

EXHIBIT “C”

1 BRUCE COLODNY-SBN107125
2 LAW OFFICES OF BRUCE COLODNY
3 290 North D St., Suite 704
4 P.O. Box 10787
5 San Bernardino, California 92423-0787
6 (909) 862-3113

7 Attorney for Defendant Edgar Padilla Atilano

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
10

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

15 EDGAR PADILLA ATILANO,

16 Defendant

) Case No.: DJ00CF0066
)
)

) MOTION TO TRAVERSE/QUASH SEARCH
) WARRANT AND SUPPRESS EVIDENCE
) AND FOR RETURN OF PROPERTY;
) MEMO OF POINTS AND AUTHORITIES;
) and SUPPORTING DECLARATIONS [Penal
) Code Section 1538.5] TESTIMONY
) REQUESTED
)

17
18 TO TONY RACKAUCKAS, DISTRICT ATTORNEY OF ORANGE COUNTY AND HIS
19 AGENTS AND REPRESENTATIVES:

20 PLEASE TAKE NOTICE that on March 30, 2001 at 9:00 a.m., or as soon thereafter as
21 the matter may be heard in the above-entitled court, defendant EDGAR PADILLA ATILANO
22 ("ATILNAO"), by and through his counsel, Bruce Colodny, will move for an order suppressing
23 as evidence all items listed in the return (copy attached hereto as Exhibit 1) to the search warrant
24 issued in this case by the Honorable David T. McEachern on November 10, 1999 seized at 1235
25 Lincoln Avenue #409, Anaheim, California.
26

27 ATILANO will further move the court for an order permitting cross-examination of
28 former California Department of Justice ("DOJ") Agent Joan Young ("YOUNG"), the affiant in

1 the affidavit (copy attached hereto as Exhibit 2) filed in support of search warrant, issued and
2 executed in this case, and for a further order permitting the defendant to present evidence to
3 controvert the factual allegations of this affidavit. Such evidence will include, but not be limited
4 to: Testimony of DOJ Agent Ignatius Chinn (whose undercover purchase from Atilano of one
5 and observation of two more alleged unlawful firearms displayed by Atilano forms virtually the
6 entire basis of the search warrant affidavit of former DOJ Agent Young); Testimony of Randy
7 Rossi, Director of the DOJ Firearms Unit, Testimony by Deputy Attorney General Tim Rieger
8 (who advises Randy Rossi); Documents concerning the DOJ's 10 year practice of identification
9 of firearms as assault weapons (requiring registration and being restricted as to sale) only by the
10 markings upon the receivers or frames of firearms and treating firearms similar in appearance
11 and function as not being assault weapons if such firearms do not bear the specified receiver or
12 frame markings; and Testimony of Dwight Van Horn, former law enforcement forensic firearms
13 expert, who will testify that all the three firearms of the firearms mentioned in the search warrant
14 affidavit were legal on October 30, 1999 when they were purchased and/or observed by CHINN.

15
16
17
18 Said motion will be made pursuant to California Penal Code Section 1538.5, and will be based
19 on this notice of motion, the memorandum of points and authorities served and filed herewith, on
20 such supplemental memoranda of points and authorities as may hereafter be filed with the court
21 or stated orally at the conclusion of the hearing, on all the papers and records on file in this
22 action, on the transcript of the preliminary hearing, and on such oral and documentary evidence
23 as may be presented at the hearing of the motion.

24
25 DATED: March 16, 2001

26
27
28

BRUCE COLODNY, Attorney for
Defendant

///

///

1
2
3
4
5
6
7
8
9
10
11
ISSUE PRESENTED

12 A search warrant may be traversed if the supporting affidavit contains misstatements or
13 omits material information. Did YOUNG and CHINN include intentionally or recklessly
14 include false or misleading information in the affidavit requiring a traversal of the search
15 warrant? More specifically, the affidavit claims that ATILANO (it is undisputed that ATILANO
16 was a duly licensed firearms who observed all the California and Federal requirements for a
17 retail firearms sale) sold one illegal firearm to CHINN and displayed two more illegal firearms.
18 ATILANO claims that all three firearms were legal to sell or possess on October 30, 1999, the
19 date on which CHINN claims to have purchased the alleged illegal firearm and observed the
20 other two alleged illegal firearms.

21
22
23
24
25
26
27
28
STATEMENT OF ANTICIPATED FACTS

29 Upon interviewing CHINN's report and preliminary hearing testimony (both in this case,
30 which arises from the alleged unlawful firearms and firearms parts seized during the execution of
31 the search warrant at ATILANO's Anaheim apartment (his licensed premises), and the now-
32 dismissed companion case (People v Atilano, Los Angeles Superior Court Case No. KA046436)
33 arising from ATILANO's sale (as a duly-licensed firearms dealer with completion of the required
34 California and Federal forms and observation of the required 10-day wait) of a firearm alleged to
35 be an assault weapon, and a review of YOUNG'S affidavit in support of the search warrant at
36 issue, the following evidence was deduced, and will be presented at the hearing on this motion:

37 On October 30, 1999, ATILANO was a duly licensed firearms dealer lawfully displaying
38 firearms for sale at a gun show in Pomona, California. (see Exhibit 2, SW A7: 24-25, SW A8:
39 10-12, SW A9: 16-17). ATILANO conducted the sale in a lawful manner requiring CHINN both
40 to complete the required California and Federal sales forms (SW A6: 9-10) and to observe the 10
41 day waiting period before delivery (SW A6:9-10).

42 In his reports, CHINN states that he observed the Israeli rifle that he purchased to be
43 marked "Galil". However, it was later determined that the word "Galil" did not appear anywhere
44 on the subject firearm. This is very significant, in that the 1989 Roberti-Roos Assault Weapon

1 Control Act ("RRAWCA") which was the only assault weapon statute in effect in 1999,
2 identified assault weapons only by make or model rather than generically by features as does
3 current law. The foreword (copy attached hereto as Exhibit 3) to the Assault Weapon
4 Identification Guide ("AWIG"), which the DOJ was required by statute to publish (PC
5 12276.5(g)) and distribute to law enforcement, concedes that firearms are, "...physically
6 identified as assault weapons by the markings that appear on them" and that "...firearms which
7 may appear identical to specified "assault weapons", but which have different identification
8 markings, are not "assault weapons" within the meaning of the California Penal Code.". This
9 lack of a "Galil" marking was the basis of the Judge's decision to grant the 995 motion in the
10 companion prosecution of Mr. Atilano in the Pomona court (People v Atilano, Los Angeles
11 County Superior Court Case No. KA046346). DOJ documents (see copy of May 6, 1997 letter
12 DOJ Firearms Section Employee Dennis Hilburn attached as Exhibit 4) from have confirmed
13 that the DOJ had previously rejected assault weapon applications for rifles such as Mr. Atilano's
14 which are marked as an "Action Arms IMI Model 331" rather than "Galil". The DOJ never
15 caused the "Action Arms IMI Model 331" rifle to be declared an assault weapon pursuant to PC
16 12276.5 (a-f) nor did the DOJ ever cause a list of identified assault weapons to be published in
17 the California Code of Regulations as required by PC 12276.5(h).

18 As set forth in the attached supporting declaration of Dwight Van Horn (a copy of Mr.
19 Van Horn's resume is attached as Exhibit 5) , until January 1, 2000 (when the new law, PC
20 12276.1 became effective defining assault weapons generically by features) firearms were
21 identified only by the markings on their receivers or frames despite that many firearms existed
22 that were virtually identical in appearance and utilized interchangeable parts. Mr. Van Horn
23 will testify and, the defense counsel expects Mr. Rieger to agree that RRAWCA was lawfully
24 circumvented by manufacturers who responded by marketing renamed but similar semi-
25 automatic firearms until the new generic assault weapon act (PC 12276.1) took effect on January
26 1, 2000. Mr. Van Horn will testify that until that time, it was the custom and practice of licensed
27 California firearms dealers to identify military semi-automatic firearms as lawful for sale by
28 means of their lack of the identification markings set forth in PC 12276. None of this is

1 mentioned in the affidavit. Thus, it was reasonable for ATILANO to conclude that this subject
2 Israeli rifle was legal to sell as it was not marked "Galil".

3 The search warrant affidavit falsely states that Agent Chinn observed Mr. Atilano at the
4 gun show displaying a "pre-Roberti-Roos 16" barrel Uzi with a folding stock and a AK-47 short
5 barrel rifle" which were unregistered assault weapons (SW A7:10-12 and SW A9:12-15). Yet in
6 his preliminary hearing testimony in this case, Agent Chinn admitted that this "pre-Roberti-Roos
7 16" barrel Uzi" that he saw at the gun show was actually a Group Industries firearm that was not
8 marked "Uzi" (RT 67:2-68:17). Further, in his preliminary hearing testimony in this case, Agent
9 Chinn also admitted that the "AK-47 short barrel rifle" that he saw at the gun show was actually
10 a MARS pistol. This is very significant as the DOJ itself admitted in it's August 22, 2000
11 Information Bulletin No. 2000-04-FD (copy attached hereto as Exhibit 6) that this particular
12 firearm was not classified as an assault weapon and could legally be sold up to and including
13 August 16, 2000 (more 9 months after it was displayed by Mr. Atilano).

14 CHINN acted in bad faith in that he had previously demonstrated a failure to familiarize
15 himself with the intricacies of the very complex California firearms laws. On August 18, 1999,
16 two months before he claims to have purchased from and observed the display Atilano of alleged
17 illegal firearms, CHINN testified as an expert witness in the unsuccessful prosecution in People
18 v Scott William Mills, Los Angeles County Superior Court Case No. KA 044547. In the Mills
19 case, CHINN testified that a machine pistol grip-trigger group assembly purchased in an
20 undercover operation at the May, 1999 Great Western Gun Show in Pomona, was actually a
21 machine gun. At the conclusion of that August 18, 1999 preliminary hearing, the Court
22 dismissed the case and further ruled that the subject component part met none of the four
23 definitions of a machine gun set forth in PC 12200 (see pages 8-10 of the reporter's transcript of
24 the Honorable Thomas A. Peterson's ruling at the conclusion of that preliminary hearing; Copy
25 attached hereto as Exhibit 7). This demonstrates bad faith in that just before the investigation of
26 ATILANO, CHINN ignored this notice that California firearms law is extremely complex and
27 that the distinction between lawful and unlawful firearms in this state often is determined by very
28 subtle technical differences.

1 The companion Los Angeles County prosecution of ATILANO mentioned above was
2 dismissed on August 23, 2000 by the Honorable Charles E. Horan (a copy of the reporter's
3 transcript is attached hereto as Exhibit 8). Judge Horan in granting ATILANO's 995 motion
4 criticized CHINN as follows:

5 "...the bear (sic) assertion by Agent Chinn, whose training leaves a little bit to be desired,
6 that in his opinion that weapon is a Galil of the sort to banned under the California law can
7 withstand much scrutiny." (RT 8:23-8:27)

8 "Chinn is no expert in assault weapons as far as the transcript shows. Although he might
9 be quite honest and diligent, he is no expert. Therefore, his bear (sic) assertion should carry little
10 weight.: (RT 12:23-12:27).

11 Finally, as set forth in the attached supporting declaration of defense counsel Bruce
12 Colodny, on March 15, 2001, assigned Deputy District Attorney Erin Rowe stated that the
13 People would not be proceeding with any of the counts alleging unlawful possession of "Galil"
14 rifles. Combined with the unsuccessful companion Los Angeles County prosecution (for selling
15 a firearm that was allegedly an illegal Galil) of ATILANO, this is a further recognition and a
16 concession by the People that ATILANO did sell an illegal weapon despite it's
17 mischaracterization as such by the affidavit.

18 **1.**
19 **A SEARCH WARRANT MAY NOT BE ISSUED EXCEPT UPON A SHOWING**
20 **OF PROBABLE CAUSE; UNDER GATES, THE MAGISTRATE MUST**
21 **CONDUCT A TOTALITY OF THE CIRCUMSTANCES ANALYSIS**

22 Both the Fourth Amendment of the United States Constitution and article I, section 13 of
23 the California Constitution guarantee the right of the people to be secure in their "persons,
24 houses, papers, and effects" against unreasonable searches and seizures. (U.S. Const., amend.
25 IV; Cal. Const., art. I, § 13.) In addition, both the federal and state constitutions require warrants
26 not to be issued except upon a showing of probable cause. (People v. Medina (1985) 165
27 Cal.App.3d 11, 15-16; U.S. Const., amend. IV; Cal. Const., art. I, § 13.)
28

1 This protection applies to all unreasonable government intrusions into legitimate
2 expectations of privacy. (United States v. Chadwick (1977) 433 U.S. 1, 7.) In particular,
3 residents of dwellings have a constitutional right of the highest order to be free from
4 unreasonable entries. (See v. Seattle (1967) 387 U.S. 541, 543.)

5
6 Since a warrant may be issued to search any property at which there is probable cause to
7 believe that fruits, instrumentalities, or evidence of a crime will be found (Zurcher v. Stanford
8 Daily (1978) 436 U.S. 547, 554), two conditions must be met in order for a search warrant to
9 issue: (1) there must be probable cause to believe a crime has been committed and that the
10 particular items sought to be seized are connected with criminal activity or will assist in a
11 particular apprehension or conviction; and (2) there must be probable cause to believe that the
12 items sought to be seized will be found in the place to be searched. (United States v. Harris
13 (1971) 403 U.S. 573, 584.)

14
15 In Illinois v. Gates (1983) 462 U.S. 213, the Supreme Court set forth a "totality of the
16 circumstances" test for determining probable cause to support a search warrant: probable cause
17 exists if, based upon a common sense consideration of all the circumstances set forth in the
18 supporting affidavit, there is a fair probability that contraband or evidence of a crime will be
19 found in a particular place. (Id., at 238.) Further, as the Gates court stated, probable cause is a
20 fluid concept which turns on the assessment of probabilities in particular factual contexts; as a
21 result, the concept is neither readily nor usefully reduced to a neat set of legal rules. (Id. at 230-
22 32.)

23
24
25 In making a determination concerning the existence of probable cause, the magistrate's
26 task is to decide whether the information in the affidavit accompanying the application presents
27 sufficient facts to justify a prudent person in the belief that there is a fair probability that
28

1 contraband or evidence of a crime will be found in a particular place. (Ibid.; United States v.
2 Depew (9th Cir. 1993) 8 F.3d 1424, 1428.)

3
4 **2.**

5 **THE AFFIANT INTENTIONALLY OR RECKLESSLY INCLUDED**
6 **FALSE OR MISLEADING INFORMATION IN THE AFFIDAVIT**
7 **REQUIRING A TRAVERSAL OF THE SEARCH WARRANT.**

8 A search warrant may be traversed on the ground that the supporting affidavit contains
9 misstatements or omits material information. People v. Glance, (1989) 209 Cal.App.3d 836.
10 Information is "material" if its omission would make the affidavit "substantially misleading."
11 People v. Siripongs, (1988) 45 Cal.3d 548; People v. Huston, (1989) 210 Cal.App.3d 192; see
12 also People v. Bradford, (1997) 15 Cal.4th 1229, 1297.

13 If the error was deliberate or made with reckless disregard for the truth, the reviewing
14 court may correct the affidavit, and then retest it. The omitted matters are added, and any
15 misstated matters are deleted, and the affidavit is reassessed to determine if probable cause still
16 exists. If it does, the warrant is upheld; if not, it is quashed. Franks v. Delaware, (1978) 438 U.S.
17 154; People v. Lamas, (1991) 229 Cal.App.3d 560, 567; People v. Bradford, (1997) 15 Cal.4th
18 1229, 1297; People v. Costello, (1988) 204 Cal.App.3d 431; People v. Mayer, (1987) 188
19 Cal.App.3d 1101.]6

20 The defendant need only prove that the "allegations of perjury or reckless disregard ... by a
21 preponderance of the evidence." Franks v. Delaware, (1978) 438 U.S. 154, 156. The defendant's
22 challenge to a search warrant based on misstatements or omissions is not precluded by U.S. v.
23 Leon, (1984) 468 U.S. 897, 914.

24
25 **3.**

26 **THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT**
27 **AUTHORIZING THE SEARCH OF 1235 LINCOLN AVENUE #409**
28 **CONTAINS MATERIAL MISSTATEMENTS AND OMISSIONS**

1 **AND THE RESTESTED AFFIDAVIT FAILS TO SUPPLY PROBABLE**
2 **CAUSE FOR THE SEARCH OF THE PREMISES**

3 In Franks v. Delaware (1978) 438 U.S. 154, the United States Supreme Court recognized
4 that a defendant has a Fourth Amendment right to a hearing to challenge the veracity of statements
5 in an affidavit for a search warrant. The Franks Court also set forth the procedure for controverting
6 factual allegations in search warrant affidavits. According to Franks, if a defendant makes a
7 substantial preliminary showing that the affiant intentionally or recklessly included false material
8 in the affidavit, the reviewing court must excise that information and review what information
9 remains to determine if it still supports probable cause. (Id. at 155-156.)
10

11 Similarly, if the defendant provides proof of material omissions, the reviewing court must
12 add to the affidavit such intentional or reckless omissions and re-evaluate the existence of probable
13 cause in light of this new information. (People v. Maestas (1988) 204 Cal.App.3d 1208, 1216.) If
14 the information remaining in the affidavit, (after deletion of false, or inclusion of omitted
15 information), is not sufficient to establish probable cause, then the evidence seized must be
16 suppressed. (People v. Sandlin (1991) 230 Cal.App.3d 1310, 1316; Franks, supra, 438 U.S. at 157;
17 People v. Luttenberger (1990) 50 Cal.3d 1, 10.)
18

19 As succinctly stated by the Supreme Court in Franks:

20 The requirement that a warrant not issue 'but upon probable cause, supported by
21 Oath or affirmation,' would be reduced to a nullity if a police officer was able to
22 use deliberately falsified allegations to demonstrate probable cause, and, having
23 misled the magistrate, then was able to remain confident that the ploy was
24 worthwhile. (Franks, supra, 438 U.S. at 168.)
25

26 In order to obtain a Franks evidentiary hearing, the attack on the affidavit must be more than
27 conclusory, and must be supported by more than simply a desire to cross-examine. (Id. at 171.) In
28

1 the instant case the attack upon the affidavit in support of the warrant for 1235 Lincoln Avenue
2 #409, Anaheim California is both specific and justified.

3 The rule enunciated in Franks is applicable, moreover, to affidavits marred by omissions
4 of fact. (United States v. Lefkowitz (9th Cir. 1980) 6118 F.2d 1313, 1317, n. 4.) Whether the
5 alleged judicial deception was brought about by material false statements or material omissions
6 is of no consequence. (United States v. Stanert (9th Cir. 1985) 762 F.2d 775, 781, as amended,
7 769 F.2d 1410. By "reporting less than the total story, an affiant can manipulate the inferences a
8 magistrate will draw." (Id., at 781.) To allow a magistrate to be misled in such a matter "could
9 denude the probable cause requirement of all real meaning." (Ibid.) Accordingly, a Fourth
10 Amendment violation occurs where "the affiant intentionally or recklessly omitted facts required
11 to prevent technically true statements in the affidavit from being misleading." (Ibid.)

12 As detailed herein in support of the motion to traverse, there are several important
13 instances of material misstatements and omissions in the search warrant affidavit for the 1235
14 Lincoln Avenue #409.

15 After making the necessary corrections to the information contained in YOUNG's
16 affidavit, there is undoubtedly insufficient information to support probable cause for issuance of
17 the warrant. (Franks, supra, 438 U.S. at 156.) The evidence obtained as a result the entry and
18 search of the residence at 1235 Lincoln Avenue #409 must therefore be suppressed.

19
20
21
22
23 4.
24 **THE GOOD FAITH EXCEPTION DOES NOT APPLY IN THE INSTANT CASE**
25 **A REASONABLE LAW ENFORCEMENT OFFICER COULD NOT**
26 **HARBOR A GOOD FAITH RELIANCE ON A SEARCH WARRANT**
27 **SO LACKING IN INDICIA OF PROBABLE CAUSE**

28 In United States v. Leon, (1984) 468 U.S. 897, the United States Supreme Court first
formulated the "good faith exception" to the exclusionary rule. According to Leon, the good faith

1 inquiry should be confined to the question of "whether a reasonably well-trained officer would
2 have known that the search was illegal despite the magistrate's authorization." (Id. at p. 922,
3 fn.23.) The fact that a magistrate signs a warrant which has an insufficient affidavit is entitled to
4 no weight in determining whether good faith exists. (People v. Camarella (1991) 54 Cal.3d 592,
5 604-605.) The prosecution bears the burden of proving the good faith reliance of the officers
6 involved. (United States v. Leon, supra, 468 U.S. at p. 924.)

7
8 The Leon court recognized that the good faith exception is only appropriate where an
9 officer's reliance on a warrant is objectively reasonable:

10
11 Nevertheless, the officer's reliance on the magistrate's probable-cause
12 determination and on the technical sufficiency of the warrant he issues must be
13 objectively reasonable (citations omitted) and it is clear that in some
14 circumstances the officer will have no reasonable grounds for believing that the
15 warrant was properly issued.

16 (Id. at pp. 922-923, emphasis added.)

17
18 Accordingly, the Leon court declared that the good faith exception is inapplicable when
19 any of the following are true: when (1) the magistrate "was misled by information in an affidavit
20 that the affiant knew was false or would have known was false except for his reckless disregard of
21 the truth"; (2) the magistrate "wholly abandoned his judicial role"; (3) the affidavit is "so lacking
22 in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
23 (4) the warrant itself is "so facially deficient - i.e. in failing to particularize the place to be searched
24 or the things to be seized - that the executing officers cannot reasonably presume it to be valid."

25
26 (Id. at p. 923.)

27
28 Reiterating the third and fourth situations above, the fact that a warrant was signed by a
magistrate does not absolve the police officer from exercising reasonable professional judgment, or

1 from having a reasonable knowledge of what the law prohibits. (People v. Johnson (1990) 220
2 Cal.App.3d 742, 749-750; People v. Maestas (1988) 204 Cal.App.3d 1208, 1214-1215; Malley v.
3 Briggs (1986) 475 U.S. 335, 345-346.) Clarifying the third situation above, if a well-trained police
4 officer reasonably could conclude that the question regarding whether probable cause existed was
5 close or debatable, Leon's third situation does not apply. (People v. Camarella, supra, Cal.3d at p.
6 606.) In Camarella, supra, the California Supreme Court stated that the test by which the
7 objective reasonableness of the officer's decision to submit an affidavit to a magistrate is
8 "whether a reasonable and well-trained officer 'would have *known* that his affidavit failed to
9 establish probable cause and that he should not have applied for the warrant.'" (People v.
10 Camarella (1991) 54 Cal.3d 592, 605-606.)

11
12
13 As recognized by the Court of Appeal in Bailey v. Superior Court (1992) 11 Cal.App.4th
14 1107, in which the court found the affidavit lacking and the good faith exception inapplicable:

15
16 Harried magistrates may not always take the care necessary to ensure
17 that the application for the warrant contains sufficient allegations of probable
18 cause. [Citation omitted.] **An officer may not shift all of the responsibility**
19 **for the protection of an accused's Fourth Amendment rights to the**
20 **magistrate.** [Citation.] Therefore, an officer applying for the warrant is
21 required to exercise reasonable professional judgement. (Id. at 1113-1114.)
22 (**emphasis added**)

23 Not only does the affidavit in the present case contain insufficient probable cause on its
24 face, it also contains information that is materially misleading. As pointed out in People v.
25 Maestas (1988) 204 Cal.App.3d 1208, if an officer includes misstatements or omissions in a search
26 warrant affidavit, such conduct raises considerable doubt as to the officer's own belief in the
27 existence of probable cause. As pointed out by the court:
28

1 Whether a well-trained officer could have harbored such an objectively reasonable belief
2 may turn on whether the officer's affidavit contains any misstatements or omissions, as an officer
3 who misrepresents the facts to the magistrate has less reason to believe in the existence of probable
4 cause than an officer who makes no such misrepresentation. In other words, misstatements or
5 omissions in the affidavit may bear upon whether the officer's belief in the existence of probable
6 cause was objectively reasonable regardless of whether they were material to the magistrate's
7 probable cause determination under Franks. [Citation.] (Id. at 1216.)

8 The "good faith" exception is thus inapplicable for the search of ATILANO's premises.
9 Numerous misstatements and omissions of material facts were included in the affidavit.
10 Knowing that the affidavit contained such information, the officers cannot now claim that they
11 relied in good faith on the warrant based thereupon. All evidence obtained as a result of the
12 entry, seizure, and search of the residence, together with all of the fruits thereof must therefore
13 be suppressed.
14

15 ARGUMENT AND CONCLUSION

16 In summary, ATILANO was a duly-licensed dealer who sold a firearm in a completely
17 lawful manner. CHINN insists that the firearm sold was actually a Galil although that word
18 appears nowhere on that firearm. The companion Los Angeles County prosecution of
19 ATILANO for sale of the alleged Galil was dismissed after granting of a 995 motion and, in this
20 case, the People have finally conceded that ATILANO had no Galil rifles by abandoning the
21 counts alleging possession of illegal Galil rifles. CHINN's own testimony, combined with DOJ
22 (the California state agency charged by statute with administering the assault weapon laws)
23 actions, conclusively establishes that the other two firearms that CHINN observed in
24 ATILANO's possession on October 30, 1999 were also not illegal.
25

26 Thus, the affidavit is based entirely on CHINN's unfounded assertions that ATILANO
27 sold one illegal firearm and displayed two other illegal firearms. As it has been demonstrated
28

1 that none of the three firearms falsely characterized in the affidavit are actually illegal, there was
2 no basis whatsoever for the search warrant to issue. Further, since CHINN has a past track
3 record of providing expert testimony that was disregarded and resulted in dismissal of recent
4 prosecutions for alleged illegal firearms activity, the search warrant cannot be saved by the
5 "good faith" holding in Leon, supra.
6

7 The defense respectfully requests that the affidavit and search warrant should be
8 traversed and/or quashed, the evidence suppressed and all lawful firearms and other property
9 seized from ATILANO should be ordered returned to him forthwith.
10

11
12 DATED: March 16, 2001

13 BRUCE COLODNY, Attorney for
14 Defendant

15 ///

16 ///

17 SUPPORTING DECLARATION OF DWIGHT VAN HORN
18

19 I, DWIGHT VAN HORN, declare as follows:

20 I was employed for 13 1/2 years as a forensic firearms examiner by the Los Angeles
21 County Sheriff's Department. In that capacity I qualified and testified as an expert witness in over
22 350 cases. Since my retirement, I have worked as a private forensic firearms expert in civil cases
23 for almost two years. A true and correct copy of my current resume is attached hereto as Exhibit 5.

24 In 1989, I served on an ad hoc California Department of Justice committee convened to
25 study the issue of assault weapon identification.

26 In 1993, I completed a California Department of Justice seminar in Orange County
27 California where in the instructors stated that the DOJ policy was to identify firearms as assault
28 weapons by the means of the markings that appear on the receivers or the frames of the firearms.

1 The DOJ instructors also stated that firearms that appeared identical to the firearms listed as assault
2 weapons in California Penal Code Section 12276 were not considered to be assault weapon unless
3 they bore the specified markings on their receivers or frames as set forth in the list that appears in
4 Penal Code Section 12276.

5 I have reviewed the characteristics of the three firearms identified in the search warrant
6 affidavit in this case and in my professional opinion, none of these three firearms were assault
7 weapons as of October 30, 1999.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct and that this declaration is executed at Saugus, California.

10
11 DATED: _____

12 _____
13 DWIGHT VAN HORN

14 ///

15 SUPPORTING DECLARATION OF BRUCE COLODNY

16 I, BRUCE COLODNY, declare as follows:

17 I am an attorney at law duly licensed to practice before all courts of the State of
18 California. I am attorney of record for the defendant in the above-entitled matter. If called as a
19 witness therein, I would testify as follows:

20 At approximately, 8:40 a.m., Thursday, March 15, 2001, I spoke by telephone with
21 Deputy District Attorney Erin Rowe. Ms. Rowe told me that the People would not be
22 proceeding with any of the Galil counts in the above-entitled matter.

23 I declare under penalty of perjury that the foregoing is true and correct and this
24 declaration is executed on March 16, 2001 at San Bernardino, California

25
26
27 _____
28 BRUCE COLODNY, Attorney for
Defendant

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT "D"

10-2001 12:58 PM BRUCE COLODNY LAW OFFICE 909 864 8243

P.02

May 10 01 12:24p OfficeMax, Orange (875) 714 894 8200

FILED
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF ORANGE
 CENTRAL JUSTICE CENTER

MAY - 9 2001

ALAN SLATER, Clerk of the Court

BY L. SUN

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,

Case No.00CF0065

Plaintiff,

ORDER

vs.

EDGAR PADILLA ATILANO.

Defendant.

Defendant filed a motion to Traverse/Quash the Search Warrant and Suppress Evidence. The matter was briefed and argued on March 30, 2001. Appearing for the People was Brian F. Fitzpatrick, Deputy District Attorney; appearing for the defendant was Bruce Colodny. After hearing, the matter was submitted. Thereafter, with leave of court, the defendant lodged a copy of the California Attorney General's "Assault Weapons Identification Guide," April 1993 Edition. On April 6, 2001 the Court received defendant's Supplemental Memorandum of Points & Authorities. On April 11, 2001 the Court received the People's Supplemental Memorandum of Points & Authorities in Opposition. The matter having been submitted, the Court having considered all of the above materials, the Court rules as follows: The motion to traverse is GRANTED. The defendant's motion to suppress is RESERVED, pending further evidentiary hearing.

////////////////////

////////////////////

copy sent to court on 5-9-01 by Judge

10-2001 12:59 PM BRUCE COLODNY LAW OFFICE 909 864 5245

P.03

May 10 01 12:24p OfficeMax, Orange (975) 714 834 9200

P.2

1 Franks Hearing

2 The defendant has made a substantial preliminary showing that material in
3 the search warrant affidavit was false and that the cause of that
4 information may have been reckless disregard.

5 As a preliminary matter, the Court rejects any contention that it is
6 limited in its analysis to the conduct of the affiant officer. Rather,
7 case law provides that the Court must evaluate the Franks factors as to
8 the conduct of the affiant's source, if that source is identified clearly
9 as a fellow law enforcement agent. Under the principle elucidated in
10 United States v. Johns (9th Cir. 1988) 851 F.2d 1131, 1134, fn1, a
11 defendant may properly attack the veracity of the source of the affiant's
12 information, even if the affiant has a good faith belief in matter told to
13 her by another law enforcement officer.¹ That is what happened in the
14 case at bar. Agent Chinn told the affiant certain information, which the
15 affiant then recited into the affidavit and the magistrate later
16 considered.

17 Thus, the focus of this inquiry is whether the defendant has made a
18 prima facie showing, warranting a hearing on the question of whether Agent
19 Chinn's identification of three weapons as illegal "assault weapons" was
20 wrong and whether the material misstatements were the product of
21 intentional falsity or reckless disregard for the truth. Having
22 considered the motions papers and attachments, including the March 28,
23 2001 Declaration of Dwight D. Van Horn, the California Attorney General's
24 Assault Weapons Identification Guide, and the preliminary hearing
25 testimony, the Court concludes that the defendant has made a prima facie
26 showing that: (1) None of the 3 weapons identified in the search warrant

27

28 ¹ To this extent, the Court disagrees with the People's position,
stated at page 2 in their opposition brief. Search warrant affidavits
utilizing informant information are distinguishable from officer-to-
officer communications. Cf. People v. Sandlin (1991) 230 Cal.App.3d 1310.

12-2001 12:59 PM BRUCE COLODNY LAW OFFICE 909 864 5243
May 10 01 12:24p OfficeMax, Orange (975) 714 834 8208

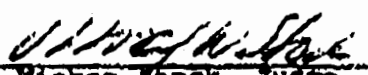
P.04

1 affidavit were illegal as of the date of the affidavit; (2) there was
2 nothing else in the affidavit upon which a reasonable magistrate could
3 know otherwise; and (3) the statutory language of Section 12276, available
4 supporting documentation from the State Attorney General, as well as
5 experience in the field, would have placed Agent Chinn on notice of the
6 need to make further information available to the magistrate at the time
7 of the seeking of the search warrant.

8 Accordingly, it is the order of this Court that the matter be set
9 for evidentiary ~~Frank~~ hearing. Counsel shall meet and confer prior to
10 the next hearing date of May 11, 2001, so as to propose a date for such
11 hearing.

12 The Clerk shall serve a copy of this order on counsel.

13 SO ORDERED this 8th Day of May, 2001.

14
15
16 
17 Nancy Wieben Stook, Judge
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, am employed in the City of San Pedro, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 407 North Harbor Boulevard, San Pedro, California 90731.

On April 3, 2002, I served the foregoing document(s) described as

REQUEST FOR JUDICIAL NOTICE

on the interested parties in this action by placing

☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

(BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Pedro, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

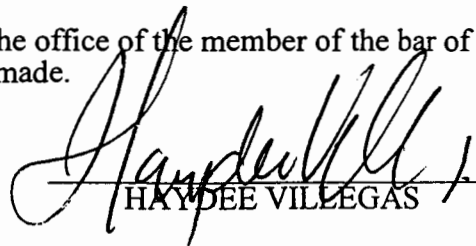
Executed on April 3, 2002, at San Pedro, California.

X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.

Executed on April 3, 2002, at San Pedro, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.


HAYDEE VILLEGAS