C.A. NO. 07-10567

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL CLAY PAYTON, Defendant-Appellant.	D.C. NO. 1:05-CR-0338-OWW (E.D. California, Fresno)

Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE

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v.	)	D.C. NO. 1:05-CR-0333 OWW (E.D. California, Fresno)
MICHAEL CLAY PAYTON, Defendant-Appellant.	)	

JURISDICTION

The defendant was charged with violating 18 U.S.C. §2252(a)(4). E.R. 337-39; C.R. 8. The district court had jurisdiction over this case under 18 U.S.C. § 3231. A final Judgment and Conviction was entered on November 5, 2007. E.R. 61-67; C.R. 72. The defendant filed a timely notice of appeal two days later. Fed. R. App. P. 4(b)(2). E.R. 68; C.R. 71. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying the defendant's motion to suppress evidence, based on a defense claim that the search exceeded the scope of the warrant.

2. Whether the district court erred in denying the defendant's motion to suppress, based on a defense claim that the warrant was issued without probable cause.

3. Whether the district court erred in denying the defendant's motion to suppress, based on a defense claim that the search warrant affidavit contained misstatements and omissions of material facts.

STATEMENT OF THE CASE

The defendant was charged by way of criminal complaint on September 2, 2005. S.E.R. 1; C.R. 1. The defendant was ordered detained at a detention hearing on September 12, 2005. C.R. 7. The defendant was charged by way of an indictment filed on September 15, 2005. E.R. 337-39; C.R. 8. The two-count indictment alleged that the defendant was in possession of material involving the sexual exploitation of a minor, on July 30, 2004 and on September 2, 2005, respectively. 18 U.S.C. §2252(a)(4). Id.

A number of search warrants were issued in this case, and the defendant filed a number of motions to suppress the warrants. C.R. 39, 49, 62. A state warrant was obtained on July 30, 2004 to search for evidence of drug trafficking at the defendant's residence. S.E.R. 2. This is the search warrant that is the

subject of this appeal.[1] During the execution of that search warrant, evidence of child pornography was located. S.E.R. 1, at 00004-00008. On October 17, 2006, the defendant filed a motion to suppress evidence. C.R. 39; E.R. 298-336.

On January 30, 2007, an evidentiary hearing was held regarding the intended scope of the search warrant. C.R. 47; E.R. 186-235. Judge Kirihara testified that he intended the scope of the search warrant to include a search of computers at the defendant's residence, and that the failure to include a reference to computers in Attachment A of the warrant was inadvertent error. E.R. 14. On May 8, 2007, the district court issued a written order denying the defendant's motion to suppress based on facial invalidity. C.R. 56; E.R. 15-39.

On June 5, 2007, a Franks hearing was held regarding whether or not the search warrant was issued without probable cause. C.R. 58; E.R. 76-123. The district court found that probable cause existed to support the warrant. C.R. 58; E.R. 2-14. In addition, the court found that the affidavit did not include intentional and/or reckless material misrepresentations. C.R. 58, E.R. 2-14; 76-123.

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[1] On October 4, 2004, a state warrant was issued for a forensic search of the computer hard drive. On September 1, 2005, a federal warrant was obtained to search for child pornography on a second computer at the defendant's residence. All evidence seized pursuant to the later warrants was ordered suppressed. C.R. 63-64.

On August 24, 2007, the defendant pleaded guilty pursuant to a plea agreement to Count One, charging possession of child pornography on July 30, 2004. C.R. 66; S.E.R. 4, at 00038. The defendant expressly reserved the right to appeal the denial of his suppression motion pertaining to the July 30, 2004 search warrant. C.R. 67; E.R. 69-71; 74-75.

On November 5, 2007, the district court sentenced the defendant to 63 months imprisonment, 120 months supervised release, and a $100 special assessment. C.R. 70; E.R. 61-67.

BAIL STATUS

The defendant is currently serving his sentence. His projected release date is March 24, 2010.

STATEMENT OF FACTS

Officer Horn applied for a state search warrant, informing State Judge John D. Kirihara of the following facts:

1. On July 29, 2004, Officer Horn served an outstanding warrant for the arrest of Melinda Fuentes at 544 Spur Court, Merced.[2] S.E.R. 2, at 00016. At the front door, Officer Horn was informed that Fuentes was inside the apartment. Id. He went inside the residence and arrested Fuentes. Id. He searched her purse, finding

[2] 544 Spur Court in Merced, California is also defendant Payton's residence. S.E.R. 1, at 00004.

a glass pipe typically used to smoke controlled substances. Id.

2. Officer Horn requested Fuentes' consent to search the residence. She refused to give consent. Id.

3. At the jail, Fuentes was found to be in possession of 2.7 grams of suspected methamphetamine pinned to her brassiere. Id. Fuentes was charged with possession of a controlled substance for sale, smuggling a narcotic into a jail and drug paraphernalia. In addition, she was held pursuant to the warrant. Id.

4. Officer Horn inspected the suspected methamphetamine and packaging. Relying on the fact that the suspected methamphetmaine was packaged in two separate bags and its total quantity, Officer Horn informed the judge that based on his training and belief, the suspected methamphetamine was possessed for sale. See S.E.R. 2, at 00017-18.

5. Officer Horn was aware of complaints from neighbors regarding drug activity at the residence. Id. at 00017.

6. In the affidavit in support of the search warrant dated July 30, 2004, Officer Horn stated that based on his training and experience, which included narcotics investigation he had conducted as an officer for both

Merced and Los Banos' Police Departments, he had learned that narcotics traffickers:

a. typically maintain larger quantities of methamphetamine in their residences;

b. deal narcotics from their permanent or temporary residences;

c. conduct hand-to-hand drug transactions at various locations and do not stay in any location for too long, causing increased foot traffic to and from their permanent or temporary residences;

d. use the telephone to conduct drug sales negotiations;

e. keep scales and other equipment used for trafficking in their residences;

f. keep indicia of their identity and control over their residence inside their actual residence;

g. keep large sums of money at their residences;

h. have co-conspirators who may have evidence of joint drug transactions;

i. sell drugs to maintain their own drug habits and for personal gain; and

j. maintain evidence of sales of narcotics on their computers.

Id. at 00018.

The affidavit was accompanied by an Attachment A, which listed all the drug-related items to be seized. S.E.R. 2, at 00015. Computers were not included in the attachment A, despite the fact that the request for authorization to search any computers was set forth in the affidavit. Id. That item was inadvertently left out of the list of items to be seized. See E.R. 14; S.E.R. 2, at 00018.

Upon execution of the warrant, officers seized a small quantity of suspected methamphetamine from Sonya Reyes Fuentes, another resident of the defendant's residence. S.E.R. 1, at 00004. Inside the master bedroom, Officer Horn seized several pipes, which he recognized as those used to smoke controlled substances, as well as what appeared to be marijuana leaves and seeds on the ground. Id; E.R. 97. Officer Horn determined that this was defendant Payton's bedroom. Id. While searching the room, he also noticed VHS videos, including one titled "The Adolescence," and others with the names of females written on them. Id.

Officer Horn located a computer in the defendant's bedroom. Id. Officer Horn believed that a search of the computer was authorized by the search warrant since he had made such a request

in his affidavit. E.R. 92-93; 97. He noticed that the computer was on and in screen saver mode. E.R. 97-99; S.E.R. 1, at 00004-05. He moved the mouse, and a page showing computer files came up. Id. Upon clicking on the first file listed, a photograph of what appeared to be a 10-year old girl lying completely naked on a bed with her legs spread open displaying her genitals appeared. Id. Officer Horn closed the file and decided to seize the computer based on his belief that it contained child pornography. Id.

The defendant was charged on September 15, 2005 with two counts of possession of material involving the sexual exploitation of minors, in violation of Title 18, United States Code, Section 2252(a)(4). E.R. 337-39. Defense motions to suppress evidence seized from two computers followed. C.R. 39; 49; 62.

SUMMARY OF ARGUMENT

The district court did not err in denying the defendant's motion to suppress evidence based on the defense claim that the search exceeded the scope of the search warrant. Failure to include computers in the list of items to be seized was cured by the inclusion of the affidavit with the search warrant. This Circuit has held that a document need not be physically affixed to the search warrant to be considered in deciding whether the

warrant is constitutionally overbroad. United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993).

The district court correctly found that the failure to include computers in Attachment A was the result of mistake and oversight. The warrant at issue is a state warrant, and under state law, a typographical error is considered a technical defect and not a Constitutional violation. The affidavit, when read together with the warrant, satisfies the particularity requirement. Federal law permits reference to the incorporated affidavit to determine whether the search and seizure of computers was intended to be authorized.

In addition, the district court did not err in denying the defendant's motion to suppress, based on the defense claim that the warrant was issued without probable cause. The evidence of possession of methamphetamine and drug paraphernalia justified the issuance of the search warrant at 544 Spur Court. The district court was presented with a substantial basis for a finding of probable cause: evidence showing the presence of controlled substances, use of controlled substances, and weight and packaging consistent with that used for drug sales.

In reviewing probable cause determinations, courts give "due weight to inferences drawn from [the] facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. 690, 699 (1996). Even if this Court were to find that

the search warrant lacked probable cause for drug sales, the search and seizure of the computer was justified by Officer Horn's good faith belief that the warrant authorized such a search.

Finally, the district court correctly denied the defendant's motion to suppress, based on the defense claim that the search warrant affidavit contained misstatements and omissions of material facts. Under Franks, the defense bears the burden of establishing by a preponderance of the evidence that false statements were made either intentionally or with reckless disregard for the truth and that without these statements there is insufficient information in the affidavit to support a finding of probable cause. The district court properly found that the defendant did not make this showing. Franks v. Delaware, 438 U.S. 154, 171 (1978).

Officer Horn's affidavit showed that there was a reasonable basis to believe that drugs were being sold at the defendant's residence. The defendant's theory that the amount of drugs seized was not consistent with drug trafficking is merely a difference of interpretation of the facts, not a misrepresentation of the facts, as the defendant claims.

Officer Horn also had a reasonable basis for his belief that evidence of drug sales would be found on the computer. As he set forth in the affidavit, based on his training and experience,

computers are used by drug dealers. At the Franks hearing, he testified that he had received training regarding this fact, and in addition, he had recent experience on a gang investigation where electronic technology was used to monitor the targets' instant messages they were sending to each other to set up and negotiate drug deals.

For the foregoing reasons, this Court should affirm the defendant's conviction in this case.

ARGUMENT

I. The District Court Did Not Err in Denying the Defendant's Motion to Suppress Evidence Based on the Defense Claim that the Search Exceeded the Scope of the Search Warrant.

A. Standard of Review

Whether a search is within the scope of a warrant is a question of law subject to de novo review. United States v. Hurd, 499 F. 3d 963, 965 (9th Cir. 2007); United States v. Cannon, 264 F. 3d 875, 878 (9th Cir. 2001). The district court's factual findings are reviewed for clear error. United States v. Howard, 447 F. 3d 1257, 1262 n. 4 (9th Cir. 2006).

B. The Inadvertent Failure to Include Computers in Attachment A Did Not Require that the Search Warrant Be Suppressed for Lack of Particularity Under the Fourth Cir

The defendant argues that the omission of computers from the list of items to be seized set forth in Attachment A made the search exceed the scope of the search warrant. Def. Br. at 11-

12. Therefore, the defense argues, the items seized as a result should be suppressed. However, the state search warrant and the affidavit setting forth the probable cause to search the computer are all one document and can be read together. The magistrate was indeed presented with the request to search computers for evidence of drug trafficking and made a probable cause finding to that effect. Failure to include computers in the list of items to be seized was cured by the inclusion of the affidavit with the search warrant.[3]

"The general rule is 'that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it.'" In re: Property Belonging to the Talk of the Town Bookstore, 644 F.2d 1317, 1318 (9th Cir. 1981), quoting United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976) (per curiam). However, a warrant may be construed with reference to the affidavit for purposes of sustaining the particularity requirement provided that: 1) the affidavit accompanies the warrant; and b) the warrant uses suitable words of reference that incorporate the affidavit therein. Talk of the Town Bookstore, 644 F.2d at 1319; see also United States v. Fannin, 817 F.2d 1379, 1384 (9th Cir. 1987) (any lack of particularity in

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[3] The search warrant and affidavit fact sheet states that the affiant swears under oath that "the facts expressed by him in this search warrant and affidavit and incorporated are true." S.E.R. 2 at 00014 [emphasis added].

the warrant was of no effect because "a descriptive affidavit [had] been attached to and incorporated in the warrant.") Thus, incorporation of the affidavit as part of the search warrant can cure a defective search warrant. See Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 750 (9th Cir. 1989) (affidavit can cure the over breadth of a warrant if the affidavit is attached to and incorporated by reference in the warrant.") More important, the Ninth Circuit has "never held that any document that is not physically affixed to the piece of paper labeled 'search warrant' is excluded from consideration in deciding whether the warrant is constitutionally specific." United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993).

1. The District Court Correctly Found that the Failure to Include Computers in Attachment A was the Result of Mistake and Oversight

At an evidentiary hearing held on January 30, 2007, Judge Kirihara testified that when he reviewed the search warrant he issued on July 30, 2004, he received all of the following items together: the search warrant and affidavit face sheet, the statement of probable cause, and Attachment A, describing specific items of property to be seized. C.R. 47; E.R. 193-94. Judge Kirihara testified that he considers these papers to be one document:

> All the pages that compose [the search warrant and affidavit face sheet, the statement of probable cause, and Attachment A] would be the warrant. And it's

> handed to me as a multiple page document, as in this case, and I consider it to be a single document.

C.R. 47; E.R. 195. He testified that the probable cause statement is considered part of the actual warrant and it is filed together. Id. at 196. He further testified that the entire document is taken to the location when the warrant is executed. Id. at 195.

Judge Kirihara testified that he inadvertently neglected the fact that there was not a listing in Attachment A for computers when it clearly states probable cause to search for computers in the statement of probable cause. Id. at 198-99. The statement of probable cause includes:

> Because of my experience and training I know that drug dealers will have evidence of sales on their computer. I would ask that this warrant allow me to look at computer files, and seize the computer if it shows evidence of criminal behavior.

S.E.R. 2, at 00018. The state court judge clearly testified that it was his "intention to authorize a search for computer as well as the other things that are mentioned." C.R. 47; E.R. 199.

2. Under State Law, A Typographical Error Is Considered a Technical Defect and Not a Constitutional Violation.

Technical defects in a warrant will not invalidate the oath and affirmation on the affidavit for a search warrant. Clifton v. Superior Court, 7 Cal.App.3d 245, 254-55 (1970). For instance, failure of a magistrate to sign a search warrant was

deemed a technical defect that did not invalidate the warrant. Sternberg v. Superior Court, 41 Cal.App.3d 281, 291 (1974).

"[T]he mere fact that there is on the face of a warrant some error, omission or ambiguity, is not sufficient to defeat the sufficiency or the validity of the warrant." People v. Moore, 31 Cal. App. 3d 919, 927 (1973). In Moore, the California Appellate court found that a search warrant that incorrectly set forth the violation for which evidence was sought constituted a purely clerical error. Moore, 31 Cal.App. 3d at 919, 927. In upholding the search, the Court of Appeals ruled:

> We think it significant that the search and seizure was conducted by the same police officer who had sworn the affidavit. A warrant must be sufficient to allow the officer to ascertain what is authorized. In this instance, the searching officer obviously knew what it was he was looking for.

Id. at 925-27. The fact that the affiant was also in charge of executing the search warrant ensured that the search was circumscribed to the items authorized by the magistrate. Id.

As in the Moore case, the warrant in the instant case was defective due to the mere omission of one item from the list of items to be seized. Judge Kirihara confirmed that he intended to authorize the search and seizure of computers pursuant to probable cause shown in Officer Jeff Horn's affidavit. S.E.R. 2, at 00018. He also testified that the omission of the word "computers" was a simple mistake. C.R.; E.R. 198-99. Moreover, Judge Kirihara confirmed that, in the state system, the search

warrant face sheet and the affidavit are considered one document and filed as one, thus permitting this Court to consider the contents of the affidavit in determining whether the warrant sufficiently guided the officers in the search of the defendant's residence. C.R. 47; E.R. 195. Finally, the fact that Officer Horn was in charge of executing the warrant prevented the seizure of unauthorized items as it was Officer Horn himself who wrote the affidavit in support of the warrant and was presumed to know exactly what he was seeking.

In People v. Sternberg, 41 Cal. App. 3d 281 (1974), the California Court of Appeal upheld the validity of a search where the judge inadvertently failed to sign the search warrant. The Court held that the defect of the judge's failure to sign:

> ...was cured by his affixing his signature at the earliest opportunity after such omission was discovered and prior to any challenge to the warrant...there was clear and convincing evidence that the magistrate had determined that there was probable cause and had authorized the search and seizure.

Sternberg at 191-92. Similarly, Judge Kirihara testified that he had determined that there was probable cause and that he had intended to authorize the search and seizure of computers. C.R. 47; E.R. 198-99.

Because the state law is consistent with federal law in deeming a mere typographical error a technical defect rather than a constitutional violation, the district court did not err in

denying the defendant's claim that the search exceeded the scope of the search warrant.[4]

3. The Affidavit, When Read Together with the Warrant, Satisfies the Particularity Requir

The defendant argues that because the Attachment A to the search warrant did not include computers, even reading the affidavit together with the search warrant does not meet the particularity requirement. Def. Br. at 1-2; 12. However, the incorporation of the attachment is not what the law requires. It is the affidavit requesting permission to seize the items omitted from the warrant itself that must be incorporated by reference. Because the face sheet of the affidavit clearly incorporated the affidavit by reference, it may be considered in deciding whether it identified the items to be seized with sufficient particularity. S.E.R. 2, 00014-18.

The requirements of Fed.R.Crim. P. 41 do not apply to the warrant at issue here. See United States v. Piver, 899 F.2d 881,

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[4] Even if this Court finds that the defect on the face of the warrant cannot be cured by reference to the affidavit, the state law recognizes the Leon good faith doctrine, that also supports affirming the district court's finding that the search warrant was not Constitutionally defective. See People v. McAvoy, 162 Cal.App.3d 746, 764 (1984) (search warrant that failed to adequately describe the place to be searched was nonetheless upheld under Leon because officers limited their search to the actual location that was intended to be authorized); see also People v. Garcia Alvarez, 209 Cal.App.3d 660, 667 (1989) (officer reasonably relied on search warrant even though it did not have list of items to be seized attached due to mistake by district attorney's office).

882 (9th Cir. 1990) ("searches conducted by state officers with state warrants issued by state judges, with minimal or no federal involvement, are not to be judged by the specific provisions of Rule 41 but must only conform to federal constitutional standards").

The opening paragraph of the search warrant provides:

> Jeffrey R. Horn, Swears, under oath, that the facts expressed by him in this Search Warrant and Affidavit and incorporated in the Statement of Probable Cause are true and that based thereon he has probable cause to believe and does believe that the property and/or persons described below is lawfully seizable, pursuant to penal code § 1524, as indicated below, and is now located at locations set forth below. Wherefore, Affiant requests that this Search Warrant be issued.

S.E.R. 2, at 00014.

It is clear from the above paragraph that through use of the standard state Search Warrant and Affidavit form, the affiant directed the magistrate to the descriptions of places to be searched and items to be seized in the affidavit itself. That is so because otherwise the above paragraph would be insufficient to show probable cause. The above paragraph was merely an introduction to the probable cause, which could be found in the attached affidavit filed together with the face sheet to the warrant, in accordance with state procedures. The fact that the introductory paragraph does not mention the Attachment A is irrelevant as courts only look to whether the warrant incorporated the affidavit and whether the affidavit accompanies

the warrant. Both requirements were satisfied here. S.E.R. 2, at 00014-18. Thus, the court may look to the affidavit in determining whether the search of the computer was requested and authorized pursuant to a finding of probable cause.

The cases cited by the defendant are distinguishable.[5] They involved warrants that did not describe a single item to be seized in the attachment. For example, Groh v. Ramirez, 540 U.S. 551, 554 (2004), involved an application and affidavit in support of a federal search warrant for firearms and explosives. There, the Court found the warrant facially invalid because it failed to list a single item sought to be seized. Groh, 540 U.S. at 557. In fact, the section where such items should have been named set forth a detailed description of the place to be searched instead. Id. at 558. Thus, the Court found that while the warrant was supported by probable cause, it was facially defective for failure to list the items to be seized or to incorporate the affidavit by reference. Id. The reviewing court noted that failure to identify any items to be seized left law enforcement with no guidance as they conducted their searches.

That is not the case here. The July 30, 2004 search warrant did include an Attachment A that listed at least seven categories

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[5] Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) concerns civil damages for alleged Fourth Amendment violations based on a warrantless search in the absence of probable cause.

of evidence related to drug violations to be seized. S.E.R. 2, at 00015. The only omitted item was the computer, for which authorization was requested but not included in the attachment. S.E.R. 2, at 00015, 00018. As the district court correctly pointed out, "[t]his is not a situation in which the items to be searched were not described at all in the search warrant." C.R. 56; E.R. 24. Officer Horn not only authored the warrant but also executed it based on his belief that the magistrate had considered his request and approved it based upon probable cause. As will be discussed below, Officer Horn believed in good faith that he was authorized to search any computers for evidence of drug trafficking. See United States v. Leon, 468 U.S. 897, 919-20 (1984) (where officer acted as a reasonable officer would act in similar circumstances, evidence recovered during a warrantless search will not be suppressed). While conducting the most cursory of searches, he discovered evidence of another crime. Office Horn acted prudently, seizing the suspected contraband and turning over the computer to a forensic specialist, who later obtained a second search warrant to allow for a search based on suspicion of a child pornography violation. C.R. 58; E.R. 98-101.

In addition, Doe v. Groody, 361 F.3d 232,240 (3rd Cir. 2004), actually supports the government's position that the mere omission of one item from the list of items to be seized is

deemed to be a technical defect. In the context of a civil rights matter, the Third Circuit, in finding that the search of two women not identified in the search warrant exceeded the scope of the search warrant, differentiated between technical defects and constitutional deficiencies as follows:

> We recognize that there are decisions in which an affidavit has been used to save a defective warrant even when it has not been incorporated within that warrant. But the cases fall into two categories. The first embraces those circumstances in which the warrant contains an ambiguity or clerical error that can be resolved with reference to the affidavit. In these situations, it is clear that the requesting officer and the magistrate agreed on the place to be searched or item to be seized, but there is an obvious ministerial error in misidentifying or ambiguously identifying the place or item.... Reliance on the affidavit in these circumstances neither broadens nor shrinks the scope of the warrant, but merely rectifies a minor irregularity.

Id. at 240 (internal quotations and citations omitted).

The court went on to find that the omission of the two female occupants from the list of people to be searched was not a technical error because the language of the warrant was inconsistent with the affidavit and to find otherwise would impermissibly expand the scope of the warrant. Id. The Third Circuit found that an affidavit may be used to cure a defective search warrant even when it has not been incorporated within that search warrant, where "the warrant contains an ambiguity or clerical error that can be resolved with reference to the affidavit." Id. at 238-40. In situations such as those where any ambiguity or clerical error can be resolved with

reference to the affidavit:

> ...it is clear that the requesting officers and the magistrate agreed on the place to be search or item to be seized, but there is an obvious ministerial error in misidentifying the place or item. See, e.g., United States v. Ortega-Jimenez, 232 F. 3d 1325, 1329 (9th Cir. 2000)(ambiguous term); United States v. Simpson, 152 F. 3d 1241, 1248 (10th Cir. 1998)(internal inconsistency in warrant). Reliance on the affidavit in these circumstances neither broadens nor shrinks the scope of the warrant, but merely rectifies a '[m]inor irregularit[y].' United States v. Johnson, 690 F. 2d at 65 n. 3 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)...).

Groody, at 238-40.

Federal law permits reference to the incorporated affidavit to determine whether the search and seizure of computers was intended to be authorized. The testimony in this case is that the magistrate intended to authorize such a search. C.R. 47; E.R. 198-99. The omission of the word "computers" was a typographical error that can be clarified by examining the affidavit. More important, the request in the affidavit is consistent with the magistrate's understanding of what he authorized and with the officer's actions in executing the search warrant.

This Court is permitted to consider the affidavit in determining whether the seizure of computers was authorized. Because a cursory reading of the affidavit makes it is clear that the magistrate authorized the search and seizure of computers, the district court did not err in denying the defendant's motion

to suppress based on the defense claim that the warrant was overbroad.

II. The District Court Did Not Err in Denying Defendant Payton's Motion to Suppress, Based on the Defense Claim that the Warrant Was Issued Without Probable Cause.

A. Standard of Review

This Court reviews de novo a district court's determination as to whether a search warrant was supported by probable cause. United States v. Bishop, 264 F. 3d 919, 924 (9th Cir. 2005). This Court also reviews de novo whether the good faith exception to the exclusionary rule applies to a search warrant. United States v. Luong, 470 F. 3d 898, 902 (9th Cir. 2006); United States v. Hove, 848 F. 2d 137, 139 (9th Cir. 1988). However, the district court's underlying findings of fact and determinations of credibility are reviewed for clear error. Bishop, 264 F. 3d at 924; See also United States v. Jones, 286 F. 3d 1146, 1150 (9th Cir. 2002).

A magistrate's determination of probable cause should not be reversed absent a finding of clear error. United States v. Wright, 215 F. 3d 1020, 1025 (9th Cir. 2000); United States v. Pitts, 6 F. 3d 1366, 1369 (9th Cir. 1993). It is to be accorded great deference, because resort by officers to the warrant process, as opposed to conducting warrantless searches, is preferred and to be encouraged. Illinois v. Gates, 462 U.S. 213, 236-37 & n. 10 (1982).

Accordingly, the duty of a district court reviewing a search warrant on a motion to suppress is to ensure that the issuing magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. Id. at 238-39. See also United States v. Weber, 923 F. 2d 1338, 1343 (9th Cir. 1991).

B. The Evidence of the Possession of Methamphetamine and Drug Paraphernalia Justified Issuance of the Search Warrant

The defendant argues that Officer Horn's affidavit failed to set forth sufficient probable cause for the search for evidence of drug sales. He argues that "the only issue is whether probable cause existed to search computers that might be at [the defendant's] residence for evidence of drug sales." Def. Br. at 17. Further, the defendant "does not contest that substantiated or reliable complaints of drug sales from neighbors would be sufficient to infer that the drugs possessed by Melinda Fuentes were possessed for sale." Def. Br. at 19. Because Officer Horn presented ample evidence of drug possession and drug paraphernalia justifying his conclusion that evidence of drug sales violations could be found at 544 Spur Court, the defendant's argument on this basis must fail.

When a magistrate judge issues a search warrant for a residence, he must find a "reasonable nexus" between the contraband sought and the residence. United States v. Rodriguez,

869 F. 2d 479, 484 (9th Cir. 1989). "Direct evidence that contraband or evidence is at a particular location is not essential to establish probable cause to search the location." United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir.1986); United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993). "The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit." United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987); United States v. Terry, 911 F.2d 272, 275 (9th Cir. 1990).

The warrant clause of the Fourth Amendment requires probable cause, "supported by Oath or affirmation" to justify the issuance of a search warrant. Courts review such probable cause determination with "great deference." United States v. Hay, 231 F.3d 630, 634 n. 4 (9th Cir. 2000). Thus, the relevant inquiry is whether the magistrate had a "sufficient basis" for finding probable cause. United States v. Weber, 923 F.2d 1338, 1343 (9th Cir. 1991). A "fair probability" is sufficient to establish probable cause. United States v. Rabe, 848 F.2d 994, 997 (9th Cir. 1988).

In reviewing probable cause determinations, courts give "due weight to inferences drawn from [the] facts by resident judges and local law enforcement officers." Ornelas v. United States,

517 U.S. 690, 699 (1996). The reviewing court need only find that the issuing magistrate had a substantial basis for finding probable cause. Illinois v. Gates, 462 U.S. 213, 239 (1983). In making this determination, a magistrate judge must assess the totality of the circumstances and make a "practical, common-sense decision." Id. at 238.

Under the totality of the circumstances test, otherwise innocent behavior may be indicative of criminality when viewed in context. See United States v. Ocampo, 937 F.2d 485, 490 (9th Cir. 1991). Issuing judges may also rely on the training and experience of affiant police officers. United States v. Chavez-Miranda, 306 F.3d 973, 978 (9th Cir. 2002); United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995).

The facts of this case are distinguishable from the Weber case cited by the defense. Def. Br. at 19-20; see United States v. Weber, 923 F. 2d 1338, 1334 (9th Cir. 1991). In Weber, this Court found that probable cause for a warrant did not exist where there was no evidence that Weber had attempted to claim material that was described by law enforcement as "apparently depict[ing] the sexual exploitation of children." Id. at 1340. In addition, law enforcement made no determination whether Weber had ordered the advertising material or whether the advertisements had been sent unsolicited. Id. In addition, the package of suspect

material was seized almost two years prior to the date of the warrant. Id.

Here, the judge was presented with evidence showing the presence of controlled substances, use of controlled substances and packaging consistent with that use for drug sales. S.E.R. 2, at 00016-18. C.R. 58; E.R. 91-97. In his affidavit, the officer stated that he weighed the drugs found on Melinda Fuentes at the time of her arrest and looked at the way it was packaged:

> It was packaged [sic] in two separate bags inside of a slightly larger bag. Officer Horn also noticed that the weight was almost what is called an "8 ball".

S.E.R. 2, at 00017. Because of his training and experience, Officer Horn believed that these drugs were possessed for sales. Id. This information was fresh, from the day before. Id. In addition, the quantity of methamphetamine, 2.7 grams, was consistent with a sales quantity. S.E.R. 2, at 00016-17; C.R. 58; E.R. 85. The issuing judge was entitled to rely on Officer Horn's observations and interpretations of the evidence in making the probable cause determination. Likewise, the state court judge was entitled to rely on Officer Horn's showing that based on his training and experience, drug dealers often keep drugs at their homes. C.R. 58; E.R. 94.

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C. Officer Horn's Search of the Defendant's Computer was Based on His Good Faith Belief on the Validity of the Search Warrant.

Even if the Court were to find that the search warrant lacked probable cause for drug sales, the search and seizure of the computer was justified by Officer Horn's good faith belief that the warrant authorized such a search.

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court held that a facially-valid search warrant later determined to lack probable cause does not preclude the admission of evidence obtained pursuant to the search warrant, provided "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues [is] objectively reasonable." 468 U.S. at 922. In determining whether the good faith exception applies, a court considers whether it was objectively reasonable for an officer to rely on the "magistrate's probable-cause determination and on the technical sufficiency of the warrant." Id. at 922; see also United States v. Clark, 31 F.3d 831, 835 (9th Cir. 1994) (the question is whether "a reasonably well-trained officer would have known that this particular search was illegal despite the magistrate judge's authorization"). However, an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" cannot be saved by the good faith doctrine. United States v. Hove, 848 F.2d 137, 139

(9th Cir. 1988) (internal quotation marks omitted), quoting Leon, 468 U.S. at 923.

The defense cites Luong for the proposition that the critical deficiency in the affidavit is its reliance on an unverified tip as the lynchpin for the theory of probable cause. Def. Br. at 20-21; United States v. Luong, 470 F. 3d 898, 903 (9th Cir. 2006). However, as set forth above, the affidavit in this case included ample facts indicating the presence of evidence of narcotics violations at the defendant's residence, justifying the issuance of the search warrant, including the seizure of methamphetamine and drug paraphernalia from a resident of the house, inside 544 Spur Court. S.E.R. 2, at 00015-18; C.R. 58; E.R. 93-96. The search of computers was justified by evidence of drug trafficking, including the 2.7 grams of methamphetamine, packaged separately, which according to Officer Horn, based on his training and experience, was consistent with drug trafficking. S.E.R. 2, at 00015-18; C.R. 58; E.R. 85-92. More important, Officer Horn himself prepared the affidavit and executed the warrant that he believed authorized the search of computers. Id. The omission of more detail surrounding the complaints of neighbors was not so egregious as to make the warrant obviously invalid. For those reasons, Officer Horn was entitled to rely on the validity of the warrant. The defendant's argument accordingly fails.

III. The District Court Did Not Err in Denying Defendant Payton's Motion to Suppress, Based on the Defense Claim that the Search Warrant Affidavit Contained Misstatements and Omissions of Material Facts.

A. Standard of Review

The district court's finding that an affidavit did not contain purposefully or recklessly false statements or omissions or false information is reviewed for clear error. United States v. Elliott, 322 F. 3d 710, 714 (9th Cir. 2003); United States v. Maldonado, 215 F. 3d 1046, 1050 (9th Cir. 2000). The district court's finding regarding probable cause is reviewed de novo. Elliott at 714; United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir. 2000). Whether any omissions or misstatements are material is a mixed question of law and fact which is also reviewed de novo. Elliott at 714; United States v. Garza, 980 F. 2d 546, 551 (9th Cir. 1992).

B. The District Court Correctly Ruled that the Search Warrant Affidavit Did Not Contain Misstatements and Omissions of Material Facts

The defense claims that Officer Horn intentionally and/or recklessly mislead the magistrate with false information and omissions in his search warrant affidavit. Def. Br. at 21. Specifically, the defense makes these assertions regarding the information about complaints by neighbors of drug sales and the affiant's knowledge that evidence of drug sales will be found on computers. Def. Br. at 21-26. However, both of these assertions

lack merit; the district court correctly found that Officer Horn did not intentionally or recklessly mislead Judge Kirihara.

The district court held a Franks hearing in this case.[6] The defendant had the burden to establish by a preponderance of the evidence that false statements were made either intentionally or with reckless disregard for the truth and that without these statements there was insufficient information in the affidavit to support a finding of probable cause. If the defendant makes this showing, the evidence should be suppressed. Id. 438 U.S. at 155-56. The district court properly found that the defendant did not make this showing.

1. Officer Horn Had Reasonable Basis for Belief that Drugs Were Being Sold at Defendant's Residence

Officer Horn's affidavit showed that there was a reasonable basis to believe that drugs were being sold at the defendant's residence. At a Franks hearing on June 5, 2007, Melinda Fuentes testified that she had been living at the defendant's address, 544 Spur Court, at the time of her arrest on an outstanding warrant. C.R. 58; E.R. 88. Approximately 2.7 grams of

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[6] A Franks hearing is appropriate if the defendant can make a substantial preliminary showing that a false statement was deliberately or recklessly included in or omitted from a warrant affidavit, and that the false statements or omissions were material to the finding of probable cause. United States v. Meek, 366 F. 3d 705, 716 (9th Cir. 2004); see also Franks v. Delaware, 438 U.S. 154, 171 (1978).

methamphetamine was found in her possession. Id. at 91. Officer Horn testified:

> There were two small bags that were packaged separately inside of another bag. The outside bag is the one that actually was safety-pinned to [Fuentes'] bra.

Id. at 90. Officer Horn testified that there was a likelihood that evidence of drug sales might be found at the location based on Fuentes' arrest at that location and her possession of controlled substances packaged for sale. Id. at 90-93. In addition, Officer Horn testified at the Franks hearing that street level drug dealers deal "half a gram to a gram to someone on a street corner out of a residence to either support their own habit or make enough money to buy groceries." Id. at 85.

In addition, the Declaration of Rhonda Espinoza, attached as Defendant's Exhibit D to the October 17, 2006 motion to suppress, serves to corroborate, rather than contradict, that she indeed complained to the police about drug activity at the residence, which included videotaping the residents of 544 Spur Court and viewing the tape with members of the Merced Narcotics Task Force. C.R. 39; S.E.R. 5, at 00041, ¶ ¶ 9, 11-16. Ms. Espinoza added that she complained about the amount of traffic to and from the defendant's house, the type of people who constituted the traffic and her suspicion that drugs were being used at the house. Id. at 00042, ¶ 17. Officer Horn was entitled to rely on the collective knowledge of the officers of his department. See

United States v. Sutton, 794 F.2d 1415, 1426 (9th Cir. 1986) (collective information known by officers justified stop of defendant's vehicle). The fact that Ms. Espinoza never reported sales is irrelevant, as Officer Horn was in a position, based on his training and experience, to analyze and interpret the reported facts, and he testified to such at the Franks hearing. C.R. 58; E.R. 86-92.

In addition, Melinda Fuentes testified that the methamphetamine was in two separate baggies, one for her use and one for the use of everyone else. C.R. 58; E.R. 109-10. She admitted to trafficking of drugs. As the district court correctly noted, "if you transfer to another, you're sure trafficking." C.R. 58; S.E.R. 6 at 00050.

More important, the magistrate was entitled to rely on the officer's interpretation of the evidence based on his training and experience of otherwise normal actions in making the probable cause determination. In determining probable cause, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty' but the degree of suspicion that attaches to particular types of noncriminal acts." Gates, 462 U.S. at 243-44 n. 13. Because the difference in interpretation of facts does not amount to a material misrepresentation, the defendant's argument lacks merit.

Defendant's theory that the amount of drugs seized was not consistent with drug trafficking is merely a difference of interpretation of the facts, not a misrepresentation of the facts, as defendant claims. The government recognizes that the good faith exception does not apply if the judge issuing "a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth" or if there were reckless omissions. Leon v. United States, 468 U.S. 897, 923 (1984). However, as set forth above, a mere difference of interpretation does not rise to the level of purposeful misstatements or reckless disregard for the truth required to suppress evidence. Finally, the defendant's claim that inclusion of the fact that neighbors complained about drug sales at the defendant's home was misleading, is likewise a difference in interpretation.

As the district court correctly found following the Franks hearing, the way the drugs were packaged and the amount of drugs was honestly presented. Even without a complaint by neighbors of drugs sales:

> ...the affidavit is still sufficient for the magistrate to authorize a search of a residence where obvious drug activity with people who are under the influence, it looks like, to use the vernacular, a crack house or a place where narcotics are used.

E.R. 58; S.E.R. 6 at 00054.

The defense claims that the officer admits making statements that he concedes are false. Def. Br. at 24. However, that is not the case. The defense cites two Sixth Circuit cases for the proposition that the district court's finding that there were no false statements nor any statements made in reckless disregard for the truth was clearly erroneous where the affiant admitted that the statements in his affidavit were untrue and material to the affidavit. United States v. Bennett, 905 F. 2d 931, 934 (6th Cir. 1990); United States v. Henson, 848 F. 2d 1374, 1381 (6th Cir. 1988).

However, in Bennett, the officer stated in his affidavit that the informant had told him that he had seen several bags of marijuana in Bennett's house and barn. The officer testified at a Franks hearing that the informant had not told him that he had seen marijuana in Bennett's house or barn. Id. at 934. That is not the case here. Officer Horn did not admit that he made any false statements; rather, he testified at the Franks hearing that based on his training and experience, he determined that there was evidence of drug trafficking going on at defendant Payton's residence.

In Henson, the Sixth Circuit upheld the district court's finding that the search warrant should not be suppressed. Id. at 1381. The Court held that the affiant's testimony at the Franks hearing was not inconsistent with statements in the affidavit.

Id. Similarly, in this case, Officer Horn's testimony at the Franks hearing was not inconsistent with statements in the affidavit.

2. Reasonable Basis for Belief that Evidence of Drug Sales Would Be Found on Computer

The defense calls into question the officer's assertion that based on his training and experience, evidence of drug sales may be found on a computer. Def. Br. at 26. However, there is nothing false about this statement by the officer in his affidavit, let alone deliberate or reckless. See Franks, 438 U.S. 156. Officer Horn testified at the Franks hearing that at the time the warrant affidavit was written, he was involved in an investigation with the California Department of Justice in the drug dealing of a gang in Merced. C.R. 58; E.R. 84. He testified that during that investigation, they used electronic technology to monitor the targets' instant messages they were sending to each other to set up and negotiate drug deals. Id. As the district court correctly found:

> And there is no contradiction of Officer Horn's testimony that he had just completed training in which he was educated that often -- especially in the gang that he was investigating -- people use ....electronic means of communication, and that drug dealers record their transactions, pay/owe-type information on computer.
>
> And, therefore, it was entirely appropriate, even though he hadn't had the personal experience of seizing a computer before, part of his training was -- and he had been seeing - in other words, he says I know that computers are used, and has testified that he had seen

> in the Merced Gangsters Crips investigation that texting and E-messages, electronic messages, were being used by the gang members.

C.R. 58; S.E.R. 6 at 00048-49. There is nothing false about Officer Horn's statement that he had personal training and experience that computers are used by drug dealers.

The defense claims that Officer Horn testified he had never discovered drug evidence on a computer. Def. Br. at 26. However, Officer Horn also testified that he never previously requested a search of computer evidence for a case involving suspected drug sales. C.R. 58; E.R. 92. He testified:

> [He had] just attended [a course] with the Department of Justice in which they talked about drug dealers having evidence located on their computers, as well as a case [he was] currently investigating where [he was] using the wire taps and intercepting text messages and everything else that went along with it.

Id. at 92-93. Given that Officer Horn had not made the request to search computers before, it is not surprising that he had not personally located evidence there in the context of a drug trafficking case.

Officers are supposed to interpret facts, and based on their training and experience, they can make conclusory statements as to what they think the facts mean. Judges are entitled to rely on those conclusions, which Judge Kirihara did in this case. The defendant's second-guessing of the conclusions made at the time does not mean that the officer lied or misstated evidence recklessly or deliberately. Somebody was found in possession of

drugs and drug paraphernalia at the residence; there was probable cause to issue the search warrant. Based on his training and experience, Officer Horn gave opinions in the affidavit that the defendant does not like. However, that does not make the opinions lies, or deliberate falsehoods, or in reckless disregard for the truth.

CONCLUSION

For the forgoing reasons, this Court should affirm the conviction of the defendant in this case.

Dated: May 22, 2008

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

By 
SHERRILL A. CARVALHO
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, the United States of America, Appellee herein, hereby states that it is not aware of any related cases pending in this Court.

DATED: May 22, 2008

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

By Sherrill A. Carvalho
SHERRILL A. CARVALHO
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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Brief for Appellee is monospaced, has 10.5 or less characters per inch, and contains 8933 words.

DATED: May 22, 2008

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

By 
SHERRILL A. CARVALHO
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on May 22, 2008, she served a copy of the **BRIEF FOR APPELLEE** via first class mail by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Fresno, California.

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