STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Court File Nos.
62-CR-08-10515, CA 2073776
62-CR-08-10338, CA 2073782
62-CR-08-10335, CA 2072783
62-CR-08-10342, CA 2073787
62-CR-08-10345, CA 2073778
62-CR-08-10365, CA 2073785
62-CR-08-10336, CA 2073786
62-CR-08-10370, CA 2073788

State of Minnesota,

Plaintiff,

v.

Monica Rachel Bicking,
Robert Joseph Czernik,
Garrett Scott Fitzgerald,
Luce Guillen-Givins,
Erik Charles Oseland,
Nathanael David Secor,
Max Jacob Specktor,
Erin Trimmer,

Defendants.

STATE'S RESPONSE TO DEFENDANTS' JOINT REQUEST FOR A FRANKS HEARING

TO: The Honorable Theresa Warner, 15 West Kellogg Boulevard, Saint Paul, MN 55102; Defendants and Defendants' counsel Bruce Nestor, 3547 Cedar Avenue South, Minneapolis, MN 55407; Travis Snider, 1005 W. Franklin Avenue, #3, Minneapolis, MN 55405; John Bachman, P.O. Box 477, Eau Claire, WI 54702; Jordan Kushner, 431 S. 7th Street, #2446, Minneapolis, MN 55415; Ted Dooley, 1595 Selby Avenue, St. Paul, MN 55104; Robert Kolstad, 1005 W. Franklin Avenue, #3, Minneapolis, MN 55405; Larry Leventhal, 319 Ramsey Street, Saint Paul, MN 55102; Barbara Ann Nimis, 350 River Road, P.O. Box 50812, Mendota, MN 55150:

FACTS

Four search warrants were obtained relying on essentially the same affidavits. The warrants at issue were for the following places and people:

2301 23rd Avenue, Minneapolis/Robert Czernik
3500 Harriet Avenue/Max Specktor
627 Smith Avenue/Convergence Center
3240 - 17th Avenue/Garrett Fitzgerald, Monica Bicking, Eryn Trimmer

The above-named Defendants have jointly filed one motion requesting a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). The State's position is as follows:

1. Defendants are not entitled to a Franks hearing because they have failed to show the affidavits contain material misrepresentations or omissions;

2. Defendants are not entitled to a Franks hearing because even if the statements Defendants take issue with are false, the statements are minor and unimportant to the overall probable cause found in the warrants;

3. If this Court grants Defendants' request for a Franks hearing, the first issue this Court must address is standing. Specifically, which Defendants have a reasonable expectation of privacy in the locations searched?

I. THIS COURT SHOULD DENY DEFENDANTS' REQUEST FOR A FRANKS HEARING BECAUSE THEY HAVE FAILED TO MAKE A SUBSTANTIAL PRELIMINARY SHOWING THAT THE SUPPORTIONG AFFIDAVITS CONTAIN MATERIAL MISREPRESENTATIONS OR OMISSIONS.

Franks v. Delaware, 438 U.S. 154 (1978)[1] sets forth the procedure to be followed when a defendant wishes to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. The standard is clear: No evidentiary hearing is required unless "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant

[1] See State v. Moore, 438 N.W.2d 101, 105 (Minn. 1989); State v. Smith, 448 N.W.2d 550 (Minn. App. 1989).

affidavit . . ..” ” Id. at 154-155. To make this preliminary showing, Defendants' attack must be more than conclusionary and must be supported by more than a mere desire to cross-examine:

> [The] allegation[s] of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false, and it must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable Statements of witnesses, or a satisfactory explanation of their absence.

Id. Also, “Innocent or negligent misrepresentations will not invalidate a search warrant.”[2] In other words, even when the search warrant contains a material misrepresentation, there are no grounds for invalidating the warrant if the misrepresentation is negligent rather than intentional.[3]

If a defendant establishes a preliminary showing, the next step is to look at the affidavit as a whole, without the part that is false, and decide if there is probable cause without this information. If there is still probable cause, no Franks hearing is allowed and the question becomes moot. Moore, 438 N.W.2d at 105. If, and only if, the court deems the offer of proof to be sufficient, and probable cause does not exist absent the materially misrepresented information, does a Franks hearing take place. It is not enough to show that there are misrepresentations or omissions in the warrant affidavit. A defendant must show “by a preponderance of the evidence” that “the misstatement of fact is material to the determination of probable cause.”[4] If probable cause is found in the remainder of the affidavit, the warrant is still valid and no hearing is granted. State v. Hunnuksela, 452 N.W.2d 668 (Minn. 1990).

Defendants allege numerous “misrepresentations” and false statements. However, most of the alleged errors are omissions rather than misrepresentations.

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2 Citing Moore, 438 N.W.2d at 105.
3 Id.
4 Franks; State v. Causey, 257 N.W.2d 288 (Minn. 1977); State v. Doyle, 336 N.W.2d 247 (Minn. 1983) (emphasis added).

Defendants first claim of "Omissions, Affirmative Falsehoods and Exaggerations" beginning on page eight of their brief is, itself, an exaggeration or affirmative falsehood. Defendants allege: "The officers . . . failed to inform the judges who issued the search warrants that CRI1 was a violent individual and that arrangements had been made for the dismissal of domestic assault charges against him just prior to his infiltration of the RNCWC." In support of this assertion, Defendants attach a court "Register of Actions" which records that Christopher Dugger (CRI1) was charged with Domestic Assault on April 18, 2007. This court record clearly states that these charges were dismissed. It is quite a leap to suggest, based on this court sheet, that CRI1 is a violent individual; that affiants knew about the charges; that the affiants or other law enforcement investigators had any involvement in the case being dismissed; or that there is any case, rule, or statute that would require that a search warrant affidavit contain information about a case that had been dismissed.

Second, Defendants contest the affiants' portrayal of a picture on the cover of the RNCWC Welcoming Guide a publication created by the co-defendants to explain the RNC Welcoming Committee ("RNCWC") and recruit protestors for the convention.[5] The search warrant affidavit describes this document as

> . . . entitled HEARTCHECK by Jeffrey Luers and Rob Thaxton. On the cover of this document depicted is a Molotov Cocktail with the image of a person holding a cocked slingshot pointed in the direction of a police line.

Every word in the affidavit is true. Defendants allege wrongdoing because the "person" is not specifically identified as a little girl. This criticism, then, is that the affidavit is not specific enough -- an omission. The affidavit does not, in any way, misrepresent the information because it is in fact a person cocking the slingshot. Notably, Defendants do not dispute that the

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5 It is unclear whether Defendants include this in their challenge. It is mentioned in the "Facts" portion of their brief, but never referenced or argued in the "Argument" section.

Defendants' publication depicts a cocked slingshot pointed at a police line, which is the real relevance of this passage in the affidavit. If anything, a child engaging in violent dissidence is more disturbing than an adult.

Third, Defendants suggest that a video created by the RNCWC should have been specifically labeled as a spoof, a matter of opinion. The search warrant affidavits state:

> . . . video depicts several persons dressed in "black bloc" attire with their faces covered to disguise their identity. It should be noted that "black bloc" is not a particular group, but a tactic that typically dresses in black with faces covered and have caused significant property damage and carried out acts of violence towards law enforcement in the past. During one scene, an individual . . . is seen throwing a Molotov cocktail. In another scene, the same Feldman (still dress in black bloc attire) hands a bolt cutter to another individual similarly dressed in black bloc attire. Also, Feldman also rolls a bowling ball labeled "RABL" in front of a military recruiting station. It should be noted that RABL is an acronym for an anarchist group known as the Revolutionary Anarchist Bowling League. The RABL was responsible for vandalizing military recruiting stations by throwing bowling balls through the windows. Finally, the video depicts an individual throwing rocks at persons dressed as riot police. The video ends with text that States "We're getting ready . . . What are you doing? . . . RNC 2008, St. Paul . . . pReNC Aug. 31 - Sept. 3, 2007 . . . Learn more at: RNCWelcomingCommittee.org . . . starring Robyn B . . . Made possible by the RNC Welcoming Committee." CRI2 reviewed this video and identified the following individuals: Garrett Fitzgerald, Scott Demuth, and Carrie Feldman. Additionally, information was received from CRI2 that Gus Ganley produced and edited the video.

Again, every word in the affidavit is true. Of the entire passage, the only criticism the defense has is that the video was not labeled as a "spoof" by the affiants, and that the affidavit omitted that the Molotov cocktail landed in a grill. An affiant is required to present facts, not opinions or interpretations of what the evidence may or may not mean. Even if the affiants believed it to be a spoof, which they did not, a search warrant affidavit calls for facts and evidence, not opinion. The omission of, or the significance of, where the Molotov cocktail lands is minor and unimportant, in light of all the other facts regarding the video that Defendants apparently concede are accurate:

- that this video was the product of the RNCWC;
- that the actors were in black bloc;
- that black bloc represents the uniform of those engaged in tactics to cause significant property damage and carry out acts of violence against law enforcement;
- that this video promotes RABL and that RABL was responsible for vandalizing military recruiting stations by throwing bowling balls through the window; and
- that this video shows people throwing rocks at the police.

Fourth, Defendants' motion claims that the presence of bricks at Food Not Bombs was misrepresented because the signing judge was not told that affiants knew the bricks were to build a BBQ pit. The affidavit states:

> [y]our affiants have observed, along with other investigators and UC1, a stack of bricks in the backyard of the abovementioned address. It should be noted there appears to be no construction projects at the residence.

Again, every word is true. The defense complains that a statement made by Nathanael Secor at a meeting on April 23, 2008, should have been included in the affidavit ("Nathanael said he has about 3000 bricks at his residence, and he is thinking of building a BBQ pit."). Nathanael Secor still had the bricks in his backyard on August 29, 2008 when the affiants wrote their affidavits. He had not built a BBQ pit. Nor was such a pit under construction. It is hardly relevant, much less a "material omission," that four months prior Nathanael Secor articulated that he considered building a BBQ pit.

Fifth, Defendants takes offense to the affidavit's mention of Eryn Trimmer's visit to an ironworks business and then to Home Depot to buy paint, a deadbolt, and a deadbolt tool because

the affidavit did not mention that the ironworks business does "ornamental iron fabrication" and that Eryn Trimmer had just moved into his residence. On this issue, the affidavit states:

> On 8/22/08, Investigators from RCSO followed Trimmer to Krech Ironworks, 6163 Cahill Avenue, Inver Grove Heights, MN. Investigators observed Trimmer carry out a box. Trimmer was then observed at Home Depot where he purchased a gallon of paint, deadbolt and key hole saw.

Again, every word is true. The defense is suggesting that the affiants should have speculated about what Eryn Trimmer bought the materials for. The affidavit draws absolutely no conclusion about the evidence. The affidavit does not say he was buying bomb materials or materials to build violent weapons. It is unclear why Eryn Trimmer was purchasing these materials. The affiants laid out the facts for the court's consideration. It is not an omission not to tell the court that an ironworks business does ornamental iron fabrication. The affidavit does include that Defendant Trimmer lives at 2340 17th Avenue along with Defendant Monica Bicking. The signing judge was given all of the information and had the option to conclude that Eryn Trimmer was buying the materials for the benefit of the RNCWC or for home repair.

Sixth, Defendants claim that the search warrant affidavits misrepresent the RNCWC's intentions regarding incendiary devices, claiming "[r]ecklessly overlooked by the officers is that CRI2 was present at and participated in a meeting on 17 August 2008 at Powderhorn Park where the use of any such devices was firmly rejected." Defendants do not present any evidence or reference any report to support their claim that the RNCWC "firmly rejected" the use of incendiary devices. The State is unaware that such evidence exists. The State is aware of a report where two of the eight charged Defendants decided not to have Molotov cocktails at one point in time. But, there was never a consensus by the RNCWC or the eight Defendants. To suggest that the RNCWC as a group, or even all eight Defendants, rejected the use of Molotov cocktails is false.

Seventh, Defendants attack the affidavits' inclusion of illegal squatting taking place at the Lilydale Tennis Club, a closed business and empty building in Mendota Heights. Their assertion is that the affidavit fails to say that no one squatting at the property was also living or staying at the addresses of the search warrants. The affidavit contains accurate and true statements. The affidavit states:

> On 8/27/2008, the Mendota Heights Police Department responded to Lilydale Tennis Club due to evidence of trespassing. The Lilydale Tennis Club is currently abandoned. Officers located the following items:
>
> - PVC piping (2" diameter and 8")
> - (3) five gallon buckets of paint
> - Maps of downtown St. Paul
> - RNCWC pamphlets
> - Chlorine
> - Bleach
> - Boxes of screws
> - Black anarchist flag
> - Carpet with "NO RNC" painted on it
>
> According to information from CRI2, the Lilydale Tennis Club was used by out-of-town associates of the RNCWC, who had come to assist in disrupting the RNC. CRI2 stated 'Tom LNU from Cleveland' was the individual who opened the building and was making it available to out of state anarchists. CRI2 stated Erik Oseland spent the night on 8/14/08. This CRI had been to this location on several occasions.
>
> The RNCWC has discussed providing a facilities target list for illegal direct actions. The RNCWC stated they would facilitate blocking bridges and freeway ramps and encouraged attendees to commit direct actions. The RNCWC suggested individuals prepare for the RNC by committing direct actions prior to the event.

The affidavit as a whole connects the eight defendants to the RNCWC. The affidavit then connects the RNCWC to the Lilydale Tennis Club. It is of no consequence that no one named as illegally squatting at the abandoned property lived at any of the addresses subject to the search warrants.

Eighth, Defendants contend that a misrepresentation in the affidavits took place because it includes the fact that one undercover informant saw glass bottles, empty and filled with liquid, at 2301 23rd Avenue in Minneapolis. The affidavit does not indicate the date on which this occurred. Defendants correctly recite the law, which requires that probable cause exist at the time of the search.[6] Even if this portion of the affidavit is removed, it still contains more than adequate probable cause to support the search warrant.

Ninth, Defendants challenge the affidavit's notation of a firearm present at 2301 23rd Avenue. The affidavit states that "[i]nformation was received from CRI2 who observed a shotgun standing up in the corner of the house (no further information provided on location or functionability)." Again, each word in the affidavit is true. The information comes from a May 6, 2008 FBI report, providing that:

> [t]he source noted an older, possibly non-functioning shotgun standing up in corner at the residence. The source surmised it was non-functioning based on the type of the people involved in the Welcoming Committee, but is uncertain if it functions or not.

The affidavit contains exactly the information it should, a factual statement that operability of the firearm was unknown. The informant did not know whether the gun worked. She had drawn a conclusion, an opinion, that the gun did not function. But the fact of the matter is that affiants did not know whether the gun was operational or not, exactly as the affidavit states.

In summary, Defendants have not presented clear and convincing evidence that the affidavits contain false, material statements or omissions. The items cited are neither

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6 This technicality is unfortunate, because the bottles were seen just days before the warrants were drafted, on August 18, 2008. See Supplemental Report of Marilyn Hedstrom 08.18.08. The omission was obviously not intentional, because it was to the benefit of the affiants to include the date.

misrepresentations nor omissions. Thus, they have not met their initial burden and their request for a Franks hearing should be denied.

II. DEFENDANTS ARE NOT ENTITLED TO A HEARING BECAUSE EVEN IF THE STATEMENTS DEFENDANTS TAKE ISSUE WITH WERE FALSE, THE STATEMENTS ARE MINOR AND UNIMPORTANT TO THE OVERALL PROBABLE CAUSE FOUND IN THE WARRANTS.

Even if the warrants contain misrepresentations or omissions, which the State contends they do not, and even if any of them are deemed to be intentional, Defendants are not entitled to a Franks hearing. This Court, even before holding a hearing, must evaluate whether the search warrant affidavit, having been cleansed of misrepresented information or having had omissions supplied, still contains the probable cause necessary to support the issuance of the search warrants. If probable cause still exists, the court shall not hold a Franks hearing. The next step need not be taken, although the end result would remain the same.

To be adequate, a warrant must contain probable cause to believe that the items sought will be in the place to be searched; must describe the place to be searched and the items to be seized with particularity; and must be issued by a neutral and detached magistrate.[7] Probable cause exists when there is "a fair probability that contraband or evidence of a crime will be found in a particular place."[8] A reviewing court gives great deference to the issuing judge's determination of probable cause and looks only to see that the court had "a substantial basis for concluding that probable cause existed.[9] In this context, "substantial basis" means a fair probability, given the totality of the circumstances.[10]

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7 State v. Merrill, 274 N.W.2d 99 (Minn. 1978); Minn. Stat. § 626.08
8 State v. Wiley, 366 N.W.2d 265 (Minn. 1985), quoting Illinois v. Gates, 462 U.S. 213 (1983).
9 State v. McGrath, 706 N.W.2d 532 (Minn. App. 2005), citing State v. Rochefort, 631 N.W.2d 802 (Minn. 2001); see also State v. Harris, 589 N.W.2d 782, 787-88 (Minn. 1999).
10 Id.

The information included in search warrant affidavits may come from many different sources. One of the commonly accepted sources includes reliable hearsay from non-law enforcement individuals. Information from these individuals, also referred to as "informants," may establish, or assist in establishing, probable cause. The credibility of an informant may be determined in a number of ways. One of the ways, the method employed here, is the accuracy of information provided by the informant in the past.[11] "[H]aving a proven track record is one of the primary indicia of an informant's veracity."[12] It is enough that the affidavit merely states, for example, that the informant has "been used over several years successfully."[13]

Defendants' motion does not address the probable cause question. The Honorable Joanne Smith signed the Smith Avenue warrant on August 29, 2008. Judge Wernick, a Hennepin County Judge, signed the other three search warrants at issue also on August 29, 2008. Both judges, independent of each other, found that the affidavits established probable cause. This Court is required to give great deference to Judges Smith and Wernick's original determinations of probable cause. To invalidate the warrants based on probable cause, this Court would have to conclude that neither Judge Smith nor Judge Wernick had "a substantial basis for concluding that probable cause existed."[14]

The State's position is that the affidavits supporting the search warrants more than amply provided Judges Smith and Wernick with probable cause. The affidavits are over fourteen pages long, single-spaced, and packed with probable cause established during a careful and thorough investigation. The affidavit portion of the search warrants details activities surrounding the

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11 State v. Wiley, 366 N.W.2d 265 (Minn. 1985).
12 State v. Beissel, 2008 WL 763078, 3 (Minn. App. 2008), citing State v. Maldonado, 322 N.W.2d 349, 351 (Minn. 1982).
13 Wiley, 366 N.W.2d at 265.
14 State v. McGrath, 706 N.W.2d 532 (Minn. App. 2005), citing State v. Rochefort, 631 N.W.2d 802 (Minn. 2001); see also State v. Harris, 589 N.W.2d 782, 787-88 (Minn. 1999).

Defendants and the RNCWC. The chronology of the investigation reaches back to March 5, 2007, and details activities through August 28, 2008, just a day or two before the warrants were obtained and executed. The supporting affidavits are exceedingly detailed and voluminous. They thoroughly addresses a number of categories relevant to establishing probable cause, including "Overview of the RNCWC;" "Investigation into RNCWC;" "pReNC #1, August 31-September 1, 2007 & pReNC #2, May 3, 2008;" "RNCWC Action Camp, July 31, 2008-August 3, 2008 Lake Geneva, MN," and "RNCWC Leadership." They contain entries dedicated solely to individual suspects Robert Joseph Czernik, Garrett Scott Fitzgerald, Max Jacob Specktor, Monica Rachel Bicking, and Eryn Trimmer.

The affidavits include the use of two confidential reliable informants. Their roles are described in the warrant affidavits as follows:

> "...a Confidential Reliable Informant (CRI1) [was] utilized and posed as [a] member of the RNCWC. CRI1 was utilized as a paid informant. It should be noted that this CRI1 has worked with other investigators from your affiant's department in the past and has an excellent track record regarding corroborated information, resulting in various successful prosecutions. CRI1 has also worked with numerous other law enforcement agencies and had an excellent track record as to the quality of the information provided. This investigation also had access to information provided by a Confidential Reliable Informant (CRI2) from another law enforcement agency. This agency has utilized this CRI on past investigations and has been able to corroborate much of the information that has been provided. This CRI was also posing as a member of the RNCWC."

The law lists six ways to establish the credibility of an informant. One of the factors declares that "an informant who has given reliable information in the past is likely reliable." State v. Ross. 676 N.W.2d 301, 304 (Minn. App. 2004). A proven track record is a strong indication of veracity. See State v. Maldonado, 322 N.W.2d 349, 351 (Minn. 1982). In drafting a search warrant, the credibility of an informant can often be shown by stating that the informant has provided information in the past, and that information has been reliable. Id. It is not necessary that the affiant include specifics regarding past veracity. State v. Ross,

676 N.W.2d 301 (Minn. App. 2004). It is also unnecessary for the affiant to have had direct contact with the informant. State v. Barnes, 618 N.W.2d 805 (Minn. App. 2000), rev. denied (Minn. Jan. 16, 2001).

These affidavits clearly identify the use of informant information. The two informants are referred to as "CRI1" and "CRI2." The credibility of CRI1 is established based on his past history. As the affidavit states,

> CRI1 has worked with other investigators from your affiant's department in the past and has an excellent track record regarding corroborated information, resulting in various successful prosecutions.

This establishes that (1) the informant has previously provided information: (2) the provided information has been tested against corroborated information, and resulted in the informant having an "excellent" track record; and (3) the past information has been so credible and accurate that it has withstood the scrutiny of litigation in prosecutions. This is not all. Additional reliability is created in the affidavit noting that "CRI1 has also worked with numerous other law enforcement agencies and had an excellent track record as to the quality of the information provided." This informant has not only worked with one law enforcement agency vouching for his credibility, but additional law enforcement agencies have also received information from this informant that has proven to be accurate and reliable. The credibility of CRI1 and the information he provided cannot be in question.

A second informant provided information in this investigation, referred to in the search warrant affidavits as "CRI2." The credibility of CRI2 is established by relying on one of the other factors: corroboration. "Reliability can be established by police corroboration." State v. Ross. CRI2 is reliable and credible because the affiants state that "[t]his agency has utilized this CRI2 on past investigations and has been able to corroborate much of the information that has been provided."

Defendants allege that CRI2 is not credible because the affiants did not have personal knowledge of CRI2. The law does not, however, require the affiant to have had direct contact with the informant.[15] Nor is it necessary that the affiant provide specifics as to the informant's past veracity.[16]

Although the information of the confidential reliable informants was reliable, that information was just the beginning. Law enforcement utilized regular surveillance of the Defendants. A member of the law enforcement community went undercover as an investigator to collect intelligence. Open source information – found from publicly available sources – was compiled showing that individuals, including the Defendants, intended to engage in criminal activity up to and during the Republican National Convention.

The compilation of information contained in the affidavits was organized into two categories establishing probable cause: evidence the property sought was used in a crime or was going to be used in a crime and evidence establishing a conspiracy by detailing the involvement of five individuals that were ultimately named Defendants. The warrant application also delineates the specific involvement of the Defendants named in the search warrants in the criminal activity afoot, and the property sought as evidence of the criminal activity. Judges Wernick and Smith had a substantial basis for finding that probable cause existed.

Defendants are not entitled to a Franks hearing because even if the statements Defendants take issue with are false, the statements are minor and unimportant to the overall probable cause found in the warrants. This Court could add all alleged "materially omitted statements", and delete all alleged "false statements" and there is still ample probable cause contained in the

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15 State v. Barnes, 618 N.W.2d 805 (Minn. App. 2000), rev. denied (Minn. Jan. 16, 2001).
16 State v. Ross, 676 N.W.2d 301 (Minn. App. 2004).

search warrant affidavits. For example, this Court could "cleanse" the affidavit by including the following statements:

a. "CRI1 was charged with Domestic Assault on April 18, 2007. The charges were dismissed on August 28, 2007."

b. Regarding the RNCWC Welcoming Guide: "The person holding a sling shot is a child."

c. Regarding the RNCWC video: "The Defendants and one police officer, Dave Korus, have the opinion that the video may be a 'spoof' because the Molotov cocktail lands in a grill."

d. Regarding the bricks at the Food Not Bombs house: "Nathan Secor had stated on April 23, 2008, he was thinking of building a BBQ pit. As of August 29, 2008, when the affiants wrote the affidavits, a BBQ pit was not under construction."

e. Regarding Eryn Trimmer's visit to an ironworks business then to Home Depot to buy paint, a deadbolt, and a deadbolt tool: "Krech Ironworks does ornamental iron fabrication. Eryn Trimmer had recently moved into his residence."

f. Regarding the request to search the four addresses for evidence of incendiary devices: "On August 17, 2008, Nathanael Secor stated, in the presence of Max Specktor, that he did not want to use Molotov cocktails."

g. Regarding the Lilydale Tennis Club: "No one squatting at the property was also living or staying at the addresses of the search warrants."

h. Regarding the firearm present at 2301 23rd Avenue: "The source surmised it was non-functioning based on the type of the people involved in the Welcoming Committee, but is uncertain if it functions or not."

Adding all of the statements or missing information raised by Defendants, does not affect whether there is probable cause for the search warrants. None of these statements negate or otherwise invalidate any of the information provided by the informants. These statements do not change any of the information detailed regarding the "Overview of the RNCWC;" "Investigation into RNCWC;" "pReNC #1, August 31-September 1, 2007 & pReNC #2, May 3, 2008;" "RNCWC Action Camp, July 31, 2008-August 3, 2008 Lake Geneva, MN," and "RNCWC Leadership." None of the statements at issue here change the fact that the affidavits establishes that Robert Joseph Czernik, Garrett Scott Fitzgerald, Max Jacob Specktor, Monica Rachel

Bicking, and Eryn Trimmer played leadership roles in the RNCWC. None of the statements at issue are therefore "material". Thus, no Franks hearing is required.

III. NOT ALL DEFENDANTS HAVE STANDING TO REQUEST A FRANKS HEARING.

The Constitutions of the United States and Minnesota both provide that people are to be secure from search of their person, home, and property: "[T]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . "[17] Search and seizure can be made, however, upon a showing of probable cause and particular description of the persons, places, or things to be searched.[18]

To challenge the propriety of law enforcement's search and seizure, an individual must first demonstrate that they have standing – or more appropriately stated: a reasonable expectation of privacy. Standing exists only when the individual has exhibited a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable.[19] The person challenging the search has the burden of proof.[20] Certainly then, not all places and things are protected under the state and federal constitutions. Overnight guests generally enjoy an expectation of privacy because "[s]taying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society."[21] Guests that are not staying overnight, however, are considered to be 'merely permitted on the premises' [and] are not entitled to Fourth Amendment protection."[22]

17 U.S.C.A. Const. Amend. IV; Minn. Const. Art. 1, §10.
18 U.S.C.A. Const. Amend. IV; Minn. Const. Art. 1, §10.
19 In re B.R.K., 658 N.W.2d 565, 571 (Minn. 2003).
20 State v. Bryan Dion Harris, unpublished, A08-1270, 2009 WL 2925527 (Minn. App. September 15, 2009), citing State v. Gail, 713 N.W.2d 851, 860 (Minn. 2006); State v. Jordan, 742 N.W.2d 149, 156 (Minn. 2007).
21 Minnesota v. Olson, 495 U.S. 91 (1990).
22 State v. Harris, Unpublished, A08-1270 (Minn. App. September 15, 2009), citing State v. Sletten, 664 N.W.2d 870, 876 (Minn. App. 2003).

Even in a home, one individual does not have an expectation of privacy in the apartment of another, if he was not a co-tenant.[23] It is also true that the expectation of privacy in a business or commercial premises is much lower than that in a home.

> Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."

Carter, citing New York v. Burger, 482 U.S. 691, 700 (1987).

There are also limited privacy expectations on certain property. Property that "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[24]

All eight Defendants signed one motion to contest the search of four addresses. The motion does not address standing. The first question for this Court, before addressing any joint motion, is to determine which Defendants have standing to object to which challenged searches. The State's position is:

1. Max Specktor has standing to contest the search warrant executed at his home at 3500 Harriet. However, even if the motion to suppress the evidence seized at 3500 Harriet is granted, the State does intend to present this evidence against the remaining seven Defendants who lack standing to challenge this search.
2. Monica Bicking, Garret Fitzgerald, and Eryn Trimmer have standing to contest the search of 3240 – 17th Avenue. However, even if the motion to suppress the evidence seized at 3240 – 17th Avenue is granted, the State does intend to use this

[23] United States v. Sacco, 436 F.2d 780 (2d Cir. 1971), cert. denied 404 U.S. 834, 92 S.Ct. 116, 30 L.Ed.2d 64; United States v. Shea, 436 F.2d 740 (9th Cir. 1970), appeal after remand 445 F.2d 856 (9th Cir. 1971); State v. Christenson, 371 N.W.2d 228 (Minn. Ct. App. 1985); A co-tenant or person that lives in the apartment does, however, have an expectation of privacy.
[24] Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

evidence against the remaining five Defendants who lack standing to challenge this search.

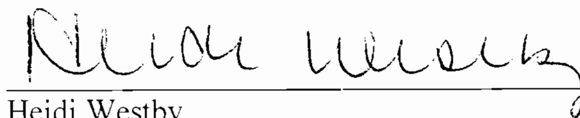
3. Rob Czernik and Nathanael Secor have standing to contest the search of 2301 – 23rd Street. However, even if the motion to suppress the evidence seized at 2301 – 23rd Street is granted, the State does intend to use this evidence against the remaining six Defendants who lack standing to challenge this search.

4. Luce Guillen-Givins and Erik Oseland do not have standing to contest the searches conducted at any of the above-identified addresses.

5. It is unlikely any of the eight Defendants will be able to meet their burden of proving they have standing to contest the search of the Convergent Center.

SUSAN GAERTNER
RAMSEY COUNTY ATTORNEY

Date: 4-23-10



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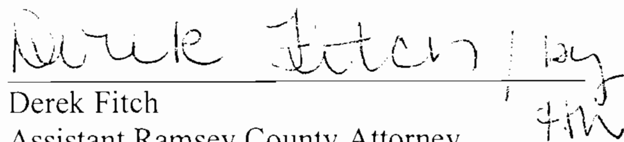

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