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9 **Attorneys For Defendant,**
10 **Jose Luis Moreno**

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 **UNITED STATES OF AMERICA,**)

14 **Plaintiff,**)

15 **v.**)

16 **JOSE LUIS MORENO,**)

17 **et. al.**)

18 **Defendants**)

CR 98-1081-SVW

**NOTICE OF MOTION
AND MOTION FOR
ORDER SUPPRESSING
EVIDENCE SEIZED
PURSUANT TO SEARCH
WARRANT; REQUEST
FOR EVIDENTIARY HEARING**

**DATE: [To Be Set]
TIME: [To Be Set]
CTRM: HON. Stephen
V. Wilson**

19 **NOTICE IS HEREBY GIVEN that on December __, 1998, at __ a.m./p.m., or as soon**
20 **thereafter as counsel may be heard, in the courtroom of the Honorable Stephen V. Wilson,**
21 **defendant Jose Luis Moreno will move the court for an order suppressing any and all evidence**
22 **that the government may seek to introduce against him at the trial of this action, which was**
23 **obtained in the course of searches conducted pursuant to a search warrant on October 2, 1998**
24 **at the following residential locations: 1607 Glenoaks Blvd, San Fernando, CA, and 12879**
25 **Herrick Ave, Los Angeles, CA. In the alternative, defendant Moreno requests an evidentiary**
26 **hearing to permit examination of the agents and officers involved in the acquisition of the**
27 **search warrant, the securing of the subject locations and the execution of the warrant, for the**
28 **purpose of establishing evidence to support the legal arguments contained in this motion.**

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This motion is brought on the following grounds:

- (1) The search warrant affidavit is based largely on intercepted telephone communications obtained pursuant to an illegal wiretap, which is the subject of a separate written motion which is scheduled for hearing on December 7, 1998, at 11:00 a.m. Accordingly, the evidence seized pursuant to the search warrant from the two residential locations constitutes the inadmissible “fruit” of the illegal wiretap.**
- (2) The search warrant on its face lacks probable cause;**
- (3) Evidence produced to the defense in the course of pretrial discovery establishes reasonable cause to believe that the officers conducted an illegal warrantless search of each of the two residential locations for evidence prior to obtaining the warrant, and that the basis for seeking the warrant pertained to information obtained in the course of the warrantless search. Accordingly, the search warrant affidavit was incomplete in stating its basis and thus was false and misleading to the issuing judge. Under these circumstances, this Court should conduct an evidentiary hearing to determine whether the seized evidence should be suppressed under Franks v. Delaware, 438 U.S. 154 (1978).**

The documents supporting the motion consist of this notice of motion, the attached memorandum of points and authorities, all documents and papers already on file with the court, as well as such additional oral and documentary evidence that the court permits counsel to present at the hearing on the motion.

DATED: November 20, 1998

Respectfully submitted,

**HOWARD SHOPENN
GREGORY NICOLAYSEN
Attorneys for defendant,
Jose Luis Moreno**

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I.

INTRODUCTION

On or about October 2, 1998, a Criminal Complaint was filed against defendant Jose Luis Moreno (“Moreno”), alleged to operate under the alias “Chombi”, and others charging violations of 21 U.S.C. 841 and 846, specifically, conspiracy to distribute cocaine and marijuana and related substantive counts. An indictment was subsequently returned and the defendants were arraigned on or about October 25, 1998, at which time trial was set for December 15, 1998.

In the early morning hours of October 2, the same date that the Criminal Complaint was later prepared and filed, two residential searches were conducted at the following locations: 1607 Glenoaks Blvd, San Fernando, CA (the “Glenoaks residence”), and 12879 Herrick Ave, Los Angeles, CA. (the “Herrick residence”). The searches of the two residences were purportedly conducted pursuant to a search warrant issued by Magistrate - Judge James McMahan.¹

The search warrant affidavit relies in large part on telephone conversations intercepted pursuant to a wiretap order issues by U.S. District Court Judge Lourdes Baird on September 14, 1998. As such, it is defective as a “fruit” of the illegal wiretap, which is the subject of a pending motion. Moreover, the search warrant affidavit relies almost entirely on opinions of the affiant and lacks objective evidence to establish probable cause to believe that drugs are inside the residences. Accordingly, the search warrant affidavit is defective on its face, thus warranting suppression of the seized evidence without the need for an evidentiary hearing.²

The search at the Glenoaks residence resulted in the seizure of, among other things, firearms, ammunition, currency and miscellaneous documents. The search at the Herrick

¹ The search warrant affidavit is attached hereto as Exhibit “A”.

² The wiretap order and application are exhibits to the pending wiretap suppression motion filed by defendant Moreno.

1 residence resulted in the seizure of, among other things, 107 kilos of cocaine and 13 kilos of
2 marijuana.

3 The search at the Glenoaks residence was conducted by FBI agents in conjunction with
4 the South Gate Police Department. The search at the Herrick residence was conducted
5 principally by local law enforcement officers in the Los Angeles Interagency Metropolitan
6 Police Apprehension Crime Team (L.A. Impact).³ Accordingly, the conduct being challenged
7 by this motion focuses directly on local law enforcement officers.

8 The two searches were conducted simultaneously. At approximately 8:00 p.m. on
9 October 1, officers went to each of the two locations and “secured” the premises.⁴ Prior to the
10 arrival of a warrant, officers made entry into the Glenoaks residence, then exited to wait for
11 the warrant before conducting the formal search. It would appear that the same procedure
12 was followed at the Herrick residence.

13 The government’s reports on the two searches strongly suggest that even the formal
14 searches themselves were conducted prior to receipt of a signed warrant. A report prepared
15 by the South Gate Police Department states that at approximately 2:16 a.m. on October 2, the
16 officers at the two locations received word that Magistrate - Judge McMahon had signed the
17 warrant.⁵ Reports prepared by the DEA agents state that the searches of the two locations

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19 ³ The summary of the searches set forth in the Introduction to this motion is based on
20 reports produced by the government to the defense on or about November 16, 1998, the
21 last day for filing pretrial motions 21 days prior to the December 7, 1998 hearing date
22 set by the court for pretrial motions. The reports summarizing the search of the
23 Glenoaks residence are Bate Stamp 1909 - 1912, and 1978 - 1981, attached hereto
24 collectively as Exhibit “B”. The report summarizing the search of the Herrick residence
25 is Bate Stamp 1990 - 1993, attached hereto as Exhibit “C”.

26 ⁴ The term, “secured”, is taken directly from the reports. As to the Glenoaks search, see
27 Exhibit B, pages 1911; 1978, par. 2. As to the Herrick search, see Exhibit C, page 1990,
28 par. 2. The reports on the Glenoaks search make it clear that officers entered the
residence prior to obtaining the warrant. See Exhibit B, page 1911. The report on the
Herrick search is not clear as to whether entry into the residence was made prior to the
arrival of the warrant; it is reasonable to infer that the same procedure was followed as
with the Glenoaks residence because the two searches appear to have followed the same
game plan in all other respects.

⁵ Exhibit B, page 1911.

1 were conducted at approximately 1:25 a.m. — nearly an hour prior to receiving word that the
2 warrant had been signed.⁶

3 Adding to the suspicious circumstances surrounding the searches here is the timing of
4 the submission of the search warrant affidavit to the Magistrate - Judge. As noted above, the
5 two residences were “secured” between 8:00 - 8:30 p.m. The search warrant affidavit explicitly
6 makes reference to the fact that the residences have been secured pending issuance of the
7 warrant, thus suggesting that the affidavit was prepared *after* the officers made their
8 warrantless entries into the residences and saw what was inside. Referring to the evening of
9 October 1, the search warrant states:

10 35. At approximately 7:35 p.m., agents effected arrests of
11 CHOMBI, and two other individuals. Agents obtained consent
12 to search a van in which they had been traveling. During the
13 search, agents recovered the target telephone. Law enforcement
14 officers then secured the Glenoaks and Herrick locations. Agents
15 continue to have these locations secured pending the issuance of
16 the requested search warrants. In securing the Glenoaks
17 location, Detective Darren Arakawo told me he⁷ observed in plain
18 view several firearms, . . .⁸

19 Based on the foregoing excerpt, it is clear that the government prepared and submitted
20 the search warrant affidavit to the Magistrate *after the initial warrantless entry* into the
21 residences. In other words, the officers already knew what was inside the two residences prior
22 to preparing the affidavit, but did not want to admit such to the issuing judge, so as to avoid
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24 ⁶ In regard to Glenoaks, see Exhibit B, page 1978, at par 2: “On 10/02/1998, at 1:25 AM,
25 (the agents/officers) conducted a search warrant at (the Glenoaks residence).” In regard
26 to Herrick, see Exhibit C, page 1990, at par. 3: “At approximately 1:20 a.m., (the
27 officers) executed the search warrant at (the Herrick residence).”

28 ⁷ Exhibit A, par 35, at page 20: the phrase, “Detective Darren Arakawo told me he” is
handwritten, in place of the interlineated typed word, “agents”.

⁸ Exhibit A, par. 35, page 20, lines 1-9.

1 disclosing the true manner in which the search was being handled. Instead, the affidavit was
2 prepared with a focus on other evidence in the investigation, thus misleading the issuing judge
3 regarding the advance knowledge already in the possession of the officers.

4 The manner in which these searches were conducted, coupled with deficiencies in the
5 search warrant affidavit itself, justify suppression of the seized evidence or, at the very least,
6 an evidentiary hearing, based on the law and arguments set forth in the following sections.

7
8 **II.**

9 **THE GOVERNMENT IS ESTOPPED TO DENY**
10 **THAT DEFENDANT MORENO HAS STANDING**
11 **TO CONTEST THE SEARCHES**

12 If this case goes to trial, the government will seek to introduce the evidence seized from
13 both the Glenoaks and Herrick residences against defendant Moreno to support its theory of
14 conspiracy and possession of cocaine.

15 The government's theory of its case is that Moreno, who is alleged to operate by the
16 alias "Chombi", is closely connected to both the Glenoaks and Herrick residences.⁹ The
17 Criminal Complaint alleges that Moreno was seen by surveillance units at the two locations
18 prior to his arrest on October 1, 1998.¹⁰ The indictment alleges the following Overt Acts on
19 this subject.

20 17. On or about October 1, 1998, defendant MORENO traveled
21 from the Herrick Avenue location to the parking lot of Food 4
22 Less, 2040 Glenoaks, San Fernando, California, for the purpose
23 of meeting with an unindicted co-conspirator driving a dark-

24
25 ⁹ The caption page of the Indictment lists the alias, "Chombi", under the name of
26 defendant Jose Luis Moreno.

27 ¹⁰ See, Criminal Complaint, filed with the Court on or about October 2, 1998, at par. 35,
28 page 17, at lines 5-6 ("Moreno and his associates have been surveilled at both of these
locations."). Because the Complaint is part of the District Court file, this Court can take
judicial notice of the foregoing assertion referenced above.

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colored truck.

18. On or about October 1, 1998, defendant MORENO, followed by an unindicted co-conspirator driving a dark-colored truck, returned to the Herrick Avenue location.

21. On or about October 1, 1998, at the Herrick Avenue location, defendants MORENO and SALAZAR stored approximately 107.6 kilograms of cocaine, approximately 6.8 kilograms of marijuana, two handguns, a digital scale, and approximately \$220,000 in U.S. currency.

22. On or about October 1, 1998, at 1607 Glenoaks Boulevard, San Fernando, California, defendants MORENO and SALAZAR stored five firearms, including a semi-automatic assault rifle, and approximately \$8,000 in U.S. currency.¹¹

Moreover, the search warrant affidavit makes numerous assertions purporting to connect Moreno to both locations:

14. . . . Based on surveillance, I believe that the cocaine seized from GUZMAN's vehicle came from the Herrick location.¹² Based on surveillance and intercepted conversations, I believe that CHOMBI and members of his organization frequent the Glenoaks location. In addition, CHOMBI and his associates has (*sic*) been surveilled at the Glenoaks location. Based on the wire intercept and surveillance, I believe that CHOMBI and his organization use the Glenoaks location to meet and discuss narcotics trafficking business. In addition, based on the wire

¹¹ Indictment, page 5, Overt Acts 17, 18; page 6, Overt Acts 21, 22.

¹² The seizure of 39.7 kilos of cocaine from defendant Guzman's vehicle on September 30, 1998, is the basis of the substantive charge set forth in Count Two of the indictment. Defendant Moreno is charged in that count under an aid / abet theory.

1 intercept, surveillance, and seizure of approximately 39 kilograms
2 of cocaine on September 30, 1998, I believe that CHOMBI and
3 his associates use the Herrick location to store narcotics.¹³

4 Based on the foregoing assertions, the government cannot have the benefit of arguing
5 that Moreno possessed the subject narcotics and evidence seized from the two residences yet
6 oppose standing to bring this motion. In this case, the circumstances at hand make possession
7 and denial of an expectation of privacy inconsistent. United States vs. Isaacs, 708 F.2d 1365
8 (9th Cir. 1983). Accordingly, the government is estopped to deny that Moreno has standing to
9 bring this motion.

10 Moreover, a possessory or property interest in the residence is not dispositive on the
11 standing issue. *See* Rakas v. Illinois, 439 U.S. 128 (1977) [reaffirming holding in Jones vs.
12 United States, 362 U.S. 257, 259, 267 (1960) that houseguest who has key and uses premises
13 in host's absence may have legitimate expectation of privacy even though he has no property
14 interest, pays no rent, and has been in apartment only for a short time]. Indeed, society
15 recognizes as legitimate the expectation of privacy possessed by an overnight guest -- even
16 though he has at best a fleeting connection to his host's home. Minnesota vs. Olson, 495 U.S.
17 91, 98 (1990).

18 Moreover, the illegal nature of Moreno's alleged activities at the Glenoaks and Herrick
19 residences do not make any expectation of privacy regarding the premises unreasonable.
20 Privacy expectations do not hinge on the nature of defendant's activities -- innocent or
21 criminal. United States v. Taborda, 635 F.2d 131, 138 n. 10 (2d Cir.1980). In fact, many
22 Fourth Amendment issues arise precisely because the defendants were engaged in illegal
23 activity on the premises for which they claim privacy interests. United States vs. Fields, 113
24 F.3d 313, 320 (2d Cir. 1997).

25 For these reasons, Moreno clearly has standing to seek suppression of the evidence
26 seized from the two residences.

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28 ¹³ Exhibit A, par. 14, page 9, lines 1 - 13.

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III.
THE SEARCH WARRANT CONSTITUTES
THE “FRUIT” OF AN ILLEGAL
WIRETAP ORDER

By separate motion, defendant Moreno has challenged the legality of the wiretap order issued on September 14, 1998. The search warrant at issue here was based in large part on wire interceptions obtained pursuant to the September 14 wiretap order, as illustrated by the following excerpts from, and references to, the search warrant affidavit:

1. “The information in this affidavit is based on . . . my review of summaries of wire communications intercepted pursuant to court order.”¹⁴
2. Section III of the search warrant affidavit, entitled, “Court-Authorized Wire Interception.”¹⁵
3. The introductory paragraphs in Section IV of the search warrant affidavit, entitled, “Probable Cause”, which explicitly state that the evidence supporting probable cause derives from the wiretap interceptions.¹⁶
4. The sub-section of Section IV, entitled, “Summary Of Investigation and Intercepted Conversations”,¹⁷ which lays the entire groundwork for the search warrant application and further establishes that surveillance conducted on the Herrick and Glenoaks residences prior to the search was based on information gathered through the wiretap interceptions. Thus, to the extent the search warrant application is based on surveillance, it derives from the wiretaps.

¹⁴ Exhibit A, par. 3, page 1, lines 22 - 27.

¹⁵ Exhibit A, pars. 8 & 9, at page 4.

¹⁶ Exhibit A, pars. 10, 11 & 12, at page 5.

¹⁷ Exhibit A, pars. 14 - 34, at pages 8 - 19. These paragraphs constitute the meat of the search warrant affidavit, which in total contains 36 paragraphs and is 20 pages long.

1 believe that the things listed as the objects of the search are
2 located in the place to be searched.

3 United States vs. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991).

4 In the case at bar, the application supporting the search warrant contains simply a
5 "bare bones" affidavit lacking any objective facts linking defendant Moreno with criminal
6 activity. At most, the affidavit relies on allegedly "coded" wiretap conversations on which
7 the affiant bases the *opinion* that drug conversations are being conducted and that such
8 conversations are linked to the Glenoaks and Herrick residences. However, in the absence
9 of any information other than the allegedly coded conversations, the warrant lacked
10 probable cause.

11 While courts often rely on the opinion of police officers as to where contraband may
12 be kept, United States vs. Hargus, 128 F.3d 1358, 1362 (10th Cir. 1997), the question before
13 this Court is whether an affidavit that relies almost entirely on opinion establishes probable
14 cause.

15 Indeed, Ninth Circuit rulings which have upheld search warrant affidavits
16 containing opinions of the law enforcement affiant have clearly pointed to additional
17 evidence in the affidavit to show that it did not rely solely on opinions. In United States vs.
18 Motz, 936 F.2d 1021 (9th Cir. 1991), the Circuit upheld a search warrant affidavit which
19 contained opinions of the affiant but also contained the percipient observations of both the
20 officers and a confidential informant who gave first-hand accounts of drug activity over a
21 four-year period. Similarly, in United States vs. Burnes, 816 F.2d 1354, 1356 (9th Cir.
22 1987), a methamphetamine case, the Circuit upheld the search warrant affidavit because it
23 included not simply opinions but also statements regarding extensive surveillance of
24 suspects carrying bottles from a chemical lab facility to the searched residence; the bottles
25 matched the physical appearance of containers of ephedrine, a meth precursor chemical.
26 Further, in United States vs. Michaelian, 803 F.2d 1042, 1045 (9th Cir. 1986), cited in each
27 of the foregoing opinions, the search warrant affidavit did not rely solely on opinions but
28 rather, included percipient accounts of close business associates of the defendant regarding

1 the cash-skimming scheme that violated tax laws.

2 _____ The affidavit before this Court is replete with opinions, to the point where it relies
3 on little else. The majority of the affidavit contains summaries of wire interceptions, and
4 all of the summaries are interpreted by the agent's opinion of code language that purports
5 to connect the conversations to drug activities. Beyond the wiretap summaries, the
6 affidavit relies on surveillance, but none of it provides objective evidence of narcotics
7 activities at either the Glenoaks or Herrick residences.

8 The government is likely to cite the seizure of the 39 kilos cocaine from defendant
9 Guzman's car as evidence in the affidavit of narcotics activities at the Herrick location.
10 Yet this reference, too, fails to draw an objective connection to either residence. The
11 affidavit merely states that the surveillance officers observed the following:

12 two males walk from the rear of the Herrick location and
13 walked to the Volkswagen where they opened the hatchback of
14 the car. Surveillance officers observed the two male hispanics
15 place *something* in the Volkswagen [emphasis added].¹⁸

16 The affidavit merely asserts the affiant's opinion of a connection between the seized cocaine
17 and the Herrick location, nothing more.¹⁹

18 Under these circumstances, probable cause is clearly lacking on the face of the
19 search warrant affidavit. This is not surprising because the facts before this Court
20 demonstrate that the officers conducted a warrantless search of the residences, learned
21 what was inside each residence, then quickly put together a search warrant affidavit in the
22 hopes of legalizing the searches with a warrant; however, the affidavit is merely a pretext to
23 conceal a warrantless search, rather than a bona fide recitation of objective evidence
24 necessary to establish probable cause. The evidence seized from both residences should
25 therefore be suppressed.

26 _____
27 ¹⁸ Exhibit A, par. 22, page 14, at lines 14 - 18.

28 ¹⁹ Exhibit A, par. 14, page 9, lines 2 - 3.

1 V.

2 IF SUPPRESSION IS NOT GRANTED

3 ON THE ABOVE GROUNDS,

4 THIS COURT SHOULD CONDUCT AN EVIDENTIARY

5 HEARING TO DETERMINE WHETHER THE

6 SEIZED EVIDENCE SHOULD BE SUPPRESSED

7 BECAUSE THE SEARCHES WERE TANTAMOUNT

8 TO WARRANTLESS SEARCHES, WHICH

9 LACKED THE REQUISITE EXIGENT CIRCUMSTANCES

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11 As discussed earlier, the search warrant affidavit and police reports attached as
12 exhibits to this motion make it amply clear that the search warrant affidavit was prepared
13 and submitted to the Magistrate - Judge *after the initial warrantless entry* was made into the
14 residences. This conduct gives rise to a serious issue as to whether the searches of the two
15 residences were tantamount to warrantless searches due to the officers' advance knowledge
16 of what was inside the residences at the time they applied for the search warrant, even
17 though such advance knowledge is not reflected in the body of the search warrant affidavit.
18 If the searches are indeed tantamount to warrantless searches, the evidence seized must be
19 suppressed because the requisite circumstances for a warrantless search are not present
20 here.

21 The warrantless nature of the search is made particularly troublesome by the
22 inconsistencies between the reports, whereby one police report states that the officers at the
23 two locations learned at approximately 2:15 a.m. that the warrant had been approved;
24 whereas other reports state that the searches were conducted pursuant to the warrant at
25 approximately 1:25 a.m. – nearly an hour earlier.²⁰ This may be the classic slip by which
26 the government inadvertently concedes that the officers jumped the gun and commenced
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28 ²⁰ See footnotes 5 and 6.

1 the searches at 1:25 a.m., expecting that the warrant would be approved as a formality and
2 that they could always hide behind it as a cloak of legitimacy. This critical view is
3 enhanced by the fact that the officers had already made entry into the residences at
4 approximately 8:00 p.m. – just a few hours earlier – to “secure” the locations.

5 In reality, what really seems to have happened is that the officers conducted an
6 initial warrantless search at 8:00 - 8:30 p.m., under the pretext of “securing” the locations,
7 observed contraband and firearms inside, then made the decision that there was key
8 evidence they needed to seize for the prosecution of this case. Upon making that decision,
9 they decided to prepare and submit a formal search warrant application to the Magistrate -
10 Judge. Of course, the officers / agents did not want it to be known that the application for
11 the warrant was really based on information they already knew based on an improper
12 warrantless search; and so the search warrant affidavit omits any reference to such,
13 focusing instead on evidence derived from the wiretap interceptions.

14 It also seems quite probable that as the hours grew late, the officers / agents decided
15 to proceed with the search in the absence of the warrant, expecting that the warrant was
16 forthcoming. After all, they already knew what was inside the two locations, having been
17 in there just a few hours earlier. So, at 1:25 a.m., they went in and proceeded to seize the
18 contraband, guns, and other items which they had already noted from their earlier entries.
19 When word came at 2:15 a.m., while the searches were in progress, that the warrant had
20 been signed, the official approach was to treat these searches as though they conducted
21 pursuant to the warrant.

22 This Court should not be fooled by form over substance. The form of the warrant is
23 a pretext for what appears to be nothing more than warrantless searches masquerading as
24 warrant-related searches. The government has no choice but to hide behind the warrant
25 because no exigency or other exception to the warrant requirement would uphold the
26 seizure of the evidence. This is not a case, for example, where a warrantless search was
27 made necessary out of a fear of destruction of evidence. Cf. Schmerber v. California, 384
28 U.S. 757, 770-71 (1966) (exigent circumstances existed where delay necessary to obtain a

1 warrant threatened the destruction of evidence). Moreover, it should be noted that the
2 presence of drugs alone does not give rise to exigent circumstances justifying a warrantless
3 entry and search. *See* United States vs. Howard, 106 F.3d 70, 74 (2d Cir. 1997); United
4 States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986);

5 The law on this subject is axiomatic. The Fourth Amendment protects an
6 individual's reasonable expectation of privacy from unauthorized intrusion. *See* Katz v.
7 United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Where an individual
8 possesses a reasonable expectation of privacy -- such as in a residential location -- the
9 government must generally obtain a warrant before conducting a search. The United
10 States Supreme Court has stated: "Searches conducted outside the judicial process,
11 without prior approval by judge or magistrate, are per se unreasonable under the Fourth
12 Amendment -- subject only to a few specifically established and well-delineated
13 exceptions." Horton v. California, 496 U.S. 128, 133 n. 4 (1990) (quoting Katz, 389 U.S. at
14 357).

15 There is good cause to believe that in this case the initial entry and searches of the
16 Glenoaks and Herrick residences were conducted outside the judicial process and were,
17 therefore, per se unreasonable unless the government is able to show that an exception to
18 the warrant requirement applies.

19 "[T]he Fourth Amendment has drawn a firm line at the entrance to the house,"
20 Payton v. New York, 445 U.S. 573, 590 (1980), and it "is designed to prevent, not simply to
21 redress, unlawful police action." Chimel v. California, 395 U.S. 752, 766 n. 12 (1969).
22 Consequently, unless the government can show that the warrantless search was permissible
23 under an exception to the Fourth Amendment's warrant requirement, see Carter v. United
24 States, 729 F.2d 935, 940 (8th Cir.1984), the exclusionary rule would bar the admission of
25 evidence obtained from the warrantless search. *See* Mapp v. Ohio, 367 U.S. 643, 648,
26 (1961) (citation omitted); Weeks v. United States, 232 U.S. 383, 398 (1914).

27 On similar facts, the Fifth Circuit recently reversed the district court's denial of a
28 suppression motion in a drug case, finding that the officers' entry into the defendant's

1 property prior to the arrival of the search warrant constituted a “search” and that exigent
2 circumstances were lacking to justify a warrantless search. In United States vs. Blount, 98
3 F.3d 1489 (5th Cir. 1996), officer Weston went to defendant Blount’s residence and, without
4 a warrant, went into the back yard and peeked through a rear window, observing Blount
5 inside. The Circuit rejected the government’s argument that the officer’s action did not
6 amount to a search:

7 Proceeding chronologically, we begin with Weston's
8 observation of Blount through the small aperture in the rear
9 window. The district court found that Weston's actions did
10 not constitute an illegal search because he was in the backyard
11 to seal an avenue of escape and not to peer into the window.
12 This factual finding regarding Weston's subjective state of
13 mind is inapposite to the question presented, i.e., whether
14 Weston's objective conduct invaded the defendants' legitimate
15 expectation of privacy in the curtilage of their home. [footnote
16 omitted] We conclude and hold that when a police officer
17 walks into the partially fenced back yard of a residential
18 dwelling, using a passage not open to the general public, and
19 places his face within inches of a small opening in an almost
20 completely covered rear window to look into the house and at
21 the inhabitants, that officer has performed a "search" within
22 the meaning of the fourth amendment.

23 98 F.3d at 1495.

24 The analysis in Blount leads to the inescapable conclusion that the actions of the
25 officers in the case at bar clearly constituted a warrantless search. Here, the officers
26 actually *went inside* at least one of the residences prior to the arrival of the search warrant.
27 With regard to the Glenoaks residence, the police reports openly admit that the officers
28 went inside the residence and proceeded to observe evidence within the residence prior to

1 the arrival of the search warrant.²¹ Thus, the government is hard-pressed to deny that a
2 warrantless search was conducted. At an evidentiary hearing, the testimony of the officers
3 may indeed establish that the same type of warrantless search was conducted at the
4 Herrick residence, and that the *scope* of the searches conducted was more than the mere
5 “securing” of the two residences, as suggested in the police reports.

6 To lay a proper basis for suppression under the theory advanced here, an
7 evidentiary hearing should be held to establish:

- 8 (1) that the officers had made a warrantless entry in advance of seeking the warrant
9 and already knew what was inside the residences, thus using the warrant as a mere
10 pretext to legitimize what was really a warrantless search. [8:00 - 8:30 p.m.,
11 10/01/98]
- 12 (2) that prior to receiving word that the search warrant had been signed by the
13 Magistrate - Judge, and prior to having a signed warrant in their possession, the
14 officers proceeded to conduct the formal search of the residence, seizing evidence
15 that is the subject of this suppression motion. [approx 1:25 a.m., 10/02/98].
- 16 (3) that exigent circumstances were lacking to justify a warrantless search. The
17 purpose of the hearing;
- 18 (4) that the search warrant was misleading in failing to apprise the Magistrate - Judge
19 of the fact that the agents already knew what was inside the two residences as a
20 result of their warrantless entries but did not want this to be known to the issuing
21 judge. Accordingly, in addition to focusing on (1) and (2) above, the Court should
22 treat the evidentiary hearing as a *Franks* hearing under Franks v. Delaware, 438
23 U.S. 154 (1978).

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28 ²¹ Exhibit B, page 1911.

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VI.

CONCLUSION

For the reasons stated above, this Court should suppress the physical evidence seized from the Glenoaks and Herrick residences. At the very least, an evidentiary hearing should be conducted to establish that the searches were tantamount to warrantless searches lacking the requisite exigent circumstances.

DATED: November 21, 1998

Respectfully Submitted,

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