

~~SEALED~~

SATZ 6/17/10

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA)

4:08CR00028 CVE ✓

JUN 3 2010 ✓

v.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HUGO ALBERTO GUTIERREZ)

UNDER SEAL

LIMITED ENTRY OF APPEARANCE AND DISCLOSURE
AND MOTION FOR PROTECTIVE ORDER

Comes now the United States of America, by and through Special Attorney Jane W. Duke, and for its Limited Entry of Appearance and Disclosure and Motion for Protective Order, states:

1. Undersigned counsel is not an attorney of record in this proceeding. However, in the course of a grand jury investigation with which this Court is familiar, counsel has become aware of certain information relating to this case. Undersigned counsel now makes a limited entry of appearance in this matter for the purpose of disclosing such information to the Court, the United States Attorney for the Northern District of Oklahoma, and counsel for the defendant.

2. In early 2009, the Special Attorney was appointed to oversee an investigation in the Northern District of Oklahoma concerning possible law enforcement corruption. As a part of that investigation, the Special Attorney discovered credible evidence that Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Special Agent Brandon Jay McFadden and Tulsa Police Department (TPD) Officer Jeff Henderson committed perjury in April 2008 when they testified before a jury in the case of *United States v. Larry Barnes and Larita Barnes*, Case No. 07-CR-135-CVE. After obtaining this information, the United States petitioned the Tenth Circuit Court of Appeals to dismiss the Barneses' then-pending appeals and remand the matter to

the District Court so that appropriate action could be taken. In July 2009, this Court entered an order dismissing the case against the Barneses and directing their immediate release from custody.

3. As part of the continuing corruption investigation, the United States recently discovered credible evidence that TPD Officer Henderson also committed perjury in a pretrial hearing in the case of *United States v. Bobby Wayne Haley, Sr.*, Case No. 04-CR-127-TCK. Haley was convicted in September 2005 after a jury trial and sentenced to 264 months imprisonment. At the request of the United States, on May 21, 2010, United States District Judge Kern entered an order vacating the conviction of Bobby Wayne Haley and directing his immediate release from federal prison.

4. As a further part of the continuing corruption investigation, the United States recently secured the cooperation of TPD Officer John K. (“J.J.”) Gray through a plea agreement. Pursuant to the plea agreement, Gray was extensively de-briefed on May 11, 2010. During that interview session, Gray admitted to falsifying information in two separate search warrant affidavits he prepared in December 2007. One of those affidavits was submitted in support of a search for the defendant’s residence in the instant case.¹

5. Attached as Exhibit 1 is a copy of the search warrant affidavit prepared by Gray in this matter. The probable cause section of the affidavit reflects that within 72 hours prior to December 28, 2007² one of Gray’s Confidential Informants (“CIs”) entered the residence of 1217

¹The other was prosecuted by the Tulsa County District Attorney’s Office. Appropriate disclosure of this matter will be made to the Tulsa County District Attorney by the undersigned Special Attorney.

²The affidavit actually purports to be executed on December 28, 2008; however, this is a scrivener’s error because all accompanying documentation demonstrates that the warrant was executed on January 4, 2008. Hence, the affidavit was obviously signed by Gray on December 28, 2007.

North Rockford Avenue, Tulsa, Oklahoma to make a controlled drug purchase. It goes on to state that under law enforcement surveillance, the CI was able to make a controlled buy of a quantity of marijuana from an unknown Hispanic male inside the residence. Based on this information, a state court warrant was obtained for the premises of 1217 North Rockford Avenue. The affidavit and warrant both list the defendant as "John Doe."

6. Pursuant to this warrant, TPD Officer Gray and others searched the residence of 1217 North Rockford Avenue on January 4, 2008. During that search, officers reported recovering 143 pounds of marijuana, 8 ounces of methamphetamine, and in excess of \$80,000 in currency. Ultimately, defendant Hugo Gutierrez was federally charged with possession of methamphetamine with intent to distribute and possession of marijuana with intent to distribute. Through his counsel, Gutierrez filed a motion to suppress the fruits of the January 4, 2008 search. That motion was denied by this Court's order of April 1, 2008.

7. Once the suppression motion was denied, defendant entered a guilty plea to one count of possession of methamphetamine with intent to distribute. That plea was entered on April 14, 2008. In his change of plea proceeding, defendant admitted that he, in fact, possessed the drugs that were found inside 1217 North Rockford Avenue on January 4, 2008. Gutierrez subsequently received a sentence of 97 months imprisonment, to be followed by 5 years of supervised release. Gutierrez is currently incarcerated in the Bureau of Prisons on this sentence.

8. During Gray's May 11, 2010 de-briefing, he affirmatively stated that he falsified information in the December 2007 affidavit in order to protect the CI's identity from being obvious to the person or persons distributing drugs from the subject premises. Specifically, Gray stated that, in actuality, the CI had accepted a controlled delivery of marijuana from Gutierrez within 72 hours prior to the execution of the search warrant. The CI and Gutierrez met at a

remote location (not the premises described in the affidavit) and the CI received the marijuana from Gutierrez at that remote location. To Gray's knowledge, the CI had not purchased controlled substances from the premises described in the search warrant affidavit within the 72 hours before its submission to a judge. However, Gray's affidavit fabricated the probable cause in order to gain entry to the premises of 1217 North Rockford Avenue.

9. A review of Gray's affidavit in this case demonstrates that the CI's purported controlled buy from the premises of 1217 North Rockford Avenue was the sole basis of probable cause to search that location.³

10. This Disclosure is being filed under seal because Gray's plea of guilty to a felony has not yet been entered and accepted. The United States anticipates that this will occur during the week of June 14, 2010. Until such time as that plea is entered, Gray's cooperation should be considered sensitive investigative material and kept confidential. If acceptable to the Court, upon entry and acceptance of Gray's plea, this counsel will advise the Court of such fact so that the sealing of this pleading and any ensuing pleadings can be lifted.

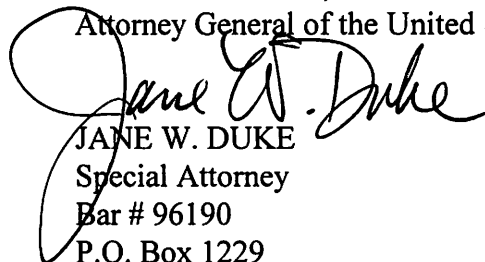
11. It is further requested that the Court enter a protective order similar to that entered in the case of *United States v. Larry and Larita Barnes*, which prohibited defense counsel from disclosing the matters contained in the United States' pleading until further order of the Court.

³In addition to disclosing the fact that he falsified information in the affidavit, Gray also admitted that during the execution of the search warrant he and other TPD officers stole money from the defendant. Gray estimates that approximately \$10,000 was stolen and divided among the participating officers, which included Gray, Harold Wells, Callison Kaiser, and Eric Hill. Since learning this information from Gray, the United States has been able to corroborate the theft through different means. For example, on May 21, 2010, the United States took a proffer from Callison Kaiser. During that proffer, Kaiser confirmed the theft and sharing in the money. Additionally, Gray advised that just days before Gray was scheduled to meet with the United States for his de-briefing, Wells expressed great concern that the United States would learn of the Gutierrez theft through Gray's cooperation. Wells encouraged Gray not to disclose this theft by stating that "just us officers know about that."

WHEREFORE, the United States of America makes this Limited Entry of Appearance and Disclosure under seal and requests that this pleading and any ensuing pleadings related thereto be filed under seal until such time as undersigned counsel advises the Court that sealing is no longer necessary. It is further requested that the Court enter a protective order similar to that entered in the case of *United States v. Larry and Larita Barnes*, which prohibited defense counsel from disclosing the matters contained in the United States' pleading until further order of the Court.

Respectfully submitted,

ERIC H. HOLDER, JR.
Attorney General of the United States



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2010, a copy of the foregoing was mailed to the defendant's last attorney of record and to the other persons specified below:

Michael G. McGuire
Attorney at Law
717 South Houston Ave., Suite 400
Tulsa, OK 74127-9007

T. Scott Woodward
United States Attorney
Northern District of Oklahoma
110 West 7th Street
Tulsa, OK 74119


JANE W. DUKE

SEARCH WARRANT - Uniform Controlled Dangerous Substance Act

STATE OF OKLAHOMA,) ss. IN THE DISTRICT COURT
COUNTY OF TULSA)

THE STATE OF OKLAHOMA,
vs. Plaintiff,

No. _____

JOHN DOE

Defendant,

SEARCH WARRANT

IN THE NAME OF THE STATE OF OKLAHOMA:

To my Sheriff, Policeman, or Law Enforcement Officer in the County of TULSA, Oklahoma: Probable cause having been shown on this date before me by Officer J.K. GRAY for believing the following described property: certain controlled dangerous substances listed in the Schedules of the Controlled Dangerous Substances Act of the State of Oklahoma, to wit:

MARIJUANA, FRUITS, INSTRUMENTALITIES, MONIES, RECORDS AND PROOF OF RESIDENCY

is located at, and is now being kept, possessed, and concealed by the above named defendant, or by other persons in whose possession he has placed it for the purpose of concealment, at or upon or within a certain vehicle and/or house, building or premises, the outlage thereof and the appurtenances thereunto belonging, in TULSA County, Oklahoma, described as follows:

A SINGLE STORY, SINGLE FAMILY RESIDENCE, LOCATED IN THE 1200 BLOCK OF NORTH ROCKFORD AVENUE. THE RESIDENCE IS THE SECOND RESIDENCE NORTH OF EAST MARSHALL STREET, ON THE EAST SIDE OF NORTH ROCKFORD AVENUE. THE RESIDENCE IS CONSTRUCTED OF WHITE SIDING, MAROON WOOD TRIM, AND A GREY COMPOSITION ROOF. THE FRONT DOOR OF THE RESIDENCE IS WHITE IN COLOR, COVERED BY A STORM DOOR, AND FACES WEST. THE NUMBERS "1217" APPEAR IN BLACK, RUNNING VERTICAL ON THE FRONT PORCH POST TO THE SOUTH OF THE FRONT DOOR. THIS RESIDENCE IS MORE COMMONLY KNOWN AS 1217 NORTH ROCKFORD AVENUE, CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA.

The affidavits being positive that the above described property is on the person, or in the place to be searched and there being a likelihood that said property above described will be destroyed, moved, or concealed.

YOU ARE THEREFORE COMMANDED at any time of the day to make search of said person, vehicle and/or house, building and premises, the outlage thereof and the appurtenances thereunto belonging for the described property, and if found to seize the same and safely keep it, and bring it before me at the TULSA County Courthouse in accordance with the subsequent order of the court, and make return hereof within Ten days.

WHEREFORE WITNESS MY HAND this 21 day of Dec. 2007

[Signature]

JUDGE of the DISTRICT COURT of TULSA COUNTY, STATE OF OKLAHOMA

Time Signed 14:51



AFFIDAVIT FOR SEARCH WARRANT -- Uniform Controlled Dangerous Substances Act ORIGINAL

STATE OF OKLAHOMA,) ss. IN THE DISTRICT COURT
COUNTY OF TULSA,)

THE STATE OF OKLAHOMA, Plaintiff,
VS. No. _____

JOHN DOE
Defendant,

AFFIDAVIT FOR SEARCH WARRANT

The undersigned affiant, being duly sworn, upon oath says: that in TULSA County, Oklahoma, at and upon or within a certain vehicle, house, building, or premises, the curtilage thereof and the appurtenances thereto belonging, described as follows:

A SINGLE STORY, SINGLE FAMILY RESIDENCE, LOCATED IN THE 1200 BLOCK OF NORTH ROCKFORD AVENUE THE RESIDENCE IS THE SECOND RESIDENCE NORTH OF EAST MARSHALL STREET, ON THE EAST SIDE OF NORTH ROCKFORD AVENUE. THE RESIDENCE IS CONSTRUCTED OF WHITE SIDING, MAROON WOOD TRIM, AND A GREY COMPOSITION ROOF. THE FRONT DOOR OF THE RESIDENCE IS WHITE IN COLOR, COVERED BY A STORM DOOR, AND FACES WEST. THE NUMBERS "1217" APPEAR IN BLACK WITH RUNNING VERTICAL ON THE FRONT PORCH POST TO THE SOUTH OF THE FRONT DOOR. THIS RESIDENCE IS MORE COMMONLY KNOWN AS 1217 NORTH ROCKFORD AVENUE, CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA.

The named defendant, or other persons in whose possession he has placed the following described property for concealment, does now unlawfully, illegally, knowingly and willfully keep, and does unlawfully have in his possession and under his control certain dangerous substances, to wit:

MARIJUANA, FRUITS, INSTRUMENTALITIES, MONIES, RECORDS AND PROOF OF RESIDENCY,

listed in the schedules of the Uniform Controlled Dangerous Substances Act of the State of Oklahoma, with the unlawful intent to possess, use and distribute said substances in violation of the laws of the State of Oklahoma.

Affiant further states that said dangerous substances be reason of their physical structure are easily destroyed and that there is likelihood that the person in possession of the same will attempt to destroy them, and that there is further likelihood that the aforesaid, controlled, dangerous substance, equipment, and paraphernalia will be moved unless a search warrant may be executed in the day or night.

YOUR AFFIANT FURTHER STATES:
THAT WITHIN THE PAST 72 HOURS, HE WAS CONTACTED BY A CONFIDENTIAL INFORMANT (HEREAFTER REFERRED TO AS CI) THAT STATED A HISPANIC MALE NAME UNKNOWN WAS SELLING LARGE QUANTITIES OF MARIJUANA. FURTHER THAT HE WAS SELLING THE MARIJUANA FROM HIS RESIDENCE.

YOUR AFFIANT FURTHER STATES THAT THE "CI" DIRECTED HIM TO THE RESIDENCE AND POINTED IT OUT TO YOUR AFFIANT AS BEING THE RESIDENCE FROM WHICH THE MARIJUANA WAS BEING SOLD. THAT RESIDENCE WAS 1217 NORTH ROCKFORD AVENUE.

YOUR AFFIANT FURTHER STATES THAT THE CI HAS A WORKING STREET KNOWLEDGE OF MARIJUANA AND SEVERAL OTHER CONTROLLED AND DANGEROUS SUBSTANCES, ITS APPEARANCE, USES, MANUFACTURE, AND DISTRIBUTION.

YOUR AFFIANT FURTHER STATES THAT AT THIS TIME, A SEARCH OF THE CI'S PERSON AND VEHICLE WAS CONDUCTED, AND NO DANGEROUS DRUGS OR MONIES WERE FOUND. YOUR AFFIANT THEN HANDED THE CI A QUANTITY OF U.S. CURRENCY WITH WHICH TO PURCHASE THE MARIJUANA. YOUR AFFIANT THEN FOLLOWED THE CI TO THE RESIDENCE, THE CI EXITED THE CI'S VEHICLE, WALKED TO THE RESIDENCE TO BE SEARCHED, KNOCKED ON THE DOOR, AND WAS GRANTED ENTRY. YOUR AFFIANT FURTHER STATES THAT OFFICERS MAINTAINED A CONSTANT SURVEILLANCE ON THE RESIDENCE TO BE SEARCHED, WHILE THE CI WAS INSIDE THE RESIDENCE AND AT NO TIME WHILE THE CI WAS INSIDE THE RESIDENCE DID ANYONE ENTER OR EXIT THE RESIDENCE.

YOUR AFFIANT FURTHER STATES THAT HE WATCHED THE CI EXIT THE RESIDENCE AND WALK BACK TO THE CI'S VEHICLE, AND DRIVE TO A PREDETERMINED LOCATION. AT THIS TIME YOUR AFFIANT CONDUCTED A SECOND SEARCH OF THE CI'S PERSON AND VEHICLE WAS CONDUCTED, AND A QUANTITY OF MARIJUANA WAS RECOVERED FROM THE CI'S PERSON AND THE MONIES THAT THE AFFIANT HAD GIVEN THE CI TO PURCHASE THE MARIJUANA WERE GONE.

YOUR AFFIANT FURTHER STATES THAT THE CI STATED THAT WHILE THEY WERE INSIDE THE RESIDENCE, THE CI GAVE THE HISPANIC MALE THE QUANTITY OF U.S. CURRENCY, AND THAT THE HISPANIC MALE GAVE THE CI A QUANTITY OF MARIJUANA. THE CI STATED THEY HAD SEEN MORE MARIJUANA INSIDE THE RESIDENCE PACKAGED FOR SALE.

YOUR AFFIANT FURTHER STATES THAT HE HAS RECEIVED INFORMATION FROM TWO OTHER INFORMANTS THAT THIS HISPANIC MALE IS SELLING LARGE QUANTITIES OF MARIJUANA.

YOUR AFFIANT FURTHER STATES THAT HE HAS BEEN A POLICE OFFICER FOR THE CITY OF TULSA FOR SEVENTEEN YEARS, AND HAS RECEIVED TRAINING THROUGH THE TULSA POLICE ACADEMY AND FROM SENIOR OFFICERS IN THE IDENTIFICATION OF CONTROLLED SUBSTANCES AND RECEIVED INSTRUCTION ON OTHER NARCOTIC RELATED ISSUES. FURTHER THAT HE HAS ATTENDED A DEA DRUG INTERDICTION, ASSOCIATION OF OKLAHOMA NARCOTIC ENFORCER SEMINARS, AND OBND NARCOTICS INVESTIGATORS SCHOOL.

FURTHER YOUR AFFIANT SAYETH NOT.

WHEREFORE, Affiant asks that a search warrant issue according to law, directed to any sheriff, policeman or law enforcement officer in TULSA County, Oklahoma, commanding that he search said persons, premises and/or vehicle, and take possession of all the controlled dangerous substances, equipment and paraphernalia hereinbefore described, and vehicle in which said dangerous substance is unlawfully kept, deposited or concealed.

Affiant *[Signature]*

Subscribed and sworn to before me this 24 day of Dec., 2008

[Signature]
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
) 4:08CR00028 CVE
 v.)
)
 HUGO ALBERTO GUTIERREZ)
)

SUPPLEMENTAL DISCLOSURE

Comes now the United States of America, by and through Special Attorney Jane W. Duke, and for its Supplemental Disclosure, states:

1. On or about June 3, 2010, undersigned counsel filed a Limited Entry of Appearance, Disclosure, and Motion for Protective Order under seal in this matter. Since that filing, the seal has been lifted by Court order.

2. The Special Attorney now supplements the original disclosure, specifically Footnote 3, as follows:

In addition to disclosing the fact that he falsified information in the affidavit, Gray also admitted that during the execution of the search warrant he and other TPD officers stole money from the defendant. Gray estimates that approximately \$10,000 was stolen and divided among the participating officers, which included Gray, Harold Wells, Callison Kaiser, and Eric Hill. Since learning this information from Gray, the United States has been able to corroborate the theft through different means. For example, on May 21, 2010, the United States took a proffer from Callison Kaiser. During that proffer, Kaiser confirmed the theft and sharing in the money. Further, on June 7, 2010, the United States took a proffer from Eric Hill. During that proffer, Hill also confirmed the theft and sharing in the Gutierrez money. Finally, during Gray's proffer, he advised that just days before Gray was scheduled to meet with the United States for his de-briefing, Wells expressed great concern that the United States would learn of the Gutierrez theft through Gray's cooperation. Wells encouraged Gray not to disclose this theft by stating that "just us officers know about that." Kaiser and Hill also had similar encounters with Wells in the recent past. Specifically, Wells stated to Kaiser, "You can't say anything about that money I gave you," referring to the Gutierrez money. Wells told Hill, again in relation to the Gutierrez search, that Wells recalled giving money to either Hill or Kaiser. However, Wells assured Hill that because Wells could not recall to which one he had given the money, Hill should not worry. Wells would simply tell the United States that he could

