

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:99-CR-324-T-23A

STEVEN B. AISENBERG
MARLENE J. AISENBERG

/

REPORT AND RECOMMENDATION

The Defendants, who are charged with conspiracy and making false statements to law enforcement in violation of 18 U.S.C. §§ 371 and 1001, move to suppress a state authorized intercept and claim that applying agents deliberately made false statements and omissions and that the surveillance violated Florida's statutory scheme (doc. 90). United States District Judge Steven D. Merryday referred the matter to me for a report and recommendation with directions to conduct such hearings as are necessary (doc. 119). *See* 28 U.S.C. § 636(b)(1); Local Rule 6.01(c)(14). After a suppression hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), I recommend the district court grant the motion for the following reasons.

I.

At 6:42 a.m. on November 24, 1997, Marlene Aisenberg called 911 and frantically reported someone had kidnapped her five-month old daughter, Sabrina Aisenberg. Within minutes, a Hillsborough County deputy sheriff arrived at the Aisenbergs' Valrico home. Teams of detectives, deputies, Florida Department of Law Enforcement agents, and FBI agents eventually scoured a four-mile radius for clues. Their exhaustive efforts, combined with massive media attention, yielded no promising leads. Authorities for the next two

weeks maintained a twenty-four hour vigil at the Defendants' residence waiting for a ransom demand. No one called.

Agents suspected the Defendants' account from the start. Several reasons fueled this: the lack of any physical evidence at the crime scene or reports of unusual activity in the neighborhood, the presence of a dog in the house which reportedly barks at strangers but did not bark the night of the baby's disappearance, the rarity of a crime like this occurring in the manner the Defendants described, the failure of mass publicity to draw meaningful leads, Marlene Aisenberg's peculiar comments to interviewing detectives, and the Defendants' behavior toward investigating agents. The Defendants likely surmised they were suspects too; they hired present defense counsel within days after reporting their daughter missing.

On December 12, 1997, Hillsborough County Sheriff detectives Linda Sue Burton and William Blake, the two lead detectives, applied to a state court judge for an order authorizing the interception of the Defendants' communications at their residence.¹ Although neither one had applied for a wire before, they met with a superior, Corporal Knowles, to decide what facts and information should be included in their affidavit. Knowles then drafted the application, the proposed order, and the authorization using forms maintained by the Hillsborough County Sheriff's Office (HCSO).² Burton and Blake

¹ Blake served as a homicide detective; Burton worked as a detective on juvenile matters and as director of the Hillsborough County Child Death Review Team. Although the two may have been named lead detectives at one point, Blake soon concluded he reported to Burton about the case.

² Corporal Knowles is deceased. Just who made the decision to seek an intercept in the first place is unclear from the record before me.

then reviewed Knowles's work for factual accuracy. Thus, the two affiants claimed probable cause existed to believe the Defendants "and others as yet unknown, have been committing, are committing and are about to commit" certain offenses against the State of Florida, namely: homicide, sale of a minor child, child neglect with great bodily harm, and aggravated child abuse in violation of FLA. STAT. §§ 782.04, 63.212(1)(d), 827.03(3), and 827.03(2). An intercept, the affiants reasoned, would likely uncover evidence of these crimes.

Burton and Blake presented their joint application to Assistant State Attorney Eric Myers who presumably reviewed the documents and presented them to State Attorney Harry Lee Coe for his approval. The same day, Chief Circuit Judge F. Dennis Alvarez authorized the request. That order permitted agents to monitor the Defendants' home for thirty days and required the state attorney (or a designated representative) to submit reports every ten days "showing what progress ha[d] been made toward achievement of the authorized objective and the need for continued interception."

On December 13, 1997, authorities placed intercepts in the Aisenbergs' kitchen and bedroom. Per instructions, monitors minimized conversations every two minutes, unless they were recording a pertinent conversation, and shut down the bedroom intercept from midnight to 7:00 a.m. Three tape decks controlled by a master switch operated simultaneously. Two decks recorded the tapes to be submitted to the state attorney and the court. Monitors continuously inserted and removed tapes from the third deck (the work-copy deck) as they identified pertinent calls. The monitor who identified a relevant call later transcribed that conversation usually within twenty-four hours (although sometimes

other personnel transcribed the call). Corporal Knowles then retrieved these handwritten transcripts, summarized them, and prepared the state attorney's ten-day progress reports to the court.³ At some point in this process, Burton and Blake listened to the pertinent calls (known as P-calls) with the aid of the monitors' transcripts. When they or others made changes to the transcripts after Knowles made his summaries, Knowles did not correct his draft summaries for the ten-day progress reports.

On January 9, 1998, and again on February 6, 1998, Burton and Blake applied for thirty-day extensions of the intercept. Again, while neither detective prepared these documents, they met with superiors and discussed what should be included. Knowles, who authored the first extension, and Sergeant Roman, who drafted the second, decided what information to include and simply pasted the pertinent progress report summaries from the previous thirty days of surveillance to show the intercept's progress and the need to continue it.⁴ Each drafter attached transcripts of the summarized conversations as exhibits, but neither one checked to see if the transcripts matched the summaries nor if any updated transcripts rendered the summaries inaccurate.

Burton and Blake, like they did for the initial intercept application, reviewed the extensions for factual accuracy. Like Knowles and Roman, neither took the time to

³ It is doubtful if anyone at the state attorney's office reviewed Knowles's proposed progress reports for accuracy. Assistant State Attorney Myers likely just signed off on the periodic reports and forwarded them to the judge.

⁴ Sergeant Roman had extensive experience applying for wiretaps. Indeed, he trained Knowles regarding Florida's statutory requirements; therefore, he was intimately familiar with Knowles's practice. In this investigation he replaced Knowles who took leave to attend to his ailing wife. Roman used Knowles's work product in large part despite quickly spotting problems with the previous applications.

determine if a transcript supported the summary. Although Burton now admits she spotted some differences, she said nothing. Assistant State Attorney Myers also did not note any inconsistencies, and he did not question the detectives about the applications. Eventually, Judge Alvarez approved the extensions.⁵

State authorities terminated the wire on March 2, 1998. The 79 days of surveillance generated fifty-five audio cassettes recording over 2,600 conversations. More than seventeen months later, a federal grand jury returned a seven-count indictment charging the Defendants with conspiracy and making false statements to investigators regarding the disappearance of their daughter.⁶

II.

The Defendants essentially give four reasons to suppress the evidence derived from the electronic surveillance. First, they argue detectives Burton and Blake, in violation of the Fourth Amendment, intentionally, or with reckless disregard for the truth, made materially false statements or omitted material facts in each application. *See Franks v. Delaware*, 438 U.S. 154 (1978). More particularly, the Defendants contend the detectives misled the reviewing judge about their behavior, their affection for their daughter, the

⁵ At the Court's request, the government has filed *in camera* the applications for electronic surveillance (including extensions), the authorizations, progress reports, and sealing order (docs. S-26, 27, and 28).

⁶ Count one charges both Defendants with conspiracy to violate 18 U.S.C. § 1001. *See* 18 U.S.C. § 371. Counts two, three, and seven accuse the Defendants jointly with committing substantive § 1001 offenses. Lastly, the remaining counts charge the Defendants individually with making false statements (Marlene Aisenberg - counts five and six; Steven Aisenberg - count four). Counts two through six allege the Defendants jointly or individually made false statements to investigators before Burton and Blake applied for the wire on December 12, 1997.

evidence at the crime scene, their interviews by law enforcement, potential leads, and the content and context of their intercepted conversations. Second, the surveillance orders, contrary to Florida law, authorized the interception of communications about crimes outside the wiretap scheme, namely, sale of a minor child, child neglect with great bodily harm, and aggravated child abuse. Accordingly, the warrants are invalid and all surveillance evidence should be suppressed. Third, agents monitoring the wire failed to adequately minimize communications protected by the marital and attorney-client privileges. Fourth, Burton and Blake failed to show an investigative need for electronic eavesdropping, a statutory prerequisite (doc. 90).⁷

The government, in response, denies Burton and Blake misled the reviewing judge. If the detectives did make any misstatement or omitted any information, they did not do so deliberately, and their misstatements or omissions were immaterial to the probable cause findings. Thus, the government urges a *Franks* hearing is unnecessary. It also rejects the Defendants' other reasons for suppressing the evidence (doc. 170).⁸

On October 16, 2000, after the benefit of oral argument, I issued an order (doc. 257) finding the Defendants had made a substantial preliminary showing warranting a limited *Franks* hearing as to certain paragraphs of the first and second extensions (first extension: ¶¶ V5-6, V8-11, V13, V17, V20-24; second extension: ¶¶ V10, V17-19).

⁷ The Defendants have supplemented their motion to dismiss at docs. 103, 113, 133, 195, 223, 229, 246, 255, and 260.

⁸ The government has supplemented its response at doc. 254.

Notably, most of these paragraphs concern issues pertaining to the audibility of the intercepted conversations.

This report first addresses the *Franks* issues. It explains the standards for evaluating a *Franks* challenge, continues with my reasons for deciding a *Franks* hearing is unnecessary as to the initial intercept application, and follows with my findings regarding the first and second extensions. The remainder of the report outlines Florida's electronic surveillance scheme, analyzes the Defendants' and government's arguments pertaining to the consequences of conducting surveillance on unauthorized predicate crimes, and addresses the Defendants' claims about lack of proper minimization during the surveillance and the investigative need for the surveillance.

III.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held a defendant has the right under the Fourth Amendment to challenge the truthfulness of a police officer's sworn statements in support of a search warrant. But this right is limited and prescribed. Accordingly, the Court outlined a three-stage analysis for evaluating *Franks* claims.

First, the defendant must make a "substantial preliminary showing" the affiant made a "false statement knowingly and intentionally, or with reckless disregard for the truth." *Franks*, 438 U.S. at 155. The Eleventh Circuit defines "reckless disregard for the truth" to include instances where the affiant "should have recognized the error, or at least harbored serious doubts" about his representations. *United States v. Kirk*, 781 F.2d 1498, 1502-03 (11th Cir. 1986). A defendant must be specific regarding his claim of falsity or

reckless disregard. Conclusory allegations are insufficient. *Franks*, 438 U.S. at 171. The defendant should point to the exact portions of the application he challenges, provide a statement of reasons for his contentions, and supply an offer of proof supporting his grounds or give some satisfactory explanation for not doing so. *Id.* Negligence or innocent mistakes do not violate the Fourth Amendment. *Id.*; *Madiwale v. Savaiko*, 117 F.3d 1321, 1326 (11th Cir. 1997).

Franks concerns only the affiant's own deliberate falsity or reckless disregard. Hence, the source of the alleged false statement is significant. The affiant, for example, is entitled to rely on the observations of other law enforcement officers in a common investigation. In such instances the affiant's statements, even if incorrect, are still "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165. Nonetheless, the affiant in some way must set out in his application that he is basing his information on others. This satisfies the Fourth Amendment's particularity requirement and allows the reviewing judge to make an independent probable cause determination. *Id.* at 165; *Kirk*, 781 F.2d at 1504-05.

Second, if the defendant satisfies these threshold demands, *Franks* requires the reviewing judge to set aside the disputed material and examine the remaining affidavit. If the redacted application supports a probable cause finding, no hearing is necessary. If it does not, the Fourth Amendment requires a hearing. *Franks*, 438 U.S. at 171-172.

Lastly, should the court decide a hearing is necessary, the defendant bears the burden of proving by a preponderance of the evidence his claims of perjury or reckless disregard. If the defendant does this, the reviewing judge, like at the previous stage, must

set aside these statements and determine if the edited application supplies probable cause. If it does not, the warrant is void, and the fruits of the electronic surveillance must be excluded to the same extent as if the face of the affidavit lacked probable cause. *Franks*, 438 U.S. at 156.

Although *Franks* dealt with false statements, the Eleventh Circuit also applies its reasoning to omissions. *Madiwale*, 117 F.3d at 1326-27; *United States v. Martin*, 615 F.2d 318, 328-29 (5th Cir. 1980).⁹ Thus, an agent who intentionally or with reckless disregard omits facts material to an affidavit's probable cause violates the Fourth Amendment. *Madiwale*, 117 F.3d at 1326-27. The Eleventh Circuit permits a defendant to show recklessness without direct evidence. A court, instead, can infer recklessness from the omission itself if the fact is "clearly critical to a finding of probable cause." *Id.* at 1327 (quoting *Martin*, 615 F.2d at 329). In other words, the omitted fact is material if, when added to the application, probable cause no longer exists. *Madiwale*, 117 F.3d at 1327.¹⁰

⁹ In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as precedent the former Fifth Circuit's decisions rendered before October 1, 1981.

¹⁰ In *Madiwale*, the plaintiffs sued a police officer under 42 U.S.C. § 1983 claiming the officer omitted material facts in her affidavit for a search warrant. The court, addressing the issue of qualified immunity, restated the rule in this circuit: "[A]n officer would not be entitled to qualified immunity when 'the facts omitted ... were ... so clearly material that every reasonable law officer would have known that their omission would lead to a search in violation of federal law.'" 117 F.3d at 1327 (quoting *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995)). Admittedly, this is not a civil action under § 1983; nonetheless, the test adds gloss to defining the "materiality" of a claimed omission.

During this three-stage process, a reviewing judge views the affidavit and warrant through traditional Fourth Amendment lenses. The warrant is presumed valid, supporting affidavits are not examined in a hypertechnical manner, and a realistic and commonsense approach is used. *Franks*, 438 U.S. at 171; *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Ventresca*, 380 U.S. 102, 109 (1965). In fact, even the doubtful or marginal search under a warrant may be sustainable where one without a warrant would fail. *Ventresca*, 380 U.S. at 106. The probable cause standard is a “‘practical, nontechnical conception.’” *Gates*, 462 U.S. at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). It is a “fluid concept” dependent on the assessment of the probabilities in particular factual contexts. *Gates*, 462 U.S. at 232. Law enforcement officers, it follows, are entitled to form certain “common-sense conclusions about human behavior.” *Id.* at 231-32. The judge’s task is “simply to make a practical, common-sense decision” whether a “fair probability” exists that evidence of the crime will be uncovered in a particular place taking into account the totality of the circumstances presented in the affidavit. *Id.* at 238. Applying this standard to electronic intercepts, an application must show probable cause exists to believe: (a) an individual is committing, has committed, or is about to commit a crime enumerated in FLA. STAT. § 934.07; (b) particular communications concerning that offense will be obtained through such interception; and (c) the facilities where the oral communications are to be intercepted are to be used or have been used in the commission of such an offense. *See* FLA. STAT. § 934.09(3)(a), (b), and (d).

IV.

A. The initial application

The Defendants assert Burton and Blake deliberately, or with reckless disregard, made material false statements or material omissions in sixteen of the twenty-two “fact” paragraphs outlining probable cause in the initial wiretap application.¹¹ They challenge the detectives’ reports about their demeanor, their interviews, the crime scene, the lack of any unusual activity in the neighborhood, and the FBI’s study on child abductions. After carefully considering the Defendant’s arguments, their exhibits in support, and the government’s responses, I find Burton and Blake made false statements with reckless disregard, but a *Franks* hearing is unnecessary because the application arguably supports sufficient probable cause for murder.¹²

1. The Defendants’ behavior

Burton and Blake feature a central theme in their application: the Aisenbergs exhibited behavior at odds with the gravity of the reported event - an infant snatched from her crib while her parents slept. The detectives start with the 911 call. Marlene Aisenberg’s tone, Burton and Blake comment, sounded “very hysterical” when she first reported her daughter had been kidnapped. Steven Aisenberg then took the phone from his wife and answered the operator’s questions. While he talked to the operator, Marlene Aisenberg spoke to some “unknown” person using another telephone. No longer

¹¹ These are ¶¶ 1, 2, 6-9, 11-15, 17, 18, and 20-22 at part V of the application.

¹² As the government points out, the Defendants do not make a facial challenge claiming the application lacks probable cause for murder; instead, their argument pertaining to probable cause is limited to a post-*Franks* setting.

hysterical, the affiants opine she sounded “calm” with “her thoughts collected” (¶ V1). Burton and Blake add that HCSO deputy Warren, who arrived minutes later, observed that the Defendants did not appear “very upset” (¶ V2).

Burton and Blake found little food or diapers in the house for the child: six jars of baby food, one-half box of dry formula, and just four unused diapers; not enough, Burton says, for a day’s needs (¶ V7). They observed the Defendants displayed no pictures of their infant in the home (¶ V22h) and retreated to their bedroom several times during the next several days to avoid law enforcement (¶ V21). Lastly, neither Defendant asked the affiants questions about the investigation (¶ V22i). This behavior, the affiants opine from their experience, models the behavior of “[i]ndividuals involved in the homicide or sale of a minor child,” i.e., an inability “to display signs normally associated with those who have lost a child through unexplained circumstances” and a “fail[ure] to stock an adequate supply of items such as food, diapers and other necessities to maintain the well being of the missing victim” (¶¶ III3-4).

The Defendants assert these statements are deliberately false or were made with reckless disregard for the truth or the agents omitted material facts, facts which would have negated the inferences the agents created in their application. Most of these claims do not demand much comment. As stated previously, law enforcement officers seeking to show probable cause for a warrant are entitled to form certain “common-sense conclusions about human behavior.” *Gates*, 462 U.S. at 231-32. Likewise, the affiants may justifiably rely on the personal observations of fellow officers participating in the same investigation. *Ventresca*, 380 U.S. at 111; *Kirk*, 781 F.2d at 1505. Burton and Blake did this.

Undoubtedly, the Defendants, together with their family and friends, strongly disagree with detectives' conclusions about their lack of affection for their daughter and the demeanor they demonstrated when officers arrived at the scene. They may also have reasons for not asking Burton and Blake about the investigation, preferring instead that their attorney handle these matters given the particular circumstances presented. They may have decided to go to their room for simple privacy. But these complaints do not warrant a *Franks* hearing. Admittedly, the affiants' statements about insufficient baby supplies are inaccurate, but I do not find them deliberate or reckless. The clutter in the Aisenbergs' house, evidenced by the video taken by law enforcement, explains why the detectives' incorrect accounts are at worst negligent and at best innocent mistakes. Besides, these statements are immaterial. The inference the detectives urge – the lack of diapers and baby food in the house shows the Aisenbergs were planning to get rid of Sabrina Aisenberg – is simply unconvincing.

Burton and Blake's interpretation about the 911 call, however, is recklessly misleading. The two obviously did not witness Marlene Aisenberg during the Aisenbergs' conversations with the operator; instead, their opinions about her "calm" and "collected" demeanor rest on the 911 tape. Thus, their conclusions differ in quality from those based on personal observations; moreover, their ability to discern Marlene Aisenberg's demeanor is no better than the Court's. After listening to the tape several times, I find the affiants' opinions are unreasonable and made with reckless disregard for the truth. Marlene Aisenberg is not "calm" nor "collected" while talking to her mother; she is wailing. The affiants also knew she was speaking to her mother, not some "unknown party." Mrs.

Sadowsky informed Burton her daughter had called her; indeed, Marlene Aisenberg can be heard (without difficulty) saying “I gotta go, Mom!” when her husband is relaying questions from the 911 operator. A *Franks* hearing as to this issue, however, is unnecessary. Even if the detectives’ opinions are redacted, the application supplies probable cause.¹³

2. *Other leads and an unknown intruder*

The detectives, according to the Defendants, lied or purposely omitted information from their application that would have negated probable cause. Specifically, the Defendants assert the agents did not advise the judge about the physical evidence uncovered at the scene suggesting an unknown intruder may have snatched the child; purposely misled him about the reason they found no evidence of forced entry (the doors were unlocked); lied about the Defendants’ alarm system; falsely stated the dog barked at everyone who entered their residence; and falsely reported the investigation had revealed no unusual activity in the neighborhood (¶¶ V6, V8, V9, V18, V20, V22a, V22c, V22e, V22f). After studying the Defendants’ exhibits in support, I find the Defendants have not made the necessary substantial preliminary showing required by *Franks*.

As to these claims, the detectives’ statements are substantially accurate. None of the leads put forth by the Defendants is striking. None of the physical evidence discovered

¹³ The governing standard of review requires me to give deference to a judge’s earlier determination of probable cause even if the showing is marginal or doubtful. *Ventresca*, 380 U.S. at 106. This is such a case. Applying *Ventresca*’s approach, Burton and Blake’s reckless statements about the 911 call, even if redacted, do not alter the impact of Deputy Warren’s observations. Namely, Warren’s conclusions about Marlene Aisenberg’s demeanor when he arrived at the scene immediately after the 911 call are similar in nature to the affiants’ opinions regarding her behavior during the call.

at the scene appears promising. As to some of this evidence, like the shoe print on the dust ruffle, hair samples, and unidentified latent prints, the detectives did not obtain test results until after they applied for the intercept. Besides, an affiant cannot be expected to include in an affidavit every piece of information gathered during the course of an investigation. Otherwise, applications would be exposed to endless conjectures about investigative leads, fragments of information, and other matters that might, if included, redound to a defendant's benefit. *Franks* imposes more stringent standards for a hearing. *United States v. Colkley*, 899 F.2d 297, 300-301 (4th Cir. 1990).

3. *Defendants' interviews*

Burton and other law enforcement officers questioned the Aisenbergs on November 24 and 25, 1997. The Defendants say Burton and Blake deliberately mischaracterized these interviews (¶¶ V11-V15) (doc. 90, pp. 13-18). Although I find the Defendants' contentions difficult to follow, their complaints here are minor: the misidentification of the officer who questioned Steven Aisenberg on November 24, 1997, at 8:50 a.m.; whether Marlene Aisenberg used the word "crib" or "bed"; conclusions regarding her use of the past tense when making comments about her child (she "loved" her baby); and whether Marlene Aisenberg's interviews were inconsistent. All this is either immaterial to probable cause, observations the affiants are at liberty to make, or conclusions the judge could accept or reject given the information presented to him. For example, the judge could have disagreed with the agents' belief that Marlene Aisenberg's statements were inconsistent. A *Franks* hearing is unnecessary.

4. Statistical studies

The day before making their application, Burton and Blake telephonically interviewed Special Agent Mark A. Hilts, supervisor of the FBI's Child Abduction and Serial Killer Unit. Agent Hilts informed the affiants about a "cooperative research project" with the University of California at Los Angeles pertaining to 550 cases of "child abduction and/or homicide reported to the FBI during the period 1985-1995." This study noted the majority of the cases involving infants "were found to be ... emotion-based crimes (68%) or abductions wherein the offender needed a child to fulfill the illusion of having experienced pregnancy and childbirth" (§ V17). Only family members perpetrated these "emotion-based crimes" (homicides) in the studied cases. Of all the infant abductions reviewed, only one involved an abduction from the family's residence. The offenders were either strangers (70%) or acquaintances (30%); none were family members. Lastly, Hilts remarked his unit's experience has been "that some parents have falsely reported their murdered children as victims of abduction, in order to cover-up their own involvement."

The detectives reference other data culled from the FBI's Violent Criminal Apprehension Program (VICAP), a national database of solved and unsolved homicides. Examining cases whose victims were less than one year old and whose last known location was the victims' residences, the database revealed a care giver is usually responsible for the child's death (91.67%; i.e., 44 of 48 cases). The remaining four instances are unresolved abductions (§ V17).

Burton and Blake point to these statistical studies to buttress their contention it is likely a family member murdered the child and the parents falsely reported an abduction

to hide the crime from investigators. The Defendants claim the affiants selectively cited data from these works and omitted information which would have detracted from their importance and relevance, specifically a study by the National Center for Missing and Exploited Children (NCMEC).¹⁴ They also object to using statistical studies like this to establish probable cause (doc. 90, pp. 18-20). Importantly, however, the Defendants do not argue the detectives' summaries are specifically false.

These arguments are without merit. The Defendants do not make a substantial preliminary showing the agents deliberately omitted material information. These studies only informed the judge what he likely knew from his experience. A crime like the Defendants reported – an abduction of an infant from her home by a stranger - is a rare event; other explanations are more plausible. Besides, in a quantitative way, these studies reflect the experience and expertise of law enforcement officers trained in these type of offenses. The Supreme Court permits this. *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (officers are entitled to make reasonable inferences based upon their experience with aliens and smugglers); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) (same); *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(c) (3d ed. 1996). Furthermore, information inadmissible at trial may be used to support probable cause. *See Jones v. United States*, 362 U.S. 257, 271 (1960) (officer permitted to use hearsay to show probable cause).

¹⁴ According to the Defendants, Major Terry (HCSO) was aware of *An Analysis of Infant Abductions*, done by NCMEC, before Burton and Blake applied for the warrant. They assert this work shows one-fourth of the infants abducted were taken from the home and 94% of all infant abductors were primarily strangers (doc. 90, pp. 18-19).

B. The extensions

The Defendants claim the affiants deliberately misrepresented, or acted with reckless disregard for the truth in representing, facts in thirteen paragraphs of the application for the first extension and four paragraphs of the application for the second extension. Almost all concern intercepted conversations. According to the Defendants, some of the recordings are unintelligible, and the affiants have distorted the context of the conversations.

The Aisenbergs paint a consistent pattern, and they proved this pattern beyond a preponderance of the evidence at the *Franks* hearing. The detectives report conversations no reasonably prudent listener can hear, quote conversations that do not appear in the supporting transcript at all or in the manner described, and deliberately or with reckless disregard summarize conversations out of context. The government steadfastly rejects all of this. It does so against a record showing: systemic, technical problems producing recordings plagued by distortion, interference, and mechanical noises; application transcripts that make no sense; revised transcripts that continue to make no sense; revised transcripts that contradict the application transcripts in material respects; a continual effort to amend transcripts (to purportedly improve them) up to and through the date of this report; admissions, as evidenced by the government's transcripts, that significant amounts of particular conversations cannot be understood or were not recorded (due to

minimizations); and the government's tacit acknowledgment that certain recordings are so poor or so irrelevant it will not offer them as evidence at trial.¹⁵

1. First Extension: ¶V5

On December 13, 1997 at approximately 10:57 p.m. a conversation was intercepted on the listening device located in the master bedroom (P-1, conversation number 22). Steven Bennett Aisenberg and Marlene Joy Aisenberg were conversing and during the conversation Steven Bennett Aisenberg stated "You think I did that?" Marlene Joy Aisenberg then advised "You been acting weird every night." Steven Bennett Aisenberg asked "You think (possibly Tina) behind it." and Marlene Joy Aisenberg replied "Uhuh." It should be noted that this recording is of poor quality. It was also noticed that Marlene Joy Aisenberg was upset and crying during this conversation. Later in the conversation a discussion of figures took place and Marlene Joy Aisenberg asked "About how much is the set amount (inaudible). Steven Bennett Aisenberg replied "(inaudible) about (one-hundred or nine-hundred) thousand." (SEE EXHIBIT "B")¹⁶

The Defendants claim this recording (G Ex. 20A) is largely unintelligible. I agree. By this paragraph, Detectives Burton and Blake suppose that Steven Aisenberg had done something to the child, whom the detectives presume is dead, and that the Defendants were talking about money to sell or dispose of the child. But after listening to the tape carefully, I can understand only a few phrases during its approximately twenty minutes. The speakers' voices are mostly distorted and muffled. Noises such as hissing, mechanical humming, and wire interference (telephone ringing in the background) permeate the

¹⁵ No party has cited a case, and I am unaware of any, setting forth a test for the audibility of recordings in the context of a *Franks* proceeding. Nonetheless, I am guided by Judge Merryday's thoughtful analysis in his Order Respecting Audibility. *United States v. Aisenberg*, 120 F. Supp. 2d 1345 (M.D. Fla. Nov. 9, 2000).

¹⁶ This paragraph and the succeeding ones are direct quotes from the extension applications. Occasionally I have underlined parts to easily identify the challenged language.

recording.¹⁷ The television is constantly playing. While one can reasonably hear Steven Aisenberg say, “you think I did (it or that)?”, no prudent person could reasonably conclude this question pertained to his missing daughter. Nothing preceding or after the comment is particularly audible. Indeed, a prudent person straining to understand the conversation would likely guess the Aisenbergs were talking about their bills (like the “water bill,” which the monitor also heard and jotted in the log). For Burton and Blake to deduce from this unintelligible conversation the Defendants were speaking about selling or disposing of their child (much less murder) is baseless and reckless.¹⁸

2. *First Extension: ¶V6*

On December 24, 1997 at approximately 11:19 p.m. a conversation was intercepted on the listening device located in the master bedroom (P-2, conversation number 98). Steven and Marlene Aisenberg were speaking and during the conversation Steven Aisenberg advised "That amounts to four to five thousand dollar bail." Marlene replied "What?" Later in the conversation Steven Aisenberg advised "It depends on you, you had to deal with the pain everyday. You know what I'm saying, not everybody has that." Later Marlene Aisenberg advised "I'm scared." Then Steven Aisenberg advised "On top of a little baby." Marlene Aisenberg replied "I said, I saw them together, on the fourth, he was upset I thought, gee, you know could it be dead, you know, dead." Steven Aisenberg replied "They belong without you, you, Oh my God, we pulled her clothes off, we, I," Marlene Aisenberg then replied “(inaudible) find it." They then discussed

¹⁷ The Defendants’ forensic audio expert, Bruce E. Koenig, who previously served as the Special Agent Supervisor in the FBI’s Engineering Section, testified all the tapes he examined had similar problems. The intercept system introduced extraneous sounds such as ringing phones, hissing, and humming. This noise directly impacts the ability to understand the recorded speech. Koenig pointed to studies showing comprehension proportionally suffers as signal to noise ratios increase. As if this were not enough, distortion caused by microphones picking up the speakers’ voices from too great a distance added to the unintelligibility.

¹⁸ The government has advised the district court it does not intend to use this tape at trial.

something about a hospital. Later in the conversation Steven Aisenberg advised "No, it wouldn't even bother me killing the dog." "Umm, the young, talking abuse." Later in the conversation Marlene Aisenberg advised "Sell that van, and (inaudible) change that five-hundred (inaudible) baby blanket thrown away." Steven Aisenberg then advised "They gonna have to because (inaudible) my baby back (long pause) You know, we can always take the story back." (SEE EXHIBIT "C")

The Defendants assert this recording (G Ex.12A) is largely unintelligible. I agree. Like the previous recording, this tape suffers from the same systemic problems: distortion, muffled voices, interference (ringing), and mechanical hissing. Even identifying the male speaker is difficult.¹⁹

3. *First Extension: ¶V8*

At approximately 10:41 a.m. a conversation was intercepted on the listening device located in the master bedroom (P-4, conversation number 133). Steven and Marlene Aisenberg were speaking and during the conversation Steven stated "... and that's it. You just had a stomach ache (inaudible) to worry about it. I don't have to worry so far." Marlene replied (inaudible) I hate you, I hate you for what you did to our tiny daughter." Steven replied "Shut up, I know what you did to me." Marlene then stated "That is my fault, we didn't need to (inaudible) black people to kidnap her, we need to go back." Later in the conversation Steven stated "Our tiny baby didn't suffer because of your" Marlene interrupted the conversation with an inaudible statement and then advised "I understand that, I know why you need to (inaudible) you're getting out of control. You won't hear me." (SEE EXHIBIT "E")²⁰

The Defendants claim this recording (G Ex.15A) is unintelligible. I agree. It suffers from the same pervasive distortion and noise as the previous recordings. Some quotes in the summary are not even in the transcript attached to the application. For

¹⁹ The government has advised the district court it does not intend to use this tape at trial.

²⁰ This intercepted conversation occurred on December 28, 1997.

example, the summary quotes Marlene Aisenberg saying: “That is my fault, we didn’t need to (inaudible) black people to kidnap her, we need to go back.” But the application transcript has her stating: “That is my (truck). We didn’t need ... to tell lies to the kidnap people of a kidnapping. We need to go back _____ (INAUDIBLE) _____.” Yet another government version (April 12, 2000), supplied to the district court in an effort to resolve disputed transcript issues, has none of this. Instead, it has Marlene Aisenberg saying: “They absolutely got me for kidnaping. Where did you hear that, Steve? ... Uh ...” Likewise, the statement, “Our tiny baby didn’t suffer because of your” is missing in the application transcript and the government’s revised transcript.²¹

4. First Extension: ¶V9:

On January 6, 1998 at approximately 11:07 p.m. a conversation was intercepted on the listening device located in the master bedroom (P-5 , conversation number 269). Steven Bennett Aisenberg and Marlene Joy Aisenberg were having a discussion in reference to the news broadcast about the fact that Marlene had taken a polygraph earlier that day. They discussed Marlene’s parents reaction to the news cast. Later in the conversation Marlene advised “I didn't say shit, I didn’t say nothing (inaudible) shit (inaudible) not anything.” (SEE EXHIBIT “F”)

The Defendants claim this conversation (G Ex.13A) is mostly unintelligible. I agree. It is impossible to hear any mention about polygraphs, either from the Defendants or from any news broadcast. Besides, Burton and Blake knew, or should have known, the

²¹ As these various transcripts underscore, the differences are significant. This is not a case in which transcripts differ in minor or immaterial detail. The fact this occurs so often with so many conversations points to the obvious. As Koenig observed based on his experience, if a number of transcripts about the same conversation are different it is likely the disputed portions are unintelligible.

reference about Marlene Aisenberg's taking a polygraph earlier that day was false because the HCSO last polygraphed her on November 25, 1997.

The government again presents three versions of the same conversation: the summary, the application transcript, and a later transcript based upon the state attorney's recording. All are different; none makes sense. The application transcript quotes Marlene Aisenberg this way: "(INAUDIBLE) as well it's not gonna take shit (INAUDIBLE) (laughing) (INAUDIBLE) giving me shit - (INAUDIBLE)." The transcript based on the state attorney's recording quotes her this way: "He goes well, if I had to take a guess I didn't say that. I said that (INAUDIBLE) (LAUGHING) Barry said he wouldn't (INAUDIBLE) giving me shit, so I said screw them." Although the differences are apparent, the government argues otherwise. Furthermore, it ignores the timing of these purported statements as evidenced by its transcripts. Presumably, any broadcast comments about the polygraph occur at the start of the thirty-minute recording. Marlene Aisenberg's quoted statements, gauging by the transcripts, do not appear until near the end of the tape. Across this gulf of time, the transcripts are punctuated with "inaudibles" and at least seven minimization pauses. These pauses generally lasted one to two minutes each (doc. S-26, Minimization Procedures). To conclude Marlene Aisenberg's purported comment near the end of the recording responds to the claimed broadcast at the beginning with no idea what occurred in between is baseless and deliberately reckless.²²

²² Detective Burton testified that "on the way" to have Judge Alvarez review and approve the application, she noticed differences between the summary and the transcript. Because she deemed these discrepancies to be minor, she told no one. I note the government has advised the district court it does not intend to use this tape at trial.

5. *First Extension: ¶V10*

On December 16, 1997, at approximately 1:05 p.m. a conversation was intercepted on the listening device located in the kitchen (P-2, conversation number 20). Marlene and Steven Aisenberg had a conversation and during the conversation Steven became upset because Marlene was telling other people about what was going on reference the case. Steven stated "But there is information they don't need to know, ok." "Later in the conversation Steven reiterated" "(inaudible) what happens in this house stays in this house. You can't trust a soul. If the alarm people are calling you can't tell them that stuff, you can't." (EXHIBIT "G")

Unlike the previous recordings, this one is intelligible. Burton and Blake maintain Steven Aisenberg's statements prove the Defendants were trying to hide something. Although Burton candidly admits she has no idea what the Aisenbergs are hiding, the detective thinks it must be inculpatory. However, the Defendants submit the subject matter of the conversation is obvious; they are discussing their security. Burton and Blake deliberately or recklessly distorted this conversation by omitting pertinent parts of the recording. After listening to the tape several times, I agree the affiants materially distorted what the Defendants said.

The work-copy recording (G Ex. 21A) begins just after monitors had minimized Marlene Aisenberg's telephone conversation with Judy Bailey.²³ Admittedly, one cannot hear, at least from this tape, Marlene Aisenberg mention Judy Bailey's name. Nonetheless, it is obvious Marlene Aisenberg is recounting to her husband a conversation she has just finished with someone about an effort to put Sabrina Aisenberg's flyer in the New York papers. Even the introduction in the application transcript and the first few

²³ Bailey was a neighbor of the Aisenbergs at the time. Law enforcement had likely interviewed her before this conversation took place.

lines of reported dialogue confirm this. The logs of the preceding calls, taken by the same monitor (M. Diaz) who prepared the application transcript, note that “Judy” telephoned the Aisenbergs (Defendants’ Ex.1.G.L.).²⁴ Yet, the detectives explain none of this in their summary.

Had the detectives listened to the entire conversation (G Ex. 21B), they would have heard Marlene Aisenberg tell Judy Bailey the alarm will be hooked up that day and an extra key pad will be installed in their bedroom. Her husband, apparently perturbed about her revealing this, mutters (likely to himself), “Jesus Christ, just shut up.” The two women continue their telephone conversation for several minutes. After the call ends, Marlene reports what Bailey said about posting flyers in the New York papers (the work-copy tape begins here). He admonishes his wife not to disclose certain information that, despite everyone’s good intentions, could eventually reach the public. Some “ground rules” are in order.

Marlene Aisenberg: She has the connection in the *New York Post* and *New York Times*, I guess, or whatever those big New York (inaudible) is called. They are putting a full flyer in those papers. That is unbelievable.

Steven Aisenberg: Uh huh. Now we have to set some ground rules.

Marlene Aisenberg: You know, you forget that I am allowed to talk to them Steve.

Steven Aisenberg: There’s information they don’t need to know, o.k.

²⁴ Bailey calls while the Aisenbergs are trying to teach their daughter, Monica, to write the alphabet and the number 2 (Defendants’ Ex. 1.G.L. at call #s 15 and 16; the log notes this telephone conversation up to the call referenced in the application transcript, call # 20). The full version of the conversation as recorded on the state attorney’s copy (G Ex. 21B) supports this.

Marelene Aisenberg: You know hon, they are doing ... (Steven Aisenberg interrupts)

Steven Aisenberg: They, they're, yes, they're doing for us Mar, but you know what? They unknowingly say to somebody, "Oh yeah, the people aren't in the Aisenberg's home anymore." Or, "Yeah, they still have that trap and trace on the phone." Unknowingly. Unknowingly to whoever it was.

What happens in this house stays in this house. You can't (inaudible) that the alarm people are coming. You can't tell them that stuff. You can't.

Marlene Aisenberg: Honey, they all want to make sure that the house is secure.

Steven Aisenberg: (inaudible) We're doing what we need to do.

The monitor then minimizes the conversation (G Exs. 21A and B).

This conversation is exculpatory. It weighs against finding probable cause to believe the Defendants murdered their child. The Defendants' statements should cause a reasonably prudent officer to ask several questions. If the Aisenbergs had murdered their child, why would Marlene Aisenberg react positively to news designed to locate the child? Why would Steven Aisenberg warn his wife not to reveal details about the alarm unless he is concerned about the security of his family given his child's disappearance? Why would he be concerned if his wife tells someone about a trap and trace unless it is because he fears this could jeopardize the investigation into their daughter's disappearance? If the Defendants had murdered their child, and therefore knew no one would call to demand a ransom, what difference would it make who knew about the trap and trace? If the Aisenbergs paid someone to dispose of the child (as Burton and Blake theorized), is it not

more plausible that they would want to leak news about a trap and trace to warn accomplices about calling?²⁵

Marlene Aisenberg, by her responses, understood her husband to be concerned about their family's safety. Steven Aisenberg's statements about the trap and trace suggest he did not want his wife to divulge information which could hamper the investigation into their daughter's disappearance. Burton's conclusion - this conversation proves the Defendants are trying to hide information from the police - makes no sense. The affiants reported this conversation out of context and acted with reckless disregard when they omitted material facts from the application.

6. First Extension: ¶VII

At approximately 5:06 p.m. a conversation was intercepted on the listening device located in the kitchen (P-3, conversation number 38). Marlene Aisenberg spoke advising "Help" "Me, help me, help me, Oh, oh, oh, oh." (SEE EXHIBIT "H")

Note: Detective William Blake advised that early in this investigation Marlene Aisenberg was observed speaking the same way as noted in this conversation when under pressure giving indications of possible severe mental or emotional distress.²⁶

The source of Marlene Aisenberg's distress, the affiants reason, is not her baby's kidnapping. Because Burton and Blake believe the Aisenbergs murdered or sold their child, Marlene Aisenberg is crying out from an overwhelming sense of guilt. Although

²⁵ A "trap and trace" is a "device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." 18 U.S.C. § 3127(4).

²⁶ This intercept occurred on December 16, 1997.

the application does not succinctly spell this out, the affiants affirmed this at the *Franks* hearing. Indeed, Detective Blake testified Marlene Aisenberg's expression of emotion here reminded him of a particular murder suspect who suddenly cried out and confessed during a police interrogation. Frankly, the comparison is as bizarre as the settings are different – a suspect under interrogation at the station house and a mother at home with her children.²⁷

The Defendants claim their eight year old son, William, is the one who cried out, “help me, help me.” Sarah McCall, their babysitter, listened to the recording and identified William as the speaker (saying it was not uncommon for him to make such outbursts). Admittedly, only someone familiar with William's behavior could identify his voice on this recording (G Ex. 14A). The monitors and the affiants could not have discerned this.

But a reasonably prudent officer would have quickly ruled out Marlene Aisenberg as the one who screamed out. And no reasonably prudent officer would have made the connection the affiants make – Marlene Aisenberg suddenly cried out “help me, help me” to express her grief for having murdered or sold her child. The tape begins with what sounds like a child's voice. A woman speaks momentarily in the background; it sounds like Marlene Aisenberg. A child is talking softly. Then loud wailing abruptly pierces the house and quickly ends. The same calm woman's voice, probably Marlene Aisenberg, immediately continues in the background. For a reasonably prudent officer to deduce the person wailing is Marlene Aisenberg, he would have to ignore the female's voice before

²⁷ I note the government does not intend to offer this tape at trial.

and after the sudden hollering. Or, he would also have to conclude Marlene Aisenberg spoke calmly, then for some unexplained reason howled “help me.” Having satisfied her need to express her grief (as the affiants posit), she instantly composed herself and carried on her quiet conversation. Obviously, such deductions defy human experience.²⁸ Blake’s opinion is baseless. Burton and Blake misrepresented this conversation with reckless disregard.

7. *First Extension: ¶V13*

At approximately 5:34 p.m. a conversation was intercepted on the listening device located in the kitchen (P-5, conversation number 109). Marlene Joy Aisenberg and Steven Bennett Aisenberg engaged in a conversation and during the conversation Marlene Aisenberg advised "I don't like lying to my dad at all and I'm in his face (inaudible)." Steven Aisenberg replied "(inaudible) well tell your dad not to ask you any questions concerning the case, cause you can't answer a lot." Marlene Aisenberg replied "You know (inaudible) everybody's so quick to think, you know. You don't understand, my parents are here just as much as (inaudible) and I'll tell you one thing, you know if it would have been my father who said about the abusing first." Steven Aisenberg replied "I know I have said that already." They then discussed someone who "Came up with a crazy idea." Marlene then complained about her parents being "shut out completely" and how she (Marlene Aisenberg) doesn't appreciate it. Steven Aisenberg then replied "But Mar., what you need to understand, there's certain things you cannot say to your parents. When they're questioning your parents, then technically they're not questioning my family, cause they're not here. There are certain things pending, the case, that you cannot

²⁸ Blake, no doubt, is convinced he is correct. But to accept his testimony, I would have to credit what is contrary to the teachings of basic human experience and completely at odds with ordinary common sense. The fact that he believes this and testified to it is not enough. “If a witness were to testify that he ran a mile in a minute, that could not be accepted, even if undisputed. If one testified, without dispute, that he walked for an hour through a heavy rain but none of it fell on him, there would be no believers.” *United States v. Chancey*, 715 F.2d 543, 546-47 (11th Cir. 1983) (reversing the district judge for erroneously crediting the testimony of the government’s key witness for Fed. R. Crim. P. 29 purposes).

say to them. And it's unfortunate that they're so close too, so it's for there sake." Later in the conversation Steven Aisenberg advised "No, there's a difference in protecting yourself and not protecting yourself, and if my being rude to your friends means protecting you then I'll be very rude to your friends." "But just you understand, I'll be very rude to all your friends, I don't care. My priority is you, not them and your priorities should be yourself and your family, not them. That's why I'm rude to them." (SEE EXHIBIT "J")²⁹

The Defendants submit the underlined word, "abusing," is not on the tape (G Ex. 22A) and contend the affiants should not have intentionally or recklessly included the word in the transcript and summary paragraph. Instead, the Defendants say the word is actually "immunity." The government, in its response to the motion to suppress, submits the affiants did not misstate the conversation and their interpretation is reasonable (doc. 170, p. 45). But at the *Franks* hearing, both Burton and Blake admitted the word is "immunity" and not "abusing." "Immunity" can be heard clearly.³⁰ Burton and Blake misquoted this conversation with reckless disregard.³¹

²⁹ This intercept occurred on December 17, 1997.

³⁰ The detectives first listened to all these tapes on cassette deck transcribers commonly used for office dictation. Burton testified she noticed the error only after listening to the recording after it had been transferred to a compact disc (presumably a higher fidelity format). I have listened to all these cassette recordings using a transcriber provided by the government and represented to be similar to the ones the affiants operated. I had no difficulty hearing the word, "immunity," and I do not credit Burton's testimony.

³¹ I have considered whether the term, "immunity," adds to the probable cause calculus or detracts from it. Obviously, talking about "immunity" can suggest culpability for some type of crime. But this conversation patterns earlier ones where Steven Aisenberg is admonishing his wife about discussing matters pertaining to the investigation. Accordingly, I do not find including "immunity" into the conversation adds to probable cause. Further, I find redacting "abusing" from the paragraph is a material change; it supported the affiants' theory regarding aggravated child abuse, a crime the affiants targeted in their intercept applications.

8. *First Extension:* ¶V17

On January 5, 1998, at approximately 5:55 p.m. a conversation was intercepted on the listening device located in the kitchen (P-11, conversation number 681). Steven Bennett Aisenberg and Marlene Joy Aisenberg were having a general discussion and during the conversation Steven advised "Let's discuss this independently Hon." "Let's discuss that in the bedroom, you gotta pay attention to what's around you." Later in the conversation Marlene asked "Did they finish packing, no? "What if they check the shed?" Steven replied "You know nothing." Marlene then advised "I said doing it won't kill me, alright, you know, fine." (SEE EXHIBIT "N")

The Defendants have two specific objections to this paragraph. First, although the application transcript's synopsis mentions Steven Aisenberg is talking to his son, William, the summary says no such thing. By omitting this information, the affiants distorted Steven Aisenberg's statements and placed his comments in a "sinister" light. Their second objection is that certain statements are inaudible: "shed" and "I said doing it won't kill me, alright, you know, fine." The government maintains the summary and the supporting transcript are accurate and demonstrate the Defendants had something to hide from law enforcement, such as they dumped the baby's body in some shed.³²

This paragraph exemplifies the careless approach the affiants took to the warrant process. Even though the recording is poor and one can hear only parts of the conversation with any confidence, agents swore to the judge implying their information is trustworthy and reasonably grounded. The judge relied on their proffer and the inference their proffer imparted. Unfortunately, the judge was unaware the question "what if they check the shed?" is more likely "what if you think they said?" Or, if he had listened to the same muffled sounds, he could just as easily have surmised the speaker said something

³² Burton searched nearby sheds and storage units and found nothing.

else. He did not know the remark, “I said doing it won’t kill me, alright, you know, fine,” cannot be heard. He did not know the recording’s quality and brevity make any reliable affirmation about what the speakers are saying and what they mean impossible. The judge could never have imagined Blake would later testify he had no firm conclusion or even a reasonable suspicion how this conversation related to any of the predicate crimes. Had the judge known all this, I suspect his conclusion would be the same as mine. Burton and Blake were simply guessing about the conversation and silently hoping the judge would agree.³³ I find the affiants made these statements with reckless disregard.

9. First Extension: ¶V20-24

20. On November 23, 1997, a video tape recording was made of the missing baby, Sabrina Paige Aisenberg, by the parents. After reviewing this video your affiant's noted what appeared to be missing hair on the side of the head and bruises on the facial area of the baby. On December 11, 1997, the video tape recording was taken to video enhancement facilities located at Walt Disney World by Detective Carlos Somellan, Hillsborough County Sheriff's Office. Several still photographs were retrieved from the video recording of Sabrina Paige Aisenberg.

21. On December 30, 1997, your affiant, Linda Burton met with Doctor Laleh Posey, a Pediatrician who works with the Child Protection Team, Tampa General Hospital. Doctor Posey was given the photographs to examine. Doctor Posey in her expert opinion concluded that hair had been pulled out of the left side of the baby's head and the area around the left eye was bruised. Also noted was a linear bruise was observed on the left side of the face near the mouth. A linear bruise was also noted in the area from where the hair had been pulled out.

22. It should be noted that during the initial interviews of Marlene Joy Aisenberg by your affiants she advised that there were no injuries to Sabrina Paige Aisenberg prior to her reported disappearance.

³³ Judge Alvarez, of course, was entitled to rely on the affiants’ representations. He had no duty to listen to the recordings.

23. During the initial interview Marlene Joy Aisenberg advised that on November 22, 1997 she had taken both Sabrina Joy Aisenberg and William Aisenberg, her older son, to Mr. Willys Hair Salon, located at 3634 Lithia-Pinecrest Road, Valrico, Florida. Williams Hair was cut by Stacey Allen, an employee of Mr. Willys Hair Salon.

24. On December 17, 1997, your affiant Linda Burton interviewed Stacey Allen and Allen advised that she had observed hair missing from the left side of Sabrina Paige Aisenberg's head.

A television viewer, after watching a local broadcast of a video showing Sabrina Aisenberg crawling, called the sheriff's tip line and opined hair was missing from the baby's scalp. Apparently from this tip, Burton reviewed the tape, Marlene Aisenberg's November 22, 1997, home video (Defendants' Ex. 6), and discussed it with other investigators at a regular task force meeting. The group agreed they needed to retrieve still frames from the video and have medical experts give an opinion. They also agreed they would not conduct any interviews of lay witnesses until the physicians had reported their findings.

But by this time, Burton and Blake knew no one who had observed Sabrina Aisenberg within days of the 911 call had reported any bruising or anything unusual about the child. Blake interviewed Yashira Perez on November 24 at her school. Perez, who babysat the child on November 22, reported the infant seemed fine. Ginny Westberg, who worked with Marlene Aisenberg and saw the baby on the Wednesday before the 911 call, told Burton on November 25 she spotted nothing unusual. Burton interviewed Kristen Kelly, William Aisenberg's classmate who appears in Marlene Aisenberg's home video, on December 9. She said she saw no bruises or any injury. The affiants also knew the baby had attended her cousin's birthday party the afternoon (Sunday) before the 911 call.

In fact, authorities had custody of the birthday video. Nonetheless, as the Defendants complain, Burton and Blake omitted these facts from the application.

Burton and Blake met Dr. Posey, the medical director of the county's child protection team, and showed her the stills (G Ex. 25). The detectives failed to tell the pediatrician about what witnesses had observed; anecdotal information the physician would have considered helpful. Dr. Posey studied the grainy photos and offered her differential diagnosis – possible bruising under the left eye and under the nose and an unexplained patch of hair missing from left side of the scalp. These areas seemed “suspicious” to her. She did not tell the detectives, contrary to what they stated in the application, she had “concluded” in her “expert medical opinion” the infant’s face was bruised and “hair had been pulled out.”

Likewise, Stacey Allen’s testimony at the *Franks* hearing differed from what Burton reported in the application, that Allen observed hair missing from the left side of Sabrina’s head (¶ V24). Burton included Allen’s statement to show an eyewitness had observed Sabrina’s injuries. Giving Burton the benefit of the doubt that she interviewed Allen on December 17, 1997,³⁴ Burton acted with reckless disregard by failing to include in the affidavit the remainder of the hairdresser’s statement. Allen told Burton the baby’s hair appeared to be rubbed off in a manner typical of newborns, not that it had been pulled out as Burton implied. Considering by then Burton had talked with others who stated the child

³⁴ Stacy Allen testified that she was on maternity leave on December 17, 1997. Detectives, she said, never interviewed her at that time.

appeared fine shortly before her disappearance, Burton acted with reckless disregard by implying to the reviewing judge that an eyewitness had observed an injury.

10. Second Extension: ¶V10

On January 29, 1998, at approximately 11:40 p.m. a conversation was intercepted on the listening device located in the bedroom (P-9, conversation number 451). Steven Bennett Aisenberg and Marlene Joy Aisenberg had returned from appearing on the Oprah Winfrey show and were discussing matters concerning the show and investigation. Marlene Aisenberg makes a comment which is partially inaudible and on two separate occasions, Steven Aisenberg responds to Marlene Aisenberg's statement by responding "They have that!!!" to which Marlene Aisenberg answers "Well ... they haven't figured it out yet." Marlene Aisenberg then discusses with Steven Aisenberg a Tampa Tribune article which comments on how Oprah Winfrey was skeptical about the story surrounding the disappearance of baby Sabrina. (SEE EXHIBIT M)

The Defendants contend portions of this tape are unintelligible and they cannot hear the quote, "Well ... they haven't figured it out yet." The government counters the affiants did not mislead the judge. Notably absent in their response, however, is some affirmation that Marlene Aisenburg uttered these words. Indeed, the government omits the quote in a revised transcript submitted to the district judge (April 12, 2000 version). Burton testified she included this paragraph to demonstrate the Aisenbergs were hiding something from law enforcement. One can only wonder which tape she reviewed to reach such a conclusion. Certainly it cannot be this one (G Ex. 19A).

The beginning of the tape presents the same systemic problems apparent in the others. I cannot hear "Well ... they haven't figured it out yet." But eventually one can hear Marlene and Steven Aisenberg converse about her recent appearance on the "Oprah Winfrey" television show. The two go back and forth about what was on the show and

what may have been “cut out.” Each time Marlene Aisenberg comments about a point she thought had been edited from the telecast, Steven Aisenberg replies, “They have that.” Or he says, “No, they have that.” Burton’s representation that this conversation evinces the Aisenbergs’ determination to hide “something” from the police is factually baseless. I find Burton and Blake recklessly misrepresented its context to the reviewing judge.

11. Second Extension: ¶V17

On January 21, 1998, at approximately 9:19 p.m. a conversation was intercepted on the listening device located in the kitchen (P-17, conversation number 955). Steven Aisenberg is talking to an unknown subject on the telephone and during the conversation, he and Marlene Aisenberg both begin talking at the same time about the bruises and the hair in the photographs of Sabrina Aisenberg. Steven Aisenberg comments “...you don't see...under the eye...” “There's bruises.” Marlene Aisenberg talks over Steven Aisenberg and is heard stating “...the hair.” to which Steven Aisenberg states, again concerning the pictures of Sabrina Aisenberg, “...over there, one with the hair...” Marlene and Steven Aisenberg then begin a conversation concerning an incident involving a bathtub and sedatives. Some of the conversation involved talking over each other. Steven Aisenberg states “... the sedatives ...you know, we did it and then you, they climbed in.” to which Marlene Aisenberg responds “and she ...drink.” to which Steven Aisenberg answers “then I quieted you.” “Then I quieted you and then you like you got up because the kids were crying in the bath tub, take care of that and ummmm that's when we use it...” Later in the conversation, Marlene Aisenberg reminds Steven Aisenberg that “You know we can't say anything...brother, without talking to Barry...” Marlene and Steven Aisenberg then continue the conversation discussing the video of Sabrina Aisenberg. (SEE EXHIBIT T)

The Defendants argue the affiants falsely included the underlined phrases, omitted material facts, and purposely distorted the conversation. Although the government concedes the underlined phrases do not appear in the application transcript, it points out the statements appear in the progress report submitted to the state court judge. Thus, the

government argues, the phrases “exist,” and the affiants did not manufacture them or intentionally mislead the judge.

According to Burton and Blake, they included this summary to convince the judge the Aisenbergs battered or murdered their child. The Aisenbergs acknowledge photographs exist showing injuries to their baby; they are determined to keep this discovery a secret. Absolutely nothing in the recording supports the affiants’ conclusions. Any reasonable listener, if informed about what prompted the conversation, would quickly realize the Defendants are not doing what the affiants and the summary suggest. The detectives’ implications, like some of the quoted statements, are pure fiction.

Burton and Blake deliberately omitted to tell the judge what they did about an hour before this recording starts. At approximately 8:15 p.m., the Burton and Blake stop unexpectedly at the Defendants’ home (Detective Blake testified they dropped by to keep the Aisenbergs posted on the case’s progress). The detectives confront the Defendants with photographs of their child. Using the ones shown to Dr. Posey, Burton points to the “suspicious” areas. Marlene Aisenberg denies seeing any bruising. During the encounter, Marlene Aisenberg excuses herself to attend to her two children who were in the bath tub.

Fifteen minutes after leaving the Aisenbergs, Blake and Burton stop at Ginny Westberg’s house. They show the same photos to Westberg. Westberg tells the detectives she does not see any bruises and remarks the baby’s hair always looked patchy. After the detectives leave, Westberg telephones the Aisenbergs. She informs Steven Aisenberg about her encounter with Blake and Burton.

This prelude explains Steven Aisenbergs' first few statements (G Ex. 17A):

If you can write down as close to word for word as what transpired from the time they came to the time they left. And, um, and if you can get that to us you know before tomorrow morning or by ... you know. We have to be down by the attorney's by nine, so we will be leaving here about quarter of eight to drop William off at school and Monica and be down there.³⁵

Obviously, Steven Aisenberg is not speaking to his wife. As the government's revised transcript (April 12, 2000) belatedly implies, he is on the telephone with "Ginny" asking her to write down what "transpired between the time [the detectives] came and the time they left." After hanging up, Steven and Marlene Aisenberg review their encounter with the detectives so they can later inform their lawyer.

The affiants knew all this. The Defendants did not all of sudden talk about evidence of injuries to the child as this summary suggests. Burton and Blake prompted the conversations. They knew about the events the Aisenbergs and Westberg were discussing. This is why they stopped by the Defendants' home – to spur talk. They knew precisely what Steven Aisenberg meant when he said "the kids were crying in the bath tub." It had nothing to do with sedatives, a word I cannot hear after carefully listening to the recording. Likewise, I cannot hear any of the other underlined portions of the summary.³⁶ The affiants deliberately misled the judge. They omitted information and

³⁵ The transcript attached to the application only partially quotes the first two sentences. The transcriber summarizes the rest.

³⁶ During the *Franks* hearing, one of the prosecutors, while questioning some witnesses, implied Marlene Aisenberg acknowledged bruising when she stated: "(Inaudible) now they've got these pictures. You know, not ah them fucking pictures, them fucking pictures in that video Sabrina is crawling, rolling on the floor and loving it ..." Presumably, the source for this dialogue is the government's revised transcript (April 12, 2000, at p. 3) which it submitted to the district judge for review. The defense

distorted the conversation. They included statements which the Defendants did not say or cannot be heard.

12. *Second Extension:* ¶V18

On January 21, 1998, at approximately 9:54 p.m. a conversation was intercepted on the listening device located in the kitchen (P-18, conversation number 958). Marlene Joy Aisenberg is discussing the hair missing from Sabrina Aisenberg. She states "...I mean ... you know... hair, that light spot where hair is ... and um, they said that it ... pulled out." (SEE EXHIBIT U)

This conversation follows the preceding one (¶ V17) by twenty minutes. Again, Marlene Aisenberg is telling someone about the affiants' visit and their claims that photographs prove hair is deliberately missing from her child's head (G Ex. 23A).³⁷ Like the previous paragraph, the Defendants complain Burton and Blake distorted her statements by omitting these facts. I agree.

While the summary accurately recites what Marlene Aisenberg said, it fails to identify "they" as in "*they* said that it ... pulled out." Of course "they" are Burton and Blake. The detectives also conveniently omit Marlene Aisenberg's retort to their suggestion she (or her husband) pulled hair out from her baby's scalp - "unbelievable."

transcript (May 1, 2000, at p. 4) differs: "You know, not, ah, there's nothing (inaudible), nothing (inaudible) in that video, Sabrina is crawling, rolling on the floor and loving it. (Inaudible)." I find the defense's version more accurate.

³⁷ The Defendants submit Marlene Aisenberg is speaking to Kevin Kalwary, an investigator with the defense firm, on the telephone (*see* Defense transcript submitted to the district judge dated May 1, 2000). The Defendants did not present evidence supporting this at the *Franks* hearing; nonetheless, I note the Aisenbergs mention the need to contact Kalwary about Burton and Blake's visit.

For the same reasons I gave earlier, I find Burton and Blake deliberately misled the judge. Including this information materially changes the context and negates probable cause.³⁸

13. Second Extension: ¶V19

On January 25, 1998, at approximately 9:52 p.m. a conversation was intercepted on the listening device located in the kitchen. (P-20, conversation number 1032). Marlene Joy Aisenberg and Steven Bennett Aisenberg were having a conversation and it becomes apparent that Marlene Aisenberg has said something to someone which concerns Steven Aisenberg. Marlene Aisenberg is nonchalant about making the statement and advises "...I am glad I told her." to which Steven Aisenberg responds "Hon, you know, you just don't, be careful." Steven Aisenberg goes on to state that this "...is also backfiring on us." "... you got very lucky, you know what I'm saying ok, how many other people did you tell?" Marlene Aisenberg then discusses the polygraph with Steven Aisenberg and states to him "...they told me something different and you said to fake it...". After more brief conversation, Steven Aisenberg then instructs Marlene Aisenberg to "Just don't talk to anyone." "Just do what I ask." (SEE EXHIBIT V)

The Defendants argue the affiants distorted the conversation and included statements which are inaudible. The government responds defense counsel merely dislikes the nature of this conversation as reflected in the application transcript; regardless, Burton and Blake did not deliberately or with reckless disregard mislead the reviewing judge (doc. 170, pp. 53-54). I disagree.

This conversation mimics earlier ones: the Aisenbergs are reviewing what each has said to others about the case. First, Steven Aisenberg tells his wife he recently spoke with someone who had previously led him in "prayer," the one who had asked him about his

³⁸ The Defendants also claim this conversation is protected by the attorney-client privilege. I see no need to reach this issue for the reasons stated later in this report. Besides, the government represents it does not intend to use this recording at trial.

“feelings.”³⁹ Aisenberg asked if the individual recalled their earlier discussion about the polygraph. The person did remember the conversation; Aisenberg had remarked it was inconclusive. “Kevin or Barry,” Aisenberg informed his friend, might need to speak to him. By now, Burton and Blake knew “Barry” and “Kevin” to be defense counsel (Barry Cohen) and the defense’s investigator (Kevin Kalwary).

When she heard her husband’s account, Marlene Aisenberg mentioned her discussion with her friend (the name is unintelligible to me) who had asked questions about the polygraph results. Rumors had apparently circulated about the tests. Marlene Aisenberg seemed anxious to tell her friend the exam results; Steven passed, but authorities decided her two tests were inconclusive. Again, consistent with his previous admonitions, Steven Aisenberg warned her to be careful about what she says to others. It could “backfire.”

None of these statements, made in the setting I have described, are incriminating. Unfortunately, affiants suggest something altogether different to the judge. They continue to weave the same cloak, the Defendants are hiding something. But this summary adds more to the cloth; the suggestion that Marlene Aisenberg purposely lied during her polygraph tests. Proof, according to the affiants, is her interjection to her husband, “you said to fake it.” The Defendants, however, declare “you said to fake it” is really “you spoke to David.” To settle the score, the government called Anthony Pellicano, an audio

³⁹ The Defendants identify this individual as their rabbi. Although I cannot hear the word, “rabbi,” their representation is reasonable given the context of the conversation. Further, the government acknowledges in its April 2000 transcript Steven Aisenberg spoke with a rabbi.

expert. Pellicano testified he listened to this part of the tape at least *five hundred times*. Apparently, he still cannot decide if Marlene Aisenberg said “fake it” or “David.” He is leaning toward “David.” An objective listener using simple equipment does not need to listen to this tape five hundred times to make out what Marlene Aisenberg told her husband. Once is enough. Marlene Aisenberg said “you spoke to David.” Burton and Blake distorted this conversation with reckless disregard.

C. Evaluating the revised extension applications

I listened to these recordings with headphones, sometimes without headphones, and in open court. I listened first without the aid of transcripts and then listened again looking at the application transcripts and application summaries. The quality of some recordings is strikingly poor. So is the accuracy of Burton and Blake’s reporting; quotes in the summaries often do not match the corresponding transcript. Conversations offered to show probable cause for a targeted offense often are irrelevant or exculpatory. This case is not the typical *Franks*-type case. In the typical case, the defendant claims one or a few statements in the application are deliberately or recklessly false. Here, these claims pervade the extension applications. The Defendants have shown by a preponderance of the evidence that Burton and Blake engaged in a pattern of inappropriate conduct. The detectives gave substance to unintelligible recordings and they distorted the context of intelligible conversations.

These errors are not innocent or negligent mistakes or omissions. A reasonable and prudent officer would have recognized these mistakes. At the very least, a reasonable and prudent officer would have harbored serious doubts about the accuracy of the extension

applications. *See United States v. Kirk*, 781 F.2d 1498, 1503 (11th Cir. 1986) (surveilling agents should have recognized their error or harbored serious doubts when they misidentified a suspect). Because *Franks* requires me to modify the applications in light of these findings, the issue is whether either revised extension application supplies probable cause and otherwise meets Florida's surveillance scheme.⁴⁰

Pursuant to FLA. STAT. § 934.09(5) (1997), an application to extend an intercept must meet the requirements of § 934.09(1) and (3). In other words, the application has to satisfy all the prerequisites for an initial application; additionally, it has to include a statement outlining the results of the intercept to date or reasonably explain why it has failed to obtain the desired results. The judge, before permitting the intercept to continue, is required to make the same findings he made when he first approved the intercept: probable cause to believe that an individual is, has, or is about to commit a listed offense; probable cause to believe that particular communications concerning that offense will be obtained through such interception; normal investigative techniques are unlikely to succeed; and probable cause exists to believe the communications will be intercepted at the particular place being used. *See* 18 U.S.C. § 2518(5); *United States v. Giordano*, 416 U.S. 505, 532-33 (1974).⁴¹

⁴⁰ Obviously, if the first extension application fails to supply probable cause, the second extension application necessarily fails too because it is the fruit of the first. *See Wong Sun v. United States*, 371 U.S. 471 (1963). Nevertheless, given the nature of this report, both applications are evaluated.

⁴¹ State law governs the validity of state court orders authorizing electronic surveillance. *See United States v. Mathis*, 96 F.3d 1577, 1583-1584 (11th Cir. 1996); *United States v. Bascaro*, 742 F.2d 1335, 1347 (11th Cir. 1984). Florida's wiretap scheme is similar to its federal counterpart (18 U.S.C. §§ 2510-2522). Indeed, 18 U.S.C.

After redacting and modifying the challenged paragraphs of the extension applications per my *Franks* findings, I conclude the authorizations are invalid. As required by § 934.09(1), the revised applications do not support probable cause to believe one or both of the Defendants are committing, have committed, or will commit murder, the only targeted offense permissible under FLA. STAT. § 934.07 (1997). Nor do the revised applications provide probable cause to believe that particular communications concerning murder will be obtained through further electronic surveillance.

V.

Florida's wiretap scheme, in conformity with Title III (*see* 18 U.S.C. § 2516(2)), permits the state attorney to authorize an application for an intercept to a judge for specific offenses. *See* FLA. STAT. § 934.07 (1997). The applicant must set out a full and complete statement of the facts and circumstances justifying his or her belief the enumerated crime has been, is being, or is about to be committed. FLA. STAT. § 934.09(1)(b)(1). A judge must then find probable cause exists not only to believe that an individual is committing, has committed, or is about to commit an enumerated offense, but also that communications concerning such an offense will be obtained through the interception. FLA. STAT. § 934.09(3)(a) and (b). Burton and Blake sought and obtained intercepts for communications pertaining to homicide, sale of a minor child, child neglect with great bodily harm, and aggravated child abuse in violation of FLA. STAT. §§ 782.04, § 2516(2) permits state courts to authorize the interception of wire or oral communications in conformity with § 2518 and applicable state law. In other words, a state is free to enact more restrictive legislation than the federal model, which acts as the least restrictive plan. *See State v. Rivers*, 660 So. 2d 1360, 1362 (Fla. 1995).

63.212(1)(d), 827.03(3), and 827.03(2) (1997). Of these, only murder is listed in § 934.07.⁴² The Defendants contend the inclusion of the non-listed offenses renders the orders invalid (doc. 90, pp. 89-93, and doc. 255). In support, they cite *United States v. Ward*, 808 F. Supp. 803 (S.D. Ga. 1992), a case in which the district judge granted a defendant's motion to suppress because the application listed some offenses not enumerated in the authorizing statute. The government argues *Ward* is not binding and is distinguishable. In contrast to *Ward*, the non-listed offenses here serve as predicates to felony-murder or are sufficiently related to homicide so as to not require suppression. Besides, even if affiants failed to specify these offenses as predicates for felony-murder, the "good faith" exception applies (doc. 170, pp. 65-74, and doc. 254). See *United States v. Leon*, 468 U.S. 897 (1984).

A. *Felony-Murder*

The government correctly observes all the non-listed offenses can serve as predicates for felony-murder under § 782.04. But it neglects to admit the affiants never proposed such a theory in their applications. Their applications are devoid of any details suggesting how the particular offense of felony-murder "has been, is being, or is about to

⁴² Although the applications and orders identify "homicide" as the targeted crime, the documents cite FLA. STAT. § 782.04 (1997), the murder statute, as the operative violation. Homicide is defined as the killing of one person by another; thus, not every homicide is a murder or even a criminal act. See *Black's Law Dictionary* 739 (7th ed. 1999). Florida statutorily recognizes this distinction. See Fla. Stat. ch. 782 (1997). Thus, § 934.09(3)(a) limits intercepts for the most serious criminal homicide – murder (and its varying degrees) as outlined in § 782.04. Intercepts for other types of criminal homicides, like manslaughter, are not authorized under Florida's wiretap scheme. The Defendants concede "homicide" means "murder" for purposes of §§ 934.09(3)(a) and 934.07 in this case.

be committed.” FLA. STAT. § 934.09(1)(b)(1). Indeed, the affiants consistently offered two hypotheses throughout their applications, murder or sale of a child: “Your affiants through experience and training believe that in fact this investigation is not a kidnapping investigation but a homicide or sale of a minor child.” *See e.g.*, initial application dated December 12, 1997, at p. 20, ¶22. Sergeant Roman, who drafted the second extension, likewise never implied a felony-murder theory despite realizing the two prior applications Knowles prepared included offenses outside Florida’s wiretap scheme. It is likely Knowles knew this too. Roman trained Knowles; he recognized his co-worker’s familiarity with the statute’s requirements.

While courts should not review warrants hypertechnically but instead realistically and commonsensically, *see Ventresca*, 380 U.S. at 109, I find it difficult to accept the government’s proposition. Indeed, if one reads the applications fairly, it is hard to imagine the applicants ever conjured all the felony-murder scenarios the government puts forth. Even the minimization instructions are at odds with the government’s notion. These instructions admonish monitors: “Rule Three – you can only intercept conversations where (name omitted) is a party and where the subject of the conversations is homicide, sale of a minor child, child neglect with great bodily harm, or aggravated child abuse” (doc. S-26, Minimization Procedures). Realistically, only aggravated child abuse could logically be incorporated under some implied felony-murder theory given the time frame involved. The affiants knew that less than twenty-four hours had elapsed from the end of the birthday party to the time the Defendants called 911. If authorities suspected aggravated child abuse had occurred, they had to realize it would have had to lead to the infant’s quick death.

Effectively, the temporal distinction between any aggravated abuse and death would be blurred. Certainly nothing in the application provided cause to believe death from child neglect with great bodily harm or death during the sale of a minor child had taken place during this limited time. Thus, the government cannot justify the inclusion of non-listed offenses by a felony-murder theory the affiants never contemplated.

B. Good Faith

The government recognizes the Florida Supreme Court has refused to apply *Leon*'s good faith exception to wiretap cases. In *State v. Garcia*, 547 So. 2d 628 (Fla. 1989), the Florida Supreme Court reasoned FLA. STAT. § 934.06 provides a statutorily created exclusionary remedy; *Leon* addresses the judicially created sanction implementing the Fourth Amendment. To circumvent *Garcia*, the government contends federal law applies to the issues the Defendants raise, citing *United States v. Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988), a case in which the Eleventh Circuit applied *Leon* to a Florida wiretap (doc. 254).

Malekzadeh does not hold, as the government posits, federal courts should apply federal law when evaluating motions to suppress a state wiretap obtained by state actors. Rather, it concludes the federal rules of evidence govern the admissibility of evidence obtained via a valid state wiretap. *Malekzadeh*, 855 F.2d at 1496. The Eleventh Circuit, as noted previously, has consistently looked to state law for deciding the validity of state intercepts. See *United States v. Mathis*, 96 F.3d 1577, 1583-84 (11th Cir. 1996); *United States v. Bascaro*, 742 F.2d 1335, 1347 (11th Cir. 1984); *United States v. Nelligan*, 573 F.2d 251, 253-54 (5th Cir. 1978). These cases recognize one of the principal features of

the federal legislation – states are free to enact more restrictive electronic surveillance statutes than Title III.

In view of the Eleventh Circuit’s admonition regarding the controlling law for deciding the validity of state wiretaps, *Malekzadeh*’s use of good faith principles to a Florida wiretap is puzzling. To follow *Malekzadeh* by applying a good faith rationale here contradicts the *Nelligan-Bascaro* line of cases. It also would effectively eliminate Title III’s notion that states can impose more restrictive demands for electronic surveillance. Significantly, the Florida Supreme Court issued *Garcia* after the Eleventh Circuit ruled *Leon*’s good faith rationale applied to a Florida state court wiretap. Perhaps, if the Eleventh Circuit faced the issue again it would find *Garcia* controlling. Regardless, *Malekzadeh* conflicts with the earlier line of Eleventh Circuit cases applying state law to state wiretaps. The rule in this circuit when this occurs dictates the earlier line of precedent governs. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998) (holding when circuit authority is in conflict, a court should apply the earliest line of authority). I, therefore, decline to follow *Malekzadeh* to the extent it promotes “good faith” principles to an intercept authorized by a Florida court.

Moreover, even if *Malekzadeh* did control, I would find *Leon* still does not apply. As I have indicated, the applications for the first and second extensions contained deliberately false and reckless material statements and omissions. The Supreme Court specifically declined to allow good faith exceptions to warrants based on such applications. *Leon*, 468 U.S. at 923 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Similarly, Knowles had to know when he drafted the initial application he had targeted offenses

outside Florida’s surveillance scheme. These actions were not minor technical mistakes; limiting intercepts to prescribed offenses goes to the heart of the surveillance statute.

C. Non-listed offenses

The starting place for any analysis begins with the statute giving an “aggrieved party” the right to seek relief.

FLA. STAT. § 934.09(9)(a) (1997) provides in pertinent part as follows:

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted;
2. The order of authorization or approval under which it was intercepted is insufficient on its face; or
3. The interception was not made in conformity with the order of authorization or approval.

Only subsections 1 and 2 arguably apply here and both mirror 18 U.S.C. § 2518(10)(a)(i) and (ii). In a series of cases, the Supreme Court reviewed, explained, and applied the federal provisions. *See United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Chavez*, 416 U.S. 562 (1974); and *United States v. Donovan*, 429 U.S. 413 (1977). Two essential themes emerge from these decisions as they relate to this case. First, subsection (ii) (and therefore its state corollary, FLA. STAT. § 934.09(9)(a)(2) (1997)) is limited to those instances where the order *on its face* is deficient. *Giordano*, 416 U.S. at 526 n.14. Namely, the order omits some statutory requirement. Second, the term “unlawfully intercepted” as used in subsection § 2518(10)(a)(i) (and its state counterpart, FLA. STAT. § 934.09(9)(a)(1) (1997)) does not mean all violations of the wiretap scheme

require suppression. “Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.” *Giordano*, 416 U.S. at 527. For example, in *Giordano*, the court determined the approval of a senior official in the Justice Department plays “a central role in the statutory scheme,” and ordered suppression of the intercepted wire communications. 416 U.S. at 528. In *Chavez*, the Court refused to suppress wiretap evidence when the Attorney General authorized the wire but the application and order incorrectly identified the Assistant Attorney General as the authorizing official. 416 U.S. at 579-80. Suppression, the Court reasoned, would not further the goal of guarding against unwarranted use of wiretapping. *Id.* at 571. Similarly, in *Donovan*, the Court refused to suppress evidence even though the application failed to meet the identification requirements of § 2518(1)(b)(iv) and notice requirements of § 2518(8)(d). 429 U.S. at 434-40. These sections were not central to the underlying legislative purpose of Title III. *Id.*

The initial order authorizing the intercept and the orders approving the extensions facially comply with Florida’s statutory demands. Although the orders identify unlisted offenses, this fact alone does not render them facially invalid. In other words, each order targets a designated offense, murder, and otherwise facially complies with the statutory requisites. *See Giordano*, 416 U.S. 505 (1974) (order not invalid under § 2518(10)(a)(ii) because it clearly identified, though erroneously, the appropriate Assistant Attorney General with authority to approve the application; but the interception is invalid under

§ 2518(10)(a)(i) because an Executive Assistant to the Attorney General authorized the application without the appropriate designation of authority).

Because the orders are not invalid on their face, the Defendants must look to § 934.09(9)(a)(1) for relief by demonstrating the communications were unlawfully intercepted. That is to say, the Defendants must show §§ 934.07 and 934.09(3)(a), the statutory requirements violated, occupy “a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.” *Chavez*, 416 U.S. at 578.⁴³

In *United States v. Ward*, 808 F. Supp. 803 (S.D. Ga. 1992), the case the Defendants principally rely upon, the government sought and obtained an order authorizing the interception of communications pertaining to the transmission of wagering information, illegal gambling, interstate transportation of wagering paraphernalia, Hobbs Act, obstruction of state or local law enforcement, conspiracy to commit said violations, and income tax evasion. 808 F. Supp. at 819. Of all these crimes, interstate transportation of wagering information and tax evasion were not designated offenses under Title III. Despite the fact the remaining offenses were listed crimes for Title III purposes, the judge suppressed all communications, even those relating to the listed crimes. He reasoned Congress took deliberate steps to restrict wiretap authorizations to specific offenses. *Id.* at 806. The government, for example, would have been required to minimize the interception of communications not otherwise subject to seizure under Title III.

⁴³ Admittedly, the Defendants do not specifically cite in their papers § 934.09(9)(a)(1) or 18 U.S.C. § 2518(10)(a)(i), but their arguments are broad enough to include such references.

“Permitting the Government to proceed in this instance without sanction for the overinclusive applications and intercepts offers no incentive for the Government to fulfill its responsibility to comply from the outset with a central and functional provision of Title III.” *Id.* at 808. Sanctions, the judge reasoned, would serve the deterrent purpose of Title III’s exclusionary rule by placing the onus on the government for insuring compliance with the statutory scheme at the outset of the process. *Id.*

Undoubtedly, Congress purposely limited the use of electronic surveillance to identified offenses. This is the central theme of the legislative work. *See Giordano*, 416 U.S. at 514 (the purpose of Title III is to effectively prohibit on the pain of civil and criminal penalties all interceptions of oral and wire communications except those specifically provided for in the Act, most notably those intercepts authorized by court order in connection with the investigation of the serious crimes listed in § 2516). Florida rigorously applies this concept. *See State v. Rivers*, 660 So. 2d 1360, 1363 (Fla. 1995) (Title III does not authorize intercepts for nonviolent prostitution-related offenses). Florida strictly construes its surveillance statute and limits the law’s application to the specific provisions set out by the legislature. *Id.* at 1362. But *Ward’s* exclusionary reach, suppressing intercepted communications for authorized crimes along with communications for unauthorized offenses, is too broad as a general proposition. While *Ward’s* holding fosters Congress’s goal for limiting unauthorized interceptions, it stifles Congress’s aim for allowing investigators to intercept communications pertaining to authorized crimes. *Cf. Donovan*, 429 U.S. at 435 (the failure to identify additional persons in an intercept

application who are likely to be heard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization).

The Supreme Court's use of § 2518(10)(a)(i) suggests reviewing courts should, when faced with mixed applications like the ones here, strive to employ narrower sanctions other than *Ward's* total ban. In appropriate instances, a court should be able to surgically remove unauthorized communications from the body of intercepted communications. This method would allow the government to offer the validly intercepted communications as evidence in a subsequent proceeding.

The Eleventh Circuit has counseled this type of approach for 18 U.S.C. § 2517(5) violations. This section requires the government to obtain prior judicial approval before disclosing intercepted communications about crimes different than the ones specified in the authorization order. But if the government fails to abide by this provision, it does not mean the court must dismiss the indictment. Nor is the court required to suppress all seized communications and throw out intercept evidence relevant to the designated Title III crimes along with evidence for the non-designated offenses. Sanctions are to be applied flexibly with an awareness of § 2517(5)'s purpose. *United States v. Watchmaker*, 761 F.2d 1459, 1470 (11th Cir. 1985) (refusing to dismiss RICO indictment when government failed to obtain disclosure order under § 2517(5) before using state wiretap evidence pertaining to drug offenses).

In *United States v. Van Horn*, 789 F.2d 1492, 1503-04 (11th Cir. 1986), the Eleventh Circuit adopted this flexible approach, one that requires courts to keep in mind the statutory goal involved. The *Van Horn* surveillance application listed certain drug

offenses as its focus (21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. § 1962(c)-(d)), but the indictment charged different drug violations (21 U.S.C. §§ 848, 952(a), and 963). The prosecutors did not secure judicial approval before revealing the contents of the intercepts to the grand jury, and the defendants moved to suppress the intercept evidence claiming the government violated 18 U.S.C. § 2517(5). The court rejected their arguments. Citing former Fifth Circuit precedent, it emphasized § 2517(5)'s purpose: to prohibit the government from getting an intercept for one crime as a subterfuge for obtaining evidence of a different crime for which the prerequisites are lacking. *Id.* at 1503 (citing *United States v. Campagnuolo*, 556 F.2d 1209, 1214 (5th Cir. 1977)). The judge's approval of surveillance extensions with knowledge of the intercepted conversations as reported in the progress reports satisfied § 2517(5)'s goals. *Van Horn*, 789 F.2d at 1503-04.

Watchmaker's and *Van Horn's* approach implements the message the Supreme Court preached in *Giordano*, *Chavez*, and *Donovan* – the statutory exclusionary rule remedy should match the particular goal Congress attempted to achieve when it included the particular provision in question. The statutory goal implicated in this case is precise: limit the intercepted communications to authorized crimes and exclude communications about unauthorized offenses.

However, using a flexible-sanction's approach to implement the identified goal necessarily contemplates the government has seized intelligible communications. Indeed, § 2518(10)(a), the Defendants' vehicle for enforcing Congress's statutory limits on electronic surveillance, presumes the court will be presented with intelligible communications to review. An "aggrieved person ... may move to suppress the contents

of any wire or oral communication intercepted pursuant to the chapter.” 18 U.S.C. § 2518(10)(a). Title III defines “contents” to mean “information concerning the substance, purport, or meaning of that communication.” 18 U.S.C. § 2510(8). Thus, a court implicitly assumes the intercepted conversations the government will offer as evidence at a trial are of such a quality that a “listener can hear satisfactorily the words spoken and reliably distinguish them from other words that sound similar” and understand “enough of the recording ... to permit the listener to reasonably determine the sense in which the words are used, i.e., the sense in which the speaker intended them.” *United States v. Aisenberg*, 120 F. Supp. 2d 1345, 1349 (M.D. Fla. Nov. 9, 2000). Moreover, the court anticipates the government will be able to establish the “communications” at issue are relevant as contemplated by Fed. R. Evid. 401.⁴⁴ Namely, the statements are either intrinsically relevant or the government can demonstrate their relevancy through extrinsic evidence.

But identifying intercepted communications meeting these standards, after listening to the work-copy recordings and evaluating the testimony presented at the *Franks* hearing, is difficult if not impossible. The government hears what no reasonably prudent listener can; it interprets what can be heard as no reasonably prudent listener would. Faced with the quality and nature of the recordings so far presented in this case, it is doubtful any judge, no matter how skilled and dedicated, could parse the conversations into its component parts looking for evidence of murder, sale of a minor child, child neglect with

⁴⁴ Rule 401 defines “relevant evidence” as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

great bodily harm, or aggravated child abuse. Admittedly, such an exercise, if successful, would satisfy the intent of Title III's framers by allowing the court to excise unlawfully intercepted communications, thus, limiting the intercept to its permissible reach. But in this case, the nature and quality of the recordings make it impossible. Moreover, the reality is that if evidence of these crimes existed, if the Defendants' intercepted conversations proved they had done these things to their child, they would not be in the dock of a federal court charged with false statement violations. A federal judge would not be examining the "contents" of the intercepted communications for compliance with Title III or Florida's electronic surveillance scheme.

Faced with this canvas of nebulous conversations, the Court's task of measuring the merits of the motion to suppress against Title III's twin aims is exacerbated by the nature of this prosecution – false statement violations under § 1001. The government's central theme is the Defendants falsely reported their daughter had been kidnapped. Obviously, it proposes to use the Defendants' intercepted conversations to prove something else likely happened to the child. The indictment, like the intercept applications, insinuates two possible scenarios: the Defendants either murdered or sold their child. If the government's approach at the *Franks* hearing is indicative, the government is not wedded to a specific theory. Either supposition, murder or sale of a child, will suffice, so long as it is plausible enough to convince a jury beyond a reasonable doubt the Defendants lied to investigators as charged. Yet, the intercepted conversations do not supply probable cause to believe the Defendants murdered their child, the only offense authorized by FLA. STAT.

§ 934.07 (1997). Nor do these conversations provide probable cause to believe the Defendants committed the other crimes listed in the applications.

Employing the Eleventh Circuit's gauged sanctions approach to this confluence of varying, ambiguous, unintelligible, somewhat-intelligible, irrelevant conversations is the root of the review problem. What the government advocates is the indiscriminate use of all these intercepted conversations, irrespective of any relevancy to an authorized crime under FLA. STAT. § 934.07, to suggest something happened to the child other than what the Defendants reported to law enforcement. But to allow this indiscriminate use of intercepted communications without regard to the limited purposes dictated by Florida's wiretap scheme eviscerates the law's intent. It invites the Court to give its imprimatur to Detective Burton's driving justification for the wire, "the Defendants must be hiding something."

Adopting a commensurate, flexible sanction matching the particular goals Congress outlined for Title III, which the Florida legislature adopted, does not work in this case because the communications the state seized are either unintelligible, do not stand for the proposition the government advances, or are unrelated to the offenses described in § 934.07. For these reasons, the only plausible sanction for the seizure of communications based on applications containing non-listed offenses under § 934.07 is to suppress the fruits of all three intercepts. This sanction is proportionate to the statutory scheme's intent. Specifically, it ensures the intercepted conversations will not be used for a purpose other than one contemplated by the statute.

D. Minimization and Privileges

In somewhat interrelated arguments, the Defendants contend the orders are invalid because they impermissibly authorized the interceptions of communications protected by the marital privilege; further, the agents failed to appropriately minimize marital and attorney-client protected conversations (doc. 90, pp. 94-105). These arguments are without merit.

The Defendants, notably, cite no authority for the proposition that a wiretap order is *per se* invalid if it targets the interception of communications of two individuals who are married. Accepting this proposition would mean law enforcement officers could never intercept communications between spouses even if probable cause existed to believe both had committed an enumerated crime. Neither Congress nor the Florida legislature intended to prohibit this. Indeed, the wiretap schemes make clear that Congress and the Florida legislature anticipated authorities would intercept privileged communications pursuant to a valid wiretap order. *See* 18 U.S.C. § 2517(4); FLA. STAT. § 934.08(4) (1997).

Following Title III, Florida requires authorization orders instruct monitors to minimize the interception of conversations not otherwise subject to interception under the statute. FLA. STAT. § 934.09(5) (1997); 18 U.S.C. § 2518(5). All three orders included such provisions, and the monitors received appropriate instructions regarding these procedures. Because the orders are valid to this extent, the admission at any trial of conversations that are arguably protected by the attorney-client privilege or marital

privilege is governed by Fed. R. Evid. 501. *United States v. Mathis*, 96 F.3d 1577, 1583-84 (11th Cir. 1996); *United States v. Malekzadeh*, 855 F.2d 1492,1496 (11th Cir. 1988).

E. Investigative Need

Lastly, the Defendants contend the affiants violated FLA. STAT. § 934.09(1)(c) (1997) by applying for the intercept too soon.⁴⁵ That section essentially requires the affiants to explain in their application whether or not they tried other reasonable investigative procedures and if not why. Because the investigation was only eighteen days old, the Defendants reason, the state had not given enough time for traditional investigative methods to work. The Defendants, however, do not specifically identify what authorities should have done short of acquiring the intercept.

Section 934.09(1)(c) mirrors 18 U.S.C. § 2518(1)(c). Both statutes underscore an important legislative theme. Electronic eavesdropping is not to be “routinely employed as the initial step in criminal investigation.” *Giordano*, 416 U.S. at 515. Nor is it to be “resorted to in situations where traditional investigative techniques would suffice to expose the crime.” *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974). Florida courts and this circuit interpret these provisions identically. It is not necessary for the applicants to show first that all possible techniques or alternatives to wiretapping have been exhausted. It is enough that other reasonable investigative procedures have been tried and either have failed or appear likely to fail or to be too dangerous. *State v. Birs*, 394 So. 2d 1054, 1057

⁴⁵ The Defendants appear to limit their argument to the first intercept. Although the extension applications must satisfy the same requirements as the initial one, I see no need to address the investigative need for the extensions given my findings as to their lack of probable cause and the Defendants’s failure to raise the issue.

(4th Fla. Dist. Ct. App. 1981). Nor will Florida courts invalidate an intercept order simply because defense lawyers are able to suggest some investigative technique that might have been used and was not. All that is demanded is that the application explain the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves. *Hudson v. State*, 368 So. 2d 899, 902-03 (3d Fla. Dist. Ct. App. 1979), (citing *United States v. Hyde*, 574 F.2d 856, 867 (5th Cir. 1978)); *see also United States v. Nixon*, 918 F.2d 895, 901 (11th Cir. 1990) (§ 2518(1)(c) does not require application to provide a comprehensive exhaustion of all possible techniques; instead it must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves) (citing *Van Horn*, 789 F.2d at 1496).

Generally, this issue surfaces in a different setting. Agents are attempting to pierce the inner workings of a drug conspiracy or an organized crime conspiracy. Evaluating the need for a wire in these instances is relatively straightforward. Traditional investigative techniques have developed a strong probable cause showing for the electronic surveillance by identifying the conspiracy's existence and some of its participants. Eventually, the investigation progresses to the stage where electronic surveillance becomes the more reasonable tool for exploring the scope of the conspiracy and the identity of all or most of the conspirators. The wire produces tangible incriminating results (unlike here), and the courts review for statutory compliance knowing the wiretap or intercept has successfully infiltrated the criminal group. Thus, courts are reluctant to engage in a what-if analysis given the success of the electronic surveillance when compared to speculating about the potential success of some other investigative technique.

Here it is the absence of evidence, not the presence of evidence, that fuels law enforcement's desire for an intercept. Traditional investigative methods have yielded nothing promising to support the Defendants' claims of kidnapping. Yet, the affiants essentially admitted at the *Franks* hearing they did little to investigate the offenses described in the application using traditional methods. For example, by December 12 (the date the state judge approved the first intercept) no one had completed any financial analysis of the Defendants. The Federal Bureau of Investigation had subpoenaed documents, but it was likely awaiting receipt of the requested items by that date. Certainly its analyst was unable, based upon the information available to him then, to give any opinion as to whether the Aisenbergs had deposited any large sums of money suggesting a sale of the child. These questions should have been answered before seeking the intercept. Nor had the investigators, according to the government, interviewed family members and acquaintances asking detailed information about the Aisenbergs' treatment of their children and Sabrina Aisenberg in particular.⁴⁶ Likewise, law enforcement had not processed all the evidence seized from the Aisenbergs. This is elementary detective work.

The government emphasizes law enforcement spent massive resources searching for the infant. This is undoubtedly accurate. I can think of no other local investigation in the past several years which has commanded such dedicated and laudatory efforts by so many agencies. The difficulty is that the government seeks to equate the efforts to find the

⁴⁶ The government attempted to show at the *Franks* hearing that Burton and Blake conducted only limited interviews of family members and acquaintances. As noted previously, the government offered this to suggest the affiants had not omitted in their application exculpatory information about the lack of bruising.

child with the efforts to satisfy its obligation under § 934.09(1)(c) and 18 U.S.C. § 2518(1)(c). But this a false comparison; the two investigations while intertwined were not the same. What emerged from the *Franks* hearing is the sense that authorities had split their investigation into two components, the massive search for the child and the parallel investigation of the parents as suspects. By December 12, law enforcement had dedicated most of its effort to looking for the infant and tracing all potential leads as to her whereabouts. They had not done some of the basic detective work for building a case against the Defendants for the crimes outlined in the application.

Adherence to FLA. STAT. § 934.09(1)(c) and 18 U.S.C. § 2518(1)(c) not only promotes the legislative goal of limiting the use of intercepts so that they are not “routinely employed as the initial step in criminal investigation,” *Giordano*, 416 U.S. 505, 515 (1974), it assists the judge in fulfilling his statutory responsibility. It assures the judge he can evaluate the probable cause requirement with confidence. The basic investigative steps have been completed. The initial phase is over. He can take the information produced from this stage knowing the applicants have met their obligations for using traditional methods first and decide if it is likely the intercept will produce additional results, namely, incriminating communications about the targeted crimes. But the affiants did not give Judge Alvarez a full and complete statement about their investigative efforts into the charged offenses. They did not tell him they knew several people had seen the child the day before she was reported missing but had not interviewed these witnesses yet. These witnesses, interviewed in late January 1997, stated they saw nothing unusual about the child the day before her parents reported her missing. The affiants did not tell the judge

they were still awaiting a financial analysis on the couple, a financial analysis which would show nothing unusual. They did not inform him crime labs were still processing evidence. They did not reveal a federal grand jury would be convened in several weeks to investigate the Defendants. Had they unveiled all this to him, he likely would have reviewed the application in a different light. Judge Alvarez, unaware, had to fulfill his responsibilities in a vacuum of information. After considering the respective arguments, I find the initial application did not meet the requirements of FLA. STAT. § 934.09(1)(c) (1997).

VI.

For the reasons stated, it is hereby

RECOMMENDED:

1. The Defendants' motion to suppress electronic surveillance (doc. 90) be GRANTED.

IT IS SO REPORTED at Tampa, Florida on 14 this day of February, 2001.

Mark A. Pizzo

MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within ten days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by the district court of issues covered in the report. It shall also bar the party from attacking on appeal the factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice. 28 U.S.C. § 636(b)(1)(C); Local Rule 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*).

cc: Hon. Steven D. Merryday
Counsel of Record