

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

GARY S. COLLOCK,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS - NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether the information in the application for the warrant to place the GPS device on Colldock's vehicle was 'stale', where the Agents relied upon 2-year-old messages under a "Dr.White" moniker from the *Silk Road* dark-website, to link Colldock to activity 2-years later under a "DrWhite" moniker on the *Agora* dark-website?

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I. PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary S. Colldock respectfully petitions for a writ of certiorari to review the judgement of the U.S. Court of Appeals for the Ninth Circuit in case number 19-10333.

II. OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals is unpublished and can be found at 19-10333. (Pet. App. 1a.) The relevant trial court proceedings and orders are unpublished and can be found at CR 16-01254-TUC-JAS. (Pet. App. 2a-4a).

III. JURISDICTION

The Ninth Circuit entered its decision on September 18, 2020. (Pet. App. 1a). No request was made for a rehearing or *en banc* hearing. According to the *Rules of the Supreme Court*, Rule 13, Petitioner must file this Petition for Writ of Certiorari within 90 days of the Ninth Circuit's decision which was issued on September 18, 2020. (Pet. App. 1a). In this case, a timely Petition was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”

V. STATEMENT OF THE CASE

This case presents an important question regarding when information to support probable cause for a search warrant becomes stale under the Fourth Amendment. The Circuits have different standards articulated to make this important determination. The Ninth Circuit has a broad and arbitrary standard that provides the magistrate and the reviewing courts too much discretion and little guidance.

A. Nature of the Case and Course of Proceedings

On June 22, 2016, a Tucson grand jury returned an indictment charging the Petitioner with two counts of Possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(B)(viii); one count of Possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(A)(viii); three counts of Possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C); one count of Possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A)(I); and a forfeiture allegation, under 21 U.S.C. § 853;

18 U.S.C. § 924 (d); 28 U.S.C. § 2461. (CR¹ 1.) On May 28, 2019, Petitioner entered into a plea agreement, pleading guilty to Count 3 of the Indictment, while preserving his right to appeal the court's prior evidentiary rulings. (CR 100.) On September 27, 2019, the District Court sentenced the Petitioner to 120 months in prison, to be followed by sixty months of supervised release. The court also ordered a special assessment of \$100. (CR 114.)

B. Statement of Facts

1. The Petitioner's Crime

On or about October 16, 2015, at or near Tucson, in the District of Arizona, the Petitioner did knowingly and intentionally possess with intent to distribute, fifty (50) grams or more of actual methamphetamine, a Schedule II controlled substance. (See CR 1; CR 99.)

2. The Affidavit and Petitioner's Suppression Motion

This case involved 2 separate 'dark-web' market places: 'Agora', which was in operation at the time of the issuance of the relevant warrant in this case; and 'Silk Road', which had ceased operation about 2-years prior to the issuance of the relevant warrant in this case. Government Agents' purchased drugs on the

¹"CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript followed by the date of the hearing and page number(s).

Agora website over the course of a few months, from a seller known on that site by the moniker “Dr.White.” (CR 69.) The most recent purchase occurred approximately one month prior to the issuance of the search warrant. (*Id.*) The Government Agents’ had information regarding a previous ‘dark-web’ marketplace known as *Silk Road* which had, at the time of the warrant, ceased operation. (*Id.*) A “Dr.White” moniker was used on the *Silk Road* site 2-years earlier. (*Id.*) Based on messages and data from that defunct *Silk Road* website, the Government Agents had some indicia that Gary Colldock had used the “Dr.White” moniker on the *Silk Road* website, 2-years earlier. (*Id.*) The person using the “Dr.White” moniker on the *Silk Road* website 2-years earlier, was not the subject of any criminal charges in this case. (*Id.*)

On August 1, 2015, agents presented an affidavit to a magistrate judge seeking an order to place a global positioning system (GPS) tracking device on “a white 2000 Ford Taurus sedan, bearing vehicle identification number 1FAFP5328YG147367, Arizona license plate number AVM3506, and registered to Gary S. Colldock, at 15525 N Lago Del Oro Pkwy, Tucson, AZ 85739, (hereinafter the "TARGET VEHICLE").” (CR74-1, Affidavit ¶4). As probable cause for the application, the Affidavit set forth the following relevant facts:

On October 1, 2013, the FBI arrested the owner and operator of a dark

website named “Silk Road.” (*Id.* at ¶12). During this investigation, the FBI seized several computers which contained “transaction histories and private message communications associated with Silk Road users.” (*Id.*) On June 29, 2015, the FBI obtained transactional histories and private message communications between a “Silk Road vendor” named “DrWhite.” The FBI identified communications that occurred on May 29, 2013 between “DrWhite” and “doobiesmoker16” regarding the purchase of “bitcoins.” “Doobiesmoker16” was instructed to send the money for the “bitcoins” to “Mr. Gary C. 2727 N. Oracle Road Apt, 242 Tucson, AZ 85705” and it was signed “DOC.” (*Id.* at ¶13). A similar message was found between “DrWhite” and “mrpgoeshard” and “DrWhite and “winowisheslon” on June 3, 2013. (*Id.* at ¶16). “According to a Tucson Police Department report, Colldock was arrested on June 26, 2013, at 2727 N. Oracle Road Apt 242, Tucson, AZ 85705” in an unrelated case. (*Id.* at ¶7). Another private message was sent from “DrWhite” to “terminal” on July 19, 2013 regarding “DrWhite’s” inability to get a “pgp pub key to import.” (*Id.* at ¶17). On an unidentified date, messages were also sent to “DrWhite” containing “MoneyPak Numbers” which convert cash into funds to be used online. Agents traced MoneyPak number 56527442904046, which was sent to “DrWhite,” to Gary Colldock with an address of 15525 N Lago Del Oro Pkwy, Tucson, AZ 85739. The Target Vehicle was registered to this

address and had previously been observed at this address. (*Id.* at ¶19, 20).

On an unidentified date, DEA agents located the *Agora* Marketplace on the dark web. ((*Id.* at ¶7). *Agora*’s website sells “illegal drugs, precursor chemicals, and counterfeit merchandise. *Agora* also provides the ability to launder money.” (*Id.*) The Affiant opined that *Agora* is similar to *Silk Road* and both sites sell illegal drugs. (*Id.*) “DrWhite” was believed to be a vendor of methamphetamine who had profile pages on multiple dark web markets including *Agora*, *Evolution*, *Alphabay*, and *Black Bank*. “DrWhite” was “believed to be Gary Colldock.” (*Id.* at ¶8)

The Affiant then opined that “DrWhite” was selling drugs on *Agora* and “operating a cash-in-mail service for bitcoin.” Because customers mail cash to “DrWhite” for bitcoins, the affiant opined “that these addresses would have been valid at that point in time.” (*Id.*)

Between May 14, 2015, and August 3, 2015, an agent purchased methamphetamine four times from “DrWhite” on *Agora*. The orders totaled 9.5 grams and were shipped via the United States Postal Service from fictitious companies that listed either Tucson, Arizona or Saddlebrook, Arizona as the address. (*Id.* at ¶10) “DrWhite’s” profile page on *Agora*, listed that he was “verified as being on *Silk Road*.” (*Id.* at ¶11)

On one date, July 27, 2015, a surveillance officer attempted to follow the target vehicle but terminated surveillance because the target vehicle was using “surveillance detection measures.” (*Id.* at ¶21). Based on this one attempted surveillance, the Affiant opined “that law enforcement has exhausted its investigative techniques, including the use of traditional surveillance, to identify COLLDOCK's drug trafficking activities” so a GPS device was needed. (*Id.* at ¶24). The Order for a Tracking Device was granted on September 1, 2015 for a period of 45-days and the documents were sealed for 180 days. (CR74-1).

The Government Agents' had no similar information showing Gary Colldock being connected to the *Agora* “Dr.White,” who had sold drugs to the agents. The Government presented Gary Colldock's connection to the *Silk Road* (non-criminal) “Dr.White” from 2-years previous and asserted Mr. Colldock was also behind the (criminal) “Dr.White” of *Agora*. (CR 69.)

Petitioner filed a Motion to Suppress alleging that the Affidavit failed to contain sufficient evidence to support a probable cause finding that Colldock was “DrWhite” of *Agora*.² The Defense asserted that information to support the issuance of a search warrant was stale because sufficient time has elapsed so that

²CR 69, 70; CR 70 was an Unopposed Amended Motion to Dismiss which was filed on August 9, 2017 and corrected some dates asserted in CR 69.

there was no longer a “sufficient basis to believe . . . that the items to be seized are still on the premises.” *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir.1997) (quoting *United States v. Gann*, 732 F.2d 714, 722 (9th Cir.1984)). To avoid information being deemed “stale,” “[t]he facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant.” *United States v. Grant*, 682 F.3d 827, 835 (9th Cir. 2012) quoting *Durham v. United States*, 403 F.2d 190, 194 (9th Cir.1968). (CR 69.)

After entertaining oral arguments on the Motion, the Magistrate Judge issued a Report and Recommendation that the District Court deny Petitioner’s Motion. (Pet. App. 2a; CR 75, 76.) On June 21, 2018, the District Court entered an Order Adopting the Report and Recommendation and denying Petitioner’s Motion. (Pet. App. 3a; CR 92.) In it’s Memorandum Decision, the Ninth Circuit rejected Petitioner’s ‘staleness’ argument by simply stating “we disagree” with no citation to any supporting authority nor citation to any particular Government argument it may have relied upon to reach this conclusion. (Pet. App. 1a, p. 4).

The Ninth Circuit held:

[t]he affidavit identified sufficient reasons to conclude that the activity by Agora’s “DrWhite”—which occurred over the course of a few months preceding the warrant application, with the most recent

sale of methamphetamine having occurred less than one month before the warrant application was submitted—could probably be attributed to the same person who had controlled the Silk Road “DrWhite” account approximately two years earlier. (*Id*).

VI. REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit’s standard to determine if information is stale is overbroad and arbitrary.

The Circuits have different standards to determine if Information is stale which creates confusion and arbitrary decisions regarding a person’s right to be free from illegal search and seizure under the Fourth Amendment. This Court should determine the appropriate standard so the Circuits are uniform and the magistrate judges can better assess whether information in a warrant application is stale.

According to the Ninth Circuit, to avoid information being deemed “stale,” “[t]he facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant.” *United States v. Grant*, 682 F.3d 827, 835 (9th Cir. 2012) quoting *Durham v. United States*, 403 F.2d 190, 194 (9th Cir.1968); See also, *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir.1997) quoting *United States v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984). "Staleness must

be evaluated in light of the particular facts of the case and the nature of the criminal activity and property sought." *United States v. Greany*, 929 F.2d 523, 525 (9th Cir.1991) (two-year-old information not stale when the evidence sought is of long-term, ongoing criminal business). The length of the time lapse is not controlling. *Durham v. United States*, 403 F.2d 190, 194 n. 6 (9th Cir.1968).

The Ninth Circuit has a broad and discretionary standard that provides little guidance to the Magistrates, police and defendants. The Ninth Circuit's opinion in Petitioner's case neither cited any contrary authority nor identified or articulated why Petitioner's reliance on the above authority was misplaced. As the cases cited all hail from the Ninth Circuit, the current law has now become unclear. With these cases being neither overruled nor distinguished, they would appear to be valid precedent but have inexplicably not been followed.

In Petitioner's case, a logical connection cannot be made that if "DrWhite" on *Silk Road* made reference to Gary C, then Gary C must be involved with "DrWhite" two-three years later on Agora. In 2013, "DrWhite" on *Silk Road* made reference to Gary C. who sold bitcoins. In 2015, "DrWhite" on *Agora* sold drugs to an agent four times over the course of 2 months; however, this "DrWhite" does not make reference to "Gary C." Therefore, the Government failed to show that Gary C was still associated with "DrWhite" in 2015. Gary C could have been

an associate of “DrWhite’s” on *Silk Road*; however, that does not equate to a finding that they would still be associates two-three years later.

Basically, the government attempted to connect the “DrWhite” from *Silk Road* to the “DrWhite” on *Agora* simply because they used the same name on the dark web. The connection is too nebulous to support probable cause to justify infringing on a person’s Fourth Amendment Rights. However, the Ninth Circuit, determined that a time lapse of two years accompanied by a time lapse of one-two months is not stale in drug cases. As discussed below herein, other Circuits would probably disagree with the Ninth Circuit’s decision especially considering this is an internet drug transaction via mail with no informant or information regarding where the drugs are being stored. The police hoped that Petitioner would lead them to the drugs but they had no knowledge that Petitioner actually had drugs, how often Petitioner had drugs or where the drugs were stored. The facts of Petitioner’s case are different from the facts in *Greany*, since there was no evidence showing a long-term business or ongoing criminal business. Petitioner’s business on *Silk Road* ceased two years prior when the website was shut down.

B. The Circuits have different standards to determine if information is stale.

This Court should set the appropriate standard to determine staleness to

avoid arbitrary decisions regarding a person's important Fourth Amendment right and to promote uniformity among the Circuits.

The Tenth Circuit has held that "whether the information is too stale to establish probable cause depends on 'the nature of the criminal activity, the length of the activity, and the nature of the property to be seized'." *United States v. Snow*, 919 F.2d 1458, 1459-60 (10th Cir. 1990) (citations omitted); See also *United States v. Iiland*, 254 F.3d 1264 (10th Cir. 2001); See *United States v. Le*, 173 F.3d 1258, 1266-67 (10th Cir. 1999) ("passage of time is not of critical importance" where offense ongoing); *United States v. Reyes*, 798 F.2d 380, 382 (10th Cir. 1986) (five months old information upon which search warrant was issued was not impermissibly stale when periodic drug violations at several month intervals are alleged); *United States v. Sherman*, 576 F.2d 292, 295-96 (10th Cir. 1978) (affidavit valid where activities "continuous in nature").

According to the Fourth Circuit, "[p]robable cause can become stale if there is a significant lapse of time between the observed drug transaction and the issuance of the search warrant." *United States v. Thompson*, 972 F.2d 344, 1992 WL 182812 (4th Cir. 1991) ("where no more than seventy-two hours have passed between the alleged drug transaction and issuance of a search warrant, probable cause does not become stale."). If Petitioner's case were heard in the Fourth

Circuit, the ruling probably would have been different since the drug transaction was approximately one month earlier and the connecting information was approximately three years earlier.

The Sixth Circuit claims “whether information is stale depends on the ‘inherent nature of the crime’.” *United States v. Spikes*, 158 F.3d 913, 923 (6th Cir.1998) (quoting *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir.1988)). The Sixth Circuit has “several factors” such as “the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and] the place to be searched (mere criminal forum of convenience or secure operational base?).” *United States v. Hammond*, 351 F.3d 765, 771-72 (6th Cir.2003) (quoting *United States v. Greene*, 250 F.3d 471, 480-81 (6th Cir. 2001)). In the context of drug crimes, information goes stale very quickly “because drugs are usually sold and consumed in a prompt fashion.” *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir.2009).

The Eighth Circuit held “A warrant becomes stale if the information supporting the warrant is not sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search.” *United States v. Huyck*, 849 F.3d 432 (8th Cir.

2017) quoting *United States v. Brewer*, 588 F.3d 1165, 1173 (8th Cir. 2009) (quotation and citation omitted). "There is no bright-line test for determining when information in a warrant is stale." *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010). Instead, we look to "the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search." *United States v. Estey*, 595 F.3d 836, 840 (8th Cir. 2010) (quotation omitted); See *United States v. Button*, 653 F.2d 319, 324-25 (8th Cir. 1981) (affidavit of police officer who received information about drug transactions from information over "past six months" does not show probable cause that drugs are still in the residence).

VII. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 26th day of October, 2020.

Law Offices of Stephanie K. Bond. P.C.

STEPHANIE K. BOND
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this brief is double-spaced uses a 14-point proportionately-spaced Times New Roman typeface and contains 14 pages and approximately 3,642 words.

RESPECTFULLY SUBMITTED this 26th day of October, 2020.

Law Offices of Stephanie K. Bond, P.C.

STEPHANIE K. BOND
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Supreme Court using the appellate CM/ECF system. I understand that participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have served this document via United States Mail to the following non-CM/ECF participant:

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APPENDIX

Court of Appeals Memorandum Decision.	1a
Report and Recommendation from the U.S. District Court Magistrate.	2a
Order from the U.S. District Court Judge.	3a
Judgement from the U.S. District Court	4a

NOT FOR PUBLICATION**FILED****UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SEP 18 2020

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

UNITED STATES OF AMERICA,

No. 19-10333

Plaintiff-Appellee,

D.C. No.
4:16-cr-01254-JAS-LCK-1

v.

GARY STEVEN COLLOCK,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Submitted September 16, 2020**
San Francisco, California

Before: WATFORD, FRIEDLAND, and MILLER, Circuit Judges.

Gary Collock appeals the district court's denial of his motion to suppress evidence obtained following the execution of a search warrant that authorized GPS tracking of his car. He argues that the warrant was not supported by probable cause. We affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

“A search warrant is supported by probable cause if the issuing judge finds that, ‘given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). When deciding whether to suppress evidence obtained following execution of a warrant, courts assess whether the issuing judge “had a substantial basis for . . . conclud[ing] that probable cause existed,” and give “great deference” to the issuing judge’s probable cause determination, overturning it only for clear error. *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011) (alterations in original) (quoting *Gates*, 462 U.S. at 238-39).

Generally, “[w]e review a district court’s rulings on motions to suppress and the validity of search warrants *de novo*.” *Underwood*, 725 F.3d at 1081. The Government here contends, however, that the district court’s ruling on the validity of the warrant is “arguably” reviewable only for plain error, because Colldock did not file any objections to the magistrate judge’s Report and Recommendation, which the district court adopted. We need not resolve any dispute over the standard of review because Colldock’s challenge fails even under *de novo* review.

Here, there was a substantial basis for concluding that probable cause existed—that is, to find a fair probability that, by tracking the location of

Colldock's car, law enforcement would find evidence that Colldock had engaged in drug trafficking. As the affidavit in support of the warrant application explained, a federal agent obtained methamphetamine by mail on four separate occasions, between May and August 2015, through orders placed with a vendor identified as "DrWhite" on the dark web marketplace Agora. And the affidavit demonstrated a fair probability that Colldock was the Agora vendor using the name "DrWhite."

Specifically, the affidavit explained that agents inferred from a "verif[ication]" feature on Agora as well as their own intelligence about the way vendors operate on dark web marketplaces that Agora's "DrWhite" was probably the same person who had, approximately two years earlier, used the name "DrWhite" on the dark web marketplace Silk Road to provide a "cash-in-mail service for bitcoin" (similar to a service offered by Agora's "DrWhite"). Agents linked the Silk Road "DrWhite" to Colldock based on messages that Silk Road's "DrWhite" had sent to customers requesting that funds be sent by mail to "Gary C." at Colldock's then-address, as well as messages referencing a financial account number associated with an individual with Colldock's full name, date of birth, and the same address as was on Colldock's car registration. The identification of Colldock as Agora's "DrWhite" was also consistent with the fact that the four packages of methamphetamine that had been ordered from Agora's "DrWhite"

were sent by mail with return addresses near the city in which Colldock lived at that time. This evidence reasonably supports the inference that, by tracking the car that was registered to Colldock and that he had been observed driving near the time of the Agora transactions at issue, officers would uncover evidence of drug trafficking.

Colldock argues that the information linking him to Agora's "DrWhite" was "stale" because of the two-year gap between the messages associated with Silk Road's "DrWhite" and the Agora activity that more immediately preceded the warrant application. We disagree. The affidavit identified sufficient reasons to conclude that the activity by Agora's "DrWhite"—which occurred over the course of a few months preceding the warrant application, with the most recent sale of methamphetamine having occurred less than one month before the warrant application was submitted—could probably be attributed to the same person who had controlled the Silk Road "DrWhite" account approximately two years earlier.

Colldock also contests the affidavit's statement that law enforcement had, before seeking a GPS tracking warrant, "exhausted its investigative techniques." Colldock has failed to show, however, that this statement is material to the assessment of whether there was probable cause to track Colldock's location. To the extent Colldock intends to suggest either that there was an exhaustion requirement distinct from the probable cause requirement, or that he is entitled to

relief based on a false statement in the affidavit, we deem any such challenges forfeited for failure to develop these points in Colldock's appellate briefs. *See AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012) (explaining that we ordinarily do not consider issues not "specifically and distinctly" argued in an opening brief (quoting *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992))).¹

AFFIRMED.

¹ Because we hold that there was a substantial basis to conclude that the warrant was supported by probable cause, we need not address whether the good-faith exception to the exclusionary rule would apply here. *See United States v. Leon*, 468 U.S. 897, 924-25 (1984) (explaining that courts may "exercise an informed discretion" in selecting the most appropriate ground for decision when the good-faith exception is raised).

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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,
10 Plaintiff,
11 v.
12 Gary S. Colldock,
13 Defendant.
14

No. CR-16-1254-JAS (LCK)

**REPORT AND
RECOMMENDATION**

15 Pending before the Court is Defendant Gary Colldock's Motion to Suppress. (Doc.
16 70.) Defendant argues that all evidence obtained from the tracker placed on his vehicle
17 should be suppressed because the facts supporting the search warrant lacked probable
18 cause and were stale. The government responded in opposition. (Doc. 74). This matter
19 came before the Court for oral argument and a report and recommendation as a result of a
20 referral, pursuant to LRCrim 57.6. Argument was heard on September 5, 2017. (Doc. 75.)
21 Having now considered the matter, the Magistrate Judge recommends that the District
22 Court, after its independent review, deny Defendant's motion to suppress.
23

I. FACTUAL BACKGROUND

24 On September 1, 2015, Magistrate Judge Bruce Macdonald found probable cause
25 for agents to install a tracking device on a 2000 Ford Taurus (Target Vehicle), registered
26 to Defendant Gary Colldock, 15525 N. Lago Del Oro Parkway, Tucson, Arizona 85739,
27 based on probable cause that it would lead to evidence of violations of 21 U.S.C. § 841.
28 All information necessary to show probable cause for the issuance of a search warrant

1 must be contained within “the four corners” of the written affidavit. *United States v.*
 2 *Gourde*, 440 F.3d 1065, 1067 (9th Cir. 2006) (en banc) (citing *United States v. Anderson*,
 3 453 F.2d 174, 175 (9th Cir. 1971)).

4 In the instant case, the affidavit in support of the tracking warrant provided
 5 information that Drug Enforcement Administration (DEA) Special Agent Tanya Solana
 6 knew, based on her training and experience, that drug traffickers routinely utilize vehicles
 7 for a variety of reasons directly related to their smuggling operation; that it is common
 8 for traffickers to drive these vehicles using counter-surveillance techniques; and, that
 9 individuals on probation and participating in narcotics trafficking usually store narcotics
 10 in a place other than their residence because their residences are subject to probation
 11 searches. (Doc. 74-1 at 3 ¶ 5.)

12 The Miami DEA office conducted an undercover investigation involving a dark
 13 web marketplace known as Agora which is used to buy and sell, among other things,
 14 illegal drugs, precursor chemicals, and counterfeit merchandise, and provides the ability
 15 to launder money. (*Id.* at 4 ¶¶ 6-7.) In dark web marketplaces, bitcoin is the currency
 16 used to make purchases, and customers can purchase bitcoin by exchanging cash with
 17 dark web vendors. (*Id.* at 8 ¶ 18.) In the course of this investigation, agents located
 18 DrWhite¹ as an Agora vendor of methamphetamine, cocaine, and “Fast Cash In Mail For
 19 BTC Service.” (*Id.* at 5 ¶ 8.) In addition to selling drugs, SA Solana determined DrWhite
 20 was operating a “cash-in-mail” service for bitcoin. (*Id.* at 8 ¶ 18.) Between May 14, 2015
 21 and August 3, 2015, DEA agents placed a series of four orders with DrWhite on Agora
 22 for a total amount of 9.5 grams of methamphetamine. (*Id.* at 5 ¶ 10.) The four packages
 23 were shipped via U.S. mail with return addresses from fictitious companies in Tucson or
 24 Saddlebrook, which is approximately 27 miles northeast of Tucson. (*Id.* at 5-6 ¶ 10.)

25 On DrWhite’s profile page, Agora indicated it had verified that DrWhite was on
 26 another dark web marketplace known as Silk Road. (*Id.* at 6 ¶ 11.) This verification

28 ¹ All references to DrWhite in the affidavit contain no space between Dr and
 White and no period after Dr. (See Doc. 74-1 at 8-12.)

1 feature provides credibility to a vendor; therefore, most vendors do not change their
 2 vendor name from one dark web marketplace to another. (*Id.*) Instead, by using a
 3 consistent name, vendors build their “brand name” with customers. (*Id.*)

4 In 2013, the FBI arrested the person it believed to be the owner of Silk Road. (*Id.*
 5 ¶ 12.) During their investigation, forensic analysis of computer servers recovered
 6 transaction histories and private message communications associated with Silk Road
 7 users. (*Id.*) In trying to identify Agora vendor DrWhite, SA Solana reviewed private
 8 message communications which were identified for Silk Road vendor DrWhite. (*Id.*
 9 ¶ 13.) May and June 2013 communications revealed that Silk Road DrWhite was
 10 involved in receiving cash for bitcoins and possibly other illegal activity via the dark web
 11 and requested funds be sent to “Gary C.” at an Oracle Road address in Tucson. (*Id.* at 6-7
 12 ¶¶ 13-15.) The physical address in these communications was confirmed as Defendant
 13 Gary Colldock’s then-current address when he was arrested by Tucson Police on an
 14 unrelated matter in June 2013. (*Id.* at 8 ¶ 16.) The messages sent to Silk Road DrWhite
 15 contained MoneyPak numbers that are used to convert cash into funds to be used online.
 16 (*Id.* ¶ 19.) Although MoneyPak is no longer available, it is part of the Green Dot
 17 Corporation and DEA agents provided Green Dot with a MoneyPak number sent to
 18 DrWhite on Silk Road. (*Id.* at 8-9 ¶ 19.) That MoneyPak number came back to Gary
 19 Colldock, which included Defendant’s date of birth and his current (2015) listed Tucson
 20 address where the Target Vehicle was registered and observed by agents. (*Id.* at 9 ¶¶ 19-
 21 20.) Defendant’s current (2015) Pima County Probation Officer is aware of Defendant
 22 driving only one car, the Target Vehicle, and it is the sole vehicle law enforcement has
 23 observed him operating. (*Id.* ¶ 23.) Surveillance of Defendant driving the Target Vehicle
 24 resulted in agents observing him use counter-surveillance techniques. (*Id.* ¶ 21.)

25 Defendant Colldock was indicted on June 22, 2016, and charged with six counts of
 26 violating 21 U.S.C. § 841, for possessing with intent to distribute a controlled substance,
 27 and one count of violating 18 U.S.C. § 924(c)(1)(A), for carrying a firearm during a drug
 28 trafficking crime. (Doc. 1.) Trial is currently scheduled for October 18, 2017. (Doc. 63.)

II. DISCUSSION

A. Probable Cause Determination

The standards for determining probable cause for a search are set forth in *Illinois v. Gates*, 462 U.S. 213 (1983). Probable cause has been defined as a “fair probability” that contraband or evidence is located in a particular place. *Id.* at 238. A fair probability is dependent on the “totality of the circumstances” and can include reasonable inferences, as well as a “common sense practical” approach. *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007). A fair probability is not a certainty or even a preponderance of the evidence. *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011) (citing *United States v. Gourde*, 440 F.3d 1065, 1069-71 (9th Cir. 2006) (en banc)). Further, “great deference” should be given to a magistrate judge’s determination. *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). Moreover, “resolution of doubtful or marginal cases in this area should largely be determined by the preference to be accorded to warrants.” *Kelley*, 482 F.3d at 1051 (citing *Gates*, 462 U.S. at 237 n.10) (other citations omitted).

The affidavit in this case provided evidence that DEA agents purchased methamphetamine from DrWhite on the Agora dark web marketplace. The packages containing the methamphetamine were sent through the U.S. mail and had return addresses from Tucson and Saddlebrook (27 miles from Tucson). DrWhite on Agora sold narcotics and operated a cash-in-mail service for bitcoin. Agora verified that DrWhite was a previous vendor from the dark web marketplace Silk Road. Agents also knew that dark web vendors keep their brand names from site to site so that customers know what to expect in future transactions. In trying to determine the identity of Agora DrWhite, DEA agents obtained, from the FBI, transaction histories and private message communications associated with Silk Road users.

The Silk Road communications showed that DrWhite requested bitcoin purchasers to send funds to “Gary C” at an address on Oracle Road in Tucson used by Defendant Colldock in 2013. Agents also learned that Silk Road DrWhite used MoneyPak numbers

1 and that a MoneyPak number corresponded to Defendant's name, date of birth, and 2015
2 resident address. This information provided probable cause to believe Silk Road DrWhite
3 is Defendant Gary Colldock. In turn, because DrWhite from Agora was verified to be a
4 Silk Road vendor, and DrWhite on Agora and Silk Road used identical names, sold
5 bitcoin, and used addresses in the Tucson area, there is probable cause to believe they
6 were the same person.

7 The Target Vehicle was registered to Defendant's 2015 address (used for
8 MoneyPak transactions) and was observed at that residence by law enforcement. Agents
9 also observed Defendant use counter-surveillance techniques when driving the vehicle.
10 There was a fair probability that the Target Vehicle was being used in furtherance of drug
11 trafficking and that use of the tracking device would lead to evidence, fruits, or
12 instrumentalities of the drug trafficking and the identification of involved individuals.
13 Under a totality of the circumstances, the issuing magistrate judge did not err in making a
14 practical, common-sense decision finding probable cause.

15 B. Staleness

16 Defendant argues the information in the search warrant was stale because the Silk
17 Road information about DrWhite was from 2013. Therefore, he argues there is no reason
18 to believe that DrWhite would be carrying drugs in 2015. As explained above, the
19 tracking warrant was based on drug purchases made from DrWhite on Agora in 2015.
20 The 2013 Silk Road information was used for purposes of identifying DrWhite.

21 A review of the applicable case law provides that information offered in support of
22 the application for a search warrant is not stale if "there is sufficient basis to believe,
23 based on a continuing pattern *or other good reasons*, that the items to be seized are still
24 on the premises." *United States v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984). There was no
25 significant delay in this case. As set forth in the affidavit, DEA agent placed four orders
26 for methamphetamine with DrWhite through Agora, between May 2015 and August 3,
27 2015. (Doc. 74-1 at 8 ¶ 10.) During that same time period, agents researched the 2013
28 transactional histories and communications for Silk Road DrWhite and conducted

1 surveillance on Defendant's vehicle. The warrant was requested and signed on September
 2 1, 2015. (Doc. 74-1 at 18-21.) The Court finds there is a sufficient basis to believe that
 3 drug trafficking, which was known to have taken place over the course of three months in
 4 2015, was ongoing less than a month later.

5 **C. Good Faith.**

6 As stated above, the Court finds there was sufficient probable cause to support the
 7 issuance of the search warrant. However, even if the warrant was deemed not sufficient,
 8 the Court finds the "good faith" exception applies because the agents' reliance on the
 9 warrant was objectively reasonable, and the affidavit contained sufficient evidence to
 10 justify the agents' reliance on the warrant. *See United States v. Leon*, 468 U.S. 897, 922-
 11 23 (1984).

12 **D. *Franks* Hearing**

13 In his motion, Defendant cited *Franks v. Delaware* in arguing that the government
 14 failed to sufficiently link Agora DrWhite in 2015 to Silk Road DrWhite in 2013. (Doc. 70
 15 at 14.) The Court must conduct a *Franks* hearing if a defendant makes "a substantial
 16 preliminary showing that '(1) the affidavit contains intentionally or recklessly false
 17 statements, and (2) the affidavit purged of its falsities would not be sufficient to support a
 18 finding of probable cause.'" *United States v. Stanert*, 762 F.2d 775, 780 (9th Cir. 1985)
 19 (quoting *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir. 1980)). The Court
 20 finds that Defendant made no showing that the affidavit contained intentionally or
 21 recklessly false statements. As indicated above, the agent and affidavit clearly showed a
 22 sufficient link between Silk Road DrWhite and Agora DrWhite and to Defendant and the
 23 Target Vehicle.

24 **III. RECOMMENDATION**

25 It is recommended that, after its independent review of the record, the District
 26 Court deny Defendant's Motion to Suppress (Doc. 70). Any party may serve and file
 27 written objections on or before September 25, 2017. A party may respond to the other
 28 party's objections on or before October 9, 2017. No reply brief shall be filed on

1 objections unless leave is granted by the District Court. If objections are not timely filed,
2 they may be deemed waived.

3 Dated this 11th day of September, 2017.

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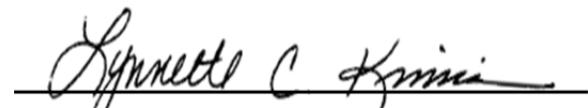
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Honorable Lynette C. Kimmens

United States Magistrate Judge

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 United States of America,) No. CR 16-1254-TUC-JAS (LCK)
10 Plaintiff,)
11 vs.) **ORDER**
12 Gary S. Colldock,)
13 Defendant.)
14 _____)
15

16 Pending before the Court is a Report and Recommendation issued by United States
17 Magistrate Judge Kimmins that recommends denying Defendant's motion to suppress. A
18 review of the record reflects that the parties have not filed any objections to the Report and
19 Recommendation and the time to file objections has expired.¹ As such, the Court will not
20 consider any objections or new evidence.

21 The Court has reviewed the record and concludes that Magistrate Judge Kimmins'
22 recommendations are not clearly erroneous. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72;
23 *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *Conley v. Crabtree*, 14
24 F. Supp. 2d 1203, 1204 (D. Or. 1998).

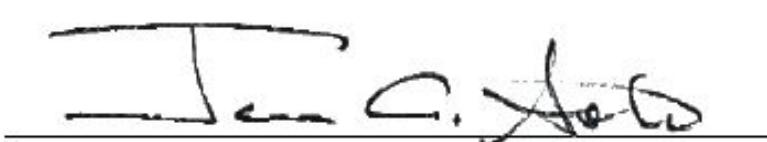
25 Accordingly, IT IS HEREBY ORDERED as follows:

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27 _____
28 ¹The Court extended the date to file objections to 11/27/17 (see Doc. 80), and no
objections were filed.

1 (1) Magistrate Judge Kimmens' Report and Recommendation (Doc. 76) is accepted and
2 adopted.

3 (2) The motion to suppress (Doc. 70) is denied.

4 DATED this 20th day of June, 2018.

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8 James A. Soto
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10 United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America

v.

Gary Steven Colldock

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-16-01254-001-TUC-JAS (LCK)

Mark Francis Willimann (CJA)

Attorney for Defendant

USM#: 62590-408

THE DEFENDANT ENTERED A PLEA OF guilty on 5/28/2019 to Count 3 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 21, U.S.C. §841(a)(1) and (b)(1)(A)(viii), Possession with Intent to Distribute Methamphetamine, a Class A Felony offense, as charged in Count 3 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **ONE HUNDRED TWENTY (120) MONTHS**, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **SIXTY (60) MONTHS**.

IT IS FURTHER ORDERED that defendant's interest in the following property shall be forfeited as a money Judgment to the United States:

\$884,203.93 in U.S. currency, which represents the amount of proceeds obtained as a result of the offense held in the 149.0252 bitcoins in the Wallet 14wpbHaX2KFUiijyQVrxBLSnoyF2VsH7Mh.

IT IS ORDERED that all remaining counts are dismissed on motion of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$100.00 FINE: WAIVED RESTITUTION: N/A

The defendant shall pay a special assessment of \$100.00 which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the

priority established under 18 U.S.C. § 3612(c). The total special assessment of \$100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 3 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, you must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation

officer within 72 hours of becoming aware of a change or expected change.

- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must participate as instructed by the probation officer in a program of substance abuse treatment (outpatient and/or inpatient) which may include testing for substance abuse. You must contribute to the cost of treatment in an amount to be determined by the probation officer.
- 2) You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of

release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

- 3) You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
- 4) You must participate in a mental health assessment and participate in mental health treatment as determined to be necessary by a medical or mental health professional and follow any treatment directions by the treatment provider. You must take medicine as prescribed by a medical professional providing mental health treatment, unless you object, in which event you must immediately notify the probation officer. You must contribute to the cost of treatment in an amount to be determined by the probation officer.
- 5) You must not use or possess alcohol or alcoholic beverages.
- 6) You must cooperate in the collection of DNA as directed by the probation officer.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter (except for the defendant's right to appeal the denial of the Motion to Suppress). The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

THE DEFENDANT IS ADVISED OF THE RIGHT TO APPEAL THE DENIAL OF THE MOTION TO SUPPRESS BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

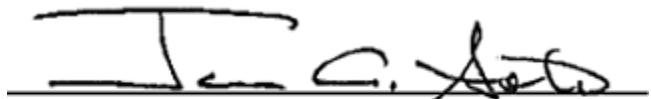
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USA vs. Gary Steven Colldock

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The Court orders commitment to the custody of the Bureau of Prisons and recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program and the defendant be placed in an institution in or near Phoenix, Arizona. If the defendant is not eligible for the RDATP the court recommends the defendant be placed in or near Tucson, Arizona.

Date of Imposition of Sentence: **Friday, September 27, 2019**

Dated this 27th day of September, 2019.



Honorable James A. Soto
United States District Judge

RETURN

I have executed this Judgment as follows: _____, the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal By: _____ Deputy Marshal _____

CR-16-01254-001-TUC-JAS (LCK)- Colldock 9/27/2019 - 11:25 AM