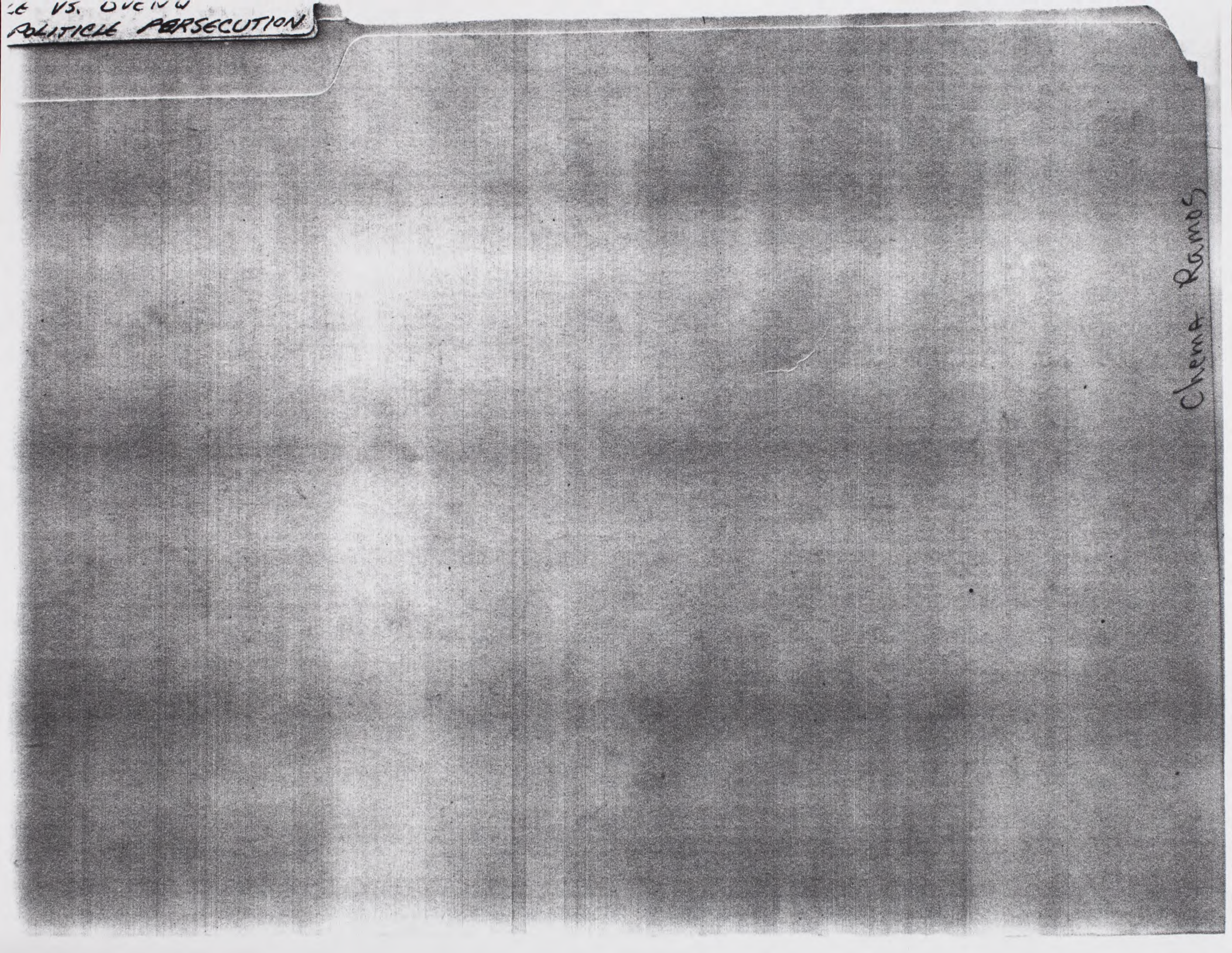
POLITICAL PERSECUTION
Chema Ramos

BARTON C. SHEELA
JOHN W. LIGHTNER
PETER J. HUGHES
RAMON CASTRO
HOWARD J. BECHEFSKY
MICHAEL H. WALSH
DENNIS L. WELLS
FEDERICO CASTRO

LAW OFFICES
SHEELA, LIGHTNER, HUGHES & CASTRO
A PROFESSIONAL CORPORATION

3104 FOURTH AVENUE
SAN DIEGO, CALIFORNIA 92103
TELEPHONE: 291-4500

August 29, 1975

TO WHOM IT MAY CONCERN:

Within the last three months I have been employed to handle the appeal of Eurico Bueno, Jr.

Since my employment, I have become acquainted with the facts of his case and the harshness of his sentence.

I have been a criminal lawyer for 25 years, both as a prosecutor and as defense counsel. Bueno's sentence to prison for possession of a non-commercial amount of contraband seems unnecessarily and unusually harsh in view of his record. My investigation leads me to believe that Bueno had been the object of unfair and secretive surveillance and the object of unusual and unnecessary police activity.

This was caused by Bueno's anti-war beliefs and activities and caused by Bueno's strong support of minority causes.

If Bueno's harsh sentence was the result of rumor, innuendos, and other inaccurate reports that stem from reaction to his anti-war and minority activities, it would be my belief that his sentence should be modified or at least his confinement terminated.

BARTON C. SHEELA, JR.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

NO. 4 CR 8111

vs.

ENRIQUE BUNDA BUENO,

Defendant and Appellant.

ISSUES ON APPEAL

1. Should the trial court have granted Appellant's motion to reveal the identity of the informant on the basis that the informant was a material witness on the issue of Appellant's guilt or innocence?

2. Does the search warrant comply with the constitutional mandate that the place to be searched must be described with particularity?

3. Did the search constitute an unlawful nighttime search?

4. Was there sufficient evidence to support the trial court's ruling that Appellant had constructive possession of the contraband?

STATEMENT OF THE CASE

Complaint was filed in the Municipal Court, County of San Diego, State of California, on February 26, 1974. Appellant was arrested by deputies of the San Diego Marshal's Office armed with an arrest warrant on April 3, 1974. Preliminary hearing was had by Appellant on July 1, 1974.

On July 10, 1974 an information was filed charging Appellant with violation of Health and Safety Code Section 11350, 11357 and 11364 (CT 1). After arraignment, a plea of not guilty was entered on July 15, 1974 (CT 34). Readiness date was scheduled for August 22, 1974, and trial date was scheduled for September 3, 1974 (CT 34).

On August 9, 1974, Appellant submitted a motion to suppress evidence under Penal Code Section 1538.5, and arguments were heard. (CT 35) On August 12, 1974, the motion was denied (CT 36).

Readiness conference was had on August 22, 1974.

On September 3, 1974, trial was trailed to September 5, 1974, and bond was forfeited (CT 38).

On September 5, 1974 the bond forfeiture was set aside, and bond reinstated. Trial was continued to October 23, 1974 (CT 39).

On October 23, 1974, trial was continued to January 13, 1975.

On January 13, 1974, Appellant waived jury trial and submitted the matter to the court as to Count 1, violation of Health and Safety Code Section 11350, based on the preliminary transcript. The court found Appellant guilty as to that count. Counts 2 and 3 were dismissed. (CT 41) Appellant was committed to the custody of the Director of Corrections on April 17, 1975 (CT 44).

A timely notice of appeal was filed by Appellant on April 18, 1975 (RT 31).

STATEMENT OF THE FACTS

In the afternoon of February 25, 1974 pursuant to an affidavit filed by Agent Meisner of the California Bureau of Narcotics Enforcement, a warrant was issued authorizing a search of the premises located at 6499 Montezuma Road, San Diego. (RT 6, CT 14, 15, 16). The warrant specifically "commanded [officers] to make [the] search at any time of the day." (CT 14, line 13).

The affidavit relies extensively upon information supplied by a confidential informant, who is as yet undisclosed. The affidavit states that the informant was present in the residence within the last nine days, that while in the residence the informant saw herion on the table in the dining/living area, and that the herion was still present when the informant left

the premises. (CT 15)

The affidavit stated that the phone number for the residence was listed in the name of Enrique Bueno, and that an automobile registered in Bueno's name was seen near the residence. (CT 15, 16). The officers sought the warrant for the purpose of discovering evidence against Bueno, under the belief that the structure was Bueno's residence. (RT 38-41). Although Meisner later testified that the informant told him that Bueno was present at the time the informant viewed the contraband in the residence, Meisner specifically did not include this information in the affidavit. (RT 37, 41).

At 9:50 p.m., on February 25, 1974 agents and officers of the Bureau of Narcotics Enforcement, District Attorneys Office, and Marine Corp. C.I.D. approached the residence at 6499 Montezuma Road, for the purpose of executing the warrant. (RT 7) The premises consisted of two separate dwellings, having in common only the same address (6499 Montezuma Road) and a common wall. Each said dwelling had a separate exterior entrance door and there was no internal passageway between them. (RT 10, 11).

The officers first knocked on the front door and received no answer. (RT 25) They went around to the back door and knocked on that door. (RT 26) After they received no response, they began to depart from the residence. (RT 26) The officers

were about one hundred feet from the residence when they saw a person later identified as defendant Phillips, standing at a gate near the house, holding a gun. (RT 26, 27)

Phillips was ordered to drop the gun, and he complied without incident. (RT 7) Meisner approached Phillips and explained to him that Meisner had a search warrant. (RT 7) In response to questioning, Phillips offered his name and stated that his residence was 6499 Montezuma. (RT 28)

Phillips was followed by Meisner into the west portion of the building, which was apparently Phillip's portion of the dual residence structure. (RT 10, 11) Phillips was then shown the search warrant which he proceeded to read. (RT 30, 31)

Meisner, the other officers and Phillips then proceeded to a door on the north side of the residence where Meisner attempted to pick the lock in order to gain entrance to the east portion of the residence. (RT 11) Not having a picking device on him, Meisner, nevertheless, was successful by using a pocket knife. (RT 29)

Agent Meisner testified that the entire process, from the time that the officers approached the residence, to the time they entered the residence, took six or seven minutes. (RT 31) According to Meisner, they first approached the residence at 9:50 p.m., (RT 30) and entered the residence, after picking

the lock, at 9:56 or 9:57 p.m. (RT 31) He "picked up the first object" at 9:58. (RT 31) Meisner did not testify as to what that object was. (RT 31)

As a result of the search and seizure, Phillips was arrested that night and charged with possession of illegal contraband. Bueno was later arrested on April 3, 1974 by San Diego County Marshals and was charged with possession of illegal contraband on February 25, 1974, the date the search warrant was executed. (CT 1) Bueno was not present on the premises on that date.

I

THE IDENTITY OF THE INFORMANT SHOULD HAVE BEEN DISCLOSED BECAUSE THE INFORMANT WAS A MATERIAL WITNESS ON THE ISSUE OF GUILT, AND THE FAILURE TO DISCLOSE HIS IDENTITY DENIED APPELLANT A FAIR TRIAL.

A. Introduction

When it appears from the evidence that an informer is a "material witness" on the issue of the defendant's guilt and nondisclosure of his identity would deprive the defendant of a fair trial, it is well-settled that disclosure of the identity of the informant will be mandated. Theodor v. Superior Court, 8 Cal. 3d 77, 88 (1972). This standard is satisfied when,

based upon "some evidence", the defendant,

> "Demonstrates a reasonable possibility that the annonyomous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration. (Emphasis added)

People v. Garcia, 67 Cal. 2d 830, 840 (1967). See also: Theodor, supra, at 88. The rationale of the rule requiring disclosure,

> "is that the defendant, through the testimony of the informer when his identity is made known might be able to rebut a material element of the prosecution's case and thereby prove his innocence."

People v. Kiihoa, 53 Cal. 2d 748, 752 (1960). As the trial judge noted in this case,

> "[I]f there is anything close to being a - if the witness can testify to anything almost to prove the defendant is not guildty, why he is entitled to it." (RT 34, 39).

B. The informant might have been able to rebut a material element of the prosecution's contention that Appellant was in constructive possession of the contraband.

Unlawful possession of narcotics is established by proof (1) that the accused exercised dominion and control over the contraband, (2) that he had knowledge of its presence, and

(3) that he had knowledge of its narcotic character. People v. Fitzwater, 260 C.A. 2d 478 (First Dist. 1968), cert. den. 353 U.S. 953 (1968). Constructive possession is sufficient to establish the crime as long as defendant had actual knowledge of the substance, and of its narcotic character. People v. Barnett, 118 C.A. 2d 336 (First Dist. 1953).

In this case, since Bueno was not present on the premises on February 25, 1975, and he was charged and convicted of possessing contraband on those premises on that date (CT 1, 41), it is clear that possession in this case was constructively imputed to the defendant by reason of the location at which the contraband was discovered by the officers, and by reason of the informer's recent observation of contraband on those premises. See People v. Francis, 71 Cal. 2d 66, 71 (1966).

Counsel for defendant argued in the court below that the informant is a material witness in this case on the issue of whether Bueno and others were present when the informant saw the contraband in the residence, and whether Bueno had constructive possession of the contraband. The informant was an especially material witness, counsel argued, in light of the possibility that Phillips, as a resident on the premises, may have had exclusive control and possession of the contraband. (RT 39) The trial court, however, denied defendant's motion on the basis

that, according to Agent Meisner, the informant's "tip" inculpated Bueno, not Phillips, and Phillips' existence came as a surprise to officers. (RT 40, 41)

The trial court's ruling is contrary to the great weight of authority. The standard for requiring disclosure is aimed at safeguarding "the individual's right to prepare his defense." People v. Kiihoa, supra, at 754.

> "Inherent in the Supreme Court's formulation is the concept that a defendant seeking disclosure is not bound by police allegations that the informer inculpated the defendant."

Williams v. Superior Court, 38 C. A. 3d 412, 419 (Third Dist. 1974). Accord: Honore v. Superior Court, 70 Cal. 2d 162, 168 (1969). Thus, if it appears from the circumstances that the informant is possibly a material witness on the issue of guilt, which might result in defendant's exoneration, defendant is entitled to discover the identity of the informant, regardless of the prosecution claims to the contrary. Honore v. Superior Court, supra, at 168.

Where, as here, possession of contraband is one of the elements of the crime charged, and it is imputed to the defendant by reason of the location at which the contraband is discovered by the police, and where such discovery stems from an informant's recent observation on these premises, the courts have required

disclosure if the informant might be able to testify on the question of whether the defendant had knowledge of the existence of narcotics, and exercised control over the contraband.

In Williams v. Superior Court, supra, the court required disclosure of the informant despite the fact that the uncontroverted prosecution evidence indicated that the informant observed defendant exercising control over the herion. Id. at 423. In that case, the informant also claimed to have seen defendant in possession of contraband. Defendant argued that since possession of the contraband was imputed constructively from the presence of the contraband in defendant's dresser drawer, and since others were present, the informant might be able to testify that defendant was merely present when the informant was at the residence, and had no dominion over the contraband. See Honore v. Superior Court, supra, where the court ordered disclosure because it was possbile that other persons may have brought the contraband on the premises.

The People may argue that the foregoing cases are distinguishable on the basis that the informant in each of those cases had stated to officers that he saw persons other than the defendant on the premises when the informant observed the contraband. In this case, there was no evidence that the informant saw other individuals. It should be noted, however, that there was no evidence that the informant had not seen other individuals.

Assuming that the informant had not seen other individuals on the premises, it is clear that the distinction is inapplicable to this case. In Theodor v. Superior Court, supra, the Supreme Court was faced with a similar distinction. In that case, the informant stated that he observed contraband on the premises in possession of a person therein described. The informant stated that he observed a pile of marijuana bricks, two feet high by three feet wide. Defendant was arrested when he entered the house while officers were there, and keys taken from his person opened locks on a room in which the large quantity of contraband was found.

The court held that, although the informant had evidently not seen others present, his testimony might be relevant to establish whether defendant had constructive dominion and control over the contraband. The court based their decision on certain discrepancies and factors which arguably created an inference that someone else may have been in possession of the contraband, and not defendant.

This inference could only be rebuted by the informant. Id. 89. Among the important factors were the discrepancy in the physical description supplied by the informant, unusual selling arrangements, and the accessibility of others to the residence. Id. at 89-90.

Appellant submits that the Theodor case presents an analogous situation to the case at hand. In this case, there was a discrepancy in the physical description of the premises in that the informant failed to inform officers of the dual residence. (RT 37) In fact, the informant did not advise officers of Phillips' existence. (RT 37) Most unusual is the fact that Officer Meisner did not include in the affidavit that the informant had mentioned Bueno's name. Only later did Meisner claim that he was informed that Bueno was present. (RT 41) Nowhere in the record does anyone inquire as to whether the informant may have had an indication that other individuals were present. In addition, nowhere in the record does any person state any more than the allegation that Bueno was merely present at the time the informant observed contraband in the residence. Finally, as in the Theodor case, the premises were accessible to individuals other than Bueno, by virtue of the dual nature of the dwelling.

The foregoing factors and discrepancies create an arguable inference that someone else may have been present, and in possession of the contraband, and not Appellant.

C. The Informant was the only witness, other than law enforcement officers, who could testify as to the guilt or innocence of Appellant.

Where the informant is the only witness, other than narcotics agents, disclosure of the informant's identity will be necessary to a fair trial. People v. Diaz, 174 C.A. 2d 799, 803 (First Dist. 1959); People v. Williams, 51 Cal. 2d 355, 359-60 (1958). See Hawkins v. Robinson, 367 F. Supp. 1025 (D. Conn. 1973):

> "As in [Roviaro v. United States, 353 U.S. 53 (1957), unless petitioner waived his constitutional right not to take the stand in his own defense, the informant was his sole material witness... who was not a law enforcement officer."

Id. at 1036. The only witness in this case on the issue of whether Bueno had constructive possession of the contraband were the law enforcement officers who found the contraband at Bueno's residence, and the informant who allegedly observed Bueno in the presence of the contraband. (RT 38)

II

THE SEARCH WARRANT WAS INVALID BECAUSE IT CONTAINED NO DESCRIPTION OF THE SUBUNIT TO BE SEARCHED BUT REFERRED MERELY TO A LARGER MULTIPLE - OCCUPANCY STRUCTURE.

Under both the United States Constitution and the Constitution and statutory law of California it is essential to the validity of a search warrant that it describe with particularity the place to be searched. U.S. Const., 4th Amend.; Cal. Const., Art. I, §19; Cal. Penal Code §1525. This requirement, when applicable to dwellings, means that when a warrant is issued which describes an entire building based on probable cause for searching only one apartment therein, the warrant is void. People v. Sheehan, 28 C.A. 3d 21,24 (First Dist. 1972), See also People v. Fitzwater, 260 C.A. 2d 478 (First Dist. 1968), cert. den. 393 U.S. 953 (1968); U.S. v. Higgins, 428 F. 2d 232 (7th Cir. 1970), In this case, the warrant described the premises as,

> "... a single family dwelling ... at 6499 Montezuma Road, San Diego." (CT 14, lines 15, 17-18).

The premises, however, consisted of two separate dwellings, having in common only the same address (6499 Montezuma Road) and a common wall. Each said dwelling had a separate exterior entrance door and there was no passageway between them (RT 10, 11). The premises, under the generally-accepted view, was not a "single dwelling", but was a multiple occupancy structure. See, People v. Fitzwater, supra at 487.

Nevertheless, officers in this case, entered both dwellings. (RT 10, 11) Although Officer Meisner claimed that he did not

conduct a search of Phillips' dwelling (RT 28), he did enter that dwelling, and Phillips read the search warrant while Meisner was inside Phillips' dwelling (RT 28, 29). In addition, Meisner testified that he entered Phillips' dwelling for the purpose of searching for a means of entry from Phillips' room into the other portions of the residence. (RT 37).

Whether officers technically conducted a search of Phillips' residence is inconsequential. Meisner testified that he believed he had authority to search both dwellings (RT 38). Merely because he may have chosen to search one portion does not validate the otherwise invalid warrant. The essence of the proscription against warrants failing to adequately describe the premises to be searched derives from the fear of just such unbridled police discretion. Trupiano v. United States, 334 U.S. 699, 710 (1948).

> "The constitutionally protected right of privacy is readily violated if law enforcement officers, for lack of a warrant specifically defining the extent of their search, are free to determine it for themselves."

People v. Fitzwater, supra at 485-86.

Here, the warrant did not mention Bueno, nor did it mention any other factors which could reasonably lead officers to conclude that their search was to be limited to Bueno's dwelling.

The officers, in fact, did not believe that their search was to be so limited (RT 38). The warrant, therefore, was void, and all evidence seized pursuant to said warrant should be suppressed.

III

THE SEARCH WAS UNLAWFUL BECAUSE IT WAS A NIGHTTIME SEARCH NOT AUTHORIZED BY THE SEARCH WARRANT.

A. The search was in substantial conflict with Penal Code §1533, in that the search was conducted in the nighttime without good cause.

Officer Meisner testified that he arrived at the premises at 9:50 p.m. (RT 7), found no one at home, went to the rear (RT 26) and departed (RT 26). He then saw Phillips outside the premises holding a gun; he ordered Phillips to drop it, questioned him (RT 28), and then entered the westerly of the two residences with Phillips. (RT 10, 11) He showed the search warrant to Phillips who read it (RT 30, 31). Then Meisner went to the entrance of the easterly residence and picked the lock which alone took three or four minutes. (RT 29) That the whole of this episode described by Meisner consumed a total of less than eight minutes is patently impossible and inherently unbelievable.

Penal Code Section 1533 provides:

"Upon a showing of good cause, the magistrate may in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m." (Emphasis added)

The People argued, in the court below, that Penal Code Section 1533 merely requires that service of the warrant be made upon the resident of the premises prior to 10:00 p.m. They define service as, "where a writ of notice is handed or delivered to a person." (CT 21, lines 16-27)

The word "service" has a variety of meanings, dependent upon the context or the sense in which it is used. Central Power & Light Co. v. State, 165 S.W. 2d 920, 925 (Tex. 1949). Thus, "service" in the contractual sense may mean the performance of an employment contract. Black's Law Dictionary at 1533 (1968). And, "service" of an heir under Scotish law may mean the determination of a right Id. at 1534.

One interpretation of the word "served" in Penal Code Section 1533 is that it was intended to prohibit nighttime searches. Thus, within the meaning of Penal Code Section 1533, "service" of a warrant would include execution of the search as well as delivery of the warrant. This interpretation is

based upon the strong constitutional purpose of Penal Code Section 1533 to remedy the evil of nighttime searches. See Varan, Search Seizures and Immunities, 2d ed., Vol. 1, p. 546-50 (1974). See also, Call v. Superior Court, 266 C.A. 2d 163 (First Dist. 1968):

> "[Penal Code Section 1533] requires that the magistrate must 'insert a direction' in the warrant in order to authorize a night search." (Emphasis added) Id. at 164.

Likewise, in People v. Mills, 251 C.A. 2d 420 (First Dist. 1967), the court noted,

> "[N]ight Search is not authorized unless a direction to that effect is inserted" (Emphasis Added). Id. at 423.

The legislative purpose for enacting code sections prohibiting nighttime "service" of warrants was "to protect people in the security of their homes in the late night and early morning hours." People v. Dinneen, 45 C.A. 3d Supp. 5, 10 (L.A. 1974).

> "The householder is entitled to the assurance that the magistrate has considered and decided whether the facts justify a night search." People v. Mills, supra at 422.

In this case, Respondent acknowledged that the magistrate did not consider, nor authorize a nighttime search. (CT 21, lines 6-8). Yet the search was conducted entirely after nightfall, and all but two minutes (assuming Officer Meisner's testimonty as to the time sequence is at all believable) after the 10:00 p.m. limitation within Penal Code Section 1533. Appellant submits that the sequence of events violated the policy and spirit of Penal Code Section 1533, if not the actual wording of the statute. The officers, apparently aware of the 10:00 p.m. limitation and the use of the word "served", apparently subscribed to the interpretation offered by respondents, attempted to satisfy that interpretation of Section 1533, while conducting what amounted to a prolonged nighttime search. This court should not allow such an obvious abuse of legislative safeguards:

> "The search of a person's home is a drastic police measure at best... When the Legislature has laid down limitations on such police instrusion, the courts should not evade them under the guise of interpretation. (citations omitted) The court should be on its guard to preserve the constitutional and legislative safeguards set up to prevent an abuse of process. (citations omitted) Statutes preventing nighttime searches should be strictly construed, and the court should be "vigilent" to see that statutory protections are observed and

enforced. (Emphasis added)

Solis v. Superior Court, 63 Cal. 2d 774, 779 (1966). See also, People v. Mills, supra at 422;

The underlying doctrine supporting Appellant's interpretation was first enunciated in Dep't of Motor Vehicles v. Indus. Acc. Com., 14 Cal. 2d 189 (1939), where the court stated:

> "[W]here the language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted". Id. at 195.

See also: People v. Bruni, 25 C.A. 3d 196, 198 (First Dist. 1972). Appellant's contention is that an interpretation which allows "service" of the warrant (within respondent's definition) three or four minutes prior to 10:00 p.m., and allows the search to be substantially a nighttime search is utterly absurd in light of the purpose of Penal Code Section 1533 of preventing nighttime searches.

B. The search was unconstitutional in that the search warrant was executed, and the search conducted, in the nighttime without good cause.

Even if Penal Code Section 1533 does not prohibit nighttime searches, it certainly does not authorize nighttime searches.

If Respondent's definition of "service" is accepted, the statute proscribes only delivery of the warrant after 10:00 p.m., and not the conducting of a search.

However, there is considerable authority that nighttime searches even under search warrants (containing no judicial authorization therefore) are forbidden by the Fourth Amendment to the United States Constitution.

The search and seizure clause of the Constitution is properly "construed in the light of what was deemed an unreasonable search and seizure when it was adopted." Carroll v. United States, 267 U.S. 132, 149 (1925). As Chief Judge Hastie for the Third Circuit Court of Appeals has shown, nighttime searches were considered during the early years of our constitutional heritage to be a serious threat to ordered liberty.

> "At common law, prior to the adoption of the Fourth Amendment, there was a strong aversion to nighttime searches. 2 Hale, Pleas of the Crown, Stokes & Ingersoll ed. 1847, 113; Cooley, Constitutional Limitations, 7th Ed. 1903, 430; Voorhies v. Faust, 1922, 220 Mich. 155, 189 N.W. 1006, 27 A.L.R. 706. Commonwealth v. Hinds, 1887, 145 Mass. 182, 13 N.E. 397. Even the odious "writs of assistance which outraged colonial America permitted search of dwellings only in the daytime. Lasson, History

& Development of the Fourth Amendment to the United States Constitution, 1973, 54.

. . . . . .

During the early years of the republic this common-law tradition was embodied in two statutes passed by our first Congress that authorized only daytime searches, Act of July 31, 1789, § 24, 1 Stat. 43; Act of March 3, 1791, §29, 1 Stat. 206. Thereafter, the reluctance to authorize nighttime searches except under exceptional circumstances continued as an integral part of our jurisprudence."

United States Ex Rel. Boyanle v. Myers, 398 F. 2d 896, 897-98 (Third Dist. 1968).

In Parrish v. Civil Service Commission, 66 Cal. 2d 260 (1967), for instance, the California Supreme Court distinguished between daytime and nighttime administrative searches, and grounded the distinction on constitutional considerations inhering in the Fourth Amendment.

A cognate argument has already been held to be grounded in the Fourth Amendment independent of statute: the argument that breaking and entering to effect service of a search warrant must be conditioned upon certain antecedent formalities such as those proscribed in Penal Code Section 844 and Section 1531. Sabbath v. United States, 391 U.S. 585 (1968) (18 USC §3109);

Wong Sun v. United States, 371 U.S. 471, 482-84 (1963); Ker v. California, 374 U.S. 23, 47-59 (1963) (Ker points out that even the infamous writs of assistance could be executed only during daylight hours, and further makes clear that California's Penal Code Section 844 is a constitutional mandate Id. at 52-3. California courts have since confirmed that "the requirements of announcement before entry have been held to be compelled by the guarantees against search and seizure contained in the Fourth Amendment." (Parsley v. Superior Court, 9 Cal. 3d 934, 939 (1973); People v. Gastelo, 67 Cal. 2d 586, 588-89 (1967).

The facts in this case would not render any error harmless, as Respondent's argued (CT 24, lines 1-12). See Tidwell v. Superior Court, 17 C.A. 3d 780 (First Dist. 1971). Unlike the Tidwell case, here there was an occupant on the premises, and officers, in fact, expected an occupant to be present. Thus, the reason for the Fourth Amendment safeguard against nighttime searches is applicable.

C. To the extent that Penal Code Section 1533, as amended in 1970, authorizes searches beyond nightfall to 10:00 p.m. without justification, it is unconstitutional.

Prior to the amendment of Penal Code Section 1533, the statute authorized service of the warrant during the "daytime", unless a contrary direction is inserted in the warrant. Most statutes today continue to authorize only "daytime" searches.

See Varon, Search, Seizures and Immunities, 2d ed., Vol. 1, p. 546-550 (1974). Pursuant to these "daytime-nighttime" statutes, cases have indicated two possible tests used by the courts to determine when an unlawful nighttime search begins. Some courts support a definition of "nighttime" based on a factual determination of darkness, see, Jones v. U.S., 357 U.S. 493 (1958); Edwards v. State, 162 So. 2d 894 (Ala. 1964); U.S. v. Liebrich, 55 F. 2d 341 (7th Cir. 1932); State v. Cain, 31 S.W. 2d 559 (Mo. 1930); Linnen v. Banfield, 72 N.W. 1 (Mich. 1897), while others follow a sunset-to-sunrise test. See People v. Malunsky, 232 N.Y.S. 2d 843 (1962); U.S. v. Leeper, 295 F. 1017 (2nd Cir. 1923). The California case of Sollis v. Superior Court, 63 Cal. 2d 774 (1966), followed the latter view by implication.

In 1970, Penal Code Section 1533 was amended to define "nighttime" as between 7:00 a.m. and 10:00 p.m. See People v. Bruni, 25 C.A. 3d 196 (First Dist. 1972). Respondent contends that this liberal definition of "nighttime" is justified on the basis of the modern use of artifical lighting. (CT 24, lines 13-25).

The legislative mandate of Penal Code Section 1533 has its origins, along with those of Penal Code Section 1531, in the common law aversion to pre-Revolutionary Crown practices in the execution of writs of assistance and general warrants.

(See Appellant's brief at p. 20-22, supra). The rules developed by the common law at the time of the adoption of the Fourth Amendment to regulate such practices should be viewed as constitutional parameters of a reasonable search and seizure. See Carroll v. United States, supra. This mode of analysis has been employed in determining that Penal Code Section 1531 is a rule of constitutional dimension. (See Appellant's brief at p. 21, supra). The same mode of analysis should be employed in determining that Penal Code Section 1533 in its pre-1970 form is similarly a constitutional rule.

Appellant acknowledges that changes in life-style may justify changing interpretations of the Constitution. With respect to nighttime searches, however, it cannot seriously be contended that artifical lighting has made the proscription against nighttime searches obsolete. Aversion to such police instrusion at night as a serious threat to ordered liberty appears in contemporary judicial pronouncements, regardless of the influence of modern lighting. See Frank v. Maryland, 359 U.S. 360, 366 (1959); Jones v. United States, 357 U.S. 493, 498 (1958); Wolf v. Colorado, 338 U.S. 25, 27-28 (1948). In 1961, Justice Frankfurter re-stated the common law belief:

> "Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Nighttime search was the

evil in its obnoxious form."

Monroe v. Pape, 365 U.S. 167, 210 (1961).

Moreover, it is "the peculiar abrasiveness of official instrusions at such periods" which constitute the essence of proscribed nighttime searches, Tidwell v. Superior Court, 17 C.A. 3d 780, 786 (First Dist. 1971), and which support a special claim to privacy during the nighttime hours. See People v. Mills, 251 C.A. 2d 420, 422 (First Dist. 1967). The intrusion is made no less abrasive, nor the privacy insignificant, by the fact that an individual has electrical lighting at his disposal instead of a kerosine lamp.

Thus, insofar as this court finds that Penal Code Section 1533 authorizes a nighttime search, within the meaning of the generally accepted standards, supra, it is submitted that Penal Code Section 1533 is in violation of the Fourth Amendment to the United States Constitution.

D. The search was unlawful because it exceeded the scope of the search warrant.

The search warrant states that the officers are, "commanded to make search at any time of the day." (CT 14, line 13).

Officer Meisner testified that the search commenced around 9:57 p.m. (RT 31). Regardless of the definition of day or night, the search was conducted substantially, if not totally, at night.

Therefore, even if the search was legal within the meaning of Penal Code Section 1533, and was constitutional within the meaning of the Fourth Amendment, the search still exceeded the bounds established in the search warrant.

The long-standing prerequisite that before a search warrant is issued, the place to be searched must be described with particularity, sufficiently certain to identify the place to be searched, People v. Garnett, 6 C.A. 3d 280 (First Dist. 1970); People v. Fitzwater, 157 C.A. 2d 478, 483 (First Dist. 1968), is analagous to the case at hand. This constitutional requirement has been used to invalidate searches and seizures "beyond the scope" of the warrant. People v. Sheehan, 28 C.A. 3d 21 (First Dist. 1972) (certain items held inadmissible because place to be searched not specified in the warrant). The further requirement that the persons or things to be seized be particularly described has resulted in invalidating a search and seizure "beyond the scope" of the enumerated persons and things to be seized. People v. Hill, 12 Cal. 3d 731 (1974).

The requirement that executing officers follow the mandate of the search warrant is not limited to the above cited situations. Rather, the requirement is based on the constitutional definition of the judicial function. Justice Powell spoke to this issue in United States v. United States District Court, 407 U.S. 297, 317 (1972):

> "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy... [T]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."

Simply stated, according to Justice Powell, "The Magistrate ought to judge; and should give certain directions to the officers." Id. at 317.

The California legislature has indicated that "timeliness" is one aspect of the execution of a search warrant which should be directed by the magistrate, rather than left to the unbridled discretion of the officers. See e.g. Cal. Penal Code §1531 (search warrant must be executed within 10 days); Cal. Penal Code §1533 (service after 10:00 p.m. unlawful without magistrate's direction). See also Rogers v. Superior Court, 35 C.A. 3d 716 (Second Dist. 1973); Powelson v. Superior Court, 9 C.A. 3d 357 (Third Dist. 1970); People v. Mills, 251 C.A. 2d 420 (First Dist. 1967), where the courts held that executing officers could not act without judicial direction.

Once the directions are given, officers cannot exceed the scope of those directions, at their whim, ignoring the words of the search warrant.

IV

EVIDENCE OF APPELLANT'S CONSTRUCTIVE POSSESSION OF CONTRABAND WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

Unlawful possession of narcotics under Health & Safety Code §11350 can clearly be established by showing that defendant had constructive possession over the contraband. People v. Velasquez, 3 C.A. 3d 776 (Fifth Dist. 1970). To prove possession, it is sufficient if the contraband is deposited in a place within the possession and control of the accused. People v. Stanford, 176 C.A. 2d 388 (Second Dist. 1959).

However, it is well settled that, absent other inculpating evidence, the mere fact contraband is found in an individual's residence does not justify a finding of guilt. People v. Williams, 218 C.A. 2d 86, 92-94 (Second Dist. 1963); People v. Stanford, supra, at 390-92.

In this case, the only credible evidence tending to show Appellant's dominion and control over the contraband, was the fact that it was found in his residence. The only other evidence, the informant alleged observation of Appellant and the contraband at an earlier time, is inadmissible on the question of guilt or

innocence. See Witkin, California Evid. §455 et seq. (1966).

The only evidence of Appellant's possession being discovery of the contraband on the premises, the evidence was insufficient to support the conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction must be reversed.

Respectfully submitted,

SHEELA, LIGHTNER, HUGHES & CASTRO

By BARTON C. SHEELA, JR.

And: JAN I. GOLDSMITH,
Certified Legal Intern

RUFFIN & WHALEN

By ROGER S. RUFFIN