

## **EXHIBIT “C”**

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

10

11 THE PEOPLE OF THE STATE OF ) Case No.: DJ00CF0066  
12 CALIFORNIA, )  
13 Plaintiff, ) MOTION TO TRAVERSE/QUASH SEARCH  
14 vs. ) WARRANT AND SUPPRESS EVIDENCE  
15 EDGAR PADILLA ATILANO, ) AND FOR RETURN OF PROPERTY;  
16 Defendant ) 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 ATILANO will further move the court for an order permitting cross-examination of  
27 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 Said motion will be made pursuant to California Penal Code Section 1538.5, and will be based  
17 on this notice of motion, the memorandum of points and authorities served and filed herewith, on  
18 such supplemental memoranda of points and authorities as may hereafter be filed with the court  
19 or stated orally at the conclusion of the hearing, on all the papers and records on file in this  
20 action, on the transcript of the preliminary hearing, and on such oral and documentary evidence  
21 as may be presented at the hearing of the motion.  
22  
23

24  
25 DATED: March 16, 2001

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26 BRUCE COLODNY, Attorney for  
27 Defendant

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**ISSUE PRESENTED**

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

11

**STATEMENT OF ANTICIPATED FACTS**

12 Upon interviewing CHINN's report and preliminary hearing testimony (both in this case,  
13 which arises from the alleged unlawful firearms and firearms parts seized during the execution of  
14 the search warrant at ATILANO's Anaheim apartment (his licensed premises), and the now-  
15 dismissed companion case (People v Atilano, Los Angeles Superior Court Case No. KA046436)  
16 arising from ATILANO's sale (as a duly-licensed firearms dealer with completion of the required  
17 California and Federal forms and observation of the required 10-day wait) of a firearm alleged to  
18 be an assault weapon, and a review of YOUNG'S affidavit in support of the search warrant at  
19 issue, the following evidence was deduced, and will be presented at the hearing on this motion:  
20

21 On October 30, 1999, ATILANO was a duly licensed firearms dealer lawfully displaying  
22 firearms for sale at a gun show in Pomona, California. (see Exhibit 2, SW A7: 24-25, SW A8:  
23 10-12, SW A9: 16-17). ATILANO conducted the sale in a lawful manner requiring CHINN both  
24 to complete the required California and Federal sales forms (SW A6: 9-10) and to observe the 10  
25 day waiting period before delivery (SW A6:9-10).

26 In his reports, CHINN states that he observed the Israeli rifle that he purchased to be  
27 marked "Galil". However, it was later determined that the word "Galil" did not appear anywhere  
28 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.

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

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

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

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

**1.**

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

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

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

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

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

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 2.

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

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

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

26 3.

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

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

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

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

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

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

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

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

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

4.

**THE GOOD FAITH EXCEPTION DOES NOT APPLY IN THE INSTANT CASE  
A REASONABLE LAW ENFORCEMENT OFFICER COULD NOT  
HARBOR A GOOD FAITH RELIANCE ON A SEARCH WARRANT  
SO LACKING IN INDICIA OF PROBABLE CAUSE**

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.)

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:

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 posession 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

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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 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.

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

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

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

DATED: \_\_\_\_\_

## DWIGHT VAN HORN

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## SUPPORTING DECLARATION OF BRUCE COLODNY

I, BRUCE COLODNY, declare as follows:

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

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

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

BRUCE COLODNY, Attorney for  
Defendant

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**EXHIBIT “D”**

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P.02

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P.1

FILED

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

MAY - 9 2001

ALAN GLATZER, Clerk of the Court

by L. GUN

7 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
8 IN AND FOR THE COUNTY OF ORANGE9  
10 PEOPLE OF THE STATE OF CALIFORNIA, }  
11 Plaintiff, }  
12 vs. }  
13 EDGAR PADILLA ATILANO. }  
14 Defendant. }  
15

Case No.00CF0066

ORDER

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

Copies mailed to counsel on 5/9/01 by Judge

18-2001 12:59 PM BRUCE COLODNY LAW OFFICE 909 864 5248

P.03

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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.<sup>1</sup> 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 <sup>1</sup> 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.

FROM

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P. 04

P. 3

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 ~~Ex parte~~ 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 8<sup>th</sup> Day of May, 2001.

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16 Nancy Wielen Stock  
17 Nancy Wielen Stock, Judge  
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**PROOF OF SERVICE**

2 | STATE OF CALIFORNIA

### 3 | COUNTY OF LOS ANGELES

4 I, Haydee Villegas, am employed in the City of San Pedro, Los Angeles County,  
5 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.

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

## REQUEST FOR JUDICIAL NOTICE

8 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

13 (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and  
14 processing correspondence for mailing. Under the practice it would be deposited with the  
15 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.

17 X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of  
18 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under  
19 the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for  
20 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.

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

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

24 (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. 110

## HAYDIE VILLEGAS