IP 06-0025-CR 1 H/F U.S. v McCotry [2]
Judge David F. Hamilton Signed on 7/13/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
MCCOTRY, JAMES E,	)	CAUSE NO. IP06-0025-CR-01-H/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 06-CR-25-01-H/F
	)	IP 06-CR-25-02-H/F
JAMES E. McCOTRY and	)	
TAMICA V. HOLLINGSWORTH,	)	
	)	
Defendants.	)	

ENTRY ON MOTIONS TO SUPPRESS

This case began as an inquiry into the attendance problems of a third grader. That inquiry has led to a federal criminal indictment against the child's mother and the mother's boyfriend. On December 7, 2005, police in Anderson, Indiana obtained and executed a search warrant on the apartment of defendants James E. McCotry and Tamica V. Hollingsworth. After the search, a grand jury indicted McCotry on two counts of possessing cocaine base with intent to distribute and one count of possessing marijuana with intent to distribute, all under 21 U.S.C. § 841(a)(1). Hollingsworth was indicted on one count of possessing marijuana, in violation of 21 U.S.C. § 844(a), and one count of managing or controlling a place and knowingly or intentionally making the place available for the unlawful storage or use of a controlled substance, in violation of

21 U.S.C. § 856(a)(2). Defendants McCotry and Hollingsworth have moved to suppress the evidence recovered in the search of their apartment.

The court held an evidentiary hearing on April 21, 2006 and received later briefs. Pursuant to Rule 12(d) of the Federal Rules of Criminal Procedure, the court now states its factual findings and its conclusions of law. In summary, the court finds that the search warrant was not supported by probable cause but that the officers who executed it did so in good faith. The court also finds that there was no deliberate or reckless effort to conceal material information from the issuing court. The court therefore denies McCotry's motion to suppress. The court also finds, however, that the police obtained the warrant by violating Hollingsworth's federal constitutional right of family privacy and integrity under the Fourteenth Amendment when they used a school social worker to interrogate her nine year old daughter at a public school for the sole purpose of conducting a criminal investigation of her mother, and not, for example, for the purpose of investigating any concerns of child abuse or neglect. See generally *United States v. Penn*, 647 F.2d 876, 888-89 (9th Cir. 1980) (en banc) (Kennedy, J., dissenting) (arguing that police violated parent-child rights by offering five year old child money to show the police where drugs were hidden at home). Hollingsworth's motion to suppress is therefore granted.

Findings of Fact

The events at issue began in the principal's office of a public elementary school on December 7, 2005. Hollingsworth's daughter "T.H." was summoned to

the office following classroom reprimands for disruptive behavior on December 6th and frequent tardiness. T.H. met in the principal's office with her third grade teacher Nancy Staley, Staley's teaching assistant, and substitute principal Darlene Westerfield. Westerfield spoke with T.H. regarding her behavior and her tardiness. The school officials had hoped that Hollingsworth would attend the meeting, but they had not reached her directly. (Hollingsworth did not answer telephone calls on December 6th and 7th, probably because she was at work, and the letter regarding the meeting, which school officials gave to T.H. on December 6th, probably did not reach her mother.) During the meeting on December 7th, Westerfield told T.H. that she needed to speak with her mother. T.H. told the adults that her mother would not answer the phone if she saw the school was calling.

Principal Westerfield told T.H. that if the school could not reach her mother, the school might need to send Officer Steve Denny to do a home visit to discuss the situation. Officer Denny is an Anderson police officer assigned as the school resource officer. His duties include investigating and addressing truancy. The officer uses a work area at the school across the hall from the principal's office. In response to Westerfield's statement that Officer Denny might visit her home, T.H. said that Officer Denny could not visit her home until her mother and "J" had a chance to "get their stuff out." Westerfield testified that as the conversation in the principal's office progressed, T.H. spoke to the three adults about sometimes being left alone at home, and that "it came out" in the conversation that there

were "things in the house that her mother did not want anybody to see." The preponderance of the evidence shows that T.H. was not more specific in that meeting about what the "stuff" might be.[1]

Principal Westerfield then told Officer Denny about the meeting with T.H. Denny contacted school social worker Julie Hoyt and asked her to talk with T.H. Around the same time, Hollingsworth phoned the school to speak with Denny. Denny testified that he spoke with Hollingsworth regarding T.H.'s tardiness. He attempted to schedule a home visit and asked to speak with Hollingsworth in person. Hollingsworth balked at meeting at her apartment, but she agreed to come to the school to speak with Officer Denny. When Hollingsworth arrived, Denny met with her briefly and discussed his concerns about T.H.'s attendance. He did not mention to Hollingsworth T.H.'s statement about the "stuff" because he considered Hollingsworth to be a possible suspect.

The evidence shows that Officer Denny and Hoyt made a deliberate decision not to inform Hollingsworth of the fact that Hoyt was going to talk with her

[1]Staley testified that T.H. referred to "weed" in that meeting the morning of December 7th. Her testimony conflicts with the specific testimony of Westerfield. Also, Officer Denny testified he was not told of any reference to weed when Westerfield later told him about the meeting. School social worker Julie Hoyt also did not know of any reference to weed before she questioned T.H. later in the afternoon. If T.H. had actually mentioned "weed" during the morning meeting, it is highly likely (a) that Westerfield would have told Officer Denny about it, (b) that Denny would have approached Hollingsworth with more specific suspicions when he met with her in the afternoon, and (c) that Denny would have told Hoyt about it before she questioned T.H. at his request that afternoon.

daughter T.H. They decided that Hoyt should speak with T.H. in a private area where her mother would not know she was being interviewed. Some time after speaking with Officer Denny, Hoyt pulled T.H. out of her class and interviewed her in the school. Hoyt met with T.H. just after Denny met with Hollingsworth.

The evidence was in conflict as to the purpose of Hoyt's questioning of T.H. The weight of the credible evidence shows that Hoyt removed T.H. from class and interviewed her for the sole purpose of pursuing a criminal investigation of Hollingsworth. Hoyt testified that Denny informed her that he had received information that T.H. was sometimes left home alone, and that T.H., when told that Denny and Westerfield might make a visit to her house, said that no one could go to her house because her mother had to "get their stuff out." Hoyt testified that one of her goals in interviewing T.H. was to determine whether T.H. was being subject to improper treatment at home by being left home alone.

The clear weight of the evidence concerning Hoyt's own actions and Denny's testimony conflicts with this claim that Hoyt questioned T.H. for T.H.'s own safety or protection. Officer Denny testified that he was never informed of any concern on the school's part about T.H. being left home alone. He testified that his efforts on that afternoon had nothing to do with making sure that T.H. was not left home alone, but that he asked Hoyt to pursue the information solely for the purpose of the criminal investigation. Denny was suspicious as a result of the statement that items needed to be cleaned or removed from the home. He testified that this

statement was the only information that prompted him to contact Hoyt and to direct her to question T.H. Denny testified that he wanted Hoyt to question T.H. because she was more qualified to speak with a child. Hoyt testified that she did not speak with Westerfield before speaking with T.H., so all the information she had about the situation came from Denny.

Hoyt's actions after the interview are also consistent with the sole purpose having been the criminal investigation. If Hoyt had been concerned that T.H. was sometimes left home alone or might otherwise have been neglected, her suspicions were confirmed by the interview. Hoyt filed no formal report of neglect and did not even document the conversation. Such a report, she testified, was standard procedure for discussions that went "the CPS route" (for "child protective services"). Copies of such reports were, according to Hoyt's testimony, customarily distributed to school and district administration. Although Hoyt reported the interview to Officer Denny, there was no guarantee at the end of the day, when, by Hoyt's account, T.H. came to her crying and scared to go home, that any professed concerns about T.H.'s welfare would be addressed by anyone. Thus, in light of Officer Denny's testimony and Hoyt's failure to follow her standard procedures for investigating and reporting child welfare matters, the court finds that the sole purpose of Hoyt's interview with T.H. was to assist the police in conducting the criminal investigation of her mother, an investigation based only on T.H.'s ambiguous reference to the "stuff" in the meeting with school officials on the morning of December 7th.

During Hoyt's questioning, T.H. told Hoyt that she was sometimes left home alone and was frightened when that happened. Hoyt asked T.H. what the "stuff" was that she had spoken about earlier with Ms. Westerfield. T.H. explained that the "stuff" was "weed." T.H. confirmed that "weed" meant marijuana. She told Hoyt that there was weed in her home "every day," that her mother and "J" went on drug runs, and that when they did so they either left T.H. at home alone or sometimes took her along on these runs. T.H. told Hoyt that she had been left home alone "many" times. T.H. also told Hoyt that people smoked "blunts" in her home, that she had seen marijuana on the kitchen table at home, and that she had also seen marijuana in her mother's bedroom on top of and inside the dresser the previous night. T.H. did not describe the weight or amount of marijuana in her home, did not draw a picture of it, did not describe its smell, and did not otherwise describe the marijuana or its packaging except to say that it was green.

After this first interview with T.H., Ms. Hoyt reported the results to Officer Denny, who then discussed the information with Drug Task Force Detective Cliff Cole. Detective Cole told Denny to try to learn some more specific information. Officer Denny asked Hoyt to talk with T.H. again. He asked her to find out the last name of the man T.H. called "J," the kind of car T.H.'s mother drove, and the last time T.H. had observed the marijuana in her home. Hoyt followed Officer Denny's instructions. She pulled T.H. out of class again and interviewed her in the hallway. She asked T.H. the additional questions that Officer Denny had

instructed her to ask. Hoyt then immediately reported the information that she had gathered to Officer Denny.

Denny relayed the additional information to Detective Cole. Cole told Denny that he was going to contact the prosecutor's office to see about obtaining a hearing for a warrant. Denny left the school at around 3:00 p.m. that day to go to the prosecutor's office. Denny testified that he wanted to obtain a search warrant before T.H. arrived home from school, which let out around 3:15 p.m., because he was both concerned with T.H.'s safety and concerned that she would tell her mother, a suspect, about the conversations. Denny had not run a criminal background check on either Hollingsworth or the man T.H. referred to as "J," who is defendant James McCotry.

A judge of the Madison Superior Court then held an immediate hearing on the application for a search warrant. Denny testified as to what Principal Westerfield and Hoyt had told him T.H. had said. Denny testified before the judge that his information had been gathered from a student at the elementary school. He did not testify as to T.H.'s exact age. Denny did not present any evidence as to any surveillance of the home or controlled buys or other investigative measures. He also did not testify as to whether he or anyone else had received reliable information from T.H. in the past. Denny testified during the hearing in this court on the motions to suppress that he had never received any information from T.H. before December 7, 2005. The only information provided by Denny during the

probable cause hearing before the state court judge was the information Westerfield and Hoyt had reported to him. The transcript indicates that the hearing lasted less than ten minutes. At its conclusion, the judge issued the warrant, noting that he did so at 3:28 p.m.

Detective Cole was already in place to execute the warrant. As he waited outside Hollingsworth's apartment building, Denny called to inform him that the warrant had been issued. Cole then spotted T.H. walking up the stairs to her apartment. As she walked up the stairs, he asked her if she lived in apartment H. She answered that she did. After she went to the apartment and knocked on the door, he instructed her to come back down the stairs, and she followed his direction. The officers executed the search warrant. They found both marijuana and crack cocaine in the apartment.

Defendants McCotry and Hollingsworth claim that Officer Denny and/or other school officials coerced T.H. into speaking with them by threatening her with lunch detention, a home referral, or the loss of recess. Defendants also claim that Officer Denny intimidated T.H. by showing her his gun and bullets, giving her his business card, and repeatedly asking her questions about her mother and drugs.

T.H.'s testimony on these matters was vague, inconsistent, and not credible. T.H. initially testified that she spoke with Officer Denny on the day the search warrant was obtained and executed, December 7, 2005. She later testified

repeatedly that she did not in fact speak with Denny at school that day. She testified that Denny and Hoyt both called her out of class, that "they" asked her how she paid for her clothes, that "they" threatened to give her a home referral or to take away a recess if she did not answer them, that "they" asked her if "J" sold drugs, and that "they" asked her what the marijuana looked or smelled like. She initially testified that she had not met with Denny before that day, but then testified that she had met with "them" before more than once, and that "they" had questioned her about "the dope weed" during those discussions.

T.H. also testified that on at least one occasion, she told Officer Denny and Hoyt that she did not want to speak with them and asked them to call her grandmother, father, or mother. She also testified that she cried during some of the meetings and that in response to her crying "they" told her they were "just trying to save" her. She testified that Officer Denny gave her business cards to give to her family, and that he had shown her the bullets for his gun, but that this did not happen on the day the search warrant was issued and executed. She also testified that she spoke with Hoyt that day, but that it was "just Officer Denny" who had threatened her. T.H. repeatedly and consistently testified that Hoyt did not threaten her. She later repeatedly testified that she had never met with Officer Denny on the day of the search warrant, but testified that Officer Denny had directed Hoyt to pull her out of class, though she did not testify as to how she knew this, and testified that Officer Denny had pulled her out of class to talk before the day of the search warrant. She testified that Officer Denny threatened

her only once, that this did not occur on the day her mother was arrested, and that she could not remember when it happened.

Officer Denny testified that he had spoken with T.H. once about her tardiness sometime between September and November 2005, but that he did not talk to her on December 7, 2005, and never threatened her or gave her or showed her bullets.

Based on the testimony of the witnesses, the court finds that Officer Denny had no conversations with T.H. on any relevant subjects and did not speak with her on December 7, 2005. The court also finds that Hoyt did not threaten T.H. when she questioned T.H. about the "stuff" in her home. T.H.'s testimony regarding threats by Officer Denny is uncorroborated by any evidence that Officer Denny even met with T.H. on December 7, 2005, or any of the several days beforehand. Also, T.H.'s testimony on these conversations was inconsistent and vague in a way that her testimony about other details was not. T.H. testified that Hoyt was the only one with whom she spoke on December 7, 2005, and that Hoyt did not threaten her on that day or any other. Accordingly, the preponderance of the evidence is that T.H. was not threatened, either by Officer Denny or by Hoyt.[2] Nevertheless, the circumstances of Hoyt's interview with T.H. – a school official removing a nine year old girl from a public school class to question her about her

[2]The court does not find that T.H. was deliberately lying. T.H. was unable to separate the roles of different adults who were authority figures, and she could not accurately sort out what happened and when.

mother – had some clear coercive aspects. T.H. could not leave, and she could not reasonably be expected to have refused to answer questions if she did not want to talk about her mother.

Conclusions of Law

The Fourth Amendment provides in relevant part 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 . . . ." The Fourth Amendment protects persons from unreasonable searches or seizures of places or items in which they have a subjective and reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 143 & n.12 (1978), citing *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Sandoval-Vasquez*, 435 F.3d 739, 742-43 (7th Cir. 2006).

Defendants have moved to suppress any and all evidence recovered by the government in the December 7, 2005 search of apartment H at 5825 Apple Creek Way. Defendants argue that the search warrant was not supported by probable cause and that Officer Denny withheld material information from the issuing judge.[3]

[3]Defendants have withdrawn a separate challenge based on a discrepancy between the address in the search warrant and the address in the probable cause hearing transcript. The error was in the transcript, not in the application or the testimony itself.

I. *Probable Cause*

Under the Fourth Amendment, courts have a "strong preference" for searches conducted pursuant to a warrant as distinct from attempts to rely on various exceptions to the warrant requirement. See *Illinois v. Gates*, 462 U.S. 213, 236 (1983). In evaluating probable cause, the judge's task is to make "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. "Warrants are presumed valid." *United States v. Childs*, 447 F.3d 541, 546 (7th Cir. 2006). Accordingly, where a neutral judge has found probable cause to support a search and has issued a search warrant, a reviewing court's task is to determine whether substantial evidence in the record supports the issuing judge's decision. *United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995). The exclusionary rule does not apply to evidence procured in a search pursuant to a warrant later rendered invalid where the officer had a good faith reason to believe the warrant was valid. *United States v. Leon*, 468 U.S. 897 (1984). The court first addresses the issue of probable cause to contribute guidance for future action of those who apply for, issue, and review such warrants, *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002) (finding that warrant was issued without probable cause but that officers acted in good faith), and to provide a full analysis for a reviewing court.

Courts examine the totality of the circumstances before the issuing judge to determine if there existed probable cause for the search. *Id.* Where the evidence derives solely from a tip by an informant, this inquiry requires the court to consider several factors, including: (1) the amount of detail provided by the informant; (2) whether the informant is known or anonymous, and if known, whether the informant has a history of providing reliable information; (3) the extent to which the police have corroborated the informant's statements; (4) whether the informant provided first-hand information regarding his observations; (5) whether the informant's statements were against his penal interest; (6) whether the informant appeared before the issuing judge; and (7) the interval between the date of the events reported by the informant and the application for the warrant. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005); *Koerth*, 312 F.3d at 866-68, 870; see also *Illinois v. Gates*, 462 U.S. at 241-46. No one factor is determinative. A deficiency as to one factor may be mitigated by strength of another factor or an additional indicator of reliability. *United States v. Peck*, 317 F.3d 754, 756 (7th Cir. 2003); *United States v. Brack*, 188 F.3d 748, 756 (7th Cir. 1999).

Applying the factors, the evidence presented by Officer Denny's testimony at the probable cause hearing did not provide sufficient guarantees of the reliability of T.H.'s report to support the finding of probable cause, even under the deferential standard applied by a reviewing court. In support of the finding, T.H. was a known source. She reported having observed the marijuana first-hand, and

she reported having viewed it as recently as the day before she spoke with Hoyt. The strength of these factors, however, is not sufficient to counterbalance the lack of support with respect to several other factors relevant to the reliability of T.H.'s report of seeing marijuana in her home.

First, the judge heard only double hearsay in support of the application. Only Officer Denny testified during the probable cause hearing; neither T.H. nor Hoyt appeared before the issuing judge. Although probable cause can be based on hearsay reports, first-hand information carries greater weight. *United States v. Pless*, 982 F.2d 1118, 1125 (7th Cir. 1992); see also *Illinois v. Gates*, 462 U.S. at 241-42 ("an affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented"), quoting *Jones v. United States*, 362 U.S. 257, 269 (1960), overruled on other grounds, *United States v. Salvucci*, 448 U.S. 83 (1980); *United States v. Church*, 970 F.2d 401, 404 (7th Cir. 1992) (probable cause existed to search a safe in defendant's home where officer's affidavit stated that a reliable confidential informant reported that an unknown associate told him the safe contained contraband or proceeds of crime; affidavit detailed informant's reliability, and informant provided corroborating evidence of previous crack sales by the defendant and guns in other parts of the home); *United States v. Montegio*, 274 F. Supp. 2d 190, 198 (D.R.I. 2003) ("Even double-hearsay statements need not be discarded if they are sufficiently corroborated through other sources of information.").

Although T.H.'s reports were first-hand, Officer Denny never spoke with T.H. regarding the marijuana in her home. He could testify only as to what Hoyt reported T.H. had reported to her. Hoyt took no notes during or after the discussion to document the information T.H. provided. Although such "totem-pole hearsay" may, under the totality of the circumstances, be accompanied by sufficient guarantees of reliability to support probable cause, Denny's testimony was entitled to less weight than testimony from T.H. or even Hoyt might have been.

Even overlooking the third-hand nature of Denny's information, however, there was minimal or no evidence that T.H., the only source of information, was a reliable source as to whether there was marijuana located in her home. She had no history of supplying reliable information to any officers. She did not specify even a vague quantity of the "weed" she had observed at her house. She was apparently not asked to describe the marijuana she reported in any significant detail beyond its green color, an important omission considering that she was nine years old at the time. The police did not present to the issuing judge any evidence corroborating T.H.'s reports: no surveillance, no controlled buys, and no background check of Hollingsworth, for example.

The lack of evidence showing the source was reliable, corroborating her reports, or otherwise indicating reliability leads the court to find the search warrant was not supported by probable cause. See *Mykytiuk*, 402 F.3d at 775-76

(uncorroborated information from known informant that defendant manufactured methamphetamine, that the informant and defendant had stolen materials for such manufacture, and that defendant kept such materials in two five-gallon buckets in vehicles on his property held insufficient to establish probable cause); *Peck*, 317 F.3d at 756-57 (reversing district court finding of probable cause despite the fact that the informant appeared before the judge and signed an affidavit stating that she had observed drugs in the defendant's home within the last two days; informant did not provide an amount, state where the drugs were located in the house, provide any details about the defendant even though she claimed to be his girlfriend, provide the frequency with which defendant sold drugs, or explain how she knew the substance was an illicit drug, and police did not corroborate information); *Koerth*, 312 F.3d at 867-68 (statement that named but previously unknown informant reported having bought narcotics from defendant and had recently personally observed over one hundred pounds of marijuana in defendant's home failed to establish probable cause where there was no corroboration or other evidence of reliability); cf. *United States v. Reddrick*, 90 F.3d 1276, 1280-81 (7th Cir. 1996) (officer's testimony that confidential informant reported observing drugs first hand would have been insufficient on its own to establish probable cause; informant did not appear before issuing judge or provide a sworn affidavit and provided little detail, but corroboration from controlled buys was sufficient to support warrant).

II. *Good Faith and the Franks Challenge*

Even where a warrant is not actually supported by probable cause, the exclusionary rule may not be applied where the executing officers' reliance on the warrant was objectively reasonable, meaning that the officers executed the warrant in good faith reliance on the issuing judge's determination. *United States v. Leon*, 468 U.S. 897, 922 (1984). "An officer's decision to obtain a search warrant is prima facie evidence that she was acting in good faith." *Mykytiuk*, 402 F.3d at 777. This presumption of good faith may be rebutted where the defendant demonstrates that the issuing judge "wholly abandoned his judicial role" or was misled by an affiant, where the warrant is based on an affidavit "so lacking in indicia of probable cause" that no officer could reasonably believe probable cause existed, or where the warrant is so deficient on its face, such as lacking information as to the place to be searched, that no reasonable officer could believe it was valid. *Leon*, 468 U.S. at 922-23, quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975); *Mykytiuk*, 402 F.3d at 777; *Peck*, 317 F.3d at 757.

As a corollary to the good faith requirement, it is well established that the police, to obtain a valid search warrant, must tell the court what they believe is the truth. That requirement is implicit in the Fourth Amendment requirement that a warrant be issued only after probable cause is established by a showing of specific facts. *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978). If a defendant demonstrates by a preponderance of the evidence that a false statement was intentionally or recklessly included in the affidavit, and if, stripping the affidavit

of the false information, the affidavit is insufficient to establish probable cause, the warrant must be invalidated and the exclusionary rule applied to the fruits of the search. *Id.*, at 155-56. The "rule of *Franks v. Delaware* . . . also prohibits an officer from deliberately or recklessly omitting material information" from a warrant application. *United States v. Pace*, 898 F.2d 1218, 1232 (7th Cir. 1990). Where intentionally or recklessly omitted information is material, meaning that if it were included in the application the affidavit would not support a finding of probable cause, the proper remedy is also suppression of the evidence secured by the wrongly procured warrant. *Id.* at 1232-33, citing *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984); see also *United States v. McNeese*, 901 F.2d 585, 594 (7th Cir. 1990), *overruled on other grounds*, *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001). To prove wrongdoing under *Franks*, a defendant must show that the police omitted material information intentionally or with reckless disregard for the truth; negligent omission will not suffice. *Williams*, 737 F.2d at 602.

The presumption of good faith has not been rebutted in this case, and defendants have not shown that the police deliberately or recklessly withheld any material information from the issuing court.

First, as noted above, the officers presented some evidence at the hearing relevant to factors that weigh in favor of a probable cause finding, including that T.H.'s information was based on her own observations, that she was known to

Officer Denny, and that she reported having viewed the marijuana very recently at two specific locations in the apartment. In light of this evidence and the judge's approval of the warrant, the "good faith exception" applies and the evidence may not be excluded. See *Mykytiuk*, 402 F.3d at 777; *Peck*, 317 F.3d at 757-58 (evidence supporting some relevant factors, plus informant's appearance before the issuing judge, warranted application of the good faith exception); cf. *Owens v. United States*, 387 F.3d 607, 609 (7th Cir. 2004) (supporting affidavit from detective that informant had purchased "a quantity" of crack cocaine three months earlier at the defendant's home did not establish probable cause and was so lacking in the indicia of probable cause that the officers could not in good faith have believed it sufficient).

In their challenge under *Franks*, defendants argue that Officer Denny deliberately or recklessly omitted two pieces of material information during his testimony before the state court: (1) T.H.'s precise age and (2) evidence that T.H. did not give her information willingly, but was coerced and threatened by both Officer Denny and school officials. The defendants have not met their burden of establishing a *Franks* violation on either argument.

First, defendants have not shown that evidence of T.H.'s exact age was a material fact omitted from the evidence provided at the probable cause hearing. Officer Denny testified at the probable cause hearing that the key information came from an elementary school student, who was also referred to during the

hearing as a "child" and a "little girl." Probable Cause Tr. at 4-6. As defendants have argued, elementary school students as a group range in age and maturity. The officer gave the judge sufficient information to tell him that the informant was a child. If the judge had wanted to inquire further, he had an opportunity to do so. The omission of T.H.'s exact age, in light of the other evidence from which the judge could infer her approximate age, was not a material omission.

Second, defendants have not shown that T.H. was threatened into speaking with Hoyt or Officer Denny about the "weed" she had seen in her home. The most credible testimony from the witnesses shows that Officer Denny did not speak to or meet with T.H. on December 7, 2005 and that Hoyt never, on that day or any other, threatened T.H. T.H.'s testimony with respect to earlier threats by Officer Denny during other meetings is not credible, particularly in light of some of the inconsistencies in her testimony as to such events, and in light of her inability to identify any time frame for such events. In light of this evidence, and testimony from Officer Denny and Hoyt that neither one threatened T.H., the court finds that defendants have not shown by a preponderance of the evidence that Officer Denny committed a *Franks* violation by omitting material information from his testimony during the probable cause hearing.

III. *Intrusion on Parent-Child Relationship: Substantive Due Process*

The court's findings of fact do not fit completely with either side's views of the case. All of the evidence pertaining to marijuana upon which the warrant was

issued came from an interview of Hollingsworth's daughter by school social worker Hoyt. The interview took place during instructional time at the elementary school after Hoyt pulled T.H. from class at the request of Officer Denny. The evidence was gathered for the sole purpose of pursuing a criminal investigation of Hollingsworth, and not for any child protective purpose, such as investigating child abuse or neglect.

In light of the court's factual findings, the question presented here is whether the police may interrogate a young elementary school child at a public school (using a school personnel member as the interrogator) for the sole purpose of a criminal investigation of the child's parent and not for any purpose relating to child protection, such as in cases of suspected abuse or neglect. Under the court's findings, this issue is not identical to those argued by the parties, but it is closely related to them. Defendants have made it clear that they believe the school authorities acted improperly in questioning T.H. as part of a criminal investigation, so that the results of the questioning should not have been available to pursue a search of the apartment.

Questions like this do not arise often. Relevant case law is scarce. American police appear not to have made a habit of investigating a parent's suspected crimes by interrogating young children, especially by using the child's required presence at school to do so, and by using the friendly and familiar school personnel to carry out the interrogation.

A full discussion of the Fourteenth Amendment's substantive due process protection of family privacy and family relationships is well beyond the scope of this decision. This court's reasoning is built in large part on the foundations of the dissenting opinions in *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (en banc), and in particular on the dissenting opinion of then Circuit Judge (now Justice) Kennedy, which relied on cases that recognize a fundamental liberty and privacy interest in family relationships. Some general principles are worth noting.

First, the Supreme Court has long recognized that the liberty interest in familial relations (also referred to as family integrity) is worthy of substantial constitutional protection and is one of the oldest and deepest privacy interests in our Nation. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (rights relating to the parent-child relationship are "the oldest of the fundamental liberty interests recognized"); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (distinguishing the interests of natural families from those of foster families;"the

liberty interest in family privacy has its source . . . in intrinsic human rights, as they have been understood in this Nation's history and tradition") (internal quotations omitted); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir. 2000) (right of parents to bear and raise children is the most fundamental of all rights of all civilization).

The "touchstone of due process . . . is 'protection of the individual against arbitrary action of government.'" *Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 965 (7th Cir. 1998), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998); *Remer v. Burlington Area School District*, 286 F.3d 1007, 1013 (7th Cir. 2002). The Supreme Court has explained that while substantive due process protection limits both legislative and executive action, "criteria to identify what is fatally arbitrary" differ depending on the type of action at issue. *Lewis*, 523 U.S. at 846; *Dunn*, 158 F.3d at 965. With respect to executive action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846, citing *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992); *Dunn*, 158 F.3d at 965; *Remer*, 286 F.3d at 1013. The Court has treated the "benchmark" of such an abuse as "that which shocks the conscience." *Lewis*, 523 U.S. at 846, citing *Rochin v. California*, 342 U.S. 165, 172-73 (1952). Conduct that "shocks the conscience," must go beyond merely "offend[ing] some fastidious squeamishness or private sentimentalism about combating crime too energetically." *Rochin*, 342 U.S. at 172. *Lewis* explained that behavior likely to support a substantive due process

claim under this standard would be that which is "intended to injure in some way unjustifiable by any governmental interest." 523 U.S. at 849; accord, *Remer*, 286 F.3d at 1013.

With these general principles in mind, the court turns to the more directly applicable but sparse case law dealing with police efforts to enlist the help of young children in criminal investigations of their parents.[4]

In *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (en banc), Seattle police had investigated defendant Clara Penn for two years on suspicion that she was distributing heroin from her residence. They also suspected that she had included her children in the packaging and delivery stages of this business. The officers obtained a search warrant for the home and its yard. They found Penn's children and a quantity of cocaine, but no heroin. After the children taunted the officers, indicating that they were aware of the drug-related activities, one officer offered Penn's five year old son five dollars to show him where the heroin was

[4]The court does not attempt to address here the propriety of any action by school officials or other officials for the purpose of investigating any form of suspected child abuse or neglect. Such cases pose their own complex issues, and the balance of governmental and private interests in them differs substantially from this case. See generally *Doe v. Heck*, 327 F.3d 492, 517-26 (7th Cir. 2003) (state has a compelling interest in protecting children from abuse or neglect; caseworkers violated family constitutional rights but were entitled to qualified immunity); *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000) (constitutional right to familial integrity is not absolute but is limited by compelling state interest in protection of children; reversing dismissal of family integrity substantive due process claims based on state's forcible removal of child from family).

hidden. The boy led the officers to a buried jar in the yard containing heroin. The state courts suppressed the evidence. Penn was then prosecuted in federal court for possessing heroin with intent to distribute. She moved to suppress the evidence procured from her son's disclosure. She argued that the use of her child to procure evidence against her violated her due process rights under the Fifth Amendment and her Fourth Amendment rights. 647 F.2d at 878-79.

The district court had found that the officers' use of the young boy to find the drugs at his mother's home "shocked the conscience." The Ninth Circuit considered the case en banc with nine judges participating in the final decision, which was a 5-4 vote to reverse. The majority examined the totality of the circumstances and identified several factors specific to the case that warranted reversal. *Id.* at 880, citing *Betts v. Brady*, 316 U.S. 455, 462 (1942), overruled on other grounds, *Gideon v. Wainright*, 372 U.S. 335 (1963). The Ninth Circuit majority emphasized that the officers had probable cause to believe Penn dealt heroin (which the court noted was an extremely serious crime), had reason to believe she included her children in the business, and had a search warrant broad enough to cover the entire property, including the yard where the jar had been buried. The court also noted that the policeman had a legal right to be alone with the boy, did not deceive or trick him, and offered him a "bribe" only after he indicated that he knew where the heroin was, and that the conduct violated no law. Finally, the majority emphasized that the act was only an isolated incident,

and that the police department did not typically seek to pay young children to inform against their parents. *Id.* at 881.

Under these circumstances, the majority explained, the payment offer did not shock the judicial conscience so as to violate substantive due process standards. The court took care to emphasize, however, that similar actions might reach that level under other circumstances. *Id.* at 880 ("Under the facts of this case, the tactic did not violate the Fifth Amendment; under the facts of another, it might.").

Four judges dissented. Joined by three other judges, Judge Goodwin argued that the payment offered to the boy rendered the search unreasonable under the Fourth Amendment because of its intrusion on the family relationship:

> By offering money to the defendant's five-year-old son, the police intruded in this case on a family relationship that is highly valued. Confidence between parents and their children enhances preservation of the family unit, an interest which the law should promote when it has the opportunity. At least, the law should not unnecessarily make parents and children apprehensive about exchanging information. Nor should the law encourage children to turn against their parents.

647 F.2d at 887 (Goodwin, J., dissenting). Judge Goodwin also cautioned that the family privacy could not be absolute, as where the family was used as a shield for criminal work. *Id.*

Justice Kennedy, while then a member of the Ninth Circuit, wrote a separate dissenting opinion joined by two other judges. He also focused directly on the issue of family privacy and the family's liberty interest:

> The existence of the parent-child union and the fundamental place it has in our culture require no citation, but it is perhaps appropriate to note that courts have protected it where the threat of disruption is in some respects more attenuated than in the circumstances of the case before us. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
>
> * * *
>
> I know for a certainty that none of my brothers sitting in this case would neglect for an instant their duty to protect essential liberties; I regret only that we the dissenters have been unable to convince them that the case before us presents a question of this gravity. The assault on the parent and child bond is relentless and deliberate in many countries of the world, see Amnesty International, Children (1979), and to some observers the manipulation of the child and the injury to the relationship that occurred in this case may seem innocuous by comparison. I view the police practice here as both pernicious in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of the state's hostility to it. That is why the judgment is entered over my emphatic dissent.

647 F.2d at 888-89 (Kennedy, J., dissenting).[5]

The Seventh Circuit addressed a similar issue in *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985), in which FBI agents had briefly questioned a suspect's fifteen year old daughter. The agents were investigating a series of jewel

[5]Several other members of the Ninth Circuit wrote separately to dissent from the later denial of further en banc review by the full court. Those opinions lend further support to the privacy and family liberty ground for suppressing the evidence. See 647 F.2d at 889-91 (opinions by Fletcher, J., Pregerson, J., and Ferguson, J.).

thefts but had been unable to locate their prime suspect. They watched his last known address and saw the girl leave on her bicycle. They followed her for several blocks and eventually honked their horn to signal her to stop. They identified themselves and asked if they could ask her questions. She reluctantly said that the man they were looking for was her father, and she gave them a telephone number he had given her to use in case of emergency. The FBI agents used this information to trace her father to his girlfriend's home. They used the information to conduct additional surveillance and investigation that led to a search warrant and ultimately to criminal convictions for the father and his girlfriend. *Id.* at 895-96.

On appeal, the father argued that the agents' questioning of his daughter violated his own constitutional rights and the parent-child evidentiary privilege recognized in *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983). The Seventh Circuit rejected his arguments and upheld his conviction. The court recognized that there exists a private realm of family life that the state cannot enter and that is protected by the substantive due process dimension of the Fourteenth Amendment. *Davies*, 768 F.2d at 898. Because of the general caution in recognizing or expanding evidentiary privileges, however, the court declined to recognize a parent-child privilege and disagreed with *Agosto* on this point. The court went on to discuss *United States v. Penn* and concluded that even if a privilege might exist, it would not apply to the sidewalk encounter with the defendant's daughter, as distinct from courtroom testimony. See *id.* at 900. By

way of comparison, the court noted also that even where the marital evidentiary privilege might bar one spouse from testifying against the other in court, the police are not prohibited from "enlisting one spouse to give information concerning the other or to aid in the other's apprehension." *Id.*, quoting *Trammel v. United States*, 445 U.S. 40, 52 n.12 (1980).

The police-sponsored interrogation of T.H. in this case intruded much further into the private sphere of the family, and on the basis of far less evidence or reason for suspicion, than occurred in either *Penn* or *Davies*. The police here decided to investigate the suspicious but ambiguous reference to "stuff" only by using T.H.'s state-mandated presence in a public school to question her, and they did so by using the familiar face of the school social worker to carry out the interrogation. The social worker's questioning of T.H., acting as an agent of the police, must be viewed as a custodial interrogation of the young child. T.H. could not have felt free to leave, even if she had been in a position to make a truly voluntary decision about whether to answer questions about her mother. See *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (finding that fourth grade student was seized within meaning of Fourth Amendment when child welfare officials had him removed from class in private school and took him to secluded part of school to question him). Nor could T.H. have felt free not to answer the social worker's questions, given her young age, the setting, and the social worker's authority as a school official.

By comparison, in *Penn* the police had already obtained a search warrant after a thorough investigation, and they had legal authority to search the entire home and to dig up the entire yard. The information obtained from the young boy in exchange for the promised five dollars saved the police time and effort but did not enable them to obtain information not otherwise available to them. The young boy in *Penn* also knew he was dealing with police officers. By using social worker Hoyt to do the questioning in this case, the police kept T.H. from having any idea she was being interrogated as part of a criminal investigation. The police here even took pains to make sure Hollingsworth, who came to the school to meet with Officer Denny about tardiness issues, would not see T.H. and would not learn of Hoyt's interrogation of her.

The police practices in this case also invaded private family relationships substantially more than the events the Seventh Circuit considered in *Davies*. The FBI agents in *Davies* briefly stopped a fifteen year old girl on a public sidewalk. She was considerably older and more mature than T.H. in this case, and she was not in custody. The agents identified themselves, unlike the interrogation-by-proxy that occurred in this case. The only information the daughter provided in *Davies* was her father's telephone number. That information was valuable, perhaps even proving critical to the investigation, but its disclosure would not be an obvious intrusion on family life and relationships. *Davies* does not provide a green light for police to undertake the type of interrogation of a child that occurred in this case.

The use of school personnel for the sole purpose of eliciting incriminating information from T.H. is particularly troubling. Indiana's laws on compulsory education require a child of T.H.'s age to attend school. See Ind. Code § 20-33-2-1 *et seq.*; see also *Doe v. Heck*, 327 F.3d at 509 (holding that police interview of fourth grade student in private room in private school constituted search and seizure within meaning of Fourth Amendment). Once there, T.H. was removed from class twice on December 7, 2005 at Hoyt's (and Officer Denny's) direction.

The Supreme Court has repeatedly recognized the important functions of the public schools in our society and our system of government. The operation of public schools, central to our democratic system, "ranks at the very apex of the function of a State." They teach children cultural values, prepare them for the professional world, prepare them to participate in our political system, and equip them with the tools they will need to be economically productive. *Wisconsin v. Yoder*, 406 U.S. 205, 213, 215 (1972); see also *Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Nowhere among these recognized aims of compulsory public education is a state interest in using children's presence at school to gather evidence about suspected crimes by their parents.

The courts and the public have historically relied upon schools to help build foundations of good citizenship. These efforts have not previously gone so far as to include efforts by police and school officials to gather incriminating information

against students' parents, at least where such information is not sought for child protection purposes, such as when school officials have concerns about child abuse or neglect. The use of the school and its personnel in this case for a criminal investigation departs from, and even tends to undermine parents' confidence in, those most admirable aims and functions of the public schools. After all, the state persuades families to entrust their children to the public schools so that they may be educated and prepared for life as citizens who contribute to our society. We teach our children to respect school personnel and to tell them the truth. We do not expect the police to seize on that trust and respect for the purpose of investigating their parents.

It might be argued that this is such a rare case that the police tactics here pose no serious threat to family privacy and integrity. The Ninth Circuit majority in *Penn* similarly rejected the dissent's arguments that the ruling might have adverse effects on future police practice:

> It is urged to us that we should not limit our vision to the facts of this case, for a reversal of the suppression order here would lead to systematic government programs to "persuade" young children to inform against their parents, as in the societies created by George Orwell and Adolf Hitler. If we agreed with this logic, we would of course affirm the district court. We have no reason to believe, however, that this kind of information-gathering method is or will become anything remotely approaching standard procedure in any law enforcement community in the United States.

647 F.2d at 882. Perhaps the circumstances in *Penn*, where the information was elicited from the child by officers who had probable cause and a warrant for the search, and where the children blatantly showed that they were familiar with the

criminal enterprise, were unique enough to guard against widespread use of such tactics.

The same cannot be said in this case, where the information was elicited by a school social worker at the direction of the police after only an ambiguous indication of possible wrongdoing. Even so, a practice as disturbing as this one need not be widespread or standardized before courts say it should not be allowed to take root. One foundation of the rule of law is that similar cases should be decided similarly. The courts' first encounter with a practice may set a precedent that will be followed by others seeking guidance on what the law permits and requires. As Justice Kennedy wrote in *Penn*: "I view the police practice here as both pernicious in itself and dangerous as precedent. Indifference to personal liberty is but the precursor to the state's hostility to it." *Id.* at 889 (Kennedy, J., dissenting).[6]

[6]Other courts that have addressed interrogation of children regarding their parents' criminal activities yield mixed results and are of little help in this case. In *United States v. Levasseur*, 699 F. Supp. 995 (D. Mass. 1988), *aff'd*, *United States v. Curzi*, 867 F.2d 36 (1st Cir. 1989), the court found that police interrogation of children held after their parents were arrested did not "shock the conscience" in a constitutional sense. The court in *Grendell v. Gillway*, 974 F. Supp. 46 (D. Me. 1997), found that a child's § 1983 claim based on her substantive due process rights under the Fourteenth Amendment should survive summary judgment where she claimed that officers coerced and threatened her into incriminating her parents during a police interview with the social worker at the child's school. Neither case presented facts sufficiently analogous to this case to provide helpful guidance.

The court also cannot ignore that this police tactic poses a substantial risk of psychological harm to the child. See *Penn*, 647 F.2d at 887-88 (Goodwin, J., dissenting). That risk was obvious during T.H.'s testimony at the hearing on defendants' motion to suppress. An excerpt from the government's cross-examination of T.H. provides but one example:

> Q. And does whether or not your mommy goes to jail today, does that depend on what you say today?
>
> A. No. I don't know.
>
> Q. What happens if you say the wrong thing today? What happens to your mommy?
>
> A. She go to jail.
>
> Q. What happens if you say the right thing?
>
> A. She don't go to jail.

This harm may be due in significant part, of course, to the actions of a child's parent, especially if the child is used in a criminal enterprise. *Penn*, 647 F.2d at 882 (majority opinion). The added trauma, however, of criminally implicating a parent by speaking to trusted adults surely should not be risked without either serious child protection concerns or significantly more reason to believe a crime had occurred. As Officer Denny acknowledged during his testimony, the only evidence leading him to ask Hoyt to question T.H. was the ambiguous statement that her mother had to "get their stuff out" before anyone visited her home.

Perhaps it should go without saying, but this area of constitutional law is one in which bright lines are rare and the competing interests are powerful. Application of the totality of the circumstances test also renders this determination particularly fact-sensitive. That much is evident from the sharp division within the Ninth Circuit in *United States v. Penn*, where the majority acknowledged the gravity of the issue, 647 F.2d at 882, and the dissenters acknowledged that more exigent circumstances might have persuaded them to tolerate the police's offer of money to the child, *id.* at 886 (Goodwin, J., dissenting). The Seventh Circuit has repeatedly acknowledged this need for balancing interests in child protection cases, such as *Doe v. Heck*, 327 F.3d at 520 (right to familial relations not absolute; holding that child protection caseworkers' actions to investigate corporal punishment at private school violated constitutional right of family integrity but that caseworkers were entitled to qualified immunity), and *Brokaw v. Mercer County*, 235 F.3d at 1019.

This district court's role in our judicial system is not to offer a comprehensive treatise defining the metes and bounds precisely for a broad range of future cases. This court's role is instead to find the facts objectively and to apply more general principles of law to this case. Here the combination of factors persuades the court that the police stepped over the line protecting the family from government intrusion: T.H.'s young age, the lack of prior indications of criminal activity by her mother, the ambiguous quality of the statement triggering the investigation, the use of T.H.'s presence in a public school (under compulsion

of law) to investigate her mother, the use of a school social worker to carry out what amounted to custodial interrogation for purposes of criminal investigation, and (in the absence of any child protective purpose, such as investigation of child abuse or neglect) the officials' efforts to conceal this interrogation.

The *Penn* majority rejected the dissent's arguments that the action shocked the conscience because of the sanctity of the family, by taking "into account what manner of family unit it was." 647 F.2d at 881-82. Yet "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986), quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This court declines to head down the path of conditioning the right to family integrity, particularly outside the child protection context, on the court's appraisal of the quality or integrity of the particular family in question.

For all these reasons, the court finds that the police questioning of T.H. by school personnel without her mother's knowledge, while she was removed from class during school hours, all for the sole purpose of incriminating her mother, amounts to the kind of governmental abuse of power that "shocks the conscience." The interest at stake is here is a foundation of American liberty long protected by constitutional safeguards: the privacy and sanctity of family relations.

"Under the fruit of the poisonous tree doctrine, a defendant is entitled to the suppression of derivative evidence obtained" as a result of "a constitutional violation." *United States v. Segal*, 313 F. Supp. 2d 774, 780 (N.D. Ill. 2004), citing *Wong Sun v. United States*, 371 U.S. 471(1963). Accordingly, the court finds that the evidence procured during the December 7, 2005 search must be suppressed as to defendant Hollingsworth because the evidence was obtained in a manner that violated her substantive due process rights under the Fourteenth Amendment.

This discussion of family privacy and integrity applies only to defendant Hollingsworth as T.H.'s mother. Defendant McCotry cannot claim any constitutional injury arising from the police use of school officials to carry out the custodial interrogation of T.H. to investigate her mother. "Generally, individuals not personally the victims of illegal government activity cannot assert the constitutional rights of others." *United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984), citing *Cunningham v. DeRobertis*, 719 F.2d 892, 895-96 (7th Cir. 1983); see, *e.g.*, *United States v. Hurt*, 92 F.3d 1188, **2 (Table) (7th Cir. 1996) (unpublished opinion).[7] Also, an accused may not vicariously assert a Fourth Amendment violation. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *United*

[7]The Seventh Circuit has recognized that an accused may challenge admission of evidence of a third party confession obtained in violation of the third party's Fifth Amendment rights, but may do so only where the confession was obtained by means of "extreme coercion or torture," none of which has been shown in this case. *Chiavola*, 744 F.2d at 1273 (ultimate issue is whether the government's methods resulted in a fundamentally unfair trial), citing *Cunningham*, 719 F.2d at 896.

States v. Price, 54 F.3d 342, 345 (7th Cir. 1995). Because McCotry has no legally recognized relationship to T.H., blood or otherwise, he was not entitled to the same interest in family privacy or integrity and therefore cannot assert the same privacy interest and cannot vicariously assert either Hollingsworth's or T.H.'s constitutional protections. Compare *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (local ordinance restricting the number of unrelated adults living in a single family residence, but not restricting cohabitation of those related by blood, adoption, or marriage, did not implicate a fundamental right such as a privacy interest), with *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977) (distinguishing *Belle Terre* and explaining that local housing ordinance defining "family" as only a subset of even blood relations implicated fundamental interest in "matters of marriage and family life").

Conclusion

The search warrant was issued in this case without probable cause, but the police were entitled to act in good faith reliance on the warrant. Defendants have not shown that the police intentionally or recklessly concealed material information from the issuing court. Accordingly, defendant McCotry's motion to suppress evidence obtained from the search of the apartment he shared with Hollingsworth is denied. However, because the police obtained the search warrant by using public school officials to carry out a custodial interrogation of Hollingsworth's nine year old daughter with no child protection purpose such as the investigation of abuse or neglect, the police violated the substantive due

process rights of both Hollingsworth and her daughter. Hollingsworth's motion to suppress evidence obtained from the search is hereby granted.

So ordered.

Date: July 13, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
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