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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- MILES WAYNE SIMPSON, Defendant	CR. No. 08-60022-AA MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND TO CONTROVERT SEARCH WARRANT AFFIDAVIT

TABLE OF CONTENTS

INTRODUCTION .... Page 1

I. **The Search Warrant Was Overbroad And Violated The Particularity Requirement Of The Fourth Amendment**

Statement of Facts .... Page 4

The Law .... Page 8

A. The Search Warrant Authorized A General Search Prohibited By The Fourth Amendment .... Page 8

B. The Warrant Violated The Particularity Requirement........... Page 11

C. The Warrant Failed To Incorporate By Reference Any Document To Narrow The Scope Of The Search Or Seizure .... Page 18

II. **The Execution Of The Warrant Violated Rule 41**

Statement of Facts .... Page 19

The Law .... Page 22

III. **The Search Warrant Affidavit Failed To State Probable Cause For The Search Or Seizure Of All Financial Records**

Statement of Facts .... Page 27

The Law .... Page 29

IV. **The Search Warrant Affidavit, As Controverted, Failed To State Probable Cause For Issuance Of The Warrant**

Statement of Facts .... Page 31

The Law .... Page 34

A. Misstatements Concerning The Scope Of Criminal Laws Mr. Simpson Was Alleged To Have Violated .... Page 36

B. Conclusory Assertions of "Illegal Artifact" Activities .... Page 37

C. Material Omissions Concerning The Reliability Of The Informant .... Page 38

D. Misrepresentations Of Mr. Simpson's Statements To The Informant, A Government Agent .... Page 41

E. Assertions That Portray Mr. Simpson As A Dishonest Individual In His Dealings With "Artifacts" From Private Sources .... Page 45

CONCLUSION .... Page 46

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INTRODUCTION

Mr. Simpson raises four distinct challenges to the validity of the search warrant executed at his residence in January 2005. Those challenges fall into three broad categories: (1) Whether the search warrant itself met the

particularity requirement of the Fourth Amendment; (2) Whether the manner of execution of the search warrant violated Rule 41(f)(1), Federal Rules of Criminal Procedure, in ways that implicate the Fourth Amendment; and (3) Whether the affidavit in support of the warrant provided probable cause on its face or as controverted. An evidentiary hearing will be necessary to resolve factual disputes raised by controverting the warrant, and the manner of execution of the warrant. The evidentiary hearing is likely to take one full day of the Court's time.

The search warrant at issue was one of more than 20 federal search warrants obtained by Bureau of Land Management (BLM) and U.S. Forest Service agents, and executed simultaneously on January 25, 2005. BLM agent Dennis Schrader authored the affidavit for the Simpson warrant, based primarily on information provided by a paid confidential informant, Brian Doland. Conversations between Doland and Simpson during two "controlled buys of artifacts" in 2004 are mentioned in the affidavit as corroborating Doland's information. The search warrant issued based on the Magistrate's finding of probable cause that evidence of Native American artifact crimes—specifically "theft, destruction, removal and trafficking in artifacts" allegedly committed by Mr. Simpson—would be found on his person, and in his residence and vehicle(s). However, Mr. Simpson was never charged with any artifact-related crimes, and in April 2010, the government agreed to return all "artifacts" seized from his residence.

The evidence that Mr. Simpson seeks to suppress through this motion includes financial and business records, his oral statements, and other fruits of the illegal search and seizure, particularly the identities of persons subsequently interviewed by government agents and their resulting statements. The search warrant authorized seizure of virtually every financial record, including bank records and tax returns. The search warrant also authorized seizure of all of Mr. Simpson's business records, which included contact information for many, if not all, of the individuals interviewed by the government as prospective witnesses in this tax prosecution. During execution of the warrant, agents obtained recorded statements from Mr. Simpson, some or all of which the government has advised it intends to use in the tax prosecution.

This Memorandum is divided into sections addressing each of the four distinct challenges raised by the Motion To Suppress And To Controvert, filed herewith. Each section contains a Statement of Facts that are pertinent to the legal issues being addressed.

I. The Search Warrant Was Overbroad And Violated The Particularity Requirement Of The Fourth Amendment.

Statement of Facts

At 7:22 a.m. on January 25, 2005, a team of eight federal agents executed the search warrant at Mr. Simpson's home in Bend, Oregon. The search of this modest-sized, single-story, three-bedroom home consumed 14 hours, concluding at 9:21 p.m., with agents clearing the residence at about 10 p.m. Officers seized 23 "boxes" of property, and numerous items that were not associated with an evidence "box," for a total of 66 "control numbers." See copy of Inventory, attached as Exhibit 108. They took truckloads of property under the guise of this warrant: most of the items from the room housing Mr. Simpson's and his father's Native American artifacts collections[1]; anything resembling a stone artifact, beadwork or basket material found elsewhere on the premises, including the back yard; virtually every financial and business record and any other scrap of paper with names or numbers written on it; family photographs, personal correspondence, magazines, and all of Mr. Simpson's reference books, among many other items. Agents seized records dated as far back as 1994, and photographs older than that.

Agents also took hundreds of pages of financial records clearly identified as belonging to Mr. Simpson's domestic partner, Elizabeth Neill, who was not

[1] See selected photographs of items seized, taken by law enforcement, and photographs of the same location post-seizure, taken by Mr. Simpson after officers left the residence, attached as Exhibit 109.

named in the warrant, and $8800 of cash also identified at the scene as belonging to her.[2]

That officers came close to stripping the premises of all property other than household furnishings, food, clothing and sundry items is the logical outcome of the authority granted by this warrant. The warrant authorized a search of Mr. Simpson's residence, vehicles and person, for "certain evidence of a crime (See attachment B)." Exhibit 101, page 1, hereafter [Ex#__: page#]. The warrant did not identify the crime by name or legal citation, nor did it incorporate by reference Attachment B, the affidavit, or any other documents. Id.

Attachment B stated:

Evidence to be seized <u>including, but not limited to</u>[3]:

ARPA/Theft Evidence

a. Artifacts provided to Simpson in undercover transactions[4]
b. Baskets
c. Artifacts, <u>including but not limited to</u> projectile points, pestles, baskets, sandals, stone tools[5]
d. Human remains
e. Burial items, that are items traditionally buried with human remains of Native Americans[6]

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[2] See Control #58, #63 on Inventory, Exhibit 108.

[3] Underlined herein to emphasize the breath of the warrant.

[4] Neither the warrant nor the affidavit describe or otherwise identify these "artifacts".

[5] Emphasis supplied. Furthermore, neither the warrant nor affidavit further described or define what an "artifact" is or is not.

[6] This fails to provide any description or limitation of what types of items are "burial items".

f. Artifact diagrams and sketches

g. Archaeological and historical reference materials, including materials related to laws prohibiting such activity, research materials and records associated with this activity.

h. Personal notes, memoranda, diaries, indices, journals calendars and all relevant records. (Emphasis supplied).

i. Photographs and film, both developed and undeveloped, video and audio tapes related to artifact activities.[7]

j. Sales and purchase records

k. Advertisement records and contracts

l. Financial records to include, but not limited to statements of accounts, records of deposit, transfers, cancelled checks, withdrawals, ledgers, copies of signature cards, passbooks, financial statements, balance sheets, cash disbursement logs and ledgers, purchase and sales ledgers, income and expense journals, disbursement journals, federal and state tax returns, records regarding entities such as dba's (doing business as), corporations, partnerships, limited liability partnerships and corporations. (Emphasis supplied).

m. Evidence of proceeds derived from the sale and purchase of illegally obtained archaeological resources, including currency, stock certificates, securities, bearer instruments, bank records for personal or business checking accounts, vehicle registrations or titles, purchase invoices, records created identifying assets.[8]

n. Safes, deposit box keys, and safe deposit box rental agreement, storage locker rental agreements.

o. Documents exhibiting dominion and control over premises and artifacts including invoices/receipts/rental agreements, telephone records/phone directory records,

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[7] Emphasis supplied. "Artifact activities" is not further defined by the warrant or affidavit.

[8] The warrant does not define or describe "archaeological resources"; the affidavit gives a materially incomplete definition; and neither the warrant nor any attachment thereto describes or otherwise identifies how officers should discern legally from illegally obtained archaeological resources.

ownership records, affidavits, survey documents, and property lease agreements.

p. Tools, to include, flipping sticks, excavation implements, sifting screens, rakes, shovels, flipping sticks, tarps, trowels and related equipment. [Ex#101: 3-4].

In handwriting following this list are the words: "All related to the subject's involvement in the crimes of theft, destruction, removal and trafficking in artifacts."[9] Id. Attachment B goes on to give a similar laundry list of 16 categories of items for other "Evidence to be seized, including but not limited to: Computer Evidence." [Ex#101: 5].

Neither Attachment B, nor the affidavit in support of the warrant, were incorporated by reference in the search warrant itself. [Ex#101:1]. The application for the warrant included Attachment B, but neither the application nor the affidavit incorporated Attachment B by reference. The application did incorporate by reference the affidavit of Agent Schrader. [Ex#102: 1].

These facts demonstrate the search warrant failed to state with particularity the items to be seized, and was overbroad, resulting in the officers executing the warrant conducting a general search and seizure.

[9] As previously stated, there is no definition of "artifact" in the warrant or any attachment thereto. "Artifacts" are not a discrete category of property, such as "firearms," nor are artifacts contraband.

The Law

A. The Search Warrant Authorized A General Search Prohibited By The Fourth Amendment

The Fourth Amendment states that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. Our Supreme Court has observed: "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 US 573, 583 (1980). Furthermore, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."*Id.,* at 585.

"The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement," *Go-Bart Importing Co. v. United States,* 282 US 344, 357 (1931). This Amendment exists in recognition of "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions," *Marron v. United States,* 275 U.S. 196 (1927). The particularity requirement guarantees "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.*

Search warrants are fundamentally offensive to the underlying principles of the Fourth Amendment when they are so expansive in their language of what may be seized that they constitute "a virtual, all-encompassing dragnet of personal papers and property to be seize at the discretion" of officers executing the warrant. *United States v. Bridges,* 344 F.3d 1010, 1016 (9th Cir. 2003). The breadth of the warrant in Mr. Simpson's case is greater than the warrant condemned by the Supreme Court in *Stanford v. State of Texas*, 379 US 476 (1965), where officers were authorized to seize "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas." The Court found: "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history." 379 US at 486; *cf.*, Attachment B, authorizing seizure of "Archaeological and historical reference materials, including materials related to laws prohibiting such activity, research materials and records associated with this activity; Personal notes, memoranda, diaries, indices, journals, calendars and all relevant records; Photographs and film, both developed and undeveloped, video and audio tapes related to artifact activities;" plus every conceivable form of electronic data storage. [Ex#101: 3].

The breadth of items listed in Attachment B to the Simpson warrant is profoundly disturbing. In addition to its broad sweep for books, records, and photographs, it lists "artifacts," and by handwritten notation seeks to limit all

property to be seized to whatever officers executing the warrant deem "related to the subject's involvement in crimes of theft, destruction, removal and trafficking in artifacts." "Artifacts" are not contraband. The word "artifact" is not a term of art defined by criminal statutes. "Artifact" means "any object made by human work," Webster's New World Dictionary (1995 ed.); "something created by humans usually for a practical purpose; *especially*: an object remaining from a particular period [of time]," Merriam Webster OnLine Dictionary, www.merriam-webster.com/dictionary/artifact, (emphasis original). The word has no generally accepted legal meaning that narrows the breadth of its common English meaning, as evidenced by its absence from Black's Law Dictionary (Ninth Edition). The word is not used or defined in the Archaelogical Resources Protection Act (ARPA), 16 U.S.C. §470ee, which is referenced by its acronym in Attachment B.

That "artifacts" are not contraband has legal significance, as explained by the Court in *Stanford*:

> We need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or 'cases of whiskey.' The point is that it was not any contraband of that kind which was ordered to be seized, but literary material, 379 US at 486 (citation omitted).

Even "artifacts" that are "archaelogical resources" under ARPA are legal to purchase, sell or possess if those items were originally collected prior to 1979, the effective date of ARPA. Furthermore, ARPA's criminal provisions specifically exclude "the removal of arrowheads located on the surface of the

ground." 16 U.S.C. §470ee(g). Thus, arrowheads, also known as "points," that were collected from the surface of public lands at any time whatsoever may be possessed, purchased or sold without committing an ARPA crime. Officers indiscriminately seized thousands of arrowheads from Mr. Simpson's residence. They also seized Native American baskets, bags and beadwork that would not come within the criminal provisions of ARPA, had the officers been so restricted by the warrant.

B. <u>The Search Warrant Violated The Particularity Requirement</u>

The Ninth Circuit examines both the warrant's particularity and its breadth to determine compliance with the Fourth Amendment's particularity requirement. *Bridges, supra,* 344 F.3d at 1016 (citing *United States v. Kow*, 58 F.3d 423, 426 (9th Cir. 1995). *Bridges* held that while the warrant was reasonably descriptive in naming the generic types of items to be seized, it was unconstitutionally overbroad because (1) the warrant failed to specify the crime that agents were investigating; (2) the wording was unquestionably broad in describing the items the agents could seize, stating agents could seize items "include[ed] but not limited to" those listed; and (3) the expansive language "authorizes the Government to seize almost all of [the suspect's] property, papers and office equipment." *Id.*, at 1017. Attachment B to the warrant in *Bridges* listed, among other items, "records and documents, or electronically stored information . . . documents, contracts or correspondence . . . computer hardware . . . computer software . . . all records, documents, and photographs establishing the person . . . owning or leasing [the premises to be searched]".

That list is quite similar to part of the listed items in Attachment B to the warrant for Mr. Simpson.

The Ninth Circuit noted, "The list is a comprehensive laundry list of sundry goods and inventory that one would readily expect to discover in any small or medium-sized business in the United States." *Id.* The Court found this lack of particularity compounded by the warrant authorizing the seizure of "all records relating to clients or victims 'including *but not limited to'* (emphasis added) the ones listed in the warrant." *Id.* "If, however, the scope of the warrant is 'not limited to' the specific records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search." 344 F.3d at 1018. This same "including but not limited to" language appears in Attachment B to the Simpson warrant.

The Court went on to explain, "[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible." 344 F.3d at 1019 (citing *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982)). *Cardwell* also concerned business records, under a warrant that directed officers seize: "corporate books and records, including but not limited to cancelled and duplicate checks, check stubs, journals, ledgers, weekly summaries, driver trip envelopes, and daily schedules . . . which are the fruits and instrumentalities, of violations of [the tax evasion statute]." 680 F.2d at 76. Agents seized approximately 160 boxes of corporate records, containing over 100,000 documents dating back about 10 years. *Id.*

The Ninth Circuit found the warrant invalid in *Cardwell*, noting "The only limitation on the search and seizure of appellants' business papers was the requirement that they be the instrumentality or evidence of violation of the general tax evasion statute, 26 U.S.C. §7201. That is not enough." 680 F.2d at 77. The only limitation on the search and seizure of Mr. Simpson's personal and business papers was that they be "related to the subject's involvement in the crimes of theft, destruction, removal and trafficking in artifacts." This purported limitation, which is not even included in the warrant itself, is broader than the invalid warrant in *Cardwell*, which at least required that the items be the "instrumentality or evidence of violation" of a specific criminal statute, rather than simply "related to the subject's involvement in" a list of generic and at best potentially criminal activities, given reliance on the term "artifacts". *Cardwell* explained:

> As we noted before, "limiting" the search to only records that are evidence of the violation of a certain statute is generally not enough. In *Abrams* the district court had noted that such a limitation forced the executing officers "to make a legal distinction between fraudulent records and records that are not fraudulent, which they were not qualified to do. The foregoing statements are equally applicable to the warrant presently before us. If items that are illegal, fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized. No such guidelines were contained in the warrant used against the appellants. 680 F.2d at 78 (citations omitted).

Cardwell condemned not only the lack of specificity as to what corporate records to seize, but also the lack of any limitation as to the time period covered

by the records. *Id.* Mr. Simpson's warrant, including Attachment B, also lacked any limitation as to the time period covered by his business or personal records. Agents seized records dated as far back as 1994 from Mr. Simpson's residence (longer than the 10-year period in *Cardwell*) and family photographs of more ancient vintage.

In *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), the Court invalidated a warrant for the seizure of "illegally reproduced and stolen copies of 35mm, 16mm, and 8mm motion picture films which are duly copyrighted and protected by the provisions of the United States Copyright law embodied in Title 17, United States Code; books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and distribution of such motion pictures which are the fruits and instrumentalities of violations of Title 17(18), United States Code, 371 and 2314." 557 F.2d at 1322. The error was that "this warrant left to the executing officers the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally reproduced." *Id.* at 1322-23.

Drebin is applicable to the Simpson warrant, because as previously noted, "artifacts" are not contraband, and his warrant contains no guidelines for officers to determine which "artifacts" at his home were probably illegally obtained, assuming they could first discern "artifacts" from non-artifacts. *See, Cardwell, supra* ("If items that are illegal, fraudulent, or evidence of illegality are

sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized.”).

Granted, the specificity required in a warrant varies depending on the circumstances of the case and type of items involved. *E.g., United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). "Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible." *Id.* In determining whether a description is sufficiently precise, the Ninth Circuit has “concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued." *Spilotro,* 800 F.2d at 963 (internal citations omitted); *United States v. Mann*, 389 F.3d 896, 878 (9th Cir. 2004)(quoting *Spilotro*).

Applying those factors to the case at bar, (1) Mr. Simpson disputes the existence of probable cause for issuance of the warrant, as discussed in detail, *infra*; (2) the warrant in his case did not set out objective standards by which officers could reasonable determine what “artifacts” and “records” were subject to seizure from those which were not; and (3) the government was able to describe the items with more particularity in light of the information available to it at the time the warrant issued. For example, the affidavit alleged two

controlled sales of "artifacts" to Mr. Simpson, but no photographs of those items were attached, nor did the affiant provide even an imprecise description such as "arrowhead," or "obsidian knife blade." It alleges that the informant knew Mr. Simpson purchased "artifacts" illegally obtained by other named suspects, in some cases from specific locations on public lands, but again largely fails to provide the slightest description of these "artifacts."

It is frankly inconceivable that the government lacked the ability to provide greater specificity regarding what "artifacts" were to be seized. This leads one to question whether the vagueness infecting both the affidavit and the warrant in describing items believed to be evidence of crimes could be anything but intentional, the design being to seize Mr. Simpson's entire collection, and try to keep it. That the government kept it for study by its own archaeologists for more than five years under protest supports that conclusion.

The affidavit on its face gives little reason to think Mr. Simpson would have kept records concerning trafficking in illegal artifacts, since the affiant points out that he provided no records during the alleged controlled sales of artifacts, and paid in cash. The affidavit contains the names of several antique stores where Mr. Simpson was alleged to have sold "artifacts," and also mentions unspecified auction sales. At least, "records" could have been more particularly described as those concerning sales and purchases of "artifacts" through the antique stores, auctions, and private individuals. *See, United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006)("Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the

warrant is based."). There is, practically speaking, not a single type of "record"—be it personal or business, consisting of words or images, generated by Mr. Simpson, other individuals, or published commercially, in paper or tape or digital format, created at any time in the past—that Attachment B to the warrant excluded from seizure. Agents seized over two thousand seven hundred "records" from the residence, not counting all "records" contained within his computer and other "records" that were seized and then lost or destroyed.

The defense is currently without adequate information to know whether the seizure and search of the expansive list of "Computer Evidence" from Mr. Simpson's home yielded evidence or leads related to this tax prosecution, but notes that the affidavit stated no alleged facts concerning Mr. Simpson using a computer in connection with "artifacts" dealings, and that the warrant contained no restrictions on examination of "computer evidence". *But see, United States v. Comprehensive Drug Testing, Inc.,*579 F.3d 989, 1006-1007 (9th Cir. 2009)(*en banc*). Warrants for computer searches must affirmatively limit a search to evidence of specific federal crimes or specific types of material. *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009). The Simpson warrant did not specify the crimes for which evidence was sought, and Attachment B to the Simpson warrant contained essentially no limitation on the types of material to be gleaned from any "computer evidence".

C. The Warrant Failed To Incorporate By Reference Any Documents To Narrow The Scope Of The Search And Seizure.

A nonspecific warrant and a supporting affidavit may be read together to satisfy the particularity requirement only if the warrant expressly incorporated the affidavit and, in addition, the affidavit and warrant were presented together to the individual whose property was searched. *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993). The warrant did not incorporate either the affidavit, or "Attachment B" by reference. Although Attachment B accompanied the warrant, the affidavit did not. *See, Groh, supra,* 540 U.S. at 557-558 ("The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents . . . [A] court may construe a warrant with reference to the supporting application or affidavit if the warrant uses appropriate words of incorporation *and* if the support document accompanies the warrant.")(emphasis supplied). As previously noted, neither Attachment B nor the affidavit for the Simpson warrant—even if deemed a part of the warrant, contrary to *Groh*—increase the specificity of the warrant by any appreciable degree.

Simply stated, the government went on a "fishing expedition" with its facially invalid warrant. Agents rummaged through all of Mr. Simpson's papers and belongings—plus those of his domestic partner—from shortly past dawn through late night; and after retaining truckloads of property for more than five years, found no illegally obtained artifacts and no records to charge him with trafficking in illegal artifacts. The government used seized records and the fruits of that search to put together a prosecution of a whole different nature—the

instant tax code violations. The particularity requirement of the Fourth Amendment "prevents general, exploratory searches and indiscriminate rummaging through a person's belongings," *Spilotro*, 800 F.2d at 963. A warrant that does not particularly describe the items to be seized cannot be saved by the "good faith" exception. *See Groh v. Ramirez*, 540 U.S. 551, 561 n.4 (2004).

II. The Execution Of The Warrant Violated Rule 41.

Statement of Facts

The execution of the search warrant at Mr. Simpson's residence at 2128 NE Edgewood, Bend, Oregon, was part of "Operation Bring 'Em Back," heralded by the government through the news media as "the largest investigation of suspected archaeological theft and sale of illegally obtained artifacts in the Pacific Northwest." The execution of the warrant was planned days in advance, and not the result of any exigency. Agents pounded on the front door shortly after 7 a.m., and entered with guns drawn when Mr. Simpson's domestic partner, Liz Neill, opened the door. Agents encountered Mr. Simpson in the hallway, naked, and brought him into the living room with Ms Neill, where both were commanded to stand with their arms in the air, under guard.

Agents proceeded to search for other occupants and weapons in the house. This took approximately 20 minutes from time of entry. While officers swarmed the residence, Mr. Simpson—still standing naked and with arms raised--asked to see the warrant, and received no answer. A few minutes later he asked again, was told they had one, but no warrant was produced. After completing

the "officer-safety" search, and seizure of firearms, agents moved all furniture and items away from the living room couch, and had Mr. Simpson and Ms. Neill sit down. They remained under guard. Simpson was given a bathrobe. Agents also provided a copy of the search warrant. Mr. Simpson asked to make a phone call and was told no. Agents also asked about the location of any cell phones, telling them they were not allowed to make calls. Mr. Simpson asked for a pen and paper to make some notes, and was told no. The couch faced a solid wall, and when Mr. Simpson tried to look over his shoulder to see what officers were doing, he was ordered to face forward.

An armed guard remained by them at all times. To use the restroom, or get a drink of water, required one officer for an escort, and another to stand guard over either Simpson or Neill who remained seated on the couch. Later that morning Mr. Simpson was allowed to put on jeans and a shirt. Around 3 p.m., agents advised Mr. Simpson he could leave the residence, but would not be allowed back. He elected to stay, but remained under guard seated on the couch facing the wall, and was not allowed to watch officers conduct the search, or to see any of the "artifacts" being seized.

Agents occupied the home for approximately 15 hours, seizing well over thirty-five thousand Native American made objects and other items;[10] at least

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[10] The number of items seized is based on a BLM archeologist's report of the post-seizure inventory of Mr. Simpson's collection, which remained on-going in 2007, and the books and records returned to Mr. Simpson or provided by the government in discovery.

eight federal agents, and an unknown number of state and local law enforcement officers, were involved in the search warrant execution.

Throughout the search, both Ms. Neill and Mr. Simpson were fully cooperative with agents, and answered all questions asked. Agents interviewed Mr. Simpson four times, on tape, totaling more than three hours of interrogation. Although informed that the vast majority of Native American items in his collection had belonged to his deceased father, agents made no effort to narrow the scope of their seizure to "artifacts" that were likely to be evidence of the crimes for which Mr. Simpson was suspect. From the vantage point of the living room couch, Mr. Simpson was unable to observe the seizure of the items from his home, and was denied the opportunity to observe the inventory of seized property. As agents were preparing to leave, he was handed an 8-page inventory describing the property seized in generic terms, and the location where the property had been found. When Mr. Simpson questioned the lack of specificity of the property being taken, he was told "that's what you're getting," and no further information was provided.

The written inventory left with Mr. Simpson was woefully inadequate to document the property seized: For example, the inventory lists a total of 24 "control numbers" with generic descriptions of "artifacts," such as "frames of projectile points, small baskets, beads", "hammerstones, hand axes," and "mortars and pestles." In contrast, a BLM archeologist reported two-and-one-half-years later that "to date thirty thousand one hundred ad eight (sic) six (30,186) artifacts have been inventoried from the Simpson collect (sic), and

that there are numerous other items that needed to be inventoried to included (sic) other artifacts and the basket collection."[11]

Not long after the search warrant execution, Mr. Simpson retained counsel, and an agreement was reached with the government for the defense to conduct a videotaped inventory of seized property, excluding the books, photographs, and other records, so that an accurate record of the seized property could be obtained. This occurred at a storage facility in Bend on May 24, 2005. That inspection revealed damage to many of the items, as well as improper packaging and storage conditions contributing to the damage. No chain of custody had been maintained.

In summary, officers refused to allow Mr. Simpson to monitor the execution of the warrant and to observe the inventory of the property that was seized, and failed to prepare a proper inventory through photographic or other means of the items seized, and that conduct was deliberate, or of constitutional magnitude, or otherwise prejudiced Mr. Simpson.

<u>The Law</u>

Rule 41(f), Federal Rules of Criminal Procedure (formerly Rule 41(d)), governs the execution and return of search warrants. That rule provides, in pertinent part:

> **(1) Warrant to Search for and Seize a Person or Property.**

[11] Memo of Interview, Ron Gregory, government discovery Bates #000515.

> (A) **Noting the Time.** The officer executing the warrant must enter on it the exact date and time it was executed.
>
> (B) **Inventory.** An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.
>
> (C) **Receipt.** The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.
>
> (D) **Return.** The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

Rule 41(f)(1)(Emphasis supplied).

In *United States v. Gantt,* 194 F.3d 987 (9th Cir. 1999), the court held that a technical violation of Rule 41(d), Federal Rules of Criminal Procedure, called for suppression of evidence seized pursuant to a warrant, where the violation was deliberate. In *Gantt,* the suspect was denied access to the

searched area, had her request for a copy of the warrant rebuffed, and had no idea what items were seized. The court found the police were justified in removing her from the scene of the search, believing she was prone to violence, thereby excusing adherence to part of the rule, but erred in failing to provide her with a copy of the warrant even after she asked for it. The court explained:

> The language of Rule 41(d) does suggest that the subjects of searches are to monitor the execution of the search: "The inventory shall be made in the presence of . . . the person from whose possession or premises the property was taken, if they are present . . . ." We do not, however, require agents to always abide by this provision. Believing Gantt was prone to violence, agents removed her from the apartment and prevented her from monitoring the search. There is no dispute over their authority to have done so. The dispute concerns only the government's unjustified failure to show her the warrant as the search began or even after she asked to see it.

194 F.3d at 1002-1003.

The Ninth Circuit observed that the provisions of Rule 41 correspond to protections the Fourth Amendment was intended to afford citizens undergoing governmental intrusion: "The search warrant requirement arose from the Founder's understanding that '[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted.' *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948)." Service of a warrant assures the citizen that officers are acting under lawful authority, and gives notice to the person subject to the search what the officers are entitled to seize. "Citizens deserve the opportunity to calmly argue that agents are

overstepping their authority or even targeting the wrong residence." 194 F.3d at 1001-1002.

In Mr. Simpson's case, although he was given a copy of the warrant within thirty minutes after agents entered his residence, he was denied the opportunity to observe the property being seized, and had little idea of what items were taken until agents vacated the premises. Even then he learned far more from seeing what was gone, than the vague statements on the inventory form. Mr. Simpson was fully cooperative with officers executing the warrant, and there could be no credible claim that he was prone to violence, yet he was given no opportunity to observe and question the seizure of numerous items that were outside the scope of the warrant, nor was he given a proper inventory of the items seized. Mr. Simpson was further prejudiced in that property seized by officers was callously handled and some items, including documents material to his defense, have been lost or destroyed by government agents.

In *United States v. Williamson,* 439 F.3d 1125, 1133 (9th Cir. 2006), the court explained:

> There are three circumstances under which evidence obtained in violation of Federal Rule of Criminal Procedure 41 requires suppression: 1) the violation rises to a 'constitutional magnitude'; 2) the defendant was prejudiced, in the sense that the search would not have occurred or would not have been so abrasive if law enforcement had followed the Rule; or 3) officers acted in 'intentional and deliberate disregard' of a provision in the Rule. *United States v. Martinez-Garcia,* 397 F.3d 1205, 1213(9th Cir.) *cert. denied,* 546 U.S. 901, 126 S.Ct. 241, 163 L.Ed.2d 222 (2005).

If a defendant claims prejudice, “the manner in which the agents executed the warrant . . . would be relevant.” *Williamson*, 439 F.3d at 1133 n.6. The court explained that the search warrant execution in Williamson comported in substance with Rule 41, where “the agents introduced themselves, displayed their identification and a copy of the search warrant, discussed the purpose and scope of the search, narrowed their search based on Williamson's feedback, and offered Williamson an opportunity to examine the seized items.” *Id.*

Mr. Simpson’s Motion To Suppress alleges the violations of Rule 41 rose to a “constitutional magnitude” in that officers executed the warrant as if it were a “general warrant,” rummaging through his home for more than 14 hours and indiscriminately seizing vast numbers of items outside the scope of the warrant, as evidenced by the government finally returning most of the property to him, albeit over five years later.

His motion alleges he was prejudiced by the officers’ violations of Rule 41, because the search would not have been so abrasive if law enforcement had followed the rule. This is because had he been allowed to monitor the seizure and inventory of his property, it is more likely that agents would have narrowed their seizures based on his feedback, handled his collection of artifacts with more care so as to avoid the damage caused to his property, and provided a proper inventory that would have been used to maintain chain of custody and help determine who later lost or destroyed, items of his property.

His motion alleges the failure to follow the procedures set forth in Rule 41 was deliberate, in that officers were acting under the supervisory authority of

three Assistant United States Attorneys, and were instructed in writing that "Occupants should be permitted to observe the execution of the warrant so long as they do not interfere."[12]

III. The Search Warrant Affidavit Failed To State Probable Cause For The Search Or Seizure Of All Financial Records.

Statement of Facts

On its face, the affidavit contains the following statements of alleged fact that could support a conclusion that some financial records would be found at Mr. Simpson's home related to dealings in "artifacts," legal or illegal: (1) Simpson sells Native American artifacts through several local antique stores in the Central Oregon area [EX#102: 13]; (2) Simpson had a wanted ad in the local newspaper and a business card that promoted his sale and purchase of Indian Artifacts [id.]; (3) Simpson told the informant he had purchased artifacts and sold artifacts at auction and to a private party [EX#102: 16]. The affidavit also reveals, as to the two alleged controlled sales of artifacts to Mr. Simpson, that he paid in cash and did not make or keep records related to the transactions. [Ex#102: 16, 18].

The affidavit contained the following opinions related to financial records, based on the "training and experience" of the affiant, and an involved IRS agent: (1) that subjects of illegal artifact trafficking "often maintain for years the following types of records associated with their activities: . . . sales records, logs, ledgers etc.," [Ex#102: 6]; (2) that "during most searches for illegal

[12] See Search Warrant Protocol Issues [Ex#110: 1].

artifact activity . . . evidence consists of but is not limited to . . . contracts, advertisements, and sales records . . . fiscal statements of accounts, deposits, transfers, ledgers, bank accounts, income journals and disbursement records . . . bank records for personal or business checking accounts . . . purchase invoices and records created identifying assets," [Ex#102: 27]; (3) that "persons involved in the trafficking of illegal items such as stolen artifacts often keep detailed purchase, sale and inventory records of their transactions" and engage in other related criminal activities including money laundering, evading currency transaction reporting requirements, and tax code violations, [Ex#102: 28]; and (4) "records consist of and are not limited to statements of accounts, records of deposit, transfers, cancelled checks, withdrawal documents, ledgers, copies of signature cards, passbooks, financial statements, balance sheets, cash disbursement logs and ledgers, purchase and sales ledgers, income and expense journals, disbursement journals, federal and state tax returns . . ." [Ex#102: 28-29].

Attachment B to the search warrant purported to authorize the search and seizure of "Financial records to include, but not limited to statements of accounts, records of deposit, transfers, cancelled checks, withdrawals, ledgers, copies of signature cards, passbooks, financial statements, balance sheets, chase disbursement logs and ledgers, purchase and sales ledgers, income and expense journals, disbursement journals, federal and state tax returns, records regarding entities such as dba's (doing business as), corporations, partnerships, limited liability partnerships and corporations." This language is the same

boilerplate as what the affiant stated he learned from the IRS agent would be records, presumably related to money laundering and tax crimes. The affidavit omits an explicit link between these records and any crime, but that would be a fair reading given the context of the affidavit.

The affidavit alleges Mr. Simpson bought and sold illegally obtained artifacts. Although the affiant notes that the IRS Criminal Investigation Division has interest in the overall investigation, called "Operation Bring 'Em Back," and that he has knowledge of what constitutes evidence of "tax/money laundering violations," [Ex#102: 12], he does not assert that Mr. Simpson is suspected of committing financial fraud crimes, nor does he assert facts that would support the magistrate drawing such a conclusion.

The Law

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Jones v. United States,* 362 U.S. 257, 271 (19670). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244, n.13 (1983). The affidavit in Mr. Simpson's case does not assert that he was suspected of committing financial fraud crimes, or that evidence of money laundering or tax code violations would be found at his home. Without probable cause for commission of those crimes, rather than illegal artifact

purchase and sales—which the affidavit indicates were undocumented, cash transactions—searching for records associated with financial fraud crimes in general does not comport with the Fourth Amendment. *United States v. Rubio,* 727 F.2d 786, 793 (9th Cir.1983) (where a warrant seeks evidence relevant to proving a criminal violation, the affidavit must establish probable cause to believe there is a connection between the evidence sought and a violation of the criminal statute at issue).

In *United States v. Ventresca*, 380 US 102, 108-109 (1965), the Court noted that affidavits must be tested in a common-sense and realistic fashion, but "[t]his is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."

The affidavit for the Simpson warrant contains only law enforcement agents' conclusory statements about the types of financial crimes that persons who traffic in any type of illegal commodity may commit, and the types of records that may provide evidence of those crimes. It is little more than speculation that Mr. Simpson, even if he was probably involved in the purchase and sale of illegal artifacts, was also involved in financial crimes that could be proven through financial records kept at his home. Indeed, the affiant does not even make that assertion. Moreover, that conclusion is made less likely by the

affidavit stating Mr. Simpson paid cash for illegal artifacts and made no record of the transaction. *Cf., United States v. VonderAhe*, 508 F.2d 364, 370 (9th Cir. 1974)(where affidavit showed other records were unlikely to contain incriminating information, there was no probable cause to justify the broader search for all records).

In *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990), the Court found that an officer's training and experience, while expert opinion, consisted of "rambling boilerplate recitations designed to meet all law enforcement needs. It is clear that the "expert" portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind," and could not support probable cause to search for a laundry list of items generally found in the homes of child molesters. The same result, based on analogous circumstances, should be reached in the case at bar.

All facts, authorities, and arguments contained in this section of the memorandum are incorporated by reference for the evaluation of the affidavit as controverted.

IV. The Search Warrant Affidavit, As Controverted, Failed To State Probable Cause For Issuance Of The Warrant.

Statement of Facts

The facts in support of this issue are set forth in the Declaration of Counsel and all exhibits thereto, filed herewith and incorporated by reference. There are four categories of assertions where the affiant, either through material

omission or deliberate or reckless misstatement, presented matters to the Magistrate in a false light: (1) statements concerning the scope of criminal laws Mr. Simpson was alleged to have violated; (2) statements concerning the reliability of the informant; (3) statements allegedly made by Mr. Simpson to the informant during recorded conversations; and (4) statements that portray Mr. Simpson as a dishonest individual when it comes to acquiring artifacts from sources other than public lands. A fifth category of assertions controverted by the defense are false statements or material omissions by the confidential informant, that the affiant asserted without corroboration.

If the affidavit would have been truthful and complete, it would have told the Magistrate the following facts: that Mr. Simpson maintained inside one room at his home a large collection of Native American made items, including arrowheads, blades, stoneware, baskets and beadwork, that had been lawfully acquired by his deceased father; along with a small number of similar items that Mr. Simpson had lawfully acquired through auctions, private sales, and himself hunting on private lands with permission of the owner. Mr. Simpson had shown the informant this collection, and explained in general how he came to possess the items, and about his father's collection. The informant saw no Native American burial items or human remains in Mr. Simpson's possession, and Mr. Simpson told him he would not purchase any such items.

When the informant initially asked to purchase items from Mr. Simpson's collection, Mr. Simpson told him the collection was not for sale; and that he was a collector, not a seller of Native American handicrafts. The informant learned

from Mr. Simpson that his primary business was buying and selling antiques, and that he also sold frames of arrowheads at the local antique stores where he rented space. The affiant was able to verify this, and to see for himself that the frames of arrowheads for sale included written statements concerning where the points had been found.

Mr. Simpson purchased a few arrowheads and other chipped stone items from the informant for small sums of cash on two occasions. The informant told Simpson he had found those items hunting on private lands with permission of the owner. Mr. Simpson did not ask to purchase these items from the informant, but eventually did so because the informant told Mr. Simpson he needed money for a family emergency, and for gas. Mr. Simpson also purchased surface-found arrowheads from several other subjects of the investigation. Surface-found arrowheads are not illegal to possess or purchase under ARPA or related Oregon statute. Mr. Simpson also purchased some stone knife blades that these subjects told him had come from private land, without knowing that was or may have been false. He paid them small sums of cash for these items.

Mr. Simpson did not ask for written documentation of where the items that he purchased from the informant and other subjects of the investigation came from, but written documentation is not required by ARPA, and Oregon law requires the seller to provide documentation, and places no criminal liability on the purchaser. Mr. Simpson said he did not keep the relatively few items he purchased from the informant or other suspects, because they were not of good enough quality for his collection; he gave away, traded or sold those items.

These several transactions occurred over the passage of about a year. The informant had no knowledge as to whether Mr. Simpson provided written documentation of the origin of these items that he later traded or sold.

The defense submits that the Magistrate would not have issued the Simpson warrant had the affidavit apprised him of these facts.

The Law

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Supreme Court held that a defendant seeking an evidentiary hearing to determine whether a facially valid affidavit contains false statements must make a substantial preliminary showing that: (1) the affidavit contains intentionally or recklessly false statements and (2) the affidavit cannot support a finding of probable cause without the allegedly false information. If a defendant prevails at a *Franks* evidentiary hearing, evidence obtained on the basis of a search warrant issued on an affidavit containing material omissions or misrepresentations must be excluded. In *United States v. Stanert,* 762 F.2d 775 (9th Cir.1985), *amended, reh'g denied,* 769 F.2d 1410 (9th Cir.1985), the Court extended *Franks* to omissions of material facts and concluded that "the Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead." *Id.* at 781. In that situation, the affidavit must be considered with the omitted information included. *United States v. Condo,* 782 F.2d 1502, 1506 (9th Cir.1986).

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*, with the misrepresentations struck and the improperly omitted information included. The relevant inquiry under *Gates* is whether in light of all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 238.

In general, a court reviewing the validity of a search warrant is limited to the information contained on the face of the underlying affidavit. *United States v. Taylor,* 716 F.2d 701, 705 (9th Cir.1983). The fact that probable cause existed and could have been established in a truthful affidavit will not cure a *Franks* error. *Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005). *Franks* does not permit a court to "correct" the affidavit after the fact, but directs instead that the court delete the false statements and examine the remaining information. *See United States v. Davis,* 714 F.2d 896, 900 (9th Cir.1983). *United States v. Leon* expressly states the "good faith" exception does not apply to warrants successfully challenged under *Franks. Leon,* 468 U.S. 897, 923 (1984).

A defendant need not present clear proof that the misrepresentations were deliberate or reckless in order to obtain a *Franks* hearing; all that is needed is a substantial showing. *United States v. Gonzalez, Inc.,* 412 F.3d 1102, 1111 (9th Cir. 2005). The due process principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny concerning the production of exculpatory or potentially exculpatory evidence are applicable to suppression hearings involving a challenge

to the truthfulness of allegations in the affidavit for a search warrant. *United States v. Barton*, 995 F.2d 931, 934-36 (9th Cir. 1992).

A. Misstatements Concerning The Scope Of Criminal Laws Mr. Simpson Was Alleged To Have Violated.

The affiant states several times that the investigation was aimed at, and the warrant should issue to obtain evidence of, Mr. Simpson's criminal involvement in the removal, sale and purchase of artifacts from federal lands. See, e.g., [Ex#102: 3]. "Artifacts" is a generic term used through out the affidavit, yet no federal or Oregon state law criminalizes removal, sale or purchase of "artifacts" from public lands, much less simple possession. Therefore, statements in the affidavit concerning Mr. Simpson's alleged activities with "artifacts" cannot provide probable cause for criminal activity, without a further description of the "artifact," including when and where it was obtained, for the Magistrate to determine if it is reasonably within the class of items protected by law. Stated most simply, "artifacts" are not contraband, although the entire affidavit is steeped in that erroneous presumption.

The application for the warrant included Attachment C, which contained about 20 pages of photocopies of various federal and state statutes and administrative agency regulations concerning Native American "archaeological resources". However, inclusion of that source material does not render harmless material misstatements in summarizing the law in the affidavit. The defense has found no cases concerning material misstatements of law by affiants, but submits that when an affiant elects to make representations about the law for

the Magistrate to consider in determining probable cause, that the rule of *Franks* applies.

The Declaration of Counsel in support of the Motion To Controvert details nine types of assertions in the affidavit rendered misleading by misstatements or material omissions regarding ARPA's criminal provisions and related Oregon statutes. See pages 4-11. It would be redundant to provide greater detail in this Memorandum.

B. Conclusory Assertions Of "Illegal Artifact" Activities.

Conclusory statements in an affidavit do not provide a sufficient basis for probable cause. "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." *Gates,* 462 U.S. at 239 (1983). As the Court explained:

> A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States,* 290 U.S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas,* 378 U.S. 108 (1964). As in *Nathanson,* this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. *Id.*

The affidavit supporting a warrant therefore must contain a statement of the facts relied upon to establish probable cause, as well as sufficient identification of the sources of those facts to warrant the conclusion that the facts recited are probably true. Without such facts, the Magistrate cannot truly judge for himself the persuasiveness of those facts, as well as make an independent determination that they establish probable cause.

The affidavit here is rife with conclusory statements about Mr. Simpson's involvement with "illegal artifacts," devoid of underlying facts or attribution, including the following: "An investigation has revealed that Miles Simpson is believed to be involved in a conspiracy to traffic in stolen artifacts," [Ex.#102: 6]; The informant "also posed as a seller of stolen artifacts to two subjects of this investigation based on information that two subjects were, purchasing large quantities of artifacts illegally removed from federal lands. One of these subjects was Miles W. Simpson," [Ex/#102: 11]; "During the course of this long term investigation it was discovered that Miles W. Simpson was involved in the trafficking of Native American artifacts stolen from federal lands," [Ex.#102: 13]; "[Note: the investigation has uncovered other subjects who have been selling illegally acquired artifacts to Simpson]," [Ex.#102: 20].

These "bare bones" assertions cannot contribute to a finding of probable cause. *See Gates, supra*.

C. Material Omissions Concerning The Reliability Of The Informant.

The affiant omitted material facts concerning the credibility of the informant, Brian Doland, including that he is a methamphetamine addict who

continued to use while on pretrial release on a federal meth manufacturing case that was pending throughout his contacts with Mr. Simpson; that he repeatedly violated his promises to state court judges to appear and pay child support; that he was cooperating not simply for financial gain, but with the expectation of avoiding prison on the federal drug case; and that he had prior convictions for negotiating bad checks and contempt of court.

"Any crime involving dishonesty necessarily has an adverse effect on an informant's credibility." *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000). Therefore, when an informant's criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit "to bolster the informant's credibility or the reliability of the tip." *Id.* Otherwise, "an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause." *Id.* (citing *United States v. Meling,* 47 F.3d 1546, 1554-55 (9th Cir.1995)).

Negotiating a bad check is a crime of dishonesty, which does not become unworthy of mention simply by crafting the affidavit to state the informant had no felony convictions. Equally—if not more—probative of a character for untruthfulness is Mr. Doland's history of making repeated false promises to the court, and being held in contempt of court. A man who would lie to a judge to evade payment of child support—while he was earning thousands of dollars as an informant—would probably not hesitate to lie about targets of investigation to curry favor with law enforcement.

The Magistrate deserved to evaluate the informant's statements about Mr. Simpson that are uncorroborated—and there are many—with knowledge of the true facts regarding Mr. Doland's credibility and reliability. Neither the affiant, nor any other law enforcement officer, had personal knowledge of any "artifact" crimes by Mr. Simpson that form the basis for this warrant. All of those "facts" came from the informant.

To determine whether information provided by an informant establishes probable cause, a magistrate looks to the "totality of the circumstances." *Gates,* 462 U.S. at 238. Evidence bearing on the veracity of the informant and his basis of knowledge is considered together with other relevant evidence in making the probable cause determination based on the totality of the circumstances. *See United States v. Roberts,* 747 F.2d 537, 543 (9th Cir.1984). However, "The basis of a confidential informant's knowledge, as well as his reliability, [remain] important factors in deciding whether information in an affidavit supports a finding of probable cause for a search." *United States v. Avery*, 295 F.3d 1158, 1167 (10th Cir. 2002).

The "basis of knowledge" prong of the *Aguilar-Spinelli* test requires that the affiant set forth the underlying circumstances that led the informant to believe that criminal activity was occurring; a mere conclusory allegation that a suspect was engaging in criminal activity is insufficient. *Spinelli,* 393 U.S. at 416. If the basis of the informant's knowledge is not personal knowledge but hearsay, the hearsay must carry indicia of reliability both as to the veracity of the original source and the basis of the latter's knowledge. *See id.*

The affidavit includes the following assertions that fail to provide a basis of knowledge for the informant's claims, or rest on the hearsay of other suspects under investigation, with no indicia of veracity for those suspects: "I learned through [the CI] that Simpson had purchased from other subjects of this investigation artifacts which had been stolen from federal lands by other subjects of this investigation, [Ex.#102: 13]; The CI "advised that he was aware, through conversations with the following subjects, who are subjects of this undercover operations, that they had sold some of their illegally obtained artifacts to Miles Simpson," [Ex.#102: 20]; The CI "told me that Miles Simpson had purchased numerous illegal artifacts (knife blades) from Felix Maxwell, Mark Shumaker, and Dustin Hull which they had stolen from two cache sites located on the Deschutes National Forest," [id.]; The CI "also told me that Dustin Hull, Randy Wools, and Mike and Allin Harsh had also previously sold Simpson numerous artifacts (points)," [id.].

D. Misrepresentations Of Mr. Simpson's Statements To The Informant, A Government Agent.

An affidavit may contain conclusory statements and withhold facts indicating the informant was less than credible, so long as it has a solid core of facts establishing probable cause. In the Simpson affidavit, that "solid core" must be formed by his allegedly incriminatory statements to the informant, because law enforcement officers had no first-hand knowledge of any illegal activities by Mr. Simpson. The affiant represented that those incriminatory statements were either captured on audio recordings that he had reviewed, or

"corroborated" by those recordings. [Ex.#102: 12]. If that representation proves false, as contended in the Declaration of Counsel controverting the affidavit, the "solid core" turns hollow, and the basis for probable cause collapses. The plethora of misleading and false assertions by the affiant concerning Mr. Simpson's statements to the informant are set forth in detail in the Declaration, and will not be repeated here. See Declaration, pages 12-25.

When an officer has all of the relevant facts at his disposal—as with the audio recordings in Simpson's case—his inclusion of false or misleading information in a search warrant affidavit exhibits a reckless disregard for the truth and requires suppression. *Cf. Liston v. County of Riverside,* 120 F.3d 965, 975 (9th Cir.1997)(fact that officer carefully observed house and probably saw "sold" sign provided sufficient evidence of knowing or reckless dishonesty in omitting this information from search warrant affidavit); *United States v. Stanert,* 762 F.2d 775, 785, *amended by* 769 F.2d 1410 (9th Cir.1985)(demonstration that affiant probably knew that previous arrest mentioned in affidavit had not resulted in conviction was sufficient showing of recklessness to warrant *Franks* hearing).

Even if the affiant was unaware that the informant gave him false information about Mr. Simpson, in this case the informant functioned as a government agent, and his falsehoods should be subjected to the same constitutional scrutiny as those of the affiant.

Whether a private person acts as a government agent, and therefore becomes subject to constitutional constraints, is an issue confronted in a variety

of contexts, but controlled by the same legal principles. The entrapment defense is available only when a defendant is persuaded to commit a crime by government agents. The Ninth Circuit approved an instruction telling the jury in an entrapment case that "someone is a government 'agent' when the government directs and supervises his or her activities and is aware of those activities. To be an agent, it is not enough that someone has previously acted as an informant or been paid as an informant by other state or federal agencies or that one expects compensation for providing information." *United States v. Fontenot,* 14 F.3d 1364, 1367 (9th Cir. 1994). In *Sherman v. United States*, 356 U.S. 369, 374-375 (1958), the Court found that a informant who was working off drug trafficking charges by making cases for the government, but not otherwise being compensated, was a government agent, stating "The Government cannot make such use of an informer and then claim disassociation through ignorance."

In the case at bar, the confidential informant was paid by the government and worked under the direction and supervision of the affiant. The informant was highly motivated to assist the government, not only to obtain monetary compensation, but also to avoid prison on a pending federal drug trafficking case by making cases against suspects in Operation Bring 'Em Back. The government utilized the informant as its sole undercover operative, and relied on his purported "in-depth knowledge about cultural resources and artifacts" and his experience working for the same federal agency in an earlier artifacts prosecution. [Ex.#102: 9].

The Fourth Amendment protects against unreasonable searches and seizures by government officials and those private individuals acting as instruments or agents of the government. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). The Fourth Circuit noted the inquiry turns on "common law agency principles," and the "two primary factors" to be considered are (1) whether the Government knew of and acquiesced in" the private individual's challenged conduct; and "whether the private individual intended to assist law enforcement or had some other independent motivation." *United States v. Day,* 591 F.3d 679, 683 (2nd Cir. 2010). The informant in Mr. Simpson's case clearly meets that test.

The Ninth Circuit has held that "misstatements or omissions of government officials which are incorporated in an affidavit for a search warrant are grounds for a *Franks* hearing, even if the official at fault is not the affiant." *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992). Although *DeLeon* concerned conduct of another law enforcement officer who provided information to the affiant, the underlying principle extends to any individual who functions as a government agent: "The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants." *Id.* In *United States v. Wapnick*, 60 F.3d 948, 956 (2nd Cir. 1995), the court held that when the undercover informant (a city employee) who provided information to the affiant was himself a government agent, "a deliberate or reckless omission by the informant can . . . serve as grounds for a *Franks* suppression." (citing *DeLeon, supra.*).

E. Assertions That Portray Mr. Simpson As A Dishonest Individual In His Dealings With "Artifacts" From Private Sources.

The affidavit contains pages of information concerning Operation Bring 'Em Back, laws concerning the removal, destruction and trafficking in "artifacts" stolen from public lands, the informant's background, and boilerplate assertions about the type of items constituting evidence of these crimes that would probably be found and should be seized, that were designed to be employed in every affidavit for search warrants in this investigation. It contains 14 pages under the heading, "Contacts with Miles W. Simpson," that are the foundation for probable cause to issue the Simpson warrant. [Ex.#102: 13-26]. Almost half of those 14 pages have nothing to do with the undercover investigation, and instead relate to Mr. Simpson's alleged dealings with Native American artifacts obtained from private lands or private parties.

The assertions regarding those activities falsely portray Mr. Simpson as a dishonest person in unrelated dealings, based on either misstatements of the facts or material omissions. See [Ex.#102: 20-26]. The slanderous nature of these assertions are recounted in the Declaration of Counsel, pages 26-27, and will not be set forth in detail here. The number of pages devoted to these unrelated activities in the affidavit underscores the paucity of information developed through the undercover operation to establish probable cause. Furthermore, the affiant's resort to innuendo and conjecture in this portion of

the affidavit to smear Mr. Simpson's character is strong evidence of reckless disregard for the truth.

CONCLUSION

For the reasons set forth above, the Court should either find the warrant to be facially invalid due to its overbreadth and lack of particularity, or proceed to a *Franks* hearing and find the affidavit as controverted fails to state probable cause. At the evidentiary hearing, the Court should also resolve any factual disputes regarding the execution of the warrant and whether the Rule 41 violation requires suppression of evidence, and should grant the Motion To Suppress on one or more of these alternative grounds.

RESPECTFULLY SUBMITTED this 29th day of July, 2010.

/s/Terri Wood
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