CR-18-01695-005-TUC-JAS (EJM)
United States District Court, District of Arizona

United States v. Williams

Decided May 10, 2022

CR-18-01695-005-TUC-JAS (EJM)

05-10-2022

United States of America, Plaintiff, v. Michael Anthony Williams, Defendant.

Eric J. Markovich, United States Magistrate Judge.

REPORT AND RECOMMENDATION

Eric J. Markovich, United States Magistrate Judge.

Pending before the Court is a Motion to Suppress Evidence filed by Defendant Michael Anthony Williams ("Williams"). Doc. 1139. The defendant seeks to suppress all evidence obtained from his person - *i.e.*, his DNA, tattoos, and cell phone - and the evidence recovered from the forensic search of his cell phone. The defendant argues that the search warrant that allowed the initial seizure and subsequent search of his cell phone is devoid of probable cause, as well as any indicia of probable cause that would warrant this Court applying the good faith exception to the exclusionary rule.

In its response, the government first argues that the warrant was supported by probable cause. Doc. 1197. Alternatively, the government argues that the good faith exception to the exclusionary rule applies if the Court were to conclude that the warrant lacked probable cause. In a supplemental pleading, the government further argues that because the phone was lawfully seized and lawfully in law enforcement custody, the inevitable discovery doctrine applies based on a later federal search warrant. Doc. 1283.

In Response to the inevitable discovery argument raised at the eleventh hour by the [1] government, the defense asserts that the inevitable discovery doctrine does not apply based on a federal search warrant obtained a year after the phone was seized. The defense also argues that the unreasonable one-year delay between the seizure of the phone and the later federal search warrant violated the Fourth Amendment. *See* Doc. 1304.

For the reasons discussed below, the Court concludes that there was not probable cause for issuance of the state search warrant, or any indicia of probable cause for purposes of the good faith exception to the exclusionary rule. The Court also concludes that the inevitable discovery doctrine does not apply to the facts in the case at hand. Finally, the Court concludes that the year delay between the seizure of the cell phone and the search of the phone pursuant to the federal search warrant also violated the Fourth Amendment. As such, the Court recommends that the District Court grant the defendant's motion and suppress the evidence seized from the defendant's cell phone.

FACTUAL BACKGROUND

The defendant is charged with eighteen individuals in a Second Superseding Indictment with offenses related to his alleged membership in a street gang know as the Western Hills Bloods. Doc. 811. The defendant is charged in a RICO conspiracy, the objects of which include murder,

violent acts, drug trafficking, and obstruction of justice. Additionally, the defendant is charged with the following violent offenses: Violent Crime in Aid of Racketeering - Conspiracy to Commit Murder; Violent Crime in Aid of Racketeering - Murder; and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death. Finally, the defendant is charged in multiple drug conspiracies and substantive drug offenses, as well as prohibited possessor offenses. *Id.*[1]

[1] A Third Superseding Indictment was returned on April 6, 2022, which does not add defendants or offenses.

On February 22, 2022, the defendant filed a Motion to Suppress evidence seized from his person (DNA, tattoos, and a cell phone) on June 27, 2015, and the subsequent search of his cell phone. The defendant claims the seizures and search were unconstitutional because the search warrant that authorized the seizures and search lacked probable cause and was unconstitutionally overbroad. The defendant also argues that the *2 good faith exception to the exclusionary rule does not apply because the search warrant lacks any indicia of probable cause. As a result of these Fourth Amendment violations, the evidence unlawfully seized from him should be suppressed. *See* Doc. 1139.

The government first argues that the search warrant affidavit is supported by probable cause. Alternatively, if the Court concludes that probable cause was lacking, the government claims that the motion to suppress should be denied under the good faith exception to the exclusionary rule because officers reasonably relied on what they believed was a valid warrant. *See* Doc. 1197. The government also argues that the contents of the defendant's cell phone would have been inevitably discovered because the phone remained in law enforcement custody as a result of the defendant's arrest, and the phone was searched pursuant to a later federal search warrant which the defendant has not challenged. *See* Doc. 1283.[2]

[2] As will become evident in *text infra*, the Court is quite critical of the government's various arguments. However, to be fair, government counsel did a heroic job of trying to save the state and federal search warrants given the hand she was dealt. It just wasn't "in the cards." But the District Judge will be a new dealer.

In his Reply, the defendant argues that the government tries to assert a legal fiction that the cell phone was seized incident to his arrest. The phone was seized and searched pursuant to the search warrant which lacked probable cause. The defendant again argues that the good faith exception does not apply because the search warrant affidavit lacks any indicia of probable cause. Finally, the defense argues that the inevitable discovery doctrine does not apply, and that the delay between the seizure of the phone and obtaining the federal search warrant was constitutionally unreasonable. *See* Doc. 1304.

A. The Telephonic Search Warrant Affidavit.

On June 27, 2015, a telephonic search warrant application was made to a Pima County Superior Court Judge. (*See* Exhibit to Doc. 1197 [Government's Response].) The affiant was Tucson Police Department ("TPD") Detective Thomas Stewart. Detective Stewart first tells the judge that five black males, which included Williams, are prohibited *3 possessors. *Id.* at 3-4. Detective Stewart states that he is seeking a search warrant for Room 118 at the Super 8 Motel, located at 715 West Starr Pass, a white 2003 Chevy Tahoe registered to Shawmaine Moore, and a white 2005 Hyundai registered to Alicia Wesson. *Id.* at 4. The items to be searched for and seized include: weapons; weapon paraphernalia; ammunition; tattoos; buccal cell DNA swabs; DNA fingerprint evidence; narcotics; narcotics paraphernalia; surveillance video footage; any

item that tends to show criminal street gang affiliation; fruits and instrumentalities and evidence of the crimes of prohibited possessor, possession of stolen property, unlawful possession of narcotic drugs; and cell phones. *Id.* at 4-5. With respect to cell phones, Detective Stewart sought permission to analyze them for any digital or electronic communication and/or storage, to include calls, call logs, contacts, texts, and call history. *Id.* at 4. Detective Stewart tells the judge that he is investigating the crimes of prohibited possessor in possession of stolen property, unlawful possession of narcotic drugs, and unlawful possession of marijuana. *Id.* at 6.

Detective Stewart explained that a hotel employee called 911 at 2:01 a.m. to report that "there were some subjects in the back part of the motel." *Id.* Officers arrived at the scene at 2:05 a.m. *Id.* Because the subjects could not see the police cars, the officers made a tactical decision to have one vehicle go east and one vehicle go west to surround the back of the building as officers entered through the middle of the building in a breezeway. *Id.* Officers came across six of the eight subjects previously identified. *Id.* The two subjects who were not outside were found in a motel room. *Id.* at 6-7. Detective Stewart said the officers knew that the subjects "were making furtive movements and more than likely ditching things, but due to officer safety and one gun being seen in the open right away, they . . . were distracted . . . and they couldn't tell us at that time who had thrown what and who was in what area exactly." *Id.* at 7.

Officers at the scene "looked at the video" (apparently provided by the Super 8 Motel), and saw that Shawmaine Moore was in the driver's seat of the Tahoe, and Sherman Shields and Edward Highfield-Ward were in the backseat. *Id.* Brandon Cooper was the driver of the Hyundai, Melvin Ingram was in the front passenger seat, and Dante Graham and Deon [4] Banks were in the back seat. *Id.* Detective Stewart stated that there were four guns found in the Tahoe: an AK-47 in the back passenger seat; a Tech 9 in the front driver's seat; an SKS in the front passenger seat; and what appears to be a revolver barrel sticking out from under a shirt behind the driver's seat. *Id.* at 8. "There were also three guns ditched on the ground or in the bushes right around those two vehicles and a pair of keys." *Id.* The eighth gun was found on Dante Graham who is a South Tucson Soldier Crip. *Id.*

Detective Stewart told the judge that "[t]he only person who has been somewhat forthright is Shawmaine, " although he initially lied about having arrived at the motel in either vehicle. *Id.* at 9. That lie was discovered when officers realized they had left Moore's cell phone with him in the back of the patrol car and observed a text from Moore telling someone to call in the car as stolen. *Id.* Moore admitted that the vehicle was not stolen "and it was his friend that made the call and that he arrived here;" but Moore "wouldn't say who with." *Id.* Detective Stewart said that none of the men will admit to being an owner of any of the guns. *Id.* Moore said that he knows that there is at least one handgun registered to him in the Tahoe that he arrived in, and probably some dope. *Id.* at 9-10. "But [he] wasn't specific about where it is[.]" *Id.* at 10. Detective Stewart advised the judge that he is listing theft as one of the crimes that he is looking into, as well as drugs because of Moore's statement. *Id.* at 10.

Based on these facts, the state judge found that there was probable cause and issued the requested search warrant, which led to the seizure and subsequent search of the defendant's phone. *Id.*

B. Testimony at the Evidentiary Hearing.

The Court held an evidentiary hearing on the Motion to Suppress on March 24, 2022. The government called two witnesses: ATF Special Agent David Korn and TPD Detective Vance Padilla. The Court asked government counsel if she planned to call Detective Stewart as a witness since he swore to the telephonic search warrant affidavit. Counsel stated that she was not calling

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Detective Stewart to testify because "the standard
5 *5 is the four corners of the warrant on the probable cause and a reasonable officer on the good faith argument[.]". Tr. 3/24/22 at 7. Counsel explained that she is calling Agent Korn as a witness to talk about the later federal search warrant. *Id.*

1. Special Agent Korn.

Agent Korn testified as follows on direct examination. Agent Korn has been an agent with the ATF since 2002. *Id.* at 14. He started investigating firearms offenses and then moved into investigating violent crimes committed by gangs eleven years ago. *Id.* He became involved in this case around August 2015. *Id.*

Agent Korn reviewed the federal search warrant which authorized a search of a cell phone belonging to Williams. *Id.* at 15. Agent Donald Berlin was the affiant for that warrant. *Id.* Agent Korn spoke to Agent Berlin about the warrant, but he was also aware of the facts in the affidavit due to his work on the case. *Id.* at 15-16. At the time the federal warrant was obtained in 2016, ATF was working on a larger case involving Williams. *Id.* at 17. That investigation involved potential RICO charges. *Id.*

Agent Korn became aware at some point that Williams' cell phone was in TPD custody. *Id.* When asked about his understanding of the validity of the state search warrant, Agent Korn testified that "the phone was seized in a search warrant and that the detective was unable to conduct a download or a search of the phone specifically." *Id.* He had no reason not to believe or doubt that the state search warrant was valid at the time the federal warrant was obtained. *Id.* at 17-18. He also believed that the phone was in the same condition as when it was originally seized from Williams on June 27, 2015. *Id.* at 18.

He testified that Agent Berlin went "through all the procedures and protocols" in obtaining a federal search warrant. *Id.* at 18. Specifically, Agent Berlin contacted the U.S. Attorney's Office and wrote an affidavit setting forth probable cause to search the phone, and went in front of a federal judge to swear to the truth of the facts set forth in the affidavit. *Id.* at 18-19. Agent Korn believed that the phone was "appropriately detained at that time[.]" *Id.* at 19. Once the federal warrant was
6 obtained, ATF went to get the phone out *6 of TPD property. *Id.* Agent Korn testified that even if the phone had been returned to Williams at some point, either on June 27, 2015 or later, ATF would still have obtained a warrant to seize and search the phone because they felt there was probable cause to search the phone. *Id.*

Agent Korn testified as follows on cross-examination. The case against the Western Bloods was opened by ATF on June 26, 2015, which was the day before the defendant's arrest at the Super 8 and the seizure of his phone. *Id.* at 20. So, as of late June 2015, Williams was a "person of interest" in the federal investigation. *Id.* Agent Korn agreed that the ATF investigation was conducted "in conjunction with the Tucson Police Department." *Id.* at 21.

Agent Korn had no involvement in drafting the federal search warrant. *Id.* at 23. He did not instruct Agent Berlin to get the warrant. *Id.* at 24. His testimony today is based solely on his reading the affidavit and speaking with Agent Berlin. *Id.* at 23-24. His understanding is that he was called as a witness to "[a]nswer questions associated with the search warrant[.]" *Id.* at 24.

Agent Korn did not know when Agent Berlin or ATF became aware of the seizure of the cell phone on June 27, 2015, and he also does not know the date when Detective Padilla "could not get into the phone." *Id.* at 25. But he agreed that the phone sat with TPD for almost a year before Agent Berlin obtained the federal search warrant. *Id.* When asked if he knew why it took a year to get the federal warrant, Agent Korn testified that he "can't explain the thought process behind it" because he does not have personal knowledge. *Id.* at 25-26.

He can only say that there was a large investigation and at some point some agent realized "that there was a cell phone in evidence associated with Michael Williams shortly after a homicide that was the crux of the ATF investigation . . . and that that phone had been unable to be downloaded." *Id.* When asked if there was any reason the federal warrant could not have been obtained before June 2016, Agent Korn testified that he does not know when Agent Berlin found out about the phone. *Id.* at 27-28. But he agreed that Agent Berlin was working with TPD Detective Frieberg initially on the case. *Id.* at 28.

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On redirect examination, Agent Korn testified that between the time of the state search warrant and the federal search warrant, ATF learned additional information about the defendant's involvement in crimes that were being investigated. *Id.* at 30. And that information made "ATF more concerned about what information may be in that cell phone that they found out was in property and evidence." *Id.* at 31.

2. TPD Detective Vance Padilla.

Detective Padilla testified as follows on direct examination. Detective Padilla has been with TPD since 2001, and was promoted to detective in 2009. *Id.* at 120. He was assigned to the gang unit a year later. *Id.*

On June 27, 2015, Detective Padilla became aware of an incident involving Williams at a Super 8 motel. *Id.* at 121. Detective Padilla was the responding case detective. *Id*. In that role, he was responsible for making decisions throughout the course of the investigation regarding arrests to be made or search warrants to be obtained. *Id.* Detective Stewart swore out the search warrant on June 27, 2015, for Williams' cell phone downloads. *Id.* at 122. Detective Padilla knew that the warrant had been granted. *Id.*

In response to counsel's question of what would have happened to the phone if the warrant had not been granted, Detective Padilla testified: "we will still seize the phone and hold it in evidence, pending any other discovery of reasons to get into a phone. So we'll hold on to it." *Id.* In response to counsel's question of what would have happened to the phone if TPD did not keep it, Detective Padilla testified that if someone still had their phone on them when they were "booked" into jail, the phone "would be held in the locker for safekeeping." *Id.*

Detective Padilla testified that "had the judge not granted Detective Stewart's warrant, " he would have "attempted to get an additional warrant" for the cell phone. *Id.* at 123. In response to counsel's question of whether there was additional information that he could have put in another search warrant affidavit, Detective Padilla testified that there was video at the hotel that showed "activity where Mr. Williams and others were holding, or touching, some of the firearms in the

8 vehicle in question at the time." *Id.* He further *8 testified that he knew that Williams was associated with the Western Hills Bloods gang, and it was common for gang members to "support their habits of owning guns, displaying guns on their phones, to include either selling or taking pictures of such." *Id.* In fact, he had seen gang members take or post pictures of themselves with guns. *Id.* at 124. As such, he testified that he would not have let the phone "be returned back to Mr. Williams when he was released from custody" without applying for another search warrant. *Id.*

Detective Padilla was responsible for executing the search warrant, which consisted of downloading the contents of the phone. *Id.* He testified that he thought this warrant "was fine, " and had no concerns about the judge granting the warrant. *Id.* at 125. He testified that he was only able to extract data from the "SD card, " which typically contains "images, photographs, sometimes music and sometimes documents." *Id.* In response to a question from the Court, he

testified that he could not recall what material he extracted from the S.D. card. *Id.* at 146. After the extraction, he returned the phone to evidence. *Id.* at 125. He had no indication that Williams "had asked for his phone back at any time." *Id.* at 126. He is aware that ATF later got another warrant, but does not know when it was obtained. *Id.*

Detective Padilla testified as follows on cross-examination. He explained that as the case detective, he was responsible for supervising "the thoroughness and the, I guess, the context of the investigation." *Id.* He made decisions on who got arrested, followed up on what the state prosecutors needed, and made sure reports were finished; he also put in evidence requests for any laboratory analysis that may have been needed. *Id.* at 126-127. He also made some assignments regarding this case, but he does not know who tasked Detective Stewart with requesting the search warrant at issue. *Id.* at 127. He agreed with defense counsel that he was responsible for making sure that "everything about the investigation went smooth[ly], " which included any follow-up investigation. *Id.* at 126127. He also agreed with counsel that he was ultimately responsible because he presented the case for prosecution. *Id.* at 128. That responsibility included "making sure that any warrant that [was] issued was done correctly[.]" *Id.* *9

Detective Padilla agreed with counsel that Mr. Williams' phone was seized pursuant to the search warrant. *Id.* at 129. Defense counsel asked what Detective Padilla would have done if the state judge denied the search warrant. *Id.* He testified that he did not testify on direct that about the possibility of the search warrant being denied; rather, he testified that if a search warrant was not called in "we would still hold on to the phone." *Id.* Defense counsel stated that his recollection of the testimony on direct examination was that "even if the judge had denied the search warrant, you would have kept the phone anyway." *Id.* Detective Padilla testified that the phone would have been held in evidence. *Id.* Defense followed up again by asking if the search was denied, you would "then turn around and say, 'Well, I don't care about that. I'm going to keep it anyway?'" *Id.* at 129130. Detective Padilla testified that he does not believe "holding a person's phone in evidence or safekeeping isn't a violation." *Id.* at 130. Defense counsel pointed out that holding the phone for safekeeping is different than holding it for evidence. *Id.* Detective Padilla testified that the phone "goes to the same place, " in a locker, and "we have the authority to change the terminology from 'safekeeping' to 'evidence.'" *Id.* But Detective Padilla agreed with counsel that when an arrestee is "booked in at the jail with a phone, it's not held for safekeeping; it's held in their property[.]" *Id.* However, Detective Padilla testified that this did not happen here. *Id.* Detective Padilla again agreed that the phone was seized pursuant to the warrant. *Id.* Counsel explained to Detective Padilla he wanted to clarify his thought processes when a judge does not find probable cause for a search warrant. *Id.* at 130-131. In response to counsel's question of whether the phone would still be seized in that situation, Detective Padilla testified that "[i]f a judge told me no on the phone, I would not seize it, no." *Id.*

Detective Padilla agreed with counsel that Detective Stewart "called in the search warrant, " and later advised him that the judge issued the warrant. *Id.* at 131. Detective Padilla was under the impression that the search warrant that authorized the seizure and search of all phones applied to all eight men at the Super 8 motel on June 27, 2015. *Id.* at 131-132. Detective Padilla did not review the telephonic affidavit submitted to obtain the *10 search warrant until today. *Id.* at 134-135. In response to counsel's question of whether Detective Padilla's supervisory duties included reviewing the telephonic affidavit, Detective Padilla testified that he did not believe he had to supervise Detective Stewart because he "is a tenured detective, and I trust his judgment and ability." *Id.* at 135.

Detective Padilla believes that the affidavit establishes probable cause. *Id.* Counsel then probed into what leads Detective Padilla to that conclusion. Detective Padilla agreed that the affidavit mentions Williams by name and that he has a prior felony and therefore cannot possess a firearm. *Id.* But he also agreed that the affidavit does not say that Williams possessed a weapon, that he was around a weapon, that he was near the Tahoe that contained weapons, or how close he was to guns found in the bushes. *Id.* at 136. Detective Padilla also agreed that the affidavit only mentions that Williams is a prohibited possessor and "present with the others." *Id.* at 137. In response to counsel's question of whether Detective Padilla still thinks the affidavit establishes probable cause, he testified that "I wouldn't second-guess Detective Stewart's opinion." *Id.* at 138. Counsel reminded Detective Padilla that he was asking for his opinion. Detective Padilla testified that Detective Stewart "incorporated [Williams'] name with the other individuals, I think the story was told that Mr. Williams was with the group around a bunch of weapons. So I think that the probable cause was there, yes." *Id.* He further explained that Williams is a prohibited possessor, so "there's reasonable cause to believe" that he was "part of that group." *Id.* But Detective Padilla again agreed that the affidavit never states that Williams was in possession of a weapon. *Id.* at 139.

Counsel returned to the seizure of the cell phone. Detective Padilla disagreed that he testified that he "would have held on to [the phone] no matter what[.]" *Id.* at 141. Detective Padilla agreed that a cell phone is not in and of itself illegal, and that when he searches an arrestee and finds a phone he does not "automatically assume that it contains evidence of a crime." *Id.* at 142.

The Court asked Detective Padilla to explain "the nexus of the phone to the crime" and the belief that it may contain evidence of that crime. *Id.* at 144. Detective Padilla *11 testified as follows:

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> Just in my training and experience in the gang unit, dealing and interacting with many gang members - and not even gang members but just the criminal element - it's my experience that cell phones are a tool or mechanism to propagate their activities, and that includes handling of firearms in photographs, videos or even text messages. So it was common and still is commonplace in investigations of this nature to attempt to acquire a search warrant for the furtherance of the investigation at hand.

Id. at 144. Detective Padilla agreed with the Court that he was describing his experience in general and not specific to Williams. *Id.* at 144-145. He further explained that "in some investigations, a cell phone is the actual mechanism that supports the crime" being investigated. *Id.* at 145. "[I]t was an additional tool that we wanted to acquire to further the investigation at hand, and at the time was the possession of firearms." *Id.*

The Court inquired as to whether Detective Padilla had seen photos of Williams posing with guns. *Id.* He testified that "[i]n general, yes, " based on his work in the gang unit he was aware of social media postings. *Id.* He testified that he recalls seeing Williams posing with guns prior to June 27, 2015, the date the search warrant was issued, probably on social media, but he cannot recall "exactly when or where." *Id.*

The Court asked Detective Padilla to confirm whether his earlier testimony was that if the state judge declined to issue the search warrant the phone would not have been seized. *Id.* at 146-47. He testified as follows: "Correct. I mean, to me, that's almost alleging judge shopping. You know, if a judge told me no, I'm not going to go to a different judge and try to circumvent what he told me. So I'd respect the declination if that was the case, and Mr. Williams, or whoever, would not have their phone seized." *Id.* at 147. The Court asked Detective Padilla to explain what would

have happened to the phone if the search warrant was not issued, specifically, whether the phone would have been classified as personal property and would have gone to the jail with Williams. *Id.* He testified as follows: "Yeah. There's two ways. We could have kept it with him to go to
12 safekeeping *12 at the jail or we could have kept it at the Tucson Police under safekeeping. And then when he gets out, the evidence section doesn't need authorization for us to release it. He could just go to evidence, and they'll release it to him." *Id.*

Defense counsel had follow-up questions pertaining to the Court's question about whether Detective Padilla had seen photos of Williams posing with guns. Detective Padilla agreed with counsel that Williams has not always been a prohibited possessor of firearms, and prior to his felony conviction he had every right to own or possess a firearm. *Id.* at 148. He also agreed that he does not know if any photos of Williams with guns were posted after he became a prohibited possessor. *Id.*

DISCUSSION

The related constitutional issues implicated in the Motion to Suppress are whether the search warrant was supported by probable cause, and if not, whether the good faith exception or the inevitable discovery doctrine apply such that exclusion of the evidence obtained from the search of the cell phone is not warranted. As discussed below, the Court concludes that the search warrant not only lacked probable cause, it lacked any indicia of probable cause which is required for the good faith exception to the exclusionary rule. The Court also concludes that the inevitable discovery doctrine does not apply based on a federal search warrant obtained a year after the seizure of the cell phone. Relatedly, the Court concludes that suppression is also warranted based on the unreasonable delay between the seizure of the phone and when the government obtained the federal search warrant. Accordingly, the Court recommends that the evidence recovered from search of the cell phone
13 be suppressed.[3] *13

[3] The government has represented that it will admit evidence of the defendant's tattoos through other evidence, and not as a result of the search warrant at issue here. As such, the suppression motion is moot as to the tattoos. The Court also finds that the acquisition of DNA evidence is also moot because, in this Court's experience, the DNA evidence would have been obtained as a matter of course because of defendant's arrest, which he does not challenge was unlawful. And even if a search warrant was required to obtain the defendant's DNA, the defendant's prohibited possessor status and his presence with a tgroup of men who possessed guns was sufficient probable cause for the search warrant for e DNA to determine if the defendant ever possessed (even albeit momentarily) the guns. Finally, while the defense has not necessarily abandoned the DNA argument, the primary focus at oral argument was the lawfulness of the search warrant for the phone.

A. There Was Not Probable Cause For The Search Warrant.

Probable cause for a search warrant requires "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The determination of whether probable cause existed to issue a search warrant is examined under the "totality of the circumstances." *Gates*, 462 U.S. at 238. However, "[i]n reviewing the validity of a search warrant, a court is limited to the information and circumstances contained within the four corners of the underlying affidavit." *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985). If a search warrant lacks probable cause, "evidence obtained during its execution should generally be suppressed under the

exclusionary rule." *United States v. Underwood*, 725 F.3d 1076, 1084 (9th Cir. 2013) (*citing Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

The defendant argues that the search warrant affidavit is devoid of any facts that would support a finding of probable cause to search his cell phone. The only facts about the defendant in the affidavit are that he is a prohibited possessor of firearms and was located somewhere on the premises of the Super 8 motel where firearms were found. The defendant points out that his name is mentioned only once in the affidavit, specifically, when Detective Stewart mentions that he was one of eight men present at the Super 8 motel and is a prohibited possessor. The affidavit does detail that other suspects, Moore, Shields, and Highfield-Ward, arrived at the motel in a Tahoe that contained firearms. But the affidavit does not mention the defendant possessing or even being in the proximity of firearms, stolen property, or drugs. *See* Doc. 1139 at 6.

The defense further argues that not only does the affidavit not allege that Williams committed a crime, the affidavit failed to establish a reasonable nexus between the alleged crimes or evidence and Williams' cell phone. Specifically, the affidavit does not connect the prohibited possessor offense to the cell phone or express a belief as to why evidence of that offense would be found on the cell phone. Nor does the affidavit connect Williams to stolen property or drugs, let alone that evidence of those crimes may be found on his phone. There is simply no information in the
14 affidavit to suggest that cell phones were *14 used in the commission of any crime. For these reasons, the defense argues that the warrant lacks probable cause and the evidence seized pursuant to the warrant must be suppressed. *Id.* at 7-10.

The government's response sets forth the law on probable cause to issue search warrants, specifically highlighting that: (1) the defendant bears the burden of suppressing evidence seized pursuant to a warrant; (2) a court should give substantial deference to a court's finding of probable cause; (3) the resolution of doubtful or marginal cases should be largely determined by the preference accorded to warrants; (4) when issuing a search warrant a judge's task is simply to make a commonsense determination whether there is a fair probability that contraband or evidence of a crime be found in the place or item to be searched; and (5) probable cause is not a high bar. The government then merely states that there was probable cause for the search warrant because "cellphone information is relevant as it potentially places the individual within proximity of the location where the firearm was originally stolen." Doc. 1197 at 4.

The Court finds that the search warrant affidavit comes nowhere near to establishing probable cause for the search of the cell phone. Simply put, this is a no-brainer. In fact, the government's conclusory argument noted above demonstrates the futility of their position in trying to save the search warrant for the cell phone. As the defense points out, there is no attempt to link the crime to the phone, let alone an effort to detail why the phone is likely to contain evidence of a crime. At its essence, the affidavit says that the defendant was suspected of committing a crime (and it doesn't do a great job of that) and that he had a cell phone when arrested. If those facts amounted to probable cause, there would be no limit to law enforcement's ability to obtain a search warrant for every arrestee's phone. The alleged crime, whether it be a serious felony or a misdemeanor, wouldn't matter. All that would matter is that the person had a phone when arrested.

For the reasons stated above, the Court concludes that the search warrant affidavit did not establish probable cause for issuance of the search warrant
15 for the defendant's cell phone. *15

B. The Good Faith Exception To The Exclusionary Rule Does Not Apply.

There is an exception to the exclusionary rule for a search conducted in good faith reliance upon an objectively reasonable search warrant. *United States v. Leon*, 468 U.S. 897, 924-925 (1984). "For the good faith reliance exception to apply, the officers must have relied on the search warrant in an objectively reasonable manner." *United States v. Crews*, 502 F.3d 1130, 1135-1136 (9th Cir. 2007) *(citing United States v. Clark*, 31 F.3d 831 (9th Cir. 1994)). The affidavit submitted to support the search warrant application "'must establish at least a colorable argument for probable cause' for the exception to apply." *Crews,* 502 F.3d at 1136 (*quoting United States v. Luong*, 470 F.3d 898, 903 (9thCir. 2006)). The good faith exception does not apply "where the affidavit upon which the warrant is based is so lacking in indicia of probable cause that no reasonable officer could rely upon it in good faith." *Id.* (*citing Leon*, 468 U.S. at 923-926)).

The defense obviously knew that the government's fallback argument would be that the good faith exception to the exclusionary rule applies, because the defense gets out in front of that argument in its Motion to Suppress. Specifically, the defense argues that the good faith exception to the exclusionary rule does not apply to the facts at hand because the search warrant affidavit lacks any indicia of probable cause, and that reliance on it would have been objectively reasonable. *See* Doc. 1139 at 10-11.

The defense was correct because the government indeed relies on the good faith exception to save the search warrant. However, once again, the government presents a half-hearted argument to support that position. The government merely asserts that the search warrant affidavit "was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Doc. 1197 at 5 (*quoting Leon*, 468 U.S. at 923). The government does not explain why it claims the search warrant was not lacking any indicia of probable cause. The government goes on to say that "when officers obtain a warrant, they do what is constitutionally required, and 'it is vital that having done so, their actions should be sustained under a system of justice responsive to both the needs of individual liberty and to the rights of the community.'" *Id.* *16 (*citing United States v. Ventresca*, 380 U.S. 102 (1965)). But, again, the government does not elaborate on this "tug of the heart strings" argument.

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The good faith exception does not apply to Detective Padilla's affidavit. It is not even a close call. In fact, if the good faith exception applied to the case at hand, a defendant could never challenge a probable cause determination. This is the classic case of where an affidavit lacks any indicia of probable cause. As discussed earlier, the search warrant affidavit says only that the defendant is a prohibited possessor, he was with seven other men in the vicinity (although the "vicinity" was never specified) of where firearms were found, and he had a phone. The Court finds that no reasonable officer could have relied in good faith on the search warrant when the only evidence detailed in the affidavit was that the defendant had a cell phone, just like virtually every adult in the United States (and many kids now as well), when he was arrested on the suspicion that he was a prohibited possessor of firearms.

At oral argument, government counsel seemed to suggest that things were different in 2015 in terms of what amounted to probable cause to search a phone. Tr. 3/24/22 at 152. The Court acknowledges that as technology has advanced the electronic devices that can be searched and the information that can be seized from those devices has dramatically increased. However, the legal test for probable cause to search does not ebb and flow with advances in technology.

Finally, the Court notes that Detective Padilla testified that they obtained a search warrant for the phone to further the investigation. That makes perfect sense. But that will almost always be the

motivation for law enforcement officers when they arrest someone with a cell phone, given the vast amount of information that can be stored on these minicomputers. In their perfect world, law enforcement officers would love to always be armed with a search warrant that allows them to rummage through an arrestee's phone to discover inculpatory evidence or evidence that would assist or further their investigation. However, the means used to obtain that information - *i.e.,* a search warrant based on probable cause - must be lawful to justify the legitimate ends of preventing or
17 investigating criminal *17 activity. Searching a phone to further an investigation, even when coupled with the fact that the defendant was arrested and had a phone, does not amount to an indicia of probable cause. As such, the good faith exception does not apply.

C. The Inevitable Discovery Doctrine Does Not Apply.

The "inevitable discovery" doctrine is an exception to the exclusionary rule. *Nix v. Williams*, 467 U.S. 431, 444 (1984). "It applies when the prosecution can show by a preponderance of the evidence that the evidence would have been discovered inevitably by lawful means." *United States v. Martinez-Gallegos*, 807 F.2d 868, 870 (9th Cir. 1987). "This doctrine requires that 'the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself.'" *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) (*quoting United States v. Boatright*, 822 F.2d 862, 864-865 (9th Cir. 1987)). "[T]he core inquiry is whether the police would have discovered the evidence if the misconduct had not occurred." *Ramirez-Sandoval*, 872 F.2d at 1396 (*quoting United States v. Namer*, 835 F.2d 1084, 1087 (5th Cir. 1988)).

In a supplemental pleading, the government argues that the inevitable discovery doctrine applies because they subsequently obtained a federal search warrant for the cell phone and removed evidence from the phone, and the defense has not challenged the probable cause articulated for the federal search warrant. The government states that after the defendant was arrested on June 27, 2015, he was taken to the jail and booked into custody. During that booking process, he would have been searched and his property, including his phone, would have been placed into custody based on routine administrative procedures. The government reasons that even if TPD did not seize the phone, it would have been in custody at the jail and available for federal agents to search pursuant to the federal warrant obtained on June 10, 2016. Thus, the contents of the phone would have been inevitably discovered as a result of the federal search warrant, even if a state search warrant had not been obtained. *See* Doc. 1283 at 3-4.

The defense argues that the government creates a
18 legal fiction by claiming that the *18 cell phone was seized incident to arrest rather than pursuant to the state search warrant. Moreover, even if the phone was seized incident to arrest, the seizure lacked probable cause because there was no nexus between the phone and the alleged criminal conduct. The defense also argues that, but for the search warrant, the phone would have been placed into the defendant's personal property at the jail and returned to him when he was released from custody the day after his arrest. Relatedly, the defense asserts that the federal search warrant does not "cleanse the unconstitutionality of the initial seizure" which was based on an unlawful search warrant and remained in TPD custody for a year based on that warrant, when it would otherwise have been returned to the defendant. Doc. 1304 at 4.

This Court's conclusion that the search warrant was unconstitutional because the affidavit submitted in support of the warrant lacked probable cause, or any indicia of probable case, means the warrant should never have been issued. Consequently, Detective Padilla's testimony that the phone would have been returned to the defendant if the June 27, 2015, search warrant

application was denied eviscerates the government's inevitable discovery argument. Detective Padilla testified that if the state judge declined to issue the warrant, he would not have gone "judge shopping" on June 27th in an effort to get a search warrant. Tr. 3/24/22 at 147. As a result, he would not have seized the phone, but rather, returned the phone to the defendant in a roundabout way. *Id.* Specifically, the phone would have either gone with the defendant's property to the jail, or it would have been kept at TPD for safekeeping. *Id.* Once the defendant was released from custody, which happened the day after his arrest, the phone would have been returned to him either by jail officials or TPD depending on who had the phone. *Id.* Thus, if the search warrant had not been obtained on June 27, 2015, law enforcement would have relinquished custody of the phone to the defendant the following day. As discussed below, that break in law enforcement's custody of the cell phone makes the inevitable discovery arguments speculative because they are based on several assumptions.

In light of Detective Padilla's testimony that if the search warrant was not issued the phone would have been returned to the defendant once he was
19 released from custody, *19 the government proffered two theories at oral argument to support inevitable discovery. The first is that even though Detective Padilla would not have gone "judge shopping" on June 27, 2015, he would have obtained a search warrant at some point thereafter. *Id.* at 152-154. This theory is based on two assumptions.

The first assumption is that Detective Padilla would have been able to establish probable cause to believe that the defendant's phone contained evidence related to the prohibited possessor offense, as well as probable cause that the defendant committed that offense, both of which were lacking in the first search warrant application. The evidence at the hearing did not demonstrate if or when Detective Padilla could make these showings. Detective Padilla testified that he saw photos of the defendant posing with guns, likely on social media; but he conceded that he did not know if those photos were taken at the time the defendant was a prohibited possessor. Thus, those photos would not have aided in establishing probable cause. And Detective Padilla did not testify about any other information that he knew on June 27, 2015, or later, that would have supported probable cause to believe the phone contained evidence related to the prohibited possessor charge.

The second related assumption is that Detective Padilla would have obtained another search warrant quickly enough so the phone could have been seized from the defendant shortly after his release from custody, when it was still likely to contain evidence of a crime. That is a big assumption given that Detective Padilla did nothing with the phone after he could not extract information; it sat in TPD evidence for a year until the federal search warrant was obtained.[4] Simply stated, inevitable discovery of evidence must be based on facts presented by the government, and not assumptions.

> [4] The Court notes that Detective Padilla did not testify about whether the attempted search of the phone was conducted in the time period prescribed by the state search warrant, or if he sought extensions from the state judge to conduct the search because of the technical difficulties. The only evidence is that the search was not successful, and the phone sat in TPD custody for a year before ATF obtained the federal search warrant.

The government's second theory for inevitable discovery is that the same information in the cell phone would have been recovered pursuant to the federal search warrant. *Id*. at 156-157. This theory is more speculative than the first because it
20 assumes *20 that both the cell phone and its contents would have existed a year later. The government would have had to articulate to a U.S. Magistrate Judge why it believed that a phone

returned to the owner a year earlier would still contain evidence of a crime. That would have been a tough sale. This Court was never told what evidence was obtained from the cell phone. But there must be inculpatory or at least useful information because the government is fighting hard to prevent that evidence from being suppressed at trial. However, a lot could have happened to that cell phone and its contents over the course of a year. The defendant could have intentionally destroyed the phone or deleted information from the phone; or he could have lost the phone or accidentally damaged it beyond repair. The possibilities are not endless, but there are many. The Court is obviously speculating about what could have happened to the phone and/or its contents during the year between the seizure and the federal search warrant. But that is because the government's inevitable discovery argument both invites and is premised on speculation, which is not sufficient to prove inevitable discovery.

Based on the discussion above, the Court concludes that the government has not proven by a preponderance of the evidence that the evidence recovered from the cell phone would have been discovered inevitably by lawful means. Because the inevitable discovery doctrine does not provide an exception to the exclusionary rule, the evidence seized from the phone must be suppressed.

D. The Seizure of the Defendant's Cell Phone For a Year Was Unlawful.

"An unreasonable delay between the seizure of [an item] and obtaining a search warrant may violate the defendant's Fourth Amendment rights." *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015). In fact, "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *United States v. Jacobson*, 466 U.S. 109, 124 (1984). Thus, "'even a seizure based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant.'" *United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) *21 (*quoting United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998)).

"The reasonableness of the delay is determined 'in light of all the facts and circumstances,' and 'on a case-by-case basis.'" *Mitchell*, 565 F.3d at 1351 (*quoting United States v. Mayomi*, 873 F.2d 1049, 1054 n. 6 (7th Cir. 1989)). The determination of whether the delay was "reasonable" is based on the "totality of the circumstances, not whether the government pursued the least intrusive course of action." *Sullivan*, 797 F.3d at 633. "[T]he reasonableness determination will reflect a 'careful balancing of governmental and private interests.'" *Mitchell*, 565 F.3d at 1351 (*quoting Sodal v. Cook County*, 506 U.S. 56, 71 (1992)).

"The Supreme Court has adopted a balancing test to determine whether a seizure is reasonable." *Sullivan*, 797 F.3d at 633. A court must balance the "'nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (*quoting United States v. Place*, 462 U.S. 696, 703 (1983)). When balancing these interests, a court may consider whether an individual consented to a seizure and search because no possessory interest will have been infringed by the "*voluntary* tender of property." *Id.* at 633. A court may also consider whether an individual was in custody between the seizure and the search, which would evidence a reduced possessory interest in the item seized. *Id.*

The defense argues that even if the seizure of the defendant's cell phone was proper, the more than a year delay between the seizure of the cell phone and federal search warrant is unreasonable, and as a result, unconstitutional. The defense argues that the Eleventh Circuit's decision in *Mitchell* is analogous to the case at hand. In fact, the defense asserts that the delay in the case at hand was far more egregious than in *Mitchell*, where the court

held that a 21-day delay between the seizure of a computer and obtaining a search warrant for the computer was unreasonable. See Doc. 1304 at 5-6.

In *Mitchell*, agents seized the defendant's hard drive from his desk top computer without a search warrant. 565 F.3d at 1349. The agent obtained a search warrant for the hard drive 21 days later. *Id.* At a suppression hearing, the agent testified that
22 the delay in *22 obtaining a search warrant resulted from his attendance at a two-week out of state work-related training. *Id.* The agent testified that he did not see any urgency in obtaining a search warrant during the two weeks that he was gone. *Id.* at 1351. The district court denied the defendant's motion to suppress reasoning that the delay was reasonable. *Id*. at 1350.

The Eleventh Circuit reversed, finding that the 21-day delay was unreasonable because it constituted a significant interference with the defendant's possessory interest, and there was no compelling justification for the delay. *Id.* at 1351-1353. The court noted that the sooner a search warrant issues, the sooner "the property owner's possessory rights can be restored if the search reveals nothing incriminating." *Id*. at 1352. The court further noted that "this consideration applies with even greater force to the hard drive of a computer, which is the digital equivalent of its owner's home, capable of holding a universe of private information." *Id*. As a result, the court held that the vast amount of business and personal information that can be stored on a hard drive - *e.g.*, personal letters, emails, financial information, passwords, family photos - reflected a significant interference with the defendant's possessory interest. *Id*. at 1351. With respect to the absence of a compelling government interest for the delay, the court found that because the seizure of the hard drive occurred two and one-half days before the agent left for his training, he had sufficient time to obtain a search warrant. *Id*. Moreover, the court also found that a second agent who was at the defendant's home when the hard drive was seized could have secured a search warrant during the first agent's absence. *Id.* The court held that the delay was unreasonable "because law enforcement officers simply believed that there was no rush" in obtaining a search warrant. *Id.* at 1353.

The Court finds that the defendant is correct that the delay in the case at hand is even more unreasonable than in *Mitchell*.[5] The Court finds
23 that a cell phone, even in 2015, *23 is the digital equivalent of its owner's home, capable of holding a universe of private information. Thus, the vast amount of business and personal information that could be stored on the defendant's cell phone reflected a significant interference with his possessory interest. And that possessory interest is strengthened by the fact that Williams was released from custody the day after he was arrested and his phone was seized, and he never consented to the search of his phone.

5 Obviously, *Mitchell* is not binding on this Court. But that court's analysis and reasoning is consistent with Ninth Circuit cases that have addressed the constitutionality of a prolonged delay between the seizure of an item and obtaining a search warrant. For instance, in *United States v. Dass*, 849 F.2d 414, 415 (9th Circuit), the court held that law enforcement officers acted unreasonably by detaining packages for 7 to 23 days before executing a search warrant. Obviously, the delay in the case at hand is substantially longer than in *Dass*; and the item seized (the cell phone here) contains exponentially more information than a package. In *Sullivan*, the Ninth Circuit distinguished *Mitchell* in holding that a 21-day delay between the seizure of a laptop computer and obtaining a search warrant for the computer was not unreasonable. 797 F.3d at 635-636. Those distinguishing facts included: (1) the defendant had a reduced possessory interest in the computer both because he was in custody between the time of the seizure of the computer and when the search warrant was obtained, and his status as a parolee; (2) the defendant

consented to a search of his laptop seventeen days after it was seized; and (3) the state had a compelling interest for the delay because of the need to supervise parolees, and the need to transfer the laptop between law enforcement agencies. *Id.* at 634-635. As discussed in *text infra*, none of *Sullivan's* distinguishing facts are present in the case at hand.

Additionally, the 21-day delay in *Mitchell* pales in comparison to the year delay in the case at hand. And, as in *Mitchell,* the government has not presented a compelling interest for the year delay in obtaining a search warrant.[6] In *Mitchell*, the agent at least explained that he did not obtain the search warrant for 21-days because he was at a work-related training for two weeks. In the case at hand, Agent Korn had no idea why it took ATF a year to obtain the federal search warrant.[7] He testified that he "can't explain the thought process behind it" because he does not have personal knowledge. Tr. 3/24/22 at 25-26. He could only say that it was a large investigation. *Id.* But he acknowledged that the ATF investigation was opened June 26, 2015, the day before the defendant's arrest at the Super 8 motel, and that ATF agents were working in conjunction with TPD detectives on this large investigation. *Id.* at 20-21, 28. As a result, it is hard to believe that ATF agents did not learn of the inability to download information from the defendant's phone
24 *24 long before the federal search warrant was obtained in June 2016. And, as in *Mitchell*, there simply had to be an agent who could have sought the federal warrant during the year that the phone sat in TPD evidence.

6 To be clear, there was certainly no delay in obtaining the state search warrant or searching the phone. But once that search proved futile, and the time to execute that warrant expired, there was no basis to conduct a further search of the phone until the federal search warrant was obtained a year later. That is the delay that was unreasonable.

7 In fairness to Agent Korn, it seemed to the Court that he had no idea why he was called as a witness. He agreed with defense counsel that he was merely present to testify about the contents of the federal search warrant affidavit, which everyone could read for themselves.

Based on the significant interference with the defendant's possessory interest in his cell phone and the absence of a compelling justification for the delay in obtaining the federal search warrant, the Court concludes that the prolonged seizure of the phone violated the Fourth Amendment, and the results of the search of the phone should be suppressed for this reason as well.

CONCLUSION

The Court recommends that the District Court grant the Motion to Suppress and exclude the evidence obtained from the cell phone at trial.

Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and file written objections within 14 days of being served with a copy of this Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If any objections are filed, this action should be designated case number: **CR 18-01695-TUC-JAS**. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to de novo consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
25 (9th Cir. 2003) (en banc). *25