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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE M. JAMES LORENZ)

UNITED STATES OF AMERICA, Plaintiff, v. Refugio Games-Lopez (3) Defendant.	Case No. 93cr471-MJL Date: November 5, 2007 Time: 2:00 p.m. **MEMORANDUM IN SUPPORT OF MOTIONS**

I.

Introduction and Questions Presented

A. *Doggett* Motion:

The Sixth Amendment guarantees the right to a speedy trial after indictment. As little as a one-year delay between indictment and arrest triggers a presumption of prejudice. Mr. Games-Lopez suffered a 13-year delay between indictment and arrest, at least seven of which he spent living openly in the United States, unaware of the indictment, his whereabouts and personal information known to the federal government. Should the indictment be dismissed for post-indictment delay?

B. Illegal Search Motion(s):

A search warrant cannot be based upon illegally-obtained evidence or on misrepresentations of fact. Here, agents illegally searched a property, relying on clearly insufficient "consent" given by a neighbor who had no authority to allow agents onto the land. They then used fruits of the illegal search to get a search warrant. Agents also swore in the warrant affidavit that energy consumption on the property had tripled, but the bills themselves proved this statement to be untrue. Should this Court suppress illegally-obtained evidence, excise it and other untruths from the search affidavit, and then quash the warrant for lacking probable cause?

II.

Statement of Facts

A. Background.

Fourteen years ago, the government indicted Mr. Games-Lopez and two co-defendants on various charges related to the alleged manufacture of methamphetamine at a ranch in rural Escondido. Mr. Games-Lopez lived in a house on the ranch; other men lived in several out-structures on the property. No methamphetamine existed in the areas controlled by Mr. Games-Lopez. All of the drugs were found in structures or vehicles used by the other men on the ranch. The government, however, dismissed charges entirely against one of the defendants. The other received 60 days' custody for violation of 8 U.S.C. § 1325 only. Mr. Games-Lopez has pleaded not guilty to these drug charges, and files the present motions to address serious constitutional concerns that have arisen during the investigation and delayed prosecution of this case.

B. Facts relating to post-indictment delay.

In the early 1990's, Mr. Games-Lopez, like many men from Mexico, worked in the United States and sent money back home to his family. He had become a Legal Permanent Resident of the United States, and lived on a ranch in rural Escondido.

In about 1993, his wife contacted him and asked him to come back to Mexico. She

needed his help with the children, she said.[1] He obliged. He was unaware that in his absence, he would be included in a federal methamphetamine indictment, or that the other residents of the property would attempt to blame him for their apparent misdeeds.[2]

Approximately seven years later, in 2000, Mr. Games-Lopez's children were older, and he agreed to return to the U.S. for work. An acquaintance informed him that there was good factory work to be had in the state of Indiana, and so he traveled there.[3]

Mr. Games-Lopez still had no idea that he had been indicted, and he acted like it. Within a year of returning to the U.S., he lived openly in the United States, including:

- establishing an address at 712 Water Street, Ligonier, Indiana, 46767. He has remained at that address for the last seven years.[4]
- renewing his green card with the INS.[5] The INS granted him a new resident card without incident. The application confirms that the government had the same 712 Water Street address through the INS.[6]
- obtaining work using his own name and social security number.[7]
- paying federal taxes every year, again using the same name, address, and social security number.[8] IRS records confirm that the government again received the 712 Water Street address and Mr. Games-Lopez's social security number.

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[1] *See* Declaration of Refugio Games-Lopez, attached as Exhibit A.

[2] *Id.* at 1-2 (swearing that he was unaware of the pending indictment).

[3] *Id.*

[4] *See* Exhibit A, at 2.

[5] *See* Application to Replace Alien Registration Card, attached as Exhibit B.

[6] *Id.*

[7] *See* Confirmation from Employers (including social security numbers), attached as Exhibits C, D. Note that pursuant to General Order 514-A, Mr. Games' social security number has been redacted from the publicly-filed version of these documents; an unredacted copy will be provided to the Court and government under seal.

[8] *See* IRS Taxpayer Account Transcript, 2001-2006, attached as Exhibit E.

- obtaining an Indiana driver's license, again using the same contact information.[9]
- crossing the border once or twice a year to visit his family, using his LPR card for entry each time.[10]

Importantly, evidence reveals that the government possessed Mr. Games' valid social security number – and very likely other contact information – since its investigation began in 1993.[11]

C. Facts relating to the search of the Old Wagon Road property.

Agents claim that in March of 1993, they received a report of "suspicious activity" on the ranch at Old Wagon Road.[12] Agents spoke to a neighbor, Jack Keck. Keck stated that he knew the owner of the property, and that the owner had allowed Keck to go onto the property in the past. He claimed that "on occasion" he would use the property for hunting and hiking.[13] Significantly, Keck never claimed any ownership or possessory interest in the property, or that he had authority to allow other persons onto the land.[14]

Nevertheless, a federal agent entered the property without permission of Mr. Games-Lopez (who lived on the property), or his uncle (who owned the property), accompanied only by neighbor Keck.[15] While on the property, the agent apparently saw several items that he associated with possible drug manufacturing, including plastic drums, hoses, and electrical cords. The agent also uncovered additional evidence and residue consistent with methamphetamine buried within a pile on the property.[16] The agent related all of these

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[9] *See* Declaration of Leila Sayar, attached as Exhibit F.

[10] *See* Exhibit A, at 2.

[11] *See* Exhibit G, IRS documents seized during search (including name and same social security number filed with the IRS).

[12] *See* Report of Investigation, attached as Exhibit H.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

1 observations to the magistrate in applying for a search warrant.[17]

2 But the agent related other facts to the magistrate as well – "facts" that were simply

3 untrue. The agent claimed that "the electric bill for the last month (Feb-Mar) has tripled."[18] This

4 increase also showed the operation of a methamphetamine lab, according to the agent.[19] The

5 agent claimed that he and his partner actually looked at the electric bill itself.[20]

6 The electric bills never supported the agents' sworn testimony, however. As the table

7 below indicates, there was simply no three-fold increase in electricity use:

8 **ELECTRICITY BILL: 23010 OLD WAGON ROAD**[21]

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Service Dates and Meter Reading Period	Total Amount Due	Fluctuations: [+/-] Amount	% of increase/ decrease	Meter reading (in KWHR)
9/21/1992 - 10/20/1992	$174.22[22]	$0	0%	1472
11/18/1992 - 12/18/1992	$152.60	- $21.62	- 12.4%	1341
12/18/1992 - 1/20/1993	$186.51	+ $33.91	19.5%	1618
1/20/1993 - 2/19/1993	$149.55	- $36.96	- 21.2%	1305
2/19/1993 - 3/22/1993	$215.64	+ $66.09	37.9%	1840

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19 Because the agent did not provide the actual electric bills to the magistrate, his testimony

20 went unchallenged, and the warrant was issued.

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22 [17] *See* Search Warrant Affidavit, attached as Exhibit I.

23 [18] *Id.* at 5, line 11.

24 [19] *Id.* at 5, lines 12-15.

25 [20] *Id.* at 5, lines 15-17 ("the cooperating citizen showed your affiant and S/A Leininger

26 the electrical bill for this period.").

[21] See Monthly Electric Bills for 23010 Old Wagon Road, attached as Exhibit J.

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28 [22] This table uses Sept-Oct. as the baseline for percentage-of-increase calculations, because it is the first billing period provided by the government in discovery.

After obtaining the warrant, agents searched the premises a second time. They did find some methamphetamine – not in the blue house where Mr. Games-Lopez stayed, but in a vehicle that belonged to the landlord of the property.[23] Agents also found some rubber gloves, aluminum foil, and plastic baggies in a trailer used by one of the other tenants.[24]

An arrest warrant for Mr. Games-Lopez followed the discovery of the contraband, and he was arrested fourteen years later. These motions follow.

III.

Discussion

This case should be dismissed on either one of two independent grounds: 1) unconstitutional post-indictment delay; and/or 2) following the suppression of the drugs and other evidence that form the basis of the charges.

A. This Court should dismiss the indictment because for seven years, Mr. Games-Lopez lived openly, repeatedly providing the government his whereabouts and identifying information, and he suffered both presumed and actual prejudice from the delay.

"The right to a speedy trial ... is one of the most basic rights preserved by our Constitution."[25] To determine whether a defendant's right to a speedy trial has been violated, courts consider (1) whether the delay before trial was uncommonly long; (2) whether the government or the defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay.[26] A district court's decision whether to dismiss an indictment for post-indictment delay will be reviewed *de novo* on appeal.[27]

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[23] See Report of Investigation re: search, attached as Exhibit K.

[24] *Id.*

[25] *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). *Accord Barker v. Wingo*, 407 U.S. 514, 515 (1972).

[26] *Doggett v. United States*, 505 U.S. 647, 655 (1992).

[27] *See United States v. Gregory*, 322 F.3d 1157, 1160-61 (9th Cir. 2003); *United States v. Manning*, 56 F.3d 1188, 1193 (9th Cir. 1995).

In *Doggett v. United States*,[28] the Supreme Court granted certiorari to "consider whether the delay of 8 1/2 years between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial." [29] Because *Doggett* is so similar to this case, a more detailed discussion of its facts is helpful.[30]

In 1980, the defendant was indicted in a cocaine conspiracy. Agents arrived at his mother's home to arrest him, only to be told that he had left for Columbia four days earlier.[31] In 1981, the DEA received word that the defendant was being held in Columbia, and it requested that Columbia "expel" him to the U.S. In 1982 the defendant "passed unhindered through Customs in New York City and settled down in Virginia." He "married, earned a college degree, found a steady job as a computer operations manager, lived openly under his own name, and stayed within the law."[32] Finally, in 1988, United States Marshals ran a credit check to run down active warrants, and located Mr. Doggett. Eight and one-half years after his indictment and six years after his return to the U.S., the government arrested him. He moved to dismiss the indictment for postindictment delay. The district court denied the motion, and the Circuit Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court confirmed that "a defendant may invoke due process to challenge delay both before and after official accusation."[33] Acknowledging that the defendant could not point to specific prejudice that he suffered from the delay, it wrote that "affirmative proof of particularized prejudice is not essential to every speedy trial claim. . . . impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of

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[28] 505 U.S. 647 (1992).

[29] *Id.* at 648.

[30] A courtesy copy of both *Doggett* and the Ninth Circuit case, *United States v. Reynolds*, 231 Fed.Appx. 629 (9th Cir, May 3, 2007) (discussed *infra)*, is attached as an Appendix to this brief.

[31] *Id.* at 648-49.

[32] *Id.* at 649.

[33] *Id.* at 655 (*citing United States v. MacDonald*, 456 U.S. 1, 7 (1982)).

exculpatory evidence and testimony 'can rarely be shown.'"[34] The Court held that the negligent failure to locate Mr. Doggett for six years "far exceeds the threshold needed to state a speedy trial claim; indeed, we have called shorter delays 'extraordinary.'"[35] "When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review," the Court continued, "and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief."[36] The Supreme Court thus reversed the lower courts' decisions denying the motion to dismiss.[37]

The Ninth Circuit is in accord. In *United States v. Reynolds*,[38] the defendant suffered a four-year-and-eight-month delay between indictment and arrest. The district court found that he failed to establish prejudice, and denied the motion to dismiss. The Ninth Circuit reversed. The "fifty-six-month delay between indictment and arrest is presumptively prejudicial" the Court observed.[39] "The district court erred in finding that the four-year, eight-month delay between Reynolds's indictment and his arrest was not uncommonly long" it held.[40] The Court also held that where the government provided evidence that it looked for the defendant for six months, but only relied on an NCIC warrant thereafter, "*the district court clearly erred* in finding that the government diligently sought Reynolds during the entire period between his indictment and his arrest".[41]

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34 *Id.* at 655 (quo*ting Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

35 *Id.* at 658.

36 *Id.* (internal citations omitted).

37 *Id.*

38 231 Fed.Appx. 629 (9th Cir., May 3, 2007). Mr. Games-Lopez cites to *Reynolds* under the guidance of revised F.R.A.P. 32.1 and revised Ninth Circuit Local Rule 36-3 (allowing citation to unpublished decisions issued after January 1, 2007).

39 *Id.* at 630.

40 *Id.* at 631.

41 *Id.* (emphasis provided).

The facts of this case are indistinguishable from *Doggett* and *Reynolds*, and should lead to the same result. First, the delay of seven years was "uncommonly long" according to precedent.[42] It is seven times longer than what is required to trigger presumptive prejudice, and it is a year longer than the "extraordinary" delay witnessed in *Doggett.*

Second, the delay, as in the *Doggett* case, is more attributable to the government than to Mr. Games-Lopez. Mr. Games-Lopez cannot be blamed for any of this delay, because he did not know that he had been indicted. The government, on the other hand, was at a minimum negligent in attempting to locate him: Mr. Games-Lopez lived and worked openly, told the IRS his whereabouts, corresponded with the INS, crossed the border frequently, and lived under his own name and social security number. The government had his same social security number – and very likely more information – since before the indictment in 1993.[43] The second prong weighs against the government too.

Third, Mr. Games-Lopez is asserting his right to a speedy trial now, at the first motion hearing in this case. This prong favors the defendant also.

And fourth, prejudice – both presumed and actual – to Mr. Games-Lopez supports dismissal. After a delay of one year, appellate courts presume prejudice: "the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year."[44] But Mr. Games-Lopez suffered actual prejudice too, as co-defendants appear to have vanished, and it is not clear what witnesses remember about the case. The government has not revealed whether any physical evidence exists any longer, but one can only assume that not everything has survived. Prejudice, both presumed and actual, weighs in favor of Mr. Games-Lopez as well. Dismissal should result under *Doggett.*

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[42] *See Doggett* 505 U.S. at 658 (six years of failure to find defendant "extraordinary"); *Reynolds,* 231 Fed.Appx. at 631 (four years, eight months "uncommonly long").

[43] The proverbial questions "what did the government know, and when did it know it?" form the basis of Mr. Games-Lopez's motion for discovery related to his *Doggett* motion, *infra* at 10.

[44] *Id.* at 652 n. 1.

B. Mr. Games-Lopez requests that the government provide discovery supporting his *Doggett* motion.

The government has a duty under *Brady* to provide evidence that is helpful to the defense, whether at trial or for a potentially-dispositive motion.[45] Mr. Games-Lopez has made his best efforts to obtain information in support of his *Doggett* motion. He will continue to do so. The government, however, is in the best position to provide records of him crossing the border, contacts with the DEA, the contents of the Marshal's file surrounding his arrest warrant, and what if any steps the government took or failed to take to effect an arrest in this case. Mr. Games-Lopez formally requests discovery of all documents that the government or any of its agencies possess relating to this motion. He also requests a response to his requests for physical items of discovery – both to prepare for trial and to complete the record of actual prejudice for his *Doggett* motion. Mr. Games-Lopez hereby incorporates by reference the discovery requests set forth in his September 18, 2007 letter to the prosecutor, and asks that the Court order production of each of these items of discovery.[46]

C. Agents conducted an unlawful warrantless search on the Old Wagon Road ranch, used illegally-obtained evidence from the first search to get a warrant, and added separate misrepresentations of fact to the warrant affidavit, thus all evidence obtained from the ranch should be suppressed.

All of the evidence taken from the Old Wagon Road ranch must be suppressed because:

- agents first gained access to the property through the "permission" of a mere neighbor who clearly had no actual or apparent authority to consent to a search;
- agents unlawfully conducted a search beyond what was in plain view, even if they were on the property lawfully;

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[45] *See United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (non-disclosure of material helpful to the accused, "whether at trial or on a motion to suppress" may violate due process); *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) ("To protect the right of privacy, we hold that the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant.")

[46] *See Exhibit L*, letter to AUSA Weiner requesting various items of discovery.

- information gained from this illegal "consent" search poisoned the search warrant that agents then obtained; and
- agents also included separate misrepresentations of fact in the warrant affidavit.

For any of these reasons, and for all of them together, evidence gained from the "consent" search and the later warrant must suppressed in its entirety.

1. Because a neighbor clearly cannot give federal agents consent to go onto someone else's property, facts gathered during agents' initial entry onto the Old Wagon Road ranch were obtained illegally and must be suppressed and excised from the warrant.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."[47] Though consent is one exception to the warrant requirement, to meet its burden, the government must demonstrate that the third party has either 1) actual or 2) apparent authority to consent to the search.[48] Authority to search cases receive *de novo* review on appeal.[49]

a. Neighbor Keck did not have authority to allow agents onto property that he neither owned nor controlled.

In *United States v. Matlock*, the Supreme Court held that consent to a search must be made by an individual with common authority over the property.[50] The Court defined common authority as "joint access or control for most purposes."[51] Even "[a] landlord generally may not give consent to the search of a dwelling rented to another."[52] "Only the occupier or renter can

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47 *Katz v. United States*, 389 U.S. 347, 357 (1967).

48 *Id.*

49 *United States v. Kim*, 105 F.3d 1579, 1582 (9th Cir. 1997).

50 *United States v. Matlock,* 415 U.S. 164 (1974).

51 *Id.* at 171 n. 7.

52 *United States v. Yarbrough,* 852 F.2d 1522, 1533 (9th Cir. 1988) (*citing Chapman v. United States*, 365 U.S. 610, 616-17 (1961)). *See also United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988) ("Landlords, however, do not have authority to waive the fourth amendment's warrant requirement by consenting to a search of premises inhabited by a tenant who is not at home at the time of a police call.").

1 waive the right to object to a search."[53] Cases applying *Matlock* emphasize that a consent-giver
2 with limited access to the searched property lacks actual authority to consent to a search.
3 In *United States v. Impink*,[54] for example, a landlord contacted the DEA and asked them
4 to investigate suspicious activity on her property. The DEA walked onto the property, and
5 noticed various flasks and items suggesting a meth lab.[55] Using the information that they gained
6 from the "consent search", they obtained a warrant, and found drugs in the tenant's garage.[56]
7 The tenant later moved to suppress for an unlawful search, and the district court denied the
8 motion, finding consent to search by the landlord.[57] The Ninth Circuit reversed. "Generally, a
9 lessor cannot consent to a search of leased premises" the Court began.[58] Because the landlord
10 "had reserved only the limited right to enter" the premises, the Court reasoned, she did not have
11 sufficient "access or control for most purposes" to authorize a search.[59] The Ninth Circuit gave
12 even less weight to the landlord's alleged authority because it was pursuant only to an informal
13 oral agreement. "Even if we accept the district court's finding that a right to re-enter existed,"
14 the Court wrote, "we need not interpret an informal oral agreement as conveying an unlimited
15 right of access."[60]
16 Likewise in *United States v. Warner*, a landlord rented out a house and garage but
17 retained the right to enter the property to make repairs and mow the lawn.[61] The landlord
18 consented to police entering the garage after he noticed a strong chemical smell coming from it,
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20 [53] *Yarbrough*, 852 F.2d at 1533 (*citing Stoner v. California*, 376 U.S. 483, 489 (1964)).
21 [54] 728 F.2d 1228, 1233 (9th Cir.1984).
22 [55] *Id.* at 1230.
23 [56] *Id.*
24 [57] *Id.* at 1232.
25 [58] *Id.* at 1232 (*citing Stoner v. California*, 376 U.S. 483, 489-90 (1964); *Chapman v. United States*, 365 U.S. 610, 616-18 (1961)).
26 [59] 728 F.2d at 1233 (quoting Matlock, 415 U.S. at 171 n. 7).
27 [60] *Id.*
28 [61] 843 F.2d 401, 405 (9th Cir.1988).

and the police found chemicals used to make meth.[62] The Ninth Circuit held that the search was unlawful, affirming the district's court's suppression of evidence. Rejecting the government's argument that the landlord consented to the search, the Ninth Circuit again relied on the fact that the landlord had only a limited right of access onto the land.[63] In contrast, the cases upholding searches generally rely on the consent-giver's unlimited access to property to sustain the search.[64] A search of all federal appellate cases using the terms "neighbor w/5 consent and search" revealed not a single case authorizing the government's conduct here, in any circuit. It did reveal authority to the contrary. As the Sixth Circuit held, "Appellees have cited, and we have found, *no* authority for such a broad expansion of the consent doctrine, one which would allow neighbors the right to consent to the search of areas over which they exercised no control or had no possessory interest."[65]

Here too, Mr. Keck did not have control over or a possessory interest in his neighbor's land. At most, he had a limited right of access to the land that was vastly inferior to a landlord's. Like the *Impink* landlord, neighbor Keck's agreement, if any, was oral and informal. Here, the actual resident of the property, Mr. Games-Lopez, had never agreed that he could let other people onto the land, and did not even know that Keck was permitted there, if that was even true. If a person who actually owns property cannot consent to a search – as in *Impink* and *Warner* – then a neighbor surely cannot grant actual authority to search. The "consent" entry and search of the land violated the Fourth Amendment.

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[62] *Id.* at 402.

[63] *Id.* at 403 ("The landlord in this case did not have any right of access for most purposes . . . . at best, the landlord had permission to enter the property for the limited purpose of making specified repairs and occasionally mowing the lawn. . . . [he] therefore could not give effective consent for the search of Warner's property.").

[64] *See United States v. Guzman*, 852 F.2d 1117, 1122 (9th Cir.1988) (holding that authority to consent was present when consent-giver had full access to property)

[65] *See Wilson v. Health and Hospital Corp. of Marion County* 620 F.2d 1201, 1208 n.3 (6th Cir. 1980)

b. Neighbor Keck did not hold himself out as anything other than a neighbor who sometimes went on the land, thus he did not have apparent authority either.

"Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent."[66] "However, the doctrine is applicable only if the facts believed by the officers to be true would justify the search as a matter of law."[67] "A mistaken belief as to the law, no matter how reasonable, is not sufficient."[68] The government must meet a three-part test to show apparent authority: (1) the police believed an untrue fact that they used to assess the would-be consenter's control of the property; (2) it was objectively reasonable to believe that the fact was true; and (3) if the fact was true, there would have been actual authority to consent.[69]

The government cannot meet this test. First, agents did not believe any untrue fact about Jack Keck: he stated plainly that he was only a neighbor, and that he would "on occasion" hunt or hike on the property. Whether or not it was reasonable to believe him is beside the point, because a neighbor simply doesn't have authority to welcome the government onto property belonging to someone else. Even if agents reasonably believed that a neighbor could give legal consent to enter the property next door (a dubious proposition in its own right) the search would remain unlawful because "[a] mistaken belief as to the law, no matter how reasonable, is not sufficient" to confer apparent authority.[70] Because the police did not reasonably rely on an untruth that would have given legal consent to search, apparent authority did not permit their

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66 *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003).

67 *United States v. Welch*, 4 F.3d 761, 764 -765 (9th Cir. 1993).

68 *Id.*

69 *United States v. Reid* 226 F.3d 1020, 1025 (9th Cir. 2000) (reversing district court finding of apparent authority); *United States v. Enslin* 327 F.3d 788, 793 -794 (9th Cir. 2003) (same test).

70 *Id.*

search of the property. Suppression should result.

c. Even if Keck could give consent to enter the property, agents conducted an illegal search by moving and searching property while on the premises.

Even if Jack Keck somehow had the authority to allow agents onto his neighbor's land, agents still conducted an illegal search. To avoid suppression, the government will have to argue that agents lawfully entered the property (with the consent of a neighbor), saw some incriminating items in "plain view" at the time, and properly included that plain view evidence into a warrant affidavit. Even when agents are lawfully on premises, however, a new "search" occurs if they move property – even if a few inches – to look for evidence.[71] In *Arizona v. Hicks*, the Supreme Court held that when an officer who has lawfully inside a residence moved a stereo a few inches to reveal its serial number, he committed an unlawful search.[72]

So it was here. The agent's Report of Investigation reveals that while on the residence – ostensibly accompanying the neighbor to discuss the recent electric bill – the agent took it upon himself to search through a burn pile, removing and testing items that were not in plain view: "S/A McConnell found numerous plastic garbage bags, in one of the bags, S/A McConnell found two rubber gloves (Exhibit 14), in another bag he discovered aluminum foil and two pieces of white cloth which contained a white powder residue (Exhibit 15) consistent with methamphetamine. Additionally, the residue tested positive for the presence of methamphetamine during a presumptive test."[73] Thus, many of the items that they observed were not in plain view at all, and Jack Keck plainly did not have authority to permit rifling through his neighbor's property and conducting field tests on items within it. Even if they were

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[71] *See Arizona v. Hicks*, 480 U.S. 321(1987).

[72] *Id.* at 325 ("Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. . . .But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry.").

[73] *See* Exhibit K at 2.

lawfully on the property, agents exceeded the scope of the consent and violated the plain view doctrine upon which they rely. Suppression of the items within the trash pile should result, even if the Court denies the other motions.

2. Evidence obtained pursuant to the search warrant must also be suppressed because the warrant was based on illegally-obtained evidence and misrepresentations of fact.

a. This Court should excise all evidence in the search warrant that came from the first warrantless search.

"[E]vidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search."[74] "When an affidavit contains evidence illegally obtained, '[a] reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant.'"[75]

Here, the Court should excise all of the information that agents obtained while on the premises with Jack Keck. This information is memorialized in paragraphs 8-12 of the warrant affidavit, and includes everything that the agent described seeing on the ranch that day. Absent paragraphs 8-12, there is clearly insufficient probable cause for a warrant to issue.[76] Suppression of all fruits of the warrant must result.

b. This Court should also excise statements in the search affidavit that the electricity bill "had tripled" and grant a Franks hearing on this issue, because this sworn testimony was deliberately or recklessly false.

The Court should also excise paragraph 5, lines 10-20 of the affidavit, because the agent either knew or should have known that they were lies. When a defendant makes a substantial preliminary showing that an affidavit for a search warrant contains prejudicial intentionally or

[74] *United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004) (*citing United States v. Wanless*, 882 F.2d 1459, 1465 (9th Cir.1989) (citations omitted)).

[75] 377 F.3d at 1054 (*quoting United States v. Vasey*, 834 F.2d 782, 788 (9th Cir.1987) (citation omitted)).

[76] *See generally* the search warrant affidavit, Exhibit I

recklessly false statements, that defendant is entitled to a *Franks* evidentiary hearing.[77] If the evidence at such a hearing shows intentional or reckless false statements, and that they were necessary to find probable cause, then the evidence seized pursuant to the warrant must be suppressed.[78]

According to the affidavit supporting this warrant, "the electric bill for the past month (Feb-Mar) had tripled"for the property to be searched.[79] The agent swore that "methamphetamine laboratories often function continually for 24-72 hours in order to complete the chemical process, a process that requires large amounts of electricity."[80]

As the table below indicates, the agent did not tell the truth: there was simply no three-fold increase in electricity use in the month (or even the months) before the search:

[77] *Franks v. Delaware*, 438 U.S. 154 (1978)

[78] *Id.*

[79] *See* Exhibit I, at page 5, line 11.

[80] *Id.* at page 5, line 13-15.

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ELECTRICITY BILL: 23010 OLD WAGON ROAD[81]

Service Dates and Meter Reading Period	Total Amount Due	Fluctuations: [+/-] Amount	% of increase/ decrease	Meter reading (in KWHR)
9/21/1992 - 10/20/1992	$174.22[82]	$0	0%	1472
11/18/1992 - 12/18/1992	$152.60	- $21.62	- 12.4%	1341
12/18/1992 - 1/20/1993	$186.51	+ $33.91	19.5%	1618
1/20/1993 - 2/19/1993	$149.55	- $36.96	- 21.2%	1305
2/19/1993 - 3/22/1993	$215.64	+ $66.09	37.9%	1840

Thus, the Feb-Mar electricity bill was not triple that of the previous month by any measure. In reality, there was a $66 increase from the previous billing cycle and only a $29 increase from the December to January cycle – a fractional increase of 44% and 13.5%, respectively. If one uses the actual energy consumed (KWHR) rather than the cost in dollars, there was an increase of 40% from the previous period, and 13.7% from the period before that. The facts do not show, as the affiant swore to the magistrate, a 300% increase in electricity consumption, ever. That statement was plainly false, and there is no excuse for it, because "the cooperating citizen showed your affiant and S/A Leininger the electrical bill for this period."[83] Because the agent either deliberately or recklessly told an untruth, this fact too should be excised from the warrant, and should result in suppression of the evidence seized in reliance upon it.

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[81] *See* Exhibit J.

[82] This table uses Sept-Oct. as the baseline for percentage-of-increase calculations, because it is the first billing period provided by the government in discovery. One can compare *any* two billing periods, however, and fail to find anything close to a three-fold increase in energy consumption.

[83] Exhibit I, page 5, lines 15-17.

IV.

Conclusion

When the government indicted Mr. Games-Lopez, the median price of a home in San Diego county was $177,000. The elder George Bush had just been replaced by Bill Clinton in the White House. Gas cost $1.11 a gallon, Florida State quarterback Charlie Ward won the Heisman Trophy, and the Menendez brothers stood trial for the murder of their parents.[84] In the fourteen years since then, times have changed, memories have faded, and evidence has disappeared.

What has not changed since 1993 is that for all of us, a neighbor cannot allow strangers onto our property, whether or not we have welcomed that neighbor on our property before, and whether we rent or own our homes. Then and now, only a person with full access and control of the property may consent to a search. A search warrant founded on neighbor's unlawful consent – and on additional misrepresentations of fact, for that matter – must be struck down. Suppression of all of the evidence from the ranch is the only just remedy.

For all of these reasons, this case should not reach a jury in 2007 or 2008. The Court should dismiss the indictment, suppress fruits of the illegal search, or both. Mr. Games-Lopez respectfully requests that these motions be granted.

Dated: October 25, 2007

Respectfully submitted,

s/ Timothy A. Scott

TIMOTHY A. SCOTT

Attorneys for Refugio Games-Lopez

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[84] *See* www.1990sflashback.com/1993.