No. _____

In The

Supreme Court of the United States

In re STANLEY LYLE MILLS,

Petitioner.

**On Petition For A Writ Of Mandamus
To The Supreme Court
Of The State Of Nevada**

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED FOR REVIEW

Can the "good faith exception" rule of *Leon v. United States,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) to the exclusionary rule of *Mapp v. Ohio,* 367 U.S. 643, 651, 655-57, 81 S.Ct. 1684, 1689, 1691-92, 6 L.Ed.2d 1081 (1961) apply at all to a search pursuant to an issued search warrant, where:

> a) The affidavit and subsequent affidavits in support of the warrants, aimed exclusively at the Petitioner's minor child, are conclusory, are based exclusively upon a hypothetical model of behavior applicable in some other like cases but not all, and have no quantum of individualized suspicion that the items sought will be found in the Petitioner's residence; and
>
> b) The multiple warrants allow seizure of any "computer" capable of storing information located in Petitioner's residence; and the particular item (a zip drive) is seized from Petitioner's bedroom when the Affiant and other searchers know under the circumstances that it could not possibly contain information relative to the Petitioner's son, but only to the Petitioner himself, an unsuspected third party at the time of issuance of the warrant?

Put another way, should this Court's recent pronouncements in *Heien v. North Carolina,* ___ U.S. ___, 135 S.Ct. 530, 82 U.S.L.W. 4021 (2014) cause this Court to grant mandamus and declare that, under those circumstances, the facts that the searchers seek multiple warrants during the course of the search

QUESTION PRESENTED FOR REVIEW – Continued

and on legal advice of the prosecutor are ultimately irrelevant? That is, where the multiple warrants lack sufficient particularity because all of them authorize the seizure of items for which there never was probable cause to seize, as the Nevada Supreme Court concluded, does that end the inquiry and cause a reviewing court to conclude that the good faith exception of *Leon* to the exclusionary rule simply cannot apply?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

Petitioner, Stanley Lyle Mills.

Respondent, The State of Nevada.

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CONSTITUTION AND RULES

PETITION FOR WRIT OF MANDAMUS

Petitioner, Stanley Lyle Mills, respectfully petitions for a writ of mandamus to review the order and judgment of the Supreme Court of the State of Nevada.

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CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Order of Affirmance, filed December 13, 2013, in the Supreme Court of the State of Nevada, case no. 62987 (unpublished). (Exhibit "A")

Order Directing Answer to Petition for En Banc Reconsideration, case no. 62987, filed July 31, 2014. (Exhibit "B")

Order Denying En Banc Reconsideration, filed October 23, 2014. (Exhibit "C")

Order Staying Issuance of Remittitur filed November 21, 2014. (Exhibit "D")

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STATEMENT OF BASIS OF JURISDICTION

This Petition is filed within 90 days of November 21, 2014, as that is a discretionary ruling following the timely filing of a Petition for Rehearing that stays its judgment and contemplates the filing of this Petition within 90 days of that order. *See*: U.S. Sup. Ct. Rule 13.3, 28 U.S.C. §1651(a).

This Petition implicates U.S. Sup. Ct. Rule 10(b) and (c): A state court of last resort (the Supreme Court of the State of Nevada) has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED BY A PETITION

The Fourth Amendment to the United States Constitution states:

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

The Fourteenth Amendment to the United States Constitution states *in para materia:*

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty of property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

RULE 20.1 STATEMENT

In this case, the writ sought is in aid of this Court's appellate jurisdiction.

First, this Court could treat the Petition as a Petition for Writ of Certiorari and a Motion for Leave to File it as such Out of Time. U.S. Sup. Ct. Rule 13.5. For reasons stated below, that would be an appropriate exercise of discretion, especially since it is tendered well within 60 days of when a Petition for Writ of Certiorari would be due per the strictly construed time line of U.S. Sup. Ct. Rule 13.3.

Second, this is a case where a question of public importance is involved, and where as a practical matter Petitioner has no other adequate remedy. *See*: *Ex Parte Republic of Peru,* 318 U.S. 578, 582-84, 63 S.Ct. 793, 796-97, 87 L.Ed. 1014 (1943).

The *Leon* exception to *Mapp* affects numerous citizens throughout the country who have been subjected to unreasonable searches and seizures. But per *Stone v. Powell, post,* where a state court gives an accused a "full and fair hearing" on his Fourth Amendment issue, as here, the fact that the state court misconstrues the requirements of the Fourth Amendment, also as here, is irrelevant. That misapplication cannot be reviewed under 28 U.S.C. §2254.

It also cannot be reviewed under state *habeas,* NRS 34.810(1)(b)(2), since the issue was raised on direct appeal.

Third, this case actually works better as a Petition for Writ of Mandamus than it does as a Petition for Writ of Certiorari. Mandamus is proper when the lower court clearly and undisputably misconceives the scope and effect of the Supreme Court's decision on appeal. *United States v. Haley,* 371 U.S. 18, 19-20, 83 S.Ct. 11, 12, 9 L.Ed.2d 1 (1962); *and see*: *Hollingsworth v. Perry,* 558 U.S. 183, 190, 130 S.Ct. 705, 710, 175 L.Ed.2d 657 (2010). Here, Petitioner's position is that the Supreme Court of Nevada's misapplication of *Leon* is "clear and undisputable." If it were "arguable," then certiorari probably would be the appropriate procedural vehicle; but Petitioner contends the misapplication is much more than "arguable."

Fourth, the undersigned was not trial or appellate counsel. After the Supreme Court of Nevada issued its Order Denying *en banc* Reconsideration on October 23, 2014. (Exhibit "C") Petitioner retained the undersigned about three weeks later. Petitioner was (and is) on bail pending appeal after imposition of a sentence of imprisonment. Thus, as the appellate remittitur had not issued, the first thing the undersigned did was to file a Motion to Stay Issuance of Remitttur. The Supreme court of the State of Nevada *granted* the Motion, staying the issuance until *March 17, 2015,* or until the Petitioner filed his Petition. (Exhibit "D") From that, the Supreme Court of the

State of Nevada led the undersigned to believe that it considered its Order of November 21, 2014 to be its final discretionary order, and that Petitioner's 90 days under Rule 13.1 would run from November 21, not from October 23.

STATEMENT OF THE CASE

This is an Application for Mandamus from the Supreme Court of the State of Nevada.

Per the Nevada Supreme Court's recitation of facts:

> "This was an appeal from a judgment of conviction, pursuant to a guilty plea, of felon in possession of a firearm and two counts of possession of visual presentations detecting sexual conduct of a person under 16 years of age.
>
> Petitioner's son, L.M., sent multiple harassing e-mails and Facebook messages to a teacher at his high school. Based on the messages, law enforcement successfully obtained a warrant to search L.M.'s home and computers for weapons or other evidence of his threats. Once inside the home, law enforcement discovered weapons and electronic devices which were not covered by the language of the first warrant, and obtained a second warrant authorizing the seizure of the additional items. Several firearms and

> electronic devices were removed from the home.
>
> While reviewing a 'thumb' drive removed from the home, law enforcement discovered images in a folder associated with Petitioner, which appeared to detect sexual conduct of persons under 16 years of age. A third warrant was obtained allowing for a more thorough search, and additional images were discovered. Petitioner was arrested for possessing the firearms and images, Petitioner moved to suppress, alleging that the evidence was obtained pursuant to an unconstitutional search. After the district court denied Petitioner's Motion to Suppress, he pleaded guilty to the instant charges, reserving the right to appeal the denial of his Motion."

(Exhibit "A" 1-2)

Although that recitation is factually correct, Petitioner asserts that proper adjudication of the Fourth Amendment issue herein cannot be made without reference to consistent additional, undisputed facts, to wit:

1. The application for search warrant of September 16, 2010 (Appellant's Appendix to the Nevada Supreme Court, hereinafter "AA") involved investigation of the crime of "threats," a misdemeanor violation of an ordinance of Carson City. The target was L.M., a juvenile who lived in the residence situated at 2400 Baker Drive, Carson City, Nevada. That residence was owned by Petitioner, L.M.'s biological

father. Obviously, the police had the hard copies of the Facebook threats and the e-mails in question. The threats were targeted specifically towards the teacher and nobody else. At the time of the affidavit, L.M. had been removed from Carson High School. (*See*: AA: 1-8)

2. What the affiant, a school police officer named Jessica Rivera, was actually seeking was evidence of something on the nature of "Columbine." As to that, her affidavit stated in *para materia*:

> "9. My experience and research leaves me to believe [L.M.] is a threat to the school and staff at Carson High School. School violence is a reoccurring problem nationwide; often violence begins with verbal or written threats to teachers and students. Students often make threats, then move on to more active forms of violence.
>
> Research has shown active shooters begin with a problems [sic] regarding a student(s) or teacher(s). Students research information to build weapons, response plans for schools and police departments, as well as information regarding students and teachers. Often the students keep journals and draw pictures, and spend countless hours researching other school shootings, the stories and histories behind past school violence, or how to carry out the act.
>
> The e-mails sent to [the teacher in question] beginning in July and ending September 12, 2010 from [L.M.] are consistent with the threats of violence which often precludes to

> actual violence [sic], [L.M.'s] attitude and lack of remorse for the blatant threats made towards a teacher, his beliefs, and his family fit the profile of students who have committed such acts of violence against their schools, teachers and fellow students."

(AA: 7)

Noteworthy about this Affidavit is nowhere therein is there any particularized, individualized information that L.M. had actually created plans for building weapons, keeping journals, drawing pictures, or researching school shootings, or had actual, active plans to commit violent acts generally at Carson High School that would put anybody at risk.

3. The initial search warrant of 9-16-10 allowed the searchers to enter 2400 Baker Drive and seize any computers and any personal information on any students or staff of the Carson City School District, and any and all documentation and/or media related to school shootings, weapons or purchasing of weapons, bomb building information and material, and school district safety plans. (AA: 9-10)

4. During the actual search of 9-16-10, the same Deputy Jessica Rivera successfully sought a telephonic search warrant to include all weapons, as the searchers found weapons and ammunition inside of the residence in plain view. (AA: 11-17) Deputy Rivera *emphasized* that she was *not* investigating "new crimes." (AA: 1546) And she was not seeking to limit the computers that could be seized, but actually *expanding* the *definitional scope* of computers to be

seized from the Baker Drive residence. The telephonic warrant allowed seizure of: any and all personal computers, laptop computers, hard disc drives, modems, monitors, scanners, CD roms and any/all electronic and/or optical data storage and/or retrieval systems, or medium, and/or any related computer peripherals to include but not limited to LCDs, CRT controllers, printers, video cameras, digital cameras, camcorders, VCRs, and other image capturing reproducing devices to include but not be limited to magnetic tapes, cassette tapes, CDs, DVDs, thumb drives, external drives, SD cards, and any data storage devices and digital cameras. The scope of the expanded amended warrant was to include but not be limited to Play Station III video game systems, air cards used to access the internet – and any and all weapons and/or ammunition. Accordingly, upon the grant, the search warrant was amended. (AA: 18-19)

5. The subsequent application and affidavit for amended search warrant signed on September 27, 2010 (AA: 20-22) had the same issues about it.

Paragraph four had the same request to search the same type of "computer equipment" as the telephonic warrant. (*See*: AA: 20-21) And paragraph six of the Application and Affidavit stated:

> "This amended search warrant for the above mentioned items is due to the fact upon serving of the original search warrant large numbers of the above-mentioned items are in plan [sic] view in several rooms. According to my research typically in these types of cases

> subjects do surveillance on schools, teachers and students [sic] homes before possibly carrying out an act of violence. It is believed these items may have information leading to the carrying out of threats against the students [sic] school, teacher or other unknown individuals."

(AA: 21)

6. In the subsequent search warrant application affidavit, this time signed by Daniel G. Gonzalez, a detective with the Carson City Sheriff's Office dated October 20, 2010 (AA: 25-33), he indicated that he was present during the search with Deputy Rivera of September 16, 2010; the Petitioner was present in his residence; during the course of the search Petitioner told Detective Gonzalez that L.M. had access to his computer, but that his log-ons were password protected (AA: 26); and the search that they wished to engage upon was from an Ativa thumb drive taken from Petitioner's bedroom. (AA: 26) He indicated that the discovery of the images of child pornography occurred when a lab technician conducted a forensic examination of the thumb drive off of the site on September 29, 2010. (AA: 26-27)

In other words, missing in Detective Gonzalez's affidavit is any indication that L.M. had any access whatsoever to this thumb drive. Given where it was located, it would *not* seem more probable than not that L.M. had computer access to said thumb drive.

7. In Officer Rivera's Incident Report (AA: 57-61), she indicated on page two thereof that L.M. was

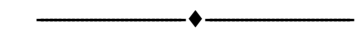
in the Carson City Juvenile Detention Facility on September 20, 2010 when she interviewed him. At that point, L.M. explained that he had *thought* about doing something to the school, certain teachers or students a lot, especially when he gets upset. (AA: 60) Significantly missing in this after-the-fact description was any admission that L.M. had put his thoughts *to paper,* much less that evidence of his thoughts could be located in his father's residence.

8. In Detective Gonzalez's and Deputy Rivera's interview of Petitioner while executing the first search warrant (AA: 86-109), Petitioner stated that L.M. used his computer and his own screen name and log in number (AA: 89), but the name of "weird" on the computer was one where only Petitioner had the password. (AA: 91) Further, the police asked Petitioner if they could take his hard drive, but Petitioner refused, stating that his children had no access to any information thereon. The searchers indicated that his objection of necessity was overruled, since the search warrant allowed them to take all computers. (AA: 93) The transcript also reveals that at the time of the interview, L.M. was hospitalized in a psychiatric hospital, West Hills Hospital, in Reno, Nevada. (AA: 98)

In its Order of Affirmance, the Nevada Supreme Court noted that the warrant lacked sufficient particularity, as it authorized the seizure of items for which there was no probable cause to seize. In particular, the amended warrant allowed law enforcement to seize computer monitors, printers, VCRs, and

cassette tapes – devices which could not reasonably have contained evidence of the crimes L.M. allegedly committed. (Exhibit "A": 4)

However, the Nevada Supreme Court ruled that the officer's good faith reliance on the warrant was reasonable under the circumstances because the officer requested the warrant telephonically while at the scene under time pressures, after consulting with the prosecutor. (Exhibit "A": 4) For that reason, the Nevada Supreme Court affirmed the Denial of the Motion to Suppress and the resulting judgment of conviction. The entire Supreme Court of the State of Nevada became concerned enough that it ordered the State to respond to Petitioner's Petition for *En Banc* for Reconsideration. (Exhibit "B") However, the entire Court ultimately summarily denied the Petition. (Exhibit "C")



REASONS FOR GRANTING THE PETITION

I.

Very frankly, there are jurists in this country who believe that *Leon* effectively overruled the exclusionary rule of *Mapp v. Ohio, supra,* especially where alarming things like child pornography become discovered. Undoubtedly, that perception came from this language of *Leon*:

> "If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter

> the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage the officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. **We find such arguments speculative and conclude the suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.**"

Leon, 468 U.S. at 918, 104 S.Ct. at 3418. From there, the judicial perception arises that if the police searched pursuant to a warrant issued by a neutral and detached magistrate, and seized items technically authorized by the warrant itself, the purposes of the exclusionary rule are not served and suppression cannot be warranted, no matter what else the facts may be. Petitioner disagrees; hence, he seeks mandamus.

Certainly, in cases where there is undisputedly probable cause to search and the Fourth Amendment violation occurs as a result of a clerical error, the

"good faith exception" to the exclusionary rule clearly applies. *Arizona v. Evans,* 514 U.S. 1, 14, 115 S.Ct. 1185, 1193, 131 L.Ed.2d 34 (1995). This, however, is not that case.

Likewise, when the legal foundation for the crime being investigated turns out to be erroneous, but the police conduct a search in objectively reasonable reliance on binding appellate precedent at the time of the warrant application, the exclusionary rule does not apply. *Davis v. United States,* ___ U.S. ___, 131 S.Ct. 2419, 2429, 180 L.Ed.2d 285 (2011). Again, this is not that case.

As this Court noted in *Davis,* for purposes of applying the exclusionary rule, the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for the individual's Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting cost, But when the police act with an objectively reasonable good faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrent rationale loses much of its force, and exclusion cannot pay its way. *Davis,* 131 S.Ct. at 2427-28.

In filing this Petition, what we seek from this Honorable Court is this ruling: Where an officer swears out an application for a search warrant that is lacking in probable cause; where the same officer conducts the search and obtains subsequently a telephonic warrant that allows seizure of items that

cannot contain the evidence that the police seek logically; and where the affiant/searcher obtains information that the target of the search has no access to items seized, yet the searcher seizes them anyway, under *those* circumstances *Leon* simply cannot apply, and the exclusionary rule *must* be the order of the day. That is, Petitioner seeks a bright-line rule that under those circumstances, with those types of violations of the Fourth Amendment, suppression of evidence seized pursuant to such violations of the Fourth Amendment simply cannot be saved by factors such as the officers acting under some perceived "time pressure," or the officers acting pursuant to the advice of the state's or of the government's attorneys.

The Court seemed to be headed in that direction in *Groh v. Ramirez,* 540 U.S. 551, 560-61, 124 S.Ct. 1284, 1291-92, 157 L.Ed.2d 1068 (2004). There, this Court held that where a search warrant fails to describe persons or things to be seized specifically, it is invalid on its face and cannot be saved under the "*Leon* good faith exception" to the exclusionary rule. It is incumbent upon the officer executing the search warrant to ensure that the search warrant conforms to constitutional requirements.

However, the very recent opinion of *Heien v. North Carolina,* ___ U.S. ___, 135 S.Ct. 530, 82 U.S.L.W. 4021 (2014) might be viewed as limiting *Groh* to its facts. There, this Court held that a reasonable suspicion, as required for a traffic stop or investigatory stop, can rest on a reasonable mistake

of law. *Heien,* 135 S.Ct. at 536. This Court noted that the Fourth Amendment tolerates only *reasonable,* mistakes with respect to a reasonable suspicion for a traffic stop or an investigatory stop, and those mistakes, whether of fact or of law, must be objectively reasonable. *Heien,* 135 S.Ct. at 539.

From there, the state or government could certainly argue that as long as a neutral and detached magistrate issued the warrant, and as long as the warrant gave the searchers directions on what to seize – even if it was overbroad, as here – the searcher's reliance upon the magistrate's mistake of law would be deemed reasonable per se as it is the magistrate, not the searchers, who is deemed to know the law; and as long as the warrant gives direction on what to seize, and the searchers follow those directions, the exclusionary rule could not apply.

Although some jurists such as the Supreme Court of the State of Nevada would read *Leon* (and *Heien*) that far, Petitioner asserts that such a reading is improper. As Justice Kagan noted in her concurrence in *Heien,* the "mistakes of law" which are objectively reasonable cannot rest on the requirements of the Fourth Amendment. *Heien,* 135 S.Ct. at 540-42 (Kagan, J., concurring). And as Justice Sotomayor noted in her dissent in *Helen,* an arresting officer's state of mind does not factor into the probable cause inquiry, except for the facts he knows. *Devenpeck v. Alford,* 543 U.S. 146, 153 (2004). Departing from this tradition means further eroding the Fourth Amendment's protection of civil liberties in a

context where that protection has already been worn down. *Heien,* 135 S.Ct. at 543 (Sotomayor, J., dissenting).

Respectfully, in this case, a reasonable jurist could not conclude anything but that the Fourth Amendment had been violated, both in the issuance of the search warrant and in its scope, for the following reasons:

II.

Beyond doubt, Deputy Rivera was speculating and had an uncorroborated belief that L.M. had created evidence of plans to do injury to Carson High School and/or its occupants at the time she sought the search warrant. One may argue that her belief was grounded upon years of experience and study of cases such as Columbine; but nevertheless, it remained an uncorroborated belief.

A belief, however well founded, that an item will be found in the place to be searched furnishes no justification for a search of that place without a warrant. *Chapman v. United States,* 365 U.S. 610, 613, 81 S.Ct. 776, 778, 5 L.Ed.2d 828 (1961). To accommodate public and private interest, **some quantum of individualized suspicion** is usually a prerequisite to a constitutional search and seizure, although the Fourth Amendment imposes no irreducible requirement of such suspicion. *United States v. Martinez-Fuerte,* 428 U.S. 543, 561-62, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976); *see*: *Maryland v. King,*

___ U.S. ___, 133 S.Ct. 1958, 1977-78, 186 L.Ed.2d 1 (2013). A search warrant affidavit must set forth *particular facts and circumstances* underlying the existence of probable cause. *Franks v. Delaware,* 438 U.S. 154, 166, 8 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978). The "sufficient information" presented to the magistrate to determine probable cause cannot be a mere ratification of the bare conclusions of others. *Illinois v. Gates,* 462 U.S. 213, 240, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527 (1983).

Clearly, the "subjective good faith" of Deputy Rivera is not enough. If that alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects only in the discretion of the police. *Beck v. Ohio,* 379 U.S. 89, 97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964).

To make matters more egregious, Deputy Rivera sought the search warrant before speaking either with Petitioner or with L.M. After speaking with L.M. days later while he was in custody, she would have known that L.M.'s "Columbine-like thoughts" were exactly that – thoughts, not reduced to a piece of paper or otherwise acted upon. Beyond the e-mails and Facebook posts themselves, which the police already had and which were clear and convincing

evidence of the misdemeanor violation, what the police had were "pre-crime speculations."[1]

And the search warrant was clearly overbroad, as the Nevada Supreme Court found. It is true that valid warrants may be issued to search any property, whether or not occupied by a third party, when there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found on the property. *Zurcher v. Stanford Daily,* 436 U.S. 547, 554, 98 S.Ct. 1970, 1975-76, 56 L.Ed.2d 525 (1978). A state is not prevented by the Fourth and Fourteenth Amendments from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement. *Zurcher,* 436 U.S. at 560, 98 S.Ct. at

[1] Of course, the validity of a search warrant must be assessed on the basis of information the officers disclosed or had a duty to disclose to the issuing magistrate. *Maryland v. Garrison,* 480 U.S. 79, 85-86, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72 (1987). That is, evidence (or lack thereof) discovered afterwards cannot validate a warrant or invalidate it at the time it is issued. Here, we do not seek the grant of mandamus so as to overrule this time-honored principle. Rather, we point out that Deputy Rivera's after-acquired information is further evidence of her bad faith. She had no specific information grounding a particularized belief that L.M. had done anything other than send the e-mails and Facebook messages in question; and what she discovered four days after she successfully applied for the first search warrant did not help her case at all. Yet, knowing that, she sought a third warrant on September 27, seven days later, omitting that fact.

1978.[2] However, execution of a search warrant resulting in the conduct of independent searches of unsuspected third parties – beyond brief detention and questioning – who happen to be on the premises at the time of execution of the warrant is impermissible under the Fourth Amendment. *See*: *Denver Justice & Peace Committee, Inc. v. City of Golden,* 405 F.3d 923, 931 (10th Cir. 2005), citing *Ybarra v. Illinois,* 444 U.S. 85, 93-94, 100 S.Ct. 338, 343-44, 62 L.Ed.2d 328 (1979).

As noted by the Ninth Circuit in *United States v. Hill,* 459 F.3d 966 (9th Cir. 2006), a case that seems perfectly in keeping with this *Court's jurisprudence,* the government does not have an automatic blank check when seeking or executing warrants in computer-related searches. Although computer technology may in theory justify blanket seizures, the government must still demonstrate to the magistrate *factually,* why such a broad search and seizure authority is reasonable in the case at hand. There must be some threshold showing before the government may "seize the haystack to look for a needle." *Hill*, 459 F.3d at 975. That, of course, does not mean that searches pursuant to overbroad warrants are immune from a *Leon* attack; if the officers can show that they were motivated by considerations of practicality rather than by a desire to engage in "indiscriminate fishing,"

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[2] Congress passed 42 U.S.C. §2000aa(a) or the "Privacy Protection Act," which had the effect of superseding the *Zurcher* holding. Other states did likewise. *See:* California Penal Code §1524(c); NJSA 2 A:84A-21.9-21.12.

the exclusionary rule may not be appropriate. *Hill,* 459 F.3d at 977. *See also: Riley v. California,* ___ U.S. ___, 134 S.Ct. 2473, 2485-88, 189 L.Ed.2d 430 (2014) [interests in protecting officer's safety and in prevention of destruction of evidence do not justify dispensing with warrant requirements for searches of cell phone data].

But as also noted by the Ninth Circuit in *United States v. Payton,* 573 F.3d 859, 861-64 (9th Cir. 2009), in reversing the denial of a motion to suppress, where on its face a broad search warrant allows a seizure of any computers, the question is whether there is ample independent evidence that the documents being sought by the warrant could reasonably be found in the computer in question. The mere fact that the computer is "capable" of storing such information, by itself, is insufficient.

In this case, the searching officers knew that only the computer to which L.M. had a specific password was likely to contain any evidence material to L.M.'s alleged threats. Yet, the searchers relied on the warrant in seizing everything. Not only did they seize L.M.'s grandfather's computers, they seized the instant thumb drive located in Petitioner's bedroom, with no information whatsoever that L.M. had any access whatsoever to said thumb drive. That is a Fourth Amendment violation, just as the Nevada Supreme Court held.

III.

The Supreme Court of Nevada's Order of Affirmance is painful for its reliance upon cases which should have informed that court to reverse, not affirm.

The court cited *United States v. Spilotro,* 800 F.2d 959, 963 (9th Cir. 1986), a case decided by Justice Kennedy when he was Judge Kennedy, for the proposition that the warrant lacked sufficient particularity because it authorized the seizure of items for which there was no probable cause to seize.

In *Spilotro,* the Ninth Circuit noted that the Fourth Amendment requires a warrant particularly describing the place to be searched specifically enough to enable the person conducting the search reasonably to identify the things to be seized. This requirement prevents general, exploratory searches and indiscriminate rummaging through a person's belongings. *Andreson v. Maryland,* 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976).

The Ninth Circuit further noted that use of generic descriptions in a warrant may not be fatal if the warrant more specifically identifies the alleged criminal activities in connection with which the items are sought. *Spilotro,* 800 F.2d at 964, and cases cited therein. But where the government knows exactly what it needs and wants, a warrant that is generic does not give guidance to the searchers to determine

what particular items to seize. That fact invalidates the warrant. (*Id*. at 965-66)

Where a warrant is as general and exploratory as was the one in *Spilotro* and as is the one here, *Spilotro* further holds that the "good faith exception" of *Leon* **cannot apply**. *Spilotro,* 800 F.2d at 968.

Yet, in applying the "good faith exception" of *Leon,* the Nevada Supreme Court cited *United States v. Weber,* 923 F.2d 1338 (9th Cir. 1990). As with *Spilotro, Weber* would compel the reversal, not the affirmance, of the denial of the motion to suppress. *Weber* holds that the government did not act in good faith in relying on a warrant which sought items as to which there was no probable cause to seize. The government had complete control over the timing of the search and acted unreasonably in preparing the affidavits. As the Ninth Circuit noted: "the foundation was expert testimony that may have added fat to the affidavit it presented, but certainly no muscle. Stripped of the fat, it was the kind of 'bare-bones' affidavit that is deficient under *Leon.*" *Weber,* 923 F.2d at 1346.

That is what we are talking about here. Stripped of the "fat" of Deputy Rivera's opinions about children who would threaten teachers, the remainder of her affidavit had no muscle whatsoever. And asking for a specific description by telephone of every computer-type device found in the home was akin to pouring a bottle of Coors into a Budweiser can and calling it Budweiser! By any other name, both the original

warrant and the amended telephonic warrant were general, exploratory warrants. Given that Deputy Rivera knew that the amended warrant authorized seizure of items for which there was absolutely no probable cause to seize, how could *Leon* apply in light of *Spilotro* and *Weber*? The obvious answer is that it could not.

The truly bothersome thing about this case is this: Petitioner well recognizes that this Honorable Court does not sit as a "court of super errors." However, this Court held in *Stone v. Powell,* 428 U.S. 465, 495, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976), that where the state provides an opportunity for a full and fair litigation of the Fourth Amendment claim, the state prisoner cannot be granted *habeas* relief on the ground that the evidence obtained against him was pursuant to an unconstitutional search and seizure. It would be cynicism to the extreme to deny this Petition on the grounds that the Fourth Amendment violation here was so blatant, and the *Leon* exception so obviously inapplicable, that the Court simply has no reason to grant mandamus to declare what this Court has already declared. In light of *Stone,* Petitioner would simply have no meaningful avenue for redress in that instance.

For this additional reason, then, Petitioner prays that this Honorable Court grant the within Petition and reverse the Order of Affirmance entered by the Supreme Court of the State of Nevada and remand for further proceedings.

Respectfully submitted,

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EXHIBIT A

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

STANLEY LYLE MILLS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 62987

ORDER OF AFFIRMANCE

(Filed Dec. 13, 2013)

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felon in possession of a firearm and two counts of possession of visual presentations depicting sexual conduct of a person under 16 years of age. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Stanley Mills' son, L.M., sent multiple harassing emails and Facebook messages to a teacher at his school. Based on the messages, law enforcement successfully obtained a warrant to search L.M.'s home and computers for weapons or other evidence of his threats. Once inside the home, law enforcement discovered weapons and electronic devices which were not covered by the language of the first warrant, and obtained a second warrant authorizing

the seizure of the additional items. Several firearms and electronic devices were removed from the home.

While reviewing a "thumb" drive removed from the home, law enforcement discovered images in a folder associated with Mills which appeared to depict sexual conduct of persons under 16 years of age. A third warrant was obtained allowing for a more thorough search, and additional images were discovered. Mills was arrested for possessing the firearms and images. Mills moved to suppress, alleging that the evidence was obtained pursuant to an unconstitutional search, After the district court denied Mills' motion to suppress, he pleaded guilty to the instant charges, reserving the right to appeal the denial of his motion. *See* NRS 174.035(3).

First, Mills contends that the district court abused its discretion by denying his motion to suppress because the first search warrant was not supported by probable cause.[1] Probable cause to support a search warrant exists where the facts and circumstances within an officer's knowledge warrant a reasonable belief that an offense has been or is being committed, *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949), and that "there is a fair probability that contraband or evidence of [the] crime will be found in a particular place," *Illinois v. Gates,* 462 U.S. 213, 238, (1983). When reviewing a magistrate's

[1] We note that neither party, either below or on appeal, has raised the issue of standing.

probable cause determination, "[t]he reviewing court is not to conduct a de novo probable cause determination but instead is merely to decide whether the evidence viewed as a whole provided a substantial basis for the magistrate's finding." *Keesee v. State,* 110 Nev. 997, 1002, 879 P.2d 63, 67 (1994). When reviewing a district court's ultimate decision regarding a motion to suppress, this court reviews findings of fact for clear error, but the legal consequences of those facts de novo. *State v. Beckman*, 129 Nev. ___, ___ 305 P.3d 912, 916 (2013).[2]

Mills contends that the first search warrant lacked probable cause because L.M.'s messages were merely offensive and did not warrant a search of each computer in Mills' home. We disagree with both contentions. The warrant application included the messages L.M. sent to his teacher, in which L.M. stated his desire to see the teacher dead, challenged his teacher to a fight, discussed hatred of the teacher and his family, and possibly referenced the teacher's home. These messages were sent over the course of several months, in escalating frequency and hostility, The officer applying for the warrant averred that, based upon her training and experience, such messages were often preludes to "more active forms of violence," and that L.M. likely sent the messages from one of the computers in his home. These facts, among others, support the court's probable cause

[2] We reject Mills' contention that the district court's factual findings are not entitled to the appropriate level of deference.

determination. *See* Carson City Municipal Code (C.C.M.C.) 8.04.015 (defining harassment); *see United States v. Terry,* 522 F.3d 645, 648-49 (6th Cir. 2008) (it is reasonable to infer that a suspect used a computer in his home. to send messages over the internet); *see generally Keesee,* 110 Nev. at 1004, 879 P.2d at 68 (probable cause to search extends to all areas under a suspect's control). We conclude that the district court did not abuse its discretion by denying Mills' motion to suppress on this basis.

Second, Mills contends that the district court abused its discretion by denying his motion to suppress because the second warrant was not sufficiently precise, rendering it, a general warrant. We review de novo a district court's determination whether a warrant lacked sufficient particularity. *United States v. Spilotro,* 800 F.2d 959, 963 (9th Cir. 1986). Although evidence obtained pursuant to warrant that is deemed invalid may be suppressed as a remedial measure, the evidence, need not be suppressed if an officer relied in good faith on the warrant's validity, *United States v. Leon,* 468 U.S. 897, 922 (1984); *State v. Allen,* 119 Nev. 166, 172, 69 P.3d 232, 236 (2003) ("Exclusion is only appropriate where the remedial objectives of the exclusionary rule are served.").

We agree that the warrant lacked sufficient particularity because it authorized the seizure of items for which there was no probable cause to seize. *See Spilotro,* 800 F.2d at 963. The second warrant allowed law enforcement to seize computer monitors, printers, VCRs, and cassette tapes – devices which could not

reasonably contain evidence of the crimes L.M. allegedly committed. However, we conclude that the officer's good faith reliance on the warrant was reasonable under the circumstances and does not support exclusion of the evidence obtained in this case. Although the warrant was not a model of precision, the officer who requested it did so telephonically, while at the scene, *see United States v. Weber,* 923 F.2d 1338, 1346 (9th Cir. 1990) (time pressure is a factor to be considered when analyzing good faith), after consulting with a prosecutor, *see United States v. Pappas,* 592 F.3d 799, 802 (7th Cir. 2010) (consulting with a prosecutor prior to applying for a search warrant provides objective evidence of good faith). As a result, the district court did not abuse its discretion by denying Mills' motion to suppress on this basis.

Having considered Mills' contentions, and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

/s/ Pickering, C.J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Cherry, J.
Cherry

cc: Hon. James E. Wilson, District Judge
Kenneth A. Stover
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

EXHIBIT B

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

STANLEY LYLE MILLS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 62987

ORDER DIRECTING ANSWER TO PETITION FOR EN BANC RECONSIDERATION

(Filed Jul. 31, 2014)

Appellant has petitioned this court for en banc reconsideration of the Order of Affirmance entered by a panel of this court on December 13, 2013. Having reviewed the petition, it appears that an answer will assist the court in resolving the issues presented. Accordingly, respondent shall have 15 days from the date of this order within which to file and serve an answer to the petition. *See* NRAP 40A. We stay issuance of the remittitur in this appeal pending resolution of the petition for en banc reconsideration.

It is so ORDERED.

/s/ Gibbons, C.J.

cc: Kenneth A. Stover
Attorney General/Carson City
Carson City District Attorney

EXHIBIT C

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

STANLEY LYLE MILLS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 62987

ORDER DENYING EN BANC RECONSIDERATION

(Filed Oct. 23, 2014)

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

cc: Hon, James E. Wilson, District Judge
Kenneth A. Stover
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

EXHIBIT D

IN THE SUPREME COURT
OF THE STATE OF NEVADA

STANLEY LYLE MILLS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 62987

ORDER APPROVING SUBSTITUTION OF COUNSEL AND STAYING ISSUANCE OF REMITTITUR

(Filed Nov. 21, 2014)

The substitution of counsel filed on November 14, 2014, is approved. NRAP 46(d)(2). The clerk of this court shall substitute attorney Richard F. Cornell and the Law Offices of Richard F. Cornell as counsel of record for appellant in place of attorney Kenneth A. Stover.

Appellant has moved to stay issuance of the remittitur pending the filing of a petition for a writ of certiorari with the United States Supreme Court. Cause appearing, we grant the motion. *See* NRAP 41(b). We hereby stay issuance of the remittitur until March 17, 2015. *Id.* If the clerk of this court receives written notice by March 17, 2015, from the clerk of the United States Supreme Court that appellant has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the

certiorari proceedings. If such notice is not received by March 17, 2015, the remittitur shall issue on March 18, 2015.

It is so ORDERED.

/s/ Gibbons, C.J.

cc: Hon. James E. Wilson, District Judge
Kenneth A. Stover
Richard F. Cornell
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk
Stanley Lyle Mills