

1992

Utah v. Ruiz : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

92-0126-CA

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RENE RUIZ,	:	Case No. 920126-CA
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

This is an appeal from the trial court's denial of a motion to suppress, which preceded the entry of Mr. Ruiz's conditional guilty plea to one count of unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8(2)(a)(i) (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hansen, Judge, presiding.

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUE	1
STANDARD OF REVIEW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. THIS COURT SHOULD READ THE AFFIDAVIT AND DETERMINE IF THE AFFIDAVIT PROVIDES PROBABLE CAUSE FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME WARRANT.	8
II. THE AFFIDAVIT DOES NOT PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME SEARCH WARRANT.	14
A. SEARCH WARRANT AFFIDAVITS MUST PROVIDE SUFFICIENT FACTS FROM WHICH A MAGISTRATE MAY MAKE AN INDEPENDENT FINDING OF PROBABLE CAUSE.	14
B. SEARCH WARRANT AFFIDAVITS SEEKING NO-KNOCK NIGHTTIME SEARCH WARRANTS MUST MEET SPECIFIC CRITERIA.	17
C. THE AFFIDAVIT DOES NOT PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME SEARCH WARRANT.	19
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES CITED

<u>Aguilar v. Texas</u> , 378 U.S. 108 (1964)	14, 16
<u>Allen v. Lindbeck</u> , 93 P.2d 920 (Utah 1939)	13, 16
<u>Boyance v. Myers</u> , 398 F.2d 896 (3d Cir. 1968)	18
<u>Giordanello v. United States</u> , 357 U.S. 480 (1958)	16
<u>Go-Bart Importing Co. v. United States</u> , 282 U.S. 344 (1931)	22
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	8, 14, 16
<u>Jones v. United States</u> , 357 U.S. 493 (1958)	12, 17
<u>Ker v. California</u> , 374 U.S. 23 (1963)	18
<u>Miller v. United States</u> , 357 U.S. 301 (1958)	12, 17
<u>Nathanson v. United States</u> , 290 U.S. 41 (1933)	16
<u>People v. Stoppel</u> , 637 P.2d 384 (Colo. 1981)	22
<u>State v. Anderson</u> , 701 P.2d 1099 (Utah 1985)	14
<u>State v. Bailey</u> , 675 P.2d 1203 (Utah 1984)	14, 15, 22
<u>State v. Brown</u> , 798 P.2d 284 (Utah App. 1990)	15
<u>State v. Buck</u> , 756 P.2d 700 (Utah 1988)	13, 17, 18
<u>State v. Droneburg</u> , 781 P.2d 1303 (Utah App. 1989)	16, 25
<u>State v. Gallegos</u> , 712 P.2d 207 (Utah 1985)	19
<u>State v. Hygh</u> , 711 P.2d 264 (Utah 1985)	13
<u>State v. LaRocco</u> , 794 P.2d 460 (Utah 1990)	13, 26
<u>State v. Lindner</u> , 592 P.2d 852 (Idaho 1979)	18

	<u>Page</u>
<u>State v. Nielsen</u> , 727 P.2d 188 (Utah 1986)	13
<u>State v. Rowe</u> , 806 P.2d 730 (Utah App.), <u>cert.</u> <u>granted</u> , 167 Utah Adv. Rep. 26 (Utah 1991)	passim
<u>State v. Thompson</u> , 810 P.2d 415 (Utah 1991)	13
<u>State v. Treadway</u> , 499 P.2d 846 (Utah 1972)	15
<u>State v. Weaver</u> , 169 Utah Adv. Rep. 47 (Utah App. 1991)	passim
<u>United States v. Mitchell</u> , 783 F.2d 971 (10th Cir.) .	18

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. IV	passim
Utah Const. Art. I, § 14	passim
Utah Code Ann. § 77-1-3(4) (1991 Cum. Supp.)	10
Utah Code Ann. § 77-23-4(1) (1990 Repl. Vol.)	10
Utah Code Ann. § 77-23-5(1) (1990 Repl. Vol.)	18, 24
Utah Code Ann. § 77-23-10(2) (1990 Repl. Vol.) . . .	18, 23

OTHER AUTHORITIES CITED

LaFave, <u>Search and Seizure</u> ,	17, 18, 19, 24
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STATEMENT OF JURISDICTION

Utah Code Ann. section 78-2a-3(2)(f) (1992 Repl. Vol.) provides this Court's jurisdiction over this non-capital, non-first degree felony criminal conviction from the district court.

STATEMENT OF ISSUE

Did the search warrant affidavit provide probable cause for the no-knock nighttime search warrant?

STANDARD OF REVIEW

In assessing this issue, this Court should read the affidavit "in a common sense manner and as a whole," State v. Rowe, 806 P.2d 730, 732 (Utah App.) (citation omitted), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991), and determine whether the affidavit establishes probable cause for the no-knock nighttime warrant. Constitution of Utah, Article I section 14. The standard of review of the search warrant affidavit is discussed further in Point I of this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix 1 to this brief contains the full text of the following controlling constitutional and statutory provisions:

United States Constitution, Amendment IV
Utah Constitution, Article I section 14
Utah Code Ann. section 77-1-3(4) (1991 Cum. Supp.)
Utah Code Ann. section 77-23-4(1) (1990 Repl. Vol.)
Utah Code Ann. section 77-23-5(1) (1990 Repl. Vol.)
Utah Code Ann. section 77-23-10(2) (1990 Repl. Vol.).

STATEMENT OF THE CASE

The State originally charged Mr. Ruiz with one count of unlawful possession of a controlled substance with the intent to distribute and one count of unlawful possession of a controlled substance (R. 6-7).

Defense counsel moved to suppress evidence seized in violation of Article I section 14 of the Utah Constitution and the fourth amendment to the United States Constitution (R. 25-26). The prosecutor filed a memorandum in opposition to the motion to suppress (R. 49-51). The parties relied on State v. Rowe, 806 P.2d 730 (Utah App.), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991). After hearing argument concerning the sufficiency of the affidavit to support the issuance of the no-knock nighttime search warrant, the trial court denied the motion to suppress (R. 60, T.6/14/91 18-21). The trial court ordered the prosecutor to prepare the findings and conclusions (T.6/14/91 21), and the prosecutor did so (R. 76-80). Defense counsel filed an objection to the findings (R. 74-75), and the prosecutor filed a motion for the trial court to sign the proposed findings or set a hearing (R. 83-84). The trial

court did not sign the proposed findings or set the matter for hearing.¹

Mr. Ruiz subsequently entered a conditional guilty plea to one count of unlawful possession of a controlled substance, a third degree felony (R. 61, 63-69; T.6/17/91 3-14). The trial court sentenced Mr. Ruiz to a term of one to five years in the Utah State Prison and fined him \$1,000 (with a 25% surcharge) (R. 93-94).

STATEMENT OF FACTS

The magistrate issued a no-knock nighttime search warrant directing the searching officers to confiscate the following items from Rene Montoya and the apartment located at 1975 South 1100 East, #8 (R. 52-53):

Cocaine, a white substance in powder or solid form. Drug paraphernalia, specifically smoking devices, scales, cutting agents and packaging materials. Records pertaining to narcotics transactions. U.S. Currency, and all items which are determined to be collateral or proceeds from narcotics transactions.

(R. 52).

The magistrate issued the warrant on the basis of information included in the affidavit for the search warrant submitted by Officer Craig Watson (R. 54-56) and apparently did not make a record of any clarification or supplementation of the affidavit.

1. Because the issue before this Court allows this Court to simply review the search warrant affidavit, State v. Weaver, 169 Utah Adv. Rep. 47, 48 (Utah App. 1991), this Court needs no clarification of the trial court's ruling in this case.

The magistrate signed the search warrant on June 5, 1990, before Rowe was published.

Copies of the search warrant, affidavit for the search warrant, and return are in Appendix 2 to this brief.

The following quotation of the search warrant affidavit distinguishes between the portions of the affidavit which apparently were preprinted from the portions which apparently were typed in, by underlining the apparently preprinted portions. The references to Rene Montoya are underlined in the original affidavit. The portion of the affidavit that was written by hand is in bold-face type in the following quotation. The paragraphs are numbered in the quotation for future reference. The search warrant affidavit states, in part, as follows:

The facts to establish the grounds for issuance of a Search Warrant are:

1. Your affiant is a Deputy Sheriff for the Salt Lake County Sheriff's Office with over two years experience. Your affiant has been assigned to the Narcotics Division for one year, and has worked as an Undercover Investigator for eight months. During which time, your affiant made over 170 undercover drug buys. Your affiant has been trained by the Utah Peace Officer's Standards and Training, the Salt Lake County Sheriff's Training Division, and numerous hours of on the job training. Your affiant has also received 24 hours training from the Clandestine Law Investigators Association (C.L.I.A.), and 24 hours from the California Narcotics Officers Association, (C.N.O.A).
2. Your affiant, in the past seven days, has initiated the purchase of controlled substance from inside the address to be searched, specifically cocaine. This was done by utilizing a confidential informant, (hereafter referred to as a C.I.). The circumstances surrounding the purchase are described as follows:

3. The C.I. was searched prior to, and immediately after the purchase. This was done to ensure no other controlled substance, or money, were present. The C.I. was given a predetermined amount of money. The C.I. was kept under constant visual observation from the time of the first search, until the second, with the exception of the time the C.I. was directly inside the residence to be searched. At the time of the second search, the C.I. produced a substance, which field tested positive for cocaine.
4. Prior to the above described purchase, your affiant received information from a second C.I., that a Hispanic, Male, named RENE, was dealing in large quantities of cocaine, and he lived in an apartment located at approximately 2000 South. This C.I. did have the phone number for RENE, and gave it to the Sheriff's Office. The number is 485-6125. This number was checked with telephone security, and the subscriber was listed as Rene MONTOYA, at 1975 South 1100 East, #18.
5. Your affiant has also been advised by Detective Keith Stephens, of the Sheriff's Office Narcotics division, of a third C.I. he had received information from, about a Hispanic, Male, named: RENE, who was dealing cocaine at 1975 South 1100 East. This C.I. gave a description of a vehicle, which Rene MONTOYA had been driving. A vehicle matching the description has been observed parked at the address to be searched by your affiant.
6. This C.I. also advised Detective Stephens of the intense counter surveillance done by MONTOYA, and those who help, and/or work for him. This counter surveillance has been observed by your affiant.
7. **YOUR AFFIANT HAS OBSERVED PERSONS WALKING BACK AND FORTH IN FRONT OF THE APARTMENT, WRITING DOWN LICENSE PLATE #8, WATCHING FOR PERSONS BEING FOLLOWED. AND OR JUST BEING A LOOKOUT.**
8. Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source) All information received from the C.I. has proven to be true and accurate. The C.I. has always followed instructions exactly as they were given. Your affiant has received information

from three independent confidential sources,
where-in the information is corroborating.

9. Your affiant has verified the above information from the confidential informant to be correct and accurate through the following independent investigation: Sheriff's Office records checks have verified information received from all C.I.'s. All substances purchased by the C.I. tested positive for cocaine.

(R. 55-56).

The portion of the affidavit seeking nighttime authorization states,

10. WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items:
() in the day time.
(XX) at any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered or for other good reasons, to wit:
All narcotics related activity at the address to be searched was observed in the evening hours.

(R. 56). The portion of the affidavit seeking no-knock authorization states,

11. It is further requested that (if appropriate) the officer executing the requested warrant not be required to give notice of the officer's authority or purpose because:
(XX) physical harm may result to any person if notice were given; or
(XX) the property sought may be quickly destroyed, disposed of, or secreted.

This danger is believed to exist because:
Handguns have been found on most narcotic search warrants.
Montoya has made statements to two C.I.'s, which indicate he has, and will, use a hand-gun to defend his narcotics.
Counter surveillance has been observed at 1975 South 1100 East.

(R. 56).

SUMMARY OF ARGUMENT

This Court should hold under Article I section 14 of the Utah Constitution that no deference is afforded to the magistrate on review of the issuance of a no-knock nighttime search warrant. The deference afforded to magistrates issuing search warrants under federal law should not be extended to the context of no-knock nighttime search warrants and is illogical under the Utah statutory scheme.

When reading the affidavit in this case "in a common sense manner and as a whole," Rowe, supra, this Court can see that the affidavit fails to establish probable cause for the issuance of the no-knock nighttime search warrant. Facial discrepancies in the affidavit that were never clarified by the magistrate preclude a finding of probable cause for the issuance of a search warrant. The affidavit does not state adequate facts to allow a neutral and detached assessment by a magistrate. The affidavit fails to establish the statutory predicates for the issuance of a no-knock nighttime search warrant.

Because the "barebones" affidavit was patently inadequate to justify the issuance of the no-knock nighttime search warrant, the officer's search cannot be justified under the federal "good faith" exception to the exclusionary rule, which does not apply under the Utah Constitution.

The evidence seized pursuant to the no-knock nighttime search warrant should be suppressed.

ARGUMENT

I.

THIS COURT SHOULD
READ THE AFFIDAVIT AND DETERMINE IF
THE AFFIDAVIT PROVIDES PROBABLE CAUSE
FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME WARRANT.

Under the fourth amendment, the United States Supreme Court has indicated that reviewing courts are to grant a magistrate's issuance of a search warrant great deference and review for a "substantial basis" for the issuance of the warrant, rather than for probable cause, theorizing that if reviewing courts scrutinize warrant affidavits too closely, that will somehow discourage police from seeking warrants prior to conducting searches. See Illinois v. Gates, 462 U.S. 213, 236 (1983).

The first problem with the deference afforded to the magistrates by the United States Supreme Court is the vagueness of the "substantial basis" test. Search warrants should only issue if the search warrant affidavits establish probable cause, by asserting facts that would lead a reasonable person to believe that there is "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Yet under the United States Supreme Court's standards, reviewing courts are to read the affidavits for a "substantial basis" for the issuance of the search warrants and are expressly not to review for probable cause. Id. at 236. The "substantial basis" test is abstruse. "Either an affidavit establishes probable cause or it does not." State v. Weaver, 169 Utah Adv. Rep. 47, 50 (Utah App. 1991) (Orme, J., concurring).

The second problem with the deference afforded to the magistrates by the United States Supreme Court is that this deference undercuts the critical role of meaningful judicial review in enforcing citizens' rights to privacy. The historical importance of meaningful judicial review of the issuance of warrants can be appreciated through review of the appendix to State v. Rowe, 806 P.2d 730, 740-743 (Utah App. 1991). Police officers preparing search warrant affidavits and magistrates issuing warrants are most likely to do the best job of upholding the constitutions if they are stimulated to do so by meaningful judicial review. Id. at 743. Rather than requiring police and magistrates to follow the constitutional requirements of securing search warrants based on probable cause prior to searches, with the "substantial basis" test, the United States Supreme Court tacitly informs police officers and magistrates that if the officers and magistrates will at least file the paperwork before the searches, the courts may be willing to look the other way if the paperwork is substantively lacking in probable cause. See State v. Weaver, 169 Utah Adv. Rep. 47, 49 (Utah App. 1991) (Orme, J. concurring) ("The stated reason [for deferring to the magistrates' probable cause finding] ... is to encourage the use of warrants. ... It should be reason enough to rigidly require the use of warrants that the Constitution requires them and further requires that they be supported by probable cause.") (citations omitted).

The unique statutory scheme in Utah calls for evenhanded and meaningful review of all search warrant affidavits. In seeking search warrants, police may approach any justice, judge, or justice of the peace in this state. Utah Code Ann. § 77-1-3(4) (1991 Cum. Supp.) (allowing all judges and justices of any court to act as magistrates). As the Court reviewing many search warrant affidavits, and as the Court composed of seven magistrates, this Court is in a position to take judicial notice of the fact that Utah magistrates do not uniformly have the opportunity to develop expertise in issuing search warrants. It appears that those magistrates with the most experience in evaluating the affidavits obtain that experience because the police most often solicit search warrants from these select magistrates. Judicial review is most important in these circumstances, to insure the neutrality and detachment of the magistrates. Under the Utah statutory scheme, it cannot be said that magistrates should be deferred to because they develop expertise through repeated exposure to search warrant affidavits. See State v. Weaver, 169 Utah Adv. Rep. 47, 49-50 (Utah App. 1991) (Orme, J. concurring) (noting hypothesis that deference to magistrates might be justified by their expertise developed through repeated experience with search warrant affidavits).

Under the Utah statutory scheme, magistrates are directed to receive evidence in support of search warrants in written form or to record the evidence verbatim and have the record transcribed. Utah Code Ann. § 77-23-4(1) (1990 Repl.). In these circumstances, the magistrates should not be privy to information unavailable to

reviewing courts, and the scope of information available to the magistrates does not provide a basis for deferring to the magistrates. See State v. Weaver, 169 Utah Adv. Rep. 47, 49-50 (Utah App. 1991) (Orme, J. concurring) (noting hypothesis that deference to magistrates might be justified because magistrates have the opportunity to clarify affidavits when they are presented, and appellate courts may not be privy to the information available to the magistrate, but stating, "On the other hand, such explanations should be made of record even if only by appropriate interlineation of the affidavit.").

Under the Utah statutory scheme, it cannot be said that magistrates should be deferred to because they are at an institutional disadvantage and lack the resources of reviewing courts. See State v. Weaver, 169 Utah Adv. Rep. 47, 49-50 (Utah App. 1991) (Orme, J. concurring) (noting hypothesis that deference to magistrates might be justified because magistrates operate at an "institutional disadvantage," without the time and resources available to appellate judges.). As an initial matter, evaluation of search warrant affidavits does not require great resources--it simply requires a thoughtful reading of the affidavits. As a secondary matter, it seems curious that an appellate court would exalt sympathy for the "institutionally disadvantaged" magistrates over the fundamental constitutional rights at stake in search and seizure cases. Most importantly, in Utah, police have the opportunity to forum shop. Every justice, judge and justice of the peace is authorized to act as magistrate. The fact that the police choose to patronize the magistrates with the least resources is

reason for meaningful appellate review and does not call for deference to the magistrates.

It appears that none of the United States Supreme Court cases directing reviewing courts to defer to the magistrates involves no-knock nighttime search warrants. This country has a long history of reprobation of no-knock nighttime searches. See Jones v. United States, 357 U.S. 493, 498-500 (1958); Miller v. United States, 357 U.S. 301, 306-08 (1958). No-knock nighttime search warrants pose extreme dangers to searching officers and others inside or near the premises to be searched and involve an extreme intrusion into the privacy and solitude of the home. See State v. Rowe, 806 P.2d 730, 734 n.5, 738-40, and nn.10 and 11, (Utah App.) (main opinion and concurring opinion of Garff, J.) (discussing the dangers posed by no-knock nighttime search warrants), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991). The unique threats posed by no-knock nighttime search warrants call for intense judicial review and counsel against deference to the magistrates. See State v. Rowe, 806 P.2d 730, 739-740 (Utah App.) (Garff, J., concurring) ("[W]henver a 'canned,' or preprinted affidavit is presented to a magistrate, he or she has an affirmative responsibility to scrutinize the factual circumstances justifying the search warrant. Conclusory or ambiguous statements in the affidavit are insufficient. This is particularly critical when the warrant authorizes nighttime intrusion into a person's home."), cert. granted, 167 Utah Adv. Rep.

26 (Utah 1991); State v. Buck, 756 P.2d 700, 703-04 (Utah 1988) (Zimmerman, J., concurring) (explaining the need for judicial scrutiny of no-knock searches).

Numerous Utah cases have recognized that it is appropriate for Utah courts to decide search and seizure cases on the basis of independent Utah law. See Allen v. Lindbeck, 93 P.2d 920 (Utah 1939) (decided under Article I section 14; striking statute purporting to allow search warrant affidavits based on the belief of the affiant, rather than stating the underlying facts). See also State v. Thompson, 810 P.2d 415 (Utah 1991); State v. LaRocco, 794 P.2d 460, 465-473 (Utah 1990) (plurality); State v. Nielsen, 727 P.2d 188, 192-93 (Utah 1986); State v. Hygh, 711 P.2d 264, 272 (Utah 1985) (Zimmerman, J., concurring).

Because federal deference to magistrates undercuts important rights established by Article I section 14 of the Utah Constitution and is illogical in the context of the Utah statutory scheme, this Court should read affidavits in support of the no-knock nighttime search warrants and determine if they state sufficient facts to provide probable cause for the issuance of the warrants, without any deference to the magistrates. Constitution of Utah, Article I section 14.

II.
THE AFFIDAVIT DOES NOT PROVIDE PROBABLE CAUSE
FOR THE ISSUANCE OF THE
NO-KNOCK NIGHTTIME SEARCH WARRANT.

A. SEARCH WARRANT AFFIDAVITS MUST PROVIDE SUFFICIENT FACTS FROM WHICH A MAGISTRATE MAY MAKE AN INDEPENDENT FINDING OF PROBABLE CAUSE.

This Court set forth the federal law on how a magistrate is to assess search warrant affidavits for probable cause, in State v. Weaver, 169 Utah Adv. Rep. 47 (1991), explaining,

Probable cause is to be determined by the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332-33 (1983).

Under this analysis, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S.Ct. at 2332.

Id. at 47 (citations omitted).

It is important to note that the Utah Supreme Court has recognized that the Gates "totality of the circumstances" test has not wholly supplanted the Aguilar-Spinelli test in the evaluation of affidavits based on information provided by informants. For instance, in State v. Anderson, 701 P.2d 1099 (Utah 1985), the court stated,

[I]n State v. Bailey, [675 P.2d 1203 (Utah 1984),] we observed that even under the Gates "totality of the circumstances" standard, compliance with the Aguilar-Spinelli guidelines might be necessary to establish the requisite "fair probability" that the evidence sought actually exists and can be found where the informant so states. However, in other cases, "a less strong showing of the basis of the affiant's knowledge, veracity and reliability may be

required, if the circumstances as a whole indicate that the informant's report is truthful." [Bailey, at 1205-06].

Id. at 1101-02 (footnotes omitted). When the totality of circumstances indicates the truthfulness of the informant's report, the showing of the informant's basis of knowledge and veracity and reliability may be "less strong," but there must still be some showing of each of these three things. Id.

Affidavits relying on police informants, rather than named citizen informants, logically require heightened scrutiny. In State v. Treadway, 499 P.2d 846 (Utah 1972), the court explained, "Recent case law has acknowledged that a different rationale exists for establishing the reliability of named citizen informers as opposed to unnamed police informers, who are frequently criminals. Those in the latter category often proffer information in exchange for some concession, payment, or simply out of revenge against the subject; under such circumstances, it is proper to demand some evidence of their credibility or reliability." Id. at 848 (emphasis added and deleted). The court indicated that the testimony of police informers is viewed with "rigid scrutiny." Id. Accord State v. Brown, 798 P.2d 284, 286-287 and n.4 (Utah App. 1990) (police informant testimony may require showing of "veracity, reliability, and basis of knowledge" if circumstances do not "readily indicate the truthfulness of the informant.").

Search warrant affidavits must provide sufficient factual allegations for the magistrate to make an independent factual assessment of probable cause. Our state supreme court recognized the importance of the exercise of independent factual assessment by

magistrates in Allen v. Lindbeck, 93 P.2d 920 (Utah 1939). Acting under Article I section 14 of the Utah Constitution, the court struck a statute authorizing the issuance of search warrants on the basis of the affiant's belief of facts, stating,

"A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, rests upon the reasoning of the affiant, based upon the secret facts of which he may have knowledge, and the conclusion which results from such reasoning is affiant's, not that of the judicial officer. The judicial process to ascertain probable cause is then transferred from the judicial officer to the affiant. The Constitution permits no such thing."

Id. at 924-925 (citation omitted).

Numerous other cases decided under federal law have recognized that, in the absence of sufficient factual bases in search warrant affidavits, magistrates cannot act with the requisite detachment and neutrality in issuing search warrants. See Giordanello v. United States, 357 U.S. 480, 486-87 (1958) (arrest warrant); Aguilar v. Texas, 378 U.S. 108, 109, 111-14 (1964); Nathanson v. United States, 290 U.S. 41, 47 (1933); Illinois v. Gates, 462 U.S. 213, 239 (1983).

Evidence seized under warrants obtained by magistrates' "rubberstamping" of "barebones" affidavits must be suppressed; the "good faith" exception to the exclusionary rule does not apply when the police proceed on the basis of such affidavits and warrants. State v. Droneburg, 781 P.2d 1303, 1304-05 (Utah App. 1989); State v. Rowe, 806 P.2d 730, 738 (Utah App. 1991).

B. SEARCH WARRANT AFFIDAVITS SEEKING NO-KNOCK NIGHTTIME SEARCH WARRANTS MUST MEET SPECIFIC CRITERIA.

No-knock nighttime searches involve severe dangers to searching officers and others inside or near the premises to be searched, extreme intrusion into the privacy and solitude of the home, and the destruction of property. See State v. Rowe, 806 P.2d 730, 734 n.5, 738-40, and nn.10 and 11, (Utah App.) (main opinion and concurring opinion of Garff, J.) (discussing the dangers posed by no-knock nighttime search warrants), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991); Miller v. United States, 357 U.S. 301, 306-08, 313 n.12 (1958) (interpreting federal knock and announce statute); LaFave, Search and Seizure, § 4.8(a) at 272-273; State v. Buck, 756 P.2d 700, 701 (Utah 1988). No-knock nighttime searches have met with judicial disfavor throughout the history of the United States. See Jones v. United States, 357 U.S. 493, 498-500 (1958); Miller v. United States, 357 U.S. 301 (1958).

Because of the dangers historically recognized in no-knock nighttime searches, magistrates are to proceed with caution in evaluating search warrant affidavits seeking no-knock nighttime search warrants. See State v. Rowe, 806 P.2d 730, 739-740 (Utah App.) (Garff, J., concurring) ("[W]henver a 'canned,' or preprinted affidavit is presented to a magistrate, he or she has an affirmative responsibility to scrutinize the factual circumstances justifying the search warrant. Conclusory or ambiguous statements in the affidavit are insufficient. This is particularly critical when the

warrant authorizes nighttime intrusion into a person's home."), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991); State v. Buck, 756 P.2d 700, 703-04 (Utah 1988) (Zimmerman, J., concurring) (explaining the need for judicial scrutiny of no-knock searches).

Even when no-knock nighttime search warrants are issued in compliance with pertinent statutes, the searches still must meet constitutional standards of reasonableness. See Ker v. California, 374 U.S. 23, 39 (1963); United State v. Mitchell, 783 F.2d 971, 973-74 (10th Cir.), cert. denied, 479 U.S. 860 (1986); Boyance v. Myers, 398 F.2d 896, 899 (3d Cir. 1968); State v. Lindner, 592 P.2d 852, 858 (Idaho 1979), LaFave, Search and Seizure, § 4.7(b) 264-267; State v. Rowe, 806 P.2d 730, 739 n.11 (Utah App.), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991).

Under Utah Code Ann. section 77-23-10(2), in order to issue a no-knock warrant, the magistrate must have facts in the affidavit or supplemental record which provide "proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given."

Under Utah Code Ann. section 77-23-5(1), in order to issue a nighttime warrant, the magistrate must have facts in the affidavit or supplemental record which provide "a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason[.]" Under the current statute, it is not enough for the issuance of the nighttime warrant to show that the evidence is likely to be present at night; there must be a reason why the search

must occur at night, rather than during the day. State v. Rowe, 806 P.2d 730, 733 (Utah App.), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991); LaFave, Search and Seizure, § 4.7(b) 264 and n.20.

C. THE AFFIDAVIT DOES NOT PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME SEARCH WARRANT.

Certain fundamental problems apparent on the face of the search warrant and affidavit indicate that, in issuing the no-knock nighttime search warrant without further clarification, the magistrate was acting as more of a rubber stamp than as a neutral and detached arbiter of probable cause.

The warrant itself demonstrates a delegation of judicial authority by the magistrate to the police. The warrant seeks to seize "U.S. Currency, and all items which are determined to be collateral or proceeds from narcotics transactions." This portion of the warrant transforms the warrant into a general warrant, giving the searching officers unlimited discretion to search for and seize property that has no apparent connection to the crimes at issue, possession of illegal drugs, and possession with intent to distribute. Such general warrants are illegal. See State v. Gallegos, 712 P.2d 207, 209 (Utah 1985) ("The fourth amendment to the United States Constitution requires that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the things . . . to be seized.' This portion of the amendment is essentially a proscription against general warrants whereby administrative officers determine what is and what is not to be seized. The decision to seize must be

judicial, as opposed to administrative, and the warrant must be sufficiently particular to guide the officer to the thing intended to be seized, thereby minimizing the danger of unwarranted invasion of privacy.")(emphasis added).

The first noticeable problem with the affidavit is that the affidavit refers to two apartments--#8 and #18, while the search warrant is limited to one apartment--#8. The facts in the affidavit apparently relating to apartment #8 are that Officer Watson initiated through a confidential informant a controlled buy of an unidentified quantity of cocaine from an unidentified person or persons inside the "residence to be searched" (Aff. ¶¶2 and 3). The allegation that a car matching a confidential informant's description of the car of an alleged cocaine dealer, Rene Montoya, was observed parked at "the address to be searched" (Aff. ¶5) might arguably apply to apartment #8 since apartment # 8 is the address to be searched. However, there is no indication in the affidavit that the parking is correlated to the apartment numbers.

The information in the affidavit relating specifically to apartment #18 indicates that apartment #18 is the location of the telephone with the number 485-6125, the telephone number subscribed to by Rene Montoya, the telephone number provided by a confidential informant who indicated that the person with this phone number was a hispanic male named Rene, who was dealing in large quantities of cocaine at approximately 2000 South (Aff. ¶4).

The other assertions in the affidavit, including references to counter-surveillance and threatened use of a gun to protect

narcotics, do not refer specifically to apartment #8 or #18 but are alleged against Rene or Montoya, the person listed as the telephone subscriber in apartment #18 (Aff. ¶¶5-7, 10-11).

It may be that Rene Montoya (named in the search warrant affidavit) and Rene Ruiz (the appellant) are different people who were living in separate apartments at the time the magistrate signed the search warrant. It may be that the affidavit contains a typographical error in mentioning apartments #8 and #18. Such possibilities may have grave consequences in the context of no-knock nighttime searches, and the magistrate should have clarified this facial problem with the affidavit prior to issuing the warrant. See Judge Garff's concurring opinion in Rowe, supra (noting magistrates' duty to scrutinize affidavits, particularly in cases seeking no-knock nighttime warrants).

The second facial problem with the affidavit is that it fails to provide an adequate showing of the reliability, veracity and basis of knowledge of the confidential informants. In this case involving multiple confidential informants, the paragraphs of the affidavit relating to the reliability of the information from confidential informants do not make clear reference to any informant, stating,

8. Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source) All information received from the C.I. has proven to be true and accurate. The C.I. has always followed instructions exactly as they were given. Your affiant has received information from three independent confidential sources, where-in the information is corroborating.

9. Your affiant has verified the above information from the confidential informant to be correct and accurate through the following independent investigation: Sheriff's Office records checks have verified information received from all C.I.'s. All substances purchased by the C.I. tested positive for cocaine.

(R. 55-56). See State v. Bailey, supra (requiring a showing of confidential informants' veracity, reliability and basis of knowledge).

The third facial problem with the affidavit is that it is too vague to allow independent neutral and detached assessment by a magistrate. Aside from the information relating to the controlled buy which occurred during the seven days prior to the typing of the affidavit, and Officer Watson's receipt of information from the confidential informant with Rene Montoya's phone number sometime "prior to" the controlled buy, none of the allegations are tied to any timeframe. See e.g. People v. Stoppel, 637 P.2d 384, 391 (Colo. 1981) ("The grounds in an affidavit for a search warrant must have a relationship to the date and the time that the warrant is issued."; stale information does not provide probable cause). Because critical portions of the affidavit are drafted in passive voice, the affidavit does not reflect whether the confidential informants discussed in paragraphs 4 through 6 had personal knowledge of the information they relayed, or whether the confidential informants mentioned in paragraphs 4 through 6 and 11 spoke directly to the police or were quoted to the police by other sources. See Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (warrants are not to issue on the basis of "loose, vague or doubtful bases of fact.").

The affidavit fails to demonstrate the statutory prerequisite to the issuance of a no-knock warrant, that "the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given." Utah Code Ann. § 77-23-10(2). In the instant case, the affidavit gives no specification as to the amount of drugs expected in apartment #8 and does not indicate the amount involved in the controlled buy. However, the information from the confidential informant with the phone number for apartment #18 indicates that "Rene" was dealing in "large quantities of drugs." The affidavit and warrant seek additional items that are not readily destroyed: paraphernalia, records, and currency and "proceeds". Because the affidavit did not allege facts establishing probable cause to believe that the no-knock warrant was necessary to prevent the destruction of evidence, the magistrate should not have signed the warrant. See Rowe at 733-734 n.3 ("A more particularized showing may well be required if, for example, a large quantity of drugs is sought. In such cases, as where the affiant has information of the on-going cultivation or manufacture of drugs, the exigency of ready destructability, inherent with small quantities of drugs, may not be present.").

The no-knock warrant was not justified by the assertion that "Montoya has made statements to two C.I.'s which indicate he has, and will, use a hand-gun to defend his narcotics," for three reasons. First, there is no indication that Montoya, the phone subscriber in apartment #18, lived in apartment #8, the place to be

searched, according to the warrant. Second, the veracity and reliability of the confidential informants is unclear from the affidavit, and it is not clear that these informants gave this information to the police or were quoted to the police by other informants. Third, the allegations concerning the gun are not tied to any timeframe.

The affidavit fails to demonstrate the statutory prerequisite to the issuance of a nighttime warrant, that "a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason[.]" Utah Code Ann. §77-23-5(1). See also LaFave, Search and Seizure, § 4.7(b) 264 and n.20 (explaining that under Utah's current type of statute, affidavit must provide an adequate reason as to why the search must occur at night); State v. Rowe, 806 P.2d 730, 733 (Utah App.) (same), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991). There is nothing in the affidavit explaining why apartment #8 had to be searched at night, rather than in the day. As previously discussed, the evidence to be seized was not evanescent, and there is nothing to indicate that its seizure was more necessary at night than in the day. Inasmuch as all drug activity and presumably all of the "intense counter-surveillance" occurred at night (Aff. ¶10), issuance of a nighttime search warrant posed uniquely high dangers in this case and was improper. See State v. Rowe, 806 P.2d 730, 734 n.4 (Utah App. 1991) ("For example, if the supporting affidavit made a particularized showing that drugs were likely to be sold or consumed over the course of the night and

evidence thereby lost, or that the supply was likely to be imminently moved en masse to a different location during the night, or that a safer search was likely at night because the house was abustle with activity during the day and no one but the occupant was likely to be home at night, then the propriety of a nighttime search becomes manifest. We caution that a mere incantation of such circumstances will not justify a nighttime search--the required factual showing is not one which is conducive, for example, to preprinted language.") (emphasis added), cert. granted, 167 Utah Adv. Rep. 26 (Utah 1991). See generally Rowe; State v. Droneburg, 781 P.2d 1303 (Utah App. 1989).

The federal "good faith" exception to the exclusionary rule has not been and should not be adopted under the exclusionary rule of Article I section 14 of the Utah Constitution. See Rowe at 737-738 and appendix to Rowe opinion at 740-743. Even if the "good faith" exception could be applied in this state, it does not apply in this case because no officer could rely in good faith on the barebones affidavit submitted in this case. See Rowe at 738 (good faith exception does not apply when magistrate acts as a rubber stamp).

The violations in this case are substantive and require suppression. The affidavit and warrant are too vague to support a finding of probable cause to search particularly in a no-knock nighttime manner, and constitute violations of the fourth amendment of the United States Constitution and Article I section 14 of the Utah Constitution. The affidavit fails to establish statutory

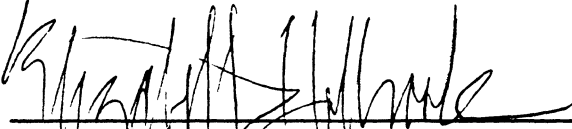
grounds for a no-knock nighttime warrant. Suppression is the appropriate remedy for the substantive rights violations involved here. Rowe at 738. See State v. LaRocco, 794 P.2d 460, 465-73 (Utah 1990) (plurality) (adopting exclusionary rule under Article I section 14 of the Utah Constitution, and reserving judgment on whether or not the court will adopt exceptions to the Utah exclusionary rule).

CONCLUSION

This Court should reverse the trial court's denial of Mr. Ruiz's motion to suppress and remand this case to the trial court for further proceedings.

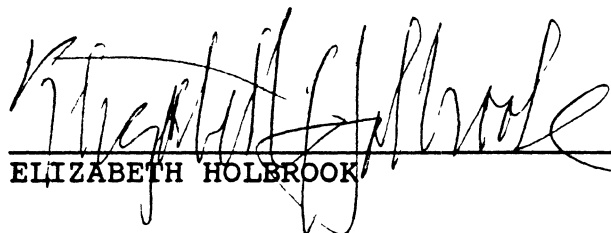
RESPECTFULLY SUBMITTED this 5 day of June, 1992.

LISA J. REMAL
Attorney for Mr. Ruiz


ELIZABETH HOLBROOK
Attorney for Mr. Ruiz

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 2 day of June, 1992.



ELIZABETH HOLBROOK

DELIVERED by _____ this ____ day
of June, 1992.

APPENDIX 1

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV to the Constitution of the United States provides:

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 seized.

Article I, Section 14 of the Constitution of Utah provides:

**Sec. 14. [Unreasonable searches forbidden--
Issuance of warrant.]**

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Ann. section 77-1-3 (1991 Cum. Supp.) provides in pertinent part:

77-1-3. Definitions.

For the purpose of this act:

(4) "Magistrate" means a justice of the Supreme Court, a judge of the district courts, a judge of the juvenile courts, a judge of the circuit courts and a justice of the peace or a judge of any court created by law.

Utah Code Ann. section 77-23-4 (1990 Repl. Vol.) provides in pertinent part:

77-23-4. Examination of complainant and witnesses--Witness not in physical presence of magistrate--Duplicate original warrants--Return.

(1) All evidence to be considered by a magistrate in the issuance of a search warrant shall be given on oath and either reduced to writing or recorded verbatim. Transcription of the recorded testimony need not precede the issuance of the warrant. Any person having standing to contest the search may request and shall be provided with a transcription of the recorded testimony in support of the application for the warrant.

. . .

Utah Code Ann. section 77-23-5 (1990 Repl. Vol.) provides in pertinent part:

77-23-5. Time for service--Officer may request assistance.

(1) The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

. . .

Utah Code Ann. section 77-23-10 (1990 Repl. Vol.) provides in pertinent part:

**77-23-10. Force used in executing warrant--
Notice of authority prerequisite, when.**

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

APPENDIX 2

County of Salt Lake, State of Utah

I, the undersigned, Clerk of the Circuit Court, State of Utah, Salt Lake County, do hereby certify that the foregoing is a true and full copy of an original file in my office as such clerk.

Witness my hand and seal of said Court This 11 day of Jan 19 91

By Paul Vance Clerk

By Paul Vance Deputy

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affidavit under oath having been made this day before me by Detective C. Watson-SLCOSO, I am satisfied that there is probable cause to believe

That ☒ on the person(s) of Rene MONTOYA, a male Hispanic, age: approximately 30 years, height: 5'2", weight: 145 pounds.
☐ in the vehicle(s) described as

☒ on the premises known as 1975 South 1100 East, #8, the upper south-east unit of an apartment building.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:
Cocaine, a white substance in powder or solid form.
Drug paraphernalia, specifically smoking devices, scales, cutting agents and packaging materials. Records pertaining to narcotics transactions. U.S. Currency, and all items which are determined to be collateral or proceeds from narcotics transactions.

and that said property or evidence:

- ☒ was unlawfully acquired or is unlawfully possessed, or
- ☒ has been used to commit or conceal a public offense, or
- ☒ is being possessed with the purpose to use it as a means of committing or concealing a public offense, or
- ☒ consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct, or
- ☐ consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct. [Note requirements of Utah Code Annotated, 77-23-3(2)]

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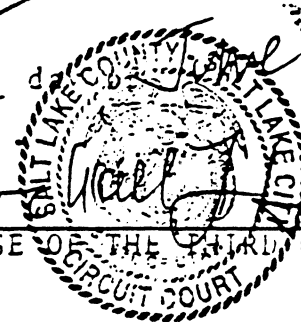
PAGE 2
SEARCH WARRANT

You are therefore commanded:

- () in the day time
- (XX) at any time day or night (good cause having been shown)
- (XX) to execute without notice of authority or purpose. (proof under oath being shown that the object of this search may be quickly destroyed or disposed of or that harm may result to any person if notice were given)

to make a search of the above-named or described person(s), vehicle(s), and premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Fifth Circuit Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this

[Signature] *June 1990*

[Signature]
JUDGE OF THE THIRD CIRCUIT COURT

00050

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH)
 : ss
County of Salt Lake)

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: Michael C. Hestings 450 South 2nd East
JUDGE ADDRESS

The undersigned affiant being first duly sworn, deposes and says:

That he has reason to believe

That (XX on the person(s) of Rene MONTTOYA, a male Hispanic, age:
approximately 30 years, height: 5'2", weight: 145 pounds.
() in the vehicle(s) described as

(XX on the premises known as 1975 South 1100 East, #8,
the upper south-east unit of an apartment building.

In the City of Salt Lake, County of Salt Lake, State of
Utah, there is now certain property or evidence described as:

Cocaine, a white substance in powder or solid form.
Drug paraphernalia, specifically smoking devices, scales, cutting agents
and packaging materials. Records pertaining to narcotics transactions.
U.S. Currency, and all items which are determined to be collateral or
proceeds from narcotics transactions.
and that said property or evidence:

- (XX was unlawfully acquired or is unlawfully possessed, or
- (XX has been used to commit or conceal a public offense, or
- (XX is being possessed with the purpose to use it as a means
of committing or concealing a public offense, or
- (XX consists of an item or constitutes evidence of illegal
conduct, possessed by a party to the illegal conduct, or
- () consists of an item or constitutes evidence of illegal
conduct, possessed by a person or entity not a party to
the illegal conduct. [Note requirements of Utah Code
Annotated, 77-23-3(2)]

Affiant believes the property and evidence described above is
evidence of the crime(s) of Possession of a controlled substance, and/or
Possession of a controlled substance with the intent to distribute

PAGE 2
AFFIDAVIT FOR SEARCH WARRANT

The facts to establish the grounds for issuance of a Search Warrant are:

Your affiant is a Deputy Sheriff for the Salt Lake County Sheriff's Office with over two years experience. Your affiant has been assigned to the Narcotics Division for one year, and has worked as an Undercover Investigator for eight months. During which time, your affiant made over 170 undercover drug buys. Your affiant has been trained by the Utah Peace Officer's Standards and Training, the Salt Lake County Sheriff's Training Division, and numerous hours of on the job training. Your affiant has also received 24 hours training from the Clandestine Lab Investigators Association, (C.L.I.A.), and 24 hours from the California Narcotics Officers Association, (C.N.O.A.).

Your affiant, in the past seven days, has initiated the purchase of controlled substance from inside the address to be searched, specifically cocaine. This was done by utilizing a confidential informant, (hereafter referred to as a C.I.). The circumstances surrounding the purchase are described as follows:

The C.I. was searched prior to, and immediately after the purchase. This was done to ensure no other controlled substance, or money, were present. The C.I. was given a pre-determined amount of money. The C.I. was kept under constant visual observation from the time of the first search, until the second, with the exception of the time the C.I. was directly inside the residence to be searched. At the time of the second search, the C.I. produced a substance, which field tested positive for cocaine.

Prior to the above described purchase, your affiant received information from a second C.I., that a Hispanic, Male, named RENE, was dealing in large quantities of cocaine, and he lived in an apartment located at approximately 2000 South. This C.I. did have the phone number for RENE, and gave it to the Sheriff's Office. The number is 485-6125. This number was checked with telephone security, and the subscriber was listed as Rene MONTOYA, at 1975 South 1100 East, #18.

Your affiant has also been advised by Detective Keith Stephens, of the Sheriff's Office Narcotics Division, of a third C.I. he had received information from, about a Hispanic, Male, named: RENE, who was dealing cocaine at 1975 South 1100 East. This C.I. gave a description of a vehicle, which Rene MONTOYA had been driving. A vehicle matching the description has been observed parked at the address to be searched by your affiant.

This C.I. also advised Detective Stephens of the intense counter surveillance done by MONTOYA, and those who help, and/or work for him. This counter surveillance has been observed by your affiant.

CU Your affiant has observed persons walking back and forth in front of the apartment, writing down license plate #s, watching for persons being followed, and or just being a look out.

00055

PAGE 3
AFFIDAVIT FOR SEARCH WARRANT

Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source) All information received from the C.I. has proven to be true and accurate. The C.I. has always followed instructions exactly as they were given. Your affiant has received information from three independent confidential sources, where-in the information is corroborating.

Your affiant has verified the above information from the confidential informant to be correct and accurate through the following independent investigation: Sheriff's Office records checks have verified information received from all C.I.'s. All substances purchased by the C.I. tested positive for cocaine.

WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items:

() in the day time.

(XX) at any time day or night because there is reason to believe it is necessary to seize the property prior to its being concealed, destroyed, damaged, or altered, or for other good reasons, to-wit:

All narcotics related activity at the address to be searched was observed in the evening hours.

It is further requested that (if appropriate) the officer executing the requested warrant not be required to give notice of the officer's authority or purpose because:

(XX) physical harm may result to any person if notice were given; or

(XX) the property sought may be quickly destroyed, disposed of, or secreted.

This danger is believed to exist because:

Hand-guns have been found on most narcotic search warrants.

Montoya has made statements to two C.I.'s, which indicate he has, and will, use a hand-gun to defend his narcotics.

Counter surveillance has been observed at 1975 South 1100 East.

Chas. [Signature]
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 6th of June, 1989.

1989.

1990

[Signature]
JUDGE OF THE THIRD CIRCUIT COURT,
IN AND FOR SALT LAKE COUNTY, STATE
OF UTAH

RETURN TO SEARCH WARRANT

NO. _____

The personal property (~~XXXXXXXXXX~~) set out on the inventory attached hereto) was taken from the premises located and described as 1975 South 1100 East, #8

and from the vehicle(s) described as n/a

and from the person(s) of n/a

by virtue of a search warrant dated the 5th day of June,
1990.

and executed by Judge Michael L. Hutchings
of the above-entitled court: Third Circuit Court

I, Craig Watson, by whom this warrant was executed,
do swear that the (~~XXXXX~~/attached) inventory contains a true and
detailed account of all the property taken by me under the warrant,
on the 5th day of June, 1990.

The following will be a list of items seized pursuant to a search warrant at 1975 South 1100 East, #8, on the date of June 5th, 1990.

Narcotics: Page A:

- #1: Seven small bags of cocaine, (each containing one-sixteenth of an ounce), and one small bag of heroin, (containing one gram).
- #2: A small amount of cocaine.

Paraphernalia: Page B:

- #1: One red scale.
- #2: One syringe, and cooker.
- #3: One box of baggies.

Guns/Knives: Page C:

- #1: One Rino, .22 calibre, pearl handle, number: 32724.
- #2: One Hialeah, .38 calibre, pearl handle, Derringer, number: 04156.
- #3: One Sterling, .22 calibre, black handle, number: E12519.
- #4: One Luger, .22 calibre, brown handle, number: CL07675.
- #5: A silver handle knife.

Money: Page D:

- #1: Eight hundred and forty two dollars, (\$842.00), in U.S. Currency.
- #2: One thousand one hundred thirty seven dollars, (\$1137.00), in U.S. Currency.

All of the property taken by virtue of said warrant will be retained in my custody subject to the order of this court of or any other court in which the offense in respect to which the property or things taken, is triable.

Livingstone

Subscribed and sworn to before me

this 8 day of Sept, 1990

JUDGE

