IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Ramon Antonio Monreal-Rodriguez, et al., Defendants.	CR 18-1905-TUC-JAS(JR) CR 18-2215-TUC-JAS(JR) **REPORT AND RECOMMENDATION**

Pending before the Court is a Motion to Suppress Invalid Warrants, which was filed in both the above-referenced cases (Doc. 327 in CR 18-1905; Doc. 160 in CR 18-2215) by Defendant Ramon Monreal (referred to as "Monreal"). Defendant Marna Argelia Monreal (referred to as "Marna Monreal"), who is a co-defendant in CR 18-2215, filed a Notice of Joinder in the Motion to Suppress (Doc. 171). On August 2, 2021, the Government filed an Amended Response in both cases (Doc. 366; Doc. 197), and Defendant replied (Doc. 373; Doc. 204). The Court conducted an evidentiary hearing on September 28 and 30, 2021, and heard argument from counsel on October 21, 2021. Defendants Ramon Monreal and Marna Monreal were present and represented by counsel. The Government presented three witnesses and offered exhibits 1 through 16 (Doc. 419). Defendants presented no witnesses and offered nine exhibits, numbered 57 through 65 (Doc. 415). Having

considered the matter, the Magistrate Judge recommends that the District Court GRANT IN PART AND DENY IN PART Defendant's Motion.[1]

I. Introduction

On September 19, 2018, in CR 18-1905-TUC-RM(JR), Defendant Monreal was indicted and charged with making false statements in connection with the acquisition of a firearm, aiding and abetting the commission of an offense, and conspiracy (the "weapons case"). (Doc. 3 in CR 18-1905). On October 31, 2018, in CR 18-2215-TUC-JAS(JR), Defendant Monreal and co-defendant Marna Monreal were indicted and charged, respectively, with conspiracy to possess cocaine with the intent to distribute and conspiracy to possess marijuana with the intent to distribute (the "drug case"). (Doc. 15 in CR 18-2215). In the motion now before the Court, which was filed by Defendant Monreal in both cases and joined by Defendant Marna Monreal in the drug case, Defendant Monreal argues that the evidence found under two warrants issued in the weapons case must be suppressed because they are invalid general warrants that are overbroad and lack particularity.

II. Factual Background

Agent Brett Adler joined the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in 2015 and was immediately assigned to the trafficking group which investigates international and interstate firearms and ammunition trafficking. Hr'g Tr. Vol. 1 ("TR1"),

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[1] Ramon Monreal's trial in CR 18-1905-TUC-JAS(JR) and both Ramon and Marna Monreal's trials in CR 18-2215-TUC-JAS(JR) are currently scheduled for March 1, 2022, and a plea deadline has been set for February 11, 2022 (Doc. 444 in CR 18-1905; Doc. 268 in CR 18-2215).

16:3-17:7. Typically, his investigations result in charges involving the dishonest or incorrect completion of ATF Form 4473, which requires a firearms purchaser to state to the Federal Firearms Licensee ("FFL") seller that they are a lawful purchaser and do not intend to illegally transfer the weapon. TR1 18:12-19:6. Agent Adler has participated in dozens of such investigations and his duties have included drafting affidavits and applying for and executing search warrants. TR1 18:2-19:22.

Agent Adler was the assigned case agent in the investigation of Defendant Ramon Monreal-Rodriguez involving "straw purchases" of weapons where an individual provides false information on ATF Form 4473 in the attempt to acquire firearms from an FFL. TR1 20:16-21:3. The investigation was instituted after Agent Adler received information that an individual, later identified as co-defendant Cesar Enriquez-Trejo, had come into an FFL known as "Climags" on July 31, 2018 with a backpack containing $10,000.00 cash and attempted to purchase "high-dollar pistols." TR1 22:16-25; 32:16. While such a purchase is not in itself illegal, Agent Adler was concerned because it was "atypical to purchase [$]3[,000] to $5,000 firearms using a backpack of cash." TR1 23:7-13. Then, on August 14, 2018, Agent Adler learned that Enriquez-Trejo ordered two similar firearms through the internet and had them sent to the same store. TR1 24:12-15; 32:19. Based on that information, Agent Adler had Enriquez-Trejo come into the ATF office for an interview and was told that the funds used in the purchase were provided by an individual named "Ramon" who Enriquez-Trejo knew through another eventual co-defendant, Luis Demara. TR1 24:12-25:1. Because Enriquez-Trejo indicated on ATF Form 4473 that the weapon was for himself, when the attempted purchase actually was made for "Ramon," he had

provided false information in violation of 18 U.S.C. § 922(a)(6). TR1 25:3-21.

During the interview, Enriquez-Trejo provided agents a telephone number for "Ramon" and the location where he and "Ramon" had gone to purchase money orders used to pay for firearms purchased online. With that information, agents were able to obtain surveillance footage of "Ramon" during the money order transaction and were able to determine that the telephone number was tied to Defendant Ramon Monreal. TR1 25:22-26:8.

Agents also learned that Monreal had referred to himself as a Border Patrol agent, and with that information were able to verify through the government's email system that Ramon Monreal was a Border Patrol agent at the Three Points station in Arizona. The agents immediately informed the Department of Homeland Security ("DHS") Office of Professional Responsibility ("OPR") and DHS Office of Inspector General ("OIG"). TR1 26:4-16; 141:17-142:5. Agent Adler then learned from the FBI and the OIG that Defendant Monreal "was an individual they had been looking at for a separate [drug] case." TR1 27:7-13. Agent Adler's weapons case investigation was focused on firearms trafficking, but he shared information with FBI Agent Adam Radtke, who was investigating the drug case, about the weapons case even though they "were not helping each other out." TR1 66:11-68:9; 140:8-21.

Agent Adler subsequently returned to Climags and learned that two other individuals had been in the store and attempted to purchase the same firearms as Enriquez-Trejo had attempted to purchase. Because the weapons in question were "a high-dollar collector's item," Agent Adler found the attempted purchase and the attempted purchasers

suspicious. TR1 27:14-28:5. Agent Adler obtained surveillance footage of the attempted purchase from Climags and obtained additional footage that showed Defendant Monreal, Defendant Demara and an unknown third individual enter the store looking at firearms. TR1 33:21-35:6. Agent Adler also learned that, on August 13, 2018, Defendant Monreal had purchased "two or three [] Ruger 10/22 rifles from Climags." TR1 35:10-24. Agent Adler found the latter purchase suspicious because it occurred "during the same time frame that other individuals were being asked to purchase firearms on [Defendant's] behalf . . .," and because "someone purchasing three of the same make, model, and caliber of a firearm can be indicative of some sort of trafficking . . . ." TR1 36:1-9.

Defendant Monreal was indicted on September 19, 2021, and with the information they had, the agents sought and obtained an arrest warrant and search warrants with the goal of executing them at the same time. TR1 150:5-21. In the first warrant obtained in relation to Defendant Monreal, 18-08827MB (DTF) (the "8827 Warrant"), dated September 21, 2018, the agents were seeking to search Defendant's residence and two of his vehicles. TR1 38:14-18; Ex. 1. The 8827 Warrant packet consists of six different documents: (1) the one-page search warrant, Ex. 1, p. 1; (2) the warrant return; (3) an Attachment A; (4) an Attachment B; (5) the warrant application; and (6) a 12-page affidavit supporting the warrant. Hr'g Tr. Vol. 2 ("TR2") 37:19-38:17. Agent Gaines explained that Attachment A "describes the thing to be searched as best as possible, such as a house or vehicle," TR1 136:1-10, and that Attachment B describes the type of evidence expected to be found in the search, and in this case included the following descriptions:

1. Firearms, ammunition, and any documents indicating the possession,

sale receipt, purchase or barter for items in exchange for firearms or property, specifically ammunition packaging, containers, labels, receipts, and other items pertaining to the possession of firearms, including gun cases, ammunition magazines, holsters, spare parts for firearms, firearms cleaning equipment, photographs of firearms or of persons in possession of firearms, and receipts for the purchase and/or repair of all these items.

2. Records and documents which reflect the sale, trade, pawn, receipt or disposition of any firearm, buyer lists, seller lists, books reflecting the value of firearms and or notes, cryptic or otherwise, pay-owe sheets, records of sales, log books, ledgers, documents and photographs which reflect relationships between identified and/or unidentified co-conspirators to include personal telephone/address books, including electronic organizers and rolodexes, and financial instruments such as pre-ay and/or bank debit cards, credit cards, checkbooks, and any other financial instrument used to purchase goods and services, to include bulk amount of US and foreign currency.

3. Records that establish the persons who have control, possession, custody or dominion over the property and vehicles searched and from which evidence is seized, such as personal mail, checkbooks, personal identification, notes other correspondence, utility bills, rental agreements and receipts, payment receipts, keys, leases, mortgage and loan documents, vehicle registration information, title documents, ownership warranties, receipts for vehicle parts, rental vehicle information and agreements, and repairs and telephone answering machine recordings and fingerprints.

4. Records related to banking activity, including bank and credit card statements, check registers, deposit and withdrawal slips, ATM receipts, cancelled checks, certificates of deposit, notes, account applications, money drafts, letters of credit, money orders, cashiers' checks and receipts for same, bank checks, certificates of deposit, safety deposit slips, stock certificates, bonds, bearer instruments, money market accounts statements, letters of credit, wire transfers and bank reconciliations.

5. Such records also include audio recordings, video recordings, memoranda, correspondence, diaries, maps, notes, address books, day planners, calendars, appointment books, newspaper clippings, articles, books, storage agreements and bills, storage locker keys, asset ownership records, journals, ledgers, financials, budgets, proposals, plans, contracts, agreements, bills of sale, delivery records, invoices, receipts, documentation of conveyances, deeds, and other papers. These records may be in many forms such as paper, electronic, or in code.

> 6. Safes, strong boxes, and/or other secure receptacles for the maintenance of valuable items, firearms and/or documents including books, records, and any keys or other evidence of the existence and usage of any lockers, safety deposit boxes or other secure receptacles situated elsewhere than at defendant's property.
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> 7. Cellular telephones, cellular telephone bills and/or receipts, calling cards, land line bills and/or receipts, SIMS cards, cellular telephone battery chargers, computers, laptops, tablets, and any electronic device that can access the internet.

Ex. 1, Attachment B; TR1 39:1-15; 136:11-13. Much of the information included in the attachments was taken from previous warrant applications used in similar cases. TR1 136:14-137:8; TR2 43:1-9.

The search warrant affidavit for the 8827 Warrant was written by ATF Special Agent Cornelius Gaines. Agent Gaines graduated from the Federal Law Enforcement Training Camp on June 14, 2018 and this was the first federal warrant affidavit he had written. TR1 131:16-18; 146:10-12; TR2 31:12-14. Included in the affidavit was information about the defendants' use of cell phones, suspicious weapons purchases in person and on-line, and the use of bulk cash and money orders. TR2 7:16-9:22; Ex. 1. Agent Adler was Agent Gaines' training officer and, as Agent Adler explained, "we worked together on all of our investigations in an effort to teach [Agent Gaines] how we run investigations, how you write search warrants, and everything else that comes with our job." TR1 28:25-29:22; 61:8-11; 132:10-133:2 (Agent Gaines' description of training relationship with Agent Adler). Agent Adler reviewed the affidavit carefully, however, in the application for the 8827 Warrant, he did not notice that the application was attributed to an agent by the name of Albert J. Gibes rather than to Agent Gaines, who signed the

application. TR1 73:1-74:8; TR2 45:3-23; Ex. 1, p. 7. AUSA Woolridge avowed to the Court that she, rather than the agents, placed the wrong name in the application for the 8827 Warrant. TR1 74:74:21-25. And although the application calls for the initials of the reviewing AUSA, those also do not appear on the application for the 8827 Warrant. TR1 75:23-76:1; Ex. 1 (Application for Search Warrant attached to 8827 Warrant).

On September 24, 2018, there was a multiagency meeting held at the ATF offices to discuss the execution of the 8827 Warrant. TR1 81:15-20. Agents from several agencies were present, including FBI Special Agent Adam Radtke, DHS/OIG Special Agent Crystal Diaz, and from the Pima County Sheriff's Department. TR1 81:23-82:19; TR2 94:5-11; TR2 131:17-23. Because not all the agents involved in executing the warrant were also involved in the investigation, prior to the execution of the warrant, Agent Gaines briefed them "on the history of the case and what we're doing, why we're there, what we're looking for." TR1 45:18-46:13; 152:5-13. During the briefing, Agent Gaines did not read Attachment B to the agents, but summarized its contents with the agents involved in the search and they were informed of the categories of items included in the search, such as receipts and firearms, and told them to refer any questions they had during the search to Agent Gaines. TR1 46:17-47:9; 153:6-154:20; 156:9-25; TR2 89:24-91:1.

The arrest warrant for Defendant Monreal and the search warrant for his home were executed over the period of several hours beginning at approximately 7:15 a.m. on September 25, 2018. TR2 87:18-88:7. Agent Adler was charged with executing the arrest warrant and Agent Gaines was charged with executing the search warrant for Monreal's home and their plan "was not to initiate contact at Mr. Monreal's residence until [Agent

Adler] notified [Agent Gaines] that Mr. Monreal was in custody . . . ." TR1 158:6-16. Agent Adler and his team executed the arrest warrant for Defendant at the Three Points Border Patrol Station. TR1 48:11-18; 84:9-12; 85:4-11.

DHS/OIG Agent Crystal Diaz was part of the search team at the Three Points Border Patrol Station. Agent Diaz was assisting the OIG corruption task force on the drug case investigation related to Defendant Monreal and her duties in that case included surveillance, generating reports, conducting records checks, and reviewing documents and evidence. TR2 130:4-131:3. In relation to the weapons case, Agent Diaz was asked to attend the August 24, 2018 briefing related to execution of the arrest and search warrants and her role, along with Immigration and Customs Enforcement/Office of Professional Responsibility Agent Steve Strijdonk, was to assist with the execution of the search warrant for the Ford Taurus Monreal was driving at the time of his arrest. TR2 131:17-132:8. When Monreal was arrested, Agent Diaz watched as he was escorted out of the station. TR2 133:10-14. Before searching the vehicle, Agent Diaz obtained consent to search Monreal's locker at the station. TR2 133:18-134:2. Agent Diaz removed the items from Monreal's locker and gave Border Patrol management the items that had been issued to Monreal, such as his gun and radio. TR2 135:18-25. The items that were not seized or returned to Border Patrol were put in a bag and placed in the trunk of Monreal's vehicle. TR2 135:25-136: The keys to Monreal's vehicle were inside the locker and, after reviewing Attachment B, Agents Diaz and Strijdonk searched the vehicle for several hours and seized evidence, including over $3,900.00 in cash and two receipts, and photographed the evidence and the vehicle. TR2 134:6-21; 153:15-154:16; Exs. 63, 64, 65 (photographs). Agent Diaz was also

aware that Monreal had used a cell phone booster antenna and found it in the trunk of the vehicle. However, she photographed the antenna but did not seize it at the time because it was not included as part of Attachment B to the warrant. TR2 134:19-135:7. After concluding the search, Agent Diaz left a copy of the warrant return listing the items that were taken from the vehicle. TR2 135:11-17. Diaz then "took the items to ATF, and that was the end of our day." TR2 136:22-24. When she did so, she was given receipts for the property, none of which reflect the seizure of a phone. TR2 154:17-155:2; Exs. 59, 60, 61 (property receipts). Although Diaz testified that she had a copy of Attachment B and reviewed it prior to conducting the search of the vehicle, a photograph of the warrant taken after the search shows only a C cover letter and a copy of the warrant. TR2 155:4-20; Ex. 62.

Once Agent Adler notified Agent Gaines of the arrest, agents knocked on the door and rang the doorbell and, after Monreal's wife, Defendant Marna Monreal, answered the door, the search warrant was executed. TR1 158:6-24. During the search, there were "maybe eight to 10 agents from the ATF, one or two from OIG, and there might have been one or two agents from the FBI and potentially an agent from HSI." TR1 44:19-25; TR2 96:5-24. Typically, a copy of search warrant Attachment B, which specifically describes what is authorized to be searched and seized, is at the scene during the briefing and execution of the warrant; however, Agent Adler does not recall if it was read or summarized at the briefing and indicated it was not at Defendant's home at the time the warrant was executed. TR1 47:10-22; 83:18-84:2. Agent Gaines was available if anyone had any questions during the search, and although he was not at the scene, Agent Adler similarly

stated that he was available to the agents executing the warrant if they needed clarification on what items were subject to seizure. TR1 87:12-18; 162:23-25. Agent Gaines' recalls that there was no paper copy of the warrant affidavit and Attachment B at the scene of the search, but recalls it being available as an email copy on his phone, and that he referenced it during the search to determine if the searching agents could properly seize cash and marijuana that were found in the house. TR1 159:22-162:15; TR2 29:9-30:10. When the search was complete, Agent Gaines left at the residence a copy of the warrant and a list of what was seized. TR1:20-22. ATF took custody of all the evidence collected during the search and it was placed in ATF's vault. TR2 30:15-20. During the search of Defendant's home, over 20 electronic items were seized, including various phones, computers, tablets, and a drone. TR1 51:19-24.

On September 26, 2018, Agent Adler invited Border Patrol Agent Crystal Diaz to review the phones seized during the arrests of Defendants Monreal and Demara that were in Agent Adler's custody at the ATF offices. TR1 85:15-23; 117:8-13; TR2 136:25-137:8. At the time, Agent Diaz was working on the task force with FBI Agent Radtke that was investigating Monreal in relationship to the drug case. TR1 117:11-14; 119:7-22. Agent Adler testified that the two task forces were not conducting a joint investigation and did "[n]othing more than providing information with each other." TR1 119:15-22.

Agent Diaz is a fluent Spanish speaker and is familiar with local slang terminology. TR2 137:17. She was directed to review the phones for "[a]nything drug – I mean, I'm sorry – gun related, anything that had to do with guns." TR2 137:22-138:1. She was aware that there might also be drug-related evidence on the phones, but her role at that point was

to assist the ATF with their weapons investigation. TR2 138:2-6. Her role was to look through the phones and prioritize what was to be downloaded by the Border Patrol's Data Forensic Unit. TR2 138:7-25. She was able to manually access a phone without a password and started to scroll through the pictures, voice and written messages. TR2 139:13-23. Initially, she did not encounter anything that appeared to be criminal, but then found information about coordinating an assault on an individual held at a county jail and about a domestic dispute about a child where the male "appeared to be very upset and wanted his ex-significant other to disappear." TR2 139:24-140:25. She then discovered some drug-related content on the phone and informed the OIG Case Agent Joaquin Alvarez and, at that point, stopped reviewing the phone due to her relationship with the OIG drug investigation and prepared a report. TR2 141:2-142:5.

On September 27, 2018, a separate search warrant (18-07466MB (the "7466 Warrant")) was prepared for two telephones seized during the arrests of Defendant Monreal and co-defendant Luis Demara-Campas. Ex. 3. After the 7466 Warrant had been executed for the phones and the extraction of data had commenced on October 1 and 2, 2018, Agent Adler realized that the same Attachment B used for the search warrant of the home was inadvertently attached as Attachment B to the 7466 Warrant for the telephones and "omitted some of the language for seizing digital evidence . . . ." TR1 51:25-52:9; 95:6-23; 111:19-24; Ex. 3. After realizing the error, Agent Adler stopped the electronic forensic analysis that was already underway and contacted the U.S. Attorney's Office. TR1 52:3-10. It was agreed after consultation with the U.S. Attorney's Office that "it would be in our best interests to do a separate search warrant for the electronic items." TR1 53:10-12. For

the new warrant (18-06049MB (the "6049 Warrant")), which was sought on October 10, 2018, they "amended the Attachment B to pertain to electronic evidence, not what you look for in a house." TR1 52:12-14; Ex. 5. In the application for the 6049 Warrant, Agent Adler did not disclose that information had already been extracted from the phones or that Agent Diaz had searched through one of the phones with Agent Adler. TR1 110:1-7. The 6049 Warrant application also contained references to the allegedly violated federal statutes and included the names of the two alleged co-conspirators, Demara-Campas and Enriquez-Trejo, which was not included in the applications for the 8827 Warrant or 7466 Warrant. TR1 113: 14-115:14.

In the warrant returns, Agent Adler did attempt to explain why they sought a new warrant for the search of the phones. TR1 54:12-17; Exs. 10, 12. In the 7466 Warrant return, he stated "that digital evidence was extracted from the cell phones [but that] due to a perceived error with Attachment B, agents did not conduct a complete analysis of extraction and opted to write a new warrant." TR1 54:21-55:2. The 6049 Warrant was signed by the Magistrate Judge on October 10, 2018, "allowing for the search of the same cell phones and the seizure of digital evidence." TR1 55:2-4. In the return for the 6049 Warrant, Agent Adler stated that "[s]ome of the digital extraction had been completed prior to this warrant [the 6049 Warrant], under the aforementioned warrants, but their complete analysis did not commence until the above-listed date and time." TR1 55:12-15; Ex. 12 (6049 Warrant return).

At the hearing, Agent Adler was shown a red Apple iPhone, model number A1661, seized from Defendant's person at the time of his arrest. TR1 101:6-16; Ex. 57. However,

in the 6049 Warrant affidavit, the same phone was described as being found at Defendant's home, while the packaging it was placed in indicated it was seized from Defendant's person. TR1 101:17-25. At the hearing, Agent Adler stated that the phone was found on Defendant's person. TR1 102:1-4; 106:2-4; Ex. 57 (packaging).

III. Discussion

A. The 8827 Warrant

1. Specificity

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. That right "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*. "In order for a search to be reasonable, the warrant must be specific." *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856 (9th Cir. 1991); *see also United States v. SDI Future Health, Inc.*, 568 F.3d 684, 702 (9th Cir. 2009). "The Fourth Amendment's specificity requirement prevents officers from engaging in general, exploratory searches by limiting their discretion and providing specific guidance as to what can and cannot be searched and seized." *United States v. Adjani*, 452 F.3d 1140, 1147 (9th Cir. 2006).

The Ninth Circuit reads the Fourth Amendment's specificity requirement as consisting of two aspects: "breadth" and "particularity." *SDI Future Health*, 568 F.3d at 702. Breadth means the warrant's scope must be limited to the probable cause on which it is based. *SDI Future Health*, 568 F.3d at 702 (citation omitted). "Particularity means that

'the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize.'" *Id*. (quoting *In re Grand Jury Subpoenas*, 926 F.2d at 857). The Ninth Circuit has made clear that "particularity and overbreadth remain two distinct parts of the evaluation of a warrant for Fourth Amendment purposes." *Id*. There are several factors a court may consider in examining a warrant's breadth and particularity, including: (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *Adjani*, 452 F.3d at 1148 (quoting *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

a. Breadth

To avoid overbreadth, a warrant must give "legal, that is, not overbroad, instructions . . .." *SDI Future Health*, 568 F.3d 684, 702. A warrant is overbroad if it fails to establish "probable cause to seize the particular thing[s] named in the warrant," and courts will invalidate warrants "authorizing a search which exceeded the scope of the probable cause shown in the affidavit." *In re Grand Jury Subpoenas*, 926 F.2d at 857. Probable cause exists where there is a "fair probability that contraband or evidence of a crime will be found in a particular place based on the totality of the circumstances." *United States v. Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007) (simplified). In undertaking an evaluation of the breadth of a warrant, a "magistrate's determination of probable cause should be paid great deference by reviewing courts." *United States v. King*, 985 F.3d 702, 707 (9th Cir. 2021)

(quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). To find probable cause, this Court need only ensure that the magistrate judge had a "substantial basis" supporting the determination. *Gates*, 462 U.S at 238.

In the affidavit supporting the 8827 Warrant, Agent Gaines detailed his experience, his familiarity with the law related to false statements made in relation to the purchase of firearms and to conspiracies to commit offenses against the United States, detailed the investigation of Monreal and his co-conspirators, and described the facts that led him to believe Monreal was illegally trafficking weapons. Agent Gaines specifically laid out his knowledge that firearm and ammunition traffickers used "straw purchasers," often used numerous vehicles, would store documents related to their activities in their residences and vehicles, often used multiple cell phones, computers and electronic storage devices to search and store information related to their trafficking activity.

In a section of the affidavit under the heading "History of Investigation," Agent Gaines summarizes the events that led him to believe Monreal was trafficking weapons. The information included in the summary indicates that Monreal was implicated as a participant in attempted straw-purchases of weapons. A telephone number, an email address, and money orders associated with the straw-purchaser and attempted straw-purchases were linked to Monreal. Agents were then able to identify Monreal as a Border Patrol Agent. Agents were also able to link Monreal and two vehicles, a Ford Taurus and a Ford HD truck, to his home address in Vail, Arizona.

These facts, taken together, provided the Magistrate Judge with a substantial basis to authorize the search and seizure of the seven categories of items identified in Attachment

B to the 8827 Warrant. *See* Ex. 1. The seven categories relate to (1) firearms and ammunition; (2) records and documents related to firearms transactions; (3) records used to establish ownership of the property and vehicles searched; (4) and (5) records and recordings relating to banking activity; (6) safes and strongboxes; and (7) cellphones and electronic devices. The issuing Magistrate Judge had a substantial basis for concluding that probable cause existed for each category of items. Each category is linked to particular information provided by Agent Gaines in the affidavit, including his expert opinion regarding the sort of items typically associated with weapons trafficking. *See United States v. Cervantes*, 703 F.3d 1135, 1139 (9th Cir. 2012) (training and experience are factors to be considered as part of the probable cause determination). Agent Gaines provided a description of the investigation that led to his suspicion that Monreal was involved in weapons trafficking and establishes that a "fair probability" existed that evidence of the crimes would be found in his home and vehicles.

However, that probable cause existed for each category of items sought to be seized under the 8827 Warrant does not end the inquiry into overbreadth. Categories 1, 2, 4 and 5 of Attachment B to the warrant are entirely lacking in specificity. Each of those categories contains a laundry list of firearms or records that it untethered from the crimes and individuals being investigated. "In other words, by failing to describe the crimes and individuals under investigation, the warrant provided the search team with discretion to seize records wholly unrelated to" the basis for probable cause. *See SDI Future Health*, 568 F.3d at 705. As noted by the *SDI Future Health* court, "where investigators believed that an art gallery was selling forged Dali artwork, the warrant should have limited the

search 'to items pertaining to the sale of Dali artwork.'" *Id*. (quoting *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), *abrogated on other grounds, J.B. Manning Corp. v. United States*, 86 F.3d 926, 927 (9th Cir. 1996)).

Looking at categories 2, 4, and 5 of Attachment B from a slightly different perspective shows the unlimited nature of what was authorized to be seized. Those categories allowed for the collection of any records associated with any firearms transaction, and banking records and, in fact, any records at all. As stated in *SDI Future Health*, such an approach "amounts to the laziest of gestures in the direction of specificity." 568 F.3d at 705. Each of these categories "practically begs the search team to find and to seize" every record inside Defendant Monreal's house. *See id*.

Based on the foregoing, the Court finds that categories 1, 2, 4, and 5 of Attachment B to the 8827 Warrant were overbroad "because probable cause did not exist to seize all items of those particular types." *Id*. (cleaned up) (quoting *Adjani*, 452 F.3d at 1148).

b. Particularity

i. Cure By Affidavit Rule

Before assessing the particularity of the 8827 Warrant, the Ninth Circuit directs that the Court make the threshold determination of whether the warrant incorporated Agent Gaines's supporting affidavit. *See SDI Future Health, Inc.*, 568 F.3d at 699 (citing *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993) ("Only after the content of 'the search warrant' is established . . . can the warrant be tested to see if it meets [the Fourth Amendment's] requirements."]). Because the overbreadth evaluation is a probable cause inquiry, the affidavit will always be considered in relation to that inquiry. *See United States*

v. Webber, 923 F.2d 1338, 1342 (9th Cir. 1990), *as amended on denial of reh'g* (Jan. 15, 1991) (referring to the overbreadth requirement as the "probable cause rule"). However, if the supporting affidavit was properly incorporated into the warrant, the warrant and the affidavit are evaluated together in determining particularity, "allowing the affidavit to "cure" any deficiencies in the naked warrant." *SDI Future Health*, 568 F.3d at 699 (citing *Towne*, 997 F.2d at 544).

Courts consider an affidavit to be part of the warrant, "and therefore potentially curative of any defects," when "(1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *Id.*; *see also United States v. Hotal*, 143 F.3d 1223, 1225 (9th Cir. 1998); *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997) (holding the warrant was invalid where it incorporated the affidavit but the affidavit was not at the scene or served on the defendant); *United States v. Van Damme*, 48 F.3d 461, 466 (9th Cir. 1995) (holding the warrant was invalid where it incorporated "Attachment #1" but nothing was attached to the warrant or taken to the scene).

The purpose of the "cure by affidavit" rule is to consider all the documents that actually "limited the discretion of the officers executing the warrant." *SDI Future Health*, 568 F.3d at 699. In *United States v. Towne*, which was approvingly quoted in *SDI Future Health*, the Ninth Circuit reasoned:

> When the officer who requests authorization for the search, the magistrate who grants such authorization, and the officers who execute the search expressly rely upon a given set of papers containing a given series of words, they identify *that* set of papers and *that* series of words as the proof that proper precautions were taken to prevent an unreasonably invasive

> search. Fairness and common sense alike demand that we test the sufficiency of the precautions taken—that is, that we conduct the particularity and overbreadth inquiries—by examining *that* evidence.

Towne, 997 F.2d at 548.

As to the first element of the "cure by affidavit" inquiry, there are "no magic words of incorporation." *United States v. Vesikuru*, 314 F.3d 1116, 1121 (9th Cir. 2002). "A warrant expressly incorporates an affidavit when it uses 'suitable words of reference,'" and it is sufficient for a warrant to "point[ ] to the affidavit explicitly, noting 'the supporting affidavit(s)' as the 'grounds for application for issuance of the search warrant.'" *Id*. at 699-700 (citations omitted). For example, the Ninth Circuit held in *Vesikuru* that the phrase, "*Upon the sworn complaint made before me* there is probable cause to believe that the [given] crime . . . has been committed," were words sufficiently suitable for incorporating the affidavit into the warrant. 314 F.3d at 1120 (emphasis in original).

Here, the warrant stated that "Application and Affidavit having been made before me by a federal law enforcement . . ." and "I find the affidavit(s) . . . establish probable cause to search and seize the person or property described." Ex. 1. These statements are like those found suitable for incorporation in *Vesikuru*. In particular, the latter statement finding the affidavit establishes probable cause echoes *Vesikuru's* approval of incorporation when the affidavit is identified in the warrant as supplying probable cause. As in other cases, the warrant could have contained more explicit wording, but the Ninth Circuit has found similar language sufficient. *See Vesikuru*, 314 F.3d at 1121; *SDI Future Health*, 568 F.3d at 700. As such, the Court finds that the language used in the 8827 Warrant was sufficient to incorporate the affidavit by reference.

As to the second element, however, the evidence indicates that the affidavit was neither physically attached to nor accompanied the warrant at the time the agents executed the searches. While the affidavit was "summarized" by Agent Gaines during the pre-search meeting, TR1 156:19-25, there were no copies of the affidavit present during the search of Monreal's home, TR2 29:9-13; Ex. 36. In fact, Agent Gaines testified that he turned to Attachment B for clarifying information during the search and did not rely on the affidavit. TR1 47:3-9; 137:16-21; 159:22-160:24; TR2 30:5-10. Additionally, while Agent Diaz testified that Attachment B was present during her search of Monreal's Ford Taurus and telephone, there is no evidence of copies of the affidavit being present during those searches either. Because the affidavit was not attached and did not accompany the warrant, it could not cure any deficiencies in the warrant's particularity or limit the discretion of the agents executing the warrant and, as such, its consideration here would not serve the goal of the "cure by affidavit" rule. *See SDI Future Health*, 568 F.3d at 699 (citation omitted).

Trying to overcome Agent Gaines's testimony that there was no paper copy of the affidavit at the scene, the Government contends that the second element is nevertheless satisfied if the affidavit is "available" rather than "present." Hr'g Tr. Vol. 3 ("TR3") 61:7-13. The Government's contention is that Agent Gaines, as the affiant, constituted a "walking affidavit . . . there directing the search, he has phones that can each reach out and get copies of the affidavit there, either by phone or email . . .." TR3 61:14-21. However, as the defense contends, by making this argument, the Government is essentially seeking a change in the law. TR3 90:17-91:2. The second element of the cure by affidavit rule "has been variously stated as requiring either that the incorporated affidavit *accompany* or that

it be *attached* to the warrant." *Towne*, 997 F.2d at 544 (emphasis in original). Significantly, the *Towne* court was critical of the cases that ignored this requirement. *Id.*; *see also United States v. McGrew*, 122 F.3d at 849 ("The government, however, has offered no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search of McGrew's home, even though . . . the affiant was present at the search."). Thus, without any authority to support the proposition that Agent Gaines was a "walking affidavit" or that it was sufficient that he could have accessed the affidavit electronically, this Court is bound by the Ninth Circuit's expressed requirement that the affidavit, at a minimum, accompany the warrant. Here, the evidence establishes that the affidavit was not attached and did not accompany the warrant. It therefore cannot be considered by the Court in evaluating the specificity of the 8827 Warrant.

ii. Assessment For Particularity

"Particularity means that 'the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize.'" *SDI Future Health*, 568 F.3d at 702 (quoting *In re Grand Jury Subpoenas*, 926 F.2d at 857). To determine if a warrant is sufficiently particular, the Court considers "the particular circumstances and the nature of the evidence sought." *Adjani*, 452 F.3d at 1147. "[I]f a more precise description of the items subject to seizure is not possible," the fact that a warrant "describes generic items does not necessarily render it invalid." *Id.* at 1147-48 (internal quotations and citations omitted). The Supreme Court has explained that the particularity requirement of the Fourth Amendment "makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing

is left to the discretion of the officer executing the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927). The Ninth Circuit has similarly summarized the rationale of the particularity requirement:

> The Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search or, alternatively, what criminal activity is suspected of having been perpetrated. *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). Otherwise, the officers charged with executing the search are left to speculate as to what is the underlying purpose or nature of the search. The executing officers must be able to identify from the face of the warrant, as well as any attached or expressly incorporated documents, what it is they are being asked to search for and seize from the targeted property.

United States v. Bridges, 344 F.3d 1010, 1016-17 (9th Cir. 2003).

In his particularity argument, Defendant directs the Court's attention to the Ninth Circuit's decisions in *Bridges* and *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), where the court found warrants violative of the Fourth Amendment's particularity requirement. In *Bridges*, as is the case here, the court found that the affidavit was sufficient to support a finding of probable cause that the defendant had engaged in mail fraud and a conspiracy to defraud the United States by making false claims. 344 F.3d at 1012. The affidavit outlined the Government's allegations that the defendant "manufactured false documents, evaded paying federal income taxes, filed fraudulent claims with the IRS, obstructed or impeded the Government's lawful administration of Title 26, conspired to defraud the United States, and engaged in multiple counts of mail fraud." *Id*. at 1015. The defendant operated a tax consulting business that advised its clients to declare themselves "non-resident aliens" so they would not be obligated to pay federal income tax. *Id*. at 1013. The defendant's business filed more than 100 claims with the IRS on behalf of its clients requesting tax

refunds based on their "non-resident alien" status. *Id*. The IRS did not grant any of the requested refunds. *Id*. Although the court found that the warrant was supported by probable cause, it nevertheless held that the warrant's description of the items to be seized violated the particularity requirement of the Fourth Amendment and reversed the trial court's denial of the defendant's motion to suppress. *Id*. at 1019.

The Attachment B to the warrant at issue in *Bridges* listed thirteen categories of items to be seized, including business records, office equipment, cash, notary seals, and unopened mail, but did not include any additional description of the items which limited the categories to the criminal acts described in the supporting affidavit. *Id*. at 1017. Although the categories of items to be seized was detailed, the court described it as a "laundry list" that was "so expansive that its language authorized the Government to seize almost all of ATC's property, papers, and office equipment . . . ." *Id*. The court, quoting *Kow*, 58 F.3d at 427, noted that it had "criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected . . . . " 344 F.3d at 1018. The warrant at issue in *Bridges* did not state what criminal activity was being investigated by the IRS. *Id*. The court noted that it had previously held that a '"warrant['s] provision for the almost unrestricted seizure of items which are 'evidence of violations of federal criminal law' without describing the specific crimes suspected is constitutionally inadequate.'" *Id*. (quoting *Center Art Galleries- Hawaii*, 875 F.2d 747). *Bridges* concluded that "[s]uch warrants are suspect because '[n]othing on the face of the warrant tells the searching officers for what crime the search is being undertaken.'" *Id*. (quoting *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992)).

Kow involved another effort to avoid paying taxes. There, the defendants were indicted on charges of corporate tax evasion, individual tax fraud, and profit skimming. 58 F.3d at 426. The affidavit submitted in support of the Government's warrant alleged that the defendant's business "maintained multiple sets of accounting records, paid falsified invoices submitted by phony corporations, and paid employees under the table, all for the purpose of defrauding the IRS." *Id*. The search warrant authorized the seizure of 14 categories of documents, records, and computer-related items. *Id*. Many of the categories consisted of generalized descriptions of various types of business records allowing "the seizure of virtually every document and computer file . . . ." *Id*. at 427. The court stated:

> To the extent that it provided any guidance to the officers executing the warrant, the warrant apparently sought to describe every document on the premises and direct that everything be seized. The government emphasizes that the warrant outlined fourteen separate categories of business records. However, the warrant contained no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity. By failing to describe with any particularity the items to be seized, the warrant is indistinguishable from the general warrants repeatedly held by this court to be unconstitutional. *E.g., Center Art Galleries–Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (9th Cir.1989); *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir.1989) (warrant invalid "because of the complete lack of any standard by which an executing officer could determine what to seize").

Id. The court concluded that the warrant was "wholly deficient" because it "should have been limited by time, location, and relationship to specifically described suspected criminal conduct." *Id*. at 430.

The 8827 Warrant at issue here suffers from shortcomings like those identified by the Ninth Circuit in *Bridges* and *Kow*. The 8827 Warrant provided no description of the criminal activity in which Monreal was suspected to be involved. It also provided no time

limitations. These are omissions which affect the warrant as a whole. The Ninth Circuit has "criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected." *See Kow*, 58 F.3d at 427. Similarly, in *SDI Future Health*, the Ninth Circuit found that certain categories of items to be seized lacked specificity because the warrant failed "to describe the crimes and individuals under investigation" and, as a result, "provided the search team with discretion to seize records wholly unrelated to the" defendants. 568 F.3d at 705.

The impact of the omission of the crimes, co-conspirators and time frame is best illustrated by examining the categories of items identified in Attachment B. Category 1 authorizes the seizure of firearms and other items pertaining to the possession of firearms. Pursuant to category 1, the searching agents had unfettered discretion to seize any firearm. If the warrant had identified the suspected crime of gun trafficking, the agents would have been restricted to seizing weapons consistent with that crime. In his affidavit in support of the warrant, Agent Gaines stated that the ATF refers to such weapons as "weapons of choice," which "include semi-automatic and automatic military type rifles such as AK-47-type rifles and pistols, AR-15-type rifles and pistols, Beretta 9mm Luger pistols, Colt .38 Super pistols, and FN Five-seven 5.7x28mm pistols." Ex. 1, Affidavit ¶ 7. Without including this information in the warrant, or attaching the affidavit to the warrant, the searching agents were provided with no guidelines as to the type of weapon they were authorized to seize.

Category 2 of Attachment B authorizes the seizure of any records or documents which "reflect relationships between identified and/or unidentified co-conspirators."

However, none of Monreal's alleged co-conspirators is mentioned in the 8827 Warrant or Attachment B. Without that information, the searching agents were entirely unable to narrow the documents that could be seized that might reflect Monreal's relationship with any identified co-conspirator.

Categories 4 and 5 of Attachment B permit the collection of banking records in whatever form they might be found. The categories are not restricted by topic, crime, date or identification of suspects. "[G]eneric classifications in a warrant are acceptable only when a more precise description is not possible." *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). *SDI Future Health* warned that the failure to describe the crimes and individuals being investigated provided the search team with discretion to seize records unrelated to any alleged crime or person. 568 F.3d at 705. In *Center Art Galleries–Hawaii*, 875 F.2d at 750-51, the affidavit supporting the warrant provided probable cause to search for evidence of mail and wire fraud involving the sale of forged Salvador Dali artwork. However, the court found that the "government . . . failed to limit the warrants to items pertaining to the sale of Dali artwork despite the total absence of any evidence of criminal activity unrelated to Dali." *Id*. at 750. Similarly, in *Kow*, the court found that a generalized seizure of business records was not justified where "none of the . . . categories of seizable documents was limited by reference to any alleged criminal activity." 58 F.3d 423, 427 (9th Cir.1995). As in *SDI Future Health*, *Center Art Galleries*, and *Kow*, there is no perceptible limit on the documents that could be seized pursuant to the 8827 Warrant. Thus, any records from any person from any time period were subject to seizure.

Without statutory citations, time frames, or identification of the suspects related to

the items sought to be seized, Categories 1, 2, 4, and 5 of the warrant were generic descriptions that provided no specificity as to what items were properly subject to seizure. Categories 3 and 6 fall into a grayer area of specificity. Category 3 authorized the seizure of "[r]ecords that establish the person who have control, possession, custody or dominion over the property and vehicles searched and from which evidence is seized . . . ." Ex. 1, Attachment B, ¶ 3. The sufficiency of category 3 is entirely dependent on whether the underlying property was properly seized. For example, if documents were taken that established control over a weapon outside the scope of the "weapons of choice" described by Agent Gaines in his affidavit, it too would be outside the proper scope of the 8827 Warrant. While a close call, the Court finds that for this reason Category 3 is also insufficiently particular.

Category 6 authorizes the seizure of "safes, strong boxes, and/or other security receptacles . . . . *Id*., ¶ 6. Although the Court can readily imagine that whatever might be contained in such receptacles could fall outside the scope of the warrant, due to the nature of safes and strongboxes, without opening them, agents would be unable to know if the contents were within the scope of the items authorized to be seized. Likewise, the content of the cellular phones authorized to be seized in Category 7 would be unknown until additional searches were conducted. Thus, searching agents, even with information about the alleged crimes, would be unable to differentiate between which safes or phones were properly subject to seizure. Thus, the specificity of these categories would not be much improved by the inclusion of statutory citations, time frames, or identification of the suspects related to the items sought to be seized and they are therefore sufficiently

particular.

In sum, the Court finds that Categories 1, 2, 3, 4, and 5 of Attachment B to the 8827 Warrant failed to particularly describe the items to be seized.

2. Exclusion, Good Faith, and Severance

Having concluded that the 8827 Warrant lacked specificity, the Court must consider the appropriate remedy. Monreal contends that the warrant's insufficiency requires that all the evidence seized must be excluded. The Government contends that even if some categories of the 8827 Warrant are found to be overbroad or lacking particularity, the warrant is saved by the good faith exception to the exclusionary rule or, alternatively, that the Court should apply the severance doctrine and preserve the valid categories in the warrant. The Court finds that the good faith exception does not apply but that portions of the warrant are sufficiently particular to apply the severance doctrine.

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 141 (2009). The "'prime purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'" *United States v. Sears*, 411 F.3d 1124, 1128 (9th Cir. 2005) (quoting *Illinois v. Krull*, 480 U.S. 340, 347 (1987)). Exclusion of evidence, therefore, is not "a necessary consequence" of a Fourth Amendment violation; rather, courts evaluate whether exclusion will be effective "in deterring Fourth Amendment violations in the future." *Herring*, 555 U.S. at 141 (citations omitted).

"Suppression of evidence seized pursuant to a warrant unsupported by probable

cause is not appropriate if the government relied on the warrant in 'good faith.'" *United States v. Grant*, 682 F.3d 827, 836 (9th Cir. 2012) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)); *see also Massachusetts v. Shepard*, 468 U.S. 981, 987-88 (1984) (applying good faith exception to warrant lacking particularity). Courts have identified four general circumstances in which an officers' good faith reliance is unreasonable and suppression is warranted:

> (i) where an affiant misleads the issuing magistrate or judge by making a false statement or recklessly disregarding the truth in making a statement; (ii) where the magistrate or judge wholly abandons her judicial role in approving the warrant, acting only as a "rubber stamp" to the warrant application rather than as a neutral and detached official; (iii) where the warrant is facially deficient in detail as to the place to be searched or the things to be found that the officers could not reasonably presume it to be valid; or (iv) where the affidavit upon which the warrant is based is so lacking in indicia of probable cause that no reasonable officer could rely upon it in good faith.

United States v. Crews, 502 F.3d 1130, 1136 (9th Cir. 2007) (citing *Leon*, 468 U.S. at 923-26). The only circumstance relevant to Monreal's Motion to Suppress is whether the 8827 Warrant is so facially deficient in particularity that the agents involved in the search could not reasonably presume it to be valid.

When invoking the good faith exception, "the government bears the burden of proving that officers relied on the search warrant 'in an objectively reasonable manner.' " *SDI Future Health*, 568 F.3d 684, 706 (quoting *Crews*, 502 F.3d at 1136)). The determination of whether a warrant is so facially deficient that it cannot be relied on in good faith is largely based on the degree or extent of the lack of specificity in the warrant. *See Kow*, 58 F.3d at 428-29; *Center Art Galleries*, 875 F.2d at 752-53.

"Partial suppression is proper under this circuit's doctrine of severance, which allows a court 'to strike from a warrant those portions that are invalid and preserve those portions that satisfy the fourth amendment.'" *United States v. Sears*, 411 F.3d 1124, 1129 (9th Cir. 2005) (quoting *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir. 1984)). In *Sears*, the Ninth Circuit held that where the violation of the particularity requirement of the Fourth Amendment "was not flagrant, and where the invalid portions of the warrants were relatively insignificant," blanket suppression was not required. 411 F.3d at 1125. "Total suppression, on the other hand, is appropriate when a warrant is wholly lacking in particularity." *Id*. at 1129. In general, the Ninth Circuit does not "allow severance or partial suppression 'when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search.'" *SDI Future Health*, 568 F.3d at 707.

Although the 8827 Warrant appears to have been executed according to its terms, it was not executed in good faith reliance on its validity because the warrant was entirely lacking in particularity. Like the warrants at issue in *Center Art Galleries* and *Kow*, the 8827 Warrant contained no meaningful restrictions in any of the categories of items that could be seized. Illustrative of the lack of limits on the agents' actions is the testimony of Agent Gaines. When questioned about how, based on Attachment B, the searching agents would know what not to take, Agent Gaines responded: "That's in consultation with me and we would just kind of – of relevancy to the investigation," and "[i]f there's questions, if there's something that I feel that is obvious, like firearms, obvious. If it's a document, you know, we would probably gauge the document. Is this a financial document? Does it have, you know, the person's name just written down? Things – it just depends, but they

would come to me, and we'd have a discussion about it." TR2 86:25-87:17. The agent's testimony illustrates that the 8827 Warrant and Attachment B contained few meaningful limits on what could be seized. There was no statutory or other citation to the suspected criminal activity, there were no temporal limitations, no identification of co-conspirators, and no detail in the description of the weapons and documents subject to seizure. When faced with a warrant that authorized virtually unrestricted seizures, an executing officer acting in good faith should know that such a search is objectively unreasonable and in violation of the target's Fourth Amendment rights.

Turning to the severance doctrine, the government argues that at least portions of the 8827 Warrant may be upheld under the rule of severance. Under the rule, invalid portions of a warrant may be stricken and the remaining portions held valid, and the seizures made pursuant to the valid portions will be sustained. *See United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir. 1984). The rule requires "that identifiable portions of the warrant be sufficiently specific and particular to support severance." *Spilotro*, 800 F.2d at 967 (warrant is more amenable to severance when items are set forth in textually severable portions).

The only categories of the 8827 Warrant which might meet this requirement are category 6 (safes, strongboxes, and secure receptacles), and category 7 (cellular telephones). The Court concludes that these categories of the warrant are severable. As discussed above, the absence of any description in the warrant or Attachment B of the alleged criminal activity or temporal limitations relating to the listed categories did not impact categories 6 or 7 in such a way that made them less particular. Thus, the concerns

raised by the Ninth Circuit in cases such as *Kow* and *Center Art Galleries*, both of which focused on document seizures, do not apply to those two categories. Thus, when categories 6 and 7 are severed from the defective portions of the 8827 Warrant, the Government's agents could have objectively believed in good faith that the warrant was valid as to those items.

During the search of Defendant's home, over 20 electronic items were seized, including various phones, computers, tablets, and a drone, that appear to have been seized pursuant to category 7 of the 8827 Warrant. TR1 51:19-24. This group of items does not include the phones seized during the arrests of Defendants Monreal and Demara, the search of which was undertaken pursuant to the defective 7466 Warrant discussed in Section B of this Report and Recommendation. However, both the electronic items seized pursuant to the 8827 Warrant and the two phones seized at the time of arrest were included in the items to be searched pursuant to the 6049 Warrant. Ex. 5, Attachment A. Although the Court recommends in Section B that any evidence obtained from the two phones seized during the arrests and searched pursuant to the defective 7466 Warrant be suppressed, that conclusion does not impact the electronic items seized pursuant to the 8827 Warrant and searched pursuant to the 6049 Warrant. The items seized from the home were not included in the defective 7466 Warrant and were therefore not affected by that warrants defects, but were properly searched under the 6049 Warrant.

Summarizing, to remedy the Fourth Amendment violation in this case, this Court would recommend that the District Court suppress any evidence obtained under the portions of the 8827 Warrant found to lack particularity: categories 1, 2, 3, 4, and 5.

However, the evidence seized under the valid portions of the warrant, namely categories 6 and 7, are not subject to suppression.

B. The 7466 Warrant

On September 27, 2018, the 7466 Warrant was prepared for two telephones seized during the arrests of Defendant Monreal and co-defendant Luis Demara-Campas. Ex. 3. Attachment A to the 7466 Warrant describes the property to be searched as:

> 1. Red Apple Iphone cellphone seized from the person of Ramon Antonio MONREAL-Rodriguez on September 25, 2018.
>
> 2. Black Samsung Galaxy S8 cellphone bearing IMEI: 357759082780271 seized from the person of Luis DEMARA-Campas on September 25, 2018.

Ex. 3, Attachment A.

After the 7466 Warrant had been executed for the phones and the extraction of data had commenced on October 1 and 2, 2018, Agent Adler realized that the same Attachment B used for the search warrant of the home was inadvertently attached as Attachment B to the 7466 Warrant for the telephones and "omitted some of the language for seizing digital evidence . . . ." TR1 51:25-52:9; 95:6-23; 111:19-24; Ex. 3. Due to the attachment of the incorrect Attachment B, the Government agrees that "you can't have that link-up [between the thing to be searched and probable cause] when it's clearly the wrong attachment." TR3 54:14-55:13. The Government also concedes that good faith cannot apply under the circumstances because the inclusion of the incorrect Attachment B is an error that a reasonable law enforcement officer should have noticed. TR3 55:14-27.

Recognizing the lack of probable cause and no basis for applying the good faith

doctrine, the Government contends that the evidence obtained from the search of the phones listed in the 7466 Warrant is saved by the inevitable discovery doctrine. The Government's counsel explained the argument as follows:

> I argue here that inevitable discovery keeps the evidence as a result of 7466 in the game. It is only because it was not seized as part of the warrant. Remember, this warrant was signed the 27th. You had the arrest the 25th. The arrest was as an execution of an arrest warrant issued as a part of the indictment. So you have that taken into custody as part of the arrest. You have this warrant saying: Hey, we have this phone, let's search it. It's messed up. The fact that 18-6049 exists and takes into account, I believe and I argue, saves it because it shows that inevitably we could have gotten the right thing if – but for the mistake.

TR3 55:18-56:4. Put simply, the Government agrees that the 7466 Warrant was invalid and could not be saved by good faith, but contends that the 6049 Warrant that was sought and obtained on October 10, 2018, even though well after the commencement of the initial electronic forensic analysis of the phones, shows that discovery of the evidence collected from the phones was inevitable.

The inevitable discovery doctrine operates as an exception to the exclusionary rule and permits the admission of otherwise excluded evidence "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police . . . ." *Nix v. Williams*, 467 U.S. 431, 447 (1984). The government must make this showing by a preponderance of the evidence. *See id*. at 444.

As a threshold matter, it is not clear that the inevitable discovery doctrine is available under the circumstances of this case. The Government agrees that the 7466 Warrant was invalid and that a reasonable officer should have recognized the invalidity. In

United States v. Riley, 224 F.3d 986 (9th Cir. 2000), the Ninth Circuit explained that the reasoning behind the inevitable discovery doctrine does not extend to cure a "federal agents' unexplained failure to secure a search warrant." *Id*. at 995. As the court explained:

> As this court noted in *United States v. Echegoyen*, 799 F.2d 1271, 1280 n. 7 (9th Cir.1986), "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." This contention has been echoed with approval in *United States v. Boatwright*, 822 F.2d 862 (9th Cir.1987), and *United States v. Mejia*, 69 F.3d 309 (9th Cir.1995). As this court explained in *Mejia*, it "has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant." 69 F.3d at 320. Hence, the district court committed clear error in applying the inevitable discovery doctrine based on the agents' actual but unexercised opportunity to secure a search warrant.

Riley, 224 F.3d at 995. The Court finds that the rule described in *Riley* applies with equal force here. Because the Government acknowledges that the mistaken Attachment B should have been recognized by the agents as rendering the 7466 Warrant invalid, the effort to save it by seeking and obtaining the 6049 Warrant after the commencement of the electronic forensic analysis came too late. The search of the phones was undertaken without a valid warrant and the agents' failure to recognize its invalidity is not saved by the inevitable discovery doctrine.

Additionally, it is not clear that the 6049 Warrant would have been issued if agents had disclosed that forensic examination of the phones had already been commenced pursuant to the invalid 7466 Warrant. In the application for the 6049 Warrant, Agent Adler did not disclose that information had already been extracted from the phones or that Agent Diaz had searched through one of the phones with Agent Adler. TR1 110:1-7. In fact, in

the affidavit supporting the 6049 Warrant application, it was represented that:

> All of the items are secured and stored in a manner in which their contents are, to the extent material to this investigation, in substantially the same state as they were when the items first came into the possession of law enforcement agents upon their seizure on September 25, 2018, pursuant to federal search warrants.

Ex. 5, Affidavit, ¶ 15.

It was only in the subsequently filed warrant returns that Agent Adler explained that the defects in the 7466 Warrant prompted the application for the 6049 Warrant. TR1 54:12-17; Exs. 10, 12. In the 7466 Warrant return, he stated "that digital evidence was extracted from the cell phones [but that] due to a perceived error with Attachment B, agents did not conduct a complete analysis of extraction and opted to write a new warrant." TR1 54:21-55:2. Then, in the return for the 6049 Warrant, Agent Adler stated that "[s]ome of the digital extraction had been completed prior to this warrant [the 6049 Warrant], under the aforementioned warrants, but their complete analysis did not commence until the above-listed date and time." TR1 55:12-15; Ex. 12 (6049 Warrant return). Had agents disclosed in the application for the 6049 Warrant that the search of the phones had already commenced under the admittedly invalid 7466 Warrant, the examining Magistrate Judge may have questioned the procedure and refused to issue the 6049 Warrant. If that had occurred, the legal discovery of the evidence contained on the phones was not inevitable.

Finally, the application of the inevitable discovery doctrine requires that the Government establish by a preponderance of the evidence that, "by following routine procedures, the police would inevitably have uncovered the evidence." *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989). Defendant Monreal contends that

the Government has not met its burden in this case because they cannot show that the phone in question was seized from Monreal during his arrest or seized at his home under the 8827 Warrant. However, at the hearing, Agent Adler was shown a red Apple iPhone, model number A1661, seized from Defendant's person at the time of his arrest. TR1 101:6-16; Ex. 57. It was pointed out to him that, in the 6049 Warrant affidavit, the same phone was described as being found at Defendant's home, while the packaging it was placed in indicated it was seized from Defendant's person. TR1 101:17-25. At the hearing, Agent Adler stated that the phone was found on Defendant's person at the time of his arrest. TR1 102:1-4; 106:2-4; Ex. 57 (packaging). At the hearing, the Government's counsel admitted that "[t]here's some confusion because there's a tertiary identifier, the model numbers seem to be transposed with another phone we searched. But, to the best of my knowledge, there was a red IPhone on his person, not in his locker, not in his car that was searched and that's, I believe, how 7466 describes it is the red IPhone found on his person." TR3 51:2-8. If the District Court finds that the inevitable discovery doctrine is suitable for application in this case, the Court finds that the Government has shown by a preponderance of the evidence that the red IPhone at issue was found on Defendant Monreal's person and was not in the group of phones seized at his residence.

IV. Recommendation

Based on the foregoing, the Magistrate Judge recommends that the District Court, after an independent review of the record, GRANT IN PART and DENY IN PART Defendant Monreal's Motion to Suppress (Doc. 327 in CR 18-1905; Doc. 160 in CR 18-2215) and Defendant Marna Monreal's Notice of Joinder in the Motion to Suppress (Doc.

171 in CR 18-2215).

This Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment. However, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the District Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. No replies are permitted without leave of court. If any objections are filed, this action should be designated with case numbers: **CR 18-1905-TUC-JAS and CR 18-2215-TUC-JAS**. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to de novo consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Dated this 3rd day of January, 2022.

Honorable Jacqueline M. Rateau
United States Magistrate Judge