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Attorney for Defendant
JOHN PERRY BARLOW

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, No. NM 333376

Plaintiff,

v.

JOHN PERRY BARLOW

Defendant.

OPPOSITION TO MOTION FOR A PROTECTIVE ORDER

Date: December 15, 2004
Time: 2:00 p.m.
Dept: PH

TO THE CLERK OF THE ABOVE-ENTITLED COURT, To the United States Attorney AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SAN MATEO:

DEFENDANT, by and through counsel, hereby moves this court to deny the request for a protective order made by the Transportation Security Administration ("TSA" or "the Government"). Furthermore, defendant moves this court to order production of all material items requested by the defense.

Finally, if this Honorable Court finds that the government has demonstrated valid and sufficient grounds for impeding defendant's Constitutional rights to investigate, present exculpatory evidence,

and confront his accusers, then this court must dismiss the charges against him.

Dated: December 13, 2004

/s/ Omar Figueroa
OMAR FIGUEROA
Attorney for Defendant
JOHN BARLOW

MEMORANDUM OF POINTS AND AUTHORITIES

Summary of Facts

According to police reports, on September 15, 2003 at about 6:55 a.m. Officer Wurdinger responded to a dispatch request from Covenant Security at the San Francisco Airport. This is likely erroneous however, as the time of arrest is listed as 7:30 a.m. on the San Mateo County Arrest Report/Booking Sheet, but is listed as 7:45 a.m. on Officer Wurdinger's San Francisco Police—Airport Bureau report. The documents requested by subpoenae may be able to shed light on this material issue.

Officer Wurdinger reports receiving information from Covenant Security that they had searched Mr. Barlow's luggage and found a small amount of possible marijuana, and other potential contraband. However, the filed police report omits information regarding the fact that Mr. Barlow's bag was illegally searched beyond the permissible scope allowed for security purposes. During screening, a Covenant Security guard searched Mr. Barlow's luggage beyond the legal scope of airport security inspections. This can be seen from Officer Wurdinger's report. It states that "As S/Barlow's bag came through, Ramos saw wires and batteries in the X-ray that appeared suspicious to her. She opened the bag and began to search it. Inside **she found that the batteries and wires were not threats**, but **as she searched she saw what appeared to be marijuana and other**

possible contraband." This shows that Covenant Security employee Sandra Ramos was no longer investigating a potential danger, but was in fact searching the luggage without cause.

Although the police report would lead one to believe otherwise, the contraband was **not found through visual detection,** this was not the case. The contraband was found in the bottom of an Ibuprofen bottle, after luggage screener Ramos emptied out all of the Ibuprofen. The Ibuprofen bottle was never mentioned as being suspected as a potential bomb when Sandra Ramos chose to search the bag. This demonstrates the severe degree to which this search went beyond the stated purpose of a security search. As such, it is clear that the scope of this initial search was illegal and unjustified, since it was unrelated to security concerns.

The police officers handling this case omitted all information regarding the illegal, over-intrusive search by Covenant Security employees from the police report. Officer Wurdinger omitted any mention of where and under what circumstances the contraband was found in order to hide evidence of an illegal search and seizure. Similarly, the other officers who participated in the arrest excluded this evidence by neglecting to file police reports. This improper police procedure necessitates that defendant be provided with true and accurate information regarding the initial search.

I.

A CRIMINAL DEFENDANT IS ENTITLED TO DISCOVER ANY INFORMATION WHICH SHEDS LIGHT ON THE SUBJECT MATTER OF THE MOTION TO SUPPRESS.

A defendant's right to discovery in criminal proceedings was first recognized by the California Supreme Court in People v. Riser (1956) 47 Cal.2d 566. Of paramount concern to the court in recognizing this right was a defendant's need to prepare his defense and effectively cross-examine the prosecution's witnesses.

> Absent some governmental requirement that information be kept confidential for the purpose of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular, it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.
>
> 47 Cal.2d at 586.

The right of discovery during trial recognized in Riser was soon extended to pretrial situations as well (Powell v. Superior Court (1957) 48 Cal.2d 704) and further elucidated and reiterated in the Supreme Court opinions in Pitchess v. Superior Court (Echeveria) (1974) 11 Cal.3d 531, and Hill v. Superior Court (1974) 10 Cal.3d 812. In Pitchess the court stated:

> Allowing an accused the right to discovery is based on the fundamental proposition that he [or she] is entitled to a fair trial and an intelligent defense...
> 11 Cal.3d at 535.

A showing that the defendant cannot readily obtain the information through his or her own efforts will ordinarily entitle

the defendant to pretrial knowledge of any unprivileged evidence or information which might lead to the discovery of evidence "if it appears reasonable that such knowledge will assist him in preparing his defense." Hill v. Superior Court, 10 Cal.3d at 817 (emphasis in court's opinion). This includes information which will enable the defendant to conduct a vigorous cross-examination of the witnesses and which will assist him in assessing the credibility of witnesses and assist the witnesses in refreshing their recollection of the incident. Joe Z. v. Superior Court (1970) 3 Cal.3d 797; Cadena v. Superior Court (1978) 79 Cal.App.3d 212; People v. Memro (1985) 38 Cal.3d 658.

In Brady v. Maryland (1963) 373 U.S. 83, the United States Supreme Court held that a defendant's right to due process is violated when "favorable" evidence that has been "suppressed" by the prosecution is "material" to the issue of guilt or punishment. See also People v. Pratt (1999) 69 Cal.App.4th 1294. The Brady obligation encompasses evidence that is exculpatory or mitigating, and also includes evidence that might be used to impeach a government witness, Giglio v. United States (1972) 405 U.S. 150, 154, or reflect on the witness's credibility, People v. Hayes (1992) 3 Cal.App.4th 1238; People v. Garcia (1993) 17 Cal.App.4th 1169.

In the present case, Mr. Barlow requests that the court uphold his right to obtain information that is material to the charges filed against him. The requested information is unobtainable through any other method besides discovery procedures. Although the government asserts that it cannot comply with these discovery procedures since its right to protect sensitive information will be

impaired, this is not supported. From the government's argument outlined in the "Motion for a Protective Order" it is clear that the government recognizes that the requested information must ultimately be turned over. For this reason, the government also requests that they have the opportunity to redact discovery evidence, or otherwise limit discovery through *in camera* review, production under seal, or protective orders.

First, their asserted need for secrecy is overbroad, as it is applied liberally to most of the events in question that clearly do not warrant secrecy. For example, the government's claims that the exact time of the initial search cannot be revealed because it is contained within, and is inseparable from reports detailing general screening procedures and policies. This is clearly not an appropriate topic for secrecy. Further, the government argues that Mr. Barlow cannot obtain the requested information because it does not fall under the purview of Cal. Pen. Code § 1054.1. (Motion for a Protective Order pg.8) This statute outlines the discovery which the government is obliged to turn over in response to a discovery request. However, this in no way limits the amount of discovery which must be produced upon a defendant's request. In this case, requests for information have been properly served on the government.

Second, the government argues that there has been no showing that the requested evidence is material. This is not correct. Incorporated into the subpoena served on Covenant Security is a Declaration of Counsel which articulates the materiality of the requested evidence. In pertinent part, it states that the initial

search of Mr. Barlow's luggage was impermissibly intrusive, as it extended beyond the scope of a security search limited to detection of explosives and hazardous materials. As such, it is defendant's intention to investigate whether this type of excessive, and therefore illegal, search was the standard operating procedure of the TSA or of Covenant Security. These standard procedures are identical to the types found illegal by the Ninth Circuit in United States v. Bulacan, 156 F.3d 963, where administrative searches were not limited to searches for explosives and weapons, but also to the secondary purpose of discovering narcotics and other contraband. In Bulacan, the "Security Officers were instructed that explosives could be as small as a quarter, [and therefore] virtually any closed container, however small, could be subject to a search." Bulacan, 156 F.3d at 966. Because the facts in this case are virtually identical to those in Bulacan, it is necessary that defendant obtain the various requested training materials promulgated by the aforementioned government agencies. For similar reasons, defendant must not be denied have the opportunity to confront and examine Agent Ramos, and elicit her unrestricted testimony regarding her training and general practical application of these formulated procedures for performing luggage searches. This is because the Ninth Circuit has instructed that,

> in determining whether the [administrative search] scheme is valid, the Court should consider the entire class of searches permissible under the scheme, rather than focusing on the facts of the case before it.
>
> ...

> This Court held that **an unlawful secondary purpose invalidates an otherwise permissible administrative search scheme.**
>
> Bulacan, 156 F.3d at 967-970; *Citing to* United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1244 (9th Cir. 1989) ("$ 124,570").

Thus, the general practices of the TSA and Agent Ramos are directly at issue in this matter. Therefore, Defendant is entitled to obtain information regarding the particulars of all arrangements between law enforcement and the luggage screeners including: searches, rewards, incentives, training, agent discretion, and cooperation pertaining to dual-motive searches. Furthermore, her testimony will also be necessary for purposes of determining the particulars of the search at issue.

Finally, as stated above, Mr. Barlow respectfully asks this court to order that he be given all requested discovery under Brady v. Maryland and all other related cases. Defendant maintains that many of the requested reports, memorandums, accounts, briefs, communications, messages, notes, reviews pertaining to the search of Mr. Barlow's luggage, and or his case, as well as all training materials, manuals, memorandum, and directives pertaining to protocols or procedures for the search of checked luggage will contain information relevant to the warrantless search and seizure. Because Mr. Barlow is a defendant in a criminal case, he has a constitutional right to obtain any and all evidence which would be favorable to his case, whether directly or by leading to the discovery of other favorable evidence.

II.

THE GOVERNMENT OVERSTATES THE WEIGHT AND APPLICABILITY OF ADMINISTRATIVE AVIATION REGULATIONS TO THE PRODUCTION OF DISCOVERY IN A CRIMINAL MATTER.

To make weight in their motion, the government summoned the grim specter of the tragedy that occurred on September 11, 2001. The government's needless reference to this heartbreaking tragedy can only be seen as an attempt to frame their request for limited discovery as being in the national interest, and narrowly tailored to post-September 11th realities. This argument is disingenuous and misleading. Although the government's history of the TSA may be accurate, this sheds no light on the issue of production of evidence, through discovery, in a criminal matter. In fact, quite to the contrary, the government's arguments pertaining to their authority to limit the release of Sensitive Security Information (SSI) have remained unchanged for a decade. The re-organization of the federal government after September 11, 2001 merely resulted in a new organization (TSA) restating the same arguments for limiting access to information that were asserted by the FAA before it. See, Public Citizen, Inc. v. FAA 988 F.2d 186 (1993 App DC).

In its Motion for Protective Order, the government states that, "The TSA now handles aviation security matters formerly handled by the Federal Aviation Administration" and cites to 49 U.S.C. §44901, *et seq.* (Motion for Protective Order pg.3) This statute has a history dating back to July 5, 1994. The government also states

that "TSA has the authority to prohibit the disclosure of information obtained or developed in carrying out security activities" pursuant to 49 U.S.C. §114(s) and 49 U.S.C. §40119(b)(1)(C). (Motion for Protective Order pg.3) Identical to 49 U.S.C. §44901, as was stated above, 49 U.S.C. §40119 was originally enacted on July 5, 1994. Finally, 49 U.S.C. §114, while actually a new law enacted to detail the duties of the TSA, subsection (s) merely restates the government's long-held position on its authority to prevent disclosure of aviation security activities. It should be clear that as these policies have remained unchanged for about a decade or more, they were in no way promulgated as a response to the horrors of September 11th as suggested by the government. Nor has the existence of the government's decade old policy of: 'preventing disclosure of Sensitive Security Information (SSI)' related to aviation, in any way advanced their purported goal of hiding "a systemic vulnerability of the aviation system or aviation facilities to attack" as asserted on page three of its Motion for a Protective Order. Curiously, in support of this assertion, the government cites 49 C.F.R. §1520.7(h) which states in total, "DHS and DOT." (Motion for a Protective Order pg.3) Thus, if the government wishes to state that the law provides reasoning behind the need to conceal SSI, it must cite to a statute or code section which provides as much. Here, the government makes a claim wholly unsupported by the cited statute.

Next, the government asserts that TSA enacted regulations prohibit the disclosure of SSI except to those with an "operational need to know," and cite 49 C.F.R. §1520.5(b). (Motion for a Protective Order pg.4) 49 C.F.R. §1520.5(b) is a large section, containing dozens of sub-sections each detailing various types of information that constitutes SSI, however, nowhere within this section (or any other section contained in 49 C.F.R §1520.5(b)) is there a regulation prohibiting the proper disclosure of SSI to a defendant facing criminal charges in either state or federal court. Simply put, this regulation does not assert the point of law which the government claims it does. Again, if the government wishes to make this argument, erroneous though it may be, it must cite some authority for its claims.

III.
DEFENDANT'S DUE PROCESS RIGHTS UNDER THE CALIFORNIA CONSTITUTION, AND FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SUPERCEDE THE FEDERAL REGULATIONS CITED BY THE GOVERNMENT FOR DENIAL OF A RIGHT TO DISCOVERY.

The government cites to sections of 49 U.S.C. § 114(s); 49 C.F.R. §§1520.7(a),(b),(c), and (j) as support for its assertion that the various aforementioned information is SSI and cannot be released. (Motion for Protective Order pgs. 4-5) This argument attempts to give more weight to governmental agencies' regulations than are permissible without violating defendant's due process rights under the California and United States Constitutions.

As the government clearly acknowledges, Covenant Aviation Security LLC (CAS) is operating under TSA Contract Number DTSA20-03-C-00560, awarded under a pilot program established by Congressional enactment of 49 USCS §44919. TSA employees engaged in law enforcement functions may be designated as law enforcement officers. 49 U.S.C. § 114(q)(2). Because CAS's employee actions are pursuant to federal administrative directives, and in conjuncture with federal law enforcement officers under a general and specific law enforcement scheme, the actions of CAS's staff are properly considered governmental action. As such, the TSA and CAS's methods for screening passengers and luggage must comport with the requirements of the Fourth Amendment, including the prohibition of general warrants. Here, the government's scheme of searching for drugs during the screening of carry-on luggage went beyond the scope of lawfully screening checked luggage for loaded firearms and explosives. In practice, it is more akin to a general warrant to search all baggage for any signs of illegal activity. This type of behavior is beyond the purview of actions allowed by statue (*see* United States v. Davis, 482 F.2d 893 (9th Cir. 1973) and Torbet, 298 F.3d at 1089), beyond the scope of action required by exigent circumstances such as national security, and certainly beyond the bounds of Mr. Barlow's Fourth Amendment Constitutional rights. "Because these searches require no warrant or particularized suspicion, an administrative search scheme…carries with it a vast

poser for abuse." *See* United States v. Soyland, 3 F.2d at 1312, 1316 (9th Cir. 1993) (Kozinski, J., Dissenting). *Cited at* Bulacan, 156 F.3d at 967.

The government cites to the case of Torbet v. United Airlines, 298 F.3d 1087 (9th Cir.2002) in order to support the position that the government (or even merely a defendant airline) can produce 'SSI' discovery evidence *in camera* as opposed to simply making it available to the moving party. For several reasons, this proposition—which appears as dicta in Torbet—cannot be controlling in this case. Most notably, the facts in Torbet are not square with the facts in the instant case. In Torbet, the defendant's **carry on luggage** was searched after he went through an x-ray, as opposed to the current case, where Mr. Barlow's **checked luggage** was searched.

First, the cause of action in Torbet was an alleged violation of Hugo Torbet's 42 U.S.C. § 1983 rights. The court made rulings on whether Mr. Torbet's Fourth Amendment rights were violated for this purpose. The holdings were not on the government's or any airline's right to withhold or limit discovery material. Although there are remarks on these points, as dicta, they are not now controlling law in the Ninth Circuit. Furthermore, the dicta merely allowed the defendant airline to produce discovery including, "three documents under seal: two FAA Security Directives and excerpts from an Air Carrier Standard Security Program. The documents set forth the circumstances and methods for conducting random inspection of bags

that have passed through the x-ray machine." Torbet, 298 F.3d at 1089.

Second, as stated above, the cause of action in Torbet was a civil rights violation, and the plaintiff Torbet did not have the same heightened discovery rights that a defendant in a criminal matter enjoys. This fact further weakens any persuasive value that the dicta in Torbet might provide.

Third, the luggage search in Torbet arose in 1998. As has been repeatedly noted by the government, the current legal and social realities differ drastically from those prior to September 11, 2001.

When Torbet was ruled on, the court held that:

> Airport security screening procedures must comply with the Fourth Amendment. United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973). The procedures must, therefore, be reasonable. Id. At 910. An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly." Id. At 913 (Emphasis added).

Today, explosive detecting technology is far more sophisticated than it was in 1973. Therefore, the government has a greater burden when attempting to broaden the scope of permissible manual searches of checked luggage.

Fourth, another aspect of change that has occurred in the post-September 11th world that is relevant to the reasonableness test

outlined in Davis. The court found that it must be possible for a traveler to avoid the searches by electing not to fly. Although that may have been possible in years past, today, a traveler is also likely to encounter a luggage search on board a train or buss. Therefore, the ability to travel without search has been reduced drastically, and the court's holding would be meaningless if interpreted otherwise.

Finally, the last relevant aspect of the social landscape which has changed in the years following the decision in Torbet is the mounting evidence of aviation security agencies and airlines failing to act with good faith in their employment of 'security practices.' There have been repeated instances where airlines, as well as the government have been performing illegal airline screening procedures such as 'no-fly' lists, unnecessary credit checks etc. Because of these repeated bad-faith actions, it is more likely that defendant's luggage was searched in bad-faith, and far more necessary for defendant to obtain complete disclosure of these agencies practices. This is the very issue at hand, whether the search of Mr. Barlow's luggage was in good faith or not, and the increasing number if reports which suggest that these very agencies are not operating in good faith cannot be ignored.

The following cases cited by the government Ospina v. Trans World Airlines, Inc., 975 F.2d 35 (2d Cir. 1992); Gray v. Southwest Airlines, 33 Fed. Appx. 865, 2002 U.S. App. Lexis 6442 (9th Cir.

2002); Mariani v. United Airlines, Inc., 2002 U.S. Dist. Lexis 13369 (S.D.N.Y. 2002); Public Citizen Families of Pan-Am.103/Lockerbie v. Federal Aviation Administration, 988 F.2d 186, (D.C. Cir. 1993) are largely irrelevant to the issues in the present case.

The Second Circuit's opinion in Ospina is not controlling here, and it relates solely to SSI issues at trial and appeals. As the case at hand is in a California court, and is still at the pre-trial stage, this case has no relevance.

Similarly, the unpublished case, Gray, has no value as precedent since it has never been published. Even had it been published, it only concerns issues of SSI revolving around a *pro se* plaintiff. The case at hand does not concern a *pro se* plaintiff, thus this case is irrelevant.

Mariani held that the TSA would be allowed to intervene in litigation, but this opinion otherwise offered no particular guidance as to how SSI could be limited or produced.

Finally, Public Citizen Families of Pan-Am.103/Lockerbie appears to have allowed the FAA to avoid producing some SSI in particular instances. However, as in the other cases cited by the government, it did not involve a criminal defendant seeking discovery, but merely an advocacy group seeking discovery under a Freedom of Information Act request.

IV.
IF THE COURT DENIES MR. BARLOW AN OPPORTUNITY TO OBTAIN MATERIAL DISCOVERY,

CONFRONT WITNESSES OR PRESENT EXCULPATORY EVIDENCE, THEN THE CHARGES AGAINST HIM MUST BE DISMISSED IN THE INTEREST OF JUSTICE

Even when the government has the strongest interest in obtaining protective orders for sensitive information, the Court must balance this against a defendant's Constitutional right to discover information that is pertinent to the charges against him. In situations where the government has relied on a confidential informant, they frequently seek to prevent discovery relating to this person. L. Douglas Pipes, and William E. Gagen, Jr., California Criminal Discovery (2nd ed. 1999) 406-415. This is reasonably requested to protect the safety or even life of a known person for reasons that are imminent and clear, ie. their cooperation with law enforcement against a criminal defendant. People v. Luttenberger, (1990 50 Cal.3d 1) By contrast, in this case there is no particular person whose safety or life is in danger, and the government has only offered speculation as to the potential for harmful use of the requested information by unknown evildoers. Simply put, the government's interest in protecting sensitive information is more compelling in the case of a confidential informant than in the case of an airport search. Yet even in cases where a protective order is granted for a confidential informant, the charges against a defendant must be dismissed if the government's assertion of privileged impinges

their Constitutional right to obtain relevant information or confront witnesses. This is because discovery that is necessary to effectuate a constitutional right is considered to be constitutionally mandated. Griffin v. Municipal Court for Desert Judicial Dist. (1977 20 Cal.3d 300, 308); People v. Hertz, (1980) 103 Cal.App.3d 770, 776; People v. Municipal Court for San Francisco Judicial Dist., (1979) 89 Cal.App.3d 739, 749.

Furthermore, defendants possess, "a limited but viable constitutional right to attempt to controvert the veracity of statements made in the affidavit." Luttenberger, 50 Cal.3d at 19. In this case, Mr. Barlow has a constitutional Fourth Amendment right to be free from unreasonable and warrantless searches and seizures. To demonstrate that he was the target of an illegal search and seizure, and to show grounds for the suppression of the resulting 'fruits of the poisonous tree,' Defendant must be given the information necessary to establish his position.

For all of the foregoing reasons, defendant submits that the requests for discovery should be granted, and that if any of the government's claims of privilege are sustained, the charges against defendant must be dismissed. Honore v. Superior Court (1969) 70 Cal.2d 162, 168; People v. Garcia 67 Cal.2d 830; Price v. Superior Court (1970) 1 Cal.3d 836, 842; People v. McShann, (1948) 50 Cal.2d 802, 805; People v. Singletary (1969) 276 Cal.App.2d 601, 604.

Dated: December 13, 2004

OMAR FIGUEROA
Attorney for Defendant
JOHN BARLOW

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is 506 Broadway, San Francisco, California 94133. 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

OPPOSITION TO MOTION FOR A PROTECTIVE ORDER

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

San Mateo District Attorney 1050 Mission Road South San Francisco, CA 94080	United State Attorney's Office Civil Division 450 Golden Gate Avenue, 10th San Francisco, CA 94102
VIA Personal Service	VIA Personal Service

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on Tuesday, December 14, 2004, at San Francisco, California.

/s/ Omar Figueroa

OMAR FIGUEROA