

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SUSAN CARNABY, INDIVIDUALLY, and AS REPRESENTATIVE OF THE ESTATE OF ROLAND CARNABY, DECEASED,)(
)(CIVIL ACTION NO.:4:08-cv-01366
Plaintiff,)(
v.)(
)(
CITY OF HOUSTON, HPD OFFICER CECIL FOSTER and HPD OFFICER ANDREW J. WASHINGTON,)(
Defendants.)(

**PLAINTIFF SUSAN CARNABY’S RESPONSE TO MOTION TO QUASH AND
MOTION TO PRESERVE EVIDENCE**

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES SUSAN CARNABY, INDIVIDUALLY and AS REPRESENTATIVE OF THE ESTATE OF ROLAND CARNABY, DECEASED, and files this as a response to the City of Houston’s motion to quash and moves the Court order the City of Houston to preserve evidence in this case and sets forth as follows:

FACTS

1. Plaintiff Susan Carnaby (Susan) is an eighth grade teacher and has never been convicted or arrested for a crime in her entire life. Her husband Roland, 52, frequently worked as a contractor for various federal agencies providing information and investigations into security risks to the interests of the United States for at least the Central Intelligence Agency, the Federal Bureau of Investigation and the Secret Service.¹ Roland was president of the Houston Office of

¹Local Houston TV news has reported that several reliable sources have confirmed that Roland

Association For Intelligence (AFIO) Officers and had scheduled illustrious speakers for their May 15, 2008, Spring Dinner including Michael F. Scheuer, PH.D., CIA Chief of the Bin Laden Unit at the CIA's Counterterrorism Center, Andrew R. Bland III, Special Agent in Charge Of The Houston Division, and Carlos J. Barron, FBI Assistant Special Agent in Charge of The FBI Counter Terrorism Intelligence Group, (CTIG) Houston Division, An FBI Joint Task Force (JTIF) initiative. For the AFIO Houston's Summer 2007 dinner Roland has procured featured speakers former Chief of Disguise and former Chief of the Graphics and Authentication, Antonio J. Mendez and his wife CIA former Chief of Disguise, Jonna H. Mendez and retired KGB Major General Oleg D. Kalugin, former Chief, KGB Foreign Counterintelligence (Directorate KR).

2. During daylight hours on April 29, 2008, the Houston Police Department stopped Roland Carnaby, 52, for speeding in the south of Houston, Texas. In his vehicle Roland had sensitive information in his laptop computer and elsewhere regarding his national security interest investigations. Roland showed the officer his identification and the officer checked Roland's background via the HPD squad car computers. The officer at the scene learned Roland's address and that Roland had passed the rigorous requirements to obtain a Texas concealed handgun permit² and that Roland had never been convicted or even arrested for a

had "good information" on United States' agency interests.

² **GC §411.172. ELIGIBILITY.** (a) A person is eligible for a license to carry a concealed handgun if the person: (1) is a legal resident of this state for the six-month period preceding the date of application under this subchapter or is otherwise eligible for a license under Section 411.173(a); (2) is at least 21 years of age; (3) has not been convicted of a felony; (4) is not charged with the commission of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code, or of a felony under an information or indictment; (5) is not a fugitive from justice for a felony or a Class A or Class B misdemeanor; (6) is not a chemically dependent person; (7) is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun; (8) has not, in the five years preceding the date of application, been convicted of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code;

(9) is fully qualified under applicable federal and state law to purchase a handgun; (10) has not been finally determined to be delinquent in making a child support payment administered or collected by the attorney general; (11) has not been finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state; (12) has not been finally determined to be in default on a loan made under Chapter 57, Education Code; (13) is not currently restricted under a court protective order or subject to a restraining order affecting the spousal relationship, other than a restraining order solely affecting property interests; (14) has not, in the 10 years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony; and (15) has not made any material misrepresentation, or failed to disclose any material fact, in an application submitted pursuant to Section 411.174 or in a request for application submitted pursuant to Section 411.175. (b) For the purposes of this section, an offense under the laws of this state, another state, or the United States is: (1) a felony if the offense is so designated by law or if confinement for one year or more in a penitentiary is affixed to the offense as a possible punishment; and (2) a Class A misdemeanor if the offense is not a felony and confinement in a jail other than a state jail felony facility is affixed as a possible punishment. (c) An individual who has been convicted two times within the 10-year period preceding the date on which the person applies for a license of an offense of the grade of Class B misdemeanor or greater that involves the use of alcohol or a controlled substance as a statutory element of the offense is a chemically dependent person for purposes of this section and is not qualified to receive a license under this subchapter. This subsection does not preclude the disqualification of an individual for being a chemically dependent person if other evidence exists to show that the person is a chemically dependent person. (d) For purposes of Subsection (a)(7), a person is incapable of exercising sound judgment with respect to the proper use and storage of a handgun if the person: (1) has been diagnosed by a licensed physician as suffering from a psychiatric disorder or condition that causes or is likely to cause substantial impairment in judgment, mood, perception, impulse control, or intellectual ability; (2) suffers from a psychiatric disorder or condition described by Subdivision (1) that: (A) is in remission but is reasonably likely to redevelop at a future time; or (B) requires continuous medical treatment to avoid redevelopment; (3) has been diagnosed by a licensed physician or declared by a court to be incompetent to manage the person's own affairs; or (4) has entered in a criminal proceeding a plea of not guilty by reason of insanity. (e) The following constitutes evidence that a person has a psychiatric disorder or condition described by Subsection (d)(1): (1) involuntary psychiatric hospitalization in the preceding five-year period; (2) psychiatric hospitalization in the preceding two-year period; (3) inpatient or residential substance abuse treatment in the preceding five-year period; (4) diagnosis in the preceding five-year period by a licensed physician that the person is dependent on alcohol, a controlled substance, or a similar substance; or (5) diagnosis at any time by a licensed physician that the person suffers or has suffered from a psychiatric disorder or condition consisting of or relating to: (A) schizophrenia or delusional disorder; (B) bipolar disorder; (C) chronic dementia, whether caused by illness, brain defect, or brain injury; (D) dissociative identity disorder; (E) intermittent explosive disorder; or (F) antisocial personality disorder.

crime and had no warrants for his arrest. The officers at the scene were told by an HPD superior to arrest Roland “for something” which would entail impounding the vehicle and its contents including the laptop computer with the sensitive security data entrusted to Roland. Roland knew that arrest means jailing without the ability to communicate to anyone for many hours and that vehicle contents are often stolen from impound lots and police property rooms. Roland then drove off and a police chase ensued. Despite the knowledge of Roland’s exemplary background and home address HPD chased Roland at high speeds through Houston’s streets and highways endangering any man, woman or child that they passed. At no time during the pursuit did Roland display a weapon or attempt to hit any police officer with his vehicle.

3. During the chase the Federal Bureau of Investigation contacted HPD, confirmed Roland Carnaby’s status and asked HPD to call off the chase. HPD refused.

4. Roland came to stop. With full knowledge of Roland’s background as set forth above police attacked the vehicle with nightsticks and weapons drawn shouting for Roland to get out smashing in the passenger window. When Roland complied by getting out of the SUV an officer slammed Roland with the SUV door. Two Houston Police officers, Cecil Foster and Andrew J. Washington, shot at Roland Carnaby striking him in the lower back when they were not in objectively reasonable fear of their lives or the lives of another. Instead of administering any aid to the gunshot wound(s) the HPD officers handcuffed Roland and left him lying facedown on the street. When Houston paramedics arrived at least twelve minutes later they did not take Roland to the nearest emergency room--Roland was fully covered by medical insurance--but to Ben Taub Hospital ten miles away through busy Houston streets.

5. The shooting may have been caused by negligent use, condition or maintenance of officer’s firearms.

6. Roland died of a gunshot wound to the BACK which caused fatal loss of blood. Before he died Roland experienced great pain and the knowledge and fear of his impending death. Houston Police Chief Hurtt, policymaker for the City of Houston, viewed the various videotapes of the shooting and evidence and stated that the actions of the police were consistent with the policies and practices of Houston, Texas.

7. Officer Washington, who shot at Roland, has a sustained disciplinary record including suspension from duty. His record includes discipline for the violent striking of a prisoner, failure to abide by laws, insubordination and speeding.³

8. Houston Police Department officers have shot and wounded or killed many civilians in vehicles when the HPD officers were not in objectively reasonable fear of the lives or the lives of another.

PROCEDURE AND ARGUMENT

9. Susan filed this lawsuit May 2, 2008. The Court set July 3, 2008, as the date for the Rule 26 hearing. Plaintiff served subpoenas upon the City of Houston to obtain mobile data transmissions and 911 tapes. HPD's mobile data transmissions (MDTs) are saved, by policy, for only 30 days. 911 tapes are kept 90 days by policy. The MDTs and 911 tapes are critical to this case as they are discoverable and relevant to ascertain whether officers followed City policy and exactly what those policies were regarding police chases and high risk vehicle approaches. Also, they go to the objective reasonableness of any officer being in fear of his life or the life of another before the shooting--the MDTs can reveal if the police knew anything other than Roland Carnaby was 52 and had never been convicted or even arrested for any crime in his life and had

³Plaintiff has not obtained the disciplinary record of Cecil Foster.

passed the rigorous and extensive concealed handgun application process. The City filed a motion to quash requesting a blanket ban on most discoverable evidence until after internal and criminal investigations are complete.

10. Susan requests an order from the court addressed to the City of Houston which preserves, intact and unaltered, the following relevant materials:

- 1) video and audio from all local TV news channels including helicopter videos, ground videos, raw video and all televised news reports regarding any aspect of this case that comes into the City of Houston's possession
- 2) HPD squad car videos and audios of the original stop, chase and shooting scene
- 3) the subject vehicle and all its contents including any weapons and DNA and fingerprint analysis of the weapons
- 4) all identifications and any evaluations of the identifications or other document found in the vehicle
- 5) Carnaby's laptop computer and the information therein, as well as floppies, discs, cds, dvds or other electronic information storage items found in the vehicle or in the laptop
- 6) notebooks, papers or any other documents or tangible things collected from the vehicle Carnaby was driving
- 7) all photographs of the original stop, chase, or shooting scene
- 8) all correspondence, emails of other communications from any source regarding Roland Carnaby except for attorney/client privilege materials
- 9) all clothing of the deceased Roland Carnaby and any items found on or near his person that comes into the possession of HPD or the City of Houston
- 10) all cell phones and electronic devices arguably possessed by Carnaby's or any found anywhere in Carnaby's vehicle with all stored numbers and information intact
- 11) all autopsy reports and their drafts including toxicology reports and ME investigation reports that come into the possession of HPD or the City of Houston
- 12) HPD mobile data transmissions regarding the incident
- 13) police helicopter videos and audios and mobile data transmissions

- 14) the involved officers' weapons, bullets, casings, clips and any fingerprint or DNA
- 15) all other photos, videos or recordings of any aspect of the incident or subsequent investigation
- 16) all 911 calls or other recordings or notations of any communication Roland Carnaby made to any law enforcement officer or agency or acquaintance during the before during or after the chase on the day of the shooting
- 17) all communications, emails, letters in the ten years prior to the incident to or from any employee of the Harris County DA's office or any law enforcement agency regarding any police shooting by an HPD officer
- 18) any DNA or biological samples of Roland Carnaby or any other involved person
- 19) any other document or tangible thing related to Roland Carnaby or his death that is not attorney client privilege.
- 20) all emails and documents regarding any police pursuit policy or high risk vehicle approach policy changes or proposed changes from January 2000 to the present
- 21) all black box computers and the data therein from Roland's vehicle
- 22) the vehicle Roland was driving, and
- 23) the cell phone records for the day of the shooting of all involved officer, supervisors, chiefs or any other HPD officer.

In the order Susan requests that destroying, altering, deleting, or hiding any of the above items may result in sanctions up to and including the striking of the City of Houston's pleadings and an award of attorneys fees.

PRAYER

Plaintiff requests that this Honorable Court ORDER the City of Houston to preserve and not to destroy, alter, delete, or hide away any of the above items and that this ORDER may be enforced by sanctions up to and including the striking of the City of Houston's pleadings and entering of judgment for plaintiff against the City of Houston and an award of attorney's fees and expenses for all other relief to which plaintiff shows herself entitled.

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RESPECTFULLY SUBMITTED
LAW OFFICE OF RANDALL L. KALLINEN

/s/ Randall L. Kallinen

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CERTIFICATE OF CONFERENCE

Plaintiff has in good faith conferred with defendant City of Houston by email and telephone and the City of Houston, however, all issues were not agreed upon making the filing of this motion necessary.

/s/ Randall L. Kallinen

Randall L. Kallinen

CERTIFICATE OF SERVICE

A true and correct copy of the document to which this certificate is affixed has been served on the attorneys as indicated by the ECF system on May 21st, 2008.

L. A. Teehan, Senior Assistant City Attorney
P.O. Box 368
Houston, Texas 77001-0368

/s/ Randall L. Kallinen

Randall L. Kallinen