UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-340 (JRT/LIB)

UNITED STATES OF AMERICA, Plaintiff, v. DANNY JAMES HEINRICH, Defendant.	)	**GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTIONS TO SUPRESS EVIDENCE AND CHANGE VENUE**

The United States of America, by and through its attorneys Andrew M. Luger, United States Attorney for the District of Minnesota, and Julie E. Allyn and Steven L. Schleicher, Assistant United States Attorneys, hereby submits its response to the defendant's motions to suppress evidence.

Summary of Argument

Defendant's motion to suppress his collection of child pornography and other evidence found in his Annandale residence should be denied. This evidence was seized pursuant to a valid warrant that was issued by a judge and based upon an affidavit supported by probable cause. Defendant's contention that the affidavit was "stale" is without merit. Even if this Court were to find the warrant deficient, the *Leon* exception to the exclusionary rule applies because law enforcement officers relied on the warrant in good faith.

Defendant's motion to suppress his statements should also be denied. Officers are not required to provide *Miranda* warnings when a defendant is not in custody. Custody is defined as the functional equivalent of arrest. The defendant voluntarily accompanied police to his own residence and proceeded to engage in hours of conversation while sipping beer, sitting at a picnic table in his own backyard, having been told he was free to leave.

Likewise the defendant was not in custody during his second encounter with police, whom he invited inside his home and proceeded to speak with them at his own kitchen table. No reasonable person would believe they were in custody in these circumstances.

Finally, defendant's motion for a change of venue should be denied because at this stage, he has made no showing that fair jurors cannot be found in the District of Minnesota through a careful process of jury selection.

Introduction

This case arises from the investigation of several related, unsolved crimes: the January 13, 1989 abduction and sexual assault of a then 13-year old boy ("JS") in Cold Spring, Minnesota; the October 22, 1989 kidnapping of 11-year old Jacob Wetterling; and a string of sexually motivated assaults of young boys in the Payenesville, Minnesota area in the mid to late 1980's. Unlike JS and the Paynesville victims, Jacob Wetterling has not been seen since the kidnapping and is presumed to be a victim of homicide, the investigation of which has continued from the date of his abduction to the present. It has long been believed that the Cold Spring and Wetterling abductions were likely to have been committed by the same person. The abductions were committed in the same geographic area, involved similarly aged boys, were committed by a lone male suspect and occurred within months of each other. The investigation of the two cases occurred simultaneously, with evidence of one deemed to be evidence of the other.

Investigators looked closely at the defendant in 1990 – soon after the disappearance of Jacob Wetterling and the abduction of JS – based in part on local law enforcement's belief that the defendant was involved in the Paynesville molestation attacks. Investigators developed compelling circumstantial evidence linking the defendant to these crimes,

including footprint and tire print evidence, the absence of a provable alibi and possession of photographs of children clothed only in underwear or towels. Investigators arrested the defendant for the kidnapping and sexual assault of JS in February 1990. However, after multiple interviews of the defendant during which he denied having committed any crimes, an unsuccessful search warrant at his father's residence, and an inconclusive identification of the defendant by the victim, investigators were unable to establish guilt. The defendant was released without charges.

While the use of DNA profiling techniques is presently commonplace in law enforcement, it was new back in the late 1980's and early 1990's. The sweatshirt worn by JS during his abduction and sexual assault was collected by investigators in 1989 and remained in evidence. Investigators also had in evidence the defendant's hairs, which he voluntarily provided in 1990. In 2012, JS's sweatshirt was tested at a laboratory, and a sample from one of the sleeves contained a mixture of DNA from two or more persons. In 2015, investigators submitted the defendant's 1990 hair sample to a laboratory to obtain his DNA profile. The results were disclosed to investigators on July 10, 2015: the DNA on JS's sweatshirt matched the defendant's. Investigators now had proof that Danny Heinrich was the person who kidnapped and sexually assaulted JS in Cold Spring in 1990.

Investigators moved quickly, securing a search warrant for the defendant's Annandale residence on July 27, 2015, and executing it on July 28. Seeking evidence of the Cold Spring sexual assault and abduction, as well as the related Wetterling abduction case and child pornography, investigators recovered defendant's current collection of printed and digital child pornography from three-ring binders and a computer located inside his residence. The defendant, who was not in custody, spoke with investigators during the

execution of the search warrant and freely acknowledged that child pornography would be found in his residence. Defendant provided a second statement to investigators on October 26, 2015, during which time the defendant, who was again not in custody, provided a more detailed confession as to his knowing possession of child pornography.

I. Defendant's Motion to Suppress Fruits of Search and Seizure Should be Denied

The defendant's contention that the four-corners of the search warrant affidavit lacked probable cause is without merit. The 11-page, single-spaced affidavit sets forth in detail significant evidence linking the defendant to the crimes and establishing the likelihood that the evidence sought would be at the placed searched. Defendant's primary complaint is that because the underlying criminal activity occurred 26 years ago, evidence related to the offense is "stale" for the purpose of seeking a search warrant. But this overly simplistic argument does not accurately reflect the law. Probable cause exists so long as the facts establish a fair probability that the evidence sought will be located at the place searched – regardless of whether it is a cold case homicide or an ongoing conspiracy. Contrary to defendant's argument, the age of the crime is not dispositive here.

A. The Search Warrant was Supported by Probable Cause.

The Warrant Clause of the Fourth Amendment requires that warrants (1) be issued by a neutral and detached judge; (2) contain a particular description of "the place to be searched, and the persons or things to be seized"; and (3) be based "upon probable cause, supported by Oath or affirmation." *Dalia v. United States*, 441 U.S. 238, 255 (1979); *see also* U.S. Const. amend. IV. "Probable cause exists, if under the totality of the circumstances, a showing of facts can be made sufficient to create a fair probability that evidence of a crime will be found in the place to be searched." *United States v. Wallace*, 550 F.3d 729, 732 (8th Cir. 2008) (citations and internal

quotation marks omitted). When evaluating whether probable cause supported the issuance of a warrant, a court is to assess the "totality-of-the-circumstances" including the "'veracity' and 'basis of knowledge' of persons supplying hearsay information." *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). A reviewing court "is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). A court's review should be "flexible" and not "hypertechnical," but the affidavit "must provide the magistrate with a substantial basis for determining the existence of probable cause." *Id.* at 236, 239. An issuing judge "may draw reasonable inferences ... in determining whether probable cause exists." *Wallace,* 550 F.3d at 732. After all, affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca,* 380 U.S. 102, 108 (1965). A reviewing court accords great deference to a magistrate judge's determination as to whether an affidavit establishes probable cause. *Illinois v. Gates,* 462 U.S. 213, 236 (1983); *United States v. Nieman*, 520 F.3d 834, 839 (8th Cir. 2008).

The affidavit submitted in support of the search of defendant's Annandale residence established that various crimes were committed and set forth a strong connection between these crimes and the defendant. It provided a clear factual basis demonstrating that evidence related to these crimes presently existed and provided a specific showing that the evidence would likely be found in the defendant's house. This more than meets the legal requirements for the issuance of a search warrant.

First, the affidavit clearly demonstrated the commission of several serious crimes, to include eight separate sexually motivated attacks of young boys in Paynesville from 1986 through 1988; the abduction and sexual assault of JS in January 1989; and the abduction and presumed murder of Jacob Wetterling in October 1989. Ex. 8, pp. 36-39.

Second, the affidavit set forth a substantial basis to connect the defendant to each of these crimes. The eight separate sexually motivated assaults of juvenile boys in Paynesville from 1986 to 1988 occurred within blocks of the defendant's residence. Ex. 8, p. 37. The defendant's description at the time of these attacks matches the description that various victims offered of the perpetrator: a white male in his 30's, 5'6" to 5'9" tall, with a heavy set or pudgy build.

The manner in which these attacks took place was similar and indicates a single perpetrator. The victims were all juvenile males approximately 12 years of age, who were approached and attacked in a public place such as while the boys were walking or biking home, or otherwise outside. The perpetrator, who commonly concealed his face, groped or attempted to grope the victims' genital region.

A few times, the assailant asked the boys their age or grade and/or threatened to kill the child as part of the assault. In three of the incidents, the perpetrator threatened the victim in this manner. After the attack referred in the warrant affidavit as "Incident 3," the perpetrator instructed the juvenile victim to "keep laying down or I will blow your head off." Ex. 8, p. 36. During Incident 4, the perpetrator instructed the victim to keep quiet or he would be killed. Ex. 8, p. 36. During Incident 7, the perpetrator said to the victim, "shut up or I'll kill you" while holding a knife to the victim's throat. Ex. 8, p. 37.

One victim described the perpetrator as having a "low, static filled voice." Another stated he spoke in a "deep low whisper." Ex. 8, p. 36. Yet another described his voice as "raspy." Ex. 8., p. 37.

In January 1990, the Paynesville Police Chief informed investigators that he suspected that the defendant was the perpetrator of the Paynesville assaults. Ex. 8, p. 39. The examination of physical evidence further connected the defendant. After Incident 5, the attacker fled the area

on foot and left behind a baseball cap. The BCA crime lab tested this hat in 2014 and found it to contain a mixture of DNA from three or more individuals. Ex. 8, p. 36, 41. After the defendant's DNA profile was completed in July 2015, the crime lab was determined it could not exclude the defendant from being a possible contributor to the DNA mixture found on the hat. The laboratory report noted that an estimated 80.5% of the general population could be excluded. Ex. 8, p. 42

The warrant affidavit also demonstrated a strong connection between the defendant and the Cold Spring abduction and sexual assault – an attack that bore striking similarity to the Paynesville attacks. According to the affidavit, on January 13, 1989, 12-year old JS was walking home from a café in Cold Spring, Minnesota at approximately 9:45 p.m. A lone adult white male approached JS and asked him whether he knew where "Kraemer" lived. As JS began to respond, the assailant exited the vehicle, grabbed JS, and forced him into the back seat of his car. As he drove JS to a gravel road, the assailant told him that he had a gun and wasn't afraid to use it. JS noticed that the assailant had a "walkie talkie" handheld radio device on the front passenger seat and heard voices broadcast from it. The assailant stopped the car and instructed the boy to remove his snow suit and pull down his pants and underwear. Terrified, the boy complied. The assailant lowered his own pants and underwear and proceeded to sexually assault JS. The assailant forced JS to perform oral sex upon him and attempted anal penetration. After the attack, the assailant gave JS his snow suit back but kept JS's pants and underwear, placing them on the front seat of the car. The assailant told JS that he was lucky to be alive, but if the police got a "lead" on him, the assailant would "get him after school and shoot him." After driving the boy back to the Cold Spring area, the assailant let JS out of the car and instructed him to roll

around in the snow to wipe off his snow suit off. He told the boy to run and warned him to not look back or he would shoot him.

JS described his attacker to the police: a white male, approximately thirty years old; approximately 5'6 to 5'7 and weighing around 170 pounds; dark brown mid-length hair; brown eyes; fat ears that stuck out; a fat nose; bushy eyebrows; rough, wrinkled skin; dark complexion; broad neck; thick shoulders; rough, short thick hands; a pudgy "beer belly" stomach; crooked bottom "cheese teeth" and a deep raspy voice. JSJS told police that the man wore a brown baseball cap, camouflage fatigues, a military style watch and black Army boots.

This physical description fits the description of the defendant at the time of the crime in the late 1980's: white male, born March 21, 1963, 5'5' tall, 160 pounds, brown hair and brown eyes. Ex. 8, p. 38. Moreover, the clothing description, namely, the camouflage fatigues and military-style watch and boots, is consistent with someone who had served in the military. The defendant served in the National Guard.

The description is also generally consistent with the description of the attacker given by the Paynesville assault victims. In December 1989, JS JSassisted police in creating a police sketch of his attacker, which was attached as an exhibit to the search warrant affidavit. A photograph of the defendant taken in 1990 was also attached. Warrant Appendix A. These two images are remarkably similar.

The warrant affidavit explained that JS was unable to positively identify the defendant as his assailant. On January 17, 1989, investigators showed JSJS a six-person photo array that included a picture of the defendant. While JS JSindicated that the defendant's photo appeared "somewhat similar" to the man who abducted him, he indicated that the photo of another did as well. Ex. 8, p. 38. On January 25, 1990, the defendant appeared with five other white males for

a physical lineup. While JS JSstated that the defendant was similar in size and build to his attacker, he thought another person in the lineup was also similar, and JS was ultimately unable to identify anyone. Ex. 8, p. 40.

While understandably a 12-year old boy who had been subjected to a terrorizing sexual assault at night by a stranger who kidnapped and threatened to shoot him was unable to confidently identify the defendant, the physical evidence described in the warrant affidavit clearly connected him to the attack. A search warrant was executed upon defendant's father's house on January 24, 1990. Officers found a handheld scanner, which could have been the "walkie talkie" described by the victim. Officers recovered a camouflage shirt and trousers, which is consistent with the clothing the victim describe being worn by his assailant. Officers recovered black lace-up boots, consistent with the footwear described by the victim. The victim had also indicated that his assailant wore a brown cap. Two brown caps were recovered during the execution of the 1990 warrant. Investigators noticed that the defendant's bottom teeth had black spots on the front and the defendant indicated that he had chewed tobacco for many years. JS had previously described his assailant as having "cheese teeth." Ex. 8, p. 40.

JS provided a description of the car in which he was abducted: a dark blue four-door automatic transmission passenger car with a luggage rack on the trunk; blue cloth interior with dark blue leather or vinyl interior trim and front bucket seats. Ex. 8, p. 38. The defendant drove a 1987 dark blue 4-door Mercury Topaz. When officers observed it in January 1990 – approximately one year after the attack – the vehicle did not have a luggage rack on the trunk. However, JS was able to view the vehicle and sit inside it. JS told officers that the vehicle "felt like" the one he was abducted in and that he "wouldn't change a thing" about the interior. He expressed that the vehicle was an "8 or possibly a 9" on a 10-point scale as being similar to the

car in which he had been kidnapped and sexually assaulted. Ex. 8, p. 40. On January 18, 1990, back seat carpet and seat samples were taken from defendant's Mercury Topaz. An examination of fibers taken from the back seat of defendant's car found them to be consistent with fiber material found on JS's snowmobile suit after the assault. Ex. 8, p. 40.

The most significant connection between the defendant and the Cold Spring abduction and sexual assault was DNA evidence that wouldn't be developed until the Summer of 2015. According to the warrant affidavit, the defendant was arrested for the sexual assault of JS on February 9, 1990. The defendant was interviewed by law enforcement, but emphatically stated he was not guilty. He was ultimately released without charges. Ex. 8, p. 41. However, the defendant had provided body hair samples to law enforcement on January 12, 1990, and these were retained by law enforcement.

On March 12, 2015, investigators submitted the hair samples to the BCA trace evidence unit and the hairs were found to be suitable for DNA testing. JS had previously described to investigators that he had been forced to perform oral sex upon his attacker and that he had wiped his mouth on the sleeve of his sweatshirt several times during the incident. Ex. 8, p. 37. A DNA profile was developed from a sample taken from the right wrist of the sleeve of the sweatshirt that JS wore during the assault. The predominant DNA profile from the sleeve of the sweatshirt matched that of the defendant. According to the laboratory report, the predominant profile would not be expected to occur more than once among unrelated individuals in the world population. Ex. 8, p. 42. The defendant's connection to the Cold Spring abduction and sexual assault of JS was scientifically conclusive.

The abduction of Jacob Wetterling also bore strong similarities to the Paynesville attacks and the Cold Spring abduction and sexual assault. According to the affidavit, the Wetterling

abduction occurred on October 22, 1989 – only nine months after JS's kidnapping and about one year after the last reported Paynesville attack. Jacob Wetterling was abducted in St. Joseph Township, less than 20 miles from Paynesville and Cold Spring. The Wetterling abduction was carried out by a lone, masked male. Each of the previously described victims was attacked by a lone male. Several of the Paynesville victims said the perpetrator obscured his face. Like the Cold Spring assault and the Paynesville attacks, the Wetterling abduction occurred at night - around 9:15 p.m. JS was a 12-year old boy when he was attacked – similar in age to the Paynesville victims. Jacob was 11.

In addition to the mask, other aspects of the physical description of the perpetrator of the Wetterling abduction were similar to those provided in the Paynesville and Cold Spring incidents. The man was described as an adult male, between 5'9" and 5'10" tall, approximately 180 pounds, again, this is generally similar to the build described by JS and the Paynesville victims. The kidnapper wore a mask, dark coat, dark pants and dark shoes. He spoke with a rough voice, as if he had a cold. Ex. 8, p. 39. Three separate Paynesville victims had described the perpetrator's voice as low and "static filled," "raspy" and a "deep low whisper." Ex. 8, p. 36. JS said that his abductor had a deep "raspy" voice.

As described in the warrant affidavit, Jacob Wetterling and two other juvenile males were approached on foot by a masked man who displayed a handgun. Like the Cold Spring abduction and the Paynesville attacks, this attack was also sexually motivated. The masked man asked the boys how old they were and the boys told him their ages. (In Paynesville incident four, the suspect asked the boy what grade he was in. Ex. 8, p. 36.) The attacker then groped one of the children's penis over his clothing. He ordered the two other boys to run and not to look back or he would shoot them. This is similar to the threat issued in the Cold Spring abduction, in which

the victim was ordered to run away and not look back or the perpetrator would shoot him, and in two of the Paynesville attacks. In Paynesville incident three, the boy was told to "keep laying down for five minutes or I'll blow your head off." Ex. 8, p. 36. When the victim in incident seven screamed, the suspect said, "shut up or I will kill you." Ex 8, p. 37. Jacob was led away by the masked man and never seen again.

The warrant affidavit described physical evidence from the Wetterling abduction that connected the defendant. Law enforcement discovered in a gravel driveway next to the abduction site with shoe prints and tire tracks and took cast impressions of these prints and tracks. One set of the two shoe impressions appeared similar to the shoes worn by Jacob at the time of his abduction. Ex. 8, p. 39. On January 12, 1990, the defendant voluntarily provided the only pair of shoes he owned at the time of the abduction to investigators. On January 15, 1990, he allowed investigators to remove the rear tires from the 1982 Ford EXP he owned at the time of the abduction. Ex. 8, p. 39. An FBI examiner conducted a comparison examination between the tracks from the abduction site and the defendant's tires and found that while the defendant's tires could not be considered an exact match, they were consistent in size and tire tread design to the cast impressions. The examiner also found that the defendant's right shoe corresponded in size and design to an impression taken from the abduction site. Ex. 8, p. 41. Photos of the tires, shoes and impressions were presented to the issuing judge in the warrant affidavit. Ex. 8, p. 51, 61-2. The similarities are clear. When asked about his whereabouts on the dates of the Cold Spring and Wetterling abductions, the defendant could not offer a verifiable alibi for either. Ex. 8, p. 39.

In addition to the sexually motivated attacks described above, the warrant affidavit also set forth facts establishing the likelihood that the defendant possessed child pornography. First,

and most significant, the affidavit clearly established the defendant's sexual interest in children – specifically 11 to 12 year old boys. Such evidence is of itself sufficient to establish probable cause to search an individual's residence for child pornography:

> There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Child pornography is in many cases simply an electronic record of child molestation. Computers and internet connections have been characterized elsewhere as tools of the trade for those who sexually prey on children. *See, e.g., United States v. Paton,* 535 F.3d 829, 836 (8th Cir. 2008). For individuals seeking to obtain sexual gratification by abusing children, possession of child pornography may very well be a logical precursor to physical interaction with a child: the relative ease with which child pornography may be obtained on the internet might make it a simpler and less detectable way of satisfying pedophilic desires.

United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010).

In *Colbert*, the Eighth Circuit considered whether evidence of child molestation or pedophilic tendencies can support probable cause to search for child pornography and rejected a categorical distinction between possession of child pornography and other types of sexual exploitation of children as "in tension both with common experience and a fluid, non-technical conception of probable cause. *Id.* at 578 (8th Cir. 2010) (citing *Gates,* 462 U.S. at 230–32).

The warrant affidavit in *Colbert* failed to include the affiant's knowledge as to the link between child enticement and possession of child pornography and, in the court's opinion, would have been strengthened by such inclusion. *Id.*, at 579. The affidavit here does not present such a deficiency. Rather, the affidavit established based on the experience and training of the affiant and other officers involved in the investigation of crimes against children, that individuals, such as the defendant, who are sexually attracted to children tend to collect and save child pornography as a means by which to satisfy their sexual desires. Ex. 8, p. 42. The affidavit stated that such individuals keep images of child pornography in the form of printed photographs, videotapes, and digital graphic image files which are accessed via a computer or similar device.

Ex. 8, p. 43-43. The affidavit stated that it is common for people with sexual interest in children to retain child pornography for lengthy periods of time and that they rarely dispose of such materials, which they view as "treasured possessions." Ex. 8, p. 42. The affidavit indicates that individuals who have a sexual interest in children prefer not to be without their child pornography for any prolonged time period and that "[t]this behavior has been documented by law enforcement officers involved in the investigation of child pornography throughout the world." Ex. 8, p. 43.

This behavior is consistent with what the affidavit established about the defendant. As argued below, the affidavit demonstrated the defendant's collection of "souvenirs" or "trophies" of these attacks for the purpose of later sexual gratification. Finally, the affidavit contained specific information demonstrating the defendant's past interest in maintaining and collecting visual images of children. During the search conducted on defendant's father's residence on January 24, 1990, investigators found six photographs in one of the defendant's locked trunks. Three of the photographs were school photos of children and another was of three fully clothed children. Another photo depicted a male child coming out of the shower with a towel wrapped around him. The final photo was of a male child dressed only in his underwear. Ex. 8, p. 40. The defendant objected to the officers taking the photos and acknowledged that the photos "looked bad" and were "no kind of pictures to have anyway." Ex. 8, p. 40. The defendant's behavior and statements are indicative of his state of mind for possessing these photographs, which, in that context, cannot be dismissed as potentially innocent images with no improper purpose.

The United States Supreme Court decision in *Illinois v. Gates* requires this warrant affidavit to be viewed in light of the totality of the circumstances and to accord due deference to

the judge who issued it. Applying those standards here compels a finding that the court had a reasonable basis to conclude that there was probable cause to believe crimes were committed, that there was a connection between these crimes and the defendant. The presence of the defendant's DNA on the sleeve of the Cold Spring victim, the similarity of manner in which the attacks were conducted, their geographic proximity, the sexual motivation of the offenses, the similarity of ages and gender of the victims, the similar physical description of the suspect, the tire tracks and footprints at the scene of the Wetterling abduction – all link the offenses to each other and to the defendant. The defendant's sexual attraction to children, his willingness to use violence to satisfy his sexual urges, the fact that individuals attracted to children tend maintain collections of child pornography and the defendant's own past possession of sexually suggestive photos of children establish the reasonable likelihood that the defendant was currently in possession of such images. This evidence far exceeds the "fair probability" standard required by the Fourth Amendment and the issuing judge's determination in that regard should be accorded deference.

The warrant affidavit established a sufficient nexus between the evidence sought and the defendant's Annandale Residence.

Defendant argues that the warrant affidavit failed to establish a sufficient nexus between the place to be search and the items sought, that is, the defendant's residence and the computer located therein. First, he argues that the warrant affidavit fails to establish that 55 Myrtle Avenue South was in fact the defendant's residence. However, the affidavit alleges that the residence was defendant's home. Ex. 1, p. 36. It is the magistrate, not the affiant, who is responsible for making the determination whether conclusory statements in affidavits give rise to probable cause. *United States v. Summage*, 481 F.3d 1075, 1077-78 (8th Cir. 2007). The warrant affidavit provided a detailed physical description of the residence: a single story, white, single family

dwelling with a detached garage located on the southeast corner of Myrtle Avenue South and Spruce Drive East, with a front door facing onto Myrtle Avenue and a white, oversized detached garage with a single overhead door that faces toward Spruce Drive East. Given the level of detail in which the house was described and the specificity with which the affiant provided criminal activity related to the defendant in an investigation taking place over a 25 year time span, the issuing judge reasonably relied upon the affiant's statement that this residence was the defendant's home.

Defendant also argues that since the January 24, 1990 search of his father's Paynesville residence did not result in the recovery of any of the items taken from the victims, the instant affidavit fails to establish the likelihood that the defendant retained any of these items as trophies and kept them at the Annandale residence. This ignores the fact that affidavit stated that the defendant transitioned between residences during the time period from the Paynesville assaults until the search of his father's residence. Ex. 8, p. 40. He lived at an apartment in Paynesville with his mother from the fall of 1988 until moving into his father's residence in November 1989. Prior to February 1989, when the defendant was in his 20's, he split time between the two residences. The issuing Judge could have reasonably concluded that some of the defendant's personal belongings, including the "trophies" of his prior sexual assaults, were still at his mother's residence at the time of the search and therefore not recovered by investigators. The Judge could have also concluded that the defendant may have hidden any such incriminating items at a third location since one of his parents resided at both of the other locations. Or the Judge could have believed that investigators were unable to find the evidence because it was well hidden. In any event, the issuing court reasonably found probable cause to believe that the defendant, now in his 50's, was likely in possession of souvenirs of past, sexual based crimes in

his own residence given their training and experience and the defendant's possession of sexually suggestive photos of children found during the 1990 search.

Defendant claims that the warrant affidavit failed to link the defendant's residence to the present possession of child pornography. As noted above, the affidavit provided more than a sufficient basis the support the issuing judge's determination that the defendant likely possessed child pornography. Further, the likelihood that people sexually aroused by children will keep (indeed, "hoard") images of child pornography in their home is supported by common sense and the cases. United States v. Hyer, 498 F. App'x 658, 660-61 (8th Cir. 2013) (citing *United States v. McArthur,* 573 F.3d 608, 613–14 (8th Cir. 2009)). The Eighth Circuit has explained, "[s]ince the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to [ ] destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence. " Id. (quoting *McArthur,* 573 F.3d at 613–14) (alteration in original).

In *McArthur*, 573 F.3d 608 (8th Cir. 2009), a male was arrested for public indecency after having been found to be masturbating inside his vehicle in the mall parking lot. His wallet was searched and he was found to be in possession of a single a laminated photograph of a nude, male child who is looking at and touching an erect, adult penis that was superimposed on the child's body. That defendant told officers that he has always had an overactive libido and sometimes could not control his urges. He claimed that he met someone online who agreed to meet him, but when that person did not arrive, he drove around the parking lot, became aroused, and began to masturbate. *Id.* at 610.

The detective applied for and received a search warrant for the suspect's residence and "any digital data devices found therein for evidence of possession of child pornography." *Id.* at 611. The search warrant affidavit listed the detective's experience with "subjects known to possess and sell obscene material," detailed the events surrounding the suspects public indecency arrest including the discovery of the computer-altered photograph, and noted the defendant's prior arrests for sex offenses and his failure to register as a sex offender. *Id.* Officers recovered a computer, which contained child pornography. *Id.*

The defendant argued that the affidavit "contained insufficient indicia of probable cause to believe that McArthur possessed child pornography, in his home or on his computer" that "the only averment even remotely connected to child pornography was a single laminated photograph in [his] wallet" and that "the inference that [he] kept child pornography in his home or on his computer was specious" and insufficient to support probable cause. *Id.* at 612. The Eighth Circuit disagreed, finding a sufficient basis under the "totality of the circumstances" and examining the affidavit using a "common sense" approach. *Id.* at 614.

The defendant here argues that the warrant affidavit is deficient because it does not allege that the defendant owned a computer. However, the affidavit having established probable cause to believe that the defendant was likely in possession of child pornography in his home; the vessel in which the child pornography could be contained is of no consequence. It is well known that computers and other such devices are capable of storing thousands of images and the warrant affidavit stated that such images are commonly stored on such devices. The common sense approach mandated by *McArthur* establishes that these devices are now as common as boxes and storage containers. The warrant properly authorized the search of the defendant's computer just as it authorized searching for other items of evidence present in the defendant's home.

The Search Warrant Affidavit Was Not Stale.

"A warrant becomes stale if the information supporting it is not sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search." *United States v. Brewer*, 588 F.3d 1165, 1173 (8th Cir.2009) (internal quotations omitted). "There is no bright-line test for determining when information is stale.... [T]ime factors must be examined in the context of a specific case and the nature of the crime under investigation." *United States v. Summage*, 481 F.3d 1075, 1078 (8th Cir.2007). The factors in determining whether probable cause has dissipated, rendering the warrant fatally stale, "include the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search." *United States v. Gibson*, 123 F.3d 1121, 1124 (8th Cir.1997). Staleness is a case-specific inquiry, and probable cause cannot be judged "by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit." *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir.1993). The affidavit and application sought authorization to search for very specific items, which may have been kept by the defendant as souvenirs or trophies of his sexual assault of his victims. These items included: Jacob Wetterling's clothing to include his red hockey team jacket, sweat pants, soccer t-shirt, traffic vest, mesh jersey, socks, shoes and underwear (items 4-11); JS's blue jeans and underwear (item 15); human hair and a hat taken from Paynesville victim #3 (items 17 and 18) and a wallet taken from Paynesville Victim #4 (item 39). Ex. 8, p. 34.

What defendant dismisses as a "legal fiction" (Doc. 52, p. 28) is in fact a grim reality. As specifically set forth in the affidavit, sexual offenders who engage in sexual fantasies often keep articles from victims as keepsakes, souvenirs or trophies. Ex. 8, p. 42. These "trophies" may include biological samples or articles of clothing taken from their victims. Ex 8, p. 42. This

information was provided to the issuing judge by a seasoned investigator - a licensed police officer with 15 years' experience on the force, who based these statements on his own training and experience and the knowledge and experience of other law enforcement officers involved in cases of sexual crimes against children. Probable cause may be established by the observations of trained law enforcement officers or by circumstantial evidence." *United States v. Searcy,* 181 F.3d 975, 981 (8th Cir.1999).

While this general information regarding sex offenders could in itself reasonably convince a judge that a suspect likely possesses such trophies, it is particularly convincing here because the affidavit provides specific examples of the intentional taking of particular items from the victims. The attacker used a knife to cut a sample of Paynesville Victim #3's hair and kept his stocking cap. Ex. 8, p. 36. The attacker kept Paynesville Victim #4's wallet after groping his penis and testicles over and under his clothing. Ex. 8, p. 36. The attacker kept JS's pants and underwear after abducting him, threatening him with a gun, groping his genitals, forcing him to perform oral sex and attempting to anally penetrate him. Ex. 8, p. 37-38.

The affidavit established that the defendant has a strong sexual preference for young boys and that he engaged in a series of sexually motivated attacks during which he retained personal items belonging to his victims. The issuing judge reasonably believed that there was probable cause to believe that he kept these items. Individuals who collect things tend to keep them. *See United States v. Lemon*, 590 F.3d 612, 615 (8th Cir. 2010) (holding that affidavit containing general information about the practices of child pornography collectors, along with specific information establishing that defendant was a preferential collector of child pornography supported reasonable belief that child pornography would be found in a search conducted eighteen months after series of incriminating internet exchanges).

So while the passage of time is a relevant consideration, a case-specific analysis of probable cause for this search warrant also requires consideration of the nature of the criminal activity and the kind of property subject to the search. *Gibson*, 123 F.3d at 1124. The particular crime here reasonably believed to have been committed by the defendant, as articulated throughout the affidavit, is the sexual assault of children, as well as the related offense of possession of child pornography. This was not a theft of property case in which the motive was profit, the items were inherently valuable and were likely to have been sold. Nor was this a drug investigation in which the narcotics were likely consumed and proceeds spent long before the search. Rather, the motive for the offenses described in the affidavit was a desire for illicit sexual gratification using children. Unlike situational violence or financial desperation, this is a motive that is persistent, inherent to the individual himself, and is highly unlikely to dissipate over the mere passage of years.

As to the "kind of property subject to the search," the evidence strongly demonstrates that the items to be seized were in fact taken as souvenirs. These were personal items – a child's pants and underwear, a child's billfold, a child's hat and a lock of his hair cut from him during a sexually motivated assault using a knife. None had any intrinsic value, and there could be no reason for taking any of it other than to possess a souvenir of a sexual assault for future sexual gratification. The defense argues that expecting defendant would retain these items more than 25 years after committing the crime defies common sense, which implies that the logical thing to do would be to destroy it to avoid detection. But what may be logic and common sense with respect to a different crime with a different motive simply does not apply here. It might be logical for someone who commits a murder or serious assault to conceal or destroy evidence inadvertently left behind to avoid detection. But a sexual offender who derives gratification from perpetrating

upon children is going to have a different motivation, that is, to use the items taken for the purpose of reliving the experience in the future. The whole point of taking a souvenir is to keep it, while the whole point of destroying evidence is to avoid detection. These disparate goals lead to different reasonable inferences about the likelihood an offender will continue to possess them.

So, too, is the likelihood that the defendant retained images of child pornography at the time of the warrant application. The Eighth Circuit has recognized that, given the compulsive nature of the crime of possession of child pornography, information that might, in other circumstances, be deemed stale can have substantial probative value. *United States v. Hyer*, 498 F. App'x 658, 660-61 (8th Cir. 2013). In *Hyer,* the defendant's prior child pornography activities and use of a computer, even though several years old, was relevant to a common sense determination about whether to issue a warrant when that information was coupled with other information. As noted above, the defendant was previously found to be in possession of suggestive images of children in 1990. He kept the images in a trunk at his father's residence where he was living at the time and objected when the officers took them. His demonstrated behavior of hiding images of children under lock and key and his desire to keep them is consistent with officers' training and experience, as outlined above.

B. Officers Executed the Search Warrant in Good Faith

Even if the warrant was found to lack probable cause, the evidence should not be suppressed due to the application good-faith exception to the exclusionary rule as set forth by *United States v. Leon*, 468 U.S. 897 (1984) and its progeny. When violations of the warrant requirement occur, the Exclusionary Rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Leon*, 468 U.S. at 906. The Exclusionary Rule is not

to "be applied to exclude the use of evidence obtained by officers acting in reasonable reliance on a detached and neutral magistrate judge's determination of probable cause in the issuance of a search warrant that is ultimately found to be invalid." *United States v. Taylor*, 119 F.3d 625, 629 (8th Cir.1997) (citing *Leon*, 468 U.S. at 905, 922).

The Supreme Court's rationale for the good-faith exception is that it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the police officer can do in seeking to comply with the law. Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Leon*, 468 U.S. at 921 (internal quotation and citation omitted). "The Exclusionary Rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id.* at 916.

"[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *United States v. Hessman*, 369 F.3d 1016, 1021 (8th Cir. 2004) (citing *Leon*, 468 U.S. at 918). The good-faith exception does not exclude evidence when an officer's reliance on a warrant issued by a judge or magistrate is objectively reasonable. *Leon*, 468 U.S. at 922. Here, as established at the motions hearing, officers executing the warrant relied in good faith on the warrant that was issued to them by a qualified judge. Trans, p. 28.

An officer's reliance is not objectively reasonable, and the good-faith exception does not apply, in four limited circumstances, none of which is present here: (1) when the issuing judge is

misled by information that is false or made in reckless disregard for the truth; (2) when the issuing judge completely abandons her judicial role; (3) when the information provided to the judge includes so little indicia of probable cause that the officer's belief in its existence is entirely unreasonable; and (4) when the warrant is so facially deficient, i.e., in failing to particularize the place to be searched or the things to be seized, that the executing officer cannot reasonably presume it to be valid. *Id.* at 923; *see also Hessman*, 369 F.3d at 1020 (noting these four situations).

The first exception is not applicable. There is no indication whatsoever that the affidavit contained information that was either false or made in reckless disregard for the truth and the defendant has not claimed this to be the case.

The second exception is also inapplicable. Under the second exception, the issuing judge abandons his judicial role when he serves as a mere "rubber stamp" or an "adjunct law enforcement officer." *Leon*, 468 U.S. at 914. The Fourth Amendment's warrant requirement ensures that there is a neutral and detached magistrate who makes a probable cause determination and stands between the citizens and the officers who are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). For example, one way an issuing judge acts as a rubber stamp is when the affidavit lacks probable cause and the judge issues the warrant without question or hesitation. *See United States v. Swift*, 720 F. Supp. 2d 1048, 1058–59 (E.D. Ark. 2010). The affidavit here was thorough and detailed. It contained a summary of investigative efforts spanning 25 years, included a prior affidavit and search warrant, and several attachments. It was not a conclusory or boilerplate application, but rather alleged specific facts supporting the affiant's reasonable belief that there was probable cause to search. According to the testimony of retired investigator Pam Jensen, who assisted in

the preparation of the affidavit and was present at its signing, the issuing judge was a duly appointed State Court Judge located in the county in which the search was to be conducted. Trans, p. 27-28. The judge reviewed the affidavit for about 10 or 15 minutes before signing it. Trans, p. 60. There is no indication that the Judge abandoned his judicial role.

The third exception to *Leon* is likewise inapplicable. Under the third circumstance for refusal to apply the good-faith exception, "[e]vidence should be suppressed only if the affiant-officer could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Gibson*, 928 F.2d 250, 254 (8th Cir.1991) (citing *Leon*, 468 U.S. at 921–23). The *Leon* inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of all of the circumstances. *Leon*, 468 U.S. at 922 n.23. This rule was not fashioned to provide incentives for detectives to write better search warrants, but "to deter unlawful police conduct" by suppressing evidence gained from a search the officer knew to be unconstitutional. *Id.* at 918–19.

Here, there is nothing to indicate that a reasonably well-trained officer such as Investigator Jensen would have believed this affidavit failed to establish probable cause, which again is a common-sense analysis dependent upon examination of the totality of the circumstances. To the contrary, this affidavit set forth in painstaking detail the facts and circumstances connecting the defendant to eight sexually motivated assaults and two sexually motivated kidnappings. The affidavit, which included detailed analysis of witness descriptions, physical evidence and forensic analysis, established the defendant's sexual attraction to male children of a particular age. It provided general information known to law enforcement about the propensity of pedophiles to possess and keep child pornography and it provided a specific example of defendant's prior possession of sexually suggestive photos of children and his

reluctance to have it taken from him. Any reasonably trained officer in Investigator Jensen's position would have believed this warrant was valid.

Likewise the fourth circumstance, when the warrant is so facially deficient, in failing to particularize the place to be searched or the things to be seized, that the executing officer cannot reasonably presume it to be valid, is inapplicable. The warrant application specified very specific items of evidence to be seized from the defendant, his home and his computer, that were very narrowly related to the facts set forth in the affidavit. It sought the particular "souvenirs" believed to be maintained by the defendant, including a victim's wallet, a lock of hair, and clothing worn by the Cold Spring victim that was kept by his attacker. It sought the clothing of Jacob Wetterling that was never recovered and also believed to be kept as a souvenir. It sought the weapons described by victims as having been used in the assaults, including firearms and a jagged edge knife. And it sought child pornography, not only due to the defendant's established propensities toward children, but because he had previously collected suggestive images of children. The warrant, on its face, was specific, particularized and supported by 25 years of investigation. Any reasonable officer would have believed it to be valid.

C. The Inevitable Discovery Doctrine

In the alternative, even if the Court were to find that the evidence found in defendant's computer were unlawfully seized based on deficiency in the warrant as it relates to the computer, the evidence should not be suppressed because it would have been inevitably discovered. The inevitable discovery doctrine holds that evidence is purged of taint and should not be suppressed "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams,* 467 U.S. 431, 444 (1984). The inevitable discovery exception applies when the government proves "by a

preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *United States v. Conner,* 127 F.3d 663, 667 (8th Cir. 1997). In this analysis, "it is important to focus not on what the officers actually did after unlawfully recovering evidence, but on what the officers were reasonably likely to have done had the unlawful recovery not occurred." *United States v. McManaman*, 673 F.3d 841, 846 (8th Cir. 2012) (citing *United States v. Villalba–Alvarado,* 345 F.3d 1007, 1020 (8th Cir. 2003)).

There is no question but that, had the officers not been authorized by the original search warrant to search the computer, they would have applied for and received a second warrant authorizing the search after seeing the computer and binders of printed child pornography in the defendant's house. That warrant affidavit would have certainly included all the information presented in the first affidavit, observations of the presence of the computer and the binders of child pornography, and the defendant's July 28 admission to investigators that he possessed child pornography in his house.

II. Defendant's Motion to Suppress Statements Should be Denied.

The defendant seeks to suppress various statements made to law enforcement on two different occasions. The first statements occurred on July 28, 2015, immediately prior to and during the execution of a search warrant at 55 Myrtle. The second statement occurred on October 26, 2015 while the defendant was at his home when law enforcement returned previously seized property to him.

On July 28, 2015, officers applied for and received a search warrant for the defendant's residence at 55 Myrtle Avenue. Tr. 27-28. Executing the warrant required physical access to the

residence. Tr. 29. Investigators decided to approach the defendant at his work place and request that he accompany them to 55 Myrtle in order to gain entrance to the premises without the need to use a locksmith or break the door. Tr. 29. Investigators had no plan to arrest or take the defendant into custody, but hoped that he would make statements that would further their investigation. Tr. 30. Investigators used hidden audio and video recording devices in an effort to preserve any statements that the defendant might make. Tr. 30. The recordings were introduced into evidence at the motions hearing.

On July 28, 2015, Investigator Pam Jensen, a supervisory investigator with Stearns County and 24-year veteran police officer, accompanied BCA Special Agent Ken McDonald to the defendant's work place at Buffalo Plywood and Veneer in Buffalo, Minnesota. Tr. 31. Jensen and McDonald were both dressed in plain clothes, with their duty weapons and badges underneath their jackets, and driving an unmarked car. Tr. 31. The investigators entered the establishment, introduced themselves as law enforcement officers, and requested to speak with the defendant. Tr. 31-32. The defendant was paged over a loudspeaker and he walked up front to the area where the investigators were waiting. Tr. 32. Jensen received permission to use a private office at the business to speak with the defendant. The office was an approximately eight-by-ten feet in dimension with a door and small window, and provided a private space in which to speak with the defendant. Tr. 35.

Investigator Jensen introduced herself and displayed her credentials. Tr. 35-36; Ex. 2, p. 2022. She explained that the investigators had a search warrant for his house and asked if the defendant would come with them so that he could let them inside. Tr. 36; Ex. 2, p. 2022. The defendant asked the investigators what the warrant was for, and Jensen explained that technology has changed in recent years, that they were working on the "1989 cases" and had enough

information to get a search warrant. Ex. 2, p. 2022. Defendant immediately asked to see the warrant and the investigators complied. While the defendant appeared to be a little agitated, stating that the warrant was "bullshit," he was cooperative– as can be heard on the recording. Jensen told the defendant, "You're not under arrest. You're not gonna have to come with us or anything like that." Agent McDonald added, "We just don't want to break in either, so that's why we ask you for a key." Investigator Jensen then asked the defendant, "Would it be a big deal if you left work for just a few hours you think?" The defendant replied, "Yeah, yeah, yeah, yeah, yeah. Well let's go…give me a second to get a few things together and I'll be right with you." Ex. 2, p. 2022. Investigator Jensen asked the defendant if the officers should follow the defendant home. The defendant responded, "Yup. Yup, that would be fine." Investigator Jensen told the defendant that they would wait for him outside. This entire exchange lasted approximately four minutes. Tr, p.37. Investigator Jensen noted that the defendant was cooperative, showed no signs of intoxication and appeared to understand everything the investigators had said.

The defendant went by himself to the production area of his work place to retrieve his keys and lunch. The investigators left the building through the front door, got into the unmarked car that was parked behind the defendant's vehicle, and waited. The defendant left the building through the back door, unaccompanied by law enforcement or anyone else. Tr., P. 37. The defendant then got into his vehicle. He was not pat searched, checked for weapons or asked to empty his pockets prior to getting into his car. Tr., P. 37-38. The defendant led the investigators to his residence, a trip taking approximately ten to fifteen minutes. The investigators maintained a normal following distance, anywhere from a couple of car lengths to a quarter mile behind, and did not activate lights or sirens. Tr, p. 38-40.

The defendant pulled into the driveway of 55 Myrtle Avenue and the investigators parked in front of the residence. The defendant walked towards the house, opened the door and allowed the investigators to come inside. The investigators had asked to go inside with him to ensure that nothing in the house was moved and for officer safety. Tr, p. 40. The defendant indicated that he wanted to put his lunch inside the refrigerator, which investigators allowed him to do. Investigator Jensen told the defendant that he could grab a snack or some beverages out of the refrigerator. The defendant did so and offered the beverages to the investigators. Tr, p. 39-40; Ex. 2, p. 2024. The defendant asked if anything should be done with his cats while the warrant was being executed. Investigator Jensen told the defendant that the cats could stay inside and the defendant decided to let the cats remain. The defendant was not handcuffed, pat-searched or checked for weapon prior to entering the house or at any other time that day. Tr, p. 41. Investigators did not restrict the defendant's movements or access to the residence in any way when he initially let them inside, however, they did inform him that he couldn't be in the house while the warrant was actually being executed. Tr, p. 41. Investigator Jensen explained to the defendant the process that would be used to execute the search warrant – that other officers and a photographer would be in the house, that they would go through the rooms inside the house and the garage, and that they would be in and out quickly. Ex. 2, p. 2026. Investigator Jensen added, "And then we'll be out of your hair and you can do what you want to do at that point." Ex. 2, 2026.

Investigators made it clear to the defendant that he was not required to stay with them during the execution of the warrant. After being given access to the house by the defendant, Investigator Jensen asked him if he was going to "stick around" so he could lock up after everyone left. The defendant replied, "Oh yeah, yeah…I'll probably take the day off." Ex. 2, p.

2023. Investigator Jensen inquired whether the defendant would get into trouble at work and the defendant replied, "No, no, no." Investigator Jensen repeated to the defendant that he was not under arrest and that he did not have to stay: "Okay. But you do know you're not under arrest, you can leave whenever you want. We do have a search warrant, which I'll give you a copy so we have to right to be here so let's just try to, I'll try to make you most comfortable and answer any questions you want and not put any pressure on you, okay?" Ex. 2, p. 2026. Investigator Jensen assured the defendant that he was not under arrest and would not be arrested that day two additional times during the course of their interaction with him. Ex. 2, p. 2037, 2057.

After the defendant choose to stay with the officers during the execution of the warrant, Investigator Jensen, Agent McDonald and the defendant took a seat at a picnic table in a gazebo in the defendant's back yard. Tr., p. 42-43. It was a nice, July morning and the weather was good. The investigators and the defendant sat together and engaged in conversation until about 2:30 in the afternoon, as the three sat on the picnic table and the defendant casually sipped on beer. While the defendant did speak with investigators about the Wetterling and JS cases, they did not interrogate him about those topics. Ex. 2, p. 43-44. Rather, the investigators hoped that the defendant might make an incriminating statement and their goal was to not get confrontational with him. Tr., p. 44. Rather, the investigators sat with the defendant and engaged in casual conversation regarding such topics as his collections, cars, bands and music, his cats, his parents, his attempts to watch his weight, and other small talk. The defendant made some incriminating statements relative to child pornography that would be found in the house, but the investigators did not confront him about it. Ex. 2, p. 2030. It was after those statements that the investigators told defendant he would not be arrested that day. Ex. 2, p. 2027, 2057. As can be readily determined by viewing the videotape of the defendant's statement, listening to the

audio recording and reviewing the transcript, investigators maintained a cordial, non-confrontational tone with the defendant the entire time. The defendant was friendly, relaxed and on his own property, sipping about three beers during the course of an afternoon. He exhibited no outward appearance of intoxication and appeared to understand everything that was happening. Tr., p. 46.

After law enforcement officers finished executing the warrant, they took out boxes of evidence and left the scene. Investigators did not arrest the defendant. Instead, they repeatedly thanked him for his cooperation. Ex. 2, p. 2141-42. They explained that the warrant process was complete and that they had left a receipt of what was taken on his table. The defendant stated, "Yeah, we'll see you guys." Ex. 2, p. 2142. Investigator Jensen and Agent McDonald left the residence. The defendant remained behind, standing in his back yard and looking through his garage. Tr., p. 47.

Approximately three months later, on October 26, 2015, Investigator Jensen and Special Agent McDonald went back to 55 Myrtle to speak with the defendant. Agents had found incriminating evidence at defendant's residence during the search warrant execution in July, including child pornography. Other items recovered were found to have little to no evidentiary value and investigators decided to return those items to the defendant. Tr., p. 48-49. Jensen and McDonald, again dressed in plain clothes and driving an unmarked police car, drove to defendant's residence and parked down the street and waited for him to return home from work. The defendant pulled into his driveway a little after 4:00 p.m. and the investigators pulled up to the curb and began speaking with him. Tr., p. 52. The investigators explained that they were there to return some of his property. Agent McDonald asked if they could go inside the defendant's house and speak with him. The defendant agreed. Tr., 52. The investigators went

inside the residence and the defendant invited them to sit at his kitchen table. The defendant appeared a little agitated, but was cooperative and went into his garage to get another chair so everyone could sit. Ex. 6, p. 285.

The investigators explained to the defendant that he was not under arrest. Investigator Jensen told the defendant that they were not going to arrest him "for porn or anything else" but wanted to ask some clarifying questions about the porn. Tr., p. 53; Ex. 6, p. 286. The investigators did not arrest the defendant, place him in handcuffs or search him. The agents did not intend to arrest him that day, nor did they. Tr., p. 54. Rather than engage in casual conversation as in the prior encounter, the investigators asked the defendant more direct questions about the child pornography, to which the defendant gave incriminating responses, confessing to his knowing possession of the child pornography found in his residence.

Eventually, the investigators engaged the defendant in a conversation about the evidence in the Wetterling and JS cases. Agent McDonald reminded the defendant that the investigators would "walk away today" – that he was not under arrest and that the defendant did not have to speak with them. Ex. 6, p. 289. Agent McDonald revealed to the defendant that his DNA was found on JS's clothing and discussed the fact that tire and shoe impressions from the Wetterling abduction linked the defendant to the scene. Ex. 6, pp. 292-96. The defendant denied responsibility for either crime and eventually said he was not going to speak to investigators further without an attorney. Ex. 6, p. 299. Investigators continued to speak with the defendant for a few minutes and provided information about the evidence in the JS and Wetterling cases and informed the defendant that he could be charged related to the child pornography. The defendant stated that he had "nothing to do with" the JS and Wetterling cases and indicated that was all he had to say. Tr., p. 55; Ex. 6, p. 301. The defendant indicated to officers that he had

been treated "decent," stating, "You could…be a lot rougher." Ex. 6, p. 304. The interaction continued as investigators spent time returning various items to the defendant. The entire interaction took approximately 55 minutes. Tr., p. 56. The investigators left the residence at approximately 4:55 p.m. They did not arrest the defendant until two days later – October 28, 2015. Tr., p. 57.

A. *Miranda* warnings Were Not Required.

Defendant argues that his statements to officers on July 28 and October 26, 2015 should be suppressed because he wasn't issued a *Miranda* warning. This motion should be denied because *Miranda* warnings are only required (1) when a suspect is interrogated and (2) while he is in custody. The defendant was not interrogated during the first statement, nor was he in custody when he made either statement. Consequently, no *Miranda* warnings were required.

1. No Interrogation

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). The functional equivalent of express questioning is words or actions that are reasonably likely to elicit an incriminating response. *Id.* Clearly, as the recording of the July 28 statement makes clear, officers did not expressly question the defendant. Nor did they subject the defendant to the functional equivalent of questioning. Instead, they engaged the defendant in cordial small talk that was not intended to, nor reasonably likely to, elicit an incriminating response. The defendant was not interrogated on July 28, and, therefore, further inquiry into his custodial status on that day is unnecessary. Because he was not interrogated, the Miranda safeguards were not implicated, and his motion to suppress his July 28 statement should be denied.

2. Defendant Was Not in Custody

A person who has been taken into custody for questioning must be advised of the right to be free from compulsory self-incrimination and the right to the assistance of an attorney. *Miranda v. Arizona,* 384 U.S. at 444. *Miranda* warnings are not required when a person is not in custody. The ultimate question in determining whether a person is in "custody" for purposes of *Miranda* is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (internal quotation omitted). The "only relevant inquiry" in considering that question is how a reasonable person in the defendant's position would have understood his situation. *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984); *see generally Yarborough v. Alvarado,* 541 U.S. 652, (2004). In making that evaluation, the court considers the totality of the circumstances that confronted the defendant at the time of questioning. *United States v. Axsom,* 289 F.3d 496, 500 (8th Cir.2002).

The Eighth Circuit's analysis in its en banc decision, *United States v. LeBrun*, 363 F.3d 715 (8th Cir.2004) (en banc) (2005), provides the framework for custody determinations. The defendant, however, relies on the so-called *Griffin* factors. Application of those factors, however, is not the favored approach.

In *LeBrun*, the en banc court analyzed the question of whether a person was "in custody," notably without citing *Griffin* or listing the *Griffin* factors. Instead it held:

> The "ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam) (internal marks omitted). "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (footnote omitted). Thus, the critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's "freedom to depart was restricted in any way." *Mathiason*, 429 U.S. at 495,

> 97 S.Ct. 711, 50 L.Ed.2d 714. In answering this question, we look at the totality of the circumstances while keeping in mind that the determination is based "on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 322–23, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

363 F.3d at 720.

Shortly after its decision in LeBrun, the Eighth Circuit questioned a district court's use of the *Griffin* factors in *United States v. Czichray*, 378 F.3d 822 (8th Cir. 2004), stating, "[a]lthough the 'non-exhaustive' *Griffin* factors and their attendant balancing test are often cited in our decisions concerning *Miranda,* we recently resolved the question of "custody" as an *en banc* court with nary a mention of *Griffin." Czichray*, 378 F.3d at 827-28. The following year, the *Griffin* approach was again criticized in *United States v. Brave Heart*, 397 F.3d 1035 (8th Cir. 2005). It stated,

> As our recent opinion in *Czichray* makes clear, the indicia of custody identified in *Griffin* are by no means exhaustive and should not be applied ritualistically, counting indicia which contribute to custody against those which detract. 378 F.3d at 827. Such an approach ignores the strength of certain indicia, particularly "the most obvious and effective means of demonstrating that a suspect has not been taken into custody"—an express advisement that the suspect is not under arrest and that his participation in any questioning is voluntary. *Id.* at 826 (quoting *Griffin,* 922 F.2d at 1349).

Id. at 1039.

While each *Griffin* factor counsels in favor of a finding the defendant was not in custody, the proper focus here is on whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *LeBrun*, 363 F.3d at 720. There was not.

The defendant was repeatedly told that he was not in custody and that he did not have to answer questions. Prior to the execution of the warrant, the defendant was told that he was not required to come with the officers and that he was free to leave at any time. The

investigators repeated to the defendant during both statements that he was not under arrest and that he would not be arrested that day, which he was not. Eighth Circuit law indicates that this is the most telling consideration in custody determinations: "The most obvious and effective means of demonstrating that a suspect has not been taken into custody ... is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." Czichray, 378 F.3d at 826.The Eighth Circuit explained this in *Czichray*:

> That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court or this court, or any case from another court of appeals that can be located (save one decision of the Ninth Circuit decided under an outmoded standard of review, *United States v. Lee,* 699 F.2d 466, 467–68 (9th Cir.1982) (per curiam)), holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

Id.

While the advisement to the defendant that he was free to leave is all but determinative, other considerations also establish that no reasonable person in the defendant's position would have felt compelled to remain. The defendant was specifically told he did not have to come with the officers to his residence prior to the first statement. He was reminded that he could go back to work after he let the investigators into his house with his key. He was not pat-searched, asked to empty his pockets or checked for weapons. The defendant was neither handcuffed nor restrained in any way. The defendant had unrestrained freedom of movement when he put his lunch in the refrigerator and retrieved beer. The defendant chose to remain with officers in his back yard rather than return to work.

Defendant argues that his movements were restrained because he was not allowed to be inside his residence when the warrant was being executed and because he decided to urinate in a box in his garage while police were present. But being excluded from a place where a court-

authorized search was taking place is not the same as being restrained. The defendant could have literally gone anywhere he wanted, with the exception of his house and only for the limited duration of the search. He drove himself to his house in his own car and could have used it to leave had he wanted to do so.

Moreover, the defendant never expressed any hesitation speaking with investigators. In his first statement, the defendant took the lead throughout the entire conversation, asking questions and choosing the topics discussed. Prior to his second statement, the defendant allowed investigators to enter his home, sat at his kitchen table and retrieved another chair so everyone could sit.

And there can be no inference that the defendant felt inclined to speak to investigators out of a sense of intimidation. Shortly after the conversation turned to the Wetterling and JS investigations, the defendant invoked his right to counsel and declined to engage in further discussion. Had the defendant wished to terminate his prior interactions with law enforcement, he clearly would have done so. His participation in these conversations was purely voluntary.

What's more, the officers conducted themselves in a highly professional and cordial manner throughout their contact with the defendant. Investigator Jensen and Agent McDonald were in plain clothes and driving an unmarked car. They were friendly during all of their interactions with the defendant. This is evident from the recordings made of both statements. They did not brandish weapons at him, yell at him or become confrontational. In fact, Investigator Jensen testified that their goal was to be non-confrontational. The defendant was not subjected to any physical deprivations, being allowed to eat, drink and urinate if necessary. The investigators did not use deception or scare tactics. Rather, they made him feel comfortable and engaged in polite conversation.

During the second interview, investigators presented the defendant truthful, factual information concerning their investigation. This is hardly a strong arm tactic. Investigators were straightforward and honest with the defendant in all respects. They brought a copy of a laboratory report to show the defendant as well as photos of the tire tracks and shoe impressions. Ex. 6, p. 293, 296. As Agent McDonald told the defendant, "I'm not here to try to brow beat you." Ex. 6, p. 294. They did not raise their voices or become confrontational with the defendant after he denied being involved in the JS or Wetterling cases.

The locations in which the statements were made is also significant. Both statements were taken at the defendant's own home. When a person is questioned "on his own turf," courts have observed repeatedly that the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation. *Czichray,* 378 F.3d at 826 (citing *United States v. Helmel,* 769 F.2d 1306, 1320 (8th Cir.1985)); *United States v. Wolk,* 337 F.3d 997, 1007 (8th Cir .2003); *Axsom,* 289 F.3d at 502; *United States v. Sutera,* 933 F.2d 641, 647 (8th Cir. 1991)).

During the first statement, the investigators spoke with the defendant in a gazebo in his own backyard. While there were approximately eight officers inside the residence conducting the search, the defendant was not in the house when that was happening. Rather, he sat outside on a nice day at a picnic table, placidly sipping a beer and freely chatting with investigators. This is far from a police-dominated, custodial setting such as a jail or a secure interview room at a police station. Likewise, during the second interview, the defendant willingly allowed the investigators into his own home. He sat across from the investigators at his own kitchen table. There was nothing about either interaction that was in any way "police-dominated."

This case does not present a close call. The defendant was not in custody on either occasion when he spoke to investigating officers. Because he was not in custody, no *Miranda* warning was required, and the defendant's motion to suppress his statements should be denied.

III Defendant's Motion for a Change of Venue Should be Denied

The defendant seeks a change of venue, claiming a fair trial in the District of Minnesota is impossible due to pre-trial publicity. This motion should be denied. The fact that this case has drawn media attention does not automatically give rise to a change of venue, even where pretrial publicity has been extensive. The Boston Marathon Bombing trial was held in the District of Massachusetts, despite significant and emotional pretrial publicity and over the objection of the defendant. *See United States v. Tsarnaev*, No. CR 13-10200-GAO, 2016 WL 184389 (D. Mass. Jan. 15, 2016). The District of Minnesota has also had well-publicized cases tried in the District, including the massive Thomas Petters Ponzi scheme and the Katie Poirier kidnapping. *See: United States v. Petters, 663 F.3d 375 (8th Cir. 2011); United States v. Blom,* 242 F.3d 799, 803 (8th Cir.2001). The question is not whether there has been publicity, but whether there is so great a prejudice against the defendant that he is unable to obtain a fair and impartial trial in the district. That standard has not been met.

The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by an impartial jury. This concept is embodied in Rule 21(a) of the Federal Rules of Criminal Procedure which provides:

> The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Federal Rules of Criminal Procedure 21(a). The standard imputed to Rule 21(a) by the Eighth Circuit is the same as that imposed by the Sixth Amendment. *See Pruett v. Norris*, 153 F.3d 579, 584-85 (8th Cir. 1998) (stating that a defendant must demonstrate corrupting pretrial publicity to receive a change of venue under the Sixth Amendment).

"In determining whether adverse pretrial publicity precludes a fair trial, the trial judge must consider the totality of the circumstances." *Patton v. Yount*, 467 U.S. 1025 (1984). However, it is not surprising when those charged with substantial crimes receive attention in the media. "One who is reasonably suspected of [murder] ... cannot expect to remain anonymous." *Dobbert v. Florida*, 432 U.S. 282, 303 (1977).

The Court uses a two-tiered analysis in evaluating a motion for a change of venue based on pretrial publicity. *United States v. Blom,* 242 F.3d 799, 803 (8th Cir. 2001). The tier-one analysis involves a determination of whether the pretrial publicity was so extensive and corrupting that unfairness of constitutional magnitude must be presumed. *Id.* If no such determination is made, the Court moves to the second tier of the analysis, which is a determination "whether the jury-selection process established an inference of actual prejudice." *Id.* at 804. In making this determination, the Court evaluates the voir dire testimony of the impaneled jury in order to determine whether an impartial jury was selected, thus obviating the necessity for a change of venue.' " *Id.* (quoting *United States v. McNally,* 485 F.2d 398, 403 (8th Cir. 1973)).

Defendant argues for a change of venue based on a tier-one analysis, pointing to hundreds of news articles pertaining to this case. The mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice and thus warrant a change of venue. The United States Supreme Court has identified four factors relevant to

presuming prejudice: the size and characteristics of the community, the nature of the publicity, the time between the media attention and the trial, and whether the jury's decision indicated bias. *See Skilling v. United States,* 561 U.S. 358, 382-84 (2010).

As to the size and characteristics of the community, this Court should consider that Minnesota has a population of nearly five and a half million people, with nearly 407,000 living in Minneapolis alone. The District of Minnesota encompasses all 87 counties of the state. Minnesota has a diverse population and geography, with large cities, such as Minneapolis and St. Paul, smaller cities such as Rochester and Duluth as well as numerous other cities and towns, encompassing urban, suburban and rural communities. The District of Minnesota would provide for a very large pool of prospective jurors.

Regarding the nature of the publicity in this case, press coverage has been extensive. However, the mere fact of widespread or even adverse publicity is not in itself grounds to grant a change of venue." *United States v. McNally*, 485 F.2d 398, 403 (8th Cir. 1973); *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002) ("The mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice and thus warrant a change of venue."). "Because our democracy tolerates, even encourages, extensive media coverage of crimes such as murder and kidnaping, the presumption of inherent prejudice is reserved for rare and extreme cases." *Blom*, 242 F.3d at 803. Even the formation of a tentative impression about the case by some jurors is not enough. *United States v. Bliss*, 735 F.2d 294, 298 (8th Cir. 1984) (quoting *United States v. Brown*, 540 F.2d 364, 378 (8th Cir. 1976)). Typically, such presumption is applicable in the context of small rural communities where inflammatory coverage is pervasive. *See CVS v. U.S. Dist. Ct. S.D. of California*, 729 F.2d 1174, 1181-1182 (9th Cir. 1983).

To create a presumption of inherent prejudice in the pretrial publicity, the coverage must be inflammatory or accusatory. *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002). Isolated incidents of "intemperate commentary" about the crime and the perpetrator are not sufficient to demonstrate that the coverage was inflammatory or accusatory when the majority of the reporting was "objective and unemotional." *Id.* Objective, straightforward reporting about a criminal case does not tend to arouse lingering ill-will or vindictiveness in the local community. *Bliss*, 735 F.2d at 299. As long as the reporting is factual and describes the defendant as having "allegedly" committed the crime or refers to him as being "accused" of committing the crime, the publicity is not inflammatory or accusatory. *Simmons v. Lockhart*, 814 F.2d 504, 509 (8th Cir. 1987).

To that end, defendant seems to argue that the association of his child pornography case with the Wetterling abduction is in itself inflammatory. The kidnapping of Jacob Wetterling is an emotional topic. However, the coverage as to the defendant has not been so inflammatory or accusatory as to warrant a change of venue. The mainstream press coverage regarding the defendant's case has been generally careful to indicate that the defendant is a "person of interest" in the Wetterling abduction and that he has denied any involvement. Defendant takes exception to the use of the phrase "person of interest," which the government maintains is less accusatory than the word "suspect."

The defendant also suggests that the publicity surrounding his case is attributable to the United States Attorney's Office for holding a press conference following defendant's arrest. This suggestion that, without public comments by the United States Attorney and other law enforcement officials, the case would have received less publicity is wholly speculative and simply unrealistic. The reality is that the search warrant affidavit for the defendant's residence, a publically filed document, plainly sets forth the connection between the defendant, the

Wetterling abduction, the JS kidnapping and sexual assault and the numerous attacks in Paynesville. As noted in the cases cited above, criminal proceedings are open to the public. Once the defendant was charged, it was inevitable that there would be testimony in open court about the search warrant, the affidavit, and the defendant's connection to the Wetterling case. That would have resulted in press coverage whether or not the U.S. Attorney's Office had said a single word. Had the Office remained silent about the matter, one can imagine the manner of speculation that might have occurred in a public left only with the bare allegations of the criminal complaint, the indictment and the search warrant affidavit. Rather, the comments by the United States Attorney made it clear that the defendant was being charged with various violations of laws related to child pornography, not the Wetterling abduction, and that he has denied involvement. These messages have carried though in the media and made the pretrial publicity less inflammatory, not more.

In sum, the defendant argues that he should receive a change of venue because of the association with Wetterling abduction. But it is the name of the defendant, not Jacob Wetterling, that appears on the indictment. While defendant's name has been part of the press coverage, it does not likely carry much recognition among potential jurors. The government does not anticipate the necessity at this time to introduce evidence concerning the Wetterling abduction, the JS kidnapping or the Paynesville assaults in its case-in-chief against the defendant. Rather, potential jurors will hear the defendant's name, the child pornography charges for which he has been indicted and testimony concerning the child pornography that was found during the execution of the search warrant. It is likely that the defendant can be tried in this District by a jury consisting of members who have no memory of ever having heard the defendant's name.

The last two *Skilling* factors, the time between the coverage and the trial and whether the jury's verdict indicated bias, are not ripe to consider at this time. At this stage of the

proceedings, a tier two analysis is impossible because jury selection is still months away. The ultimate determination as to venue should be deferred until such time as the Trial Court has all of the necessary facts before it. In fact, "[i]t is preferable for the trial court to await voir dire before ruling on motions for a change of venue." *United States v. Green,* 983 F.2d 100, 102 (8th Cir. 1992); *United States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001).

Moreover, the Trial Court may exercise various options to minimize any prejudicial impact upon the defendant's right to a fair trial, just as Judge Tunheim did in the *Blom* trial, a high-profile federal felon-in-possession case. Blom was the suspect in the 1999 kidnapping of nineteen-year old Katie Poirier, a sales clerk who disappeared from a convenience store in Moose Lake. During the investigation of the kidnapping and presumed homicide, authorities executed a search at the residence of Blom, a previously convicted felon, and recovered firearms and ammunition. The Poirier disappearance, search efforts and the subsequent investigation of Blom resulted in extensive statewide pretrial publicity. *Blom*, 242 F.3d at 802-03. In affirming Judge Tunheim's denial of Blom's change of venue motion, the Eighth Circuit noted the many precautions taken that were designed to assure the selection of an unbiased jury. These included moving the trial from Duluth to Minneapolis; assembling a jury pool three times the normal size; expanding the area from which the pool was drawn to the entire state but excluding the Fifth Division, where Poirier was abducted; mailing questionnaires to the prospective jurors inquiring about their exposure to pretrial publicity; and increasing the number of preemptory strikes for each side. *Id.* at 804. The Eighth Circuit concluded that the lengthy voir dire and careful exercise of discretion by the trial court succeeded in selecting a fair and impartial juror. The government believes that the same result can be achieved here.

CONCLUSION

For all the reasons explained above, the defendant's motion to suppress evidence should be denied, motion to suppress statements should be denied, and motion for change of venue should be denied.

Respectfully Submitted,

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ANDREW M. LUGER
United States Attorney

s/ Steven L. Schleicher

STEVEN L. SCHLEICHER
Assistant U.S. Attorney
Attorney ID No. 260587

BY: JULIE E. ALLYN
Assistant U.S. Attorney
Attorney ID No. 256511