CA No. 06-30266

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BURTON DEAN VIERS,

Defendant-Appellant.

Appeal from the United States District Court

For the District of Oregon

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

District Court Jurisdiction

The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, imposed sentence upon Mr.

Viers conviction by conditional guilty plea to the charge of Conspiracy to Manufacture Marijuana, 21 U.S.C. §841(a)(1) and §846. The District Court's jurisdiction was based on 18 U.S.C. §3231.

Appellate Jurisdiction and Timeliness

This is an appeal from the final judgment and sentence. This Court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a)(1). The district court entered the final judgment and commitment order on April 20, 2006, [ER:178; CR#98][1]. Mr. Viers timely filed his notice of appeal on April 26, 2006, pursuant to Rule 4(b)(1)(A)(i) of the Federal Rules of Appellate Procedure, [ER:185; CR#104].

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[1] [ER:50] refers to Excerpts of Record, and the corresponding page number; [CR#104] refers to Clerk's Record, and the corresponding docket number.

STATEMENT OF ISSUES

I. WHETHER, AFTER THE COURT FOUND THAT THE AFFIDAVIT OMITTED MATERIAL INFORMATION BEARING ON THE RELIABILITY OF THE CONFIDENTIAL INFORMANT, THE COURT ERRED IN FAILING TO EXCISE "FACTS" ATTRIBUTED TO THE INFORMANT FROM THE AFFIDAVIT IN DETERMINING PROBABLE CAUSE?

II. WHETHER THE COURT ERRED IN RELYING ON THE AGENT'S CONCLUSORY OPINION THAT THE ELECTRIC POWER CONSUMPTION WAS "HIGH ENOUGH TO SUPPORT A SIZEABLE INDOOR MARIJUANA GROW" TO SUPPORT PROBABLE CAUSE, WHEN THE AFFIDAVIT PROVIDED NO FACTUAL BASIS FOR THE COURT TO EVALUATE THE ACCURACY OF THAT OPINION?

III. WHETHER THE COURT ERRED BY RELYING ON THE AGENT'S CONCLUSORY OPINION OF DETECTING THE ODOR OF MARIJUANA TO SUPPORT PROBABLE CAUSE.

IV WHETHER, BY RELYING ON THE INFORMANT'S INFORMATION, AND ON THE AGENT'S CONCLUSORY OPINIONS ABOUT ELECTRIC POWER CONSUMPTION AND DETECTING THE ODOR OF GROWING MARIJUANA, THE COURT ERRED IN FINDING THE AFFIDAVIT PROVIDED PROBABLE CAUSE?

STATEMENT OF THE CASE

Course of Proceedings

On February 17, 2005, the grand jury returned a 3-count, Superseding Indictment against Mr. Viers, and his acquaintance, Kathi-Sue Wiechert. [ER:1; CR#39]. That indictment charged them both with Manufacturing 100 or more marijuana plants, in violation of 21 U.S.C. §841(a)(1) & (b)(1)(B)(vii), in Count 1; Conspiracy to manufacture marijuana, in violation of 21 U.S.C. §841(a)(1) & §846, in Count 2; and alleged Forfeiture pursuant to 21 U.S.C. §853, in Count 3.

On January 31, 2005, Mr. Viers filed his Motion for *Franks*[2] hearing and Notice of Joinder, [ER:43; CR#27], in defendant Wiechert's Motion to Suppress Search Warrant

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[2] *Franks v. Delaware*, 438 U.S. 154 (1978).

[ER:18; CR#43][3]. The Government filed its Response on February 25, 2005. [CR#45]. On February 28th, Mr. Viers filed his Supplemental Points and Authorities in support of the suppression motion. [ER:53; CR#52]. The Court held an evidentiary hearing on these matters on March 1, 2005, and at the conclusion took the motions for *Franks* hearing and to suppress under advisement. [CR#58]. On March 3rd, the Court entered its Order granting the Motion for *Franks* hearing, and denying the Motion to Suppress. [ER:166; CR#55].

On January 3, 2006, Mr. Viers entered a conditional guilty plea to Conspiracy to manufacture marijuana as alleged in Count 2, specifically reserving his right to appeal the Court's denial of the joint Motion To Suppress. [CR#88]. He proceeded to sentencing on April 18, 2006, along with Ms. Wiechert who

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[3] At that time, these defendants were charged in separate cases; upon consolidation under Mr. Viers' case number, Wiechert's Motion to Suppress was filed again, under the new case number.

had resolved her case similarly. [CR#96]. The Court sentenced Mr. Viers to 4-years imprisonment, in accordance with the parties' joint recommendation, followed by a 3-year term of supervised release; and granted the Government's motion to dismiss the remaining counts against Mr. Viers. [ER:178; CR#98].

Custody Status

Mr. Viers moved for stay of execution of sentence and release on appeal, which the Government opposed. The Court took under consideration and, after hearing further from the parties, granted release pending appeal. [CR#95, 97]. The Court granted the same request by Ms. Wiechert. Mr. Viers remains at liberty on conditions under the supervision of U.S. Pretrial Services.

STATEMENT OF FACTS

Mr. Viers and Ms. Wiechert were long-term acquaintances. According to the Government, Mr. Viers and she had rented a residence at 1558 Hackett Drive, LaPine, Oregon, where she lived and he frequented. On June 3, 2004, DEA Special Agent Gary Landers and a team comprised of local police and Oregon State troopers executed a search warrant at that residence. They discovered an indoor marijuana grow of modest size[4], and surplus hydroponic equipment that could be set up to cultivate additional marijuana plants. Ms. Wiechert had been an Oregon medical marijuana patient.

Lander's investigation started with an informant's tip about an indoor marijuana grow in LaPine, Oregon, involving

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[4] Upon executing the warrant, agents found approximately 100 marijuana plants, about a foot high, growing hydroponically in one bedroom of this doublewide mobile home, and approximately 80 starter plants ("clones") rooting in the laundry room. Agents also seized several pounds of dried, harvested marijuana. [ER:78-81; CR#118].

Michael Kasinger and Mr. Viers. He searched records for any residence in LaPine linked to them.

Mr. Viers, who lived in Bend, Oregon, was a long-time friend of Michael Kasinger, who lived in another part of the state. The utility account for electric power at 1558 Hackett Drive was in Mr. Kasinger's name. The "Confidential Source," or informant, for the search warrant was Mr. Kasinger's ex-wife, Stephanie Smith. Although Ms. Smith told police that Mr. Viers and her ex-husband were partners in the marijuana grow, Mr. Viers was not mentioned in the search warrant affidavit. He was charged later after his fingerprints were found on a couple of the grow light reflector hoods seized during the search. Mr. Viers had sold this type of hydroponic equipment as a business in the past. Agents also executed a search warrant at Mr. Kasinger's residence; he was never arrested nor charged.

The affidavit in support of the search warrant for 1558 Hackett Drive relied on three primary factors to establish

probable cause: (1) the tip from Ms. Smith; (2) Agent Landers' conclusory opinion that the electric power consumption for the residence would support a sizeable indoor marijuana grow; and (3) Agent Landers' conclusory opinion that he detected the odor of growing or freshly-harvested marijuana from a distance outside the curtilage of this semi-rural home on two occasions.[5]

Reliability of the Vindictive, Thieving, Informant

Under the guise of providing an "anonymous tip," the ex-Mrs. Kasinger called police in March 2004, to report that Mr. Kasinger had been engaged in growing marijuana at a residence in LaPine, Oregon. [ER:10 &92; SW¶13; CR#118][6]. She

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[5] The search warrant was based upon an affidavit filed by DEA Special Agent Brian Flannery, but all information contained in the warrant was provided to SA Flannery by SA Landers. See, *United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992)(holding false statements or omissions of government officials in an affidavit are not insulated from a *Franks* challenge, even if the official at fault is not the affiant).

[6] [SW¶13] refers to the paragraph in the search warrant; the warrant does not appear on the Clerk's Docket Sheet.

contacted police the same month in which she was indicted for numerous counts of welfare fraud—crimes which Mr. Kasinger had earlier reported to the police. [ER:93-94; CR#118]. She had prior convictions for "crimes of dishonesty." [ER:14; SW¶37]. The Kasingers' separation and ensuing divorce were known by local law enforcement to have been acrimonious. [ER:120;CR#118]. Agent Landers learned about his informant's pending fraud charges, and her vindictive motive to provide this "tip," but omitted those facts from the affidavit. [ER:119-120; CR#118].

Instead, Agent Landers presented his informant in the most favorable light: "The Confidential Source (CS) that provided the original tip had contacted law enforcement on his/her own accord. CS has provided the information voluntarily, with no compensation expected. . . . CS has not been used in an active capacity in this investigation other than

to provide information. CS has a criminal history involving crimes of dishonesty."[ER:14; SW¶37].

Ms. Smith told police she had not seen the marijuana grow, but had overheard conversations about a 300-plant grow inside a residence in LaPine that was tended by a female who lived there. [ER:10; SW¶13]. She admitted that her limited knowledge of the grow was gained about 1.5 to 2 years earlier. Familiar with the legal concept of "staleness," Agent Landers omitted the outdated nature of the tip. [ER:118-119; CR#118]. Instead, based on discovering Mr. Kasinger had been the power subscriber for the residence since July 7, 2002, [ER:10; SW¶16], Agent Landers represented that the informant told him in 2004 that "[t]he grow had apparently been in operation for several years." [ER:10; SW¶13].

Agent Landers testified that, in his opinion, there was nothing in the affidavit about the confidential source that was either false or misleading. [ER:85; CR#118]. The district court,

however, found that "material information bearing on the reliability of the CS was omitted from the affidavit." [ER:172; CR#166].

Electric Power Consumption

The affidavit contains few facts concerning power consumption. It states: "Since October 2002, power usage has not dropped below 2600 KWH per month. The highest reading has been 4300 KWH for one month. In general, the monthly electric usage readings are higher than with the previous customer that resided at 1558 Hackett Drive." [ER:10; SW¶16]. Agent Landers then opines that from his experience in investigating indoor marijuana grows, "the power consumption at 1558 Hackett Drive is high enough to support a sizable indoor marijuana grow." [ER:11; SW¶18].

The power records were not attached to the affidavit. The power records show that the highest reading (actually 4371 KWH) on Mr. Kasinger's account occurred in January 2004,

when consumption is historically high; furthermore, the highest consumption for the month of January in any year of the records available to Landers shows 4501 KWH consumed by the prior tenant in 2002. Agent Landers acknowledged that he omitted these facts from the affidavit. [ER:122-123; CR#118].

Landers explained that because of the many variables in evaluating electric power consumption, he did not undertake a detailed comparison of power consumption at the suspect residence with former tenants' consumption or with similar homes in the neighborhood. [ER:86, 98-99; CR#118]. Rather than investigation and analysis, "I give a general statement that the amount of power being utilized could support a significant marijuana grow." [ER:86; CR#118]. When asked, "do you know from your training and experience, about how much electrical power would be used to support a 300-plant grow?", Landers replied: "That would be impossible for me to say . . . . I can't relate power usage to size directly." [ER:120-121;CR#118].

Omitted from the affidavit was any mention of Agent Landers' theory that the monthly power consumption at 1558 Hackett Drive was fairly consistent and therefore indicative to law enforcement of a 3-stage marijuana grow. [ER:88-89, 121; CR#118]. Landers testified that a 3-stage grow requires 3 different rooms, one for the clones to grow roots, one for the plants' vegetative state, and one for the mature, budding state of growth, because of the different lighting and other requirements for these three different stages of plant growth. This method allows a continuous harvest of marijuana, because the plants are moved from one room to another about every 30 days, as they reach the next stage of growth; the electrical use for each room remains the same as the plants are rotated through the rooms. [ER:82-83; CR#118].

Agent Landers claimed that he found evidence of a 3-stage marijuana grow at the Hackett Drive residence, even though only two rooms, with plants in the first two stages of growth,

clones and vegetative, were observed upon entry, because "there was another separate bedroom that had obviously been used for growing marijuana in the past." [ER:83; CR#118]. Under cross-examination, Landers admitted that in his report written contemporaneously with the execution of the warrant, he had stated that this bedroom was in the process of being converted into a hydroponic grow room—not being dismantled—based on finding a wood frame under construction that would be used to hold the hydroponic system. [ER:117-118; CR#118].

In a grow where one room is used to grow plants from the vegetative stage through the mature budding stage, the number of hours of light per day is decreased from approximately 18 hours in the vegetative state, to approximately 12 hours to induce budding, with resulting spikes or peaks in power consumption.

The Unreliable Odor of Marijuana

Dr. James Woodford, a forensic chemist and recognized expert on marijuana odor, [ER:125-127; CR#118], testified to the following facts about the detection of marijuana odor:

The basic mechanism for humans to smell any odor is the same. First the odor must be generated at the source. The odor then must become airborne and reach a person's nose in sufficient quantity to interact with the nerve endings of the olfactory system.[7] [ER:131-132; CR#118]. What we call an "odor" is actually one or more molecules. Some odors are single molecules, like ammonia. There are also complex odors, including marijuana, that are comprised of intercoils of different molecules. [ER:133; CR#118].

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[7] Scientific American, *Stereochemical Theory of Odor* by John E. Amoore, James W. Johnston, Jr., & Martin Rubin, pp. 42-49, (Feb. 1964); Physiology of Behavior, *Olfaction*, Neil Carlson, p. 247, (Allyn and Bacon, Inc., Publisher 1977).

Science has identified the different individual molecules that are combined in marijuana odor: Alpha- and Beta-Pinene, Myrcene, Limonene, Beta-Phellandrene, Trans-Ocimene, Alpha-Terpinolene, Trans-Caryophyllene, Humulene, Farnesene, Bergamotene, and Caryophyllene Oxide make up about 98 percent of the odor composite.[8] [ER:133; CR#118]. These different ingredients have different molecular weights, causing the intercoiled molecules to uncoil and travel different distances once airborne, as the heavier molecules fall off and the lighter ones move on. You have some ingredients going one way in the air and some ingredients going another way in the air. [ER:134; CR#118].[9]

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[8] Journal of Natural Products, *Chemical Composition of the Volatile Oil of Cannabis Prepared for Fresh and Dried Buds,* Vol. 59, No.1, p. 50 Table 2 (1996); Nature, *Headspace Volatiles of Marijuana*, Vol. 242,pp. 402-403 (April 1972).

[9] Other odors share some of these individual molecules. For example, 84 percent of the marijuana odor molecules are found in juniper odor, and 73 percent of the marijuana odor

Turbulence and wind cause the composite marijuana odor to break apart more quickly, but even in still air, the odor disintegrates due to gravity's pull on the different ingredients' molecular weights. "And the more volume of air, the more it dissipates, it comes apart." [ER:143-144; CR#118]. Picture a drop of ink dissolving in a glass of water and causing some discoloration, versus dissolving in a bath tub of water and becoming invisible.

Simply put, the characteristic marijuana odor disassembles, and thus, no longer exists, as it moves through air. For any human to detect marijuana odor, "you need to

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molecules are found in pine odor, [ER:134; CR#118], both of which plant species are common in the LaPine area. See, Science, "*Major Monoterpenes Analyzed from Cortical Tissues of Ponderosa Pine Twigs*, Vol. 213, p. 1273, Table 1 (Sept. 11, 1981); iHerb.Com (juniper plant) http://www.herbalgram.org/iherb/expandedcommissione/he054.asp#ChemPharm.The presence of these odors in the same air as disintegrating marijuana odor molecules compounds the difficulty of reliable detection.

have all the ingredients going into that little space of the nose all at one time. Anything less than that, you start getting huge error. And it is subjective and unreliable."[10] [ER:134-135; CR#118].

"You do the studies and test the officers in a blind, scientific way, you find that smell is extremely unreliable, particularly when it comes to the kind of smell [of] multi-

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[10] See, e.g., Journal of Pharmaceutical Sciences, *Recommendations to Eliminate Subjective Olfactory Methods from Compendial Identification Tests,* George Schwartzman, Vol. 67, No. 4, pp. 539-545 (1979). This FDA researcher's introduction states: "Olfactory methods are inherently undesirable, both because of the possible toxic nature of the inhaled substances and because all such tests are markedly and unpredictably influenced by such subjective and idiosyncratic factors as the experience and discriminatory powers of the analyst, sensory fatigue, and the presence of masking odors." See also, Accident Analysis and Prevention, Moskowitz, H., Burns, M. & Ferguson, S., Vol. 31, pp. 175-180 (1999), discussing research in which subjects who drank various types of alcohol and ate foods, breathed through a hole in the wall where police officers on the other side were unable to distinguish by smell whether the beverage was beer, wine, bourbon or vodka, and others were unable to distinguish between alcohol, acetone, perfume, and ice cream.

component odors like marijuana odor, which is made of up many ingredients."[11] [ER:130; CR#118].

Woodford testified, based on scientific studies and experiments, that the characteristic marijuana odor, if present in sufficient quantity, e.g., from a large marijuana grow exhaust system venting directly outside a building, could be detected as "a whiff," "every once in a while," from a maximum distance of 25-30 feet, but would be impossible for humans to smell at greater distances. [ER:130-131, 142-143, 148-149; CR#118]. "It takes a huge amount of odor to smell it very far outside," [ER:143; CR#118], and substantially more than what would

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[11] See, *Marijuana Odor Perception*: *Studies Modeled from Probable Cause Cases*, Doty, R.L., Wudarski, T.J. & Hastings, L., Law & Human Behavior, Vol. 28, pp. 223-233 (2004)(concluding that the odor of both "immature" growing marijuana and dried, packaged marijuana was not reliably discernable by persons with an excellent sense of smell, and that higher "false positive" rates "would be expected in persons who would have greater benefit in detecting the presence of marijuana, as might occur in some law enforcement situations." Id., at 223 & 231.

seep through normal cracks and crevices around siding, windows, etc., [ER:142; CR#118].[12]

Charles McCormick, a licensed private investigator and former veteran police officer who specialized in drug enforcement, testified that in all of his investigations of marijuana grows, he had never smelled the odor of marijuana from an indoor grow from a distance of 40 feet or more outside the residence.[CR#118, Transcript p. 136].

Woodford testified that marijuana produces different odors depending on the stage of growth of the plant. Vegetative marijuana, i.e., that has not started budding, has "a non-distinctive green plant-like odor . . . . that's reminiscent of the

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[12] See, Odors from Stationary and Mobile Sources, *Characterization of Odorant Transport*, Ch. 5, pp. 169-178, (National Academy of Sciences, Washington, D.C. 1979); Police, *Olfactronic Detection of Narcotics and other Controlled Substances*, Krotoszynski, B.K., Mullaly, J.M., and Dravnieks, A., pp. 20-25 (Jan.-Feb. 1969). Dr. Woodford has also conducted marijuana odor distance studies for individual criminal cases; e.g., *United States vs. Avance*, CRNo. 90-303-FR (D. OR 1990).

grass . . . it's not characteristic of marijuana at that point." That is because the characteristic odor is emitted from glands called "glandular trichome"[13] that do not develop until the plant buds. "When you have the flowering bud, you have a characteristic odor. But when the plants are in what's called vegetative state, as we learned they were found in this case, the characteristic odor is not developed in the plant yet."[14] [ER:136; CR#118].

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[13] Dr. Woodford testified via speaker phone with less than optimal voice clarity. Consequently, the transcript of his testimony is somewhat garbled. For example, "glandular trichome" appears in the transcript as "glandular pinecone."

[14] See, e.g., Marijuana Botany, *Glandular Trichome Types,* Robert Connell Clarke, p. 97 (AND/OR Press Berkeley, CA); American Journal of Botany, *Quantitative Determination of Cannabinoids in Individual Glandular Trichomes of Cannabis Sativa*, Turner, J.C., Hemphill, J.K., and Mahlberg, P.G., Vol. 65, No. 10, pp. 1103-1106. In the Doty study, *supra,* n. 31, researchers noted "three of the four immature Cannabis plants never were found to have a distinctive marijuana odor." "Immature" is different than "vegetative." Had that study criteria used solely "vegetative" plants, none would have emitted the distinctive marijuana odor. With indoor grows, it is

However, mature marijuana that is budding does not all smell the same. "There are many different smells," some of which are usually described as "skunky," "sweet," "bubble gum," "shoe polish," "chocolate," and "leathery." [ER:138-139; CR#118].

Agent Landers claimed to detect the "odor of growing or freshly harvested marijuana" while standing in a wooded area outside the curtilage of the Hackett Drive residence during the nighttime hours of April 15th and May 20th, 2004. [ER:12-13; SW¶23 & ¶30]. Both times he positioned himself downwind of the house, there was only a slight breeze, and "based on the wind conditions and placement of buildings," he concluded the odor could not have come from any other location than the suspect residence. Omitted from the affidavit was that, on April

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impossible for the plants to begin growing the odor glands until daylight is decreased from 18 hours (vegetative) to 12 hours per day (decreasing light mimicking fall harvest).

15th, Landers was between 67 and 80 feet distant from the house when he claimed to smell this odor, [ER: 105; CR#118]; and at least a few more than 36 feet to about 60 feet distant from the house when he smelled the same odor on May 20th. [ER: 111-112; CR#118].

The affidavit stated Agent Landers' had experience investigating marijuana grows, and "[t]hrough this experience, SA Landers has learned that the marijuana plant has a recognizable odor that is especially noticeable when the plant is flowering (budding), but not exclusively so." [ER:7; SW ¶4]. The affidavit contained no assertions that Landers had correctly identified the odor of marijuana at such distances or in similar circumstances on any prior occasions.

Agent Landers testified that he had received no special training in the recognition of marijuana odors, and that there is no reliability testing or certification of law enforcement agents' ability to detect marijuana odor. [ER:99-100; CR#118].

He did not claim to have any extraordinary sensory abilities or acuteness of the sense of smell. [ER:101; CR#118]. When asked to describe the smell of growing or harvested marijuana, he expressed difficulty and was unable to say what it smelled like to him, but maintained "once you've smelled [it] on multiple occasions, it is unique and identifiable." [ER:62; CR#118]. He said that he had applied for search warrants 35 previous times in situations where he had smelled this odor, and had always found a marijuana grow. He did not testify regarding his distances from the indoor grows when he smelled marijuana in these previous cases. [ER:63-65; CR#118].

Agent Landers testified unequivocally that, in his experience, there was no difference in what he recognizes as the characteristic odor of growing marijuana in its vegetative state, i.e., before it buds, and the odor of budding or freshly harvested marijuana. [ER:103, 115; CR#118].

Dr. Woodford testified that, to a reasonable degree of scientific certainty, Agent Landers could not have detected the odor of marijuana coming from the Appellant's residence on either April 15th or May 20th. [ER:146-147; CR#118]. The primary basis for his conclusion was that the agent was too distant from the residence to detect an odor, given the science of odor detection.[15] [ER:147-149; CR#118]. Further, the facts regarding the actual grow at the Hackett Drive residence as described during Agent Landers' testimony do not establish that the grow was of the size or stage to produce the characteristic odor of marijuana, which occurs only once the plants begin to bud.[16] [ER:147-148; CR#118]. He also faulted

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[15] The Government did not challenge Dr. Woodford's qualifications as an expert in the science of marijuana odor detection, nor did it present any contrary expert opinion or scientific evidence to rebut any of Dr. Woodford's testimony on this topic.

[16] The most mature plants seized on June 3rd were approximately 1 foot high and in the vegetative state. There

Landers' lack of training in marijuana odor recognition and his erroneous opinion that growing marijuana smells the same as freshly harvested marijuana. [ER:148; CR#118].

Agent Landers testified that he had been unsuccessful in smelling the odor of marijuana around the suspect property on five occasions prior to his first detection of the odor there on April 15th. He was again successful on his next, and final effort on May 20th. [ER: 112-113; CR#118]. It was his opinion that unless he could smell marijuana, there would not be probable cause to apply for a search warrant. [ER:66; CR#118].

Dr Woodford testified regarding the scientifically recognized phenomenon of selective perception in odor

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was only one active grow room and therefore no place for mature, budding plants to have existed about two weeks earlier, on May 20th, when Landers claimed to detect marijuana odor from his closest vantage point. Recognition of this problem may have contributed to Landers testifying that there was a dismantled grow room at the residence, contrary to his formal report at the time of the search that another grow room was under construction.

detection; i.e., that a person will believe he smells what he wants to smell. [ER:129; CR#118]. He opined that Landers' "planned smell" versus "plain smell" of marijuana at Hackett Drive could be the result of selective perception, rather than intentional falsehood. [ER:148, 153-155; CR#118]. However, Woodford noted police officers are trained about the dangers of selective perception, and the high probability of false positives, so not taking steps to protect against that and thereby insure that officers' investigative conclusions are reliable is dishonest.[17] [109-111].

SUMMARY OF ARGUMENT

The courts have long required that the information used to support probable cause be "reasonably trustworthy." See, e.g., *Draper v. United States*, 358 U.S. 307, 333 (1959). In

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[17] See, Patrol Procedure, George T. Payton, Observation and Perception: *Mechanics of Faulty Perception*, Ch. VI, p. 191, (Legal Book Corp, Los Angeles, CA).

addition, affidavits for search warrants must contain the factual basis for police officers' conclusions. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 239 (1983)("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.").

For too long, these Fourth Amendment safeguards have been dodged by "the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), who claims to have smelled the marijuana that he can't see. The courts have deemed the officer to be credible, and stopped there, without determining whether the officer's opinion about detecting the odor is reliable, i.e., "reasonably trustworthy" information.

Mr. Viers case presents a question of law of seemingly first impression: whether a police officer's conclusory opinion of detecting the odor of marijuana should be subject to the same

reliability requirements as other types of conclusory opinions of police officers contained in search warrant affidavits. *Cf., United States v. Clark,* 31 F.3d 831 (9th Cir. 1993), *cert. denied*, 513 U.S. 1119 (1995)(affidavit must furnish basis for court to evaluate reliability officer's opinion about power consumption being indicative of marijuana grow).

There were insufficient facts in the affidavit for the magistrate to evaluate the reliability of Agent Landers' claim of detecting the odor of marijuana. The district court also erred in relying on Landers' claim of detecting marijuana odor as the primary basis for probable cause, when his ability to reliably detect the odor under the circumstances was scientifically improbable or impossible. There were no corroborating facts of an ongoing marijuana grow at the residence to overcome the scientific improbability that whatever odor, if any, Landers detected was that of marijuana.

The district court erred in relying on the informant's tip about a marijuana grow inside a LaPine, Oregon, residence to support probable cause, after finding that Landers omitted material facts from the affidavit bearing on the informant's reliability. *See, United States v. Reeves*, 210 F.3d 1041 (9th Cir. 2000), *cert. denied*, 531 U.S. 1000 (2000). An officer's unreliable opinion about smelling marijuana cannot serve to restore reliability to the informant's tip.

The district court erred in giving any weight to Landers' conclusory opinion that the electric power consumption was high enough to support a sizeable marijuana grow, when there was virtually no factual basis in the affidavit to evaluate the reliability of that opinion. *Clark, supra*.

Probable cause for a search warrant does not arise from an unreliable informant's tip combined with an unreliable opinion about high power consumption to buttress an unreliable opinion about detecting marijuana odor.

ARGUMENT

I. AFTER THE COURT FOUND THAT THE AFFIDAVIT OMITTED MATERIAL INFORMATION BEARING ON THE RELIABILITY OF THE CONFIDENTIAL INFORMANT, THE COURT ERRED IN FAILING TO EXCISE "FACTS" ATTRIBUTED TO THE INFORMANT FROM THE AFFIDAVIT IN DETERMINING PROBABLE CAUSE.

The District Court's Rulings

The defense argued that although Agent Landers disclosed his informant had a "criminal history involving crimes of dishonesty," he attempted to bolster her credibility by the other information provided in that paragraph of the affidavit, claiming the informant had volunteered the information to law enforcement without expecting compensation. Landers failed to disclose that the "tip" came from an individual who not only had a criminal history demonstrating dishonesty, but who also had a motive to retaliate against one or more of the persons she named, and was under indictment for new crimes of dishonesty at the time she called law enforcement. He also

failed to disclose that the information about the grow was gained as much as two years earlier. The defense submitted that when these material and intentionally omitted facts are considered, all information attributed to the informant should be excised from the affidavit in reviewing it for probable cause. [ER:44-45 &159-160; CR#27 & #118].

Stripped of the informant's claim of a 300-plant marijuana grow operating inside the residence, probable cause is largely dependent on two conclusory opinions by the investigating DEA agent: one regarding electric power consumption and the other regarding marijuana odor detection. Those opinions, however, were themselves tainted by Lander's reliance on the CS's information. See, e.g., Order at p.9 ("It is possible that Landers made a false-positive detection because he expected to, given his substantial experience with marijuana grow operations."). [ER:174; CR#55].

The court found "material information bearing on the reliability of the CS was omitted from the affidavit. Nonetheless, the information from the CS is what started the investigation and does not provide the primary support for probable cause." [ER:172-173; CR#55]. Although not the "primary support," the court's opinion indicates that it accorded some weight in the probable cause calculus to the informant's claim that a woman living at 1588 Hackett Drive tended an indoor marijuana grow of approximately 300 plants. See also Order, p. 12, finding probable cause based, in part, on "Lander's investigation substantially corroborated the confidential source's information." [ER:177; CR#55].

The Standard of Review.

The District Court's conclusions of law regarding a motion to suppress are reviewed de novo on appeal. *United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir 2000), cert. denied, 531 U.S. 969 (2000); *United States v. Enslin,* 315 F.3d 1205, 1209

(9th Cir. 2003) (independent review). A district court's findings of fact are reviewed for clear error. *United States v. Noushfar*, 78 F.3d 1442, 1447 (9th Cir. 1996). Mixed questions of law and fact are reviewed *de novo. See, United States v. Medrano*, 241 F.3d 740, 746 (9th Cir. 2001); *Boonen v. United States*, 944 F.2d 1489 (9th Cir. 1991).

The District Court's determination that probable cause existed for issuance of a search warrant is reviewed *de novo* on appeal. Whether probable cause is lacking because of alleged misstatements or omissions in the supporting affidavit is also reviewed *de novo*. E.g., *United States v. Reeves*, *supra,* 210 F.3d at 1044.

Probable Cause Must Be Evaluated Without The Informant's Tip

The district court erred in failing to excise "facts" attributed to the confidential informant from the affidavit for purposes of determining probable cause, after the court found that the affiant omitted "material information bearing on the

reliability of the CS." *See, e.g., Reeves, supra*, 210 F.3d at 1044 ("If an informant's history of criminal acts involving dishonesty renders his/her statements unworthy of belief, probable cause must be analyzed without those statements.").

The omitted facts were that a vindictive ex-spouse with a track record of crimes involving dishonesty, told police that about 1.5 to 2 years earlier she had overheard her former husband and his good friend, Mr. Viers, talking about operating an indoor marijuana grow at a house in LaPine. She coincidentally called police shortly after being indicted for numerous counts of welfare fraud.

Unlike the informants in cases discussed in *Reeves,* 210 F.3d at 1045, the ex-Mrs. Kasinger had never previously provided information to police that proved to be reliable; her criminal history for crimes of dishonesty was substantial; and she had more than one clear motive to fabricate this tip, i.e., pending charges plus an acrimonious divorce. Furthermore,

her tip was based solely on the allegedly overheard conversation with no other confirmation, such as seeing marijuana, and it was stale, factors not found in the cases discussed in *Reeves.*

Familiar with the legal concept of "staleness," Agent Landers omitted the outdated nature of the tip. [ER:118-119; CR#118]. Instead, based on discovering Mr. Kasinger had been the power subscriber for the residence since July 7, 2002, [ER:10; SW ¶16], Landers represented that the informant told him in 2004 that "[t]he grow had apparently been in operation for several years." [ER:10; SW ¶13]. This is an intentionally false representation by the agent, masking the staleness of his source's information.

Unlike the district court in *Reeves*, the district court granted Mr. Viers' request for a *Franks* hearing, [ER:167; CR#55], and found that "material information bearing on the reliability of the informant was omitted." [ER:172; CR#55].

Under these circumstances, "probable cause must be analyzed without those statements," 210 F.3d at 1044.

This stale tip from the vindictive, thieving informant cannot be transformed into "reliable" support for probable cause by the "scientifically improbable if not impossible"[18] claim of detecting marijuana odor by the same governmental agent who misled the magistrate about the reliability of his informant. See, *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended, reh'g denied,* 769 F.2d 1410 (9th Cir.1985):

> The Supreme Court in *Franks* noted that the Warrant Clause of the Fourth Amendment takes the affiant's good faith as its premise. 438 U.S. at 164. Moreover, "[b]ecause it is the magistrate who must determine independently whether there is probable cause, . . . it would be an

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[18] "Scientifically improbable if not impossible" was the district court's characterization of Dr. Woodfords' testimony that, to a reasonable degree of scientific certainty, Agent Landers could not have smelled the odor of marijuana under the facts of this case.

> unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Id.* at 165. The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning. See *id.* at 168.

II. THE COURT ERRED IN RELYING ON THE AGENT'S CONCLUSORY OPINION THAT THE ELECTRIC POWER CONSUMPTION WAS "HIGH ENOUGH TO SUPPORT A SIZEABLE INDOOR MARIJUANA GROW" TO SUPPORT PROBABLE CAUSE, WHEN THE AFFIDAVIT PROVIDED NO FACTUAL BASIS FOR THE COURT TO EVALUATE THE ACCURACY OF THAT OPINION.

The District Court's Rulings

In its motions and at the conclusion of the evidentiary hearing, the defense argued that Agent Landers' conclusory opinion about electric power consumption was a "bare bones assertion" without an adequate factual basis in the affidavit to rely upon it in evaluating probable cause, based on this Court's

opinion in *United States v. Clark*, *supra*. [ER:26-27 & 160; CR#43 & #118].

The district court found that Lander's opinion that the power consumption could support a grow operation was "not an intentional or reckless misstatement," [ER:173; CR#55]. That, however, does not address the issue of whether the conclusory opinion itself should be given any weight in establishing probable cause. The district court listed "the increased power consumption" as a factor establishing probable cause. [ER:177; CR#55].

The Standard of Review

The District Court's conclusions of law regarding a motion to suppress are reviewed *de novo* on appeal. *United States v. Wright*, *supra*; *United States v. Enslin, supra*. A district court's findings of fact are reviewed for clear error. *United States v. Noushfar*, *supra*. Mixed questions of law and fact are reviewed *de novo. See, United States v. Medrano*, *supra.*

The Conclusory Opinion Regarding Power Consumption is Entitled to No Weight

Before relying on Agent Landers' conclusory opinion that the electric power consumption was "high enough to support a sizeable indoor marijuana grow" to support probable cause, a factual basis must appear in the affidavit to evaluate the accuracy of that opinion. *United States v. Clark*, *supra.*

In *Clark,* the Ninth Circuit held that an affiant's assertion that Clark's electrical consumption was high and consistent with a marijuana grow operation did not help establish probable cause because "such consumption is consistent with numerous entirely legal activities." 31 F.3d at 835. The Ninth Circuit also criticized the affiant for providing no comparative information about Clark's consumption compared to that of other homes in the vicinity, thereby "provid[ing] no basis for a magistrate judge or this court to evaluate whether the usage was high." *Id. Clark* also indicated that the "average residential electric consumption for homes" in that area of the state would

be useful for evaluating whether Clark's consumption was high. *Id.*; *see also United States v. Huggins*, 299 F.3d 1039, 1045-1048 (9th Cir. 2002).

In Mr. Viers' case, Landers made no effort to undertake any comparisons beyond the former tenant's power usage. Rather than investigation and analysis, he gave "a general statement that the amount of power being utilized could support a significant marijuana grow." [ER:86; CR#118]. When asked, "do you know from your training and experience, about how much electrical power would be used to support a 300-plant grow?", Landers replied: "That would be impossible for me to say . . . . I can't relate power usage to size directly." [ER:120-121; CR#118].

Landers also failed to attach the power records he relied on in reaching his conclusion, to the affidavit. The district court found: "Defendants challenge the power records by noting the power usage was consistent with similar homes in

the area. . . . The defense presented evidence that one would expect the power to frequently run 1100 to 1500 kwh more per month when growing marijuana, but the prior tenant typically used more power during the months of December and January, and Kasinger used only about 300 to 400 kwhs more per month the rest of the year." [ER:173; CR#55].

In the search warrant affidavit, as well as in his testimony at the suppression hearing, Landers gave the court little more than a bare bones conclusion, devoid of facts to evaluate its reliability. Nothing in the affidavit—or the power records themselves—provide a reason to believe the power consumption was indicative of illegal activity.

III. THE COURT ERRED BY RELYING ON THE AGENT'S CONCLUSORY OPINION OF DETECTING THE ODOR OF MARIJUANA TO SUPPORT PROBABLE CAUSE.

The District Court's Rulings

Mr. Viers challenged Agent Landers' veracity in claiming to smell the odor of marijuana at the Hackett Drive property.

The defense also submitted that, as a matter of law, in order to give weight to Landers' opinion that he smelled marijuana, the court must first evaluate the reliability and reasonableness of that opinion. [ER: 53-54 &160-161; CR#52 & #118].

The Court found "Defendants present[ed] expert testimony that under the conditions existing, it is scientifically improbable if not impossible to detect the odor, thus challenging Landers' credibility. The defense notes the juniper and sage blooming in the area, the sealed windows at the house, lack of evidence of mature budding plants, and close neighbors' claims that they never smelled marijuana (including a former police officer who also has training and experience in detecting the odor of marijuana). The defense evidence at best establishes that Landers made a false-positive detection of the odor of marijuana" on the two occasions described in the affidavit. [ER:173-174; CR#55]. The Court also found Landers

"credible with respect to his representations regarding the detection of marijuana odor." [ER:175; CR#118].

The Standard of Review

The District Court's conclusions of law regarding a motion to suppress are reviewed *de novo* on appeal. *United States v. Wright*, *supra*. A district court's findings of fact are reviewed for clear error. *United States v. Noushfar*, *supra*. Mixed questions of law and fact are reviewed *de novo. See, United States v. Medrano*, *supra*.

The district court's determination that probable cause existed for issuance of a search warrant is reviewed *de novo* on appeal. Whether probable cause is lacking because of alleged misstatements or omissions in the supporting affidavit is also reviewed *de novo*. E.g., *United States v. Reeves*, *supra.*

The district court erred as a matter of law in relying on Agent Landers' unreliable conclusory opinion of smelling the odor of marijuana.

Assertions by an agent, who is familiar with the odor of marijuana, that he detected the odor of marijuana in the vicinity of a suspect's residence and further concluded that the odor could not have come from any other source are conclusory opinions, not facts. See, e.g., *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982)(recognizing that witnesses' testimony concerning things "such as size, heights, odors, flavors, color, heat, and so on" constitute "their opinions or conclusions of what they observed.").

The court must determine whether the agent's conclusions are sufficiently reliable before the conclusions may serve to establish probable cause to search. *See*, *United States v. Clark*, *supra*, 31 F.3d at 835 (magistrate must evaluate affiant's conclusions that power consumption was "high" and indicative of marijuana growing); *see also*, United *States v. $30,060.00*, 39

F.3d 1039, 1041-44 (9th Cir. 1994)(dog sniff alert of supposed drug money was insufficient to establish probable cause based on expert evidence that 75% of money in circulation in the area was tainted; information used for probable cause must be "sufficiently reliable").

Looking only within the "four corners" of the affidavit, there are few facts from which to evaluate the reliability of Landers' conclusion:

1. There is no information about his distances from the Hackett Drive residence when he claims to detect the odor, other than he is in a wooded area outside the curtilage and therefore not close.
2. There is no mention of open windows, chimney or vent pipes, or other observed means of odors within the house escaping to the outside air that Landers attributes

to his ability to detect marijuana odor coming from the residence.[19]

3. There is little information about obstructions, including vegetation, other structures, or changes in elevation between him and the suspect residence that would tend to disrupt and deflect a straight-line path by the "slight breeze" supposedly carrying the odor from the house to his nose. The affidavit does note that Landers' odor detections took place in "wooded areas", and outside a fence at the back of the residence on May 20th; and that there were two portable garages and one detached log-sided shed on the property, but does not discuss the

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[19] The affidavit mentions what Landers believed to be the sound of a fan "coming from the fenced yard area behind 1558 Hackett Drive," on May 20th, [ER:13; SW ¶31], but does not indicate that Landers believed the odor he detected was being vented outside by the supposed fan, or that the odor was coming from the direction of exhaust from the supposed fan. He testified that "the sound of a running fan would indicate to me the possibility of air intake or exhaust," [ER:74;CR#118].

location of these structures relative to his odor-detection vantage points. [ER:13, 15; SW¶29, ¶38].

4. There is no information about the distances between the suspect residence and neighboring homes that Landers concludes could not be an alternative source(s) for the odor.[20]

5. There is no assertion that Landers had correctly detected the odor of marijuana by the methods he employed here in any prior cases. The affidavit simply states that Landers has experience investigating indoor and outdoor marijuana grows, and based on that experience he has learned that marijuana has a recognizable odor. [ER:6-7; SW¶4].

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[20] Landers did testify that he checked on the neighbors and "started finding too many criminal histories" to approach any of them for assistance in his investigation. [ER:105-106; CR#118].

Compare, Hervey v. Estes, 65 F.3d 784, 790 (9th Cir. 1995)("A neutral magistrate could not possibly credit the Deputy's broad statement that he smelled 'odors that you'd find at a methamphetamine lab' without knowing more about what those odors were or why and how [the deputy] was trained to recognize them. That information is lacking in this affidavit").

Mr. Viers contended that the district court must use its common sense, in light of what science tells us about human detection of marijuana odor, to decide whether there is reason to believe Agent Landers could have reliably detected the odor of marijuana, and could have reliably determined that odor emanated from the place to be searched.

The district court concluded that the defense evidence "at best establishes that Landers made a "false-positive detection of the odor of marijuana on April 15, and May 20, 2004," and any false-positive detection by Landers would be "an honest mistake," and that Landers did not therefore make

misrepresentations about his opinion of detecting marijuana odor. [ER:174; CR#55]. Those findings by the court on the *Franks* issue do not, however, address the issue of whether Landers' conclusory opinion is reliable enough to support probable cause; indeed, a finding that Landers made "false-positive detection(s)" supports a finding of unreliability. *Cf., Illinois v. Caballes*, 125 S.Ct. 834, 838 (2005)(trial court found dog sniff alert to narcotics sufficiently reliable to establish probable cause; Supreme Court notes the record contained no evidence or findings regarding error rates or false positives); *see also*, *U.S. v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002) (Government must establish reliable basis for law enforcement officer's expert opinion; here, expert interpreting "drug trade jargon.").

In *United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992), the Ninth Circuit set forth the following requirements for a claim of drug odor detection to establish probable cause:

the magistrate must "find[] the affiant *qualified* to know the odor, and [that] it is one sufficiently distinctive to identify a forbidden substance."(Emphasis original).

In Dr. Woodford's opinion, Agent Landers was not qualified to know the odor of marijuana given his lack of training in odor recognition[21] and his incorrect belief that growing vegetative marijuana has the same characteristic odor as freshly harvested (budded) marijuana. See also *DeLeon, supra* at 765 & n.1 (recognizing that growing marijuana plants

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[21] Landers' testified that he had no formal training in odor recognition, and that his method of standing downwind of the suspect residence in efforts to detect marijuana odor was "just common sense." [ER:69, 100; CR#118]. Among Woodford's specific criticisms of Landers' qualifications was Landers' reliance on walking in a "zig zag pattern" downwind from the residence in efforts to detect marijuana odor. [ER:13; SW¶30]. Woodford explained that walking in a zig-zag pattern, like a dog following a scent, only works when the scent is anchored to the ground, not when the odor is airborne and subject to turbulence and movement. With "the dissipation and movement of marijuana [molecular] ingredients into the air, they go everywhere." [ER:143; CR#118].

have no commonly recognized odor; and relying on Dr. Woodford's unrebutted expert testimony that detection of marijuana plant odors requires "a trained person."). Landers' faulty claim in the affidavit that "the marijuana plant has a recognizable odor that is especially noticeable when the plant is flowering (budding), but not exclusively so," likewise demonstrates his lack of qualification to know the odor. [ER:7; SW¶4].

Mr. Viers submitted that in order for the magistrate to find the affiant is "qualified to know the odor," the magistrate must find more than simply the affiant is familiar with the odor; the magistrate must also consider the affiant's ability to reliably detect the odor under the totality of the circumstances.

Dr. Woodford's undisputed testimony concerning how humans detect odor, the molecular complexity of the characteristic marijuana odor, and the resulting huge difficulties of accurately detecting that odor from indoor

marijuana grows when standing more than a few feet outside the structure, make accepting Landers' opinion as reliable an exercise in defying common sense. Reliability is further undercut by the likelihood of faulty opinions of odor detection due to selective perception.

The Court clearly erred in crediting the agent's conclusory opinion of having smelled the odor of marijuana coming from the suspect residence.

In *United States v. Kerr*, 876 F.2d 1440, 1444-45 (9th Cir. 1989), this Court found it "quite remarkable that the odor of fresh marijuana could escape through a small vent in an otherwise enclosed, well-insulated building, travel in excess of 50 yards over thick vegetation and still be detectable to the human nose." Given that the magistrate and district court had found the agent's claim credible, this Court "with some reluctance" accepted it "[b]ecause we cannot rule out the possibility that [the agent] may have actually smelled marijuana."

Dr. Woodford's expert opinion, based upon review of all available evidence in this case,[22] including having heard agent Landers' testimony, was that it was scientifically impossible for Landers to have actually smelled marijuana odors under the circumstances in which his "planned smells" occurred. [ER:146-147; CR#118]. The district court clearly erred in finding, nonetheless, that Landers did smell marijuana as claimed in the affidavit. [ER:175, 177; CR#55].

The district court did not discredit Dr. Woodford's expert testimony on the issue of marijuana odor detection, but did misapprehend it:

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[22] Dr. Woodford reviewed the videotape evidence of the indoor marijuana grow at 1558 Hackett Drive during execution of the search warrant, and related discovery including the search warrant affidavit and power records. He also reviewed photographs of the residence and surrounding area and information from a land survey regarding distances between the dwelling and adjoining wooded areas where Agent Landers claimed to have smelled marijuana. [ER:47; CR#27].

> [T]he testimony of Dr. Warren James Woodford is in many ways consistent with Landers' testimony regarding the detection of odor. Woodford testified that as the odor travels through the air its component parts break-up and detection becomes more difficult and erratic at best. Landers testified that he positioned himself at distances varying from 20 feet to 80 feet from the house and that he detected the odor only intermittently with the breeze coming toward him from the direction of the house. [ER:174; CR#55].

Landers never testified that he detected the odor from as close as 20 feet from the house.[23] Regarding distances for detection of marijuana odor, Woodford testified that without

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[23] Landers testified that on April 15th, he detected the odor somewhere in the range of 67 to 80 feet distance from the residence. [ER:105; CR#118]. On May 20th, he started from a position behind the fence at the back of the house. The fence line is about 36 feet from the house. He did not smell marijuana when he was next to the fence. He walked in a zig-zag pattern "working an area approximately 20 feet back from that [fence] to maybe 30 feet wide. And in that area is where I smelled the marijuana." [ER:112; CR#118]. In other words, Landers did not smell marijuana until he was at least a few more than 36 feet away from the house, somewhere within an additional 20 feet distance from the fence line.

direct venting of a substantial amount of odor from an indoor grow, an officer standing in an open doorway to the house typically smells it while an officer standing 10 feet away from the open door will not. The odor "doesn't survive over traveling through air over distance very far. . . . [W]hen it goes out a chimney, it goes up, it might blow it down 20, 30 feet away. And you—somebody might be walking down the street and it might blow down through an air turbulence. And once in a small window of opportunity, somebody could actually smell it." [ER:142; CR#118]. Landers acknowledged there were no chimney or roof vent pipes at the residence.

Woodford recounted an experiment using an indoor marijuana grow with the odor being exhausted outside through a flue, "when I was 50 feet away, I couldn't smell it at all. I walked straight into the plume from an external vent that's blowing out a strong air movement out of the house, and there was odor, and at about 25 feet you could get it once in a while,

in around 10 or 12 feet you could smell it, but it takes a huge amount of odor to smell it very far outside." [ER:142-143; CR#118].

Landers recklessly omitted material facts bearing on the reliability of his claimed odor detection. He omitted his estimated distances, averaging 60 feet He omitted that he had been to the Hackett Drive residence five times prior to April 15th, attempting to smell marijuana without success, and any explanation as to what was different in his methods or circumstances when he finally succeeded on April 15th and May 20th . What is for certain is that, without smelling marijuana, he believed he would have to engage in other investigative efforts before applying for a warrant. [ER:64, 90; CR#118].

Landers credibility is suspect based on his testimony that the house contained evidence of a recent harvest of marijuana because of a grow room being dismantled, necessary to validate his claim of having smelled freshly harvested marijuana odors

a couple of weeks earlier on May 20th. That testimony was contradicted by his official report recording his observations contemporaneous with the search warrant execution, that the grow room was under construction. Surely Landers reviewed his report in preparation for the suppression hearing. He also offered no explanation for this rather large discrepancy when confronted with his official report on cross-examination.

Landers credibility is further suspect by his unsubstantiated conclusion in the affidavit that the power consumption at 1558 Hackett Drive was enough to support a sizeable marijuana grow, given his testimony that he can not even say how much power would be used for the 300-plant grow he expected to find.

Finally, his credibility is suspect because even the district court found Agent Landers to have been less than candid about CS in the affidavit.

IV BY RELYING ON THE INFORMANT'S INFORMATION, AND ON THE AGENT'S CONCLUSORY OPINIONS ABOUT ELECTRIC POWER CONSUMPTION AND DETECTING THE ODOR OF GROWING MARIJUANA, THE COURT ERRED IN FINDING THE AFFIDAVIT PROVIDED PROBABLE CAUSE.

The District Court's Rulings

At the conclusion of the evidentiary hearing, the district court stated:

> [T]hose of you who come in this court know I usually rule orally on these motions. I'm not going to on this one. But among the issues involved are the confidential informant. I think there should have been more about that person in the affidavit. And the question is whether she was corroborated by what is—everyone's focusing on is whether the officer could smell the marijuana grow. The other aspects, frankly, are a little more than consistent or arguably consistent with such a grow. There was the prior conviction, but there is the staleness question, of course.[24] And so without going through each of those items, to me that's really what this hinges on. [ER:158-159; CR#118].

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[24] The court was referring to Ms. Wiechert's 2001 state conviction for manufacture of a controlled substance.

In its formal opinion, the court concluded: "The affidavit on its face and as challenged supports probable cause." [ER:175; CR#55]. The court explained:

> Landers considerable experience in the detection of marijuana odor and his detection of the odor on two separate days combined with the increased power consumption and previous drug conviction of defendant Wiechert regarding a marijuana grow operation, supports probable cause in this case. In addition, Landers' investigation substantially corroborated the confidential source's information. [ER:177; CR#118].

The Standard of Review

The District Court's determination that probable cause existed for issuance of a search warrant is reviewed *de novo* on appeal. Whether probable cause is lacking because of alleged misstatements or omissions in the supporting affidavit is also reviewed *de novo*. E.g., *United States v. Reeves*, *supra.*

The District Court Erred in Finding Probable Cause

In determining whether probable cause to search exists, a court must view the "totality of circumstances" set forth in the affidavit. *Illinois v. Gates, supra*. The relevant inquiry is whether those circumstances establish there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*,462 U.S. at 238.

In the case at bar, for the reasons previously stated under Issue I, the information in the affidavit attributed to the informant should have been stricken from consideration due to Agent Landers' misleading the magistrate about both the reliability of the informant and the staleness of her information. For the reasons previously stated under Issue II, the conclusory opinion in the affidavit concerning high power consumption should have been disregarded due to the lack of a factual basis to evaluate its reliability.

For the reasons previously stated under Issue III, Agent Landers' conclusory opinions of detecting marijuana odor on two occasions are, at best, not reliable enough to serve as the sole basis for probable cause. The only additional fact relied on by the district court, Ms. Wiechert's state drug conviction sustained three years earlier, is simply inadequate corroboration to overcome strong concerns about the reliability Landers' claimed odor detection. In this case it was incumbent on the police to undertake further investigative measures before applying for a search warrant, and not to mislead the magistrate in the application, "particularly [given the] non-exigent suspected crime, involving neither violence nor mobile contraband," *DeLeon, supra* at 764 (describing an indoor marijuana grow).

CONCLUSION

The Fourth Amendment protects citizens from home invasion by police armed with a warrant obtained through

misleading the issuing magistrate, and based almost solely on the investigating officer's conclusory opinion of having smelled the odor of marijuana under circumstances where undisputed scientific evidence establishes the inherent unreliability of that opinion.

For the foregoing reasons, the Court should vacate the judgment and sentence, and remand to the district court to vacate Mr. Viers' conditional guilty plea.

RESPECTFULLY SUBMITTED this ___ day of August, 2006.

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Terri Wood
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BURTON DEAN VIERS, Defendant-Appellant.	CA No. 06-30266

STATEMENT OF RELATED CASES

I, Terri Wood, undersigned counsel of record for defendant-appellant, Burton Dean Viers, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that the case of *United States v. Kathi-Sue Wiechert*, CA No.06-30274, arose out

of the same case in the district court and raises closely related issues.

DATED: August____, 2006.

_____
Terri Wood
Attorney for Defendant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BURTON DEAN VIERS, Defendant-Appellant.	CA No. 06-30266

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the APPELLANT'S BRIEF complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has

been prepared in a proportionally spaced typeface using Microsoft Word 2004 (for Macintosh computers) in New York font, size 14.

DATED: August____ , 2006.

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Terri Wood

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Appellant's Brief on Special Assistant U.S. Attorney Stephen Gunnels by depositing in the U.S. Mail at the Eugene Downtown Branch Post Office on August _____, 2006, two true, exact and full copies thereof with postage paid, addressed to him at his office at the Deschutes County District Attorney Office, 1164 NW Bond, Bend, Oregon 97701.

_____

Terri Wood
Attorney for Defendant-Appellant