

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal No. 99-1417 JC/DS

WEN HO LEE,

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES**

The defendant, Dr. Wen Ho Lee, through his undersigned attorneys, submits this memorandum of law in support of his contemporaneously filed motion to suppress evidence.

**SUMMARY OF ARGUMENT**

Agents searched Dr. Lee's home on April 10, 1999, pursuant to an illegal general warrant. Under binding Tenth Circuit precedent, a warrant is an illegal general warrant unless it describes with particularity the items to be seized and sets forth that these particular items are either the evidence of or fruits of some specified illegal conduct. The search warrant here blatantly violated this well-established prohibition against general warrants.

Instead of describing with particularity all the items to be seized, the search warrant here does not describe with particularity *any of the items to be seized*. The search warrant first copied incorrect boilerplate language that referred to an unattached secret affidavit. The warrant then described the items to be seized as follows:

“include but are not limited to records, documents and materials including those used to facilitate communications, electronic data and computer equipment and peripherals . . .”

The warrant contained no limitation on the “records, documents and materials” the government could seize from Dr. Lee’s home. The Tenth Circuit has repeatedly held unconstitutional warrants that state with far greater specificity the items to be seized. See, e.g. United States v. Leary, 846 F.2d 592, 600-01 (10th Cir. 1988) (finding unconstitutional a warrant authorizing agents to seize documents typical of those kept in an export business that relate to “the purchase, sale and illegal exportation of materials in violation of the’ federal export laws”); Voss v. Bergsgaard, 774 F.2d 402, 404-05 (10th Cir. 1985) (finding unconstitutional a warrant authorizing agents to seize documents and records described as “evidence of violations of Title 18, United States Code, Section 371”). This first constitutional defect is compounded by the warrant’s failure to limit these generic “records, documents and materials” to potential evidence of some criminal violation. *Taken together, these facial deficiencies create an unconstitutional general warrant.*

The warrant also failed to specify that the place the government sought to search was Dr. Lee’s home. Instead, the government merely checked a box indicating it sought to search at an address in White Rock, New Mexico. Over seven years ago the Tenth Circuit strongly criticized this practice by law enforcement in New Mexico and set forth the requirement that the warrant state particularly that it authorizes the search of someone’s home. United States v. Dahlman, 13 F.3d 1391, 1396 (10th Cir. 1993) (finding location described as two numbered subdivision lots not sufficiently particular to search a residence).

The government cannot “cure” the overbreadth of this unconstitutional general warrant by relying on the affidavit used to obtain the warrant. Setting aside the incorrect language that confuses the search warrant with the “Affidavit” used to obtain the warrant, even a correct reference would be irrelevant. The Tenth Circuit mandates that an affidavit can be used to cure an otherwise unconstitutional general warrant *only* if the affidavit is both incorporated in and attached to the overbroad search warrant. See Dahlman, 13 F.3d at 1391. Neither was done here.<sup>2</sup>

### FACTUAL BACKGROUND

On April 10, 1999, federal agents entered the home of Dr. Wen Ho Lee and his wife Sylvia Lee, pursuant to a search warrant, and conducted an extensive search of Dr. Lee’s personal residence, his garage, his garden, his front yard, and his back yard. A true and correct copy of the search warrant is attached as Exhibit A to the motion filed with this memorandum. The items seized included, among other things: Selected Short Stories of Guy du Maupassant, Dr. Lee’s daughter Alberta’s address book, the telephone numbers for members of a Christian church group, the membership list of a Los Alamos Chinese-American society, Dr. Lee’s children’s old school notebooks and diaries, the plays of Tennessee Williams, the telephone book for Los Alamos and Santa Fe, Dr. Lee’s children’s photo albums, Dr. Lee’s personal correspondence, and materials related to Dr. Lee’s work. Further, the agents took numerous documents that were well over twenty years old, including Dr. Lee’s Ph.D thesis which plainly indicated it was published in 1966, letters between Dr. Lee and his professors in 1971 and 1972, letters Dr. Lee wrote to other scientists in 1973, and hundreds of pages of computer printouts from 1977.

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<sup>2</sup> If the court concludes that the search of Dr. Lee’s home was unlawful, then Dr. Lee requests an evidentiary hearing to determine the scope of the taint.

The search warrant used to search Dr. Lee's home failed to include any reference to any federal criminal statute the government believed Dr. Lee or someone else had violated. The search warrant also did not include even a general reference to how any item to be seized related to any alleged criminal activity. The search warrant also failed to identify or list particular items to be seized. The entire text of the warrant is as follows:

Items to be seized are described in Attachment B of this Affidavit [sic], and include *but are not limited to* records, documents and materials including those used to facilitate communications, electronic data and computer equipment and peripherals.

(Emphasis added.)

No such "Attachment B" is attached to the warrant. In addition, no affidavit is attached to the warrant, nor could it be, because the government filed the affidavit *under seal*. On its face, the warrant clearly states that the agents were not even "limited to" seizing "records, documents and materials." Basically, the warrant gave unfettered discretion to the executing officers to seize anything.

In addition, the warrant did not state that the government sought to search Dr. Lee's home. Rather, the warrant identified the property to be searched as "LEE, WEN HO, 80 Barcelona Avenue, White Rock, New Mexico." The form warrant included a check on a box indicating the search would be "on the premises known as" 80 Barcelona Avenue, White Rock, New Mexico. The warrant contained no information stating whether the place to be searched was a home, apartment, or office or whether the agents were authorized to search more than one structure. It is not clear whether the warrant authorized the search of land, attachments to buildings, or any particular building.

## ARGUMENT

### I. THE WARRANT'S FACIAL OVERBREADTH VIOLATES THE CONSTITUTIONAL PROHIBITION ON GENERAL WARRANTS

The Fourth Amendment requires that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. CONST. AMEND. IV. A search warrant must be sufficiently particular in its description of the items to be seized to prevent a general exploratory rummaging in a person’s belongings. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The Supreme Court has explained, “The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Stanford v. Texas, 379 U.S. 476, 485 (1965) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)); see also United States v. Carey, 172 F.3d 1268, 1272 (10<sup>th</sup> Cir. 1999) (relying on Stanford to suppress computer files seized pursuant to warrant that described a large group of computer files to be searched).

The Tenth Circuit has strictly applied this constitutional requirement of particularized warrants and has reiterated the Supreme Court’s stringent application of the particularity requirement. The Tenth Circuit has repeatedly invalidated warrants for overbreadth where the language of the warrants authorized the seizure of broad categories of documents that one might expect to find in a home or office, especially where the categories included documents with no connection to the criminal activity providing the probable cause for the search. Davis v. Gracey, 111 F.3d 1472, 1479 (10th Cir. 1997) (internal quotation omitted); see also United States v. Lcary, 846 F.2d 592, 601 (10th Cir. 1988) (“As an irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may or may not be seized.”). In reaffirming this

particularity requirement, the Tenth Circuit has uniformly held that to ensure that “nothing is left to the discretion of the officer executing the warrant” a search must be “confined in scope to particularly described evidence relating to a specific crime for which there is demonstrable probable cause.” Voss, 774 F.2d at 404.

In the instant case, the exact opposite was true. When the federal agents executed their warrant at Dr. Lee’s home, neither he nor Mrs. Lee would have been able to object to any seizure the agents made, because, by its terms, the warrant was not limited to even the impermissibly broad categories of materials listed in its face. The search warrant permitted the officers executing it to seize items that “include, *but are not limited to* records, documents and materials including those used to facilitate communication, electronics, data and computer peripherals.” (Emphasis added.) By its very terms, the warrant was “*not limited*.” Even the records cited as examples of items that could be seized included all “data,” all “electronics,” and all “materials used to facilitate communication.” Thus, the warrant both specifically permitted the seizure of “all data” and made clear that the items seized could fall outside of even this non-existent limitation. Simply put, *nothing* was beyond the discretion of the officers executing the warrant.

General warrants, like the one used to search Dr. Lee’s home, are so repulsive to the ideals of a free society that the founders of this country specifically prohibited them in the Bill of Rights. U.S. CONST. AMEND. IV. The Supreme Court has long recognized that the abhorrence of such warrants was an essential catalyst to American independence, see Boyd v. United States, 116 U.S. 616 (1886), and the long “history of the use of general warrants as instruments of oppression from the time of the Tudors, through the Star Chamber, the Long Parliament, the Restoration, and beyond,” Stanford, 379 U.S. at 482 (1965). As the Tenth Circuit noted just one year ago while summarizing the

particularity requirement of the Fourth Amendment, ““It is axiomatic that the 4<sup>th</sup> Amendment was adopted as a direct response to the evils of the general warrants in England and the writs of assistance in the Colonies.”” Carey, 172 F.3d at 1272 (10<sup>th</sup> Cir. 1999), (quoting O’Rourke v. City of Norman, 875 F.2d 1465, 1472 (10<sup>th</sup> Cir. 1989)), (citations omitted).

The Tenth Circuit has been unwavering in its adherence to the constitutional requirement that a warrant particularly describe the items to be seized to limit the searching officers’ discretion regarding what they may seize. In National Commodity and Barter Ass’n v. Archer, 31 F.3d 1521 (10<sup>th</sup> Cir. 1994), the Tenth Circuit summarized this uniform restriction on general warrants, holding that:

It is beyond peradventure that ... the general rule [is] clearly established that the Constitution require[s] that warrants state with particularity the place to be searched and the persons or things to be seized, ... and that as to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Id. at 1541 (internal quotations and citation omitted).

There can be no doubt that the defective general warrant here violated this prohibition against general warrants and left everything to the discretion of the executing officers. It was impossible for either Dr. Lee or the agents themselves to know what the agents could or could not take because the warrant provided no guidance. The result was the seizure of such puzzling items as the Los Alamos telephone book, a church telephone roster, the membership list of a Chinese-American Society, Dr. Lee’s 1967 thesis, the plays of Tennessee Williams, and photo albums of Dr. Lee’s children. The warrant failed to meet either of its constitutional purposes.

A comparison of the general search warrant here with the warrant in Voss illuminates how clearly the government violated the Fourth Amendment here. In Voss, the Tenth Circuit upheld a district court's ruling that a warrant was unconstitutionally overbroad. Unlike the defective warrant here, the warrant in Voss was supported by an unsealed affidavit that described a massive tax fraud scheme operating out of the premises to be searched. Voss, 774 F.2d at 403-04.

Specifically, the Voss warrant, unlike the warrant here: (1) referred to an alleged federal criminal statute that had been violated; (2) included eleven categories of business records allegedly related to a "tax fraud"; (3) was supported by an unsealed affidavit that explained how the offices being searched were used primarily to conduct such a fraud; and, (4) did not have "including but not limited to language" in the warrant. Id. at 404-06. Despite the IRS agents' attempts to particularize the warrant in Voss, both the district court and the Tenth Circuit held the search warrant to be an unconstitutional general warrant. Id. at 405-06.

A comparison of the instant warrant to the warrant found to be illegal in Leary, 846 F.2d at 603, also illustrates how the instant warrant cannot possibly survive. In Leary, all evidence seized pursuant to a search warrant executed on the defendant's offices was suppressed for overbreadth, even though the warrant specifically limited the items to be seized to those "relat[ed] to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act." Id. at 594. The Tenth Circuit found these limitations did not prevent the warrant from being an illegal general warrant because the limitations provided no restrictions on the agents' discretion to seize these business records. Id. at 600. The instant warrant made no reference to any alleged illegal activities to which the items to be seized from Dr. Lee's home could have been related. No attempt was made to list categories of items to which the search of Dr. Lee's home

would be limited. Moreover, the warrant here stated that the agents were not limited to the seizure of the general categories on the warrant and had discretion to seize other items as well.

**II. UNDER CONTROLLING TENTH CIRCUIT PRECEDENT, THE AFFIDAVIT, WHICH WAS NOT PHYSICALLY ATTACHED, CANNOT CURE THE FACIAL OVERBREADTH**

The government cannot cure the facial overbreadth of the warrant executed at the Lee home by resort to the secret, sealed affidavit because the affidavit was not physically attached to the warrant. Tenth Circuit law is explicit and clear on this issue. Under established precedent, to cure an otherwise defective warrant, an affidavit must both be attached and incorporated by reference. See Dahlman, 13 F.3d at 1395; Leary, 846 F.2d at 603. As the Tenth Circuit stated in Leary:

the particularity of an affidavit may cure an overbroad warrant, but only 'where the affidavit and the search warrant . . . can be reasonably said to constitute one document. Two requirements must be satisfied to reach this result: first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.'"

Id. (quoting 2 W. LAFAVE, SEARCH AND SEIZURE Sec. 4.6(a), at 241 (2d ed. 1987)). This remains the law in this circuit. See United States v. Williamson, 1 F.3d 1134, 1136 n.1 (10<sup>th</sup> Cir. 1993) (refusing to consider the contents of the warrant application or its accompanying affidavit to cure the warrant's lack of particularity in describing the place to be searched because neither was attached to the search warrant at the time of execution); see also United States v. Guidry, 199 F.3d 1150, 1155 n.2 (10<sup>th</sup> Cir. 1999) (particularity of an affidavit can cure an overbroad warrant only when the affidavit is both referenced in the warrant and physically attached to the warrant). Numerous courts

have noted that the rule requiring affidavits to accompany warrants serves two important purposes. First, it limits the officers' discretion and, second, it informs the person whose privacy interest is at stake what items the officers executing the warrant are permitted to seize. United States v. McGrew, 122 F.3d 847, 850 (9<sup>th</sup> Cir. 1997).

In this case, it is clear that the affidavit, which was sealed at the government's request, could not possibly be said to constitute a part of one document. It did not accompany the warrant executed at the Lee home, and, therefore, placed no limitations on the officers' discretion. Because it was sealed, it was incapable of informing Dr. or Mrs. Lee of the scope of the search, or which of their goods or belongings the government was permitted to seize.

### III. **THE VIOLATION IS COMPOUNDED BECAUSE THE LEE HOME WAS SEARCHED**

The constitutional violation here is compounded because the place searched was Dr. Lee's home. In Dahlman, 13 F.3d at 1396, the Tenth Circuit stressed that the "traditional sanctity given to a residence [requires] law enforcement officers to be more particular in their description when they wish to search a known residence." In finding the search in Dahlman violated the Fourth Amendment because the record did not indicate that the affidavit was physically attached to the warrant or incorporated into the warrant by words, the Tenth Circuit added:

In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home zone that finds its roots in clear and specific constitutional terms: The right of the people to be secure in their ... houses ... shall not be violated.

Id. at 1396 (citations omitted). The Tenth Circuit applied the Fourth Amendment's particularity requirements to reject the warrants used to search offices in both Leary and

Voss. Not only is the warrant here far more defective than those two, Dr. Lee's constitutional interests are heightened in this general search of his home.

**IV. TENTH CIRCUIT LAW ON THIS ISSUE WAS WELL-SETTLED WHEN THE WARRANT WAS EXECUTED, SO THE *LEON* GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT APPLY**

Searches pursuant to general warrants are expressly excluded from the scope of the good faith exception to the warrant requirement. The Supreme Court articulated the good faith exception to the warrant requirement in United States v. Leon, 468 U.S. 897 (1984). Under the exception, the objective good faith of an officer in reasonably relying on the determination of a detached and neutral magistrate can save a search pursuant to an invalid warrant. See id. at 923. However, the good faith exception articulated in Leon explicitly does not extend to cover a warrant “so facially deficient i.e., in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.” Id. The warrant at issue here falls directly into the category so obvious that the Court chose it as its example. The warrant executed at the Lee home indisputably “fail[ed] to particularize ... the things to be seized,” and thus is expressly excluded from the good faith exception.

Nor may the government request that this Court look beyond the four corners of the warrant and reexamine the executing officers' conduct. The subjective good faith of the agents is irrelevant, and they could not have “objective good faith.” Further, because the “incorporated” affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents. United States v. McGrew, 122 F.3d 847 (9<sup>th</sup> Cir. 1997); United States v. Kow, 58 F.3d 423, 428-30 (9<sup>th</sup> Cir. 1995). No exception can save this general warrant.

V. **EXCLUSION OF EVIDENCE SEIZED UNDER AN INVALID WARRANT IS THE APPROPRIATE REMEDY**

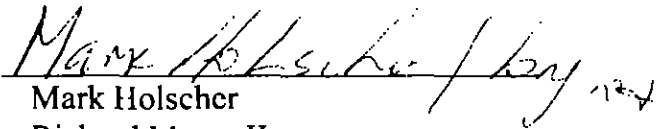
It is axiomatic that evidence seized in violation of a person's Fourth Amendment rights is inadmissible at a subsequent criminal proceeding against the person. See Mapp v. Ohio, 367 U.S. 643 (1961); Leary, 846 F.2d at 592 (holding that evidence seized pursuant to a facially overbroad warrant should be suppressed). In this case, where there was no supporting affidavit, the executed warrant was plainly a general warrant, and therefore, all evidence seized pursuant to it (and the fruits of that evidence) must be suppressed.

**CONCLUSION**

For the reasons stated herein and in the accompanying motion, this court should suppress all evidence seized pursuant to the general warrant used to search Dr. Lee's home and all fruits of the unconstitutional search.

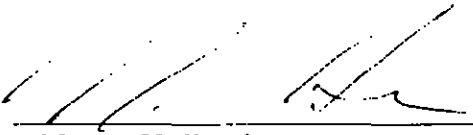
Respectfully submitted,

O'MELVENY & MYERS LLP

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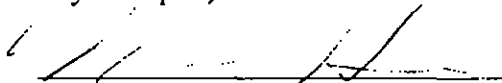
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I HEREBY CERTIFY that a true  
copy of the foregoing was ~~mailed~~ *hand delivered*  
to opposing counsel this 17<sup>th</sup>  
day of April, 2000.

  
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Nancy Hollander