UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	Criminal No. 15-340 (JRT/LIB)
	)	
v. Plaintiff,	)	
	)	**DEFENDANT'S MEMORANDUM IN**
DANNY JAMES HEINRICH,	)	**SUPPORT OF HIS MOTION TO**
	)	**SUPPRESS FRUITS OF UNLAWFUL**
Defendant.	)	**SEARCH AND SEIZURE**

> *[P]rivacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic.*

Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J. concurring).

* * *

> *One's home is sacrosanct, and unreasonable government intrusion into the home is "the chief evil against which the wording of the Fourth Amendment is directed."*

United States v. Zimmerman, 277 F.3d 426, 431-32 (3d Cir. 2002) (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)).

I. Introduction

In 1990, law enforcement officers investigating one of the highest profile cases in Minnesota history marshalled all of their investigative information, presented it to a judge and obtained a warrant to search Danny Heinrich's Paynesville family home. Nothing of any evidentiary value was discovered. His property was returned and no charges were filed. The investigation in the Jacob Wetterling case continued for the next twenty five years. In 2015, officers from the same law enforcement agency wanted to search Heinrich's home again, searching for evidence of 1980s offenses, including the

Wetterling case. Set forth in the affidavit in support of this warrant was the same information provided to justify the original warrant. Also included were results from a 2015 DNA analysis—which examined evidence provided in 1989 and 1990. Investigators suggested that this new information justified a second search of Mr. Heinrich's home. But in reality, the information offered to support the warrant offered no connection between the suspected twenty-five year old crimes and Danny Heinrich's home, other than the fact that it was Danny Heinrich's. The DNA evidence in a cold case from 1989 had given law enforcement reason to believe that they could label Danny Heinrich a "person of interest" in the Jacob Wetterling investigation. Now they wanted to search the house he was living in twenty-five years after the offense. The affidavit submitted to obtain the warrant in this case was stale and failed to establish any nexus between Heinrich's home and the fair probability that evidence of a crime would be located in his home.

Mr. Heinrich, through counsel, submits this memorandum in support of his motion to suppress evidence obtained as a result of the July 28, 2015 search of the Annandale home. The evidence must be suppressed because the information contained in the underlying Affidavit is stale and the Affidavit fails to allege a nexus between the home to be searched and any evidence of a crime. If the search warrant is validated, this Court will endorse a law enforcement action that offends the Fourth Amendment: using twenty-five-year-old information—with nothing more recent to refresh those stale facts—to justify the government's breach of a private home. The exclusionary rule must be allowed to operate as intended and prevent the police from using such evidence when the Fourth

Amendment violation is so clear, even to a law enforcement officer. At issue in this case is more than the search of Mr. Heinrich's home; the government asks the Court to take a sledgehammer to the bedrock of the Bill of Rights so it may save a search that is constitutionally deficient. This should not happen, and all evidence seized as the result of the search warrant's execution must be suppressed.

II. Factual Background.

After decades of failing to arrest a suspect in the 1989 abduction of Jacob Wetterling, in 2015, law enforcement officers executed a search warrant at 55 Myrtle Avenue South, (hereinafter "55 Myrtle") in Annandale, Minnesota. For purposes of this Court's analysis of whether the issuance of that warrant was valid, the law requires that the Court examine the "four corners" of the warrant and the accompanying Affidavit in support of the warrant application. *United States v. Farlee*, 757 F.3d 810, 819 (8th Cir. 2014) ("When a magistrate relies solely on an affidavit to issue the warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." (citation and internal punctuation omitted)). The facts discussed below therefore come from the search warrant and an Affidavit supporting the warrant application, introduced as Government Exhibit 8 at the April 27, 2016 pretrial motions hearing before the Court.

On July 27, 2015, Stearns County Sherriff's Office Investigator Dennis Kern submitted an application for a search warrant to Wright County District Court Judge Geoffrey W. Tenney. Government's April 27, 2016 Pretrial Motions Hearing Exhibit

(hereinafter, "Ex.") 8 at 1-11.[1] Investigator Kern had been a law enforcement officer for 15 years, an investigator for three, and had executed numerous warrants. *Id.* at 1-4. The warrant sought 39 separate categories of evidence, including clothing, weapons, books, electronic files, and more. *Id.* at 1-1 – 1-2. The Affidavit makes clear that investigators were pursuing a novel and unorthodox theory of probable cause. The vast majority of evidence presented covered events and investigative findings 25 or more years prior to the 2015 search warrant application. *Id*. at 1-4 – 1-11.

But what is striking to any trained legal observer—law enforcement officer or judge—is what was missing from the Affidavit: there is a conspicuous and inexplicable absence of what is usually found in this kind of document, such as recent information derived from witnesses, informants, surveillance or searches of publicly available information. *Id.* That lack of first-hand information that 55 Myrtle contained any items at all is puzzling—the place could have been completely empty based on the minimal evidence that investigators presented.

What *is* evident from a careful reading of the Affidavit's face, though obscured by the document's length, is that investigators offered nothing about Mr. Heinrich in 2015 and nothing about 55 Myrtle either. *Id*. That left them with a probable cause theory based

[1] Ex. 8 begins with the Application for Search Warrant and Supporting Affidavit, which is numbered in the upper right corner of each page, "Application 1-1" through "Application 1-11[.]" Ex. 8 also includes the Search Warrant itself, which is numbered "Warrant 1-1" through "Warrant 1-3" in the upper right corner of each page, as well as Appendices A through E, which are not numbered in the same way. Because all references in this memorandum are to pages 1-1 through 1-11 of the Application for Search Warrant and Supporting Affidavit, citations herein do not include the word "Application" prior to the page number.

on speculation and old information. The vast majority of the Affidavit—not just the text, but the lengthy appendix as well—is just a recap of information known to the law enforcement 25 years ago and every day since. *Id.* at 1-4 – 1-11, Appendices (hereinafter, "App.") A-E.

A. Prior Investigations: Paynesville, JNS and Wetterling

The Affidavit begins by detailing "several incidents from 1986 through 1988 where juvenile males [were] assaulted or sexually assaulted in various locations throughout [the City of Paynesville]." *Id.* at 1-4. Eight incidents are described. *Id*. at 1-4 – 1-5. The alleged incidents labeled number one and number two occurred in August 1986 near a pizza shop, both involving ambush assaults upon "juvenile male[s]." *Id.* at 1-4. In those cases, no sexual assault was alleged. *Id.* The alleged incidents labeled numbers three through five (occurring on three specified dates in 1986 to 1987), all involved sexual assaults upon "juvenile males." *Id.* In the alleged incident number three, the assailant "cut off some of the [victim's] hair with a jagged edged knife." *Id.* In the alleged incidents labeled numbers six through eight (occurring on three dates in 1987 and 1988), the narrative indicates no attack at all or reverts to assaults bearing no signs of a sexual motive. *Id.* at 1-5.

Though varying in details, the alleged victims in each of the incidents generally described the assailant as a "heavy set," "chubby," "pudgy," or "husky" white male, approximately 5'6" to 5'9" tall. *Id.* at 1-4 – 1-5. In some of these alleged incidents, the attacker made off with some item from the victim, *e.g.*, a lock of hair, a hat, a wallet, *etc*. The Affidavit then explains: "At the time all of these incidents took place, [Mr. Heinrich]

primarily resided . . . in the city of Paynesville. These incident all took place within several blocks of his residence." *Id.* at 1-5.

Next, the Affidavit details an incident that allegedly occurred in Cold Spring, Minnesota on January 13, 1989. *Id.* at 1-5 – 1-6. An individual identified as "JNS"—a 12-year-old boy at the time—was walking home in the winter darkness, at about 9:45 in the evening. *Id.* at 1-5. A male motorist drove near JNS, spoke to him briefly, and then forced him into the rear passenger compartment of his car. *Id.* The assailant then threatened JNS and instructed him to cover his face. *Id*. JNS complied, but managed to catch sight of his assailant, his surroundings and items in the car. *Id.* The assailant drove around for a time, finally coming to a stop on a gravel road. *Id.* There, the assailant climbed into the back seat, forced JNS to disrobe, and sexually assaulted him. *Id.* at 1-5 – 1-6. After the assault had ended, JNS was instructed to re-dress in his snowsuit, but his assailant retained possession of his underwear and jeans. *Id.* at 1-6. The assailant then drove back toward Cold Spring, threatened JNS once again, and allowed him to leave without further harm. *Id.*

At the time, JNS described the assailant to police and later assisted in the creation of a police sketch. *Id*. The Affidavit's appendix includes a side-by-side comparison of the sketch with a 1990 photo of Mr. Heinrich. *Id.* at App. A. The Affidavit then states that JNS was neither able to identify Mr. Heinrich as the assailant in a photographic lineup nor in a live lineup. *Id.* at 1-6, 1-8. Rather, as to the photographic lineup, JNS reported that *both* a then-current photograph of Mr. Heinrich *and* a picture of another male only "somewhat resembled" the assailant. *Id.* at 1-6. And as to the live lineup, JNS "could

not identify any of the males [(including Mr. Heinrich)] as being the individual who kidnapped and sexually assaulted him." *Id.* at 1-8. JNS stated that both another male *and* Mr. Heinrich were "similar" to his assailant based on build, chest, and stomach, but he also indicated that, whereas one of the participants was a "7" out of ten in similarity to his kidnapper, Mr. Heinrich was only a "4" out of ten. *Id.*

JNS gave a very specific description of the assailant's car. He described the car as dark blue, with four doors, an automatic transmission, blue interior, and a luggage rack on the trunk. *Id.* The Affidavit then describes Mr. Heinrich's car at the time as a "1987 dark blue Mercury Topaz, 4-door with a light blue interior," and attaches photos. *Id.* at 1-6, App. B. The Affidavit later explains that investigators actually found that the interior of Mr. Heinrich's car was not blue, but gray and that there was no luggage rack on the trunk of Mr. Heinrich's vehicle. *Id.* When JNS actually sat in the car, he could only say it "feels like" the same car as the one in the assault. *Id.* at 1-8. The Affidavit also includes a vague discussion of a 1990 FBI forensic study of fibers from JNS's snowsuit that were "consistent" with Mr. Heinrich's vehicle, though no detail is supplied. *Id.*

The Affidavit then discusses the abduction of Jacob Wetterling, albeit in abbreviated form. *Id.* at 1-6 – 1-7. On the evening of October 22, 1989, a group of boys identified as TW, AL, and Jacob Wetterling were together in St. Joseph. *Id.* at 1-6. At about 9:15 p.m., a masked gunman accosted the boys. *Id.* The assailant sexually assaulted AL, then ordered AL and TW to depart. *Id.* at 1-7. The assailant then led Jacob Wetterling away, never to be seen since. *Id.* The police discovered shoe and tire tracks nearby, and took impressions of both. *Id.*

Overall, the Affidavit suggests that Mr. Heinrich was the prime suspect in all of the incidents at the time, as now. *Id.* at 1-4 – 1-11. But what the Affidavit doesn't say is that in the twenty five years that have elapsed since these incidents occurred, Danny Heinrich is not and never has been charged with any offense in connection with those alleged events. Viewed in that context, the Affidavit indicates that, while the police clearly viewed Mr. Heinrich as a suspect in the JNS and Wetterling cases in 1989 and 1990, they lacked sufficient, credible evidence to bring a charge, much less obtain a conviction. Nevertheless, the Affidavit details the investigators' vigorous pursuit of Mr. Heinrich, including their repeated interrogations of Mr. Heinrich and their search of his residence in January of 1990, just three months after the Wetterling abduction. *Id.* at 1-7 – 1-9.

Prior to that search, in December of 1989, the police interrogated Mr. Heinrich about both the JNS and Wetterling cases for the first time, but he denied any knowledge or involvement regarding either case. *Id.* at 1-7. About a month after that, according to the Affidavit, Mr. Heinrich was re-interviewed and at that time he voluntarily supplied his shoes and tires to the police for comparison with the St. Joseph shoe and tire impressions, discussed earlier. *Id.* Although the Affidavit leaves the impression of a match, it later concedes that the tire impressions are "not an exact match" and that "it could not be determined whether the right shoe impression at the scene was made by [Mr.] Heinrich's right shoe." *Id.* at 1-9. The Affidavit indicates that, over the course of at least four police interrogations between 1989 and 1990, Mr. Heinrich consistently denied involvement with the JNS and Wetterling cases. *Id.* at 1-7 – 1-9.

As noted above, in 1990, the police obtained a search warrant for Mr. Heinrich's then-residence (his father's home), using much the same presentation as discussed above, and seeking much the same evidence. *Id.* at 1-8. During the search, the police interrogated Mr. Heinrich again. *Id.* During the search, the police expressed interest in photos of young males found in the home. Investigators did not confiscate the photos, as they were apparently not contraband or evidence of any crime. *Id.*

In February 1990, the police arrested Mr. Heinrich on suspicion of being the assailant in the assault of JNS in Cold Spring. *Id.* at 1-9. After subjecting him to yet another round of interrogation, wherein he again denied involvement in either the JNS or Wetterling case, law enforcement released Mr. Heinrich without charge. *Id*. One year later, in February of 1991, law enforcement returned to Mr. Heinrich all property seized during the execution of the 1990 search warrant of Mr. Heinrich's father's home. *Id.*

And remarkably, that's where the Affidavit leaves a gap of better than 20 years. *Id.* at 109 – 1-11. Although it is well-known that the investigation into the Wetterling abduction has been ongoing since 1989, the Affidavit sets forth no discussion at all concerning the status of the investigation between 1990 and 2012. *Id.* There is nothing about investigations of other suspects. *Id.* There is nothing about surveillance of Mr. Heinrich. *Id.* Nothing about his activities in the lengthy gap period at all. *Id.* Bizarrely, other than a passing reference to 55 Myrtle as "his home[,]" the Affidavit doesn't even assert that Mr. Heinrich lived in the residence where the search was conducted. *Id.* at 1-4. Contrast this with the 1990 search warrant, in which the search warrant affiant complied with the requirement of establishing that there was credible evidence to support that

Danny Heinrich was in fact connected with the place to be searched. *See* Ex. 8, at Appendix D. The affiant provided information that a reliable informant who lived in the residence to be searched confirmed that Danny Heinrich was currently residing at the address and had been there for two months. *Id.* The 2015 Affidavit is devoid of any information as to why the police believe the address is Mr. Heinrich's home. *Id.* at 1-4 – 1-11.

Set forth in the Affidavit is information related to an attempt to revive the cold case. *Id.* at 1-9 – 1-10. The Affidavit says a lab conducted DNA-identification testing on hair samples obtained from Mr. Heinrich in 1990. *Id.* The Affidavit further explains that in 2012, the lab obtained a "DNA profile" from JNS's clothing associated with the alleged Cold Spring incident. *Id.* at 1-9. The lab compared Mr. Heinrich's posited DNA profile from the 1990 hair sample to that obtained from the clothing. *Id.* The results from a sweatshirt indicated that the "predominant male DNA profile matches [Mr. Heinrich]" such that it "would not be expected to occur more than once among unrelated individuals in the world population." *Id.* at 1-9 – 1-10. In 2014, the lab conducted DNA profiling on a baseball hat associated with one of the Paynesville incidents, and a comparison with Mr. Heinrich's posited DNA profile concluded that Mr. Heinrich "could not be excluded" as a contributor. *Id.* at 1-10.

Again, it is important to note what is missing from the Affidavit. The DNA results address comparison of evidence that was obtained in 1990 or earlier. *Id.* at 1-9 – 1-10. The Affidavit does not allege that any of the forensic lab results suggest continued

criminal activity by Mr. Heinrich or a specific present-day event (or even a months- or years-old event) that occurred at 55 Myrtle. *Id.* at 1-4 – 1-11.

After this summary of the investigation, the Affidavit states, in conclusory fashion, that based on unspecified police "training and experience," suspected "serial sex offenders . . . *may* keep articles from victims as [] keepsakes, souvenir[s], or trophies even years after their crimes." *Id.* at 1-10 (emphasis added). It then goes on to say: "Individuals who are sexually attracted to children *may* collect and save sexually-explicit materials" in various forms of media, such as magazines, videos and computer files. *Id.* (emphasis added). The Affidavit then goes on to say that "[i]ndividuals who have a sexual interest in children or images of children almost always possess and maintain their 'hard copies' of child pornography material" in their homes, and that these collections "are often maintained for several years." *Id.* at 1-11. Moreover, the Affidavit asserts that "individuals who have a sexual interest in children or images of children often maintain their collections that are in a digital or electronic format in a safe, secure, and private environment, such as a computer" and that "[t]hese collections are often maintained for several years and are kept close by, usually at the collector's residence . . . ." *Id.* Notwithstanding these conclusory assertions, the Affidavit utterly fails to provide any information regarding whether Mr. Heinrich in 1989, 1990, or, for that matter, at any point in time, possessed a computer and/or subscribed to an internet service provider. *Id.* at 1-4 – 1-11. Nor does the Affidavit include any assertion that law enforcement officers have any evidence whatsoever that Danny Heinrich has any such materials or items.

This long recitation of facts boils down to a few relevant facts for constitutional analysis. One of the most important facts is this: the last alleged criminal act occurred on October 22, 1989, 25 years and nine months prior to the application for the search warrant at issue. *Id.* at 1-6, 1-11. Other than a physical description of the home and a reference to the property as being "his home[,]" investigators did not provide any information to the judge reviewing the search warrant application about the place they intended to search, and provided no direct information about Mr. Heinrich or his activities following their last contact with him in the early 1990s. *Id.* at 1-4 – 1-11. Instead, investigators emphasized forensic connections between evidence they obtained in 1989 and 1990 and the JNS case. Whereas this new information was significant in the JNS investigation, that offense had occurred twenty six years ago. *Id.* at 1-5 – 1-6, 1-9 – 1-10. Lab results that assisted officials in that case could not serve as a legitimate basis to support the application for the search warrant seeking evidence of a crime in Mr. Heinrich's home in July of 2015, twenty six years later. As explained below, this deficiency is fatal to the search warrant and requires suppression of all evidence seized.

III. Legal Background

A. Above All, the Fourth Amendment Protects the Home.

At the heart of the rights that the Constitution provides to Americans is the protection that it affords the private home. The Fourth Amendment says that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., AM. IV. While the Fourth Amendment has evolved to apply in many contexts, its protective force is strongest at the private home's doorstep. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quotation omitted). The respect and protection the Constitution affords a person's house is as old as the Bill of Rights, or older. "The Fourth Amendment embodies [the] centuries-old principle of respect for the privacy of the home," *Wilson v. Layne*, 526 U.S. 603, 610 (1999). In the simplest of terms, the Eleventh Circuit explained the importance of a person's home in Constitutional jurisprudence:

> Dorothy may have said it best when she said, "There is no place like home." Though we are pretty sure that she was not talking about the Fourth Amendment, she may as well have been. Under the Fourth Amendment, the home is a sacrosanct place that enjoys special protection from government intrusion.

Moore v. Pederson, 806 F.3d 1036, 1039 (11th Cir. 2015) (footnote omitted)

For police to breach this most private space of a citizen, the Fourth Amendment requires a showing of "probable cause." While that legal term has evolved over time, the requirement itself it is not an empty formality. Rather, it is designed to be meaningful, not merely a "rubber stamp for the police." *United States v. Ventresca*, 380 U.S. 102, 109 (1965). Prior to issuing a warrant for search and seizure, a judge must find—typically based upon an affidavit—that there is probable cause to justify the intrusion. *See Groh v. Ramirez*, 540 U.S. 551, 557 (2004). The issuing magistrate must examine "all the

circumstances set forth in the affidavit" to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "When a magistrate relies solely on an affidavit to issue the warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *United States v. Farlee*, 757 F.3d 810, 819 (8th Cir. 2014) (citation and internal punctuation omitted).

In a case such as this one, where investigators were trying desperately to solve one of the most public and important criminal cases in Minnesota history, the Fourth Amendment plays a central role protecting all citizens' rights, especially when law enforcement officers zealously carry out their duties.

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948); *see also Steagald v. U.S.*, 451 U.S. 204, 212 (1981) (warrant necessary because law enforcement "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty"). If there were ever a case where investigators lacked sufficient objectivity in ferreting out crime, this is the case.

B. Stale Information Cannot Support Probable Cause to Search A Home.

Although this case implicates the search of one man's home, the legal issue that the Court must decide involves the evolution of the boundaries of the Fourth

Amendment. For this reason, the national implications presented by the issue before the Court are obvious. It seems that every day, there is news of newly discovered forensic evidence that is responsible for either the exoneration or conviction of someone decades after the commission of a crime. Law enforcement officers use their broad powers in response to DNA lab results to investigate crimes in any way the Constitution allows, including searching private homes. Thus, defining the boundaries of what the Constitution will permit in light of these technological advances is crucial. This case presents facts so far on the extreme end of police investigation and practice that the government is asking the Court to endorse bending the Fourth Amendment beyond its breaking point. Should this warrant be validated by this Court, it opens the door to permit the search of virtually any home, no matter how long ago an offense may have occurred and no matter how tenuous the connection between the alleged crime and the home may be.

Because it relates to the Fourth Amendment's probable cause requirement, the constitutional dimensions of Mr. Heinrich's staleness argument are well-rooted in the case law. "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time*." *Sgro v. United States*, 287 U.S. 206, 210, (1932) (emphasis added). Therefore, the age of the information contained within a search warrant affidavit is a factor a reviewing judge must consider in determining probable cause. If the information is too old, it is stale, and probable cause may no longer exist. *United States v. Zimmerman*, 277 F.3d 426, 434 (3d Cir. 2002); *see also United States v. Palega*, 556 F.3d 709, 715 (8th Cir. 2009) (holding

that it is insufficient for probable cause to exist "*as of some time in the past*" (quotation omitted) (emphasis added)); *United States v. Formaro*, 152 F.3d 768, 771 (8th Cir. 1998) ("probable cause must exist at the time of the search and not merely at some earlier time"). Simply put, fresh information about a crime can support probable cause to search a place, and old information cannot.

How old is too old? "There is no bright-line test for determining when information in a warrant is stale." *United States v. Pruneda*, 518 F.3d 597, 604 (8th Cir. 2008). Courts decide how old is too old, and "[p]robable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." Wayne R. LaFave, 2 Search & Seizure § 3.7(a), at 464 (5th ed. 2012) (footnote omitted). Rather, a court reviewing a search warrant must instead look to the timeliness of the information, which depends on the circumstances of the individual case, including the nature of the crime under investigation and the property sought in the search. *See United States v. Gibson*, 123 F.3d 1121, 1124 (8th Cir. 1997).

Other courts have analyzed a similar list of factors.

> Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?), *etc*."

United States v. Spikes, 158 F.3d 913, 923 (6th Cir. 1998) (quoting *Andresen v. State*, 331 A.2d 78, 106 (Md. App. 1975)). More recently, the Sixth Circuit has refined the list of factors. "[A] district court should consider the following four factors in determination

whether a probable cause finding is stale: 'the defendant's course of conduct; the nature and duration of the crime; the nature of the relevant evidence; and any corroboration of the older and more recent information.'" *United States v. Helton*, 314 F.3d 812, 822 (6th Cir. 2003) (citing *United States v. Czuprynski*, 46 F.3d 560, 567 (6th Cir. 1995) (*en banc*)).

1. In Cases Not Involving Computer Evidence, Even the Passage of a Few Months Renders Information Stale.

As a general matter, both within the Eighth Circuit and in other circuits, the passage of even a few months between the evidence of illegal activity and the application for a warrant often draws a court's scrutiny. *United States v. Button*, 653 F.2d 319, 325 (8th Cir. 1981) (information stale because statement that drug transactions occurred over previous 6 months failed to establish that PCP, a highly portable substance, would be found in residence at time warrant issued); *United States v. Hython*, 443 F.3d 480, 486-87 (6th Cir. 2006) (information stale because affidavit failed to include either a date or a reference to recentness of activity); *United States v. Roach*, 582 F.3d 1192, 1201-02 (10th Cir. 2009) (information stale because at time of warrant application, defendant's isolated admission of gang membership was nearly 1.5 years old).

Courts have similarly held in the cases concerning crimes of violence. *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979) (footnote omitted). "A sixteen day lag between the commission of a murder and the issuance of a search warrant for a murder weapon of this type is too long for a finding of probable cause that the gun will still be located on defendant's premises." *Id*. at 1018.

Finally, in other miscellaneous cases that do not involve computer evidence, it is clear that the passage of a few months between the allegation of illegal activity and the application for a search warrant produces stale information. *See, e.g., Durham v. United States*, 403 F.2d 190, 195 (9th Cir. 1968) (search unlawful where counterfeiting activity occurred more than four months before the warrant was issued); *United States v. Neal*, 500 F.2d 305, 309 (10th Cir. 1974) (information stale where "no reference in the affidavits as to what occurred during the three months after the discontinuance of" individual's participation in stolen vehicle scheme and no information that material sought to be recovered remained on the described premises).

Even Eighth Circuit cases concluding that probable cause *did* exist in the face of older evidence make clear that, for offenses that do not involve computer-related evidence, a months- or years- long gap between illegal conduct and the issuance of a search warrant must be buttressed by either recent information or some factor that makes the passage of time permissible. *See, e.g., United States v. Smith*, 266 F.3d 902, 904-05 (8th Cir. 2001) (information in the affidavit regarding three controlled buys at defendant's residence occurring three months prior to application for search warrant not stale because drugs likely to still be in place to be searched and because warrant in response to ongoing narcotics operation); *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir.2001) (lapse of one month between five methamphetamine transactions (which had occurred over the course of two months) and an application for search warrant did not render information stale in light of the ongoing nature of crimes); *United States v. Formaro*, 152 F.3d 768, 770 (8th Cir. 1998) (information regarding controlled buy made

two and one-half weeks before the application for a warrant not stale); *United States v. Maxim*, 55 F.3d 394, 397 (8th Cir.1995) (upholding a warrant based in part on three-year-old information about the defendant's illegal possession of a firearm, because the suspected offense was continuing in nature and because expert testimony established that possessors of illegal firearms often keep their weapons for a long period of time.

However, anticipating the government's argument that the warrant at issue in this case also involved allegations of a computer-related crime, it is noteworthy that the staleness doctrine has evolved when computer-related evidence—especially in child pornography cases of the last 15 years—is at issue.

2. Modern Child Pornography Cases Alter the Staleness Analysis But Retain Its Principles.

As noted above, the nature of the offense is a consideration in a court's staleness analysis, and more recent cases involving computers and digital evidence have altered the length of time that a Court may consider to be so long that information is deemed stale. It is true that, once courts began addressing staleness in the context of digital evidence—particularly in child pornography cases—the staleness doctrine evolved.

"We have suggested that the staleness argument takes on a different meaning in the context of child pornography because of the fact that collectors and distributors rarely, if ever, dispose of their collections." *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008); *see also United States v. Lemo*n, 590 F.3d 612, 614 (8th Cir. 2010) (rejecting defendant's argument that officer's affidavit was inadequate to establish probable cause because it alleged that defendant last traded child pornography eighteen

months before the warrant issued); *United States v. Burkhart*, 602 F.3d 1202, 1206–07 (10th Cir. 2010) (holding that an email between child pornography distributor and the defendant that occurred two years and four months before issuance of a search warrant for the defendant's home was not stale).

Whereas it is true that Courts employ a less restrictive view as to staleness in child pornography cases, still the courts measure the number of years that require a staleness finding in single-digit years, not decades. Further, at a minimum, officers must allege a specific timeframe for the information that they believe supports probable cause. If they do not allege a timeframe, the information is *per se* stale. *United States v. Doyle*, 650 F.3d 460, 474-75 (4th Cir. 2011) (information stale because affidavit gave no evidence of when events occurred); *United States v. Hython*, 443 F.3d 480, 486-87 (6th Cir. 2006)(information stale because affidavit failed to include either date or reference to recentness of activity).

C. Nexus: There Must Be a Connection Between The Place To Be Searched And Evidence Of A Crime

In addition to the timing aspects of probable cause, a search is not constitutional unless the warrant provides probable cause to believe that evidence of a crime will be found in the place to be searched. This concept of requiring a showing of "nexus," like staleness, is deeply rooted in the case law interpreting the Fourth Amendment. A finding of probable cause requires a search warrant affidavit to establish a nexus between contraband or evidence of a crime and the place to be searched. *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000) (citing *United States v. Koelling*, 992 F.2d 817, 823

(8th Cir. 1993)). However, a court may not "arrive at probable cause simply by piling hunch upon hunch." *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004).

Specifically as to search warrants for residences, the nexus requirement makes clear that the warrant application must show that evidence of a crime is likely to be found in a person's home, not simply that police suspect a person of a crime, and thus that person's house should be searched. "[I]t cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence." *United States v. Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970); *see also States v. Helton*, 314 F.3d 812, 821 (6th Cir. 2003) (where investigation revealed a defendant was closely connected to possession of narcotics, a search warrant for his home was invalid without any reliable evidence linking that residence to the drug trade); *United States v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005) ("The critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978))). In other words, just because a person is suspected of a crime does not give police the authority to search that person's home.

Certain situations demonstrate clear showings of nexus that are not present here, even viewing the facts in the most favorable manner for the government. For instance, sometimes police claim that criminal activity actually occurred at the place to be searched. *See, e.g.*, *United States v. Adams*, 401 F.3d 886, 893 (8th Cir. 2005) (probable cause justified warrant where defendant engaged in drug activity at his house, which was

established by earlier electronic surveillance intercepting conversations from telephone number assigned to that house). Another clear-cut scenario is when police know that a crime was committed in another place, but that evidence or fruits of the crime were recently seen in the location to be searched. *See, e.g., United States v. Barfield*, 507 F.2d 53 (5th Cir. 1975) (informant told of his participation in bank burglary and also of subsequent removal of tools and fruits to defendant's residence). Neither situation applies here because the Affidavit did not state that Mr. Heinrich lived at 55 Myrtle during the period of 1986 to 1990, nor did it state that any person saw contraband at 55 Myrtle at any point.

Because suspicion that an individual committed a crime does not automatically amount to probable cause to search that person's home, it is crucial to proving nexus that police establish that the suspect *actually lives at the premises to be searched*. Failure to provide such information is fatal to a probable-cause presentation. *United States v. Frangenberg*, 15 F.3d 100, 102 (8th Cir. 1994) (because the warrant did not indicate how suspect was connected to the place to be searched, it was doubtful that the application provided adequate basis for search). Ultimately, the issuing judge must have sufficient information upon which to base a finding that "there is a fair probability that contraband or evidence of a crime will be found" in the place to be searched. *Gates*, 462 U.S. at 238.

In order to demonstrate a connection between a criminal suspect and a place to be searched, it is common for law enforcement to conduct further investigation so that a reviewing judge has facts upon which to decide that there is probable cause based on that person's connection to the place. These techniques include physical surveillance,

obtaining public records of ownership of the property to be searched or a nearby vehicle, obtaining utility records for the property, obtaining postal records to see who receives mail at the property, or, in the case of a computer-related crime, issuing a subpoena to an internet service provider to establish that the home is connected to the internet and to determine who pays for that service. As argued below, with the exception of baldly calling 55 Myrtle "his home," Ex. 8 at 1-4, the Affidavit contains no information to corroborate that the home actually belongs to Mr. Heinrich.

ARGUMENT

IV. The Warrant Lacked Probable Cause Because the Information Contained In It Was Stale and No Nexus Was Shown Between Criminal Activity and 55 Myrtle.

In 1990, law enforcement officers applied for and received a search warrant to search Danny Heinrich's home. Although they seized a number of items, one year later they returned those items because they were not evidence of any crime. Twenty five years later law enforcement officers used that same supporting information, with some additional forensic results, to request a warrant to search for evidence of those same crimes. In essence, with only a 2015 forensic lab test result, investigators created the appearance that recent information made it likely that evidence would be discovered in a home, over twenty-five years after the alleged criminal acts by its owner. In reality, although the forensic information served to bolster the dated information, the information offered in support of the warrant was no less stale. Such stale information cannot support the issuance of this search warrant.

In addition to the information being stale, the Affidavit utterly failed to provide any nexus between the 25-plus-year-old offenses or speculative child pornography offenses and the 55 Myrtle home in 2015. The statements in the Affidavit at best suggest that Mr. Heinrich is a suspect in offenses committed over 25 years ago. These statements do not, however, provide probable cause to believe that 55 Myrtle contained evidence of any crime in 2015. Because the warrant so lacked of any indicia of probable cause, it was unreasonable for the officers executing the search warrant to rely on it and the good faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), cannot save the search. All evidence seized as a result of the search warrant execution must be suppressed.

A. The Information in the Affidavit Was So Stale That It Cannot Provide Probable Cause.

The Affidavit makes clear that over 25 years passed between the most recent allegation of an illegal act by Mr. Heinrich—the Wetterling abduction on October 22, 1989—and the application for a search warrant. Ex. 8 at 1-6, 1-7. To conclude that such a gap survives a staleness challenge would render meaningless the Fourth Amendment's most sacred protection and eliminate any meaningful-case-by-case analysis mandated by the courts. However, the weakness of the Affidavit is not just that decades passed before the investigators applied for the warrant. A close analysis of the factors courts use to analyze staleness questions also demonstrates the utter failure of the Affidavit.

As noted above, courts analyzing staleness arguments have sometimes utilized a multifactor test. The Eighth Circuit's cases suggest that it has relied on a smaller subset

of those factors. *See, e.g.*, *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010) ("we look to the circumstances of the case, including the nature of the crime involved"); *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (examining "the nature of the criminal activity involved, and the kind of property for which authority to search is sought"). However, a review of these factors, as well as the factors other circuit courts have considered, best demonstrates the staleness of the information in the Affidavit and why this Court should conclude the warrant application falls far short of probable cause.

1. The Character of the Crime, Including its Nature and Duration

This factor is focused on what type of crime is alleged in the Affidavit, how long the crime was alleged to have occurred, and whether it is continuous.

> As is only logical, ongoing and continuous activity makes the passage of time less critical when judging the staleness of information upon which a search warrant is based, because evidence of a longstanding pattern of repeated activity makes it less likely that the activity has ceased within a short time frame.

United States v. Roach, 582 F.3d 1192, 1202-03 (10th Cir. 2009) (citation and quotation marks omitted). However, "[w]here the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time." *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972).

The Affidavit alleges two types of crimes: (1) offenses involving sexual misconduct or violence, including the Paynesville incidents occurring between 1986 and 1988, as well as the sexual assault of JNS and the 1989 kidnapping and presumed murder of Jacob Wetterling; and (2) the undated and purely speculative possession, receipt, and

sharing of child pornography, which is based only on officer training and experience. Ex. 8 at 1-4 – 1-11.

The government may argue that the Affidavit presents a series of crimes that amount to a multi-year pattern of continuing offenses, and an extended period of time is therefore justified before information becomes stale. However, as noted above, the last alleged incident of sexual assault occurred in October of 1989, with no hint of any continuing offense; as noted above, the allegations regarding child pornography are undated and purely speculative.

Furthermore, as to the first type of offense, the crimes alleged in the Affidavit are typically discrete events, and are not usually continuing offenses, such as drug conspiracies or continuous possession offenses. Even though one of the alleged offenses is kidnapping, it is unreasonable to believe that a kidnap victim would remain with the kidnapper 25 years later, particularly given that the thorough investigation of Mr. Heinrich in 1989 and 1990, including the search of his home, revealed no evidence that Mr. Wetterling was in his custody. Moreover, in sexual assault, kidnapping, and murder cases, courts typically find that information is not stale when it is only a few weeks or months old. *See, e.g.*, *United States v. Neal*, 528 F.3d 1069 (8th Cir. 2008) (probable cause where informant said he saw firearms in defendant's residence "on several occasions," most recently a month ago, as "individuals who possess firearms tend to keep them for long periods of time"); *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011) (where "murder weapons were not left at the scene," there was probable cause to search for them 12 days later in house where "the suspected killers were residing"); *State*

v. Kelly, 526 P.2d 720 (Ariz. 1974) (probable cause as to knife and clothing 8 days after rape); *Blount v. State*, 511 A.2d 1030 (Del. 1986) (10 days not too long to search for murderer's clothing and gun); *State v. Liner*, 397 So.2d 506 (La. 1981) (where 25 days had elapsed since a homicide, there was probable cause to search the defendant's home for shoes which left bloody prints); *State v. Pease*, 724 P.2d 153 (Mont. 1986) (warrant for knife used in homicide valid though issued 53 days after body found); *State v. Beckham*, 513 S.E.2d 606 (S.C. 1999) (relying on *Steeves*, *supra*, court concludes probable cause re presence of gun in defendant's home though information one year old); *State v. Benoit*, 265 N.W.2d 298 (1978) (probable cause where 12 days passed as to clothing worn in robbery).

What courts have rarely, if ever, endorsed is the idea that highly incriminating evidence of discrete crimes, such as murder, would remain with the offender for a long period of time, such as decades. The court in *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979) explained this point well:

> Common sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone. If defendant shot [the victim], as the affidavit states, one of the first things he would do would be to get rid of the gun. The handgun could easily have been disposed of permanently within a short time after the crime. It is not reasonable to infer that defendant . . . placed a weapon which had fired more than one bullet into a man on the shelf in his bedroom closet.

United States v. Charest, 602 F.2d 1015, 1017 (1st Cir. 1979) (footnote omitted). In *Charest*, the First Circuit concluded that "[a] sixteen day lag between the commission of a murder and the issuance of a search warrant for a murder weapon of this type is too

long for a finding of probable cause that the gun will still be located on defendant's premises." *Id*. at 1018. In another case, a Kentucky District Court held that

> the alleged crime was not of a continuous nature. Moreover, the evidence sought was evidence pertaining to an alleged homicide. It was an unreasonable expectation that officers would discover a .45 caliber pistol allegedly used in the murder and other evidence connected to a murder more than two months after the alleged homicide.

United States v. Kemper, 375 F. Supp. 2d 551, 555 (E.D. Ky. 2005).

Here, as to the first type of offense alleged, the Affidavit asks the reviewing judge to believe that the most highly incriminating evidence of a kidnapping, possible murder, and sexual assaults would have been retained by the alleged offender for decades. That evidence includes human remains, victim clothing, victim hair, and weapons used in the offenses, including handguns and knives. As *Charest* and *Kemper* demonstrate, a warrant application seeking such evidence, twenty five years after the alleged events, is both contrary to common sense and the law.

In desperation to get the search warrant signed, investigators in Mr. Heinrich's case proposed a legal fiction—that theoretical possibility of holding on to a "trophy" of a twenty-five-year-old crime would be sufficient justification for a judge to believe that there would still be evidence of that crime in the home today. This theory is especially suspect in view of the specific facts of this case, where investigators had previously obtained a warrant and searched a home that Mr. Heinrich lived in approximately three months after the Wetterling abduction. Ex. 8 at 1-8. As to the first type of offense alleged in the Affidavit, other than unsupported speculation, there is nothing about their nature or

duration that provides probable cause to believe that evidence of the offenses would be located at 55 Myrtle in 2015, decades after the alleged crimes.

As to the second type of offense discussed in the Affidavit—child pornography—courts have developed a bright-line rule as to one aspect of staleness. When the police fail to allege a timeframe that child pornography was in a person's home, or fail to state when a person engaged in conduct involving child pornography, the evidence is *per se* stale. Thus, when, as in this case, investigators made no claim as to when Mr. Heinrich possessed or attempted to possess child pornography, absolutely no probable cause has been shown. As the Fourth Circuit explained in *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011),

> the argument is not that *too much* time elapsed, but instead that there was insufficient evidence presented to the magistrate to determine *how much* time elapsed. While in the context of child pornography substantial amounts of time can elapse before probable cause to search for child pornography becomes "stale," there is no support for the contention that once probable cause exists to search for child pornography, it remains valid *ad infinitum*.

650 F.3d at 475 (italics in original; footnotes omitted); *see also United States v. Prideaux-Wentz*, 543 F.3d 954, 959 (7th Cir. 2008) ("the government's failure to find out the dates in which the pictures were uploaded supports a finding of staleness in this case . . ."); *United States v. Hython*, 443 F.3d 480, 483 (6th Cir. 2006) (government conceded that warrant void for staleness because neither the affidavit nor the warrant specified date when drug transaction at defendant's house took place); *United States v. Wiley*, Crim. No. 09-239 (JRT/FLN), 2009 WL 5033956, at *3 (D. Minn. Dec. 15, 2009) (Tunheim, J.)

(insufficient probable cause where the affidavit provided no timeframe for alleged illegal activity and no reliable information of continuing criminal activity).

That is precisely the situation here. The Affidavit engages in pure speculation and never claims that Mr. Heinrich possessed child pornography at some point in the past or engaged in any conduct regarding child pornography. The Affidavit doesn't even claim that Mr. Heinrich possessed a computer, accessed the Internet or even subscribed to an internet service provider. Thus, the Affidavit's allegations are *per se* insufficient, and even if the Court agreed that officer training and experience could be trusted to believe that child pornography would be in the home, approving the warrant in this case did exactly what the *Doyle* court prohibited: authorized an *ad infinitum*, limitless grant of probable cause just because law enforcement had a speculative hunch that Mr. Heinrich *may* have had child pornography at some unknown time.

When analyzing the character of the crime in sexual assault and child pornography crimes, a trio of circuit court decisions are particularly instructive on the question of what constitutes probable cause. These decisions expose the fatal flaw of the Affidavit in this case: that the Affidavit both fails to allege a timeframe as to the existence of child pornography at 55 Myrtle and fails to allege a timeframe after 1990 of other conduct by Mr. Heinrich permitting such an inference.

First, in *Falso*, the Second Circuit was confronted with the question of whether the defendant's eighteen-year-old sexual abuse conviction and the appearance that he had gained or attempted to gain access to a website containing child pornography was sufficient to support probable cause to search the defendant's home and computer. 544

F.3d 110. Like the Affidavit here, the search warrant affidavit in *Falso* made general allegations about the characteristics of child-pornography collectors. It explained that the "majority of individuals who collect child pornography are persons who have a sexual attraction to children, and that those who collect images of child pornography generally store their collections at home." *Falso*, 544 F.3d at 113 (quotation marks omitted). The *Falso* affidavit also explained that eighteen years prior to its preparation, the defendant was convicted of sexually abusing a seven-year old girl. *Id.* at 114. Unlike the Affidavit in this case, police alleged in the *Falso* affidavit that the defendant's residential address was associated with a Yahoo email account that the FBI believed was a possible subscriber to a website which contained eleven child pornography images. "The affidavit also stated that the residential address associated with Falso's Yahoo account had active internet service during the period immediately preceding the warrant request." *Id*. at 113-14. Finally, the affidavit explained that it appeared that Falso "either gained access or attempted to gain access to the website containing child pornography images." *Id*.

After the warrant execution revealed child pornography and Falso confessed to other illicit sexual conduct, he pled guilty to related offenses and appealed the district court's denial of his suppression motion to the Second Circuit. The Second Circuit held that the warrant lacked probable cause. Central to the court's decision was the fact that Falso

> was not alleged to have actually accessed or subscribed to any child-pornography website. Rather, [the] affidavit alleged only that Falso was perhaps one of several hundred possible subscribers to the cpfreedom.com website, who *appeared* either to have gained or attempted to gain access to the site.

Id. at 120 (emphasis original). The Second Circuit's probable cause analysis focused on the fact that "there is no specific allegation that Falso accessed, viewed or downloaded child pornography." *Id*. at 121. The affiant's "inconclusive statements about whether Falso even accessed the cpfreedom.com website, coupled with the absence of details about the features and nature of the non-member site, falls short of establishing probable cause." *Id.*

Because the affidavit's statements about the specifics of Falso's alleged online activities were insufficient, the court next turned to his eighteen-year-old criminal history. The Court found that the affidavit's claim that "the majority of individuals who collect child pornography are persons who have a sexual attraction to [children]. . . falls victim to logic." The Second Circuit concluded that "[a]lthough offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, the correlation drawn by the district court." *Id*. at 122.

And even if the prior conviction was relevant, the Court concluded it was stale. In concluding the eighteen year passage of time was significant, the Court stated: "the sheer length of time that had elapsed renders Falso's prior sex crime only marginally relevant, if at all." *Id*. at 123. In addition, the Court found it significant that that "no such evidence was provided in this case to bridge the temporal gap between Falso's eighteen-year old sex offense and the suspected child-pornography offense." *Id*. Although the Second Circuit concluded that the search was saved by the *Leon* good faith exception, the *Falso* case illustrates that the Affidavit in the case before this Court comes nowhere close to establishing probable cause, and as argued below, it is so distinguishable on the issue of

good faith—the facts of this case are far worse for the government than they were in *Falso*—that *Leon* cannot save *this* search.

Applying the *Falso* probable cause analysis to the present matter, whereas the *Falso* affidavit noted the defendant's 18-year-old *conviction* for prior sexual misconduct, the Affidavit here contained only 25-year-old *allegations* of offenses against Mr. Heinrich, and actually noted that Mr. Heinrich had been released without charge following his arrest in the JNS case. Whereas the *Falso* affidavit established that the defendant had an email address, subscribed to an ISP, and that his residential address was connected to the email address, the Affidavit in this case did *not* allege that Mr. Heinrich had ever actually owned a computer, accessed the internet, or that Mr. Heinrich or 55 Myrtle had internet service. And whereas the *Falso* Court discounted the affidavit's generalized claims about individuals with a sexual interest in children collecting child pornography, the Affidavit here contains those same bald allegations, which are likewise legally meaningless as to probable cause.

The *Falso* case represents a clear example of how an old sexual abuse conviction coupled with nonspecific allegations about online activity is insufficient to establish probable cause to search in a person's home. In the case before this Court, the mere *allegations* of decades-old criminal conduct combined with only speculation about what a *hypothetical* person might do with computer *if* it were connected to the internet—does not even begin to rise to the level necessary to establish probable cause to support a search warrant.

The second case that shows the Affidavit's fatal deficiency is *United States v. Zimmerman*, 277 F.3d 429 (3rd Cir. 2002). In *Zimmerman*, police in a Pennsylvania township obtained a warrant to search for adult and child pornography. As in Mr. Heinrich's case, "[t]he warrant application did not contain any information indicating that Zimmerman ever possessed child pornography." 277 F.3d at 429. The warrant did allege, however, that "one video clip of adult pornography was in Zimmerman's home (or at least that Zimmerman had accessed it via the Internet from his home)." *Id.* at 429. The affidavit also "recounted various incidents in which Zimmerman allegedly sexually accosted students at the high school or on athletic road trips, with only brief mention made of pornography." *Id*. at 431. The affidavit also referenced a postal inspector's opinion "that persons with a sexual interest in children may possess child pornography and keep it in their homes for extended periods of time," but the postal inspector's opinion did not refer to the individual facts of Zimmerman's case. *Id*. The warrant application sought authorization to search for evidence of sexual abuse of children, including possession of child pornography, and to seize computers and pornography. *Id*. After Zimmerman was charged in federal court with possession of child pornography, he moved to suppress the evidence seized in the search warrant execution. The district court denied that motion and Zimmerman appealed to the Third Circuit. *Id*. at 432.

A divided panel of the Third Circuit held that, because "the affidavit contained no information that Zimmerman had ever purchased or possessed child pornography[,]"there was no probable cause to search his home for child pornography. *Id.* at 432. Before the Third Circuit, the government conceded this point. *Id*. As for adult pornography, the

panel found that the information in the affidavit was stale. When the warrant was issued, officers were only aware of one video clip depicting a woman performing a sexual act with a horse and that boys were shown the clip in Zimmerman's home six to ten months prior to the issuance of the warrant. *Id*. at 434. In ruling that this information was stale, the Court noted that there was no evidence in the affidavit that Zimmerman ever downloaded the video clip of the woman and the horse, and thus there was no evidence that it was located in Zimmerman's home. *Id.* at 435. As detailed further in Section C below, the Court further concluded that the *Leon* good faith exception did not save the search because the affidavit "so lacked the requisite indicia of probable cause that it was 'entirely unreasonable' for an official to believe to the contrary." *Id*. at 437.

In many ways, the facts of the *Zimmerman* case were much stronger for the government than the facts in the case before this Court. Just as in *Zimmerman*, the Affidavit in Mr. Heinrich's case contained no information that he had ever purchased or possessed child pornography. But in *Zimmerman*, the affidavit at least recounted the statements of witnesses who claimed to have been sexually assaulted within months of the application for the search warrant, and also claimed to have seen an illicit video inside the home to be searched. In contrast, the Affidavit here does not even reference a single witness statement claiming that Mr. Heinrich actually *lived* at 55 Myrtle, let alone that he owned a computer or possessed contraband of any kind inside the home. Furthermore, just as in *Zimmerman*, the 55 Myrtle Affidavit's claims about child pornography collectors were general and not particularized by any specific fact of Mr. Heinrich's circumstances. *Zimmerman* underscores the legal issue here: when an affidavit fails to

offer any date associated with supposed illegal activity inside a home, such an affidavit is *per se* stale. In this case, the fatal flaw is that the government alleges no timeframe whatsoever for any illegal act occurring inside 55 Myrtle or any illegal item or evidence of a crime existing inside the home.

Finally, in its analysis of the character of the alleged crime, *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011) further demonstrates that the information in the present Affidavit is stale. In *Doyle*, a January 2004 warrant affidavit seeking to search for a computer and child pornography alleged that Doyle had sexually abused three children in his home in late 2003 and that one of the children had indicated that Doyle showed him a photo of a nude child. *Id.* at 475. But the affidavit failed to allege a timeframe during which law enforcement believed the defendant possessed child pornography. *Id*. at 466. The Fourth Circuit noted that where the majority of the affidavit was focused on sexual assault allegations, and not child pornography offenses,

> [t]here is, however, remarkably scant evidence in the affidavit (or Rouse's investigation summary) to support a belief that Doyle in fact possessed child pornography. The bulk of the information supplied in the affidavit concerned allegations of sexual assault. But evidence of child molestation alone does not support probable cause to search for child pornography.

United States v. Doyle, 650 F.3d 460, 472 (4th Cir. 2011).

In suppressing the evidence seized in the search, the Fourth Circuit clarified that the issue was not that the evidence of illegal conduct was too old. Rather, the government's problem was that law enforcement did not tell the magistrate judge how much time had elapsed. *Doyle*, 650 F.3d at 475. The *Doyle* decision explained that the

staleness analysis need not even start when there is absolutely nothing provided to the judge reviewing the search warrant as to when contraband was possessed.

The *Doyle* case is remarkably similar to Mr. Heinrich's case, but, as in *Falso* and *Zimmerman*, the facts here are much weaker for the government. Just as in the *Doyle* case, the 55 Myrtle Affidavit alleges prior sexual assaults followed by a search for child pornography. And just as in *Doyle*, the 55 Myrtle Affidavit utterly fails to state how much time has passed since Mr. Heinrich allegedly ever possessed child pornography. That, by itself, requires a finding that there is no probable cause to search 55 Myrtle.

But in *Doyle*, the affidavit explained that more than one victim claimed to have been recently sexually assaulted by Doyle inside his home and that at least one victim was shown a nude photo of a child, presumably also in Doyle's home. Here, by contrast, the Affidavit does not claim that any of the alleged sexual assaults happened inside of 55 Myrtle, as there is no evidence that Mr. Heinrich lived in that house when the prior crimes occurred between 1986 and 1989 (nor was there any evidence provided to the issuing judge that Mr. Heinrich ever lived in the house). In *Doyle*, where the Court could at least presume that the photograph of the nude child was shown to the victim in Mr. Doyle's home within a few months of the warrant application, the Court *still* found that the affidavit's failure to allege any date was fatal to the warrant application and that the *Leon* good faith exception could not save the woefully deficient warrant. Here, the situation is much more dire—there is simply no date offered and therefore the judge had no ability to determine whether the purported possession of child pornography was months, years, or decades prior to the warrant application. Moreover, just as in *Doyle*, "it

[is] unreasonable to believe that probable cause was demonstrated to search [the] home given the complete absence of any indication as to when the pictures were possessed . . . . [T]here is absolutely no indication in the affidavit as to when probable cause to search arose." *Id*. at 474.

These analogous cases establish that—even considering the character of the crime of possession of child pornography—if the information contained in the Affidavit is stale and the Affidavit fails to set forth a defined timeframe for criminal activity in the place to be searched, then the Affidavit lacks probable cause. *Falso*, *Zimmerman* and *Doyle* provide this Court strong persuasive precedent that the specific facts in this case compel the conclusion that there was no probable cause to support the search warrant.

2. Characteristics of the Defendant Including the Defendant's Course of Conduct and Whether He is Nomadic or Entrenched

The facts contained in the Affidavit have little or no bearing on this factor of the staleness analysis. As opposed to the allegations against Mr. Heinrich 25-plus years ago, this factor focuses on whether, in 2015, something about Mr. Heinrich increases the likelihood that evidence of a crime will be discovered in his home. What is clear about the Affidavit is that investigators made no attempt to inform the court about *any* facts regarding Mr. Heinrich in 2015. While they certainly could have employed investigative techniques to demonstrate something about his recent conduct (criminal or otherwise) the Affidavit is simply silent as to anything about Mr. Heinrich's present-day characteristics.

The Affidavit explains that Investigator Kern has been in law enforcement for fifteen years, an investigator for three years, and that he has executed numerous search

warrants. But his Affidavit says nothing about commonly-employed techniques to learn about an individual or a home associated with that individual. These techniques include physical surveillance, public records for ownership of the property to be searched or a nearby vehicle, obtaining utility records for the property to be searched, obtaining postal records to see who receives mail there, or, in the case of a computer-related crime, issuing a subpoena to an internet service provider to establish that the home is connected to the internet and who pays for that service. The Affidavit is silent as to any such potential investigation that could have aided the judge in determining whether or not there was probable cause.

It is also noteworthy that although investigators searched Mr. Heinrich's home in 1990, the Affidavit says nothing of where he has lived between 1990 and 2015. Nothing is included about how many times he has moved since 1990, or about how long he has been living at 55 Myrtle. Therefore, this factor weighs heavily in favor of suppressing the evidence because the 25 years that have passed since the last alleged crime require that the government justify the belief that evidence of a crime might still remain in a home associated with Mr. Heinrich today. Because the Affidavit does nothing to assist the analysis, this factor indicates that it was stale.

3. The Nature of the Evidence To Be Seized

In this case, in part, the Affidavit claims to be searching for direct evidence of a possible murder, kidnapping, or sexual assault, or evidence that would theoretically be retained as a trophy. That claim is contrary to how the law views staleness for these sorts of crimes. "[A] highly incriminating or consumable item of personal property is less

likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating." *Steeves*, 525 F.2d at 38; *see also State v. Jones*, 261 S.E.2d 860, 865 (N.C. 1980) (probable cause after 5 months as to gloves and hatchet used in murder, as they "were not particularly incriminating in themselves and were of enduring utility to defendant"). It is true that courts sometimes find that certain evidence sought by the Affidavit is more likely to be retained for longer periods of time, such as a firearm and other clothing since they may not appear incriminating on their own. *See Steeves*, 525 F.2d at 38. However, such cases cannot account for the passage of decades, especially when investigators previously searched Mr. Heinrich's home within months of the Wetterling abduction and did not find the clothing or weapons they claim could be retained today.

The affidavit also seeks child pornography. Although courts have ruled that evidence of child pornography possession, including images themselves, can be retained for years, that information is not relevant to a staleness analysis when "there is absolutely no indication in the affidavit as to when probable cause to search arose." *Doyle*, 650 F.3d at 474. Specifically, the law enforcement officer only speculated that the home might contain these items, but no such items were ever reported or observed.

4. The Place To Be Searched

As with the characteristics of the defendant, the Affidavit is utterly devoid of any information about 55 Myrtle, other than to say that it is Mr. Heinrich's "home[.]" Ex. 8 at 1-4. No information is included about how long Mr. Heinrich has resided there, how often he comes and goes, what time the lights go out at night, whether he has been seen

moving items to and from the house, or whether any other person has been seen at the home. Particularly as to whether there is child pornography in the home, does the home have a computer or an internet connection? The judge reviewing the warrant could only guess the answers to any of these questions because the Affidavit is void of this information. In other words, the Affidavit is entirely unhelpful in assisting the reviewing judge in making a determination as to whether there is a fair probability that evidence of 25-year-old crimes or possibly child pornography might exist inside this home. The sheer lack of any information regarding this factor weighs heavily in favor of staleness.

5. Any Corroboration of the Older and More Recent Information

Courts may certainly use years-old information to arrive at probable cause to search, but it must be accompanied by the kind of proof that is conspicuously missing here: that the offense is continuing in nature or that some new information refreshes probable cause because it demonstrates that evidence of a crime will now be found in the place to be searched. *See, e.g., United States v. Maxim*, 55 F.3d 394, 397 (8th Cir. 1995) (four-year-old information about firearm possession augmented and confirmed by witness who saw defendant in possession of firearms four months prior to the execution of the warrant); *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008) (no probable cause where "there is no new evidence to 'freshen' the stale evidence").

The concept of "refreshing" or "freshening" can sometimes turn stale information into support for probable cause. *See, e.g., United States v. Thomas*, 605 F.3d 300, 310 (6th Cir. 2010) (defendant claims informant's 8-month-old tip regarding marijuana growing operation stale, but court responds that information was "sufficiently refreshed"

by information about defendant's high electricity bill over last 6 months). The government may argue that the 2015 DNA result implicating Mr. Heinrich in the 1989 sexual assault of JNS freshens probable cause with new information. But that fact does nothing to make it more likely that, in 2015, evidence of the crimes would be located among Mr. Heinrich's property. The DNA result, at best, simply reveals connections about old information. The Affidavit makes no statements about anything that Mr. Heinrich did or said after 1990. In other words, the Affidavit says nothing of a continuing crime or even a separate crime that law enforcement, an informant, or even a lay witness has seen in the last 25 years. Nor is there any information that any witness has observed at the 55 Myrtle address any evidence that might be connected with this criminal conduct. Law enforcement officers simply want to have another opportunity to look for the same evidence they searched for, unsuccessfully, 25 years ago.

In sum, comparing the facts of this case with the factors that courts have used to determine whether information in a warrant application is stale, each factor overwhelmingly weighs in favor of Mr. Heinrich. While there is no bright-line rule for determining staleness, *Pruneda*, 518 F.3d at 604, allowing the warrant to stand would destroy the limitations set in the case law that interprets the staleness doctrine. Typically, the maximum amount of time courts allow before ruling information stale—in a child pornography case or otherwise—is five years. *See, e.g., United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005) (finding five-year-old information relied upon in part in issuing search warrant was not stale); *United States v. Irving*, 452 F.3d 110, 116, 125 (2d Cir. 2006) (rejecting staleness argument based in part on a five-year-old witness

statement, child erotica images on diskettes found five years earlier in the defendant's luggage, and five-year-old identifications by children who witnessed the defendant sexually abuse young boys); *see also United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010) (affidavit established probable cause where defendant last traded child pornography eighteen months before the warrant issued). Twenty-five years is certainly too long. The Court should conclude that the Affidavit's information was stale and therefore could not support a finding of probable cause to search 55 Myrtle.

B. The Affidavit Provides Absolutely No Nexus Between The Home and Evidence of A Crime.

Twenty-five-year-old stale information is not the only problem with the Affidavit. The document fails to explain Mr. Heinrich's connection to the home to be searched, and the details offered in the Affidavit make no connection between the alleged crimes and 55 Myrtle. Where suspicion follows the person, and there is not some independent basis to suspect a place for harboring contraband, the failure to describe the person's connection to the place to be searched is a fatal flaw.

In *United States v. Frangenberg*, 15 F.3d 100 (8th Cir. 1994), police sought a warrant after the suspect asked a pharmacist to refill a prescription under suspicious circumstances. The Eighth Circuit concluded that, because the warrant did "not indicate how [the suspect] was connected to the place to be searched[,]" it was doubtful that "the information in the warrant application, standing alone, provide[d] an adequate basis to conclude that there was 'a fair probability that contraband or evidence of a crime' would

be found at" the home to be searched. 15 F.3d at 102 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Here, the only investigative theory offered by the Affidavit is that the alleged crimes follow the person. Investigators believed that Mr. Heinrich committed crimes 25 years ago, and so today there must be contraband wherever he happens to be living. The Affidavit makes clear that the police neither believed the alleged crimes happened inside 55 Myrtle nor was there some independent basis to believe, other than bare speculation, that Mr. Heinrich hid the evidence of a crime there.

Thus, there are two failures as to the issue of "nexus"—the supposed connection between Mr. Heinrich and the property to be searched. First, the warrant application offers only *one word*—"his"—to describe Mr. Heinrich's connection to the property to be searched. Second, even if the Court ignores this serious constitutional problem, other than a speculative and conclusory "trophy" theory, the rest of the Affidavit provides no explanation of how crimes committed between 1986 and 1989 are connected to the 55 Myrtle address in 2015. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Doyle*, 650 F.3d at 471 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)).

Moreover, the Affidavit's claims that officer training and experience show that child molesters possess child pornography is meritless given that there was no particularized showing that Mr. Heinrich's specific conduct corroborates that theory.

"[E]vidence of child molestation alone does not support probable cause to search for child pornography." *Id.* at 472 (4th Cir. 2011) (citing *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008)); *see also Falso*, 544 F.3d at 124 ("[A]lthough Falso's crime allegedly involved the sexual abuse of a minor, it did not relate to child pornography. That the law criminalizes both child pornography and the sexual abuse (or endangerment) of children cannot be enough.") (citation omitted)); *Hodson*, 543 F.3d at 292 ("[I]t is beyond dispute that the warrant was defective for lack of probable cause—Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography)."); *Virgin Islands v. John*, 654 F.3d 412, 419-21 (3rd Cir. 2011) (citing *Falso* and *Hodson*, *supra*, for the proposition that there is no presumptive correlation between child molestation and possession of child pornography).

While the government may rely on caselaw such as *United States v. Colbert*, 605 F.3d 573, 577 (8th Cir. 2010) for the proposition that sexual conduct with a child *is* a factor that a judge can consider in determining whether a defendant likely possessed child pornography, *Colbert* is distinguishable from the facts for this case. In *Colbert*, the defendant attempted to lure a five-year-old girl to his apartment by telling her that he had videos she would like to watch. A vehicle with a license plate provided by a witness was located by officers at Colbert's apartment. 605 F.3d at 575. In ruling that these facts supported probable cause to search Colbert's apartment, a divided panel of the Eighth Circuit distinguished *Falso* and *Hodson*, by stating that "[n]either case involved an

application for a search warrant based on the defendant's *contemporaneous* attempt to entice a child." *Id*. at 577 (emphasis added). Further, the panel noted that

> neither case involved an application to search the exact location of the relevant sex crime. Here, in contrast, law enforcement officers drafted the search warrant as an *immediate* response to Colbert's attempted enticement. The officers executed the warrant *on the same day* that Colbert approached the child at the park, and they focused their search *on the very place* where Colbert had expressed a desire to be alone with a five-year-old girl.

Id. at 578 (emphases added). The facts of this case are quite different than the facts of *Colbert*. In this case, the Affidavit sought to search Mr. Heinrich's home for evidence of alleged crimes that were more than 25-years old, unlike the "immediate" search warrant application to investigate the "same-day" enticement as was at issue in *Colbert*. And in this case, there is no claim that 55 Myrtle is involved in the offense, whereas, in *Colbert*, the defendant's home was "the very place" where the defendant attempted to lure a child.

Although some cases support the idea that child pornography is more often possessed in places of privacy or seclusion, *see United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006), the government cannot rely on that theory when there has been no showing that 55 Myrtle contained a computer or was connected to the internet.

It is important to note that this was the second search of a home associated with Mr. Heinrich for essentially the same evidence. The 1990 search of his father's home, which recovered no contraband, or evidence of a crime, seriously diminishes any possibility of establishing probable cause with an Affidavit that relies primarily on the same dated information that was contained in the 1990 affidavit. The 2015 warrant Affidavit's description of Mr. Heinrich's multiple non-incriminating statements to law

enforcement in 1990, as well as the voluntarily surrender of his shoes and car tires to investigators, certainly does not provide additional support for nexus or probable cause to believe that evidence of the alleged crimes would be located at this address.

C. The *Leon* Good Faith Exception Does Not Save The Search.

> When the Supreme Court announced the good faith exception in *Leon*, it weakened the exclusionary rule, but it did not eviscerate it. *Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble*.

Zimmerman, 277 F.3d at 437-38 (emphasis added). Here, that trouble is obvious. The government only has 25-year-old allegations, mere speculation about what might be in the home in 2015, and absolutely no evidence that the home is connected to any crime. Faced with multiple fatal flaws, the government will be forced to argue the results of the illegal search could still be admissible pursuant to the *Leon* good-faith exception. *United States v. Leon*, 468 U.S. 897, 919–20 (1984). However, well-established precedent precludes reliance on a warrant based on a "bare bones" affidavit such as this one. *Id*. at 926 (noting that the warrant at issue in *Leon* was "clearly supported by much more than a 'bare bones' affidavit").

The exclusionary rule is designed to deter police conduct that violates the constitutional rights of citizens. *Leon*, 468 U.S. at 919. "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *United States v. Peltier*, 422 U.S. 531, 539 (1975) (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)). *Leon* aims to balance the exclusionary rule with the interest of promoting

warrant applications over warrantless searches. 468 U.S. at 919–21. Because the exclusionary rule is aimed at punishing police misconduct rather than magistrate error, exclusion is justified:

> (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. Houston, 665 F.3d 991, 995 (8th Cir. 2012) (citing *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007)).

This case falls into the third circumstance in which exclusion is justified: the Affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Houston*, 665 F.3d at 995. Following that standard, *Leon* cannot correct the unconstitutional Affidavit and the resulting search of 55 Myrtle, as well as the taking of a DNA swab.

As a procedural matter, it is important to note that at the pretrial motions hearing, the government called Captain Pamela Jensen to attempt to establish the good faith of officers executing the search warrant at 55 Myrtle. However, retrospective officer testimony after the execution of a search warrant is simply not relevant to either a probable cause or *Leon* good faith analysis because

> a determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit. Whether an objectively reasonable officer would have recognized that an affidavit was

> so lacking in indicia of probable cause as to preclude good faith reliance on the warrant's issuance can be measured only by what is in that affidavit.

United States v. Laughton, 409 F.3d 744, 751-52 (6th Cir. 2005); *see also Hodson*, 543 F.3d at 292 ("The question we address here is whether the faceless, nameless 'reasonably well trained officer' in the field, upon looking at this warrant, would have realized that the search described . . . did not match the probable cause described . . . and therefore the search was illegal, despite the magistrate's decision to the contrary.") Thus, Captain Jensen's testimony is irrelevant as a matter of law and this Court should not consider it in deciding the present motion.

Examining the four corners of the warrant, Mr. Heinrich's case clearly falls outside of the protections of the *Leon* good faith exception because of the Affidavit's basic, common-sense problem as to both staleness and nexus. The Affidavit starts with information about crimes that are at least 25 years old. It includes no information establishing that Mr. Heinrich lives at the residence. There is no discussion of law enforcement even trying to provide the Court with any of the necessary information about Mr. Heinrich or his home. There was no mention of physical surveillance conducted, a review of vehicle registration records, or utility information. The Affidavit seeks to search for child pornography but does not even allege there is a computer in the home, an internet connection, or any particularized evidence that Mr. Heinrich ever possessed child pornography in any form. The affidavit says *nothing* about Mr. Heinrich's life since 1990. These are not complicated legal concepts; these are fundamental factual deficiencies. Simply put, because the Affidavit contains absolutely no recent facts about

the investigation, the home, the individual, or the required nexus, it is "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Houston*, 663 F.3d at 995.

Similar to the probable cause analysis above, this case is analogous to the Fourth Circuit's decision in *Doyle* as to *Leon* good faith protection because, like the *Doyle* affidavit, the Affidavit in this case presented information so stale that no officer could rely on it. *Doyle* held that

> where the totality of the information provided to the magistrate included no indication as to when the events supposedly creating probable cause to search took place, we cannot conclude that the officers reasonably relied on the resulting search warrant . . . . Here, nothing indicated when or if child pornography allegedly existed in Doyle's home. We conclude that the objectively reasonable officer would not rely on a warrant application so devoid of necessary information. Moreover, because reliance on the warrant was not objectively reasonable, we find that the good faith exception recognized in *Leon* is inapplicable.

650 F.3d at 475-76 (footnote and citations omitted). Just as in *Doyle*, in addition to the 25-year passage of time since the most recent allegation of criminal activity, the Affidavit in this case also made no statements about *when* or *if* child pornography supposedly existed in Mr. Heinrich's home. With those facts missing, it was not objectively reasonable for officers executing the warrant on 55 Myrtle to believe the search was supported by probable cause. Just as the good faith argument failed in *Doyle*, good faith should likewise not save the search here.

Similarly, the *Zimmerman* case reviewed above provides additional persuasive authority that the government cannot successfully argue that the *Leon* good faith exception applies in this case. In *Zimmerman*, the court concluded that the *Leon* good

faith exception did not save the search. Because the law enforcement agent in *Zimmerman* never made a claim that an illegal item had ever been in the subject home, the affidavit "so lacked the requisite indicia of probable cause that it was 'entirely unreasonable' for an official to believe to the contrary." 277 F.3d at 437. In addition to finding *per se* staleness based on the affidavit's failure to allege any timeframe for the possession of child pornography inside the home, the *Zimmerman* Court also found that same deficiency prevented the government from availing itself of the *Leon* good faith exception.

More specifically, the *Zimmerman* Court focused on the staleness of the information regarding the existence of an illicit video and noted that "nothing in the affidavit indicated that such pornography was ever in Zimmerman's home" *Id*. at 437. The Court reasoned that "[a]ny reasonably well-trained officer in the stationhouse shop would recognize as clearly insufficient" the affidavit that was presented to the magistrate in that case. *Id*. at 437 (quoting *United States v. Williams*, 3 F.3d 69, 74 (3d Cir. 1993)). Because the Affidavit in this case likewise presented only decades-old stale information and no evidence that child pornography ever existed at 55 Myrtle, this Court should rule, consistent with *Zimmerman*, that *Leon* does not remedy the constitutional deficiencies in the warrant.

In addition to the good faith problems with stale evidence, *Leon* cannot save the search because "[w]ithout any nexus between the criminal activity and the residence, reliance upon this warrant would be completely unreliable and would place it beyond the good faith exception." *Kemper*, 375 F. Supp. 2d at 554 (in murder case, stale information

did not support probable cause and the good faith exception to the exclusionary rule was not applicable; *John*, 654 F.3d at 418-19 (reliance unreasonable despite affidavit providing reasonable belief that defendant had committed sex crimes because allegations did not even hint at any connection to the separate crime of possessing child pornography).

No law enforcement officer could reasonably believe that the Affidavit in this case presented probable cause because the Affidavit is so lacking on the issue of nexus between evidence of a crime and 55 Myrtle. That is because when an "affidavit[] simply do[es] not say very much about [the defendant] or his residence," officers cannot reasonably rely on the issuing judge's probable cause determination. *United States v. Herron*, 215 F.3d 812, 814 (8th Cir. 2000). In *Herron*, a search warrant issued for Mr. Herron's residence, following his alleged involvement in a relative's marijuana grow operation. While the supporting affidavits included his prior marijuana convictions and his family relationship to the marijuana growers, "the affidavits [made] only two passing references to the Herron residence" and only three references to Herron. *Id*. at 815. In concluding that suppression was warranted in spite of the good faith exception, the Eighth Circuit ruled that "the lack of probable cause in the affidavits would have been apparent to reasonable officers." *Id*. Further, just as in this case, the Eighth Circuit explained that "we are mindful that the subject of this search—a person's home—enjoys special protection under the Fourth Amendment." *Id*. Similarly, the Affidavit in this case says nothing meaningful about 55 Myrtle and nothing at all about Mr. Heinrich in 2015. The startling lack of probable cause is so blatant that any reasonable officer could plainly

see it on the face of the warrant. The flagrant dearth of any allegation in the Affidavit that the crimes committed between 1986 and 1989 were in any way connected to the home, and the Affidavit's woeful silence as to evidence that the materials sought existed there was obvious to any reasonable officer.

The most important reason that this Court should not allow the government to rub the *Leon* magic lamp and overcome the obvious probable cause deficiencies in this warrant is because this is not simply about a search of one man's home. Although it might be understandable in the emotionally charged environment of trying to solve a quarter century old crime, law enforcement's efforts to obtain a warrant to search Mr. Heinrich's home can only be described as overreaching. The information presented to the Court to seek a warrant fell far short of what is necessary to authorize an intrusion into a person's home under the Fourth Amendment of the United States Constitution and a trained law enforcement officer would recognize that. If this search warrant is validated by this Court, then any person's home is subject to police intrusion if the police believe that decades-old evidence somehow gives them a new theory of investigation, no matter whether the home had anything to do with the crime or whether there is a fair probability that evidence of a crime will be located in that home. Although an average person might believe that in some situations there may be justifiable reasons for bending the constitutional safeguards, the Court knows all too well that if the Constitution is to have any value, it must protect us all equally.

V. Conclusion

The warrant affidavit lacks probable cause because the information contained in it was stale, and there was no nexus alleged between any criminal activity and 55 Myrtle. Those deficiencies were obvious and would have been obvious to the officers that applied for and executed the search warrant. For these reasons the *Leon* good faith exception does not apply. The evidence seized must be suppressed.

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Respectfully submitted,

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