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COUNTY OF STANISLAUS

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1 JAMES C. BRAZELTON
2 District Attorney
3 Stanislaus County
4 Courthouse
5 Modesto, California
6 Telephone: 525-5550
7 Attorney for Plaintiff

8 STANISLAUS COUNTY SUPERIOR COURT

9 STATE OF CALIFORNIA

-----oOo-----

10 D.A. No.1056770			
11 THE PEOPLE OF THE STATE OF CALIFORNIA)	No.1056770	
)		
12 Plaintiff,)	PEOPLE'S RESPONSE	
)	TO DEFENSE MOTION	
13)	FOR FRANKS HEARING	
)		
14 vs.)	Hrg: 10-20-03	
)	Time: 8:30 am	
15 SCOTT LEE PETERSON,)	Dept: 2	
)		
16 Defendant.)		

-----oOo-----

18 Comes now the People of the State of California to
19 submit the following POINTS AND AUTHORITIES IN OPPOSITION
20 TO THE DEFENSE MOTION FOR A HEARING PURSUANT TO FRANKS V.
21 DELAWARE.

22 LAW AND ARGUMENT

23 The defendant has not made any showing that Inv. Steve
24 Jacobson intentionally or recklessly misrepresented or omitted
25 material facts in either of his affidavits for Wiretap No. 2 and
26 3.
27
28

1 Under *Franks v. Delaware*, (1978) 438 U.S. 154, 171-172, a
2 defendant must meet five requirements in order to obtain a
3 hearing on alleged false statements or omissions in an affidavit:
4 (1) he must specifically state which portions of the affidavit
5 are allegedly false or misleading due to omissions; (2) he must
6 contend that the false statements or omissions were deliberately
7 or recklessly made; (3) he must present a detailed offer of
8 proof, including affidavits to support his allegations; (4) he
9 must challenge only the veracity of the affiant (and not an
10 informant) and (5) the challenged statements must be necessary to
11 find probable cause (or, in the case of a wiretap, necessity).
12 The *Franks* rules apply to wiretap application affidavits. [*United*
13 *States v. Mack* (U.S. Dist. Colo., 2003)) 272 F.Supp 2d 1174,
14 1175-1176; *United States v. Ippolito*, (9th Cir. 1985) 774 F.2d
15 1482, 1484-1485.]

16 The defendant bears the burden of showing that material
17 misstatements were made in the affidavit. [*People v. Thuss* (2003)
18 107 Cal.App.4th 221, 230.] It is only if the defendant makes a
19 "substantial preliminary showing" that the court must conduct a
20 hearing to determine if any false statements or omissions
21 deliberately or recklessly made in the affidavit were material to
22 the magistrate's finding of probable cause. [See, *United States*
23 *v. Fowlie* (9th Cir. 1994) 24 F.3d 1059, 1066; *People v. Estrada*
24 (2003) 105 Cal.App. 4th 783, 790.]

25 The defendant bears the burden of proving a *Franks* violation
26 by a preponderance of the evidence [*United States v. Dozier* (9th
27 Cir. 1988) 844 F.2d 701,705; *People v. Thuss*, *supra*, at 230;
28

1 | *People v. Estrada*, supra, at 790] The defendant must further
2 | demonstrate that the affiant intentionally or recklessly made
3 | false statements or omissions. Mere negligence or inadvertence
4 | does not constitute a *Franks* violation [*United States v. Collins*,
5 | (9th Cir. 1995) 61 F.3d 1379, 1384; *People v. Gibson* (2001) 90
6 | Cal.App.4th 371, 381-382].

7 | "Reckless disregard for the truth" in the *Franks* context
8 | means that the affiant "in fact entertained serious doubts as to
9 | the truth of his allegations." [*United States v. Williams*, 737
10 | F.2d, infra, at 602]. Due to the difficulty of meeting this
11 | burden, such hearings are rarely held. [*People v. Estrada*, supra,
12 | 790].

13 | If the defendant points to evidence outside the affidavit to
14 | support his *Franks* claim of material omission, the government may
15 | respond by presenting additional inculpatory evidence outside the
16 | affidavit to rebut the defendant's claim. [*United States v.*
17 | *Williams*, (7th Cir. 1984) 737 F.2d 594, 604.]

18 | If a court determines that an affiant did intentionally or
19 | recklessly misrepresent or omit material facts in an affidavit,
20 | the proper remedy is to restore the affidavit to the true facts
21 | and reevaluate the affidavit for probable cause [*People v.*
22 | *Gibson*, supra, at 382, citing *People v. Sousa* (1993) 18 Cal.App.
23 | 4th 549, 562-563; *United States v. Ippolito*, 774 F.2d, supra, at
24 | 1486-1487, n.1.]

25 | CONCLUSION

26 | Here, the defendant **has made no showing** of any facts that
27 | were either omitted, or misrepresented by Inv. Jacobson. The
28 |

1 defendant's bald assertions about alleged misstatements are not
2 sufficient to require the court to order a *Franks* hearing. The
3 defendant's motion should be denied.

4 Dated: October 15, 2003

5 Respectfully submitted,

6 JAMES C. BRAZELTON
7 District Attorney

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9 RICK DISTASO
10 Deputy District Attorney

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OFFICE OF

JAMES C. BRAZELTON
District Attorney

D I S T R I C T A T T O R N E Y

Court House

P.O. Box 442

Modesto, California 95353
Tel. (209) 525-5550

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Date: October 15, 2003

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COMMENTS: People v. Scott Lee Peterson, No. 1056770

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OFFICE OF JAMES C. BRAZELTON
District Attorney
D I S T R I C T A T T O R N E Y
Court House

P.O. Box 442

Modesto, California 95353
Tel. (209) 525-5550

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SENT BY: DLH

DATE: 10/15/03 TIME: 9:30 a.m.

AFFIDAVIT OF SERVICE BY MAIL (C.C.P 1013a)

STATE OF CALIFORNIA)
(
COUNTY OF STANISLAUS)

I, the undersigned, say:

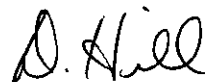
That I am a citizen of the United States, over 18 years of age, a resident of Stanislaus County, and not a party to the within action.

That affiant's business address is Stanislaus County Courthouse, Modesto, California.

That affiant served a copy of the attached PEOPLE'S RESPONSE TO DEFENSE MOTION FOR FRANKS HEARING by placing said copy in an envelope addressed to MARK GERAGOS, GERAGOS & GERAGOS, 350 SOUTH GRAND AVENUE, 39TH FLOOR, LOS ANGELES, CA, 90071-3480, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on October 15, 2003, delivered by FEDEX at Modesto, California. That there is delivery service by FEDEX at the place so addressed, or regular communication by FEDEX between the place of mailing and the place addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of October, 2003, at Modesto, California.



People v. PETERSON

D.A. No. 1056770

Court No. 1056770

dmh

DECLARATION OF PERSONAL SERVICE

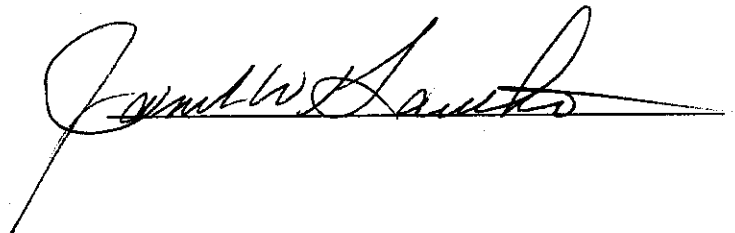
I, the undersigned, say:

I was at the time of service of the attached PEOPLE'S RESPONSE TO DEFENSE MOTION FOR FRANKS HEARING over the age of eighteen years and not a party to the above-entitled action. I served a copy of the above-entitled document(s) on the 15 day of October, 2003, delivering a copy thereof to the office(s) of:

Kirk W. McAllister
McAllister & McAllister
1012 11th Street, Suite 100
Modesto, California 95354

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15 day of October, 2003, at Modesto, California.



People v. PETERSON
D.A. No. 1056770
Court No. 1056770

dmh

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