

Howard J. Shopenn (Bar No. 72641)
8484 Wilshire Blvd, Ste 605
Beverly Hills, CA 90211
(310) 657-1663

Gregory Nicolaysen (Bar No. 98544)
8530 Wilshire Blvd, Ste 404
Beverly Hills, CA. 90211
(310) 854-5135

Attorneys For Defendant,
Jose Luis Moreno

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CR 98-1081-SVW
)	
Plaintiff,	)	NOTICE OF MOTION
	)	AND MOTION FOR
v.	)	ORDER SUPPRESSING
	)	WIRETAP EVIDENCE OR,
	)	ALTERNATIVELY, SETTING
JOSE LUIS MORENO,	)	EVIDENTIARY HEARING;
	)	REQUEST FOR DISCOVERY
<u>et. al.</u>)	
	)	DATE: December 7, 1998
	)	TIME: 11:00 a.m.
Defendants	)	CTRM: HON. Stephen
_____	)	V. Wilson

NOTICE IS HEREBY GIVEN that on December __, 1998, at 11:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Stephen V. Wilson, defendant Jose Luis Moreno will move the court for an order (1) suppressing any and all wiretap evidence that the government may seek to introduce against him at the trial of this action, or in the alternative, (2) scheduling a Franks

hearing, and ordering the government to produce to the defense in advance of the hearing date all wiretap affidavits issued in connection with this investigation, other than the July 1, 1998 application which has already been produced.

This motion is brought on two grounds:

- (1) First, the government has failed to establish “necessity” for issuance of a wiretap order, as required under 18 U.S.C. 2518(1)(c) and (3)(c). Suppression of the wiretap evidence is warranted on this basis alone.
- (2) Second, if suppression is not granted based on the first ground above, there is reasonable cause to believe that the wiretap affidavit at issue contains misleading statements and omissions, such that an evidentiary hearing should be conducted under Franks vs. Delaware, 438 U.S. 154 (1978), and its progeny. In connection with the conduct of the hearing, discovery should be ordered, to wit, production of all prior wiretap affidavits (other than the July 1, 1998 affidavit already produced) for the purpose of demonstrating at the hearing that the government substantially relied upon necessity - related arguments from those earlier affidavits in fashioning its necessity arguments in the September 11 wiretap application which is the subject of this motion; that the government carried over a substantial amount of its necessity - related argument from those earlier affidavits; and misled the issuing judge by failing to disclose this fact.

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 12, 1998

Respectfully submitted,

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

A. Opening Statement

Defendant Jose Luis Moreno ["Defendant Moreno"] moves for an order suppressing all evidence of intercepted telephone conversations which the government acquired pursuant to a wiretap order issued on September 14, 1998.¹ In this memorandum, defendant Moreno will establish that the government's application for the wiretap order, despite its artful draftsmanship, fails to meet the specificity requirements for a finding of necessity under 18 U.S.C. 2518(1)(c) and (3)(c). This ground alone is a sufficient basis to suppress the subject wiretap evidence.

Alternatively, if the court finds that the wiretap application meets the requirements for showing statutory necessity, an evidentiary hearing (commonly referred to as a Franks hearing) is warranted because reasonable cause exists to believe that the wiretap affidavit contains misleading statements and omissions.

B. The Indictment

This is a drug case naming three defendants, including Defendant Moreno, who is charged in all four counts. Count One alleges conspiracy under 21 U.S.C. 846; the

¹ Defendant Moreno has standing to bring this motion because the government maintains that he was a party to intercepted communications and, as such, qualifies as an "aggrieved person" under 18 U.S.C. 2518(10)(a). United States v. Simpson, 813 F.2d 1462, 1471 n.11 (9th Cir. 1987).

objects of the conspiracy are the distribution of cocaine and marijuana. Count Two is a substantive count under 21 U.S.C. 841(a)(1) charging Moreno as an aider / abettor in regard to possession with intent to distribute 39.7 kilos of cocaine. Count Three charges Moreno under 841(a)(1) with possession / intent to distribute 107.6 kilos of cocaine. Count Four charges Moreno under 841(a)(1) with possession / intent to distribute 6.8 kilos of marijuana.

The stakes in this case are extremely high: if Moreno is convicted and the government prevails at sentencing in regard to Relevant Conduct and Role in the Offense enhancements, Moreno could be subject to a guideline range of thirty years to life.

C. The Wiretap Application And Order

The wiretap order which is the subject of this motion was issued on September 14, 1998 by U.S. District Court Judge Lourdes G. Baird [the "September 14 Order"], pursuant to the government's September 11, 1998 filing of an "Application For An Order Authorizing The Interception Of Wire Communications", Misc. No. 98-246 [the "September 11 Application"].²

This is the latest in a series of *two dozen* wiretap orders issued over a *one-year* time period since this investigation began in the summer of 1997. Again and again, the

² The September 11 Application is attached hereto as Exhibit "A." The September 11 Order is attached hereto as Exhibit "B". As used in this motion, the term "Application" means the application and accompanying wiretap affidavit signed by the DEA agent, Renee Marie Babic.

government has resorted to wiretaps as its principal investigative technique, apparently recycling the same generic, boilerplate language in its wiretap applications to rush from one wiretap order to the next.³ Typically, the wiretap applications are spaced apart by short time intervals, leaving little or no opportunity for any meaningful attempt to undertake normal investigative techniques, as required by law.

Judged both on its face and in the broader context in relation to prior wiretap applications, the September 11 Application raises serious issues regarding the adequacy of the showing on “necessity”. As discussed more fully in this motion, the statements contained in the affidavit regarding attempts to use normal, investigative techniques are nothing more than boilerplate, generic representations which the DEA commonly uses as a routine method of seeking wiretap authorization. On closer scrutiny, the September 11 Application fails to demonstrate that any good faith attempt was undertaken to employ normal, investigative techniques, or that further use of informants or undercover agents would be futile or too dangerous.

Moreover, beyond its facial deficiencies, the September 11 Application is misleading in a material respect, by suggesting to the issuing court that the particular investigative efforts that were either unsuccessful or fruitless were specific to the target

³ The government has only turned over to the defense only one prior wiretap Application, out of the nearly *two dozen* applications and orders issued in this investigation since the summer of 1997. The application turned over is dated July 1, 1998. Based on the large amount of carryover language from the July 1 Application to the September 11 Application, it is reasonable to infer that this recycling of standard, generic language, and the government’s reliance thereon, has been a routine practice from one application to the next. This raises serious questions as to whether the government has attempted to pursue normal, investigative techniques in regard to each new application and, in particular, the September 11 Application which is the subject of this motion.

of the September 11 Application. As discussed more fully, infra, there is reasonable cause to believe that these investigative efforts which purport to establish necessity in the September 11 Application were referenced in earlier wiretap affidavits in regard to other telephonic targets, and that the government merely *carried over* necessity-related arguments from one wiretap application to the next.

Thus, if the court does not suppress the wiretap evidence based on lack of necessity, a Franks hearing must be conducted to challenge the authenticity of the government's claim of necessity as to the target of the September 11 Application. What appears to be happening here is that the government has engaged in a pattern and practice of racing from one wiretap to the next, carrying over the same language from one affidavit to the subsequent affidavit, in an attempt to make the requisite showing of necessity for a wiretap.

This rapid-fire approach to the use of wiretaps seems to manifest a reckless indifference by law enforcement in conducting this investigation by which traditional investigative methods have been routinely bypassed in favor of the *convenience* of electronic surveillance, in total disregard of its strict legal obligations.

The applicable legal standards are discussed in the following section, followed by a discussion of the facts which support each of the grounds supporting this motion.

II.

WIRETAP EVIDENCE MUST BE SUPPRESSED WHERE THE GOVERNMENT’S AFFIDAVIT FAILS TO ESTABLISH THE REQUISITE NECESSITY UNDER 18 U.S.C. 2518

A. General Standards

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et. seq. (the “Act”) governs the use of governmental electronic surveillance. The Act attempts to balance the need for electronic surveillance against the obvious dangers inherent in electronic surveillance.

With this balance in mind, the government may utilize electronic surveillance when necessary to ferret out serious crime only when assurances have been made that citizens are not subjected to unreasonable and unnecessary intrusions into their privacy. United States v. Giordano, 416 U.S. 505, 526-527 (1974). Thus, electronic interception of private conversation may be conducted only after court authorization based upon government compliance with stringent predicate requirements.

The Ninth Circuit has long recognized the important policy considerations that underscore the critical balance between effective law enforcement and the restraint necessary to protect the public in the context of wiretap interception. *See, United States v. Kalustian*, 529 F.2d 585, 588 (9th Cir. 1976).

Central to this restraint is the government's burden to meet the "exhaustion" or "necessity" requirement of 18 U.S.C. § 2518(1)(c), which requires that each application for electronic surveillance include:

a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

The standard is reflected in 18 U.S.C. 2518(3)(c), which provides that the issuing judge shall determine whether

normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

The statutory standard is to be strictly applied. A district court must reject a wiretap application if law enforcement officers have not first attempted, without success, traditional investigative methods that "easily suggest themselves and are potentially productive and not unduly dangerous." United States v. Ippolito, 774 F.2d 1482, 1486 (9th Cir. 1985). The purpose of the necessity requirement is to insure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 (1974).

Because necessity is the keystone of Congressional regulation of electronic eavesdropping, courts have given close scrutiny to applications challenged for non-compliance. Kalustian, 529 F.2d at 589-90. This scrutiny has been recognized by the

Supreme Court as an essential component of judicial review of government conduct. *See, Dalia v. United States*, 441 U.S. 238 (1979) [(T)he plain effect of the detailed restriction of Sec. 2518 is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it and only to the extent that it is needed.”].

Where the government fails to comply with its duty to demonstrate necessity, suppression of wiretap evidence is the appropriate remedy, as provided for under the statute. 18 U.S.C. § 2515. *Giordano*, 416 U.S. at 527.

B. The Wiretap Affidavit Must Establish Necessity With Specificity

The necessity for the wiretap must be readily apparent from the affidavit. *United States v. Martinez*, 588 F.2d 1227, 1231 (9th Cir. 1978), cited with approval in *Ippolito*, 774 F.2d at 1485 (9th Cir. 1985). Moreover, necessity must be established with factual specificity. The government's affidavit in support of the wiretap order must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. *United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977).

Accord: Ippolito, 774 F.2d at 1486 [“Such a showing must allege specific circumstances that render normal investigative techniques particularly ineffective, or the application must be denied.”]

In order to show necessity, the government must overcome the statutory presumption against granting a wiretap application. *Ippolito*, 774 F.2d at 1486. The

presumption can not be overcome by conclusory, boilerplate or generic statements in the wiretap affidavit:

[a]n affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c). Spagnuolo, 549 F.2d at 710.

The policy supporting the necessity standard clearly militates against the government's use of boilerplate or generic language in the wiretap affidavit. Boilerplate assertions that the necessity standard is met based on an agent's knowledge and experience will not suffice. Spagnuolo, 549 F.2d at 710. As the Ninth Circuit explained in Ippolito,

The reason for requiring specificity is to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which a wiretap is sought. 774 F.2d at 1486.

On this point, the District of Columbia has observed that:

we must be careful not to permit the government merely to characterize a case as a "drug conspiracy" . . . that is therefore inherently difficult to investigate. The affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail.

[emphasis in original] United States v. Robinson, 698 F.2d 448, 453 (D.C.Cir. 1983)(per curiam), quoted per above in Ippolito, 774 F.2d at 1486, and in United States v. Simpson, 813 F.2d 1462, 1471 (9th Cir. 1987).

As explained in Spagnuolo, the government may meet the specificity requirement

in various ways, including, but not limited to, descriptions of the particular illicit operation's peculiarities which necessitate a wiretap and of the heretofore unsuccessful investigatory efforts of the police. 549 F.2d at 710.

[citations omitted] [emphasis added].

Focusing on this specificity requirement, the District Court in the Northern District of California (USDJ Walker) in U.S. vs. Ailemen, 986 F. Supp. 1228 (N.D. Cal. 1997) granted a motion to suppress wiretap evidence by finding, among other things, that the wiretap affidavit relied far too much on boilerplate, generic language. Citing Ippolito, 774 F.2d at 1486, the Court observed that “[s]uch generic language is far from specific about the inability of traditional methods to uncover specific information.”

C. Necessity Must Be Shown As To Each Telephone And Each Conspirator

The Ninth Circuit has expressly recognized that a showing of necessity is required for each telephone and each member of a conspiracy, and that the government cannot simply use its necessity argument as to one conspirator to justify a wiretap

against another conspirator. In United States vs. Carneiro, 861 F.2d 1171 (9th Cir. 1988), the Court suppressed wiretap evidence and was highly critical of the government's failure to comply with its statutory mandate. Citing the earlier Ninth Circuit opinions in United States vs. Brone, 792 F.2d 1506 (9th Cir. 1986), United States vs. Santora, 600 F.2d 1317 (9th Cir. 1979), and United States vs. Abascal, 564 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978), the Court in Carneiro made the following observations which highlight the strict standard by which the government must establish necessity as to each individual target of the wiretap, regardless whether they are all members of the same conspiracy:

The DEA failed to conduct an investigation of Harty prior to applying for authority to tap his telephone. Instead, it appears that the DEA sought the wiretap simply because Harty was believed to be a member of the conspiracy under investigation. A suspicion that a person is a member of a conspiracy, however, is not a sufficient reason to obtain a wiretap. Abascal, 564 F.2d at 826 (the government must do more than show that the telephone subscribers they wish to tap are all part of one conspiracy). *See also*, Brone, 792 F.2d at 1507 (the government may not dispense with the necessity showing with regard to one conspirator simply because it has proved necessity in the case of another); Santora, 600 F.2d

at 1321 (same). Rather, the government must satisfy the necessity requirement every time that it seeks a wiretap. Abascal, 564 F.2d at 826 (government must show that each wiretap separately satisfies the necessity requirement).

861 F.2d at 1180.

Moreover, Carneiro reiterates the key legal standard that

[T]here must be a showing of necessity with respect to each telephone and conspirator. [citations to Brone, Santora, and Abascal omitted]

861 F.2d at 1181.

As stated by the Ninth Circuit in Abascal, 564 F.2d at 826, cited with approval in Santora, 600 F.2d at 1320,

It is not enough that the agents believe the telephone subscribers they wish to tap are all part of one conspiracy. Less intrusive investigative procedures may succeed with one putative participant while they may not succeed with another.

Thus, the fact that the government may have obtained wiretap authorization against one or more members of a conspiracy does not permit the government to dispense with the required showing when applying to tap the telephones of other conspirators. Santora, 600 F.2d at 1320.

The Santora case provides a particularly useful illustration of the Ninth Circuit standard requiring the government to establish necessity as to each telephone and each conspirator. In that case, the Court held that although the government's first affidavit was sufficient to support the initial intercept order, it was insufficient to support authority to tap telephones of other suspected conspirators. The Court observed that the law is clear that each wiretap application must individually satisfy the necessity requirement. Id. at 1321. The defect recognized by the Court was that the Government had relied almost entirely on its previous affidavit. Id. at 1322.

In reversing the conviction, the Court in Santora suppressed the wiretap evidence as well as fruits of this illegal tapping, including the products of search warrants based on the intercepted conversations. In so holding, the Court made the following instructive comments:

The affidavit in support of the order failed to recited that any specific efforts had been made by federal agents to investigate the activities of those person whose telephones were to be tapped to discover each of those individuals' complicity in the offenses. Id.

D. The Affidavit Must Establish That The Government Undertook A Good Faith Effort To Apply Normal Investigative Techniques Prior To Seeking The Wiretap

The Ninth Circuit has "expressly adopted a practical and common sense approach in determining the sufficiency of government wiretap affidavits." Ippolito, 774 F.2d at 1486, citing Abascal, 564 F.2d at 825. The Circuit's approach is consistent with the legislative history of the wiretap statute. S.Rep.No. 1097, 90th Cong. 2d Sess. 1968, U.S. Code Cong. & Adm. News, pp. 2112, 2190.

Fundamental to this approach is a showing that the agents endeavored in good faith to successfully utilize normal investigative techniques:

[T]he affidavit must reveal that normal investigative techniques have been employed in a *good faith effort* to determine the identity of those violating the law and to assemble sufficient evidence to justify their prosecution and that these efforts have failed to achieve their ends.

Spagnuolo, 549 F.2d at 710. [emphasis added]

Accord: United States v. Brone, 792 F.2d at 1506 ["This necessity requirement means that the affidavit must set out a factual background that shows that ordinary investigative procedures, *employed in good faith*, would likely be ineffective in the particular case."] [emphasis added].

Accordingly,

although law enforcement agencies need not exhaust all conceivable alternative procedures before resorting to a wiretap, the government must show, by a full and complete statement, and the issuing court must find, that "normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time." Ippolito, 774 F.2d at 1486, quoting from Spagnuolo, 549 F.2d at 710. [emphasis added]

The agent's experiences are not sufficient to meet the good faith standard. Thus, for an agent to assert in an affidavit that, based on his/her experience, s/he believes that normal, investigative methods would fail or are too dangerous, is not sufficient to satisfy the good faith requirement. As explained in Ippolito, 774 F.2d at 1486,

Any such showing requires setting forth an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine, *independently of an agent's assertions with respect to his or other agents' experiences*, that ordinary investigative techniques very likely will not succeed or

that their use will imperil life or in some other specific way
be too dangerous. Id. [emphasis added]

III.

THE SEPTEMBER 11 APPLICATION HAS FAILED
TO ESTABLISH THE REQUISITE NECESSITY
TO JUSTIFY WIRETAP INTERCEPTION

D. Opening Statement

The government purports to establish necessity for wiretap authorization in the September 11 Application in the section entitled, “Need For Interception.”⁴ In this section, the government purports to show that normal, investigative techniques are inadequate in the following areas: use of informants; use of undercover agents; interview of witnesses; physical surveillance; search warrants; trash searches; and grand jury subpoenas. In large part, the government’s claims are boilerplate, generic representations commonly found in all wiretap affidavits and lack the required specificity to demonstrate why normal investigative techniques would fail as to the particular target of this wiretap application.

⁴ Exhibit A, pages 28 - 52, pars. 28 - 59.

E. Failure To Show Necessity As To Each Conspirator And Each Telephone

As discussed earlier, The Ninth Circuit has repeatedly held that the government must demonstrate necessity for *each* conspirator and telephone, and may not simply carry over necessity arguments from earlier wiretap applications filed against other conspirators with regard to other telephones. The law is clear that it is not enough for the government to show that the target of the present wiretap application is alleged to be a member of the same conspiracy as to which prior wiretaps had been issued previously against other conspirators. Carneiro, 861 F.2d at 1181 (“Agent Sanchez testified at the suppression hearing that this statement was merely carried over from previous wiretap applications”); Brone, 792 F.2d at 1507; Santora, 600 F.2d at 1321; Abascal, 564 F.2d at 826.

In the case at bar, the government has violated this cardinal rule. As discussed more fully below, the September 11 Application borrows heavily from the many prior wiretap applications filed against other members of the conspiracy and clearly fails to show necessity as to the specific telephone targeted (Telephone #9) or the particular conspirator who is alleged to be using that phone.

The government’s conduct causes the September 11 Application to be defective on both necessity and Franks - related grounds because the government not only carried over necessity arguments from earlier wiretaps, but also failed to disclose this to the issuing judge. Thus, this district court should examine the government’s conduct from both perspectives, and this issue will be addressed again later in this memorandum in regard to the request for the Franks hearing.

F. Absence Of Any Claim Of Danger

It is instructive to note, as a preliminary matter, that the September 11 Application does not, in any place, suggest (let alone asserts any facts showing) that wiretap authorization is being sought in lieu of normal investigative methods to avoid the risk of danger to the safety of an agent or informant. The government has not presented the issue of danger as a justification for wiretap authorization.

G. Extensive Reliance On Boilerplate, Generic Language

The September 11 Application is replete with boilerplate, generic language. Obvious examples can be found in the following examples:

1. “The interception of wire communications over Target Telephone #9 and electronic communications to Target Pager #4 is necessary in this matter because normal investigative procedures have been tried and have failed or appear reasonably unlikely to succeed if tried, or are too dangerous.”⁵
2. “Traditional methods of investigation will not work to accomplish the goals of this investigation, which include (but are not limited to) discovering: [(a) - (e) listed].”⁶

⁵ Exhibit A, par. 30e, at page 30, lines 10 - 14.

⁶ Exhibit A, par. 30e, at page 30, lines 15 - 27.

3. “I do not know of any individual who could act successfully as a confidential informant in this investigation now or in the future, . . .”⁷
4. “. . . based upon my experience with Mexican drug trafficking organizations, I believe that it is highly unlikely that an informant would learn about the full scope of the organization, the role each participant plays, the source(s) of supply, the methods of distribution or the means of distributing and concealing proceeds and assets.”⁸
5. “. . . normal investigative techniques have been tried and have failed, are reasonably unlikely to succeed if tried or are too dangerous.”⁹
6. “Normal investigative techniques have been tried and have failed, are reasonably unlikely to succeed if tried or are too dangerous.”¹⁰

Beyond the obvious use of boilerplate, generic language, the September 11 Application is craftily written so as to convey the impression that it is specific but in fact, upon closer scrutiny, is nothing more than a verbose narrative of predictable, frequently used law enforcement expressions – a law enforcement “language” – that masks the fundamental reality that the government simply did not undertake conventional investigative methods for the *particular target at issue* in the September 11 Application. *See, Ailemen*, 986 F. Supp. at 1239 (“Such generic language is far from

⁷ Exhibit A, par. 32, at page 31, lines 14 - 16.

⁸ Exhibit A, par. 32, at page 31, line 23, to page 32, line 1.

⁹ Exhibit A, par. 59, at page 52, lines 11 to 13.

¹⁰ Exhibit A, par. 66, at page 59, lines 18 to 20.

specific about the inability of traditional methods to uncover specific information.”). *See also, Ippolito*, 774 F.2d at 1486 (Court explicitly prohibited “sidestepping” of the necessity requirement with general allegations about “drug conspiracies.”).

In fact, the generic problem before this Court is not confined to the use of language per se, but applies to the overall design of the affidavit, which summarizes the general history of the investigation but does not specifically explain why the target of the September 11 Application cannot be investigated by conventional means.

H. Failure To Make Specific Efforts To Recruit Or Use Informants Against The Target(s) Of The September 11 Application

The September 11 Application refers to four confidential informants, identified as CI-1 through CI-4, who were known to the government prior to the wiretap application as being incapable of helping achieve the objects of the investigation.¹¹ As discussed more fully later in this motion, these four informants are carry-overs from the July 1 Application and thus do not reflect any good faith efforts by the government to recruit informants specifically in regard to the target of the September 11 Application. This issue is discussed more fully in the Franks analysis set forth in the next section of this memorandum

Without making any comparison to earlier wiretap applications, the September 11 Application is deficient on its face by relying on boilerplate, generic comments regarding the inadequacy of the four informants. Reducing all the verbage to its bare

¹¹ Exhibit A, pars. 33 - 36, at page 32, line 3, to page 34, line 12.

essence, what the government is saying is that it has four informants who have been around for a while; they don't have much information of value and are unwilling to testify. What the government has presented by this affidavit is nothing more than an illusion of necessity. Simpson, 813 F.2d at 1472. When matched against the standards previously discussed, artfully drafted representations in the affidavit regarding the four informants fall far short of the showing required under section 2518:

1. Failure To Recruit Viable Informants

The government knew well in advance of seeking its wiretap order that each of these informants was useless as an investigative resource. This is clear from a comparison of the September 11 Application with the earlier July 1 Application (outlined in more detail later in this motion). The government simply wanted a wiretap on Telephone #9 and did not want to spend the time or effort to recruit new informants. Thus, in order to persuade the issuing judge that informants were not a viable resource, the government merely set forth generic remarks about these four informants it already had in its ranks.

This is clearly insufficient. The government has clearly failed to meet its burden of showing that it endeavored in good faith to recruit viable informants who had the ability to help the government infiltrate the organization, specifically as to the targets who became the focus of the September 11 Application.

It is important to note that nowhere in the affidavit does the government discuss efforts undertaken to *recruit* viable informants. The affidavit merely states that four confidential informants, referenced as CI-1 through CI-4, do not have sufficient

information by which to achieve the goal of the investigation. The affidavit teaches no more than that. There is no explanation, as required, as to why in this particular investigation, ordinary means of investigation such as the recruitment and use of informants will fail or be too dangerous. Robinson, 698 F.2d at 453; Ippolito, 774 F.2d at 1486; Simpson, 813 F.2d at 1471; Spagnuolo, 549 F.2d at 711.

Under these circumstances, the affidavit provides nothing more than a conclusory assertion that informants cannot be used. Such assertions clearly fail the statutory test. Spagnuolo, 549 F.2d at 710.

2. Failure To Indicate Whether Additional Informants Could Be Located, Even Those With Only Partial Knowledge

Importantly, the affidavit fails to show, or even suggest, that the four informants at issue were the only individuals who could have been considered as possible informants -- i.e., that these four individuals constituted the entire pool of potential candidates.

Thus, it still remains to be shown whether other individuals, aside from the four people discussed, could have been recruited by the government to help infiltrate the target organization. On this point, the affidavit merely asserts that

I do not know of any individual who could act successfully as a confidential informant in this investigation either now or in the future . . .¹²

¹² Exhibit A, par. 32, page 31, lines 14 to 16.

. . . it is highly unlikely that an informant would learn about the full scope of the organization, . . .¹³

Stating that “I do not know” hardly comports with the due diligence requirements under the statute. Moreover, the obligation to explore the use of informants does not turn on whether the informants could disclose “the full scope” of the target organization. The government was required to attempt to recruit informants who had only partial knowledge about the target organization, and it failed to do so.

3. Failure To Describe Peculiarities Of The Target(s) Of The September 11 Application That Would Prohibit Infiltration By Informants

In filing the September 11 Application, the government maintained that the target organization extended to the individual(s) using Target Telephone #9. At the very least, the affidavit should have described the peculiarities of that branch of the subject organization prohibited its penetration by informants. Spagnuolo, 549 F.2d at 710.

By simply using boilerplate, generic remarks about the inadequacy of CI-1 through CI-4, the affidavit fails to explain or even suggest why the particular people who are being targeted by the September 11 Application cannot be successfully investigated through use of informants or other investigative means, even if other parts of the overall organization are suitable for wiretap interception. The case law cited above makes it clear that *peculiarity* is a critical aspect of the wiretap analysis: that is,

¹³ Exhibit A, par. 32, page 31, lines 25 to 26.

what is peculiar about the target of the pending wiretap application that makes normal, investigative techniques unsuccessful or futile? The September 11 Application completely fails to address the critical element of peculiarity by repeatedly stating boilerplate, generic comments that can easily be printed from a standard form at the DEA office.

For the foregoing reasons, the affidavit does not comply with the necessity requirements under 18 U.S.C. 2518. On this basis alone, the motion to suppress should be granted.

E. Failure To Make Specific Efforts To Use Undercover Agents Against The Target(s) Of The September 11 Application

In sharp contrast to the narratives on CI-4 through CI-4, the September 11 Application contains but one paragraph on the issue of whether undercover agents could penetrate the target organization. The affidavit merely asserts that “there are no undercover agents who are in a position to penetrate this money laundering and/or narcotics trafficking organization,” and no future prospects.¹⁴ Pure conclusory language, with no attempt made to state what, if any, efforts have been made, or could be made, to successfully use undercover agents. This is not a case, for example, in which the undercover agent aroused suspicion that he was a police officer. Cf., U.S. vs.

¹⁴ Exhibit A, par. 37, page 34, lines 14 to 22.

Blanco, 1994 WL 695396 (N.D. Cal., Dec. 8, 1994)¹⁵, cited with approval in Ailemen, 986 F. Supp. at 1240. Nor is this a case where a prolonged investigation proved unable to gain the defendant's complete trust. Cf., Spagnuolo, 549 F.2d 705 (nine month undercover operation unable to gain target's trust); U.S. vs. Commito, 918 F.2d 95 (9th Cir. 1990) (ten month investigation).

It is clear that the government wants its wiretap order quickly and does not want to be bothered with the effort and time required to employ normal, investigative techniques, such as the use of undercover agents. Quite frankly, the history of this investigation shows that the government became quite comfortable with the practice of rolling over one wiretap after another and gave short shrift to alternative investigative methods.

In upholding wiretap orders, the Ninth Circuit has generally taken note of diligent, albeit unsuccessful, efforts by agents to penetrate the drug conspiracy. E.g., Santora, 600 F.2d at 1321 (agents posing as customers were "personally rejected" by the defendant). Here, we are presented with the opposite scenario. The government doesn't want to be bothered trying.

Indeed, the September 11 Application conveys the distinct message that the government prefers not to delay the wiretap order because the agent is of the view,

¹⁵ The Westlaw citation given in the body of this memorandum is the only available citation. The opinion appears to be published but apparently does not have an F. Supp. citation. The same Westlaw citation was used in the 1997 opinion, U.S. vs. Ailemen, 986 F. Supp. 1228, 1240 (N.D. Cal. 1997).

based on his experience, that conventional investigative methods will not work.¹⁶ However, the Ninth Circuit in Spagnuolo made it very clear that the necessity showing must be sufficiently specific so that the issuing judge can make his/her own *independent* determination; opinions based on the agent's experience will not satisfy the government's obligation under section 2518(1)(c):

To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents as a waste of time and resources. Their perception may be accurate, but Congress has deprived it of decisive influence. The particularized showing here described is necessary. The district judge, not the agents, must determine whether the command of Congress has been obeyed.

Spagnuolo, 549 F.2d at 710-711.

In the case at bar, the government has sought to circumvent the standards clearly enunciated by the Ninth Circuit. Taking shortcuts that they were hoping to get away with in an effort to avoid what they perceived as a waste of time, the agents in this case failed to employ productive investigative methods to discover the information desired as to the target of the September 11 Application. For this reason, the

¹⁶

See Exhibit A, section entitled, "Need For Interception", pars. 28 - 59, at pages 28 - 52. This section is replete with the agent's personal opinions regarding the futility of attempting various conventional investigative methods.

government has not satisfied the necessity requirement. Carneiro, 861 F.2d at 1180. On this basis, suppression should be granted.

If the court finds that necessity has been shown, then as an alternative remedy, this Court should conduct a Franks hearing to explore the misleading nature of the statements made in the September 11 Application in regard to the government's claim of necessity. This issue is discussed in detail in the following section.

IV.

EVEN IF NECESSITY EXISTS ON THE FACE
OF THE WIRETAP AFFIDAVIT, SUPPRESSION
IS WARRANTED IF THE AFFIDAVIT CONTAINS
FALSE OR MISLEADING STATEMENTS THAT
ARE MATERIAL TO THE FINDING OF NECESSITY

When law enforcement officers circumvent the procedural requirements of section 2518(1)(c), courts must suppress the evidence obtained from the illegal wiretap. Thus, even where a wiretap application may appear to show necessity on its face, courts will suppress evidence derived from a wiretap order issued on the basis of an affidavit that contains material omissions or misstatements. *See, Carneiro*, 861 F.2d at 1179. The general proposition is that if these omissions and misstatements had been revealed in the application, “a reasonable district court judge could have denied the application

because necessity for the wiretap order had not been shown.” Ippolito, 774 F.2d at 1487; Simpson, 813 F.2d at 1472.

Applying the guidelines originally set forth by the Supreme Court in Franks vs. Delaware, 438 U.S. 154 (1978), suppression is warranted where

- (1) the affidavit contains misstatements or omissions made with the intent to deceive the issuing judge, or with a reckless disregard for the truth, that were material to the necessity determination; and
- (2) the affidavit, after the misstatements are deleted and the omissions are inserted, does not disclose the requisite necessity for a wiretap.

Ippolito, 774 F.2d at 1485 - 1487.

The Ninth Circuit has suppressed wiretap evidence in circumstances where the issuing judge was misled by the government’s failure to disclose that the necessity argument in the wiretap application derived from a previous wiretap application. In U.S. vs. Carneiro, 861 F.2d 1171 (9th Cir. 1988), which was cited earlier in this memorandum in connection with the necessity standard, the government filed a wiretap application seeking to tap a target named Hardy. In the same investigation, the government had previously obtained a wiretap against a target named McNeil.

The Circuit held that the defect in the Hardy wiretap affidavit was that it falsely suggested that the government had conducted a traditional investigation of Hardy prior to applying for the wiretap. In fact, as the Court in Hardy noted, “Agent Sanchez’s supporting affidavit appears to be a word processor copy of the allegations he set forth

in the McNeil wiretap application.” 861 F.2d at 1179.¹⁷ In ordering suppression of the wiretap evidence, the Court expressly observed that statements in the Hardy affidavit were “carried over from previous wiretap applications.” 861 F.2d at 1181.

Thus, the fact that the government carried over arguments on necessity from a previous application into the present application can serve as significant evidence of government misconduct because it may establish that the issuing court was led to believe that traditional methods of investigation had been undertaken in regard to the target of the present wiretap application.

The carry-over problem is not resolved in the government’s favor simply by disclosing the existence of the previous wiretap application in the body of the present application. In U.S. vs. Santora, 600 F.2d 1317 (9th Cir. 1979), also cited earlier in connection with the necessity standard, the Circuit suppressed all wiretap evidence, and fruits thereof, based on the government’s noncompliance with section 2518(1)(c). In that case, the Court observed that “the Government relied almost entirely on its previous affidavit.” 600 F.2d at 1322. The present affidavit expressly referred to the prior affidavit and “incorporated by reference” statements contained in the prior

¹⁷

It should be noted that the September 11 Application and the July 1 Application contain supporting affidavits by the same DEA agent. Defense counsel has not been provided with any of the other supporting affidavits for the other two dozen wiretaps in this investigation; it would seem likely that a substantial number of those were also prepared by the same agent, since the vast majority of prior wiretap orders were issued by district court judges in the Central District of California. Thus, the facts of this case are parallel with those in Carneiro not only in terms of the carry-over from the July 1 Application to the September 11 Application (discussed in the next section of this memorandum), but also in terms of the same agent preparing each of the wiretap affidavits. The carryover from one affidavit to the next is thus deliberate and purposeful because the same agent is preparing them.

affidavit. Thus, there was no concealment of the existence of the prior affidavit from the issuing judge. Nonetheless, the government's reiteration of necessity - related arguments from the prior affidavit caused the present affidavit to be fatally defective because it

failed to recite that any specific efforts had been made by federal agents to investigate the activities of those persons whose telephones were to be tapped to discovery each of those individuals' complicity in the offenses. Reference to the previous affidavit was insufficient to meet the requirements of Section 2518(1)(c) . . .

600 F.2d at 1322.

Judged by these standards, the September 11 Application contains misleading statements insofar as it fails to disclose to the issuing judge the government's practice of carrying over necessity - related arguments from prior wiretap affidavits in this investigation. As discussed in detail in the next section, the Application relies heavily on references to prior affidavits; fails to disclose that this Application is largely a re-hash of old arguments presented in earlier applications; and conveys a misleading illusion that specific efforts had been made by federal agents to investigate the target(s) of the Application, when in fact the purported efforts were just the same generic contentions asserted earlier in wiretap applications pertaining to other members of the conspiracy.

Defendant Moreno respectfully contends that the factual discussion that follows makes a preliminary showing sufficient to warrant a Franks hearing.

V.

EVEN IF THIS COURT FINDS THAT THE
SEPTEMBER 11 APPLICATION DEMONSTRATES
NECESSITY ON ITS FACE, THE DEFENSE HAS MADE
A SUFFICIENT PRELIMINARY SHOWING OF
MISLEADING REPRESENTATIONS IN THE
SEPTEMBER 11 AFFIDAVIT TO JUSTIFY
THE CONDUCT OF A *FRANKS* HEARING

In a nutshell, the September 11 Application is highly misleading because it appears to substantially rely upon the same necessity arguments presented in earlier wiretap applications against other members of the conspiracy, while purporting to show that specific, conventional efforts had been made to investigate the activities of the target(s) of the September 11 Application.

The target of the September 11 Application is referred to in the affidavit as Telephone Target #9.¹⁸ In seeking to establish necessity for the wiretap, the government referred directly to the earlier wiretap applications in this investigation:

¹⁸

Exhibit A, par. 6a, at page 2, line 24, to page 3, line 5.

Several confidential informants (“Cis”) have been interviewed during the course of this investigation. However, for the reasons discussed in more detail in prior affidavits in support of the applications for authorization to intercept communications over Target Telephones #1, #2, #3, #4, #5, #6, #7 and #8, none of these informants has information about or access to the Target Subjects to the extent necessary to achieve the goals of this investigation.¹⁹

This point was reiterated towards the end of the necessity section of the September 11 Application:

. . . During the course of this investigation, I have obtained information regarding this organization from judicially - authorized wiretaps in Los Angeles, California and other judicially - authorized electronic surveillance, including the wire interception of calls to and from Target Telephones #1, #2, #3, #4, #5, #6, #7, #8, and Target Pagers #1, #2, and #3.²⁰

¹⁹ Exhibit A, par 32, at page 31, lines 6 to 13. It is important to note that the September 11 Application is stating, in essence, that this application draws from the wiretap applications for all of the preceding eight telephone targets – i.e., the entire history of this investigation. Thus, the merits of the September 11 Application cannot be evaluated standing alone, but must be judged in the overall context of all of the antecedent wiretap applications.

²⁰ Exhibit A, par. 58, at page 51, lines 5 to 10.

As the chronology outlined below demonstrates, the government moved repeatedly from one wiretap to another, strongly suggesting that the justification for the wiretap in the September 11 Application is nothing more than a re-hash of the same generic commentary set forth in each of the antecedent applications.

Serious integrity questions must be raised in assessing whether the government has merely recycled, or carried over, necessity arguments from prior applications to the September 11 Application. As discussed earlier in this memorandum, the law is clear that a showing of necessity must be made as to each specific target of a wiretap application; the government may not simply carry over prior necessity arguments made in earlier applications regarding other telephone targets.

Thus, it is essential to examine the integrity of the September 11 Application by its reliance upon, and cross-references to, the earlier wiretap applications. Indeed, the September 11 Application openly acknowledges its dependency upon the necessity claims made in earlier applications. For example, early in the Application, the affiant states that the request for wiretap authorization is based in part on information obtained through the interception of conversations pursuant to a wiretap order issued on July 2, 1998, by U.S. District Court Judge William D. Keller [the "July 2 Wiretap Order"], pursuant to the government's July 1, 1998 filing of an "Application For An Order Authorizing The Interception Of Wire Communications", Misc. No. 98-189 [the "July 1 Application"].²¹

²¹ Exhibit A, at page 2, par. 5(f), lines 21-23. The July 1 Wiretap Application and July 2 Order are attached hereto as Exhibit "C."

Moreover, the September 11 Application expressly states, in its section on Probable Cause, that

The information contained in this affidavit is based upon information developed through the use of judicially-authorized interception of wire and electronic communications to and from several devices (including Target Telephones #1, #2, #3, #4, #5, #6, #7, and #8 and Target Pagers #1, #2, and #3) . . .²²

The target telephone and pager numbers referenced in the above excerpt pertain to prior wiretap orders issued in this investigation.²³ The above reference to earlier wiretap orders is reiterated toward the end of the Application.²⁴

The government has failed to provide defense counsel with any of the prior wiretap affidavits other than the July 1 Application. It is deeply troubling that the September 11 Application relies upon a lengthy list of antecedent wiretaps (outlined below), but only one such prior application has been turned over to the defense. This failure by the government heightens suspicion that what the government has been doing is merely rehashing old language from earlier affidavits into subsequent

²² Exhibit A, at page 13, par. 11, lines 22 to 26. The July 1 Application contains virtually identical language. See Exhibit C, at page 13, par. 11, lines 25 to 28.

²³ See also, Exhibit A, at page 15, footnote 3, wherein the government cross-references the same prior wiretap applications in stating that the probable cause analysis in the September 11 Application is substantially similar to that set forth in each of the prior affidavits.

²⁴ Exhibit A, at page 51, par. 58.

affidavits, and that the September 11 Application is a mere rehash of old stuff – a clear violation of the government’s good faith duty to undertake normal, investigative techniques in regard to the specific target of the wiretap application at hand – i.e., Telephone Target #9.

In the section entitled, “Prior Applications For Interception”, the September 11 Application sets forth a chronological history of antecedent wiretap authorizations relating to this investigation.²⁵ For the court’s convenience, the chronology of the prior wiretap orders is listed below with footnote references to the September 11 and July 1 Applications:²⁶

<u>Date Of Order</u>	<u>Issuing Judge</u>	<u>Since Last Wiretap Application</u>
August 18, 1997	James Ideman, CD Cal; ²⁷	(first application)
August 19, 1997	Dean Pregerson, CD Cal; ²⁸	one day

²⁵ Exhibit A, section entitled, “Prior Applications For Interception”, pages 5 - 13, and in particular, page 5, lines 17-20, which expressly preface the chronology by stating that the prior wiretaps are part of the instant investigation. See also, Exhibit C, section entitled, “Prior Applications For Interception”, pages 5 - 13, which contains references to additional related wiretap orders issued in this investigation which are not included in the September 11 Application’s historical recitation.

²⁶ Id.

²⁷ Exhibit A, at page 5, par 10a., line 21, to page 6, line 2.
Exhibit C, at page 5, par 10a., line 22, to page 6, line 3.

²⁸ Exhibit A, at page 6, par 10b., lines 3 to 10.
Exhibit C, at page 6, par 10a., lines 4 to 11.

This order was for the continued interception of a phone number not previously referenced in the two affidavits; it appears, therefore, that the affidavit has failed to mention the date when this wiretap was originally issued. Thus, the chronology of wiretapping in this investigation may date back even before August 18, 1997. It should also be noted that the chronology set forth in the affidavits (reprinted in this motion) lists wiretap orders that were for both original interception and for continued interception. This distinction is of no significance in

<u>Date Of Order</u>	<u>Issuing Judge</u>	<u>Since Last Wiretap Application</u>
September 17, 1997	Dean Pregerson, CD Cal; ²⁹	48 days
October 17, 1997	Dean Pregerson, CD Cal; ³⁰	30 days
January 21, 1998	Manuel Real, CD Cal; ³¹	3 months, four days
January 26, 1998	Manuel Real, CD Cal; ³²	five days
February 13, 1998	Frederic Block, EDNY; ³³	14 days
February 24, 1998	Audrey Collins, CD Cal; ³⁴	11 days
February 24, 1998	J. Spencer Letts, CD Cal; ³⁵	same day
March 6, 1998	Frederic Block, EDNY; ³⁶	10 days

regard to the arguments raised in this motion regarding the government's pattern of recycling its necessity arguments from one application to the next. The issuing court is required to make the same findings for an extension order as for an original order. United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986).

²⁹ Exhibit A, at page 6, par 10c., lines 11 to 17.
Exhibit C, at page 6, par 10c., lines 12 to 18.

³⁰ Exhibit A, at page 6, par 10d., line 18 - 28.
Exhibit C, at page 6, par 10d., line 19, to page 7, line 1.

³¹ Exhibit C, at page 7, par 10e., lines 2 - 16.

³² Exhibit C, at page 7, par 10f., line 17, to page 8, line 2.

³³ Exhibit A, at page 7, par 10e., lines 1 to 13.
Exhibit C, at page 8, par 10g., lines 3 to 15.

³⁴ Exhibit C, at page 8, par 10h., lines 16 to 23.

³⁵ Exhibit C, at page 8, par 10i., line 24, to page 9, line 4.

³⁶ Exhibit A, at page 7, par 10f., lines 14 to 20.
Exhibit C, at page 9, par 10j., lines 5 to 11.

<u>Date Of Order</u>	<u>Issuing Judge</u>	<u>Since Last Wiretap Application</u>
March 13, 1998	Charles Sifton, EDNY; ³⁷	7 days
March 27, 1998	Manuel Real, CD Cal; ³⁸	14 days
April 7, 1998	Frederic Block, EDNY; ³⁹	10 days
April 24, 1998	William Keller, CD Cal; ⁴⁰	17 days
May 6, 1998	Frederic Block, EDNY; ⁴¹	14 days
May 21, 1998	Richard Toohey, Sup. Ct.; ⁴²	15 days
May 22, 1998	Curtis Rappe, Sup. Ct.; ⁴³	1 day
June 3, 1998	Frederic Block, EDNY; ⁴⁴	13 days
June 16, 1998	William Keller, CD Cal; ⁴⁵	13 days

³⁷ Exhibit A, at page 7, par 10g., lines 21 to 27.
Exhibit C, at page 9, par 10k., lines 12 to 19.

³⁸ Exhibit C, at page 9, par 10l., lines 20 to 27.

³⁹ Exhibit A, at page 8, par 10h., lines 1 to 15.
Exhibit C, at page 9, par 10m., line 28, to page 10, line 15.

⁴⁰ Exhibit C, at page 10, par 10n., lines 16 to 23.

⁴¹ Exhibit A, at page 8, par 10i., line 17, to page 9, line 6.
Exhibit C, at page 10, par 10o., line 24, to page 11, line 14.

⁴² Exhibit C, at page 11, par 10p., line 15, to 21.

⁴³ Exhibit C, at page 11, par 10p., line 21, to page 12, line 1.

⁴⁴ Exhibit A, at page 9, par 10j., lines 7 to 28.
Exhibit C, at page 12, par 10q., lines 2 to 23.

⁴⁵ Exhibit A, at page 10, par 10k., lines 1 to 14.
Exhibit C, at page 12, par 10r., line 24, to page 13, line 15.

<u>Date Of Order</u>	<u>Issuing Judge</u>	<u>Since Last Wiretap Application</u>
June 30, 1998	William Keller, CD Cal; ⁴⁶	14 days
<i>July 2, 1998</i>	<i>William Keller, CD Cal;⁴⁷</i>	<i>3 days</i>
July 15, 1998	William Keller, CD Cal; ⁴⁸	13 days
July 29, 1998	Lourdes Baird, CD Cal; ⁴⁹	14 days
August 10, 1998	Lourdes Baird, CD Cal; ⁵⁰	12 days
August 25, 1998	Lourdes Baird, CD Cal; ⁵¹	15 days
<i>September 14, 1998</i>	<i>Lourdes Baird, CD Cal;⁵²</i>	<i>20 days</i>

Judged against the backdrop of this lengthy chronology, the September 11 Application raises serious questions as to whether the claim of necessity contained therein is merely a carry-over from earlier applications, in violation of law. Of particular importance is the misleading nature of the government's practice: to the extent the government has re-stated (or carried over) necessity - related arguments

⁴⁶ Exhibit A, at page 10, par 10l., lines 15 to 22.
Exhibit C, at page 13, par 10s., lines 16 to 23.

⁴⁷ Exhibit A, at page 10, par 10m., line 23, to page 11, line 2.
This entry has been italicized to emphasize that the July 2, 1998 wiretap application / order is Exhibit C to this motion.

⁴⁸ Exhibit A, at page 11, par 10n., line 3, to page 12, line 12.

⁴⁹ Exhibit A, at page 12, par 10o., lines 13 to 21.

⁵⁰ Exhibit A, at page 12, par 10p., line 12, to page 13, line 2.

⁵¹ Exhibit A, at page 13, par 10q., lines 3 to 20.

⁵² This is the instant application / order which is the subject of this motion.

from earlier wiretap applications, the government has misled the issuing court in the September 11 Application by failing to inform the court that the necessity contentions are not unique to Target Telephone #9, but rather are the same, or substantially the same, arguments made in earlier wiretap applications regarding other telephone targets.

While defense counsel in this case only have the July 1 Application with which to substantiate this concern at this time, a comparison between the necessity section of the September 11 Application and the necessity section of the July 1 Application strongly supports the view that the government has been engaged in a pattern and practice of carrying over old arguments into each successive wiretap application, thus demonstrating that the September 11 Application (1) was misleading to the district court, and (2) fails to meet the necessity standard when the misleading statements are redacted, as they should be.

The following chart provides an overview of the substantial similarity between the September 11 Application and July 1 Application on the claims of necessity:

Subject Matter	July 1 Application	September 11 Application
Use Of Informants	Refers to five unnamed informants: CI-1 - CI5. ⁵³	Refers to four unnamed informants: CI-1 - CI4. These appear to be the same individuals referred to as CI-1 - CI4 in the July 1 Application
Use Of Informants: CI-1	Refers to meetings between CI-1 and Ramon in 1997 and purports to establish why CI-1 is inadequate to fulfill goal of investigation. ⁵⁴	A carry-over from the July 1 Application. Refers to the exact same information, including the meeting with Ramon in 1997. Fails to set forth any specific information regarding Target Telephone #9. ⁵⁵ <i>Note: the affidavit begins its discussion of CI-1 by stating, in par. 33: "As set forth in previous affidavits, ..."</i>
Use of Informants: CI-2	Refers to CI-2's second-hand information about target Aramburo's narcotics organization, meetings with FBI agent Thomas Rafferty, and generally purports to establish why CI-2 is inadequate to fulfill goal of investigation. ⁵⁶	A carry-over from the July 1 Application. Refers to the exact same information, including the meeting with agent Rafferty and the second-hand knowledge about Aramburo. ⁵⁷ Nothing specific or unique as to Target Telephone #9. <i>Note: the affidavit begins its discussion of CI-2 by stating, in par. 34: "As set forth in previous affidavits, ..."</i>

⁵³ Exhibit A, pages 32 to 34; Exhibit C, pages 33 to 37.

⁵⁴ Exhibit C, pars. 38 - 40, page 33, line 24, to page 34, line 15.

⁵⁵ Exhibit A, par. 33, page 32, at lines 3 to 15.

⁵⁶ Exhibit C, pars. 41 - 43, page 34, line 16, to page 35, line 11.

⁵⁷ Exhibit A, par. 34, page 32, line 17, to page 33, line 4.

Subject Matter	July 1 Application	September 11 Application
Use Of Informants: CI-3	States that CI-3 has useful information about the target of the investigation and is willing to testify but is needed by the government in other investigations. ⁵⁸	A carry-over from July 1 Application. The government is referring to the same informant but now states that the informant has been terminated by the government. This is the <i>opposite</i> of seeking to recruit viable informants: the government is merely telling the court that an old informant is no longer available. ⁵⁹
Use Of Informants: CI-4	Same as CI-3: States that CI-4 has useful information about the target of the investigation and is willing to testify but is needed by the government in other investigations. ⁶⁰	A carry-over from July 1 Application. The government is referring to the same informant but states that the informant cannot be helpful. ⁶¹ Nothing specific or unique as to Target Telephone #9.
Use Of Undercover Agents	A boilerplate, generic statement that undercover agents would not be able to penetrate the target organization. ⁶²	A carry-over from July 1 Application. Almost a verbatim reiteration. Nothing specific or unique as to Target Telephone #9. ⁶³ <i>Note: par. 34 contains the phrase, "As discussed in prior affidavits, . . ."</i>

⁵⁸ Exhibit C, pars. 44 - 46, page 35, line 13, to page 36, line 18.

⁵⁹ Exhibit A, par. 35, page 33, lines 6 to 13.

⁶⁰ Exhibit C, pars. 44 - 46, page 35, line 13, to page 36, line 18.

⁶¹ Exhibit A, par. 36, page 33, line 15, to page 34, line 12.

⁶² Exhibit C, par. 49, page 37, line 16, to page 38, line 17.

⁶³ Exhibit A, par. 37, page 34, lines 14 to 22.

Subject Matter	July 1 Application	September 11 Application
Interviews Of Witnesses	A boilerplate, generic statement that there are no witnesses available who are able to provide information by which to achieve the objective of the investigation. ⁶⁴	A carry-over from July 1 Application, with an almost verbatim reiteration of the same boilerplate, generic statements. Nothing specific or unique as to Target Telephone #9. ⁶⁵
Physical Surveillance	Provides summary of dates when surveillance was conducted and states that this is inadequate to achieve objectives. Specific Dates: June 20 and 22, 1998. ⁶⁶	A carry-over from July 1 Application, with an almost verbatim reiteration of the June 20 and 22 surveillance. The only difference from the July 1 Application is that this affidavit adds discussion of surveillance conducted subsequent to the filing of the July 1 Application, but is otherwise substantially the same. ⁶⁷

The substantial similarity between the July 1 Application and September 11 Application strongly suggests that the government has misled the issuing court by failing to disclose that the necessity arguments outlined above in the September 11 Application were largely carried over from prior wiretap applications and thus failed to satisfy the legal requirements that normal, investigative efforts be undertaken *specifically for the target of the wiretap application at issue.*

The government cannot escape the sanction of suppression by arguing that the September 11 Application openly disclosed the existence of the prior applications and thus was not in any way trying to conceal the Application's dependency on the prior

⁶⁴ Exhibit C, par. 50, page 38, line 19, to page 39, line 21.

⁶⁵ Exhibit A, par. 38, page 34, lines 24, to page 35, line 25.

⁶⁶ Exhibit C, pars. 51 - 55, page 39 , line 23, to page 43, line 21.

⁶⁷ Exhibit A, pars. 39 - 40, page 35, lines 26, to page 41, line 22.

applications. Under substantially similar facts involving a wiretap affidavit that cross-referenced to earlier wiretap affidavits in the same investigation, the Ninth Circuit in Santora expressly held that “[r]eference to the previous affidavit was insufficient to meet the requirements of Section 2518(1)(c).” 600 F.2d at 1322. In the case at bar, there is reasonable cause to believe that the government in this case misled the issuing judge by failing to disclose the extent to which the September 11 Application is a mere re-hash of prior necessity arguments – a mere carry-over from earlier applications.

V.

CONCLUSION

In sum, the foregoing analysis makes a preliminary showing that the section of the September 11 Application entitled, “Need For Interception”, was “artfully drafted with the intent to mislead the [issuing] judge.” Simpson, 813 F.2d at 1471, cited in Ailemen, 986 F. Supp. at 1237. This preliminary showing is clearly sufficient to warrant a Franks hearing to enable this district court and counsel to properly explore the government’s failure to properly disclose to the issuing judge the extent of its reliance on prior wiretaps, its practice of carrying over necessity - related arguments from one wiretap application to the next, and its failure to undertake bona fide, good faith efforts to explore normal, investigative efforts as to Target Telephone #9 prior to seeking a wiretap.

Based on the analysis and arguments presented above, defendant Moreno respectfully contends that this court should:

1. **Suppress all wiretap evidence based on the government's failure to demonstrate statutory necessity;**
2. **Alternatively, conduct a Franks hearing and direct the government to turn over to defense counsel in advance of the hearing date, all of the antecedent wiretap affidavits outlined in the chronology set forth in this motion. This will enable the defense and the court to assess the scope of the government's dependency on prior wiretaps and its failure to properly disclose such dependency to the issuing judge in its September 11 Application.**

DATED: November 13, 1998

Respectfully Submitted

**HOWARD J. SHOPENN
GREGORY NICOLAYSEN
Counsel for Defendant,
Jose Luis Moreno**