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United States Court of Appeals  
For the Eighth Circuit

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No. 16-4308

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United States of America

*Plaintiff - Appellee*

v.

Prentiss Anthony Crumble

*Defendant - Appellant*

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Appeal from United States District Court  
for the District of Minnesota - St. Paul

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Submitted: October 20, 2017

Filed: January 2, 2018

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Before WOLLMAN and SHEPHERD, Circuit Judges, and GOLDBERG,<sup>1</sup> Judge.

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SHEPHERD, Circuit Judge.

On October 21, 2014, at approximately 1:28 p.m., police received reports of shots being fired between two vehicles in St. Paul, Minnesota. Dispatch informed responding officers that one of the vehicles—a tan Buick—had crashed into a house

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<sup>1</sup>The Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

and its two male occupants had fled on foot. Officers arrived at the scene to find the wrecked Buick with bullet holes along its passenger side and a shot-out rear window. They noticed the Buick's key in its ignition and a handgun on the driver's side floorboard. A witness informed the officers that after the crash the other vehicle's shooter continued to fire at the Buick. The witness stated that the Buick's two occupants fled the scene on foot heading west, describing one as a black male, in his early 20s, wearing a white t-shirt. Another witness also reported seeing an approximately 25-year-old black male in a white t-shirt running westward from the Buick. Officers found a man matching this description hiding behind a shed a block and a half away. That man was appellant Prentiss Crumble.

Officers took Crumble into custody and drove him to the scene of the wrecked Buick—where he denied any knowledge of the shooting or the Buick. When an officer searched the Buick later that day, he found a cell phone on the driver's seat, which he secured into evidence. The following day, the officer applied for a search warrant to search the cell phone for “information as to the second occupant in the Buick or further information related to the crime.” A county judge issued a warrant to search “[a]ll electronic data (including but not limited to contacts, calenders, call records, voice messages, text messages, photo and video files) stored in” the phone. In the subsequent search, the officer found a video of Crumble inside a vehicle wearing a white t-shirt and brandishing a handgun similar to that recovered from the Buick. The video was recorded shortly before the shooting on October 21, 2014 at 1:15 p.m.

Crumble was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Crumble moved to suppress the evidence recovered from the cell phone. The magistrate judge recommended granting Crumble's motion to suppress, finding Crumble had not abandoned his Fourth Amendment rights in the phone. The district court rejected the magistrate judge's recommendation, concluding that the evidence from the cell phone was admissible

because Crumble abandoned the Buick and the phone left in it when he fled and subsequently denied any knowledge of the vehicle. The district court alternatively held that the search warrant was supported by probable cause and did not lack particularity or amount to a general warrant. Finally, even if there were no probable cause or a lack of particularity, the good-faith exception applied because it was objectively reasonable for the police to rely on the warrant.

Crumble entered a conditional guilty plea, reserving his right to appeal the district court's denial of his motion to suppress the evidence obtained in the search of his cell phone. At sentencing, the government sought application of the Armed Career Criminal Act ("ACCA") based on Crumble's prior felony convictions under Minnesota law, which included a conviction for second-degree assault, a conviction for second-degree burglary, and two convictions for third-degree burglary. Crumble argued the burglary convictions were not violent felonies under the ACCA. The district court disagreed and imposed the ACCA mandatory minimum sentence of 15 years in prison. Crumble now appeals his conviction and sentence.

## I.

We first take up Crumble's Fourth Amendment challenge to the search of the cell phone. The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend. IV. "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has [a reasonable] expectation of privacy in the place searched . . . ." Minnesota v. Carter, 525 U.S. 83, 88 (1998). Therefore, we must initially consider whether Crumble had a reasonable expectation of privacy in the cell phone he left behind in the Buick.

It is well-established that a defendant does not have a reasonable expectation of privacy in abandoned property. See United States v. Tugwell, 125 F.3d 600, 602 (8th Cir. 1997). Thus, if Crumble abandoned the cell phone, he forfeited his

expectation of privacy and cannot raise a Fourth Amendment challenge to the subsequent search. See id. (“A warrantless search of abandoned property does not implicate the Fourth Amendment, for any expectation of privacy in the item searched is forfeited upon its abandonment.”). “The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished [his] reasonable expectation of privacy . . . .” Id. (internal quotation marks omitted). A finding of abandonment depends on the totality of the circumstances, with “two important factors [being] denial of ownership and physical relinquishment of the property.” Id. (internal quotation marks omitted). Courts consider only “the objective facts available to the investigating officers, not . . . the owner’s subjective intent.” United States v. Nowak, 825 F.3d 946, 948 (8th Cir. 2016) (per curiam) (internal quotation marks omitted).

Here, the district court found that Crumble abandoned the cell phone. We review this factual finding for clear error, “affirm[ing] the district court’s abandonment finding unless its decision is ‘unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.’” United States v. Ruiz, 935 F.2d 982, 984 (8th Cir. 1991) (quoting United States v. Meirovitz, 918 F.2d 1376, 1379 (8th Cir. 1990)).

Based on the totality of the circumstances, we cannot say that the district court clearly erred in finding Crumble abandoned the cell phone in the Buick. After the crash, Crumble fled the scene, leaving the Buick wrecked on a stranger’s lawn. The Buick’s key was in the ignition and its back window was shot out—allowing for easy access to the vehicle and its contents—which included a gun on the floorboard and the cell phone on the driver’s seat. Crumble claims he was not fleeing from police, but rather attempting to get away from the shooter in the other vehicle. Abandonment, however, does not turn on Crumble’s subjective intent, but rather “the objective facts available to the investigating officers.” Nowak, 825 F.3d at 948

(internal quotation marks omitted). Based on these objective facts, the district court did not clearly err in concluding Crumble had abandoned the vehicle and its contents, including the cell phone. See United States v. Taylor, 462 F.3d 1023, 1025-26 (8th Cir. 2006) (finding defendant abandoned cell phone when he dropped it on street while fleeing vehicle); see also United States v. Smith, 648 F.3d 654, 660 (8th Cir. 2011) (finding defendant abandoned vehicle and contents when he fled, leaving door open, key in ignition, and motor running); United States v. Tate, 821 F.2d 1328, 1330 (8th Cir. 1987) (finding defendant abandoned vehicle and contents when he fled, leaving vehicle unoccupied and unlocked).

Moreover, Crumble initially denied any knowledge of the wrecked Buick, evincing his intent to abandon the vehicle and its contents. See United States v. Nordling, 804 F.2d 1466, 1470 (8th Cir. 1986) (finding defendant's "denials objectively demonstrate an intent to abandon the property"). Only the following day—after police had already seized the cell phone—did Crumble admit to having been in the Buick. This admission did not constitute a reassertion of a privacy interest in the abandoned cell phone. See id.

Crumble urges this Court to categorically deny application of the abandonment doctrine to cell phones. We decline to do so. Crumble points to Riley v. California, where the Supreme Court held that the search incident to arrest exception does not apply to cell phone searches, in part because cell phones hold "the privacies of life." 134 S. Ct. 2473, 2494-95 (2014) (internal quotation marks omitted). However, Riley's holding is limited to cell phones seized incident to arrest. Id. at 2495. Riley was explicit that "other case-specific exceptions may still justify a warrantless search of a particular phone." Id. at 2494. Other courts have found abandonment to be one such exception. See, e.g., United States v. Quashie, 162 F. Supp. 3d 135, 141-42 (E.D.N.Y. 2016) (finding Riley does not eliminate abandonment exception for cell phones).

We conclude the district court did not clearly err in finding abandonment and denying Crumble’s motion to suppress. Because we affirm the district court’s holding based on abandonment, we need not consider whether the warrant was valid. Cf. Tugwell, 125 F.3d at 602 (“warrantless search of abandoned property does not implicate the Fourth Amendment”).

## II.

We next turn to Crumble’s sentencing challenge. The district court sentenced Crumble to the ACCA mandatory minimum of 15 years imprisonment. The ACCA applies when a defendant convicted under 18 U.S.C. § 922(g) has three prior convictions “for a violent felony or a serious drug offense.” 18 U.S.C. § 924(e)(1). As noted earlier, Crumble’s prior felony convictions include a Minnesota conviction for second-degree assault, a Minnesota conviction for second-degree burglary, and two Minnesota convictions for third-degree burglary. Crumble argues his burglary convictions do not qualify as violent felonies under the ACCA, and the government agrees. We review whether a prior conviction qualifies as a violent felony de novo. United States v. Shockley, 816 F.3d 1058, 1062 (8th Cir. 2016).

The ACCA’s definition of “violent felony” includes burglary. 18 U.S.C. § 924(e)(2)(B)(ii). To determine whether a state burglary conviction qualifies as burglary under the ACCA, we must first determine whether to apply the categorical approach (used when an indivisible statute lists alternative means of committing a single crime) or the modified categorical approach (used when a divisible statute lists alternative elements to define multiple crimes). See Mathis v. United States, 136 S. Ct. 2243, 2248-49 (2016). Under the categorical approach, a state burglary conviction qualifies only if its statute’s elements are the same as, or narrower than, those of generic burglary, which is an “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Descamps v.

United States, 133 S. Ct. 2276, 2283 (2013) (quoting Taylor v. United States, 495 U.S. 575, 599 (1990)).

Minnesota’s third-degree burglary statute provides that:

Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building . . . commits burglary in the third degree . . . .

Minn. Stat. § 609.582, subdiv. 3. In determining whether Minnesota third-degree burglary qualifies as a violent felony under the ACCA, this Court’s decision in United States v. McArthur, 850 F.3d 925 (8th Cir. 2017) is controlling. There, this Court found Minnesota’s third-degree burglary statute to be indivisible and applied the categorical approach. Id. at 938. While the first alternative means in the Minnesota statute (entering with intent to commit a crime) qualifies as generic burglary, the second alternative means (unlawful entry followed by the commission of a crime) does not. Id. at 938-40. That is because the second alternative means “does not require that the defendant have formed the ‘intent to commit a crime’ at the time of the nonconsensual entry or remaining in,” as is required by the definition of generic burglary in Taylor. Id. at 940. Thus, Minnesota third-degree burglary “is broader than generic burglary” and does not qualify as a predicate conviction under the ACCA. Id.

Minnesota’s second-degree burglary statute provides that:

Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building . . . commits burglary in the second degree . . . .

Minn. Stat. § 609.582, subdiv. 2(a). Both parties agree that because this statute includes the same overbroad second alternative means as Minnesota’s third-degree burglary statute (unlawful entry followed by the commission of a crime), Minnesota second-degree burglary does not qualify as a violent felony under the ACCA. Indeed, this Court’s analysis of Minnesota’s third-degree burglary statute in McArthur applies with equal force to Minnesota’s second-degree burglary statute. The statute is indivisible, so we apply the categorical approach. See McArthur, 850 F.3d at 938 (citing State v. Gonzales, No. A15-0975, 2016 WL 3222795, at \*2-3 (Minn. Ct. App. June 13, 2016)). Because a conviction under the second alternative means of the statute “does not require that the defendant have formed the ‘intent to commit a crime’ at the time of the nonconsensual entry or remaining in,” Minnesota second-degree burglary “is broader than generic burglary” and does not qualify as a predicate conviction under the ACCA. See id. at 940.

Because Crumble’s Minnesota burglary convictions do not qualify as violent felonies, Crumble has no more than one predicate conviction. The ACCA mandatory minimum, therefore, does not apply. We vacate his sentence and remand to the district court for resentencing.

### III.

For the foregoing reasons, we affirm the district court’s denial of Crumble’s motion to suppress and remand for resentencing in accordance with this opinion.

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 16-4308

United States of America

Appellee

v.

Prentiss Anthony Crumble

Appellant

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Appeal from U.S. District Court for the District of Minnesota - St. Paul  
(0:14-cr-00362-DWF-1)

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**ORDER**

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

Judge Kelly, Judge Erickson and Judge Grasz would grant the petition for rehearing en banc.

March 22, 2018

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

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/s/ Michael E. Gans

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

United States of America,

Criminal No. 14-362 (DWF/SER)

Plaintiff,

v.

**ORDER DECLINING TO ADOPT  
REPORT AND RECOMMENDATION**

Prentiss Anthony Crumble,

Defendant.

This matter is before the Court upon Defendant Prentiss Anthony Crumble's ("Defendant") objections (Doc. No. 65) and Plaintiff United States of America's (the "Government") objections (Doc. No. 66) to Magistrate Judge Steven E. Rau's July 22, 2015 Report and Recommendation (Doc. No. 62) insofar as it recommends that: (1) Defendant's Motion to Suppress Evidence Obtained in Violation of the Fourth Amendment be granted; (2) Defendant's Motion to Suppress Confessions and Statements in the Nature of Confessions be denied consistent with the Report and Recommendation; and (3) Defendant's Motion to Suppress Identification be denied. The Government filed a response to Defendant's objections on August 19, 2015. (Doc. No. 71.) Defendant filed a response to the Government's objections on September 2, 2015. (Doc. No. 74.)

The Court has conducted a *de novo* review of the record, including a review of the arguments and submissions of counsel, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(b). The factual background for the above-entitled matter is clearly and precisely set forth in the Report and Recommendation and is incorporated by reference

for purposes of Defendant's and the Government's objections. Having carefully reviewed the record, the Court declines to adopt the Magistrate Judge's recommendations in certain respects and adopts the recommendation in other respects as detailed below.

Based on the parties' objections, two issues are before the Court at this time:

(1) Defendant's Motion to Suppress Evidence (Doc. No. 23); and (2) Defendant's Motion to Suppress Identification (Doc. No. 25). There appear to be no objections to the recommendation relating to Defendant's Motion to Suppress Confessions and Statements in the Nature of Confessions (Doc. No. 24). The Court addresses each issue separately below.

#### **I. Motion to Suppress Evidence**

The Magistrate Judge first considered Defendant's motion to suppress all evidence obtained from the search of his cell phone, which was executed pursuant to a search warrant. (Doc. No. 62 at 7.) Magistrate Judge Rau concluded that, in light of the undisputed fact that Defendant owned the cell phone, Defendant had a privacy interest in the cell phone and therefore had standing to challenge the search and seizure. (*See id.*) Further, the Magistrate Judge concluded that Defendant's expectation of privacy in the cell phone "is one that society is prepared to recognize as objectively reasonable." (*Id.* at 12 (citation omitted).) Accordingly, Magistrate Judge Rau concluded that, in light of *Riley v. California*, 134 S. Ct. 2473 (2014), Defendant's physical relinquishment of the cell phone in the car did not constitute abandonment because the cell phone belonged to Defendant. (*Id.*)

Considering the warrant itself, the Magistrate Judge found that the officer did not improperly search the phone in order to seek the warrant and that, even if he had, under the independent source doctrine, the evidence would have been acquired through a source independent of the allegedly tainted search. (*Id.* at 16.) Therefore, the Magistrate Judge declined to suppress the evidence on the basis that the officer conducted an illegal search. Further, Magistrate Judge Rau declined to suppress the evidence on the basis that the Search Warrant was not supported by probable cause because it was “fairly probable that the cell phone would contain evidence related to the car chase and shooting,” and that, even if not, probable cause was supported by the good-faith exception. (*Id.* at 18-19.)

Finally, however, the Magistrate Judge found that the Search Warrant failed to “comply with the Fourth Amendment because it fail[ed] to describe with particularity the information to be seized” and because the good-faith exception did not apply. (*Id.* at 21.) Specifically, the Magistrate Judge found that the Search Warrant sought all types of evidence and was so broad that it amounted to a general warrant and that the officers could not have reasonably thought otherwise. (*Id.* at 21-26.) Thus, the Court found that Defendant’s Fourth Amendment rights were violated by the general warrant and recommends that the motion to suppress evidence be granted.

Both parties object to the Report and Recommendation. Defendant objects to the Magistrate Judge’s recommendation to the extent that the Magistrate Judge recommended denying Defendant’s challenge regarding probable cause and asks that this Court grant the motion to suppress on that basis in addition to adopting the Magistrate Judge’s

recommendation to grant the motion on the basis that the search was an unconstitutional general search. (Doc. No. 65 at 1-2.) Specifically, Defendant asserts that due to a lack of information about the second occupant of the vehicle, there was no reasonable basis to believe that evidence related to a crime would be found on the cell phone and also, because the crime at issue was a shooting, and not a crime associated with cell phone use, there was no basis for probable cause. (*Id.*)

The Government, on the other hand, objects to the Magistrate Judge's recommendation on the grounds that that Defendant abandoned the cell phone under the relevant legal standards and therefore did not retain a reasonable expectation of privacy in the phone's data. (Doc. No. 66 at 6.) The Government further argues that the warrant was not a general warrant, as determined by the Magistrate Judge, and was neither lacking in particularity nor overly broad because it was as specific as the circumstances allowed at the time. The Court addresses the issues raised by the parties below.

First, with respect to the question of abandonment of the cell phone, the Court notes that the issue is admittedly complex in light of the Supreme Court's holding in *Riley* and that there is a dearth of applicable on-point case law on the issue. However, for the reasons stated below, the Court concludes that Defendant abandoned the cell phone.

"A warrantless search of abandoned property does not implicate the Fourth Amendment, for any expectation of privacy in the item searched is forfeited upon its

abandonment.” *United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997) (citing *United States v. Segars*, 31 F.3d 655, 658 (8th Cir. 1994)). Thus, once a right to privacy has been extinguished, items can be searched and seized. *See id.* To determine whether an item was abandoned, courts consider the following:

The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid. Whether an abandonment has occurred is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner’s subjective intent. This determination is to be made in light of the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property. We consider only the information available to the officers at the time of the search.

*Tugwell*, 125 F.3d at 602 (quotations and citations omitted). Considering “only the information available to the officers at the time of the search,” *id.*, as the Court must, the totality of the specific facts of this case demonstrate that the vehicle and its contents were abandoned. The occupants fled the car; left the key in the ignition switch; witnesses reported seeing people fleeing the car; and the occupants fled the car and left the phone and a gun in the car. Thus, it was reasonable for the officers to assume that the occupants did not intend to return anytime in the near future. Further, Defendant denied knowing about the crashed vehicle, thereby disclaiming association with the vehicle and anything found in it. Therefore, “the objective facts available to the investigating officers” support the view that Defendant had “relinquished his reasonable expectation of privacy.” *Id.*; *see, e.g., United States v. Smith*, 648 F.3d 654 (8th Cir. 2011) (concluding that the district court properly denied the motion to suppress when it determined that the

defendant had abandoned the car at issue by leaving it open, with the keys in the ignition, the motor running, in a public area, and ran from the police); *United States v. Kelly*, 329 F.3d 624, 629 (holding that when the defendant discarded his wallet on the floor of the station “to avoid its discovery” he discarded any privacy interest he may have had in the wallet or its contents).

Further, the question of abandonment does not turn on the issue of ownership (the issue “is not abandonment in the strict property right sense”) and also does not depend on Defendant’s views regarding the situation (“[w]hether an abandonment has occurred is . . . not [determined] on the basis of the owner’s subjective intent”). *Tugwell*, 125 F.3d at 602. In this case the Magistrate Judge focused on Defendant’s ownership, which implicates the issue of property rights and Defendant’s subjective views, both of which are not a proper basis for determining abandonment. Similarly, the officer’s viewpoint at the time he sought the warrant is not the proper basis for the Court’s abandonment analysis. (See Doc. No. 62 at 12-13 (considering the officer’s possible subjective beliefs based on his decision to obtain a search warrant).) Additionally, Defendant outlines three categories of cases, which he argues show that abandonment does not apply here. However, none of these categories precludes a finding of abandonment. Contrary to Defendant’s view, the caselaw does not hold that fleeing a scene because of a shootout means that abandonment is impossible. Again, the focus is “the objective facts available to the investigating officers” when arriving at the scene. Here, it was reasonable for the officers to see a crashed car, with bullet holes in the door, and reports that the drivers had

fled, and to determine that the individuals would not want to return to be associated with a crime scene and, as a result, that any expectation of privacy in the car and its contents had been relinquished.

Moreover, while the Court agrees that *Riley* indicates a need for a sort of heightened expectation of privacy for cell phones, *Riley* only addressed the search and seizure of cell phones incident to arrest. *Riley*, 134 S. Ct. at 2485-86, 2494. Federal caselaw has not fully addressed the issue of the intersection of abandonment and expectations of privacy in a cell phone. Further, current caselaw examining abandonment does not distinguish amongst the type of items abandoned, the question instead turns on the relinquishment of an expectation of privacy. The same is true with respect to the object itself and its contents, which are not separate once abandoned. Therefore, the fact that it was a cell phone that was abandoned does not change the Court's determination. *See, e.g., State v. Samalia*, 344 P.3d 722, 724 (Wash. Ct. App. 2015) (holding that *Riley* does not eliminate the abandonment exception to the warrant requirement).

Finally, the Supreme Court clearly stated in *Riley* that case-specific exceptions to the warrant requirement based on heightened privacy expectations for cell phones exist. *See Riley*, 134 S. Ct. at 2485-86, 2494 (“[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.”). Abandonment is one such well-recognized exception. Therefore, the Court concludes that, under the facts of this case, Defendant

had “relinquished his reasonable expectation of privacy” in the contents of the vehicle, including the cell phone, when he fled the car and left it on the seat of a bullet-ridden car with a gun on the floor. Evidence from the phone should not be suppressed.

However, even setting aside the question of abandonment, the Court concludes that the Search Warrant was supported by probable cause and that the Search Warrant did not lack particularity and did not amount to a general warrant. First, the Court agrees with the Magistrate Judge’s finding that the Search Warrant is supported by probable cause and that, even if probable cause does not exist, the good-faith exception applies to the question of probable cause in this case. Although the connection between the cell phone and the crime is not as immediately obvious as other situations, for example, a child pornography case, under the totality of the circumstances, it was still “fairly probable” that the cell phone could contain evidence related to the car chase, gunfire, and the identification of the individuals involved in the case. *See United States v. Chrobak*, 289 F.3d 1043, 1046 (8th Cir. 2002) (citations omitted). The phone was seized from a vehicle from which the occupants had just fled after being involved in a chase involving gunfire. Witnesses stated that the occupants of the vehicle were shooting at another vehicle and there were bullet holes and a firearm found in the vehicle. The likelihood of determining involved individuals as well as information related to the shooting was “fairly probable” in light of the totality of the circumstances. *See id.* Further, the Court agrees with the Magistrate Judge’s determination that the good-faith exception applies to the question of probable cause because the “affidavit in support of the Search Warrant is

not ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” (Doc. No. 62 at 19 (citation omitted).)

Second, even considering *Riley*, the Court further concludes that the Search Warrant and corresponding Affidavit did not lack specificity or constitute a general warrant. The application for the warrant included the following specific language: “Your affiant believes data stored on the phone will provide information as to *the second occupant in the Buick or further information related to the crime.*” (Doc. No. 42 at Ex. 12 (emphasis added).) This describes the type of information likely to be found on the phone. The Court respectfully disagrees with the Magistrate Judge’s determination that the items to be sought in a computer-related<sup>1</sup> situation must be specifically tied to the criminal activity at issue. (See Doc. No. 62 at 22-23 (distinguishing a number of cases on the grounds that those cases sought data related to criminal activities that involve computers).) The standard is whether the warrant describes with particularity what is to be searched, which depends on the case and types of items involved. See *United States v. Horn*, 187 F.3d 781, 788 (8th Cir. 1999). Here, the language in the warrant and affidavit, and the situation, indicate that the officer was searching for evidence related to the shootings and crashed car. Further, the Court agrees with the Government that the warrant was “as specific as the circumstances and the nature of the

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<sup>1</sup> The Court considers the cell phone at issue here to be a “computer-related” device as described in *Riley*, for example, the Supreme Court stated: “The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact mini-computers that also happen to have the capacity to be used as a telephone.” *Riley*, 134 S. Ct. at 2489.

activity under investigation permit[ted].” *Id.* Additionally, the Court finds that it would have been objectively reasonable for the police in this case to rely in good faith on the judge’s determination and that, therefore, the good-faith exception applies. *See United States v. Hamilton*, 591 F.3d 1017, 1028 (8th Cir. 2010) (citations omitted).

Finally, the Court notes that unlike *Riley*, it does not appear that evidence of something like a past crime was found in the search at hand. Should that have been the case, the Court would have suppressed any such evidence consistent with *Riley* and in acknowledgment of the very different nature of a cell phone from a purse, wallet, or other such item. *See Riley*, 134 S. Ct. at 2488-89 (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search for a cigarette pack, a wallet, or a purse.”).

In sum, the Court concludes that the abandonment exception applies in this case and that Defendant relinquished his expectation of privacy in his cell phone when he fled the car. Further, even if abandonment does not apply, the Court concludes that there was probable cause for the search warrant and that it was sufficiently particular so as to not constitute a general search warrant. Finally, the good-faith exception also applies here.

## **II. Defendant’s Motion to Suppress Identification**

Defendant objects to the Magistrate Judge’s recommendation to the extent it denies his motion to suppress a witness’s identification of him. In the report and recommendation, the Magistrate Judge concluded that the show-up identification used in this case was not impermissibly suggestive. Defendant, however, argues that the

witness' description was "vague enough that it could have described any number of people," and further, "[t]o immediately take this witness to see an apprehended black male standing in the custody of a St. Paul Police Officer directly next to a St. Paul Police squad car raised a substantial likelihood of irreparable misidentification." (Doc. No. 65 at 4.)

The Court disagrees. As outlined by the Magistrate Judge, based on the totality of the circumstances and considering the factors outlined in *United States v. Rodriguez*, 581 F.3d 775, 810 (8th Cir. 2009), the witness was reliable—he saw the tan Buick from about forty to fifty yards and saw who he believed to be Defendant leave that Buick, he provided details, articulated that he was one-hundred percent certain, and there was only a short period of time between the viewing and the identification. Further, as the Magistrate Judge noted, the weather allowed for clear visibility, and Defendant matched the description provided. Thus, the Court concludes, as did Magistrate Judge Rau, that the show-up identification was not "impermissibly suggestive" so as to implicate Defendant's constitutional right to procedural due process.

Accordingly, the Court respectfully overrules in part and adopts in part the Magistrate Judge's Report and Recommendation. Specifically, both of Defendant's objections are overruled and the Government's objections are adopted to the extent that the Court concludes that Defendant abandoned his cell phone, the search warrant was valid, and the evidence found in that cell phone should not be suppressed as a result.

Thus, based upon the *de novo* review of the record and all of the arguments and submissions of the parties, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

**ORDER**

1. Defendant Prentiss Anthony Crumble's objections (Doc. No. [65]) to Magistrate Judge Steven E. Rau's July 22, 2015 Report and Recommendation are **OVERRULED**.

2. Plaintiff United States of America's objections (Doc. No. [66]) to Magistrate Judge Steven E. Rau's July 22, 2015 Report and Recommendation are **ADOPTED IN PART**.

3. The Court **DECLINES TO ADOPT IN PART AND ADOPTS IN PART** Magistrate Judge Steven E. Rau's July 22, 2015 Report and Recommendation (Doc. No. [62]) consistent with the Court's Opinion.

4. Defendant Prentiss Anthony Crumble's Motion to Suppress Evidence Obtained in Violation of the Fourth Amendment (Doc. No. [23]) is **DENIED**.

5. Defendant Prentiss Anthony Crumble's Motion to Suppress Confessions and Statements in the Nature of Confessions (Doc. No. [24]) is **DENIED** consistent with the Report and Recommendation (Doc. No. 62).

6. Defendant Prentiss Anthony Crumble's Motion to Suppress Identification  
(Doc. No. [25]) is **DENIED**.

Dated: September 28, 2015      s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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United States of America,

Plaintiff,

v.

**Criminal No. 14-362 (DWF/SER)**

Prentiss Anthony Crumble,

**REPORT AND RECOMMENDATION**

Defendant.

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Bradley M. Endicott, Esq., United States Attorney's Office, St. Paul, Minnesota, for Plaintiff.

Robert M. Christensen, Esq., Robert M. Christensen, PLC, Minneapolis, Minnesota, for Defendant.

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STEVEN E. RAU, United States Magistrate Judge

The above-captioned case came before the undersigned on Defendant Prentiss Anthony Crumble's ("Crumble") Motions to Suppress.<sup>1</sup> This matter was referred for the resolution of the issues raised in Crumble's Motions to Suppress pursuant to 28 U.S.C. § 636(b)(1)(B)–(C) and District of Minnesota Local Rule 72.1. For the reasons stated below, the Court recommends that the Motion to Suppress Evidence be granted, and that the Motion to Suppress Statements and Motion to Suppress Identification be denied.

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<sup>1</sup> The "Motions to Suppress" refer to the following: Motion to Suppress Evidence Obtained in Violation of the Fourth Amendment ("Motion to Suppress Evidence") [Doc. No. 23]; Motion to Suppress Confessions and Statements in the Nature of Confessions ("Motion to Suppress Statements") [Doc. No. 24]; and Motion to Suppress Identification [Doc. No. 25].

## I. BACKGROUND

On November 12, 2014, a grand jury indicted Crumble with one count of felon in possession of a firearm (armed career criminal) in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Indictment) [Doc. No. 1].

Crumble filed several pretrial motions and a hearing was held on March 25, 2015. (Minute Entry Dated Mar. 25, 2015) [Doc. No. 41]. Five police officers testified on behalf of the Government, and two individuals testified on behalf of Crumble. (Ex. & Witness List) [Doc. No. 42]. Eighteen Government exhibits were received into evidence.<sup>2</sup> (*Id.*). The parties requested supplemental briefing, and the Court issued an order on Crumble's nondispositive motions. (Minute Entry Dated Mar. 25, 2015); (Order Dated Mar. 27, 2015) [Doc. No. 45]. After reviewing the parties' supplemental briefing, the Court ordered Crumble to file additional briefing addressing issues raised for the first time in the Government's supplemental memorandum. (Order Dated June 17, 2015) [Doc. No. 60]. Thus, the Motions to Suppress came under advisement on June 24, 2015. (*Id.* at 2).

## II. FACTS<sup>3</sup>

On October 21, 2014, at about 1:30 p.m., St. Paul Police received a call of shots fired near Dale Street and Minnehaha Avenue in St. Paul. (Tr. at 6). Officer Jeff Gilsrud ("Officer Gilsrud") and his partner Officer Lenarz drove to that area. (*Id.* at 7). While they were en route, dispatch notified them that one of the cars involved crashed into a house on Arundel Street. (*Id.*). Instead of going to the area of the shots-fired call, Officer Gilsrud and Officer Lenarz went to the

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<sup>2</sup> Contrary to the notations on the Exhibit and Witness List, all exhibits were marked and admitted into evidence. (Tr. of Criminal Mots. Hr'g, "Tr.") [Doc. No. 44 at 12, 28, 38, 59, 79].

<sup>3</sup> The facts presented in this section are drawn from the testimony at the hearing. *See generally* (Tr.). The Court only summarizes those facts that are pertinent to the instant Motions to Suppress.

crash site, where they observed a tan Buick up against the house. (*Id.* at 7–8). Officer Lenarz was told that a couple fled from the vehicle. (*Id.* at 10). They also received reports that when the car crashed, another car that had been chasing it stopped and fired shots at the car. (*Id.* at 9). The officers approached the vehicle to determine whether there were suspects or victims inside. (*Id.*). No one was in the car. (*Id.* at 7). The officers observed bullet holes in the side of the car and a gun on the driver’s side floorboard. (*Id.* at 8, 10–11). The passenger-side back window was smashed. (*Id.* at 10). Officer Gilsrud notified dispatch about the gun, and dispatch notified other officers that the occupants may be armed. (*Id.* at 11). Officer Lenarz spoke to a witness, Mr. Vang, who said that the cars were driving eastbound on Van Buren Avenue. (*Id.* at 13). Mr. Vang said the tan Buick crashed when it tried to turn south on Arundel Street. (*Id.*). It did not make the turn, and crashed through the fence and into the house. (*Id.*). Mr. Vang reported that the occupants of the tan Buick ran westbound, and described one occupant as a black male in his early 20s, wearing a white t-shirt. (*Id.* at 13–14).

Officer Chad Degree (“Officer Degree”) also responded to the scene. (*Id.* at 20). Shortly after his arrival, he was notified that a possible suspect was running about a block and a half from the crash site. (*Id.* at 21). Officer Degree drove over to that area, where he joined other police officers who were in the process of arresting a man later identified as Crumble. (*Id.* at 23). Crumble, who was wearing a white t-shirt, was out of breath, sweating, and complaining that he could not breathe. (*Id.* at 24). Officer Degree returned to the crash site and assisted with the collection of evidence. (*Id.*). He collected a silver and black handgun, a cell phone, and miscellaneous paperwork from the car.<sup>4</sup> (*Id.* at 25). The cell phone was on the driver’s seat and was turned on. (*Id.* at 25–26). The paperwork associated with the car bore the name Antoine

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<sup>4</sup> He also recovered bullets and casings from the scene. (Tr. at 25).

Eugene Smith. (*Id.* at 26). Officer Degree did not find any paperwork associated with Crumble in the vehicle. (*Id.*). Officer Degree placed the items in containers and marked them, and later placed the containers in the property room. (*Id.* at 27). The property room is a secure facility inside of the police department's headquarters building. (*Id.*).

Officer Degree then wrote search warrants and reports based on the information gathered at the scene. (*Id.*). Specifically, he wrote a search warrant for the vehicle and the cell phone. (*Id.*). At some point between collecting the cell phone and applying for the search warrant, Officer Degree turned the cell phone off to preserve the battery and to ensure that the phone would not be manipulated. (*Id.* at 28, 42–43). Officer Degree testified that he did not send any text messages or make any phone calls from the phone on October 21, 2014. (*Id.* at 44). Ramsey County Judge Alshouse signed both search warrants. (*Id.* at 28, 42).

After Judge Alshouse signed the search warrant, Office Degree turned on the phone and looked at its contents. (*Id.* at 29, 43). He discovered a video that showed Crumble inside a vehicle in the area of Fuller Avenue and Avon Street, which is near where the shooting occurred. (*Id.* at 29). Crumble was holding a silver and black handgun and was wearing a white t-shirt. (*Id.*). Officer Degree watched the video, which was dated October 21, 2014, at 1:15 p.m., about ten times. (Tr. at 36, 39–40). Office Degree also believed the video was from the same day as the shooting because Crumble was wearing the same clothing, and the interior of the vehicle appeared to be the same as the crashed vehicle. (*Id.* at 43–44). Officer Degree turned the phone over to Officer Adam Siegfried ("Officer Siegfried"). (*Id.* at 30). Officer Siegfried relied on the warrant to remove the data from the cell phone and put it on a disc or DVD. (*Id.*).

Officer Darryl Boerger ("Officer Boerger") also responded to the shots-fired call that led to Crumble's arrest and learned that a suspect was in a nearby backyard. (*Id.* at 47). Officer

Boerger went to that area to assist. (*Id.*). He observed several police officers ordering someone to come out from behind a shed. (*Id.* at 48). Officer Boerger recognized the individual as Crumble from previous contacts. (*Id.* at 48–49). Crumble did not respond to verbal commands, and a dog was brought to the scene. (*Id.* at 48). The officer handling the dog ordered Crumble to come out from behind the shed, and said if he did not, the officer would deploy the dog. (*Id.*). Crumble emerged and was taken into custody. (*Id.*). Crumble appeared disheveled, with messy hair and clothing. (*Id.* at 49). He was wearing dark jeans and a white t-shirt, and was out of breath and nauseated. (*Id.*). Based on his experience, Officer Boerger believed Crumble fled from the car that crashed and had been running from police. (*Id.*).

Officer Salim Omari (“Officer Omari”) also responded to the scene of the crash, and was approached by a witness who saw an individual run from the scene. (*Id.* at 64). The witness described the individual as a black male with “poofy black hair.” (*Id.*). The witness further described the individual as being approximately twenty-five years old, heavy set, and wearing a white shirt. (*Id.*). The witness said the individual ran west in the alley. (*Id.* at 65). The witness reported being about forty to fifty yards from the crash scene. (*Id.* at 65–66). Officer Omari confirmed that the witness would be able to identify the individual, and coordinated a show-up with Officer Boerger. (*Id.* at 66). Officer Omari drove the witness in an unmarked SUV with tinted windows to the location where Officer Boerger was with Crumble. (*Id.* at 66, 71). Officer Omari did not ask the witness any questions, and did not stop the car. (*Id.* at 67–68).<sup>5</sup> The witness volunteered that Crumble was the individual he saw running from the scene of the crash. *See (id.* at 67). At the time, Crumble was handcuffed and standing next Officer Boerger, who

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<sup>5</sup> Because police officers want to protect a witness’s identity, it is common for the police to not stop the car and to not ask the witness to exit the vehicle or roll down the window. (Tr. at 69).

was wearing a blue polo shirt that said “POLICE” on the front, in large gold lettering. (*Id.* at 72). The witness was about ten yards away from Crumble at the time of the identification. (*Id.* at 67). Crumble matched the description the witness provided initially. (*Id.* at 68).

At this time, approximately twenty minutes had elapsed between the witness’s initial observations and the identification, and the weather was clear. (*Id.*). The witness said that he was one-hundred percent certain of his identification. (*Id.* at 67). “The witness seemed very capable[,]” “very factual and [he] just stated exactly what [he] had seen.” (*Id.* at 69). The identification was consistent with evidence other officers found and observed. (*Id.*). Because two individuals were reported as having fled the crash scene and only one person—Crumble—was in custody, police officers were concerned that other people and vehicles involved in the shooting were in the area. *See (id.* at 70).

Steven Wright (“Wright”) and J’Andra Crumble (“J’Andra”) testified on Crumble’s behalf. Wright is an attorney who works with Crumble’s attorney, Robert M. Christensen (“Christensen”). (*Id.* at 80). He testified that he and Christensen met with an ATF special agent, where they reviewed the text messages on Crumble’s cell phone. (*Id.* at 81). There were a number of incoming messages from a cell phone number later identified as belonging to J’Andra around 3:12 p.m. on October 21, 2014. (*Id.* at 81–82); *see also (id.* at 87). Crumble’s cell phone sent a text message to J’Andra at 3:12 p.m. that said “I am driving.” (*Id.* at 83).

J’Andra, who is Crumble’s sister, testified that on October 21, 2014, she was trying to reach her brother because she had heard the police were looking for him. (*Id.* at 85–86). She sent him approximately three text messages and called him repeatedly, beginning around 2:00 p.m. (*Id.* at 86). Her text messages were the same messages Wright observed. *See (id.* at 87) (J’Andra

identifying her phone number as the one Wright identified); *see also* (*id.* at 81–82). Around 3:12 p.m., she received a text message from Crumble’s phone saying that he was driving. (*Id.* at 87).

### **III. MOTION TO SUPPRESS PHYSICAL EVIDENCE**

Crumble asks the Court to suppress all evidence obtained from the search of Crumble’s cell phone, which was executed pursuant to a search warrant. (Mem. in Supp. of Pretrial Mots., “Crumble’s Mem. in Supp.”) [Doc. No. 57 at 1]. The parties dispute whether Crumble has a Fourth Amendment privacy interest in the cell phone that allows him to challenge the search, whether Officer Degree searched the phone before obtaining a warrant, whether there was probable cause to obtain the search warrant, and whether the search warrant was substantially overbroad, thus rendering it unlawful. *See* (*id.* at 2–13); (Gov’t’s Mem in Opp’n to Def.’s Mots. to Suppress, “Gov’t’s Mem. in Opp’n”) [Doc. No. 58 at 8–17]; (Suppl. Mem. in Supp. of Pretrial Mots., “Crumble’s Suppl. Mem. in Supp.”) [Doc. No. 61]. The Court addresses each argument in turn.

#### **A. Crumble’s Fourth Amendment Interest in the Cell Phone**

The Government argues Crumble lacks standing to challenge the search of the cell phone, and that he abandoned the cell phone, and therefore has no Fourth Amendment interest in the cell phone to challenge its search. (Gov’t’s Mem. in Opp’n at 8–12). The Government’s argument is, fundamentally, whether Crumble retained a legitimate expectation of privacy in his cell phone after leaving it in the tan Buick after the crash.<sup>6</sup> *See* (*id.*).

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<sup>6</sup> Despite testimony to the contrary at the hearing, Crumble now asserts that he was in the tan Buick when it crashed. *Compare* (Tr. at 52) (Officer Boerger’s testimony that he took Crumble to the crash scene and “he simply denied knowing anything about it.”) *with* (Crumble’s Suppl. Mem. in Supp. at 4) (“Mr. Crumble also never intentionally relinquished his privacy rights in the data on his phone when he left the phone in the car where he had recently been a passenger.”). Although the testimony at the hearing created a strong inference that Crumble was the occupant of the tan Buick, Crumble did not testify at the hearing. *See* (Ex. & Witness List).

### 1. Legal Standard

Because Fourth Amendment rights are “personal in nature,” any analysis regarding whether a particular defendant may challenge a search or seizure “is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.” *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Regardless of the vocabulary, “[t]he inquiry under either approach is the same.” *Id.* at 139. “[A] person challenging a search warrant must demonstrate that he or she has a legitimate expectation of privacy in the area searched.” *United States v. Wiley*, 847 F.2d 480, 481 (8th Cir. 1988). A legitimate expectation of privacy requires “(1) a subjective expectation of privacy; and (2) that this expectation is one that society is prepared to recognize as objectively reasonable.” *United States v. Green*, 275 F.3d 694, 699 (8th Cir. 2001). Other factors considered include ownership, possession, historical use, the ability to regulate access, and the totality of the circumstances of the search. *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994).

A search of abandoned property, however, does not implicate the Fourth Amendment because “any expectation of privacy in the item searched is forfeited upon its abandonment.” *United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997). Abandonment is analyzed “not . . . in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *Id.* at 602 (internal quotation marks omitted). This determination is made based on the objective facts available to the investigating officers, and in light of the totality of the circumstances. *Id.* “[T]wo

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The Court relies on Crumble’s representation that he was in the tan Buick for the purposes of this Report and Recommendation, but defers any factual finding on this matter, and any potential effects of such a finding, to the jury.

important factors are denial of ownership and physical relinquishment of the property.” *Id.* (internal quotation marks omitted).

## 2. Analysis

As an initial matter, the Court notes that Crumble asserts that the cell phone is his, and the Government does not dispute this.<sup>7</sup> Further, Wright testified that the cell phone showed messages to Crumble’s sister, and Crumble’s sister corroborated that testimony by stating that she was texting her brother. *See* (Tr. at 82–87). The evidence before the Court establishes that Crumble owns the cell phone. This fact weighs in favor of finding that Crumble has a legitimate expectation of privacy in the contents of the cell phone because he had a subjective expectation of privacy. *See Green*, 275 F.3d at 699. It also weighs in favor of finding that Crumble did not abandon his cell phone because he did not, and currently does not, deny ownership. *See Tugwell*, 125 F.3d at 602. Thus, the remaining issues are whether Crumble’s expectation of privacy is objectively reasonable, and if so, whether he retained that expectation of privacy when he physically relinquished the phone.

### a. Objectively Reasonable Expectation of Privacy

Whether his expectation of privacy is one that “society is prepared to recognize as objectively reasonable” must be analyzed in the context of the Supreme Court’s recent decision in *Riley v. California*, 134 S. Ct. 2473 (2014). *See Green*, 275 F.3d at 699.

In *Riley*, the Supreme Court held that “officers must generally secure a warrant before conducting” a search of a cell phone found pursuant to a search incident to arrest. 134 S. Ct. at 2485. In so holding, the Supreme Court stated that the justifications that typically authorize a

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<sup>7</sup> Compare (Crumble’s Mem. in Supp. at 2) (referring to “Mr. Crumble’s cell phone”) and (Crumble’s Suppl. Mem. in Supp. at 3) (“Mr. Crumble owned the cell phone, all the data contained on it, and all data hosted elsewhere that was accessible through the cell phone.”) with (Gov’t’s Mem. in Opp’n at 8–12) (addressing ownership of the tan Buick but not the cell phone).

warrantless search incident to arrest—officer safety and the prevention of the destruction of evidence—are not present in the context of a cell phone. *Id.* at 2484–87. But more importantly for our purposes here, it also analyzed “an arrestee’s reduced privacy rights upon being taken into police custody.” *Id.* at 2488. The Court reviewed the complicated privacy rights at issue in modern cell phones, noting that “[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” *Id.* at 2488–89. The Court noted that cell phones “are in fact minicomputers that also happen to have the capacity to be used as a telephone.” *Id.* at 2489. This is due to their “immense storage capacity,” which gives rise to three “interrelated consequences for privacy.” *Id.* First, a cell phone is a collection of “many distinct types of information . . . that reveal much more in combination than any isolated record.” *Id.* Second, “one type of information convey[s] far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.” *Id.* And “[t]hird, the data on a phone can date back to the purchase of the phone, or even earlier.” *Id.* The Supreme Court also noted the “element of pervasiveness that characterizes cell phones but not physical records,” and stated that

a cell phone search would typically expose the government to far **more** than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

*Id.* at 2491.

Thus, under *Riley*, the Court finds that Crumble’s expectation of privacy is “one that society is prepared to recognize as objectively reasonable.” *See Green*, 275 F.3d at 699. As the

Supreme Court noted, cell phones contain so much information that a search of one exposes the government to even more information than a search of a person's residence. *Riley*, 134 S. Ct. at 2491. It is therefore reasonable for society to recognize an expectation of privacy in a cell phone.

The Government argues that Crumble did not have a reasonable expectation of privacy in "the vehicle or its contents" because he has no ownership interest in the vehicle. (Gov't's Mem. in Opp'n at 8–10). But because Crumble does not challenge the search of the vehicle or the seizure of his cell phone from the vehicle, this is not relevant to the Court's analysis of Crumble's ability challenge the search of the data on the cell phone.<sup>8</sup> See (Crumble's Mem. in Supp. at 1); (Crumble's Suppl. Mem. at 2). The Government relies on *Hollister* for the proposition that a defendant cannot challenge the seizure of cell phones found in an apartment where he had no reasonable expectation of privacy, but *Hollister* is not instructive. (Gov't's Mem. in Opp'n at 9–10) (citing *United States v. Hollister*, No. 12-CR-13 (PJS/TNL), 2012 WL 4058062, at \*15 (D. Minn. July 23, 2012), *adopted by* 2012 WL 4076170 (Sept. 14, 2012)). In *Hollister*, the Honorable Tony N. Leung, United States Magistrate Judge, wrote that

Defendant presented no evidence to support that he had a reasonable expectation of privacy to have standing to contest the seizure of three cellular telephones from A.S.'s apartment or standing to challenge the search of those cellular telephones. In contrast, it is undisputed that Defendant has standing to challenge the search and seizure of the cellular telephone seized from his van.

*Hollister*, 2012 WL 4058062, at \*15. This holding, however, is not instructive in the present case because Crumble has presented evidence that he has a reasonable expectation of privacy in the contents of the cell phone through his ownership. See (Crumble's Suppl. Mem. in Supp. at 3).

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<sup>8</sup> Initially, Crumble challenged the search of the vehicle. (Mot. to Suppress Evidence). Crumble specifically abandons this argument in his supplemental briefing. (Crumble's Mem. in Supp. at 1); (Crumble's Suppl. Mem. at 2); *see also* (Tr. at 92–93) (Court advising parties that only those arguments identified and supported in the parties supplemental briefing will be addressed in its Report and Recommendation).

The Court concludes Crumble’s expectation of privacy in the cell phone “is one that society is prepared to recognize as objectively reasonable.” *See Green*, 275 F.3d at 699.

**b. Physical Relinquishment of the Cell Phone**

The Court finds that Crumble’s physical relinquishment of the cell phone—leaving it in the tan Buick—does not constitute abandonment to the extent that he thereby relinquished his expectation of privacy in the cell phone. Under *Riley*, an arrestee retains his expectation of privacy in the data found in a cell phone even when the cell phone is lawfully seized pursuant to an arrest. *See* 134 S. Ct. at 2485. This is true even though the arrestee has a diminished privacy interest. *See id.* at 2488 (“The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.”). Here, Crumble’s cell phone was lawfully seized but his privacy interest in its contents is not extinguished merely by his lack of possession.

The facts available at the time of the search support the Court’s conclusion that Crumble did not abandon the cell phone. *See Tugwell*, 125 F.3d at 602. Officer Degree, who collected the cell phone at the scene and who applied for the search warrant, did not testify that he believed the cell phone was abandoned. *See, e.g.,* (Tr. at 24, 27). Instead, the fact that Officer Degree chose to obtain a search warrant supports the opposite conclusion: Officer Degree assumed the cell phone belonged to **someone**, and in order to avoid violating the cell phone owner’s Fourth Amendment rights, he obtained a search warrant. *See* (Application for Search Warrant & Supporting Aff., the “Search Warrant,” Gov’t Ex. 12).<sup>9</sup> This is true even if Officer Degree did not specifically believe the cell phone belonged to Crumble. *See* (Crumble’s Suppl. Mem. in

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<sup>9</sup> Although another search warrant was admitted during the hearing, only the search warrant for the cell phone is at issue in this Report and Recommendation, and therefore, the Court refers to it simply as the “Search Warrant.” *See* (Ex. & Witness List).

Supp. at 4) (stating that no one asked Crumble if the cell phone belonged to him).<sup>10</sup> At the time Officer Degree applied for the Search Warrant, Crumble was in custody and a witness identified Crumble as one of the people who was in the tan Buick where the cell phone was found. (Search Warrant at 2). These facts demonstrate, at minimum, an inference apparent to Officer Degree that the cell phone not only was not abandoned, but that it belonged to Crumble.

The Government argues Crumble “abandoned his reasonable expectation of privacy in the phone because he fled from the police and denied being in the car where the phone was found.” (Gov’t’s Mem. in Opp’n at 12); *see also* (*id.* at 10–12). The cases cited by the Government, however, do not support this proposition. In each of the Eighth Circuit cases the Government cites, an object was seized from a vehicle the court found the defendant had abandoned. *See* (Gov’t’s Mem. in Opp’n at 11).<sup>11</sup> These cases arguably show that Crumble does not have a legitimate expectation of privacy in the vehicle, but that is not at issue here. Crumble does not challenge the seizure of the cell phone from the vehicle. (Crumble’s Mem. in Supp. at 1); (Crumble’s Suppl. Mem. at 2). Instead, his challenge is that although the cell phone was

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<sup>10</sup> Although the statements Crumble made following his arrest are not at issue for the purposes of this motion, none of Crumble’s statements, as testified to during the hearing, involve the cell phone. *See* (Tr. at 50, 52, 54, 56–58); Section IV, *infra*.

<sup>11</sup> *See also* *United States v. Smith*, 648 F.3d 654, 657, 660 (8th Cir. 2011) (finding the defendant relinquished any legitimate expectation of privacy in a vehicle, which he left “open, with the keys in the ignition, the motor running, in a public area” when he fled during an attempted vehicle stop and where the search of the vehicle yielded nearly \$73,000 in cash and a gun (internal quotation marks omitted)); *United States v. Tate*, 821 F.2d 1328, 1329, 1330 (8th Cir. 1987) (holding defendant, who fled the scene of a traffic-stop-turned-murder, “leaving the van unoccupied and unlocked,” abandoned his expectation of privacy to challenge the seizure of “numerous automatic weapons, ammunition, hand grenades, and kinetic explosives”); *United States v. Walton*, 538 F.2d 1348, 1351, 1354 (8th Cir. 1976) (finding defendant, who owned the vehicle, abandoned it when he fled from police approaching it while he was inside, for the purposes of the Fourth Amendment challenge to the search of the vehicle, which appeared to show that the defendant purchased the vehicle using proceeds from the robbery at issue).

lawfully **seized** from the vehicle, the Government's search warrant was not valid so as to permit a **search** of the contents of the cell phone. *See* (Crumble's Mem. in Supp. at 2–11).<sup>12</sup>

For these reasons, the Court concludes Crumble did not abandon the cell phone in the vehicle for the purposes assessing whether his Fourth Amendment rights were violated during the subsequent search of the cell phone.

In summary, because Crumble has a legitimate expectation of privacy in the cell phone, and because the cell phone was not abandoned, Crumble appropriately raises a Fourth Amendment challenge to the Search Warrant.

### **B. Affidavit in Support of Search Warrant**

Having found Crumble's Fourth Amendment rights are at issue in the execution of the Search Warrant, the Court summarizes the following facts from Officer Degree's affidavit in support of the Search Warrant. *See* (Search Warrant at 1–2). Officer Degree described a report that a black male was leaning out of a sedan, firing shots at a silver sedan. Dispatch received several updates stating that two vehicles were chasing each other, and one of those vehicles, the tan Buick, crashed into a house on Arundel Street. Although no occupants were found at the scene, Officer Degree noted that there was a firearm in plain view on the driver's side floorboard and several bullet holes in the passenger side of the vehicle. Officer Degree described Crumble's arrest and that a witness identified him as one of the people inside the tan Buick. Witnesses also said the occupants of the tan Buick were shooting at another vehicle. A black T Mobile Samsung cell phone was found in the vehicle and Officer Degree believed "data stored on the phone will

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<sup>12</sup> The cases the Government cites from outside the Eighth Circuit and this District are inapposite. *See United States v. Powell*, 732 F.3d 361, 374 (5th Cir. 2013) (finding defendant who denied owning a cell phone discovered during a vehicle search abandoned it and could not challenge the admissibility of the phone and its records); *United States v. Foster*, 65 F. App'x 41, 46 (6th Cir. 2003) (analyzing only seizure of a phone found in an abandoned vehicle and not the subsequent warrantless search).

provide information as to the second occupant in the Buick or further information related to the crime.” He also noted that information from cell phone memory cards “often contains evidence that is useful in a criminal investigation,” and that information from the “cell phone[], memory card, sim card and micro SD card may contain information about the activities and whereabouts of individual(s) involved in the criminal incident described [in the affidavit].” Based on this information, Officer Degree sought permission to search “[a]ll electronic data (including but not limited to contacts, calenders [sic], call records, voice messages, text messages, photo and video files) stored in [the] aforementioned cellular phone.”

### **C. “Search” Before the Search Warrant**

Crumble argues that “[t]he evidence . . . shows that Off. Degree searched Mr. Crumble’s cell phone before he ever applied for a search warrant[,]” and applied for a search warrant based on what he found. (Crumble’s Mem. in Supp. at 11). The evidence to which Crumble refers is J’Andra’s testimony that she received a text message from Crumble’s cell phone at 3:12 p.m. on October 21, 2014, when the cell phone was in police custody. *See (id. at 11–12)*. Additionally, Crumble refers the Court to Wright’s testimony that J’Andra’s text messages to her brother and the outgoing text message at 3:12 p.m. “were recorded in the cell phone’s memory.” (*Id. at 12*). Crumble argues that Officer Degree’s testimony that he did not send any text messages from Crumble’s phone is “simply not true” and “[t]his evidence strongly suggests that Off. Degree watched the videos on October 21” prior to obtaining the Search Warrant (*Id.*).

The Court finds Officer Degree’s testimony that he did not send any text messages from Crumble’s phone at or around 3:12 p.m. on October 21, 2014, credible. *See (Tr. at 28, 44)*. While it is certainly odd that J’Andra received a text message from her brother’s phone at the time the phone was in police custody, the lack of explanation does not lead the Court to conclude that

Officer Degree is not being truthful. *See* (Gov’t’s Mem. in Opp’n at 16 n.3) (“[T]here is no factual explanation as to how or why that message was sent at that time.”).

Even if Officer Degree, as Crumble suggests, improperly searched the phone, it does not follow that Officer Degree used any information he may have found in his affidavit in support of his search warrant. *See* (Crumble’s Mem. in Supp. at 12–13). If Officer Degree viewed videos he believed to be incriminating, the Court thinks it is likely that the Search Warrant would have sought to search only videos, as opposed to all electronic data. *See* (Search Warrant at 2). Further, although the Search Warrant mentions “video files” as one type of electronic media to be searched, the affidavit does not contain any information, or even suggestion, that video files are of particular interest or relevance. *See (id.)*.

Even if Officer Degree searched the phone, saw videos, and obtained the Search Warrant because of them, the evidence should not be suppressed. “Under the independent source doctrine, the exclusionary rule is inapplicable where the evidence was acquired through a source independent of the tainted search.” *United States v. Brooks*, 715 F.3d 1069, 1075 (8th Cir. 2013). Thus, “[a] warrant obtained after an illegal search is an independent source if: (1) police would have applied for the warrant had they not acquired the tainted information, and (2) the application affidavits support probable cause after the tainted information has been redacted from them.” *Id.* (internal quotation marks and alteration omitted); *see also* (Crumble’s Mem. in Supp. at 11) (recognizing the independent source doctrine). Here, the second factor—removing the tainted information—does not apply because, as discussed above, there is no tainted information in the Search Warrant.<sup>13</sup> And absent any tainted information, there’s no factual basis, i.e. nothing

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<sup>13</sup> As discussed below, the Court finds the Search Warrant establishes probable cause. *See* Section D, *infra*.

the record, for the Court to determine that he would not have applied for the Search Warrant absent the alleged illegal search. *See* (Tr. at 28, 44).

Thus, to the extent Crumble argues that the Motion to Suppress Evidence should be granted based on Officer Degree's alleged illegal search, the Court disagrees.<sup>14</sup>

#### **D. Probable Cause**

Crumble argues the search warrant lacks probable cause because it does not provide sufficient information that evidence of a crime will be found on the phone. *See* (Crumble's Mem. in Supp. at 2–5). Crumble also argues the search warrant is not entitled to any good-faith presumption. (*Id.* at 9).

##### **1. Legal Standard**

In determining whether probable cause exists to issue a search warrant, a court considers the information that was before the issuing judicial officer and affords “great deference to the issuing judge’s determination.” *United States v. Smith*, 581 F.3d 692, 694 (8th Cir. 2009). Where no evidence outside of the affidavit was submitted to the issuing judge, “only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.” *United States v. Solomon*, 432 F.3d 824, 827 (8th Cir. 2005) (internal quotation marks omitted). Probable cause exists when the likelihood of finding evidence of a crime in a certain place is fairly probable. *United States v. Chrobak*, 289 F.3d 1043, 1046 (8th Cir. 2002). “Probable cause . . . does not require evidence sufficient to support a

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<sup>14</sup> As the Government notes, “[i]t is unclear exactly when Officer Degree turned off the phone.” (Gov’t’s Mem. in Opp’n at 16 n.3); *see also* (Tr. at 28, 43). Nonetheless, merely turning on or off a phone is not a search, and, as addressed above, there is nothing in the search warrant to suggest that any of its averments were based on an earlier search. *See United States v. Doney*, No. CR 14-50-BLG-SPW, 2015 WL 327835, at \*5 (D. Mont. Jan. 23, 2015) (stating that “the Court does not need to determine whether putting a phone in airplane mode is an impermissible search, as Agent Pawlowski did not obtain any information from the phone”).

conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime.” *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (omission in original) (internal quotation marks omitted). In other words, “[p]robable cause exists when the facts and circumstances . . . are sufficiently trustworthy to warrant a person of reasonable caution to believe that a crime has been committed and that seizable property from that crime may be located at a particular place or on a person to be searched.” *United States v. Gipp*, 147 F.3d 680, 687 (8th Cir. 1998). “Judges may draw reasonable inferences from the totality of the circumstances in determining whether probable cause exists to issue a warrant.” *United States v. Summage*, 481 F.3d 1075, 1078 (8th Cir. 2007) (internal quotation marks omitted).

Contested evidence is admissible under the good-faith exception to the exclusionary rule even if probable cause is lacking. *See United States v. Leon*, 468 U.S. 897, 922–23 (1984). “Under the *Leon* good-faith exception, disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge’s determination that there was probable cause to issue the warrant.” *United States v. Hager*, 710 F.3d 830, 837 (8th Cir. 2013) (internal quotation marks omitted). Good-faith reliance is limited, however, and is considered unreasonable in four situations:

- (1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge;
- (2) when the issuing judge wholly abandoned his judicial role in issuing the warrant;
- (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
- (4) when the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid.

*United States v. Perry*, 531 F.3d 662, 665 (8th Cir. 2008) (emphasis omitted).

## 2. Analysis

The Court finds that the Search Warrant is supported by probable cause. The cell phone was found in a vehicle known to Officer Degree to have been involved in a vehicle chase involving gunfire. (Search Warrant at 1–2). When the cell phone was seized from the vehicle, the occupants of the vehicle had fled. (*Id.* at 1). Witnesses told officers that the occupants of the vehicle were shooting at another vehicle. (*Id.* at 2). The vehicle itself had bullet holes on the passenger side and a firearm was found on the driver’s side floorboard of the vehicle. (*Id.* at 1–2). Under the totality of the circumstances, the Court finds that it was fairly probable that the cell phone would contain evidence related to the car chase and shooting because of the vast amount of information available on a cell phone and because officers were still attempting to identify the second occupant of the vehicle.

Even if probable cause does not exist, the Court finds the good-faith exception applies as to the question of probable cause. The affidavit in support of the Search Warrant is not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”<sup>15</sup> See *Perry*, 531 F.3d at 665 (emphasis omitted). As stated above, the Search Warrant affidavit describes the events leading up to the discovery of a cell phone in a vehicle, marked by bullet holes, and identified by witnesses as a vehicle out of which individuals were firing a weapon at another vehicle. (Search Warrant at 1–2).

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<sup>15</sup> Although Crumble does not clearly identify which limit on the good-faith exception applies here, the Court presumes Crumble’s reliance on the “so lacking in indicia of probable cause” language because that is the language he quotes from *Leon*. See (Crumble’s Mem. in Supp. at 9) (citing *Leon*, 468 U.S. at 923).

Thus, to the extent Crumble argues that the Motion to Suppress evidence should be granted because the Search Warrant lacked probable cause, the Court recommends the motion be denied.

#### **E. General Search Warrant**

Crumble argues that, given the volume of information available in a cell phone, the Search Warrant violated the Fourth Amendment because it failed to describe with particularity the information to be searched and that the good-faith exception does not apply. *See* (Crumble’s Mem. in Supp. at 5–10).

##### **1. Legal Standard**

A search warrant must “particularly” describe “the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. A court determines whether this “particularity requirement” is satisfied by looking at “such factors as the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case.” *United States v. Fiorito*, 640 F.3d 338, 346 (8th Cir. 2011) (internal quotation marks omitted). This requirement prevents “a general exploratory rummaging through a person’s belongings.” *United States v. Hibbard*, 963 F.2d 1100, 1102 (8th Cir. 1992) (citing *Andresen v. Maryland*, 427 U.S. 463, 480 (1976)). “The degree of specificity required will depend on the circumstances of the case and on the type of items involved.” *United States v. Horn*, 187 F.3d 781, 788 (8th Cir. 1999). The standard is not hyper-technical; instead, it is a standard of practical accuracy. *United States v. Peters*, 92 F.3d 768, 769–770 (8th Cir. 1996). In searches of computers, “[t]he failure of the warrant to anticipate the precise form in which the data would appear is not fatal.” *United States v. Sherman*, 372 F. App’x 668, 676 (8th Cir. 2010) (internal quotation marks and alterations omitted).

## 2. Analysis

The search warrant authorized a search of “[a]ll electronic data” because “information contained in cell phones[ and] memory cards . . . often contain[] evidence that is useful in a criminal investigation.” (Search Warrant at 2). The Court finds the Search Warrant fails to comply with the Fourth Amendment because it fails to describe with particularity the information to be seized. *See* U.S. Const. amend. IV.

Officer Degree stated “[a]ll electronic data” would assist in the identification of information and activities regarding the occupants of the Buick. *See* (Search Warrant at 2). The criminal nature of what transpired—a car chase with gunfire exchanged—is obvious. *See Summage*, 481 F.3d at 1078 (“It is not necessary for an affidavit to include the name of the specific crime alleged.”). But the search warrant provides no details about what type of information he is looking for—other than “[a]ll electronic data”—or how it would be helpful.

To take one example, call records from October 21, 2014, the date the phone was seized, arguably may demonstrate that Crumble and the other occupant made plans to meet. But the Search Warrant is so broad so as to allow a review of call records from October 21, 2014, but would also permit the review of all call records before that date, possibly dating as far back as the date the phone was purchased. *See Riley*, 134 S. Ct. at 2489 (“[T]he data on a phone can date back to the purchase of the phone, or even earlier.”). Nothing in the affidavit demonstrates that all call records, much less “all” of any other type of information dated prior to the phone’s seizure would be relevant to the events of October 21, 2014.

But phone call records are just one example of a plethora of types of data stored on a phone. *See id.* (“Even the most basic phones that sell for less than \$20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone

book, and so on.”). In other words, the Search Warrant authorizes police to look at website browsing history, banking information, fitness applications, and any other data, without restriction and without describing any connection to the “activities and whereabouts of individual(s) involved in the criminal incident described [in the affidavit].” See (Search Warrant at 2); see also *Riley*, 134 S. Ct. at 2491 (“[A] cell phone search would typically expose to the government far **more** than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”).

The Eighth Circuit has stated that not knowing the form of data sought is not fatal to the search warrant. *Sherman*, 372 F. App’x at 676. But in *Sherman*, “the search warrant was tied to the specific fraudulent practices suspected, and the computer records identified . . . were likely to contain evidence relevant to those suspect practices.” *Id.* In a case similar to *Sherman*, the Honorable Susan Richard Nelson recommended upholding a search warrant for computers over the defendants’ arguments that the search warrant did not contain sufficient particularity. See *United States v. Scott-Kelley*, Crim. No. CR-10-190 (JNE/SRN), 2010 WL 5559758, at \*12–15 (D. Minn. Nov. 9, 2010), *adopted by* 2011 WL 70615 (Jan. 10, 2011). Judge Nelson found that although “the officers executing the search warrant could not predict the form in which relevant data would appear[,]” “[t]he warrant sought a variety of computer-related evidence directly related to the identity theft investigation.” *Id.* at \*15.

The holdings in *Sherman* and *Scott-Kelley*, however, do not support upholding the warrant in this case. In those cases, the search warrants described specific criminal activity, evidence of which was likely to be found on computers. See *Sherman*, 372 F. App’x at 676; *Scott-Kelley*, 2010 WL 5559758, \*15. In other words, although the scope of the searches was

broad—all computers—the items sought were specifically tied to the criminal activity at issue. Here, the Search Warrant fails to identify how “[a]ll electronic data” is likely to contain information relevant the discrete event of a car chase. The Search Warrant not only authorizes the search of a large volume of information—all data on the cell phone—it authorizes the officers to look for any type of evidence.

The Government argues that “[t]his District has upheld search warrants that authorize broad searches of mobile phone data.” (Gov’t’s Mem. in Opp’n at 13) (citing *Hollister*, 2012 WL 4058062, at \*10, \*17). *Hollister* is not instructive for two reasons. First, although the Court independently stated that the search warrants “describe with particularity the place to be searched and the items to be seized,” the defendants did not challenge the particularity of the search warrant. *Id.* at \*14, \*17. Second, the suspect was seen talking and texting on one of the cell phones, thereby identifying at least one of the cell phones as used by the suspect at the time and location of the crime. *See id.* at \*10. Here, Crumble specifically asks the Court to examine the issue of particularity and there is nothing in the Search Warrant that suggests that the cell phone was in use at the time of the car chase. *See* (Search Warrant); *see also United States v. Mims*, 567 F. Supp. 2d 1059, 1071 (D. Minn. 2008) (JMR/JSM) (finding that the “request for seizure of ‘computer hard drives and disks and the stored data therein’” was “not stated with sufficient particularity”);<sup>16</sup> *cf. United States v. Bui*, Crim. No. 10-311 (DWF/JJK), 2010 WL 5559756, at \*1–2, \*4 (D. Minn. Dec. 27, 2010) (recommending denial of a motion to suppress based on a search warrant to search “any names, phone numbers, messages, and other electronic information stored within the electronic equipment of Defendant’s cell phone” where defendant “identified

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<sup>16</sup> In *Mims*, however, no evidence was suppressed as a result the particularity violation because that portion of the warrant could be severed, and “no computer hard drives, disks or stored data were seized.” *Mims*, 567 F. Supp. 2d at 1072.

no particular deficiency of the supporting affidavit” and where “the affiant verified that there were multiple incoming and outgoing calls and text messages between Defendant” and a second suspect), *adopted by* 2011 WL 134183.

The Court’s finding that a Fourth Amendment violation occurred, however, does not mandate exclusion of the evidence. *Leon*, 468 U.S. at 906 (“Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.” (internal quotation marks omitted)); *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88 (1984) (finding police officers had an “objectively reasonable basis” for their mistaken belief that the search warrant “authorized the search they conducted” even though the search warrant “failed to conform to the commands of the Fourth Amendment because it did not particularly describe the items to be seized.”).<sup>17</sup> Under the *Leon* good-faith exception, disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge’s determination that the warrant contained probable cause and was technically sufficient. *Leon*, 468 U.S. at 922–23. The Supreme Court identified four categories in which the good-faith exception does not apply. *Id.* In terms of particularity, the Court must examine *Leon*’s fourth good-faith exception: whether the warrant is “so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *Id.*; see (Crumble’s Mem. in Supp. at 9–10).

The Court concludes that the officers who executed the search warrant could not reasonably presume it to be valid. Although the Eighth Circuit has held that good faith may save

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<sup>17</sup> *Sheppard* was decided at the same time as *Leon*. See *Sheppard*, 468 U.S. at 983–84.

the evidence seized pursuant to an insufficiently particular warrant, the totality of the circumstances in this case do not yield the same conclusion.

In *United States v. Henderson*, 416 F.3d 686, 695 (8th Cir. 2005), the Eighth Circuit upheld the district judge's determination that an overly broad search warrant did not require suppression of the evidence based on the good-faith exception articulated in *Leon*. The Eighth Circuit noted that "in the context of the rest of the warrant, the officer had a reasonable belief that warrant was limited to the seizure of computer files and drives related to [the defendant's] business activities, finances and disabilities." *Id.* Here, there is no limitation to what the officers executing the Search Warrant could seize—the affidavit states that "data" will provide the officers additional information. (Search Warrant at 2). Additionally, the Court has no information suggesting that the officers executing the Search Warrant believed that the Search Warrant contained any limitations on the type of information to be collected—Officer Degree's testimony does not demonstrate that he or Officer Siegfried believed the Search Warrant was limited in any way. *See* (Tr. at 29–30).<sup>18</sup> In fact, Officer Degree said Officer Siegfried conducted "a dump of **all** the data and the evidence." (*Id.* at 30). In other words, not only were the police authorized to search all of the data, they did so. For the reasons stated above, searching an entire cell phone for all types of evidence amounts to a general warrant, and the Court concludes that the officers executing the Search Warrant could not have reasonably thought otherwise.

The Court finds that suppression of the cell phone evidence will further the purposes of the exclusionary rule: "to deter future Fourth Amendment violations." *See Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). In light of *Riley*, both law enforcement and the courts must

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<sup>18</sup> A court may consider information "known to the officers but not presented to the issuing judge" when assessing whether an officer's reliance on the search warrant was objectively reasonable. *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001).

be mindful of the massive amounts of information stored in cell phones and the accompanying Fourth Amendment issues. *See* 134 S. Ct. at 2489. Law enforcement, in particular, must draft search warrants that avoid “a general exploratory rummaging through a person’s belongings.” *See Hibbard*, 963 F.2d at 1102 (citing *Andresen*, 427 U.S. at 480). Therefore, the good-faith exception does not apply, and the Court recommends the evidence from the cell phone be suppressed.

Based on the foregoing, the Court finds that Crumble’s Fourth Amendment rights were violated because the Search Warrant did not state with particularity the items to be seized, and the good-faith exception does not apply. Therefore, the Court recommends the Motion to Suppress Evidence be granted.

#### **IV. MOTION TO SUPPRESS STATEMENTS**

Crumble seeks suppression of statements made to Officer Boerger on October 21, 2014, immediately following his arrest. (Crumble’s Mem. in Supp. at 14). The Government represents that it no longer intends to introduce those statements. (Gov’t’s Mem. in Opp’n at 17). Therefore, the Court recommends denying the Motion to Suppress Statements as moot with respect to statements Crumble made on October 21, 2014, immediately following his arrest.

The Government represents that it intends to introduce the statements Crumble made on October 21, 2014, at the hospital that were not in response to police questioning, as well as Crumble’s statements made after *Miranda* warnings on October 22, 2014. (*Id.*). The parties were advised that the Court would only consider those issues addressed in the parties’ supplemental briefing. (Tr. at 92–93). Crumble does not challenge the admissibility of these statements in his supplemental briefing. *See* (Crumble’s Mem. in Supp. at 14). Therefore, the Court recommends denying the Motion to Suppress Statements without prejudice with respect to these statements.

## V. MOTION TO SUPPRESS IDENTIFICATION

Crumble argues that the witness's identification of him on October 21, 2014, was impermissibly suggestive and unreliable and should therefore be suppressed. (Crumble's Mem. in Supp. at 1, 15–16).

### A. Legal Standard

A claim that an identification procedure “was so unduly suggestive as to give rise to a very substantial likelihood of irreparable misidentification that tainted” the identification “implicates a defendant's constitutional right to procedural due process.” *United States v. Hickman*, 764 F.3d 918, 922 (8th Cir. 2014). A court first considers whether the pretrial identification was “impermissibly suggestive.” *United States v. Wade*, 740 F.2d 625, 627 (8th Cir. 1984) (internal quotation marks omitted). A show-up<sup>19</sup> is “the most suggestive, and therefore the most objectionable method of pre-trial identification.” *United States v. Henderson*, 719 F.2d 934, 937 (8th Cir. 1983) (internal quotation marks omitted). But whether a show-up is “impermissibly suggestive depends on the circumstances surrounding [its] use.” *Id.* “The need for quick and efficient police investigations and arrests, and the desire to release persons mistakenly apprehended, may offer some justification for a showup.” *Id.* at n.4.

Even if an identification procedure is impermissibly suggestive, the identification will not be suppressed unless the likelihood of misidentification “created a very substantial likelihood of irreparable misidentification.” *United States v. Martinez*, 462 F.3d 903, 910 (8th Cir. 2006) (internal quotation marks omitted). The Court considers the following factors of reliability:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description

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<sup>19</sup> “A ‘show-up’ is the presentation of a single person as a suspect to an eyewitness for identification purposes.” *United States v. Derring*, 592 F.2d 1003, 1005 n.2 (8th Cir. 1979).

of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

*United States v. Rodriguez*, 581 F.3d 775, 810 (8th Cir. 2009) (quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)) (numbers added in *Rodriguez*).

## **B. Analysis**

The Court finds the show-up used in this case was not impermissibly suggestive. The Eighth Circuit’s decision in *United States v. Pickar*, 616 F.3d 821 (8th Cir. 2010), is instructive. Defendant Gregg Allen Pickar (“Pickar”) was detained in his vehicle following a bank robbery. 616 F.3d at 824. He matched the witnesses’ physical description of the bank robber, and had cash in the exact amount stolen from the bank. *Id.* Pickar was arrested and brought to the bank for a show-up identification. *Id.* All five witnesses identified Pickar as the robber under the following conditions:

Pickar was handcuffed and standing in front of a marked police cruiser. Pickar stood between an officer in uniform and an officer in plainclothes, with one of the officers shining a small flashlight in Pickar’s face. Pickar stood in the bank’s parking lot, about twenty to thirty feet from the bank’s windows. The witnesses stood inside the bank and looked through the tinted windows to identify Pickar.

*Id.* at 828. The Eighth Circuit found this show-up identification was not unduly suggestive. *Id.* In so holding, the court contrasted the show-up in *Pickar* with another case where the identification of suspects was impermissibly suggestive because when the witnesses viewed the suspects, who were African-American, the suspects were both handcuffed and “surrounded by white police officers,” one of whom was holding a shotgun. *Id.* (quoting *Clark v. Caspari*, 274 F.3d 507, 509 (8th Cir. 2001)).

The circumstances of Crumble’s show-up identification are similar to those in *Pickar*. When the witness viewed Crumble, Crumble was handcuffed and standing next to Officer Boerger, who was wearing clothing identifying him as a police officer. (Tr. at 72). Under these

circumstances and *Pickar*, the Court finds the show-up identification is not impermissibly suggestive.

Even if the show-up identification was impermissibly suggestive, the Court finds that there is no substantial likelihood of misidentification. *See Martinez*, 462 F.3d at 910. Under the factors considered, the Court finds the witness reliable. *See Rodriguez*, 581 F.3d at 810. At the time the witness saw Crumble leave the tan Buick, the witness was about forty to fifty yards from the crashed Buick. (Tr. at 66). Based on Officer Omari's testimony that the witness was "very factual and . . . stated exactly what [he] had seen," the witness appeared to have been paying close attention to the events that occurred after the Buick crashed. *See* (Tr. at 69). The witness said he was one-hundred percent sure that Crumble was the person he saw leave the Buick, and only about twenty minutes had passed from when the witness saw Crumble leave the Buick, and when the witness saw Crumble in the show-up identification. (Tr. at 67–68). Two additional factors demonstrate reliability: The weather was sunny, allowing for clear visibility, and Crumble matched the description the witness provided. (Tr. at 68). Thus, the Court concludes that there was no substantial likelihood of misidentification. *See Martinez*, 462 F.3d at 910.

For the foregoing reasons, the Court finds that the show-up identification does not implicate Crumble's constitutional right to procedural due process, and therefore, Crumble's Motion to Suppress Identification should be denied.<sup>20</sup>

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<sup>20</sup> Nothing in this Report and Recommendation, however, prevents Crumble from further challenging the witness's identification at trial. *See Perry v. New Hampshire*, 132 S. Ct. 716, 720 (2012) ("[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.").

## VI. RECOMMENDATION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendant Prentiss Anthony Crumble's ("Crumble") Motion to Suppress Evidence Obtained in Violation of the Fourth Amendment [Doc. No. 23] be **GRANTED**;
2. Crumble's Motion to Suppress Confessions and Statements in the Nature of Confessions [Doc. No. 24] be **DENIED** consistent with this Report and Recommendation; and
3. Crumble's Motion to Suppress Identification [Doc. No. 25] be **DENIED**.

Dated: July 22, 2015

s/Steven E. Rau  
STEVEN E. RAU  
United States Magistrate Judge

### Notice

**Filing Objections:** This Report and Recommendation is not an order or judgment of the District Court and is therefore, not appealable directly to the Eighth Circuit Court of Appeals.

Under D. Minn. LR 72.2(b)(1) "a party may file and serve specific written objections to a magistrate judge's proposed findings and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

**Under Advisement Date:** This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after objections are filed; or (2) from the date a timely response is filed.