PROGRAM

8:00 a.m. to 8:30 a.m.	**Registration**
8:30 a.m. to 9:00 a.m.	**Odds and Ends** *Nick Drees* Federal Public Defender
9:00 a.m. to 10:00 a.m	**Suppression Issues** *Alfred E. Willett* CJA Panel Attorney
10:00 a.m. to 10:15 a.m.	**Break**
10:15 a.m. to 11:45 a.m.	**Trial and Post-Appeal Practices and Procedures** *Thomas O'Flaherty* CJA Panel Attorney
11:45 a.m. to 1:00 p.m.	**Lunch (On your own)**
1:00 p.m. to 2:00 p.m.	**Supreme Court & Eighth Circuit Update** *John Messina* Research & Writing Attorney Federal Public Defender's Office Des Moines, IA
2:00 p.m. to 3:00 p.m.	**A View From the Bench** *The Honorable John A. Jarvey* District Court Judge for the Southern District of Iowa
3:00 p.m. to 3:15 p.m.	**Break**
3:15 p.m. to 4:15 p.m.	**Surviving an Ethics Complaint** *N. Tre Critelli* Attorney

N. TRE CRITELLI

EDUCATION: J.D., Drake University Law School (1995); B.A., Loras College (1988)

PROFESSIONAL: Currently Vice-Chair of the Iowa Supreme Court Attorney Disciplinary Board and frequent speaker on Legal Ethics.

NICK DREES

EDUCATION: J.D., University of Chicago Law School (1989); B.A., Harvard College (1985)

PROFESSIONAL: Federal Public Defender, Northern and Southern Districts of Iowa (1999-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-1999); Assistant Public Defender, Polk County Public Defender's Office (1991-1994); Law Clerk for the Honorable Donald E. O'Brien, U.S. District Court for Northern Iowa (1989-1991).

JUDGE JOHN A. JARVEY

EDUCATION: J.D., Drake University Law School (1981); B.A., U of Akron (1978)

PROFESSIONAL: District Court Judge for the Southern District of Iowa

JOHN MESSINA

EDUCATION: J.D., Drake University Law School (1979); B.A., Drake University (1975)

PROFESSIONAL: Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984).

THOMAS O'FLAHERTY

EDUCATION: J.D., Drake University (1982); M.A., UConn (1978); B.S., Drake University (1976)

PROFESSIONAL: Recently retired from active practice of law but practiced criminal trial and appellate law in state and fedeal courts in Iowa for 25 years.

ALFRED E. WILLETT

EDUCATION: J.D., University of Nebraska College of Law (1983); B.A., University of Nebraska-Lincoln (1980)

PROFESSIONAL: Terpstra, Epping & Willett (August, 2000-present); Irvine and Robbins (March 1992-August 2000); Hines, Pence, Day & Powers (July, 1989-February, 1992); Assistant City Attorney for the City of Marion, Iowa (July, 1989-February, 1992); Iowa Electric Light & Power Co. (October, 1987-June, 1989); White and Johnson, P.C. (March, 1984-September 1987).

ODDS & ENDS

PRESENTED BY

NICK DREES
FEDERAL PUBLIC DEFENDER

Amendments to U.S. Sentencing Guidelines - 2008

(Reader-friendly version of amendments' text available at ussc.gov)

Amendments Effective May 1, 2008

I. Crack Cocaine (Amendment #715)
   A. Amends retroactive amendment #706 to eliminate anomalies in figuring offense levels on crack cases in multi-drug cases. Under new amendment, courts will figure offense levels in usual way with marijuana equivalents for each drug and then give 2-level reduction from total.
   B. Amended procedure does not apply if:
      1. Offense involved 4.5 kg or more cocaine base;
      2. Offense involved less than 250 mg cocaine base; or
      3. Combined offense level of non-crack drugs involved in the case is higher than level for cocaine base alone.

II. Retroactivity - Amendment 715 applies retroactively.

Amendments Effective November 1, 2008 (unless Congress acts to contrary)

I. Introduction to Chapter One of the Guidelines Manual - Had been relegated to editorial notes in 2003 but now returns to its former location with additional discussion of Supreme Court cases and other developments.

II. Court Security Improvement Act of 2007
   A. Amendment addresses new offense prohibiting filing of false liens against property of government officers or employees because of the person's performance of official duties. Statutory maximum of 10 years. New offense covered by §2A6.1 (Threatening or Harassing Communications; Hoaxes). Applies two-level increase if offense involved more than two false liens or encumbrances. Adjustment for official victim (§3A2.1) also applies.
   B. Amendment addresses new offense that prohibits public disclosure of restricted personal information about federal officers, employees, their families, or others in order to threaten or commit crime of violence. Statutory maximum of five years. References offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Applies 8-level increase to §2H3.1's base for committing this offense, or applies 10-level increase instead if a computer was used to disseminate the personal information.

III. Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007

A. Repromulgates as permanent a temporary emergency amendment to §2B1.1, which adds 2-level increase if offense involved fraud in connection with benefits paid for major disaster or emergency. Minimum offense level of 12. Allows downward departure if defendant was victim of disaster and illegal benefits were an overpayment or overextension of benefits legitimately received.

IV. Honest Leadership and Open Government Act of 2007

A. Amendment addresses new offense that prohibits members or employees of Congress from influencing, on basis of political affiliation, a private entity's employment decisions or practices. References offense to §2C1.1 (Offering, Giving, Soliciting or Receiving a Bribe . . .)

V. Animal Fighting Prohibition Enforcement Act of 2007

A. Amendment implements amendments to Animal Welfare Act to increase penalties from one-year statutory maximum to three-year maximum. Also implements new offense making it illegal to sell, buy, or transport in interstate commerce any knife, gaff, or sharp instrument attached or designed to be attached to a bird's leg for use in an animal fighting venture. New offense also has three-year statutory maximum.

B. Creates new alternative base offense level 10 at §2E3.1 (Gambling Offenses) if offense involves an "animal fighting venture": any event which involves a fight between at least two animals conducted for purposes of sport, wagering, or entertainment.

VI. Immigration

A. Amendment "addresses certain discrete issues that have arisen in the application of §2L1.2 (Unlawfully Entering or Remaining in the United States)"

1. Clarifies scope of "forcible sex offense" as used in definition of crime of violence to include crimes where consent to the conduct is not given or is not legally valid.
2. Clarifies that an "offer to sell" a controlled substance is a "drug trafficking offense."
3. Provides departure provision for some cases in which categorical enhancements do not reflect seriousness of prior offense. For example,
   a. Possible upward departure where prior drug conviction does not qualify for enhancement but amount of drug possessed exceeds personal use quantity, or
   b. Possible downward departure where subsection (b)(1)(A) applies (16-level increase) but prior conviction does not meet definition of aggravated felony.

VII. Miscellaneous Food and Drug Offenses

A. Amendment changes §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product):

1. Adds 4-level enhancement for repeat violations of Federal Food, Drug, and Cosmetic Act.
2. Expands upward departure provision to include offenses that create substantial risk of bodily injury or death, such as re-importation into U.S. of any previously exported prescription drug (except by the manufacturer), the sale or purchase of any prescription drug sample or coupon, and wholesale distribution of prescription drugs without necessary license.

✎CJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 1/06)

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED		VOUCHER NUMBER
3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
7. IN CASE/MATTER OF *(Case Name)*	8. PAYMENT CATEGORY ☐ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	9. TYPE PERSON REPRESENTED ☐ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	10. REPRESENTATION TYPE *(See Instructions)*

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*

REQUEST AND AUTHORIZATION FOR EXPERT SERVICES

12. ATTORNEY'S STATEMENT

As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request:

☐ Authorization to obtain the service. Estimated Compensation and Expenses: $ _____ OR

☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. *(Note: Prior authorization should be obtained for services in excess of $500, excluding expenses)*

Signature of Attorney _____ Date _____

☐ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

ATTORNEY'S NAME (*First Name, M.I., Last Name, including any suffix*), AND MAILING ADDRESS

Telephone Number: _____

13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES *(See Instructions)*

14. TYPE OF SERVICE PROVIDER

01	☐ Investigator	15	☐ Other Medical
02	☐ Interpreter/Translator	16	☐ Voice/Audio Analyst
03	☐ Psychologist	17	☐ Hair/Fiber Expert
04	☐ Psychiatrist	18	☐ Computer (Hardware/ Software/Systems)
05	☐ Polygraph		
06	☐ Documents Examiner	19	☐ Paralegal Services
07	☐ Fingerprint Analyst	20	☐ Legal Analyst/Consultant
08	☐ Accountant	21	☐ Jury Consultant
09	☐ CALR (Westlaw/Lexis, etc.)	22	☐ Mitigation Specialist
10	☐ Chemist/Toxicologist	23	☐ Duplication Services *(See Instructions)*
11	☐ Ballistics		
13	☐ Weapons/Firearms/Explosive Expert	24	☐ Other *(Specify)*
14	☐ Pathologist/Medical Examiner		

15. COURT ORDER

Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted.

Signature of Presiding Judge or By Order of the Court

Date of Order _____ Nunc Pro Tunc Date _____

Repayment or partial repayment ordered from the person represented for this service at time of authorization.

☐ YES ☐ NO

CLAIM FOR SERVICES AND EXPENSES / FOR COURT USE ONLY

16. SERVICES AND EXPENSES *(Attach itemization of services with dates)*	AMOUNT CLAIMED	MATH/TECHNICAL ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. Compensation			
b. Travel Expenses *(lodging, parking, meals, mileage, etc.)*			
c. Other Expenses			
GRAND TOTALS (CLAIMED AND ADJUSTED):	$0.00	$0.00	

17. PAYEE'S NAME AND MAILING ADDRESS

TIN: _____

Telephone Number: _____

CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM _____ TO _____

CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee _____ Date _____

18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case.

Signature of Attorney _____ Date _____

APPROVED FOR PAYMENT — COURT USE ONLY

19. TOTAL COMPENSATION	20. TRAVEL EXPENSES	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED/CERTIFIED
			$0.00

23 ☐ Either the cost *(excluding expenses)* of these services does not exceed $500, or prior authorization was obtained.

☐ Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost *(excluding expenses)* exceeds $500.

Signature of Presiding Judge _____ Date _____ Judge Code _____

24. TOTAL COMPENSATION	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMOUNT APPROVED
			$0.00

28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3)

Signature of Chief Judge, Court of Appeals (or Delegate) _____ Date _____ Judge Code _____

INSTRUCTIONS FOR CJA FORM 21

1. INSTRUCTIONS FOR CJA 21
AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES

Read these instructions carefully before completing the form. Accuracy and thoroughness will aid in the prompt payment of the claim. Use a typewriter if possible to complete the form; otherwise, write legibly with a ball point pen (preferably black or dark blue ink). If the form is system generated, Items 1 through 10 and 14 will be preprinted on the form. Attach an itemized statement of the services provided and expenses incurred. Give the date and the number of hours claimed for each service provided. Provide the dates for, and a description of expenses incurred. For additional guidance, see the *Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines),* Volume VII, *Guide to Judiciary Policies and Procedures,* which is available for reference in the Clerk's Office.

All payments made pursuant to this claim are subject to post-audit. any overpayments are subject to collection, including deduction of amounts due from future vouchers.

Refer to 18 U.S.C. § 3006A(e)(1) and the *CJA Guidelines* on making *Ex Parte* applications for services other than counsel.

NOTE: Prior authorization from the presiding judicial officer should be obtained for all investigative, expert, or other services where the cost (excluding reimbursement for reasonable expenses) will exceed $500. Failure to obtain prior authorization will result in the disallowance of any amount claimed for compensation in excess of $500, unless the presiding judicial officer, finds that, in the interest of justice, timely procurement of necessary services could not await prior authorization.

Compensation may not exceed $1,600, excluding reasonable expenses, unless the excess amount is certified by the presiding judicial officer as necessary to provide fair compensation for services of an unusual character or duration, and the amount exceeding the statutory limit is approved by the chief judge of the court of appeals (or active appeals court judge to whom the chief judge has delegated excess compensation authority).

If prior authorization is obtained for investigative, expert or other services and later it is determined that the cost of the service will exceed the initial estimate by a significant amount, you should seek, from the presiding judicial officer, further prior authorization for the additional amount.

Item 1. **CIR./DIST./DIV. CODE**: This four-character location code is the circuit or district and divisional office codes of the court where the proceedings for the person represented are held.

Item 2. **PERSON REPRESENTED**: Give the full name of the person whom you were

appointed to represent.

Items 3-6. **DOCKET NUMBERS**: Provide the case number or miscellaneous number assigned by the court. Enter the number using the last two digits of the calendar year (YY), the sequential number assigned by the court (NNNNNN), and the defendant number (DDD), as shown on the indictment or charging document. Thus, the format of the docket number is YY-NNNNNN-DDD. **Note:** If two or more cases are heard or tried together for the person represented, complete a separate voucher for each case in which services are provided (i.e., docket number listed). Prorate the total time among the cases. On the supporting documentation, cross reference all related claims for which costs are prorated.

Item 7. **IN CASE/MATTER OF (CASE NAME):** In criminal cases, enter *U.S. vs. Defendant's Name*. If it is a multiple defendant case, give the case cite as provided on the indictment or information (e.g., *U. S. vs. Lead Defendant's Name, et al*). If the person represented is not a defendant (e.g., material witness), enter the first named defendant in the court's recording of the case. If this is a civil case (e.g., habeas corpus), enter the *Name of the Petitioner vs. the Name of the Respondent* and include the respondent's title. If other than a criminal or civil case (i.e., miscellaneous matters), enter *"In the matter of"* followed by the *"Name of the Person Represented."*

Item 8. **PAYMENT CATEGORY:** Check the appropriate box that identifies the offense class for the representation in which the expert or other services are requested. If "Other" payment category is checked, specify the category within the scope of the CJA.

Item 9. **TYPE PERSON REPRESENTED**: Check the box that defines the legal status of the person represented.

Item 10. **REPRESENTATION TYPE:** From the list below, select the code that describes the type of representation:

CC A defendant charged in a criminal case with an offense(s) that is a felony, misdemeanor, or petty offense under the U.S. Code, or an assimilated crime under a state code.
NT A new trial either directed from the court of appeals on remand or as a result of a mistrial
MA Motion attacking a sentence (28 U.S.C. § 2255)
MC Motion to correct or reduce sentence (Fed. R. Crim. P. 35)
HC Habeas Corpus, non-capital (28 U.S.C. § 2254)

BP Bail Presentment
WI Material Witness (in custody)
WW Witnesses (Grand Jury, a Court, the Congress, a Federal Agency, etc.)
PR Probation Revocation
PA Parole Revocation
SR Supervised Release Hearing
EW Extraordinary Writs (Prohibition, Mandamus)
CH Mental Competency Hearings (See Chapter 313 of Title 18 U.S.Code)
PT Pretrial Diversion
EX Extradition Cases (Foreign)
OT Other types (e.g., line ups, consultations, prisoner transfer, etc.)
TD Appeal of a trial disposition
CA Other Types of Appeals
AP Appeal From a Magistrate Case to District Court

FOR DEATH PENALTY CASES, USE THE CJA FORM 31 AND THE APPLICABLE TYPE OF REPRESENTATION CODE.

Item 11. **OFFENSE(S) CHARGED:** Cite the U. S. Code, title and section, or other code citation of the offense or offenses (list up to five) with which the person represented is charged. If other than a federal code is cited, state the maximum period of confinement authorized for the offense. If a civil matter, such as a habeas corpus representation or a motion attacking sentence, cite 28 U.S.C. § 2254 or 28 U.S.C. § 2255, respectively. For direct appeals from a trial disposition, cite the major offense (U.S. Code, title and section) at case disposition.

Item 12. **ATTORNEY'S STATEMENT, NAME AND MAILING ADDRESS:** Check the appropriate box to indicate whether the request is for authorization to obtain services, or approval of services already provided. (Note that prior authorization is required for compensation of all services in excess of $500.) Indicate the estimated cost of the services requested. Note the basis for compensation (e.g., hourly rates, daily rates, fixed fee, etc.). This statement must be signed and dated by counsel for the person represented (or by the person proceeding *pro se*). Check the appropriate box to designate attorney status as a panel attorney, retained attorney, attorney for a legal organization (bar association, legal aid agency, or community defender organization not receiving a periodic sustaining grant under the CJA), or as a person who qualifies for representation under the CJA but has chosen to proceed *pro se*.

Give the complete legal name of the attorney appointed to represent the

person whose name is shown in Item 2. Provide the mailing address and telephone number of the attorney.

Item 13. **DESCRIPTION OF AND JUSTIFICATION FOR SERVICES:** Briefly, describe the nature of the services requested and the reason services are necessary to provide adequate representation.

Procedures for Requesting Psychiatric and Psychological Services.

If this is a request for an examination by a psychiatrist or psychologist, state specifically the purpose of the examination. If the examination is ordered pursuant to a statute, cite the statute (U.S. Code, title and section).

The payment procedures for psychiatric and psychological examinations are outlined below. For further information, refer to paragraph 3.11 of the *CJA Guidelines.*

1. If this is a court-ordered examination to determine, exclusively, the mental condition as set forth in 18 U.S.C. §§ 4241-4246, DO NOT USE THIS FORM, regardless of who requested the examination. Examinations conducted pursuant to these statutes are considered "non-defense" purpose examinations. The costs are paid by the Department of Justice, and claims for these examinations should be submitted to the U.S. Attorney.

2. If this is an examination exclusively for a "defense" purpose (where the person represented selects the expert and controls disclosure of the report), USE THIS FORM. The court order executed in Item 15 is sufficient for this purpose.

3. If this is a dual purpose examination for a "non-defense" and a "defense" purpose, USE THIS FORM. For the convenience of the expert, the Administrative Office will pay the expert the total amount approved and obtain reimbursement from the Department of Justice for one-half of the total amount approved. In order for the Administrative Office to obtain this reimbursement, a separate court order authorizing the examination must be attached to the voucher when it is submitted for payment. This order should indicate (1) who requested the examination, (2) the specific purpose(s) of the examination, (3) to whom the report of the examination is directed, and (4) to whom copies of the report are to be given. This separate order is in addition to the court order at Item 15, which also must be

signed and dated by the presiding judicial officer.

4. If this is a dual purpose examination for two "non-defense" purposes (e.g., evaluation of competency to stand trial under 18 U.S.C. § 4241 and evaluation of sanity at the time of the offense under 18 U.S.C. § 4242), DO NOT USE THIS FORM. Submit the entire claim to the U. S. Attorney for payment. **Item 14. TYPE OF SERVICE PROVIDER:** Check the box which identifies the type of service provider requested. If you check the box "Other," be sure to specify the type of service or service provider. If computer assisted legal research (CALR) is checked, refer to paragraph 3.15 of the *CJA Guidelines* for an explanation of the criteria and procedures for approval of CALR as a necessary service under the CJA.

Item 15. **COURT ORDER:** This court order must be signed and dated by the presiding judicial officer. An additional court order is not necessary except for certain psychiatric and psychological examinations as explained in the instructions for Item 13, or to authorize payment for services exceeding $500 when prior authorization was not obtained (see Item 23). Indicate whether full or partial repayment of the cost for these services was ordered by the court from the person represented by checking "Yes" or "No."

Item 16. **CLAIM FOR SERVICES AND EXPENSES:**

COMPENSATION (16a): Enter the total amount claimed for professional services rendered. On an attachment to the voucher, describe in detail the services provided, including dates of service and the amount of time spent (in hours and tenths of hours). State the basis for the fee claimed (e.g., hourly rate, daily rate, fixed fee).

TRAVEL EXPENSES (16b): Travel related expenses that are incidental to the representation (e.g., transportation, lodging, meals, car rental, parking, bridge, road and tunnel tolls, etc.) must be itemized on a separate sheet, indicating dates the expense was incurred. Attach supporting documentation (receipts, canceled checks, etc.) for all travel expenses. Travel expenses by privately owned automobile, motorcycle, or aircraft should be claimed at the rate in effect for federal employees at the time of travel. For overnight travel, reasonable expenses for lodging and meals will be reimbursed on an actual expense basis; per diem is not allowed. Service providers are limited dto the travel and subsistence expenses

of federal employees. The clerk of court can advise you of applicable rates and federal government travel regulations.

OTHER EXPENSES (Item 16c): Itemize all reimbursable out-of-pocket expenses incidental to the services provided. Provide dates and a brief description of the expense. Submit supporting documentation (receipts, canceled checks, paid invoice, etc.) for single item expenses of $50 or more. Do not include general office overhead (e.g., rent, telephone services, secretarial services) as reimbursable expenses.

The columns provided "**FOR COURT USE ONLY**" will reflect any mathematical or technical adjustments to the claim during judicial approval or required additional review of the chief judge of the court of appeals (or delegate).

Item 17. **PAYEE'S NAME AND MAILING ADDRESS, TAXPAYER IDENTIFICATION NUMBER (TIN), CLAIMANT'S CERTIFICATION AND CLAIM STATUS:** Provide the complete name and address of the payee (claimant). The claimant must certify dates covered in the claim for payment by indicating the date range for services rendered. Check the box to indicate the status of the claim as: (1) final payment for the services, (2) an interim payment, or (3) a supplemental payment (an additional claim submitted after a the final payment). If this is an interim payment, indicate the interim payment number. The claimant or payee must sign and date the payment certification statement prior to submitting the claim to the attorney for certification that services were rendered and received. Provide the Taxpayer Identification Number (TIN) to report these earnings to the IRS.

Item 18. **CERTIFICATION OF ATTORNEY:** This section must be completed by the attorney appointed to provide representation, a retained attorney whose client is unable to afford the cost of service requested, or by a person proceeding *pro se* under the CJA.

Items 19-22. **APPROVED FOR PAYMENT:** The court will review, for reasonableness and compliance with the *CJA Guidelines*, every claim for compensation of services rendered and any claim for reimbursement of expenses incurred. The presiding judicial officer will indicate the amount approved for payment in each of the payment categories (Items 19-21).

These amounts will reflect any mathematical or technical adjustments made to the claim.

The **"TOTAL AMOUNT APPROVED/CERTIFIED"** (Item 22) is the amount approved for payment of the claim, less any amounts to be withheld in accordance with an interim payment order. Upon preliminary approval of a claim for more than the $1,600 statutory threshold, not including expenses, the presiding judicial officer will (1) signify approval by circling the word "cert" (for word certified) and indicate the amount approved in Item 22, and (2) forward the claim to the chief judge of the court of appeals (or delegate) for additional review and approval of the excess amount.

Item 23.

SIGNATURE OF THE PRESIDING JUDICIAL OFFICER: The presiding judicial officer must check the appropriate box to indicate (1) either the cost, excluding expenses, does not exceed $500, or prior authorization was obtained, or (2) approval of cost, excluding expenses, exceeding $500 when prior authorization was not obtained but in the interest of justice the court finds that timely procurement of these services could not await prior authorization. The presiding judicial officer must sign and date Item 23, indicating approval/certification of the amount indicated in Item 22. The court will provide the judge code.

If the amount approved for compensation, excluding expenses, is less than or equal to the $1,600 statutory limitation, the claim will be forwarded for payment processing.

Items 24-27.

APPROVED FOR PAYMENT: If the chief judge (or delegate) approves the excess compensation, the judge will indicate the amounts approved in each of the payment categories, Items 24-26, and the total amount approved for payment in Item 27.

Item 28.

SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS (OR DELEGATE): Before a claim is paid for the excess amount certified, the chief judge of the appeals court (or delegate) must sign and date Item 28, approving payment for compensation that exceeds the statutory threshold. If approval is not granted, compensation will be limited to the statutory maximum for the representation and expenses approved. The **JUDGE CODE** will be provided by court staff.

SUPPRESSION ISSUES

PRESENTED BY

ALFRED E. WILLETT
CJA PANEL ATTORNEY

DEDICATION

This outline is dedicated to my brothers, and sisters, in the law who zealously defend indigent individuals accused of crimes in the United States District Courts for the Northern and Southern Districts of Iowa. Those things that do not kill us, make us stronger.

DISCLAIMER

The opinions of the author of this outline are to be attributed solely to him and not to any other defense attorney or defender organization.

If the author of this outline articulates any opinions about any individual connected with the judicial, executive, or legislative branch of government, those opinions should be considered at best, complimentary; at worst, humorous; and never derogatory.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. ANTONIO RAY LIDDELL, Defendant.	**No. 3:05-cr-00568-JEG** **ORDER**

This matter is before the Court on Defendant Antonio Ray Liddell's December 8, 2005, Motion to Suppress, which the Government resists. Hearing was held on the matter on January 3, 2005.[1] Defendant was represented by Alfred Willett. The Government was represented by Assistant United States Attorney Cliff Cronk. The motion is now fully submitted to the Court for review. For the reasons discussed below, the motion is denied.

SUMMARY OF MATERIAL FACTS

On August 18, 2005, at approximately 12:45 a.m., Clinton Police Officer Michael Adney activated his emergency lights and initiated a traffic stop on a vehicle being driven by Antonio Ray Liddell ("Defendant"), after observing the vehicle was playing extremely loud music. A review of Officer Adney's cruiser camera videotape reveals that Defendant did not immediately stop his vehicle but instead drove another

[1] The Clinton police officers involved in the traffic stop and search of Defendant's vehicle were available at the time of the hearing but were not called to testify. The Government and the Defendant stipulated to a record consisting of the video recordings made by cameras in both patrol vehicles (Ex. 1), a transcript of the specific questions and Defendant's answers which are at issue (Ex. 2), and the narrative reports prepared by the two officers (Ex. A and B).

two or three blocks, making three turns before finally stopping for the officer. After approaching the vehicle and speaking with Defendant, Officer Adney determined that Defendant was barred from operating a motor vehicle in Iowa, and Defendant was placed under arrest for driving while barred. Officer Adney had Defendant exit his vehicle, placed him in handcuffs, and then conducted a pat-down search of Defendant's person, finding a baggie containing a substance that appeared to be marijuana, $183 cash, and two cellular phones. Defendant was then placed in Officer Adney's patrol unit.

At approximately 12:51 a.m., Officer John Melvin arrived on the scene to assist Officer Adney. Incident to the arrest, both Officer Melvin and Officer Adney began a cursory search of Defendant's vehicle at approximately12:53 a.m. Officer Adney returned to his police cruiser at approximately 12:55 a.m., opened the back door of the cruiser, and briefly spoke with Defendant.[2] During this time, Officer Melvin continued to search the front seat area of Defendant's vehicle. It was at this time that Officer Melvin first located an unloaded, pearl-handled, .38 caliber Smith & Wesson revolver under the driver's seat.

Officer Melvin immediately halted his search and asked Officer Adney to return to Defendant's vehicle. Officer Melvin showed the firearm to Officer Adney and informed him that the weapon looked real but was unloaded. The officers briefly discussed charging Defendant with carrying a concealed weapon, and then both officers

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[2] Officer Adney's cruiser camera did not produce any audio; however, the substance of this brief conversation is irrelevant to the issue presented.

returned to Officer Adney's patrol vehicle. While walking back to the patrol unit, Officer Melvin asked Officer Adney if he had checked Defendant good, and if he had given Defendant a good crotch search to ensure nothing was hidden in that area. Officer Adney indicated that he had patted Defendant down. Officer Adney then had Defendant exit the patrol unit and asked Defendant, "Is there anything else in there we need to know about?" Before Defendant could respond to this inquiry, Officer Melvin immediately qualified the question by adding, "That's gonna hurt us?" Officer Adney then repeated this statement to Defendant, stating, "That's gonna hurt us? Since we found the pistol already."[3] Defendant responded by stating, ". . . I knew it was there but it . . . it's not mine." Defendant was patted down a second time and was again placed in Officer Adney's patrol vehicle. Nothing was found on Defendant's person during this second pat-down search. Defendant and the Government agree that no Miranda[4] warnings were given to Defendant prior to his being asked whether anything else was located in the vehicle, and the Government concedes Defendant was under arrest and in custody at the time of the limited questioning.

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[3] Defense counsel stated at hearing that Defendant does not take exception to the way the question was phrased but rather takes issue with the timing of the questioning that took place. The Court notes that "the fact that [a] question was also broad enough to elicit other information does not prevent application of the public safety exception when safety was at issue." United States v. Williams, 181 F.3d 945, 954 n.13 (8th Cir. 1999). Law enforcement's question, "Is there anything else in the vehicle we need to know about", which was immediately qualified by adding, before Defendant responded, "that's gonna hurt us?", is not so overly broad as to preclude the application of the public safety exception.

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

Officer Adney subsequently transported Defendant to the police department, while Officer Melvin resumed his search of Defendant's vehicle. During this more thorough search of the vehicle, Officer Melvin searched the entire passenger compartment, the glove box, and the trunk. Officer Melvin's search of the vehicle produced the previously referenced firearm, some rolling papers which are commonly used to roll marijuana cigarettes, and a sock that contained ammunition.

On September 14, 2005, Defendant was charged in a four-count indictment with distribution of drugs (counts one, two, and three) and being a felon in possession of a firearm (count four). On December 8, 2005, Defendant filed a motion to suppress. Defendant contends that while he was in custody, he was questioned by law enforcement prior to being advised of his Miranda rights; therefore, any statements made by him should be suppressed as obtained in violation of his Fifth Amendment rights.

The Government resists the motion to suppress. The Government argues the questioning by law enforcement while Defendant was in custody and prior to any Miranda warnings falls under the "public safety exception" to Miranda.

APPLICABLE LAW AND DISCUSSION

"Unless a person in custody has been advised that he has the right to remain silent, that any statement he makes can be used as evidence against him, and that he has a right to an attorney, statements made in response to interrogation must generally be suppressed." United States v. Mendoza-Gonzalez, 363 F.3d 788, 795 (8th Cir. 2004). "The Miranda protections are triggered only when a defendant is both in custody and being interrogated." United States v. Hatten, 68 F.3d 257, 261 (8th Cir. 1995) (citing

United States v. Lawrence, 952 F.2d 1034, 1036 (8th Cir.), cert. denied, 503 U.S. 1011 (1992)). There is no dispute that Defendant was in custody at the time he was questioned by law enforcement.

The Government argues that given the circumstances of the present case, law enforcement's limited questioning of Defendant falls within the public safety exception to Miranda. The Supreme Court first announced the public safety exception to Miranda in New York v. Quarles, in which it articulated the relevant inquiry as whether law enforcement's questioning related to "an objectively reasonable need to protect the police or the public from any immediate danger." New York v. Quarles, 467 U.S. 649, 659 n.8 (1984). "Under [the public safety] exception, a suspect's answers to questions from a police officer are admissible in the absence of a Miranda warning so long as the questions asked of the suspect are reasonably prompted by a concern for the public safety." United States v. Williams, 181 F.3d 945, 953 (8th Cir. 1999) (quoting Lawrence, 952 F.2d at 1036) (quotations omitted). The public safety exception applies where, as in the present case, concerns for public safety are not present but concerns for officer safety are. Id. at 954 n.13.

When the public safety exception has been applied, law enforcement is generally in possession of some piece of information which takes the facts outside of the routine and ordinary arrest scenario and raises public or officer safety concerns. See Quarles, 467 U.S. at 652 (officers confronted with the immediate necessity of locating a firearm where the defendant was apprehended wearing an empty holster); United States v. Donachy, 2004 WL 2823347, *2-3 (10th Cir. 2004) (law enforcement's questioning of

defendant regarding the whereabouts of a gun was justified where the officers knew defendant was in possession of two firearms but could only locate one during their initial search); Lawrence, 952 F.2d at 1037 (officers were aware that defendant had disposed of a gun while fleeing, thus officers had a reasonable concern that the gun might be found by an innocent individual and do harm); United States v. Knox, 950 F.2d 516, 519 (8th Cir. 1991) (where defendant was carrying a loaded magazine but no firearm when he was arrested, officers were justified in making an immediate attempt to locate the gun to protect public and officer safety); compare United States v. Mobley, 40 F.3d 688, 693 (4th Cir. 1994) (where law enforcement was in possession of no information raising a safety concern or otherwise separating the facts of the arrest from those of an ordinary and routine arrest situation, there was no demonstration of an immediate safety concern, and the public safety exception was not applicable).

In United States v. Luker, Luker's vehicle was stopped for having an excessively loud muffler, and Luker was subsequently arrested for driving drunk. United States v. Luker, 395 F.3d 830, 831-832 (8th Cir. 2005). The arresting officer, who was aware of Luker's history of methamphetamine use and thus concerned about getting stuck by a needle, asked Luker if there was anything on his person that could stick or poke the officer, and then conducted a pat-down search of Luker's person. Id. at 832. Law enforcement then asked Luker if there was anything in his vehicle that they should be aware of. Id. Luker responded, "Just my .410 [shotgun]." Id. All of this occurred prior to Luker being read his Miranda rights. Id. Law enforcement then searched Luker's vehicle and found the shotgun in Luker's trunk. Id. The Eighth Circuit agreed with the

district court that the circumstances of the case placed law enforcement's questioning within the public safety exception to Miranda, noting that because the officer was aware of Luker's history of methamphetamine use and was therefore concerned about needles or other drug paraphernalia possibly being located in the vehicle, the officer's question regarding what was in the vehicle was justified. Id. at 833-834.

In Williams, the arresting officers possessed information indicating that Williams had been arrested on a weapons possession charge in the past and that he was currently dealing drugs out of his residence. Williams, 181 F.3d at 954 n.14. The Eighth Circuit found Williams' response to the officer's question, "is there anything we need to be aware of?", asked while Williams was in custody but prior to Miranda rights being given, was admissible under the public safety exception to Miranda. Id. at 953.

> Although Williams' hands were cuffed behind his back when the officers asked him if they needed to be aware of anything else, the officers could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time. Similarly, the officers could not have known whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way. Therefore, the district court did not commit error by admitting Williams' statement identifying the location of the gun.

Id. at 953-954. The court specifically noted that, prior to questioning the defendant, the officers had information suggesting that Williams may have possessed a gun or other explosive device. Id. at 954 n.14.

At the time Officer Melvin and Officer Adney conducted the cursory search of Defendant's vehicle, which was prior to the discovery of the firearm, the officers possessed no information that would have lead them to believe the contents of the

vehicle presented any unusual safety concern. It was not until Officer Melvin located the firearm that the officers became aware that Defendant was traveling with a weapon hidden in his vehicle. The discovery of a firearm hidden in a vehicle would lead an officer to have an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way. The accidental discovery of additional weapons poses a threat to officer safety and at the time the officers conducted their limited questioning of Defendant, given the information then known to them, it was reasonable for the officers to believe this threat existed. There was no way for Officer Melvin or Officer Adney to know that the firearm found under the driver's seat was ultimately the only weapon or dangerous device located inside of the vehicle.[5]

The cursory search of Defendant's vehicle that occurred prior to the limited questioning of Defendant does not impair the conclusion that a legitimate concern for officer safety existed. The initial search was conducted in the absence of any additional information which would have lead the officers to believe this was anything other than

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[5] Defendant argues that once officers found "the" firearm and had cuffed and confined the Defendant, any danger to the officers or others was over, rendering the public safety exception inapplicable to these facts. Defendant argues additional significance from the fact that no other firearm or other dangerous device is found in the more detailed search of the vehicle subsequent to the officers' question about dangerous items. The Court has not been persuaded by this argument because the officers could not know at the time of their question that no other dangerous devices would be found beyond the handgun, nor that only one gun could be present. Consistent with the language in Williams, 181 F.3d at 953-54, the officers, once alerted to the initial discovery of the gun, "could not have known whether other hazardous weapons [or other devices] were present in the [vehicle] that could cause them harm if they happened upon them unexpectedly or mishandled them in some way."

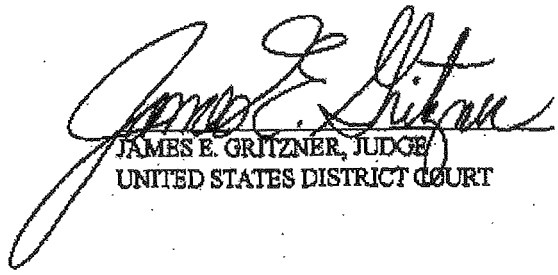
an ordinary and routine arrest scenario. The discovery of the firearm, in a somewhat concealed location under the front seat, constituted an additional piece of information which gave the officers a newfound concern for their safety and justified the immediate and limited questioning of Defendant that occurred in the absence of Miranda warnings.

CONCLUSION

The Court concludes that the officers' very limited questioning of Defendant, conducted while Defendant was in custody but in the absence of Miranda warnings, was reasonably prompted by a concern for officer safety and therefore falls within the public safety exception to Miranda. Defendant's Motion to Suppress (Clerk's No. 20) must be **denied**.

IT IS SO ORDERED.

Dated this 9th day of January, 2006.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1337

United States,

Plaintiff - Appellee

v.

Antonio Ray Liddell,

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:05-cr-00568-RP-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 25, 2008

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-1337

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Southern District of Iowa.
Antonio Ray Liddell,	*	
	*	
Defendant - Appellant.	*	

Submitted: October 16, 2007
Filed: February 25, 2008

Before LOKEN, Chief Judge, GRUENDER and BENTON, Circuit Judges.

LOKEN, Chief Judge.

Antonio Ray Liddell pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). As permitted by a condition in his plea agreement, Liddell now appeals the denial of his motion to suppress a post-arrest statement made without the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). We agree with the district court[1] that the arresting officers' in-custody questioning fell within the public safety exception to Miranda established in New York v. Quarles, 467 U.S. 649 (1984). Accordingly, we affirm.

[1] The HONORABLE JAMES E. GRITZNER, United States District Judge for the Southern District of Iowa.

The following facts are undisputed. At approximately 12:45 a.m., Police Officer Michael Adney stopped a car driven by Liddell for a loud music violation. Adney arrested Liddell when a check revealed that he was barred from driving in Iowa. After the arrest, a pat-down search uncovered a bag of marijuana, $183 in cash, and two cell phones. Adney handcuffed Liddell and placed him in the patrol car. Meanwhile, Police Officer Jon Melvin arrived to assist and began to search Liddell's car incident to the arrest. When Melvin discovered an unloaded .38 caliber revolver under the front seat, he showed the gun to Adney and asked whether Liddell's person had been thoroughly searched after the arrest.

Adney removed Liddell from the patrol car and asked, referring to Liddell's car, "Is there anything else in there we need to know about?" Melvin added, "That's gonna hurt us?" Adney repeated, "That's gonna hurt us? Since we found the pistol already." Liddell laughed and said, "I knew it was there but . . . it's not mine," before telling the officers there were no other weapons in his car. Melvin completed the search of the car, finding .38 caliber ammunition and rolling papers used to make marijuana cigarettes.

Charged with unlawful possession of the firearm and with unrelated drug offenses, Liddell entered a conditional plea of guilty to the felon-in-possession charge after the district court denied a motion to suppress his highly incriminating statement that he knew the .38 revolver was under the front seat of his car. In the district court and on appeal, the government conceded that Liddell was in custody and had not been given Miranda warnings at the time the officers asked the question that elicited this incriminating statement. Thus, the issue is whether the statement is admissible under the public safety exception to Miranda as articulated by the Supreme Court in Quarles and applied by this court in United States v. Williams, 181 F.3d 945 (8th Cir. 1999), and United States v. Luker, 395 F.3d 830 (8th Cir.), cert. denied, 546 U.S. 831 (2005). "Whether facts support an exception to the Miranda requirement is a question of law" that we review *de novo*. United States v. Lackey, 334 F.3d 1224, 1226 (10th Cir.),

cert. denied, 540 U.S. 997 (2003); accord United States v. Talley, 275 F.3d 560, 561 (6th Cir. 2001).

In Quarles, the Supreme Court held that "there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence." 467 U.S. at 655. In this context, protection of the public safety includes protection of the police officers themselves. Id. at 658 n.7, 659. The exception does not depend upon the subjective motivation of the questioning officers. Instead, the Court adopted an objective standard: the exception applies when "police officers ask questions reasonably prompted by a concern for the public safety." Id. at 656, quoted in Williams, 181 F.3d at 953. It does not apply to "questions designed solely to elicit testimonial evidence from a suspect." 467 U.S. at 659.[2]

Liddell argues that the public safety exception does not apply because, at the time the officers asked the question that prompted his incriminating admission, "there was no longer an objective reasonable need to protect the police or the public from any immediate danger" because the revolver had been found, Liddell was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or been harmed by the contents of Liddell's car. The district court rejected this contention, explaining:

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[2]Because this is an objective standard, and because police officers must react spontaneously to situations posing a threat to public safety, the public safety exception does not turn on the specific form of questions asked. See Williams, 181 F.3d at 953 n.13; United States v. Newton, 369 F.3d 659, 678-79 & n.8 (2d Cir. 2004). There can be no doubt that the question posed by the officers in this case was sufficiently focused on public safety to trigger the public safety exception. By contrast, the Court explained in Quarles, 467 U.S. at 659 n.8, the post-arrest questioning without Miranda warnings in Orozco v. Texas, 394 U.S. 324, 325-26 (1969), was "clearly investigatory."

> The discovery of a firearm hidden in a vehicle would lead an officer to have an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way. The accidental discovery of additional weapons poses a threat to officer safety and at the time the officers conducted their limited questioning of [Liddell], given the information then known to them, it was reasonable for the officers to believe this threat existed. There was no way for Officer Melvin or Officer Adney to know that the firearm found under the driver's seat was ultimately the only weapon or dangerous device located inside of the vehicle.

The district court's analysis is consistent with this court's controlling precedents. Our prior cases recognized that the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search. See Luker, 395 F.3d at 832 (public safety exception applied to post-arrest question whether there was anything in intoxicated driver's car the police should know about); Williams, 181 F.3d at 953-54 (public safety exception applied to post-arrest question, "is there anything we need to be aware of" in the suspect's apartment, because the police "could not have known whether other hazardous weapons were present . . . that could cause them harm if they happened upon them unexpectedly or mishandled them in some way"). Accord Lackey, 334 F.3d at 1227-28; contra United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007). Here, when the officers found Liddell's concealed .38 caliber revolver, they had good reason to be concerned that additional

weapons might pose a threat to their safety when they searched Liddell's car incident to a late-night arrest.

The judgment of the district court is affirmed.

GRUENDER, Circuit Judge, concurring.

Based on our circuit's precedents, I concur in the opinion of the Court. However, I write separately to explain my concern that our decisions applying the public safety exception to *Miranda* have strayed from the Supreme Court's tethering of the exception to the existence of exigent circumstances.[3]

As an alternative rationale in *Williams* and then followed in *Luker*, this court held that the public safety exception to *Miranda* applies to situations where a police officer could happen upon weapons or needles "unexpectedly or mishandle[] them in some way." *Williams*, 181 F.3d at 954. In so holding, this court applied the exception to the possible handling of an inherently dangerous instrumentality but neglected the Supreme Court's requirement of exigent circumstances associated with recovering the item. Therefore, I concur in the Court's opinion in this case, even though this record is bereft of evidence of exigent circumstances associated with the possible discovery of a weapon in Liddell's vehicle.

In *Quarles*, the Supreme Court recognized the public safety exception to *Miranda* and premised the applicability of this "narrow exception to the *Miranda* rule" on exigent circumstances. 467 U.S. at 658. There, Quarles, accused of armed rape, fled into a supermarket. When Quarles was arrested moments later, the police officers found him wearing an empty holster. Before giving *Miranda* warnings, the

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[3]Exigent means "[r]equiring immediate action or aid; urgent." Black's Law Dictionary 614 (8th ed. 2004).

officers asked where the gun was located, and Quarles directed them to the gun's location. The Supreme Court upheld the admission into evidence of Quarles' statement because "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." *Id.* at 657. The Supreme Court stated that "[t]he exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it." *Id.* at 658. Throughout the opinion, the Court focused on the urgency of the situation. *See, e.g., id.* at 657-58 ("We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them."); *id.* at 658 ("[W]e recognize here the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."). The Supreme Court did not express any concern that a trained police officer discovering a weapon in an otherwise secured environment would justify applying the exception. Rather, the Court did express that the exception would apply when the public "might later come upon [the weapon]," thereby creating an immediately dangerous situation. *Id.* at 657.

The Supreme Court further stated that the public safety exception to *Miranda* applies when officers ask "questions reasonably prompted by a concern for the public safety" and not to "questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 656, 659. However, the Court clarified that the exigency of the situation would distinguish between these types of questions. *Id.* at 659 n.8. To illustrate this point, the Court compared *Quarles* with *Orozco v. Texas*, 394 U.S. 324 (1969). *Id.* In *Orozco*, four police officers entered Orozco's boardinghouse and

awakened him. 394 U.S. at 325. Without giving *Miranda* warnings, the officers interrogated Orozco about a murder committed four hours earlier. The police asked if he had been present at the scene of the shooting, whether he owned a gun and where the gun was located. The defendant admitted that he was present at the scene, that he owned a pistol and that the pistol was located in the washing machine in a backroom of the boardinghouse. The *Orozco* Court held that all the statements should have been suppressed. *Id.* at 327. The *Quarles* Court stated:

> In *Orozco*, however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any *immediate danger* associated with the weapon. In short there was no *exigency requiring immediate action* by the officers beyond the normal need expeditiously to solve a serious crime.

Quarles, 467 U.S. at 659 n.8 (emphasis added). Because the police reasonably suspected that Orozco committed murder with a gun, there existed a realistic possibility that the weapon was hidden somewhere in the boardinghouse. Had the Supreme Court believed the public safety exception applied to situations where officers could happen upon weapons "unexpectedly or mishandle[] them in some way," then the public safety exception would have been applicable in *Orozco*. However, the *Quarles* Court did not indicate that the inherent danger of a trained police officer discovering a weapon by itself was sufficient to justify the application of the exception. As I read *Quarles*, the public safety exception to *Miranda* applies only when (1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation. Therefore, the public safety exception to *Miranda* would not apply to situations where officers could happen upon a weapon "unexpectedly or mishandle[] them in some way," unless some evidence of exigency is presented.

The record in this case does not establish the existence of exigent circumstances. Here, the police had removed Liddell from his vehicle, handcuffed him, conducted a pat-down search, and placed him into their patrol car. After the officers had secured both Liddell and his car, they began searching his vehicle. Upon finding an unloaded .38 caliber revolver under the front seat, the officers asked if anything else in the car could hurt them. After a discussion with Liddell, the officers completed the search of Liddell's car. Although the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous, the record does not establish that any immediate danger existed as a result of the possible presence of such a weapon in Liddell's car or that the public might have later come upon a weapon. There was no evidence, for instance, supporting the necessity of an immediate search or continued search of the vehicle by the officers, either because of some immediate safety concern or because the vehicle was to be left unsecured by the roadside where the public might gain access to any weapon left in it. Because Liddell was arrested for driving while barred, there was no immediate danger that Liddell would be allowed to return to his car where he might have access to a hidden weapon. Furthermore, there was no evidence that the officers could not safely impound and tow Liddell's car in order to conduct a search of it at a later time. Based on the record developed in the district court, the public safety concern was not related to any exigent circumstances but rather limited to the fact that the officers might have unexpectedly encountered or mishandled a weapon hidden in Liddell's vehicle.

Although the First Circuit agrees with our precedents, three other circuits do not. *Compare United States v. Fox*, 393 F.3d 52 (1st Cir. 2004) (applying the public safety exception on similar facts as in this case), *with United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989), *and United States v. Williams*, 483 F.3d 425 (6th Cir. 2007). In *Mobley*, agents arrested the defendant at his front door and made a security sweep of the apartment, which revealed that Mobley was alone. 40 F.3d at 690. With Mobley outside of the apartment, the agents asked him whether anything in the apartment could be of danger

to the agents who would be conducting the search. The Fourth Circuit held that the public safety exception to *Miranda* did not apply because the police had already secured the apartment and determined that no one else was present. *Id.* at 693; *see also United States v. Melvin*, 2007 WL 2046735 (4th Cir. 2007) (per curium) (relying on *Mobley*, the court held that the public safety exception did not apply where officers questioned Mobley about whether he had a weapon in his car when the car was secured and already heading to the impound lot). In *Raborn*, upon being stopped by DEA agents, Raborn exited his truck, removed a pistol from his holster and placed it inside the vehicle. 872 F.2d at 592. The agents handcuffed Raborn and the other passenger and placed them on the ground outside. Unable to locate the gun after a search of the front seat, one of the officers asked Raborn where he had placed it. Raborn replied that the gun was under the seat cover. The Fifth Circuit stated that "[the vehicle] had already been seized and only the police officers had access to the truck. It is difficult therefore, to find that the public-safety exception applies." *Id.* at 595. Finally, the Sixth Circuit has held that the public safety exception to *Miranda* applies only if "(1) . . . the defendant might have (or recently have had) a weapon, and (2) . . . someone other than police might gain access to that weapon and inflict harm with it." *Williams*, 483 F.3d at 428.

Based on *Quarles* and the limited record before us, I would conclude that the public safety exception to *Miranda* would not apply because there is no evidence that an immediate danger existed as a result of the possible presence of such a weapon in Liddell's car or that the public might have later come upon such a weapon. Nonetheless, the public safety exception to *Miranda* applies because the fact that the officers might have unexpectedly encountered or mishandled a weapon hidden in Liddell's vehicle alone is sufficient to justify the application of the exception under *Williams* and *Luker*.

No. 07-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee-Respondent,

v.

ANTONIO RAY LIDDELL,
Appellant-Petitioner.

On Appeal from the United States District Court
for the Southern District of Iowa
District Court Case No. 3:05-cr-00568-RP-1

PETITION FOR REHEARING EN BANC

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INTRODUCTION AND FED. R. APP. P. 35(b) STATEMENT

Rehearing en banc is warranted because the panel's decision is inconsistent with Supreme Court precedent and squarely conflicts with authoritative decisions from the Fourth, Fifth, and Sixth Circuits on an issue critical to the proper application of the Fifth Amendment throughout the Nation.

Police Officer Michael Adney stopped petitioner's car because petitioner was playing loud music. The officer ran a license check and arrested petitioner for "Driving While Barred." Officer Adney subsequently conducted a pat-down search, handcuffed petitioner, and placed him in the patrol car. Another officer who had arrived on the scene searched petitioner's car incident to the arrest and discovered an unloaded revolver under the front seat. Without informing petitioner of his *Miranda* rights, Officer Adney then removed petitioner from the patrol car and subjected him to direct questioning, asking whether "there [is] anything else in there we need to know about" and informing him "we found the pistol already." Petitioner responded, "I knew it was there but . . . it's not mine," before telling the officers there were no other weapons in his car.

The panel in this case held that Officer Adney's questioning of petitioner fell within the "public safety" exception to *Miranda v. Arizona*, 384 U.S. 436 (1966). *See New York v. Quarles*, 467 U.S. 649, 655 (1984). But the panel's application of the public safety exception cannot be squared with the Supreme Court's decision in

Quarles. There, the defendant had discarded a loaded gun in a busy supermarket. Police officers were faced with an "immediate necessity" to obtain information in order to neutralize an "obvious[] . . . danger to the public safety." None of the same concerns was present in this case: the scene was safely under the officer's control and there was no emergency that justified the officer's questioning of petitioner without informing him of his constitutional right to remain silent.

As Judge Gruender recognized in his concurrence, moreover, the panel's decision conflicts with holdings of the Fourth, Fifth, and Sixth Circuits. Those courts have recognized that, for the public safety exception to apply under such circumstances, the officers would have had to believe that someone *other* than the police officers could obtain control of the weapon and inflict harm with it. *See United States v. Williams*, 483 F.3d 425 (6th Cir. 2007), *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989). *But see United States v. Fox*, 393 F.3d 52 (1st Cir. 2004). Because the panel's decision cannot be reconciled with Supreme Court precedent, and because it exacerbates a conflict among the courts of appeals, rehearing en banc is warranted.

STATEMENT

1. Constitutional Background. The requirement that police officers inform suspects of their constitutional rights before interrogating them is a settled feature of our criminal justice system: "[t]he Fifth Amendment privilege is so fundamental

to our system of constitutional rule" that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). Without being made aware of the right to remain silent, individuals cannot make "an intelligent decision as to its exercise." *Id.* at 468.

The Supreme Court has made clear that uniformed police officers will be excused from the "[simple] expedient of giving an adequate warning," *Miranda*, 384 U.S. at 468, only if they find themselves "in a situation posing a threat to the public safety." *New York v. Quarles*, 467 U.S. 649, 656 (1984). This "public safety exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence" applies in a very "narrow" range of circumstances. *Id.* at 655, 658. In *Quarles*, officers "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" that the defendant had just discarded in a busy supermarket. The Supreme Court reasoned that in such an emergency situation, it would be "untenable" to require officers to decide "in a matter of seconds" whether to forego the *Miranda* warning at the cost of admissibility or to issue the warning to preserve admissibility but undermine their ability to "neutralize the volatile situation confronting them." *Id.* at 657-58. To avoid such "on-the-scene balancing" dilemmas, the Court made clear that the narrow public safety exception applies only to questioning that relates to the "exigency which

justifies" its application: officers may ask only those questions "necessary to secure their own safety or the safety of the public." *Id.* at 658-59.

2. Factual Background. On August 18, 2005 at approximately 12:45 a.m., Police Officer Michael Adney stopped petitioner's car because he was playing loud music. The officer ran a license check and discovered that petitioner was "Driving While Barred." Officer Adney placed petitioner under arrest, handcuffed him, and placed him in the patrol car without incident. A second officer, Officer Melvin, arrived on the scene and began searching petitioner's car incident to the arrest. Officer Melvin discovered an unloaded revolver under the front seat and ammunition under the passenger-side seat. At this point, Officer Adney removed petitioner from the patrol car, and both officers began interrogating him. Officer Melvin asked "Is there anything else in the vehicle we need to know about that is going to hurt us?" and stated, "We found the pistol already." Petitioner responded that he knew the revolver was in the car but denied that it belonged to him.

Petitioner was charged with and conditionally pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He reserved his right to appeal the district court's denial of his motion to suppress his post-arrest statement about the weapon. In the district court and on appeal, the government conceded that petitioner was in custody and had not been given *Miranda* warnings at the time the officers extracted his incriminating statement.

The district court nevertheless declined to suppress the statement because, in its view, the arresting officers' questioning fell within the public safety exception. Petitioner appealed that ruling before this Court.

3. The Panel's Decision. A panel of this Court affirmed the district court's holding that the officers' in-custody questioning of petitioner fell within the public safety exception to *Miranda*. The panel acknowledged that, at the time of the interrogation, petitioner "was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or been harmed by the contents of [petitioner]'s car." Slip op. at *2. Nevertheless, the panel reasoned that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." *Id.* (citing *United States v. Luker*, 395 F.3d 830, 832 (8th Cir. 2005), *cert. denied*, 546 U.S. 831 (2005)).

In reaching its conclusion, the panel relied on *Luker* for the proposition that the "public safety exception applie[s] to post-arrest question[ing]" regarding whether "the police should know about" any objects in a driver's car. *See* Slip op. at *2 (citing *Luker*, 395 F.3d at 832). In *Luker*, a panel of this Court summarily concluded that "the district court . . . thoroughly and correctly analyzed the legal

and factual aspects of [the public exception] claim. We agree with the district court that the circumstances in the instant case fit the public safety exception to *Miranda*." *Luker*, 395 F.3d at 832. Judge Heaney dissented in that case, arguing that the public safety exception should apply only if the officers' "questions [are] necessary to secure the safety of officers or the public." *Id.* at 834. Judge Heaney reasoned that application of the public safety exception, when the defendant was arrested and handcuffed and no third parties posed any threat, would "expand the public safety exception far beyond its original scope." *Id.* at 835. Thus, he would have "reverse[d] the district court and f[ou]nd that Luker's statement d[id] not fall within the public safety exception." *Id.*

In this case, Judge Gruender concurred separately. Like Judge Heaney, he would have "conclude[d] that the public safety exception to *Miranda* would not apply because there is no evidence that an immediate danger existed." Slip op. at *5. In Judge Gruender's view, "the public safety exception to *Miranda* applies only when (1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation." *Id.* at *4. Here, the record established that there was neither an emergency nor any third parties who might have come upon a hypothetical second weapon. *Id.* To be sure, Judge Gruender reasoned, "the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous, [but] the

record does not establish that any immediate danger" would justify foregoing the *Miranda* warning. *Id.* at *5. But because Judge Gruender felt constrained by this Court's prior decision in *Luker*, he concurred in the panel's decision. *Id.*

REASONS FOR GRANTING THE PETITION

A. The En Banc Court Should Grant Rehearing Because The Panel's Holding Expands The Public Safety Exception To *Miranda* In A Manner That Departs From Supreme Court Precedent.

En banc rehearing is warranted because the panel's holding – that "the risk [to] police officers [of] being injured by the mishandling of unknown firearms," Slip op. at *2, constitutes a public safety concern sufficient to overcome *Miranda* – cannot be reconciled with the Supreme Court precedent. (1) The panel's opinion is inconsistent with *Quarles* because there was no immediate threat to the public safety in this case that would have required the officers to undertake the sort of "on-the-scene balancing" the *Quarles* Court sought to avoid. (2) The panel opinion is also inconsistent with *Miranda* because virtually *every* search conducted by police officers involves the possibility of discovering a dangerous item and thus, according to the panel's holding, the "public safety" exception would apply to *every* interrogation preceding a search. This vast expansion of the public safety exception to *Miranda* finds no support in the rationale for that rule and departs from guidance provided by the Supreme Court.

1. The "public safety" exception carved out by the *Quarles* Court applies to a very narrow range of circumstances involving imminent danger to the public. In that case, the police, "in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun" that the defendant had just discarded in the middle of busy supermarket. *Quarles*, 467 U.S. at 657. It was undisputed that the weapon "obviously posed more than one danger to the public safety: an accomplice might make use of it, [or] a customer or employee might later come upon it." *Id.* The Supreme Court concluded that in such an emergency situation, it would be "untenable" to require officers to decide "in a matter of seconds" whether to forego the *Miranda* warning at the cost of admissibility of any incriminating statement, or to issue a warning that would preserve admissibility but undermine the officers' ability to "neutralize the volatile situation confronting them." *Id.* at 657-58. The *Quarles* Court therefore acknowledged the "public safety" exception expressly to avoid such untenable "on-the-scene balancing" dilemmas. *Id.* at 658.

None of the same concerns apply to a situation where, as here, police officers have arrested the suspect and placed him in their patrol car, and no third parties are in the vicinity who might come upon a weapon and threaten the officers or the public safety. All parties acknowledge that petitioner was sitting quietly, handcuffed, inside a police cruiser. The officers had "searched [petitioner] thoroughly

for weapons [and] [s]atisf[ied] themselves that he was not armed or carrying anything dangerous." U.S. C.A. Br. at 13. Under these circumstances, the officers clearly were not faced with the "untenable" challenge of balancing, in a split-second, petitioner's Fifth Amendment rights against the public safety. They were in control of the scene, the vehicle could have been impounded and searched by the officers at their leisure, and there simply "was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a . . . crime." *Quarles*, 467 U.S. at 659 n.8.

2. Rehearing is also warranted because the panel's expansive reading of the public safety exception will eviscerate *Miranda* with respect to *every* interrogation preceding a search. It is hard to imagine a scenario in which police officers about to conduct a vehicle search have greater control of the scene than the one that unfolded in this case: petitioner "was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or been harmed by the contents of [petitioner]'s car." Slip op. at *2. Nevertheless, the panel concluded that the officers were "were confronted with the immediate necessity of ascertaining" (*Quarles*, 467 U.S. at 657) whether there was another weapon in the car because they faced a "risk of . . . being injured by . . . mishandling" any evidence they might uncover. But, of course, *every* search police officers conduct includes a risk of coming across evidence that might be danger-

ous. Following the panel's rationale, officers will be free to interrogate suspects about their knowledge of illegal contraband preceding any search, of any location or facility, without the "[simple] expedient of giving an adequate warning" (*Miranda*, 384 U.S. at 648) that the suspect may remain silent. The panel's opinion thus plainly undermines the principle of *Miranda*.

B. The En Banc Court Should Grant Rehearing Because The Panel's Decision Exacerbates A Conflict Among The Circuits On A Matter Of Pressing Importance.

Rehearing also is warranted because the panel's holding conflicts with the decisions of three other Circuits. *See* Slip op. at *5. As Judge Gruender stated in his concurring opinion, the Fourth, Fifth, and Sixth Circuits have held (contrary to the panel's holding) that the public safety exception to the *Miranda* requirement is not triggered by a police officer's fear of mishandling firearms, drug paraphernalia, or other dangerous items during a search under circumstances similar to those in this case.[1]

1. The panel's opinion conflicts with the Sixth Circuit's recent holding in *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007). In that case, the court con-

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[1] The panel itself acknowledged the conflict with the Sixth Circuit. *See* Slip op. at *2 (citing *United States v. Williams*, 483 F.3d 425 (6th Cir.2007). Its opinion additionally conflicts with three state intermediate appellate court decisions. *See State v. Stephenson*, 796 A.2d 274, 281 (N.J. Super. App. Div. 2002); *State v. Hendrickson*, 584 N.W.2d 774 (Minn. Ct. App. 1998); *Matter of John C.*, 519 N.Y.S.2d 223 (N.Y. App. Div. 1987).
One other federal courts of appeals is in accord with the panel's decision. *See United States* v. *Fox*, 393 F.3d 52 (1st Cir. 2004).

cluded that "[t]he public safety exception applies if and only if" an officer has "a reasonable belief that he is in danger" because, "at minimum," (1) "the defendant might have (or recently have had) a weapon, and (2) . . . someone other than police might gain access to that weapon and inflict harm with it." *Id.* at 428. The court in that case remanded the matter for the trial court to determine whether "someone other than police could access the weapon and inflict harm with it." *Id.* at 429. The Sixth Circuit's holding that the public safety exception applies if and only if a third party might "gain access to [a] weapon and inflict harm with it" cannot be reconciled with the panel's opinion in this case.

2. The panel's opinion also cannot be reconciled with the Fourth Circuit's holding in *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994). There, the Fourth Circuit considered a similar situation in which officers were about to search the defendant's apartment. The apartment had already been secured and there were no third parties in the vicinity. An officer asked the defendant whether "there was anything in the apartment that could be of danger to the agents who would be staying to conduct the search warrant, such as a weapon." *Id.* at 691. The defendant confirmed that there was a weapon in the apartment and was later convicted on the basis of his statement. On appeal, the Fourth Circuit reversed the conviction, declining to apply the public safety exception "[a]bsent an objectively reasonable concern for immediate danger to police or public." *Id.* at 693. Noting that nothing

"separate[d] the[] facts [of that case] from those of an ordinary and routine arrest scenario," (*id.* at 693), the court rejected the government's argument that the risk of encountering a firearm during the course of the search constituted a threat to the public safety. *Id.*

3. Finally, the panel's holding also conflicts with the Fifth Circuit's opinion in *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989). There, the court considered a case with facts very similar to those in this case. Police had safely arrested the defendant during a traffic stop and there were no third parties on the scene. The officers believed the defendant had a weapon in his truck and, without issuing a *Miranda* warning, questioned him about the location of the gun. In response, the defendant admitted to having an illegal firearm in his truck. He was later convicted as a felon in possession and sought to suppress both the statement and the weapon, which the government argued were admissible under *Quarles*. The court concluded:

> Unlike the situation in *Quarles*, however, when the gun was hidden in a place to which the public had access, Raborn's truck, where the police officers believed the gun to be, had already been seized and only the police officers had access to the truck. It is difficult therefore, to find that the public-safety exception applies.

Id. at 595.[2] This reasoning also cannot be reconciled with the panel's opinion. Because the panel's decision squarely conflicts with the law of three other circuits, rehearing en banc is warranted. *See, e.g.*, *Olander v. State Farm Mut. Auto. Ins. Co.*, 317 F.3d 807, 809 (8th Cir. 2003) (granting rehearing en banc because the panel opinion "conflicts with a number of decisions by other courts").

* * * * *

Proper resolution of the legal question decided by the panel in this case is a matter of significant practical importance. As we have explained, the panel's opinion supports application of the "public safety" exception to *every* interrogation preceding a search. But as the Fourth Circuit recognized in *Mobley*, "*Quarles* is an exception to the *Miranda* rule . . . [and] [a]s an exception, it must be construed narrowly." 40 F.3d at 693. Rather than construing the exception narrowly, the panel's opinion dramatically expands its applicability and thus undermines important Fifth Amendment safeguards required by *Miranda*. The en banc court accordingly should grant rehearing to reconsider the panel's decision in this case.

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[2] The court ultimately upheld entry of the firearm into evidence based on the "inevitable discovery" doctrine. *See Raborn*, 872 F.2d at 595.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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March 9, 2008

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/s/ Alfred E. Willett
Alfred E. Willett

No. 07-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO RAY LIDDELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

RESPONSE OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC

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STATUTES

18 U.S.C. 922(g)(1) 1

STATEMENT

1. On August 18, 2005, at approximately 12:45 a.m., Clinton, Iowa Police Officer Michael Adney noticed that a car driven by appellant Antonio Liddell was playing extremely loud music. Officer Adney stopped the car and determined that Liddell was barred from driving in Iowa. Adney placed Liddell under arrest and patted him down, finding a bag of marijuana, $183 in cash, and two cell phones. The officer handcuffed Liddell and placed him in the patrol car. United States v. Liddell, 2008 WL 482410, at *1 (8th Cir. Feb. 25, 2008); 1/9/06 Dist. Ct. Order (Order) 1-2.

Meanwhile, Officer Jon Melvin arrived and began searching Liddell's car. Officer Melvin found an unloaded .38 caliber revolver under the front seat, showed the gun to Officer Adney, and asked whether Adney had thoroughly searched Liddell's person. Adney removed Liddell from the patrol car and asked, "Is there anything else in there we need to know about?" Melvin added, "That's gonna hurt us?," and Adney repeated, "That's gonna hurt us? Since we found the pistol already." Liddell said, "I knew it was there * * * but it's not mine," before telling the officers that there were no other weapons in the car. Melvin continued the search of the car, finding rolling papers and a sock that contained .38 caliber ammunition. 2008 WL 482410, at *1; Order 2-3.

2. Liddell was charged with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). He moved to suppress his statement to the arresting officers on the ground that he had not been given Miranda warnings before the officers

questioned him. In response, the government argued that the statement was admissible under the public safety exception to the Miranda rule established by the Supreme Court in New York v. Quarles, 467 U.S. 649 (1984). Order 4-5.

The district court denied the suppression motion, agreeing that "the officers' very limited questioning of [Liddell] * * * was reasonably prompted by a concern for officer safety and therefore falls within the public safety exception to Miranda." Order 9. The court emphasized that the discovery of a firearm concealed in Liddell's car created "an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way." Id. at 8-9. Liddell entered a conditional guilty plea to the felon-in-possession offense, reserving his right to appeal the suppression ruling.

3. This Court affirmed, finding the district court's analysis to be consistent with circuit precedent, and agreeing that "when the officers found Liddell's concealed .38 caliber revolver, they had good reason to be concerned that additional weapons might pose a threat to their safety when they searched Liddell's car incident to a late-night arrest." 2008 WL 482410, at *2. Judge Gruender concurred based on this Court's precedent, but would have concluded that the public safety exception did not apply in the absence of "evidence that an immediate danger existed as a result of the possible presence of * * * a weapon in Liddell's car or that the

public might have later come upon * * * a weapon." Id. at *3-*5.

ARGUMENT

In New York v. Quarles, 467 U.S. 649 (1984), the Supreme Court held that Miranda does not require exclusion of unwarned statements elicited by police questioning that is "reasonably prompted by a concern for the public safety." Id. at 656. In Quarles, officers chased a rape suspect through a supermarket and arrested him there. Id. at 651-652. The officers had been told that the suspect was armed, and, upon frisking him, discovered an empty shoulder holster. Id. at 652. After handcuffing the suspect, one of the officers asked him "where the gun was." Ibid. The suspect responded that "the gun is over there." Ibid. The Court held that, although the suspect had not yet received Miranda warnings, his statement was nevertheless admissible. Quarles, 467 U.S. at 659. The Court reasoned that, where officers "ask questions reasonably prompted by a concern for the public safety," any statements made in response are admissible, regardless of "the motivation of the individual officers involved." Id. at 656. The Court cautioned that such a "public safety" exception "will be circumscribed by the exigency which justifies it." Id. at 658. The Court added, however, that "[w]e think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." Id. at 658-659; see id. at 659 n.8 (distinguishing

between questions that are "clearly investigatory" and those that "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon").

1. The district court correctly applied Quarles in holding that Liddell's statement was admissible under the public safety exception. As the panel explained, the officers' discovery of a concealed .38 caliber handgun gave them "good reason to be concerned that additional weapons might pose a threat to their safety." 2008 WL 482410, at *2. Given their well-founded concern that "other, possibly loaded firearms m[ight] also be in the vehicle," Order 8, the officers had an "objectively reasonable need" to inquire about other dangerous objects before proceeding with the search of Liddell's car incident to his late-night arrest. See Quarles, 467 U.S. at 659 n.8.

Moreover, the officers' single question - advising Liddell that they had found the pistol and asking whether there was "anything else" in his car "that's gonna hurt us" - was solely focused on the need to protect their safety, rather than on an effort to "elicit testimonial evidence." Quarles, 467 U.S. at 659. And although the application of the public safety exception does not depend on the subjective motivation of the officers involved, see id. at 656, everything about the situation here, in which the officers made the inquiry only after finding a gun hidden in Liddell's car and discussing whether his person had been thoroughly searched, suggests that the officers were genuinely - and

reasonably - concerned for their safety. See Quarles, 467 U.S. at 659 (exception is intended to "free [officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety").

Contrary to Liddell's contention (Pet. 2), the public safety exception does not apply only when officers are faced with an "emergency." See United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994) (a "pressing need for haste is not essential"). Indeed, Quarles itself did not involve an emergency of the kind Liddell suggests is required. The defendant in Quarles was also handcuffed and in the custody of several armed officers, and, as the dissenters noted, there was no suggestion that Quarles had an accomplice in the rape, the store was "apparently deserted" during the late-night arrest, and the "police could easily have cordoned off the store and searched for the missing gun," which Quarles had discarded nearby. 467 U.S. at 674-676 (Marshall, J., dissenting).

Thus, courts have applied the exception to an officer's inquiry, before searching a suspect who has been arrested, about whether the arrestee has anything dangerous on his person. See United States v. Lackey, 334 F.3d 1224, 1227-1228 (10th Cir. 2003) (officer asked handcuffed defendant whether "you have any guns or sharp objects on you"); Carrillo, 16 F.3d at 1049-1050 (before searching defendant at detention facility, officer asked if he had any drugs or needles on his person); United States v. Webster, 162 F.3d 308, 332 (5th Cir. 1998) (police asked handcuffed suspect

whether he had any needles in his pockets that could injure them). As the Tenth Circuit explained in Lackey, there is little reason to require Miranda warnings before police questioning that is designed solely to protect officers from mishandling firearms or drug paraphernalia they come upon unexpectedly during a search, "not to acquire incriminating evidence" (which will presumably be recovered during the search in any case), because in that context, "[t]he risk of incrimination is limited to non-responsive answers." 334 F.3d at 1228; see also United States v. Reyes, 353 F.3d 148, 154 (2d Cir. 2003) (where arresting officers' "limited" questions "were not posed to elicit incriminating evidence," police could not "be faulted for the unforeseeable results of their words or actions"). That reasoning is equally applicable in this case, where it was only Liddell's "non-responsive" statement that he "knew [the gun] was there" that was incriminating.

Liddell's concern that the panel's decision "will eviscerate Miranda with respect to every interrogation preceding a search" (Pet. 9) is mistaken.[1] In this case, the district court found, it was only after Officer Melvin discovered a concealed firearm during his initial "cursory search" of Liddell's car that the officers had a "concern for their safety" that "justified the immediate and

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[1] Liddell's suggestion that this Court's "expansive" reading of the public safety exception will undermine the Miranda rule in "every" police search is refuted by the relatively small number of cases applying the exception. Indeed, it appears that in the almost 24 years since Quarles was decided, this Court has cited the decision in fewer than a dozen published opinions.

limited questioning," Order at 8-9, and the panel agreed that the discovery of the concealed handgun gave the officers "good reason to be concerned that additional weapons might pose a threat to their safety." 2008 WL 482410, at *2.

Liddell's assertion (Pet. 9) that the officers should simply have impounded the vehicle and searched it "at their leisure" ignores the serious risks that leaving a loaded firearm unsecured in the car could pose to police officers or members of the public during the impoundment and subsequent search. See United States v. Fox, 393 F.3d 52, 60 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1125 (2005). In Fox, another traffic stop case, a police officer discovered an unused shotgun shell during a search incident to the arrest of a suspect whom he had previously arrested for possessing a firearm. Explaining that the officer "had ample reason to fear for his own safety and that of the public," the court concluded that the officer was justified in asking whether the suspect had a gun or other weapon in his vehicle. Ibid. Further, the court held, the officer was justified in asking how to open the breech of a shotgun that he found in the suspect's car, in order to avoid the risks of "transporting the gun without first ensuring that it was not loaded." Ibid. (noting danger that "dilapidated" gun "could have fired if inadvertently bumped or jostled"). Likewise, in this case, there was no reason to require police officers to bear the risk of impounding and searching a vehicle that might contain a loaded firearm, when the dangers posed

by a concealed weapon were easily dispelled by the officers' narrowly focused inquiry about whether there were other dangerous items in the car.

2. Liddell also contends (Pet. 10-13) that this Court should grant en banc review because the panel's conclusion that the public safety exception can be applied on the basis of an officer's "fear of mishandling firearms, drug paraphernalia, or other dangerous items during a search under circumstances similar to those in this case" conflicts with decisions of three other circuits. Consistent with Quarles, however, courts have generally not adopted categorical rules governing the application of the public safety exception; instead, as Liddell's statement of the issue suggests, the applicability of the exception depends on the "circumstances" of a particular case. See Quarles, 467 U.S. at 658-659 & n.8 (noting that public safety exception lessens clarity of Miranda rule to some degree, and distinguishing facts of prior case). Thus, courts have recognized "the need for 'flexibility in situations where the safety of the public and the officers are at risk,'" United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005) (quoting Reyes, 353 F.3d at 155), and that application of the public safety exception turns on whether, in the particular circumstances presented, officers had an objectively reasonable need to ask safety-related questions in order to neutralize a threat to themselves or to the public. See Estrada, 430 F.3d at 612 (exception is "'a function of the facts of cases so various

that no template is likely to produce sounder results than examining the totality of the circumstances in a given case'") (quoting Reyes, 353 F.3d at 152) (internal quotation omitted).

Two of the cases Liddell cites involve circumstances that differ significantly from those in this case. In United States v. Mobley, 40 F.3d 688 (4th Cir. 1994), the court declined to apply the exception where agents arrested a suspect who was alone at his home and "answered the door naked," making it "quite apparent that he was unarmed," and, as the suspect was being led away, asked whether there were any weapons present. Id. at 690-693 & n.2 (noting that "each case must be examined on its own facts" to determine whether application of exception is "justified by the totality of the circumstances in which the questioning takes place"). In United States v. Williams, 483 F.3d 425 (6th Cir. 2007), the court considered the government's appeal from an order suppressing an unwarned statement made by a suspect who was arrested in his room at a boarding house. The court stated that the public safety exception would apply only if officers reasonably believed that the suspect had a weapon and that someone other than the police could gain access to it, id. at 428-429, but rather than resolving whether the exception applied, remanded for additional fact findings by the district court. Id. at 430. Finally, in United States v. Raborn, 872 F.2d 589 (5th Cir. 1989), the Fifth Circuit observed that because only the police had access to a suspect's truck, application of the public safety exception to a

question about the location of a gun the defendant had deposited in the truck would be "difficult," before affirming the admission of the weapon on an inevitable discovery theory. 872 F.2d at 595.

Even if the panel's decision is in tension with the reasoning of the decisions Liddell cites, Liddell correctly notes that this is not a case in which the other courts of appeals have unanimously rejected a legal ruling of this Court. See Pet. 10 & n.1 (citing Fox). As explained above, the panel properly concluded that the public safety exception was applicable in the circumstances of this case - where officers asked a single limited question designed to protect their safety after they discovered a weapon in an arrestee's car. Given the correctness of that ruling, and the fact that review by the en banc Court could not eliminate any conflict among the courts of appeals, any disagreement that exists provides no independent basis for en banc review. Cf. United States v. Carlos-Colmenares, 253 F.3d 276, 277-278 (7th Cir. 2001) (where every other circuit had rejected Seventh Circuit's ruling, court had an "obligation to reconsider" its "isolated position").

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted.

MATTHEW G. WHITAKER
United States Attorney
Southern District of Iowa

s/Nina Goodman
NINA GOODMAN
Attorney, U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on April 2, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Nina Goodman

NINA GOODMAN
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1337

United States,

Appellee

v.

Antonio Ray Liddell,

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:05-cr-00568-RP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender would grant the petition for rehearing en banc.

Judge Colloton did not participate in the consideration or decision of this matter.

April 23, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,:		
Plaintiff,	:	**NO: 5:08-CR-04006-MWB**
vs.	:	
DOUGLAS DEAN JOHNSON, MICHAEL LEE ROTH, GARY HOWARD WILSON, JR. a/k/a, JR, And PHILLIP CRAIG SCHURKE	:	**DEFENDANT, DOUGLAS DEAN JOHNSON'S MOTION TO SUPPRESS SEARCH WARRANT AND REQUEST FOR ORAL ARGUMENT**
Defendants.	:	

COMES NOW, the Defendant, Douglas Dean Johnson, by and through his undersigned attorney, and pursuant to the Fourth Amendment to the United States Constitution, and in support of his Motion to Suppress Search Warrant and Request for Oral Argument states to the Court as follows:

1. On or about, May 8, 2007, Lt. Randall Kramer filed an Affidavit in Support of a Search Warrant before a Magistrate Judge in O'Brien County requesting a search warrant for the residence of Douglas Dean Johnson at 375 3rd Street N.W. in Primghar, O'Brien County, Iowa. The search warrant also asked for the ability to search three vehicles pertaining to the defendant.

2. The Application for Search Warrant was granted by the Magistrate Judge on or about May 8, 2007 and a search of the Defendant's residence occurred on May 9, 2007 resulting in the seizure of items of

evidence. Defendant has attached hereto, labeled Exhibit A and incorporated by reference herein, the materials regarding that search warrant. This exhibit contains the search warrant, the inventory of seized property, the return of search warrant, the application for the search warrant, pages from the O'Brien County Assessor's Office, Attachment A which is Lt. Kramer's Affidavit in support of the search warrant and the Court's endorsement on the search warrant application.

3. It was indicated by the Magistrate Judge that the Court relied on the written application for search warrant, Attachment A and the attached assessor record and photo in granting the search warrant.

4. Defendant contends that Lt. Kramer's Affidavit in support of the search warrant application failed to establish probable cause to issue the warrant.

5. Defendant contends that Lt. Kramer's Affidavit in support of the search warrant contains insufficient facts for the issuance of the warrant.

6. Defendant contends that Lt. Kramer's Affidavit was conclusory in nature and failed to give the Magistrate Judge a basis for determining that probable cause existed so that the search warrant could be issued.

7. Defendant contends that based upon the contents of the Affidavit that there was no fair probability that contraband or evidence of criminal activity would be found at the Defendant's residence in Primghar, Iowa.

8. Defendant contends that his Fourth Amendment rights under the United States Constitution were violated based upon the issuance of the search warrant and the resulting search of his home and seizure of evidence from his home.

9. Defendant requests that any items seized during the search of Defendant's home be suppressed and not be admitted into evidence in any trial of this matter.

10. Defendant requests oral argument on these issues.

WHEREFORE, Defendant requests that the search warrant in this case be suppressed, that any evidence seized as a result of this search warrant be suppressed and for such other and further relief as this Court deems just and proper in the premises.

/s/ Alfred E. Willett
ALFRED E. WILLETT LI0008215

TERPSTRA, EPPING & WILLETT
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Direct Contact E-Mail address:
kjensen@tewlaw.net

ATTORNEY FOR DEFENDANT,
DOUGLAS DEAN JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Assistant U.S. Attorney Kevin Fletcher, Robert Tiefenthaler, Esq., Jim McGough, Esq., Matthew Metzgar, Esq.

Copies to: Doug Johnson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,:		
Plaintiff,	:	**NO: 5:08-CR-04006-MWB**
vs.	:	
DOUGLAS DEAN JOHNSON, MICHAEL LEE ROTH, GARY HOWARD WILSON, JR. a/k/a, JR, And PHILLIP CRAIG SCHURKE	:	**MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT DOUGLAS DEAN JOHNSON'S MOTION TO SUPPRESS SEARCH WARRANT**
Defendants.	:	

INTRODUCTION

> "'The Fourth Amendment requires a showing of probable cause before a search warrant may be issued' *United States v. Williams* 477 F.3d 554, 557 (8th Cir. 2007)." U.S. v. Ball, 499 F.3d 890, 895 (8th Cir. 2007).

FACTS

In his application for search warrant, Lt. Kramer requested to search Douglas Dean Johnson's residence and vehicles in Primghar, Iowa in order to locate certain property. This property included,

> "Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, drug notes." See, Defendant's Exhibit A, p. 1.

In support of that application for search warrant, Lt. Kramer submitted Attachment A. See Defendant's Exhibit A, p. 3. In that attachment, Lt. Kramer listed pseudoephedrine purchases purportedly

made by this defendant between April 11, 2007 and April 26, 2007. If these pseudoephedrine purchases pertain to the same Douglas Johnson in this case, it was alleged that the purchases were in violation of the Iowa State law for the total amount of pseudoephedrine that can be purchased by one individual in a thirty (30) day period.

Lt. Kramer gave this additional information in Attachment A in support of the search warrant.

> "Based on this investigators training and experience it is known that persons that are involved with manufacturing methamphetamine will travel to several stores to obtain the pseudoephedrine pills, lithium batteries and other items that are needed to manufacture the methamphetamines. It is also known by this investigator based on his training and experience that persons involved in the gathering of the materials used in the manufacturing of methamphetamines, will store (hide) these items at their residence and/or in their vehicles. That persons involved with the gathering and/or manufacturing of methamphetamines will also be involved in the sale and/or use of illegal drugs and that they will store (hide) items such as pipes, scales, ledgers, illegal drugs, monies, and other drug paraphernalia at their residence and/or in their vehicles." See, Defendant's Exhibit A, p. 3.

There appears to be no other information in Attachment A in support of the application for search warrant.

The Magistrate Judge issued a search warrant in this case and stated that,

> "Court relied on written application for search warrant of Randall Kramer, Attachment A and attached Assessor record and photo." See, Defendant's Exhibit A, p. 6.

Defendant contends that the statements by Lt. Kramer were conclusory and failed to give the issuing Magistrate a substantial basis for

determining if probable cause existed to issue the warrant. The Eight Circuit Court of Appeals discussed the issue of an affidavit establishing probable cause for a warrant in a 2008 opinion.

> "An affidavit establishes probable cause for a warrant if it 'sets forth sufficient facts to establish that there is a "fair probability that contraband or evidence of" criminal activity will be found in a particular place to be searched.' *Davis* 471 F.3d at 946, *quoting Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)." U.S. v. Snyder, 511 F.3d, 813, 817 (8th Cir. 2008).

Defendant contends that the Affidavit did not set forth sufficient facts to establish there was a fair probability that contraband or evidence of criminal activity would be found in the Defendant's residence. There was no connection in the Affidavit whatsoever between the allegation that this Defendant had purchased too many pills and that these pills would then be found in his residence or his cars.

In a 2007 decision, the Eighth Circuit Court of Appeals dealt with the issue of conclusory statements made in affidavits to gain a search warrant.

> "Conclusory statements made by affiants fail to give the issuing magistrate a substantial basis for determining that probable cause exists. *United States v. Caswell*, 436 F.3d 894, 897-98 (8th Cir. 2006). It is the magistrate, and not the affiant, that is responsible for making this determination. *Illinois v. Gates*, 462, U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.' *Id.*" U.S. v. Summage, 481 F.3d 1075, 1077-78 (8th Cir. 2007).

Defendant contends that the Constitutional deficiency in Lt. Kramer's

Affidavit is that it was based on conclusory statements and failed to give the issuing Magistrate a substantial basis for determining if probable cause existed.

The Summage court went on to discuss the issue of the nexus between the evidence to be searched and the place to be searched.

> "We turn next to the question of the nexus between the evidence to be searched for and the place to be searched. *See United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000) ('[T]here must be evidence of a nexus between the contraband and the place to be searched before a warrant may properly issue . . .')." Id. at 1078.

Defendant contends that there was absolutely no nexus in Lt. Kramer's Affidavit between the evidence to be searched for and the place to be searched with the exception of Lt. Kramer's conclusory statements.

Defendant contends that based upon the conclusory statements in Lt. Kramer's Affidavit, the lack of sufficient facts to establish a fair probability that contraband or evidence of criminal activity would be found in the Defendant's residence and vehicles and the absence of a nexus between the contraband and the place to be searched that the search warrant issued by the Court on May 8, 2007 should be suppressed and that any items of evidence seized as a result of that search warrant should also be suppressed.

CONCLUSION

Based upon the aforementioned facts and legal authorities, Defendant requests that his Motion to Suppress be granted and that the items of evidence seized from Defendant's residence and vehicles be suppressed.

/s/ Alfred E. Willett
ALFRED E. WILLETT LI0008215

TERPSTRA, EPPING & WILLETT
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Direct Contact E-Mail address:
kjensen@tewlaw.net

ATTORNEY FOR DEFENDANT,
DOUGLAS DEAN JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Assistant U.S. Attorney Kevin Fletcher, Robert Tiefenthaler, Esq., Jim McGough, Esq., Matthew Metzgar, Esq.

Copies to: Doug Johnson

State of Iowa, County of O'Brien

Case No.

SEARCH WARRANT

Being duly sworn, I, the undersigned, say that at the place (and on the person(s) and in the vehicle(s)) described as follows:

Douglas Dean Johnson

375 3rd Street N.W., Primghar, O'Brien County, Iowa. Described as brown 1 ½ story single family dwelling with an attached 2 stall garage (see attached O'Brien County Assessor's sheet and photos)

1991 Chev blue/silver pickup bearing Iowa license 216UMF
1984 Chev Cavalier brown bearing Iowa license 087GNY
2000 Ford Taurus blue bearing Iowa license 075SKA

In O'Brien County, there is now certain property, namely:

Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, drug notes.

DEFENDANT'S EXHIBIT A

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

THEREFORE, you are hereby commanded to make immediate search of the described place (and person(s) and vehicle(s)) for the specified property, to seize the specified property if found, leaving a receipt for the seized property at the place of the search; to prepare a written inventory of the property seized; to return this warrant together with the written inventory; and to bring the seized property before me.

Dated this 8 day of May, 20 07 6:20 pm

Magistrate/Judge

Third Judicial District

O'Brien County, Iowa

O'BRIEN COUNTY SHERIFF
INVENTORY OF SEIZED PROPERTY

PROPERTY SEIZED FROM Doug & Denise Johnson

DATE 05-09-07 TIME 1:30 P.M.

Location of Seizure: 375 3rd St NW, Primghar IA 51245

Seizing Agency: O'Brien Cnty Sheriff's Office

Agency Case No. 07-1428 Seizing Officer Fjeld / Kramer

Estimated total value of property seized: $ —

DESCRIPTION OF PROPERTY SEIZED AND PRESUMED OWNERS

Item No.	Description	Name, Address of owner (If other than person above)
1.	One Walgreens receipt dated 09-26-07	Upstairs hall closet / [illegible] jacket
2.	Two pages of phone #'s	Workbench in garage
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Receipt of the items listed above is acknowledged on this 9th day of May 1997 2007

Signature & I.D. of Officer [signature]

(Attach additional pages as needed)

Case No.

State of Iowa, County of O'Brien

RETURN TO SEARCH WARRANT

Being duly sworn, I, the undersigned, say that I have executed the attached search warrant and the following is a complete inventory of the property seized pursuant to the warrant: ([ ] See attached list.)

Peace Officer

Subscribed and sworn to before me this ____ day of _____, 20___

_____
Magistrate/Judge

Third Judicial District,

O'Brien County, Iowa

Case No.

State of Iowa, County of O'Brien

APPLICATION FOR SEARCH WARRANT

Being duly sworn, I, the undersigned, say that at the place (and on the person(s) and in the vehicle(s)) described as follows:

Douglas Dean Johnson

379 3rd Street N.W. Primghar, O'Brien County, Iowa. Described as brown 1 ½ story single family dwelling with an attached 2 stall garage (see attached O'Brien County Assessor's sheet and photos)

1991 Chev blue/silver pickup bearing Iowa license 215HMF
1984 Chev Cavalier brown bearing Iowa license 067GNY
2000 Ford Taurus blue bearing Iowa license 076SKA

in O'Brien County, there is now certain property, namely:

Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, drug notes

which is:

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

The facts establishing the foregoing ground(s) for the issuance of a search warrant are as set forth in the Attachment(s) which are made part of this Affidavit.

Affiant

Subscribed and sworn before me this 8 day of May 20 07

Magistrate/Judge

Third Judicial District

O'Brien County, Iowa

WHEREFORE, the undersigned asks that a Search Warrant be issued.

County Attorney

Assistant County Attorney

Parcel: MOORE, DENISE D FKA PHILIPPI, DENISE D
Address: 571 3RD ST NW
City: PRIMGHAR
Urban/Residential
Legal: 710 AS DIVIDED BY 300 FT IN LOTS 5 BLK 4

Owner: PRIMGHAR RESIDENTIAL
Price: 300,000.00
Date Sold: 08/10
Type: Fee Simple

Land

Land Code	Front	Depth	Size 1	Size 2	Square	Adj	Base	Depth	Eff Front	Eff Depth	Unit Price	Total
RF Main	85.00	93.00	132.00	132.00	0.00			0.00	11.44	8.50	500.00	
Sub Total							10,200.00	8,925				
Grand Total							10,200.00	8,925				

Sales

Date	$ Amount	Instrument	Recording
08/01/2008	$0	Other	08 801 0002
12/07/1995	$14,000	Quit Claim Deed	95 12 0000 1587
12/01/1995	$0	Other	95 12 0000 1583
12/07/1994	$14,000	Quit Claim Deed	94 12 0000 1871

Building Permits

Date	Number	Fee	$ Amount	Reason

Values

	Appraised	Dwl %	Sq Ft Equivalent	Price/Sq Ft
Land	$4,000	80	80	50.00
Dwelling	$46,500	93	93	500.00
Other		20	20	
Total	$50,500	80	80	631.25

Res Structure (1 of 1)

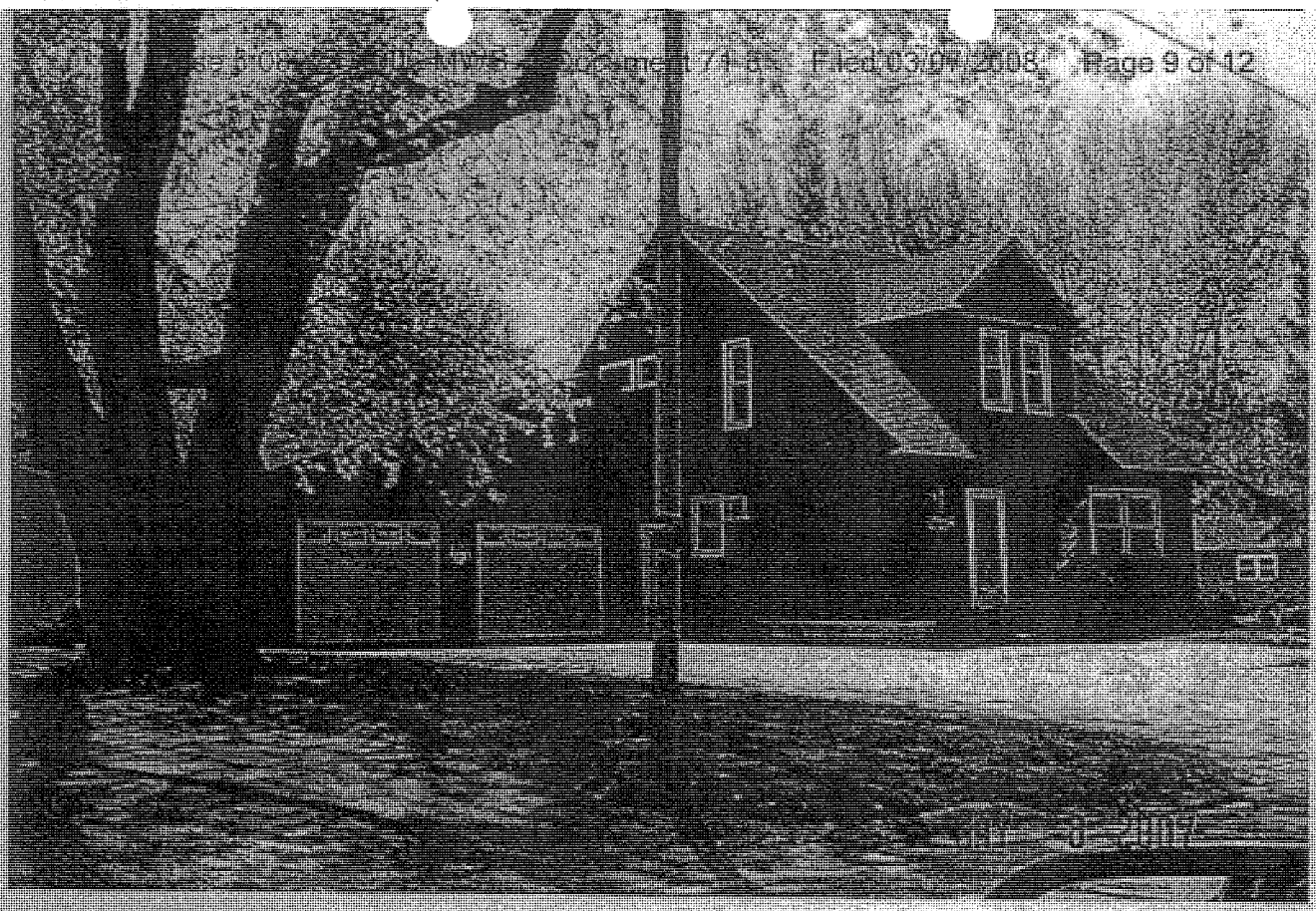
Use Code	101
Year Built	1900
Style	One Story Single Family
Exterior	1 Siding
Foundation	Stone
Roof Type	Gable
Roof Cover	Asphalt Shingle
Heat	1 1/2 Story Frame
Heating Fuel	Gas
Heating Type	Forced Air
Plumbing	Average
Electrical	Average
Attic	None
Basement	Full
Finished Basement	None
Attached Garage	None
Detached Garage	None
Carport	None
Porch	None

Fixtures

Bathrooms	1
Half Baths	0
Kitchens	1
Fireplaces	0

Plumbing

Fixture Count	7
Water Source	Municipal
Sewer Source	Municipal
Water Softener	None
Water Heater	Electric
Water Heater Capacity	40
Water Heater Age	1 Site Built
Water Heater Location	Utility Room
Water Heater Type	Tank
Water Heater Fuel	Electric
Water Heater Energy Factor	0.90
Water Heater Recovery Efficiency	0.75
Water Heater Insulation	None
Water Heater Wrap	None
Water Heater Temperature	120
Water Heater Temperature Type	Normal
Water Heater Temperature Source	Unknown
Water Heater Age Source	Unknown
Water Heater Capacity Source	Unknown
Water Heater Fuel Source	Unknown
Water Heater Energy Factor Source	Unknown
Water Heater Recovery Efficiency Source	Unknown
Water Heater Insulation Source	Unknown
Water Heater Wrap Source	Unknown
Water Heater Temperature Source	Unknown
Water Heater Temperature Type



Case No.

ATTACHMENT A

Affiant's name: Lt. Randall Kramer

Occupation: Deputy Sheriff-O'Brien County Sheriff's Office Years: 20

Assignment: Investigations Years: 20

Your affiant conducted an investigation and received information from fellow officers and other sources as follows:

( ) See investigative and police reports. Attachment(s) .)

Doug Johnson has made the following purchases of products containing pseudoephedrine on the dates listed:
April 11, 2007- Sterling Drug-Worthington, MN-1 box 20ct 120m=2.4grs pseudoephedrine
April 18, 2007-Kmart-Fairmont, MN-1 box 120mg 20ct= 2.4grs pseudoephedrine
April 18, 2007-Shopko-Fairmont, Mn-1box 120mg 20ct=2.4grs pseudoephedrine
April 18, 2007-Sterling Pharmacy-Fairmont, Mn-1 box 120mg 10ct= 1.2grs pseudoephedrine
April 18, 2007-J&R Pharmacy-Fairmont, Mn-1 box 120mg 10ct=1.2grs pseudoephedrine
April 25, 2007-Paullina Drug-Paullina, IA-1 box 120mg 10ct=1.2grs pseudoephedrine
April 26, 2007-Walgreen's-Worthington, Mn-1 box 120mg 20ct=2.4grs pseudoephedrine
April 26, 2007-WalMart-Worthington,Mn-1 box 120mg 20ct=2.4grs pseudoephedrine
April 26, 2007-Walgreen's-Worthington, Mn-2 boxes 120mg 20ct=4.8grs pseudoephedrine

TOTAL PSEUDOEPHEDRINE PURCHASED by Doug Johnson IN A 30 DAY PERIOD: 20.4grams of pseudoephedrine.

Iowa Code Section 126.23A (2)a - prohibits a person from purchasing more than seven thousand five hundred milligrams (7.5grams) of pseudoephedrine in a 30 day period.

Based on this investigators training and experience it is known that persons that are involved with manufacturing methamphetamine will travel to several stores to obtain the pseudoephedrine pills, lithium batteries and other items that are needed to manufacture the methamphetamines. It is also known by this investigator based on his training and experience that persons involved in the gathering of the materials used in the manufacturing of methamphetamines, will store (hide) these items at their residence and/or in their vehicles. That persons involved with the gathering and/or manufacturing of methamphetamines will also be involved in the sale and/or use of illegal drugs and that they will store (hide) items such as pipes, scales, ledgers, illegal drugs, monies, and other drug paraphernalia at their residence and/or in their vehicles.

ENDORSEMENT ON SEARCH WARRANT APPLICATION

1. In issuing the search warrant, the undersigned relied upon the sworn testimony of the following person(s) together with statements and information contained in the application and any attachments thereto:

Name:	Address:

2. The following described material was relied upon and is incorporated in the application and this endorsement:

Court relied on written Application for Search Warrant of Randall Emmert, Attachment A is attached hereto and incorporated herein

3. Abstract of Testimony: (Information received in addition to that set forth in the application and the attachments thereto:

None

4. The information appears credible because(select):

☐ A. Sworn testimony indicates this informant has given reliable information on previous occasions; or,

☐ B. Sworn testimony indicates this informant has not been used before but that either the informant appears credible or the information appears credible for the following reasons (if credibility is based on this ground, the magistrate MUST set out reasons here):

Magistrate/Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 08-4006-MWB
	)	
vs.	)	
	)	
DOUGLAS DEAN JOHNSON,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESISTANCE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the United States of America and files its resistance to defendant's motion to suppress evidence seized on May 8, 2007.

The government will file its brief in support of this resistance separately.

WHEREFORE, defendant's motion to suppress evidence should be denied in its entirety.

Respectfully submitted,
MATT M. DUMMERMUTH
United States Attorney

By: s/ Kevin C. Fletcher

KEVIN C. FLETCHER
Assistant United States Attorney
600 4th Street, Suite 670
Sioux City, IA 51101
Kevin.Fletcher@usdoj.gov

CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on March 17, 2008.

UNITED STATES ATTORNEY

BY: s/ Michelle Hatting

COPIES TO:

Alfred Willett

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 08-4006-MWB
	)	
vs.	)	
	)	
DOUGLAS DEAN JOHNSON,	)	
	)	
Defendant.	)	

GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS RESISTANCE TO DEFENDANT'S MOTION TO SUPPRESS

TABLE OF CONTENTS

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COMES NOW, the United States of America and files its Memorandum in Support of its Resistance to Defendant's Motion to Suppress the May 8, 2007, search warrant in O'Brien County, Iowa.

I. INTRODUCTION AND BACKGROUND

The United States resists defendant's Motion to Suppress the May 8, 2007, search warrant in O'Brien County, Iowa to search Douglas Dean Johnson; 375 3rd Street N.W. Primghar, O'Brien County, Iowa; 1991 Chev pickup; 1984 Chev Cavalier; and 2000 Ford Taurus for Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glassware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, and drug notes.

II. ARGUMENTS

Defendant argues there was insufficient facts presented to the issuing magistrate to support probable cause. (Defendant's motion and memorandum to suppress March 7, 2008). Probable cause was shown in the affidavit for the search warrant.[1] Also, the good-faith exception to the exclusionary rule applies. Defendant's motion to suppress should be denied.[2]

The Fourth Amendment, applicable to the states through the 14th Amendment, guarantees that the "right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S.

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[1] A copy of the search warrant, application, affidavit, attachments, and return are marked as Government Exhibit 1. This is the same as Defendant's Exhibit A.

[2] A copy of the items defendant asks to be suppressed from the search, a Walgreen's receipt dated 9-26-07, is marked as Government's Exhibit 2.

Const. amend. IV; *Payton v. New York*, 445 U.S. 573, 576 (1980); *United States v. Ameling*, 328 F.3d 443, 447 (8th Cir. 2003).

A. Good Faith Exception

The issue of whether the *Leon* good faith exception applies can be first taken up without deciding the issue of probable cause. *United States v. Koons*, 300 F.3d 985, 991 (8th Cir. 2002); see *United States v. Frangenberg*, 15 F.3d 100, 102 (8th Cir. 1994). The good-faith exception to the exclusionary rule also applies.

The Supreme Court created the good-faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court held that evidence seized by police officers acting in objectively reasonable good-faith reliance on a search warrant issued by a neutral and detached magistrate, but ultimately found to be unsupported by probable cause, need not be suppressed. *Leon*, 468 U.S. at 922-25. The government bears the burden of establishing that the good-faith exception to the federal exclusionary rule should apply in a particular case. *Leon*, 468 U.S. at 924. The Supreme Court noted the division of authority between the judicial officer, whose duty includes "issu[ing] a warrant comporting in form with the requirements of the Fourth Amendment," and the police officer who, in the ordinary case, "cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient." Id. at 921.

The Supreme Court explained that the exclusionary rule is a deterrent measure designed to deter police misconduct. Id. at 906; *United States v. Johnson*, 78 F.3d 1258, 1261 (8th Cir. 1996); *United States v. Moore*, 956 F.2d 843, 847 (8th Cir. 1992). The Supreme Court believed that, where police obtain evidence in reliance on a search

warrant that is subsequently found to be defective, "there is no police illegality and thus nothing to deter." *Leon* at 921. Hence, exclusion of seized evidence under those conditions serves no salutary purpose, because that sanction "cannot logically contribute to the deterrence of Fourth Amendment violations." Id. The Supreme Court concluded that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id.

Lieutenant Randall Kramer of the O'Brien County Sheriff's Office (Lt. Kramer) prepared the search warrant. Lt. Kramer had the O'Brien County Attorney review the search warrant before it was presented to the magistrate. *Massachusetts v. Sheppard*, 468 U.S. 981, 985 & 989 (1984). The magistrate reviewed and signed the warrant. Lt. Kramer had no expectation or reason to question the magistrate's determination that the warrant was sufficient. Lt. Kramer cannot be expected to question the magistrate's judgment, and the exclusionary rule is to deter police misconduct, not a magistrate's error. *Leon*, at 921. The United States is not conceding there was not probable cause. The search warrant should be upheld.

The Supreme Court acknowledged that suppression would continue to be appropriate in those 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." Id. at 919. The Supreme Court identified four circumstances in which the exclusionary rule is still appropriate: (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless

disregard of the truth;" (2) "where the issuing magistrate wholly abandoned his judicial role;" (3) if the "warrant [is] based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;'" and (4) if the "warrant [is] so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citations omitted); *Johnson*, 78 F.3d at 1261 (identifying these four circumstances from *Leon*). None of these four apply here.

B. Probable Cause

There was sufficient probable cause here for the affiant to rely on the search warrant signed by the magistrate. In issuing the search warrant, the magistrate must rely solely upon the supporting affidavit to issue the warrant. Only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause. *United States v. Etheridge,* 165 F.3d 655, 656 (8th Cir. 1999); *United States v. Leichtling,* 684 F.3d 553, 556 (8th Cir. 1982). The four corners of this search warrant show probable cause to search the defendant's residence based upon the following items summarized from Lt. Kramer's affidavit (Attachment A):

(1) The nine purchases of pseudoephedrine from April 11, 2007, through April 26, 2007, show defendant, in a thirty day period purchased 20.4 grams of pseudoephedrine;

(2) The purchases of pseudoephedrine exceed 7.5 grams of pseudoephedrine Doug Johnson could purchase in a 30 day period under Iowa Code Section 126.23A (2)(a);

(3) The O'Brien County Assessor's sheet and photos show Doug Johnson lives at 375 3rd Street N.W. Primghar, Iowa;

(4) Lt. Kramer is a 30 year law enforcement officer with 20 years of investigative experience. The training and experience of Lt. Kramer shows the pseudoephedrine purchases in a 30 day period by Doug Johnson in violation of Iowa law shows it is known that persons that are involved with manufacturing methamphetamine will travel to several stores to obtain the pseudoephedrine pills, lithium batteries and other items that are needed to manufacture the methamphetamines; and,

(5) Lt. Kramer's training and experience also shows it is known that persons involved in the gathering of the materials used in the manufacturing of methamphetamines, will store (hide) these items at their residence and/or in their vehicles. That persons involved with the gathering and/or manufacturing of methamphetamines will also be involved in the sale and/or use of illegal drugs and that they will store (hide) items such as pipes, scales, ledgers, illegal drugs, monies, and other drug paraphernalia at their residence and/or in their vehicles.

The four corners of the search warrant application established probable cause. There was a good faith belief by Lt. Kramer that the contents of this application contained probable cause, that the defendant was involved in the manufacturing/distribution of methamphetamine, and that there would be evidence of manufacturing/distribution found at the defendant's residence.

Probable cause to issue a search warrant exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that a crime has been or is being committed. This is a significantly lower quanta of proof than is required to prove guilt. It is based on the facts and circumstances viewed from the vantage point of a prudent, reasonable, cautious police officer, guided by his experience and training. It is the totality of these facts which is the relevant consideration. *Illinois v. Gates,* 462 U.S. 213, 231 (1983); *United States v. Magness,* 69 F.3d 872, 874 (8th Cir. 1995). "Probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.'" *Illinois v. Gates* at 462 U.S. at 241, citing *Brinegar v. United States,* 338 U.S. 160, 175 (1949). "When the affidavit supporting the search warrant sets forth facts sufficient to create a fair probability that evidence of a crime will be found in the place to be searched, probable cause exists." *United States v. Terry*, 305 F.3d 818, 822 (8th Cir. 2002).

> Searches pursuant to search warrants are preferred over warrantless searches. If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'

Gates at 236, citing *United States* v. *Chadwick*, 433 U.S. 1 (1977).

The Supreme Court has repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. *Illinois v. Gates,* 462 U.S. 213, 236 (1983). A magistrate's determination of probable cause should be paid great deference by reviewing courts. *Illinois v. Gates,* 462 U.S. at 236. The Eighth Circuit also gives great deference to the magistrate's finding of probable cause. *Frangenberg,* 15 F.3d at 102, citing *United States v. Curry,* 911 F.2d 72, 75 (8th Cir. 1990). The duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis" for concluding that probable cause existed. *Illinois v. Gates,* 462 U.S. at 238-39.

The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, 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. *Illinois v. Gates,* 462 U.S. at 238. This standard of review is all the Fourth Amendment requires. *Illinois v. Gates,* 462 U.S. at 236-37.

The Supreme Court has shown a strong preference for searches conducted pursuant to a warrant in *Illinois v. Gates*, 462 U.S. at 236:

> "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca, supra*, 380 U.S. at 108, 85 S. Ct., at 745, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant' "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hyper technical, rather than a common sense manner." Id., at 109, 85 S. Ct., at 746.

Affidavits for search warrants "are normally drafted by nonlawyers in the midst of haste of a criminal investigation. Technical requirements of elaborate specificity once

exacted under common law pleading have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). "Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'" *Illinois v. Gates*, 462 U.S. at 235. They are not to be judged as an entry in an essay contest, but must be judged by the facts they contain. *United States v. Harris,* 403 U.S. 573, 579 (1971). The search warrant in this case was written by a police officer, a lay person, and should be reviewed under the requirements of *Illinois v. Gates* .

To determine whether information provided in a search warrant establishes probable cause, a magistrate looks to the "totality of the circumstances." *Illinois v. Gates,* 462 U.S. at 238.

Lt. Kramer, affiant, did not rely upon a facially deficient warrant or have the magistrate abandon his judicial role. The search warrant signed by the magistrate was based on facts showing probable cause. After-the-fact scrutiny by the reviewing court is improper. The affiant followed the law by going to a magistrate with a search warrant. This was done instead of relying on exigent circumstances. This is a case where there was probable cause. This is the preference of law to get a warrant. The affiant should not be punished for obtaining a warrant.

The purchase of more than 7.5 grams of pseudoephedrine in a thirty day period in violation of Iowa Code Section 124.213 (Supp. 2005) does provide probable cause of methamphetamine manufacturing and evidence of such methamphetamine manufacturing

may be found at defendant's property. *State v. Myers*, 728 N.W. 2d 225, *2 (Iowa App. 2006) (unpublished).

A key precursor chemical needed to manufacture methamphetamine is pseudoephedrine. *United States v. Ameling*, 328 F.3d 443, 448 (8th Cir. 2003) (methamphetamine known to be a methamphetamine precursor); *United States v. Goff*, 449 F.3d 884, 886 (8th Cir. 2006) (pseudoephedrine element used in the manufacture of methamphetamine); *United States v. Goodman*, 509 F.3d 872, 876-77 (8th Cir. 2007) (pseudoephedrine and are associated with methamphetamine manufacturing) (citations omitted). Pseudoephedrine has limited legal uses. "Pseudoephedrine is an over-the-counter decongestant. Unlike sugar, if you do not have a cold, a headache, or sinus problems there are remarkably few things you can do with pseudoephedrine except make illegal narcotics." *United States v. Bewig*, 354 F.3d 731, 736 (8th Cir. 2004); *United States v. Brown*, 461 F.3d 1062, 1069 (8th Cir. 2006) (investigators found large quantities of blister packs dumped in trash receptacles outside of defendant's business).

Defendant's purchases of a key methamphetamine precursor chemical of pseudoephedrine in the last 30 days was a violation of the State of Iowa law. This provided probable cause to search for evidence of methamphetamine manufacturing at defendant's property. In addition, further facts were added that Lt. Kramer and a magistrate are "'[e]ntitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense,' magistrates can infer, in the case of drug dealers, that 'evidence is likely to be found where the dealers live.'" *United States v. Caswell*, 436 F.3d 894, 899 (8th Cir. 2006); *United States v. Luloff*,

15 F.3d 763, 768 (8th Cir. 1994) (agent's averment based upon experience drug traffickers often keep in their residences records of their illicit activity, large amounts of cash, assets purchased with the proceeds of drug transactions, and guns to protect their drugs and cash, provided the issuing magistrate a substantial basis for finding probable cause to search defendant's residence); *United States v. Whitner*, 219 F.3d 289, 297-98 (3rd Cir. 2000) (same); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999) (same).

Defendant's nine purchases of pseudoephedrine in fifteen days, in violation of Iowa law, shows an on-going criminal activity of manufacturing methamphetamine and possession of pseudoephedrine in violation of the law of the State of Iowa. This is not stale information. *United States v. Kattaria*, 503 F.3d 703, 707 (8th Cir. 2007) (passage of time is less significant when there is cause to suspect continuing criminal activity of a marijuana manufacturing/grow operation).

The facts and circumstances of the May 8, 2007, search warrant viewed from the vantage point of a prudent, reasonable, cautious police officer, guided by his experience and training under the totality of the facts shown above provide probable cause exists sufficient to warrant a man of reasonable prudence in the belief that manufacturing of methamphetamine has been or is being committed at defendant's property. *Illinois v. Gates*, 462 U.S. 213; *United States v. Magness*, 69 F.3d at 874. The search warrant should also be upheld under the good-faith exception to the exclusionary rule established in *Leon*.

III. CONCLUSION

WHEREFORE, for all the above reasons, defendant's Motion to Suppress should be denied in its entirety.

Respectfully submitted,

MATT M. DUMMERMUTH
United States Attorney

By: s/ Kevin C. Fletcher

KEVIN C. FLETCHER
Assistant United States Attorney
600 4th Street, Suite 670
Sioux City, IA 51101
Kevin.Fletcher@usdoj.gov

CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on March 17, 2008.

UNITED STATES ATTORNEY

BY: s/ Michelle Hatting
COPIES TO:
Alfred Willett

Case No.

COPY

State of Iowa, County of O'Brien

SEARCH WARRANT

Being duly sworn, I, the undersigned, say that at the place (and on the person(s) and in the vehicle(s)) described as follows:

Douglas Dean Johnson

375 3rd Street N.W. Primghar, O'Brien County, Iowa: Described as brown 1 ½ story single family dwelling with an attached 2 stall garage (see attached O'Brien County Assessor's sheet and photos)

1991 Chev blue/silver pickup bearing Iowa license 216HMF
1984 Chev Cavalier brown-bearing Iowa license 087GNY
2000 Ford Taurus blue-bearing Iowa license 076SKA

in O'Brien County, there is now certain property, namely:

Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, drug notes.

GOVERNMENT EXHIBIT 1

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which is:

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

THEREFORE, you are hereby commanded to make immediate search of the described place (and person(s) and vehicle(s)) for the specified property; to seize the specified property if found, leaving a receipt for the seized property at the place of the search; to prepare a written inventory of the property seized; to return this warrant together with the written inventory; and to bring the seized property before me.

Dated this 8 day of May, 20 07. 6:20 pm

Jeffrey P. Lunde
Magistrate/~~Judge~~

Third Judicial District

O'Brien County, Iowa

O'BRIEN COUNTY SHERIFF
INVENTORY OF SEIZED PROPERTY

PROPERTY SEIZED FROM Doug & Denise Johnson

DATE 05-09-07 TIME 1:30 P.M.

Location of Seizure: 375 3rd St NW, Primghar IA 51245

Seizing Agency: O'Brien County Sheriff's Office

Agency Case No. 07-1428 Seizing Officer: Fjeld / Kramer

Estimated total value of property seized: $ —

DESCRIPTION OF PROPERTY SEIZED AND PRESUMED OWNERS

Item No.	Description	Name, Address of owner (If other than person above)
1.	One Walgreens receipt dated 09-26-07	Upstairs hall closet / In a mens jacket.
2.	Two pages of phone #'s	Work bench in garage
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10		

Receipt of the items listed above is acknowledged on this 9th day of May ~~109~~ 2007.

Signature & I.D. of Officer [signature]

(Attach additional pages as needed)

Case No.

State of Iowa, County of O'Brien

RETURN TO SEARCH WARRANT

Being duly sworn, I, the undersigned, say that I have executed the attached search warrant and the following is a complete inventory of the property seized pursuant to the warrant: (☐ See attached list.)

Peace Officer

Subscribed and sworn to before me this
____ day of _____, 20___.

_____
Magistrate/Judge

Third Judicial District,

O'Brien County, Iowa

Case No.

State of Iowa, County of O'Brien

APPLICATION FOR SEARCH WARRANT

Being duly sworn, I, the undersigned, say that at the place (and on the person(s) and in the vehicle(s)) described as follows

Douglas Dean Johnson

375 3rd Street N.W. Primghar, O'Brien County, Iowa: Described as brown 1 ½ story single family dwelling with an attached 2 stall garage (see attached O'Brien County Assessor's sheet and photos)

1991 Chev blue/silver pickup bearing Iowa license 216HMF
1984 Chev Cavalier brown-bearing Iowa license 087GNY
2000 Ford Taurus blue-bearing Iowa license 076SKA

in O'Brien County, there is now certain property, namely:

Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, drug notes.

which is:

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

The facts establishing the foregoing ground(s) for the issuance of a search warrant are as set forth in the Attachment(s) which are made part of this Affidavit.

Affiant

Subscribed and sworn before me this 8 day of May, 2007.

Magistrate/Judge

Third Judicial District

O'Brien County, Iowa

WHEREFORE, the undersigned asks that a Search Warrant be issued.

County Attorney

Assistant County Attorney

Property Record Card WORKING O'Brien County Assessor's Office Tue 5/8/2007 2:11 PM Page 11

PDF+PIN: 001+0000223200
Address: 375 3RD ST NW
City: PRIMGHAR
Urban/Residential
Legal: 710-4-5 SHUCK'S ADDITION LOT 5 BLK 4

Deed: MOORE, DENISE D FKA PHILIPH, DENISE D
Contract:
CID#: 5
DBA:

Map Area: PRIMGHAR RESIDENTIAL
Route: 000-000-000
Tax Dist: 00100
Plat Page:

Checks/Tags:
Lister/Date:
Review/Date: KMM, 06/11/1998
Entry Status: Inspected

Land

Land Basis	Front	Rear	Side 1	Side 2	R. Lot	SF	Acres	Depth Factor	EFF	Qual./Land	Unit Price	Total	Topo	Econ	Other	$Adj	Land Total (Rnd nearest $10)
FF Main	83.00	83.00	132.00	132.00	0.00			0.98	81.34	R-60	$60.00						
Sub Total						10,956.00	0.252					$4,880	10%	0%	0%	$0	$4,390
Grand Total						10,956.00	0.252					$4,880					$4,390

Sales

Date	$ Amount	NUTC	Recording
03/21/2002	$0	D004	BK 86 PG 662
12/07/1995	$12,500	D000	BK 82-PG 752
11/01/1995	$0	D012	BK 82-PG 685
10/01/1992	$14,500	C017	BK 80-PG 263

Building Permits

Date	Number	Tag	$ Amount	Reason

Values

Type	Appraised	B of R	St. Equalized	Prior Yr. 2005
Land	$4,390	$0	$0	$4,390
Dwlg	$49,550	$0	$0	$50,190
Impr		$0	$0	
Total	$53,940	$0	$0	$54,580

Res Structures 1 of 1

Occ. Code	101
Occ. Descr.	Single-Family / Owner Occupied
Year Built	1914
EFA / EFYr	92 / 1914
Arch. Dsgn	N/A
Style	1 1/2 Story Frame
AreaSF/TLA	748 / 2,008
Grade	4+5
Grade Mult.	1.150
Condition	NML
Phy-Depr.%	45%
Basement	Full
No Bsmt Flr.	0
Heat	FHA - Gas
AC	Yes
Attic	None

Finish

Ttl Rooms Above #	8	Bedrooms Above #	2
Ttl Rooms Below #	3	Bedrooms Below #	1
Bsmt Fin Area #1			
Bsmt Fin Area #2			
Bsmt Fin Area #3			

Foundation	C Blk
Exterior Walls	Vert Wd
Roof	Asph / Gable
Interior Finish	Plas / Panel
Flooring	Carp / Hdwd

Non-base Heating

Floor/Wall #	0
Pipeless #	0
Hand Fired (Y/N)	No
Space Heat #	0

Fireplace

Appliances

Range Unit	Intercom System
Oven Unit	Intercom w/Music
Dishwasher	Built-In Stereo
Microwave	Bl Stereo(SpkrsOnly)
Trash Compactor	
Jennair	
Security System	
Built-In Vacuums	

Plumbing

Full Bath	1
Shower Stall Bath	
Toilet Room	
Lavatory	
Water Closet	1
Sink	
Shower Stall/Tub	
Mtl St Sh Bath	
Mtl Stall Shower	
No Bathroom	
Wet Bar	
Whirlpool Bathroom	
Whirlpool Tub	
No Hot Water Tank	
No Plumbing	
Sewer & Water Only	
Water Only w/Sink	
Hot Tub	
Bidet	
Fbgls Service Sink	
Urinal	

Addition

Addition	1 of 3
Year Built	1996
EFA	10
EFA Year	1996
Style	1 Sty Frm
Area (SF)	496
Condition	Normal
Phy-Depr.%	4.00
Bsmt (SF)	
NoBsmt Flr(SF)	
Heat	FHA - Gas
AC	Yes
Attic (SF)	

See other pages for more additions.

Obsolescence

Functional %	30%
Economic %	30%
Other %	0%

Architec/Design
Location
None
None

Garage

Garage	1 of 1
Style	Att Frm
W X L	0' X 0'
Area (SF)	1,276
Year Built	1996
EFA	10
EFF Year	1996
Grade	Main Building
Condition	NML
Bsmt (SF)	
Qtrs Over	None
Qtrs Over (SF)	
Qtrs AC (SF)	
%Phy/Fobs/Eqbs	4.00-30-30
Door Oprnr	2
Bsmt Stalls	

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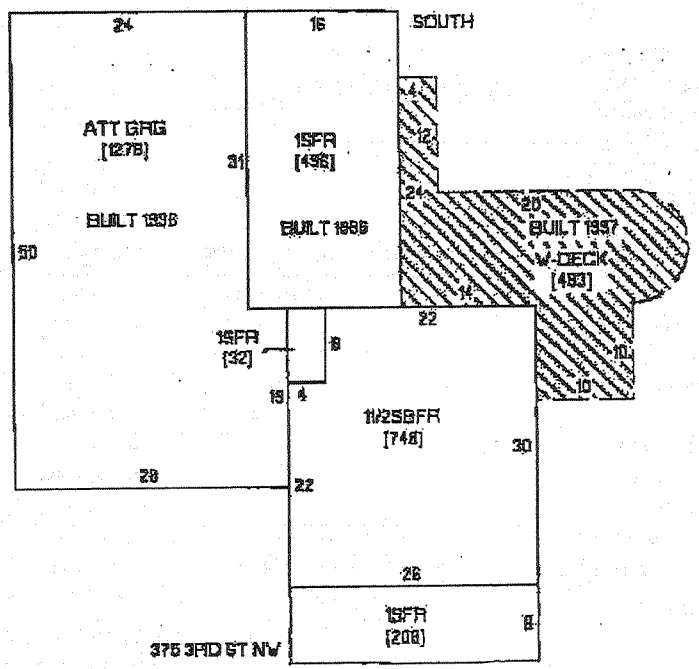
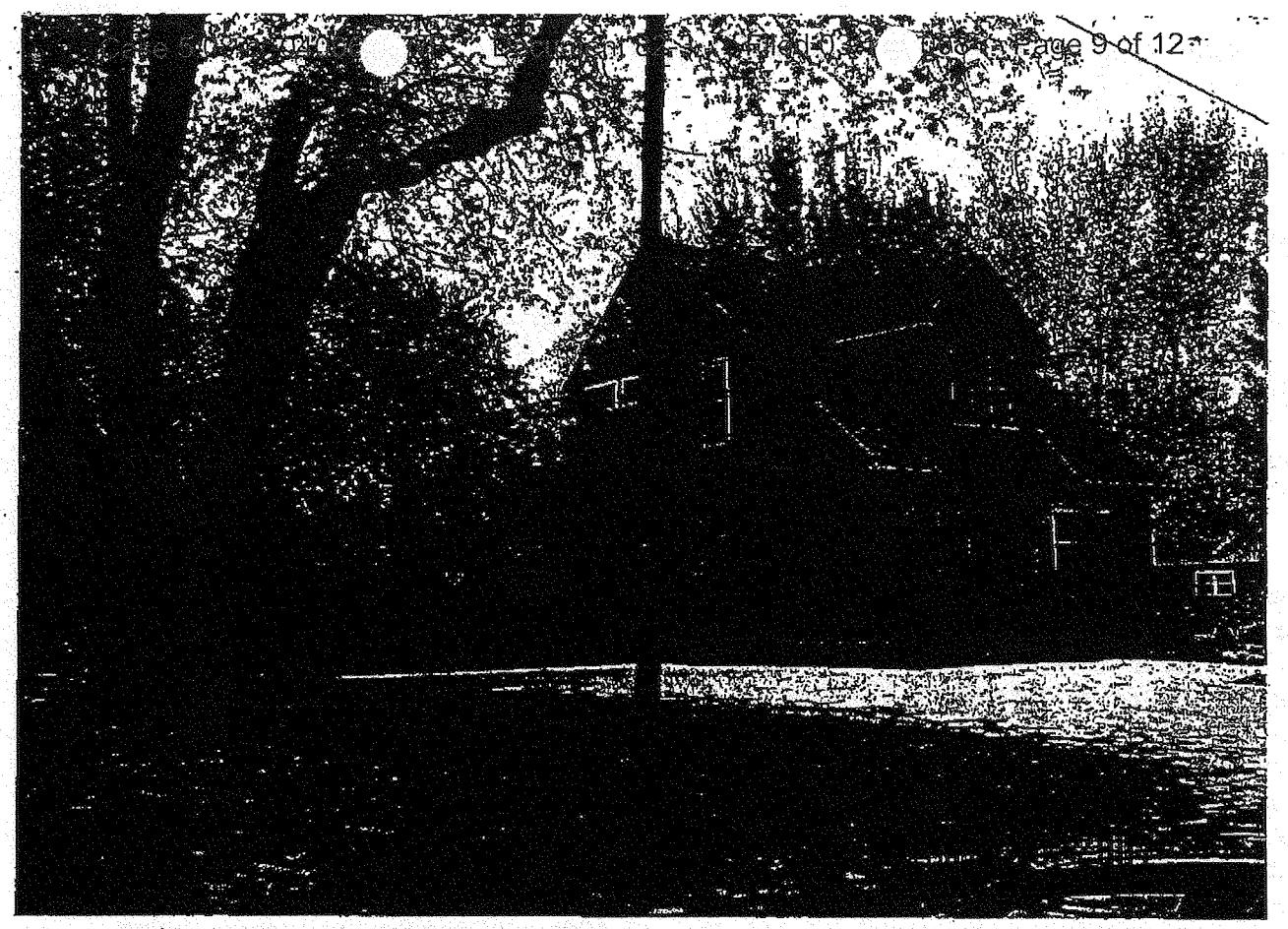
Vanguard Appraisals, Inc.

Pilot Year	Comment	Value Type	Land Value	Dwelling Value	Improvement Value	M & E Value	Total Value
2005		Appraised	$4,390	$50,190	$0	$0	$54,580
2004		Appraised	$4,390	$41,020	$0	$0	$45,410
2003		Appraised	$4,390	$41,020	$0	$0	$45,410
2002		Appraised	$4,390	$41,020	$0	$0	$45,410
2001		Appraised	$4,390	$41,020	$0	$0	$45,410
1999		Appraised	$4,390	$47,040	$0	$0	$51,430



Sketch 1 of 1



Case No.

ATTACHMENT A

Affiant's name: Lt. Randall Kramer

Occupation: Deputy Sheriff-O'Brien County Sheriff's Office Years: 30

Assignment: Investigations Years: 20

Your affiant conducted an investigation and received information from fellow officers and other sources as follows:

(☐ See investigative and police reports, Attachment(s) .)

Doug Johnson has made the following purchases of products containing pseudoephedrine on the dates listed:
April 11, 2007- Sterling Drug-Worthington, MN-1 box 20ct 120m=2.4grs pseudoephedrine
April 18, 2007-Kmart-Fairmont, MN-1 box 120mg 20ct= 2.4grs pseudoephedrine
April 18, 2007-Shopko-Fairmont, Mn-1box 120mg 20ct=2.4grs pseudoephedrine
April 18, 2007-Sterling Pharmacy-Fairmont, Mn-1 box 120mg 10ct= 1.2grs pseudoephedrine
April 18, 2007-J&R Pharmacy-Fairmont, Mn-1 box 120mg 10ct=1.2grs pseudoephedrine
April 25, 2007-Paullina Drug-Paullina, IA-1 box 120mg 10ct=1.2grs pseudoephedrine
April 26, 2007-Walgreen's-Worthington, Mn-1 box 120mg 20ct=2.4grs pseudoephedrine
April 26, 2007-WalMart-Worthington,Mn-1 box 120mg 20ct=2.4grs pseudoephedrine
April 26, 2007-Walgreen's-Worthington, Mn-2 boxes 120mg 20ct=4.8grs pseudoephedrine

TOTAL PSEUDOEPHEDRINE PURCHASED by Doug Johnson IN A 30 DAY PERIOD-20.4grams of pseudoephedrine.

Iowa Code Section 126.23A (2)a - prohibits a person from purchasing more then seven thousand five hundred milligrams (7.5grams) of pseudoephedrine in a 30 day period.

Based on this investigators training and experience it is known that persons that are involved with manufacturing methamphetamine will travel to several stores to obtain the pseudoephedrine pills, lithium batteries and other items that are needed to manufacture the methamphetamines. It is also known by this investigator based on his training and experience that persons involved in the gathering of the materials used in the manufacturing of methamphetamines, will store (hide) these items at their residence and/or in their vehicles. That persons involved with the gathering and/or manufacturing of methamphetamines will also be involved in the sale and/or use of illegal drugs and that they will store (hide) items such as pipes, scales, ledgers, illegal drugs, monies, and other drug paraphernalia at their residence and/or in their vehicles.

Case No.

ENDORSEMENT ON SEARCH WARRANT APPLICATION

1. In issuing the search warrant, the undersigned relied upon the sworn testimony of the following person(s) together with statements and information contained in the application and any attachments thereto:

Name:	Address:

2. The following described material was relied upon and is incorporated in the application and this endorsement:

Court relied on written Application for Search Warrant of Randall Kramer, Attachment A + attached Assessor record + photo

3. Abstract of Testimony: (Information received in addition to that set forth in the application and the attachments thereto:

None

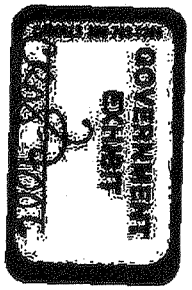
3. (Cont.)

4. The information appears credible because(select):

☐ A. Sworn testimony indicates this informant has given reliable information on previous occasions; or,

☐ B. Sworn testimony indicates this informant has not been used before but that either the informant appears credible or the information appears credible for the following reasons (if credibility is based on this ground, the magistrate MUST set out reasons here);

Jeffrey P. Trunk
Magistrate/Judge



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DOUGLAS DEAN JOHNSON, Defendant.	No. CR08-4006-MWB **REPORT AND RECOMMENDATION ON MOTIONS TO SUPPRESS**

This matter is before the court on two motions to suppress filed by the defendant Douglas Dean Johnson. In one motion, Doc. No. 71, Johnson seeks to suppress evidence seized from a Primghar, Iowa, residence during execution of a search warrant issued on May 8, 2007. In a separate motion, Doc. No. 70, he seeks to suppress evidence seized during a search of his property, outbuildings, and curtilage in Clay County, Iowa, during execution of a search warrant issued on July 11, 2008. Johnson argues neither of the search warrant applications established probable cause to issue the warrant. The plaintiff (the "Government") has resisted both motions. Doc. Nos. 82 & 81, respectively. Pursuant to the Trial Management Order, Doc. No. 16, motions to suppress were assigned to the undersigned United States Magistrate Judge for review, the holding of any evidentiary hearing, and the filing of a report and recommended disposition of the motions. The court held a hearing on the motions on March 27, 2008, at which Assistant United States Attorney Kevin Fletcher appeared on behalf of the Government, and Johnson appeared in person with his attorney, Al Willett.

Both parties agree that because the magistrates who issued the warrants relied solely on the affidavits in support of the two search warrants, "only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *United States v. Etheridge*, 165 F.3d 655, 656 (8th Cir.

1999) (internal quotation marks, citations omitted). Therefore, no testimony was offered at the hearing, and the court heard oral argument on the motions. At the parties' request, the court will consider the exhibits attached to Johnson's motions to be true and correct copies of the two warrants, warrant applications, affidavits, and supporting documents. *See* Doc. Nos. 70-3 & 71-3. The court will discuss the law applicable to review of a search warrant application, and then will address the challenged search warrants in chronological order.

Applicable Law

The United States Supreme Court has set the standard for review of a search warrant application, as follows:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States,]* 309 U.S. [410,] 419, 89 S. Ct. [1509,] 590[, 21 L. Ed. 2d 637 (1969)]. "A grudging or negative attitude by reviewing courts toward warrants," *[United States v.] Ventresca*, 380 U.S. [102,] 108, 85 S. Ct. [741,] 745, [13 L. Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, [380 U.S.] at 109, 85 S. Ct. at 746.
>
> . . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960). *See United States v. Harris*, 403 U.S.

> 573, 577-583, 91 S. Ct. 2075, 2079-2082, 29 L. Ed. 2d 723 (1971). [FN10]
>
> > [FN10] We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *Ventresca*, *supra*, 380 U.S. at 109, 85 S. Ct. at 746. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317, 2331 & n.10, 76 L. Ed. 2d 527 (1983).

Thus, the scope of this court's review of the search warrant in this case is limited to a determination of whether the magistrate had a "substantial basis" to conclude a search would uncover evidence of wrongdoing. In conducting this review, the court is mindful that

> affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law have no proper place in this area." *Ventresca, supra*, 380 U.S. at 108, 85 S. Ct. at 745. . . . [M]any warrants are – quite properly . . . issued on the basis of nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings.

Gates, 462 U.S. at 235-36, 103 S. Ct. at 2331. As the Supreme Court further explained:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, 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. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States,* 362 U.S. [257,] 271, 80 S. Ct. [725,] 736[, 4 L. Ed. 2d 697 (1960)]. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the prior legal standard].

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332. *Accord United States v. Lucca*, 377 F.3d 927, 933 (8th Cir. 2004) (noting the reviewing court must pay "great deference" to the issuing magistrate's probable cause determinations, citing *Gates*).

Notably, even if, in hindsight, the information in the affidavit is deemed insufficient to support a finding of probable cause to issue the warrant, the evidence will not be suppressed if the officers acted in reasonable, good faith reliance on a search warrant issued by a neutral and detached magistrate. *United States v. Leon*, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 3420, 82 L. Ed. 2d 677 (1984); *accord Lucca*, 377 F.3d at 933. "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself (*e.g.*, where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.*, 468 U.S. at 923, 104 S. Ct. at 3421 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. As the *Leon* Court explained:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search.
>
> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15, 104 S. Ct. at 3416 (internal citations omitted). The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964), and *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

Even if a magistrate improperly analyzes the totality of the circumstances in finding probable cause, under *Leon*, the exclusionary rule should not be applied to exclude evidence as a means of punishing or deterring an errant or negligent magistrate. The Supreme Court found that penalizing officers who act in good faith on a warrant for a magistrate's error in issuing the warrant "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921, 104 S. Ct. at 3419. The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
>
> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future

> counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

O'Brien County Search Warrant

On May 8, 2007, Lt. Randall Kramer, an O'Brien County Sheriff's Deputy, prepared an Application for Search Warrant to search the following person and property:

> Douglas Dean Johnson
>
> 375 3rd Street N.W. Primghar, O'Brien County, Iowa; Described as brown 1 1/2 story single family dwelling with an attached 2 stall garage (see attached O'Brien County Assessor's sheet and photos)
>
> 1991 Chev blue/silver pickup bearing Iowa license [number]
> 1984 Chev Cavalier brown-bearing Iowa license [number]
> 2000 Ford Taurus blue-bearing Iowa license [number]

Doc. No. 71-3 at 5. Lt. Kramer stated the above person and property contained "certain property, namely: Pseudoephedrine pills, lithium batteries, ether, sulfuric acid, muriatic acid, plastic tubing, glass ware, coffee filters, packaging materials, blender, aluminum foil, methamphetamines, drug paraphernalia, ledgers, scales, monies, [and] drug notes," all of which he indicated was "[p]roperty that has been obtained in violation of law"; "[p]roperty, the possession of which is illegal"; "[p]roperty used or possessed with intent

to be used as the means of committing a public offense or concealed to prevent an offense from being discovered"; and "[p]roperty relevant and material as evidence in a criminal prosecution." *Id.* at 5-6.

In support of the search warrant application, Lt. Kramer submitted an Affidavit in which he stated, "Doug Johnson has made the following purchases of products containing pseudoephedrine on the dates listed," listing nine transactions between April 11 and April 26, 2007, at several pharmacies in Minnesota, and one pharmacy in Iowa. *Id.* at 10. He stated the nine pseudoephedrine purchases by "Doug Johnson in a 30 day period" totaled "20.4 grams of pseudoephedrine." *Id.* He cited "Iowa Code § 126.23A(2)a," which he stated prohibits a person from purchasing more than 7500 milligrams, or 7.5 grams, of pseudoephedrine in any 30-day period. He further stated the following:

> Based on this investigator[']s training and experience it is known that persons that are involved with manufacturing methamphetamine will travel to several stores to obtain the pseudoephedrine pills, lithium batteries and other items that are needed to manufacture the methamphetamines. It is also known by this investigator based on his training and experience that persons involved in the gathering of the materials used in the manufacturing of methamphetamines, will store (hide) these items at their residence and/or in their vehicles. That persons involved with the gathering and/or manufacturing of methamphetamines will also be involved in the sale and/or use of illegal drugs and that they will store (hide) items such as pipes, scales, ledgers, illegal drugs, monies, and other drug paraphernalia at their residence and/or in their vehicles.

Id.

Lt. Kramer attached a printout from the O'Brien County Assessor's Office showing that the real property located at 375 3rd Street, N.W. in Primghar, Iowa, was owned by a Denise D. Moore f/k/a Denise D. Philiph, and listing certain information about the residence on the property (dimensions, number of bedrooms and bathrooms, finish,

plumbing, appliances, etc.). He also attached an unlabeled photograph of a house, presumably the house in question. *Id.* at 7-9.

No other information was provided in support of the search warrant application. The magistrate who reviewed the application indicated he had "relied on [the] written Application for Search Warrant of Randall Kramer, Attachment A [the Affidavit] and attached Asses[s]or record and photo." *Id.* at 11. Under "Abstract of Testimony," the magistrate wrote "None," indicating no further information was received beyond that set forth in the application. *Id.*

In the application for the search warrant and the supporting documents, Lt. Kramer made no connection whatsoever between Johnson and the property to be searched, nor did he inform the court how he determined that the defendant Douglas Dean Johnson was the same "Doug Johnson" who purchased the pseudoephedrine. The officer provided no information to indicate Johnson's connection to the residence sought to be searched; his relationship, if any, to or with the property owner Ms. Moore; who owned the vehicles listed in the warrant application and what their connection was to the residence or to Johnson; or what information led the officer to believe evidence of criminal activity might be found at the residence, in the vehicles, or on Johnson's person. Regarding the list of pseudoephedrine purchases, the officer stated he had "conducted an investigation and received information from fellow officers and other sources" indicating "Doug Johnson" had made the listed pseudoephedrine purchases. *See* Doc. No. 71-3 at 10. He failed to cite the source of his information sufficiently for the court to determine if the source was reliable.

On its face, the warrant application failed to support a probable cause determination. The application failed to provide a substantial basis for anyone to "make a practical, common-sense decision" that contraband or evidence of a crime likely would be found on

Johnson's person, in the listed vehicles, or at the residence. Notably, the Government basically conceded this point at the hearing.

Apparently, Ms. Moore is Johnson's fiancée, and Johnson was living at the Primghar residence. However, even though these facts may have been known to Lt. Kramer, they were not included in the warrant application. Considering only the information found within the four corners of the warrant application, the application and supporting documents failed to support the magistrate's probable cause determination. *See Gates, supra; Lucca, supra; Etheridge, supra.* Further, the court finds the warrant application was so facially deficient that the magistrate's issuance of the warrant was "a rubber stamp for the police," merely ratifying the bare bones conclusions of Lt. Kramer. *See Leon*, 468 U.S. at 91-15, 104. S. Ct. at 3416. Thus, the exclusionary rule should be applied and the evidence seized during execution of the O'Brien County warrant should be excluded.

The seized evidence included two items. First, the officers seized two pages of phone numbers. The Government indicated at the hearing that those two pages of phone numbers cannot be located, and the Government will not offer those pages into evidence at the trial. Johnson's motion should be granted as to the two pages of phone numbers. Second, the officers seized a receipt from a Walgreen's in Worthington, Minnesota, showing the purchase of pseudoephedrine on April 26, 2007. The same purchase of the drug is listed in the warrant application, *see* Doc. No. 71-3 at 10, and the Government obtained a copy of the receipt from Walgreen's, independently of the discovery of the identical receipt during execution of the search warrant. Thus, it appears the copy of the receipt obtained from Walgreen's would be admissible at trial. However, because the search warrant is invalid, the Government should be precluded from offering evidence that the receipt was found at the Primghar residence.

Clay County Search Warrant

On July 11, 2007, Clay County Sheriff's Deputy Casey Timmer prepared an Application for Search Warrant to search "a Morton-type building on the property of Doug Johnson located at 2970 290th Street, Dickens, Clay County, Iowa, other outbuildings on the property, [and] the curtilage of said property," for "pseudoephedrine, methamphetamine, ledger books, books of account, scales, seal a meal machines, baggies or other packaging materials, paraphernalia used for the consumption and packaging of drugs or to contain the same, money, and remnants of methamphetamine lab[.]" Doc. No. 70-3 at 2. In support of the warrant application, Deputy Timmer prepared an affidavit in which he detailed pseudoephedrine purchases by "Doug Johnson" between June 18 and 26, 2007, totaling 10,320 mg., in excess of the legal limit of 7500 mg. in a thirty-day period under Iowa law. *See id.* at 3-4.

In his affidavit, Deputy Timmer also provided the following information:

> The [pharmacy] logs show a Primghar address for Johnson. The undersigned is aware that Johnson also owns a property located at 2970 290th Street, Dickens, Clay County, Iowa. On this date [i.e. July 11, 2007], the undersigned went to that property with O'Brien County Lt. Randy Kramer. While at the residence, the undersigned spoke with the tenants of the property, Randy and Kim Berger. Tenants advised that they do not have access to a certain Morton-type building on the property, but that Johnson does frequent that building at least weekly. The undersigned could see that the windows of the building are covered with a combination of wood, cardboard, and styrofoam. Tenants also showed the undersigned a burn barrel on the premises. In plain view toward the top of the pile in the burn barrel were a number of ripped lithium batteries, consistent with having been used in the methamphetamine manufacturing process, along with what appears to be empty pseudoephedrine blister packs. There are a number of other outbuildings on the premises where illegal items could be stored.

> Based on training and experience, I know that persons manufacturing methamphetamine can and do use other people to purchase pseudoephedrine for them. Pseudoephedrine is a key ingredient in the manufacture of methamphetamine. People buying pseudoephedrine for meth manufacturers often receive meth in exchange for these purchases. These persons also will shop different stores on the same date in an attempt to avoid detection by law enforcement. As users of meth, they often maintain drugs, paraphernalia, notes, and cash for the purchases of pseudoephedrine in their homes or other buildings. They also use their vehicles for transportation to make the purchases and to store the contraband.
>
> Johnson shopped for pseudoephedrine in different stores on the same date. He also violated Iowa Code § 124.213 by purchasing more than 7500 mg pseudoephedrine in a 30 day period. These are indications that the pseudoephedrine was purchased for use in the manufacture of meth.
>
> A review of Johnson's criminal history shows drug related convictions.

Doc. No. 70-3 at 4-5.

In the magistrate's Endorsement on the search warrant application, she indicated she relied on Deputy Timer's affidavit and also on sworn testimony taken from the deputy. As the abstract of the officer's testimony, the magistrate incorporated the deputy's Affidavit. Doc. No. 70-3 at 6. The magistrate found the information presented justified probable cause, and she issued the search warrant. *Id.*

Johnson argues his "mere purchases of pseudoephedrine" are insufficient, standing alone, to support the magistrate's probable cause determination for issuance of the warrant. He argues further that the information provided by the tenants of Johnson's Clay County property was "insufficient and stale as it pertains to the granting of a search warrant." Doc. No. 70-2 at 2. Johnson claims that although the tenants told the officer that Johnson visited the property "at least weekly," there was no information about the last time Johnson was present at the property. The tenants stated they did not have access to the

Morton-type building, but Johnson did have access to the structure. However, there is no information about who else may have had access to the building. They showed the officer the burn barrel containing items of interest to his investigation, but they offered no information about when the burn barrel was used last, or by whom. Johnson argues that overall, the information contained in the warrant application was insufficient to show a reasonable probability that evidence of a crime would be found in the place sought to be searched. *Id.* at 2-4, citing *United States v. Turner*, 431 F.3d 332, 336 (8th Cir. 2006) (citing *Gates*); *United States v. Gettle*, 474 F.3d 1081, 1086 (8th Cir. 2007) (discussing factors in determining staleness, holding "[p]robable cause must exist at the time the search warrant is issued.").

The Government argues the warrant application contained sufficient information to support the magistrate's probable cause determination, pointing to six items of evidence that, when taken together, supported the officer's good faith belief that evidence of a crime could be found at the property:

> (1) The five purchases of pseudoephedrine from June 18, 2007, through June 26, 2007, show defendant, in a thirty day period purchased 10,320 milligrams of pseudoephedrine;
>
> (2) The purchases of pseudoephedrine exceeded 7,500 milligrams of pseudoephedrine Doug Johnson could purchase in a 30 day period under Iowa Code Section 126.213A;
>
> (3) The pseudoephedrine logs from the local pharmacies show defendant's address in Primghar, Iowa, but Inv. Timmer was personally aware defendant also owns a property located at 2970 290th Street, Dickens, Clay County, Iowa;
>
> (4) Inv. Timmer and Lt. Randy Kramer of the O'Brien County Sheriff's Office, on July 11, 2007, went to defendant's property at 2970 290th Street in Dickens, Iowa. Inv. Timmer spoke with the tenants of the property, Randy and Kim Berger. The tenants advised they do not have access to a certain Morton-type building on the property, but that defendant does frequent that building at least weekly. Inv. Timmer saw the

windows of the outbuilding are covered with a combination of wood, cardboard, and styrofoam. The tenants also showed Inv. Timmer a burn barrel on the premises, where in plain view, on top of the pile in the burn barrel were a number of ripped lithium batteries and empty pseudoephedrine blister packs. These items, the ripped lithium batteries and empty pseudoephedrine blister packs, are consistent with having been used in the methamphetamine manufacturing process;

(5) Inv. Timmer is a 7 1/2 year law enforcement officer with 1 year of investigative experience. [*See* Doc. No. 70-3 at 3.) The training and experience of Inv. Timmer shows that persons manufacturing methamphetamine can and do use other people to purchase pseudoephedrine for them. Pseudoephedrine is a key ingredient in the manufacture of methamphetamine. People buying pseudoephedrine for meth manufactures often receive meth in exchange for these purchases. These persons also will shop different stores on the same date in an attempt to avoid detection by law enforcement. As users of meth, they often maintain drugs, paraphernalia, notes, and cash for the purchases of pseudoephedrine in their homes or other buildings. They also use their vehicles for transportation to make the purchases and to store the contraband. The purchases of pseudoephedrine in violation of Iowa law indicates the pseudoephedrine was purchase[d] for use in the manufacture of meth; and,

(6) Inv. Timmer also performed a review of defendant's criminal history which showed drug related convictions.

Doc. No. 81-2 at 5-7.

The court finds the totality of the information presented to the magistrate would support "a practical, common-sense decision . . . that contraband or evidence of a crime [would] be found" on Johnson's property. *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332. Giving the magistrate's probable cause determination the "great deference" it deserves, the court further finds the magistrate had a substantial basis for concluding a search of the property would uncover evidence of wrongdoing. *Id.*; *see Lucca*, 377 F.3d at 933.

Johnson's staleness argument is without merit under these facts. In order to justify a search warrant for the property, it is irrelevant whether others besides Johnson also had access to the Morton-type building or to the burn barrel. The officers saw, in plain view, evidence that precursors for the manufacture of methamphetamine had been burned in the burn barrel on property owned by Johnson. The property's tenants stated Johnson frequented the property at least weekly. The officers had pharmacy logs showing Johnson had purchased in excess of the legal limit of pseudoephedrine. And they had evidence that Johnson had prior drug-related convictions. While Johnson's argument about who had access to the property and when may be useful in defending the case, it does not defeat the fact that the magistrate had ample information before her to support probable cause to search Johnson's property.

Further, even if the warrant application was lacking, the court finds that in the case of the Clay County warrant, the officers reasonably and in good faith relied on the warrant issued by the magistrate. Their belief that their conduct did not violate the Fourth Amendment was objectively reasonable, and the evidence seized in the search should not be suppressed. *See Leon, supra.*

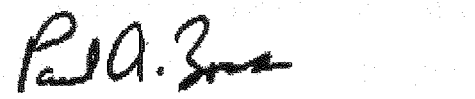
Therefore, for the reasons discussed above, IT IS RESPECTFULLY RECOMMENDED that Johnson's motion (Doc. No. 71) to suppress the evidence seized in the search of the Primghar residence be **granted**, and his motion (Doc. No. 70) to suppress the evidence seized in the search of the Clay County property be **denied**.

Any party planning to file objections to this Report and Recommendation must order a transcript of the suppression hearing **by April 4, 2008**, **regardless of whether the party believes a transcript is necessary to argue the objection**. If an attorney files an objection to this Report and Recommendation without having ordered the transcript as required by this order, the court may impose sanctions on the attorney.

Objections to this Report and Recommendation must be filed by **April 8, 2008**. Responses to objections must be filed by **April 15, 2008**.

IT IS SO ORDERED.

DATED this 1st day of April, 2008.



PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

TRIAL AND POST-APPEAL PRACTICES AND PROCEDURES

PRESENTED BY

THOMAS O'FLAHERTY
CJA PANEL ATTORNEY

TRIAL & POST-APPEAL POINTERS

Tom O'Flaherty
O'Flaherty Law Firm
P.O. Box 710
North Liberty, IA 52317-0710

Introduction

First things first: keeping license to practice law

Find (or be) a mentor.

Don't neglect client matters.

Get needed help to move ahead.

See Iowa Supreme Court v. James Hall, Jr. (3/5/07); and

Iowa Supreme Court v. Brandon Adams (3/28/08).

I want to exercise my rights:

- I want to remain silent.
- I want my lawyer to be here, now.
- Contact my lawyer, or let me, now.
- I don't want to say anything else.

Pretrial

Use an active motions practice to further your defense.

Apply Larry Pozner and Roger Dodd's "straight face" test.

Anything not frivolous is okay. Couch it in constitutional terms.

The "dead cats" practice, advocated by F. Lee Bailey, appeals to judges' basic fairness.

Paper the prosecution to death. Litigate anything but the facts.

When hearings are granted, use them to preserve sworn testimony, to create inconsistencies, to establish facts, etc. (as you would use depositions in Iowa District Court).

Take depositions (or get deposition transcripts) in Iowa criminal cases that can be used to advantage in federal prosecutions.

Totality = all of everything.

Circumstances = everything defined, explained, expanded, used, etc.

Rule 611(b) goes to credibility; the motions judge ***must*** decide credibility of witnesses to make factual and legal determinations.

Use a receptive judge to further your research and motions practice. (Example: request a daily trial transcript.)

Update motions and trial memoranda with new Eighth Circuit cases.

Do ***not*** stipulate to chain of custody (or anything else) unless the government grants a written concession or the defense gains an advantage.

Fight every case as if it were a capital case. Take a martial arts class to see what it feels like to be hit. Your client feels that way every day while waiting in jail.

Follow the discovery rules. People get hurt when attorneys abuse discovery.

Voir dire

Primacy and recency (people remember best what they hear first and last). Apply this principle throughout trial.

Have another person take notes while you are on your feet, talking with the jurors.

Remember Rich Kammen's admonition: "no notepads at cocktail parties."

Get potential jurors talking. Prosecutors rarely do this. If the defense can get the jurors to open up and be comfortable talking with us, then jurors may be more receptive to defense arguments.

Use the 11 to 1 scenario to set up, discuss, and get rid of weak or intransigent jurors. May lead to a strike for cause. Don't just ask if others agree. Repeat the 11 to 1 scenario over and over.

Ask the potential jurors to assume the case is over and your client chose not to testify. Will that affect the jurors? How? Why? Ask the jurors if they think the client should have testified and whether they will hold it against the client.

Talk about the client who didn't commit the crime but can't say why (Gary Dotson case).

Wrong place and wrong time. Have you ever been falsely accused?

Do not rely on stereotypes. They are dangerous to assume because they may not hold true.

When a potential juror gives an answer that may lead to a strike for cause, use it to find out who agrees or disagrees. That's the time to learn what others believe about the issue.

Opening

File a specific Rule 615 motion before the government gives an opening statement.

Ask for what you want or you won't get it.

Have others watch for jurors/witnesses' conversations in the hallways and the "holding tank" before, during, and after testimony, breaks, lunch, the end of the day, etc.

If client and witnesses are not separated, have client listen in the holding tank; or have friendly witnesses report on conversations in the tank.

Use any alleged violations at trial to question offending witness on subject and extent of conversation and whether anyone put witness up to it. Were threats made against client?

Do ***not*** permit prosecutors to vouch for their witnesses. They don't even seem aware that they do it! Call them on the practice. Ask the judge to make them stop.

Don't reserve an opening, generally. ***Never*** waive an opening. Period.

Tell a short story, without maps. Thank them *once*.

A legal fact is a *negative* defense: "The burden of proof is always with the government."

A persuasive fact is a *positive* defense: "We will show that Dan is not guilty because . . ."

In a snitch case, tell the jury that the written plea deal between the government and the snitch requires the snitch to testify truthfully. Tell the jury that no other witness needs a written reminder to tell the truth!

Cross-examination

Firmly control the witness at all times.

Don't ask questions if you can't control the witness.

Get relevant parts of PSIRs on government witnesses.

Do the most investigation of a criminal witness' background that finances will allow.

Everyone can afford a free look at ICIS.

See jailhouse confessional where snitch was a bigamist.

Use pretrial hearings to subpoena police to bring their records on education, training, special courses, discipline, etc.

The government ***always*** opens the door to further exploration, especially when prosecution uses police as "experts."

Respond to any objections with: "scope of direct; goes to motive, bias, credibility." (Credibility is always before the jury.)

Ask: "What makes you 'special,' agent?" Ask this particularly when two agents of different ages testify.

In a co-defendant case, if a witness does not mention your client, do ***not*** ask any questions. Asking questions can only hurt your client.

Use an incarcerated prisoner to describe the tedium, danger, and fishbowl nature of daily prison life to show what every snitch is trying to avoid. Goes to a witness' motive in testifying. Jurors do *not* know what prison life is like; prisoners do and can explain it clearly. Use this testimony in closing to show the snitch's incentive to fabricate, exaggerate, conspire, etc.

Root out and use every prior act of perjury and false statement that a snitch has provided in the past: applications for court-appointed counsel, child support cases, tax returns, car loans, etc.

Get a jury instruction to show that acts of perjury require the jury to give special scrutiny to a witness' trial testimony.

Closing

Review all possible objections. Listen for objectionable statements. Make the objections if the prosecutor crosses the line.

Do not permit the prosecutor to vouch for witnesses. *See Freisinger.*

Eighth Circuit found use of "I submit" to be a "questionable practice."
U.S.A. v. Mullins, 446 F.3d 750, 760 (8th Cir. 2006).

Reasonable doubt instructions are insurance policies against convicting innocent people.

Presumption of innocence belongs to the client; jury holds it in trust for client throughout trial; it is client's legal property and now it is time for the jury to give it back by safely delivering her to family and friends. Emotions drive 85% of all decision making.

Instructions

Object to government's use of phrase "***failure*** to testify." Instead, use "Mary Smith chose not to testify" or "John Jones exercised his right not to testify in this case."

Use the primary placement of "not guilty" favored by Chief Judge Pratt. Object to any other placement. Client is ***still*** presumed not guilty.

See Bess Myerson instruction now used by Judge Pratt.

Sentencing

"Sentence enhancement" does not exist.

Life sentences handed out as if study hall detentions.

Eighth Circuit Internal Operating Procedures

Internal operating procedures set out the permanent appearance rule.

Court discourages motions to withdraw from a criminal case. Court grants such motions only for good cause.

If a client wants to appeal, trial counsel ***must*** preserve the right by:

filing an appearance;
filing a notice of appeal with district court clerk within 10 days of judgment; and
diligently pursuing the appeal until the Court permits counsel to withdraw.

If a client does *not* want to appeal, counsel must file a written notice with the district court of the client's decision not to appeal.

Court uses its inherent power to appoint counsel in civil cases sparingly. There will be no fee for your services. You will get a lot of practice. The Court will reimburse you for expenses.

Use form to document notice to client of rights to request rehearing and to petition for *certiorari* and to document client's understanding of those rights.

Recent cases require counsel to explain rights to client and to assure Court that counsel gave the explanation.

Always request a rehearing, followed by a certiorari petition, in life sentence cases. (Dispense with form in theses cases.)

If government asks for a rehearing or *certiorari*, you are in good position to have your case affirmed. In your resistance/brief, take full advantage of facts found/implied by lower court. Do *not* accept government's version of statement of facts. Advocate client's position. Raise any valid legal argument. Appeals court may favor your reasoning over lower court's rationale.

Use Anders brief as a last resort. Most criminal records have some colorable issue worth arguing, even if only to request a good faith extension of existing law.

Discipline of Attorneys

Carefully follow the rules on deadlines for filing motions and briefs. Ask the court clerk for help in meeting your obligations to the Court. Failure to meet those obligations can result in an order to show cause, leading to discipline.

To dismiss a criminal appeal voluntarily, a defendant must personally sign a written consent to the dismissal. File the consent with the Court.

The Court gives precedence to criminal appeals in its scheduling. Goal is to decide each appeal within eight to ten months of the filing of the notice of appeal. Decisions are usually issued within 90 days of oral argument. The Court discourages motions for extension of time. File such motions only for good cause. If the Court grants a short extension, it is unlikely to grant another.

The Court does not favor rehearing requests. There is a strict 14 day deadline (***no*** grace period for mailing). If the Court finds an *en banc* hearing request to be frivolous and to have led to an unreasonable increase in costs, the Court may tax the costs to counsel.

A rehearing request is *not* a prerequisite to a petition for writ of *certiorari* to the United States Supreme Court. File the *cert.* petition within 90 days of the circuit court's decision (or denial of any rehearing request, whichever comes later).

The Circuit's internal operating procedures (at Appendix B) sets out timelines of appeals in criminal cases.

If client asks for rehearing or *cert.* petition, counsel ***must*** file request or petition. Exception occurs where counsel determines that such request or petition is completely frivolous. In that case, counsel must move to withdraw and notify the Court that counsel has advised client in writing about the timing and procedures for *pro se* filing of *in forma pauperis* application for rehearing and *cert.* petition.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. CR 99-70
vs.	)	DISPOSITION OF
	)	SEIZED PROPERTY
DAVID ALLEN,	)	
	)	
Defendant.	)	

APPEARANCES:

RICHARD L. MURPHY, ESQ., Assistant United States Attorney, United States Attorney's Office, The Hach Building, Suite 400, 401 First Street SE, Cedar Rapids, Iowa 52401-1825, on behalf of the Plaintiff.

THOMAS J. O'FLAHERTY, ESQ., O'FLAHERTY LAW FIRM, P.O. Box 520, Swisher, Iowa 52338-0520, on behalf of the Defendant.

DISPOSITION OF SEIZED PROPERTY HELD
BEFORE THE HONORABLE MICHAEL J. MELLOY,

taken at the Federal Building, 101 First Street SE, Cedar Rapids, Iowa, on the 26th day of March, 2001, commencing at 2:43 p.m., reported by Kay C. Carr, Certified Shorthand Reporter in and for the State of Iowa.

Kay C. Carr, CSR, RPR
U.S. Courthouse & Federal Building
101 First Street SE
Cedar Rapids, Iowa 52401
(319) 286-2324

1 I guess I asked that the last time and it wasn't done,
2 which raises the issue why wasn't my prior order
3 complied with, Mr. Murphy?
4 MR. MURPHY: Well, Your Honor, I don't
5 know directly. Part of it has to do with the fact
6 that this case was a case handled by Erin Burke of
7 our office and Ms. Burke, when she left our office,
8 her cases were -- were taken up by others, but to my
9 knowledge, there was nothing in this case that was
10 at least public, if you will, that needed to be
11 taken up. I don't know that anybody was aware of
12 the Court's previous order regarding the --
13 regarding the return of the items.
14 I certainly don't believe I was aware of
15 it, but -- but in any event, we also believe there's
16 authority that says that these ought not be returned
17 and that's really, I guess, the legal issue that
18 we're here on. Because we think there's authority
19 that was not -- the Court was not made aware of and
20 it's been relatively recent authority at the time of
21 the -- of the -- at the time of the sentencing. So
22 although certainly our office became aware of this
23 later on when the Court -- particularly when the
24 Court sent me a letter. At that point, we then
25 believed that there was legal authority that would

1 suggest that we should not return these firearms and
2 we should either -- if we're able to agree with the
3 defendant that it would be illegal to do so or
4 improper to do so or otherwise do exactly what we're
5 doing now and that is have the issue resolved by the
6 Court.
7 THE COURT: Well, who owns these weapons?
8 Is that a dispute?
9 MR. O'FLAHERTY: They were all taken from
10 David Allen, Your Honor. And he, at the time in
11 1997 when they were taken, he was the rightful owner
12 of them. Some of them were given to him by his
13 father and he would ask that those in particular be
14 returned to his brother, Richard Allen, and Richard
15 Allen had filed an affidavit to that effect and it's
16 attached to our memorandum in this case. I can set
17 out those particular firearms. There are three of
18 them that --
19 THE COURT: You haven't -- have you talked
20 about this at all; tried to come to some
21 accommodation?
22 MR. ~~MURPHY:~~ O'FLAHERTY: The Government's position has
23 been that Mr. Allen -- Mr. David Allen should not
24 get these guns back and no one should get the guns
25 back because they -- for him to direct the guns to

1 go to the brother would be constructive possession
2 of the guns and they're opposed to that. So yes, we
3 have talked, but there's been no -- no resolution of
4 the matter.
5 MR. MURPHY: Well, I mean I think that's
6 fair, but again, this is the first I've heard that
7 there was some claim of special status of three of
8 the guns. But beyond that, I think the rest of that
9 is accurate.
10 MR. O'FLAHERTY: Well, Your Honor, I
11 disagree with that. As far as the -- the memorandum
12 goes, I believe that it's mentioned in there that
13 some belong to the family or came from the family.
14 MR. MURPHY: Just to be clear, what I'm
15 suggesting is you've never talked to me about can we
16 return at least the three guns or something like
17 that.
18 MR. O'FLAHERTY: Right. I'm sorry if I
19 misunderstood your comment. Right on page 3 of the
20 memorandum, it just says that some of the guns were
21 owned by family members and given to him and the
22 family member was the father, who was obviously the
23 common father to David and Richard.
24 Your Honor, I have -- to try to help the
25 Court with the Court's question about why the

1 Government didn't go forward after you had ordered
2 them to do that in May, I have one exhibit,
3 Defendant's Exhibit A. I have given a copy to
4 Mr. Murphy. I don't have any other evidence or
5 testimony to put on today, but I would offer
6 Defendant's Exhibit A.
7 THE COURT: Any objection?
8 MR. MURPHY: No, I have no objection,
9 Judge.
10 Your Honor, I have some exhibits as well.
11 THE COURT: Exhibit A is admitted.
12 (Defendant's Exhibit A was offered
13 and received in evidence.)
14 THE COURT: Well, this says you weren't
15 going to seek forfeiture of the guns then,
16 Mr. Murphy?
17 MR. MURPHY: That's correct.
18 MR. O'FLAHERTY: And that was done a month
19 after your order, Your Honor. You gave the
20 Government 60 days in which to do so, and 30 days
21 later, they sent this letter to John Wagner in
22 Marion saying they weren't going to seek forfeiture
23 of the firearms, and now nearly another year has
24 gone by --
25 THE COURT: Well, if you made a conscious

1 decision 30 days after I ordered you to make an
2 election and you made an election, why are we here
3 today, Mr. Murphy?
4 MR. MURPHY: I think largely because of
5 the Felici case. Our reading of the Felici case is
6 that the defendant is not entitled to these,
7 regardless of whether the Government seeks
8 forfeiture. And I think it's that -- I mean
9 basically that simple. There's a few other cases
10 that -- that -- where the Eighth Circuit has
11 discussed this issue or related issues, in any
12 event, and I mean I really think that what it all
13 boils down to is whether or not a defendant who is
14 prohibited can receive guns back. We don't think
15 they can.
16 THE COURT: Well, but he doesn't want them
17 back. He wants them to go to his brother.
18 MR. MURPHY: Right. But I think that the
19 Felici case -- and I mean again this is really the
20 issue, but the Felici case says that that would
21 amount to constructive possession and even -- and
22 the Bagley case, the defendant didn't want the guns
23 back. He wanted them sold and -- and then there was
24 an unpublished opinion in the Davidson case recently
25 and the Court has repeatedly said that, you know, in

1 this type of situation, as I understand it anyway,
2 that they can't have them back or that -- or to give
3 them to who they want them to go to is -- is
4 amounting to giving them back to the defendant.
5 MR. O'FLAHERTY: Your Honor, if I may? In
6 the Felici case, the question there was raised in a
7 pro se brief by the inmate defendant who wanted the
8 guns to be held in a trust for him. We're not
9 asking that anything be held in trust here. That
10 was the issue that was decided by the circuit in
11 Felici. What's happened here is not a lack of due
12 process by the Government. It's just no process.
13 Nothing has happened. In 1997, Mr. Allen had these
14 guns seized and he immediately filed the $250 bond
15 for a hearing. He never had a hearing. He never
16 got the bond back. Government kept the guns. They
17 kept the 250 and didn't give him a hearing.
18 THE COURT: Why did they keep the $250?
19 MR. O'FLAHERTY: I don't know. It's all
20 -- I've put the original receipt attached to the
21 memorandum.
22 THE COURT: Where is -- is the $250,
23 Mr. Murphy?
24 MR. MURPHY: I have no idea, Judge. I
25 thought that had been returned.

1 THE COURT: Get -- Mr. Murphy, why are we
2 here?
3 MR. MURPHY: Well, we're here, Judge,
4 because of the Felici case. As I've said, this man
5 wants the guns returned in a way --
6 THE COURT: Why don't you get --
7 MR. MURPHY: -- in a way the Court says
8 cannot be returned.
9 THE COURT: All right. Go ahead.
10 MR. MURPHY: I mean that's basically it.
11 As far as the bond, I apologize; I don't know about
12 that. My understanding was that it had been
13 returned. I'll have to check with our forfeiture
14 people. I don't know why that hasn't been returned,
15 if it hasn't.
19 THE COURT: All right.
20 Anything else, Mr. O'Flaherty?
21 MR. O'FLAHERTY: Well, Your Honor, I
22 understand that the Government relies on Felici. I
23 think Felici can be distinguished here. We can
24 distinguish it from the other cases that were
25 mentioned too. Mr. David Allen is not asking that

1 the guns be sold and he get anything for them. He
2 simply doesn't want the Government to continue to
3 keep these firearms and do whatever it is that
4 they're going to do with them; destroy them, sell
5 them, do whatever they plan to do when they have not
6 afforded him any process in this matter. He simply
7 wants the guns to go to his brother. Several of
8 them came from their father. The others were his
9 that he purchased himself and he wants them to go to
10 the brother.
11 I would like to mention one other thing,
12 Your Honor, if I may. In 1997 when he was first
13 arrested or first had these things taken from him,
14 the conviction that he had was a simple misdemeanor
15 under Iowa law and was not a disabling conviction
16 for purposes of owning the firearms.
17 In 1998, a year later, the Iowa
18 legislature changed the state law to make that
19 simple assault conviction a disabling conviction for
20 purposes of owning a firearms. Yet another year
21 later, in 1999, he was arrested on the federal
22 charge of possessing the firearms when he had a
23 domestic conviction. So had the Government given
24 him the hearing that he asked for and paid the bond
25 for in July of 1997, at that time, there was nothing

1 in Iowa law to prevent him from having the guns
2 returned to him then. He didn't have a disabling
3 conviction. It wasn't until a year later that that
4 occurred.
5 And what he sees happened here is that the
6 Government has just simply delayed and delayed and
7 not followed through with his timely requests for
8 nearly four years in this case, and now, because
9 there's a new case in the Eighth Circuit, they want
10 to rely on it when it doesn't even really apply.
11 He's not asking that anything be held in trust. He
12 simply wants the guns to go to his brother for the
13 brother to do whatever he wants, and Mr. David Allen
14 is not going to have any control over whatever that
15 is. That's -- that's his position stated as simply
16 as I can. Thank you.
17 THE COURT: All right. I'm going to order
18 the guns be turned over. I think at some point the
19 orders have to be obeyed and followed that I issue.
20 I issued a specific order after extensive discussion
21 at the sentencing hearing that said the Government
22 is to do something with these guns.
23 Apparently, they're holding the
24 defendant's $250 bond, which he describes in this
25 letter has never returned that to him; dismisses the

1 forfeiture; says they're going to take it up as part
2 of the criminal action; refuses to do so; negotiate
3 the criminal action; refuses to file a forfeiture.
4 I direct them to file a forfeiture. They then send
5 a letter saying we're not going to do anything. He
6 can have the guns back, and I note the letter that's
7 Defendant's Exhibit A is sent three months after the
8 Felici case, so it's not like Felici is intervening
9 legal authority.
10 It's three months after the Felici case is
11 decided the Government makes a conscious decision in
12 response to my order saying we're not going to
13 pursue forfeiture. I think the matter is closed.
14 The letter says it's closed and I think it's
15 closed. And -- and I'm not sure Felici controls in
16 any event. I think it's distinguishable, but even
17 assuming it does, I think the Government has to live
18 with its decisions at some point. And I made an
19 order and -- and we went through this at the
20 sentencing hearing. And the Government responded to
21 my order apparently and now has changed its mind,
22 but I'm going to make them live with the decision
23 that was made, which is that the guns will be turned
24 over to Mr. Allen's brother.
25 All right.

1 MR. O'FLAHERTY: Your Honor --
2 THE COURT: I want it done within the
3 week.
4 MR. O'FLAHERTY: Within a week? Thank
5 you, Your Honor. And as far as the bond, Mr. Allen
6 represents that it's never been returned to him, so
7 we would like that returned within one week if the
8 Court would order it as well.
9 THE COURT: All right. Unless the
10 Government has some reason why the bond should not
11 be returned, I'll let the bond be returned as well.
12 MR. MURPHY: Like I said, I know nothing
13 about the bond. I'm surprised myself that that's
14 not been done, although it does -- it does not
15 emanate from our office, but it comes from the
16 department, as I understand it, so I'll have to
17 check on that.
18 THE COURT: All right. All right. This
19 matter is adjourned.
20 (Proceedings concluded at 3:04 p.m.)
21
22
23
24
25

COPY

FILED
ROCK ISLAND, IL

[redacted]

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

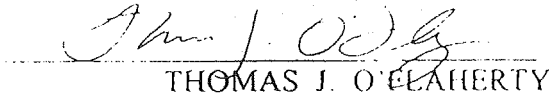
UNITED STATES OF AMERICA, *Plaintiff,*	)	CR [redacted]
vs.	)	DEFENDANT [redacted]
[redacted] *Defendant.*	)	MOTION FOR LEAVE OF COURT TO REVIEW RELEVANT PORTIONS OF PRESENTENCE INVESTIGATION REPORTS FOR COOPERATING WITNESSES

The defendant, [redacted] by counsel, Thomas J. O'Flaherty, moves the Court under the due process clause of the fifth amendment to the U.S. Constitution, and *Brady v. Maryland*, 373 U.S. 83 (1963) for permission to unseal and copy certain relevant portions of presentence investigation reports prepared earlier for witnesses cooperating with the government against [redacted]

A separate memorandum of additional authorities and reasons in support of this motion is filed under Local Rule 7.1(d).

WHEREFORE, [redacted] requests the Court to allow permission to review certain relevant portions of presentence investigation reports prepared earlier for cooperating witnesses who will testify against Mr. [redacted] at his trial.

Dated this 7th day of May [redacted]



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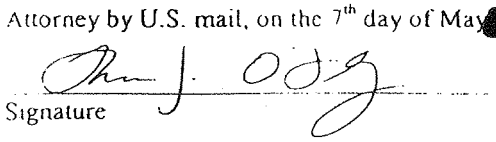
ATTORNEY FOR DEFENDANT, [redacted]

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on the Assistant United States Attorney by U.S. mail, on the 7th day of May [redacted]



Signature

cc: Assistant United States Attorney [redacted]

COPY

FILED
ROCK ISLAND,
[redacted]
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR [redacted]
	)	MEMORANDUM IN SUPPORT OF DEFENDANT [redacted] MOTION FOR LEAVE OF COURT TO REVIEW RELEVANT PORTIONS OF PRESENTENCE INVESTIGATION REPORTS FOR COOPERATING WITNESSES
vs.	)	
[redacted] *Defendant.*	)	

The defendant, [redacted] by counsel, Thomas J. O'Flaherty, submits the following memorandum of authorities and reasons in support of his motion to review certain parts of presentence reports written for cooperating witnesses. This memorandum is submitted under Local Rule 7.1(d).

BACKGROUND

The government has disclosed the names of several expected witnesses who will cooperate against [redacted] at his trial. The stakes at the trial are high. Mr. [redacted] faces a mandatory life sentence if convicted of the charges and amounts of drugs alleged in the indictment, coupled with the 18 U.S.C. § 851 notice filed by the government. For this reason, the cooperating witnesses must be thoroughly investigated and their backgrounds fully explored.

REASONS SUPPORTING REQUEST

The portions of the presentence investigation report that appear relevant to this request, in a generic sense, include the following:

- Criminal History – juvenile and adult
- Obstruction of justice – if any
- Weapons enhancements – if any
- Acceptance of responsibility – or not
- Departure – upward or downward with explanations for same
- Cooperation – including Rule 35 motion agreements

[redacted] requests that for every witness who will testify against him, and who has a presentence investigation report, an *Order* be fashioned requiring that the six sections listed above be examined and disclosed to the defense.

Based on the discovery disclosed at this stage of the case, Mr. [redacted] makes the following specific requests for the information sought on these witnesses:

1. [redacted], No. CR [redacted] SDIA
2. [redacted], No. CR [redacted] SDIA
3. [redacted], No. CR [redacted] SDIA
4. [redacted] No. CR [redacted] SDIA
5. [redacted], No. [redacted] SDIA
6. [redacted], No. CR [redacted] SDIA
7. [redacted], No. CR [redacted] SDIA

AUTHORITIES AND ARGUMENT

The Sixth Amendment to the Constitution of the United States guarantees that Mr. [redacted] be permitted to confront the government witnesses who will testify against him. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Favorable evidence, known only to the prosecutor and the Court, which is material to the question of guilt, should be disclosed to the defense. *Brady v. Maryland*, 373 U.S. 83 (1976).

The requested sections of each cooperating witness' presentence report will provide fertile ground for the cross-examination necessary to defend Mr. [redacted] in this case. Special care will be taken with the disclosed material, including, as with all other discovery made available in this case: no further copying, no disclosure to any other person and immediate return of the only copy to the Court after the witness has testified.

Dated this 7th day of May [redacted]

THOMAS L. O'FLAHERTY / O'FLAHERTY
LAW FIRM
P.O. Box 520
Swisher, IA 52338-0520
phone: (319) 857-4757
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e-mail: oflahrty@netins.net

ATTORNEY FOR DEFENDANT,
[redacted]

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on the Assistant United States Attorney by U.S. mail, on the 7th day of May [redacted]

Signature

cc: Assistant United States Attorney [redacted]

COP

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR[redacted]
	)	DEFENDANT [redacted]
vs.	)	*EX PARTE* MOTION FOR PRODUCTION OF DAILY TRANSCRIPTS OF TESTIMONY TAKEN DOWN BY COURT REPORTER AT TRIAL
[redacted] *Defendant.*	)	

The defendant, [redacted], by counsel, moves the Court, *ex parte*, to direct the reporter to produce for defense counsel a transcript of each day's trial testimony, on the morning immediately following the previous day's trial testimony.

Defendant states he is indigent and that such transcript is necessary to his defense. Title 18 United States Code § 3006A(e)(1) provides for the relief requested in this motion.

Counsel believes that this case will take approximately five days to try. The number of expected witnesses is undetermined, but may be near twenty, based upon the discovery materials available to date. Effective preparation and cross-examination calls for the use of daily transcripts in this case.

The government's case against [redacted] appears to be one made up largely of the word of many cooperating witnesses. Each one has either been sentenced or is facing sentence. Each one hopes to gain some measure of freedom based on testimony delivered against Mr. [redacted]

The local practice of the U.S. Marshal results in cooperating witnesses being housed in close proximity to each other, both leading up to and, during trial. The incentive to discuss case information, and to strengthen stories if possible, is strong among the cooperators. For this reason, a very particularized sequestration motion is also being filed today. As the Court of Appeals has noted, the sequestration rule is an "aid in detection of dishonesty." *U.S. v. Collins*, 340 F.3d 672, 681 (8th Cir. 2003). Daily transcripts available to the defendant can help to ensure that dishonesty among and between incarcerated cooperators does not occur.

[redacted] faces a mandatory life sentence if convicted of the charges in this case. Without question, if he were able to afford the cost of daily transcripts, he would avail himself of this service. Mr. [redacted] indigent but yet he requires the assistance of daily transcripts.

While no case requires the production of daily transcripts, the Second Circuit said it was error not to provide the transcripts when the government counsel had them available. *U.S. v. Bari*, 750 F 2d 1169, 1182 (2d Cir. 1984). *See also U.S. v. Rucker*, 586 F.2d 899, 905(2nd Cir. 1978); *U.S. v. Sliker*, 751 F.2d 477, 989-92 (2d Cir. 1984).

WHEREFORE, due to the expected length of trial and number of witnesses, [redacted] requests that he be allowed daily transcripts, at government expense.

COPY
FILED
ROCK ISLAND, IL
[redacted]
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR [redacted]
vs.	)	DEFENDANT [redacted]
[redacted] *Defendant.*	)	MOTION FOR EARLY PRODUCTION OF CHARTS AND SUMMARIES

Pursuant to Rule 16(a)(1)(E)(ii) of the Federal Rules of Criminal Procedure and Rule 1006 of the Federal Rules of Evidence, the defendant, [redacted] moves the Court for an *Order* directing the government to furnish the defendant with copies of all charts and summaries which it expects to use at the trial of this case one week prior to commencement of trial. In support of this motion, the defendant states that early disclosure is essential so that the defendant can examine the proposed charts or summaries, and the underlying documents, and determine whether *in limine* motions or objections should be filed.

WHEREFORE, defendant, [redacted] requests relief in the form of early disclosure of charts and summaries under Rule 1006.

Dated this 7th day of May [redacted]

THOMAS J. O'FLAHERTY
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ATTORNEY FOR DEFENDANT,
[redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served upon the Assistant United States Attorney by U.S. mail, on the 7th day of May [redacted]

Signature

cc: Assistant United States Attorney, [redacted]

COPY

FILED
ROCK ISLAND, IL
[redacted]
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR[redacted]
vs.	)	
[redacted] *Defendant.*	)	DEFENDANT [redacted] MOTION FOR EXTENDED *VOIR DIRE*

The Defendant, [redacted] by counsel, Thomas O'Flaherty, pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure, moves the Court for permission to conduct extended *voir dire* of the prospective jurors in this case.

The subject matter of the Indictment alleges that the drug laws of the United States were violated in this case. [redacted] is facing a mandatory life sentence if convicted of the charges in the Indictment. It is essential to the preparation of an adequate defense at trial that Mr [redacted] be allowed to conduct extended examination of prospective jurors for a period of time at least sixty minutes in length.

WHEREFORE, [redacted] moves the Court to grant additional time, up to sixty minutes, for attorney-conducted *voir dire* in this case.

Dated this 7th day of May [redacted]

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ATTORNEY FOR DEFENDANT,
[redacted]

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served upon the Assistant United States Attorney, by U.S. mail, on the 7th day of May [redacted]

Signature

cc: Assistant United States Attorney [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR [redacted]
	)	
	)	DEFENDANT [redacted]
vs.	)	MOTION *IN LIMINE* TO PREVENT
	)	GOVERNMENT FROM REFERRING
	)	TO "TRUTH TELLING" PORTIONS OF
[redacted]	)	COOPERATION AGREEMENTS UNTIL
Defendant.	)	AFTER CREDIBILITY IS IN ISSUE

The defendant, [redacted] by counsel, Thomas O'Flaherty, moves the Court pursuant to Rule 104 of the Federal Rules of Evidence for an *in limine* ruling precluding the government attorney from referring, in opening statement, to any "truth telling" portions of the plea agreements with cooperating informants.

A separate memorandum of points and authorities is filed under Local Rule 7.1(d).

WHEREFORE, [redacted] requests the Court to grant the relief sought by this motion.

Dated this 19th day of May [redacted]

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on the Assistant United States Attorney by U.S. mail, on the 19th day of May [redacted]

Signature

cc: Assistant United States Attorney [redacted]

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ATTORNEY FOR DEFENDANT,
[redacted]

FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR[redacted]
	)	
	)	DEFENDANT [redacted]
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION *IN LIMINE* TO PREVENT
	)	GOVERNMENT FROM REFERRING
	)	TO "TRUTH TELLING" PORTIONS OF
[redacted]	)	COOPERATION AGREEMENTS UNTIL
Defendant.	)	AFTER CREDIBILITY IS IN ISSUE

The defendant, [redacted] by counsel, Thomas O'Flaherty, submits the following authorities and argument in support of his motion *in limine* ruling precluding the government attorney from referring, in opening statement, to any "truth telling" portions of the plea agreements with cooperating informants.

Background

Several witnesses expected to testify for the government and against Mr. [redacted] have reached plea agreements with the United States. Each of the agreements has "truth telling" provisions. The government should not be allowed to put evidence or commentary in front of the jury before the credibility of the witnesses has been attacked. To do otherwise may be impermissible bolstering of the informants' credibility.

AUTHORITIES AND ARGUMENT

"Truth-telling provisions are used by the government primarily to bolster the credibility of a witness." *U.S. v. Gaind*, 31 F.3d 73, 78 (2nd Cir. 1994) (internal quotations and citations omitted). For that reason, the "admission of testimony concerning such provisions before the credibility of a witness has been challenged runs afoul of the well established rules of evidence that absent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible." (*Id*). Such testimony is admissible after a challenge to a witness' credibility has been made. (*Id*).

It is impermissible to vouch for a witness in opening statement by referring to the truth-telling provisions of a plea agreement. *U.S. v. Neoechea*, 986 F.2d 1273, 1278 (9th Cir. 1993). To put a plea agreement into evidence, on direct exam, before credibility has been attacked, is reversible error. *U.S. v. Borello*, 766 F.2d 46, 56 (2nd Cir. 1985); *U.S. v. Winter*, 663 F.2d 1120, 1134 (1st Cir. 1981).

For the reasons and authorities above, [redacted] requests that the Court instruct the prosecution to retrain from any reference to "truth-telling" provisions of its agreements with cooperating informants.

Dated this 19th day of May [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs. [redacted] *Defendant.*	))))))))))	No. CR[redacted] DEFENDANT'S SECOND MOTION *IN LIMINE:* SEEKING PERMISSION TO CROSS-EXAMINE COOPERATING WITNESSES REGARDING POLYGRAPH EXAMINATIONS (HEARING REQUESTED)

The Defendant, [redacted], by counsel, Tom O'Flaherty, respectfully moves the Court, *in limine*, pursuant to Rules 106 and 403 of the Federal Rules of Evidence, and the Sixth Amendment, for permission to fully cross-examine cooperating witnesses at trial on the plea bargain requirement that they submit to a polygraph examination, in the sole discretion of the government.

Each witness who has signed a plea bargain letter with the government to date has agreed to submit to a polygraph exam, if requested by the government. As part of the full scope of the plea bargain agreement, the polygraph requirement is an essential paragraph. Failure of the polygraph exam can lend to abrogation of the agreement. Breach of an agreement can lead to all criminal charges being reinstated against the witness. Failure to submit to a polygraph exam, if requested, can lead to the same consequences for the witness regarding breach of agreement and reinstating all charges.

A memorandum of authorities and facts in support of this motion is filed separately under Local Rule 7.1(d).

WHEREFORE, [redacted] respectfully requests the Court to grant permission for full cross examination at trial of witnesses who have signed plea agreements requiring polygraph examinations in the discretion of the government. [redacted] requests a hearing on this motion, under Local Rule 7.1(c).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	No. CR [redacted]
vs.	)	MEMORANDUM IN SUPPORT OF DEFENDANT'S SECOND MOTION *IN LIMINE*: SEEKING PERMISSION TO CROSS-EXAMINE COOPERATING WITNESSES REGARDING POLYGRAPH EXAMINATIONS
[redacted] *Defendant.*	)	

[redacted] by counsel, Tom O'Flaherty, pursuant to Local Rule 7.1(d), respectfully submits the following authorities and argument in support of his motion *in limine* to permit cross-examination of cooperating witnesses regarding polygraph examinations.

I.

Each of the cooperating witnesses who has signed a plea agreement in this case has initialed a paragraph containing language substantially similar to the following:

> It is understood that upon request by the government, the defendant will voluntarily submit to a polygraph examination. If performance in any polygraph examination suggests a conscious intent to deceive, mislead or lie and the totality of circumstances convinces the government that the defendant's statement is not complete and truthful, the defendant will be so informed and any and all obligations imposed on the government by this agreement will be rendered null and void. This decision to nullify the agreement will be in the sole discretion of the United States Attorney's Office for the Northern District of Iowa.

II.

At least ten (10) witnesses, including some indicted co-defendants and other cooperating witnesses, have signed plea agreements containing the polygraph paragraph recited above.

III.

The Sixth Amendment to the Constitution of the United States guarantees [redacted] right to confront the witnesses against him at trial. The questions about whether a polygraph was requested, or given, or refused, and what the results showed are important defense evidence in this case. *See Rock v. Arkansas*, 483 U.S. 44, 60, 107 S. Ct.2704, 2714 (1987) (defense should have been permitted to use hypnotically-refreshed memory evidence at trial).

IV.

The questions concerning whether ten (10) witnesses, each of whom has plead guilty to at least one drug-related felony, have been asked to take a polygraph exam are crucial. They show the motivation of the witness to please the prosecutor who has the power to revoke the plea agreement and prosecute the informants. *See Olden v. Kentucky*, 488 U.S. 227, 233, 109 S. Ct. 480, 483 (1988).

V.

In an oft-quoted opinion, Judge Trott of the Ninth Circuit Court of Appeals had these unflattering words to say about informants:

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government *and the courts* to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime and from lying under oath in the courtroom. *U.S. v. Bernal-Obeso*, 989 F. 331, 332 (9th Circuit 1993) (emphasis added).

Mr. [redacted] requests the full opportunity to cross-examine the informants against him, including their understanding of obligations regarding polygraph examinations.

Respectfully submitted [redacted]

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ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs. [redacted] *Defendant.*	)))))))))	No. [redacted] DEFENDANT [redacted] MOTION *IN LIMINE* TO DISCLOSE WHETHER PHONE CALLS FROM CORRECTIONAL FACILITIES MADE BY HIM IN THIS MATTER HAVE BEEN MONITORED BY ANY OFFICIAL AND THE CONTENTS OR SUBSTANCE OF THE SAME DIVULGED TO THE GOVERNMENT

The defendant, [redacted] by counsel, Thomas J. O'Flaherty, moves this Court to order the Government to disclose whether any telephone conversations of the defendant have been monitored or recorded by any person since the date of his incarceration and whether the contents or substance of the conversation have been divulged to the Government. As grounds defendant states that conversations made by incarcerated persons are routinely monitored by officials. If monitoring has occurred of the conversations of the defendant and the substance of the conversation has been transmitted to any member of the prosecution team, defendant's right to prepare a defense and consult with co-defendants in the preparation of a defense to this indictment has been infringed as has the right of the defendant to consult with counsel in violation of the Fifth and Sixth Amendments to the Constitution.

WHEREFORE, [redacted] requests the Court to *Order* the government to disclose whether it has been provided with the substance of any monitored telephone conversations while [redacted] has been incarcerated.

Respectfully submitted [redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served upon each party's attorney of record, by United States mail on the 5th day of January [redacted]

Jamie Fish
Signature

cc: Assistant United States Attorney [redacted]

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ATTORNEY FOR DEFENDANT,
[redacted]

Witness: Generic for Snitches

Source	Chapter: Number of times met with police or prosecutor	Tactics
	This is the first time we have met?	
	You and I have never spoken by telephone?	
	We have never talked about [redacted] case before?	
	You have talked with the prosecutors before?	
	When was the last time you talked with the prosecutors?	
	You prepared with them to appear here today?	
	How long did you talk with them to prepare for today?	
	Where did you meet?	
	Who was at the meeting?	
	Before preparing for today's appearance, when was the last time you spoke with police or prosecutors?	
	Have you had debriefings? How many?	
	Have you been at trials before for the prosecutors? How many?	
	Have you been to a grand jury? How many times?	
	Have you been at sentencings before? How many?	
	Have you helped to set people up? How many?	
	Before each of these times, you met with the police or prosecutors to prepare?	
	After each of these times, you met with the police or prosecutors to discuss your performance?	
	Estimate the number of times you met with the police or prosecutors?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: Violation of Probation—Specific Breach of Word	Tactics
	After your [redacted] assault conviction in Linn County, you were given probation?	*St. v. Greer*, 530 N.ER.2d 382 (Ohio 1988), cert. denied 109 S. Ct 1766 (1989)
	You *wanted* to be on probation?	
	Probation meant you could remain on the street?	
	You and your lawyer *asked* for probation?	
[redacted]	The Judge gave you what you wanted?	
	You agreed to probation?	
	The probation agreement was one you wanted?	
	You understood that agreement?	
	Nobody twisted your arm to get you to accept probation?	
	You agreed to probation to avoid going to prison?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: I will obey all State and Federal Laws	Tactics
	One promise was to obey all State laws?	
	And all federal laws?	
	And gave your word to obey those laws?	
	You made that promise on [redacted] when you were sentenced to probation?	
	Your probation was supposed to last one year?	
	The probation would have been over in November [redacted]	
	On May 20, [redacted] when you trespassed into Elizabeth Gary's house you were on probation?	
	That arrest violated the law?	
	You broke your word?	
	On May 20, [redacted] you also assaulted Elizabeth Gary?	
	That violated state law?	
	You broke your word?	
	And her jaw?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: I Will Obey all State & Federal Laws	Tactics
0120		
7	You were still on probation in January [redacted]	
	On January 12, [redacted] you burglarized the Tic Toc?	
	That burglary was against State law?	
	You broke your word?	
8	On January 17, [redacted] you burglarized Wernie's Tap?	
	That burglary was against State law?	
	You broke your word?	
9	On January 12, [redacted] you burglarized Duchess Cleaners?	
	That burglary was against State law?	
	You broke your word?	
10	The police searched your apartment on January 12, [redacted]	
	The police found a stolen photocopy machine?	
	The police found stolen tools in your apartment?	
	It was against the law to have that stolen property?	
	It was against the law to have stolen that property?	
	You broke your word?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: I will not use illegal drugs.	Tactics
Prob. K		
	You gave your word to *not* use illegal drugs?	
	The Department of Corrections did drug tests on you?	
	The drug tests were a way of testing your word?	
	Your word that you would *not* use drugs?	
	The tests showed you broke your word on January 21, [redacted]	
	At that time, you had smoked marijuana?	
	That was the month after signing the probation agreement?	
	The tests showed you broke your word on March 8, [redacted]	
	Again, you had smoked marijuana?	
	The tests showed you broke your word on December 17, [redacted]	
	You had used cocaine?	
	That was the day you robbed the Brenton Bank?	
	By using those illegal drugs, you not only broke your word, you broke the law?	

CROSS-EXAMINATION

Witness:

Source	Chapter: False & Fictitious Written Statements--Likely to Deceive	Tactics
0376-78	When you bought that .12 gauge shotgun, you had no written permission from BATF?	
	You filled out the Firearms Transaction Report Form?	
	You signed that form?	
	The form asked if you had a felony conviction?	
	You wrote "No"?	
	The form asked if you were a drug user?	
	You wrote "No"?	
	You lied when you wrote "no" to the question~~s~~ about convictions?	
	You lied when you wrote "no" to the question~~s~~ about drug use?	
	You knew those answers were lies?	
	But you went ahead and signed the form?	
	You knew that by your signature, you certified your answers to be true and correct?	
	You knew that by a "Yes" answer to any of the questions, you would not be allowed to buy that gun?	
	You knew that the store clerk would have to rely on your answers to decide if he could sell you the gun?	
	You wanted to deceive the store clerk so he would sell you the gun?	
	You successfully deceived the clerk? [redacted] ~~H~~e sold you the gun?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: I will get verbal approval to go out of Linn County.	Tactics
Prob. K	You also agreed to restrict your travel to staying in Linn County?	
	You promised to ask for verbal permission before going out of Linn County?	
	On November 17, [redacted] you went to Iowa City to buy a shotgun?	
	Iowa City is in Johnson County?	
	You did not tell Mr. Skaggs you were gun shopping in Johnson County?	
	Mr. Skaggs did not give you his verbal permission to go gun shopping in Johnson County?	
	When it suited your purposes, you went ahead and broke your word?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: I will maintain personal contact with my P.O.	Tactics
Prob. K		
	You met with your probation officer on December 17, [redacted]	
	Later that same day, you robbed the Brenton Bank?	
	Within a day or two, you went to West Virginia?	
	You did not have any contact again with Mr. Skaggs until you were arrested for burglary?	
	You had given your word to maintain personal contact with Mr. Skaggs?	
	But you decided to break that promise?	
0147	When it suited your purposes, you "failed to make contact" with Mr. Skaggs?	

Chapter Goal: EXPECTATIONS

Q: You do expect to return to Illinois when you are done here in this trial?

Q: You do expect to return to your family?

Q: To your wife?

Q: And your son?

Q: You do expect to return to your job?

Q: As a teacher?

Q: Of high school children?

Q: In public schools?

Q: You do expect that all this drug business will be behind you?

Q: And you can carry on with your life?

Q: And do as you please?

CROSS-EXAMINATION OF DAN [redacted]

GOAL: State felony dismissed

Source

Q: When you were caught, you knew you were guilty?

Q: Because you are guilty?

Q: You knew the police had enough evidence to convict you?

Q: Because you sold 35 pounds of marijuana to the police?

Q: You were charged by the State of Iowa with a felony?

Q: A felony of distributing 30 pounds of marijuana?

Q: A felony carrying a ten year prison sentence?

Q: A felony of which you knew you were guilty?

Q: But the State of Iowa dismissed that felony?

Q: You won't serve a day in jail on that state felony?

Q: Even though you, and the police, know you are guilty?

[*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)]

Q: Dismissal of the State felony is part of your deal?

CROSS-EXAMINATION OF DAN [redacted]

GOAL: No prosecution of Your Wife

Source

Q: Your wife, [redacted] was aware of your drug dealing?

Q: She was present when you sold those 30 pounds to the police?

Q: Your wife is not being prosecuted by the States of Iowa?

Q: Your wife is not being prosecuted by the federal authorities?

Q: She will walk away from this case without any punishment at all? [*U.S. v. Williams*, 568 F.2d 493 (6th Cir. 1977)]

Q: This is what you hope to do, walk away without any punishment at all? [*U.S. v. Leja*, 568 F.2d 493 (6th Cir. 1977)]

Q: In order to do that, you have to please the prosecutor today?

CROSS-EXAMINATION

Witness:

Source	Chapter: You signed on to tell the truth	Tactics
	Now, let's talk about paragraph 8 of your agreement.	
K-8	In paragraph 8, you agreed to give complete information about criminal activity?	
K-8	You promised to answer all questions?	
K-8	You promised not to withhold any information?	
K-8	You promised not to fabricate, or make up, any information?	
K-8	You promised to tell the truth?	
K-8	You promised to tell nothing but the truth?	
	You made these promises, regardless of who asked questions?	
K-8	Even defense attorneys can expect to hear the truth from you?	
	Your deal with the government hinges on you telling the truth?	
	In paragraph 8, the government says if you fail to give truthful information, then your agreement would be breached?	
	In other words, the deal would be off?	
	You want to keep your deal intact?	
	Because it is a deal that you can live with?	
	So, you signed the agreement, including paragraph 8, where you promised to give complete and truthful information?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: Would Not Speak to Defense	Tactics
K-3E	You agreed to make yourself available for interviews?	
	And for "debriefing sessions?"	
	That agreement went only to the government attorneys and agents though?	
	You did not agree to talk with the defense?	
	You and your lawyer received a letter asking you to talk with me?	
	You refused to talk to me?	
	You were willing to talk with the prosecutor?	
	And the FBI agents?	
	And any other law enforcement agent that came your way?	
	You spoke with them when you agreed to plead guilty?	
	Then, you spoke with them again?	
	Then, you spoke with them again to prepare for this trial?	
	You talked with the prosecutor because you believe that he can help you with your sentence?	
	You refused to talk with me because you knew I cannot help you with your sentence?	
	Your first wish in this matter is to help yourself?	
	In any way you can?	

CROSS-EXAMINATION

Witness: [redacted]

Source	Chapter: You lied to get out of trouble	Tactics
	When you told the FBI you didn't know anything about drugs in your motel room, you *lied*?	
	You *lied* because the lie was better than the truth?	
	You *lied* because the lie could help you more than the truth?	
	You *lied* because the lie was easier [redacted] for you than the truth?	
	You *lied* because you hoped the lie would *get you out of trouble*?	
	When you *lied to get out of trouble*, you made up details?	
	When you *lied to get out of trouble*, you made up events?	
	When you *lied to get out of trouble*, you lied to save yourself?	

DANGEROUS PLACE

Q: Life inside prison is dangerous, isn't it?

Q: If somebody wants to hurt another, there is no place to run and hide is there?

Q: You don't want to go to prison?

Q: So you signed a nine page plea letter with the prosecutor's office, didn't you?

Q: You had the help of a lawyer in reviewing that letter before signing it, didn't you?

Q: You gave the government your word that you would live up to the terms of that letter?

Q: Because you want to limit your possible prison time?

Chapter Goal: Case agent duties -- UA's

Q: As case agent, you review evidence?

Q: As case agent, you gather documents?

Q: As case agent, you review statements?

Q: You gather evidence for the prosecutor?

Q: You help the witnesses prepare for testimony?

Q: You know about the use of urine samples for pretrial release?

Q: [illegible] drug cases, people sometimes continue to use drugs, even after being arrested?

Q: Drug testing is a way to check up on persons on release?

Q: Drug testing is fairly common?

Q: It is routine?

Q: Even employees, not suspected of any crime, are asked to give urine samples?

Q: But [redacted] has never given a urine sample?

Q: Not once in nearly 4 years of being under investigation?

CROSS-EXAMINATION OF THOMAS [redacted]

GOAL: Regulator is like a train

Source

Q: You used to work for the Chicago Northwest Railroad?

Q: You were a machine operator?

Q: The machine you drove was called a ballast regulator?

Q: The regulator smooths out gravel on the [redacted] track beds?

Q: The regulator has blades that stick out like a snowplow?

Q: The regulator has its own engine?

Q: It is a diesel engine?

Q: Just like a train engine?

CROSS-EXAMINATION OF THOMAS [redacted]

GOAL: Driving that train -- High on Cocaine

Source

Q: You had an accident while driving the regulator?

Q: You hit a car?

Q: You hit a car with the train machine you were driving?

[redacted]

Q: You were fired because of that accident?

Q: You were using cocaine at the time of the accident?

Q: You were driving that train while high on cocaine?

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff.*	)	No. [redacted]
vs.	)	
[redacted], JR. *Defendant.*	)	NOTICE

I, [redacted] Jr., having been advised by counsel of my right to request a petition for *certiorari* in the United States Supreme Court of the *per curiam* decision dated June 27 [redacted] herby notify counsel and the Court that:

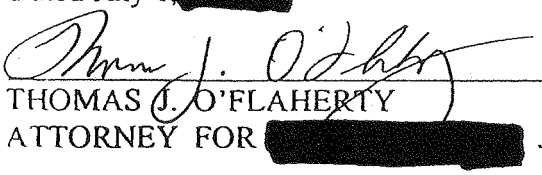
_____ I **wish** to request a petition for *certiorari*.

_____ I **do** *not* **wish** to request a petition for *certiorari*.

Dated July _____ [redacted]

_____
[redacted] JR.

Dated July 1, [redacted]



THOMAS J. O'FLAHERTY
ATTORNEY FOR [redacted] JR.

cmecf_iasd@iasd.uscourts.gov
05/13/2008 05:14 PM

To Courtmail@iasd.uscourts.gov
cc
bcc Nick Drees/IASF/08/FDO
Subject New Transcript Policy - US District Court, Southern Iowa

Who	Date	Time	Subject
cmecf_iasd	05/13/2008	05:14 PM	New Transcript Policy - US Distr

Notice to All Attorneys Practicing in the U.S. District Court for the Southern District of Iowa

Pursuant to the national policy adopted by the Judicial Conference of the U.S. with regard to transcripts, click on or copy and paste the following link to a browser to retrieve the Public Administrative Order No. 08-AO-5-P (plus attachments) establishing policy and procedures regarding the availability of electronic transcripts in the Southern District of Iowa.

http://www.iasd.uscourts.gov/iasd/courtinfo.nsf/16327d57bb96787f862569f10057722b/899f685d5baa96fd8625744800495db7/$FILE/admin%20order%2008-05%20transcripts.pdf

These documents set forth the new transcript policy as it relates to:

TRANSCRIPT FILING: Effective May 15, 2008, transcripts will be filed electronically.

AVAILABILITY: Transcripts will immediately be available for purchase from the court reporter or for viewing at public terminals in the Clerks Office, but may not be copied or reproduced for 90 days. During this 90-day period, transcripts may be purchased only from the Court Reporter. After 90 days, either the original or redacted version (see below) will be available remotely via the court reporter, PACER, CM/ECF, or Clerk's Office public terminals.

REDACTION RESPONSIBILITY: Counsel have 21 days from the filing date of the transcript to request redaction of personal identifiers from the transcript. Counsel are strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made. The responsibility for redacting personal identifiers rests solely with counsel and the parties. The Clerk of Court and Court Reporter will not review each transcript for compliance with the E-Government Act of 2002.

PROCEDURES: We have a Redaction Request form for your use in notifying the court and the court reporter that information contained in a transcript needs to be redacted prior to the transcript being made remotely electronically available. A PDF-fillable version of this form is available on our web site www.iasd.uscourts.gov.

Questions regarding this policy can be directed to our CM/ECF Help Line

A VIEW FROM THE BENCH

PRESENTED BY

THE HONORABLE JOHN A. JARVEY DISTRICT COURT JUDGE FOR THE SOUTHERN DISTRICT OF IOWA

Redirect - leading?
Family letters - type up
- why did they get involved with criminal activity
Δ allocution - best thing that ever happened
plans - realistic
- ask for specific reduction for cooperators

Victims -

CRIMINAL RULES

LCrR 1 GENERAL PROVISIONS; SCOPE

a. Citation Form. The local criminal rules are to be cited as "LCrR ___." The local civil and criminal rules are collectively referred to herein as the "rules" or the "Local Rules."

b. Scope. The local criminal rules govern all criminal proceedings in the Northern and Southern Districts of Iowa to the extent they are not inconsistent with any statute or law of the United States or any rule or order of the Supreme Court of the United States having the force of law. Except as otherwise provided or where the context so indicates, the local civil rules govern criminal proceedings to the extent they are not inconsistent with any express provision of a local criminal rule.

c. Modification of Local Rules by Presiding Judge. The Local Rules are subject to modification in any case at the discretion of the presiding judge.

d. Speedy Trials. The court's amended and modified plans pursuant to the Speedy Trial Act of 1977, 18 U.S.C. §§ 3165-3166, govern the scheduling of criminal trials. These plans may be found on the court's website at the web address given in Local Rule 1.i.

e. Pro Hac Vice Admission. A lawyer who is not a member of the bar of the district must, before appearing in a criminal case, comply with the requirements of Local Rule 83.1.d.2.

LCrR 3 COMPLAINTS

a. Presentation. Complaints ordinarily should be presented to a magistrate judge for review and execution, but a complaint may be presented to a district court judge if no magistrate judge is available. If no federal judge is reasonably available, a complaint may be presented to a state or local judicial officer.

A copy of the proposed complaint and any supporting affidavits must be delivered to the magistrate judge for his or her private review before a request is made for the magistrate judge to sign the complaint. For good cause shown, the magistrate judge may waive this requirement.

b. How Filed. All criminal complaints must be filed using the court's Electronic Case Filing ("ECF") system (*see* LR 5.2.g.3). Notwithstanding Local Rule 5.2.j, a complaint will be deemed by the court to have been filed on the date it is signed by a federal judge.

c. Lawyer for Government. Ordinarily, a person presenting a complaint to a magistrate judge should be accompanied by a lawyer for the government. If justified by unusual circumstances, a magistrate judge may entertain a proposed complaint from a person who is not accompanied by a lawyer for the government.

d. Emergencies. In an emergency situation, a magistrate judge may be contacted away from the courthouse, including at his or her home, for purposes of entertaining a proposed complaint. If no magistrate judge is available, a district court judge may be contacted away from the courthouse, including at his or her home, for purposes of entertaining a proposed complaint.

LCrR 5 APPEAL AND RECONSIDERATION OF RELEASE AND DETENTION ORDERS

a. Appeal of Release Orders and Detention Orders. A party may appeal from a release or detention order issued by a magistrate judge by filing a motion pursuant to 18 U.S.C. § 3145(a) or (b) for revocation or amendment of the order. Subject to excuse for good cause shown, the motion must be filed within 10 court days after the release or detention order has been filed. The movant must arrange promptly for the transcription of all portions of the record the district court judge will need to rule on the motion. (*See generally* LCrR 59, relating to appeals from orders issued by magistrate judges on pretrial matters.)

b. Release Orders and Detention Orders Issued in Other Districts. If a defendant is released or detained by a magistrate judge in another district after appearing in that district on a charge from this district, the 10-day period in section "a" of this rule does not begin to run until the date of the defendant's initial appearance on the charge in this district.

c. Request for Reconsideration of Release Orders and Detention Orders. At any time before trial, a party may file a motion requesting a magistrate judge to reconsider a release or detention order entered previously by a magistrate judge. (*See* 18 U.S.C. § 3142(f).)

d. Caption. A party filing a motion under this rule must state in the caption of the motion whether it is for appeal to the district court judge or reconsideration by a magistrate judge.

LCrR 6 GRAND JURY RETURN

a. Returns. An indictment must be returned to a federal judge in open court by the grand jury or by the foreperson or deputy foreperson of the grand jury. Notwithstanding Local Rule 5.2.j, an indictment will be deemed by the court to have been filed on the date it is returned to a federal judge in open court.

b. Sealing of Indictments. Immediately after an indictment is returned by the grand jury, the lawyer for the government must provide the Clerk of Court with the original indictment and a copy of the indictment with the identity of the grand jury foreperson and all personal data identifiers redacted. (*See* LR 10.h and LCrR 7.1) The Clerk of Court will file the original of the indictment under seal. Unless otherwise ordered by the court, immediately after the initial appearance in the district of any defendant charged in the indictment, the Clerk of Court will file the redacted copy of the indictment in the public case file.

LCrR 6.1 CONTACT WITH GRAND JURORS

a. Contacts by Defendants or Witnesses. Except upon leave of court, no actual or potential defendant or witness, and no lawyer or other person acting on their behalf, may contact, interview, examine, or question any grand juror or potential grand juror concerning the juror's actual or potential grand jury service.

b. Contacts by Lawyers for the Government. Except upon leave of court, no lawyer for the government or other person acting on his or her behalf may contact, interview, examine, or question any grand juror or potential grand juror concerning the juror's actual or potential grand jury service, except that contacts may be made on the record during grand jury proceedings and as necessary in connection with the administration of the grand jury.

LCrR 7 SUPERSEDING INDICTMENT

When a superseding indictment is filed, the lawyer for the government contemporaneously must file a brief statement describing the differences between the original indictment and the superseding indictment.

LCrR 7.1 PERSONAL DATA IDENTIFIERS IN AN INDICTMENT OR INFORMATION

Local Rule 10.h, relating to personal data identifiers, applies in criminal cases, except an indictment or information may include a personal data identifier if necessary to comply with the requirements of federal law. If an information contains personal data identifiers, the lawyer for the government must provide the Clerk of Court with the original information and a copy of the information with all personal data identifiers redacted. (*See* LR 10.h) The Clerk of Court will file the original information under seal and the redacted copy of the information in the public case file. (*See* LCrR 6.b, relating to the filing under seal of indictments containing personal data identifiers.)

LCrR 10 WRITTEN ARRAIGNMENT, PLEA, AND WAIVER OF PERSONAL APPEARANCE

A defendant who has been charged by indictment or misdemeanor information and has had an initial appearance pursuant to Federal Rule of Criminal Procedure 5 may, pursuant to Federal Rule of Criminal Procedure 10(b), waive personal appearance at the arraignment on the charges and plead not guilty by filing a written waiver of personal appearance in the form attached to these rules as appendix D. The waiver must be filed at least two court days before the time scheduled for the arraignment. In the Northern District, the completed waiver form also must be e–mailed to the Clerk of Court at ecfmail@iand.uscourts.gov.

Defendants are encouraged to file a written waiver of personal appearance in lieu of personally appearing at arraignments on superseding indictments and superseding misdemeanor informations.

LCrR 11 PLEA HEARINGS

a. Delivery of Plea Agreement to the Court. The lawyer for the government must deliver a copy of any plea agreement to the federal judge handling the plea proceeding at least four hours before the plea hearing.

b. Rule 11 Letter. At least four hours before a plea hearing, the lawyer for the government must file a letter setting out all relevant statutes involved in the plea proceeding, the maximum penalties and any mandatory minimum penalties that could be imposed by the court as a result of the plea, the elements of all offenses to which the defendant is pleading, and the factual basis for the plea. A copy of the letter must be delivered to the defendant's lawyer at or before the commencement of the plea hearing. In the Southern District, the government may deliver the Rule 11 letter to the chambers of the federal judge handling the plea proceeding in lieu of filing the letter.

LCrR 12 MOTION, NOTICE, AND REQUEST DEADLINES

a. **Deadlines for Non-Trial-Related Motions, Notices, and Requests.** Unless some other deadline is established by order of the court, all motions, notices, and requests under Federal Rules of Criminal Procedure 12(b), 12.1(a)(1), 12.2(a) and (b), and 12.3(a); all notices and requests pursuant to the Federal Rules of Evidence; and all other non-trial-related motions must be filed, given, or made within 28 days after the date of the defendant's first arraignment, except a request under Federal Rule of Criminal Procedure 12(b)(4)(B) must be made at the arraignment or as soon thereafter as is practicable. Notwithstanding this rule, a motion relating to a notice or request is timely if filed within five court days after service of the notice or request.

b. **Deadlines After Continuance or Superseding Indictment.** When a trial date is continued or a superseding indictment is returned, the original deadlines prescribed under the Local Rules or by order of the court remain unchanged unless, within two court days after the continuance order has been entered or at the arraignment on the superseding indictment, either the defendant or the government requests that new deadlines be set and an order is entered by the court changing the deadlines.

c. **Deadlines for Trial-Related Motions.** Motions in limine, motions pursuant to Federal Rule of Evidence 104(a), and all other trial-related motions must be filed as soon as practicable. All such motions must be filed at least five court days before trial. Motions covered by Local Criminal Rule 12.a and Local Criminal Rule 21 are not trial-related motions for purposes of this section.

d. **Motion Procedure.** Local Criminal Rule 47 governs motion procedure in criminal cases.

e. **Untimely Motions.** The court may refuse to consider an untimely motion unless the moving party establishes good cause for the untimeliness of the motion.

LCrR 16 DISCOVERY

a. Stipulated Discovery Plan. At an arraignment, the parties may be asked if they are willing to agree to a stipulated discovery plan. If such a plan has been implemented in the district, and if the parties agree to participate in the plan, the magistrate judge may enter a standard discovery order, a copy of which may be obtained in advance of the arraignment from the office of the magistrate judge or from the court's website at the web address given in Local Rule 1.i.

b. Declaration Required. Local Rule 37.a, requiring a party filing a motion concerning a discovery dispute to file a separate declaration describing the efforts of the parties to resolve the dispute, applies in criminal cases.

LCrR 17 SUBPOENAS AND WRITS

a. Delivery of Subpoenas to Marshal. The serving party is responsible for providing the United States Marshal's office with an original and two copies of each subpoena requested to be served by the Marshal's office. A subpoena for a hearing or trial to be served within the district by the United States Marshal must be delivered to the Marshal's office at least 14 days before the hearing or trial at which the witness is to testify, and a subpoena for a hearing or trial to be served outside of the district by the United States Marshal must be delivered to the Marshal's office at least 21 days before the hearing or trial at which the witness is to testify. Service of a subpoena delivered to the Marshal's office after these deadlines is not guaranteed; the subpoena will only be served if the Marshal's office is able to schedule service conveniently within the time allowed.

b. Private Service of Process Not Authorized by CJA. Unless prior approval is obtained from a magistrate judge, a lawyer appointed under the Criminal Justice Act may not use private process servers to serve subpoenas for criminal hearings or trials, but must use the United States Marshal's office for such service.

c. Deadline for Delivering Writ of Habeas Corpus Ad Testificandum to Marshal. A writ of habeas corpus ad testificandum to be served within the district must be delivered to the United States Marshal's office at least 14 days before the hearing or trial at which the witness is to testify, and a writ of habeas corpus ad testificandum to be served outside of the district must be delivered to the Marshal's office at least 21 days before the hearing or trial at which the witness is to testify.

d. Deadline for Obtaining Approval of Subpoenas and Writs. A lawyer appointed under the Criminal Justice Act who requests a subpoena and any lawyer who requests a writ of habeas corpus ad testificandum must submit a request to a magistrate judge for approval of the subpoena or writ at least two court days before the deadline for delivering the subpoena or writ to the United States Marshal.

LCrR 21 MOTION TO TRANSFER

Except for good cause shown, a motion to transfer pursuant to Federal Rule of Criminal Procedure 21(d) or a motion to transfer a case to a different division within the district must be filed within 28 days after the defendant's first arraignment.

LCrR 24 JURY SELECTION IN MULTI-DEFENDANT CASES

In multi-defendant cases, a request by a defendant for additional peremptory challenges must be made in writing at least 14 days before jury selection.

LCrR 24.1 CONTACT WITH JURORS

Local Rule 47, relating to contact with jurors, applies in criminal cases.

LCrR 28 INTERPRETERS

a. Responsibility for Obtaining. When interpreters are required in criminal proceedings or in civil proceedings initiated by the United States, the Clerk of Court will obtain the services of certified or otherwise qualified interpreters, except the United States Attorney must obtain the services of such interpreters for government witnesses. In all other cases, a party requiring the services of an interpreter must obtain interpreting services.

b. List of Interpreters. The Clerk of Court and the United States Attorney will maintain a list of all interpreters who have been certified by the Director of the Administrative Office of the United States Courts, and will make the list available to interested persons upon request.

c. Grand Jury. The government must make and preserve an electronic sound recording of any part of any grand jury proceedings in which an interpreter is used. The government may destroy any such sound recording after a period of five years from the making of the recording.

d. Confidentiality. Court interpreters must comply with all statutory requirements of confidentiality and secrecy, and must protect all privileged and confidential information. Court interpreters must not disclose to anyone information of a confidential nature obtained while performing interpreting duties during or relating to proceedings in this court unless ordered to do so by the court.

e. Conflicts. Court interpreters must disclose promptly to the court and to the parties any apparent or actual conflict of interest, including any prior involvement with the case or with persons significantly involved in the case.

f. Advice. A court interpreter must refrain from giving advice of any kind to any party or individual involved in court proceedings for which the interpreter has been engaged to perform interpreting services.

g. Opinions. A court interpreter must not publicly express an opinion concerning court proceedings for which the interpreter has been engaged to perform interpreting services.

h. Notification by Clerk of Court. The Clerk of Court will notify interpreters of the requirements of this rule by handing a copy of the rule to each interpreter upon his or her first appearance in court proceedings in this district. This requirement does not apply to telephone interpreters supplied to the court by the Telephone Interpreting Program. (*See* LCrR 28.i.)

i. Certified Telephone Interpreters. In criminal cases, the court may use certified interpreters supplied by the Telephone Interpreting Program sponsored by the Administrative Office of the United States Courts. Any objection to the use of such an interpreter must be made before the commencement of the proceeding being interpreted.

LCrR 30 JURY DELIBERATIONS

a. Availability During Deliberations. Until a verdict is reached and the jury is discharged, the lawyers and the defendant must be readily available to the court. When the jury begins to deliberate, the lawyers must advise the court of where they can be located in the courthouse, or if they intend to leave the courthouse, of a telephone number where they can be reached without delay. A pro se defendant will be treated as counsel for purposes of this rule.

b. Notification. If the jury has a question, or if some other issue arises during jury deliberations, and the court determines the issue merits a conference with the parties, the court will attempt to notify the lawyers. Defense counsel is responsible for communicating any such notification to the defendant. If a lawyer is not available within 20 minutes, he or she will be deemed to have waived the right to participate in the proceedings concerning the issue.

c. Proceedings. The nature of the proceedings concerning an issue arising during jury deliberations will be determined by the judge, but where the jury has a question, the judge generally will do the following:

1. Advise the lawyers of the jury's question;

2. Ask the lawyers for suggestions on how to respond to the question;

3. Formulate a response, as warranted;

4. Allow the parties to make a record on the proposed response; and

5. Communicate the response to the jury in an appropriate manner.

LCrR 32 SENTENCING HEARINGS; DISCLOSURE OF CONFIDENTIAL RECORDS MAINTAINED BY THE UNITED STATES PROBATION OFFICE

a. Sentencing Hearings. In the Northern District of Iowa, the following procedures and deadlines apply to sentencing hearings.

1. Any request that the court depart or vary from the advisory United States Sentencing Guidelines range, either upward or downward, must be asserted in a motion stating with particularity the basis for the requested departure or variance, and must be supported by a brief. (*See* LR 7.d.)

2. Any motion, sentencing memorandum, or brief relating to a sentencing issue, including any motion or brief filed under section "a" of this rule, must be filed, and a copy delivered to the assigned United States Probation Officer, at least five court days before the sentencing hearing. (This deadline does not apply to motions filed by the government for a downward departure under United States Sentencing Guideline § 5K1.1 or 18 U.S.C. § 3553(e).) A list of the witnesses and exhibits that will be offered in support of the motion must be filed as an electronic attachment to the motion.

3. Any response to a sentencing motion, memorandum, or brief must be filed, and a copy delivered to the assigned United States Probation Officer, at least three court days before the sentencing hearing. A list of the witnesses and exhibits that will be offered in support of the response must be filed as an electronic attachment to the response.

4. Any letters or other exhibits a party intends to offer or rely upon at the sentencing hearing must be delivered (but not filed) to counsel for the opposing party, the chambers of the sentencing judge, and the assigned United States Probation Officer at least five court days before the sentencing hearing. Any rebuttal exhibits must be delivered (but not filed) to counsel for the opposing party, the chambers of the sentencing judge, and the assigned United States Probation Officer at least three court days before the sentencing hearing. The deadlines in this subsection do not apply to impeachment exhibits.

b. Disclosure of Confidential Records Maintained by the United States Probation Office. Unless specifically authorized by this rule or by federal law, no confidential records of the court maintained by the United States Probation Office ("USPO") will be disclosed except by order of a federal judge of the district where the records are maintained.

1. **Confidential Records.** Confidential records of the court maintained by the USPO include records of an accused or defendant pertaining to the following: (A) pretrial supervision, release, or detention; (B) mental, drug, or physical evaluations or treatment; (C) presentence investigations; (D) sentencings; (E) incarceration; (F) parole; (G) probation; and (H) supervised release. Unsealed USPO records maintained in the files of the Clerk of Court are not confidential records for purposes of this rule.

2. **Petition Required.** Anyone seeking disclosure of confidential records first must serve on the USPO and file a written petition setting forth with particularity good cause justifying the requested disclosure. A showing of good cause must include the following: (A) the need for the specific information contained or believed to be contained in the records; and (B) a legal basis for disclosure of the records. This subsection does not preclude the USPO from disclosing information or records to the lawyers for the parties.

3. **Subpoena or Other Judicial Process.** If the USPO receives a subpoena or other judicial process for disclosure of confidential court records, the USPO must seek instructions from the court before responding to the subpoena or other judicial process.

LCrR 41 SEARCH WARRANTS

a. Presentation. A search warrant application ordinarily should be presented to a magistrate judge, but it may be presented to a district court judge if no magistrate judge is available. If no federal judge is reasonably available, a search warrant may be presented to a state or local judicial officer.

Copies of the application, the proposed search warrant, and any supporting affidavits must be delivered to the magistrate judge for his or her private review before a request is made for the magistrate judge to sign the warrant. For good cause shown, the magistrate judge may waive this requirement.

b. Lawyer for Government. Ordinarily, an officer presenting a search warrant application to a magistrate judge should be accompanied by a lawyer for the government. If justified by unusual circumstances, a magistrate judge may entertain a search warrant application from an officer who is not accompanied by a lawyer for the government.

c. Emergencies. In an emergency situation, a magistrate judge may be contacted away from the courthouse, including at his or her home, for purposes of entertaining a search warrant application. If no magistrate judge is available, a district court judge may be contacted away from the courthouse, including at his or her home, for purposes of entertaining a search warrant application.

d. Sealing of Search Warrant Documents. Search warrants, all affidavits filed in support of search warrants, and all search warrant returns will be filed under seal, and will remain sealed until the court orders otherwise.

LCrR 45 ADDITIONAL TIME AFTER ELECTRONIC SERVICE

The three-day mailing rule in Federal Rule of Criminal Procedure 45(c) also applies to documents served electronically. (*See* Fed. R. Civ. P. 5(b)(2)(E) and Fed. R. Crim. P. 49(b).) Thus, whenever a party is required to do something within a prescribed period after service and service is completed electronically under Local Rule 5.2.k.1, a period of three days is added to the prescribed period, unless contrary to the specific requirements of an order of the court or a Local Criminal Rule. (*See, e.g.*, LCrR 12.c and 47.a.)

The three-day mailing rule applies only to deadlines precipitated by the service of a notice or other document, and does not extend other deadlines established by the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, a Local Rule, an order, or a statute.

LCrR 47 MOTIONS

a. Motion Procedure. Motions must be filed in accordance with the deadlines prescribed in Local Criminal Rule 12. Local Rule 7 governs motion procedure in criminal cases, except a resistance to a motion in a criminal case must be filed within five court days after the motion is served, plus an additional three days under Local Criminal Rule 45 and Federal Rule of Criminal Procedure 45(c) if the motion is served electronically or by mail. In any event, a resistance to a motion in a criminal case must be filed at least three court days before the court proceeding at which the motion will be heard.

b. Discovery Motions. Local Rule 37.a, requiring a party filing a motion concerning a discovery dispute to file a separate declaration describing the efforts of the parties to resolve the dispute, applies in criminal cases.

LCrR 55 CRIMINAL CASE FILES AND DOCKETING

Local Rule 79, relating to the maintenance of official court files and docketing, applies in criminal cases.

The Clerk of Court will retain the original paper version of all indictments and informations for the length of time required by the Judicial Conference of the United States Courts. The United States Attorney's office must retain the original paper version of all criminal complaints for five years after the electronic filing of the complaint.

LCrR 55.1 ELECTRONIC CRIMINAL CASE FILES

Local Rule 5.2, relating to electronic filing and electronic access to case files, applies to criminal case files.

LCrR 57 RELEASE OF INFORMATION BY LAWYERS IN CRIMINAL CASES

a. **Impending Criminal Litigation.** No lawyer or law office participating in or associated with the prosecution or defense of an impending criminal prosecution may release or authorize the release of information concerning the matter or give an opinion about the matter, unless there is no reasonable likelihood the information either will be disseminated by any means of public communication or will interfere with a fair trial or otherwise prejudice the due administration of justice.

b. **Pending Investigations.** No lawyer for the government participating in or associated with a grand jury or other pending investigation of a criminal matter may make or authorize the release of any extrajudicial statement beyond what is included in the public record that a reasonable person would expect to be disseminated by any means of public communication. This section does not prohibit statements necessary for the following:

1. To inform the public that an investigation is underway;

2. To describe the general scope of an investigation;

3. To obtain assistance in the apprehension of a suspect;

4. To warn the public of any dangers; or

5. To aid otherwise in an investigation.

c. **From Arrest Until Trial.**

1. **Information Not to Be Released.** No lawyer or law office associated with the prosecution or defense of a pending or imminent criminal prosecution may release or authorize the release of any extrajudicial statement beyond what is included in the public record that a reasonable person would expect to be disseminated by any means of public communication concerning the following:

A. Personal information concerning the accused, including the accused's character, reputation, or prior criminal record, including arrests, indictments, or other criminal charges, except this subsection does not prohibit a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, information necessary to aid in the accused's

apprehension or to warn the public of any dangers the accused may present;

B. The existence or contents of any confession, admission, or statement given by the accused, or the refusal of the accused to make a statement;

C. The performance of or results from any examination or test, or the accused's refusal or failure to submit to any examination or test;

D. The identity, testimony, or credibility of prospective witnesses, except for the identity of the victim if the release of this information is not otherwise prohibited by law;

E. The possibility of a plea of guilty to the offense charged or to a lesser offense; and

F. Any opinion as to the accused's guilt or innocence, the merits of the case, or the evidence in the case.

2. Information That May Be Released. This section does not preclude a lawyer or law office associated with the prosecution or defense of a criminal prosecution, in the proper discharge of an official or professional obligation, from doing the following:

A. Announcing the fact and the circumstances of an arrest, including the time and place of arrest and any resistance, pursuit, or use of weapons;

B. Announcing the identity of any investigating or arresting officers or agencies;

C. Announcing the duration of the investigation;

D. Announcing that the accused denies the charges, without further comment;

E. Announcing the scheduling of any court proceeding;

F. Announcing the results of any stage of the judicial process;

LCrR 58 SCHEDULE OF FINES

Pursuant to Federal Rule of Criminal Procedure 58(d)(1), the court may, by standing order, fix sums which may be accepted in lieu of appearances in cases of petty offenses, as defined in 18 U.S.C. § 19. All schedules presently in effect are adopted.

LCrR 59 APPEALS FROM RULINGS OF UNITED STATES MAGISTRATE JUDGES IN CRIMINAL CASES

A party in a criminal case who objects to or seeks review or reconsideration of either a magistrate judge's order on a pretrial matter or a magistrate judge's report and recommendation must file specific, written objections to the order or report and recommendation within 10 court days after service of the order or report and recommendation. (*See also* LCrR 5, relating to motions for revocation, amendment, or reconsideration of release orders and detention orders.) Any response to the objections must be filed within five court days after service of the objections. A party asserting such objections must arrange promptly for the transcription of all portions of the record the district court judge will need to rule on the objections.

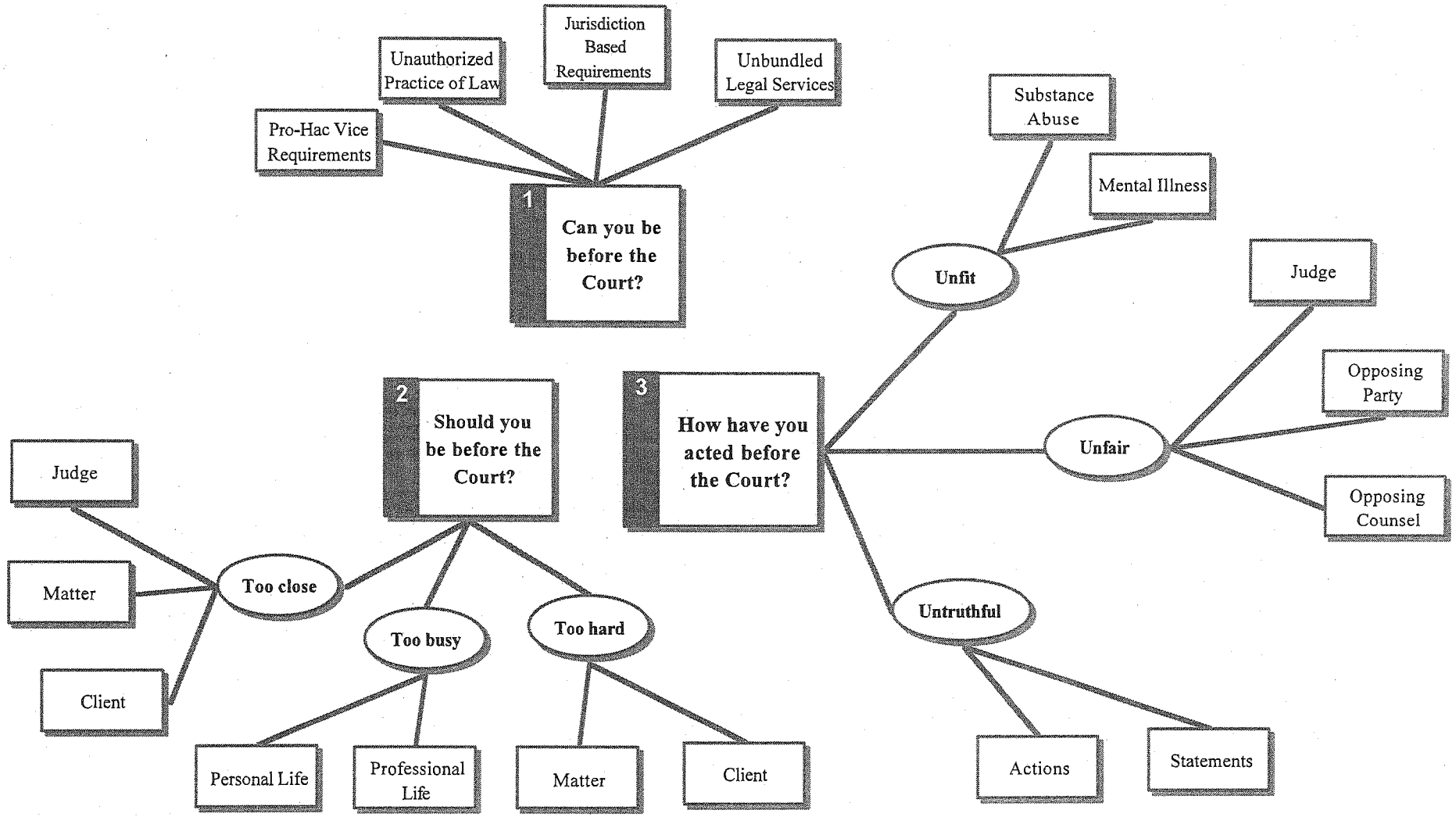
In any event, objections to a magistrate judge's order or report and recommendation must be filed at least five court days before trial, and any response to the objections must be filed at least three court days before trial.

SURVIVING AN ETHICS COMPLAINT

PRESENTED BY

TRE CRITELLI
ATTORNEY

Overview of Legal Ethics



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