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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT
11 FRESNO

12 UNITED STATES

CASE NO. 08-CR-00220 OWW

13 PLAINTIFF,

MOTION TO DISMISS AND
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

14 V.

15 RAUL DeLEON

Date: March 16, 2009
Time: 9:00 a.m.

16 DEFENDANT.

17 Please take notice that on the above date in the above entitled action,
18 Defendant, through counsel, Paul Goyette, will move this Court to issue an order
19 dismissing with prejudice the Superceding Indictment in this matter.

20 This Motion is made upon the grounds that the due process clause prevents
21 the prosecution of the Defendant in the instant matter.

22 This Motion is based on the United States Constitution, the Federal Rules of
23 Criminal Procedure, the Points and Authorities submitted in support, and such
24 argument and evidence of counsel at the hearing on the motion.

25 Dated: February 12, 2009

/S/ Paul Q. Goyette

26 Mt to Dismiss And Points and Authorities
27 In Support Thereof

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS**

I.

STATEMENT OF FACTS

Raul DeLeon was a Captain in the Stanislaus Sheriff's Department for approximately 30 years. In approximately October 2007, Raul DeLeon received an email from Bill Heyne, stating, "I'm out of the office, but there's a subpoena on my desk for you." This email was received by DeLeon a few days after a subpoena for Raul DeLeon was served on the desk of the Assistant Sheriff. Subsequently after receipt of this email, DeLeon went to the Sheriff's Office, found the subpoena buried underneath magazines on the Assistant Sheriff's desk. The subpoena ordered DeLeon to produce and bring employment records pertaining to Kathy Holloway's employment. The federal government was in the process of investigating Robert Holloway and his affiliation with organized crime. Kathy Holloway, his wife, served as DeLeon's secretary at the Stanislaus County Sheriff's Office for three years. At the time of the subpoena, Kathy Holloway had not been an employee for Stanislaus County Sheriff's Office for over one year.

The subpoena referenced a grand jury investigation. It also included a date, time and location where DeLeon needed to appear. The subpoena did not provide an advisement of confidentiality. It did not provide any other special instructions on its face.

This subpoena was not served directly on DeLeon, but was served upon the desk of the Assistant Sheriff. After receiving the subpoena, DeLeon requested information about the purpose of this subpoena from both Bill Heyne, the Assistant Sheriff, as well as, Adam Christensen, the Sheriff of Stanislaus County. Both stated they had no additional information about the grand jury investigation

1 or the subpoena, itself.

2 On October 16, 2007, only a few days after receiving the subpoena
3 regarding Kathy Holloway's employment at the Stanislaus County Sheriff's
4 Office, Robert Holloway placed a call to DeLeon regarding a different and
5 unrelated matter. As Holloway continued to speak to DeLeon about a search being
6 executed on another party, DeLeon changed the subject and asked Holloway about
7 the subpoena. DeLeon asked "...do you know anything about a Grand Jury
8 investigation regarding Kathy?...I just got a subpoena to go before a Grand Jury
9 and to bring all the records, reports, everything regarding Kathy Holloway's
10 employment while she was at the Sheriff's Office...."

11 After receiving no clarification on the subpoena, DeLeon placed a call to
12 David Harris, Assistant District Attorney for Stanislaus County. DeLeon also
13 placed a call to Mary Lynn Belsher, the attorney for Kathy Holloway. None of
14 these individuals were able to provide much information to DeLeon about this
15 subpoena.

16 DeLeon inquired about this subpoena to various people for the purpose of
17 gathering more information about the grand jury investigation so he could
18 properly respond. DeLeon had been served with subpoenas before, but had no
19 knowledge about the confidentiality associated with them. He stated to
20 Investigator, Steve Jacobson, that he was not aware that grand jury investigations
21 were to be kept secret from defense counsel or other parties, in general.
22 Furthermore, DeLeon had never been served with a subpoena duces tecum nor had
23 he been served with a subpoena for a grand jury in his 30 years in law
24 enforcement.

25 Unbeknownst to DeLeon the Central Valley Gang Impact Task Force
26 (hereafter "Task Force") was conducting an investigation of Robert Holloway and

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1 his business Road Dog Cycle. Apparently, the investigation centered around
2 Holloway's association with outlaw motorcycle gangs.

3 Mr. Holloway was an acquaintance of DeLeon. Mr. Holloway's wife Kathy
4 Holloway was employed by the Stanislaus County Sheriff's Department for many
5 years and worked under DeLeon as an Administrative Assistant. As such, DeLeon
6 had sporadic and intermittent communication with Mr. Holloway. The fact that
7 Kathy Holloway worked under DeLeon and DeLeon had interacted with Mr.
8 Holloway somehow led the Task Force to investigate DeLeon as to whether he
9 was giving sensitive or confidential law enforcement information to Holloway or
10 his associates. There is no evidence DeLeon was in anyway predisposed or had
11 ever considered giving Holloway confidential law enforcement information.
12 There is certainly no evidence that DeLeon had ever released such information to
13 Holloway or any other party.

14 As part of this investigation, the Task Force conduct wiretaps of the
15 telephone communications of various parties including Bob Holloway and Kathy
16 Holloway. The Task Force recorded brief telephone conversations between Mr.
17 Holloway and DeLeon on October 16, 2007.

18 Based upon these facts the Government has brought its Superceding
19 Indictment against DeLeon as follows:

20 Count One: 18 U.S.C. § 1512(c)(2)(k)--Conspiracy to Obstruct
21 Justice.

22 The Government alleges that by his telephone conversations with Mr.
23 Holloway on October 16, 2007, DeLeon conspired with Mr. Holloway to obstruct,
24 influence, and impede the Task Force's investigation. The Government
25 erroneously alleges DeLeon provided Holloway or sensitive law enforcement
26 information and, at the same time obtained information from Mr. Holloway and

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1 concealed it from appropriate law enforcement officials.

2 Count Two: 18 U.S.C. § 1001--Making False, Fictitious or Fraudulent
3 Statements.

4 In Count Two the Government alleges that DeLeon gave false information
5 to investigators when he told investigators that Mr. Holloway had not told him
6 that specific information regarding Dugranrut's Club property.

7 Count Three: 18 U.S. C. § 1001--Making False, Fictitious or
8 Fraudulent Statements.

9 In Count Three the Government alleges that DeLeon gave a false statement
10 while he was cooperatively being interviewed by Task Force investigators by lying
11 that he had informed Mr. Holloway that he had been served with the fraudulent
12 Grand Jury subpoena, as discussed below.

13 Count Four: 18 U.S. C. § 1001--Making False, Fictitious or
14 Fraudulent Statements.

15 In Count Four the Government alleges that DeLeon gave false information
16 to two Task Force investigators when he described his relationship with Mr.
17 Holloway as "more of an acquaintance" than the close friendship suggested by
18 investigators.

19 Count Five: 18 U.S. C. § 1001--Making False, Fictitious or
20 Fraudulent Statements.

21 In Count Five the Government alleges that DeLeon gave false information
22 to Task Force investigators of his encounter with Mr. Holloway on September 19,
23 2007.

24 As described below, DeLeon has no predisposition to commit any form of
25 misconduct let alone the crimes alleged in the Superceding Indictment. The
26 Government used a sham Grand Jury subpoena, and a wholly unrelated County

1 civil Grand Jury, to snare an unsuspecting law enforcement official in DeLeon.

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3 **II.**

4 **ARGUMENT**

5
6 **A. THE GOVERNMENT ENGAGED IN OUTRAGEOUS**
7 **CONDUCT WHEN IT INVESTIGATED RAUL DELEON.**

8 Due process under the Fifth Amendment warrants dismissal of a
9 Superceding Indictment where the government's conduct is so grossly shocking
10 and outrageous as to violate the universal sense of justice. *US v. Ramirez*, 710
11 F.2d 535, 539 (9th cir. 1983). The court held in *US v. Russell* 411 U.S. 423 (1973),
12 the conduct of law enforcement agents may be so outrageous that due process
13 principles would absolutely bar the government from invoking judicial processes
14 to obtain a conviction. In order to rise to that level the government's conduct must
15 violate that fundamental fairness, shocking to the universal sense of justice
16 mandated by the Due Process clause of the Fifth Amendment.

17 The outrageous conduct defense looks to the governments' behavior rather
18 than the state of mind of the Defendant. When the government's conduct is
19 sufficiently outrageous, the courts will not allow the government to prosecute
20 offenses developed through the conduct. *United States v. Mosely* 965 F.2d 906,
21 909 (10th Cir. 1992). Furthermore, involvement by undercover police officers or
22 informers offenses is so extensive that due process prevents the conviction of even
23 a predisposed defendant. *United States v. Gonzales-Benitez* 537 F.2d 1051, 1055
24 (9th Cir. 1976).

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1 **1. The Government Abused the Grand Jury Process When**
2 **They Served a Fake Subpoena on DeLeon to Testify at a**
3 **Non-existent Grand Jury Investigation.**

4 The government's conduct was outrageous and violated a universal sense of
5 justice when it executed a non-genuine subpoena on DeLeon for the purposes of
6 testifying at a non-existent grand jury. The use of the Grand Jury process may be
7 executed with only lawful purposes in mind. The Grand Jury process is protected
8 by the law and may not be abused.

9 First, the government abused the grand jury process by serving a counterfeit
10 subpoena on DeLeon. For the court to find the subpoena valid, the state would
11 need to establish (1) the existence of a Grand Jury investigation and (2) the nature
12 and subject matter of that investigation.

13 *In re Grand Jury Subpoena Duces Tecum v. State* 167 N.J. Super. 471. 401
14 A.2d 258. Here, the entire purpose of the creation of this subpoena was to
15 determine the extent of DeLeon's relationship with Robert Holloway and whether
16 DeLeon would reveal 'seemingly' confidential information to Holloway regarding
17 the investigation surrounding him.

18 The subpoena stated a time, date and location for DeLeon to appear. It also
19 ordered documents to be produced regarding Kathy Holloway's employment at the
20 Stanislaus County Sheriff's Office. On its face, the subpoena did establish both
21 criteria necessary for a subpoena to be held valid. However, no grand jury
22 investigation even existed. An investigation did surround Robert Holloway, but it
23 did not include a grand jury convening nor did it include DeLeon testifying in
24 front of the grand jury. Based on these facts, the subpoena should be held invalid.

25 Even if the court finds the subpoena valid, the court cannot find that the
26 government did not abuse the grand jury process. Pursuant to *Durbin v. United*
27 *States*, 221 F.2d 520 (D.C. Cir 1954), the court held that the use of a grand jury

1 subpoena was an oppressive tool and clearly an improper use of the District
2 Court's process. In *Durbin*, a subpoenaed grand jury witness was taken to the
3 United States Attorney's Office and questioned by agents of the FBI and the
4 Assistant United States Attorney instead of being taken before the grand jury. The
5 witness was not given the opportunity to testify before the grand jury.

6 In the present case, DeLeon was not taken to another location outside of the
7 actual grand jury; instead he was asked to participate in a grand jury investigation
8 that did not exist. Here, the government had no intention of actually calling
9 DeLeon to testify before the Grand Jury; it was merely a tool to determine whether
10 he would reveal such information to Holloway. Since DeLeon, was not given the
11 opportunity to even go before the Grand Jury, it was an improper use of the
12 process and should be held invalid.

13 Pursuant to both *In re Grand Jury Subpoena Duces Tecum* and *Durbin*, the
14 subpoena is invalid and the government violated the grand jury process, therefore
15 ultimately violating any universal sense of justice.

16
17 **2. The Government Wholly Manufactured a Grand Jury
18 Inquiry and Criminal Design, and Raul Deleon Was Not
19 Predisposed to Commit Any Crime.**

19 Where the government has induced an individual to break the law and the
20 defense of entrapment is at issue, the prosecution must prove beyond a reasonable
21 doubt that the defendant was predisposed to commit the criminal act prior to first
22 being approached by Government agents. *United States vs. Whoie*, 925 F. 2d 1481,
23 1483-1484 (1991). Government agents may not originate a criminal design,
24 implant in an innocent person's mind the disposition to commit a criminal act, and
25 then induce commission of the crime so that the Government may prosecute.
26 *Sorrells vs. United States*, 278 U.S. 435, 441 (1932).

1 DeLeon has been in law enforcement for 30 years. He had been promoted to
2 Captain due to his success as a peace officer. The government possess no evidence
3 that DeLeon, in past dealings, has ever revealed confidential information to other
4 individuals. The Government possess no evidence that DeLeon even knew about
5 the investigation surrounding Robert Holloway. Furthermore, the subpoena did not
6 even indicate whether it was confidential or not; thus DeLeon revealing
7 information about it to other parties should not be considered a crime. In *US vs.*
8 *Jacobson*, 112 S. Ct. 1535, the court held that the government did not establish
9 that the defendant who had received mailings from the Government , purporting to
10 be from organizations asserting individual rights, was predisposed to commit the
11 offense prior to first contact by the Government. In *Jacobson*, the government
12 continued to send literature to the defendant promoting his individual rights to
13 view sexually explicit materials and exerting substantial pressure on him to read
14 such material, in his fight against censorship.

15 While the present case did not deal with the Government sending vast
16 amounts of literature to DeLeon, the Government did create a non-genuine
17 subpoena, placing pressure on DeLeon to produce documents about Kathy
18 Holloway's employment for the purposes of a bogus grand jury investigation.
19 Although, DeLeon did not possess much independent knowledge about grand jury
20 investigations or subpoena duces tecum; DeLeon did understand the importance of
21 subpoenas and its compliance requirements. Therefore, DeLeon reasonably
22 thought it appropriate to gather additional information about the grand jury
23 investigation so that he could adequately comply with the subpoena.

24 The Government created this fake subpoena and non-existent grand jury,
25 essentially originating a criminal design, in the hopes of forcing DeLeon to "leak"
26 confidential information to Holloway. There is no evidence to show that the
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1 subpoena itself contained any special instructions, indicating its confidential
2 nature. There is no evidence to show that the government specifically ordered
3 DeLeon to keep the grand jury investigation confidential. DeLeon merely asked
4 about the grand jury subpoena to Holloway, the Stanislaus District Attorney, the
5 defense counsel, the Assistant Sheriff and Sheriff of the Stanislaus County
6 Sheriff's Office.

7 In *United States vs. Twigg*, 588 F. 2d 373 (3d. Cir. 1978) and *Greene vs.*
8 *United States*, 454 F. 2d 783 (9th Cir. 1971), both circuit courts held that
9 government may not involve itself so directly and continuously over such a long
10 period of time in the creation and maintenance of criminal operations, and yet
11 prosecute its collaborators. In these cases, the government had suggested the
12 creation of an illegal laboratory and even facilitated and supplied the necessary
13 equipment, in order to, prosecute the participants.

14 Assuming arguendo that discussing the subpoena with other individuals is a
15 crime, this case can be analogized to the above cases. DeLeon was not
16 predisposed to commit any crime due the fact that the government illegally used
17 the grand jury process by doctoring a subpoena and serving it upon DeLeon, for
18 the purposes of discovering the extent of his relationship with Holloway, in order
19 to create enough evidence against DeLeon to secure an indictment against him.
20 However, in *Jacobson, Twigg and Greene*, the government forced the parties to
21 commit crimes by creating and facilitating illegal supplies and operations. In the
22 present case, DeLeon merely requested information from other parties regarding a
23 subpoena which is not a crime.

24 Therefore, the court should not find that DeLeon was predisposed to commit
25 any crime, if the court finds that the government originated a criminal design.

1 **3. The Government Used Raul DeLeon's Commitment and**
2 **Dedication To Law Enforcement to Entrap Him.**

3 The most outrageous aspect of the Government's conduct in this case is that
4 it used DeLeon's commitment to law enforcement and public safety to entrap him
5 in a Government manufactured scheme, where DeLeon had absolutely no
6 predisposition to commit any form of misconduct. As the Government will no
7 doubt note, it is not prosecuting DeLeon for corruption, the release of confidential
8 information to Mr. Holloway, or related charges; rather, the Government has
9 dissected and hyper-analyzed the statement DeLeon voluntarily gave to Task
10 Force investigators in an effort to assist them. The Government knew DeLeon
11 would cooperate with their investigation. DeLeon had been a dedicated peace
12 officer for over 30 years and had attained the rank of captain because of his
13 dedication to his profession. When DeLeon was told by Task Force investigators
14 that they were investigating possible "leaks" of confidential information from the
15 Sheriff's Department, DeLeon was highly motivated to assist them. If in fact
16 there were leaks of confidential information from the Sheriff's Department,
17 DeLeon wanted to get to the bottom of it. Accordingly, DeLeon readily
18 cooperated with Task Force investigators thinking they were conducting a
19 legitimate investigation.

20 In reality, Task Force investigators were attempting to manufacture a
21 criminal plot or scheme to ensnare DeLeon himself. This, despite the fact the
22 investigators had absolutely no information that DeLeon was predisposed to
23 commit any form of misconduct. One can only assume that Task Force
24 investigators were motivated to entrap DeLeon for entirely ulterior purposes. Raul
25 DeLeon has simply committed no crime. The Government's conduct is despicable
26 and outrageous. The Court should dismiss all charges against DeLeon.

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III.

CONCLUSION

For the reasons stated above, Defendant respectfully asks that the Court grant his Motion to Dismiss the Superceding Indictment, with prejudice.

Dated: February 12, 2009

/s/Paul O. Goyette
Goyette & Associates, Inc.
Attorney for Defendant