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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- WADE ARTHUR WALLACE, Defendant	CR. No. 99-60045-02-HO DEFENDANT'S THIRD MOTION TO SUPPRESS AND TO CONTROVERT, AND NOTICE OF INCORPORATION AND JOINDER.

Defendant, WADE ARTHUR WALLACE, by and through counsel Terri Wood, hereby moves this Court for entry of an Order suppressing all evidence in the above-styled prosecution which was (1) seized pursuant to search warrants executed on or about April 29, 1998, issued upon the affidavit of Oregon State Police officer George Roshak, and (2) seized with or without warrant based upon evidence derived from the execution of the aforementioned search warrants issued upon officer Roshak's affidavit.

The evidence which Mr. Wallace asks the Court to suppress includes but is not limited to all evidence, whether tangible items, sensory perceptions, or statements of suspects and

witnesses, obtained or derived from the search of the following premises located in Bend, Oregon:

1) 19655 Meulink Drive;

2) 1303 NW Newport Avenue;

3) 18994 Shoshone Road;

4) 62255 Wallace Road; and

5) 35 Bridgeford Road.

The evidence also includes but is not limited to all financial records and assets, obtained or derived from the seizure warrant issued May 5, 1998, upon the affidavit of DEA agent Michael Spasaro.

The defense so moves upon the grounds that the contested searches and seizures were in violation of the Fourth Amendment to the United States Constitution, or otherwise subject to suppression under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, or otherwise subject to suppression as a judicially-created remedy, pursuant to the court's supervisory powers, for violations of 18 U.S.C. §§3121-3127 and to deter future unlawful police conduct, all as more specifically set forth in the memorandum of law which follows; and upon the grounds previously asserted in Mr. Wallace's first and second motions to suppress filed in this cause and all amendments thereto, incorporated by reference herein; and upon such other grounds and authorities as may be offered in supplemental briefings in support of this motion, or at hearing thereon.

The defense hereby gives notice that it intends this Third Motion to Suppress and to Controvert to be supplemental to, rather than an amendment of, all previously filed motions to suppress and supporting memoranda filed on behalf of Mr. Wallace, or those of any co-defendant in this cause, in which he hereby joins. Mr. Wallace also joins in any additional motions to suppress or controvert or supporting memoranda which may be filed in this cause on behalf of co-defendant Connie Dickens.

The defense also specifically reserves the right to raise additional grounds in support of suppression should any arise upon review of additional discovery which the Government has agreed to provide.

This motion is made in good faith and not for the purpose of delay.

RESPECTFULLY SUBMITTED THIS 31st day of October, 2003.

TERRI WOOD OSB 88332
Attorney for Defendant Wade Arthur Wallace

MEMORANDUM OF LAW

I. Roshak's Affidavit Fails To State Probable Cause To Search The Residence At 1303 NW Newport Avenue.

Police found Mr. Wallace at the Newport Avenue residence; they also found evidence of an indoor marijuana grow there. The affidavit in support of the search warrant provided only two circumstances to establish probable cause: (1) observation of a vehicle, usually seen parked at the Newport Avenue residence, at another suspect residence on several occasions during daytime hours; and (2) conclusory statements about "unusual peaks" in electricity consumption said to be "very consistent" with marijuana grow cycles. These circumstances, even in combination, do not support a conclusion that, more likely than not, evidence of a drug trafficking conspiracy would be located inside the Newport Avenue residence. *See, e.g., Greenstreet v. County of San Bernardino*, 41 F3d 1306 (9th Cir. 1994); *United States v. Clark*, 31 F3d 831 (9th Cir. 1994), *cert .denied, Clark v. United States*, 513 U.S. 1119 (1995).

In particular, Roshak's affidavit contains the following information regarding probable cause to search the Newport Avenue residence:

1. “On several occasions during the daytime I have observed a Subaru with Oregon License VJL041 present” at another suspect residence, 19655 Meulink Drive. “[T]his vehicle remains at the Meulink site for 1 to 2 hours, then departs. I have followed it to 1303 Newport Avenue, Bend, Oregon on over two occasions and have observed it there many times, both day and night.” Roshak Affidavit, pages 11-12. The affidavit does not further specify the dates or how many times Roshak made these observations, but a reasonable assumption would be sometime between him commencing his investigation in January of 1998, and prior to applying for the warrant in late April of 1998.
2. Roshak determined the Subaru was registered to a Shane Wallace, and that the power subscriber for Newport Avenue was Wade Wallace. Affidavit, pages 11-12.
3. “Details of the power records for the 1303 NW Newport site, indicate unusual peaks in power consumption in April 1997, July 1997, and October 1997. These peaks in consumption are very consistent with marijuana growing cycles.” Affidavit, page 12. Roshak next compared the March 1997 electric consumption for this residence with the March 1998 consumption, discerned it was higher in March 1998, and obtained some climate data from which he concluded the increased power usage was not due to weather conditions. Affidavit, pages 17-18. Roshak did not attempt to compare power consumption at the Newport Avenue residence with the power consumption of similar size and construction houses in that neighborhood, nor to compare power consumption at that residence for subscribers previous to Wade Wallace.
4. Roshak’s affidavit recites 19655 Meulink Drive is suspect because persons there called a business known to sell indoor marijuana grow equipment in April and May of 1996—two years before Roshak’s observations of the Subaru—and because one of the persons who called that business, Connie Dickens, who did not reside at Meulink Drive in 1998, had a prior conviction for growing marijuana in 1989 (nine years before Roshak’s observations of the Subaru). Roshak’s Affidavit, pages 9-10. More current information regarding the suspect Meulink Drive residence consisted of

electric power records from which Roshak concluded "a seemingly unusual peak in power consumption was noted for August 1997 and a lessor one was noted in June 1996. I know these type of unexpected peaks are consistent with sites of prior marijuana grows I have investigated." Affidavit, page 13. Roshak also claimed to detect "an odor of marijuana" while standing at "a downwind location on Meulink Drive . . . . on the north side of the dwelling" on April 21, 1998; he does not conclude the odor emanated from the suspect Meulink Drive residence. Affidavit, pages 18-19.

Stated summarily, probable cause for the Newport Avenue residence consists of "several" daytime visits to the suspect Meulink Drive residence, sometime between January and April of 1998, lasting 1-2 hours, by an unknown person(s) in a Subaru that is frequently observed parked at the Newport residence; and Roshak's conclusions that power records for the Newport residence showed "unusual peaks" in usage consistent with three-month marijuana grow cycles, with the last peak in October of 1997.

A. No Probable Cause Based On The "Subaru Connection" To The Suspect Meulink Drive Residence.

"[I]n the case of multi-location search warrants, the magistrate must be careful to evaluate each location separately," *Greenstreet v. San Bernardino, supra*, 41 F3d at 1309. " 'A search warrant designating more than one person or place to be searched must contain sufficient probable cause to justify its issuance as to each person or place named therein.' " *Id.* (citation omitted). In *Greenstreet* the Ninth Circuit found no probable cause to search the plaintiff's residence based on surveillance of a man with a history of drug offenses traveling between the alleged locus of a drug ring and then to the plaintiff's residence. *Id.* Given the dearth of any other information, the Court concluded the information was not sufficient to permit an inference that the known drug offender was other than a "casual social guest" at plaintiff's residence. *Id.* The Court went on to hold that the affidavit was so lacking in indicia of probable cause that a reasonable officer would not have sought a search warrant. 41 F3d at 1310.

Likewise, Roshak's observations that the Subaru usually parked at the Newport Avenue residence was seen several times (over the course of four months) parked at the Meulink Drive

residence for 1-2 hours—given the dearth of any other information—at best supports an inference that one or more persons who usually stayed at the Newport Avenue residence was a "casual social guest" of other person(s) unknown at the Meulink Drive residence. The information in the instant case is even weaker than in *Greenstreet*, since there is no indication that persons who were currently staying at either residence had a history of drug offenses.[1] There is likewise no information making it probable that

[1] It is well established that mere association with known or suspected criminals does not give rise to probable cause. *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979); *United States v. Hillison,* 733 F.2d 692, 697 (9th Cir.1984).

drug activity was ongoing, much less readily observable, to any visitor at the Meulink Drive residence during the few times the Subaru was seen there: the phone calls to the alleged marijuana grow equipment business occurred in April-May of 1996; there were only two "unusual peaks" in power consumption, the last in August of 1997; and the Subaru was not there when Roshak claimed to detect the odor of marijuana in the vicinity of the Meulink Drive residence in April of 1998.

In the absence of any direct evidence of drug activity at the Meulink Drive residence during the times the Subaru from Newport Avenue was observed there, this information falls far short of rising to the level of probable cause. *See*, *United States v. Huguez-Ibarra,* 954 F.2d 546, 551 (9th Cir.1992) (no probable cause for search of house; house was frequently visited, sometimes by people with some connection to drugs in their pasts, but there was no direct evidence of drug activity). It is also worth noting that visits of 1-2 hours during daylight hours are far more suggestive of a "casual social guest" relationship rather that an ongoing business relationship or the typically short and secretive trips indicative of drug sale activities.

B. No Probable Cause Based On The "High Power Consumption Peaks."

The defense intends to challenge the veracity of Roshak's assertion that the Newport Avenue residence power records evidenced usual peaks consistent with marijuana indoor grow cycles. See Section III, *infra*. Review of the actual power records attached to the affidavit show, for example, that the "unusual peak" in July 1997 is for 2138 kilowatt hours (KWH) for a 33-day meter read period, up only 459 KWH from the 30-day meter read period for June 1997. This increase of 459 KWH (over 33 days) is less than the 540 KWH used in 30 days by a single halide light of the type common to marijuana grows during peak energy use. See Roshak Affidavit, page 6. Even if taken at face value, Roshak's assertions regarding power consumption at the Newport Avenue residence do not establish probable cause.

In *United States v. Clark, supra*, the Ninth Circuit held that an affiant's assertion that Clark's electrical consumption was high and consistent with a marijuana grow operation did not establish probable cause because "such consumption is consistent with numerous entirely legal activities." 31 F3d at 835. The Ninth Circuit also criticized the affiant for providing no comparative

information about Clark's consumption compared to that of other homes in the vicinity, thereby "provid[ing] no basis for a magistrate judge or this court to evaluate whether the usage was high." Id. [2]

In *United States v. Huggins*, 299 F3d 1039 (9th Cir. 2002), the Ninth Circuit found the "good faith exception" cured any probable cause deficit for a thermal imaging search warrant when the affiant included comparative power consumption data, both from neighboring properties during the same time period and from the target property during the prior owner's residency, as well as additional details that "reduced the dangers of an apples—and—oranges comparison sufficiently to distinguish this affidavit from that in *Clark*, at least on its face." 299 F3d at 1045. *Huggins* observed that the high power consumption contributed to probable cause for searching the target residence after the thermal imaging scan indicated that whatever power-intensive activity was occurring at the target site was also one that generated significant heat; this information ruled out some, albeit not all, innocent explanations for the target location's relatively high power bills. 299 F3d at 1048.

The defense has found no case where the bare bones assertions in Roshak's affidavit for searching the Newport Avenue residence—all of which are consistent with innocent activity—amounted to probable cause. See, e.g., *Huggins*, 299 F3d at 1048, n. 11 (collecting cases)[3].

The lack of probable cause to search the Newport Avenue residence is underscored by what is missing from the affidavit:

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[2] The *Clark* court indicated that the "average residential electric consumption for homes" in that area of the state would be useful for evaluating whether Clark's consumption was high. 31 F2d at 835. Although Roshak included information on the average electrical consumption in his affidavit, page 18, such information is relatively useless as an indicia of criminal activity, for reasons that will be offered at hearing on this motion.

[3] *E.g., Robinson,* 62 F.3d at 1331 (finding probable cause based on infrared imaging results, the homeowner's purchase of thirty high- pressure sodium lights, his comparatively high electricity consumption, and the apparently expensive house he owned despite having filed no state income tax returns); *United States v. Ishmael,* 48 F.3d 850, 857 (5th Cir.1995) (finding probable cause based on high electricity consumption, a continuously running exhaust fan, phone calls to horticulture shops, and, "perhaps most importantly," thermal imaging results); *also United States v. Pinson,* 24 F.3d 1056, 1057-59 (8th Cir.1994) (upholding a search based on infrared imaging results, comparatively high electricity consumption, and the receipt of packages from a manufacturer of hydroponic growing equipment); *United States v. Zimmer,* 14 F.3d 286, 288 (6th

1) Roshak does not claim to ever detect an odor of marijuana in the vicinity of the Newport Avenue residence;
2) No calls to the marijuana grow business are linked to that residence;
3) No suspect residence, other than the Meulink Drive residence, is linked in any way to the Newport Avenue residence;
4) No named conspiracy suspects in the affidavit are linked to or in any way associated with Shane or Wade Wallace, or the Newport Avenue residence;
5) No reports of any past criminal activity by Shane or Wade Wallace are noted;
6) No person with prior drug arrests or convictions is linked by records to, or observed frequenting, the Newport Avenue residence;
7) No signs of any criminal activity are observed during surveillance of the Newport Avenue residence;

Cir.1994) (stating, in dicta, that thermal imaging results, comparatively high electric bills, and the smell of marijuana on a prior visit by a police officer "were enough to establish probable cause").

8) No signs of any suspicious activity that could be consistent with criminal activity or a criminal conspiracy are observed during surveillance of the Newport Avenue residence or any person thought to stay at that residence; and

9) No informant—or even an anonymous tip—states that drug activity was ever observed at the Newport Avenue residence, or ever engaged in by Shane or Wade Wallace.

The absence of such evidence is more demonstrable of the lack of probable cause when one considers that Roshak's investigation spanned four months—long enough to encompass the harvest from at least one three-month marijuana grow cycle, and "many" surveillances of the Newport Avenue residence.

II. Roshak's Affidavit Fails To State Probable Cause To Search Any Of The Residences Due To "Staleness."

"A search warrant is not stale where there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Bowman,* 215 F.3d 951, 964 (9th Cir.2000). Staleness must be evaluated "in light of the particular facts of the case and the nature of the criminal activity and property sought," *United States v. Pitts,* 6 F.3d 1366, 1369 (9th Cir.1993); a mere lapse of substantial amounts of time is not determinative. *Id.* In particular, "when a police investigation relates to a continuing criminal business ... courts will permit greater lapses of time between the dates of the activities described in the affidavit and the date of the warrant request." *United States v. Fisher,* 137 F.3d 1158, 1164 (9th Cir.1998). This is especially the case where older information is coupled with recently obtained information. *E.g. United States v. Vaandering,* 50 F.3d 696, 700 (9th Cir.1995); *United States v. Foster,* 711 F.2d 871, 878 (9th Cir.1983) (evidence of drug transactions that occurred fifteen months before search warrant issued not stale where evidence also linked defendant to drug sale that happened twelve months later). The reason courts accept a more substantial lapse of time in these situations "is that criminal entrepreneurs, much like their legitimate counterparts, likely will retain the equipment and capital of their enterprise for a long

period of time. Thus, evidence of a criminal business operating at a particular location in the not-so-distant past may reasonably give rise to a belief that a search of the location would yield further evidence." *Fisher,* 137 F.3d at 1164.

The defense concedes that evidence of a continuing criminal enterprise, such as that envisioned by officer Roshak in the case at bar, would overcome a staleness challenge. It is that threshold issue—the probable existence of a continuing criminal enterprise of growing and distributing marijuana, at any of the suspect residences, or involving any of the named suspects in the conspiracy charged herein—that the facts set forth in Roshak's affidavit fail to surmount.

That affidavit consists of 2-year-old phone calls from the Meulink Drive residence to a business that sells hydroponic equipment which is used to grow a variety of things besides marijuana[4]; no evidence of any purchase of halide lights or other equipment from the business; and conclusory statements about "unusual peaks" of electric power consumption that are equally consistent with legal activities; even the so-called "unusual peaks" fail to occur with any discernable pattern or regularity consistent with a three-month indoor grow cycle, except the alleged pattern at the Newport Avenue residence discussed previously:

Meulink Drive residence: June 1996 and August 1997 (over one year apart)[5];

Shoshone Road residence: February 1997 and January 1998 (over one year apart)[6];

Newport Avenue residence: April, July and October 1997 (three months apart)[7];

Wallace Road residence: February and March 1998 (two consecutive months)[8].

The first alleged whiff of marijuana odor does not come until late February 1998, in the vicinity but not opined as emanating from the Wallace Road residence; Roshak claims to detect marijuana odor near that residence, as well as near the Meulink Drive residence, in late April

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[4] The Court should not consider that Connie Dickens, who was convicted in 1991 of growing marijuana in 1989, called the hydroponic equipment dealer, because that conclusion cannot be drawn on the basis of the trap-and-trace that recorded the phone number to which he then subscribed. See Section V, *infra*.

[5] Roshak affidavit, p. 13.

[6] Roshak affidavit, p. 13.

[7] Roshak affidavit, p. 12.

[8] Roshak affidavit, p. 16

1998. The odor is never detected in the vicinity of the Newport Avenue residence nor the suspect residence on Shoshone Road.

The strongest—and not "stale"—information suggesting marijuana grow activity is the discovery of a recently dismantled grow at yet another residence, on River Bend, that was leased by Donald Froggatte, a relative of Ashley Medford's wife, Debra, who gave their Shoshone Road address on his rental application for the River Bend residence. See Roshak affidavit, pages 14-15. Froggatte leased the River Bend residence from September 1997 through January 1998, and evidence indicative of a dismantled grow operation was discovered by police on February 5, 1998. Id., at page 14. Froggatte's connections to the Ashleys and to the Shoshone Road residence, coupled with the Ashleys' prior convictions for drug offenses, might arguably provide probable cause to search the Shoshone Road residence based on the direct evidence of Froggatte's involvement in a marijuana grow[9]; however, this information does nothing to contribute to probable cause to search the other suspect residences, nor assist in overcoming a staleness challenge as to those other residences. *See Greenstreet, supra,* 41 F3d at 1309-1310.

III. Roshak's Conclusions Regarding High Electric Power Consumption Are Insufficient To Support Probable Cause; Or, Alternatively, Upon Information And Belief, Are Recklessly False And Misleading.

The defense has retained an expert in electric power consumption to review both Roshak's conclusions regarding power consumption and the underlying data in the form of power records which he attached to the affidavit. A comparison of the underlying data and Roshak's assertions by the undersigned attorney, coupled with preliminary discussions with the expert, lead the defense to believe that it will be able to show either that the Roshak's conclusions are inaccurate and unreliable, so as not to support probable cause, or are recklessly false and misleading so as to be disregarded under *Franks v. Delaware*, or both. Some of defense counsel's analysis of the power records has been set forth in this memorandum. Once the expert's report is received, the defense will make the preliminary showing required by *Franks*, if supported by the expert's findings as anticipated, or will otherwise disclose the report as it relates

to the unreliability of Roshak's conclusions. The defense expects to have the necessary information from its expert within the next two weeks.

IV. Roshak's Conclusions Regarding The Odor Of Marijuana Are Insufficient To Support Probable Cause; Or, Alternatively, Were Obtained By Trespass Of The Curtilage Of The Residences; Or, Alternatively, Upon Information And Belief, Are Recklessly False And Misleading.

The Ninth Circuit has stated that the odor of marijuana emanating from a particular source, when detected by a trained observer qualified to recognize the odor, may by itself furnish probable cause to search. See, e.g., *United States v. DeLeon*, 979 F.2d 761, 767 (9th Cir. 1992); see also *United States v. Barron,* 472 F.2d 1215, 1217 (9th Cir.) (holding, in the context of vehicular searches, that "the fact that an agent familiar with the odor of marijuana smelled such an odor emanating from an automobile ... alone was sufficient to constitute probable cause for a subsequent search for marijuana."). In the case at bar, Roshak does not state that the odors he detected emanated from either suspect residence, although that is undoubtedly the conclusion he wanted to be drawn.

In *United States v. Depew*, 8 F3d 1424, 1426-28 (9th Cir. 1993), the Court held that the officer's detection of marijuana odor made from the curtilage of the dwelling, was illegally obtained and had to be stricken from the search warrant affidavit. Although the determination of curtilage must be made on a case-by-case basis, *id.,* the Court here found that encompassed the area outside the garage in the driveway approximately six feet from the garage door and 50-60 feet from the house from which the odor was said to emanate.

Although describing the wind conditions and stating his observations were made from the roadway, as opposed to the driveways of these residences, Roshak's affidavit neither estimates his distance from the suspect residences when he detects these odors, nor does he provide any information regarding the existence or location of other homes in these neighborhoods which may have been the source of these odors.

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[9] As it turned out, no active grow was discovered at the Shoshone Road residence.

The defense has retained an expert in marijuana odor to review Roshak's claims of detecting that odor two times near the Wallace Road residence and one time near the Meulink Drive residence. An investigator for co-defendant Connie Dickens has also gone to these locations to make observations, including measurements of the distance between the two suspect residences and the roadway, where Roshak states he detected these odors, and to observe the proximity of the suspect residences to other residences in the neighborhood. That investigator has orally reported to counsel that the Meulink Drive residence is approximately 100 feet from the roadway at its closest point, and the Wallace Road residence is approximately 162 feet from the roadway at its closest point. Although there are other houses in both neighborhoods, only the Meulink Drive residence is in readily visible proximity to other houses. In addition to preliminary discussions with the odor expert, the defense has conferred with defense investigators who have prior experience from law enforcement in detecting the odor of marijuana. Based upon all of these sources, the defense believes it will be able to show either that trespass of the curtilage of the suspect residences would be necessary to detect any odor, given the low wind velocity and distance between the suspect residences and the public roadway; or that Roshak's statements regarding detecting these odors under these conditions, and implying the odors could be traced to the suspect residences, as opposed to other residences in the neighborhood, are at least recklessly false and misleading.

Once the expert's report is received, and further documentation of the observations and measurements by Mr. Dickens investigator is obtained, the defense will make the preliminary showing required by *Franks*, if supported by the expert's findings as anticipated. The defense is unable to estimate at this time when it may obtain a report from its expert.

V. All Information In Roshak's Affidavit Attributed To His "CRI" Who Observed Business Records Must Be Excised From The Affidavit Because Roshak's Sworn Statements Regarding The Source And The Nature Of The "CRI's" Information Is Deliberately False And Misleading.

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the

> telephone numbers that have been dialed--a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." *United States v. New York Tel. Co.,* 434 U.S. 159, 167, 98 S.Ct. 364, 369, 54 L.Ed.2d 376 (1977).

On this basis, the Supreme Court in *Smith v. Maryland*, 442 US 735, 99 S.Ct. 2577 (1979), determined that pen registers did not transgress upon the protections afforded by the Fourth Amendment so as to require probable cause or a search warrant. The lower courts have extended the reasoning and holding of *Smith* to trap and trace devices, the device at issue in the case at bar. See, e.g., *United States v. Hallmark*, 911 F2d 399, 402 (10th Cir. 1990); *American Agriculture, Inc. v. Shropshire*, CV 99-366-BR (8/23/01 D. Oregon)("The Supreme Court has held pen registers (which record only the telephone numbers of outgoing calls) and similar devices such as trap and trace (which record only the telephone numbers of incoming calls) do not record the content of communications, establish the identity of the persons making or receiving the calls, or indicate whether a communication was completed or actually occurred because they do not hear sound")(page 5). Furthermore, the Oregon courts have acknowledged and relied on this same reasoning from *Smith*, *id.,* so this should come as no surprise to veteran state law enforcement officers such as officer Roshak.

We now know that Roshak's confidential reliable informant (hereafter "CRI") was the last state agent in a chain of agents who passed along a phone number (389-1865) that was captured a total of 10 times by trap and trace devices on two different Portland area businesses that sold halide lights and other hydroponic equipment. But Roshak did not reveal that information in his affidavit. Instead, he intentionally fabricated a CRI with access to the business records of "a known marijuana grow equipment supplier," Affidavit, page 9, to conceal the state agent[10] with access to phone numbers from trap and trace devices. Roshak fabricated the basis for reliability of the CRI by swearing the CRI had provided him with "detailed information,"

[10] According to the Government, this individual is Bob Williams of the Oregon Department of Justice.

"directly responsible" for seizures of two previous marijuana grows based on the CRI's examination of the same business' records. Id., at pages 9-10.[11]

Roshak's fabricated CRI then provides the following information:

> That he/she had observed business records indicating that a subject possibly named Connie W. Dickens, who gave an address of 19655 Meulink Drive, Bend, Oregon, using the phone number 389-1865 had made contact with a known marijuana grow equipment supplier 6 times between 040496 and 050896, and that an additional 4 calls were possibly made by Chris Compton who gave an address of 19655 Meulink Drive, Bend, Oregon, also using the phone number 389-1865. Affidavit, page 9.

The CRI could not provide this information because "trap and trace devices do not intercept the substance or content of communications, do not reveal the identity of the parties who may be communicating, and do not indicate whether a communication actually took place." *American Agriculture, Inc. v. Shropshire, supra.* Adding subscriber information for the phone number recorded by the trap and trace does not change this.

Since that is the truth,[12] then those "business records" could not reveal "that a subject possibly named Connie W. Dickens, who gave an address of 19655 Meulink Drive, Bend, Oregon, using the phone number 389-1865 had made contact with a known marijuana grow equipment supplier 6 times between 040496 and 050896." Roshak Affidavit, page 9 (emphasis supplied). However, as written, the magistrate would conclude Roshak's CRI observed business records of the "known marijuana grow equipment supplier" documenting that Connie Dickens, or someone using that name, had contacted the business and provided an address and phone number, presumably in connection with ordering equipment. Thus, the big lie is not that the CRI is a state agent passing on a phone number recorded by a trap and trace, along with subscriber information for that number, rather than his first-hand observations of the "business records" of the equipment supplier(s). The big lie is turning a phone number captured with the device into a specific individual from a specific address making actual contact with the equipment dealer.

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[11] See Statement on Information and Belief in Support of Defendant Wallace's Motion to Suppress Evidence, attached to Defendant Wallace's Motion To Suppress Evidence (#153)

Because there is little reason for a consumer to provide his name, street address and phone number to such a business, and for such information to end up recorded in the business's records, other than in connection with a "mail order" equipment purchase, i.e., halide lights, the big lie gives rise to that inference. Moreover, Roshak's intent that the magistrate draw this inference is underscored by his remarks, repeated as to each suspect residence, regarding halide lights and the so-called high power consumption at each residence:

> All the mentioned phone calls relating to the marijuana grow equipment supplier relating to this case have been associated with 19655 Meulink and the phone number 389-1865. While there are legitimate uses for halide lights, such as outdoor or commercial/gymnasium type indoor lighting, I can not observe any outdoor lighting at this site which use halide or sodium type light, nor can I imagine an indoor use for this type of lighting in the Meulink or the Newport residences.
> Power records for 19655 Meulink Dr., Bend, Oregon show . . . a seemingly unusual peak in power consumption was noted for August 1997 and a lessor one was noted in June 1996. I know these type of unexpected peaks are consistent with sites of prior marijuana grows I have investigated. Affidavit, pages 12-13.
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> * * *
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> I have also driven past the residence located at 18994 Shoshone Rd., Bend, Oregon multiple times in the day and at night time. . . . [T]here are some high [electric] consumption periods, specifically the February 1997 reading which was almost double the typical comparative winter time consumption for this site. While there are legitimate uses for halide lights, such as outdoor or commercial/gymnasium type indoor lighting, I can not observe any outdoor lighting at this site which use halide or sodium type light. Affidavit, pages 13-14.
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> * * *
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> I noted that there was a street-light type yard light in front of the dwelling [at Wallace Road], which would be likely to use a sodium or metal-arc type light. I have been to this residence in the past and have personal knowledge that this light has been in place at this location for many years. I could not see or imagine any other legitimate use for halide or sodium type lighting at that site. Power records for 622255 Wallace Road show . . . 6057 KWH in February 1998, [this] being very similar to the power consumption at peak usage months at 60655 River Bend" where evidence of the dismantled grow was discovered. Affidavit, page 16.

The affidavit provides no basis of knowledge for the CRI other than having observed business records. The magistrate would most likely presume these to be business records of the equipment dealer, e.g., customer contact and purchase records; thus, the affidavit creates a false

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[12] It is at least the truth as stated by the Supreme Court in *Smith*, and the basis for excluding

impression of the CRI's basis of knowledge, as well as the nature of the contact—if any—persons whose phone numbers were seized had with the business. Roshak states, in the next section going to the reliability of the informant, "The basis of that information relayed to me by the CRI was the same unwitting informant business and their records." Affidavit, pages9-10 (emphasis supplied).

The affidavit attempts to establish the reliability of the informant by claiming the CRI provided information in 1990-91 and again in 1998, based on "the same unwitting informant business and their records." According to Des Connall's sworn statement in support of a *Franks* hearing[13], the 1990-91 was a totally different CRI, and also occurred about 4-5 years before the first trap and trace order for American Agriculture in 1995.

Thus, one could conclude that Roshak intentionally lied about the information the

these devices from the reach of the Fourth Amendment.

[13] Note 11, *supra*.

CRI could have provided based on a trap and trace, as well as the CRI's basis of knowledge[14], as well as the CRI's reliability. When this deliberately false or misleading information about the CRI and his observations from the equipment supplier's business records is set aside, the affidavit fails to state probable cause to search any of the suspect residences, with the possible exception of the Shoshone Road residence given its independent nexus to Donald Froggatte and the direct evidence of his marijuana grow.

VI. Alternatively, All Information in Roshak's Affidavit Derived From The Federal "Trap And Trace" Orders and Extensions Must Be Excised From The Affidavit Because The Information Was Illegally Obtained By "Government Agents."

Roshak's CRI is nothing more than a phone number, 389-1865, captured a total of 10 times by trap and trace devices on two different agricultural supply companies in the Portland area, called American Agriculture and Light Manufacturing, coupled with subscriber information for that phone.[15] The Government has already conceded that the federal court orders authorizing the trap and trace imposed geographic limits that did not extend to Bend, Oregon; and that the use of the trap and trace to provide information concerning 389-1865 violated the court orders. This geographic limit is also a condition imposed by the federal statutes governing pen registers and trap and trace devices, 18 U.S.C. §§3122-3127. See 18 U.S.C. §3123(b)(1)(C)(Contents of Order). The Government has conceded that the use of the trap and trace to provide information concerning 389-1865 also violated 18 U.S.C. §3123(b)(1)(C).

Those concessions, however, do not encompass all of the illegalities involved in obtaining and using the trap and trace information in the case at bar. Because the investigations

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[14] The analysis does not change if Roshak claims he was unaware that the state agent/CRI provided him with these falsehoods regarding the source and nature of his information. *United States v. DeLeon*, 979 F2d 761, 763-64 (9th Cir. 1992)(holding false statements or omissions of government officials in an affidavit are not insulated from a *Franks* challenge, even if the official at fault is not the affiant).

[15] From the discovery it appears Chris Compton was the subscriber during four calls made in 1997 to Light Manufacturing, and Connie Dickens was the subscriber during the six calls in April-May 1997 to American Agriculture. Roshak's affidavit does not give a time frame for the Chris Compton calls, implying he and Dickens both made calls for equipment orders to the same address. See Section V, *supra.*

of American Agriculture and Light Manufacturing were in fact local, as opposed to federal, investigations, and these orders were obtained in violation of the more restrictive Oregon law governing trap and trace[16], the state officers who obtained and used the trap and trace data, and passed it on to Roshak for his use, repeatedly violated 18 U.S.C. §3122(2), which requires state law enforcement officers conducting state investigations to abide by state law, or the Due Process Clause of the Fifth and Fourteenth Amendments.

It also appears that the state officers acted in bad faith by seeking continued extensions of the federal trap and trace orders for the stated purpose of obtaining evidence of criminal conspiracy between the owners of these two agricultural supply companies and the unknown percentage of the businesses' customers who purchased equipment to grow marijuana, whereas the true purpose was conducting an ongoing investigation of all persons who called these businesses, and reaping considerable profits for state law enforcement through property forfeitures in this process.[17]

Furthermore, the dissemination of the trap and trace data obtained in violation of the geographic limits of the orders, and in violation of more restrict state statutes that federal law mandated be observed in such cases, and in bad faith for the purpose of the ongoing state investigation of persons who called American Agriculture rather than the certified purpose supporting the court orders, to Roshak well over one year after the last extension on American Agriculture had expired and the federal prosecutor had determined there was insufficient evidence to present a case against American Agriculture to the grand jury, constitutes flagrant governmental overreaching of what Congress intended in enacting the trap and trace statutes.

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[16] ORS 165.657-165.673 control the use of trap and trace devices and pen registers. Oregon uses a scheme similar to the federal statute, with the primary distinctions being the application must state probable cause to believe the individual(s) targeted by the devices is or has committed a felony and that the device will yield evidence relevant to the crimes; and extension of the order is limited to an additional 30 days. ORS 165.663 & 165.667(2)(f).

[17] The defense is awaiting discovery of the applications for extensions and supporting affidavits for the American Agriculture trap and trace and therefore does not know whether those affidavits were authored by Shropshire. The Government has advised counsel that the trap and trace data from American Agriculture went directly from the phone company to Shropshire. Shropshire did author all of the affidavits for the Light Manufacturing trap and trace orders.

These violations, either singularly or collectively, taint the trap and trace information that is the basis of Roshak's CRI's information, and the CRI's information must be redacted from the affidavit. *See Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Simpson*, 927 F2d. 1088, 1090 (9th Cir. 1991); *cf., United States v. Michaelian,* 803 F2d 1042 (9th Cir. 1986); *but see United States v. Thompson*, 936 F. 2d 1249 (11th Cir. 1991).

A. The Ongoing Investigations of American Agriculture and Light Manufacturing

American Agriculture's trap and trace saga is detailed by the Hon. David Brewer in *State v. Mituniewicz*, 186 Or.App. 95, 97-99 (2003): "In February 1995, the City of Portland organized the Marijuana Task Force (MTF)[18] to investigate a business called American Agriculture and its owner, Martin. American Agriculture supplies grow lights and other equipment used for indoor gardening. Officers assigned to MTF believed that Martin and American Agriculture were engaged in a criminal conspiracy with customers by providing them with equipment, assistance, and advice about growing marijuana. Before the formation of MTF, the Drugs and Vice Division of the Portland Police Bureau had conducted approximately 50 investigations of American Agriculture customers. Of those investigations, only one had uncovered a customer who used the equipment for legitimate purposes.

"To obtain evidence of a conspiracy, MTF Officer Shropshire applied to the Multnomah County Circuit Court for an order to place a trap and trace device on American Agriculture's telephone. . . Shropshire's affidavit in support of the 1995 application recited information gained from a "confidential reliable informant" (CRI). According to the affidavit, the CRI had relayed to Shropshire a number of facts, including that Martin had been involved in the manufacture of marijuana plants before 1995; that the CRI had had numerous conversations with Martin regarding the manufacture of marijuana, during which Martin had disclosed that he was aware that "the major portion" of his customers used the equipment sold at American Agriculture to grow marijuana; that Martin had prepared a list of marijuana growers in the Portland metropolitan

[18] The Marijuana Task Force was a Portland Police Bureau operation which reportedly has been dissolved after its investigative methods came under frequent attack in the Oregon courts.

area that he intended to use as a plea bargaining tool should he ever be prosecuted; that Martin knew that the police had been investigating him for years but felt that he was "invincible" to prosecution for conspiracy; that Martin had assisted some of his favorite customers by making personal deliveries so they could avoid being seen at the store by police; that other customers used United Parcel Service (UPS) to avoid coming to the store; that Martin had developed a nutrient system for growing marijuana hydroponically and had tested it by giving it to six other people for comparison purposes; and that the CRI had been present when other marijuana growers called American Agriculture seeking technical advice.[19] On February 9, 1995, the court issued the trap and trace order.

"After the trap and trace was installed, MTF officers obtained the names and home addresses of subscribers to the telephone numbers trapped by the device. Because the lights used for indoor marijuana growing operations draw considerable power, MTF officers obtained, by subpoena, power records for each of those residences. Reviewing the records, the officers identified homes with abnormally high power consumption. They then went to each of those homes to conduct a "knock and talk" investigation, in which they asked the occupants for permission to search the premises. Officers searched a number of residences, either with the consent of the occupants or after returning with warrants that were issued on the basis of the power records and other information obtained during the knock and talks. MTF's stated purpose was to locate and arrest marijuana growers who might testify about a conspiracy involving American Agriculture and Martin. The Multnomah County Circuit Court trap and trace order was extended on March 9, 1995, but it expired without further extension 30 days later, on April 7, 1995.[20]

[19] The supporting affidavit for the first federal trap and trace order on American Agriculture recited this same information.

[20] A trap and trace order obtained under Oregon law is effective for 30 days and may be extended, also by court order, for an additional 30 days. ORS 165.667(2)(f).

"On June 22, 1995, MTF, with the cooperation of a federal investigator, obtained a federal trap and trace order, followed by a series of extensions.[21] In approximately August 1996, a federal prosecutor reviewed all of the information that had been obtained under the federal and state orders. By then, MTF had seized 394 marijuana growing operations and had arrested 531 suspects. According to Shropshire's affidavit, most of the seizures were "a direct result of information received from the use of the trap and trace device." However, those seizures yielded only one suspect who provided information implicating Martin in a conspiracy. That informant stated that, in 1985, Martin told him that he had started the business to supply equipment so that he and his friends could grow marijuana, but he began selling on a retail basis when he realized that there was a great demand for the equipment, which was profitable in its own right. The informant also stated that Martin had sold him marijuana "clones" (plant cuttings). Despite that information, the federal prosecutor declined to submit the case against Martin to a grand jury, opining that the evidence was not sufficient to win a conviction. She also recommended discontinuing the federal trap and trace order, and MTF did not seek any further extensions of that order. The federal order expired on August 13, 1996."

DEA agent Marc Laurie provided the affidavit for the first federal trap and trace order on American Agriculture. His affidavit states that "the Portland Police Bureau, assisted by the Drug Enforcement Administration in Portland, Oregon, has been conducting an investigation" of Richard Martin, owner of American Agriculture, and sets forth essentially the same information as Shropshire's. The application for the first order also sought installation of a pen register to record calls made by Martin and by American Agriculture. Calls placed by Martin or his business with any regularity to the same customers would obviously support a conspiracy theory as well as the issuance of wiretape orders. All of the extension orders, however, sought only continuing data from the trap and trace, not the pen register.

The Government has agreed to provide the defense with the applications and affidavits supporting the extension orders on American Agriculture. It is unknown at this time whether

[21] Unlike state law, federal law does not limit the number of 60-day extensions which may be

Shropshire authored the affidavits supporting the applications for extension of the federal order; however, this may well be the case, since Shropshire authored the affidavits supporting the original application and all extensions of the trap and trace orders for Light Manufacturing, the second source of calls referenced in Roshak's affidavit. It is clear that the information from the federal trap and trace on American Agriculture went to the MTF and Shropshire: his first affidavit supporting the Light Manufacturing trap and trace application states:

> The Portland Police Bureau Drugs and Vice Division, Marijuana Task Force has utilized information gained from a trap and trace device which was placed on the phone number . . . listed to the business of American Agriculture. . . . As of approximately August 1996 the results of [investigating the callers] since February 1995 hav been the seizure of approximately 331 marijuana growing operations, consisting of 20,347 marijuana plants. These officers have also seized approximately $434,781 in currency, approximately 79 residences, and approximately 200 weapons. Affidavit, pages 1-2.

Nothing in the affidavit indicates a single federal prosecution or civil forfeiture action by the DEA arose as a result of the American Agriculture trap and trace data.

Within two months of the end of the trap and trace on American Agriculture, Shropshire was able to convince the federal prosecutor to apply for a new order on Light Manufacturing and its owner, Rajiam Pursifull. Although the application certifies the investigation is being conducted by the DEA, and the investigation's target is Pursifull, Shropshire authored the supporting affidavit. Neither the application nor supporting affidavit requests a pen register to record Pursifull's calls; the only interest is trapping the calls of his customers. Shropshire's affidavit recites that during the time the trap and trace was active on American Agriculture, the device captured the phone numbers for Light Manufacturing, and "it appeared that these businesses communicated quite frequently." Affidavit, page 2. Shropshire's Portland Police Marijuana Task Force had been investigating Light Manufacturing under a state trap and trace order that was scheduled to expire on October 12, 19996, four days after the first federal application for Light Manufacturing was filed. Affidavit, page 3. Shropshire's affidavit goes on to request an order for

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sought. See 18 U.S.C. §3123(c).

the trap and trace from the federal court so that the MTF investigation—sworn to be an investigation of Pursifull "and others yet unknown"—can continue. Affidavit, page 6.

Shropshire's affidavits supporting the five extensions of the federal trap and trace order on Light Manufacturing continue to state that "The Portland Bureau Drugs and Vice Division, Marijuana Task Force, is conducting an investigation" of Pursifull. There is no mention of a DEA investigation or joint investigation with the DEA, and there is no longer any mention of the targets of the investigation being "others yet unknown." There is also no mention, in any of these affidavits, that the ongoing investigation has uncovered a single individual from the trap and trace data who provided any information about Pursifull engaging in a criminal conspiracy or other violation of the drug laws. That the investigation failed to produce even one potential witness against Pursifull, nothwithstanding the seizure of "at least 171 marijuana grows" and the arrests of "at least 218 subjects" of which Shropshire estimated that "ninety percent involved the use of information received from the trap and trace device,"[22] presumably led to the federal prosecutor deciding not to apply for a sixth extension.

Shropshire did note, in his affidavit supporting the fourth extension application:

> During our investigation of Light Manufacturing we have found that many of the subjects arrested for manufacturing marijuana and who are customers of Light Manufacturing are involved with the National Organization for the Reformation of Marijuana Laws (NORML). Many of these subjects are very active in the attempt to change the marijuana laws not only of the State of Oregon but of the United States Government. Affidavit, page 3.

That investigative success also failed to carry the day. *See, Smith v. Maryland, supra,* MARSHALL, J., dissenting:

> The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contactsPermitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. 442 U.S. at 751.

After losing the Light Manufacturing waterhole for leads to marijuana growers, and apparently unable to enlist federal officials to continue supporting this local cause, Shropshire returned to the state court for a new trap and trace order on American Agriculture. "On March 9, 1998, Shropshire again applied for a trap and trace order from the Multnomah County Circuit Court," and the court issued the order. *Mituniewicz, supra*, 186 Or.App. at 99-100. However, "Shropshire's affidavit did not disclose the federal prosecutor's opinion that the previously gathered evidence did not support prosecution. The affidavit also did not reveal that, on more than one occasion, an informant wearing a "body wire" was sent into American Agriculture but was ordered to leave the store immediately after mentioning an intent to use the company's equipment for growing marijuana. It also did not disclose that MTF had placed a pen register on Martin's home telephone line that failed to produce any evidence. *Id.,* at 100. Considering these omitted facts, and others, the Oregon Court of Appeals held Shropshire's affidavit failed to state probable cause required for the trap and trace oder. *Id.,* at 103-106.

Although none of the phone calls referenced in Roshak's affidavit in the case at bar came from the unlawful 1998 state trap and trace order, the defense contends this is relevant to the question of bad faith by Shropshire in his role of obtaining the federal trap and trace orders which are at issue.

According to the Government, the trap and trace data obtained pursuant to the federal court orders from both businesses went directly from the phone company to Shropshire. Shropshire would then pass the data along to Bob Williams at the Oregon Department of Justice, who in turn provided the information to Roshak. According to a tape recorded statement of Shropshire to Neal Hauser, another man prosecuted[23] based on a search warrant supported by a Roshak affidavit very similar to that in the case at bar:

> Well, I have a court order that allows me to do it, and every 30 days I reup that court order. And so we get the information back, and that's when we start passing it off. And if it's in Bend and if it's in places where we're not going to get to, we pass it through,

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[22] Shropshire affidavit in support of application for fifth extension of this trap and trace order.

[23] The State ultimately abandoned its prosecution of Mr. Hauser after the true nature of Roshak's CRI—the trap and trace data—was exposed.

> through DOJ, we'll pass them off. And if I know somebody in a particular area, I'll call them up and say 'Hey, we have this one. This is how we got it. You try not to use it as an affidavit.'

Had the trap and trace data gone to the DEA, as directed by the federal court orders, DEA policies and procedures required: "Paperwork provided by the telephone company on trap and trace information and the decoder's continuous strip of paper are to be handled and processed as documentary evidence." DEA Agents Manual §6632.2(I). Furthermore, "[a]ll disclosures of investigative information outside the Department of Justice are subject to the accounting procedures in 6327." Id., at §6322.2. "Disclosures may be made for law enforcement purposes in response to requests from law enforcement and regulatory agencies, provided the request is signed by an authorized official of the agency, identifies the record and the specific information required, and states the law enforcement purpose for which the desired information will be used." Id., at §6322.2(D). The Government has agreed to provide the defense herein with any DEA reports or other forms concerning the receipt and transmission of the trap and trace data at issue, although the defense believes no such documentation was ever generated because there is no indication yet that the DEA received the data that was certified as relevant to its investigations of American Agriculture and Light Manufacturing, which

there is no indication yet that the DEA was conducting.

Based on the information currently available, there can be little doubt that the investigations of American Agriculture and the spin-off investigation of Light Manufacturing were local law enforcement investigations by the City of Portland's Marijuana Task Force, spearheaded by Portland Police officer Nathan Shropshire; that the trap and trace data went directly to Shropshire and not the DEA; that the investigations being conducted by Shropshire & Company targeted the customers of these businesses, contrary to the sworn purpose of targeting the owners of those businesses; that Shropshire passed the data off to other local and state law enforcement agencies, so that phone numbers outside the geographic limits of the federal orders could be used in those jurisdictions; and that the trap and trace data was used by local and state law enforcement agencies statewide for state prosecutions. There is also no doubt that Shropshire enlisted the federal prosecutor to obtain federal trap and trace orders that he could not lawfully obtain under state law.

B. The Federal Statutory Scheme.

In 1986, Congress enacted 18 U.S.C. §§3121-3127, which governs pen registers and trap and trace devices. Section 3121(a) provides that "no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801, *et seq.*)."(emphasis supplied). Pursuant to Section 3121(c), the penalty for violation of the statute is imprisonment for not more than one year, a fine, or both.

Section 3122(a)(1) authorizes an attorney for the United States to apply for an order, "in writing, under oath or equivalent affirmation, to a court of competent jurisdiction." First, Section 3122(b)(1) requires the application to include both the identity of the applying attorney and the identity of the law enforcement agency conducting the investigation. Second, Section 3122(b)(2) requires the application to include a certification by the attorney "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." The application must also specify "the identity, if known, of the person who is the subject of the criminal investigation," so that can be included as statutorily required in the order. §3123(b)(B).

Section 3122(a)(2) authorizes a state law enforcement officer to make application for an order or extension under the federal statute, to a "court of competent jurisdiction of such State," "[u]nless prohibited by State law." The application by the state law enforcement officer must contain the same information, under oath or affirmation, as an application by a federal prosecutor as set forth above. §3122(b). The plain language of this provision demonstrates that Congress did not intend to allow state law enforcement agencies conducting state investigations for state prosecutions to circumvent state law regarding trap and trace devices. "With the lone exception concerning interception by state officers for state prosecutions, the federal statute does not defer to the states," *United States v. Butz*, 982 F2d 1378, 1381-82 (9th Cir. 1992)(reading similar provision of 18 U.S.C. §2516(2), which regulates electronic surveillance by state officers, allowing a judge to approve an interception "in conformity with . . . this chapter and with applicable State statute," to require compliance with more restrictive state law). The federal statute should be deemed violated when state law enforcement elects to sidestep the requirements of more stringent state laws governing these devices simply by enlisting a federal prosecutor to make the application for an ongoing state investigation resulting in an ever-growing number of state prosecutions. That is precisely what appears to have occurred in the case at bar.

Section 3123(a) states that, after a complying application: "[T]he court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the attorney for the Government . . . has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." Section 3123(b)(1)(C) requires the order state its geographic limits when the order is obtained under 3122(a)(2), i.e., by application of a state law enforcement officer. In the case at bar, both the applications and orders state geographic limits, e.g., "specifically the Portland metropolitan and surrounding areas, Oregon, and . . . specifically the Clark and Skamania Counties, Washington."[24] There is no statutory requirement for geographic limitations unless the application is on behalf of a state law enforcement officer. While the

[24] See application and order for first trap and trace on American Agriculture.

statutory scheme does not directly address nor prohibit a federal prosecutor applying to a federal court on behalf of a state law enforcement officer conducting a state investigation, rather than the state law enforcement officer applying himself in state court as provided in §3122(b), the defense contends any such application is unlawful if prohibited by State law, *id.*[25] *Compare, In re Application For An Order Authorizing The Installation and Use of a Pen Register and Trap and Trace Device*, 846 F. Supp. 1555, 1556 (M.D. Fla. 1994)(federal prosecutor certifying that "the Federal Bureau of Investigation, United States Customs Service, *** County Sheriff's Office and ***Police Department are conducting a criminal investigation of").

Section 3124 requires that providers of telephone services and other persons, if the court so orders, must assist with the installation of a pen register or trap and trace. Section 3124(b) mandates that the service provider furnish the results of the trap and trace "to the officer of a law enforcement agency, designated in the court order." The orders in the case at bar designate the DEA as that agency. Section 3124(e) provides to any cooperating person a complete defense against either civil or criminal liability, if the person relies in good faith on a court order authorizing the pen register or trap and trace.

Addressing this statutory scheme, the Court in *In re Application For An Order Authorizing The Installation and Use of a Pen Register and Trap and Trace Device*, 846 F. Supp. 1555, 1559 (M.D. Fla. 1994) observed:

> A review of these provisions demonstrates that Congress, absent Fourth Amendment concerns, intended to require an identified and presumably responsible official to attest the facts supporting the pen register application. The salient purpose of requiring the application to the court for an order is to affix personal responsibility for the veracity of the application (i.e., to ensure that the attesting United States Attorney is readily identifiable and legally qualified) and to confirm that the United

[25] The defense wishes to make clear it has found no reported decisions where this issue of statutory construction has been raised. The defense is contending that what occurred in the case at bar violated the federal statutes, but makes no claim that the federal prosecutors either knowingly violated the law or acted in bad faith. Moreover, it is unlikely the prosecutors knew Shropshire was using data outside the geographic limits of the order, or disseminating the information to a multitude of other agencies for unrelated investigations. Rather, the defense claims that Shropshire and the other involved state agents, who were knowledgeable regarding the state law on trap and trace, sought this means to avoid compliance with state law and acted in bad faith.

> States Attorney has sworn that the required investigation is in progress. . . . As a form of deterrence and as a guarantee of compliance, the statute provides instead for a term of imprisonment and a fine as punishment for a violation. . . . [Thus] the statute's structure balances the need for accountability, the legitimate interest of law enforcement in advancing a criminal investigation, and the residual privacy interest of the public. (Emphasis supplied).

The statutory scheme also includes reporting requirements by the Attorney General to Congress annually for all pen registers and trap and trace devices "applied for by law enforcement agencies of the Department of Justice." See 18 U.S.C. §3126. Among other things the report must include "the identity, including district, of the applying investigative or law enforcement agency making the application," §3126(5). This provision suggests that Congress did not contemplate federal prosecutors using the statutes to seek trap and trace orders for state law enforcement conducting state investigations.

The federal statutory scheme requires a designated law enforcement agency which is conducting an ongoing investigation into the suspected criminal activities of targeted individuals, and specifies that the trap and trace data goes to that agency. In the case at bar, the DEA was the designated law enforcement agency and the targeted individuals were two different business owners. In reality, the investigations of American Agriculture and the spin-off investigation of Light Manufacturing were local law enforcement investigations by the City of Portland's Marijuana Task Force, spearheaded by Portland Police officer Nathan Shropshire; the trap and trace data went directly to Shropshire and not the DEA; and the investigations being conducted by Shropshire and company targeted the customers of these businesses, contrary to the sworn purpose of targeting the owners of those businesses.

Nothing in the federal scheme authorizes the distribution and use of a trap and trace data outside the designated agency and outside the geographic limits of the orders for investigation and prosecution of individuals unrelated to the agency's "ongoing investigation". In the case at bar, Shropshire passed the data off to other local and state law enforcement agencies, so that phone numbers outside the geographic limits of the federal orders could be used in those jurisdictions; and that trap and trace data was used by local and state law enforcement agencies

statewide for state prosecutions unrelated to the supposed investigation of the targets of the trap and trace orders.

Furthermore, once that "ongoing investigation" has ended, as it did in the case of American Agriculture more than a year before the trap and trace information was given to Roshak, the federal statute does not authorize the wholesale distribution of that information to local law enforcement agencies throughout the state for use in unrelated state prosecutions. The instant case stemmed from one such belated dissemination of the trap and trace data—unrelated to the purpose for which the data's acquisition was authorized—to a local investigator, OSP Roshak, who acquired a state search warrant leading to a state prosecution of Mr. Wallace in the Circuit Court for Deschutes County, Oregon.

The defense contends that such use of the trap and trace devices, as occurred in the case at bar, without court authorization, in violation of the federal statutes and Oregon law, violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. *Cf., United States v. Russell*, 411 U.S. 423, 431-32 (1973)("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

C. The trap and trace information must be redacted from Roshak's affidavit

Neither the Ninth Circuit nor the Supreme Court have ruled on whether information obtained in violation of the federal statutes governing pen registers and trap and trace devices must be redacted from a search warrant affidavit. In *Thompson, supra*, the Eleventh Circuit held that pen register evidence obtained in technical violation of the statute, where one prosecutor had signed the application on behalf of the prosecutor making the application, would not support exclusion of the pen register evidence. The Court reasoned there was no constitutional violation asserted by the defendant based on this violation of the act, and the pen register statutes did not provide the remedy of suppression for a violation. *Thompson* is not binding on this Court, in addition to being factually distinguishable given the nature of the violations in the case at bar.

In *Michaelian, supra*, the Ninth Circuit affirmed the district court's refusal to fashion a dismissal or suppression remedy for IRS' alleged violation of its statutory confidentiality requirement by disclosing the accused's tax return to the Department of Justice several months before a grand jury investigation of accused was authorized. The Ninth Circuit observed that Congress specifically provided criminal penalties for unauthorized disclosure of tax return information in violation of the statute at issue, and noted its previously demonstrated reluctance to imply a judicial remedy for violations of that statute, given Congress' explicit provision of a remedy. 803 F.2d at 1049. The Court suggested, however, that such a remedy might be available in cases involving "bad faith" and "flagrant government overreaching not present in this case. *Id*.

Michaelian is not controlling here because it specifically involved violation of tax law statutes, not the federal trap and trace statutes. The trap and trace statutes are more akin to Rule 41 of the Federal Rules of Criminal Procedure, violation of which requires exclusion under *United States v. Gantt*, 194 F3d 987 (9th Cir. 1999)(See detailed discussion in Defendant Dickens' Response To Government's Amended Reply, filed in this cause and incorporated by reference herein). Furthermore, the Supreme Court in *Franks, supra*, specifically rejected the Government's claim that an exclusionary rule for official misconduct in placing intentional or deliberately reckless falsehoods in search warrant affidavits would "unnecessarily overlap with existing penalties against perjury, including criminal prosecutions," 438 U.S. at 166, observing:

> Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered. 438 U.S. at 169 (citation omitted).

It is equally unlikely to expect the U.S. Attorney's office to prosecute its staff[26] or Shropshire & Company for violations of the federal trap and trace statutes, and the orders obtained upon their applications, particularly given the multitude of criminal prosecutions and the millions of dollars of property forfeited as a result of the information gained by those statutory violations. If there is to be any remedy for these grievances, the remedy must come from the judiciary. *See, United States v. Simpson*, 927 F2d. 1088, 1090 (9th Cir. 1991)(court may exercise its supervisory power to implement a remedy for the violation of a recognized statutory or constitutional right, or to deter future illegal conduct); *see also*, *United States v. Lavin*, 604 F.Supp. 350, 356 (D. PA. 1985)(holding that violation of IRS statute regarding restrictions on disclosure of tax information, conceded by the government, required court to set aside those portions of the affidavit that rely on the unauthorized IRS information).

RESPECTFULLY SUBMITTED THIS 31st day of October, 2003.

TERRI WOOD OSB 88332
Attorney for Defendant Wade Arthur Wallace

[26] See Note 25, *supra*. The defense is not suggesting, given the information currently known, that the federal prosecutors who applied for the orders at issue knowingly violated the law or should be considered for prosecution. *Cf., Thompson,supra.* 936 F2d 1249 (assuming, without deciding, that practice of having a prosecutor sign the application on behalf of the prosecutor who made the application violated the statute).