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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

People of the State of California,

Plaintiff,

vs.

JOEL HALE,

Defendant.

Case No.: 2214744

NOTICE OF MOTION; MOTION TO SUPPRESS EVIDENCE AND QUASH / TRAVERSE SEARCH WARRANT PURSUANT TO PENAL CODE § 1538.5; POINTS, AUTHORITIES, AND ARGUMENT IN SUPPORT THEREOF.

PRELIM SET _____, 2005.

Date: _____, 2005
Time: _____ AM / PM
Dept: _____

TO: THIS HONORABLE COURT AND THE DISTRICT ATTORNEY COUNTY OF SAN FRANCISCO,

PLEASE TAKE NOTICE that on _____, at _____ in Department _____ of the above entitled court, defendant JOEL HALE will move this court under California Rules of Cout, Rule 243.2 (h) for an order to suppress evidence obtained under warrant, under Penal Code § 1538.5 Motion to Quash/Traverse. The defense specifically requests this court order its clerk to call up the Search Warrant 050445923, issued on April 12, 2005 by Judge _____, in the Superior Court of the City and County of San Francisco, State of California.

Dated: June 3, 2005

Respectfully submitted,

_____
Anthony S. Lowenstein, Esq.
Attorney for Defendant, Joel Hale

MOTION

In response to the Prosecution's and/or Court's [anticipated] opposition to our motion to reveal the confidential informant and/or unseal the warrant affidavit, the defendant respectfully moves to suppress certain tangible and intangible things seized from Defendant and from the residence which the government reports to be his home on the grounds that the "warrant" ostensibly authorizing the search was not supported by provable, reviewable probable cause,1 or to dismiss the complaint because his due process rights are violated by the non-production of that information. We need not further press the unsealing issue at this juncture or in this motion, because the Defendant's rights (or lack thereof) to the other options are clear from the People's position on the sealing point.

The things unlawfully seized include 3.42 g and .85 g of suspected methamphetamine ["meth."]; a scale; plastic "baggies'; as well as statements by the defendant and others rousted therein; the items listed on whatever "return to search warrant" might exist (other than the blank one provided to Defendant); forensic and testimonial conclusions about all such things; the transmission of information about all such things, and about the defendant's arrest based on such things, to any governmental agency, and any governmental use of that information; all law enforcement observations of the interior of the residence and its contents; and any and all other things deemed at the hearing to have resulted from this shameful grossly unlawful and unconstitutional governmental activity.

The motion is based on this memorandum and attachments, on all things on file at the time of the hearing, on evidence and argument to be submitted at the hearing, on the remaining vestiges of the United States Constitution and on all that is just and right in a purported free and democratic society.

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1 There may be further grounds for the motion, but the government's concealment of all the information necessary to ascertain such prevents us from mounting such an attack. By our not mentioning that which they have prevented us from discovering should not be deemed a waiver of the unmentioned stuff: "*Waiver*" necessarily requires knowingness and intentionality. The government hides the truth at their peril.

PERTINENT FACTS

The police descended upon a residence at 310 Stanyan, Apt. 302, in the City of San Francisco, which they have reported to be this defendant's residence. There appears to be a Warrant for that search, signed April 12, 2005.

The affidavit was "sealed" by court order[2], and hence we have no idea what the magistrate thought supported "*strong suspicion*" or "*probable cause*" evidence that criminally significant "stuff" existed on the premises at the relevant time. The evidence supposedly supporting that conclusion is currently not *sub judice*, so it must be deemed to not exist. Unlike other sealed affidavit matters, ***none*** of this one has been supplied. Not one line. So what is available [read "naught"] is utterly insufficient to support an armed invasion of private precincts.

The "stuff" mentioned above was seized in the ensuing search, the defendant arrested, and so here we are.

The law is clear, and the Constitution interposes.

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2 It was claimed that the alleged "stooge" / "stool pigeon" / [Prosecution induced] "Snitch" fears reprisals if his identity were known. Empirically, there never are such reprisals: that allegation is generally made to hide the fact that often such stooges do not even exist, and to permit the government to pad whatever information really does come from the few who do exist. We all know that. But yet the mythology persists, inviting a continuing regime of secret government in a land which hypocritically claims otherwise to those who are not "in the know".
The other proffered ground for keeping us from exposing the lack of probable cause here is the ubiquitous "there are other investigations which might be compromised" and / or "to maintain his future usefulness to law enforcement". That rationalization, if sufficient, could, of course, keep *everything* in government secret, whereas we claim to aspire to the opposite. Claim! Neither of those merely conclusory assertions are grounds for keeping us from the affidavit, nor have the People shown authority that we do not have a right to the information.

DISCUSSION

The law is quite clear, although many have tried to muddy that clarity, in the name of "truth," for various self-serving reasons.

I
A DEFENDANT MAY MOVE TO SUPPRESS AS EVIDENCE ANY TANGIBLE AND INTANGIBLE THING OBTAINED FROM A SEARCH OR SEIZURE BY WARRANT NOT SUPPORTED BY PROBABLE CAUSE, OR OTHERWISE UNCONSTITUTIONALLY GRANTED. Penal Code §1538.5(a)(1)(B)(iii), (iv).

PROBABLE CAUSE:

Probable cause does not consist of police officer conclusions which are not supported by facts. *Nathanson v. United States* (1933) 290 U.S. 41, 46-47, cited approvingly in *Illinois v. Gates* (1983) 462 U.S. 213, 227, 239. That is, the affidavit "must provide the magistrate with a ***substantial basis*** for determining the existence of probable cause." *Gates, supra* @239 [emphasis added]. That "***substantial basis***" must be more than the unadorned conclusions of "'the officer [who is] engaged in the often competitive [and profitable, with Block Grants] enterprise of ferreting out crime.'" *Id.,* @240, quoting *Johnson v. United States* (1948) 333 U.S. 10, 13-14.

The affidavit in this case is more bare bones than the one properly decried in *Nathanson*. After all, what does not make it to the light of day is bare-bones, and the government has sought to hide their substance, which means, as evidence, it does not exist. And to make certain that magistrates do not abdicate their duty in this regard, "courts must continue to conscientiously review the sufficiency of affidavits on which warrants issue." *Gates, supra* @239. Of course, that review, to be meaningful, must be the product of highlighting of deficiencies by advocates for truth, which is impossible when things are under cover of darkness. Governments of secrecy have nothing to commend them in these enlightened times. It is to be recalled that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts," wrote our insightful prosecutor at Nuremberg, Justice Jackson, "and does not change character from its success." *United States v. Di Re* (1947) 332 U.S. 581, 595. He knew whereof he spoke, from his then-recent experience with "emergency"-spouting Nazis.

You see, probable cause is not mere wishful thinking, or even creative hunch-ism; it is not a substanceless label which exists by its mere invocation; it must, instead, supply a "substantial basis" that stuff is where or what it is alleged to be. *Gates, supra* @239. The "appropriate standard of probable cause is whether the affidavit states facts that make it **substantially probable** that there is **specific property** lawfully subject to seizure **presently located in the particular place** for which the warrant is sought." *People v. Cook* (1978) 22 Cal.3d 67, 84, fn. 6 [citations omitted, but emphasis added]. Probable cause is formed from "'facts that would lead a man of ordinary caution…to entertain…a **strong suspicion** that the object of the search is in the particular place to be searched.'" *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783, quoting *Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564 [emphasis supplied in Court of Appeal]. The affidavit here is far from that, and, on the non-evidence supplied, dispositively close to *Nathanson*.

The magistrate sits as a trier of fact as to the averments in the affidavit, *Tuadles, supra* @1783, which is nigh on to impossible where, as here, there are **no** "facts" which we can place in evidence. And it is the proponent of positions who must place things into evidence, on pain of losing by default. There is **nothing**, nothing whatsoever, in the portion of the affidavit given us [NOT!] which creates a legitimate conclusion that there was seizable stuff in the place on which the warrant was served. There is not one case, in all of the manifold exemplars of published Fourth Amendment litigation, which supports a finding of probable cause from the multiples of zero in this non-affidavit.

That issue dovetails with the following:

COMMENTARY RE: SEALING OF AFFIDAVIT:

As for the sealing/unsealing issue, recall the threshold: the warrant and affidavit are presumptively "open to the public as a judicial record." California Penal Code §1534(a).

The affidavit here, in any relevant part, has been sealed, preventing the defendant from litigating the lawfulness of the governmental invasion of his precincts.

We guess the People's position would be that the affidavit would somehow compromise something of which they are concerned, perhaps reveal the identity of an informant **3**, but the rule on that is rather well-established [provided the sealing judge applied all of the necessary standards and tests prior to the sealing order, which we also question]:

> The material in the affidavit furnishes the basis of a variety of challenges to the search warrant. Obviously it furnishes the basis for a challenge to probable cause -- either to the factual basis of probable cause or the reliability of the informant, if an informant was used. If the informant is not named in the affidavit, the facts in the affidavit may give rise to a request for the identity of the informant as a material witness. The facts in the affidavit may raise questions concerning the veracity of allegations upon which the finding of probable cause rests. (See *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667, 98 S.Ct. 2674].) **A defendant who cannot view any portion of the affidavit cannot make a judgment as to whether any of these challenges should be made**. The People take the position that these challenges can be addressed by the courts as they review the sealed affidavit. This, of course, **leaves the defendant without an adversary before the court who can not only ascertain that the appropriate challenges are considered but also that the defense argument is vigorously and effectively pursued**. We conclude that the **only portion of an affidavit that may be concealed** from the defendant is that portion which **necessarily would reveal** the **identity** of a confidential informant. *Swanson v. Superior Court* (1989) 211 Cal.App.3d 332, 339 [emphasis added].

The People normally throw at the Court *People v. Hobbs* (1994) 7 Cal.4th 948, but that case presents the factual anomaly, which did not occur here **4**, of the warrant-issuing magistrate himself personally grilling/cross-examining the informant, in chambers, from which he could make his own veracity and basis conclusions. *Id*., @954, 977. **5** And based on that record, and on the reviewing court's own review of the sealed stuff, and based on the reviewing court's conclusion that motions to traverse and quash would not have been granted had the information been supplied anyway, it was held that the motion to unseal the affidavit was properly denied. *Id.,*

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3 If there even really is an informant; that is, if the averments on which the warrant issued are not merely the product of the fertile imaginations of zealous agents "ferreting out crime" with an ends-justifies-means animus. It has been known to happen. Many times! Anyway, we are not seeking the identity of the informant, and, for these purposes, we do not even want it. We want what the informant supposedly said which caused the affiant to represent something to the magistrate which resulted in an invasion of the defendant's private areas: we believe those things necessarily to have been insufficient or false!

4 That factual difference is important, because recall the fundamental rule that "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." *Ginns v. Savage* (1964) 61 Cal.2d 520. Different facts; different law.

5 And the primary case on which the court relied for its conclusion also expressly noted that the magistrate there had cross-examined the informant at length. *Id.,* @968-969.

@977. But that is a far cry from propounding a general rule that affidavits can properly be sealed on unproven claims about this and that. Even at that, *Hobbs* notes that the reviewing court must initially determine if the sealing order is proper, which involves the query both of:

(a) whether valid grounds exist for maintaining informant confidentiality, and then

(b) whether the "extent of the sealing is justified as **necessary** to avoid revealing his or his identity." *Id.,* @973 [emphasis added].

"**Necessary**," not just convenient or helpful (to the authorities). And it would be a curious and unusual case where the "extent" of sealing properly encompasses the whole affidavit. That is, to seal the entire affidavit would virtually always be unconstitutional overkill of a Bin Laden-esque kind.

Then too, everything in all of the cases basically concerns itself with protecting the identity of stool-pigeons, and not of limiting access to the information he tweeted. If the identity of the stoolie would not be revealed by the unsealing of the stuff, it has to be unsealed. *Id.,* @963, citing *Swanson, supra* @339. Even if identity were the issue here, if disclosure were "essential to a fair determination of a cause, the privilege [protecting stoolies] **must give way**." *McCray v. Illinois* (1967) 386 U.S. 300, 310 [internal citation omitted; emphasis added]. **6** That has to be decided on the "particular circumstances of each case." *Id.* We might need the narrative information in the affidavit to properly litigate the lawfulness of this search, if the government makes an issue of the matter, so the stoolie privilege should give way anyway, but it need not, because we, again, do not want the identity *qua* identity.

Once [but only once] it is decided that an affidavit is properly sealed, then is has been suggested that the motion judge may engage in a modified *Luttenberger* **7** examination of the materials to protect the defendant's interests, once defendant has filed a motion to traverse or quash. *Hobbs, supra* @972-973.**8** That of course, presents

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6 The People often cite *McCray* to support sealing, but it does not even mention the subject, let alone support it.
7 *People v. Luttenberger* (1990) 50 Cal.3d 1, 20-24.
8 As should be obvious, we are not mounting the traditional "unsealing" motion which is associated with *Hobbs*, because we don't want an unsealing: **we want a dismissal**, if we cannot make a full-bore attack on the clearly insufficient affidavit, and we cannot without all of the affidavit.

a problem where, as here, no traversal motion has been filed, which cannot properly be done without the necessary discovery.**9** And the idea that the institutionally neutral *in camera* court is going to carry out the defendant's partisan/adversarial burden and focus on his, as distinguished from the government's, interests in deciding what to do is, frankly, ludicrous, if the truth of matters be relevant.

Moreover, we have won many suppression motions in the past by changing a judge's mind about the reliability or basis of knowledge showings on the face of an affidavit [even though the judge had read the stuff previously without our edifying assistance, and a similar judge had even issued the warrant based on a superficial reading of the stuff], which would be impossible if we left the examination exclusively to the motion judge: **we cannot lend suasion to the mix if we know not what to suade about.** There is no legitimate substitute for having knowledgeable and routinely effective counsel investigate and litigate the significance of the face of the affidavit matters: is the judge going to track down and apply all of the many "basis" and "reliability" cases for us? They never have done so before. How can we expect them to now? There is nothing on the face of the non-produced affidavit here which is so revealing that its sealing is "necessary" to prevent us from discovering the identity of any informant, whose identity we would have no present use for anyhow. **10**

This sealing stuff is simply to protect the increasingly out-of-control cops from scrutiny, and not any informant from identity. And the defense suspects that everyone really knows that, whether or not they are willing to be candid about it. [Indeed, there is very little empirical evidence that informants are ever hurt or otherwise truly endangered by suspects learning their identity. That is one of those little nagging mythologies which sound plausible, and whose ostensible plausibility invites rationalizations for secret government, but there is no tight fit between fact and the mythology.]

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9 Motions should not be brought in advance of mounting a good faith position that the relief sought is merited.
10 Indeed, attorneys who really know what they are doing in this stuff generally would run away from having knowledge of the identity of the informant [those few who actually exist, that is], because if the informant's identity is publicly known, and if he/she has really done the stuff necessary to credit his credibility and basis of knowledge, then probably many more cases could be filed against the defendant whose case is being assessed.

Moreover, the People have not articulated the authority for not giving us all the transmitted information in the affidavit to enable us to mount our attack. If it is Evidence Code §1041, it is clear that an informant's **identity** but **not the contents** of his communications are **privileged**. *People v. Otte* (1989) 214 Cal.App.3d 1522, 1529, construing Evidence Code §1041. And as we have made clear before in these things, we have no interest in the informant's identity [at this point**11**], so the authority for not supplying the communication, necessary to the work we must do here, remains a mystery.

Indeed, we see nowhere that an authorized agency has invoked any privilege, and the law on that general topic is well-established: "However, the statutory privilege of nondisclosure does not apply to every 'informer.' The privilege applies only if the information is furnished in confidence to specified persons, the **privilege is claimed by a person authorized by the public entity to do so**, and disclosure is forbidden by an act of the United States Congress or California statute or disclosure of the informer's identity is against the public interest. (Evid. Code, § 1041, subds. (a) and (b).)" *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 497-498 [emphasis added]. **We see no claim of a privilege, but merely blatherings about what might be the situation if it were properly claimed**.

Furthermore, we would object to this Court taking the matter *in-camera*, as if these were the same facts as in *Hobbs*, thereby preventing us from properly litigating the matter. There are many informant-based search warrant issues which elude reviewing trial courts, at their first blush, which require case-specific explanation and treatment by attorneys exercised in the game. If non-litigated/non-explained issues in search warrant law sufficed for the reviewing task, then we would never be able to win motions to quash. And we do. Often.

But only where we can tailor our arguments and authorities to the issues on the face of the affidavit. Defense attorneys have never had a judge find authorities for them to assist a defendant in a search warrant litigation attack. Never: protection of individuals against government is not something the judiciary, in these politically confused times, considers to be at the top of its agenda, even though it was one of the Framers' most anticipated

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11 Later, we might, because it is clear from the facts of this case that the informant is material to the defendant's non-culpability herein, but we need not go there at this point.

roles for that branch. **12** The defense has always had to find things to assist defendants, which is impossible if we know not what was presented to the magistrate. We all understand that, even if some choose to posture otherwise. **We will be especially bemused if the government, as usual, announces that we have the burden of establishing the illegality of a warrant while it simultaneously *hides the ball* necessary for us to play that game.**

II

PEOPLE HAVE SUPPLIED NO AUTHORITY FOR THEIR POSITION

It is interesting that the People's opposition brief cites only the stock informant disclosure cases from their "autobrief" haversack: they have given a paucity of authority on the issue here, the authority and propriety for sealing this affidavit. Therefore, they should be deemed to have waived that issue by non-opposition.

III

DUE PROCESS REQUIRES DISMISSAL

We have a due-process protected right to discovery **necessary** to fully litigate a Penal Code§1538.5 motion, on pain of dismissal. *People v. Brophy* (1992) 5 Cal.App.4th 932, 937-938. If the government is so extravagantly concerned about its stoolie [assuming one even exists!] that it cannot give us even the information imparted to the magistrate to license the invasion of the defendant's private residence, then the case should be dismissed!

It would be a farce to suggest that we have had an opportunity to litigate this Fourth Amendment issue if such litigation consists merely of a judge looking it over, on his own, *in camera*, without our assistance and advocacy, the very same way the issuing magistrate apparently did, because the predictable outcome would mirror that which gave us the warrant in the first place, which means the "review" would be no review at all, but merely a ratification.

"Liberty comes not from officials by grace but from the Constitution by right." *Maryland v. Wilson* (1997) U.S.117 S.Ct. 882, 891 [Kennedy, J. dissenting] [no relation].

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12 That is, the intended "least political branch" has often proven to be the most politically sensitive.

This Court must watch what is going on in these "loose liberty-infringement" matters. "Were we to do less, we would fail to protect an imposing tree in the forest of our liberties whose seeds were wrested from the hands of ancient monarchs, planted by legal giants, and nurtured by patriots for centuries. Then we would surely have to bow our heads when asked where we would hide when the Devil turned round on us." *United States v. Becker* (9th Cir. 1994) 23 Fed.3d 1537, 1542, citing R. Bolt, *A Man for All Seasons* 66 (Vintage International ed. 1990). Indeed.

We are all too short on patriots these days, it would seem; and too long on devils. This Court can do something about both, if it wants to.

CONCLUSION

For the reasons articulated herein (and otherwise understood) the motion to suppress should be granted, and the case should be dismissed.

For such relief, Defendant would [temporarily] withdraw the motion to unseal the affidavit, (but we pray that the Court not deem that a sufficient middle ground to deny our dismissal / suppression motions).

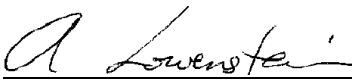
Freedom must prevail.

Justice must be done.

We humbly pray that this Court so understand and then so rule.

DATED: June 3, 2005

Respectfully submitted,



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