

1 DANIEL J. BRODERICK, Bar #89424
Federal Defender
2 JEFFREY L. STANIELS, Bar #91413
Assistant Federal Defender
3 BENJAMIN D. GALLOWAY, Bar # 214897
Assistant Federal Defender
4 801 I Street, 3rd Floor
Sacramento, California 95814
5 Telephone: (916) 498-5700

6 Attorneys for Defendant
HARRISON JACK
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 v.)

14 HARRISON ULRICH JACK; LO CHA)
THAO; LO THAO; YOUA TRUE)
15 VANG; HUE VANG; CHONG YANG)
THAO; SENG VUE; CHUE LO; NHIA)
16 KAO VANG; DAVID VANG; JERRY)
YANG and THOMAS YANG.)

17 Defendants.)
18

NO. CR-S-07-0266 FCD

DEFENDANTS' NOTICE OF MOTION
AND MOTION TO SUPPRESS FRUITS OF
ILLEGAL WIRETAPS OR, IN THE
ALTERNATIVE, FOR A *FRANKS*
HEARING

Date: September 20, 2010
Time: 10:00 a.m.
Judge: Hon. Frank C. Damrell, Jr.

19 **TO: BENJAMIN WAGNER, United States Attorney, and to ROBERT TICE-RASKIN,**
20 **ELLEN ENDRIZZI, JILL THOMAS, Assistant United States Attorneys, counsel for**
plaintiff:

21 **PLEASE TAKE NOTICE** that on September 20, 2010, at 10:00 a.m., or as soon thereafter as
22 the matter may be heard before the Honorable Frank C. Damrell, Senior United States District Judge,
23 defendants, by and through their counsel, will and hereby do move this Court for an order suppressing
24 any and all fruits of wiretaps on defendant Harrison Jack's home and mobile telephones, as well as
25 defendant Lo Cha Thao's mobile telephone, on the ground they were illegally intercepted because
26 they were based upon numerous material misstatements and omissions, they lacked a sufficient
27 showing of necessity, and the latter wiretaps are the illegal fruit of the initial illegal wiretap.
28 Defendants further move to suppress on the ground that the interceptions were not made in

1 conformity with the order of authorization as they were not properly minimized as required by law.
2 Alternatively, this motion seeks a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct.
3 2674 (1978).

4 This motion is based upon the attached Memorandum of Points and Authorities, attachments,
5 exhibits, the files and records in this case, and any argument or evidence which may be presented
6 during the pendency of this motion and at the hearing on this and related motions.

7 Dated: May 14, 2010

Respectfully submitted,

8
9 /s/ Daniel J. Broderick
DANIEL J. BRODERICK
Federal Defender
10 JEFFREY L. STANIELS
11 BENJAMIN D. GALLOWAY
Assistant Federal Defenders
Attorneys for Defendant
12 HARRISON JACK

13 Dated: May 14, 2010

/s/ Mark J. Reichel
MARK J. REICHEL
Attorney for Defendant
14 LO CHA THAO

15
16 Dated: May 14, 2010

/s/ William J. Portanova
WILLIAM J. PORTANOVA
Attorney for Defendant
17 LO THAO

18
19 Dated: May 14, 2010

MORRISON & FORESTER

/s/ James J. Brosnahan
JAMES J. BROSNAHAN
Attorneys for Defendant
20 YOUA TRUE VANG

21
22
23 Dated: May 14, 2010

/s/ Krista Hart
KRISTA HART
Attorney for Defendant
24 HUE VANG

1 Dated: May 14, 2010

/s/ Dina Lee Santos
DINA LEE SANTOS
Attorney for Defendant
CHONG YANG THAO

2

3

4 Dated: May 14, 2010

/s/ Michael B. Bigelow
MICHAEL B. BIGELOW
Attorney for Defendant
SENG VUE

5

6

7 Dated: May 14, 2010

/s/ Shari Rusk
SHARI RUSK
Attorney for Defendant
CHUE LO

8

9

10 Dated: May 14, 2010

/s/ Danny D. Brace, Jr.
DANNY D. BRACE, JR.
Attorney for Defendant
NHIA KAO VANG

11

12

13 Dated: May 14, 2010

/s/ Hayes H. Gable, III
HAYES H. GABLE, III
Attorney for Defendant
DANG VANG

14

15

16 Dated: May 14, 2010

/s/ Bruce Locke
BRUCE LOCKE
Attorney for Defendant
JERRY YANG

17

18

19 Dated: May 14, 2010

/s/ Peter Kmeto
PETER KMETO
Attorney for Defendant
THOMAS YANG

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	Table of Authorities i
4	MEMORANDUM OF POINT AND AUTHORITIES 1
5	I. INTRODUCTION 1
6	II. RELEVANT FACTUAL BACKGROUND 2
7	A. Initial Conversations Between Jack and Agent 2
8	B. February 7, 2007 Meeting With General Vang Pao and Others 6
9	C. February 15, 2007 Telephone Conversation Between Jack and Agent 7
10	D. March 1, 2007 Phone Message from Harrison Jack 7
11	E. March 2, 2007 Call from Agent to Jack 8
12	F. March 5, 2007 Meeting Between Agent and Jack 8
13	G. March 7, 2007 Phone Conversation Between Jack and Agent 10
14	III. STANDARDS FOR LEGAL WIRETAPS 10
15	A. Statutory Requirements 10
16	B. Case Law Requirements 11
17	1. Full and Complete Statement 11
18	2. Employment of Other Investigative Techniques (“Necessity Requirement”) 12
19	3. Minimization 13
20	4. Standing 14
21	ARGUMENT 15
22	IV. THE REQUIREMENTS FOR LAWFUL WIRETAPS WERE NOT MET
23	BY THESE AFFIDAVITS 15
24	A. Standards of Review 15
25	B. The Extensive, Intentional, Material Omissions Violated the Governing
26	Statute and Misled the Magistrate Judge About the Nature of This Case
27	And the Necessity for Any Wiretaps 16
28	C. The Cumulative Effect of the Extensive, Material False Statements in
	the Affidavits Misled the Magistrate Judge About the Necessity for
	Any Wiretaps 19

1 D. The Sworn Affidavits Submitted in Support of Wiretaps Fail to Establish Necessity . . . 27

2 1. Unimpeded Access to Harrison Jack 27

3 2. Access to Other Hmong Defendants 28

4 3. Witness Interviews 30

5 4. Controlled Buys 30

6 5. Phone Records 30

7 6. Trash Covers 32

8 7. Mail Covers and Internet Records 33

9 8. Visual & GPS Surveillance 34

10 9. Financial Records Analysis 35

11 E. There Was No Case Specific Showing that Any Normal Investigative

12 Procedure Would Be Too Dangerous to Try 36

13 F. The Government Has Not Shown that Individuals Who Listened to the

14 Intercepted Conversations Were Properly Instructed on Their Legal

15 Limitations 36

16 G. The Government Failed to Minimize English and Non-English Conversations

17 as Required by Law 37

18 H. The First and Second Jack Extensions and the Lo Cha Thao Wiretap Were

19 Fruit of the Initial Illegal Wiretap 38

20 1. First Jack Extension 39

21 2. Lo Cha Thao Affidavit 39

22 3. Second Jack Extension 40

23 I. The Jack Extensions and the Lo Cha Thao Wiretap Application Contained

24 Additional Material Omissions and False Statements 40

25 1. First Jack Extension 41

26 2. Lo Cha Thao Affidavit 43

27 3. Second Jack Extension 44

28 V. DEFENDANTS HAVE STANDING TO CHALLENGE THESE ILLEGAL WIRETAPS 46

VI. CONCLUSION 47

1 ATTACHMENT 1
2 Misstatements and Omissions from Jack Affidavit 49
3 ATTACHMENT 2
4 Misstatements and Omissions from First Jack Extension 57
5 ATTACHMENT 3
6 Misstatements and Omissions from Lo Cha Thao Affidavit 68
7 ATTACHMENT 4
8 Misstatements and Omissions from Second Jack Extension 80

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

1

2

3 *Aguilar v. Texas*,

4 378 U.S. 108 (1964) 13

5 *Alderman v. United States*,

6 394 U.S. 165 (1969) 14

7 *Franks v. Delaware*,

8 438 U.S. 154, 98 S.Ct. 2674 (1978) 1, 2, 11, 19

9 *Mills v. Graves*,

10 930 F.2d 729 (9th Cir. 1991) 12

11 *Scott v. United States*,

12 436 U.S. 128 (1978) 14

13 *United States v. Ailemen*,

14 986 F.Supp. 1228 (N.D.Cal. 1997) 11

15 *United States v. Bailey*,

16 607 F.2d 237 (9th Cir. 1979) 12

17 *United States v. Blackmon*,

18 273 F.3d 1204 (9th Cir. 2001) passim

19 *United States v. Brone*,

20 792 F.2d 1504 (9th Cir. 1986) 15

21 *United States v. Canales Gomez*,

22 358 F.3d 1221 (9th Cir. 2004) 15

23 *United States v. Carneiro*,

24 861 F.2d 1171 (9th Cir. 1988) 11, 13, 20

25 *United States v. Chesher*,

26 678 F.2d 1353 (9th Cir. 1982) 11, 12

27

28

1 *United States v. Commito*,

2 918 F.2d 95 (9th Cir. 1990) 13

3 *United States v. Echavarria-Olarte*,

4 904 F.2d 1391 (9th Cir. 1990) 15

5 *United States v. Elliott*,

6 893 F.2d 220 (9th Cir. 1990) 15

7 *United States v. Giordano*,

8 416 U.S. 505 (1974) 12

9 *United States v. Gonzalez, Inc.*,

10 412 F.3d 1102 (9th Cir. 2005) passim

11 *United States v. Greger*,

12 716 F.2d 1268 (9th Cir. 1983) 11, 19

13 *United States v. Ippolito*,

14 774 F.2d 1482 (9th Cir. 1985) 11, 12, 13, 36

15 *United States v. Kahn*,

16 415 U.S. 143 (1974) 12

17 *United States v. Kalustian*,

18 529 F.2d 585 (9th Cir. 1975) 13

19 *United States v. Kelley*,

20 140 F.3d 596 (5th Cir. 1998) 46

21 *United States v. King*,

22 478 F.2d 494 (9th Cir. 1973) 14

23 *United States v. Marcello*,

24 508 F. Supp. 585 (E.D. La. 1981) 46

25 *United States v. McGuire*,

26 307 F.3d 1192 (9th Cir. 2002) 14

27

28

1 *United States v. Meling,*
2 47 F.3d 1546 (9th Cir. 1995) 15
3 *United States v. Mendoza-Morales,*
4 2007 U.S. Dist. LEXIS 92491 (D. Or., Dec 2007) 34
5 *United States v. Smith,*
6 31 F.3d 1294 (4th Cir. 1994) 12
7 *United States v. Spagnuolo,*
8 549 F.2d 705 (9th Cir. 1977) 13, 27, 32, 35
9 *United States v. Stanert,*
10 762 F.2d at 781 11
11 *United States v. Tham,*
12 960 F.2d 1391 (9th Cir. 1992) 15
13 *United States v. Valdez-Pacheco,*
14 701 F. Supp. 775 (D. Or. 1989) 15

16 **FEDERAL STATUTES**

17 18 U.S.C. §2510 (11) 14
18 18 U.S.C. §2518 (1) passim
19 18 U.S.C. §3127(3)(4) 31

21 **OTHER**

22 S. REP. 90-1097, 1968 U.S.C.C.A.N. 2112, 2190 12, 33
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 28, 2007, the United States sought and obtained authority to intercept telephone conversations conducted over defendant Harrison Jack’s home telephone and over his mobile telephone.¹ On April 27, 2007, the United States sought and obtained an order extending the wiretaps on Jack’s telephones.² On May 10, 2007, the government sought and obtained authority to intercept telephone conversations conducted on defendant Lo Cha Thao’s mobile telephone.³ On May 31, 2010, the United States sought and obtained a second order extending the wiretaps on Jack’s telephones.⁴

The affidavits filed in support of each of these wiretap applications and extensions were rife with inaccuracies, misstatements, and material omissions that fundamentally mischaracterized the facts and status of the investigation. The affidavits further lacked the requisite showing that wiretaps were necessary to the investigation. After the wiretaps were installed, the United States then failed to properly minimize the intrusion into the defendants’ conversations as promised in the supporting affidavits and as required by law. The First and Second Jack Extensions and the Lo Cha Thao Affidavit are subject to these same defects and, in addition, are tainted fruit of the initial, illegal wiretap application and order.

Pursuant to 18 U.S.C. §2518(10), Defendants move to suppress the fruits of these wiretaps on

¹ The agent’s affidavit in support of the government’s request for authority to tap Harrison Jack’s telephones is hereinafter referred to as “Jack Affidavit” and attached hereto as “Exhibit A.”

² The agent’s affidavit in support of the government’s first request to extend the wiretaps on Harrison Jack’s telephones is hereinafter referred to as “First Jack Extension” and attached hereto as “Exhibit B.”

³ The agent’s affidavit in support of the government’s request for authority to tap Lo Cha Thao’s telephones is hereinafter referred to as “Lo Cha Thao Affidavit” and attached hereto as “Exhibit C.”

⁴ The agent’s affidavit in support of the government’s second request to extend the wiretaps on Harrison Jack’s telephones is hereinafter referred to as “Second Jack Extension” and attached hereto as “Exhibit D.”

1 the ground they were illegally intercepted because they were based upon numerous material
2 misstatements and omissions, they lacked a sufficient showing of necessity, and the latter wiretaps
3 are the illegal fruit of the initial illegal wiretap. Defendants further move to suppress on the ground
4 that the interceptions were not made in conformity with the order of authorization as they were not
5 properly minimized as required by law. In the alternative, the defendants request an evidentiary
6 hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to test the validity, accuracy, and
7 completeness of the affidavits.

8 **II. RELEVANT FACTUAL BACKGROUND**

9 [The Jack Affidavit (Exh. A) was filed on March 28, 2007. Relevant facts known to the
10 government prior to that date are listed below. Those facts which were intentionally omitted from the
11 wiretap affidavit are underlined.]

12 **A. Initial Conversations Between Jack and Agent**

13 Harrison Jack was informed by Lo Cha Thao that the Laotian government had issued a
14 genocide order to exterminate Hmong people residing in remote areas within Laos. Jack was further
15 told that the Hmong people did not have access to modern firearms that they could use to defend
16 themselves as they tried to get out of the country. Jack was told that the Hmong leadership was
17 exploring every option to save the lives of these people and he was asked to inquire whether there was
18 any way to provide these people with modern guns, if that was an option that the Hmong leadership
19 ultimately decided to employ.⁵

20 Some time prior to September 25, 2006, Jack contacted Namon Hawthorne and informed him
21 of this situation.⁶ Although Hawthorne was not a military contractor, Jack knew from his prior
22 conversations with him that Hawthorne had served in the military at one time and had worked

24 ⁵ Discovery, pp. TE041425 and TE041408 (relevant Tarnished Eagle (“TE”) bates-stamped
25 discovery is attached hereto in sequential order as “Exhibit E.”)

26 ⁶ Previously, in March, 2006, Jack contacted Mr. Hawthorne concerning proprietary technologies
27 that Hawthorne posted on the internet that Jack hoped might be used in the cleanup of closed
28 military bases. Hawthorne also promoted a treated water that he called “Kinesis Water,” that
Jack thought might be marketed in the Hmong community.

1 thereafter as a police officer. Jack asked Hawthorne if he might know of anyone who could provide
2 AK-47 rifles to be used to support Laotians who were being slaughtered in Laos. "Jack said there is a
3 genocide taking place in Laos and he needed to help those persons being ethnically cleansed by
4 providing them with firearms to protect themselves." Exh. E, Disc. TE034614.

5 On September 25, 2006, Jack received a phone call from Namon Hawthorne asking how soon
6 the Hmong needed the AK-47 rifles. Jack responded immediately. Hawthorne said he had two prices:
7 \$500 and \$1,000. Jack stated that any deal would be cut in Thailand. Jack also stated that the Hmong
8 in Laos were on the run, in the hills, in an escape and evasion mode all the time, subject to being
9 ambushed. After the September 25, 2006, conversation, Jack had no further discussions with
10 Hawthorne about the possible purchase of any weapons. Exh. E, Disc. TE042546-TE042552.

11 Almost four months later, on January 22, 2007, Jack received a call from ATF undercover
12 agent "Steve" (the affiant on the Jack and Lo Cha Thao Affidavits and the Jack Extensions;
13 hereinafter "Steve" or "the agent"). Their conversation went in part as follows:

14 Steve: ...I talked to Namon quite a bit about your problem, and, uh, he asked that I meet
15 with you, so I thought I'd give you a call and -- and, uh, see if you wanted to meet and
16 talk.

17 Jack: Well, now, what problem are you talking about?

18 Steve: Uh, problem in East Asia, AK's.

19 Jack: Oh. Oh. Okay. Okay. Golly sakes, that's a long time ago.

20 Exh. E, Disc. TE041371-TE041373.

21 Steve and Jack then met at a restaurant on January 25, 2007. Jack told Steve that the Hmong
22 had contacted him months ago about weapons and that until Steve called, Jack thought the whole
23 thing had fallen through. Steve initiated the conversation about weapons. Steve unilaterally
24 volunteered that he could get more than 500 AK-47s and that he could also get M-16 rifles. Exh. E,
25 Disc. TE041383-TE041384. Steve also stated that before any weapons could be delivered, he would
26 require "money up front, half of it up front and the rest of it on delivery." Jack stated that the Hmong
27 were considering options. One was to bring AK-47 rifles into the country and the other was to
28 purchase weapons from disillusioned, underpaid Laotian soldiers inside Laos. Jack told Steve that he

1 did not know what the Hmong in this country were going to do. Jack then told Steve the following:

2 You decide how you want to handle all that. I'm just interested in the basics, pass that on, see
3 if they can't -- you know, however you want to do it. If you want to follow-up with them, I
4 can give you the name or vice-a-versa, depending upon what the feedback is. My thought
5 would be pass it on to them, get a feel for what their interest level is, what their priorities.
6 Because their situation's changing daily.

7 Exh. E, Disc. TE041392.

8 Jack further informed Steve that he had worked with General Vang Pao for the last ten years,
9 not on formal or military operations, but on civic efforts, education, and youth development. Jack
10 told Steve that one of the avenues being pursued was a presentation to the U.N. regarding the Hmong
11 situation in Laos. Jack also stated:

12 Right now, like I was saying, I've got no idea what they're going to do tomorrow or how
13 they're going to approach the situation. I know they're very sensitive to protecting their
14 people. They're very sensitive for responding to this genocide order that came out. And the
15 priorities, you know, could shift drastically...

16 Exh. E, Disc. TE041408.

17 Steve told Jack that 500 AK-47s would cost about \$400,000 and that he was not willing to
18 front that and have the Hmong say, "Hey, we don't want 'em now." So Steve would require half the
19 money up front and half on delivery. The following exchange then took place between Jack and
20 Steve:

21 Jack: Okay, let me give you a scenario and you can use this as a basis for, you know,
22 analyzing or looking at things further if you choose to. This group that's meeting right
23 now, is seriously considering promoting free democratic elections inside Laos as soon
24 as possible.

25 Steve: And willing to use force to try to get –

26 Jack: Preferably not. They want to do it differently, and they've got – you see, if they
27 can bring – if they can get those documents out. If they can – if they can get those
28 communist documents that actually stated active genocide, open, you know, genocide
on the Hmong people...If they can get exposed publicly, they can leverage that. They
can create havoc with having the documents. So, they get public sympathy. They get
the media involved. They could create a set of circumstances that would be very
embarrassing to the communists. It might bring them to their knees relative to how they
handle the Hmong. At least open the borders. You see, their primary objective is to get
their people out of Laos and across the border into Thailand. They don't care about
taking over the government. They don't want to do that. They figure it's just a matter
of time.

1 There's a certain group that's surrounded right now. Okay. There's about five to eight
2 thousand of 'em that are armed, that are guerillas that have families, that are basically hiding
3 and they're in the bush, okay? Those are the ones that need refuge or asylum...."

4 Exh. E, Disc. TE041424-TE041425.

5 Steve then asked Jack if the guerillas are fighting the communists right now on a regular basis
6 to try to overthrow the government. Jack responded, "No. No. No. They're trying to survive. They
7 basically have pulled together out of – out of collective security in order to protect themselves and
8 their families." Jack concluded the meeting with Steve by telling him that the Hmong will defer to
9 General Vang Pao on how to proceed and that this thing [the weapons purchase] could unwind and
10 the Hmong could decide to go in another direction.

11 On January 31, 2007, Jack left the following message on Steve's phone:

12 Steve, Harrison Jack. Just by way of feedback, it doesn't look like the Hmong
13 community is going to be in a position to continue with their activities. They're
14 reacting right now to this genocide order, and I think they're going to work internally,
15 relative to any future purchases... They've made some final decisions over the weekend
16 meeting, and then yesterday, they sort of came to a - a position that I'm passing on to
17 you right now.

18 Exh. E, Disc. TE041451.

19 Steve then initiated an unsolicited call to Jack on February 1, 2007. Steve volunteered that he
20 talked to some people who could deliver into the location. Steve also volunteered that he had boots
21 on the ground "for technical assistance"; men who could provide instruction and other specialized
22 services. Steve also volunteered that he had "other things," some "belt fed things and anti-armor type
23 of things." Exh. E, Disc. TE041457. Jack told Steve that he had heard the Communist forces inside
24 the country were selling their weapons for \$50 each and that this "lends itself to a more effective
25 response on their part." Steve then volunteered that he had "some other good stuff that I think you're
26 going to dig, some "rock-and-roll stuff." He did not identify what this "stuff" was. Once again Jack
27 stated that what he'd like to do is get Steve's information into the Hmong leadership's hands so that
28 Steve had a direct relationship with nothing dependant upon Jack. This would allow Steve to cut
29 whatever contract he could with the Hmong leadership. Exh. E, Disc. TE041461.

30 Steve and Jack talked again by phone on February 5, 2007. Jack told Steve that General Vang

1 Pao would be coming up, would meet him, and that the General was the “number one person.” Exh.
2 E, Disc. TE041481.

3 **B. February 7, 2007, Meeting With General Vang Pao and Others**

4 On February 7, 2007, a meeting occurred at a crowded Sacramento restaurant, where a large
5 group of Hmong people (including General Vang Pao’s wife and many others) were eating lunch at
6 separate tables. Steve informed Jack and defendant Lo Cha Thao that his partner would drive up
7 nearby with an RV in which Steve had laid out “everything” for a viewing. Steve provided Harrison
8 and Lo Cha Thao with a “complete price list.” Steve then introduced himself to Hue Vang, General
9 Vang Pao, and May Song Vang.

10 Jack informed Steve that he had just received a copy of the genocide order and that he was
11 coordinating the media. Jack also stated that after the lunch meeting, the Hmong leadership would be
12 discussing what they felt they could generate over a short period of time. Steve asked how long he
13 might need men in the field, and Jack stated only a week. Jack also volunteered to Steve that if he
14 needed more information or if he needed to know the status of something, that he could call Jack and
15 ask for it.

16 Jack and Steve continued their conversation:

17 Jack: There’s basically two levels here. And this critical level is a combination of
18 political and extraction. In other words, trying to get these people out from an area that
19 they’re encircled right now.

20 Steve: So they’re trapped?

21 Jack: I can’t say they’re trapped, but they’re heading in that direction. The Laotian
22 [unintelligible] is leading in troops to try to encircle.

23 Steve interrupted to tell Jack for the first time what weapons he had unilaterally decided to assemble
24 in the RV. Jack had not been informed previously what weapons were in the RV. The conversation
25 about the Hmong in Laos resumed:

26 Jack: We got women and children. I mean this is [unintelligible] Chief Joseph moving
27 the Nez Perce tribe.

28 Steve: Yeah.

1 Jack: You know, it's the same operation.

2 Steve: Yeah.

3 Jack: It's a retreat, retrograde with two – two and three generations involved.

4 Steve: Right. I understand.

5 Jack: What I'd like to be able to do is secure the Thai border crossings and avenues that
6 would allow them choices or, you know – without being totally committed to one path
7 instead of having –

8 Steve: Right.

9 Jack: -- multiple choices.

10 Exh. E, Disc. TE041501-TE041507.

11 The group ultimately left the restaurant to view the weapons in the RV. General Vang Pao
12 said that the agent had very good material and said goodbye stating “Yeah, okay, thank you. I'm sold
13 on the whole thing.” Steve asked for the coordinates of the location where the weapons would be
14 dropped. Defendant Hue Vang subsequently entered the RV and showed the agent a map that he had
15 put together the previous night that he said showed the location where the Lao military strong points
16 were, the locations where the Hmong were, and the ideal crossing points on the border. The agent
17 emphasized after receiving the map that “nothing moves until I get half the money, until you put your
18 order in and I get half the money.” Exh. E, Disc. TE041537-TE041540.

19 **C. February 15, 2007, Telephone Conversation Between Jack and Agent**

20 On February 15, 2007, the undercover agent called Harrison Jack at his home. Jack told the
21 agent that the Hmong leadership had just finished up a major strategy session. Jack also relayed that
22 he had preliminary budgets based upon the agent's weapons list. [Note: the agent's initial weapons
23 list did not include any Stinger missiles.] The agent then told Jack that there were a lot of logistical
24 aspects to this that had to be worked out. Jack said nothing would happen until Jack returned from a
25 trip on the 27th and that the Hmong had some fund raising to do. The agent then said “if they choose
26 not to do business with me because of that, that's okay.” Exh. E, Disc. TE041559-TE041566.

27 **D. March 1, 2007, Phone Message from Harrison Jack**

28 On March 1, 2007, Harrison Jack left the following phone message on the agent's telephone:

1 Jack: Steve, Harrison. Just got back. I've only talked with Lo once. He and the
2 leadership have all moved on back to Wisconsin and Minnesota this weekend, meeting
3 with Congressional Reps, state legislators, etc., in order to generate some political
4 support for their efforts. I did not get a chance to ask him, about the status of their
5 requirement. But feel free to contact him directly. I really don't have a need to be in
6 the middle of this any longer. Having set things up, I'll really leave the rest of it up to
7 the two of you. His direct line is 559-xxx-xxxx, that's 559-xxx-xxxx and he should be
8 in Wisconsin or Minnesota, or Minnesota at this time. He just flew back there last
9 night. But that's the latest I've got at this end and uh...[message ended].

6 Exh. E, Disc. TE041572.

7 **E. March 2, 2007, Call from Agent to Jack**

8 In response to Jack's March 1 message, the agent called Jack, acknowledged the receipt of his
9 message, and said he was "good to go on that." The agent, however, said he wanted to "get together
10 with [Jack] and talk about a couple of things...BS with you and – an shoot some ideas back and forth
11 with you." Exh. E, Disc. TE041575-TE041578.

12 **F. March 5, 2007, Meeting Between Agent and Jack**

13 On March 5, 2007, the agent met Jack at a restaurant. The agent suggested to Jack that they
14 each have a few beers. Exh. E, Disc. TE041590-TE041591 The agent then talked Jack out of getting
15 out, saying that he (the agent) did not feel comfortable with the Hmong. Exh. E, Disc. TE041601-
16 TE041603. When the agent asked Jack what was going on, Jack responded that the Hmong were
17 people who follow and that Vang Pao was a leader. Jack further stated that Vang Pao was not the
18 kind of person who killed people. Exh. E, Disc. TE041606-TE041608.

19 The two then discussed the genocide order at length. The agent compared what was happening
20 in Laos to Nazi Germany's final solution. Jack related how the Hmong wanted a conference about
21 the issue that could involve Americans "and anybody else they could." Jack helped get people
22 involved in the conference from all over the country. "So we had a good meeting, good discussion,
23 basically focused on strategic planning relative to political issues, who needs to be contacted." Jack
24 related how one person at this meeting called California Senator Feinstein's office to arrange a
25 meeting with her staff, and how others set up meetings with Congressional representatives in
26 Minnesota and Wisconsin. Jack asked Steve if he knew anyone who could validate the genocide
27 order. Exh. E, Disc. TE041608-TE041616.

1 Jack told Steve that Lo Cha Thao said there were still POW's in Laos. Steve suggests later in
2 the conversation that one of the things Jack might want to consider is to use the mercenaries to extract
3 and secure the POW's and to provide them with medical care and food. Exh. E, Disc. TE041617-
4 TE041620, TE041639-TE041640.

5 Jack related how the optimum strategy in his opinion was to get the right political support for
6 the Hmong. Jack mentioned that he knew someone in Senator Feinstein's office and that he was
7 hoping to contact. "Now, simultaneously to that, I've got them [the Hmong] to organize internally
8 into various subgroups or committees that focus on media, legal issues, fund raising, operations, you
9 know, all that kind of stuff." Jack asks the agent if he knows anyone who would "access the people."

10 The two then engaged in the following discussion:

11 Steve: You need to sit down with their military guys, sit down talk about this, plan it
12 out. Because you know as well as I do, you know, if you don't have a plan in place, an
13 objective set forth for – for the team, you know what they're going to do. They're
14 going to set up ambushes. They're going to do what they do best.

15 Jack: Yeah.

16 Steve: They're going to set up ambushes, and they're going to kill bad guys, which is
17 all great, fine and dandy. I mean, I'm all for killing bad guys. But they're an asset that
18 you're going to want to use to –

19 Jack: Use to --

20 Steve: -- to do some key things –

21 Jack: Yeah, right, yeah.

22 Steve: -- and not waste – like just killing a guy walking down the trail.

23 Jack: In fact, ideally, and I told Lo this, I said, "The optimum takeover is completely
24 bloodless. If you can hit the key points inside, transition this thing – because they've got
25 people even close to senior leadership in the military. They've got the military hierarchy. To
26 me, that's the most critical piece to this."

27 Exh. E, Disc. TE041635.

28 Jack then mentioned to Steve that he would get an update from Lo Cha Thao, but that Lo
29 "won't talk certain things over the phone." Steve asked where the Hmong were with fund raising
30 with respect to purchasing weapons and Jack stated that "best of my knowledge, they haven't initiated
31 any fundraising." Jack mentions that he helped set up a non-profit organization called HERO

1 (Hmong Emergency Relief Organization) to support Hmong refugees and that people have promised
2 to donate money once the organization received a tax exempt number from the IRS. Steve states that
3 all the weapons on his list would cost over \$5 million. Steve also provides Jack with a fly zone map
4 of Laos stating that “when we get down to getting more specific, when we get together for a planning
5 meeting, which is – we’re going to have to do sooner rather than later, uh, we’re going to, uh, have
6 more detailed maps for that.” Exh. E, Disc. TE041643-TE041646.

7 **G. March 7, 2007 Phone Conversation Between Jack and Agent**

8 On March 7, 2007, Harrison spoke with Steve on the phone. Jack mentions that within the last
9 48 hours the Communists were spraying yellow rain on villages and personnel, causing people to
10 drop. Jack mentions that in response to this, he’s been in touch with Amnesty International. Jack also
11 mentions that they Hmong had made an informal contact with the CIA and were looking for a
12 meeting in the future. Jack states that the Hmong are also working to turn the underpaid Laotian
13 military over. Steve then suggests, without any prompting from Jack, that he could get Stinger
14 missiles as a response to the spraying of yellow rain. Jack responds that he’ll see if the Hmong are
15 interested in them. Exh. E, Disc. TE041718-TE041723.

16 There are no further conversations between Jack and the agent prior to the March 27, 2007,
17 application for wiretaps on Jack’s home and cell phone.

18 **III. STANDARDS FOR LEGAL WIRETAPS**

19 **A. Statutory Requirements**

20 The federal procedure for the interception of wire, oral, or electronic communications is listed
21 in 18 U.S.C. §2518. This statute requires a “full and complete statement of the facts and
22 circumstances” justifying the applicant’s belief that a wiretap order should issue. This statement must
23 include the details of the offense that has been or “is about to be” committed. The statute requires a
24 full and complete statement as to whether or not other investigative procedures have been tried and
25 failed or why they reasonably appear to be unlikely to succeed if tried. Finally, the statute requires that
26 every order and extension shall be conducted in such a way as to minimize the interception of
27 communications not otherwise subject to interception. “In the event the intercepted communication is
28

1 in a code or foreign language, and an expert in that foreign language or code is not reasonably
2 available during the interception period, minimization may be accomplished as soon as practicable
3 after such interception.” 18 U.S.C. §2518(5).

4 **B. Case Law Requirements**

5 **1. Full and Complete Statement**

6 The court must examine the application to see if it contained material misstatements or
7 omissions regarding the necessity for a wiretap. *United States v. Carneiro*, 861 F.2d 1171, 1176 (9th
8 Cir. 1988). If the application for the order does not satisfy the necessity requirement when any
9 misstatements are removed and any omissions are inserted, the court must order suppression of the
10 wiretap recordings. *United States v. Ailemen*, 986 F. Supp. 1228, 1231 (N.D. Cal. 1997) (*quoting*
11 *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985)).

12 The Supreme Court, in *Franks*, created a route to invalidate wiretap orders if the affidavits
13 supporting them conceal or misrepresent material facts leading a judge inappropriately to find
14 necessity for a wiretap order. 438 U.S. 154, 98 S. Ct. 2674 (1978). Under *Franks*, the court must hold
15 an evidentiary hearing when the defendant challenges the validity of an affidavit and makes a
16 “substantial preliminary showing” that (1) the allegations in the supporting affidavit were the result
17 “of deliberate falsehood or reckless regard for the truth” and (2) the remaining portion of the affidavit
18 is not sufficient to support a finding of probable cause. *Franks*, 438 U.S. at 171. When considering
19 the effect of misrepresentations and omissions on the existence of probable cause, a court considers
20 the effect “cumulatively.” *United States v. Greger*, 716 F.2d 1268, 1275 (9th Cir. 1983). “Specific
21 allegations” of misrepresentation or omissions in an affidavit entitle a defendant to a *Franks* hearing.
22 *United States v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983). “Clear proof” of deliberate or reckless
23 omission or misrepresentation is not required. *U.S. v. Stanert*, 762 F.2d at 781. The Ninth Circuit
24 requires (1) a “substantial showing” that the affidavit contained reckless or intentional
25 misrepresentations or omissions and (2) without the misrepresentations or omissions the affidavit
26 would not support a finding of probable cause. *Id.* at 782; *see also United States v. Chesher*, 678 F.2d
27 1353, 1360 (9th Cir. 1982). Once these two prongs are met, the defendant may test the validity of the
28

1 affidavits through live testimony and cross-examination of witnesses. *Chesher*, 678 F.2d at 1362.
2 Moreover, “[t]here is no ‘good faith’ exception to the *Franks* doctrine: a warrant based upon knowing
3 or recklessly made falsehoods in the affidavit will be invalid.” *Mills v. Graves*, 930 F.2d 729, 733
4 (9th Cir. 1991).

5 **2. Employment of other Investigative Techniques (“Necessity Requirement”)**

6 Congress intended that wiretap surveillance *not* be “routinely employed as the initial step in a
7 criminal investigation, [r]ather, the applicant must state and the court must find that normal
8 investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if
9 tried or to be too dangerous.”⁷ *United States v. Giordano*, 416 U.S. 505, 515 (1974). The purpose of
10 the necessity requirement is to ensure that wiretapping is not resorted to in situations where traditional
11 investigative techniques would suffice to expose the crime. *United States v. Kahn*, 415 U.S. 143, 153,
12 n. 12 (1974). To obtain a wiretap, therefore, the government must overcome this statutory
13 presumption against such an intrusive investigative method by proving necessity. *United States v.*
14 *Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *Ippolito*, 774 F.2d at 1486 (citing *Giordano*, 416 U.S.
15 at 515; *United States v. Bailey*, 607 F.2d 237, 241 n.11 (9th Cir. 1979)).

16 According to 18 U.S.C. § 2518(1)(c), the government may establish necessity for a wiretap by
17 any of three, alternative methods. The government may show that traditional investigative procedures
18 (1) have been tried and failed; (2) reasonably appear unlikely to succeed if tried; or (3) are too
19 dangerous to try. *See also United States v. Smith*, 31 F.3d 1294, 1298 n.2 (4th Cir. 1994). A district
20 court must reject a wiretap application if law enforcement officers have not first attempted, without
21 success, traditional investigative methods that “easily suggest themselves and are potentially
22 productive and not unduly dangerous.” *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985).

24 ⁷ Congress, in passing wiretap legislation, clearly contemplated the use of other investigative
25 techniques before resorting to wiretaps. See generally S. REP. 90-1097, 1968 U.S.C.C.A.N.
26 2112, 2190 (“The judgment would involve a consideration of all the facts and circumstances.
27 Normal investigative procedure would include, for example, standard visual or aural surveillance
28 techniques by law enforcement officers, general questioning or interrogation under an immunity
grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover
agents or informants.”)

1 Moreover, a wiretap application should be rejected if the agency cannot demonstrate that normal
2 investigative techniques would necessarily fail after “a reasonable period of time.” *United States v.*
3 *Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977) ; accord *United States v. Blackmon*, 273 F.3d 1204,
4 1207 (9th Cir. 2001).

5 This circuit has interpreted these necessity provisions to require a "full and complete statement
6 of specific allegations" establishing the necessity of the wiretap sought. *Blackmon*, 273 F.3d at 1207
7 (citing *Ippolito*, 774 F.2d at 1486). A "common sense approach" is used to evaluate the
8 reasonableness of the government's efforts to use traditional investigative tactics or its decision to
9 forego such tactics based on the unlikelihood of their success or the probable risk of danger involved
10 with their use. *Blackmon*, 273 F.3d at 1207; *United States v. Commito*, 918 F.2d 95, 98 (9th Cir.
11 1990).

12 Mere conclusions by the affiant are insufficient to justify a wiretap order. *Cf., Aguilar v.*
13 *Texas*, 378 U.S. 108 (1964) (reviewing search warrant affidavits). They do not provide facts from
14 which a detached judge or magistrate can determine whether other alternative investigative
15 procedures exist as a viable alternative. *United States v. Kalustian*, 529 F.2d 585, 590 (9th Cir. 1975).
16 Nor is it sufficient for the government to argue that conspiracies are tough to crack, so we need a
17 wiretap. *Id.* at 589. Similarly, "boilerplate conclusions that merely describe inherent limitations of
18 normal investigative procedures," (*Blackmon*, 273 F.3d at 1210) or that are based solely upon an
19 agent's knowledge and experience rather than the facts of a specific case are insufficient to establish
20 necessity. *Spagnuolo*, 549 F.2d at 710. Instead, the affidavit must contain an “adequate factual
21 history of the investigation and a description of the criminal enterprise sufficient to enable” the
22 issuing court to determine on its own whether there is the requisite necessity for the use of a wiretap.
23 *Id.*

24 Finally, each wiretap application or extension, standing alone, must satisfy the necessity
25 requirement. *Carneiro*, 861 F.2d at 1176.

26 3. Minimization

27 The statute does not forbid the interception of all nonrelevant conversations, but rather
28

1 instructs the agents to conduct the surveillance in such a manner as to "minimize" the interception of
2 such conversations. Whether the agents have in fact conducted the wiretap in such a manner will
3 depend on the facts and circumstances of each case. *Scott v. United States*, 436 U.S. 128, 140 (1978);
4 *United States v. McGuire*, 307 F.3d 1192, 1199 (9th Cir. 2002) ("Minimization requires that the
5 government adopt reasonable measures to reduce to a practical minimum the interception of
6 conversations unrelated to the criminal activity under investigation while permitting the government
7 to pursue legitimate investigation.").

8 **4. Standing**

9 The statute defines an aggrieved person as one "who was a party to any intercepted wire, oral,
10 or electronic communication or a person against whom the interception was directed." 18 U.S.C. §
11 2510(11) (emphasis added). The Supreme Court has interpreted these provisions as limiting standing
12 to challenge wiretaps to persons whose Fourth Amendment rights were violated by the interception.
13 *Alderman v. United States*, 394 U.S. 165, 175-76, n.9 (1969); see also *United States v. King*, 478 F.2d
14 494, 506 (9th Cir. 1973).

15 ///

16
17
18 [THIS SPACE INTENTIONALLY LEFT BLANK]
19
20
21
22
23
24
25
26
27
28

1 **ARGUMENT**

2 **IV. THE REQUIREMENTS FOR LAWFUL WIRETAPS WERE NOT MET BY THESE**
3 **AFFIDAVITS**

4 **A. Standards of Review**

5 A wiretap challenge in the district court is, essentially, appellate review of the original
6 authorizing court’s decision to permit a wiretap. *See United States v. Valdez-Pacheco*, 701 F.Supp.
7 775, 884 (D. Or. 1989). The standard of review varies depending on the legal issue. A district court’s
8 decision to authorize a wiretap on the face of the application and affidavit is reviewed for an abuse of
9 discretion. *See United States v. Canales Gomez*, 358 F.3d 1221, 1225 (9th Cir. 2004); *United States v.*
10 *Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Echavarria-Olarte*, 904 F.2d 1391,
11 1395 (9th Cir. 1990). The authorizing court’s determination that the government’s wiretap application
12 complied with the “full and complete statement” requirement of Section 2518(1)(c) is reviewed de
13 novo. *See United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Brone*,
14 792 F.2d 1504, 1506 (9th Cir. 1986). Similarly, de novo review is utilized when evaluating whether
15 false statements or omissions affected the original decision to authorize the interception. *See United*
16 *States v. Elliott*, 893 F.2d 220, 222 (9th Cir. 1990). The ultimate question whether a false statement or
17 omission is essential to a finding of probable cause or necessity is a mixed question of law and fact
18 reviewed de novo. *United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992).

19 When defending the wiretap applications and orders, the government must be limited to the
20 facts and information contained within the application and affidavits when presented to the
21 authorizing court. *See, e.g., United States v. Meling*, 47 F.3d 1546, 1551-52 (9th Cir. 1995) (“Looking
22 only to the four corners of the wiretap application, we will uphold the wiretap if there is a substantial
23 basis for these findings of probable cause.”).

24 ///

25 ///

26 ///

1 **B. The Extensive, Intentional, Material Omissions Violated the Governing**
2 **Statute and Misled the Magistrate Judge About the Nature of this Case and**
3 **the Necessity for any Wiretaps**

4 The requirements for valid wiretap affidavits are dictated by statute. Title 18 U.S.C.
5 §2518(1)(b) specifically requires that each application for a wiretap or wiretap extension include “a
6 full and complete statement of the facts and circumstances” justifying the tap. As is abundantly clear
7 from the statement of relevant facts listed above, the Jack Affidavit does not present a full or
8 complete statement of relevant facts. These same facts, and others, are intentionally omitted from the
9 First and Second Jack Extensions and the Lo Cha Thao Affidavit.⁸

10 Moreover, the facts that were omitted from the affidavits are not mere oversights. The
11 affidavits were intentionally written in such a manner as to present a completely slanted and
12 incorrect picture of what was occurring in this case. This was not an “insurgent group’s attempt to
13 overthrow the current government of Laos.” Instead, this was an effort by expatriate Hmong to
14 address the imminent genocide of Hmong men, women, and children living in the jungles of Laos.

15 The knowing omission of material facts from the wiretap affidavit permitted the government to
16 deceive the issuing court about the need for a wiretap at all. For example:

17 (1) Harrison Jack repeatedly told the agent about the nature and substance of his
18 communications with other Hmong defendants. Harrison Jack never refused or failed to answer any
19 questions posed to him by the agent. Tapping his phones would reveal nothing that Harrison Jack did
20 not tell the agent. Harrison Jack also did not speak Hmong, so tapping his phones would not reveal
21 any conversations in the Hmong language.

22 (2) Harrison Jack repeatedly told the agent he could deal directly with the Hmong defendants.
23 In fact, Jack provided the agent with his contact’s direct phone number. The agent made the repeated
24 decision not to do this; yet, in the affidavit for wiretaps, the agent omits this and instead falsely states
25 he had only indirect access to Hmong defendants. Subsequent to the initial wiretap on Harrison

26 ⁸ Lists of the numerous material omissions and false statements from the Jack Affidavit, the First
27 Jack Extension, the Lo Cha Thao Affidavit, and the Second Jack Extension are provided as
28 Attachments 1 through 4 to this motion.

1 Jack's phones, the agent in fact arranged a separate meeting with Lo Cha Thao and other Hmong
2 defendants, but not Harrison Jack. When meeting with the agent, Lo Cha Thao appears to be as
3 willing as Harrison Jack to answer any of the agent's questions.

4 (3) At all times, the agent was in charge of any and all weapons. If any weapons were to be
5 received, possessed, or transported, the agent was the person dictating where, when, and by whom.
6 Wiretaps would reveal nothing about weapons delivery, receipt, or payment, as the logistics for each
7 of these areas had to be processed through the agent.

8 (4) The agent required \$200,000 up front before any weapons of any kind would be delivered.
9 Harrison Jack kept the agent apprised on virtually a daily basis of the status of any fund raising efforts
10 that he was aware of; tapping his phones would not reveal any additional information. If any money
11 were ever forthcoming, either a few questions to Lo Cha Thao or a search warrant could easily
12 uncover any list of payees.

13 (5) The agent specifically requested that he be directly involved with any plans. Harrison Jack
14 agreed.

15 (6) The government had, or was able to obtain, the subscriber information for calls to and
16 from the phones of all alleged conspirators, including Harrison Jack, Lo Cha Thao, General Vang
17 Pao, Lo Thao, Lo Cha Thao, and Chong Yang Thao. Harrison Jack's calls to and from the agent were
18 already being recorded and Harrison Jack told the agent the substance of relevant calls he had with Lo
19 Cha Thao, the only co-defendant he called on a regular basis. Similarly, any consensual phone calls
20 or undercover meetings between the agent and Lo Cha Thao could be recorded without the need for
21 any wiretaps.

22 (7) Harrison Jack repeatedly told the agent that the Hmong were considering many options,
23 only one of which involved the purchase in the United States of any weapons, and that Jack did not
24 know what the Hmong in this country were going to do. Jack also repeatedly promised to notify the
25 agent of any Hmong leadership decisions about weapons, and he kept this promise.

26 (8) Each time the agent unilaterally suggested that the Hmong wanted to take over the country,
27 Harrison Jack replied that the Hmong did not want to use force and that they did not desire an
28

1 overthrow of the Laotian government.

2 The effect of the omissions upon the need for wiretaps can best be illustrated by reviewing just
3 some of the omitted facts from just one part of one meeting between Jack and the agent on March 5,
4 2007:

5 (1) Jack mentioned to the agent that he would get an update from Lo Cha Thao, but that Lo
6 “won’t talk certain things over the phone.” Exh. E, Disc. TE041637. The normal investigative
7 technique of simply talking to Jack and Lo Cha Thao was likely to gain more relevant information
8 than a wiretap on either defendant’s phone.

9 (2) Steve asked where the Hmong were with fund raising with respect to purchasing weapons
10 and Jack stated that “best of my knowledge, they haven’t initiated any fundraising.” Exh. E, Disc.
11 TE041640. Jack shows his willingness to answer any of Steve’s questions, including questions
12 regarding fundraising; again, obviating any need for a wiretap.

13 (3) Jack mentions that he helped set up a non-profit organization called HERO (Hmong
14 Emergency Relief Organization) to support Hmong refugees and that people have promised to donate
15 money once the organization received a tax exempt number from the IRS. Exh. E, Disc. TE041641.
16 Jack, rather than any wiretap, would be the best resource for the agent to use in determining the
17 purpose of donated money.

18 (4) The agent states that all the weapons on his list would cost over \$5 million. Exh. E, Disc.
19 TE041643. The agent also provides Jack with a fly zone map of Laos stating that “when we get down
20 to getting more specific, when we get together for a planning meeting, which is – we’re going to have
21 to do sooner rather than later, uh, we’re going to, uh, have more detailed maps for that.” Exh. E, Disc.
22 TE041646. No transfer of weapons, no military action, not even any planning would occur without
23 the agent’s active involvement. A wiretap was totally unnecessary.

24 The government did not give “a full and complete statement of the facts and circumstances”
25 justifying the tap and, in so doing, violated the governing statute. This is not a constitutional
26 question. It is not an exclusionary rule issue. It is simply a statutory question: Did the government
27 comply with the explicit requirements of the statute? It did not. The wiretaps must be suppressed on
28

1 that basis alone.

2 **C. The Cumulative Effect of the Extensive, Material False Statements in the**
3 **Affidavits Misled the Magistrate Judge About the Necessity for any Wiretaps**

4 A list of the numerous material false statements in the Jack Affidavit are contained in
5 Attachment 1. This list is more than eight pages long. "Specific allegations" of misrepresentation or
6 omissions in an affidavit entitle a defendant to a *Franks* hearing. *United States v. Kiser*, 716 F.2d
7 1268, 1271 (9th Cir. 1983). A few of the more telling false statements that went directly to the
8 asserted need for a wiretap include:

9 (1) "In most cases, [Jack] does not elaborate on the substance of [his phone calls and
10 meetings with Neo Hom leadership.]"

11 This totally false assertion is made in Exh. A, p. 35, ¶99.⁹ It is perhaps the key false statement
12 as it directly misleads the court into a belief that wiretaps of Jack's telephones will reveal information
13 that he is not sharing with the agent. In fact, Harrison Jack goes out of his way to share every
14 conversation and every fact that he is aware of with the agent. Not once does Harrison Jack refuse to
15 answer any question posed him by the agent. Not once does he fail to follow up with the agent. It is
16 simply impossible to show or even argue that wiretaps of Harrison Jack's phones will reveal anything
17 that he would fail to share with the agent.

18 (2) False statements about lack of access to the alleged co-conspirators.

19 The agent stated that: "It is exceptionally rare that Neo Hom¹⁰ will interact with or include
20 non-clan members in their plans, thus making introductions from additional cooperating sources or
21 undercover officers unlikely. JACK is the link to the Neo Hom organization and hierarchy."¹¹ He

23 ⁹ The same false statement appears in the First Jack Extension, Exh. B, at p. 45, ¶128, the Lo Cha
24 Thao Affidavit, Exh. C, at p. 49, ¶140, and the Second Jack Extension, Exh. D, at p. 30-31, ¶87.

25 ¹⁰ As discussed below, the agent's use of "Neo Hom" was also intentionally and materially
26 misleading.

27 ¹¹ This false statement appears in the Jack Affidavit, Exh. A, at p. 32, ¶93, First Jack Extension,
28 Exh. B, at p. 42, ¶122, the Lo Cha Thao Affidavit, Exh. C, at p. 45, ¶132, and the Second Jack
Extension, Exh. D, at p. 27, ¶81.

1 further stated: "The operation is limited in that I only have indirect access through Harrison JACK to
2 the Neo Hom members involved in the conspiracy. JACK is the only subject who has interacted
3 directly with me."¹² These statements were entirely false. The agent had achieved access to many of
4 the alleged co-conspirators and had direct conversations with them, which he had recorded, on more
5 than one occasion. Moreover, Jack specifically informed the agent on January 25, 2007; February 1,
6 2007; and March 1, 2007, that the agent could and should communicate *directly* with Lo Cha Thao
7 and that Jack's involvement as a middleman was no longer necessary. On March 1, 2007, Jack even
8 provided the agent with Lo Cha Thao's direct phone line. Exh. E, Disc. TE041390.

9 False statements about the usefulness of cooperating sources, when "these misstatements and
10 omissions work to 'conceal the fact that the wiretap was not necessary'" justify the suppression of the
11 wiretaps. *Blackmon*, 273 F.3d at 1209 (citing *Carneiro*, 861 F.2d at 1182).

12 (3) False statements alleging that defendants received machine guns.

13 The agent states that Jack and his co-conspirators are "responsible for: illegally receiving and
14 possessing machineguns [sic] [and] possessing and transferring machineguns [sic] to Laos."¹³ There
15 is no basis whatsoever for this statement. There is no evidence that any defendant ever received any
16 weapons, let alone machine guns, or that any defendant ever transferred any weapons to Laos. The
17 true facts are that any and all weapons were under the exclusive control of the agent. By including
18 these false statements, however, the agent was able create the false impression that wiretaps were
19 necessary because the alleged conspirators might use weapons without his knowledge.

20 (4) Improper and repeated use of the misleading terms "Neo Hom" and "insurgents."

21 Jack made it clear again and again that the Hmong people he was dealing with were not
22
23

24 ¹² This false statement appears in the Jack Affidavit, Exh. A, at p. 35, ¶99, First Jack Extension,
25 Exh. B, at p. 45, ¶128, and the Lo Cha Thao Affidavit, Exh. C, at p. 49, ¶140. It is also
incorporated by reference in the Second Jack Extension, Exh. D, at p. 2, ¶4.

26 ¹³ This false statement appears in the Jack Affidavit, Exh. A, at p. 3, ¶8, and the First Jack
27 Extension, Exh. B, at p. 3, ¶8. It is also incorporated by reference in the the Second Jack
28 Extension, Exh. D, at p. 2, ¶4.

1 advocating violence and that any weapons were for protection against an imminent genocide. The
2 government had nothing to suggest otherwise, except some unverified information obtained a decade
3 or more earlier about expatriate Hmong activities outside of the Eastern District. It is not a mere
4 oversight, but a blatant effort to mislead, that the wiretap affidavit omits dates in several paragraphs
5 where “Neo Hom” or “insurgents” are mentioned. *E.g.* Exh. A ¶¶ 22, 23, 25, 32. When dates are
6 mentioned in paragraphs alleged or implied insurgent activities they concern alleged events in 1987
7 (¶24), 1999 (¶¶26, 41, 42), 2000 (¶43), and 2001 (¶31).

8 The Ninth Circuit has soundly rejected efforts by the government to bootstrap necessity
9 showings from previous investigations into subsequent applications for lines or re-ups. *See, e.g.*,
10 *United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir. 2005). As the Court explained:

11 To cover its failure to establish necessity for the Blake Avenue wiretap, the Hill
12 affidavit attempted to shoehorn the significant investigatory work the government
13 conducted before applying for the Terminal wiretap into its application for the Blake
14 Avenue wiretap. But the government is not free to transfer a statutory showing of
15 necessity from one application to another – even within the same investigation. This
16 court has held that an issuing judge may not examine various wiretap applications
17 together when deciding whether a new application meets the statutory wiretap
18 requirement. Each wiretap application must separately satisfy the necessity requirement.

19 *Id.* at 1115.

20 The agent repeatedly and misleadingly referred to the alleged conspiracy as one being
21 conducted by the “Neo Hom” to give the impression of a unified and organized conspiracy, even
22 while admitting that “at no time during this investigation has a target subject or any other Hmong
23 person identified him/herself to me as a Neo Hom member.” Exh. A, ¶ 23. The agent injects the term
24 “Neo Hom” at hundreds of points to suggest that the individuals identified were part of a larger group
25 with illicit motives and access to money. *E.g.* Exh. A ¶¶ 57, 62, 66, 69, 71, 72, 74, 75, 78, and 79.
26 This term, which the agent admits no defendant *ever* uttered, was used for the sole purpose of
27 suggesting an insidious plot backed by an organization with structure and resources to bolster the
28 agent’s claim that wiretaps were necessary. For instance, the agent misled the Court by stating that
the “purpose of the Neo Hom is to overthrow the Communist regime in Laos” and discussing various

1 meetings and articles about the Neo Hom.¹⁴ Exh. A, ¶¶ 23-26. Further, other allegations were
 2 included in the affidavits regarding purported collections of money by the Neo Hom and purported
 3 members of the Neo Hom who went missing in Laos in the 1990s. Exh. A, ¶¶ 25, 26.

4 Given that at no time did anyone involved in this case indicate that the Neo Hom was behind
 5 the purported conspiracy or that any defendants were active members of the Neo Hom, it is clear that
 6 these false allegations were included only to suggest that there was credibility to the far-fetched
 7 alleged scheme to overthrow the government of Laos. The agent's rampant use of this term
 8 throughout all four of the affidavits, in light of the lack of evidence to confirm this incriminating
 9 branding of the alleged conspirators, was an improper attempt to bolster the claim of necessity. As
 10 with other the agent's other false statements, all references to the "Neo Hom" and the activities
 11 thereof in the affidavits should be disregarded by the Court when assessing the validity of the agent's
 12 claim that the wiretaps were necessary.

13 The affidavits also are rife with the word "insurgents." This term is also used hundreds of
 14 times in the affidavits at issue. Obviously, the purpose of this is to mislead the court into a false
 15 belief that the purchase of weapons was to overthrow the current Laotian regime, rather than the true
 16 fact that the weapons, if purchased at all, would be used to protect Hmong people fleeing the
 17 genocide. The truly outrageous circumstance surrounding the use of the word "insurgent," however,
 18 is that the agent repeatedly tried to get Jack to support this idea – and Jack repeatedly told the agent he
 19 was wrong to suggest this:

20 Agent: ...And willing to use force to try to get –

21 Jack: Preferably not. They want to do it differently;¹⁵

22 ...

23
 24 ¹⁴ The affidavit also includes many other irrelevant allegations offered to suggest legitimacy, such
 25 as the reference to a news article in which a Neo Hom member allegedly claimed his payments to
 26 the defunct organization "guarantees him a government position in Laos after Neo Hom
 27 overthrows the existing government." Exh. A, ¶ 25. And he purports to quote General Vang Pao
 28 in a speech given *two decades* ago in which the General allegedly stated that the purpose of the
 Neo Hom was to overthrow the Communist regime in Laos. Exh. A, ¶ 24.

¹⁵ Exh. E, Disc. TE041425.

1 Steve then asked Jack if the guerillas are fighting the communists right now on a regular
2 basis to try to overthrow the government.

3 Jack responded, “No. No. No;”¹⁶
4 ...

5 Jack: In fact, ideally, and I told Lo this, I said, “The optimum takeover is completely
6 bloodless.”¹⁷

7 Jack would not fall into the agent’s repeated traps because they were based upon false
8 assumptions and he told the agent that. So the government decided to trap this court into approving
9 illegal wiretaps by omitting what Jack was saying and repeatedly using a term that it knows was
10 disavowed by the very people subject to the wiretap.

11 (5) False information about the government informant and Jack’s contact with him.

12 The undercover agent falsely informed the Court that Harrison Jack came to the ATF’s
13 attention because “he reached out to a defense contractor.”¹⁸ This was clearly intended to suggest that
14 Jack had legitimate connections with arms merchants, and therefore posed a serious threat of
15 obtaining weapons and delivering them to Laos, in order to bolster the claimed necessity for a wiretap
16 on Jack’s phone. But the statement is untrue. According to the government’s own investigation
17 report, Jack had contacted an acquaintance named Namon Hawthorne.¹⁹ Hawthorne is no “defense
18 contractor.” He is an inventor and small businessman whose principal venture is a company that sells
19 “kinetically charged” water, and posts “testimonials” on its website claiming that its water can cure
20 leukemia, prostate cancer, shingles, and many other ailments.²⁰ The government has produced, and

21 ¹⁶ Exh. E, Disc. TE041427.

22 ¹⁷ Exh. E, Disc. TE041635.

23 ¹⁸ This false statement appears in the Jack Affidavit, Exh. A, at p. 16, ¶49, First Jack Extension,
24 Exh. B, at p. 19, ¶60, and the Lo Cha Thao Affidavit, Exh. C, at p. 17, ¶54. It is also incorporated
25 by reference in the the Second Jack Extension, Exh. D, at p. 2, ¶4.

26 ¹⁹ Exh. E, Disc. TE0034615.

27 ²⁰ See Declaration of Galia A. Phillips In Support of Defendants’ Motion to Dismiss for
28 Outrageous Government Conduct, Excerpts from www.kinesiswater.com. p. 1, ¶4.

1 defendants have uncovered, no evidence suggesting that Hawthorne is involved in any way with arms
2 sales.

3 The agent also omitted from the affidavits that when Jack contacted Hawthorne, Jack made it
4 clear he wanted guns not for any offensive purpose, but for besieged Hmong villagers “*to protect*
5 *themselves.*”²¹ And the agent omitted any mention of Jack’s statements that those with whom Jack
6 purported to be connected *preferred not to use force, and did not care about taking over the*
7 *government, but rather, were simply “trying to survive.”*²² Indeed, Jack told Hawthorne that he hoped
8 to buy “rifles to be used to support Laotians who are being slaughtered in Laos,” explaining that
9 “there is a genocide taking place in Laos and he needed to help those persons being ethnically
10 cleansed by providing them with firearms *to protect themselves.*”²³

11 Similarly, when the agent inaccurately describes his phone call to Jack in which he refers to
12 “[t]he problem in East Asia,” he omits Jack’s response, which was: “*Oh. Oh. Okay. Okay. Golly*
13 *sakes, that’s a long time ago.*”²⁴ The agent also omits Jack’s statement when they met that the
14 Hmong had contacted him months ago about weapons and that until Steve called, Jack thought the
15 whole thing had fallen through.²⁵ These responses show that, contrary to the allegations in the
16 affidavits, there was no imminent conspiracy to overthrow the government of Laos and there was no
17 other attempts being made to obtain weapons from individuals in the United States. But the agent
18 improperly omitted these responses from his affidavits.

19 (6) False statements concerning the February 7, 2007 meeting between the agent and Jack.

20 In describing the meeting, the affidavits repeatedly and misleadingly attribute supposedly
21 incriminating statements to “Jack and General Vang Pao” collectively, as though both were actively
22

23 ²¹ Exh. E, Disc. TE041427.

24 ²² Exh. E, Disc. TE041427.

25 ²³ Exh. E, Disc. TE0034614.

26 ²⁴ Exh. E, Disc. TE041371-TE041373.

27 ²⁵ Exh. E, Disc. TE035452.

1 discussing the supposed coup plot at the meeting.²⁶ In fact, General Vang Pao said virtually nothing
2 at the lunch meeting.²⁷ Moreover, much of the affidavit's descriptions of the dialog attributed to
3 "Jack and General Vang Pao" is totally fabricated, corresponding to *nothing* on the tape recordings.
4 For example, the undercover agent said in his affidavit, "During the meeting at the restaurant on
5 February 7, 2007, I told Jack and General Vang Pao that I needed to have them show me on maps
6 exactly where they needed me to insert both the troops and munitions, . . . [and] they stated that they
7 understood and could provide me with maps showing the points of insertion, as well as the placement
8 of insurgent troops and Lao government troops."²⁸ But the tapes reveal no discussion at all like this at
9 the lunch meeting.²⁹ Nor is there any support for the undercover agent's statement in his affidavit that
10 "I told Jack and General Vang Pao that I needed to get an operational briefing from someone doing
11 the operations planning for their insurgent operation, as well as copies of the operations plan."³⁰ The
12 agent simply made this up. The undercover agent also attests that Jack and General Vang Pao
13 described to him what appeared to be a serious insurgency plan:

14 Jack and General Vang Pao advised me that the plan was **to provide arms to**
15 **insurgents who were in place in Laos, and to initiate hostile military action in the**
16 **very near future against military forces of the government of Laos.** I was advised
17 that the insurgents would **attack Lao government soldiers and positions** and attempt
18 to gain control of certain areas of the border between Laos and Thailand.³¹

19
20 ²⁶ These false statements appears in the Jack Affidavit, Exh. A, at ¶¶ 63, 64, First Jack Extension,
21 Exh. B, at ¶¶ 74, 75, and the Lo Cha Thao Affidavit, Exh. C, at p., ¶¶ 68, 69. They are also
22 incorporated by reference in the the Second Jack Extension, Exh. D, at p. 2, ¶4.

23 ²⁷ As this Court is well aware, the government originally indicted General Vang Pao and accused
24 him of being the leader of the so-called plot to overthrow the government of Laos. For that
25 reason, the agent included numerous false statements about General Vang Pao in these and other
26 affidavits. The government dismissed General Vang Pao from the case in September 2009.

27 ²⁸ Exh. A, ¶ 64; Exh. B ¶ 75; Exh. C, ¶ 69; Exh. D, ¶4.

28 ²⁹ Exh. E, Disc. TE041490-TE041543.

³⁰ Exh. A, ¶ 65; Exh. B ¶ 76; Exh. C, ¶ 70; Exh. D, ¶4.

³¹ Exh. A, ¶ 63; Exh. B ¶ 74; Exh. C, ¶ 68; Exh. D, ¶4.

1 But the taped record contains no statements like this either.³²

2 These are clearly material false statements offered to support the agent's assertion that wiretaps
3 were needed to: "prove that the conspirators intend to violate the Neutrality Act by beginning,
4 providing, preparing, providing money for and taking part in a military expedition or enterprise to be
5 carried out against the foreign state and people of Laos" and to "prove the conspirators [sic]
6 subjective state of mind, i.e. that they intend to attempt to overthrow the Laotian government, and not
7 merely provide for free passage to and physical security for refugee camps in Thailand." Exh. A, ¶96.

8 The government has since conceded that the agent's affidavit contains these falsehoods; in
9 their Opposition to the Motion to Dismiss for Government Misconduct, the government admitted:
10 **"The UC does not believe that Vang Pao affirmatively made the statements noted in the**
11 **affidavit."**³³ Stated somewhat differently, the undercover agent has admitted that Vang Pao (whom
12 the government once insisted was the leader of the alleged conspiracy) *never made* the statements
13 attributed to him in the affidavit. Furthermore, Jack said at the meeting that he was "trying to get
14 these people [i.e., the Hmong victims of genocide] out from an area where they're encircled in," and
15 that he wanted to "secure tight border crossings and avenues" for them to escape.³⁴ But he made clear
16 that the "optimum situation" was not to use force at all.³⁵ And there was no mention of "insurgents"
17 or of initiating a "hostile military action" at all—only of escape.

18 For the purpose of this motion, the most important fact about the government's false
19 statements is not that they were false, or the sheer number of such false statements, but that they were
20 knowingly made for the purpose of mischaracterizing this case and misleading the court into
21 approving unwarranted wiretaps. There was no agreement for a violent takeover of the Laotian
22 government. There was no agreement to purchase any weapons. There were discussions with an
23

24 ³² Exh. E, Disc. TE041490-TE041543.

25 ³³ Gvt Opp. to Mtn. to Dismiss at 81:14-17.

26 ³⁴ Exh. E, Disc. TE041504.

27 ³⁵ Exh. E, Disc. TE041506-TE041507.

1 undercover agent about weapons where that agent controlled all access to any weapons and where that
2 agent insisted that nothing go forward until someone showed him the money – and not just a little
3 money, \$200,000. Equally significantly, there was not a single question by the agent that Harrison
4 Jack refused to answer, not a single event that Jack hid from the agent, and not a single conversation
5 that Jack engaged in that he failed to relate to the agent. Wiretapping Jack’s phones was entirely
6 unnecessary.

7 **D. The Sworn Affidavits Submitted in Support of Wiretaps Fail to Establish Necessity**

8 The section of the affidavits addressing necessity is a virtual primer on the limitations of
9 individual investigative techniques in other investigations, particularly when each technique is viewed
10 in isolation. The problems are that very little of this section has anything to do with *this* case, and
11 investigative techniques cannot be evaluated in isolation. The Ninth Circuit has repeatedly held that
12 boilerplate, conclusory affidavits “that merely describe inherent limitations of normal investigative
13 procedures,” (*Blackmon*, 273 F.3d at 1210) or that are based solely upon an agent’s knowledge and
14 experience rather than the facts of a specific case are insufficient to establish necessity. *Spagnuolo*,
15 549 F.2d at 710.

16 Even a cursory reading of the necessity section shows that the government did not fully
17 exhaust normal investigative techniques before seeking the wiretaps. To the contrary, the affidavits
18 demonstrate that when the government used other investigative techniques, they were successful. *E.g.*
19 Exh. C, ¶ 134. The governing statute requires that the government “*prove necessity* before it may
20 utilize the unconventional method of wiretaps as an investigative tool.” *Gonzalez*, 412 F.3d at 1110
21 (emphasis added). The government utterly failed to do so here.

22 **1. Unimpeded Access to Harrison Jack**

23 Harrison Jack met or talked to undercover agent Steve every single time he requested to do so.
24 And at every meeting, Harrison Jack never once refused to answer any question posed to him by the
25 agent. Moreover, when Harrison Jack did not know an answer to the agent’s question, particularly
26 with regard to decisions by the Hmong leadership, Harrison Jack subsequently inquired and informed
27 the agent what he learned. The affidavit for the wiretap utterly fails to mention the successful and
28

1 repeated efforts that the agent made to keep Jack involved after Jack indicated he desired to cease his
2 involvement. In so doing, the agent insured that his conduit for information remained open and
3 available.

4 One of the normal investigative tools used by law enforcement is to infiltrate group criminal
5 activities by introducing an undercover agent to the group.³⁶ Harrison Jack's willingness to share all
6 the information he knew with the agent served precisely this purpose. In the wiretap application the
7 government lists information that it desired; yet, it utterly fails to explain why it didn't simply ask
8 Harrison Jack for this information. The agent did not need wiretap approval to tape record any and all
9 consensual telephone conversations he had directly with Harrison Jack. Before a court approves the
10 wiretapping of Harrison Jack's phones, the government should have been required to show why it
11 would be unable to obtain any and all of the information relayed on these lines by simply asking
12 Harrison Jack questions.

13 **2. Access to Other Hmong Defendants**

14 The agent falsely told the Court that wiretaps were necessary because he had no access to the
15 co-conspirators other than through his link, Harrison Jack.³⁷ In fact, Jack repeatedly encouraged the
16 agent to meet directly with Lo Cha Thao and even provided the agent with Lo Cha Thao's direct
17 telephone number. Exh. E, Disc. TE041572. The agent opines that the Hmong community could not
18 be infiltrated but, in reality, the agent could have done everything that Jack was doing, as Jack does
19 not speak Hmong and was not a member of that community.

20 Moreover, the agent met most of the alleged co-conspirators face to face on February 7, 2007.
21 The agent could have met with the alleged co-conspirators directly and recorded his conversations

22 ³⁶ A second tried and true investigative technique is to turn a suspect into a cooperator. The very
23 first day the agent met Jack, Jack stated that the agent could decide how he wanted to handle the
24 situation. Exh. E, Disc. TE041392. On that date, the agent knew that Jack was a decorated war
25 veteran with no prior criminal record. Nothing prevented the agent from simply saying,
26 "Actually, shipping these weapons to Laos without government approval is illegal. You need to
27 help me prevent this from happening." The agent and the government chose not to pursue this
28 option.

³⁷ This false statement appears in the Jack Affidavit, Exh. A, at p. 35, ¶99, First Jack Extension,
Exh. B, at p. 45, ¶128, and the Lo Cha Thao Affidavit, Exh. C, at p. 49, ¶140.

1 with them (as he successfully did on several subsequent occasions) and could have taken a role
2 similar to Jack's. The agent spoke directly in English with Lo Cha Thao and Hue Vang prior to the
3 wiretap application. During the February 7, 2007, meeting, the agent allegedly spoke with Hue Vang
4 and arranged for future telephonic communication and contact with him. Exh. E, Disc. TE041530-
5 TE041531. Specifically, as the individuals viewed weapons in the recreational vehicle parked outside
6 of the Amarin Thai restaurant on February 7, 2007, the agent claimed that he "gave Hue Vang a
7 (secretly marked) memory stick and reader that contained photographs of the weapons [he] had
8 displayed in the RV." Exh. A, ¶68. The agent alleged that he "told Hue Vang that the memory stick
9 corresponded with the numbered price list/inventory I had provided and that when communicating via
10 telephone, [Hue] Vang should only use the numbers when referring to a weapon on the list." Exh. A,
11 ¶68.

12 The agent admitted to having five additional recorded calls from Lo Cha Thao before he
13 submitted his April 27, 2007 affidavit³⁸ (which he failed to disclose to the Court). As with Harrison
14 Jack, the agent did not need wiretap approval to tape record any and all of his consensual personal
15 calls with Lo Cha Thao. The agent also had a lengthy in-person meeting with a number of the alleged
16 co-conspirators on April 24, 2007, which he recorded and videotaped. All of this demonstrates the
17 access that the agent had to members of the alleged conspiracy and further contradicts the agent's
18 assertion that wiretaps were necessary to obtain additional information about that alleged conspiracy.
19 As in the *Gonzalez* case, where the Ninth Circuit determined that the use of undercover agents was a
20 "potentially productive" tool, here, the wiretap applications did not establish that other investigative
21 tools like the ongoing undercover investigation "were reasonably unlikely to be productive."
22 *Gonzalez*, 412 F.3d at 1115.

23
24
25 ³⁸ Exh. E, Disc. TE042014 [4/23/07 8:00 a.m. and 9:14 a.m. voicemails from Lo Cha Thao to
26 agent re setting up a meeting for 4/24/07] (both calls are on the same transcript); Disc.
27 TE042024 [4/23/07 phone call between Lo Cha Thao and agent re setting up a meeting on
28 4/24/07]; Disc. TE042034 [4/24/07 8:49 a.m. voicemail from Lo Cha Thao to agent re
confirmation of 4/24/07 meeting]; Disc. TE042038 [4/24/07 4:53 p.m. call between Lo Cha
Thao and agent re weapons flash at Hilton later that evening.]

3. Witness Interviews

Jack repeatedly mentions the names of individuals with whom he was working on issues related to the Hmong's plight. Yet, only Namon Hawthorne was interviewed by the government. And once the agent introduced himself to Jack as Hawthorne's connection, the government inexplicably opted not to use Namon Hawthorne again. Similarly, the government has produced in discovery records of interviews with people who did cooperate with the prior FBI investigation. The affidavits themselves admit that there were an unspecified number of witnesses "willing to share information" on a confidential basis.³⁹ For reasons that are simply unexplained, the agent concludes that "any future interviews would be of limited value."⁴⁰

4. Controlled Buys

Harrison Jack's initial inquiry was about purchasing modern guns to be used by Hmong for self-protection as they tried to flee the announced genocide. The agent unilaterally upped the ante, by producing new and different weapons and by suggesting that he could sell Stinger missiles. Exh. E, Disc. TE041718-TE041723. But there was nothing to prevent the agent from lowering the ante at any time in order to test the alleged conspirators' actual desire to purchase weapons. In undercover drug cases, agents routinely negotiate for the purchase of lesser amounts of illegal drugs before negotiating for a larger amount. In this case, the agent could simply have negotiated for the sale of 25 or fewer weapons, then observed whether any of the alleged conspirators agreed to such a purchase and whether any of the alleged conspirators produced any money to purchase such weapons.

5. Phone Records

Traditional law enforcement techniques include review of three types of phone records that do not involve intrusive wiretaps: pen registers, toll registers, and trap and trace records. Pen register devices capture only the "numbers dialed or otherwise transmitted" on the telephone line to which the

³⁹ Exh. A, p. 39, ¶110; Exh. B, p. 50, ¶140; Exh. C, p. 53, ¶151; Exh. D, pp. 35-36, ¶100.

⁴⁰ This statement appears in the Jack Affidavit, Exh. A, p. 39, ¶110, First Jack Extension, Exh. B, p. 50, ¶140, the Lo Cha Thao Affidavit, Exh. C, p. 53, ¶151, and the Second Jack Extension, Exh. D, pp. 35-36, ¶100.

1 device is attached. 18 USC § 3127(3). In other words, a pen register keeps track of the numbers dialed
2 from the target number. Toll registers are essentially phone bills. These are provided by the phone
3 company, and track the numbers called and the duration of the call. Trap and trace devices capture
4 the incoming electronic or other impulses which identify the originating number or other dialing,
5 routing, addressing, and signaling information. 18 USC § 3127(4). Essentially, trap and trace devices
6 identify the *number calling* the target number.

7 The affidavit reveals that between March 5, 2007, and March 26, 2007, the government used
8 pen registers and trap-and-trace devices on Jack's telephone lines. Exh. A, pp. 40-41, ¶ 115. The
9 agent scrupulously avoids indicating in the affidavits what information was gleaned from these
10 techniques. A full and complete statement – required by the statute – would have indicated this
11 information. In fact, the agents knew every number called into Jack's phones and every number he
12 dialed during this period. From these numbers the agents could identify the names associated with
13 each number. Phone records would have been particularly valuable and effective in this case because
14 all of the alleged co-conspirators except Jack are Hmong and have Hmong names. Thus, through the
15 use of phone records, the government could have easily assembled a list of all the Hmong names that
16 Jack called or who called him. Similarly, the agents could have employed pen registers, toll registers,
17 and trap and trace records for every single alleged co-conspirator. There is no explanation why these
18 techniques were not employed.

19 Jack was totally forthcoming about dates of Hmong leadership meetings. The simplest
20 investigative technique possible would have been to compare these dates with phone calls to and from
21 the targets listed in the initial affidavit. This was not done. The agent complains that subpoenas were
22 issued to the phone companies, but “to date, the companies have not provided all of the requested
23 information.”⁴¹ A full and complete statement – required by the statute – would have indicated when
24

25
26 ⁴¹ Versions of this statement appear the Jack Affidavit, Exh. A, at p. 40, ¶114, First Jack
27 Extension, Exh. B, at p. 51, ¶144 [“untimely, delayed return of subscriber and toll information’],
28 the Lo Cha Thao Affidavit, Exh. C, at pp. 54-55, ¶155 [same], and the Second Jack Extension,
Exh. D, at p. 37, ¶104 [same].

1 the subpoenas were issued and what information has been provided.⁴² This was not an oversight, it
2 was intentional deception. The very next paragraphs of each affidavit clearly state that pen registers
3 and trap and traces were activated and provide the dates of activation.⁴³ Yet, having now given a
4 date, the agent specifically omits any full and complete statement about what these devices revealed.

5 Instead of giving any explanation why the above techniques were not employed in *this* case,
6 the agent presents irrelevant boilerplate: “criminals” use false subscriber information (no facts
7 support that ruse being done in this case by anyone); illegal aliens use false information (no facts that
8 any targets are illegal aliens); “cellular telephones are often discarded” (no suggesting anyone has
9 done that in this case); “pay-as-you-go cellular service” may impede law enforcement (not only is
10 there no suggestion of this happening in this case, but the agent knew that it was not happening, as the
11 targets were using registered phones).⁴⁴

12 6. Trash Covers

13 Trash covers do not require court authorization. They do not require non-Hmong agents to
14 stick out in a Hmong community as they are done after trash is picked up by the normal neighborhood
15 garbage truck. The government never once attempted a trash cover as to any defendant in this case.
16 This is particularly surprising as the agent admitted that a prior trash cover used in 2000 was
17 successful. Exh. A, p. ¶ 42. The governing statute mandates that the agents *try* to use other
18 investigative techniques, show that this effort failed, or explain why *in this case* an investigative
19 technique was unlikely to be successful. 18 U.S.C. § 2518(1)(c). In the wiretap affidavits, the
20

21 ⁴² A wiretap application should be rejected if the agency cannot demonstrate that normal
22 investigative techniques would necessarily fail after “a reasonable period of time.” *United States*
23 *v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977); *accord United States v. Blackmon*, 273 F.3d
1204, 1207 (9th Cir. 2001).

24 ⁴³ Jack Affidavit, Exh. A, pp. 40-41, ¶115 [March 2, 2007]; First Jack Extension, Exh. B, at p.
25 52, ¶145 [March 2, 2007]; Lo Cha Thao Affidavit, Exh. C, p. 55, ¶156 [March 30, 2007]; Second
Jack Extension, Exh. D, at p. 37, ¶105 [May 27, 2007].

26 ⁴⁴ These boilerplate assertions appear the Jack Affidavit, Exh. A, at p. 40, ¶114, First Jack
27 Extension, Exh. B, at p. 51-52, ¶144, the Lo Cha Thao Affidavit, Exh. C, at pp. 55, ¶155, and the
28 Second Jack Extension, Exh. D, at p. 37, ¶104.

1 government does just the opposite -- they show that a trash cover did uncover evidence in an earlier
2 investigation of Hmong activities, so somehow there is no reason to use that technique now.
3 Potentially productive investigative techniques must be used before resorting to wiretaps.⁴⁵

4 **7. Mail Covers and Internet Records**

5 Oddly missing from the affidavits' list of other investigative techniques is any mention of the
6 use of the tried and true investigative technique of mail covers or the more modern technique of
7 reviewing internet records. Mail covers are like telephone records, they record any mail coming into
8 a home and coming out of that home. They are particularly useful when used in conjunction with
9 financial records whenever the government attempts to show a flow of money. If wired or by check,
10 bank records show it. If cash is sent, mail covers will show senders and then the senders' banks can
11 be examined.

12 Even more potentially productive would have been some effort to link up with the alleged
13 conspirators via computer. Hmong organizations, and no doubt some individuals, have Facebook
14 accounts, myspace pages, and other social networking internet sites. An Anglo undercover
15 investigator might stick out at a Hmong gathering, but not someone posing as a Hmong on the
16 internet. After each defendant was arrested, their homes were searched, mail seized, and all computer
17 records (particularly e-mail traffic) were seized or duplicated. The government has included reams of
18 this information in its discovery. But the government made no effort to use the investigative
19 technique of accessing the defendants' internet messages. Why, for example, was this scenario not
20 tried:

21 Agent: Harrison (or Lo Cha Thao), do you have an e-mail address?

22 Jack: Yes, it is xxxx.

23 Then, having that address, the agents could monitor any e-mail traffic from Jack to Lo Cha
24 Thao, and from Lo Cha Thao to others. Although sealed search warrant applications seeking access
25 to internet information are incredibly intrusive, they are, nonetheless, other investigative techniques

26
27 ⁴⁵ See generally S. REP. 90-1097, 1968 U.S.C.C.A.N. 2112, 2190; see also *Gonzalez*, 412 F.3d
28 at 1114.

1 that were not attempted in this case.

2 8. Visual & GPS Surveillance

3 The affidavit states that fixed surveillance was also utilized and had “resulted in some success,
4 including the verification of intelligence obtained from various outside sources.” Exh. A, ¶104; Exh.
5 B, ¶134; Exh. C, ¶145; Exh. D, ¶94. The agent intentionally omits – despite the statutory requirement
6 for a full and complete statement – any further explanation of what this meant. Instead, the agent
7 inserts boilerplate arguments as to why surveillance was unlikely to succeed. “[P]hysical surveillance
8 alone is not adequate to identify all of the co-conspirators.” *Id.* Normal investigative techniques do
9 not include limiting the investigation to one technique. “[W]hen target vehicles are followed, law
10 enforcement cannot predict which vehicles may be owned by uninvolved clan members.” *Id.* But
11 such predictions can be vastly improved by combining surveillance with phone records of the
12 vehicle’s owner or known intelligence about Hmong leadership. “[S]urveillance would be virtually
13 impossible in the neighborhoods in which the clan meetings are ‘likely’ conducted.” *Id.* Vang Pao
14 lived in Westminster, California, an ethnically mixed community. Other leaders similarly live in
15 Sacramento or Fresno, also ethnically mixed communities. Even if a particular target lived on a street
16 with a majority of Southeast Asian residents, presumably the ATF, FBI, and local police are not
17 populated solely by Anglo officers. “[T]argets do employ counter-surveillance driving tactics.” *Id.*
18 There is no evidence of this by any targeted defendants in this case. *See Gonzalez*, 412 F.3d at 1113
19 (rejecting claim that surveillance could not be used instead of wiretaps where affidavit only contained
20 vague allegation regarding a “counter-surveillance effort”).

21 The government simply did not adequately attempt to use surveillance prior to seeking
22 wiretaps. For instance, Jack always carried his mobile telephone, which the government could have
23 used to track his movements.⁴⁶ The government also made no effort to place transponders on the
24

25 ⁴⁶ *See, e.g., United States v. Mendoza-Morales*, 2007 U.S. Dist. LEXIS 92491 (D. Or., Dec
26 2007), [“the accuracy of latitude and longitude records for cell towers ... are able to show the
27 general vicinity of a cell phone and recreate the movement of that cell phone as calls are made
28 from it to ‘a very high degree of accuracy.’”] *Id.* at *6.

1 vehicles of the various suspects, despite having access to those vehicles. When Harrison Jack attended
2 any Hmong leadership meetings, he drove there in his vehicle. The affidavit states “targets own and
3 use many different vehicles.” Exh. A, ¶106; Exh. B, ¶136; Exh. C, ¶147; Exh. D, ¶96. There is no
4 evidence in the affidavit to support this. The agent, in fact, states that the government “will apply for
5 a search warrant to attach a GPS tracking device to Jack’s car.” *Id.* There is no indication why this
6 was not done previously, or why the government did not seek a GPS on Lo Cha Thao’s vehicle –
7 particularly when Jack tells the agent repeatedly that Lo Cha Thao was present at Hmong leadership
8 meetings. The agent opines that attaching GPS to vehicles “would not confirm the possession or
9 driver of those vehicles.” *Id.* Not by itself; but certainly such information would be obtained by GPS
10 combined with surveillance.

11 **9. Financial Records Analysis**

12 The Jack Affidavit admits that “[s]ubpoenas have been issued, but not received, on bank
13 records.” Exh. A., p. 41, ¶117. The affidavit intentionally omits the statutory requirement of a full
14 and complete statement – when were these subpoenas issued? Moreover, a wiretap application should
15 be rejected if the agency cannot demonstrate that normal investigative techniques would necessarily
16 fail after “a reasonable period of time.” *United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir.
17 1977) ; *accord United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001).

18 According to the agent, it is not “expected that this evidence could be developed prior to
19 significant developments in this investigation.” Exh. A., p. 41, ¶117. This unexplained conclusion is
20 not supported by the facts that no weapons would be delivered without the agent’s involvement and
21 that Harrison Jack was keeping the agent aware of any known fundraising efforts. The agent also
22 opines that the source of funds could not be traced because “Neo Hom operates primarily in cash.”⁴⁷
23 All of the alleged offenses required the purchase of extraordinarily expensive weaponry. The agent’s
24 weapons list totaled \$2.5-\$9.8 million; the guns alone were to cost \$400,000. There is no evidence to
25

26 ⁴⁷ This statement appears in the Jack Affidavit, Exh. A, at p. 41, ¶117, First Jack Extension, Exh.
27 B, at p. 53, ¶148, the Lo Cha Thao Affidavit, Exh. C, at p. 56-57, ¶159, and the Second Jack
28 Extension, Exh. D, at p. 108, ¶39.

1 support the notion that anyone had that kind of money in cash. This amount of money could be traced
2 to bank records, particularly if the agents obtained the records of wire transfers into the bank accounts
3 of the targeted Hmong defendants.

4 The affidavits in this case are primarily boilerplate conclusions by the agent that have no
5 relation to investigative techniques actually applied in this case. The government's affidavits failed to
6 make a showing that the unutilized investigative tools were unlikely to succeed. *Ippolito*, 774 F.2d at
7 1486. On the contrary, the wiretap application itself showed that law enforcement did attempt some
8 investigative techniques with success, and did not attempt others at all that could have been
9 "potentially productive." *Id.*; see also *Gonzalez*, 412 F.3d at 1114. Once again, the governing statute
10 was violated.

11 **E. There Was No Case Specific Showing that Any Normal Investigative Procedure**
12 **Would be too Dangerous to Try**

13 The affidavits include several boilerplate conclusions that the use of some investigative
14 procedures might place agents in danger. *E.g.* "search warrants could jeopardize...my personal
15 safety"⁴⁸, "physical surveillance...is...potentially dangerous."⁴⁹ Yet, there is no evidence relative to
16 this case to justify this conclusion. The affidavit doesn't suggest that any of the targets have any
17 violent criminal history. To the contrary, the full and complete statement of facts repeatedly supports
18 the notion that the targets of this investigation were attempting to protect others, not harm others.
19 Moreover, the agent met many of the targets; he knows they pose no danger to him. The affidavit
20 itself indicates that Vang Pao was 78 years old; Harrison Jack, 60; May Vang, 56; Chong Vang, 54;
21 Youa True Vang, 71; Lo Thao, 63; and Chong Yang Thao, 54. It is hardly likely that any of these
22 individuals posed any threat to the armed ATF agent.

23 **F. The Government Has Not Shown that Individuals Who Listened to the Intercepted**
24 **Conversations Were Properly Instructed on Their Legal Limitations**

25 At the time the government filed its applications for wiretap authorization and applications for

26 ⁴⁸ Exh. A, ¶102; Exh. B, ¶132; Exh. C, ¶143; Exh. D, ¶92.

27 ⁴⁹ Exh. A, ¶105; Exh. B, ¶135; Exh. C, ¶146; Exh. D, ¶95.

1 extension, the government filed a document entitled, "Instructions for Electronic Surveillance."
2 Appended to these instructions was a signature page with spaces for the names of each person
3 participating in the wire interceptions, acknowledging that these individuals had read the wiretap
4 instructions, wiretap application, affidavit in support, and wiretap order prior to conducting any
5 monitoring. On April 17, 2007; May 10, 2007; May 21, 2007; and June 6, 2007; the government
6 filed periodic reports regarding the minimization process. These reports state that AUSA Robert
7 Twiss conducted minimization and instructional briefings on the mornings of March 27 and April 3
8 and the afternoon of April 27, 2007. The reports do not state whether any of the people attending
9 these briefings reviewed the instructions or signed to acknowledge such review. The reports do not
10 state whether there were individuals involved in the interception of communications who did not
11 attend these briefing sessions. The reports do not append a copy of the signature page with any
12 signatures. Regardless of what information AUSA Twiss may or may not have shared with
13 participants in his briefings, the government obtained authority to institute wiretaps by promising the
14 court that it would have each person involved in the wiretaps read 15 pages of written instructions,
15 then sign and date an acknowledgment that the instructions, the affidavit, application and order were
16 read. Any signed forms have not been produced.

17 **G. The Government Failed to Minimize English and Non-English Conversations as**
18 **Required by Law**

19 In each of the four wiretap affidavits at issue, the agent promised under oath that "[a] Hmong
20 speaker will monitor and translate during interceptions in which Hmong is spoken." Exh. A, ¶119;
21 Exh. B, ¶150; Exh. C, ¶161; Exh. D, ¶110. The agent continued: "If, however, such a translator is not
22 reasonably available on the spot ... all such foreign language conversations will be intercepted and
23 recorded in their entirety; as soon as practical after such interception, these conversations will be
24 monitored, minimized and recorded by a translator under the guidance of a federal agent." *Id.*

25 A preliminary review of minimization records provided in discovery which pertain to Harrison
26
27
28

1 Jack's home telephone reveals that all such records are of calls involving the agent.⁵⁰ It appears,
2 therefore, that the government has provided minimization records relating only to pertinent calls.
3 Without minimization records of impertinent calls, the defense is unable to assess whether the
4 government has abided by its promise to minimize. Further, without adequate documentation of the
5 foreign language minimization process, it is impossible to assess whether the government did, in fact,
6 have a Hmong speaker present and, when there was no translator, whether it minimized "as soon as
7 practical" after interception.

8 In an interview with Sacramento Bee reporter Denny Walsh, former acting U.S. Attorney
9 Lawrence Brown provided a strong indication that the government did not adhere to the procedures as
10 promised in the agent's affidavits. According to Brown, when S. Robert Tice-Raskin was assigned to
11 the case in January 2009, he undertook a top-to-bottom analysis of the evidence.⁵¹ "Brown said not
12 all of the foreign language conversations intercepted by government wiretaps had been translated into
13 English and transcribed when the initial indictment was returned in [mid-June] 2007."⁵² Brown
14 explained that these conversations – which the government neglected to translate – ultimately
15 undermined the agent's claims regarding Vang Pao's role in the alleged conspiracy. *Id.*

16 **H. The First and Second Jack Extensions and the Lo Cha Thao Wiretap Were Fruit**
17 **of the Initial Illegal Wiretaps**

18 The affidavits in support of the Jack Extensions and the Lo Cha Thao wiretap relied heavily on
19 allegations from earlier wiretap affidavits. Most additional paragraphs report the details of telephone
20 conversations intercepted under authority of preceding warrants. As a result, misstatements and
21 omissions contained in the Jack Affidavit were carried forward into the two Jack Extensions and the
22 Lo Cha Thao affidavit. Thus, the Jack Extensions and the Lo Cha Thao Affidavit are subject to same
23 defects. In addition, the wiretaps they support are tainted fruit of the initial, illegal wiretap
24

25 ⁵⁰ TE002482-TE002664.

26 ⁵¹ Denny Walsh, *Fill-in U.S. attorney had a busy year*, Sacramento Bee, Jan. 3, 2010, at B1, B5.

27 ⁵² *Id.* at B5.

1 application and order.

2 **1. First Jack Extension**

3 On April 27, 2007, the United States sought and obtained an order extending the wiretaps on
4 defendant Jack's phones. The agent's affidavit in support of that order was 56 pages long and
5 contained 155 paragraphs. Exh. B (First Jack Extension). 116 of those 155 paragraphs were copied
6 verbatim from the original Jack Affidavit.⁵³ As one would expect, a great many of the misstatements,
7 and all of the omissions, were repeated in the First Jack Extension. A list of the numerous material
8 false statements and omissions in the affidavit supporting the First Jack Extension is contained in
9 Attachment 2 to this motion. That list documents false statements in 29 paragraphs which appear in
10 both the Jack Affidavit and the First Jack Extension.⁵⁴

11 Nineteen new paragraphs justifying the First Jack Extension which did not appear in the Jack
12 Affidavit provide details of calls between Harrison and Lo Cha Thao that were intercepted and
13 recorded under authority of the Jack Affidavit.⁵⁵

14 **2. Lo Cha Thao Affidavit**

15 On May 10, 2007, the United States sought and obtained authority to intercept telephone
16 conversations conducted on defendant Lo Cha Thao's mobile telephone. The agent's affidavit in
17 support of that order was 60 pages long and contained 166 paragraphs. Exh. C (Lo Cha Thao
18 Affidavit). 127 of those 166 paragraphs were copied verbatim from the original Harrison Jack wiretap
19 affidavit and the First Extension.⁵⁶ As before, many of the misstatements and all of the omissions
20

21 ⁵³ Paragraphs 1-11, 15-51, 60-93, 121-128, and 130-155 of Exhibit B also appear in Exhibit A,
22 although the numbering differs.

23 ⁵⁴ The misstatements in paragraphs 8, 22, 27, 60-62, 65, 67, 69, 74, 75, 76, 82, 85, 116, 122, 124,
24 126, 128, 131, 134-138, 141, 143, 144, and 146 of Exhibit B also appear (with different numbers)
in Exhibit A.

25 ⁵⁵ Paragraphs 28-29, 32-33, 36, 37, 38, 39-40, 43-48, 54-55, 58, 63, and 65 of Exhibit B
26 document calls between Harrison and Lo Cha Thao.

27 ⁵⁶ Paragraphs 1-43, 54-87, 90-103, and 131-166 of Exhibit C appear in the same form in Exhibit
28 A and/or Exhibit B.

1 recur. A list of the many material false statements and omissions in the Lo Cha Thao Affidavit is
2 contained in Attachment 3 to this motion. That list documents false statements in 32 paragraphs
3 which appear in the Lo Cha Thao Affidavit as well as the Jack Affidavit and/or the affidavit in
4 support of the First Jack Extension.⁵⁷

5 Nine new paragraphs supporting the Lo Cha Thao Affidavit which were not included in the
6 Jack Affidavit or the First Jack Extension report the details of telephone conversations to and from Lo
7 Cha Thao intercepted and recorded under authority of the Jack Affidavit and the First Jack
8 Extension.⁵⁸

9 3. Second Jack Extension

10 On May 31, 2007, the United States sought and obtained a second order extending the wiretaps
11 on defendant Jack's phones. In so doing, the agent "incorporated by reference" the Jack Affidavit and
12 the affidavit in support of the First Jack Extension, along with all of their many false statements and
13 omissions. Exh. D, p. 2, ¶4.

14 Fifteen new paragraphs supporting the Second Jack Extension which were not in earlier
15 affidavits describe telephone conversations intercepted and recorded under authority of the Jack
16 Affidavit and the First Jack Extension.⁵⁹

17 I. The Jack Extensions and the Lo Cha Thao Wiretap Application Contained 18 Additional Material Omissions and False Statements

19 Attachments 1 through 4 to this motion list more than 40 pages of material omissions and false
20 statements contained in each of the four wiretap application affidavits at issue. In addition to the
21 many oft-repeated falsehoods noted above, each affidavit has its own new and astonishing

22 ⁵⁷ The misstatements in paragraphs 18, 22, 54-56, 59, 61, 68-70, 76, 79, 132, 134, 138, 140, 142,
23 145, 146, 148, 149, 152, 154, 155, and 157 of Exhibit C appear in the same form in Exhibit A.
24 The misstatements in paragraphs 92, 93, 98, 101, 102, and 104 of Exhibit C appear in the same
form in Exhibit B.

25 ⁵⁸ Paragraphs 90-94, 98, 104, 116, and 118 of Exhibit C document intercepted calls to and from
26 Lo Cha Thao.

27 ⁵⁹ Paragraphs 21, 28-29, 32, 36, 37, 38, 39-40, 43, 54, 58, 63, 65 and 67 of Exhibit D document
28 calls monitored between Harrison Jack and Lo Cha Thao.

1 misrepresentations. What follows are just a few examples.

2 **1. First Jack Extension**

3 The agent's April 27, 2007 affidavit in support the First Jack Extension mischaracterizes key
4 facts regarding the Hmong's finances, the involvement of film maker Richard Jellerson, and the
5 perceived role of the CIA, among others.

6 (1) Hmong Fund-raising

7 Jack made it clear that the Hmong were not in a position to make a significant purchase of
8 weapons. He informed the agent that to the "best of my knowledge, they haven't initiated any
9 fundraising." Exh. E, Disc. TE041640. Jack: "I don't think they're going to do anything before
10 [March 27]...They – they've got some major fundraising to do." Exh. E, Disc. TE041565. With a
11 few clever edits, the agent completely altered Jack's statements. Where Jack described the *lack* of
12 Hmong funds, and a *lack* of Hmong fund-raising, the agent falsely reported that the Hmong were very
13 actively amassing money: "Jack said they were doing some major fundraising..." Exh. B, p. 27, ¶82.

14 (2) Richard Jellerson

15 In a shocking lack of candor, the agent writes:

16 JACK and Richard [JELLERSON] discussed specific of planning and budgeting a mission.
17 During the conversation, they discussed the possibility of sending the UC on a 'LURP,' (Long
18 Range Reconnaissance Patrol) in Laos. JACK and Richard [JELLERSON] spoke about troop
19 movements across the border between Thailand and Laos. JACK and Richard [JELLERSON]
20 continued to talk about funding and budgeting for the operation. At the end of the call, JACK
21 told Richard [JELLERSON] to budget \$10,000 for bribes.

22 Exh. B, p. 40-41, ¶117.

23 If these statements were true, Jellerson would surely be among those indicted. Instead, this
24 extremely deceptive statement describes in a totally false light what is actually a conversation about
25 producing a documentary film on the plight of the Hmong. In his affidavits, the agent inexcusably
26 strips away key words and phrases such as "what kind of footage" and "the footage we are looking
27
28

1 for” and “the cameras are easy to operate” and “theatrical release” and “the film.”⁶⁰ In so doing, the
2 agent wilfully misreports an innocent conversation about a humanitarian film as a menacing plan to
3 invade.

4 (3) Jack’s Perception of CIA Involvement

5 It is clear that, at all relevant times, Harrison Jack was absolutely convinced the CIA
6 sanctioned and supported the efforts of Hmong leadership and Lo Cha Thao relative to the Hmong in
7 Laos. Jack informed the agent “they have made an informal contact with the CIA already.” Exh. E,
8 Disc. TE041720. Jack told the agent that Lo Cha Thao had met with two deputy directors of the CIA.
9 Exh. E, Disc. TE041727-TE041728. Jack said to William Jefferds that Lo Cha Thao had met with
10 the CIA by stating “So, at least ... elected representatives and their channels have been advised.
11 There’s also been a meeting with the CIA, two weeks ago.”⁶¹ Lo Cha Thao informed Jack that the
12 CIA was involved by stating “the CIA gave us a mission to go and find the exact uh heartbeat of the
13 country, of that country, you know.”⁶² Jack told the agent that the CIA was supportive of the plan, he
14 stated “We [the CIA] can’t become overtly involved, but we’ll support and facilitate whatever
15 reference you’ve got going ... I mean, they even offered funding.” Exh. E, Disc. TE041809.

16 The agent omitted this material evidence of Jack’s firm belief that the U.S. government
17 endorsed this effort, and rather than disabuse Jack of this belief, the agent fueled it: "you've got a
18 different CIA today than you had then, Harrison. I think that, uh, I think they'll step in there and go
19 ‘hey, you know, this is what we can do, and this is why we can do it, because we have the backing of
20 our Government and not just our agency, and we want to back your political endeavor of
21 democracy.’” Exh. E, Disc. TE041631.

22 ⁶⁰ Specific audio recordings and corresponding “unofficial” transcripts were provided by the
23 government in discovery but were not bates-stamped. Relevant “unofficial” transcripts are
24 attached hereto in sequential order as “Exhibit F.” Not surprisingly, the government has not
25 provided an “official transcript” of this conversation. Therefore, the unofficial transcript is
26 attached hereto as Exhibit F, 00398-001, 4/19/07, pp. 1:22-2:1, 2:8-10, 19-23, 3:25, 4:1-3,
27 7:24-8:4, 10:9-14.

28 ⁶¹ Exh. F, 00082-001, 4/4/2007, p. 3:23-24.

⁶² Exh. F, 00208-001, 4/12/2007, p. 13:15-17.

1 (3) Fictional Details

2 The agent claimed: "I had a discussion about the stinger missiles with [Lo Cha] THAO. I
3 asked him how many he needed, and how far apart they would be. THAO indicated that they would
4 need them in the Northern Province of Laos and also down in the South near Vientiane." Exh. C, p.
5 39, ¶113. In fact, Lo Cha Thao actually stated: "We need like two of those and – just like two
6 stingers for the different provinces that we have." He does not specify which of Laos' 16 provinces he
7 is referring to. Importantly, there is no mention of "the Northern Province of Laos" and no statement
8 regarding "down in the South near Vientiane." These details are the agent's fabrications. Exh. E,
9 Disc. TE042067.

10 In another example, the agent wrote "JACK advised me that the group had reduced their search
11 for a commander-in-chief (CINC) to three candidates, and that the command group had asked JACK
12 to sit on the panel to select the CINC." Exh. C, p. 40, ¶119. In fact, Jack makes no mention of a
13 "search for a commander- in-chief (CINC)." This also is fiction. Jack does state: "They're reviewing
14 three individuals that will be their military field commanders [a somewhat different role from
15 Commander-in-Chief]. That's one of the reasons he wants me to go over there." Exh. E, Disc.
16 TE042120-TE042121.

17 **3. Second Jack Extension**

18 In his May 31, 2007, affidavit in support of the Second Jack Extension of the wiretaps on
19 Jack's phones, the agent again stocked the affidavit with false statements, but the agent was most
20 deceptive in what information he kept from the Court.

21 (1) More Fiction and False Attribution

22 In another false statement, the agent wrote: "JACK called from Target Telephone #1... JACK
23 told me that he had spoken to Lo Cha THAO who told him that he would have the items (which I
24 understood to be firearms) selected and faxed to JACK by Monday, May 7, 2007." Exh. D, p. 7, ¶ 18.
25 "I told JACK that my partner was not happy with the size of the first order and JACK replied that this
26 was the first of many orders to come." Exh. D, p. 7, ¶ 19. "JACK said that Lo (Lo Cha THAO) was
27 hesitant to place a large order.... JACK said Lo's (Lo Cha THAO) people had lost orders in the past
28

1 and they needed to feel secure about this first order.” *Id.* In reality, Jack did not say any of this. Exh.
2 E, Disc. TE042185-TE042192.

3 The agent again put his own words in Jack’s mouth with this line: “[JACK] provided the dates
4 of June 9 and June 11 as the days we could meet in Thailand for weapons delivery.” Exh. D, p. 20, ¶
5 62. In fact, it is the agent who provided Jack with the dates of June 9 and June 11 on which to meet in
6 Thailand.⁶³

7 (2) More Misleading Statements

8 The agent wrote: "JACK suggested that it [Long Chang area] could be used as a special
9 operations base." Exh. D, p. 89, ¶ 24. In fact, Jack was wildly day dreaming about setting up a
10 resource center for veterans, he specifically states: "And I was thinking it could be a haven, it could
11 have R and R facilities there, it could have medical facilities, it could have rehab facilities, it could be
12 a resource that would be available if somebody wanted to take advantage of it." Exh. E, Disc.
13 TE042206.

14 The agent also noted that “JACK asked Lisa to run ‘Steve's’ name and number through the
15 checks she has.” Exh. D, p. 3, ¶ 38. However, the agent failed to mention that the “checks” Jack was
16 referring to are “pendulum kinesiology and so on.”⁶⁴

17 (3) A Most Remarkable Omission

18 On May 12, 2007, a messenger informed Lo Cha Thao that the General forbade any violence in
19 Laos by stating:

20 [B]ut the old man [Vang Pao] emphasized ... this morning that he think
21 strongly about these work [T]he owners of this country [US
22 Government] had already hold hands [with Laos], so that’s that. We don’t
23 have to make trouble.... What he emphasize I think is, that part and this
24 work contradict ... [H]e emphasize very strong that ... that guy still
25 considers that lie is active for the owner of this country [US Government]
26 and with the policy he already have an agreement so that how our duty is
27 going to. There will not be any other violence whatsoever. So that is what
28 has been approved.

26 ⁶³ Exh. F, 00886-001, 5/10/07, pp. 1:8-4:7.

27 ⁶⁴ Exh. F, 00575-001, 5/8/07, p. 1:1-23.

1 Exh. E, Disc. TE036238-TE036239. This is just one of several recordings providing ample
2 information that the Hmong leader, General Vang Pao, completely forbade any military operations in
3 Laos. The agent simply kept this information from the court.

4
5 **V. DEFENDANTS HAVE STANDING TO CHALLENGE THESE ILLEGAL WIRETAPS**

6 Defendants have standing to challenge the legality of the applications, affidavits and orders
7 authorizing the wiretaps. “Any aggrieved person ... may move to suppress the contents of any wire
8 ... communication intercepted pursuant to” Title III. 18 U.S.C. § 2518(10)(a). “[A]ggrieved person”
9 means a person who was a party to any intercepted wire, oral, or electronic communication or a
10 person against whom the interception was directed.” *Id.* at § 2518(11). A party to a conversation
11 recorded by means of a wiretap is such an “aggrieved person” and thus has standing to challenge the
12 legality of the wiretap and the admissibility of wiretap recordings. *United States v. Kelley*, 140 F.3d
13 596, 604 n.7 (5th Cir. 1998). In addition to Jack and Lo Cha Thao, several other defendants –
14 possibly all of the defendants – participated in wiretap communications and thus, have standing to
15 challenge the wiretaps as an “aggrieved person.”⁶⁵ *Id.*

16 Furthermore, in cases where the government applies for multiple wiretaps and “each
17 subsequent wiretap order issued in a long series of orders...built upon previously issued orders to
18 establish probable cause,” defendants who are subsequently aggrieved may challenge the early
19 wiretap applications. *United States v. Marcello*, 508 F. Supp. 585, 602 n.2 (E.D. La. 1981). In other
20 words, where the “early wiretap orders formed the linchpin upon which all later findings of probable
21 cause and the wiretap orders were based,” all defendants who were aggrieved down the line have
22 standing to challenge the earlier wiretap orders. *Id.* Here, all of the defendants have standing to
23 challenge the wiretaps at issue because they were an “aggrieved person” or because the wiretaps were

24
25 _____
26 ⁶⁵ The defense has not been provided with a comprehensive list of interceptees. Indeed, many of
27 the unofficial and/or untranslated transcripts do not identify one or more the parties to intercepted
28 and recorded conversations. However, all defendants are listed throughout the affidavits as
“target subjects and interceptees.” Exh. A, ¶¶20-48; Exh. B, ¶¶24-59; Exh. C, ¶¶19-53, and also
incorporated by reference in Exh. D, ¶4.

1 the “linchpin” upon which the government’s other wiretaps and search warrants were based. Indeed,
2 the material misstatements and omissions in the affidavits submitted in support of the wiretaps were
3 repeated, verbatim, in subsequent affidavits submitted to support search warrants for the other
4 defendants.

5 **VI. CONCLUSION**

6 The wiretaps in this case were acquired through the government’s use of false affidavits that
7 contained material misstatements and omissions regarding the purported necessity for the requested
8 wiretaps. Additionally, the affidavits contain boilerplate assertions about investigation procedures
9 that lack any basis in reality and fail to demonstrate that normal investigative techniques were
10 unlikely to succeed or too dangerous to pursue. When all of these factors are considered, it is clear
11 that the government failed to establish necessity as required by 18 U.S.C. 2518(3)(c). Accordingly,
12 the Court should issue an order suppressing the illegal wiretap recordings of Harrison Jack and Lo
13 Cha Thao and all of the fruits thereof. If the Court is not inclined to grant this motion based upon the
14 overwhelming documentary evidence, then defendants are entitled to an evidentiary hearing where
15 they can question the undercover ATF agent, as well as prosecutor Ellen Endrizzi, who defendants
16 believe oversaw the wiretap process.

17 Dated: May 14, 2010

Respectfully submitted,

18 /s/ Daniel J. Broderick
19 DANIEL J. BRODERICK
20 Federal Defender
21 JEFFREY L. STANIELS
22 BENJAMIN D. GALLOWAY
Assistant Federal Defenders
Attorneys for Defendant
HARRISON JACK

23 Dated: May 14, 2010

/s/ Mark J. Reichel
24 MARK J. REICHEL
25 Attorney for Defendant
LO CHA THAO

26 Dated: May 14, 2010

/s/ William J. Portanova
27 WILLIAM J. PORTANOVA
28 Attorney for Defendant
LO THAO

1 Dated: May 14, 2010

MORRISON & FORESTER

2

/s/ James J. Brosnahan
JAMES J. BROSNAHAN
Attorneys for Defendant
YOUA TRUE VANG

3

4

5 Dated: May 14, 2010

/s/ Krista Hart
KRISTA HART
Attorney for Defendant
HUE VANG

6

7

8 Dated: May 14, 2010

/s/ Dina Lee Santos
DINA LEE SANTOS
Attorney for Defendant
CHONG YANG THAO

9

10

11 Dated: May 14, 2010

/s/ Michael B. Bigelow
MICHAEL B. BIGELOW
Attorney for Defendant
SENG VUE

12

13

14 Dated: May 14, 2010

/s/ Shari Rusk
SHARI RUSK
Attorney for Defendant
CHUE LO

15

16

17 Dated: May 14, 2010

/s/ Danny D. Brace, Jr.
DANNY D. BRACE, JR.
Attorney for Defendant
NHIA KAO VANG

18

19

20 Dated: May 14, 2010

/s/ Hayes H. Gable, III
HAYES H. GABLE, III
Attorney for Defendant
DANG VANG

21

22

23 Dated: May 14, 2010

/s/ Bruce Locke
BRUCE LOCKE
Attorney for Defendant
JERRY YANG

24

25

26 Dated: May 14, 2010

/s/ Peter Kmeto
PETER KMETO
Attorney for Defendant
THOMAS YANG

27

28