Motion To Suppress Fruits Of An Unlawful Search[2012]

INTRODUCTION

Defendant CLIENT NAME is charged in a one-count indictment with violation of 18 U.S.C. § 922(g), felon in possession of a firearm. On November 2, 2011, San Francisco police seized the firearm at issue during a search executed by means of a search warrant at ADDRESS, Apt. 309 in San Francisco. Mr. NAME now moves for an order suppressing all evidence seized from that residence on several grounds. First, he contends that the search warrant affidavit utterly lacked probable cause that fruits or instrumentalities of a crime would be located at the residence in question. Second, Mr. NAME argues that the bulk of the information relied upon by the affiant to secure the search warrant was impermissibly stale at the time the warrant issued.[1] Third, even if the Court finds that warrant affidavit sufficiently provides probable cause as to his involvement in criminal activity, Mr. NAME submits that the warrant is still invalid because it lacked probable cause that he resided at the searched location. Fourth, should the Court reject all the aforementioned arguments, Mr. Smith moves for suppression of particular evidentiary items seized because such items are outside of the scope of the permissible bounds of the warrant.

STATEMENT OF FACTS

The statement of probable cause submitted in support of the aforementioned search warrant application is attached hereto as Exhibit A, and summarized as follows:

I. Inspector Peagler's Credentials

The warrant begins with a summary of Agent Peagler's credentials, which includes fifteen years of police work and specialized training with the FBI and the DEA related to criminal street gangs and narcotics trafficking organizations. In addition to the standard police academy training, Inspector Peagler describes experience with "more than one thousand narcotic related criminal investigations." *See* Exhibit A at 5. Inspector Peagler describes his work as "specifically relating to African American gangs" and has "participated in hundreds of investigations regarding narcotic related criminal activity; narcotic trafficking; criminal street gangs, gang members, human traffickers, pimps/prostitutes and related associates." *Id.* at 5-6. In addition to these credentials, Inspector Peagler indicates that he has "spoken" to numerous investigative agencies, individuals, and criminals over the course of his duties as a police officer on the topics of "pimping/pandering investigations [and] prostitution related investigations." *See id.* Inspector Peagler additionally cites numerous training courses he has undertaken, none of which specifically relate to pimping or prostitution.

II. Evidence Related to Mr. NAME's Alleged Involvement in a Shooting in April, 2011

The first category of substantive information contained in the warrant affidavit describes a shooting of James Robinson (a "'self admitted' pimp") that occurred in April 2011 on Polk Street in San Francisco (hereinafter, the "Robinson shooting"). As relevant to Mr. NAME, Robinson purported related the following facts in the affidavit:

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[1] As this Court is aware, the government has only produced a redacted version of the warrant affidavit at issue. In accordance with the discussion with the Court at the July 10, 2012 status conference, Mr. NAME first challenges the existence of probable cause and staleness issues as to the warrant in its redacted form.

1. Two days before the shooting, Robinson allegedly had a verbal altercation with Mr. NAME about "Oakland pimps bringing prostitutes to work the Polk Gulch area of San Francisco and how Oakland pimps were essentially better/more knowledgeable pimps than San Francisco pimps;"
2. On the night of the shooting, Robinson had seen Mr. NAME driving a silver Mercedes Benz on Polk Street;
3. Robinson identified Mr. NAME from a photographic lineup as one of his two assailants.

The affidavit also notes that Robinson's positive identification of Mr. NAME as a shooter is uncorroborated by any of the on scene witnesses, physical evidence or video footage. *See* Exhibit A at 7. Nor does the affidavit cite any evidence that would tend to establish any connection between the Robinson shooting and #ADDRESS, Apt. 309.

Although not included in the warrant application, SFPD's investigation of the alleged shooting revealed facts different than those recited in the warrant affidavit at issue here. *See* 4/3/2011 SFPD Police Report, attached hereto as Exhibit B. In this report of investigation, SFPD Officer Peterson interviewed Robinson at San Francisco General Hospital directly after the shooting. *See id.* at WS352. Therein, Robinson allegedly relayed the fact that he "didn't know the suspects but he could recognize them if he saw them again." *Id.* There is no mention in the Peterson report of Robinson's assailant having engaged in any alleged "pimping" altercation with Robinson the night prior to the shooting, and no mention of any knowledge on the part of Robinson that Mr. NAME was involved in that altercation or had any involvement with Robinson's shooting whatsoever.

III. Evidence Related to Narcotics

The second category of substantive information relates to Mr. NAME's possible involvement with narcotics. Specifically, the warrant relays that on October 21, 2011, ten days prior to the day the search warrant affidavit was signed, Mr. NAME was arrested with a "suspected
portable methamphetamine lab" in the trunk of his Mercedes Benz. *See id.* at 8. According to the affidavit, Mr. NAME informed arresting officers that the chemicals belonged to a friend, Elizabeth Stepanov, who was later arrested at the Holiday Inn with one gram of suspected methamphetamine.

The warrant affidavit states no connection whatsoever between alleged narcotics manufacturing, dealing, using, or selling and the residence at #ADDRESS, Apt. 309. Nor does the affidavit contain any information that the "chemicals" found in Mr. NAME's car were ever tested or determined to be illegal narcotic drugs.

IV. Evidence that Mr. NAME is a Pimp

The third category of substantive information within the warrant affidavit attempts to tie Mr. NAME to pimping activities. In this regard, the warrant affidavit indicates:

1. Inspector Peagler believes that Mr. NAME has engaged in pimping, pandering and gang related activities for years prior, based on prior investigations and interviews. *See* Exhibit A at 8;
2. Officer David Nastari also believes the Mr. NAME has engaged in "illicit pimping, pandering, and gang-related criminal" activities. *See id.*;
3. In April, 2011, shooting victim Robinson allegedly had an argument with Mr. NAME about how "Oakland pimps bringing prostitutes to work the Polk Gulch area of San Francisco and how Oakland pimps were essentially better/more knowledgeable pimps than San Francisco pimps;" *See id.* at 7.
4. On 10/27/2011, Mr. NAME was seen by a Confidential Reliable Informant ("CRI") picking up Stephanie Anne Moore, a woman who had been arrested for prostitution-related arrests 46 times since 2005, in a White Buick Lacrosse automobile bearing California license plate 6SSB334. *See id.* at 11;
5. A search of Elizabeth Stepanov's computer seized during her October 21, 201, arrest revealed "numerous photographs similar to those posted on adult websites; emails from NAME; photographs of large bruises on Stepanov's upper thigh; photographs of young women wearing suggestive clothing. *See id.* at 12.

V. Evidence that Mr. NAME Resides at #ADDRESS, Apt. 309

With respect to establishing a connection between Mr. NAME and #ADDRESS, Apt 309, the warrant cites the following facts:

1. In "early 2011," SFPD Officer Nastari saw an "attractive white female" driving a silver Mercedes Benz, CA license plate number 6RHR930, registered to Mr. NAME, and park in the secure area of #ADDRESS. *See id.* at 8;
2. Law enforcement indices indicate that both Stephanie Anne Moore and Elizabeth Stepanov reside at #ADDRESS, Apt. 309. *See id.* at 11;
3. Law enforcement indices also list a former Los Angeles residence shared by Ms. Moore and Mr. NAME, with no information as to time period. *See id.*;
4. On October 25 and October 27, 2011, physical surveillance revealed the abovereferenced silver Mercedes Benz parked on the first level of the parking garage at #ADDRESS. *See id.*; 5.
5. On October 27, 2011, Inspector Peagler saw Mr. NAME and a white female enter the lobby of #ADDRESS. *See id.* at 12;
6. A Confidential Informant (CI) (as opposed to a Confidential Reliable Informant (CRI)) "closely associated with the Argenta," stated that Ms. Moore and a black male who drives a silver Mercedes and various expensive looking cars lives in apartment #309. When shown a picture of Mr. NAME, the CI identified Mr. NAME as the black male who lives in #309. *See id.*

VI. Evidence Related to Expert Opinion

The final category of information set forth in nearly five pages of the warrant affidavit relates to Inspector Peagler's training and experience on the modus operandi of pimps, prostitutes, and sex workers. While the expert opinion of Inspector Peagler contains many generalized statements about how sex traffickers and pimps operate, it is devoid of any opinion

that pimps or sex traffickers operate their businesses out of their residences or that fruits and instrumentalities of pimping or sex trafficking are likely to be found in the residences of pimps or sex traffickers. Similarly, the warrant affidavit is devoid of any information from which a magistrate could conclude that evidence of pimping, prostitution, pandering, or the like would necessarily be retained by the alleged pimp for long periods of time.

VII. The Search Warrant Did Not Authorize Seizure of Narcotic-Related Material, Chemistry Equipment, or Glassware

The final portion of the affidavit, Exhibit A, lists the evidence to be searched for and the items to be seized. *See* Exhibit A at 17-20. The list includes all the items indicative of pimping activity named in the affidavit. Narcotics and evidence of drug dealing and manufacturing are noticeably missing from the list of items to be seized, as are glassware and chemistry equipment. Despite this fact, searching officers seized items described as "chemistry paraphernalia in plastic case," from #ADDRESS, Apr. 309 as evidenced by the police report describing the execution of the search warrant and listing the warrant returns. *See* Exhibit C, Police Report detailing Warrant Returns and Evidence Seized, No. E-27, at WS-0051.

ARGUMENT

The Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." and that "no warrants shall issue, but upon probable cause, supported by oath or affirmation . . . ." U.S. CONST. amend. IV. A valid warrant must demonstrate both probable cause as to criminal activity, and "a showing that evidence probably will be found at the locations searched." *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995); *see also United States v. Pitts,* 6 F.3d 1366, 1369 (9th Cir. 1993) (affidavit must support a reasonable nexus between the activities supporting probable cause and the location to be searched). Moreover, the information supporting the warrant must be current enough to demonstrate that probable cause exists at the time of the proposed search. The listed evidence cannot be stale and must contain facts closely related in the time to the issuance of the warrant. *Sgro v. United States,* 287 U.S. 206, 211 (1932).

In this case, the search warrant at issue for #ADDRESS, Apt. 309 was fatally flawed. The affidavit[2] both fails to establish probable cause that Mr. NAME was engaging in pimping, pandering or prostitution and fails to demonstrate a reasonable nexus between these alleged activities and the searched location. Accordingly, the affidavit utterly lacks probable cause that the fruits or instrumentalities of pimping, pandering and prostitution (as listed in Exhibit A to the warrant affidavit) would be located there Moreover, the warrant affidavit rested on facts far attenuated from the date of the warrant request and thus, too stale to support probable cause.

[2] Affidavit" as referred to in this motion means the redacted affidavit provided by the government in discovery as of 7/25/2012 and attached hereto in its redacted form as Exhibit A. For the record, the redacted form of the affidavit is missing pages 9 and 10 entirely, as well as several lines from pages 8 and 10.

Nor do the allegations of separate, isolated criminal activities, such as the shooting of Robinson or the possession of a "suspected methamphetamine lab" give rise to probable cause to search #ADDRESS, Apt. 309 for evidence of pimping, pandering, or prostitution. The warrant authorizes the seizure of evidence related to pimping and sex crimes only – not Robinson's shooting or narcotics. Accordingly, Mr. NAME argues herein that any evidence of Mr. NAME's involvement in Robinson's shooting or suspected narcotics is irrelevant to the probable cause assessment by this Court as to the likelihood that evidence of pimping, prostitution or pandering would be found at #ADDRESS, Apt. 309. Assuming, *arguendo*, that the Court deems the Robinson shooting and "suspected narcotics" evidence as relevant to its overall probable cause determination under a totality of the circumstances approach, such evidence is fatally flawed due to its staleness (in the case of the Robinson shooting), its nature, and its lack of nexus to #ADDRESS, Apt. 309.

The appropriate remedy for the cumulative effect of these flaws is the suppression of all evidence gathered from the search of Apartment 309. In the event the Court determines that the warrant affidavit does adequately state probable cause as to the likelihood that the evidence listed in Exhibit A would be found in the searched location, Mr. NAME moves to suppress all the evidence wrongfully seized during the search; namely, the chemistry equipment, glassware, and plastic case (listed in the property inventory as Item E-27, attached hereto as Exhibit C). The seizure of said evidence exceeded the scope of the police's authority under the plain terms of the warrant affidavit. The proper remedy for such a violation is suppression of the evidence.

I. AS AN OVERNIGHT GUEST AT #ADDRESS, APT. 309, MR. NAME HAS STANDING TO BRING THE INSTANT MOTION

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Ever since the United States Supreme Court shifted constitutional focus with this now-famous statement in *Katz*, "it has been the law that capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Minnesota v. Olson*, 495 U.S. 91, 95, 110 S. Ct. 1684 (1990) (internal quotations and citations omitted). *Cf. Katz*, 389 U.S. at 352 ("No less than an individual in a business office, *in a friend's apartment*, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.") (emphasis added). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Olson*, 495 U.S. at 95-96; *see also United States v. Gamez-Orduño*, 235 F.3d 453, 458 (9th Cir. 2000).

As the Supreme Court explained in *Minnesota v. Olson*, one such reasonable expectation of privacy is that of a houseguest in his host's home. *See Olson*, 495 U.S. at 100 ("[W]e think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home."). Given the fact that Mr. NAME was an overnight houseguest at ADDRESS. Apt. 309 in November, 2011, he had a reasonable expectation of privacy in that residence at the time of the search and has standing to challenge the validity of the warrant. *See* Exhibit D, Declaration of CLIENT NAME in Support of Motion to Suppress.

II. THE WARRANT AFFIDAVIT UTTERLY LACKS PROBABLE CAUSE THAT

FRUITS OR INSTRUMENTALITIES OF A CRIME WOULD BE LOCATED AT #1 POLK STREET, APT. 309

The Fourth Amendment provides that no warrants shall issue without probable cause. U.S. CONST. amend. IV. A valid warrant must demonstrate both probable cause as to criminal activity and a nexus – "a showing that evidence probably will be found at the locations searched." *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995). The central requirement of probable cause is imperative "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" but still "give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1945). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his [or her] action cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

A. The Affidavit Lacks Probable Cause that Evidence of Pimping, Prostitution, or Pandering Would be Located at #ADDRESS, Apt. 309.

Here, the plain terms of the warrant affidavit sought evidence *solely related to pimping, pandering and prostitution. See* Exhibit A at 12-20 (both expert opinion and evidence list sought by police solely related to pimping, prostitution and sex related crimes). In its redacted form, the warrant affidavit sorely lacks probable cause that Mr. NAME is involved in any of the aforementioned crimes, much less that evidence of any of these crimes would be located at #ADDRESS, Apt. 309 on or about October 31, 2011. The probable cause analysis accordingly fails, both as to criminal activity on the part of Mr. NAME and any nexus between said criminal activity and the searched location.

1. No Probable Cause that Mr. NAME is Involved in Pimping, Pandering or Prostitution

As summarized above, the factual basis stated in the affidavit in support of probable cause that evidence of pimping, pandering or prostitution would be found at ADDRESS., Apr 309 is as follows: 1) two police officers' unsubstantiated conclusions, silent as to time period, that "Mr. NAME has engaged in pimping, pandering and gang related activities for years prior, based on prior investigations and interviews;" 2) an alleged argument in April, 2011 between Mr. NAME and a victim of a shooting that Oakland pimps are better than San Francisco pimps; 3) the fact that Mr. NAME was seen with, and may live with, a woman with numerous prostitution-related arrests, and 4) the existence of "numerous photographs similar to those posted on adult websites; emails from NAME; photographs of large bruises on Stepanov's upper thigh, and photographs of young women wearing suggestive clothing" on the computer of one of NAME's friend's, Elizabeth Stepanov." *See supra*, Statement of Facts, at II.

On its face, this purported "evidence" cannot support a finding of probable cause. Other than the affiant's unsupported suspicions, there is not a shred of evidence in the warrant affidavit that Mr. NAME is, in fact, a pimp. The affidavit fails to name a single person who has directly observed Mr. NAME as a pimp, and there is no claim that Mr. NAME has ever admitted to being a pimp. The fact that Mr. NAME is involved with a known prostitute does not transform him into a pimp – nor does his association with a woman who happens to have photographs of young

women in lingerie on her computer. Similarly, the officers' bare bones conclusion as to Mr. NAME's purported pimping history and activities is sorely deficient evidence in this regard, because there is no mention of how the affiant came to know this information and thus, no evidence that would allow a magistrate to credibly evaluate whether or not there is a reliable basis for the officer's conclusion. "[The magistrate's] action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 at 239. And while the April shooting allegedly involved an argument about the superiority of pimps from one location versus another, the victim himself does not state that Mr. NAME is a pimp and does not support the conclusion that Mr. NAME himself engages in pimping activities.

A review of relevant caselaw in this circuit reveals that warrant affidavits must contain much more to support a conclusion that probable cause exists. For example, in *United States v. King,* 560 F.Supp.2d 906, 920 (N.D. Cal. 2008), the court found probable cause for the search of a pimp's residence based on the defendant's admission that a laptop containing images of an underage prostitute belonged to him, *and an interview with that prostitute who claimed the defendant was her pimp* and likely still had her lingerie in his home. *Id.* No such direct evidence of pimping exists in the affidavit at issue in the instant case. Similarly, in *United States v. Baker,* 888 F.Supp. 1521, 1526-1527 (D. Haw. 1995), the district court upheld a warrant to search a suspected pimp's home based upon 1) a prostitute's statement claiming the defendant was her pimp and that her clothing would likely be in his house; 2) a reputation as a "renown" pimp, 3) an admission made by Baker to an investigator two years prior to the warrant that he had several prostitutes working for him; and 4) police surveillance of the defendant talking to known prostitutes in the street and suspected prostitutes coming and going from his residence at irregular hours. *Id.* Here, the affidavit here fails to name a single person who claims to have direct evidence that Mr. NAME is a pimp. Furthermore, innocent behavior of picking up and being picked up by one suspected prostitute is far less substantial than the behavior witnessed by the affiant in *Baker.*

2. The Affidavit Lacks Evidence Establishing a Nexus between Mr. NAME's Alleged Pimping Activity and the Residence at #ADDRESS, Apt 309.

Even if this Court is persuaded that the affidavit state sufficient probable cause as to Mr. NAME's alleged pimping activity, there is nothing in the affidavit linking this activity to the Polk Street apartment. Probable cause to believe the suspect has committed the crime is not, by itself, adequate to obtain a search warrant for the home. *See United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991). The Ninth Circuit requires a "reasonable nexus between the activities supporting probable cause and the location to be searched." *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (citing *United States v. Ocampo*, 937 F.2d 485, 490 (9th Cir. 1991)). Here, there are no facts in the affidavit placing any of the items to be seized in the Polk Street apartment at any time and no evidence that such material would be likely kept and retained there. Absent direct proof of evidence in a location, courts have often relied on expert opinions in affidavits linking the type of evidence sought to a location to establish the requisite nexus. *See, e.g.*, *United States v. Valenzuela,* 596 F.2d 824, 829 (9th Cir. 1979) (stating that in an officer's expert opinion in the affidavit, heroin dealers have heroin packaged for sale in their homes); s*ee also United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990)(finding nexus where an officer stated in the affidavit that based on his experience, drug dealers keep evidence in their homes).

Here, the expert opinion provided by Inspector Peagler as to the typical modus operandi of pimps is silent as to whether evidence of pimping and prostitution is likely to be found at the residence of a known pimp. The affidavit makes references to the tools of the trade of pimps, but contains no declaration that in the affiant's expert opinion, these tools are generally kept in a pimp's residence. The expert opinion in the warrant affidavit is accordingly useless toward establishing nexus. Absent this connection, the affidavit fails. The fact that Mr. NAME's car and person are seen entering and exiting the searched location with a woman who *may* be a prostitute does not establish a "fair probability" that fruits or instrumentalities of pimping, prostitution, and pandering will be located there. This is the only fact cited in the affidavit that purports to establish the appropriate nexus – and this one fact dismally fails the probable cause test. For the aforementioned reasons, this Court should find that the warrant affidavit lacked probable cause that fruits or instrumentalities of pimping, prostitution or pandering would be located at #ADDRESS, Apt. 309.

B. The Warrant Utterly Lacked Probable Cause that Evidence of The Robinson Shooting or Methamphetamine Manufacturing Would be Located at #ADDRESS, Apt. 309.

As argued above, the affidavit at issue solely sought seizure of evidence related to pimping, prostitution, and pandering; accordingly, the evidence related to Mr. NAME's purported involvement the Robinson shooting and Mr. NAME's arrest for carrying a suspected methamphetamine lab should not play a role in the court's analysis of probable cause. To the extent that this Court does opt to consider such information under a totality of the circumstances approach, the warrant affidavit still fails because it the affidavit fails to support any nexus between these alleged activities and the Polk Street apartment.

1. Robinson Shooting

Even assuming, *arguendo*, that Robinson's identification of Mr. NAME as one of hisassailants suffices as probable cause that Mr. NAME committed that crime in April, 2011, it cannot establish probable cause to search #ADDRESS, Apt. 309 in October, 2011 because there is no information in the warrant that suggests a "fair probability" that evidence of that crime would be located there *at that later time period.* In addition to the staleness problems with this evidence (argued *infra* at IIB) the affidavit lacks corroborative evidence of any kind tying Mr. NAME to the shooting. Moreover, the evidence of Mr. NAME's involvement in the shooting within the affidavit contradicts with a separate police report reflecting contradictory statements of Mr. Robinson. *See* Exhibit B at WS-352. In this second report of interview, conducted directly after the shooting, victim Robinson mentions nothing about having had an altercation over pimping with his alleged shooter the day before, and certainly mentions nothing about knowing CLIENT NAME to be the source of either an altercation or a shooting. As the lead investigator in the Robinson case, Inspector Peagler should have been aware of the details of the Robinson interview with Officer Peterson, as well as Mr. Robinson's changed memory about his relationship with his attacker. The fact that these contradictory statements were not disclosed to the issuing magistrate is a *Franks* problem (to the extent they bear on the probable cause analysis at all.)

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court considered whether the truthfulness of an officer's representations made in a search warrant application and affidavit could later be subject to defense attack. *Id.* at 155. The Court in *Franks* concluded with guiding language that has become the standard for challenges to search warrant affidavits:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue. I*d.* at 171-72 (footnote omitted).

In *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985) *amended by* 769 F.2d 1410 (9th Cir. 1985), the Court summarized this approach into an analysis that remains the prevailing standard in the Ninth Circuit:

> A defendant is entitled to an evidentiary hearing on the validity of the affidavit underlying a search warrant if the defendant can make a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information.

United States v. Reeves, 214 F.3d 1041, 1044 (9th Cir. 2000), citing *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir.1985), amended by, 769 F.2d 1410 (9th Cir.1985). As suggested by this summary of the *Franks* analysis, material omissions – as well as misstatements – are also fatal to a search warrant application. *See, e.g., United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995) ("*Franks* applies to omissions as well as false statements.").

Here, Robinson gave conflicting statements regarding his state of knowledge as to his shooter and whether or not he knew that his shooter was the same individual with whom he had an altercation the night prior. As the lead investigator on the Robinson case, Inspector Peagler should have known about these conflicting statements, but did not include them in the affidavit. He thus denied the issuing magistrate all the relevant information regarding Robinson's credibility. To the extent this Court considers Robinson's identification of Mr. NAME as a factor

supporting the probable cause analysis, Mr. NAME requests a *Franks* hearing to determine whether Inspector Peagler's omissions represent a reckless disregard for the truth.

2. Suspected Methamphetamine Manufacturing Arrest

Nor can Mr. NAME's arrest for possession of Elizabeth Stepanov's chemistry equipment and suspected chemicals in his automobile support the probable cause analysis within the warrant affidavit. As a starting place, the affidavit contains no information as to whether or not the "chemicals" found in Mr. NAME's car are contraband or not. There is no indication that the chemicals were ever tested or established as illegal narcotics, as opposed to creatine or some other innocuous substance. More importantly, the affidavit does not contain any evidence linking this alleged "methamphetamine lab" to the searched location. The affidavit is silent as to any evidence that Mr. NAME is a drug dealer, drug user, or has any drug dealing or drug use criminal history. Nor does the warrant's list of items to be seized contain any references to narcotics or evidence of drug dealing. The fact that Mr. NAME was arrested with unknown chemicals and possibly associated with a methamphetamine user does not add to the probable cause analysis to search ADDRESS., Apt. 309. Such information is far too speculative, inconclusive, and lacks the requisite nexus to the searched location. The Court should accordingly disregard this assertions in the warrant when rendering its probable cause determination.

II. AS THE BULK OF THE INFORMATION IN THE AFFIDAVIT WAS IMPERMISSIBLY STALE, IT SHOULD BE EXCISED AND THE REMAINDER OF THE EVIDENCE CANNOT SUPPORT A DETERMINATION THAT THE AFFIDAVIT STATED ADEQUATE PROBABLE CAUSE

Even if this Court is persuaded that the affidavit provides probable cause that Mr. NAME engaged in pimping, pandering and prostitution activities, and that the evidence adequately adduces a nexus between the searched location and Mr. NAME's criminal activities, the information relating to 1) the alleged April, 2011 shooting of Robinson, and 2) officers' opinions that Mr. NAME's is a pimp are impermissibly stale and should not be considered in this Court's probable cause determination. Absent this information, the affidavit's only basis for establishing probable cause is Mr. NAME's association with the suspected prostitute Ms. Moore in October, 2011. This remaining information is not sufficient to establish probable cause.

The Supreme Court has emphasized that a search warrant must be timely:

> While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it 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. Whether the proof meets this test must be determined by the circumstances of each case.

Sgro v. United States, 287 U.S. 206, 211 (1932).

In the same spirit as *Sgro*, the Ninth Circuit has carefully distinguished the past presence

of illegal goods and the present invasion of property:

> The facts submitted to the Commissioner must be sufficient to justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued. The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate search for which authority is sought may be fruitful.

Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968).

The Ninth Circuit evaluates staleness in light of the particular facts and the nature of the criminal conduct and property sought. *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993). The information is not considered stale if there is sufficient basis to believe based on continuing pattern, or other good reason, that the items to be seized are still on the premises. *United States v. Angulo-Lopez,* 791 F.2d 1394, 1399 (9th Cir. 1986). "To avoid staleness, '[t]he facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of issuance of the search warrant.'" *United States v. Grant*, 682 F.3d 827, 835 (9th Cir. 2012) (quoting *Durham v. United States,* 403 F.2d 190, 194 (9th Cir. 1968)).

A. As the Affidavit Does Not Set Forth a Continuing Pattern of Pimping Behavior, Evidence Surrounding the Alleged April, 2011 Shooting of Robinson and Mr. NAME's Prior Reputation Among SFPD Officers for Pimping is Impermissibly Stale and Must be Excised

The heart of the warrant application attempting to establish Mr. NAME as a pimp is the reputation evidence of Inspector Peagler and Officer Nastari, along with statements by victim Robinson that in April, 2011, he and Mr. NAME allegedly fought verbally about which Bay Area
city had better pimps. Two significant problems with this evidence are its age and/or its ambiguity as to time period, as the officers give no time-frame reference for their opinions, nor indicate the length of time that has passed since either officer received information about Mr. NAME's alleged pimping. Both the age of the information and its lack of temporal reference require this Court to exclude it from the probable cause as impermissibly stale. Quite simply, the fact that two police officers may have known Mr. NAME to be a pimp numerous years ago does not support the notion that there is a "fair probability" that evidence of this same crime would be found at #ADDRESS, Apt. 209 in November, 2011.

The Ninth Circuit has held that a search warrant is not stale where a continuing pattern provides a sufficient basis to believe that the items to be seized are still on the premises. A review of these cases reveals their contrast to the instant case, in which no such continuing pattern of activity is alleged. *See United States v. Angulo-Lopez,* 791 F.2d 1394, 1399 (9th Cir. 1986); see also United States v. Collins, 61 F.3d 1379, 1384 (9th Cir. 1995) (finding a search warrant was not stale where a tip from an acquaintance placed a firearm in the defendant's home

six weeks before the search, updating older information about firearms in defendant's home); United States v. Foster, 711 F.2d 871, 878 (9th Cir. 1983) (finding a three-month-old drug deal was not stale as defendant made statement about keeping phony IRS records, pointing to ongoing criminal activity). In United States v. Baker, a case factually similar to this one, the defendant argued that 18-month-old evidence that a former prostitute had left clothing in defendant's apartment was stale. 888 F.Supp. at 1527. However, the District Court was persuaded by law enforcement statements in the affidavit that the defendant engaged in a continuous pattern of pimping behavior. Id. Namely, in that case the defendant was seen talking to known prostitutes in the street and suspected prostitutes were seen coming in and out of his residences at irregular hours. Id. at 1528. Due in part to the continuous nature of the defendant's pimping activities, the District Court found this older information was not stale. *Id*.

Here, there is no expert opinion in the affidavit stating that evidence of pimping activities are generally kept for long periods of time, and no statements by the affiant as to evidence of continuous, recent pimping activity on the part of Mr. NAME. The Ninth Circuit has found older evidence not stale when accompanied by an expert's statement in this regard. See United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) (finding ten month old evidence was not stale where affiant explained that based on experience, child pornographers rarely ever disposed of depictions and often kept them in their homes); United States v. Dozier, 844 F.2d 701, 707 (9th Cir. 1988) (finding five-month-old evidence was not stale as affidavit included an experienced DEA agent's opinion that cultivators often keep tools at their residences for long periods of time); United States v. Hernandez, 886 F.2d 1560, 1566 (9th Cir. 1989) (affidavit was not stale as it contained an expert opinion from the affiant officer that people who traffic drugs generally keep records in their homes, and these types of records were of the type maintained for long periods of time). In the instant warrant affidavit, no such expert opinion exists, leaving no reasonable magistrate to conclude that even if Mr. NAME's reputation for past pimping was accurate, there is no "fair probability" that evidence of Mr. NAME's alleged pimping activities from several months prior would still be in his possession at #ADDRESS, Apr. 309 on October 31, 2011.

B. To the Extent this Court Considers Robinson's Identification of Mr. NAME as his Assailant in the Probable Cause Analysis, this 6 Month Old Information is Impermissibly Stale and Must be Excised.

Even if the Court considers the alleged April, 2011 shooting of Robinson in a totality of the circumstances approach to probable cause, there is no evidence within the warrant application supporting a conclusion that the weapon used in that shooting would still be in Mr. NAME's possession (or at ADDRESS. Apt. 309) seven months later. Hence, Robinson's identification of Mr. NAME as an assailant in April, 2011 is impermissibly stale information as to a warrant executed in November, 2011. This issue was recently considered in Grant. In Grant, the defendant's house was searched pursuant to a warrant for a weapon used in a murder nine months earlier. Id., 682 F.3d at 828. The Ninth Circuit reversed the district court, finding it unlikely that a defendant would hold onto a murder weapon for several months given the ease with which it could be disposed of and the strong incentive to do so. Id. at 835. Furthermore, the affidavit in Grant provided no "continuing pattern" or "other good reason" why a murder weapon brought into Grant's house would remain there months later. Id.

Following Grant, it is simply illogical to conclude that Robinson's identification of Mr. NAME as an assailant in April, 2011 lends support to the probable cause analysis for a warrant issued on October 31, 2011. Over seven months passed between the time of the shooting and the warrant's execution – with no evidence set forth in the warrant application that Mr. NAME would
retain evidence of such a shooting or an expert opinion setting forth a reason he would do so. The age of this information mandates its excision from the probable cause analysis, and the Court should decline to consider Robinson's identification of Mr. NAME.

III. THE AFFIDAVIT CONTAINS INSUFFICIENT EVIDENCE OF MR. NAME'S CONNECTION TO #ADDRESS APT. 309 AND THUS, NO REASONABLE NEXUS BETWEEN HIS ALLEGED ACTIVITIES AND THE APARTMENT.

The final overriding problem with the warrant affidavit in its entirety is its lack of probable cause establishing that Mr. NAME resided at ADDRESS. Apt. 309 at the time that the warrant issued.

A. Mere Presence at the Searched Location is Not Enough

Standing alone, a defendant's mere presence at a residence is too insignificant a relationship to establish a nexus. United States v. Flores, 679 F.2d 173, 175 (9th Cir. 1982); see also United States v Bailey, 458 F.2d 408 (9th Cir. 1972) (finding no reasonable nexus between a house and two robbery suspect where affidavit merely stated that one defendant was seen in house and the other was arrested there). The Ninth Circuit has affirmed other means of establishing a defendant's residence in the warrant context, none of which are present in the instant case. *See, e.g., United States v. Chavez-Miranda*, 306 F.3d 973, 978 (9th Cir. 2002) (defendant used remote control to open apartment gates, parked his car in building's gated parking lot, and kept utilities in his name); *United States v. Crews*, 502 F.3d 1130, 1137 (9th Cir. 2007) (police observed the defendant coming in and out of the doorway of the apartment several times and the defendant parked his car in the reserved space for that apartment); *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997) (utility records, DMV records and police surveillance sufficient to establish that defendant lived at residence); Baker, 888 F.Supp. at 1521 (documents indicated that the defendant rented residences and parked his car in front of both residences several times.)

Here, the affidavit states that law enforcement indices establish ADDRESS, Apt. 309 as a residence for Stephanie Anne Moore and Elizabeth Stepanov but recites no documentary evidence that Mr. NAME resides at this address. Nor does the affidavit contain evidence that anyone had ever seen Mr. NAME inside Apartment #309, walk out of its doorway, or affirm his presence on third floor of the apartment building. Unlike Crews, the instant warrant application has no proof that Mr. NAME parked his Mercedes in a reserved space for apartment #309. Moreover, unlike *Chavez-Miranda,* the utilities for the searched location are not in Mr. NAME's name.

B. A Non-Reliable Confidential Information Cannot Establish Mr. NAME's Ties to the Searched Location

Instead, the entirety of the probable cause analysis as to Mr. NAME's residence rests on the shoulders of a confidential information who purportedly told investigating officers that Mr. NAME lived in Apartment 309. *See* Exhibit A at 12. The reliability of information provided by an informant is assessed under the totality of the circumstances known to the magistrate issuing the warrant. *Gates,* 462 U.S. at 213. The veracity and basis of knowledge of an informant is considered along with other relevant information in determining probable cause. *United States v. Angulo-Lopez,* 792 F.2d 1394, 1396 (9th Cir. 1986).

In *United States v. Stanert,* a confidential informant identified the defendant as an individual who was allegedly manufacturing cocaine. *See id.* at 762 F.3d 775, 777 (9th Cir. 1985). The affidavit provided information that the informant was reliable, had participated in several investigations, and had never been known to give false information. *Id.* By itself, the Ninth Circuit found this information deficient, as it was a bare bones conclusion that failed to reveal the informant's basis of knowledge as something more substantial than a casual rumor. *Id.* at 779. Similar tips from two other informants, however, created enough evidence under the totality of the circumstances to create probable cause. *Id.*

In this case, the affidavit fails to establish the reliability of the confidential informant used to establish Mr. NAME's connection to the Polk Street apartment. Unlike in *Stanert,* the affidavit does not state that this informant has provided reliable information in the past or worked with police on additional cases to develop a reputation for truthfulness. Furthermore, the only basis of knowledge attributed to the informant is that he or she is "closely related to the Argenta." This dearth of information fails the totality of the circumstances approach, particularly given the fact that the informant could not identify Mr. NAME by name.

Considering all of the above factors, Mr. NAME submits that under the totality of the circumstances supports this Court's conclusion that the warrant affidavit contained insufficient evidence that Mr. NAME resided at the searched location. Accordingly, there was an insufficient nexus between the searched location and any allegations of criminal misconduct on his part, further providing this Court with justification to hold that the warrant affidavit utterly lacked probable cause that fruits and instrumentalities of alleged crimes committed by Mr. NAME would be found at the searched location.

IV. THE TOTALITY OF THE CIRCUMSTANCES SUPPORTS A FINDING THAT THE WARRANT AFFIDAVIT UTTERLY FAILED TO ESTABLISH PROBABLE CAUSE THAT FRUITS AND INSTRUMENTALITIES OF A CRIME WOULD BE LOCATED AT #ADDRESS, APT. 309.

An evaluation of the totality of the circumstances, as mandated by *Gates*, must result in a finding that the warrant affidavit utterly lacked probable cause that fruits and instrumentalities of

crime would be found at the searched location. The seized evidence, including the firearm, must be suppressed.

First, the identification of Mr. NAME as the assailant in the Robinson shooting was nearly seven months old at the time the warrant issued, and was thus impermissibly stale. In a similar vein, absent a continuing pattern of alleged pimping activity after April, 2011, the fact that Robinson accuses Mr. NAME of having a conversation about pimping is too stale to be included as a valid support for probable cause in an October 31, 2011 warrant application. This evidence should simply be excised from consideration due to its untimeliness.

Second, the supposed narcotics-related evidence is a red herring. The affidavit fails to state any evidence that the chemicals in question found in Mr. NAME's car turned out to be illegal substances. Moreover, the affidavit does not request permission to search for narcotics-related items nor does it draw any nexus between Mr. NAME, Apt. 309 and narcotics related activity. This entire paragraph of information is thus useless to the probable cause inquiry and should be eliminated from consideration.

Third, the allegations by the affiant and Officer Nastari regarding Mr. NAME's alleged historical "pimping" behavior are stale and should not be considered by the Court. The officer's statements and beliefs as to Mr. NAME's pimp activities are vague and conclusory at best, and are not supported by any credible evidence. Nor do the officers set forth any information that would have allowed a neutral magistrate to assess the timeliness of their opinions as to Mr. NAME's reputation as a pimp. The unsupported conclusions of two police officers, silent as to time period, do not form an adequate basis for probable cause to search a residence.

Once the stale information in the warrant affidavit is excised, the remaining information left to analyze is; 1) Mr. NAME's association with Ms. Moore, a white female with 46 prosecution related arrests, 2) the fact that Elizabeth Stepanov's computer contains images of scantily clad women and emails from Mr. NAME; 3) evidence that these two women both live in Apt 309; 4) surveillance establishing Mr. NAME as driving his car in and out of the secured parking area at #1 Polk, and 5) a non-reliable, apparently untested confidential information relaying to police that Mr. NAME lived at Apt. 309 with Ms. Moore. These facts, even when taken together, are grossly insufficient to justify the intrusive home search at 6:00 a.m that occurred in this case. The warrant affidavit at issue sorely lacks any evidence of Mr. NAME's contemporaneous illegal activities, much less establish the requisite nexus to any contemporaneous criminal activity and #ADDRESS, Apt. 309. This Court should suppress the warrant returns in their entirety.

VII. SHOULD THE COURT UPHOLD THE WARRANT, EVIDENCE ITEM E-27 MUST STILL BE SUPPRESSED AS OUTSIDE THE BOUNDARIES OF PERMISSIBLE ITEMS TO BE SEIZED

Should this Court uphold the warrant affidavit, Mr. NAME additionally moves to suppress
Evidence Item E-27 from trial. *See* Exhibit B; Police Report (establishing property returns secured through the search warrant) at WS-51. In so doing, Mr. NAME submits that the "chemistry set and glassware in plastic box" was unlawfully seized by San Francisco police because this item was well outside of the scope of the warrant. A careful review of Attachment A to the warrant affidavit reveals that San Francisco police had no authority to seize chemistry equipment and glassware from the residence. *See* Exhibit A at 17-20.

"A search must be limited to the terms of the warrant." *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985). Items that are seized by police that are later determined to be outside of the scope of the warrant must be suppressed from trial and returned to its owner. *Id.* Accordingly, in the event this Court upholds the warrant's validity, Mr. NAME additionally moves
the Court to suppress Evidence Item E-27 as outside the legal boundaries of the warrant.

CONCLUSION

For the aforementioned reasons, Mr. NAME urges the Court to exclude the fruits of the search of ADDRESS., Apt. 309 on November 2, 2011 from trial, including the firearm that is the subject of the instant case.