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APPENDIX

FILED

MAY 1 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDRE MARTEL WINN,

Defendant-Appellant.

No. 18-10473

D.C. No.
4:16-cr-00516-HSG-1

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Submitted April 17, 2020**
San Francisco, California

Before: BERZON and IKUTA, Circuit Judges, and LEMELLE,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The case has been submitted on the briefs as of April 17, 2020, pursuant to FRAP 34(a).

*** The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Andre Winn appeals the district court's denial of his motion to suppress and his conviction for possessing a firearm as a felon under 18 U.S.C. § 922(g). We have jurisdiction under 28 U.S.C. § 1291.

The district court did not err in upholding the federal search of Winn's cell phone pursuant to a search warrant based on evidence that guns purchased by a suspected Nevada gun dealer had been found in Winn's residence. Winn argues that the federal search warrant was invalid both because it was based on evidence obtained by means of an invalid search of his apartment and because the federal officers relied on the prior invalid download of information from Winn's phone by the San Leandro Police Department (SLPD). We disagree.

First, the SLPD's initial search of Winn's apartment was conducted pursuant to a valid search warrant based on probable cause that evidence relating to a shooting for which James Williams was the primary suspect would be found in Winn's apartment. *See United States v. Crews*, 502 F.3d 1130, 1136–37 (9th Cir. 2007). The affidavit presented to the magistrate judge established probable cause that Williams was temporarily residing in the apartment; it recited information from continuous GPS tracking of Williams's cell phone that put him in the vicinity of Winn's apartment several days after the shooting and stated that police officers conducting surveillance of Williams observed him entering, exiting, and reentering

the apartment, securing the door, and exiting the apartment the following morning. Given these observations, it was reasonable for the officers to infer that Williams was temporarily residing at the apartment, which distinguishes this case from the precedent on which Winn relies, where there was either no apparent connection between the suspect and the searched premises, or the suspect engaged in only casual daytime visits to the premises. *See United States v. Grandberry*, 730 F.3d 968, 976–78 (9th Cir. 2013); *Greenstreet v. Cty. Of San Bernardino*, 41 F.3d 1306, 1309–10 (9th Cir. 1994); *United States v. Bailey*, 458 F.2d 408, 412 (9th Cir. 1972).

The dissent’s reliance on *Bailey* is misplaced. *Bailey* addressed an affidavit disclosing that the defendant “had been seen at the house and that [a co-defendant] was arrested there” six weeks after the crime for which evidence was sought. 458 F.2d at 412. The affidavit included “[n]o facts . . . from which it could be inferred” that the defendant was more than a casual social guest. *Id.* Here, police officers’ observations led to the reasonable inference that Williams was an overnight guest mere days after the alleged shooting, which established a significantly stronger connection between the crime for which Williams was a suspect and Winn’s apartment.

Our precedent does not require showing that a suspect permanently lives in a home to establish probable cause that evidence of a crime will be found in that home. *See Crews*, 502 F.3d at 1136–37; *cf. Grandberry*, 730 F.3d at 973 (holding that a warrantless search of a house was not permitted under the parolee’s parole search conditions, which expressly applied only to the parolee’s permanent residence). Based on the police officers’ training and experience, Williams’s use of the premises less than a week after the shooting established probable cause that evidence related to the shooting incident would be found at the premises. *See United States v. Garay*, 938 F.3d 1108, 1113 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 976 (2020); *Crews*, 502 F.3d at 1136–37.

Moreover, the warrant did not lack sufficient particularity given that it sufficiently described the items to be seized, including cell phones, and there was probable cause that the cell phones would contain evidence relating to the shooting incident. *See Garay*, 938 F.3d at 1113.

The affidavit’s omission of information that the apartment belonged to Winn, and that Williams was Winn’s cousin, did not violate *Franks v. Delaware*, 438 U.S. 154 (1978). Williams’s status as an overnight guest in the apartment rather than the apartment’s primary resident was not material to the magistrate judge’s probable cause finding. *See id.* at 155–56. Moreover, the district court’s

determination that the police were not deliberately or recklessly misleading in omitting this information was not clearly erroneous. Therefore, the district court did not err in declining to hold a hearing as to whether the search warrant was supported by probable cause if the omitted evidence had been included.

Second, the seizure of Winn's cell phone from his person during the SLPD officers' initial search does not require exclusion of evidence obtained from the cell phone pursuant to the federal officers' warrant. The SLPD would have inevitably seized Winn's cell phone, *see Nix v. Williams*, 467 U.S. 431, 444 (1984), because after discovering four firearms, multiple high-capacity firearm magazines, several rounds of various types of ammunition, and several baggies of cocaine in his apartment, the police would have arrested Winn and searched him incident to arrest, *see United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006). And the SLPD would have been entitled to secure the phone "to prevent destruction of evidence while seeking a warrant." *Riley v. California*, 573 U.S. 373, 388 (2014).

Although the SLPD subsequently downloaded information from Winn's phone without a warrant, even assuming this search was unlawful, the federal officers' affidavit contained no "tainted evidence" derived from that search. *United States v. Nora*, 765 F.3d 1049, 1058 (9th Cir. 2014). And the record supports the district court's finding that the federal officers would have sought the

warrant regardless of the SLPD's search based on the gun evidence. *See Murray v. United States*, 487 U.S. 533, 542 & n.3 (1988). Therefore, the federal warrant was a "genuinely independent source" of the evidence from Winn's cell phone. *Id.* at 542. We conclude that the district court did not err in denying Winn's motion to suppress.

We also reject Winn's argument that there was insufficient evidence supporting his conviction under 18 U.S.C. § 922(g) because the government did not present evidence that Winn knew he had been convicted of a crime punishable by a term of imprisonment exceeding one year at the time he possessed the firearm. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). Any error in not adducing evidence on this element of the offense "did not affect [Winn]'s substantial rights" because Winn's stipulation to his prior convictions "proved beyond a reasonable doubt that [he] had the knowledge required by *Rehaif*." *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019).

AFFIRMED.

FILED

United States v. Winn, No. 18-10473

MAY 1 2020

BERZON, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. Contrary to the majority's holding, the warrant authorizing the SLPD's initial search of Winn's apartment was not supported by probable cause.

The affidavit underlying the warrant alleged that (1) GPS monitoring located Williams's cell phone in the vicinity of the apartment, without saying how many times that occurred, and (2) SLPD detectives observed Williams at the apartment twice, once around 9:00 p.m. and once the following morning, without saying the detectives had continued their surveillance overnight. Although the affidavit mentioned that Williams came out of the apartment, looked around, and went back in, that detail adds nothing to support the supposition that he lived there. Under our precedent, the information contained in the warrant affidavit was insufficient to establish that Williams had a sufficient connection to the apartment to provide probable cause for a broad search of the home to find items connected to Williams's recent crime.

In *United States v. Bailey*, 458 F.2d 408 (9th Cir. 1972), for example, two suspects in a bank robbery were seen separately at the same house on at

least four occasions in the weeks following the robbery. We held that probable cause to search the house for items connected to the robbery was lacking, because there was insufficient evidence to permit an inference that the suspects were “other than casual social guests” there. *Id.* at 412. The nexus between Williams and Winn’s apartment was weaker, or at least no stronger, than the nexus in *Bailey*.

Moreover, the reasons given in the affidavit for expecting to find evidence of Williams’s crime in Winn’s apartment were tied repeatedly to the affidavit’s assertions that the apartment was Williams’s “residence,” and that gang members often keep evidence of gang-related crimes in their residence. In parolee search cases, we have required much more evidence than was given here to establish that a dwelling place is a parolee’s residence. “Even when there is evidence that the parolee has ‘spent the night there occasionally,’ we have concluded that such evidence is ‘insufficient’ to establish residence.” *United States v. Grandberry*, 730 F.3d 968, 978 (9th Cir. 2013) (quoting *United States v. Howard*, 447 F.3d 1257, 1262 (9th Cir. 2006)).

The SLPD’s unlawful search of Winn’s apartment tainted the federal agents’ later search of Winn’s cell phone and apartment. Absent that

original search, the state officers would not have had Winn's cell phone and been able to hand it over to the federal agents. And the good-faith exception does not apply because the federal government has not established that the SLPD officers conducted the initial search in good faith. *See United States v. Artis*, 919 F.3d 1123, 1133 (9th Cir. 2019). The SLPD officers were less than forthcoming in informing the magistrate judge that the basis for their belief that Williams resided in the apartment to be searched was tenuous, and the affidavit's shortcomings in establishing a connection between Williams and the apartment were readily apparent. *See Greenstreet v. Cty. of San Bernardino*, 41 F.3d 1306, 1310 (9th Cir. 1994).

As I would hold that the district court should have granted Winn's motion to suppress the evidence from the federal searches, I would reverse the conviction, and so dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USA,

Plaintiff,

v.

ANDRE MARTEL WINN,

Defendant.

Case No.16-cr-00516-HSG-1

**ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS; GRANTING
DEFENDANT'S MOTION TO SEVER**

Re: Dkt. Nos. 146, 150

Pending before the Court are a motion to suppress, Dkt. No. 150, and a motion to sever, Dkt. No. 146, by Defendant Andre Winn. For the reasons set forth below, the Court **DENIES** the motion to suppress and **GRANTS** the motion to sever.

I. DEFENDANT'S MOTION TO SUPPRESS

On January 20, 2016, officers from the San Leandro Police Department ("SLPD") executed a search warrant at Defendant's home. *See* Dkt. No. 150-1, Ex. F, at 4. In his motion to suppress, Defendant contends that the subsequent searches and seizures "were all in violation of the Fourth Amendment," necessitating suppression of the fruits of those searches. *See* Dkt. No. 150 at 1. It does not appear, however, that the government intends to introduce any of the challenged evidence other than the contents of the phone seized on January 20, 2016 pursuant to the warrant issued that same day. *See* Dkt. No. 170 at 7 (contending that the Court "need not reach" validity of underlying state warrant to deny Defendant's motion, because the constitutionality of the subsequent federal warrant is determinative).¹ Accordingly, the Court

¹ If the Court's reading is incorrect, the government should promptly notify the Court, and explain how the introduction of such evidence would be consistent with its argument that the Court "need not reach" any issue other than the constitutionality of the federal warrant for the search of the phone.

addresses Defendant's motion only to the extent it challenges the seizure and subsequent searches of his cell phone.

A. The SLPD's Seizure of Defendant's Phone Was Valid.

The Court begins with the SLPD's initial seizure of Defendant's phone to determine whether that phone was validly in the state's possession before it was turned over to federal authorities. Here, Defendant argues that the SLPD's search of his apartment on January 20, 2016 violated his rights under the Fourth Amendment because the underlying search warrant failed to establish probable cause and, moreover, was overbroad. *See* Dkt. No. 150 at 7-14. Defendant further contends that the SLPD was "deliberately or recklessly misleading" in obtaining this warrant, negating probable cause or—at the very least—requiring an evidentiary hearing. *See id.* at 14-17. Defendant's arguments are not persuasive.

1. The January 20, 2016 search warrant for Defendant's home was supported by probable cause and encompassed Defendant's cell phone.

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. Accordingly, in order for a search warrant to be valid, it "must be supported by an affidavit establishing probable cause." *U.S. v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985). Probable cause amounts to a "'fair probability' that contraband or evidence is located in a particular place," which in turn "depends on the totality of the circumstances, including reasonable inferences, and is a 'commonsense, practical question.'" *U.S. v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (citations omitted). Courts reviewing probable cause determinations are "limited to the information and circumstances contained within the four corners of the underlying affidavit." *Stanert*, 762 F.2d at 778 (citation omitted). The standard of review with respect to "a magistrate's decision to issue a search warrant" is a narrow one: "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* at 779 (quoting *Ill. v. Gates*, 462 U.S. 213, 238 (1983)) (original brackets and ellipses). Courts therefore "may not reverse such a conclusion unless the magistrate's decision is clearly erroneous." *Id.* (citation omitted).

Here, the SLPD had probable cause to search Defendant's home. In this case, the SLPD

sought a search warrant of Defendant's home believing it was the home of James Williams, the suspect in an unrelated investigation. *See* Dkt. No. 150-1 at 11 (ECF pagination). Defendant contends that the affidavit underlying the warrant application "did not include facts, evidence or observation sufficient to establish probable cause that the location to be searched was the residence of James Williams." Dkt. No. 150 at 8. The affidavit states that on January 17, 2016, the SLPD obtained a warrant authorizing "continuous GPS tracking of WILLIAMS['] cellular phone," which placed him in the "area of Beaumont Ave and E 32nd Ave in Oakland." Dkt. No. 150-1 at 12. The SLPD located the apartment "after conduct[ing] several surveillances," and on January 19, 2016 detectives "positively identified WILLIAMS as he was observed exiting one of the apartment doors." *Id.* at 12-13. Specifically, detectives observed Williams "exiting [the] apartment door, reentering and securing the door of the apartment." *Id.* at 13. On this basis, the SLPD concluded that Williams "[had] dominion and control of the residence and thus [would] have property related to this investigation inside it." *Id.* Detectives saw Williams leave the apartment the following morning. *See id.* The Court finds that the magistrate who authorized the warrant had a "substantial basis" for finding probable cause, based not only on the detectives' observation of Williams at the apartment on January 19 and 20, but on the GPS tracking that placed Williams in the apartment's vicinity beginning on January 17. Given "the preference to be accorded to warrants," even in "doubtful or marginal cases," the Court finds sufficient probable cause. *See Mass. v. Upton*, 466 U.S. 727, 734 (1984).

Defendant next contends that even if the search of his home was proper, the "warrant was unconstitutionally overbroad in its authorization to seize, without any further specification[,] 'cellular telephones, smart cellular phones and electronic [tablets].'" *See* Dkt. No. 150 at 11. He further argues that even if the warrant were not overbroad, the SLPD's search exceeded the scope of the warrant. *See id.* at 12-13. Both contentions are incorrect. "Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible." *U.S. v. Mann*, 389 F.3d 869, 877 (9th Cir. 2004) (quoting *U.S. v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)). "While a search warrant must describe items to be seized with particularity sufficient to prevent a general, exploratory rummaging in a person's

1 belongings, it need only be reasonably specific, rather than elaborately detailed.” *Id.* (quoting *U.S.*
2 *v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996)).

3 Here, the face of the warrant is a sufficient basis upon which to conclude that seizure of
4 Defendant’s phone was proper. Under a heading styled “Property to be Seized,” the warrant listed
5 “[c]ellular telephones, smart cellular phones and electronic [tablets].” Dkt. No. 150-1, Ex. B, at 9
6 (ECF pagination). Further, the underlying affidavit stated that “suspects who[] commit these
7 crimes often use residential and cellular telephones to avoid detection by law enforcement,” and
8 may use phones “that are not subscribed to their own names to avoid detection by law
9 enforcement.” *Id.* at 11. *See also id.* at 14 (providing other information that may be gleaned from
10 a seized cell phone, including “evidence of . . . criminal intent” and the identities of “previously
11 unidentified co-conspirators”). The Court finds that the warrant is “reasonably specific” in
12 describing the phones to be seized, particularly in light of the SLPD’s explanation regarding the
13 importance of cell phones in criminal investigations. *See id.* at 11, 14.

14 **2. Defendant fails to make a substantial preliminary showing that the**
15 **affidavit supporting the SLPD’s search warrant for his home contained**
16 **intentionally or recklessly misleading omissions.**

17 Defendant alternatively seeks a *Franks* hearing based on his assertion that the search
18 warrant contained “two sets of material omissions, which singly and in combination fatally
19 undermined the probable cause for the search of” his apartment. *See* Dkt. No. 150 at 14. A
20 hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (*i.e.*, a “*Franks* hearing”), “is an
21 evidentiary hearing on the validity of the affidavit underlying a search warrant.” *U.S. v. Kleinman*,
22 880 F.3d 1020, 1038 (9th Cir. 2018) (citing *U.S. v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000))
23 (internal quotation marks omitted). A defendant is entitled to a *Franks* hearing “if he can make a
24 substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false
25 statements or misleading omissions, and (2) the affidavit cannot support a finding of probable
26 cause without the allegedly false information.” *Id.* (citing *Reeves*, 210 F.3d at 1044) (internal
27 quotation marks omitted). “If both requirements are met, the search warrant must be voided and
28 the fruits of the search excluded.” *Id.* (quoting *U.S. v. Perkins*, 850 F.3d 1109, 1116 (9th Cir.
2017)).

Defendant argues that the affidavit underlying the SLPD's search warrant made two material omissions. Neither warrants a *Franks* hearing. First, Defendant contends that the SLPD failed to mention in the affidavit that it "filled out a pen register application that pre-dated recent changes in California Law," rendering the outdated application "no longer legally sufficient for phone location tracking." *See* Dkt. No. 14. But Defendant fails to demonstrate that such an omission rises to the level of recklessness or intentional conduct, rather than simple negligence. Calling an omission "reckless" does not make it so. *See* Dkt. No. 150 at 16. Second, Defendant argues that the SLPD omitted from the affidavit the fact that its officers "knew that the primary resident of the apartment was someone other than James Williams." *See id.* at 16. In support of his argument, Defendant cites video footage from the search which shows an officer telling Defendant, "We have a search warrant for your residence, for your cousin." *See* Dkt. No. 150, Ex. E. Defendant contends that "this omission 'manipulated the inferences' as to the extent to which probable cause applied to the whole apartment or not." *See id.* at 16 (citation omitted).

First, the Court finds that Defendant overreads the significance of the snippet of video footage, and does not believe it supports the conclusion that the officers knew that Williams was not the "primary resident" of the apartment. In any event, Defendant again simply fails to present any basis for concluding that such an omission (even if it is assumed) was intentional or reckless as required under *Franks*. Finally, the addition of this purportedly omitted information would not have negated the existence of probable cause as established by the totality of the affidavit. *See Kleinman*, 880 F.3d at 1038 (in considering the materiality of an alleged omission, reviewing court asks "whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions"). Accordingly, the Court finds that the SLPD's seizure of Defendant's phone pursuant to the January 20, 2016 warrant was lawful.

B. Defendant Has Failed to Show That the Federal Search of His Phone Was Tainted.

The legality of the seizure notwithstanding, Defendant next argues that the SLPD searched his phone without applying for or receiving a warrant, which tainted the subsequent federal search of his phone. *See* Dkt. No. 150 at 18-21. Defendant also asserts that the six-month delay between

the SLPD's seizure of his phone and the federal search was unreasonable, *see id.* at 21-22, and again requests a *Franks* hearing, this time due to alleged omissions in the federal search warrant for his phone, *see* Dkt. No. 189 at 16-17. The Court disagrees.

1. Even assuming that the SLPD searched Defendant's phone without a warrant, the subsequent search by ATF was untainted.

"The exclusionary rule encompasses 'evidence seized during an unlawful search,' and also the 'indirect . . . products of such invasions.'" *U.S. v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017) (quoting *Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963)) (original ellipses). As such, "[e]vidence derivative of a Fourth Amendment violation—the so-called 'fruit of the poisonous tree'—is ordinarily 'tainted' by the prior 'illegality' and thus inadmissible, subject to a few recognized exceptions." *Id.* (citations omitted). To show that evidence is fruit of the poisonous tree, a court looks to "the causal connection between the illegality and the evidence," or whether the illegality "was the impetus for the chain of events leading to the" evidence. *See id.* (citing *U.S. v. Johns*, 891 F.2d 243, 245-46 (9th Cir. 1989)). It is the government's burden to show that such evidence is admissible. *See id.* (citation omitted).

As relevant here, the warrant listed as a place "to be searched" a "white LG touch screen phone located on the person of" James Williams. *See* Dkt. No. 150-1, Ex. B, at 8 (ECF pagination). During the search, however, SLPD officers seized Defendant's cell phone, a "black Alcatel Onetouch." *See id.*, Ex. F, at 4. The SLPD subsequently searched Defendant's phone on an unspecified date, and on July 1, 2016 provided Special Agent Robert Topper of the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF")—who was conducting a separate federal investigation of Defendant—with the phone, as well as a CD containing the phone's contents. *See* Dkt. No. 173 (Declaration of Robert Topper, or "Topper Decl.") ¶¶ 9-10. In keeping with his practice of "seek[ing] federal warrants to search items and obtain evidence for use in the federal case, even if those items may have previously been searched by local law enforcement," *id.* ¶ 13, Agent Topper "prepared an affidavit setting forth probable cause to search Winn's cell phone" on July 29, 2016, *id.* ¶ 14. He "did not include any of the information derived from SLPD's download of the phone or [his] review of a copy of that download." *Id.* That same day, he "swore

1 out and obtained a federal warrant authorizing [his] search of Winn’s phone,” *id.* ¶ 18, and
2 subsequently completed the search, *see id.* ¶ 19.

3 Even assuming (without deciding) that the SLPD’s search of the phone was warrantless or
4 exceeded the scope of the warrant, and was unconstitutional, Defendant has failed to show that the
5 federal warrant for the search of his phone was tainted by the SLPD’s search in any way. His
6 argument that the “record indicates an impermissible taint” is speculative, and appears to be based
7 entirely on the assertion that there was some unspecified communication between the SLPD and
8 federal investigators. *See* Dkt. No. 150 at 20 (“SLPD illegally searched Winn’s phone and
9 communicated with ATF, strongly raising the prospect of a tainted federal investigation.”).
10 Further, the affidavit by Agent Topper underlying the federal warrant referenced the SLPD’s
11 search of Defendant’s phone, and specifically stated that “the probable cause set forth [in the
12 federal affidavit] was not derived from any of the recovered contents of the Subject Telephone.”
13 Dkt. No. 150-2, Ex. J, at 2 n.1; *see also id.* (“This affidavit is submitted in an abundance of
14 caution to provide independent probable cause for ATF agents to search WINN’s cellular
15 telephone.”). In response, Defendant contends only that “[t]his bare assertion does not . . . end the
16 inquiry into whether the contents of [his] cellphone were revealed to or in some way directed
17 federal investigators such that the unconstitutional search by the SLPD served as the ‘impetus for
18 the chain of events’ leading to the federal search.” *See* Dkt. No. 150 at 21 (citation omitted).
19 Defendant fails to provide any authority in support of that principle, however, ending his argument
20 on that conclusory note. *See U.S. v. Lingenfelter*, 997 F.2d 632, 640 (9th Cir. 1993) (finding
21 defendant’s contention that an officer would testify regarding his drug-sniffing dog’s false positive
22 alert “too speculative to constitute a sufficient preliminary showing to trigger a *Franks* hearing”).²
23 The Court accordingly finds that the federal investigation into and search of Defendant’s phone
24 was not tainted.

25 For this reason, Defendant’s argument that the good faith exception does not apply is

26
27 ² Defendant contends in the first line of his reply brief that no evidentiary hearing is warranted, *see*
28 Dkt. No. 189 at 1, but then advances a contradictory conclusion on this point later in the same
brief, *see id.* at 17 (asserting that the government’s “blatant and material omissions require a
Franks hearing”).

1 inapposite: here, there is no need to apply the exception because the government expressly
 2 disclaimed reliance on the SLPD's search in its application for a warrant. Thus, the cases of
 3 *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987), and *United States v. Wanless*, 882 F.2d 1459
 4 (9th Cir. 1989), are distinguishable and do not govern in these circumstances. These cases stand
 5 for the proposition "that the good faith exception does not apply where a search warrant is issued
 6 on the basis of evidence obtained as the result of an illegal search." *See Wanless*, 882 F.2d at 1466
 7 (citing *Vasey*, 834 F.2d at 789). But in both of those cases—unlike the instant case—the officers
 8 actually incorporated illegally obtained evidence into the affidavit underlying the search warrant
 9 application. *See Vasey*, 834 F.2d at 788 ("All evidence Officer Jensen seized during the illegal
 10 warrantless search was tainted and should not have been included in the affidavit for a search
 11 warrant."); *Wanless*, 882 F.2d at 1467 n.13 ("[T]he information given to support the telephonic
 12 warrant included . . . the evidence seized during the unlawful first investigative search."). Also
 13 unlike this case, in *Vasey* and *Wanless* the officer who conducted the initial illegal search and the
 14 officer who subsequently applied for a warrant using the fruits of that illegal search were the same
 15 person, precluding any genuine claim of independent good faith. *See Vasey*, 834 F.2d at 784-85;
 16 *Wanless*, 882 F.3d at 1460-62. Instead, this case is akin to *United States v. Bah*, where the officer
 17 "intentionally omitted any discussion of [illegally obtained] evidence from the warrant affidavit,"
 18 and thus "permitted the magistrate judge to make an untainted probable cause determination." *See*
 19 794 F.3d 617, 633-34 (6th Cir. 2015). In *Bah*, as is the case here, the court found that "exclusion
 20 is not warranted." *See id.* at 634.

21 Moreover, the Court does not find that law enforcement's seizure of Defendant's phone
 22 was unreasonably prolonged. "An unreasonable delay between the seizure of a package and
 23 obtaining a search warrant may violate the defendant's Fourth Amendment rights." *U.S. v.*
 24 *Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (citing *U.S. v. Van Leeuwen*, 397 U.S. 249, 252-53
 25 (1970)). The "touchstone" of this inquiry is "reasonableness": courts "determine whether the
 26 delay was 'reasonable' under the totality of the circumstances, not whether the Government
 27 pursued the least intrusive course of action." *Id.* (citations omitted). "Such determinations are
 28 made on a case-by-case basis." *Id.* (citing *Van Leeuwen*, 397 U.S. at 253). Here, the totality of

the circumstances indicates that the seizure of Defendant's phone was not unreasonably delayed. As stated by the author of the SLPD's search warrant, "once an item of evidence, like Winn's cell phone, is seized and logged in as evidence in a case, in order for a civilian or defendant to get that item back he or she must petition the court and obtain a court order for the SLPD to release that item." Dkt. No. 171 (Declaration of Steven Cesaretti) ¶ 13. "The SLPD will not release any item of evidence without such a court order," *id.*, and here, there is no indication that Defendant sought the release of his phone, *see id.* ¶ 15.

2. Defendant fails to make a substantial preliminary showing that the affidavit supporting ATF's search warrant for his phone contained intentionally or recklessly misleading omissions.

Defendant's only remaining theory is that the "affidavit in support of the federal warrant contained material misrepresentations and omissions," warranting a *Franks* hearing. *See* Dkt. No. 189 at 16-17. The Court disagrees, and finds that Defendant has failed to make the required substantial preliminary showing. He contends there are two "blatant and material omissions" in the affidavit by Agent Topper underlying the federal search warrant for Defendant's phone. *See* Dkt. No. 189 at 17. First, he argues that Agent Topper failed to include in his affidavit the fact that the SLPD "had searched the contents of Mr. Winn's cellphone, told him about the contents of the cellphone, and provided him with a copy of the CD download." *Id.* (citing Topper Decl. ¶¶ 9-12). Second, in an apparent reference to Agent Topper's review of the CD containing the phone's contents provided by the SLPD, Defendant notes that Agent Topper failed to inform the magistrate "that [he] had already searched Mr. Winn's cellphone at the time that he applied for the federal warrant and 'did not see anything that appeared significant to the ATF investigation.'" *Id.* (citing Topper Decl. ¶ 12) (emphasis removed).

Even recognizing the fact that Agent Topper *also* stated in his declaration that at the time, he "believed that Winn's phone and the other electronic items that SLPD had searched had been searched pursuant to a valid warrant or based on other valid authority," Topper Decl. ¶ 10, Defendant fails to make the required substantial preliminary showing to warrant a *Franks* hearing. Most pertinent is Agent Topper's express, sworn statement in his affidavit that any probable cause was not derived from the SLPD's search of Defendant's phone. Dkt. No. 150-2, Ex. J, at 2 n.1.

Defendant does not contend that this statement was “intentionally or recklessly false,” or present any evidence supporting that conclusion.

Moreover, while the Topper Declaration does include the phrase Defendant quotes, Defendant fails to acknowledge at least two key additional facts. First, Defendant omits the beginning of the quoted portion of the declaration, which clarifies that Agent Topper “*scanned* the contents of the discs and did not see anything that appeared significant to the ATF investigation.” Topper Decl. ¶ 12 (emphasis added). Further, the same paragraph notes three sentences later that Agent Topper “did notice that on the download for Winn’s phone there were a number of photographs of firearms and there appeared to be text messages about firearms,” *id.*, which is fully consistent with the clear thrust of the declaration, *see id.* ¶¶ 5 (even before receiving the phone, Agent Topper believed based on his training and experience “that Winn’s phone would be a significant piece of evidence”), 17 (“before the ATF contacted SLPD to determine if they still had possession of Winn’s cell phone, that phone was, in my mind and based on my training and experience, likely to be the most fruitful item to search for evidence,” such that Agent Topper would have applied for a warrant for the phone in any event). Thus, whatever the phrase cited by Defendant might be speculated to mean in isolation, adding the content described in the Topper Declaration to the affidavit would not have negated the existence of probable cause. Defendant accordingly has not met his burden of showing an entitlement to a *Franks* hearing.

C. Defendant’s Motion to Suppress Statements He Made During the January 20, 2016 Search of His Apartment is Denied Without Prejudice.

Defendant also argues for the suppression of “all statements [he] made in response to police questioning during [the January 20, 2016] search.” *See* Dkt. No. 150 at 17-18. Citing *Miranda v. Arizona*, 384 U.S. 463 (1966), Defendant suggests that because he was in police custody during the search of his home, and because the police failed to give him the required warnings prior to “interrogat[ing]” him, any statements he made to the police must be suppressed. *See id.* While it is true that under *Miranda*, “the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during ‘custodial interrogation’ without a prior warning,” *see Ill. v. Perkins*, 496 U.S. 292, 296 (1990), Defendant has failed to

1 identify the statements he is seeking to suppress—either in his motion or his reply brief. This
 2 omission precludes the Court from determining whether the statements were made in the context
 3 of a “custodial interrogation.” Accordingly, Defendant’s motion to suppress his statements is
 4 denied without prejudice.

5 **II. DEFENDANT’S MOTION TO SEVER**

6 Defendant next moves to sever Counts One, Two, and Three of the second superseding
 7 indictment from the remaining counts for trial. *See* Dkt. No. 146 at 2. He contends that those
 8 counts are improperly joined under Federal Rule of Criminal Procedure 8. *See id.* The Court
 9 agrees.

10 An indictment “may charge a defendant in separate counts with 2 or more offenses if the
 11 offenses charged . . . are of the same or similar character, or are based on the same act or
 12 transaction, or are connected with or constitute parts of a common scheme or plan.” Fed. R. Crim.
 13 P. 8(a). While Rule 8 is “broadly construed in favor of joinder,” *U.S. v. Jawara*, 474 F.3d 565,
 14 573 (9th Cir. 2007) (citation omitted), at least one of these three “conditions must be satisfied for
 15 proper joinder, and those conditions, although phrased in general terms, are not infinitely elastic,”
 16 *id.* at 573-74 (quoting *U.S. v. Randazzo*, 80 F.3d 623, 627 (1st Cir. 1996)). “[A] valid basis for
 17 joinder should be discernible from the face of the indictment.” *Id.* at 572-73. Rule 14 provides for
 18 relief, including “separate trials of counts,” where joinder of offenses “appears to prejudice a
 19 defendant or the government.” Fed. R. Crim. P. 14(a).

20 Counts One through Three of the second superseding indictment, which Defendant seeks
 21 to sever, stem from his alleged involvement in the armed robbery of a gas station on November
 22 21, 2015. *See* Dkt. No. 40 ¶¶ 1-3. Count Four charges Defendant as a felon in possession of a
 23 firearm, *id.* ¶ 4, and Counts Eight through Sixty-Four are related to Defendant’s alleged
 24 involvement in a firearm distribution ring, *see id.* ¶¶ 8-32. The government’s asserted basis for
 25 joinder of Counts One through Three with the remaining counts is that “the robbery furthered the
 26 conspiracy [alleged in the remaining counts] by providing an infusion of cash for the
 27 coconspirators to use to fund the purchase of firearms from the Reno-based conspirators.” Dkt.
 28 No. 164 at 8. The government further contends that although the firearms allegedly used by

Defendant during the robbery were “not specifically identified by the government,” they “are consistent with many of the semiautomatic handguns purchased by straw purchasers for delivery to [Defendant] and [co-defendant] De La Cruz prior to the robbery.” *Id.* The government also notes that “[t]he robbery occurred in the midst of the gun trafficking conspiracy, with planning of both occurring nearly simultaneously.” *Id.*

The purported connection between the offenses is not discernible from the face of the second superseding indictment.³ The government theorizes that the robbery provided an “infusion of cash” for the firearm distribution ring’s operations—even though the robbery is alleged to have taken place approximately eight months *after* the start of the alleged gun-trafficking conspiracy. Compare Dkt. No. 40 ¶¶ 1-3 (alleging that robbery took place on November 21, 2015), *with id.* ¶ 14 (alleging that gun-trafficking conspiracy began no later than March 2015). Moreover, although the government argues “that Winn . . . used guns during the robbery that they received as part of the gun trafficking conspiracy,” it also concedes that “to be fair we have not identified the specific guns used during the robbery.” Dkt. No. 164 at 2. Last, the government’s assertion regarding the temporal proximity of the robbery and the gun-trafficking conspiracy, standing alone, is an insufficient basis for joinder. *See Jawara*, 474 F.3d at 575 (stating that “a close temporal relationship is not, in and of itself, a sufficient condition for joinder”).

Consequently, the Court finds “no direct connection between the acts other than [Defendant’s] participation in both events.” *See id.* There is also a high potential for undue prejudice in these circumstances, given the nature of the armed robbery charges. *See U.S. v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987) (stating that joinder “may prejudice a defendant” where, *inter alia*, “the jury may use the evidence of one of the crimes charged to infer . . . guilt of the other crime or crimes charged,” or where “the jury may cumulate the evidence of the various

³ In support of its argument that the alleged robbery “provid[ed] an infusion of cash for the” gun trafficking conspiracy,” *see* Dkt. No. 164 at 8, the government introduces text messages that purport to show that Defendant “stole at least \$1,000 from the gas station during the robbery,” then “shortly after the robbery . . . drove to Reno with his cousin . . . to pick up firearms from [co-defendant] Straight,” *see id.* at 3-5. Even assuming that this evidence were sufficient to establish a basis for joinder, the Court can consider only the face of the indictment to determine whether joinder of offenses under Rule 8 is appropriate. *See Jawara*, 474 F.3d at 572-73.


1 crimes charged and find guilt when, if considered separately, it would not so find”) (quoting *Drew*
2 *v. U.S.*, 331 F.2d 85, 88 (D.C. Cir. 1964)). Joinder of the offenses is therefore inappropriate, and
3 Counts One through Three must be tried separately.

4 **III. CONCLUSION**

5 Accordingly, for the foregoing reasons, Defendant’s motion to suppress as to statements he
6 made during the search of his home on January 20, 2016 is **DENIED WITHOUT PREJUDICE**,
7 while the remainder of the motion is **DENIED**. Defendant’s motion to sever is **GRANTED**. The
8 Court further **SETS** a status conference for April 23, 2018 at 2:00 p.m. in order to schedule the
9 trials in this case. In advance of that date, the parties should meet and confer regarding their
10 availability for trial.

11 **IT IS SO ORDERED.**

12 Dated: 4/16/2018

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15 HAYWOOD S. GILLIAM, JR.
16 United States District Judge
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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 22 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDRE MARTEL WINN,

Defendant-Appellant.

No. 18-10473

D.C. No.

4:16-cr-00516-HSG-1

Northern District of California,
Oakland

ORDER

Before: BERZON and IKUTA, Circuit Judges, and LEMELLE,* District Judge.

A majority of the panel has voted to deny appellant's petition for panel rehearing. Judge Berzon voted to grant the petition for panel rehearing.

Judge Berzon and Judge Ikuta voted to deny the petition for rehearing en banc, and Judge Lemelle so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and petition for rehearing en banc are DENIED.

* The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

SUPERIOR COURT OF CALIFORNIA
County of ALAMEDA

SEARCH WARRANT



THE PEOPLE OF THE STATE OF CALIFORNIA
to any peace officer in Alameda County

Warrant No. _____

The affidavit below, sworn to and subscribed before me, has established probable cause for this search warrant which you are ordered to execute as follows:

Place(s) to be searched: Described in Exhibit 1A, *attached* hereto and incorporated by reference.

Property to be seized: Described in Exhibit 1B, *attached* hereto and incorporated by reference.

Night service: [If initialed by judge] For good cause, as set forth in the Statement of Probable Cause, night service is authorized: _____

Disposition of property: All property seized pursuant to this search warrant shall be retained in the affiant's custody pending further court order pursuant to Penal Code §§ 1528(a), 1536.

January 20, 2016
Date and time warrant issued 1027-2-1

[Signature]
Judge of the Superior Court

◆ AFFIDAVIT ◆

Affiant's name and agency: Cesar Chavez San Leandro PD

Incorporation: The facts in support of this warrant are contained in the Statement of Probable Cause which is incorporated by reference. Incorporated by reference and *attached* hereto are Exhibit 1A, describing the place(s) to be searched; and Exhibit 1B, describing the evidence to be seized.

Evidence type: (Penal Code § 1524)

- ☐ Stolen or embezzled property.
- ☒ Property or things used as a means of committing a felony.
- ☐ Property or things in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered.
- ☒ Property or things that are evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
- ☐ Property or things consisting of evidence that tends to show that sexual exploitation of a child, in violation of Penal Code § 311.3, or possession of matter depicting sexual conduct of a person under the age of 18 years, in violation of Penal Code § 311.11 has occurred or is occurring.
- ☐ Firearms, deadly weapons: The warrant authorizes a search for a deadly weapon in the following premises:
5150: The premises are occupied or controlled by a person who is in custody on a 5150 W&I hold.
Domestic violence: The premises are occupied by a person arrested for a domestic violence incident involving threatened harm.
No firearms order: The premises are owned or controlled by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.

☒ **Night Service:** [If checked] Authorization for night service is requested based on information contained in the Statement of Probable Cause, filed herewith.

Declaration: I declare under penalty of perjury that the information within my personal knowledge contained in this affidavit, including all incorporated documents, is true.

Date 1/20/16

[Signature]
Affiant

Exhibit 1A – Place(s) to be searched:

1. The residence located at 3205 Beaumont Ave, Oakland, CA 94602, located on the second story, north/east apartment. Per surveillance conducted at this apartment, there are no visible markings on the door of this unit but there is a black metal security door. This building is hereafter described as a multiple unit two story apartment complex, being tan in color with white, brown and brick trim. The bottom floor of the building has two apartment units and the second story has two apartment units. The black numbers, "3205" are affixed to the front of the building on a white fascia board and face Beaumont Ave. Each unit has an assigned garage. Places to be searched are to include any and all detached and attached garages associated to the residence, storage sheds, lockers, mobile and immobile vehicles located on the property that are associated to WILLIAMS, boats, trailers, recreational vehicles.
2. Any red Camaro determined to be owned or under the dominion and control of WILLIAMS.
3. A white LG touch screen phone located on the person of WILLIAMS during his arrest on 1/20/16 at 0930 hours.

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Exhibit 1B – Property to be Seized:

1. Any paintings, drawings, photographs or photograph albums depicting persons, vehicles, weapons, or locations which may appear upon observation to be relevant on the question of gang membership or association, or which may depict items sought and/or believed to be evidence in the case being investigated with this warrant, or which may depict evidence of any criminal activity.
2. Clothing consistent with items of clothing worn by the suspects during the commission of this incident to include a blue Polo brand hooded sweatshirt, blue jeans and tan boots.
3. Any address books, lists of, or single references to, addresses or telephone numbers of persons who may later be determined to belong to or be affiliated with the suspect.
4. Articles of personal property which tend to establish the identity of person(s) exercising dominion and control of said premises consisting in part of and including telephone/utility bills and statements, completed tax forms/returns, rent/mortgage receipts and statements, canceled mail envelopes, probation/parole orders, photographs, keys, and vehicle registration documentation.
5. Firearms including short-barreled shotguns, assault-type weapons, pistols, rifles and shotguns, ammunition, and other deadly weapons that are commonly possessed illegally by gang members or persons identified in this investigation that are involved in a conspiracy using the listed weapons as means of intimidation on rival gang members or other members of the community.
6. Photographs of the residence/location to be searched
7. Cellular telephones, smart cellular phones and electronic tables
8. Evidence of street gang membership or affiliation with any street gang, including, but not limited to, any reference to any Case Boys Gang/4 Letter Gang/4'S or Money Team/Stubby/ENT criminal street gangs, any drawings or miscellaneous writings, or objects, or graffiti depicting gang members' names, initials, logos, monikers, slogans, or containing mention of street gang membership affiliation, activity, or identity.

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STATEMENT OF PROBABLE CAUSE

Your Affiant, Detective Steven L. Cesaretti #347, says that the facts in support of the issuance of the search warrant are as follows:

Affiant is currently assigned as a Persons Crimes Detective in the Criminal Investigations Division of the San Leandro Police Department and been employed with the San Leandro Police Department since 2012. Affiant was previously employed by the City of Union City Police Department. During my employment there, I was assigned as the Major Crimes Detective in the Investigations Section of the Union City Police Department.

Affiant has investigated well over 400 criminal offenses, including, but not limited to murder, violent assaults, robberies and criminal street gangs offenses. I have received specialized training through department sponsored classes as well as outside related classes. Affiant has had training in the field of criminal street gang investigation, identity theft, illegal narcotics, sexual assault and property crimes including but not limited to;

1. One thousand fifty (1050) hour police academy at the Alameda County Sheriff's Office Regional Training Center Dublin, California in 2005.
2. A forty (40) hour course of basic Interview and Interrogation Training, Behavior Analysis Training Institute at Santa Rosa, California in 2005.
3. A twenty four (24) hour Search Warrant course, South Bay Training Academy, San Bruno, California in 2007.
4. A thirty two (32) hour gang conference presented by Central Coast Gang Investigators in San Jose, California 2007.
5. A twenty four (24) hour gang awareness course provided by the Sacramento County Sheriff's Office in Sacramento, California 2007
6. An eight (8) hour Identity theft and methamphetamine investigation class presented by California Narcotics Officers Association Dublin, California, 2007.
7. An eight (8) hour Asian Street Gang Investigation course presented by California Narcotics Officers Association Dublin, California, 2008.
8. A four (4) hour Criminal Street Gang Update course presented by Agent Derting of the Southern Alameda County Gang Violence Suppression Task Force Union City, California, 2008.
9. A thirty six (36) hour Officer Involved Shooting course presented by the California Department of Justice Advanced Training Center in Tahoe, California, August 2008.
10. A forty hour (40) Homicide Investigation course presented by San Jose State University, Administration of Justice Bureau in San Jose, California, April 2009.
9. On 3/17/15, I was qualified as, and testified in the capacity of an expert concerning the possession of methamphetamine for sales during court proceedings in the Hayward Hall of Justice.

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During my career, I have conducted and participated in hundreds of investigations involving various criminal violations to include attempted murders and weapon based assaults. In conducting these investigations, I have used a variety of investigative techniques and resources, including physical and electronic surveillance and various types of informants and cooperating sources. By virtue of my training and experience, I have become familiar with the methods used by suspects, or those associated with gang related shootings to conceal evidence of their crime(s). I am aware that suspects whom commit these crimes often use residential and cellular telephones to avoid detection by law enforcement. It is also my experience that these violent offenders and co-conspirators often use cellular telephones and residential telephones that are not subscribed to their own names to avoid detection by law enforcement. I am also aware through my training and experience that individuals involved in violent crimes often use telephones to arrange their crimes or coordinate with co-conspirators.

For the purpose of this search warrant affidavit, I will make reference to a target phone number of (510)688-4710, which affiant believes belongs to a cellular phone owned and possessed by our identified suspect, James Williams, (WILLIAMS hereafter).

Your affiant alleges that the following is true based upon information received through Affiant's own investigation and through official police channels:

On 1/14/16 at 1837 hours, SLPD patrol units were dispatched to Bayfair Mall in San Leandro on a report of two suspects shooting at each other in the parking lot. Upon arrival, responding officers located evidence and witnesses that provided information consistent with two subjects shooting at each other in the parking lot. All involved suspects had fled the scene and were not immediately located. Officers on scene located two subjects who were associated with one of the shooters and they were both later interviewed by SLPD Detectives as witnesses. One of those witnesses, Robert Carter, initially lied about his identifying information as he was ultimately found to have an active warrant for his arrest. He was arrested for the warrant and for a violation of 148.9 PC, but was determined to not be one of the suspects in the shooting.

During an interview with detectives, Carter advised all involved parties were in Sheik Shoes inside Bayfair Mall. He was with a group of 5 other subjects when they observed another subject

On 1/15/16 at 0800 hours, Sgt Anthony contacted me via phone and advised me of this shooting at Bayfair Mall. During his initial investigation, he obtained information from Cater that all involved suspects for this shooting were inside Sheik Shoes in Bayfair mall. Sgt Anthony stated one of the identified suspects was a tall BMA wearing a hooded Polo brand sweatshirt, blue jeans and tan boots. He located an image of this suspect via Bayfair Mall security cameras. The suspect was observed leaving the mall, after his confrontation with the other suspects inside Sheik Shoes. He was observed with a blue shopping bag with blue writing, consistent with the shopping bags used by Shiek Shoes in the mall security video. Based on this image, I believed the suspect made a purchase from the business.

On 1/15/16 at 1030 hours, I met with the manager of Sheik Shoes, Braulio Ramirez at the business. He showed me the instore surveillance system which we reviewed to the time of this incident, 1800-1830 hours approximately.

Upon review of the video, I observed a tall BMA wearing a blue Polo hooded sweatshirt at the register picking up a pair of Timberland boots at approximately 1810 hours. Ramirez used the date and time stamp information from the video to find the associated transaction. Ramirez advised the suspect arrived at the business to pick-up the boots as he had already purchased them. He also stated the suspect had an account with the business with associated identifying information which he provided me in the form of a "Special Orders Activity" sheet. The transaction information associated to the suspect who picked up the boots was

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listed as "James Williams" with an associated phone number of (510)688-4710. Ramirez advised this would be an accurate phone number as the business would have contacted WILLIAMS to pick up his order.

I obtained several still images of James Williams from the business surveillance video.

Based on the information provided by Ramirez, I conducted several records checks of the name James Williams and the associated target phone number. I located a subject in CRIMS with the same name and descriptors. I compared the booking photos for James Williams with a date of 3/8/2013 and another with a date of 11/5/2014 to the images of the suspect obtained from Sheik Shoes surveillance system and determined them to be the same person. Further record checks showed an arrest report for WILLIAMS from 11/5/2014 that listed his cell phone number as being, (510)688-4710.

Based on the information and images obtained from Sheik Shoes, and my comparison to the images and information obtained via CRIMS, I believed WILLIAMS to be one of our suspects responsible for this shooting.

I created a sequential photo line-up via CRIMS which included a photo of WILLIAMS.

Based on the location of WILLIAMS identifiers and his current phone number as identified via Sheik Shoes and CRIMS, Sgt Anthony authored a Pen Register search warrant on 1/17/16, allowing for 30 days of continuous GPS tracking of WILLIAMS cellular phone. Based on information obtained via the Pen Register, it appeared WILLIAMS phone was located in the area of Beaumont Ave and E 32nd Ave in Oakland. SLPD detectives conducted several surveillances in the area and ultimately located the apartment

On 1/19/16, Det Benz and I met with Carter as he was in custody at Santa Rita Jail. I advised carter he was not required to speak with me and I did not think he was responsible for this shooting. He agreed to speak with me and provided me a statement.

Carter stated this incident stemmed from a gang related confrontation that occurred in Juvenile Hall between one of his friends he verbally identified as, "Ill Will", and the other involved suspect, I believed to be WILLIAMS. Carter openly admitted he and the group he was with at the mall during this incident were all members of the criminal street gang, Money Team/Stubby/ENT. His friend Ill Will, who he also identified via a still image obtained from Sheik Shoes surveillance video, recognized WILLIAMS when they were in the business. Carter stated Ill Will told the group WILLIAMS was a member of the criminal street Case Boys Gang, a rival street gang to Money Team/Stubby/ENT. Ill Will told the group that while in juvenile hall, the two had a confrontation about each other's gang affiliation when it was discovered they were from rival gangs. Carter stated he believed this shooting was related to both subjects criminal street gang affiliation.

Based on my training and experience, I know Money Team/Stubby/ENT and Case Boys Gang have had a violent rivalry for the past 10 years, resulting in numerous violent crimes to include shootings and homicides.

Carter stated Ill Will and WILLIAMS exchanged words inside the business and it almost escalated to violence. WILLIAMS exited the business and began walking toward an exit of the mall. Ill Will, Carter and the other members of their group followed WILLIAMS out of the mall, near the exit closest to Target. Upon exiting, WILLIAMS, immediately went to an older red Chevrolet Camaro that was parked and unoccupied in the parking lot, and obtained a firearm from inside. Ill Will began verbally taunting WILLIAMS and continually walked closer and closer to him. WILLIAMS then fired several rounds in the air and then aimed and fired the gun it at Ill Will, missing him. Carter stated he then ran for safety and was later contacted by police.

I left the interview and Det Benz conducted the sequential photo line-up with Carter. During the line-up,

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Carter selected the photo of WILLIAMS and tentatively identified him as the suspect in this incident, stating, "his eyes and skin color look the same".

On 1/19/16 at 1400 hours, Det Benz and I met with witness Yenifer Garcia at Bayfair Mall where she is employed. During our interview with her, she stated she was approximately 10' away from one of the shooters during this incident, as she was sitting in her vehicle in the parking lot of the mall. She described the shooter as a BMA, 6'00", thin build wearing a royal blue jacket and holding a Sheik Shoes shopping bag, consistent with WILLIAMS. She observed this subject enter a red Camaro, place the shopping bag inside and obtain a firearm. The suspect then fired two rounds into the air and then fired one round at a group of subjects nearby.

Det Benz conducted a sequential photo line-up with Garcia and she selected the photo of WILLIAMS as the involved shooter during this incident stating, "His facial features are similar to the person I recall seeing shoot".

On 1/19/16 at 2100 hours, Det Kritikos and Det Sgt Anthony were conducting surveillance of the apartment building located at 3205 Beaumont Ave in Oakland. Det Kritikos positively identified WILLIAMS as he was observed exiting one of the apartment doors, located on the second story of the business, N/E unit. It was the only apartment door located on the N/E corner of the second story of the building. Det Kritikos was able to observe WILLIAMS exit the door, look around the area, and reenter the door, securing it.

Based on Det Kritikos positive identification of WILLIAMS at the apartment, his observations of his WILLIAMS exiting an apartment door, reentering and securing the door of the apartment, I believe WILLIAMS has dominion and control of the residence and thus will have property related to this investigation inside it.

Based on the identification and observations made by Det Kritikos and Det Sgt Anthony, there were no markings or indicators located on the door to identify which apartment it was. However, based on observations by Det Kritikos and Sgt Anthony, it was the only door on the N/E corner of the second story of the building.

WILLIAMS was observed leaving this apartment on 1/20/16 at 0830 hours and was continually surveilled by SLPD detectives. He was followed to the area of the San Leandro Bart Station where he was arrested without incident. During his arrest, the listed white LG cellular phone was located on his person. Affiant requested authorization to conduct a search of this phone for evidence pertaining to this incident.

Based on my training and experience, I know the following:

Based on my training and experience, I know that persons who participate in a street gang and commonly associate with other known members will possess evidence of that participation in the gang. This includes: possession of drawings, clothing with gang identification on it, original and copies of newspaper articles reporting on gang related crimes, video tapes of gang gatherings, posters, gang rosters, personal address/ phone books with gang member names, addresses and phone numbers, school papers with gang drawings, letters from other gang members in penal institutions, and any other item decorated with gang graffiti. These items are essentially trophies, which memorialize the accomplishments of the gang or the individual gang members for crimes committed against other gang members or other members of the community. They become part of a history of a gang and are retained as a scoreboard of the gang's accomplishments. They are a source of pride and are kept at the individual gang member's residence, gang member's vehicles or on the gang member's person.

Based on my training and experience, I know that gang members that participate in violent crimes will retain the clothing they wore during those crimes in their homes and in their vehicles.

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Based on my training and experience, I know that gang members, who are involved in assaults and other criminal activity, will often arm themselves with other deadly weapons. I believe that handguns or miscellaneous gun pieces, gun cases, ammunition, gun cleaning items or kits, holsters, ammunition, ammunition belts, ammunition packaging, targets, expended pieces of lead, and photographs of firearms and other deadly weapons will be found at the above- described premises or vehicles. Based on my training and experience, I know that individuals, especially those involved in gang related assaults involving weapons, will retain access to weapons for protection from retaliation or for further use in acts of aggression, due to the value of the weapon itself, and to the enhanced "bragging" value attached to such a weapon.

Based on training and experience, I know that people involved in illegal activities often possess a police radio, scanner. A police radio scanner is a radio devise by which a person can monitor fire, police and other emergency unit communications. I know that people who engage in illicit activities often will have such scanners tuned to the police channel in their area to assist them in being prepared in the event the police are about to execute a search warrant of their premises.

Based on my training and experience, I know individuals who are involved in criminal activities will often hide weapons and evidence of their criminal activity inside storage lockers, outbuildings, sheds, garages, or trash containers at the residence.

Based on my training and experience, I know it is possible that evidence of gang membership, affiliation, association, locations, plans, correspondence, and criminal intent may be located on cellular phones, smart phones and electronic tablets. Affiant request the ability to immediately conduct a search of any and all seized cellular phones for evidence as it relates to this investigation in the form of communications, text messages, social media communications, images and videos. Concerning cellular phones, by virtue of my training and experience, affiant knows suspects who commit violent crimes to include weapon based assaults typically communicate between family and associates to aide in their escape and/or to conspire to conceal or destroy evidence. Communications between co-conspirators is most frequently accomplished by use of telecommunications devices, including hard line telephones and cellular telephones.

I know that a review of the telephone records maintained by the cellular telephone service provider for telecommunication devices used by violent crime suspects has resulted in the identification of previously unidentified co-conspirators, locations utilized by co-conspirators in the furtherance of illegal activities and other evidence of the crimes being investigated.

I know modern "Smart" phones can store digital media items such as videos, photos as well as "meta data" associated to digital media. The information contained within digital media and meta data can aid in identifying involved participants, locations, and further investigative leads.

I know that multiple subjects engaged in violent assaults where more than one person participates, often act as makeshift criminal organization, and as such, will often use their cellular telephones to communicate with each other before, during and after the commission of criminal acts. These communications will often include plans of executing assaults, mapping of getaway routes, other involved members, involved victims, disposal or hiding of evidence, stash houses and location of weapons and vehicles.

I know that the location of these communications can often help in identifying primary suspects, accomplices, aiders and abettors, victims, associates, witnesses and any plans of conspiracy.

Based on my training and experience, I know that persons who reside in residences will have indicia to those residences. This indicia indicates that the person has possession, dominion and control over the residence in which they are currently residing.

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Based on my training and experience, and the facts contained within this affidavit, I believe there is probable cause to believe that all or part of the items listed in Exhibit 1B of this document will be found at the residence of James WILLIAMS.

Affiant believes a search of the person and residence of the listed "Case Boys Gang" member will result in the recovery of evidence of ongoing participation in a criminal street gang, and indicia as listed in the attached Exhibit 1B. Gang indicia located at the listed residence will be used as evidence in seeking a criminal street gang enhancement pursuant to 186.22(a)&(d) PC. It is my opinion that this assault with a firearm was committed in order to promote the violent reputation of the criminal street gang "Case Boys Gang" and thereby further promoting the gang as a violent criminal organization.

I declare under penalty and perjury that the foregoing is true and correct to the best of my knowledge and belief. Wherefore, affiant prays that a search warrant be issued, based upon the above facts for the seizure of said property.

Subscribed and sworn to me on

January 20, 2018

Signature of Affiant

Signature of Magistrate

1 ALEX G. TSE (CABN 152348)
Acting United States Attorney

2 BARBARA J. VALLIERE (DCBN 439353)
3 Chief, Criminal Division

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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,) NO. CR 16-00516 HSG
14 Plaintiff,) DECLARATION OF
15 v.) STEVEN CESARETTI
16 ANDRE MARTEL WINN,)
17 Defendant.)
18)
19)

20 I, Steven Cesaretti, declare and state as follows:

21 1. I am currently employed as a police officer for the San Leandro Police Department (SLPD), and
22 have been so employed for since 2012. I have worked patrol as well as robbery-homicide. My title is
23 currently Sergeant overseeing patrol. I have held this title for approximately four (4) months. Prior to
24 my work with the SLPD, from 2005 to 2012, I was a police officer in the Union City Police Department
25 (UCPD). As an officer in the UCPD, I worked patrol, gang enforcement, and served as a Detective in
26 the robbery-homicide unit. I was also a member of the SWAT team.

27 2. I understand that this declaration is being submitted in connection with Andre Martel Winn's
28 (defendant's) Motion to Suppress. Accordingly, this declaration is limited to some facts concerning that

1 motion, and does not include all the information I know about the defendant or about the investigation
2 underlying this case. The following information is provided to the Court as a result of my personal
3 observations, and based on my training and experience.

4 2. On January 20, 2016, I was working as a Detective assigned to the SLPD Crime Suppression
5 Unit (CSU). I was investigating a shooting at the Bayfair Mall in San Leandro.

6 3. On or about January 20, 2016, I authored a search warrant for the residence located at 3205
7 Beaumont Avenue, second story, north/east corner apartment. I later learned that this was Apartment
8 "4." My affidavit is true and correct to the best of my knowledge.

9 4. On or about January 20, 2016, the warrant was reviewed and signed by the Honorable Judge
10 Murphy at the Hayward Hall of Justice. A true and correct copy of the search warrant is attached hereto
11 as Exhibit 1.

12 5. On or about January 20, 2016, I was subsequently the lead Detective assigned to conduct service
13 of the search warrant at 3205 Beaumont Avenue. I arrived along with other SLPD officers at the
14 apartment on the second story, in the north/east corner, knocked on the door loudly, and announced our
15 presence as police officers.

16 6. A man later identified as the defendant, Andre Winn, answered the door. I advised Winn of the
17 warrant and he allowed us to enter. I recall that Winn was shaking and seemed nervous. Winn was
18 wearing pants but did not have on a shirt. Winn was detained in handcuffs for officer safety. I patted
19 Winn down and seized a black Alcatel OneTouch smartphone from Winn's pants pocket, pursuant to the
20 search warrant. Officers conducted a protective sweep of the apartment and did not find anyone else to
21 be present. Officers then conducted a search of the apartment pursuant to the warrant.

22 7. Although at the time we arrived at his apartment Winn was not a target of our investigation of
23 the Bayfair Mall shooting, after the search of the apartment revealed numerous firearms, firearm
24 magazines, and ammunition, as well as cocaine, we arrested Winn for being a felon in possession of a
25 firearm and possession of narcotics.

26 8. I brought the Alcatel phone I took from Winn's pocket back to the SLPD to put into evidence
27 and ultimately gave it to Michael Benz. Benz was coordinating the downloads or "dumps" of electronic
28 devices we had seized.

1 9. On or about February 18, 2016, the Honorable Willie Lott, Alameda County Superior Court
2 Judge, signed a search warrant for the Alcatel cell phone that I seized from Winn. The warrant was
3 sworn electronically over the telephone. A copy of the affidavit and warrant are attached hereto as
4 Exhibit 2.

5 10. I have reviewed my report of the search that occurred on January 20, 2016, and it is true and
6 accurate to the best of my knowledge, and my independent recollection of the events is consistent with
7 my report.

8 11. Officer Benz downloaded the contents of Winn's phone. I reviewed the contents and saw
9 photographs of firearms and text messages that appeared to be about firearms.

10 12. I am aware that Winn was prosecuted in Alameda County for being a felon in possession of
11 firearms stemming from our search and arrest on January 20, 2016.

12 13. To the best of my knowledge, based on my training and experience, once an item of evidence,
13 like Winn's cell phone, is seized and logged in as evidence in a case, in order for a civilian or defendant
14 to get that item back he or she must petition the court and obtain a court order for the SLPD to release
15 that item. The SLPD will not release any item of evidence without such a court order.

16 14. In contrast, to the best of my knowledge and based on my training and experience, an item of
17 evidence like a cell phone may be transferred to another law enforcement agency pursuant to an internal
18 formal request process and does not require a court order.

19 15. To the best of my knowledge, no one sought leave from the court or obtained a court order for
20 the SLPD to release Winn's cell phone – not prior to July 1, 2016, and not after that date. Since I
21 drafted the warrant affidavit and was the lead Detective on the search of Winn's apartment, I believe that
22 I would have been notified if someone had requested a court order for SLPD to release evidence such as
23 Winn's cell phone.

24 16. If evidence is not released pursuant to court order, or transferred to another law enforcement
25 agency, then depending on the type of evidence and the type of crime the evidence relates to, SLPD has
26 a retention schedule that requires it to keep the evidence for a time period ranging from a certain number
27 of years (approximately three (3) years at the low end of the schedule) to indefinitely (e.g., in rape or
28 murder cases). Once the retention schedule expires, then the SLPD may destroy the evidence items.

1 17. In or about late June 2016, I was contacted on the phone by an ATF agent. I do not recall which
2 agent, specifically, called me. The agent asked me if we still had the cell phone I seized from Winn's
3 pocket, or other evidence from the January 20, 2016 search of Winn's apartment. I told the agent that
4 we still had all of the evidence. I arranged to meet with the agent a few days later and transfer evidence
5 to the agent.

6 18. I received authority to transfer evidence items including cell phones to the ATF agents.

7 19. On or about July 1, 2016, I met with two ATF agents, Special Agent Topper and Special Agent
8 Vallergera at the SLPD. I do not recall our exact conversation but I believe that one of the agents stated
9 that they would take whatever evidence we had from the search of Winn's apartment. The agent also
10 asked me for a copy of the search warrant. I gave the agents a copy of the warrant attached as Exhibit 1.
11 I also gave the agents items of evidence from the investigation and search of Winn's apartment –
12 including Winn's cell phone, other phones, and other non-electronic items of evidence. We did not have
13 a conversation about which exact items may have been contained among the evidence I released to the
14 ATF, except that I know that Winn's cell phone was one of the items.

15 20. I recall telling Special Agent Topper that we had downloaded the contents of the cell phone
16 found in Winn's pocket as well as some other devices. I told SA Topper that I had noticed photographs
17 of firearms and text messages about guns among the downloaded contents from Winn's phone.

18 21. I do not recall whether I gave SA Topper discs containing copies of SLPD's downloads of
19 "dumps" of Winn's phone and/or other electronic devices, but I may have done so.

20 22. I do remember SA Topper telling me that he planned to obtain a federal warrant to search
21 Winn's phone, he said something like, and I am paraphrasing, "Just to be safe, we're starting from zero."

22 23. In or about January 2016, the SLPD had recently begun issuing personal recording video devices
23 for officers to wear. The SLPD policy does not require these devices to be activated.

24 I declare under penalty of perjury that the foregoing is true and correct.

25
26 Executed this 29 day of JAN, 2018


Sergeant Steven Cesaretti
San Leandro Police Department

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,)	NO. CR 16-00516 HSG
)	
Plaintiff,)	DECLARATION OF
)	ROBERT TOPPER
v.)	
)	
ANDRE MARTEL WINN,)	
)	
Defendant.)	
)	

I, Robert Topper, declare and state as follows:

1. I am currently employed as a Special Agent for the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF), and have been so employed for more than 10 years, since approximately 2007. I have investigated cases involving violations of federal firearms laws, and other federal laws, both in the Philadelphia Field Division and the San Francisco Field Division. Prior to my employment with ATF, I worked for four years at the Department of Homeland Security including three years as Officer with the United States Customs and Border Protection (CBP), followed by one year as an Immigration Enforcement Agent with the Bureau of Immigration and Customs Enforcement (ICE).

2. Since approximately June 2016, I have been assigned to the Dublin Group II, the Crime Gun

1 Intelligence Center (CGIC), a specialized group tasked with investigating gun-related violent crime in
2 Oakland, California and the surrounding area. This group endeavors to determine the origin of the
3 firearms used in violent crimes and determine whether certain individuals or licensed gun sellers may be
4 supplying criminals with firearms. I am currently the Group Supervisor of CGIC in the San Francisco
5 Field Division and have been since March 19, 2017.

6 3. From 2012, until March 19, 2017, I was a Digital Media Collection Specialist. During that time
7 I downloaded the contents of an estimated more than one-hundred cell phones, and an estimated twelve
8 computers. I at least spot checked the downloads for all of the phones I downloaded, and did a quick
9 scan of photographs and text messages, and in my own cases I thoroughly reviewed the downloaded
10 contents. Based on my knowledge and experience of these downloads and searches, I am familiar with
11 the evidentiary value of the contents of these phones.

12 4. I understand that this declaration is being submitted in connection with Andre Martel Winn's
13 (Defendant's) Motion to Suppress. Accordingly, this declaration is limited to some facts concerning that
14 motion, and does not include all the information I know about the defendant or about the investigation
15 underlying this case. The following information is provided to the Court as a result of my personal
16 observations, and based on my training and experience.

17 5. In or about June 2016, I met and discussed with SA Paula Vallerger information she had
18 uncovered regarding evidence of the possible origin for multiple firearms purchased by Kenneth Kemp
19 that had been recovered in the Bay Area by local law enforcement during arrests, execution of search
20 warrants, or other police activity. I knew that based on SA Vallerger's investigation, as it is detailed in
21 the document the government has for purposes of this motion response entitled "Exhibit 1 to SA
22 Vallerger's Declaration," that two of the guns purchased by Kemp in Nevada on January 19, 2016, were
23 found by SLPD officers one day later, on January 20, 2016, during execution of a search warrant at
24 Winn's apartment in Oakland, California. This was significant to me because based on my training and
25 experience, a firearm recovered from a prohibited person (Winn, a felon), 200 miles away from its point
26 of initial legal purchase, approximately 24 hours after its purchase, indicates that a close if not direct
27 link between the buyer, Kemp, and the possessor, Winn, which suggests that Winn may be the
28 connection in the Bay Area through which Kemp is funneling firearms purchased in Nevada. Because

1 the purchase of the firearm occurred 200 miles away from where it was found only one day later, based
2 on my training and experience, I expected that there would be evidence of communications regarding
3 transport of the firearm between Winn and Kemp or others in the Reno, Nevada area, and possibly data
4 from Winn or Kemp's phone showing travel between Oakland and Reno. I recall stating to SA Vallergera
5 during that initial conversation that if SLPD kept Winn's phone from the January 20, 2016 search, that
6 we should go get it. Therefore, for the reasons set forth herein as well as the reasons set forth in my
7 affidavit and application for a search warrant for Winn's phone (attached as Exhibit 1 to this
8 declaration), and based on my training and experience, I believed at that time that Winn's phone would
9 be a significant piece of evidence.

10 6. While I was also potentially interested in other phones seized by SLPD from Winn's apartment,
11 it is fair to say that I was most interested in the contents of Winn's phone. When I decided to see if
12 SLPD still had Winn's cell phone I did not know at that time that SLPD had searched the phone.
13 Regardless of whether they had or had not searched the phone, at that point in time I already anticipated
14 that I would seek a federal warrant to search Winn's phone.

15 7. I am aware that SA Vallergera set up an appointment at SLPD for us to pick up Winn's phone and
16 possibly other evidence seized during SLPD's investigation.

17 8. On or about July 1, 2016, SA Vallergera and I went to SLPD, met with Sergeant Cesaretti (then
18 Detective), and picked up one or two envelopes of evidence. The envelope or envelopes of evidence
19 contained Winn's cell phone which Sgt. Cesaretti reported that he found on Winn's person during the
20 search of Winn's apartment and Winn's arrest on January 20, 2016. The evidence we obtained also
21 contained other items seized during the investigation which may or may not have been significant to our
22 investigation. For example, of the items in the evidence bag, a wallet, keys, and headphones apparently
23 belonging to James Williams, were clearly not at that time of any significance to our investigation. My
24 understanding then as to why we took this evidence is because we took everything that was contained
25 within the same envelope or envelopes that happened to also contain Winn's cell phone or other phones
26 seized during the search. When we returned to ATF with the evidence, I listed the items that we had
27 received. Ex. 2 (Report of Investigation).

28 9. On or about July 1, 2016, when I went to SLPD to pick up Winn's phone, Sgt. Cesaretti told me

1 that SLPD had searched Winn's cell phone as well as some other electronic devices that SLPD had
2 seized during their investigation of a shooting at Bayfair Mall that encompassed the search of Winn's
3 apartment. Sergeant Cesaretti told me that there were photographs on Winn's cell phone of firearms,
4 and text messages regarding firearms.

5 10. On or about July 1, 2016, at the same time that Sgt. Cesaretti gave me Winn's phone and other
6 evidence items, he also gave me CD copies of the SLPD's previous downloads from electronic devices,
7 including the download for Winn's phone. At that time, I believed that Winn's phone and the other
8 electronic items that SLPD had searched had been searched pursuant to a valid warrant or based on other
9 valid authority. I had no reason to believe otherwise at that time. I also asked Cesaretti for a copy of the
10 search warrant. I attached a copy of the warrant I received to my federal warrant application attached
11 hereto as Exhibit 1.

12 11. When I returned to the ATF office with the items from SLPD, I logged the items into evidence.
13 Two of the items were Alcatel OneTouch phones; I identified these phones as belonging to Winn and
14 Avery, respectively, to the best of my recollection this was based on SLPD packaging and reports.

15 12. On or after July 1, 2016, when I got back to the ATF office, I viewed the CD copies of the
16 electronic device downloads by SLPD for Winn's phone as well as other devices. I scanned the contents
17 of the discs and did not see anything that appeared significant to the ATF investigation. I am not sure
18 exactly which electronic devices were the source of the additional downloads beyond Winn's phone
19 provided by SLPD. I think that they were all for other phones, however. I did notice that on the
20 download for Winn's phone there were a number of photographs of firearms and there appeared to be
21 text messages about firearms.

22 13. In my experience, and based on my training, when I investigate a case that I anticipate will be
23 prosecuted federally, I generally seek federal warrants to search items and obtain evidence for use in the
24 federal case, even if those items may have been previously searched by local law enforcement.

25 14. On or before July 29, 2016, I prepared an affidavit setting forth probable cause to search Winn's
26 cell phone. I did not include any of the information derived from SLPD's download of the phone or my
27 review of a copy of that download. In the affidavit, I notified the Magistrate Judge that SLPD officers
28 had previously searched the phone. I further notified the Magistrate Judge that the affidavit did not rely

1 on or contain any information derived from the contents of the cell phone. *See* Ex. 1, at 2 fn.1.

2 15. My affidavit set forth facts establishing probable cause that a search of Winn's phone would
3 reveal evidence of violations of federal law, including unlawful firearms trafficking (18 U.S.C. §
4 922(a)(1)), felon in possession of a firearm (18 U.S.C. § 922(g)(1)), and drug trafficking (21 U.S.C. §
5 841(a)(1)). The probable cause was based on my training and experience as an ATF agent in numerous
6 investigations regarding violations of federal firearms law including unlicensed dealing and possession,
7 as well as the often-related drug trafficking conduct, and based on other items seen or seized from the
8 SLPD during the search of Winn's apartment (including seizure of a cell phone which Sgt. Cesaretti
9 documented in his report was found on Winn's person) on July 20, 2016, based on a valid state search
10 warrant. I also attached a copy of the state search warrant authorizing search of Winn's apartment and
11 seizure of all cell phones and electronics to my affidavit for consideration by the Magistrate Judge. *See*
12 Ex. 1.

13 16. I may have otherwise considered whether there was probable cause to search any of the other
14 electronic devices obtained as listed in my Report at Exhibit 2, however, I did not recall seeing anything
15 that constituted evidence of the crimes we were investigating in the other CD copies of downloads
16 provided by SLPD. Therefore, even if I had previously had the inclination to seek a warrant for
17 additional phones or electronic items, since I did not believe that there was evidence on those items after
18 my review of the downloads from SLPD, I could not honestly swear out an affidavit setting forth my
19 belief that there existed probable cause to believe that such items may be found on the other devices.


20 17. In any event, before the ATF contacted SLPD to determine if they still had possession of Winn's
21 cell phone, that phone was, in my mind and based on my training and experience, likely to be the most
22 fruitful item to search for evidence. Even if the SLPD had not told me that they had seen photographs of
23 firearms and messages about firearms on the phone, I would still have applied for a warrant to search the
24 phone. Even if the SLPD had not provided me with a copy of the download and I had not seen on that
25 download photographs of firearms and messages about firearms, I still would have applied for a warrant
26 to search Winn's phone.

27 18. On or about July 29, 2016, I swore out and obtained a federal warrant authorizing my search of
28 Winn's phone. *See* Ex. 1.

19. On or about August 1, 2016, I began processing the phone to search its contents. I completed the search on or about August 12, 2016. See Ex. 3 (Report of Investigation).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29 day of January 2018


Robert Topper
Special Agent
Group Supervisor
SF-Crime Gun Intelligence Center (CGIC)
Bureau of Alcohol, Tobacco, Firearms &
Explosives (ATF)