SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY CRIMINAL TERM: PART-95

----------x

THE PEOPLE OF THE STATE OF NEW YORK . Ind. No.: 04339/15

-against- . DECISION & ORDER

RODERICK COVLIN,
Defendant.

----------x

DANIEL P. CONVISER, J.:

New York County District Attorney Cyrus R. Vance, Jr. (Matthew Bogdanos and Anne Siegel, of counsel) for the People.

Gottlieb & Janey LLP (Robert C. Gottlieb and Derrelle Janey, of counsel) for the Defendant.

The Defendant is charged with two counts of Murder in the Second Degree. It is alleged he murdered his former wife, Shele Covlin, between December 30 and December 31, 2009 in her apartment. In a decision on June 12, 2016 (the "June 12 Decision"), this Court denied Defendant's motion to controvert 15 search warrants and suppress the physical evidence recovered from them. That decision was based on this Court's determination that the Defendant did not have standing to contest those warrants. The Court reserved decision on motions relevant to two of the search warrants (here denominated as Search Warrants 2 & 3), for which the parties agreed the Defendant had standing. The parties then presented additional arguments and briefing.

For the reasons outlined below, Defendant's motion to controvert and suppress the

property and data recovered in the execution of Search Warrant 2 (with respect to the seizure at 70 Montgomery Circle, New Rochelle, New York only) & Search Warrant 3 is granted. The Defendant's motion to revisit this Court's earlier ruling and suppress property and data recovered in the warrants this Court denominated in the June 12 Decision as Search Warrant 1 and Search Warrants 4-17 is denied. The Defendant's motion to controvert three additional search warrants and suppress property and data seized from them for which claims were not previously made (here denominated as Search Warrants 18-20) is also denied.

STATEMENT OF FACTS

The Affidavit Supporting Search Warrant 2

The affidavit supporting Search Warrant 2 sought permission to search two addresses: 70 Montgomery Circle, in New Rochelle, New York (the Defendant's home) and 23 Carriage Court in Scarsdale, New York (the home of the Defendant's parents). Only the 70 Montgomery Circle address is relevant to the discussion regarding Search Warrant 2 here.[1] The affidavit was sworn to by NYPD Detective Carl Roadarmel, approved by Assistant Manhattan District Attorney John P. Wolfstaetter and sworn before Justice Edward McLaughlin on May 28, 2010. The affidavit also sought permission to search Mr. Covlin, were he to be present at either location. The affidavit asserted there was reasonable cause to believe that evidence of two computer crimes "among others" would be found at the two addresses: Unauthorized Use of a Computer (Penal Law § 156.05) and Computer Trespass (Penal Law § 156.10). It then sought permission to search for and seize any and all kinds of electronic or paper records relevant to those crimes as

[1] References to "Search Warrant 2" in this decision are applicable only to the portion of the warrant directed to the 70 Montgomery Circle address, unless otherwise clearly indicated.

well as evidence of the ownership or use of the target premises.

The affidavit outlined a number of facts which, read together, appeared to implicate Mr. Covlin in the homicide of his former wife, Shele Covlin (for which he was later charged). It then outlined facts which provided reasonable cause to believe that Mr. Covlin likely accessed Shele Covlin's emails, after her death. The affidavit asserted that a search of electronic media at Mr. Covlin's home "may connect Roderick Covlin with unlawful access to Shele Covlin's personal accounts and/or computer devices".[2]

Search Warrant 2

Search Warrant 2 was signed by Justice McLaughlin on the same date as the affidavit was sworn. The warrant stated that "[p]roof by affidavit" had been made through Detective Roadarmel that certain property could be found at the Defendant's home at 70 Montgomery Circle. It then listed a broad range of what appeared to be any and every type of electronic communication, document or device which might be located in the home as well as evidence of the Defendant's ownership of the home including "identification bearing the name or photograph of any person, telephone books, address books, date books, calendars or personal papers". It also authorized the search of Mr. Covlin if he were found present at the location.

The provision of the warrant which purportedly limited its scope was the proviso that:

> [T]here is reasonable cause to believe that the above-described property constitutes evidence and tends to demonstrate that an offense was committed, that a particular person participated in the commission of such offense, and has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense".

---

[2] Affidavit for Search Warrant 2, ¶ 26.

The warrant directed a search for and seizure of the "above-described property" (that is, any kind of record which might be found in the house). The warrant also provided that it would be deemed executed when materials were seized and that any further analysis of those items could be conducted "at any time thereafter".

Copies of search warrant receipts provided by Investigator Mark Stewart indicate that the following items were seized pursuant to the search warrant: a Sony notebook computer, 2 HP printers, a Verizon router, a Motorola cell phone, a Sony personal computer, an HP computer with charger in a black bag, a Sanyo photo and video camera, an Iogear thumb-drive, a Lenovo laptop and power cord, an I-phone and a Verizon thumb-drive.

The Affidavit Supporting Search Warrant 3

The affidavit supporting Search Warrant 3 sought permission to search an Apple I-Phone which had been recovered from Roderick Covlin during the execution of a search warrant on June 2, 2010 (shortly after the issuance of Search Warrant 2). The affidavit was sworn to by Mark Stewart, an investigator for the New York County District Attorney's office, approved by Assistant Manhattan District Attorney Anne Siegel and sworn before Justice Bonnie Wittner on August 26, 2010. It provided information in support of the application which was similar to the representations made in support of Search Warrant 2. It asserted there was reasonable cause to believe evidence of the same two computer crimes as alleged with respect to Search Warrant 2 would be found. Similar to the affidavit for Search Warrant 2, it outlined facts implicating Mr. Covlin in his former wife's homicide and information providing reasonable cause to believe that Mr. Covlin had unlawfully accessed Shele Covlin's emails after her death.

Search Warrant 3

Search Warrant 3 was signed by Justice Wittner on the same date as the affidavit was sworn. The warrant stated that "[p]roof by affidavit" had been made through Investigator Mark Stewart that "certain property . . may be found" on the Defendant's I-Phone. It then listed that "certain property" as "all stored electronic information" "electronic security equipment and devices" and "evidence of ownership" of the phone. No other limitations on the property or data covered by the warrant were provided. The warrant authorized law enforcement to process the phone for forensic evidence and directed Apple to assist law enforcement in their search of the phone, including by bypassing the phone user's passcodes.

CONCLUSIONS OF LAW

The police may seize personal property pursuant to a valid search warrant if there is reasonable cause to believe that it "[h]as been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense . . ." or if the property "[c]onstitutes evidence or tends to demonstrate that an offense was committed . . ." CPL §§ 690.10 (3) & (4). "[T]he critical element, in reviewing the validity of a search warrant to determine whether it was supported by probable cause, was whether facts and circumstances made known to the issuing Magistrate at the time the warrant application was determined were sufficient to establish that nucleic ingredient of probable cause." *People v. Bilsky*, 95 NY2d 172 (2000); *People v. Rainey*, 14 NY2d 35 (1964).

A search warrant must describe with particularity the place to be searched with enough specificity to leave no discretion to the police in order to protect the right of privacy from arbitrary intrusion by law enforcement. *People v. Brown*, 96 NY2d 80 (2001). Courts reviewing search warrants "should accord the process proper deference and not defeat search warrants (or

discourage law enforcement officials from seeking them) by imposing overly technical requirements or interpreting them incompatibly with common sense". *People v. Cahill*, 2 NY3d 14, 41 (2003).

It has been held that the particularity rule has three requisites. First, it must establish the specific offense for which probable cause has been established. Second, it must describe the place to be searched. Finally, it must specify the "items to be seized and their relation to designated crimes". *United States v. Galpin*, 720 F3d 436, 445-446 (2d Cir 2013) (citations and quotation omitted).

Search Warrants 2 & 3 Were Not Sufficiently Particularized

It is first evident that the only plausible argument that the warrants here were sufficiently particularized is the contention that the warrants must be read with their affidavits when assessing particularity. There is no reasonable argument that the warrants themselves were sufficiently particularized.

Warrant 2, when read literally, simply authorized the search of Mr. Covlin's home for any kind of electronic or paper record, with no limitation at all. That is because the warrant first described the relevant property (any record of essentially anything which might be found), then said there was reasonable cause to believe that property would be evidence of an offense by someone and then authorized the police to enter the home and search for the "above-described property" that is, any record of any kind. When read literally then, the warrant was not even limited to evidence of undefined "offenses" of some kind by a "particular person" (i.e., anyone). The "offense" language in the warrant described its rationale. It did not limit the parameters of the search.

Assuming, however, that the "offense" by a "particular person" language in the warrant was construed as limiting its parameters, that limitation was not sufficiently particularized. An "offense" under the Penal Law includes any crime (felony or misdemeanor) as well as any "violation" or "traffic infraction".[3] And the "particular person" who may have committed such an undefined offense, under the warrant, was not limited to the Defendant or even someone connected to him (except for the fact that such evidence would have to come from the Defendant's home or digital device).

In *People v. Brown, supra,* the Court of Appeals held that a warrant authorizing the search for several identified items and "any other property the possession of which would be considered contraband" was overbroad. 96 NY2d at 84. Search Warrant 2 suffered from an even more significant infirmity. It did not list specific categories of data it sought and then expand that authority to anything else which was unlawful. It merely authorized, at best, a search for evidence that anyone had committed any offense. It is hard to imagine a more broadly worded directive. *See also, People v. Thompson,* 51 Misc3d 693, 704-706 (New York County Supreme Court [decision by this Court] 2016) (analyzing multiple New York "overbreadth" cases).

Search warrant 2 was also significantly broader than the warrant determined to be overbroad by the Second Circuit in its decision in *United States v. George,* 975 F2d 72 (2d Cir 1992). That warrant authorized a search for a number of discrete items of evidence in connection with an armed robbery along "any other evidence relating to the commission of a

[3] Penal Law § 10 (defining offenses, crimes, felonies, misdemeanors, violations and traffic infractions).

crime". The Court found this catch-all language insufficiently particularized, noting that it provided officers "virtually unfettered discretion to seize anything they saw". 975 F2d at 75. "Mere reference to 'evidence' of a violation of a broad criminal statute or general criminal activity provides no readily ascertainable guidelines for the executing officers as to what items to seize". *Id.*, at 76. *See also, Cassady v. Goering*, 567 F3d 628, 639-640 (10th Cir 2009) ("authorization to search for 'evidence of a crime,' that is to say, any crime, is so broad as to constitute a general warrant".) (citation omitted); *United States v. Stefonek*, 179 F3d 1030, 1032-1033 (7th Cir 1999) (warrant authorizing the seizure of "evidence of crime" insufficiently particularized).

The cell phone warrant here (# 3) authorized the search of a much smaller universe of information but was even less particularized than Search Warrant 2. As outlined *supra*, Search Warrant 3 simply authorized a search for "all stored electronic information" and "electronic security equipment and devices" on the phone. Obviously, Search Warrant 3 was insufficiently particularized. *See People v. Gabriel*, (Unreported Decision) Index # 2299-2017 (New York County Supreme Court, November 30, 2017 [Clott, J.]), p. 3. (finding warrant to search cell phone insufficiently particularized where it "allowed the police to search for evidence of any wrong doing at all and therefore did not limit the searching police officer's discretion".)

It is certainly correct, as the People argue, that New York's search warrant statute does not require that a warrant specify which crimes it is directed towards. Warrants should not be read in an inappropriately formal or hypertechnical manner. Obviously, had the warrants here, for example, authorized a search for a gun or heroin or a hammer, there would be no argument that it would have to specify the particular crime it was directed towards. The particularity

would arise from the description of the property to be searched for and seized. But the particularity in the affidavit here arose from its reference to specific crimes. It was the affidavit's reference to two specific computer crimes which particularized its scope. That particularity was absent from the warrant.

Particularity here also did not arise from the fact that the warrants were limited to a search for any possible kind of record or electronic media (under Search Warrant 2) or anything on the Defendant's cell phone (under Search Warrant 3). There were no allegations here that there was reasonable cause to believe that any record which might be found in the Defendant's home or anything which might be found on his cell phone would be inculpatory. The allegation was that evidence of two specific computer crimes would likely be found in such a search (among, presumably, a much larger volume of non-incriminatory material). The warrant contained no such limitation.

The Insufficiently Particularized Warrants Were Not Cured by the Affidavits

The People do not primarily argue that the provisions of the warrants themselves were sufficiently particularized. They rather argue that particularity deficiencies in a search warrant can be cured by referencing a sufficiently particularized supporting affidavit. The United States Supreme Court in *Groh v. Ramirez,* 540 US 551 (2004), however, explicitly rejected that argument in construing the Fourth Amendment.

In *Groh*, an ATF agent submitted a detailed affidavit in support of a warrant application outlining a range of weapons the government sought to search for at a ranch. The warrant itself, however, failed to include that particularized description. The targets of the warrant then brought a civil suit against the government, including a claim that the ATF had violated their

Fourth Amendment rights. The Supreme Court held that the warrant was "plainly invalid" because it provided no description of the items which were sought to be seized. It merely described the house where the search was to be conducted. The Court held that the deficiencies in the warrant could not be cured by the warrant application:

> The fact that the *application* adequately described the "things to be seized" does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. 540 US at 557. (emphasis in original).

The Court said its holding did not mean that a warrant could not be cured by referencing a supporting affidavit through "appropriate words of incorporation, and if the supporting document accompanies the warrant" (both of which, the Court held, had not occurred). *Id.,* at 558. It explained that one important reason a warrant (rather than only an application) had to be sufficiently particularized was that a magistrate might review an application and believe it was justified in part, a decision which would have to be reflected in the warrant rather than the government's affirmation. Particularity in a warrant was also necessary, the Court said, so a person subject to a search could be informed at the time the search was conducted of its parameters, through the document which authorized it.

The Court held that qualified immunity did not shield the petitioner from the consequence of his Fourth Amendment violation. "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid". 540 US at 563 (citations omitted). The Court affirmed the decision of the lower court which had denied the government's motion for summary judgment.

Multiple additional federal authorities both pre-dating and post-dating *Groh* have reached

the same conclusion. *See, e.g., United States v. Galpin, supra*; *United States v. Zemlyansky*, 945 F Supp 2d 438 (SDNY 2013). *see also, People v. Bennett*, 171 Misc2d 264 (Bronx County Supreme Court 1996 [Marcus, J.]). As the Second Circuit outlined in its decision in *United States v. George, supra*:

> A sufficiently specific affidavit will not itself cure an overbroad warrant. Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it. The recitation in the instant warrant that it is 'issued upon the basis of an application and affidavit of" Patrolman Brickell does not direct the executing officers to refer to the affidavit for guidance concerning the scope of the search and hence does not amount to incorporation by reference. (citations omitted). 975 F2d at 76.

That is the precise situation here.

There are also federal authorities which have reached a contrary conclusion. *See, e.g.*, *United States v. Bianco*, 998 F2d 1112 (2d Cir 1993); *United States v. Wuagneux*, 683 F2d 1343 (11th Cir 1982). These cases, however, pre-dated *Groh.*

The particularity requirement has special significance in digital data searches. As the Second Circuit explained:

> [A]dvances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain . . . Where a warrant authorizes the search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on where an officer may pry. . . Such limitations are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content. *United States v. Galpin, supra,* 720 F3d at 447.

The *Galpin* Court also outlined the special danger which arises when prosecutors make arguments (like one of the arguments made by the People here) that information not responsive to a warrant and indicative of a different crime can be validly seized where it has been found in "plain view" while searching a computer:

> Once the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant. There is, thus, a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant. This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches. *Id.*, at 447.

This Court is not aware of any New York appellate authority which has explicitly analyzed this issue. New York Courts have, however, historically included language in a number of decisions which appear to have countenanced the argument that an insufficiently particularized warrant can be cured by an affidavit. 42 years ago, in *People v. Nieves,* 36 NY2d 396, 401 (1975) the Court of Appeals said that "from the standpoint of common sense . . . the descriptions in the warrant *and its supporting affidavits* [must] be sufficiently definite to enable the searcher to identify the persons, places or things that the Magistrate has previously determined should be searched or seized." (citations omitted) (emphasis added).

Subsequent appellate cases have quoted that language. *See People v. Wallace,* 238 AD2d 807 (3rd Dept 1997), *appeal denied*, 90 NY2d 865; *People v. Cook,* 108 AD3d 1107 (4th Dept 2013), *lv denied,* 21 NY3d 1073; *People v. Carpenter,* 51 AD3d 1149 (3d Dept 2008), *lv denied*, 11 NY3d 786. The Court of Appeals decision in *Nieves*, however, came 29 years before *Groh.* As one New York trial court thus recently observed, "to the extent that *Nieves* permits the consideration of unincorporated supporting documents to cure an otherwise defective search

warrant, it has been abrogated by the Supreme Court's decision in *Groh*". *People v. English,* 52 Misc3d 318 (Bronx County Supreme Court 2016 [Barrett, J.]).

In *People v. Wallace, supra, People v. Telesco,* 207 AD2d 920 (2d Dept 1994) and *People v. Brooks,* 54 AD2d 333 (4th Dept 1976) courts explicitly held that "deficiencies in a warrant, overbroad on its face, may be cured by referring to supporting documents". (citations omitted). "[T]he critical facts and circumstances for the reviewing court are those which were made known to the issuing Magistrate at the time the warrant application was determined". *People v. Wallace, supra* (citations omitted). Each of those three cases preceded by many years, however, the Supreme Court's decision in *Groh*.

It is also easy to understand why New York Courts, at a time when search warrants were generally sought to search physical locations for tangible incriminatory objects, excused failures which bore a cursory resemblance to those here. In *People v. Wallace, People v. Telesco* and *People v. Brooks,* courts allowed warrants which contained ambiguities or errors in descriptions of multiple dwelling apartments to be searched (such as the failure to specify which of two apartments on a floor a warrant was directed towards) where the warrant's supporting documents clearly demonstrated that both the issuing magistrate and the police knew exactly what they were doing.

But there are two points which distinguish those cases from the warrants here. First, the warrants in those cases were apparently sufficiently particularized with respect to the contraband they sought to recover. But more importantly, warrants for large volumes of digital data present different particularity issues than warrants to search discrete pieces of property for specified contraband. That is because the opportunity for expansive interpretations and questionable

discretionary calls are much greater when the police are called upon to review hundreds of thousands of documents over months or years, rather than trusted to go on a particular day to one of two apartments they will have no problem distinguishing. The deficiencies in the warrants here, obviously, did not arise from a "mere technical mistake or typographical error". *See Groh v. Ramirez, supra,* 540 US at 558.

The People argue that language in the First Department's recent decision in the case of *In re 381 Search Warrants Directed to Facebook,* 132 AD3d 11 (1st Dept 2015), *affirmed,* 29 NY3d 231 (2017) supports the view that an insufficiently particularized warrant can be cured by a particularized affidavit. Thus the People assert:

> The controlling law in New York makes clear that the "warrant application" must specify that the property sought constitutes evidence of a specific offense. [citing *Facebook, supra,* 132 AD3d at 26-27.] "Warrant application" comprises the search warrant and its underlying and incorporated affidavits. Here, each "warrant application" list [SIC] the specific offenses, [citing the offenses listed in the warrant applications]. Where, then is the infirmity?[4]

It is obviously true, as the People say, that search warrant applications must make evidentiary showings and that the First Department in *Facebook* noted that. But it is clearly incorrect that "warrant applications" include both search warrants and their underlying affidavits. Prosecutors typically submit search warrant affidavits and search warrants to judges at the same time. But that does not mean that search warrants, as a matter of law, are encompassed within search warrant applications. Article 690 of the Criminal Procedure Law says the opposite. It provides that warrant applications and warrants are distinct operative documents with differing requisites and consequences. *See, e.g.,* CPL 690.35: "Search Warrants; *the application*"; CPL 690. 45:

---

[4] People's Response to Defendant's Suppression Motion, November 16, 2017, p. 3.

"Search *Warrants*; form and content. (emphasis added). Neither the *Facebook* case nor any other authority this Court is aware of have ever said otherwise.

Next the People argue that searches of digital devices, like computers and cell phones, necessarily require law enforcement to initially review a large volume of digital data to find data responsive to a warrant, since such data may not be found in a particular place on a computer, in a particular file or even necessarily within a particular date range. That is all true but it is not the issue here. Providing particularity in a search warrant does not lead to the conclusion that an entire device or a large volume of digital records should not be initially searched to find defined responsive material. The particularity requirement with respect to digital devices exists, in part, to define the materials that may be *seized* after an initial digital search. The initial search of a digital device or digital records will usually have to cast a much wider net than the eventual universe of responsive data which is ultimately validly seized. But that does not obviate the Fourth Amendment's particularity rule.

The People also argue that the affidavits here were sufficiently incorporated into the warrants because the warrants outlined that they were based on "proof by affidavit" and cited the applicable affiant. This boilerplate language, however, did not limit the scope of the warrants in any way, nor reference any limitation provided in the affidavits. They simply stated the obvious. Every search warrant (other than the rare search warrant sought by oral application) must be based on a written affidavit. Nor were the warrants here apparently accompanied by the affidavits when the warrants were executed, a fact the Supreme Court found significant in *Groh* and the Second Circuit explicitly found was a requisite to adequate incorporation in their decision in *United States v. George* (cited *supra*). It is notable that *Groh* not only rejected an

"affidavit can cure a defective warrant" rule: it found the doctrine so implausible that it rejected the government's claim that it was entitled to qualified immunity for relying on it.

The Policy Rationales for the *Groh* Rule

There are two basic arguments for why the particularity requirement should be satisfied by reference to an unincorporated affidavit. Both, in this Court's view, are unpersuasive. The first is that the significant costs incurred by suppression are not justified simply because particularity is found in two related documents read together, rather than one read alone. As the People frame this argument, controverting a warrant simply because it did not repeat or literally incorporate the particularity found in an accompanying affidavit, would be "redolent of a long-discarded formalism that valued form over substance at the cost of justice. That period, long dead, should not be resurrected".[5]

That argument fails, in this Court's view, for a number of reasons. First, as the Supreme Court said in *Groh*, as a matter of constitutional construction, "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents". Second, it is obviously easy for a prosecutor (or a judge) to draft a warrant to be as particular as an affidavit, either by repeating the affidavit's language or simply referencing and attaching it.

Taking such simple steps does not vindicate a mere formality because broad language in a warrant invites the police to seize anything they might find inculpatory (in this case, evidence of any "offense" or anything in a cell phone) and then litigate the legality of a seizure later (or, in most cases, never at all). "A failure [of a warrant] to describe the items to be seized with as

[5] People's response to Defendant's original omnibus motion, December 5, 2016, ¶ 23.

much particularity as the circumstances reasonably allow offends the Fourth Amendment because there is no assurance that the permitted invasion of a suspect's privacy and property are no more than absolutely necessary". *United States v. George, supra,* 975 F32d at 76 (citations omitted). Had the police in this case, for example, seized evidence from Mr. Covlin which had nothing to do with the allegations in the affidavit, such a seizure might ultimately be suppressed. But it would be hard to fault the police in the first instance for seizing evidence of any "offense" when the warrant told them to do that.

That is because an unincorporated warrant affidavit does not direct the police to do anything. A warrant affidavit is an evidentiary showing by one of the two eventual parties in a criminal case. It is not a mandate. Affidavits are not written by courts. Indeed, courts often have no input into their provisions. Courts read affidavits. Probable cause to search must be based on them. But the only function of a court with respect to an affidavit's terms is to notarize an affiant's signature. As the Supreme Court explained in *Groh*, this fact also means that, if a judge reads an affidavit and is convinced that only a portion of a requested search should be authorized, there is no way that conclusion can be reflected, except in the warrant itself. Thus, without warrant particularity, "there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit". 540 US at 560.

Finally, as the Supreme Court outlined in *Groh*, the warrant serves the essential function of informing a warrant target of a search's parameters. It reduces the potential for perceived unfairness or illegality because the warrant target can ascertain a search's permitted scope at the time of a search. The request by a warrant target, in the midst of a surprise, non-consensual

entry of her home by the police, to "see the warrant" will obviously have limited value if the warrant does not fully describe what it authorizes the police to do.

The second notion which is implicit in the argument that affidavits should be able to cure defective warrants is that the important thing in assessing warrant validity is to ensure that an impartial magistrate was presented with sufficiently particularized information to justify a search. That goal can be met by examining only the affidavit. But that is not the only purpose of the Fourth Amendment. The Fourth Amendment exists not only to ensure that impartial magistrates authorize searches. It also exists to ensure that police officers comply with the search limitations magistrates command. Those commands are reflected only in warrants.

The Warrants Cannot Be Found Partially Valid Through the Severance Doctrine

The doctrine of "severance" allows a portion of a warrant which is found invalid, usually because its lack of particularity, to be severed from the portion which is valid, allowing property seized through the valid portion of the warrant to escape suppression. "However . . . severance is not an available remedy for an overbroad warrant 'where no part of the warrant is sufficiently particularized" or "where no portion of the warrant may be meaningfully severed". *United States v. Galpin, supra,* 720 F3d at 448 (quotation omitted). To justify severance, at a minimum, "some part of the warrant must be both constitutionally valid and distinguishable from the invalid portions". "To be distinguishable, each of the categories of items to be seized [must] describe [ ] distinct subject matter in language not linked to language of other categories . . ." *Id.* at 449 (quotation omitted) (brackets in original).

Clearly, severance is not available here. Warrant 2, at most, simply authorized a search for evidence of any offense. Warrant 3 did not even contain that limitation. There was no

discrete category of authorization in either warrant which can be severed from the whole because here "no part of the warrant is sufficiently particularized". *Id.*[6] Given this Court's determination to grant the Defendant's motion to controvert and to suppress the evidence recovered under Search Warrants 2 & 3, the Court has not reached the Defendant's remaining arguments for the suppression of such evidence.

Defendant's Motion to Suppress the Remaining Warrants is Denied

The Defendant here also moves to suppress the property and data recovered in the execution of the 15 search warrants which the Court previously denied in its June 12 Decision (the "15 search warrants"). That motion is again denied.

First, in order for this Court to grant that application, the Defendant would be required to ask this Court to reconsider its previous denial of the Defendant's suppression motion. That would have to be done through a motion to Reargue or Renew, pursuant to CPLR § 2221. The Defendant has not brought any such motion. His instant claims, moreover, do not comply with a number of the threshold requirements of CPLR § 2221, including its timing rules and the requirement that such a motion allege facts or controlling law the Court previously overlooked or provide new facts along with a justification for why such facts were not presented previously.

Second, and most importantly, the Court denied the previous motion based on its conclusion that the Defendant lacked standing to move to suppress the property and data

---

[6] The Defendant's motion here also cannot be denied based on the argument that the police acted in good-faith in executing the warrant. New York has declined to adopt the "good-faith" exception which, under federal law, can defeat suppression where the police act in good-faith in executing a warrant. *See People v. Bigelow,* 66 NY2d 417 (1985). In any event, the Supreme Court's comments in rejecting the petitioner's claim for qualified immunity in *Groh*, outlined *supra*, would appear indicate such a defense would not be available here.

recovered in the 15 search warrants, a conclusion this Court continues to adhere to. As the People point out, standing is a threshold issue. If a litigant does not have standing to make a claim, the claim must be denied on that basis without reaching its merits.

Finally, to the extent the Court has considered the underlying merits of the Defendant's instant claims regarding the 15 search warrants, they appear to be insufficient to grant relief. The Defendant claims the information which led to the issuance of the 15 search warrants was derived from the information the People unlawfully obtained through Search Warrants 2 & 3. The Defendant therefore argues that the 15 search warrants must be suppressed as the poisonous fruit of that unlawfully obtained information. The People, however, deny that claim and have even submitted an affidavit from the assistant district attorney who prepared affidavits for the 15 search warrants which indicates that she did not use any of the information obtained through Search Warrants 2 & 3 to prepare the remaining affidavits. As far as the Court can ascertain, the notion that the information which led to the issuance of the 15 search warrants was derived from the illegal seizure of the property and data from Search Warrants 2 & 3 is more in the realm of informed speculation than solid inference.

This Court is aware that the content the police obtained in the execution of Search Warrant 2 was also obtained in the execution of other search warrants. Thus, as the Court understands these combined seizures, the police obtained content from the Defendant's computer but also obtained that same content through other search warrants. To the extent the People have lawfully obtained property and data in the execution of the 15 search warrants that content is not suppressed. The Court also understands, however, that certain "metadata" (that is, data about data) obtained from the Defendant's computer in the execution of Search Warrant 2 was

not obtained by other means. To the extent such data was obtained through Search Warrant 2, it is suppressed. The Court understands that with respect to the cell phone (Search Warrant 3) certain content obtained in the execution of the search warrant was not obtained in other warrants. To the extent such content came from Search Warrant 3, that content is suppressed.

Defendant also apparently moves here to suppress three additional warrants which were not addressed in his previous motion (here denominated as Search Warrants 18-20). These warrants were directed to third-parties. This motion is both untimely and barred by the same standing restrictions which this Court held foreclosed the Defendant's applications to controvert the 15 search warrants. Finally, to the extent the Defendant's motion seeks suppression of statements made by Deborah Oles as being derived from the unlawful seizure of evidence under Search Warrants 2 & 3 that motion is also denied.

The Systematic Particularity Challenges Arising Under New York's Search Warrant Approval System

This Court's own anecdotal experience indicates that the kind of non-particularized warrants for digital data at issue here are all too common in New York. This Court is quite sure it has signed warrants in the past which have suffered from similar infirmities. That is not, in this Court's view, the fault of prosecutors or police officers. It is the responsibility of the courts. Prosecutors cannot be faulted for seeking unduly expansive authority when such authority is often granted.

Insufficiently particularized warrants for digital data are facilitated by five features of the search warrant approval process. The first is that applications for search warrants are made *ex parte*. That is obviously necessary lest a search warrant target, forewarned to an impending search, seek to destroy or conceal evidence. But the necessity for *ex parte* applications does not

foreclose other steps to promote more particularized warrants. Obviously, additional judicial training would be useful. But our courts might also consider other, more creative methods to inject some semblance of adversarial debate into the system.

The second problem is that search warrants are typically provided to judges in busy calendar parts, or judges assigned to preside over a large volume of miscellaneous motions. Warrants are also often time sensitive. The resulting culture encourages quick review, and the absence of an adversary means there is no counterweight urging the court to slow down, seek more information or take what might be a significant amount of time in a busy part to rewrite an overbroad warrant. Courts, for valid reasons, are often focused on processing motions quickly and efficiently.

That problem has also been exacerbated by the reliance on sufficiently particularized affidavits to cure insufficient warrants, as existed here. Relying upon affidavits to cure defective warrants is a shortcut. It is a shortcut the Fourth Amendment does not allow.

The fourth problem is unique to digital searches, searches which are increasingly replacing the traditional physical searches of homes, apartments, offices or vehicles which used to comprise the bulk of search warrant applications. Article 690 of the Criminal Procedure Law, New York's search warrant article, was enacted in 1970. It was not designed for and does not adequately address many of the recurring issues which arise in digital searches. The statute primarily authorizes searches of physical locations for tangible property. Digital searches, like those here, however, are often conducted primarily to uncover information, not property. A physical search can be conducted in an hour. Searches of voluminous digital records can take months or even years, leading to recurring questions of how long such searches should take,

what should be done with non-responsive data once a search is completed and how the "plain view" doctrine should be applied.

All of those issues are on display here. The instant warrants were executed almost 8 years ago.[7] The warrants, in total, initially resulted in the seizure of what the court understands were hundreds of thousands of pieces of discrete information. Much of the evidence the People will eventually use from the warrant seizures does not concern the computer crimes which justified them. They concern evidence which implicates the Defendant in Shele Covlin's murder, evidence the People contend was validly seized because it appeared in plain view. The brief recitations in the warrants here didn't begin to address how any of those issues would be handled. That is typical.

The final problem is that there is a limited and largely ineffectual system for the review of digital data search warrants previously approved by courts. Individual search warrant targets do not have a pre-execution right to move to quash warrants. Internet service providers, under federal law, have such a right. But a motion to quash or modify can only be made where a service provider claims the government seeks records which are "unusually voluminous" or where compliance with a warrant would otherwise be unduly burdensome. That authority does not exist to vindicate the Fourth Amendment rights of subscribers.[8] Where a New York court

---

[7] The time between the warrant executions and the instant decision here was unusually lengthy, primarily because the Defendant was not indicted for the instant crimes until 2015. This case was then presided over by Justice Wittner (who recently retired) and was transferred to this Court last year.

[8] *See* the federal "Stored Communications Act" (the "SCA") 18 USC § 2703, at 18 USC § 2703 (d).

denies such a motion, internet companies under New York law have no right to appeal that denial.[9]

Defendants have a right to move to controvert and suppress the fruits of unlawful warrants. But the vast majority of cases are resolved by pleas, before a suppression motion is adjudicated. When motions are made, archaic standing rules with little relationship to the reasonable expectations of privacy most people have in their digital data foreclose relief without a consideration of a claim's underlying merits for any record seized from an internet service provider or cell phone company. That is, again, part of what occurred here.[10]

Even where suppression is ultimately granted, however, the horse may have long since left the barn. That is again part of what occurred here. Here, the People have had the unfettered use of the materials which have been suppressed by the instant decision for almost 8 years. Suppression will prevent the People from using some of that information at trial. But the People have already been able to use that wrongfully seized material to inform their

---

[9] That was the holding of the New York Court of Appeals in the *381 Search Warrants Directed to Facebook* decision, *supra*.

[10] *See, People v. Thompson, supra,* 51 Misc3d at at 710 (decision by this Court), criticizing the assertion in the Appellate Division's *Facebook* decision that subscribers have no right to contest search warrants directed to third-party internet service providers for their subscriber communications: "At a time when many people routinely relay sensitive personal information by email, the assertion that no Fourth Amendment protections apply to such communications because email requires an email account, in this Court's view, is an archaic notion which negates the protection of the Fourth Amendment for many of our most private communications". *See also*, the Court of Appeals' decision in *381 Search Warrants Directed to Facebook, supra,* n. 6 [Wilson J., dissenting] (asserting that the third-party standing conclusions outlined by the Appellate Division in *Facebook* "should be vacated or regarded as dicta"). That issue was not addressed in the Court of Appeals' six judge majority opinion, however.

prosecution.

The problem with the current system, in this Court's view, is not that judges don't carefully read affidavits and warrants or that prosecutors or police officers make bogus or inflated claims in them. The problem is that there has been an insufficient effort to limit the scope of digital data warrants. Courts and legislatures, for valid reasons, are often slow to adjust legal doctrines to societal changes. There is nothing which has accelerated at so rapid a pace, however, and with so profound an impact on privacy, as the information technology which has resulted in the storage of our most sensitive information on computers, cell phones and other media. The law must do a better of job of catching up to these changes. Roderick Covlin, a man who stands accused of committing an horrific crime and taking a precious human life, may be a poor exemplar for such issues. But that is true of most criminal defendants.

For all of those reasons: (i) the Defendant's motion to controvert the search warrants and suppress the property and data recovered from them are granted with respect to Search Warrant 2 (for the seizure at 70 Montgomery Circle, New Rochelle, New York only) & Search Warrant 3 (applicable to the Defendant's I-Phone). The Defendant's motion to controvert the remaining search warrants and suppress the property and data obtained through them and for related relief is denied.

January 22, 2018

Daniel Conviser, A.J.S.C.