District Court Weld County, State of Colorado 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 Phone Number : (970)351-7300 **People of the State of Colorado**, vs. **RAMON GUTIERREZ,** Defendant.	▲ **COURT USE ONLY** ▲ **Case Number: 08CR2087** Div. 12

ORDER RE: DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE

This matter came before the court for hearing on the defendant's motions to suppress evidence on February 19, 2009 and February 24, 2009. The defendant appeared on bond with his attorneys, Mr. Merson and Ms. Knickerbocker. The People appeared by Mr. Buck, Mr. Rourke, and Mr. Leier. The court heard testimony from Mr. Rock, Mr. D'Estrada, and Ms. Cerrillo. The court received as evidence Defendant's Exhibits A-MH, B-MH, C-MH, and D-MH. The court has reviewed defendant's motions 3, 4, 5, and 6, and the written response filed by the People. The court has taken judicial notice of the court file, 08CR2087, including all pleadings and attachments to the pleadings. The court has also taken judicial notice of the affidavit for search warrant prepared by Investigator Toft, the search warrant issued by a judicial officer of the Nineteenth Judicial District, and the return and inventory, all of which were originally filed in the miscellaneous criminal file 08CR1. Copies of the documents related to the search warrant have now been placed into this file by the court. The court has also considered the arguments of counsel.

The defendant has requested an order excluding from evidence copies of his tax returns and return information which were seized by investigators of the Weld County Sheriff's Department during the October 17, 2008 search of Amalia's Translation and Tax Services ("Amalia's Tax Service"), a business located at 1501 9th Street, Greeley, Colorado. The defendant argues that the affidavit submitted to the court in support of the request for the search warrant contained stale information, probable cause did not exist for

the issuance of the search warrant based on the affidavit, and the warrant was overbroad. The defendant also argues that his right to not be compelled to be a witness against himself, as established by the Fifth Amendment of the United States Constitution, would be violated if the prosecution is permitted to offer his tax returns as evidence against him at trial.

The defendant in this case has not challenged the manner in which the search warrant was executed, nor has the defendant made a veracity challenge as to the content of the affidavit. [1] The defendant has not filed a motion alleging that the search exceeded the scope of the warrant, although legal counsel for the defendant indicated at the time of the last hearing that he intended to file such a motion in the future. The deadline imposed by the court for the filing of motions for this case has passed, but the court informed counsel for the defendant that he was permitted to file additional motions with an accompanying explanation as to why good cause exists for the untimely filing of the motion.

The court holds that the defendant's Fifth Amendment challenge to the admission of the tax records is without merit.

As to the defendant's claim of a Fourth Amendment violation, for the reasons set forth in this order, the court finds that the affidavit was deficient to such degree as to not support a finding of probable cause for the issuance of the search warrant. The court further concludes that the warrant and affidavit were lacking in probable cause to such degree that it was not objectively reasonable for the investigators to rely on the warrant. The court will grant the motion to exclude evidence obtained during the search of Amalia's Tax Service as these documents were seized in violation of the Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution, and the good faith exception does not apply.

1. Jurisdictional Issue:

[1] This court recognizes that there are many persons who have been charged with criminal offenses as a result of documents seized during the search of Amalia's Tax Service, and that legal issues and legal arguments not raised by this defendant may be raised by other persons charged with criminal offenses based upon documents seized during execution of this search warrant.

This court previously issued an order to show cause in which the court requested that the prosecution provide the basis for jurisdiction of a state court to issue a search warrant for federal tax return information held in the possession of a tax preparer. The court specifically requested that the prosecution present information, either from the IRS or from Ms. Cerrillo, as to whether Ms. Cerrillo was a certifying agent or authorized acceptance agent pursuant to IRS regulations. 26 C.F.R. §301.6109-1. Ms. Cerrillo testified at the February 24, 2009 hearing that she was neither a certifying agent or an authorized acceptance agent under IRS regulations, and the court issued a verbal ruling that the provisions of 26 U.S.C.A. 6103(i) do not apply to the facts of this case, and jurisdiction is proper for a state judge to issue a warrant to search for the federal tax return and return information in the possession of Amalia's Tax Service.

2. Factual Background:

The parties rely upon the affidavit, the search warrant, and the return and inventory as evidence in this case. There has been no veracity challenge made by the defendant to the information contained in the affidavit.

According to the affidavit for the search warrant, an investigator of the Weld County Sheriff's Office investigated an identity theft on August 13, 2008. The suspect was Servando Trejo, who told the investigator that he entered the United States illegally and purchased a false name and social security number, which he used to obtain employment. Mr. Trejo said that he filed income tax returns using an individual taxpayer identification number (ITIN), and that he was assisted in filing his tax returns by Amalia's Tax Service in Greeley. Mr. Trejo told the investigator that he informed the tax return preparer that he was using a false name and SSN to work and he provided her with his correct name. Mr. Trejo said that Amalia's Tax Service assisted him with obtaining the ITIN he used to file his tax returns. Mr. Trejo said that Amalia's recently began filing his returns electronically. The investigator searched Mr. Trejo's residence and located several tax returns filed by Amalia's Tax Service, an advertisement for Amalia's Tax Service, and receipts showing

that Mr. Trejo paid Amalia's Tax Service for preparing his tax returns. The affidavit does not indicate if the copies of the tax returns for Mr. Trejo were state or federal, or which year(s) these tax returns for Mr. Trejo were filed.

Agent Bratten of the Colorado Department of Revenue reviewed the case, presumably at the request of the sheriff's department, and Agent Bratten informed the lead sheriff's investigator that Amalia's Tax Service was preparing tax returns in accordance with IRS regulations and the tax preparation business had not violated any laws. The inference is that Agent Bratten opined that Amalia's Tax Service had not violated any state or federal laws when preparing Mr. Trejo's tax returns.

The investigation then shifted to Amalia Cerrillo's role in preparing taxes for persons who did not possess a social security number. She was interviewed by Agent Bratton of the Colorado Department of Revenue and investigators of the Weld County Sheriff's Department. Ms. Cerrillo confirmed that she knowingly prepares tax returns "for individuals who are undocumented workers/illegal aliens".

In summary, the affidavit reflects that the investigators knew the following information when applying for the search warrant:

A. Mr. Trejo filed an income tax return for several years using Amalia's Tax Service, and recently his tax returns were filed electronically. Investigators obtained copies of tax returns prepared by Amalia's Tax Service for Mr. Trejo, as well as receipts showing he paid Amalia's Tax Service for these services.

B. Mr. Trejo informed the tax return preparer at Amalia's that he was using a false SSN and name to work.

C. Mr. Trejo told investigators that he worked in the agriculture industry and "everyone knows to go to her for their taxes."

D. Amalia Cerrillo told the investigators that she knowingly prepares tax returns for "undocumented workers/illegal aliens"

E. Ms. Cerrillo informed the investigators that when a client comes into her office for tax return preparation, the client provides Ms. Cerrillo with photo identification, passport or birth certificate, and wage earnings forms. The client is required to complete a W-7 form to obtain an ITIN, and the client is also required to sign a verification form that all items submitted to Ms. Cerrillo are true and accurate.

F. An ITIN is a nine-digit number beginning with the number "9".

G. Ms. Cerrillo made a statement that persons who apply for an ITIN are illegal aliens.

H. Ms. Cerrillo indicated that "almost all of them provide her with wage information W-2/1099 with a social security number that belongs to someone else" Ms. Cerrillo said she follows IRS guidelines for handling these returns and she includes the ITIN on the tax return form. She further stated that she crosses out the fake name and SSN on the wage earnings document, and inputs the correct information before sending the completed return.

J. Ms. Cerrillo confirmed that she retains at her business a copy of each client's file, which includes the return, wage earning documents, W-7 form, and photo identification, as well as information pertaining to the spouse and dependants of the taxpayer.

K. Agent Bratten asked Ms. Cerrillo why clients continue to use fictitious names and/or numbers after obtaining an ITIN and Ms. Cerrillo replied to avoid "being fired and/or deported if they notify the employer of the ITIN."

L. Amalia's Translation and Tax Service listed a business address in Ft. Morgan, Colorado and another in Greeley, Colorado. Investigators learned that the address for the Ft. Morgan office housed a restaurant at the time of application for the search warrant.

M. Agent Bratten explained to the investigators that the IRS has put into place a system which removes from the IRS records the wage information from the SSN and attributes the wages, taxes paid, and other deductions to the person with the ITIN, which eliminates the IRS from sending notice to the person whose SSN was used and removes the need for the assignee of the SSN to reconcile income differences.

The affidavit indicates that "[i]t is the affiant's belief that evidence of identity theft and criminal impersonation exists at the business/residence known as Amalia's Translation and Tax Services, 1501 9th Street, Greeley, Colorado." The affidavit does not provide specification as to which provisions of the identity theft or criminal impersonation statutes evidence seized from Amalia's would pertain.[2]

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[2] C.R.S. 18-5-902 provides in part:
"Identity theft. (1) A person commits identity theft if he or she:

(a) Knowingly uses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority to obtain cash, credit, property, services, or any other thing of value or to make financial payment;
(b) Knowingly possesses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority, with the intent to use or to aid or permit some other person to use such information or device to obtain cash, credit, property, services, or any other thing of value or to make a financial payment;
(c) With the intent to defraud, falsely makes, completes, alters, or utters a written instrument or financial device containing any personal identifying information or financial identifying information of another;
(d) Knowingly possesses the personal identifying information or financial identifying of another without permission or lawful authority to use in applying for or completing an application for a financial device or other extension of credit;
(e) Knowingly uses or possesses the personal identifying information of another without permission or lawful authority with the intent to obtain a government-issued document; or
(f) Attempts, conspires with another, or solicits another to commit any of the acts set forth in paragraphs (a) to (e) of this subsection (1)

(2) Identity theft is a class 4 felony. "

C.R.S. 18-5-113 provides:
"Criminal Impersonation.(1) A person commits criminal impersonation if he knowingly assumes a false or fictitious identity or capacity, and in such identity or capacity he:

(a) Marries, or pretends to marry, or to sustain the marriage relation toward another without the connivance of the latter; or
(b) Becomes bail or surety for a party in an action or proceeding, civil or criminal, before a court or officer authorized to take bail or surety; or
(c) Confesses a judgment, or subscribes, verifies, publishes, acknowledges, or proves a written instrument which by law may be recorded, with the intent that the same may be delivered as true; or
(d) Does an act which if done by the person falsely impersonated, might subject such person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty; or
(e) Does any other act with intent to unlawfully gain a benefit for himself or another or to injure or defraud another.

(2) Criminal Impersonation is a class 6 felony."

The affidavit also contains generic information about the imaging and storage of materials on a computer and external storage devices affiliated with computers, such as a memory card.

This court did not hear testimony from the person who prepared the affidavit or the search warrant, or the persons who executed the warrant. Amalia Cerrillo's testimony was limited in scope to whether she was a certifying agent or an acceptance agent, under IRS regulations, with regard to the Individual Taxpayer Identification Number ("ITIN") program. This was a question the court had wanted answered since December 2008, to resolve a question as to the jurisdiction of a state court to issue a warrant to search for a specific category of federal tax return information, an ITIN, in the possession of a tax return preparer. Ms. Cerrillo testified that she was not a certifying agent or an authorized acceptance agent under IRS regulations.

The warrant in the present case authorized the investigators to seize the following items, which the sheriff's department asserted were stolen or embezzled; designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal; or would be material evidence in a subsequent criminal prosecution:

1. All tax returns for tax years 2006 and 2007 for which the ITIN and name of the taxpayer on the return document do not match the wage earnings documents.

2. Proof of identification referred to in paragraph one associated with the ITIN tax returns;

3. Any and all documents associated with the ITIN tax returns referred to in paragraph one of the warrant;

4. Receipts for ITIN tax services referred to in paragraph one;

5. Contracts associated with the ITIN tax services referred to in paragraph one;

6. W-7 forms;

7. Wage and tax earning documentation referred to in paragraph one including, but not limited to, W-2 forms and 1099 forms;

8. Any and all computer systems and computer equipment to include, but not limited to, central processing units and circuit boards attached or unattached to the computer system;

9. Any and all storage media to include, but not limited to, floppy diskettes, hard disk drives, removable disk drive cartridges and drives, magnetic computer tapes, compact discs, and any other device capable of storing information in magnetic/optical form, whether internal or external to the computer system, attached or unattached to the computer system;

10. Any and all computer peripheral devices attached or unattached to the computer to include but not limited to computer monitors, printers, keyboards, modems, or other physical devices which serve to transmit or receive information to and from the computer;

11. Any and all computer programs or software used in the operation of the computer system, used to transmit or receive information, used to display or print graphics or other types of files, and all other computer programs and software associated with the computer system to include all programs stored on the computer, floppy disc, CD's, or other storage media;

12. Any and all documents which serve the purpose of explaining the way in which the computer hardware, programs, and data are used, including manuals for computer equipment or software, printouts of computer programs, data files, and other information which has been or continues to be stored electronically or magnetically in the computer system;

13. Any and all papers, documents, or other readable material, whether generated in handwriting, typewriter, computer or other device, which contains user names and related addresses or telephone numbers, and passwords for any computer equipment;

14. Any and all passwords, encryption keys, access codes or other security or privacy devices, whether of a physical, written or oral form, used to encrypt, encode, or otherwise limit access to information, files, programs, accounts or other data associated with or stored on any computer;

15. Any proof of ownership, maintenance, control, or use of electronic or computer related equipment, programs, data, or documentation at that address including correspondence, invoices, or similar items;

16. Your affiant is seeking permission to examine the computer and storage devices for any and all data, correspondence, electronic mail, voice messages, letters, notes, ledgers, spreadsheets, documents, memorandum, image, or graphic files.

The items and information subject to seizure in paragraphs 6, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the search warrant did not specify that the information sought was restricted to any particular tax year, and there was absolutely no specification or limitation in the warrant as to what the investigators could or could not search for when they accessed the computer equipment and storage devices which were seized pursuant to this search warrant.

The Weld County Sheriff's Department filed the return and inventory with the court on October 23, 2008. The complete search warrant inventory, which is set forth on eleven lines on two pages, lists the following property as being seized from Amalia's Tax Service:

a. One Gateway Computer

b. One HP Computer

c. One Dell Power Edge 600C

d. 46 CD/DVD

e. One blue file for Bertha Uribe

f. Black Spindle with CD's

g. Letter- Denver Field Office

h. Black Drawer with CD's

i. Stack of Floppies

j. 19 Boxes of Tax Docs

k. 30 Boxes of Tax Docs

There is a handwritten note on the first page of the return and inventory which reads "[a]ll original items returned on 10-23-08 after copies of material (sic) were made." This notation is followed by either a signature or the initials of a deputy of the Weld County Sheriff's Department with a badge number WC0266. There is a handwritten note on the second page which reads "[a]ll original documents were returned on 10-23-08 after photocopies were made." This notation is followed by either a signature or the initials of a deputy of the Weld County Sheriff's Department with a badge number WC0266. The prosecution informed the court at the portion of the hearing held on February 24, 2009, that the Weld County Sheriff's Office only retained copies of those files and items which they believed provided evidence of a crime and copies were not made of those files that they did not believe contained evidence of criminal activity. The prosecution indicated that witnesses could be called who could confirm the People's offer of proof. The defendant did not challenge the People's offer of proof and testimony was not taken on this issue. It

is unknown to the court whether a copy of the entire memory system of the computer equipment seized was made and retained by the Weld County Sheriff's Department, or if the memory was accessed and searched for any of the computers seized.

The investigators searched approximately 5,000 files containing tax returns and tax return information, of which copies of approximately 1,300 files were retained by the sheriff's department and approximately 3,700 were returned to Amalia's Tax Service without copies being made.

3. Discussion of Defendant's Fifth Amendment Claim:

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled, in any criminal case, to be a witness against himself…" The defendant argues that the use of information contained in his federal tax returns would violate this provision against self-incrimination. The court disagrees with the defendant's position on this issue and the court finds that the defendant's Fifth Amendment right against compelled testimony would not be violated by the use in court of the tax records seized in this case.

There is no evidence that the defendant asserted any objection to providing information on any part of the federal tax return at the time he filed his return. *See Garner v. U.S.*, 424 U.S. 648 (1976). The tax return at issue in this case was obtained from the defendant's tax preparer through the use of a search warrant by police officers, and the defendant was never compelled to himself produce this information directly to law enforcement officers. *See Fisher v. U.S.*, 425 U.S. 391, 397 (1976) (Summonses directed to accountant and attorney of taxpayer to produce tax records pertaining to a taxpayer for IRS investigation of civil or criminal liability under the federal income tax laws does not "compel" the taxpayer to be a witness against himself under the Fifth Amendment.); *Couch v. United States*, 409 U.S. 322, 329 (1973) (Fifth Amendment rights not implicated when accountant produces records pertaining to a taxpayer to IRS agent pursuant to a summons issued for investigation of possible federal tax law violations, reasoning that the

account, and not the taxpayer, is the person who is "compelled" to act.); *Andreson v. Maryland,* 427 U.S. 463 (1976) (Fifth Amendment does not apply to private papers seized under a validly issued search warrant, as the independent seizure of the records does not compel the person to testify against himself).

4. Discussion of Defendant's Fourth Amendment Claims:

The Fourth Amendment to the United States Constitution provides that "(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; and no warrant 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." Article II, Section 7 of the Colorado Constitution provides that the "people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation."[3]

The analysis of a claim of an unconstitutional search and seizure begins with a determination of whether the defendant has a legitimate expectation of privacy in the area that was searched or over the object that was seized. *People v. Hillman,* 834 P.2d 1271 (Colo. 1992). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some

[3] There are instances when the Colorado Constitution, as interpreted by the Colorado Supreme Court, has been held to offer a greater expectation of privacy rights than those guaranteed by the United States Constitution. See *People v. Corr,* 682 P.2d 20 (Colo.1984) (holding reasonable expectation of privacy in telephone toll records); *Charnes v. DiGiacomo,* 612 P.2d 1117 (Colo.1980) (holding reasonable expectation of privacy by bank depositor in the bank's records of depositor's financial transactions), compare to *United States v. Miller,* 425 U.S. 435 (1976) (no reasonable expectation of privacy by bank customer in banking transaction records under the Fourth Amendment); *People v. Sporleder,* 66 P.2d 135 (Colo.1983) (reasonable expectation of privacy under Colorado Constitution in telephone numbers dialed from person's home telephone), compare to *Smith v. Maryland,* 442 U.S. 735 (1979) (telephone customer does not have a reasonable expectation of privacy under the Fourth Amendment in telephone numbers the person dialed).

meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984).

The prosecution has argued that the tax records seized by the investigators during this search were not confidential, a position with which this court respectfully disagrees. There is a difference between confidentiality as it relates to possible civil or criminal sanctions for a disclosure in violation of a provision of state or federal law, and the underlying principle recognizing a privacy interest over the information contained in a confidential document. It is clear that tax returns and tax return information is considered confidential under both state and federal law. 26 U.S.C.A. 6103 (general provisions of confidentiality); 26 U.S.C.A. 7213 (criminal penalties for unlawful disclosure); 26 U.S.C.A. 7213A (criminal penalties for unlawful inspection of tax returns or tax return information); 26 U.S.C.A. 7216 (tax return preparer prohibited from knowingly or recklessly disclosing any information furnished to the preparer in connection with or in preparation of the return, and a violation is a misdemeanor offense); 26 U.S.C.A. 6713 (civil penalties for unlawful disclosure of tax returns or tax return information) "[T]he general assembly has expressed a strong public policy in section 39-21-113(4)(a) in favor of preserving confidentiality of state income tax returns. Although this policy of confidentiality does not amount to a testimonial privilege, it should carry great weight in deciding whether a subpoena duces tecum is unreasonable or oppressive." *Losavio v. Robb,* 579 P.2d 533, 540 (Colo.1978). Except when acting in accordance with a court order, or as otherwise provided by law, an employee of the Department of Revenue who discloses, divulges, or makes known in any way information contained in a tax return or a document submitted with a return is guilty of a misdemeanor and is subject to dismissal from office. §39-21-113(4),(6), C.R.S.. "In light of this strong policy in favor of protecting confidentiality of tax returns, we have held that the party seeking the release of a tax return bears the burden of showing a 'compelling need' for the return. Absent a compelling need, a subpoena for a tax return should be quashed." *Alcon v. Spicer,* 113 P.3d 735, 743 (Colo.2005) (citation omitted). "We now hold that, because of their confidential nature, tax returns may not be ordered disclosed unless a court finds that they are relevant to the subject of the action and there is a compelling need for information contained in the returns because the information sought is not otherwise readily available." *Stone v. State Farm*

Mutual Auto Insurance Company, 185 P.3d 150, 159 (Colo. 2008). "Federal income tax returns are confidential communications between the taxpayer and the government. 26 U.S.C. §§6103, 7213(a) (1970) insure that tax returns are protected from unauthorized disclosure while in the hands of government officials. The reason for this protection is straightforward. Unless taxpayers are assured that the personal information contained in their tax returns will be kept confidential, they likely will be discouraged from reporting all of their taxable income to the detriment of the government." *Payne v. Howard*, 75 F.R.D. 465 (1977). Federal courts have also stated that there is public policy against the disclosure of federal tax returns, even when the provisions of 26 U.S.C.6103 do not apply. *Federal Savings and Loan Insurance Corporation v. Krueger*, 55 F.R.D. 512 (N.D. Ill. 1972) ("it is the opinion of this court that the statutes cited reflect a valid public policy against disclosure of income tax returns." *Id* at 514).

The court finds that state and federal tax returns and return information are confidential documents and a person has a reasonable expectation of privacy in his or her tax returns and documents associated with the filing of a return, and this expectation of privacy extends to copies of the tax records that are retained by a tax preparer after the return is filed on behalf of the taxpayer. As such, the defendant in this case has established a reasonable expectation of privacy in his tax return and tax return information seized from Amalia's Tax Service. The confidentiality of these documents is not absolute, and there are procedures which permit tax information to be disclosed without civil or criminal liability. An order from the court, which includes the issuance of a search warrant, is one such exception. See § 39-21-113(4)(a), C.R.S.; 26 C.F.R. §301.7216-2(f)(1) (tax preparer not subject to criminal penalties if the information is released pursuant to an order of a court of record).

Probable cause to issue a search warrant exists when there are sufficient facts contained within an affidavit which would cause a person of reasonable caution to believe that contraband or evidence of a crime is located within the area or place to be searched. *Henderson v. People*, 879 P.2d 383 (Colo. 1994). A probable cause determination must be made from reviewing the four corners of the affidavit, *People v. Titus*, 880 P.2d 148 (Colo. 1994), and any reasonable inferences drawn from the facts contained within the affidavit.

People v. Green, 70 P.3d 1213 (Colo. 2003). The court must look at the totality of the circumstances when making a probable cause determination. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983); *People v. Pannebaker,* 714 P.2d 904 (Colo. 1986). "(P)robable cause for a search depends upon probabilities, not certainties, and involves a level of knowledge grounded in the practical considerations of everyday life on which reasonable and prudent persons act." *People v. Rayford,* 725 P.2d 1142, at 1148 (Colo.1986). A judge reviewing an affidavit in support of a request for a search warrant is called upon to make a common sense and practical decision whether a fair probability exists that a search of a particular place will reveal evidence of a crime. *People v. Altman,* 960 P.2d 1164 (Colo. 1998). A "bare bones" affidavit is one which contains "wholly conclusory statements devoid of facts from which a magistrate can independently determine probable cause". *People v. Altman,* 960 P.2d 1164, 1170 (Colo. 1998).

Because the determination of probable cause cannot be reduced to a precise formula, occasions will arise when reasonable minds differ on whether a particular affidavit establishes probable cause to issue a warrant. Therefore, the determination of probable cause made by another judicial officer must be given great deference by the reviewing court, and the reviewing court is called upon to determine if the issuing court had a substantial basis for finding probable cause. *Henderson v. People,* 879 P.2d 383 (Colo. 1994); *People v. Pate,* 878 P.2d 685 (Colo. 1994). A court reviewing a determination of probable cause made by another judicial officer must resolve all doubts in favor of the finding of probable cause made by the judicial officer who issued the search warrant. *People v. Fortune,* 930 P.2d 1341 (Colo. 1997). The reviewing court must remove from consideration any illegally obtained information contained in the affidavit and may then conduct a *de novo* review of a redacted affidavit to determine if the remaining facts would support a finding of probable cause to issue the search warrant. *People v. Hebert,* 46 P.3d 473 (Colo. 2002). More than one warrant can be issued based upon a single affidavit so long as probable cause exists as to each individual search warrant or each separate place to be searched. *People v. Arnold,* 509 P.2d 1248 (Colo. 1973). There must be probable cause to believe that the grounds for the issuance of a search warrant exist, based upon the facts and circumstances set forth in the affidavit, and a conclusory

belief or suspicion on the part of an affiant officer is not sufficient to issue a search warrant. *People v. Clavey,* 530 P.2d 491 (Colo. 1975).

The requirement that the warrant describe the places to be searched and the persons or things to be seized is designed to prevent general searches. *Maryland v. Garrison,* 480 U.S. 79 (1987). The particularity requirement also "curtails the issuance of search warrants on loose and vaguely stated bases in fact." *People v. Hearty,* 644 P.2d 302, 312 (Colo. 1982). The court may not issue a search warrant when the affidavit provides nothing more than a request for judicial approval in the form of a search warrant to allow the police to conduct a general exploratory search, under the theory that evidence of a crime may be discovered during the search. *Hernandez v. People,* 385 P.2d 996 (Colo. 1963).[4] "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard,* 774 F.2d 402, 404 (10th Cir. 1985). "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 describing another." *Marron v. U.S.,* 275 U.S. 192, 196 (1927). Particularity is that which permits the executing officer to reasonably identify those things that are authorized to be seized, whereas overbreadth pertains to the legal instructions to those executing the warrant, which focuses

[4] In colonial America, the British courts had the authority to issue a "writ of assistance", which permitted officers of the Crown to enter and search businesses, ships, and even the homes of persons if the officer had any suspicion that the location might hold smuggled goods. This procedure was put into place by the Crown to discover evidence of persons attempting to avoid paying taxes on imported goods. It is difficult to imagine a clearer example of a totalitarian philosophy of the end result justifying the means employed. This procedure proved to be highly effective, in the eyes of the British government, and enabled the Crown to discover goods which had been not been properly taxed, but the toll it took upon the American colonists was quite significant. Businesses, ships, and homes were frequently ransacked and damaged by the execution of these writs of assistance, and the use of the writs of assistance was one of the many grievances Americans made against the Crown. As Justice Stewart noted in *Stanford v. Texas,* 379 U.S. 476 (1965), when discussing the historical context of the Fourth Amendment, that "'no warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.' These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book' because they placed 'the liberty of every man in the hands of every petty officer.'" *Id* at 509-510.

on the establishment of probable cause to believe that evidence of a crime will be located in a particular place. *U.S. v. SDI Future Health, Inc.* 553 F.3d 1246, 1260-1261 (9th Cir. 2009).The scope of a search cannot be left solely in the discretion of the investigators conducting the search. *Lo-Ji Sales, Inc. v. New York* 442 U.S. 319 (1979). Officers executing a search warrant must act in good faith and seek only those items which are specified in the warrant, and a search warrant which is not a general warrant on its face, may nonetheless be rendered invalid if those executing it engaged in course of conduct during the search evidencing that they "substantially exceeded any reasonable interpretation of its provisions", thus becoming a mere "instrument of conducting a general search." *U.S. v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978).

A search involving a person's papers poses significant risks to privacy, and even more so when those papers may contain privileged or confidential information. See e.g. *In re Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979). In *People v. Hearty*, 644 P.2d 302, 313 (Colo. 1982), the Colorado Supreme Court, in addressing the search of an attorney's office for clearly defined papers relating to three named clients, stated "[w]e believe that rigid adherence to the particularity requirement is appropriate where a lawyer's office is searched for designated documents. Anything less than a strict limitation of the search and seizure to those documents particularly described in the warrant could result in a wholesale incursion into privileged communications of a highly sensitive nature. Once privileged communication is revealed to the police, the privilege for all practical purposes has been lost."

This court is ever mindful that great deference is to be afforded a probable cause determination made by another judicial officer, and that this court is not to engage in a *de novo* review, except in situations when the reviewing court removes portions of the affidavit from consideration, which is not present in this case. *Henderson v. People*, 879 P.2d 383 (Colo. 1994); *People v. Hebert*, 46 P.3d 473 (Colo. 2002). The review by this court is limited to a determination as to whether the judicial officer issuing the warrant had a "substantial basis" to make a finding of probable cause to issue the search warrant, based upon a review of the affidavit and reasonable inferences therein. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

This investigation, dubbed "Operation Numbers Game" by the District Attorney and the Weld County Sheriff, did not involve alleged or suspected criminal activities by Amalia Cerrillo, or any of her employees, at the time the affidavit for the search warrant was presented to the judge for review. The affidavit presented in support of the search warrant contained information that one named client of Amalia's Tax Service, Mr. Trejo, had filed tax returns using an admittedly false name and SSN. Mr. Trejo told this to the investigator before Ms. Cerrillo was interviewed by Agent Bratten and the sheriff's investigator. Agent Bratten confirmed that Ms. Cerrillo was filing tax returns in accordance with federal tax laws and that she had not violated any laws. Ms. Cerrillo confirmed that she is aware that she files tax returns for individuals who she knows are undocumented workers in the United States, and she explained the process she uses to file these types of returns. She also represented to the investigators that she was following federal tax laws when filing tax returns. The affidavit contains a nebulous statement indicating that if a person applies for an ITIN, then that person is an illegal alien, which is an incorrect statement of the law. See 26 C.F.R. §301.6109-1. The affidavit contains a statement from Ms. Cerrillo, with no explanation as to her basis of knowledge of the accuracy of this assertion, that "almost all of them provide her with wage information W-2/1099 with a Social Security Number that belongs to someone else." There is also a statement attributed to Ms. Cerrillo that clients continue to use the fictitious name and/or number after the client receives an ITIN out of fear of being fired or removed from the United States. Ms. Cerrillo confirmed that she keeps a copy of every client's file in her office in Greeley. Parried down, the essence of what is contained in the affidavit is nothing more than Ms. Cerrillo confirming that there is/are client(s) who are in like Mr. Trejo.

What is evident from a review of this warrant is that there are very few facts from which to arrive at a finding of probable cause. There are many statements attributed to Ms. Cerrillo for which no basis of knowledge has been established. What is even more evident from a review of this affidavit what is absent, and that is individualized suspicion of criminal activities as to any particular client; probable cause, as opposed to suspicion, to believe that a crime was committed; and probable cause to believe that evidence of a crime

would be found in this defendant's file, or any other specific file of the 5,000 files seized and searched by the investigators.

There was no information in the affidavit that any law enforcement agency anywhere in the country had received a complaint from a person that his/her name, SSN, or any other type of identifying information was used to file tax returns through Amalia's Tax Service, other than the one relating to Mr. Trejo's case.

There is absolutely no information contained in the affidavit that identifies the name or date of birth of any client of Amalia's Tax Service, other than that of Mr. Trejo. There is no information providing any fictitious name or SSN used by a client of Amalia's Tax Service to work, let alone to work in Colorado. As mentioned previously, there is no information as to how Ms. Cerrillo knew the SSN the client provided either belonged to a person other than the taxpayer, or was a fictitious number. There is no information as to how Ms. Cerrillo knew that any particular client was in the United States legally or illegally. The affidavit is silent as to the tax year or years Ms. Cerrillo filed a tax return for any client for whom she utilized the procedures outlined in the affidavit for search warrant. There isn't even information in the affidavit regarding when Mr. Trejo filed the tax returns that were in the possession of the investigator when the affidavit was prepared. It appears that law enforcement personnel arbitrarily chose the tax years 2006 and 2007, even though there was no information that she filed tax returns using the methods outlined in the affidavit for either, both, or neither of those two tax years. She advertised her business as a translation and tax service, yet the affidavit fails to state what percentage of her business was tax preparation and what percentage involved translation services, and whether she had records in her office that just related to the translation business. There is no information in the affidavit specifying the number of clients of Amalia's Tax Service who have obtained an ITIN and filed a tax return with wage earning documentation that included a name that differed from the name of the taxpayer, other than this vague reference by Mr. Trejo that "everyone knows to go to her for their taxes", implying that a significant number of persons in the agriculture industry use Amalia's Tax Service for tax return preparation services. There is no information in the affidavit confirming that Ms. Cerrillo electronically filed tax returns for persons other than Mr. Trejo. There is no

information in the affidavit as to how Ms. Cerrillo knew that any particular client, who used an ITIN to file a tax return, continued to use a false name or SSN to work, or for any other purpose, after the ITIN was issued by the IRS. There is no information as to what percentage of her clientele used the procedures outlined in the affidavit to file federal tax returns (i.e. false SSN or name on wage earning documents with an ITIN on the return) and what percentage of her clientele did not use the procedures outlined in the affidavit. There was no information as to what percentage of her clientele used a SSN, as opposed to an ITIN, to file taxes. There was no information as to what percentage of clients who used an ITIN on a tax return were filing as spouses of United States citizens, either filing jointly or separately as a married couple.

The investigators also provided no information in the affidavit as to how they could possibly know that probable cause existed, as opposed to reasonable suspicion, for the crimes of identity theft or criminal impersonation, from a mere review of these documents. The procedure that the investigators employed in the present case, as set forth in the affidavit for the arrest warrant, was to check the numbers on the wage earning documents seized through a law enforcement computer database to determine if the number belonged to the suspect, another person, or was fictitious. This database, as the court learned at the preliminary hearing for this case, was not affiliated with the Social Security Administration or the United States Government. The investigators, when seizing these documents, had nothing more than a reasonable and articulable suspicion that a crime had been committed.

The court recognizes that a large volume of documents were seized during this search, but that fact alone does not lead to a conclusion that the warrant was overbroad. The proper inquiry is whether probable cause existed for the seizure of each and every item seized. There are many instances when a large volume of documents may properly be seized pursuant to a search warrant, such as when there is probable cause established that the suspected criminal activity permeates an entire business enterprise. The affidavit in this case does not establish probable cause to believe that evidence relating to criminal activities by the clients of Amalia's Tax Service permeated the entire business operation. Compare *United States v. Office Known as 50 State Distributing Co.,* 708 F.2d 1371 (9th Cir. 1983); *United States v. Brien,* 617 F. 2d 299 (1st Cir), *cert denied,* 446 U.S. 919

(1980). When probable cause exists to believe that an entire business operation is permeated with fraud the Fourth Amendment will permit a broad search, however "allegations that a business has routinely engaged in fraudulent practices are insufficient; an affidavit must provide probable cause that the majority of the business operations are fraudulent." *KRL v. Moore,* 384 F.3d 1105, 1115 (9th Cir. 2004)(citation omitted).

In *People v. Roccaforte,* 919 P.2d 799 (Colo.1996), an agent of the Colorado Department of Revenue conducted an internal audit of a wholesale fuel distributor and learned that over the course of a thirteen-month period of time the distributor failed to account for fuel taxes for 700,000 gallons of fuel distributed by the business. In an attempt to reconcile this deficiency in the returns filed with the DOR by the business, the agent scheduled an appointment with one of the owners of the business to audit the business records. Prior to this meeting, the business closed and the records were moved to another location. The case was referred to the investigation section of the DOR. A search warrant was issued authorizing the seizure of many types of business records and a substantial amount of business records were seized by the investigators. The defendant challenged the constitutionality of the search and the trial court held that the warrant was an impermissible "all records" warrant because probable cause existed only for a limited part of the business venture. The trial court further held that there was no evidence that the fraudulent acts permeated the entire business enterprise and the warrant should have been drafted more narrowly. The trial court excluded some of the evidence collected during the search.

The Colorado Supreme Court disagreed with the conclusions of the trial court and held that an "'all records' warrant is appropriate where there is probable cause to believe that the crime alleged encompasses the entire business operation and that evidence will be found in most or all business documents." *Id at 803* (citation omitted). The court further reasoned that there would be evidence relevant to the culpable mental state of intent in documents not directly related to the discrepancies in the fuel invoices. *Id.* The scope of the warrant must be defined by the existence of probable cause that particular evidence relating to a specific crime will be found in the area to be searched. See e.g. *United States v. Word,* 806 F.2d 658 (6th Cir. 1986) (Holding the search of a physician's office for

evidence that the physician engaged in prescription fraud was defined with sufficient particularity when the items authorized to be seized related to specific patients of the defendant); *Pignatiello v. District Court,* 659 P.2d 683 (Colo.1983) (Subpoenas duces tecum issued to eleven banks and one brokerage company, pursuant to grand jury investigation of securities fraud of one named individual, were held to meet the particularity requirement because the subpoenas established the records sought, the person to whom the records pertained, and the subpoena was limited to a specific and reasonable period of time.).

Unlike *Roccaforte,* where the warrant authorized the seizure of a vast amount of records based upon probable cause that the *business* was engaged in criminal activity and probable cause existed that evidence of the crime would be found in numerous categories of documents of the business, the investigation in this case did not involve suspected criminal activity of Amalia Cerrillo, nor any tax preparer employed by that business. See e.g. *Tattered Cover, Inc. v. Thornton,* 44 P.3d 1044 (Colo. 2002) (Innocent third-party bookstore owner had the right to challenge the execution of search warrant for business records of client at a pre-seizure adversarial hearing. At this hearing, the Colorado Supreme Court held that the government failed to establish a compelling need which would outweigh the harm that would result to constitutional interests if the warrant was executed, and that the search warrant was unenforceable and should not have been issued.)[5]

The search warrant issued in this case was issued pursuant to a "bare bones" affidavit, which did not establish probable cause as to any particular file, or client, or that a crime had been committed by a client other than Mr. Trejo. Of course, the investigators

[5] The constitutional issue addressed in the *Tattered Cover* case pertained to the chilling effect on First Amendment rights that would result from execution of the warrant. The defendant in the present case has raised a federal preemption argument, which is premised on the anticipated chilling effect the seizure of a federal tax return of a non-citizen taxpayer from a tax return preparer will have on the ability of the IRS to collect revenue through continued voluntary filing of income tax returns by similarly situated taxpayers. The court need not address this argument because of the ruling issued on the defendant's challenges made under the Fourth Amendment. Also, the defendant in this case has not argued that a less intrusive method could have been employed, such as seeking an order for production of records pursuant to C.R.S. 16-3-301.1, or the use of a subpoena duces tecum during grand jury procedures, as such procedure was discussed in *Losavio v. Robb,* 579 P.2d 533, 540 (Colo.1978). Either procedure would have afforded the opportunity for a request for a pre-seizure adversarial hearing before disclosure occurred.

were not seeking Mr. Trejo's file as they already had that information in hand before they went to speak with Ms. Cerrillo. There was not a substantial basis for the issuing court to find that probable cause existed based upon the information contained in the affidavit. The affidavit contains conclusory statements attributed to Ms. Cerrillo which are devoid of any facts from which the court could conclude that probable cause existed. Are her statements regarding social security numbers belonging to other persons based upon personal knowledge, hearsay, or mere conjecture? How does she know whether a person is in this country legally or illegally? For how many clients did she use the procedures outlined in the affidavit?

The court would note that staleness of the information was not at issue, as argued by the defendant, because Ms. Cerrillo stated that she keeps a copy of the tax records of all of her clients at the business. There was no question that the investigators would find tax records of clients of Amalia's Tax Service at her office. Particularity as to which hard copy tax returns and wage earning documents the warrant authorized the officers to seize was also not at issue, because the warrant specified tax returns containing an ITIN for tax years 2006 or 2007, and wage earning documents with a name and/or number that did not match the name or number on the return, also for 2006 and 2007. What was missing from this extraordinarily wide-sweeping warrant was any limitation on which files from tax years 2006 and 2007 could be searched by the investigators. It is again important to note that tax records are confidential and care should be taken to limit intrusion into this privacy interest except when probable cause has been clearly established. As stated previously, the court in a civil case cannot order a party to disclose his or her tax returns as discovery unless the court finds the information is relevant to an issue in the case and the requesting party has shown a compelling need for information contained in the returns because the information sought is not otherwise readily available. *Stone v. State Farm Mutual Auto Insurance Company,* 185 P.3d 150, 159 (Colo. 2008). Likewise, a party seeking access to a tax return through service of a subpoena duces tecum must convince the court that there is a compelling need for the information; absent this high standard being met, the subpoena should be quashed. *Alcon v. Spicer,* 113 P.3d 735, 743 (Colo.2005). The level of intrusion in this case, assuming arguendo that the investigators limited their search only to the 2006

and 2007 returns of clients Amalia's Tax service, was quite significant because there were a number of clients whose private records were searched and for whom not even a scintilla of suspicion of criminal activity existed. [6] As to the computer equipment and external storage devices seized, there was no limitation at all regarding what the investigators were permitted to search for and seize under this warrant, other than that it was evidence of a crime. The warrant, as written, also authorized the seizure of all W-7 forms located by the investigators. In addition to a lack of probable cause, this search warrant authorized a general search of the computer equipment, external memory devices, and the W-7 forms, and as such does not withstand constitutional scrutiny.

The position likely to be asserted by the sheriff's department or the prosecution is that this was as specific as they could be in the affidavit, but that position does nothing to take away from the fact that probable cause was lacking and the warrant should not have been issued. It is not difficult to hypothesize other scenarios under which officers could attempt to use the quality and quantity of information set forth in the affidavit at issue in this case in an attempt to secure a search warrant, and thereafter gain access to confidential information or an area over which there is an expectation of privacy. For example, a police officer investigating a vehicular assault charge goes to the hospital where the suspect is being treated. The suspect is unconscious and an independent blood draw cannot be done without jeopardizing the health of the suspect, so the officer is left to use the results of the test performed by the hospital. The officer is provided with the blood test results for the suspect and there is a positive result for cocaine. The nurse who works at a hospital emergency room discloses that he has been working at the E.R. for six months and "this isn't the first person I've seen test positive for cocaine in the E.R." He explains to the officer in general how blood is drawn and tested in the lab at the hospital, as well as confirming that he has personally viewed the charts of other patients showing the positive test results. The hospital will unquestionably keep the records of those persons who are treated in the ER, so staleness is not at issue, and there is at least reasonable suspicion, if not probable cause, that a search of the records from the ER will provide evidence, as well as the identity of, persons who have unlawfully used a controlled substance in violation of

[6] The defendant has not asserted that the investigators exceeded the scope of the search in this case. The tax documents submitted by the prosecution with the information in this case are for tax year 2006 only.

C.R.S. 18-18-404, which is a class 6 felony. Because the persons testing positive for the controlled substances are unknown, an inspection of the ER record for every person treated during the time in question, whatever period the officer decides to seek, would be required for the officer to discover the identities of those persons who have tested positive for cocaine, as well as the date and time of the positive test. In this hypothetical, would the search withstand a Fourth Amendment challenge, even if the warrant was limited in scope to seize only those records which established that the patient tested positive for cocaine, when the private medical records of many persons had to be searched to arrive at the end result? Another example involves a college dormitory resident assistant who informs a police investigator that she had personally witnessed a number of students living in the dormitory she supervises illegally download copyrighted music for a specific artist on personal computers within the last twenty-four hours. She further describes the computers used as Dell brand laptops. This resident assistant worked for the music industry and is very familiar with the methods used to commit music piracy, and she provides this information to the officer. It does not take a stretch of the imagination to believe that a college-aged person would know how to download music onto a computer from the internet, and that many persons this age probably have done so at one time or another, either with or without paying the copyright fees. The persons who engaged in this conduct were not named, the number of students who directly engaged in these activities was not provided, nor were their dorm room numbers specified by the R.A. Would probable cause exist in this situation to search each room of that specific dormitory, even if that search was limited to seizing Dell brand laptop computers to search for illegally downloaded music relating to just that one named artist, when every Dell laptop computer found by the police would have to be searched? The court does not believe the Fourth Amendment would support the issuance of a search warrant in either hypothetical posed by the court, as it would be nothing more than an exploratory search, even though in each hypothetical there is probable cause that a crime was committed by someone, whereas in the present case there was not probable cause that a crime was committed by this defendant, or any of the other clients of Amalia's Tax Service, before the search occurred.

During this search, the Weld County Sheriff's Department did not merely seize tax return documents for 2006 and 2007; rather, they seized virtually everything related to this

tax return preparation and translation business. On October 17, 2008, the sheriff's investigators seized 49 boxes of tax returns, three computers, and dozens of compact and floppy discs. These items were removed from the business, taken to and then searched at the Weld County Sheriff's Department, and copies were made of those files the investigators believed provided evidence of a crime. The original files, computer equipment, and compact discs were returned to Amalia's on October 23, 2008. Approximately 5,000 files containing tax returns were seized and inspected by the investigators, dating back to at least the year 2000, with copies of approximately 1,300 records retained by the investigators for possible use in criminal prosecutions. The court points this out only in the context that there was no suspicion that Ms. Cerrillo was engaged in criminal activities and the investigators were not searching the business records of Amalia's Tax Service for evidence that she had committed a crime. This was not a search implicating just the privacy rights Ms. Cerrillo has toward her business records. In reality, there were 5,000 separate searches, with a separate and distinct privacy interest existing for each taxpayer whose records were searched, and none of which were supported by probable cause. Investigators searched through approximately 3,700 tax files of people who the sheriff's department determined were not even suspected of engaging in criminal activities. The tax returns and tax return documents seized for this defendant's case involve tax year 2006 only. [7] There was no individualized suspicion that any particular file that was seized and then searched would contain evidence of any crime, let alone identity theft or criminal impersonation. This search required the investigators to look through each and every file, even had the search been limited in scope only to those federal returns filed for

[7] The court has taken judicial notice, pursuant to C.R.E. 201(b), of the cases filed by the prosecution with the Nineteenth Judicial District Court through an information and complaint as a direct file. As of the first week of December 2008, when the prosecution stopped filing these cases through direct information and began submitting the cases to the grand jury, there were 112 cases filed through information and complaint. The prosecution attached a copy of the tax returns and wage earning documents with the information for each of these cases. Of those 112 cases direct filed, 37 cases (33% of the total directly filed) involved only tax returns for tax years other than 2006 or 2007: 08CR2193(2003, 2004, 2005); 08CR2251 (2005); 08CR2186 (2002, 2004, 2005); 08CR2178 (2005); 08CR2016 (2005); 08CR2061(2005); 08CR2014 (2005); 08CR2073 (2005); 2008CR2021 (2005); 08CR2179 (2005); 08CR2149 (2005); 08CR2080(2002, 2005); 08CR2136 (2005); 08CR2123 (2004); 08CR2248 (2005); 08CR2176 (2002, 2003); 08CR2032 (2005); 08CR2129 (2005); 08CR2088 (2005); 08CR2007 (2000, 2001, 2002, 2003, 2005); 08CR2124 (2205); 08CR2131 (2003, 2005); 08CR2125 (2005); 08CR2249 (2005); 08CR2191 (2005); 08CR2015 (2005); 08CR2033 (2004, 2005); 08CR2013 (2005); 08CR2188 (2002, 2003, 2004, 2005); 08CR2190 (2004, 2005); 08CR2097 (2005); 08CR2085 (2004, 2005); 08CR2127 (2005); 08CR2020 (2005); 08CR2182 (2005); 08CR2065(2005); 08CR2084 (2003, 2004, 2005). In addition, 29 cases involve 2006 or 2007 tax returns and years other than

tax years 2006 and 2007, to determine whether that person's file contained evidence of possible identity theft and/or criminal impersonation. Under this warrant, the investigators first had to determine if the file was for tax year 2006 or 2007. If the file was for tax year 2006 or 2007, then the investigator was called upon to determine if the taxpayer identification number was an ITIN. If there was an ITIN on the tax return, then the investigator would have to compare the tax return with the wage earning document(s) to determine whether there was an inconsistency between the name and/or number on the tax return and those contained on the wage earning documents (W-2 or 1099 forms).

It is a well-settled principle that a search performed in violation of constitutional law is not made lawful because it was successful in uncovering evidence the officers believe provide evidence of criminal activity. "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light…" *Byars v. U.S.*, 273 U.S. 28 (1927). To hold otherwise would completely eviscerate the protections afforded by Fourth Amendment and Article II, Section 7 of the Colorado Constitution, and put into place a determination based solely on the ends justifying the means.

The court finds that there was not a substantial basis for a finding of probable cause in the affidavit for the arrest warrant. The court will now consider the applicability of the good-faith exception to the exclusionary rule.

In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Supreme Court engaged in a detailed analysis of the application of the exclusionary rule as a safeguard to violations of the Fourth Amendment by law enforcement officers, as well as a discussion of situations when the exclusionary rule is inapplicable because of a good faith reliance by a police officer on a warrant issued by a neutral magistrate. The court in *Leon* made it clear that when a police officer acts with an objectively reasonable reliance on a search warrant issued by a judicial officer, and that search warrant is later determined to be invalid, the exclusion at trial of evidence obtained during the search would serve no deterrent effect on

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those two tax years (26% of the total number of cases direct filed). The court has no way of knowing what tax years form the basis for those cases in which an indictment was returned.

the officer. The court further stated that there cannot be reasonable reliance by an officer on a magistrate's probable cause determination, using an objective standard of review, when any one or more of four delineated exceptions exist. First, if the magistrate was misled by information in the affidavit that the affiant knew was false, or would have known was false except for a reckless disregard of the truth by the affiant, the good faith exception to the exclusionary rule would not apply. Second, the good faith exception does not exist when a magistrate wholly abandons his or her judicial role when reviewing the affidavit to such degree that no reasonably trained officer would have relied upon the warrant. Third, the good faith exception is inapplicable if the warrant is based upon an affidavit so lacking in indicia of probable cause as to make official reliance on its existence unreasonable. Finally, the good faith exception will not save the items seized from being excluded from evidence if the warrant is facially deficient, i.e. that it fails to particularize the place to be searched or the things to be seized, that an officer executing the warrant cannot reasonably presume it to be valid. *United States v. Leon,* 468 U.S. 897, 923 (1984).

The Colorado General Assembly has created a good faith exception to the exclusionary rule, which is codified at §16-3-308, C.R.S. This statute creates a presumption that the officer was acting in reasonable good faith if the officer acted pursuant to and within the scope of a warrant. C.R.S. 16-3-308(4)(b). This presumption may be rebutted if the officer did not undertake the search in an objectively good faith belief that the warrant was valid, and this objective standard has been further defined to mean that no reasonably trained police officer would have relied upon the warrant or a finding of probable cause. *People v. Randolph,* 4 P.3d 477 (Colo. 2000); *People v. Altman,* 960 P.2d 1164 (Colo. 1998). The intent of this statute was to incorporate the exception to the exclusionary rule set forth in the *Leon* decision. *People v. Leftwich,* 869 P.2d 1260 (Colo.1994).

The court finds that the exclusionary rule, and not the good faith exception, applies to the search in this case. Officers obtaining and executing a warrant to search have a continuing duty to exercise professional judgment. *People v. Randolph,* 4 P.3d 477, 483 (Colo. 2000). Officers are required to have a reasonable knowledge and understanding of what the law prohibits. *U.S. v. Leon,* 468 U.S. 897, 919 FN 20 (1984).

The affidavit presented in support of this warrant was lacking in probable cause to such degree that reliance upon it was not objectively reasonable. There is no information to show that the defendant's file, or any of the thousands of other confidential files, would contain evidence of criminal activities. Probable cause was also not shown how a discrepancy between the name and/or number on the return and that on wage earning documents, without additional information, would lead to a conclusion by the officers that the person committed an offense or what offense was committed. The discrepancy would certainly give rise to a reasonable suspicion, but not probable cause.

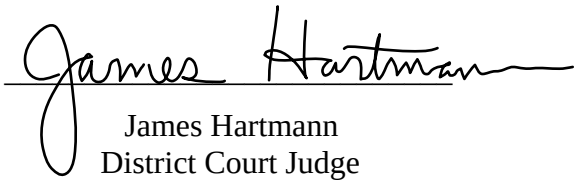
In reality, this search was nothing more than an exploratory search based upon suspicion that some unknown person or persons had committed an offense, and a reasonably cautious officer would have realized that the affidavit was so lacking in indicia of probable cause that it could not be relied upon. Probable cause did not exist to search the tax records of this defendant, or any of the thousands of other records the investigators searched, and the search of this defendant's records was not reasonable under constitutional standards.

The court finds that the exclusionary rule is applicable in this case and the deterrent purpose exists and the motion to exclude the tax records of the defendant is granted. To hold otherwise would be to stamp judicial approval on the search of the confidential records of thousands of persons based on nothing more than suspicion that one or more of them may have committed a crime, with the hope of uncovering evidence of criminal activity, which practice seems more in line with a writ of assistance employed in colonial America, but most certainly well beyond that which is deemed acceptable and reasonable under the Fourth Amendment.

IT IS SO ORDERED.

Dated: March 7, 2009

BY THE COURT:



James Hartmann
District Court Judge