**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.** **Case No. 6:15-Cr-176-Orl-37KRS**

**JOSHUA ADAM TATRO,**

**Defendant.**
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**DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OUTSIDE SCOPE OF PROBABLE CAUSE AND REQUEST FOR AN EVIDENTIARY HEARING**

Defendant Joshua Adam Tatro, by and through undersigned counsel, hereby moves this Honorable Court pursuant to Fed. R. Crim. P. 12(b)(3)(C) to suppress all evidence obtained through a violation of Mr. Tatro's rights guaranteed under the Fourth Amendment, and requests a hearing on the matter. Specifically, the initial search warrant in this case only authorized the search and seizure of any computers or computer-related equipment and not cell phones.

In support, Mr. Tatro states the following:

**BACKGROUND**

According to discovery received from the government, this case began when the National Center for Missing and Exploited Children ("NCMEC") received a complaint by Google regarding 14 images of apparent child pornography uploaded to Google's service in late January 2015. This information was then forwarded to the Brevard

County Sheriff's Office, which verified some images as minors engaging in sexually explicit conduct. A subpoena was then sent to Bright House Networks for subscriber information on the IP address associated with the image uploads. On March 4, 2015, law enforcement received subscriber information for an address ultimately determined to be Mr. Tatro's residence.

On March 17, 2015, Brevard County Sheriff's Officer Michael Spadafora applied for a search warrant ("Initial Search Warrant") on the residence. In his search warrant affidavit ("Initial Search Warrant Affidavit"), Officer Spadafora sought to search for and seize child pornography images he had reviewed from NCMEC, along with "computers" and "computer items." This included computer hardware, software, passwords, and instructions. The Initial search Warrant Affidavit additionally sought to search and seize all "computer storage media" including but not limited to "floppy disks, hard drives, tapes, DVD disks, CD-ROM disks or other magnetic, optical or mechanical storage which can be accessed by computers to store or retrieve data or images of child pornography."[1] There was no mention of any phones anywhere in the Initial Search Warrant Affidavit. The Initial Search Warrant Affidavit asserted the items sought to be searched and seized violated Sections 827.071(3)[2] and 847.0135(2)[3] of the Florida

[1] Initial Search Warrant Affidavit at 4; 6-7.

[2] A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

statutes.[4]

The Initial Search Warrant was issued the same day by Brevard County Court Judge John C. Murphy. The Initial Search Warrant authorized the seizure and search of the child pornography images mentioned in the Initial Search Warrant Affidavit. In addition the Initial Search Warrant authorized the seizure and search of all the computer and computer-related items mentioned in the Initial Search Warrant Affidavit. Likewise, there was no mention of any phones at all.[5] Judge Murphy also found probable cause the items contained evidence of Florida law violations, specifically Sections

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Fla. Stat. § 827.071(3).

[3] Computer pornography.--A person who:

> (a) Knowingly compiles, enters into, or transmits by use of computer;
> (b) Makes, prints, publishes, or reproduces by other computerized means;
> (c) Knowingly causes or allows to be entered into or transmitted by use of computer; or
> (d) Buys, sells, receives, exchanges, or disseminates,
> any notice, statement, or advertisement of any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

Fla. Stat. § 847.0135(2).

[4] Initial Search Warrant Affidavit at 7.

[5] Initial Search Warrant at 2-4.

827.071(3)[6] and 827.071(5)[7], Florida statutes.

On March 17, 2015, Officer Michael Spadafora and Brevard County Sheriff's Officer Troy Deavers interviewed Mr. Tatro at his residence prior to executing a search of the home. During the interview, which was recorded on audio, Mr. Tatro advised the officerss that he received a new cell phone "about a month or two ago" (February 2015) but there was no child pornography on it.[8] Moreover, Officer Spadafora expressed doubt that any child pornography was downloaded onto a cell phone, stating that cell phones have their own internet connection apart from the house connection.[9,10] Mr. Tatro,

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[6] *See* note 2, *supra*.

[7]
> (a) It is unlawful for any person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The possession, control, or intentional viewing of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense. If such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation includes sexual conduct by more than one child, then each such child in each such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that is knowingly possessed, controlled, or intentionally viewed is a separate offense. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
> (b) This subsection does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.
>
> Fla. Stat. § 827.071(5).

[8] Govt. Audio Recording titled"TATRO1.wma," starting at the 22 minutes, 47 seconds time marker.

[9] *Id*. starting at the 23 minutes, 59 seconds time marker.

[10] The I.P. address involved in uploading the alleged child pornography images to Google

however, admitted to having child pornography on his old cell phone.[11] Mr. Tatro's new cellular phone was found on his person after this initial interview.

Pursuant to the Initial Search Warrant, two of Mr. Tatro's cellular phones were searched and evidence supporting the charges in the Indictment (Doc. 1) was discovered.

**MEMORANDUM OF LAW**

The Fourth Amendment[12] to the United States Constitution prohibits the issuance of any warrant except based on probable cause. "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons to be seized.'" *United States v. Ofshe*, 817 F.2d 1508, 1514 (11th Cir. 1987). In other words,

> [t]he "manifest purpose" of the "particularity requirement of the Fourth Amendment" is "to prevent general searches." "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."

*United States v. Ellis*, 971 F.2d 701, 703 (11th Cir. 1992) (citations omitted). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant

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resolved to a home address.

[11] *Id*. at the 24 minutes, 34 seconds time marker.

[12] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927).

However, "[i]t is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit." *United States v. Wuagneux*, 683 F.2d 13 1343, 1348 (11th Cir. 1982).

The Initial Search Warrant failed to specify the seizure and search of any type of phone.[13] Rather, the Initial Search Warrant only specified the search and seizure of certain child pornography images and "computers" and related material. Officer Spadafora, in his Initial Search Warrant Affidavit, did not request a search or seizure of any type of phone nor did he allege probable cause relating to any phones. In fact, Officer Spadafora expressed doubt that Mr. Tatro could have used a phone to obtain child pornography, stating that cell phones have their own internet connection apart from the house connection. The I.P. address relating to the Google images uploads was resolved to the home internet connection. This statement is significant in that it puts into context Officer Spadafora's meaning of "computer" in his Initial Search Warrant Affidavit: that is, a "computer" using the I.P. address to upload the images to Google did not include a

[13] In *United States v. Mathis*, 767 F.3d 1264, 1283 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1448 (2015), the Eleventh Circuit held that "a defendant's use of a cell phone to call and send text messages constitutes the use of a computer, as that term is defined in 18 U.S.C. § 1030(e)(1), and warrants imposition of an enhancement under U.S.S.G. § 2G2.1(b)(6)." That case did not deal with the particularity requirement under the Fourth Amendment.

phone that accessed the internet differently.

In addition, the Initial Search Warrant provided too much discretion for law enforcement to determine for itself what could be searched and seized. It was not surprising, then, that the officers seized and searched the entirety of Mr. Tatro's cell phones, even though Officer Spadafora doubted a cell phone was used to download child pornography online. Unlike a traditional "computer," a cell phone is generally carried on a person, as it was in this case, and is likely to contain much more intimate data than any "computer." Indeed, in light of the Supreme Court's discussions about cell phone searches, the particularity requirement of the Fourth Amendment becomes even more crucial. *See Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (noting "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."). If the Initial Search Warrant was meant to cover cell phones, or any type of phone, it should have said so. It did not. As a consequence, law enforcement exceeded the scope of the Initial Search Warrant in this case.

## CONCLUSION

In light of the foregoing, Mr. Tatro, through undersigned counsel, respectfully requests this Honorable Court suppress the cell phone evidence obtained through a violation of Mr. Tatro's rights guaranteed under the Fourth Amendment and requests an evidentiary hearing on this matter.

The Government opposes this motion. Additionally, the Government objects to this motion on the ground that it is untimely.

I hereby certify that the undersigned electronically filed the foregoing Motion to Suppress Evidence Outside Scope of Probable Cause and Request for an Evidentiary Hearing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to Andrew Searle, Assistant United States Attorney, this the 14th day of April 2016.

Respectfully submitted,

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