

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

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UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
ERIC ROBERT RUDOLPH,)
Defendant.)

CR-00S-422-S

**DEFENDANT'S MOTION TO SUPPRESS
EVIDENCE AND FRUITS SEIZED
PURSUANT TO WARRANT 2:98M08**

COMES NOW, ERIC ROBERT RUDOLPH, by and through undersigned
counsel, and hereby files this Motion to Suppress Evidence and
Fruits Seized Pursuant to Warrant 2:98M08¹.

BACKGROUND

On June 26, 2003, Mr. Rudolph was indicted for violations of
18 U.S.C. § 844(i) and § 924(c)(1), in connection with the
bombing of an abortion clinic in Birmingham, Alabama which
occurred on January 29, 1998. Following the crime, search
warrants were obtained and executed by the government in the
Western District of North Carolina. The search warrants at issue
were obtained and executed in February, March, and May 1998 for
the following locations:

1. Cal's Mini Storage, Unit #91, 65 Old Peachtree Road,

¹ The number 2:98M08 refers to the docket number
allocated to this Warrant when it was filed in the United States
District Court for the Western District of North Carolina.

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Marble, North Carolina ("Cal's");

2. a single wide mobile home located on Caney Creek Road in Murphy, North Carolina ("Caney Creek"); and
3. a Gray 1989 Nissan Truck.

With respect to these three locations, on the following dates and times, the government obtained and executed the following warrants:

No.	Warrant/Location	Obtained	Executed
1	2:98M08 Cal's Storage 1	02/01/98 10:57 pm	02/02/98 10:00 am
2	2:98M09 Caney Creek 1	02/03/98 5:00 pm	02/04/98 7:52 am
3	2:98M10 Cal's Storage 2	02/04/98 12:15 pm	02/05/98 10:45 am
4	2:98M12 Nissan Truck	02/08/98 8:25 pm	02/09/98 4:42 pm
5	2:98M20 Caney Creek 2	03/05/98 3:15 pm	03/06/98 11:30 am
6	2:98M21 Cal's Storage 3	03/05/98 3:15 pm	03/06/98 9:00 am
7	2:98M46 Cal's Storage 4	05/13/98 4:55 pm	05/14/98 8:20 am

In a June 23, 2004 Order (Doc. 255), this Court directed counsel for Mr. Rudolph to file motions to suppress evidence on or before September 13, 2004. In compliance therewith, we hereby file this Motion to Suppress Evidence and Fruits Seized Pursuant to Warrant 2:98M08 (hereinafter "Warrant M08" or "the Warrant").

Mr. Rudolph is charged in a bombing case. However, the case

did not begin that way; apparently, it started as a misdemeanor case. When the government agents obtained Warrant M08, it never suggested that it was seeking information about a bombing charge. Rather, according to the agents, they wanted to search a storage facility in North Carolina, hundreds of miles away from the Birmingham bomb scene, because they believed Mr. Rudolph had violated a misdemeanor statute, a statute that prohibited certain types of explosives materials from being stored improperly. Nevertheless, regardless of how the case began, the following is clear: Warrant M08 fails to conform to a number of fundamental and well-established requirements imposed by the Fourth Amendment.

First, the Warrant is so lacking in indicia of probable cause that no reasonable law enforcement officer would rely upon it. Warrant M08 not only fails to establish any connection between the clinic bombing and truck the government alleges belongs to Mr. Rudolph, but also fails to establish that the place to be searched contained any evidence of criminal activity, one of the Fourth Amendment's most basic requirements.

Second, even without the insurmountable constitutional flaws that exist on the face of the Warrant, the Warrant is constitutionally infirm under the standards set forth by the Court in Franks v. Delaware, 438 U.S. 154 (1978), and its

progeny. The Warrant is plagued with material falsehoods and material omissions, constitutional deficiencies which require this Court to conduct an evidentiary hearing, and thereafter suppress the evidence and fruits that were unlawfully obtained.

Third, in addition to the constitutionally-fatal defects pertaining to the Warrant itself, the Warrant was executed in a constitutionally-flawed manner. With respect to the items the agents were authorized to seize, the Warrant was quite specific: it directed the agents to seize "explosive materials ... being unlawfully stored." However, when the agents were unable to find these materials, materials that never existed in the first place, the agents simply ignored the constitutionally-based directive and seized other items. Under fundamental Fourth Amendment law, the agents' actions are constitutionally inexcusable.

Any one of the three grounds offered by Mr. Rudolph justifies the relief he seeks. Therefore, for all of these reasons, standing alone or together, this Court should suppress the evidence and fruits seized pursuant to Warrant M08.

ARGUMENT

The Fourth Amendment unambiguously states that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const.

amend IV. Within the Fourth Amendment "resides one of the principle pillars of the liberty of the individual in the Republic: 'the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.'" United States v. Martin, 615 F.2d 318, 322 (5th Cir. 1980). To protect the values enshrined in the Fourth Amendment, it has long been the rule that "[e]vidence seized as the result of an illegal search may not be used by the government in a subsequent criminal prosecution." United States v. Martin, 297 F.3d 1308, 1312 (11th Cir. 2002) (citing Franks, 438 U.S. 154).

Here, Mr. Rudolph challenges the search conducted pursuant to Warrant M08 on the following three grounds:

- (1) the Warrant is so lacking in indicia of probable cause that no reasonable officer would rely upon it;
- (2) the Warrant was obtained in violation of the requirements set forth in Franks v. Delaware and its progeny; and
- (3) when executing the Warrant, the officers exceeded the scope of the Warrant by seizing items they were simply not authorized to seize.

In order to place each of these grounds into the appropriate context, an overview of the Warrant's allegations is essential.

I. THE WARRANT'S ALLEGATIONS.

Warrant M08 is accompanied by a less than four-page affidavit. On the first page of the affidavit, the affiants

state:

"We have set forth only the facts we believe are necessary to establish probable cause to believe that evidence of violations of Title 18 U.S.C., Section 842(j), failure to store explosive material in a manner in conformity with the regulations promulgated by the Secretary of the Treasury, is located in unit number 91 at Cal's Storage, 65 Old Peachtree Road, Marble, North Carolina."

See, Ex. A at BH-CWA-000074.² In the remainder of the affidavit, the "facts" that allegedly support the affiants assertion of probable cause may be summarized as follows.

On January 29, 1998, a bomb exploded outside a clinic in Birmingham, Alabama. Id. According to the affiants, a witness "observed an unidentified white male walking quickly away from the clinic immediately following the explosion." Id. The witness followed this male "for several blocks before losing sight of him." Id. According to the affidavit, "[l]ater, in the same vicinity, the witness observed a small gray colored foreign made pickup truck bearing North Carolina tag KND1117." Id.

In the next paragraph, the affidavit asserts that a January 29, 1998 "search of the computerized databases for the North Carolina Department of Motor vehicles revealed license tag number KND1117 is issued to a 1989 Nissan pickup truck, ... and that

² In addition to this motion to suppress, Mr. Rudolph has filed three other motions to suppress. The exhibits referenced in all three of these motions are contained in a single packet that was filed under seal.

North Carolina drivers license number 8814120 had been issued to Eric Robert Rudolph." Id. According to the affidavit, the North Carolina drivers license information describes Rudolph as "a white male, 5'11'' in height, blue eyes and brown hair; date of birth September 19, 1966." Id.

In the next paragraph, the affidavit states that on January 30, 1998, a material witness warrant was issued for Mr. Rudolph. Id.

Then, the affidavit asserts that on February 1, 1998, Calvin Stiles, the owner and operator of a storage facility in Marble, North Carolina, telephoned the FBI. According to the affidavit, Mr. Stiles informed the FBI that Eric Rudolph was renting unit number 91, a "10' X 10' storage unit" at Mr. Stiles's Marble, North Carolina storage facility ["Cal's"]. Id. at BH-CWA-000075.

In a subsequent section, the affidavit discusses Agent Neely, an ATF certified canine handler, and Garrett, his ATF canine, a yellow Labrador Retriever. Id. In addition to discussing the explosives detection training Neely and Garrett had received, the affidavit discloses Neely's and Garrett's alleged actions at Cal's on February 1, 1998. Id. at BH-CWA-000075-76.

According to the affidavit, on February 1, 1998, Agent Neely led Garrett along the outside of storage units 88 through 92 two

times. Id. at BH-CWA-000076. On both occasions, Garrett allegedly "alerted on the middle lower handle and the right side lock of unit number 91." Id. According to the affidavit, "[b]ased on Garrett's training and behavior, together with the experience and training of S/A Neely, it is believed that explosive residue exists on the door of unit number 91." Id. (emphasis added).

Thereafter, the affidavit discusses the storage unit buildings at Cal's mini storage. Id. The affidavit states that "[b]ased upon the training and experience of ATF special agents that examined the exterior of the storage unit buildings at Cal's Mini Storage, these Agents have determined that the buildings do not meet the federal regulations required for the storage of explosives." Id.

In its final paragraph, the affidavit states:

"Based upon the above facts, the undersigned believe that probable cause exists to believe that contained in Cal's Mini Storage, Unit #91 ... are explosive materials as defined in Title 18, U.S.C., Section 841, being unlawfully stored in a manner not in conformity with Part 55 of Title 27 Code of Federal Regulations, 27 CFR 55.165, in violation of Title 18, U.S.C., Section 842(j)."

Id. at BH-CWA-000077.³

³ Significantly, although the Warrant cites "27 CFR 55.165" as the regulatory basis for the alleged storage violation discussed in the Warrant, "27 CFR 55.165" has absolutely nothing to do with improper storage of explosive materials. This

II. WARRANT M08 IS SO LACKING IN INDICIA OF PROBABLE CAUSE THAT NO REASONABLE OFFICER WOULD RELY UPON IT.

"The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" Maryland v. Pringle, 124 S. Ct. 795, 799 (2003) (citation omitted).

Although the probable cause standard is a "practical, nontechnical conception" that is "incapable of precise definition or quantification into percentages," Pringle at 799-800, (citations and internal quotations omitted), there is certain "critical information [that] should be included in a search warrant affidavit to establish a finding of probable cause." United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002).

Significantly, "[i]t is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched." Id. For this reason, "the affidavit must contain 'sufficient information to conclude that a fair probability existed that seizable evidence would be found in the place sought to be searched.'" Id. "The critical element in

section, which is captioned "Failure to report theft or loss," makes it unlawful for any person who has knowledge of the theft or loss of explosive materials to report the theft or loss under specified circumstances. 27 C.F.R. § 55.165 (1998).

a reasonable search is ... reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978). For a number of reasons, Warrant M08 failed to satisfy even this most basic standard.

A. THE AFFIDAVIT FAILED TO ESTABLISH ANY CONNECTION BETWEEN THE CLINIC BOMBING AND THE TRUCK THE GOVERNMENT ALLEGES BELONGS TO MR. RUDOLPH.

According to the affidavit, "[a] witness observed an unidentified white male walking quickly away from the clinic immediately following the explosion." See Ex. A at BH-CWA-000074. Thereafter, the affidavit states:

"The witness followed this male, approximately mid-thirties in age, average height, medium build, with brown hair, for several blocks before losing sight of him. Later, in the same vicinity, the witness observed a small gray colored foreign made pickup truck bearing North Carolina tag KND1117."

Id.

Thus, the affiants state that a witness followed an individual and then lost sight of him. After that, the witness apparently never saw that individual again. Although the witness did observe a truck after losing sight of the individual, the affidavit does not allege that the individual was ever seen inside, next too, or anywhere around the truck. The affidavit merely states that the witness lost sight of the individual and "[l]ater, in the same vicinity, the witness observed a small gray

colored foreign made pickup truck bearing North Carolina tag KND1117." Id.

In order to justify the search of a storage unit in North Carolina, hundreds of miles away from the scene of the crime, the affidavit needed to establish a number of facts. Clearly, the affidavit needed to establish some connection between the clinic bombing and the truck. The affidavit, however, completely fails to make such an association. Without this connection, the affidavit merely established that a bomb exploded and that a truck was seen in the "same vicinity" as "several blocks" from the clinic. There were hundreds of vehicles in the same "vicinity" as "several blocks" from the clinic on the day of the bombing, which is located in the area of the UAB educational complex. By failing to connect the individual the witness allegedly followed to the truck the witness subsequently observed, the affidavit failed to establish what the Fourth Amendment requires: "'[S]ufficient information to conclude that a fair probability existed that seizable evidence would be found in the place sought to be searched.'" Martin, 297 F.3d at 1314.

B. THE AFFIDAVIT FAILED TO ESTABLISH THAT THE OBJECTS SOUGHT WOULD BE FOUND IN THE PLACE TO BE SEARCHED.

The affidavit asserts that probable cause existed to believe that "explosive materials" were being unlawfully stored within

storage unit #91 in violation of 18 U.S.C. § 842(j). In order to justify the search of the interior of the storage unit, the affidavit relied primarily upon "facts" pertaining to an explosives' detection dog. Aside from the substantial Franks deficiencies pertaining to the dog, which will be discussed below, the affidavit's dog-related assertions do not provide probable cause to search the inside of unit #91.

According to the affidavit, the dog handler, S/A Ray Neely, and the dog, Garrett, successfully completed the ATF Explosives Detection School in Front Royal, Virginia. See Ex. A at BH-CWA-000075. The affidavit claims that "[t]his training gave Canine Garrett the capability of recognizing all five (5) families of explosives. All 19,000 explosives can be divided into these five (5) families." Id. at BH-CWA-000075-76.

The affidavit then alleges that on February 1, 1998, S/A Neely led Garrett along the outside of units 88 through 92 and that Garrett "alerted on the middle lower handle and the right side lock of unit number 91. S/A Neely repeated the same procedure a second time with Canine Garrett, with the same results." Id. at BH-CWA-000076. According to the affidavit:

"Based on Garrett's training and behavior, together with the experience and training of S/A Neely, it is believed that explosive residue exists **on the door of unit number 91**. Individuals who handle explosives will often leave explosive residue on items which are

touched by them. These explosive residues are able to be detected by explosive detection canines."

Id. (emphasis added).

Despite the affidavit's assertion that Neely believed explosive residue existed only on the "**the door of unit number 91**," the final paragraph of the affidavit offers the following assertion: "[T]he undersigned believe that probable cause exists to believe that contained **in** Cal's Mini Storage, Unit #91 ... are explosive materials as defined in Title 18, U.S.C., Section 841, being unlawfully stored." Id. at BH-CWA-000077 (emphasis added).

Under 18 U.S.C. § 841(c), the term "explosive materials" is expressly and specifically defined. The term "means explosives, blasting agents, and detonators." 18 U.S.C. § 841(c). Each of these three terms is also specifically defined. With respect to 18 U.S.C. § 842(j), the misdemeanor section that served as the alleged violation in Warrant M08, that section makes it "unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary."

Most significantly, § 842(j) and the storage regulations do not apply to "small arms ammunition and components" or "commercially manufactured black powder in quantities not to exceed fifty pounds ... intended to be used solely for sporting, recreational," or other purposes. 18 U.S.C. § 845(a)(4) and (5)

(1998). In other words, under these circumstances, § 842(j) did not prohibit one from storing "small arms ammunition and components" or "commercially manufactured black powder" within storage unit #91.

As the foregoing reveals, the affidavit offered in support of Warrant M08 is flawed in two significant respects. First, the affidavit asserts that Neely believed that **explosive residue** existed on "**on the door of unit number 91.**" Without any factual support, however, the affiants claim that probable cause existed to believe that "**explosive materials**" were being unlawfully stored "**in Cal's Mini Storage.**" Thus, because the affidavit did not offer probable cause to believe any explosive materials were **within** unit #91, suppression on this basis alone is required.

Second, even if one were able to conclude that the affidavit provided sufficient reason to believe that explosive materials were inside unit #91, the affidavit provides absolutely no support for the contention that such materials, even assuming they existed, were being unlawfully stored. Our position on both of these points is supported by the Eleventh Circuit's decision in United States v. Lockett, 674 F.2d 843 (11th Cir. 1982).

In Lockett, the government sought and obtained a warrant to search for explosive materials being stored in violation of 18 U.S.C. § 842(j), the same statute at issue in the instant case.

Unlike in the instant case, however, with respect to the facts pertaining to the alleged storage violation, the affidavit offered in support of the warrant was far more detailed. According to the Eleventh Circuit, the affidavit in Lockett set forth the following pertinent facts:

"Curtis George Lockett was dismissed by South Central Bell Telephone Co. in May of 1976; since that time Lockett has taken several legal actions against South Central Bell and has lost in each action; about 3-14-80 SCB Attorney Donald Edwards received an unsigned letter dated 3-13-80, believed to be from Lockett due to the content and which contains implied threats; said letter had attached photographs of the residences of several SCB officials and a SCB building; between 3-27-80 and 7-8-80 several telephone conversations between Lockett and SCB Attorneys Donald Edwards and Ken Jackson have taken place in which implied threats were made and explosives were mentioned by Lockett.

"On June 19, 1980, an explosive device was found at a South Central Bell Building in Washington County, AL. This device consisted of dynamite and an electric cap.

"On June 26, 1980, I checked the records of federally licensed Explosives Dealer, A.W. Compton and Son, Nanafalia, AL. I found an Explosive Transaction Record, Form 4710, dated 6-9-80 and signed by Curtis G. Lockett. This record revealed that Lockett purchased one case of dynamite, 20 electric caps, and 20 safety caps. A.W. Compton, Jr., partner, stated he knew Curtis George Lockett personally and that he had made the sale to Lockett on 6-9-80. The dynamite and electric cap found on 6-19-80 were the same type as those purchased by Lockett on 6-9-80.

"On July 11, 1980, this affiant observed these premises from the public county road and I saw no structures which would indicate proper storage

facilities on the premises for storing high explosives."

Id. at 845. In addition to these facts, the affidavit contained a statement by the affiant that he "believ[ed] dynamite [was] on the premises." Id.

Prior to trial, Lockett moved to suppress the fruits of the search – 85 sticks of dynamite improperly stored in an abandoned car and seven sticks located inside a wooden house. Id. at 845. After the trial court denied this motion, Lockett was convicted of violating 18 U.S.C. § 842(j). Lockett appealed the trial court's decision on his motion to suppress, arguing that the evidence before the magistrate judge that authorized the search was insufficient to show "the requisite probable cause necessary to authorize the search." Id. at 845. In an opinion that is particularly relevant to the instant case, the Eleventh Circuit agreed with Lockett and reversed his conviction. Id. at 847.

The Eleventh Circuit began its analysis by recognizing that since "the warrant requirement of the fourth amendment is a valuable and cherished protection against unreasonable intrusion," it is incumbent upon courts "to insure that warrants are issued only upon a showing of probable cause." Id. at 845-46. Thereafter, the court addressed allegations of the affidavit and found that the affidavit made essentially four points:

"(1) on June 6, 1980 Lockett purchased a case of dynamite; (2) Lockett was a disgruntled former employee of South Central Bell Telephone Company (SCB) who had lost in several lawsuits against SCB, had made implied threats against the company and had mentioned explosives; (3) on June 19, 1980, a bomb made of the same 'type' of dynamite as that purchased by Lockett was found at a South Central Bell building in Washington County Alabama (about 60 miles from Sweetwater); and (4) no proper storage facilities could be observed in Lockett's Sweetwater 'residence' when viewed from the adjacent road."

Id. at 846 (internal footnotes omitted). Despite the affidavit's apparently detailed allegations, the Eleventh Circuit concluded that the warrant could not survive scrutiny under the Fourth Amendment. According to the Eleventh Circuit, the affidavit lacked one of the Fourth Amendment's most basic requirements:

"Missing is a critical link in the chain of facts and circumstances which would lead to a reasonable belief that dynamite was improperly stored at Lockett's Sweetwater address. The affidavit set forth no facts from which the magistrate could infer that dynamite was located at that particular place."

Id. at 846 (internal citations omitted). Although the affidavit contained a statement by the affiant that he believed that unlawfully stored explosives were on the premises, the Eleventh Circuit dismissed this statement entirely, noting that "[s]uch a conclusory statement, without more, of course has no probative value." 674 F.2d at 845.

Just like Lockett, the affidavit accompanying Warrant M08 set forth no facts from which the magistrate could infer that explosive materials were within the place to be searched. According to the affidavit, Garrett's alerts made Neely believe that explosive residue existed "**on the door of unit number 91.**" See, Ex. A at BH-CWA-000076. The affidavit further recognizes that the "area in the storage facility tested by S/A Neely and Canine Garrett, was conducted ... in an area accessible to the public." Id. Although the affidavit contained a statement by the affiants that they believed unlawfully stored explosive materials were "**in** Cal's Mini Storage, unit #91," Lockett demonstrates that for Fourth Amendment purposes, "[s]uch a conclusory statement, without more, of course has no probative value." 674 F.2d at 845.

Furthermore, even if one were able to conclude that the affidavit sufficiently established the existence of explosive materials **within** unit #91 - a conclusion that Lockett does not allow - the affidavit in this case, unlike the affidavit in Lockett, fails to establish the presence of any regulated explosives. In Lockett, the affidavit established that Lockett purchased dynamite, had no proper storage facilities for dynamite, threatened his former employer with dynamite, and may have placed dynamite at one of his employer's facilities less

than two weeks after his dynamite purchase. As the appellate court noted, pertinent regulations classified dynamite as a "high explosive," a classification to which various federal regulations applied. 674 F.2d at n.1.

Unlike Lockett, the instant affidavit failed to establish the existence of any regulated explosives anywhere. According to the affidavit, the dog did not have the capacity to differentiate between different types of explosives. Rather, Garrett had "the capability of recognizing all five (5) families of explosives." Ex. A at BH-CWA-000076. As shown above, under federal law, some explosives are regulated and some are not. In the circumstances specified in 18 U.S.C. § 845(a)(4) and (5), the storage regulations do not even apply to "small arms ammunition and components" or "commercially manufactured black powder in quantities not to exceed fifty pounds." See, 18 U.S.C. § 845(a)(4) and (5) (1998). Even if one were to assume the presence of a regulated explosive within unit #91 - a proposition for which the affidavit provides absolutely no support - there is no basis to conclude that regulated explosives were being unlawfully stored within the unit. See e.g., 27 C.F.R. §§ 55.202(b) 55.203(d), and 55.210(b) (1998) (permitting the indoor storage of low explosives in 50 pounds or less in a type 4 magazine).

In sum, Lockett demonstrates that a search warrant must establish "a 'substantial basis' to conclude that the instrumentalities of the crime will be discovered on the searched premises." Lockett, 674 F.2d at 846 (citations omitted). "The fact that Lockett may have placed a bomb next to a building some 60 miles away from Sweetwater is not enough. Without some showing that dynamite was being stored at the Sweetwater address, the evidence is insufficient to support a finding of probable cause." Id. at 847.

Even more so than in Lockett, the instant affidavit failed to establish that explosive materials were being unlawfully stored within the place to be searched. Like Lockett, the affidavit contained an unsupported assertion that the affiants believed that unlawfully stored explosives were within the place to be searched. According to Lockett, however, "[s]uch a conclusory statement, without more, of course has no probative value." 674 F.2d at 845.

Therefore, for the foregoing reasons, this Court should conclude, as the Eleventh Circuit did in Lockett, that the "evidence is insufficient to support a finding of probable cause." 674 F.2d at 847. See also, United States v. Gramlich, 551 F.2d 1359, 1362 (5th Cir. 1977) (search warrant was not supported by probable cause because the affidavit did not contain

any allegation that connected the defendant's residence to the smuggling of marijuana that occurred fifty miles away); United States v. Flanagan, 423 F.2d 745, 747 (5th Cir. 1970) (search warrant was issued without probable cause and noting that "[t]he inference that the [stolen] goods were, or might be, at Flanagan's residence was entirely the [affiant's]").

III. THE GOVERNMENT OBTAINED THE WARRANT IN VIOLATION OF THE STANDARDS SET FORTH IN FRANKS V. DELAWARE AND ITS PROGENY.

Since Franks v. Delaware, 438 U.S. 154, 155 (1978), a citizen accused with a crime has had the right "to challenge the truthfulness of factual statements made in an affidavit supporting [a] warrant." According to the Court in Franks:

"[W]here the defendant makes a substantial preliminary showing that an affiant knowingly and intentionally included a false statement in an affidavit, or made the false statement with reckless disregard for its truth, and the false statement was necessary to the finding of probable cause, then constitutional mandate requires that a hearing be held at the defendant's request."

United States v. Reid, 69 F.3d 1109, 1114 (11th Cir. 1995) (citing Franks, 438 U.S. at 155-56). Once a Franks hearing is conducted, the focus becomes whether "the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence." United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980) (quoting Franks, 438 U.S. at 155-56). If it is, "and, with the affidavit's false material set to

one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id.

Importantly, "[t]he reasoning in Franks also applies to information omitted from warrant affidavits. Thus, a warrant affidavit violates the Fourth Amendment when it contains omissions 'made intentionally or with a reckless disregard for the accuracy of the affidavit.'" Madiwale v. Savaiko, 117 F.3d 1321, 1326-27 (11th Cir. 1997) (citation omitted).

With respect to omissions, "[a] party need not show by direct evidence that the affiant makes an omission recklessly. Rather, it 'is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.'" Id. at 1327. Once it is shown that the omitted material would have prevented a finding of probable cause, the Court is "required to void the warrant and suppress the evidence seized pursuant to it." Martin, 615 F.2d at 328.

Here, Warrant M08 is afflicted with numerous Franks-type problems. These problems fall into two primary categories: (1) misrepresentations and omissions pertaining to the witness referenced in the affidavit, and (2) misrepresentations and

omissions pertaining to Neely and Garrett. Importantly, the Franks violations pertaining to both of these categories are not *de minimis*. They constitute real and substantial grounds for suppressing the evidence and fruits seized pursuant to Warrant M08.

A. SUBSTANTIAL FRANKS VIOLATIONS EXIST WITH RESPECT TO THE WITNESS REFERENCED IN THE AFFIDAVIT.

According to the affidavit, after an explosion outside the New Woman All Women Health Care Clinic at approximately 7:25 a.m. on January 29, 1998, the following occurred:

"A witness observed an unidentified white male walking quickly away from the clinic immediately following the explosion. The witness followed this male, approximately mid-thirties in age, average height, medium build, with brown hair, for several blocks before losing sight of him. Later, in the same vicinity, the witness observed a small gray colored foreign made pickup truck bearing North Carolina tag KND1117."

Ex. A at BH-CWA-000074. The Franks violations pertaining to this passage are astounding.

1. NO WITNESS SAW ANY INDIVIDUAL "WALKING QUICKLY AWAY FROM THE CLINIC IMMEDIATELY FOLLOWING THE EXPLOSION".

Two conclusions may be drawn from the above quoted portion of the affidavit: a) a witness observed an unidentified male "walking quickly away from the clinic immediately following the explosion;" and (b) since the witness allegedly "observed" the individual "walking quickly away from the clinic," the witness

was able to see the clinic. Both of these allegations are patently false.

Documents produced in discovery reveal that the "witness" referenced in the affidavit is J.H. Before obtaining Warrant M08 on February 1, 1998 at 10:57 p.m, FBI agents, ATF agents, and local law enforcement agents interviewed J.H. on several occasions. The government's own reports of these interviews demonstrate that J.H. did not see the individual he allegedly witnessed walking "quickly away from the clinic." Indeed, the government's own reports establish that J.H. was blocks away from the clinic at the time of the explosion.

On the morning of the bombing, J.H. "was doing his laundry on the ground floor of his dormitory, Rast Hall, when he heard an explosion." See Ex. F at BH-1B-001233. As soon as he heard the explosion, J.H. "immediately moved to the window facing [Rast] park and observed a cloud of bluish white smoke near DOMINO'S PIZZA." Id. Then, J.H. "immediately noticed a white male, walking at a south westerly angle **across the park** towards 11th Avenue at a quick pace." Id. (emphasis added).

Rast Park is not the scene of the crime. In fact, in previous filings in this case, the Government has acknowledged that when J.H. heard the explosion, he was blocks away from the clinic. In the criminal complaint filed in this District, the

Government admitted that J.H. was "one block away to the south **and** west of the site of the explosion." United States v. Rudolph, Criminal Comp. at ¶7 (emphasis added)⁴.

Although the government's filings in this District forthrightly acknowledge that J.H. was blocks away from the scene of the crime when he heard an explosion, the government's filings in North Carolina were simply untrue. In North Carolina, the affiants informed the issuing magistrate that J.H. "observed an unidentified white male **walking quickly away from the clinic immediately following the explosion.**" This assertion, however, is patently false.

The affiants' motivation for misleading the issuing magistrate is obvious. Quite naturally, the proximity of an individual to the scene of a crime is material to the probable cause inquiry. "Flight from the crime-scene, rather than from some other point, may augur probable cause for an arrest." United States v. Young, 598 F.2d 296, 305 (D.C. Cir. 1979) (Robinson, J., concurring).

It was physically impossible for J.H. to see anyone "walking quickly away from the clinic." When J.H. heard the explosion, he "was one block away to the south **and** west of the site of the

⁴ Although the complaint has no docket number, the docket in this case shows that the criminal complaint was filed on February 14, 1998.

explosion." (emphasis added) The government's own reports demonstrate that when the affiants informed the issuing magistrate that a witness observed an individual fleeing the scene of the crime immediately following the explosion, they knew that this representation on this important point was simply untrue. On this basis alone, Mr. Rudolph is entitled to a Franks hearing.

2. THE WITNESS DID NOT SEE THE TRUCK "IN THE SAME VICINITY" AS "SEVERAL BLOCKS" FROM THE SCENE OF THE CRIME.

According to the affidavit, J.H. saw an individual "walking quickly away" from the crime scene "immediately following the explosion." J.H. followed this individual for "several blocks before losing sight of him." The affidavit then states that "[l]ater, **in the same vicinity**, the witness observed a small gray colored foreign made pickup truck bearing North Carolina tag KND1117." Ex. A at BH-CWA-000074 (emphasis added). Based on these allegations, it would appear that J.H. saw the truck "in the same vicinity" as "several blocks" from the scene of the crime. Once again, however, the affiants' allegations are patently false.

J.H. has never informed any law enforcement agent that he saw a truck "in the same vicinity" as "several blocks" from the scene of the crime. Indeed, in one of his very first meetings

with FBI and ATF agents on January 29, 1998, the day of the bombing, J.H. told the agents that he saw the truck referenced in the affidavit while he was driving eastbound on Valley Avenue, near the intersection of Valley Avenue and "Becham [sic]⁵ Drive." Ex. F at BH-1B-001234 and 36. The intersection of Valley Avenue and Beckham drive is on the side of Red Mountain opposite the clinic, a total distance from the clinic of approximately 1.7 miles. See, Ex. G. No one can credibly contend that the intersection of Valley and Beckham is in "the same vicinity" as "several blocks" from the crime scene, as the affidavit falsely alleges.

Once again, it is obvious why the affiants would falsify the facts on this issue. Federal law enforcement wanted the issuing magistrate to believe that Eric Rudolph was seen fleeing the scene of the crime, and that his truck was seen "in the same vicinity" as "several blocks" from the crime scene.⁶ If this were true, a finding of probable cause would indeed be much more likely.

⁵ The correct name of the drive is "Beckham," not "Becham."

⁶ This alleged sighting must be placed in its correct historical context of the then relatively recent Richard Jewell fiasco in which the FBI improperly targeted and identified Mr. Jewell as the actor in the bombing of the Atlanta Centennial Olympic Park.

At best, J.H. observed an individual from a vantage point of blocks away from the scene of the crime. He did not witness, as the affidavit falsely alleged, an individual fleeing the scene of the crime immediately following the explosion. Moreover, at best, when J.H. allegedly saw the truck referenced in the affidavit, the truck was over Red Mountain, over one mile and one half from the scene of the crime. It was not, as the affidavit falsely alleged, "in the same vicinity" as "several blocks" from the crime scene. Thus, because the affiants falsified the true facts on these important points, Mr. Rudolph is entitled to a Franks hearing.

3. THE AFFIDAVIT OMITTED CRITICAL INFORMATION ABOUT J.H.

The information contained within the affidavit pertaining to J.H. presents a straightforward version of events. J.H. saw an individual "walking quickly away" from the crime scene "immediately following the explosion." The individual was "approximately mid-thirties in age, average height, medium build, with brown hair." J.H. followed this individual for several blocks before losing sight of him. Later "in the same vicinity," J.H. saw a pickup truck with a North Carolina license tag. In addition to the affiants' falsifications about J.H. seeing an individual fleeing the crime scene and then seeing a truck in the same vicinity as several blocks from the crime scene, the

affiants omitted critical information about J.H.'s alleged sightings.

First, with respect to the timing of J.H.'s alleged sighting of the truck, the affiants recklessly failed to inform the issuing judge that, at best, J.H. saw the truck over 40 minutes after the explosion. According to the affidavit, the explosion at the clinic occurred at approximately 7:25 a.m. Ex. A at BH-CWA-000074. The government's own documents establish that before J.H. allegedly saw the truck, he initiated and participated in a telephone conversation with a 911 operator. Ex. F. at BH-1B-001234. The 911 call began at 7:54 a.m. and ended at 8:04 a.m. Ex. H at BH-302-000085. It was not until sometime after the 911 call ended that J.H. allegedly saw the truck referenced in the affidavit. Ex. F at BH-1B-001234. Therefore, it cannot be disputed that J.H. did not see the truck until at least 40 minutes after the explosion. Yet, the affidavit recklessly omits this material fact.

In addition to this omission, the affiants omitted other critical information. The affidavit alleges that J.H. followed the individual he observed for several blocks, lost sight of the individual, and then later saw a truck in the same vicinity. When J.H. met with the agents, however, he never informed them that he lost sight of the individual one time, as the affidavit

falsely alleged. Rather, in one its very first meeting with J.H., the government learned that before seeing the truck over 40 minutes after the explosion, J.H. lost sight of the individual at least four separate times!

When J.H. met with the government on the day of the bombing, the agents learned that after seeing the individual in Rast Park, J.H. had lost sight of that individual. Ex. F at BH-1B-001233. While driving in his car attempting to locate that individual, J.H. allegedly spotted the individual again, this time walking southbound on 16th Street. Id. However, once again, J.H. lost sight of that individual, who, according to J.H., entered an alley "east from 16th Street between 14th Avenue South and 15th Avenue South." Id. Consequently, after losing sight of the individual for at least the second time, J.H. drove "to the intersection of 16th Street South and 15th Avenue South and turned east onto 15th Avenue South, parking in front of an apartment complex located on the north side of the street in the 1600 block." Id. at BH-1B-001234. After several minutes, J.H. "saw someone walk from the west side of the apartment complex heading eastbound on the north sidewalk of 15th Avenue South." Id. J.H. claims that, although this individual was dressed in "different clothing," he recognized the individual as the same person he had previously seen. Id. This time, J.H. allegedly

followed the individual "to the top of the hill where 15th Avenue South turns into 18th Street South." Id. Once again, however, J.H. lost sight of the individual, bringing the total number of lost sightings to at least three! Id. Thereafter, J.H. drove around the neighborhood looking for the individual for approximately "25 to 30" minutes, before stopping at the McDonald's restaurant "near the intersection of Valley Avenue and 20th Street South." Id. at BH-1B-001236. While talking with a 911 operator, J.H. allegedly sees the individual again. Id. Yet, once again, for at least the fourth time, J.H. losses sight of that individual. Thus, when the affiants asserted that J.H. only lost sight of the individual one time, they knew that this assertion was simply untrue.

In addition to the foregoing omissions, the affidavit also recklessly omits that J.H. provided the agents with descriptions of the individual that varied in significant respects. According to the affidavit, J.H. apparently described the individual as being "approximately mid-thirties in age, average height, medium build, with brown hair." Ex. A at BH-CWA-000074. In his description of the individual he allegedly saw in Rast Park, however, J.H. described the individual as "about 6'1'", "not like a medium height." Ex. I at BH-302-05613. J.H. also described the individual as between 175 - 185 pounds with "long" "brownish

sorta" hair. Id. at BH-302-05611. After losing sight of this individual for the second time, however, J.H. claimed that the next time he saw this person, the individual had "either brown" or "blackish hair" that appeared pressed down, and "whatever the long hair was it wasn't on anymore." Id. at BH-302-005617. On this occasion, J.H. claimed that the individual had a receding hairline with hair length that was "just average." Id. at BH-302-005617 and 21-22. Although J.H. was not sure whether the individual had a mustache, id. at BH-302-005621, in his final alleged sighting, J.H. was confident that the individual did have a mustache. Id. at BH-302-005629.

In addition to J.H.'s varying physical descriptions, the affiants recklessly omitted J.H.'s varying descriptions of the clothing allegedly worn by the individual he observed. According to J.H., the individual he observed in Rast Park was wearing a black hat, "a darker color" pair of pants, and a "longer type jacket." Ex. I at BH-302-005611-12. After losing sight of the individual and allegedly seeing him again, however, J.H. claims the individual was not wearing a coat or a cap. Id. at BH-302-005617-18. And this time, J.H. claims that the individual was wearing "some real dark sun glasses" and a light colored shirt. Id. With respect to his very next sighting, however, J.H. described the individual as wearing "a green plaid shirt" and

jeans. See, Ex. J at BH-302-000113. But on the very next sighting, J.H. did not mention a "green plaid shirt." Rather, J.H. informed the agents that the individual inside the truck was wearing "a light colored short sleeve shirt with a dark long sleeve shirt underneath." Ex. F at BH-1B-001237.

The version of events attributed to J.H. in the affidavit is straightforward and singular. J.H. saw an individual "walking quickly away" from the crime scene. The individual was "approximately mid-thirties in age, average height, medium build, with brown hair." J.H. followed the individual for several blocks. J.H. lost sight of the individual but then later saw a truck "in the same vicinity" as "several blocks" from the clinic. Yet, as demonstrated above, however, this version of events is far from accurate if not completely false. Because he was blocks away from the clinic when the explosion occurred, he physically could not have seen anyone flee the "scene of the crime." The true facts establish that J.H. never saw a truck in the "same vicinity" as "several blocks" from the clinic, as the affidavit falsely alleged. The true facts establish that, at best, J.H. saw a truck over 40 minutes after the explosion and over Red Mountain, nearly two miles from the scene of the crime. Furthermore, contrary to the affidavit, the true facts establish that J.H. did not lose sight of the individual he allegedly

followed only once. Rather, in one of his initial meetings with the Government, J.H. told the agents that he lost sight of the individual on at least four separate occasions. When they went to the magistrate judge, the agents also knew that in each of his alleged sightings, J.H.'s physical and clothing descriptions of the individual varied in material respects. Based on these real and substantial Franks violations pertaining to J.H., this Court should conduct the requisite hearing and thereafter suppress the evidence and fruits obtained pursuant to Warrant M08.

B. SUBSTANTIAL FRANKS VIOLATIONS EXIST WITH RESPECT TO AGENT NEELY AND CANINE GARRETT

To justify their request to search the interior of Cal's storage unit #91, the affiants relied upon information obtained from agent Neely and canine Garrett. In addition to discussing the training Neely and Garrett received, the affidavit discusses Neely and Garrett's actions at the storage facility on February 1, 1998. Ex. A at BH-CWA-000075-76. On February 1, 1998, Neely led Garrett along the outside of units 88 through 92 twice. Id. On both occasions, Garrett allegedly "alerted on the middle lower handle and the right side lock of unit number 91." Id. at BH-CWA-000076. According to the affidavit, "[b]ased on Garrett's training and behavior, together with the experience and training of S/A Neely, it is believed that explosive residue exists on the

door of unit number 91." Id.

Omissions in warrants pertaining to canines are subject to challenge under Franks. See, United States v. Jacobs, 986 F.2d 1231, 1233-35 (8th Cir. 1993) (finding warrant deficient under Franks based on reckless omissions pertaining to a drug detection dog). As with other omissions, the key question is whether the affiants omitted critical information "'intentionally or with a reckless disregard for the accuracy of the affidavit.'" Madiwale v. Savaiko, 117 F.3d 1321, 1326-27 (11th Cir. 1997) (citation omitted). Here, with respect to the canine, there were a number of critical omissions that easily satisfy the Franks standard.

Two days after obtaining Warrant M08, the Government obtained Warrant 2:98M09, a warrant which authorized the search of a trailer allegedly rented by Mr. Rudolph. Like Warrant M08, the affidavit submitted in connection with Warrant M09 relied upon "facts" pertaining to Neely and Garrett. Like Warrant M08, the affidavit discussed the training Neely and Garrett had received, as well as their activities outside unit #91 on February 1, 1998. See Ex. B at BH-CWA-000100-102. Most significantly, however, unlike the affidavit submitted with Warrant M08, the M09 affidavit included critical information that appears to have been at a minimum, recklessly omitted from the affidavit for Warrant M08.

First, unlike the affidavit submitted with Warrant M08, the affidavit for Warrant M09 admitted that Garrett was not certified into service until "September, 1997." Id. at BH-CWA-000101-102 (¶ 29). Second, the affidavit for Warrant M09 also conceded that Garrett's activity at Cal's on February 1st was Garrett's very "first field experience." Id. Third, and most importantly, unlike the Warrant M08 affidavit, the affidavit submitted with Warrant M09 contained the following damaging admission: "Under training conditions Canine Garrett has indicated false positives." Id.

Without a doubt, it was critical for the affiants to establish Garrett's reliability. See United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1983) (deeming drug detection dog reliable because the evidence showed the dog **never** falsely alerted). Presumably, that is exactly why they outlined Garrett's initial training, maintenance training, the relationship between Neely and Garrett, and Garrett's alleged ability to recognize all five families of explosives. In an attempt to hide the true facts about Garrett, however, the affiants recklessly omitted specific information that related directly to Garrett's reliability: (1) before February 1, 1998, Garrett had never performed in the field; and (2) in training conditions, the only conditions under which Garrett had

previously operated, Garrett "has indicated false positives."

A false positive alert by a canine is the functional equivalent of a lie. And a lying dog, just like a lying informant, is certainly something an issuing magistrate is entitled to know about. See, Illinois v. Gates, 462 U.S. 213, 230 (1983) ("an informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of his report"); United States v. Florez, 871 F. Supp. 1411, 1419 (D. N.M. 1994) (applying Gates analysis to canine alerts and recognizing that "[a] dog alert, like an informant's tip relays information which may be sufficient to establish" probable cause). Although the ATF has not yet informed the defense how many times the dog lied before February 1, 1998, in the second affidavit the affiants conceded that the dog was a multiple-time liar: "Under training conditions Canine Garrett has indicated **false positive alerts.**"⁷ Ex. B at BH-CWA-000101-102, ¶ 29 (emphasis added).

Importantly, in the Franks context, "[a] party need not show

⁷ In an attempt to determine how frequently Garrett lied, the defense served the ATF with a subpoena requesting, among other things, information relating to any problems Garrett experienced in training, including but not limited to false positive alerts. Although documents were produced in response to that subpoena, as of yet, the ATF has not provided this particular information. Therefore, we respectfully request the opportunity to supplement the record with this information as soon as the ATF provides it.

by direct evidence that the affiant makes an omission recklessly. Rather, it 'is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.'" Madiwale, 117 F.3d at 1327 (citation omitted). When they went before the judge on February 1, 1998, the affiants told the magistrate about Garrett's training and his alleged ability to recognize all five families of explosives. However, they failed to mention that Garrett was a multiple-time liar that had never worked in the field before February 1st, the day of the search. Revealingly, two days later, the affiants apparently decided to come clean, presumably recognizing that Garrett's past lies were critical to the probable cause inquiry. The affiants later revelations, however, do nothing to cure the deficiencies pertaining to Warrant M08. Therefore, based on these facts, Mr. Rudolph is entitled to a Franks hearing on this important issue.

IV. GOVERNMENT AGENTS VIOLATED THE FOURTH AMENDMENT BY SEIZING ITEMS THE WARRANT DID NOT AUTHORIZE THEM TO SEIZE.

In relevant part, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. On many occasions, the Court has made clear that

"[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." Stanford v. Texas, 379 U.S. 476, 485 (1965) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron, 275 U.S. at 196. Consequently, when materials are seized which are not identified in a search warrant, those materials are "subject to suppression." United States v. Hendrixson, 234 F.3d 494, 497 (11th Cir. 2000) (citation omitted). See also, Walter v. United States, 447 U.S. 649, 656 (1980) (recognizing that "[w]hen an official search is properly authorized – whether by consent or by the issuance of a valid warrant – the scope of the search is limited by the terms of its authorization"). A "search warrant describing particular items to be seized cannot be used as an admission ticket to a general search of the premises. If this were possible, the particularity requirement of the Fourth Amendment would have little import." Creamer v. Porter, 754 F.2d 1311, 1319 (5th Cir. 1985).

Here, Warrant M08 was quite specific in terms of the items the executing agents were authorized to seize. In unequivocal terms, the Warrant permitted the agents to seize "**explosive**

materials as defined in Title 18 U.S.C., Section 841, being unlawfully stored." According to the return accompanying Warrant M08, however, the agents seized the following items:

- 1) rope from door
- 2) swab from door handle
- 3) swab from lock and lock hasp
- 4) lock removed from unit 91
- 5) piece of green plastic
- 6) cigarette butt
- 7) 3 paper bags from nail box
- 8) 3 spent cartridge cases from nail box
- 9) alcohol wash swab - lift handle
- 10) alcohol was swab - lock hasp

See Ex. A at BH-CWA-000071.

As discussed above, 18 U.S.C. § 841(c) defines the term "explosive materials" to mean "explosives, blasting agents, and detonators." 18 U.S.C. § 841(c) (1998). Each of these three terms is also specifically defined. Under 18 U.S.C. § 842(j), Congress made it "unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary." The various regulations then specify the conditions under which explosive materials must be stored.

As the information contained on the return demonstrates, when the agents executed the Warrant, they found no explosive materials being unlawfully stored. In fact, they found no explosive materials at all. However, the absence of these items

did not deter the agents. In spite of the Warrant's plain and unequivocal limitation to "explosive materials ... being unlawfully stored," the agents ignored the Warrant and seized other items. Significantly, in addition to other items, the agents seized "a container with a few nails and other objects, including three spent firearms ammunition casings contained therein." See Ex. B at BH-CWA-000102.⁸

When government agents exceed the scope of a warrant by seizing items the warrant does not authorize them to seize, the well recognized remedy is suppression of the improperly seized materials. When materials are seized which are not identified in a search warrant, those materials are "subject to suppression." Hendrixson, 234 F.3d at 497. "The general rule, of course, is that police may only seize items described in the search warrant, absent an exception to the warrant requirement." United States v. Robbins, 21 F.3d 297, 300 (8th Cir. 1994). Here, all of the items seized were beyond the scope of the warrant. Therefore,

⁸ The return attached to the Warrant does not state that nails were seized during the February 2, 1998 search of unit #91. The return instead states that "3 paperbags from nail box" and other items were seized. Ex. A at BH-CWA-000071. In an affidavit submitted in connection with a subsequently issued warrant, however, the affiants state that the February 2, 1998 search of unit #91 produced "a container with a few nails and other objects, including three spent firearms ammunition casings contained therein." Ex. B at BH-CWA-000102 (¶31). In a letter to the Government attorneys, the defense has asked the government to identify all of the items seized pursuant to Warrant M08.

for this reason alone, this Court should suppress all of the materials and fruits seized in connection with Warrant M08.

CONCLUSION

Warrant M08 cannot survive scrutiny under the Fourth Amendment. The Warrant is so lacking in probable cause that no reasonable officer would rely upon it. It not only fails to establish any connection between the clinic bombing and the truck the government alleges belongs to Mr. Rudolph, it likewise fails to establish that the place to be searched contained evidence pertaining to any crime, one of the Fourth Amendment's most basic requirements.

Furthermore, even without the insurmountable constitutional flaws that exist on the face of the Warrant, the Warrant is constitutionally infirm under the standards set forth by the Court in Franks v. Delaware and its progeny. The Warrant is plagued with material falsehoods and material omissions, flaws which require the Court to conduct an evidentiary hearing and thereafter suppress the materials and fruits that were unlawfully obtained.

Finally, in addition to the constitutional deficiencies described above, the Warrant was executed in a constitutionally flawed manner. With respect to the items the agents were authorized to seize, the Warrant was quite specific. When the

search failed to produce these materials, however, the agents simply ignored the Warrant's constitutionally based directive and seized other items.

Based on the foregoing, the Court should grant Mr. Rudolph's request to suppress all the evidence and fruits seized pursuant to Warrant M08.

Dated: September 15TH, 2004 Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by first class United States mail, properly addressed and postage prepaid, on this 13th day of September 2004 to:

Michael Whisonant
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