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MAR 23 2005
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. CR 04-00860 DDP
)
Plaintiff,) ORDER GRANTING MOTION TO SUPPRESS
) EVIDENCE
v.) [Motion filed on 12/27/04]
)
ALBERT LAMONT HECTOR)
)
Defendant.)

This matter is before the Court on the defendant's second motion for reconsideration of order denying motion to suppress evidence. After reviewing the papers submitted by the parties and hearing oral argument, the Court grants the defendant's motion and orders the contested evidence suppressed.

I. Background

On July 9, 2004, Albert Lamont Hector ("the defendant") was charged in an indictment for possession with intent to distribute cocaine base (21 U.S.C. § 846), possession of a firearm in furtherance of drug trafficking (18 U.S.C. § 924(c)), and being a felon in possession of a firearm and ammunition (18 U.S.C. § 922(g)(1)).

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1 On September 27, 2004, the defendant filed a motion to
2 suppress the evidence obtained on June 2, 2004, when agents from
3 the Bureau of Alcohol, Tobacco and Firearms ("ATF") and officers
4 from the Los Angeles Police Department ("LAPD") arrested the
5 defendant and searched his apartment. During the search, the
6 defendant was presented with a "Search Warrant Notice of Service"
7 ("Notice of Service"). The Notice of Service did not indicate
8 which items the officers and agents were authorized to seize, or
9 state the address of the premises to be searched.¹ The government
10 acknowledged during oral argument that the "Notice of Service" is
11 not a warrant. After the defendant was booked, he apparently
12 received a property receipt indicating what items the officers had
13 seized. The government conceded during oral argument that at no
14 time before, during, or immediately after the search, did it serve
15 a search warrant on the defendant. It appears that the defendant
16 was first provided with the search warrant as part of the
17 government's discovery obligations.

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20 ¹ The Notice of Service stated:

21 To whom it may concern:

22 1. These premises have been searched by the peace
23 officers of the Los Angeles Police Department
24 pursuant to a search warrant issued on 5/28/04 by
the Honorable Judge Jacob Adajian, Judge of the
Superior Court, Los Angeles Judicial District.

25 2. The search was conducted on 6/2/04. A list of
26 the property seized pursuant to the search warrant
27 is provided on the attached Los Angeles Police
Department receipt for property taken into custody.

28 3. If you wish further information, you may
contact: Officer Fletcher at 213-473-4804.

1 In his motion to suppress evidence, the defendant argued that
2 the Notice of Service was inadequate under Federal Rule of Criminal
3 Procedure 41(f) ("Rule 41") and the Fourth Amendment. The argument
4 regarding Rule 41 was premised on the contention that the
5 investigation had been "federal in character." On October 18,
6 2004, after determining that the investigation had not been federal
7 in character and that Rule 41 did not apply, the Court denied the
8 defendant's motion to suppress. The Court granted the defendant
9 leave to submit supplemental briefing, which was filed with the
10 Court on October 22, 2004.

11 On November 1, 2004, the defendant filed a motion for
12 reconsideration of order denying motion to suppress evidence. The
13 Court denied this motion on December 1, 2004.

14 On December 21, 2004, a jury convicted the defendant on all
15 three counts of the indictment.

16 On December 27, 2004, the defendant filed his second motion
17 for reconsideration of order denying motion to suppress evidence,
18 which is now before the Court. The argument contained in the
19 defendant's reply brief relies on a recent Ninth Circuit case,
20 United States v. Martinez-Garcia, 397 F.3d 1205 (9th Cir. 2005),
21 which postdates the defendant's convictions.

22 **II. Discussion**

23 **A. Fourth Amendment Warrant Requirements**

24 The Fourth Amendment of the United States Constitution states,
25 "The right of the people to be secure in their persons, houses,
26 papers, and effects, against unreasonable searches and seizures,
27 shall not be violated, and no Warrants shall issue, but upon
28 probable cause, supported by Oath or affirmation, and particularly

1 describing the place to be searched."

2 The requirement that "a search warrant must be sufficiently
3 particular and not overbroad" is commonly referred to as the Fourth
4 Amendment's "particularity requirement." See United States v.
5 McGrew, 122 F.3d 847, 849 (9th Cir. 1997) (citations omitted). The
6 purpose of the particularity requirement is to protect people from
7 "unbounded, general searches." Id. (citing United States v.
8 Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982)). Therefore, "a
9 warrant 'must be specific enough to enable the person conducting
10 the search reasonably to identify the things authorized to be
11 seized.'" Id. (quoting United States v. Spilotro, 800 F.2d 959,
12 963 (9th Cir. 1986)). Additionally, "[a] particular warrant also
13 'assures the individual whose property is searched or seized of the
14 lawful authority of the executing officer, his need to search, and
15 the limits of his power to search.'" Groh v. Ramirez, 540 U.S.
16 551, 561 (2004) (quoting United States v. Chadwick, 433 U.S. 1, 9,
17 (1977) (citing Camara v. Municipal Court of City and County of San
18 Francisco, 387 U.S. 523, 532 (1967)), abrogated on other grounds,
19 California v. Acevedo, 500 U.S. 565 (1991)). The concern for
20 alerting the person whose property is being searched is referred to
21 as the "notice requirement." See Martinez-Garcia, 397 F.3d at
22 1211.

23 In McGrew, the Ninth Circuit confronted the issue whether the
24 particularity requirement was satisfied by a warrant's reference to
25 an affidavit that was not served on the defendant. 122 F.3d at
26 848. The magistrate judge had issued a search warrant based on an
27 affidavit by an agent of the federal Drug Enforcement Agency
28 ("DEA"). Id. The warrant itself did not specify the type of

1 criminal activity suspected or the evidence that was sought. Id.
2 Rather, "[i]n the space provided for that information, the warrant
3 referred the reader to the 'attached affidavit which is
4 incorporated herein.'" Id. When the search was performed, the
5 affidavit was not presented to the defendant. Id. at 849. The
6 court stated, "The purpose of the accompanying affidavit clarifying
7 a warrant is both to limit the officer's discretion and to inform
8 the person subject to the search what items the officers executing
9 the warrant can seize." McGrew, 122 F.3d at 850 (emphasis omitted)
10 (quoting United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir.
11 1986)). Because the purposes of the particularity requirement
12 could not be secured by an affidavit that was never served on the
13 defendant, the Ninth Circuit determined that the search warrant
14 lacked sufficient particularity and was invalid. Id. at 850.

15 In his September 27, 2004 motion to suppress evidence, the
16 defendant argued that because the law enforcement officers did not
17 serve him with the search warrant, the June 2, 2004 search was
18 unreasonable under McGrew. Because a warrant is invalid if it is
19 insufficiently particular (and a search based on an invalid warrant
20 unlawful), he argued, it follows that where no warrant has been
21 served, the search must also be unconstitutional. This argument
22 was grounded in the notice requirement; specifically, that where no
23 warrant has been served, the person whose premises are being
24 searched has no notice of the warrant's scope or the executing
25 officer's authority.

26 Following McGrew, however, uncertainties remained regarding
27 the protections secured by the Fourth Amendment. See Martinez-
28 Garcia, 397 F.3d at 1211 ("The notice requirement is not absolute

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1 and has not been fully defined by the United States Supreme
2 Court."). For example, in Groh v. Ramirez, the Supreme Court
3 stated:

4 It is true . . . that neither the Fourth Amendment
5 nor Rule 41 . . . requires the executing officer to
6 serve the warrant on the owner before commencing
7 the search Quite obviously, in some
8 circumstances—a surreptitious search by means of a
9 wiretap, for example, or the search of empty or
10 abandoned premises—it will be *impracticable or*
11 *imprudent* for the officers to show the warrant in
advance. Whether it would be unreasonable to
refuse a request to furnish the warrant at the
outset of the search when, as in this case, an
occupant of the premises is present and poses no
threat to the officers' safe and effective
performance of their mission, is a question that
this case does not present.

12 540 U.S. at 562, n.5 (citations omitted) (emphasis added).²

13 In addition, some uncertainty existed as to whether the notice
14 requirement imposed burdens on state officers executing state
15 warrants. See United States v. Silva, 247 F.3d 1051, 1058 (9th
16 Cir. 2001). In Silva, state authorities discovered evidence that
17 led to the conviction of several defendants for conspiracy to
18 manufacture and distribute methamphetamine. One defendant, whose
19 private residence was searched, argued that the evidence seized
20 from his home should be suppressed because the authorities had
21 failed to serve the search warrant on the defendant's wife, who was
22 present at the search. The court determined that the defendant

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25 ² In Groh a search warrant that did not describe the persons
26 or things to be seized, and was thus plainly invalid, was served on
27 the person searched. The application for the warrant, however, did
28 describe these things with sufficient particularity. Therefore,
the issue was whether the application, which was not attached to
the warrant or referred to by the warrant, could cure the defect.
The Supreme Court held that the application did not render the
warrant valid.

1 lacked standing to challenge the warrant's execution because he was
2 incarcerated at the time of the search. Id. at 1058.

3 Although the dispositive legal issue in Silva related to
4 standing, the court addressed in dicta two issues affecting the
5 notice requirement. First, the court suggested that there was an
6 unsettled legal issue as to whether the Fourth Amendment's notice
7 requirement applied to state warrants executed by state officers.
8 Id. ("Whatever the potential application of McGrew to a state
9 warrant, Defendant . . . lacks standing to assert the claim.").
10 Second, the court interpreted McGrew as involving Rule 41, not the
11 Fourth Amendment. Id. at n.4 ("McGrew involved a federal warrant,
12 so the agents were required by Federal Rule of Criminal Procedure
13 41(d) to 'give to the person from whom or from whose premises the
14 property was taken a copy of the warrant.'"). Accordingly, it was
15 unclear if the protections articulated in McGrew were grounded in
16 the Fourth Amendment or Rule 41; the distinction was important
17 because Rule 41 applies only to warrants that are federal in
18 character.

19 In United States v. Grubbs, the Ninth Circuit addressed
20 whether a facially defective anticipatory search warrant could be
21 cured by an affidavit when the affidavit was not presented to the
22 person whose property was being searched. 377 F.3d 1072 (9th Cir.
23 2004). The Ninth Circuit affirmed its holding in McGrew, and
24 determined that an affidavit can only cure a defective search
25 warrant if the affidavit is presented to the person whose property
26 is being searched. The court stated:

27 If the officers conducting the search were not
28 required to present the affidavit to the residents
 of the house being searched, law enforcement

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1 personnel would be free to search as they like, and
2 homeowners and others would have no effective way
3 to ensure that the search of their premises
conformed to the lawful constraints approved by an
impartial magistrate.

4 Id. at 1077. Grubbs affirmed the purpose of the notice requirement
5 and further confirmed that the protections were based on the Fourth
6 Amendment, not Rule 41. Id. at 1073 ("We . . . hold that the
7 search of Grubbs' premises violated the Fourth Amendment.").
8 However, because the Grubbs search was orchestrated by United
9 States Postal Inspectors, the case did not address whether the
10 notice requirement is applicable to state officers executing state
11 warrants.

12 To the extent that there was any uncertainty regarding the
13 applicability of the Fourth Amendment's notice requirement to
14 warrants obtained and executed by state law enforcement officers,
15 the issue was resolved by the Ninth Circuit in Martinez-Garcia. In
16 that case, a state court judge issued a search warrant based on the
17 affidavit of a state police officer. When the search was executed,
18 an officer advised the defendant that he had a search warrant and
19 showed him some "paperwork." Id. at 1210. The defendant responded
20 that he did not speak English. The police officer then called a
21 Bureau of Immigration and Customs Enforcement ("BICE") agent and
22 requested that he come to the residence and serve as a translator.
23 Id. State officers began to search the house and soon found a
24 firearm. Id. Approximately forty minutes to one hour after the
25 search began, the BICE agent arrived. Id. He read the warrant to
26 the defendant in Spanish and asked him if the residence contained
27 any firearms. Id. The defendant replied that there was a firearm
28 in the residence. Id. The BICE agent relayed this information to

1 the state officers, who responded that they had already located the
2 weapon. Id.

3 The defendant subsequently challenged the search in a motion
4 to suppress. After his motion was denied, he entered a conditional
5 plea of guilty to one count of possessing a firearm as an illegal
6 alien in violation of 18 U.S.C. § 922(g)(5).

7 On appeal, the defendant argued that the firearm should have
8 been suppressed pursuant to the Fourth Amendment and Rule 41
9 because the officers had failed to serve the warrant before
10 conducting the search. The Ninth Circuit analyzed the warrant
11 issues separately under the Fourth Amendment and Rule 41. The
12 court framed the Fourth Amendment analysis by stating that "[i]n
13 determining the contours of a reasonable search, courts have
14 balanced the need to give notice to occupants with a sometimes
15 competing need for flexibility that allows police to do their job
16 effectively." Id. at 1211. The court stated that to assess the
17 reasonableness of the execution of a search made pursuant to a
18 warrant, a court must consider (1) "factors that bear on protecting
19 the privacy due to the public"; (2) the reasonable expectations of
20 an informed public; (3) the needs of law enforcement officers; and
21 (4) "any other matters appropriately considered as part of the
22 totality of the circumstances."³ Id. (citations and quotation

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24 ³ In addition, the Ninth Circuit clarified the Supreme
25 Court's language in Groh, stating, "Most recently in Groh, the
26 Court stated that 'neither the Fourth Amendment nor Rule 41 . . .
27 requires the executing officer to serve the warrant on the owner
28 before commencing the search' under all circumstances." Martinez-
Garcia, 397 F.3d at 1211 (emphasis added). The addition of the
phrase "under all circumstances" reflects the Ninth Circuit's
conclusion that, in any given situation, the protections offered by
the Fourth Amendment's notice requirement depend upon the

(continued...)

1 marks omitted). In balancing these factors, the court determined
2 that the officers in Martinez-Garcia did not act unreasonably
3 delaying the service of the warrant for a reasonably brief time,
4 because they served the warrant as soon as it was practicable to do
5 so, i.e. when the translator arrived. Id. at 1212. The court
6 noted, however, that "it may be presumptively unreasonable if
7 officers fail entirely to serve a sufficient warrant at any time
8 before, during or immediately after a search of a home." Id. at
9 1212, n.3 (citing Grubbs, 377 F.3d at 1079 & n.9; McGrew, 122 F.3d
10 at 849-50).

11 Based on Martinez-Garcia, the Court finds that it is required
12 to examine the totality of the circumstances to determine whether a
13 search executed pursuant to a warrant is reasonable. Id. at 1211.
14 Where no law enforcement needs or other relevant considerations
15 outweigh the concerns represented by the notice requirement, the
16 Court finds that the failure of law enforcement personnel to serve
17 a sufficiently particular warrant on a defendant before, during, or
18 immediately after a search pursuant to a warrant is presumptively
19 unreasonable. See id. at 1211-212.

20 Further, the Court finds that the protections of the Fourth
21 Amendment apply to state warrants served by state officers. In
22 Martinez-Garcia, the search warrant was obtained from a state court
23 and executed by state officers. Although a federal agent from BICE
24 participated in briefings with state officers before the search "in
25 part because he believed he would have the opportunity to arrest
26 Mexican nationals for immigration violations," the court did not

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28 ³ (...continued)
particular circumstances of the search.

1 find that this issue was relevant to the Fourth Amendment analysis.
2 Id. at 1210. In contrast, when the court analyzed the Rule 41
3 warrant issues, it addressed (but did not resolve) whether the
4 investigation was federal in character. By comparing the analysis
5 under the Fourth Amendment with the analysis under Rule 41, it is
6 clear that the Ninth Circuit does not distinguish between state and
7 federal investigations when analyzing the protections of the Fourth
8 Amendment's notice requirement. This conclusion is in accord with
9 settled case law indicating that the Fourth Amendment applies to
10 the states through its incorporation into the Fourteenth Amendment.
11 See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United
12 States, 364 U.S. 206 (1960).

13 B. Application to the Case at Hand

14 As stated above, when evaluating the reasonableness of the
15 execution of a search warrant, courts must examine the totality of
16 the circumstances, taking into account (1) the privacy due to the
17 public; (2) the reasonable expectations of an informed public; (3)
18 the needs of law enforcement officers; and (4) any other
19 appropriate considerations. Martinez-Garcia, 397 F.3d at 1211.

20 The defendant in this case enjoyed a right to privacy in his
21 apartment and was protected from unwarranted governmental
22 intrusion. See, e.g., United States v. Barajas-Avalos, 377 F.3d
23 1040, 1055 (9th Cir. 2004). Although the government had the
24 authority to search the defendant's home pursuant to a search
25 warrant, it was still required to comply with the notice
26 requirement of the Fourth Amendment. The defendant asserts that
27 the notice requirement was not satisfied because the officers
28 failed to serve the search warrant on him even after they

1 determined that there were no issues regarding officer safety or
2 destruction of the evidence. (Mot. to Suppress at 16.)

3 It is undisputed that the defendant was not served with the
4 search warrant. The government has argued, however, that the
5 defendant's rights were secured by the Notice of Service. The
6 defendant contends that the Notice of Service did not satisfy the
7 Fourth Amendment's notice requirement, because, among other
8 reasons, it failed to indicate the address of the premises to be
9 searched or the items to be seized. As noted previously, the
10 government concedes that the Notice of Service is not a warrant.
11 The Fourth Amendment expressly requires a warrant to "particularly
12 describ[e] the place to be searched." In addition, a warrant
13 should (1) "enable the person conducting the search reasonably to
14 identify the things authorized to be seized," McGrew, 122 F.3d at
15 849; and (2) "[assure] the individual whose property [was] searched
16 or seized of the lawful authority of the executing officer, his
17 need to search, and the limits of his power to search."⁴ Groh, 540
18 U.S. at 561. Because the Notice of Service did not indicate the
19 premises to be searched or the items to be seized, the Court finds
20 that it failed to satisfy the Fourth Amendment's notice
21 requirement. It bears none of the attributes of a warrant. It is
22 not a warrant.

23 The Court must determine if the government's failure to serve
24 a sufficient search warrant on the defendant was reasonable under
25 the circumstances. The circumstances in this case do not suggest
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27 ⁴ For the same reasons, the receipt of items seized, which
28 was presented to the defendant at some time after the search was
executed, did not satisfy the Fourth Amendment's requirements.

1 any concerns that counterbalance the defendant's right to have
2 adequate notice of the search. There was nothing making it
3 "impracticable or imprudent" for the officers to present the
4 warrant at the beginning of the search once the defendant and the
5 premises had been secured. See Groh, 540 at 562, n. 5. A
6 fortiori, there was nothing making it "impracticable or imprudent"
7 to present the warrant during or immediately following the search.
8 Although "[t]he Constitution does not require police officers to
9 expose themselves to unnecessary and considerable personal risk and
10 potential loss of evidence when carrying out a court-ordered
11 search," United States v. Peterson, 353 F.3d 1045, 1049 (9th Cir.
12 2003), such concerns were not present in the case at hand. More
13 than a dozen law enforcement personnel assisted in executing the
14 search of the defendant's residence, a small, one-bedroom
15 apartment. (Mot. to Suppress, Ex. 8, "Arrest/Evidence Report" at
16 022.) Upon entering the apartment, the officers found the
17 defendant lying in a prone position in the living room. (Id. at
18 023.) The defendant fully complied with the officers' orders and
19 was taken into custody without incident. The officers quickly
20 determined that the defendant was the only person inside the
21 apartment. Therefore, within minutes of entering the apartment,
22 the officers discovered that there were no immediate issues
23 regarding officer safety or destruction of evidence. After
24 securing the apartment, and without serving the search warrant on
25 the defendant, the officers began to search for evidence.

26 In summary, this was a typical, uneventful search of a small
27 dwelling that presented no circumstances that would reasonably
28 justify the failure to serve the search warrant at the commencement

1 of the search. While it may be reasonable under certain
2 circumstances to delay the service of a search warrant until
3 sometime during or immediately after a search, such circumstances
4 were not present here. Having noted this, there is no evidence
5 that the search warrant was ever served in this case until provided
6 to the defense as part of the government's discovery obligations
7 following the defendant's indictment. There are no considerations
8 present that justify this failure. It is not a case, for example,
9 where law enforcement's need to surreptitiously gather evidence
10 justifies the failure to serve a search warrant. Rather, this is a
11 case where the totality of the circumstances demonstrate that the
12 officers could have served the search warrant on the defendant
13 without jeopardizing any other interest. Accordingly, the Court
14 finds that the officers' failure to serve the search warrant was
15 unreasonable and violated the Fourth Amendment.

16 C. Consequences of an Unlawful Search

17 Evidence that is gathered in an unlawful search cannot be used
18 against the victim of the search. See, e.g., Wong Sun v. United
19 States, 371 U.S. 471, 484 (1963); Martinez-Garcia, 397 F.3d at

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1 1210. Therefore, the Court finds that the evidence obtained at the
2 June 2, 2004 search of the defendant's apartment should have been
3 suppressed.

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4 **III. Conclusion**

5 For the foregoing reasons, the Court grants the defendant's
6 motion to suppress all evidence gathered as a result of the June 2,
7 2004 search.

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9 IT IS SO ORDERED.

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11 Dated: 3-23-05


DEAN D. PREGERSON
United States District Judge

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