

(ENDORSED)
FILED
SAN MATEO COUNTY

DEC 05 2003

Clerk of the Superior Court
By [Signature]
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1 OMAR FIGUEROA #196650
2 506 Broadway
3 San Francisco, CA 94133
4 Telephone: 415/986-5591
5 Facsimile: 415/421-1331

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DEC 05 2003

6 Attorney for Defendant
7 JOHN PERRY BARLOW

DISTRICT ATTORNEY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN MATEO

10 PEOPLE OF THE STATE OF CALIFORNIA, No. NM 333376

11 Plaintiff,

MOTION TO SUPPRESS
(Penal Code § 1538.5)

12 v.

13 JOHN PERRY BARLOW,

Date: Jan 7, 2004

Time: 9:00 am

Dept: 0

14 Defendant.

15 _____/
16
17 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT
18 ATTORNEY FOR THE COUNTY OF SAN MATEO:

19 Defendant John Barlow hereby moves, by and through counsel
20 Omar Figueroa, to suppress certain tangible and intangible things
21 seized from him without a warrant and in violation of the Fourth
22 Amendment.

23 The things thus illicitly seized include: the fact of Mr.
24 Barlow's arrest, any statements attributed to Mr. Barlow,
25 observations made by members of the San Mateo Sheriff's Department,
26 and the following items seized from Mr. Barlow: any and all
27 marijuana seized, all psilocyn mushrooms seized, all hypodermic
28

1 syringes and associated hayfever serum; all ketamine seized; and
2 all MDA seized.

3 In addition to the aforementioned items, defendant requests
4 suppression of any conclusions drawn therefrom, and any and all
5 other things deemed at the hearing to have resulted from this
6 lawless police conduct.

7
8 This motion is based on this memorandum, on all documents on
9 file at the time of the hearing, and on evidence and argument to be
10 submitted at the hearing.

11
12
13 PERTINENT FACTS

14 Mr. Barlow is presently facing felony charges relating to
15 a warrantless search of his baggage at San Francisco International
16 Airport. On September 15, 2003, Mr. Barlow's baggage was searched,
17 and he was subsequently personally searched, arrested, questioned,
18 and interrogated.

19
20 Moreover, this unjustifiable detention became unduly
21 prolonged, and ripened into *de facto* arrests. There was no warrant
22 for any of this.

1 DISCUSSION

2 I.

3 WHERE THE POLICE SEARCH OR SEIZE AN INDIVIDUAL OR HIS
4 PROPERTY AND OBTAIN EVIDENCE WITHOUT A WARRANT, THE
5 PROSECUTION HAS THE BURDEN UPON MOTION BY THE DEFENSE TO
6 PLEAD ITS JUSTIFICATION FOR THAT WARRANTLESS SEARCH OR
7 SEIZURE LONG ENOUGH BEFORE THE HEARING TO PERMIT THE
8 DEFENSE TO RESPOND.

9 It has become a cornerstone of Fourth Amendment jurisprudence
10 that the prosecution has the burden to justify a warrantless search
11 or seizure, Coolidge v. New Hampshire, (1971) 403 U.S. 443, 455,
12 People v. Williams(1988) 45 Cal.3d 1268, 1297, because warrantless
13 searches and seizures are presumptively invalid. Katz v. United
14 States (1967) 389 U.S. 347, 357. That rule obtains because a
15 search or seizure not supported by a warrant is per se
16 unreasonable, unless the prosecution can point to some applicable
17 exception to the warrant requirement. People v. Laiwa(1983) 34
18 Cal.3d 711, 725.

19 In service to that allocation of burdens, a procedural device
20 has been put into place whereby the major pleading effort, upon
21 motion by the defense, is initially on the prosecution to advance
22 its justification for a warrantless search or seizure. Wilder v.
23 Superior Court (1979) 92 Cal.App.3d 90, 96-97, cited approvingly in
24 Williams, *supra*, 45 Cal.3d at 1304, fn.3. Of course, "[i]f the
25 prosecution fails to carry its burden [of justification for the
26 warrantless infringement], the defendant need do nothing more to be
27 entitled to suppression of the primary evidence." *Id.* at 1300.
28

1 devises and weapons. However, checked luggage may only be
2 searched for explosive devises. The California Supreme
Court held that,

3 [T]he essential purpose of the
4 antihijacking system established by the
5 FAA is not to ferret out contraband or
6 to preserve for trial evidence of
7 criminal activity. ... Instead, pre-
8 departure screening procedures are a
9 central phase of a comprehensive
regulatory program designed to insure
that dangerous weapons will not be
carried onto an airplane and to deter
potential hijackers from attempting to
board.

10 *People v. Hyde*, 12 Cal.3d 166.

11
12 However, the initial search must be justified, and limited
13 to accord with antihijacking goals so that,

14
15 the incidental discovery of contraband
16 does not offend the Fourth Amendment.

Hyde (12 Cal.3d 166)

17 In this case airport officials have not complied with
18 this limited goal. The luggage in question was checked,
19 and not carry on. This presents an important difference.
20 Although weapons are not allowed to be carried onto a
21 plane, some items considered weapons (other than
22 explosives) may be checked into luggage. This baggage may
23 only be searched for explosives in order to comply with the
24 limited purposes of airport security. *Hyde*, 12 Cal.3d 166.

25
26 Therefore, the initial search of Mr. Barlow's bags
27 were overintrusive, and as such, it cannot provide the
28

1 basis for the ensuing detention. Furthermore, because this
2 search and detention were effected without a warrant, they
3 must be justified by the prosecution as the burden is on
4 them to explain why this intrusive and warrantless search
5 was not illegal.
6

7 Unless the prosecution concedes that there was no
8 justification for their initial warrantless search, an
9 evidentiary hearing is required to resolve material issues
10 of disputed fact.
11

12 III.
13 THE OFFICERS VIOLATED DEFENDANT'S FOURTH
14 AMENDMENT RIGHTS BY SUBJECTING HIM TO AN
UNREASONABLY LONG AND INTRUSIVE DETENTION

15 The permissible length of a stop based on "reasonable
16 suspicion" is determined by reference to the purposes to be served
17 by the stop, the time reasonably needed to effectuate those
18 purposes, and the officers' diligence and choice of investigative
19 means, rather than by reference to any arbitrary time limit.
20 United States v. Sharpe, 470 U.S. 675, 681-684 (1985). As with any
21 detention, the officer's actions must be justified from the
22 inception and "reasonably related in scope to the circumstances
23 which justified the interference in the first place." Terry v.
24 Ohio, 392 U.S. 1 (1968). Thus, an investigative detention must be
25 brief and last no longer than necessary to effectuate the initial
26 purpose of the stop. United States v. Sharpe, 470 U.S. 675, 681-
27 684 (1985).
28

1 Not only must the scope of the stop be constitutionally
2 limited, but the Fourth Amendment imposes a due diligence
3 requirement upon the officer who effects the stop. "In assessing
4 whether a detention is too long in duration to be justified as an
5 investigative stop, we consider it appropriate to examine whether
6 the police diligently pursued a means of investigation that was
7 likely to confirm or dispel their suspicions quickly, during which
8 time it was necessary to detain the defendant." Sharpe, 470 U.S.
9 at 686.

10 Here, the airport officials and San Mateo Sheriff's Department
11 officers impermissibly prolonged and exceeded the scope of a
12 permissible detention beyond a routine security check. While
13 defendant was allegedly stopped for a supposed security check, he
14 was subjected to intense and prolonged questioning, as well as
15 searched, and arrested. The officers must articulate reasonable
16 grounds that arose while diligently performing the duties
17 necessitated by the stop that taken as a whole justify a continued
18 infringement on an individual's Fourth Amendment rights.

19 Based on the above, the officers' actions violated the scope
20 and due diligence requirements for effectuating an antihijacking
21 detention. Therefore, even if the initial detention was justified,
22 the continued detention of Mr. Barlow was impermissibly prolonged.

23
24 IV.

25 THIS ILLEGAL DETENTION RIPENED INTO AN ARREST
26 UNSUPPORTED BY PROBABLE CAUSE, AND THUS,
27 VIOLATED MR. BARLOW'S FOURTH AMENDMENT RIGHTS

28 A. The Detention Became a De Facto Arrest.

1 The length of the detention can transform a Terry stop into a
2 de facto arrest, requiring probable cause. Dunaway v. New York,
3 442 U.S. 200 (1979). "In assessing the effect of the length of the
4 detention, we take into account whether the police diligently
5 pursue their investigation." Florida v. Royer, 460 U.S. 491, 500
6 (1983). If an investigative stop continues indefinitely, at some
7 point it can no longer be justified as an investigative stop.
8 Sharpe, 470 U.S. at 685.

9
10 Factors courts have considered, other than the length of the
11 detention, include but are not limited to the following:
12 (1) the intrusiveness of the stop, for example, the aggressiveness
13 of police methods and how much liberty was curtailed (Lambert, 98
14 F.3d at 1185); (2) the justifications for police actions, for
15 example, whether the officers had sufficient basis to fear for
16 their safety to warrant the action taken (Id.); (3) and the
17 disparity in power implicit in ethnic differences between
18 defendants and officers, as well as if English is not the
19 defendant's primary language. (See e.g., United States v. Baron,
20 860 F.2d 911, 916 (9th Cir. 1988), cert. denied, 490 U.S. 1040
21 (1989), citing, United States v. Moreno, 742 F.2d at 536).

22 Under the totality of the circumstances, the temporary
23 detention transpired into a *de facto* arrest, requiring probable
24 cause. Based on the above and evidence to be developed at the
25 requested evidentiary hearing, the officers' actions turned what
26 was initially allegedly a security stop into a *de facto* arrest
27 requiring probable cause.
28

1 B. The De Facto Arrest Was Not Supported By the Requisite
2 Probable Cause.
3

4 To justify an arrest, probable cause must exist prior to the
5 arrest. Smith v. Ohio, 494 U.S. 541 (1990). Probable cause to
6 arrest depends on whether the facts and circumstances, within the
7 arresting officer's knowledge, were sufficient to warrant a
8 reasonable, prudent person to believe that the suspect had
9 committed or was about to commit a crime. Adams v. Williams, 407
10 U.S. 143, 148 (1973); Michigan v. DeFillippo, 443 U.S. 31 (1979).

11 In the instant case, without probable cause to arrest or even
12 a reasonable and articulable suspicion of hijacking actions to
13 justify a temporary detention, Mr. Barlow was held and not free to
14 leave for a significant period of time. Defendant was stopped on
15 an alleged baggage security stop, but this does not amount to
16 probable cause to justify his prolonged detention, which under the
17 facts of this case ripened into a *de facto*, warrantless arrest.
18

19
20 VI.
21 THE ONLY EVIDENCE AGAINST DEFENDANT IS THE PRODUCT
22 OF ILLEGAL POLICE CONDUCT AND MUST BE SUPPRESSED

23 The exclusionary rule operates to prevent the use of evidence
24 obtained as the indirect product of unlawful conduct in the same
25 manner that it precludes the use of evidence directly obtained by
26 improper conduct. Segura v. United States, 468 U.S. 796, 804
27 (1984). This principle has become established as the "fruit of the
28 poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471
(1963).

1
2 In the present case, Mr. Barlow's baggage was searched beyond
3 the scope permissible under California law. He was then illegally
4 detained and questioned without reasonable suspicion. Furthermore,
5 the prolonged detention ripened into *de facto* arrest. All of this
6 was in violation of the Fourth and Fourteenth Amendments.
7 Accordingly, all tangible and intangible evidenced seized which is
8 the direct product of these Constitutional violations must be
9 suppressed. Such evidence includes, but is not limited to, all of
10 the seized items as detailed above, as well as any and all other
11 evidence deemed to be the fruit of the poisonous tree.

12 CONCLUSION

13 For the reasons herein and otherwise understood, the motion
14 should be granted, unless the People both timely plead and then
15 properly prove justification for these warrantless infringements
16 into the liberty and privacy of Mr. Barlow.

18 The government cannot satisfy its burden in this case by
19 demonstrating that the initial search was permissible, as in
20 furtherance of antihijacking scheme of explosives detection.
21 Furthermore, the ensuing detention was not justified as a *bona fide*
22 security stop. Moreover, there can be no justification for the
23 intense questioning, prolonged detention, and *de facto* arrest that
24 ensued. Therefore, the defense prays that all tangible and
25 intangible evidence be suppressed as violating the Fourth Amendment
26 to the United States Constitution.
27
28

In addition, the defense respectfully requests that an

1 evidentiary hearing be held to resolve the contested issues of
2 fact, and oral argument be granted.

3
4 Dated: December 5, 2003
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6
7

8 Respectfully submitted,

9 

10 OMAR FIGUEROA
11 Attorney for Defendant
12 JOHN PERRY BARLOW
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DEC 05 2003

Clerk of the Superior Court
By [Signature]
DEPUTY CLERK

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is Pier 5 North, San Francisco, California 94111-2030. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within

MOTION TO SUPPRESS (Penal Code Section 1538.5)

to be served on the following parties in the following manner:

Mail Overnight mail Personal service Fax

San Mateo County District Attorney's Office

~~400 County Center~~ 1050 Mission
~~Redwood City, CA~~ ~~22~~ South San Francisco CA

TEL: (650) 363-4636

FAX: ~~(650) 363-4873~~

[Signature]

PERSONAL SERVICE

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on

Friday 12-5-03 at San Francisco, California.

[Signature]
Omar Figueroa, Esq.