UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	*Criminal No. 01-54-P-H*
	)	
STEVEN GUAY,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant, charged with possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2), Indictment (Docket No. 1), moves to suppress the contents of a computer hard drive seized on or about January 21, 2001 from his home, Defendant Steven Guay's Motion to Suppress, etc. ("Motion") (Docket No. 6) at 1. The defendant and the government agreed that the court could consider the parties' written submissions concerning the validity of the search warrant that led to the seizure of this evidence on the papers and hold an evidentiary hearing only with respect to the government's contention that the exception provided by *United States v. Leon*, 468 U.S. 897, 920 (1984), is applicable in this case. That hearing was held before me on December 10, 2001. I recommend that the following findings of fact be adopted and that the motion be denied.

I. Proposed Findings of Fact

A. From the Search Warrant and Supporting Affidavit

1. Geraldine Guay, the defendant's wife, at all relevant times operated a day care facility known as Little People Day Care in Dresden, Maine. The defendant assisted her at times in this business. Affidavit and Request for Search Warrant (dated January 19, 2001 and signed by Rand D. Maker) ("Affidavit"), attached to Motion as Exhibit A, at [2], [4].

2. On August 12, 1999 the mother of an eight-year-old girl reported to the Lincoln County Sheriff's Department that her daughter had told her father that the defendant had kissed her on the lips while she was attending Little People Day Care. This event took place after the girl had attended the facility for only two days. Affidavit at 2.

3. The girl told an investigator that the defendant had kissed her on the lips "like two grownups do" and later told her not to tell anyone about the kiss. She reported that the defendant also told her that all she needed to do was to tell him when she wanted another kiss. She told her brother about the kiss at the time. *Id*.

4. The girl's brother confirmed to the investigator that she had reported the kiss shortly after it occurred and that his sister was "very scared." *Id*.

5. The investigator questioned the defendant about this incident the day after he spoke with the girl. The defendant denied kissing the girl but eventually stated that he remembered kissing her on the neck. Still later in the interview the defendant admitted that it was possible that he had kissed the girl on the lips. *Id*. at [2]-[3].

6. On December 12, 2000 the same investigator interviewed a five-year-old girl who had told her parents that the defendant had rubbed her "private area" many times. The child said that she no longer went to Little People Day Care because the defendant had done something bad in the kitchen area after all of the other children had been picked up. She said that the defendant told her not to tell anyone. She was unwilling to be more specific with the male investigator but told a female Department of Human Services caseworker after the investigator left the room that the defendant had touched her "peepee" and "moved it around." She said that she had also touched the defendant's penis. She also told the caseworker that the defendant touched this area of her body with his mouth. *Id*. at [3]-[4].

7. This child's mother told the investigator that the child had asked her if the police could see her through the computer. The defendant had told the child that he could always see her. The mother also told the investigator that she had spoken with Geraldine Guay after her daughter had reported this contact with the defendant and told Geraldine Guay that her daughter would not be returning to the day care. She also reported that the defendant called her later that day, denying any improper contact and saying that he was sorry. He also stated that he and his wife had decided to close the day care business at the end of the year. *Id*. at [4]-[5].

8. Another parent reported to the investigator that the defendant referred to this child as "a knock out." *Id*. at [5].

9. On December 28, 2000 the investigator spoke with a four-year-old girl who had told her thirteen-year-old stepbrother that she had touched the defendant's penis. The girl denied sexual contact, then stated that the defendant had told her to touch his "privates" while she was sitting on his lap and placed her hand on his "privates." She said that this contact took place while the other children at the day care were sleeping and also said that two others girls were in the room at the time. *Id*.

10. The four-year-old child's father asked the investigator if he planned to look at the defendant's computer. He told the investigator that the defendant had told him two or three years previously that he had viewed child pornography on his home computer. On January 2, 2001 the father told the investigator that he had installed a computer at the defendant's home in the fall of 1998 and that within six months after that installation the defendant had told him that he had viewed either child pornography or "kiddie porn" on the computer because he was curious about what these people do to kids. At least two times after that the defendant referred to child pornography in a negative way when comparing it to something else in conversation with the father. The father stated that the

defendant's computer was still connected to the Internet because he had received e-mail from the defendant as recently as November 2000. *Id*.

11. On January 5, 2001 the investigator spoke with Detective Sergeant Murphy of the Lincoln County Sheriff's Department. Murphy has attended training in computer crimes and in protecting children online, during which he learned that pedophiles and collectors typically retain their material and related information for many years; often meet to share information and material, including child pornography; rarely destroy correspondence from other pedophiles and collectors; and often share their sexual interest in children and/or child pornography with others whose names and addresses they record. *Id*. at [6].

12. The investigator also reviewed this case with Chief Clark of the Boothbay Harbor Police Department. Clark's training and experience in the field of child sexual abuse investigation includes the following:

a. assisting in the investigation of two rapes of minors in 1984 and 1985

b. assisting in the investigations of sexual abuse of minors in 1982, 1992, and 1993

c. assisting in the investigation of a case of sexual abuse of minors and pornography in 1982

d. criminal investigation and child sexual abuse training in 1981 at the Maine Criminal Justice Academy

e. rape investigation course in 1983 at the Maine Criminal Justice Academy

f. missing child seminar in 1984

g. course in child abuse and exploitation investigative techniques in 1988 at Federal Law Enforcement Training Center

h. specialized training in interpersonal violence at FBI National Academy in 1990

i. certified York County District Attorney's Office child sexual abuse investigator — 1989

Id. at [6]-[7].

13. After reviewing this case, Clark advised the investigator of his conclusions, as follows:

a. It may not be possible to determine whether the defendant is a situational child molester or a preferential child molester (or pedophile). *Id*. at [7].

b. Both categories of offenders might possess child pornography. *Id*.

c. Situational child molesters doe not have a true sexual preference for children but will engage in sexual contact with children for various reasons, including substitution, availability, experimentation or tendencies toward moral or sexual indiscrimination. Child molesters who fit this category of offender may collect pornography and in some cases child pornography. *Id*.

d. Preferential child molesters have a definite preference for children as sexual partners or objects. Such offenders tend to prefer children of a certain age range or apparent age. Certain types of pedophiles may also exhibit a preference for one gender over the other. These offenders tend to exhibit long-term and persistent patterns of sexual behavior; generally have well-developed techniques for victimizing children; have sexual fantasies that focus on children; and tend to have multiple victims. Child molesters in this category almost always have child pornography or child erotica in their possession. Such offenders are likely to maintain such collections for long periods of time and use such collections for sexual gratification, to recall sexual contacts with victims, for trading with other pedophiles or to lower child victims' inhibitions. *Id*.

14. The mother of the five-year-old who was interviewed by the investigator, at the investigator's request, questioned her daughter and was told that the daughter used the defendant's computer to play games but never viewed anything that made her uncomfortable. The mother of the four-year-old who was interviewed by the investigator questioned her daughter at the investigator's

request and was told that her daughter denied using or even observing the defendant's computer. *Id.* at [8].

15. The search warrant authorized, in relevant part, the seizure of "any and all computers, including all related computer hardware, software, documentation, passwords and data security devices, magnetic or optical media and peripheral computer equipment." Search Warrant (attached to Motion) at 1.

B. From the Hearing

16. Rand Maker, the only witness at the suppression hearing, is a detective sergeant in the Lincoln County Sheriff's Department. He held that position at all times relevant to the pending motion. He was the investigator referred to in previous findings of fact and submitted the request for the search warrant at issue in this proceeding and the affidavit in support of that request.

17. Maker decided to seek the search warrant at issue after interviewing the four-year-old child and her father. He discussed the case with Detective Sergeant Murphy, who had more experience with child abuse and computer crime, and then with Chief Clark, at the suggestion of the state task force on computer crime. He also spoke throughout the investigation and at this time with Todd Lowell, the assistant district attorney based in Wiscasset.

18. Maker prepared three drafts of the affidavit he was to submit in support of his application for the search warrant. He showed these drafts to Lowell and Murphy, and "most likely" to Clark as well. He presented the completed affidavit and the request for a search warrant to a Maine Superior Court justice who happened to be sitting in the Maine District Court in Wiscasset. He chose to present the request to a judge rather than a justice of the peace because of the serious nature of the crime involved and the likelihood that any search warrant that might be issued would be subject to further judicial review.

19. The Superior Court justice asked Maker to find out if the other two children mentioned in the affidavit had used the defendant's computer and, if so, if they had seen anything upsetting on the computer. Maker so inquired of the children's parents and amended his affidavit to include the results of these inquiries. This addition appears as item 8 on page [8] of the affidavit.

20. After crossing out a portion of the search warrant that Maker had submitted, the Superior Court justice granted the search warrant on January 19, 2001.

21. Maker had no evidence of the presence of pornographic images on the defendant's computer other than the statement of the four-year-old child's father.

22. Maker included in his affidavit the statement of the four-year-old child's father that the defendant told him that his computer had been "redone" since the time at which he made his remark about child pornography in order to be fair to the defendant.

II. Discussion

The defendant contends that the investigator's affidavit submitted in support of the application for the search warrant at issue in this case was insufficient to establish probable cause because it is overly broad, lacks particularity, is based on stale information and fails to establish a nexus between the computer seized and the alleged criminal activity. Motion at 2-7. He seeks suppression of the contents of the hard drive from the computer seized at his home pursuant to the search warrant. *Id*. at 1. The government opposes each of these arguments and contends in the alternative that the officers executing the search warrant believed in good faith that it was valid, making suppression unavailable under *Leon*. Government's Objection to Motion to Suppress ("Objection") (Docket No. 7) at 6-12.

A. Sufficiency of the Affidavit

In general, "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, "a reviewing court

should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id*. But "the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause" is a mixed question of law and fact subject to *de novo* review. *United States v. Khounsavanh*, 113 F.3d 279, 282 (1st Cir. 1997). The reviewing court must assess "the information provided in the four corners of the affidavit supporting the warrant application." *United States v. Vigeant*, 176 F.3d 565, 569 (1st Cir. 1999). The information provided must "warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id*. (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

> Probable cause exists when the affidavit upon which a warrant is founded demonstrates in some trustworthy fashion the likelihood that an offense has been committed. Mere suspicion, rumor, or strong reason to suspect wrongdoing are not sufficient.

Id. (citations and internal punctuation omitted).

> A warrant application must demonstrate probable cause to believe that (1) a crime has been committed — the "commission" element, and (2) enumerated evidence of the offense will be found at the place to be searched — the so-called "nexus" element. With regard to the "nexus" element, the task of a magistrate in determining whether probable cause exists is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place.

United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999) (citations and internal punctuation omitted).

1. Breadth and Particularity.

The defendant contends that the second paragraph of the section of the search warrant entitled "Description of property or person(s) to be seized," quoted in part in proposed finding 15 above, is

overly broad because it "does not explain why this particular information is sought or how it goes to the abuse allegation under investigation." Motion at 3. He also argues that the statement in the search warrant under the heading "Reason for Seizures" is overly broad because it is a generic statement that does not discuss the criminal offense or the nature of the contraband at issue. *Id*. at 3-4. The defendant does not expand on these brief statements or cite any authority in support of his arguments.

With respect to his second challenge, the defendant contends that the description in the search warrant of the property to be seized lacks sufficient particularity because there is nothing to guide the officers in seizing only those items for which probable cause existed. *Id*. at 4. He argues that there is no evidence to support a search for child pornography stored on a computer and that the affidavit "fails to specify with any detail the basis for believing that *any* images which might be contained within the computer sought were in fact pornographic." *Id*. at 4, 5 (emphasis in original).

The search warrant is remarkable for its failure to identify the crime of which evidence is to be sought. The government states, without citation to authority, that it is not necessary for an affiant seeking a search warrant to explain why he seeks certain items. Objection at 6. That statement itself appears unduly broad and, if accurate, could, carried to a logical extreme, eviscerate the requirement that an affidavit submitted in support of an application for a search warrant provide more than mere conclusory statements. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). In any event, contrary to the government's suggestion that the evidence sought by the warrant need only be related to an ongoing investigation, Objection at 7, the law requires that the evidence sought be evidence of criminal activity, *see Feliz*, 182 F.3d at 86 (warrant application must demonstrate probable cause to believe a crime has been committed), and without some guidance about the nature of that activity, the court officer asked to issue the warrant will not be able to determine whether there is probable cause for that action. In this case, the underlying affidavit does not establish a link between the defendant's

alleged sexual abuse of the three identified children and the possible existence of child pornography in his computer, as will be discussed in greater detail below. However, it does provide sufficient information to allow the drawing of a reasonable inference that the police sought evidence of the crime of possession of child pornography, and that inference is enough for purposes of evaluation of the search warrant's breadth and particularity.

Both of the defendant's arguments appear to be included within the scope of the concept of particularity.

> The cases on "particularity" are actually concerned with at least two rather different problems: one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take, and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized.

United States v. Upham, 168 F.3d 532, 535 (1st Cir. 1999) (citations and internal punctuation omitted). Here, the cited section of the search warrant provides sufficient information to guide the searching agents; the description of items to be seized is "easily administered based on objective criteria." *Id*. It is not unduly imprecise. With respect to the alleged overbreadth of the search warrant, the nature of the contraband is sufficiently set forth and, in the absence of some explanation from the defendant about the way in which he contends the description of the computer, its contents and related items could have been more narrowly drawn, it is not possible to conclude that the description given is unduly broad. *See generally United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980) (discussing description of items to be searched found to be overly broad).

2. Staleness.

The defendant next argues that, because "[t]he entire basis for including a search for pornography of any kind" is the reported statement of the father of one of the alleged victims that the defendant told him that he had viewed child pornography on his home computer two or three years

ago, the information supporting the search warrant was unduly stale. Motion at 5-6. The government responds that this information was not stale but rather "showed that [the defendant] had a long-standing sexual interest in children." Objection at 7. Such an interest, of course, is not the crime with which the defendant is charged nor does it necessarily mean that the defendant would have child pornography stored in his computer on January 19, 2001, when the search warrant was issued. The government correctly points out that the affidavit can reasonably be construed to show that the defendant made the reported remark within six months of the fall of 1998, or as little as slightly less than two years before the warrant was issued. *Id*. at 8. However, that length of time may be enough to make the information stale.

The government relies on the opinions of Murphy and Clark "that people who possess pornography tend to keep their materials for long periods" and that "many people who molest children keep child pornography . . . for long periods of time." Objection at 8. The first problem with this argument is that there is no evidence in the investigator's affidavit that the defendant ever possessed child pornography. At most, the affidavit shows that the defendant on one occasion viewed child pornography on his home computer. The next problem is the tenuous nature of the link between the defendant's alleged behavior with children set forth in the affidavit and the opinions of Murphy and Clark as set forth therein. Murphy's opinion is reported to be that "pedophiles and collectors typically retain their material and related information for many years," Affidavit and Request for Search Warrant ("Affidavit") (Exh. A to Motion) at [6], but there is nothing in the affidavit to suggest that the defendant had any material to retain. Clark's opinion is reported to be that it is not possible to tell whether the defendant is a situational child molester, who "may" or "might" collect child pornography, or a preferential child molester, who "almost always have child pornography or child erotica in their possession." *Id*. at [7].

Here, it should be noted, all of the alleged incidents of molestation took place well after the one reported viewing of child pornography on the defendant's home computer. The affidavit reports that the children denied viewing anything other than games on the computer, if they had used it at all, and that the defendant subsequently "made reference to child pornography in a negative way when comparing it to something else" on two occasions when speaking to the same parent who reported the initial remark. Affidavit at [5], [8].

> It is well established that the temporal proximity or remoteness of the events observed has a bearing on the validity of a warrant. But no hard and fast rule can be formulated as to what constitutes excessive remoteness, because each case must be judged in its circumstantial context. Factors like the nature of the criminal activity under investigation and the nature of what is being sought have a bearing on where the line between stale and fresh information should be drawn in a particular case.

United States v. Dauphinee, 538 F.2d 1, 5 (1st Cir. 1976) (citations omitted). Generally, "[a]n affidavit must be based on facts so closely related to the time of the warrant as to justify a finding of probable cause at that time." *United States v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997). While the mere lapse of time is not controlling, it is a factor to be evaluated in the light of the particular facts of the case.

Here, even if the defendant's reported remark about child pornography had referred to his possession of it, rather than the mere viewing of it, that evidence is clearly stale unless the reported statements of Murphy and Clark provide a reasonable basis for an inference that such material would still be in the defendant's possession almost two years later. The government relies on *United States v. Bateman*, 805 F. Supp. 1041 (D. N.H. 1992), in which the affidavit submitted in support of the application for a search warrant included the mailing of child pornography by the defendant to an informant repeatedly over a period of two-and-one-half years, with the search warrant being issued

ten months after the last contact between the defendant and the informant, *id*. at 1042-44. The court noted that

> [t]he affidavit is replete with details about the expertise and knowledge of the agents subscribing the same in the field of law enforcement as it relates to child pornography and their well-founded suspicions regarding Bateman. The affidavit outlines the modus operandi of adults, often referred to as pedophiles, who sexually and emotionally prefer minors, and the methods they use to create and retain child pornography material. It is evident that the prohibited materials are vulnerable and capable of being hidden, relocated or destroyed. The affidavit also contains detailed explanations about the informant's knowledge of Mr. Bateman's activities in child pornography….
>
> The fact that the history of the videotapes goes back fifteen years or the fact that almost seven months elapsed between the informant's last contact with Bateman . . . and the date the investigation was opened by New Hampshire police authorities . . . has, in our estimation, no serious consequence on the validity of the search warrant. The fact that the New Hampshire police authorities took three months to investigate the case and thereafter had a search warrant issued and executed does not affect the validity of the search made here.
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> * * *
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> We cannot accept that the information to support probable cause was stale. Time factors must be seen in the context of a specific case and, here, the nature of the principle under investigation (a suspected pedophile), the unique nature of the object of the warrant (child pornography), the unique nature of the creation, storage, keeping, alteration, potential of destruction of the child pornography material, and the recognized interest which the states and the federal government have in drying up the distribution network for child pornography and controlling production itself, are legitimate factors which militate against finding staleness.

Id. at 1044.

In this case, the affidavit offers nothing to show a "well-founded" suspicion that the defendant possessed child pornography stored in his computer. There is nothing to show that the defendant was a collector or distributor of child pornography. While the opinions of Murphy and Clark are entitled to consideration and weight, *see United States v. Zayas-Diaz*, 95 F.3d 105, 111 (1st Cir. 1996), at most they establish that the defendant "may" or "might" collect child pornography, with no suggestion

of the relative degree of this likelihood. The same could presumably be said of any adult individual. In addition, the reported opinion of Murphy is based on the assumption that a defendant has been shown to possess child pornography at some time, a fact missing here. This information is insufficient to show a likelihood that the defendant had child pornography stored in his computer in January 2001, based on his statement that he had viewed child pornography on his computer in late 1998 or early 1999.

The information offered to support the application was impermissibly stale and the motion to suppress should therefore be granted, unless the *Leon* exception applies.

3. Nexus.

The defendant also contends that the affidavit fails to offer evidence to support the required nexus, that is, a showing that the evidence sought is likely to be found on the premises at issue. Motion at 6-7. The government responds that the defendant's remark about viewing child pornography, the evidence of his sexual assaults on the minor victims "over a prolonged period" and the opinions of Murphy and Clark provide the required nexus. Objection at 10.

> The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide evidence of a crime.

Feliz, 182 F.3d at 88 (citation and internal punctuation omitted). The failure of the affidavit in this case to specify the crime at issue makes this analysis more difficult but does not in itself render the warrant invalid. It is possible to infer, from the affidavit's description of the property to be seized and its report of the opinions of Murphy and Clark, that the applicant seeks evidence of the crime of possession of child pornography.

However, the reasonable inferences available to the applicant end there. An officer's opinion based upon his knowledge of the behavior and practices of child molesters, by itself, does not furnish the requisite nexus between the criminal activity and the place to be searched. *United States v. Rosario*, 918 F. Supp. 524, 530-31 (D. R.I. 1996). Here, any inference that the defendant had child pornography in his computer could only arise from the reported opinions of Murphy and Clark. "To permit a search warrant based solely upon the self-avowed expertise of a law-enforcement agent without any other factual nexus to the subject property, would be an open invitation to vague warrants authorizing virtually automatic searches of any property used by a criminal suspect." *Id*. at 531. The affidavit in this case does not even state that the day care business at which the alleged sexual contact occurred is operated at the same premises where the defendant's computer is located, but that is a reasonable inference from the facts set forth. However, the only evidence suggesting a connection between that activity and the possible presence of child pornography in the defendant's computer is Clark's opinion that most preferential child molesters keep child pornography, but he cannot say whether the defendant is a preferential child molester or rather a situational child molester, who "may" keep child pornography. This evidence does not differ in quality from that found insufficient in *Rosario*. *See United States v. Schultz,* 14 F.3d 1093, 1097 (6th Cir. 1994).

The investigator's affidavit fails to establish the necessary nexus described in *Feliz* and for that reason as well the motion to suppress should be granted, unless the *Leon* exception applies.

B. Good Faith Exception

The government asserts that, even if the search warrant was not valid, the officers acted in objective good faith in executing the warrant, so that the motion to suppress should nonetheless be denied pursuant to *Leon*. Objection at 10-12.

> In most cases [where an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope], there

> is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary course, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.

Leon, 468 U.S. at 920-21 (citation and internal punctuation omitted).

> Although weakening the exclusionary rule, the Court [in *Leon*] did not defenestrate it. The Justices acknowledged that suppression would continue to be appropriate in situations where, notwithstanding the issuance of a warrant, the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Thus, to cite two instances, suppression would be proper where the warrant is so facially deficient — *i.e.*, in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid, or the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

United States v. Ricciardelli, 998 F.2d 8, 15 (1st Cir. 1993) (citation and internal punctuation omitted).

> To summarize, the exclusionary rule is alive and well to the extent that a warrant's defectiveness results from either (1) non-technical errors of a kind that a reasonably prudent officer would (or should) have recognized, or (2) law enforcement officers' acts or omissions of a kind that a reasonably prudent officer would have avoided.
>
> After *Leon*, how does a court tell whether a defect in a warrant is fatal? In determining whether a reasonable officer should have known that a search was illegal despite a magistrate's authorization, a court must evaluate all the attendant circumstances, keeping in mind that *Leon* requires not merely good faith, but objective good faith.

Id. (citations omitted). The government concedes that it bears the burden of proof on this issue. Objection at 11.

The warrant in this case did not fail to sufficiently particularize the place or thing to be searched. Nor was it so lacking in indicia of probable cause that a reasonable police officer would

have been entirely unreasonable in believing the warrant to be valid. Maker took the warrant application to a state-court judge twice, in the interim obtaining additional information requested by the judge. There is no evidence that Maker acted or failed to act in a way that a reasonably prudent officer would have avoided. Indeed, Maker commendably provided the reviewing judge with information that was not helpful to his request for the warrant. Under these circumstances, any police officer would be justified in relying on the judge's determination that probable cause for the search existed. The lack of evidence discussed above is not so obvious that a reasonable officer could not have relied in good faith on the judge's approval of the search warrant.

Counsel for the defendant appeared to argue at the close of the suppression hearing that the fact that probable cause was lacking in Maker's affidavit by itself rendered his reliance on the reviewing judge's determination to the contrary lacking in good faith. Such a formulation renders *Leon* meaningless. The fact that the search warrant was not based on probable cause merely initiates the *Leon* inquiry; it is clearly not a determinative factor. Counsel for the defendant also argued that Maker lacked good faith in executing the warrant because his affidavit did not address the elements of the federal crime with which he is now charged. In the First Circuit, it has long been the case in search warrant jurisprudence that the fruits of a valid state-court search warrant, which does not mention the possibility of a violation of federal law, may be used in a federal prosecution. *E.g.*, *United States v. Krawiec*, 627 F.2d 577, 579, 581 (1st Cir. 1980). This principle would be eviscerated if the officer executing the state warrant were required to demonstrate that the elements of the federal crime involved nonetheless were included in the warrant application in order to show objective good faith under *Leon*.

Under the totality of the circumstances, Maker had, as would any reasonable police officer in his position, a good-faith belief in the validity of the search warrant that he executed. Nothing further is required.

III. Conclusion

For the foregoing reasons, I recommend that the motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 11th day of December, 2001.

_____

David M. Cohen
United States Magistrate Judge

STEVEN GUAY (1)
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