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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	No. CR-F-05-333 OWW
)	
)	ORDER DENYING DEFENDANT'S
)	MOTION TO SUPPRESS EVIDENCE
Plaintiff,)	RE JULY 30, 2004 SEARCH
)	WARRANT ON GROUND OF FACIAL
vs.)	INVALIDITY (Doc. 39)
)	
MICHAEL CLAY PAYTON,)	
)	
)	
Defendant.)	
)	
)	

Defendant Michael Clay Payton moves to suppress all evidence obtained pursuant to three search warrants for 544 Spur Court, Merced, California:

1. Search warrant issued by the State of California, Merced County Superior Court on July 30, 2004;
2. Search warrant issued by the State of California, Merced County Superior Court on October 4, 2004; and
3. Search warrant issued by the United States District Court for the Eastern District of California on September 1, 2005.

1 The sole issue presently before the Court is whether the
2 search of 544 Spur Court on July 30, 2004 was unlawful under the
3 Fourth Amendment because the July 30, 2004 search warrant was
4 facially invalid.¹

5 Oral argument was conducted on December 12, 2006 and January
6 30, 2007. An evidentiary hearing was conducted on January 30,
7 2007 and testimony taken from the Honorable John D. Kirihara,
8 judge of the Merced County Superior Court and issuer of the July
9 30, 2004 and October 4, 2004 search warrants. Supplemental
10 briefing was completed on February 7, 2007.

11 **A. Background.**

12 The July 30, 2004 search warrant, captioned "State of
13 California - County of Merced Search Warrant and Affidavit" was
14 issued by the Honorable John D. Kirihara, judge of the Merced
15 County Superior Court. The search warrant stated in pertinent
16 part:

17 (AFFIDAVIT)

18 Jeffrey R. Horn, Swears under oath that the
19 facts expressed by him in this search warrant
20 and affidavit and incorporated statement of
21 probable cause are true and that based
22 thereon he has probable cause to believe and
23 does believe that the property and or person
described below is lawfully seizable pursuant
to Penal Code section 1524, as indicated
below, and is now located at the locations
set forth below. Wherefore, affiant requests
that this Search Warrant be issued.

24
25 ¹Defendant raises other grounds in support of suppression of
26 the July 30, 2004 search warrant as well as the later two search
warrants. Those grounds will be separately argued and resolved.

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...

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICE OFFICER, PEACE OFFICERS IN THE COUNTY OF MERCED: proof by affidavit been made before me by Jeffrey R. Horn.

There is probable cause to believe that the property and/or person(s) described herein may be found at the location set forth herein and is lawfully seizable pursuant to Penal Code section 1524 as indicated by 'x' in that:

...

X it was used as the means of committing a felony,

X it is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery,

X it tends to show that a felony has been committed or that a particular person has committed a felony ...

...

YOU ARE THEREFORE COMMANDED TO SEARCH: 544 Spur Ct. ... located in the City of Merced, County of Merced, State of California.

FOR THE FOLLOWING PROPERTY/PERSON: Melinda Reyes Fuentes, 11-10-85, Blk, Bro, 5-02, 170, and the property listed in attachment A.

AND TO SEIZE IT IF FOUND and bring it forthwith to me, or this court, at the courthouse of this court. This Search Warrant and incorporated affidavit was sworn to as true and subscribed before me this 30th day of July, 2004 ... Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

1 Officer Horn's statement of probable cause stated in pertinent
2 part:

3 Because of my experience and training I know
4 that drug dealers will have evidence of sales
5 on their computers. I would ask that this
6 warrant allow me to look at computer files,
7 and seize the computer if it shows evidence
8 of criminal behavior.

9 Attachment A to the search warrant stated in pertinent part:

10 Methamphetamine and items commonly used to
11 cut methamphetamine, weighing devices such as
12 scales used to weigh methamphetamine,
13 measuring devices such as spoons, plastic
14 baggies and other containers such as cloth or
15 plastic containers which are used to contain
16 and package methamphetamine in either powder
17 or base form. Articles of personal property
18 intending to establish the identity of the
19 person(s) in control of the premises being
20 searched; rent or house payment receipts,
21 keys, canceled mail envelopes, utility bill
22 receipts, telephone bills, address books,
23 real estate documents or lease applications.
24 Money, which has been gained from the profit
25 and sales of narcotics, shall be seized at
26 this time and forfeited under provisions of
 Sections 11470 and 11488 of the California
 Health and Safety Code. Your Affiant further
 requests this search warrant allows him to
 seize negotiable instruments and other items
 which are also subject to forfeiture under
 provisions of Section 11470 and 11488 of the
 California Health and Safety Code. Sales
 ledgers showing narcotics transactions such
 as pay/owe sheets, telephone recording
 equipment and tapes, which are included in
 the equipment that are pertinent and contain
 information dealing with hand-to-hand
 transactions, shall be included. Financial
 records of the person(s) in control of the
 residence or premises, bank accounts, loan
 applications, income and expense records,
 safety deposit box keys and records, property
 acquisitions and notes, and any lease or rent
 applications. Personal identification that
 will identify the person(s) of the residence
 at which the search warrant is taking place

1 will also be included at this time.

2 At the January 30, 2007 evidentiary hearing, Judge Kiriwara
3 testified that, based on his practice and experience, the
4 probable cause statement, the affidavit, the search warrant and
5 the attachment are presented for issuance as a single document
6 and are issued to the searching officer(s) as a single document.
7 Upon execution, this single document is filed with the Merced
8 County Superior Court. Judge Kiriwara testified that the
9 probable cause statement is considered part of the actual search
10 warrant. With regard to the July 30, 2004 search warrant, Judge
11 Kiriwara testified that Officer Horn presented the probable cause
12 statement, the affidavit, Attachment A and the proposed search
13 warrant to him, that he, Judge Kiriwara, reviewed all of these
14 documents, administered the oath of Officer Horn, and had Officer
15 Horn sign the affidavit. Judge Kiriwara then signed the search
16 warrant. Judge Kiriwara was aware that the probable cause
17 statement included a request for authorization to search any
18 computer(s) at the residence and intended that the search warrant
19 include that authorization. Judge Kiriwara testified that he
20 failed to notice that Attachment A did not list a computer in the
21 description of items authorized to be searched and seized by the
22 search warrant and that the failure to include a computer in
23 Attachment A was inadvertent.

24 **B. Facial Invalidity of July 30, 2004 Search Warrant.**

25 "[S]earches conducted by state officers with state warrants
26 issued by state judges, with minimal or no federal involvement,

1 are not to be judged by the specific provisions of Rule 41 but
2 must only conform to federal constitutional standards." *United*
3 *States v. Piver*, 899 F.2d 881, 882 (9th Cir.1990). The July 30,
4 2004 search warrant is such a warrant.

5 The Fourth Amendment to the United States Constitution
6 states that "no Warrants shall issue, but upon probable cause,
7 supported by Oath or affirmation, and particularly describing the
8 place to be searched, and the persons or things to be seized."

9 Defendant contends that neither the search warrant nor
10 Attachment A to the search warrant authorized the search and
11 seizure of Defendant's computer and, thus, the particularity
12 requirement of the Fourth Amendment is not satisfied.

13 "Particularity is the requirement that the warrant must
14 clearly state what is sought." *In re Grand Jury Subpoenas Dated*
15 *December 10, 1987*, 926 F.2d 847, 856-857 (9th Cir.1991).

16 Defendant relies on *Groh v. Ramirez*, 540 U.S. 551 (2004) as
17 support for his position that the July 30, 2004 search warrant is
18 facially invalid.

19 In *Groh v. Ramirez*, the petitioner, an agent with the Bureau
20 of Alcohol, Tobacco and Firearms, prepared and signed an
21 application for a search warrant to search respondents' ranch.
22 The application stated that the search was for specified weapons,
23 explosives and records. The search warrant application was
24 supported by petitioner's detailed affidavit setting forth his
25 basis for believing these items were on the ranch and was
26 accompanied by a search warrant form that the ATF agent

1 completed. The Magistrate Judge signed the warrant form even
2 though it did not identify any of the items that petitioner
3 intended to seize. The portion of the search warrant calling for
4 a description of the "person or property" to be seized described
5 respondents' house, didn't describe the items to be seized, and
6 did not incorporate by reference the application's itemized list.
7 Upon execution of the search warrant, no illegal weapons or
8 explosives were found. Petitioner left a copy of the warrant,
9 but not the application, with respondents. Respondents sued
10 Petitioner and others, claiming a violation of the Fourth
11 Amendment. The Supreme Court held that the search warrant was
12 "plainly invalid" because it failed to describe with
13 particularity the items to be seized. *Id.* at 557. The Supreme
14 Court stated:

15 The fact that the *application* adequately
16 described the 'things to be seized' does not
17 save the *warrant* from its facial invalidity.
18 The Fourth Amendment by its terms requires
19 particularity in the warrant, not in the
20 supporting documents And for good
21 reason: 'The presence of a search warrant
22 serves a high function,' ... and that high
23 function is not necessarily vindicated when
24 some other document, somewhere, says
25 something about the objects of the search,
26 but the contents of that document are neither
known to the person whose home is being
searched nor available for her inspection.
We do not say that the Fourth Amendment
prohibits a warrant from cross-referencing
other documents. Indeed, most Courts of
Appeals have held that a court may construe a
warrant with reference to a supporting
application or affidavit if the warrant uses
appropriate words of incorporation, and if
the supporting document accompanies the
warrant ... But in this case the warrant did

1 not incorporate other documents by reference,
2 nor did either the affidavit or the
3 application (which had been placed under
4 seal) accompany the warrant. Hence, we need
5 not further explore the matter of
6 incorporation.

7 Petitioner argues that even though the
8 warrant was invalid, the search nevertheless
9 was 'reasonable' within the meaning of the
10 Fourth Amendment. He notes that a Magistrate
11 authorized the search on the basis of
12 adequate evidence of probable cause, that
13 petitioner orally described to respondents
14 the items to be seized, and that the search
15 did not exceed the limits intended by the
16 Magistrate and described by petitioner.
17 Thus, petitioner maintains, his search of
18 respondents' ranch was functionally
19 equivalent to a search authorized by a valid
20 warrant.

21 We disagree. This warrant did not simply
22 omit a few items from a list of many to be
23 searched, or misdescribe a few of several
24 items. Nor did it make what fairly could be
25 characterized as a mere technical mistake or
26 typographical error. Rather, in the space
set aside for a description of the items to
be seized, the warrant stated that the items
consisted of a 'single dwelling residence ...
blue in color.' In other words, the warrant
did not describe the items to be seized at
all. In this respect the warrant was so
obviously deficient that we must regard the
search as 'warrantless' within the meaning of
our case law.

20 *Id.* at 557-558. The Supreme Court rejected Petitioner's argument
21 that a search conducted pursuant to a warrant lacking
22 particularity is exempted from the presumption of
23 unreasonableness if the goals served by the particularity
24 requirement, preventing general searches and preventing warrants
25 from being issued on vague or dubious information, are otherwise
26 served. Petitioner contended that the search at issue satisfied

1 these the scope of the search did not exceed the limits set forth
2 in the application:

3 But unless the particular items described in
4 the affidavit are also set forth in the
5 warrant itself (or at least incorporated by
6 reference, and the affidavit present at the
7 search), there can be no written assurance
8 that the Magistrate actually found probable
9 cause to search for, and to seize, every item
10 mentioned in the affidavit ... In this case,
11 for example, it is at least theoretically
12 possible that the Magistrate was satisfied
13 that the search for weapons and explosives
14 was justified by the showing in the
15 affidavit, but not convinced that any
16 evidentiary basis existed for rummaging
17 through respondents' files and papers for
18 receipts pertaining to the purchase or
19 manufacture of such items ... Or,
20 conceivably, the Magistrate might have
21 believed that some of the weapons mentioned
22 in the affidavit could have been lawfully
23 possessed and therefore should not be seized
24 ... The mere fact that the Magistrate issued
25 a warrant does not necessarily establish that
26 he agreed that the scope of the search should
be as broad as the affiant's request. Even
though petitioner acted with restraint in
conducting the search, 'the inescapable fact
is that this restraint was imposed by the
agents themselves, not by a judicial
officer.'

We have long held, moreover, that the purpose
of the particularity requirement is not
limited to the prevention of general searches
... A particular warrant also 'assures the
individual whose property is searched or
seized of the lawful authority of the
executing officer, his need to search, and
the limits of his power to search.'

23 *Id.* at 560-561.

24 *Groh* is not dispositive of this ground for Defendant's
25 motion to suppress. Here, the July 30, 2004 search warrant
26 omitted to list one item, computers, from the list of items

1 specifically authorized to be seized. This is not a situation in
2 which the items to be seized were not described at all in the
3 search warrant.

4 Although acknowledging that the particularity requirement of
5 the Fourth Amendment may be satisfied by cross-referencing other
6 documents, Defendant contends that the facial invalidity of the
7 July 30, 2004 search warrant cannot be so cured.

8 “\... [T]he warrant may properly be construed with reference
9 to the affidavit for purposes of sustaining the particularity
10 [requirement], provided that a) the affidavit accompanies the
11 warrant, and b) the warrant uses suitable words of reference
12 which incorporate the affidavit therein.” *Matter of Property*
13 *Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317,
14 1319 (9th Cir.1981).

15 Defendant concedes that the search warrant incorporated
16 Attachment A with suitable words of reference. However,
17 Attachment A does not list a computer among the items to be
18 seized. Defendant argues that Officer Horn’s statement of
19 probable cause cannot be used to cure the particularity
20 requirement because the search warrant does not incorporate the
21 statement of probable cause with suitable words of reference.
22 Defendant asserts that, in the Affidavit section of the search
23 warrant, Officer Horn only incorporated his statement of probable
24 causes for the purpose of averring his belief that probable cause
25 for the search of the items described in Attachment A existed.
26 Defendant argues that the incorporation of an affidavit for the

1 purpose of establishing probable cause is not the same as
2 incorporating an affidavit for the purpose of describing the
3 scope of the search warrant.

4 Defendant contends that, in the cases relied upon by the
5 parties in briefing this issue, the words of incorporation
6 expressly indicated that the scope of the search authorized by
7 the search warrant could be defined by reference to the
8 incorporated affidavit.

9 In *United States v. Johnson*, 541 F.2d 1311 (9th Cir. 1976),
10 a search warrant authorized the search and seizure of "U.S.
11 Currency as described in the affidavit". *Id.* at 1313. The Ninth
12 Circuit held that, because the affidavit stated the serial
13 numbers of the currency and because the affidavit was
14 incorporated into the search warrant by suitable words of
15 reference, the search warrant met "the constitutional standard of
16 particularity in description." *Id.* at 1315-1316.

17 In *Matter of Property Belonging to Talk of the Town*
18 *Bookstore, Inc.*, *supra*, 644 F.2d at 1319, the Ninth Circuit
19 ruled:

20 The warrants in this case commanded the
21 executing officers 'to seize only the above
22 specified property as described in the
23 Affidavits attached to this search warrant
24 ...' and 'to seize only those books,
25 magazines, and films which depict the
26 specific sex acts described in the
27 Affidavits.'

...

The warrants expressly limited the property
subject to seizure to that described in

1 detail in the incorporated affidavits; '[a]s
2 to what [was] to be taken, nothing [was] left
3 to the discretion of the officer executing
4 the warrant' ... Since the affidavits were
5 physically attached to the warrants, the
6 persons on the premises at the time of the
7 search were provided with notice of which
8 items the officers were authorized to seize.

9 We conclude that any generality in the
10 warrants was cured by the incorporation and
11 attachment of the affidavits.

12 In *United States v. Fannin*, 817 F.2d 1379, 1384 (9th
13 Cir.1987), the Ninth Circuit held in pertinent part: "Although
14 the 'other evidence' language of the warrant is not sufficiently
15 particular standing alone, that deficiency was cured by the
16 particularity of the attached and incorporated affidavit."

17 In *Center Art Galleries-Hawaii, Inc. v. United States*, 875
18 F.2d 747, 750 (9th Cir.1989), the Ninth Circuit rejected the
19 Government's argument that the overbreadth of the search warrant
20 at issue could be cured by the specificity of the affidavit
21 supporting the search warrant because, *inter alia*, the affidavit
22 was not expressly incorporated into the warrant.

23 In *United States v. Towne*, 997 F.2d 537 (9th Cir.1993), in
24 the space reserved for the description of what the executing
25 officers was to search for and seize, the police officer seeking
26 the search warrant typed, "See Attachment B". *Id.* at 539.
The Ninth Circuit held in pertinent part: "There is no question
that Attachment B was incorporated by reference in the search
warrant." *Id.* at 548-549. *See also United States v. Van Damme*,
48 F.3d 461, 465 (9th Cir.1995):

1 [T]he search warrant did not tell the
2 officers executing it what to seize. In the
3 place on the form for listing what the
4 officers were to seize, the search warrant
5 said 'SEE ATTACHMENT # 1.' But nothing was
6 attached. On its face, the warrant is
7 therefore insufficient.

8 There is no question that the disputed search warrant did
9 not use suitable words of reference to incorporate the statement
10 of probable cause into the description of property in the search
11 warrant to be seized. However, Judge Kirihara testified that he
12 specifically intended that computers be included in the list of
13 items to be seized and that the failure to include computers was
14 the result of oversight.

15 In *Doe v. Groody*, 361 F.3d 252 (3rd Cir.), *cert. denied*, 543
16 U.S. 873 (2004), a case relied upon by both parties, following a
17 long-term investigation of John Doe for suspected narcotics
18 dealing, a state narcotics task force sought a search warrant for
19 John Doe and his residence. The affidavit in support of the
20 search warrant requested permission to search John Doe's
21 residence and his Volkswagen for drugs, paraphernalia, money,
22 drug records and other evidence. Additionally, the affidavit
23 stated:

24 The search should also include all occupants
25 of the residence as the information developed
26 shows that [Doe] has frequent visitors that
purchase methamphetamine. These persons may
be on the premises at the time of the
execution of the search warrant and many
attempt to conceal controlled substances on
their persons.

...

1 This application seeks permission to search
2 all occupants of the residence and their
3 belongings to prevent the removal,
4 concealment, or destruction of any evidence
5 requested in this warrant. It is the
6 experience of your co-affiants that drug
7 dealers often attempt to do so when faced
8 with impending apprehension and may give such
9 evidence to persons who do not actually
10 reside or own/rent the premises. This is
11 done to prevent the discovery of said items
12 in hopes that said persons will not be
13 subject to search when police arrive.

14 ...

15 As a result of the information developed,
16 your affiant requests that a search warrant
17 ... be issued for ... the residence of [John
18 Doe] and all occupants therein.

19 The affidavit was signed on the last page by a police officer,
20 under whose signature was the entry: "Sworn and subscribed before
21 District Justice James R. Ferrier 21-3-03, this 6th of March
22 1998.'" Under the legend was the Magistrate's signature, followed
23 by the phrase "Issuing Authority" and the impression of a rubber
24 stamp. The warrant was attached to a separate printed face
25 sheet, entitled "Search Warrant and Affidavit." That form
26 contained boilerplate introductory language, followed by open
blocks for someone to type in information. The first block asked
for the identity of the "items to be search [sic] for and
seized." The following blocks asked, in turn, for a "[s]pecific
description of premises and/or persons to be searched"; the
"[n]ame of owner, occupant or possessor of said premises to be
sought"; a description of the nature and date of the statutory
violations; and for the basis of "[p]robable cause belief."

1 These printed blocks were completed. In response to the
2 questions "[d]ate of violation" and "[p]robable cause belief,"
3 the face sheet specifically referred to the typed affidavit of
4 probable cause attached to the warrant. But in answering the
5 question "[s]pecific description of premises and/or persons to be
6 searched," the attached typed affidavit was not mentioned.

7 Rather, the form contained a typewritten entry naming only John
8 Doe, giving his description, date of birth and social security
9 number, and identifying and describing John Doe's residence. The
10 printed warrant and affidavit face sheet was signed by the same
11 police officer and "issuing authority" who had signed the
12 underlying affidavit. When the officers went to execute the
13 search warrant, accompanied by a female meter patrol officer,
14 they meet John Doe at his residence and took him inside. Once
15 inside, the officers found no visitors, but only John Doe's wife
16 and daughter. The officers searched the two women for
17 contraband. No contraband was found on either of them. Doe's
18 wife and daughter sued the officers and others under 42 U.S.C. §
19 1983. The police officers appealed to the Third Circuit
20 following the denial by the District Court of their motion for
21 summary judgment based on qualified immunity. *Id.* at 235-237.

22 The police officers argued on appeal that the search of both
23 females was covered by the warrant for the search of the house
24 and was supported by probable cause. The Third Circuit rejected
25 this argument:

26 The face of the search warrant here ... does

1 not grant authority to search either Jane or
2 Mary Doe. The block designated for a
3 description of the person or place to be
4 searched specifically names John Doe, and
5 identifies and describes his residence.
6 Nothing in that portion of the printed
7 warrant refers to any other individual, named
8 or unnamed, to be searched. Seeking to
9 remedy this omission, the officers argue that
10 the warrant should be read in light of the
11 accompanying affidavit which requested
12 permission to search 'all occupants' of the
13 residence. They conclude that the warrant
14 should be read in 'common sense' fashion, as
15 supplemented by the affidavit. If that
16 contention is correct, then police had legal
17 authority to search anybody that they
18 encountered inside the house when they came
19 to execute the warrant.

20 To be sure, a warrant must be read in a
21 common sense, non-technical fashion ... But
22 it may not be read in a way that violates its
23 fundamental purposes. As the text of the
24 Fourth Amendment itself denotes, a particular
25 description is the touchstone of a warrant
26 ... The requirement of a particular
description *in writing* accomplishes three
things. First, it memorializes precisely
what search or seizure the issuing magistrate
intended to permit. Second, it confines the
discretion of the officers who are executing
the warrant ... Third, it 'inform[s] the
subject of the search what can be seized.'
... For these reasons, although a warrant
should be interpreted practically, it must be
sufficiently definite and clear so that the
magistrate, police, and search subjects can
objectively ascertain its scope.

21 As the officers correctly observe, it is
22 perfectly appropriate to construe a warrant
23 in light of an accompanying affidavit or
24 other document that is incorporated within
25 the warrant. But to take advantage of this
26 principle of interpretation, the warrant must
expressly incorporate the affidavit.

25 In this case, there is no language in the
26 warrant that suggests that the premises or
people to be searched include Jane Doe, Mary

1 Doe, 'all occupants', or anybody else, save
2 John Doe himself. Other portions of the face
3 sheet which describe the date of the
4 violation and the supporting probable cause
5 do refer to the attached typed affidavit.
6 But this fact is actually unhelpful to the
7 officers, since it demonstrates that where
8 the face sheet was intended to incorporate
9 the affidavit, it said so explicitly. As a
10 matter of common sense, as well as logic, the
11 absence of a reference to the affidavit must
12 therefore be viewed as negating any
13 incorporation of the affidavit.

14 *Id.* at 238-240.

15 The Third Circuit acknowledged that there two categories of
16 decisions in which an affidavit has been used to cure a defective
17 search warrant even when it has not been incorporated within that
18 search warrant. Of relevance is the first category of cases:

19 The first embraces those circumstances in
20 which the warrant contains an ambiguity or
21 clerical error that can be resolved with
22 reference to the affidavit. In these
23 situations, it is clear that the requesting
24 officers and the magistrate agreed on the
25 place to be searched or item to be seized,
26 but there is an obvious ministerial error in
27 misidentifying the place or item. See, e.g.,
28 *United States v. Ortega-Jimenez*, 232 F.3d
29 1325, 1329 (10th Cir.2000) (ambiguous term);
30 *United States v. Simpson*, 152 F.3d 1241, 1248
31 (10th Cir.1998) (internal inconsistency in
32 warrant). Reliance on the affidavit in these
33 circumstances neither broadens nor shrinks
34 the scope of the warrant, but merely
35 rectifies a '[m]inor irregularit[y].' *United*
36 *States v. Johnson*, 690 F.2d at 65 n.3
37 (quoting *Ventresca*, 380 U.S. at 108 ...).

38 The omission of Jane Doe, Mary Doe, or 'all
39 occupants' from the warrant in this case
40 cannot be viewed as the sort of ambiguity or
41 misidentification error that can be clarified
42 by inspecting the affidavit. This warrant
43 has no ambiguous or contradictory terms on
44 its face. Rather, the language of the

1 warrant is inconsistent with the language of
2 the affidavit, because the former does not
3 grant what the latter sought - permission to
4 search 'all occupants' of the house. This is
5 not a discrepancy as to form; it is a
6 difference as to scope. A state magistrate
7 reviewing a search warrant affidavit might
8 well draw the line at including unnamed 'all
9 occupants' in the affidavit because
10 Pennsylvania law disfavors 'all occupant'
11 warrants ... Thus, the circumstance of this
12 warrant is a far cry from those in the
13 category of warrants which can be 'clarified'
14 by a separate affidavit.

15 The United States argues that the failure to include
16 computers on Attachment A was an inadvertent clerical error as
17 established by the testimony of Judge Kirihara.

18 In *People v. Sternberg*, 41 Cal.App.3d 281, 291-292 (1974),
19 the California Court of Appeal rejected a challenge to the
20 legality of a search based upon the failure of the magistrate to
21 sign the search warrant:

22 It is ... concluded that under the peculiar
23 circumstances of this case any insufficiency
24 on the face of the warrant, because the
25 magistrate inadvertently failed to sign it,
26 was cured by his affixing his signature at
the earliest opportunity after such omission
was discovered and prior to any challenge to
the warrant. If there is any danger that the
police will thereby be encouraged to use
blank warrants to conduct searches and
seizures in the hopes that they can be
subsequently signed, if challenged, such
cases may be dealt with as they arise ... The
fact remains that here there was clear and
convincing evidence that the magistrate had
determined that there was probable cause and
had authorized the search and seizure. No
one's position was changed in reliance on the
omission of the signature and the defect was
promptly cured.

27 Defendant argues that California case authority supports

1 granting the motion to suppress, even though the cases cited are
2 not directly on point.

3 Defendant cites *Call v. Superior Court*, 266 Cal.App.2d 163
4 (1968). In *Call* the Court of Appeal held that the trial court
5 erred in denying a motion to suppress evidence seized during a
6 night search of defendant's residence pursuant to a search
7 warrant. The affidavit requested that the warrant authorize a
8 night search but the magistrate neglected to indicate in the
9 warrant any decision he may have made in that regard. The
10 magistrate issued a form warrant containing alternative language
11 authorizing either a day or unlimited search and did not mark out
12 one of the options. The Court of Appeals rejected the Attorney
13 General's argument that the affidavit specifically requested a
14 night search be authorized and the magistrate issued the warrant
15 during the nighttime:

16 These circumstances, it is contended, show
17 that the magistrate must have intended to
18 authorize a night search. We do not agree.
19 If the inclusion of the request for a night
20 search in the affidavit were to be given the
21 effect contended for, the householder's
22 entitlement to an exercise of discretion on
23 the part of the magistrate could be avoided
24 by including such a request in the printed
25 form of affidavit. The fact that the
26 magistrate issued the warrant after regular
office hours likewise does not show that
discretion was exercised. It might just as
well be the case that the officer went to the
magistrate after hours because he knew that
the magistrate was going out of town the next
day. The statute requires that the
magistrate must 'insert a direction' in the
warrant in order to authorize a night search.
(Pen. Code, § 1533.) When a warrant form
covering both options is used, the failure of

1 the magistrate to mark the form appropriately
2 cannot be held to be equivalent to such
3 insertion.

3 Defendant argues that the circumstances in *Call* are similar to
4 those at issue here:

5 The Fourth Amendment requires that the scope
6 of search pursuant to a warrant not exceed
7 that authorized by a neutral, detached
8 magistrate. Allowing a search for items ...
9 requested by a police officer in a probable
10 cause statement, but not authorized by a
11 magistrate, would trample that right.

12 Defendant further cites *People v. Lowery*, 145 Cal.App.3d 902
13 (1983) and *People v. Grossman*, 19 Cal.App.3d 8 (1971).

14 In *Lowery*, the defendant argued that seizure of unmarked
15 integrated circuits exceeded the scope of the warrant because the
16 warrant described marked Intel and Synertek circuits only. 145
17 Cal.App.3d at 908. The Court of Appeals rejected the contention:

18 It is well established that items not
19 particularly described in a search warrant
20 may be seized if there is a 'nexus' between
21 them and the suspected criminal behavior, so
22 that the scope of the search is
23 'circumscribed by the reasons which justified
24 its inception.'

25 In the instant case, the supporting
26 affidavits indicated that some integrated
circuits among those in appellant's
possession when he was arrested were
unmarked, and items named in the warrant
included a marking machine and plates. There
is a perfectly clear connection between the
unmarked ICs and the materials specifically
authorized to be seized.

27 *Id.*

28 In *Grossman*, the search warrant authorized a search of
29 "Apartment A" at a properly described address. At issue was

1 whether that description included the carport cabinet marked "A".

2 In upholding the search, the Court of Appeals held:

3 We reach the same general result applying
4 general principles of interpretation of the
5 description of the premises to be searched
6 contained in a warrant. At most, the
7 description here employed is ambiguous in the
8 sense that there may be a doubt whether the
9 description of 'Apartment A' includes the
10 carport cabinet marked 'A.' That ambiguity
11 is to be resolved by reference to the
12 affidavit supporting the warrant. The
13 affidavit in turn makes clear the fact that
14 the description is intended to include the
15 carport. So interpreted, the description in
16 the warrant is not overly broad. Since it
17 limits the area of search to apartment A and
18 the appurtenance to the apartment in the form
19 of the carport cabinet expressly identified
20 with it, there is no danger of intrusion upon
21 the rights of persons other than respondent
22 occupying the multiple unit dwelling.

13 19 Cal.App.3d at 12-13.

14 Both parties cite *People v. Moore*, 31 Cal.App.3d 919 (1973).

15 In *Moore*, a search warrant was issued for defendant's
16 premises. The affidavit in support of the search warrant averred
17 that defendant had violated Health & Safety Code §§ 11910 and
18 11912 by possessing and selling restricted dangerous drugs, that
19 the affiant police officer had received information from a
20 reliable confidential informant to the effect that he saw
21 defendant on July 2, 197 counting and packaging approximately
22 6,000 Seconal capsules, that another police officer had advised
23 that a juvenile had told the officer that defendant was a pusher
24 of dangerous drugs and that numerous high school students had
25 told the officer that defendant dealt in dangerous drugs, and
26

1 that the vice principal of the high school had told the affiant
2 officer that defendant had been expelled after he came to school
3 high on drugs. The affidavit set forth facts sufficient to
4 justify issuance of the warrant. However, the magistrate used a
5 form warrant printed for use in narcotics cases. The form
6 contained blank spaces for filling in the names of the affiant and
7 the accused, the dates of presentation of the affidavit and
8 issuance of the warrant, a description of the premises to be
9 searched, the name and signature of the issuing magistrate, and
10 the code sections alleged to have been violated. The printed
11 portions of the warrant referred only to narcotics and
12 paraphernalia used in connection with narcotics. The blanks were
13 all properly filled in with information conforming to that
14 contained in the affidavit. Consequently, there was an ambiguity
15 on the face of the warrant because the filled-in portion referred
16 to code sections dealing with restricted dangerous drugs while
17 the printed portion referred to narcotics. 31 Cal.App.3d at 922.
18 In upholding the search, the Court of Appeals ruled in pertinent
19 part:

20 [T]he sufficiency of the affidavit to support
21 a warrant for the seizure of dangerous drugs
22 is not disputed. The affiant police officer
23 laid before the magistrate facts which that
24 judicial officer considered, in the exercise
25 of his independent judgment, sufficient to
26 allow the defendant's privacy to be invaded
in the public interest. The form warrant
referred in its printed portions to narcotics
but the filled-in portions related to a
violation of the dangerous drug laws. We
think it significant that the search and
seizure was conducted by the same police

1 officer who had sworn the affidavit. A
2 warrant must be sufficient to allow the
3 officer to ascertain what is authorized. In
4 this instance, the searching officer
5 obviously knew what it was he was looking
6 for. No general 'fishing expedition' is
7 alleged. The affidavit stated that dangerous
8 drugs were on the premises, the warrant was
9 issued with the intent that dangerous drugs
10 be seized, and it was dangerous drugs that
11 were searched for and seized. If the warrant
12 had been delivered to an officer unfamiliar
13 with the facts as stated in the affidavit and
14 he had not noticed the ambiguity, but had
15 instead conducted a search for narcotics and
16 during that search found dangerous drugs, we
17 would have a different fact situation
18 requiring different considerations. But that
19 case is not before the court. All that must
20 be decided is whether a warrant is void
21 because of an ambiguity on its face when that
22 ambiguity cannot mislead the persons involved
23 and has resulted from clerical error in using
24 the wrong form.

25 ...

26 [I]t seems settled that the mere fact that
there is on the face of a warrant some error,
omission or ambiguity, is not sufficient to
defeat the validity of the warrant. The
cases seem generally agreed that reference
may be made to the underlying affidavit when
the warrant carries some defect upon its
face.

...

It is obvious that the error which occurred
in the preparation of the search warrant here
involved was purely clerical in nature.
Clearly, the issuing magistrate intended to
direct a search for dangerous drugs and only
by reason of clerical error did he fail to
insert such direction on the face of the
warrant. While we do not condone
carelessness on the part of the magistrate in
failing to note such error, we conclude that
the defect did not in any way substantially
prejudice the rights of the defendant.

1 *Id.* at 925-927.

2 Defendant argues that, in contrast to the cases cited above,
3 there was no objective ambiguity on the face of the July 30, 2004
4 search warrant: "The affiant expressly requested permission to
5 search for the items listed in attachment A; the magistrate
6 expressly authorized a search for the items listed in attachment
7 A; and the warrant expressly limited the search to the items
8 listed in attachment A." While Officer Horn may have
9 inadvertently failed to include computers in attachment A,
10 Defendant argues, his inadvertence did not create an ambiguity:

11 Rather, the warrant is crystal clear. It
12 authorizes a search for the items listed in
13 attachment A. It does not authorize a search
for any other items listed in the statement
of probable cause.

14 The United States argues that, as in *People v. Moore*, the
15 July 30, 2004 search warrant was not defective due to the "mere
16 omission" of one item set forth in the statement of probable
17 cause from the list of items to be seized set forth in Attachment
18 A. The United States argues:

19 Judge Kiriwara confirmed that he intended to
20 authorize the search and seizure of computers
pursuant to probable cause shown in Officer
21 Horn's affidavit. He also testified that the
omission of the word 'computers' was a simple
22 mistake. Moreover, Judge Kiriwara confirmed
that, in the state system, the search warrant
23 face sheet and the affidavit are considered
one document and filed as one, thus
24 permitting this court to consider the
contents of the affidavit in determining
25 whether the warrant sufficiently guided the
officers in the search of defendant's
26 residence. Finally, the fact that Officer
Horn was in charge of executing the search

1 warrant prevented the seizure of unauthorized
2 items as it was Officer Horn himself who
3 wrote the affidavit in support of the warrant
and was presumed to know exactly what he was
seeking.

4 **CONCLUSION**

5 Defendant's motion to suppress evidence seized pursuant to
6 the July 30, 2004 search warrant on the ground of facial
7 invalidity is DENIED. The record establishes that the failure to
8 include computers in Attachment A was the result of mistake and
9 oversight. Judge Kirihara intended that the items to be seized
10 pursuant to the July 30, 2004 search warrant include computers
11 based on the statement of probable cause submitted by Officer
12 Horn. Officer Horn both submitted the statement of probable
13 cause with Attachment A to Judge Kirihara for his review and
14 consideration in issuing the search warrant, and Officer Horn
15 executed the search warrant. Under these circumstances and with
16 this record, the particularity requirement of the Fourth
17 Amendment was satisfied even though the statement of probable
18 cause was not incorporated by suitable words of reference into
19 the description of items to be seized.²

20 IT IS SO ORDERED.

21 **Dated: May 4, 2007**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

22
23
24
25 ²This conclusion makes it unnecessary to address whether the
26 "good faith exception" to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897 (1984), applies.