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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES,

11 Plaintiff,

12 vs.

13 JOHN ALAN CARMAN

14 Defendant.

CASE NO. 07 cr 0835-H

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT
JOHN CARMAN'S MOTIONS IN
LIMINE:

- 15 (1) TO DISMISS OR FOR
16 SANCTIONS BECAUSE OF
17 THE FAILURE TO PRODUCE
18 THE INFORMANT;
- 19 (2) TO ADMIT THE
20 INFORMANT'S SOURCE FILE
21 AND OTHER INFORMATION;
- 22 (3) TO ADMIT THE TRANSCRIPT
23 AND COURT DOCUMENTS
24 RELATED TO THE
25 INFORMANT'S PLEA
- 26 (4) TO PRECLUDE THE
27 GOVERNMENT FROM
28 CALLING KAM THE
"VICTIM"

Date: September 11, 2007
Time: 9:00 a.m.

I.

INTRODUCTION

Mr. Carman was arrested on March 19, 2007, and has been detained based, in part, on the government's argument that as a former law enforcement officer Mr. Carman had special skills that warranted his detention. Since that date, also because of his status as a former law enforcement officer Mr. Carman

1 has been detained in "special housing" that is significantly more restrictive than
2 for the general population.

3 **A. Facts**

4 Mr. Carman is charged with conspiracy to commit kidnapping, in
5 violation of 18 USC § 956:

6 (a)(1) Whoever, within the jurisdiction of the
7 United States, conspires with one or more other
8 persons, regardless of where such other person or
9 persons are located, to commit at any place outside the
10 United States an act that would constitute the offense
11 of murder, kidnapping, or maiming if committed in the
12 special maritime and territorial jurisdiction of the
13 United States shall, if any of the conspirators commits
14 an act within the jurisdiction of the United States to
15 effect any object of the conspiracy,

16 The government has known since the day of his arrest that Mr. Carmen
17 denied participating in any illegal conspiracy. According to his post arrest
18 statement, Mr. Carman believed that he was referring a narcotics suspect,
19 K.A.M.,¹ to a Mexican law enforcement officer. Mr. Carman believed, based on
20 K.A.M.'s background, that she would be carrying drugs upon entering Mexico.

21 Thus, this case boils down to a simple issue. Does the government's proof
22 constitute proof beyond a reasonable doubt that

23 **B. Procedural Status**

24 Trial in this case has been set for September 19, 2007.

25 ¹ The person referred to as "K.A.M." is the alleged object of the kidnapping conspiracy
26 in this case. As with the informant, the defense will refer to this person by her initials
27 to follow the procedure used by the government. However, as no conspiracy ever
28 existed outside of the creative imagination of the informant/government, the use of
initials in this case is unnecessary because K.A.M. has never been in harms way.

1 On July 23, 2007 this Court held a status hearing in this case. At that
2 hearing, the defense noted that the informant in this case had a prior conviction
3 for falsely accusing a law enforcement officer of a crime. In that case, the
4 informant had made that false accusation "because he was concerned about his
5 immigration status, was facing exclusion from the United States, and had
6 concluded that by making the false statement to law enforcement agents he
7 could get them to allow him to remain in the United States to assist in an
8 investigation of his claims." (Transcript of Informant's Guilty Plea, pages 24-25.)

9 In that transcript of the informant's guilty plea, which the government
10 provided in discovery, the informant also states that he "was employed by
11 Customs, Internal Affairs, and FBI, a Customs officer in the capacity of an
12 informant for the government." (Transcript, page 26.) The informant also
13 admitted to being paid for his work as an informant and because of his work as
14 an informant he received an I-94 for himself and his daughter to live in the
15 United States.

16 Based, in part, on the above information (summarized for the Court on
17 July 23, 2007), this Court ordered the government to produce the FBI "source
18 file" for the informant in this case for an *in camera* review. This Court ordered
19 that review to be conducted by August 6, 2007. The Court then set a status date
20 for August 20, 2007.

21 **C. The Missing Informant**

22 The background, behavior, and past history of the informant are vital to
23 the defense. That background, behavior, and past history will tend to prove
24 that the informant set Mr. Carman up and lied to the FBI, as he has in the past,
25 in his accusations of criminal conduct in this case. As he has done in the past,
26 the informant lied to law enforcement and falsely accused Mr. Carman of crime.
27 The informant did so in order to (1) obtain papers to reside in the U.S. (which he
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1 has done before); (2) to obtain cash and other monetary rewards (which he has
2 done in the past), and; (3) for revenge.

3 With that in mind, on April 24, 2007 (Docket Entry Number 23) Mr.
4 Carman moved this Court for an order revealing the informant and order him
5 produced for a pre-trial interview. The points and authorities in support of that
6 motion stated as follows:

7 Mr. Carman specifically requests that E.F. be produced.
8 The government has the duty to produce the
9 informant[s] or to show that, despite reasonable efforts, it
10 was not able to do so. United States v. Hart, 546 F.2d
11 798, 799 (9th Cir. 1976). [¶] Mr. Carman respectfully
12 requests that the Court permit defense counsel to
13 question the informant before trial. Mr. Carman believes
14 he knows the full name of E.F. but has no idea where he
15 lives. Mr. Carman should therefore be permitted to
16 interview the informant well in advance of trial. See
United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979);
United States v. Bower, 575 F.2d 499 (5th Cir.), cert.
denied, 439 U.S. 983 (1978).

17 The government recently revealed to the defense that they had lost the
18 informant and would not call him as a witness at trial. However, despite
19 knowing that the defense considered the informant a vital witness and,
20 therefore, had moved for his production the government never told the defense
21 that they had lost the informant until ordered to do so by the Court,
22 approximately three months after losing him.

23 II.

24 THE GOVERNMENT MUST SHOW GOOD CAUSE FOR THE 25 LOSS OF THE INFORMANT

26 Once the defendant properly requests the production of an informant, the
27 government must show that it used reasonable efforts to find the informant.
28 *United States v. Montgomery*, 998 F. 2d 1468 (9th Cir. 1993). The Ninth Circuit in

1 *Montgomery* found the government's efforts unreasonable where the
2 government had passed up opportunities to inform the witness of the court's
3 order to appear and had failed to schedule an interview. 998 F.2d at 1475. In
4 *United States v. Tornabene*, 687 F.2d 312, 314-15 (9th Cir. 1982) the Ninth Circuit
5 also applied the "reasonable efforts" standard when government had met with
6 informant, and knew informant's phone number, during the period it was
7 obligated to produce him. In that case, the appellant argued that the indictment
8 should be dismissed because the failure to produce the informant in this case is
9 tantamount to failure to identify the informant, citing *Roviaro v. United States*,
10 353 U.S. 53, 65 n.15, 1 L. Ed. 2d 639, 77 S. Ct. 623 n. 15 (1957), but the Ninth
11 Circuit refused to do so.

12 The defense has proffered to this Court that the informant is an important
13 and vital witness that the government must produce. This Court should order
14 the production of the informant. Because the government cannot do so, the
15 government bears the burden of proving the reasonableness of its efforts to
16 produce the informant. *Mongomery*, supra at 1473. The government's efforts in
17 this case are unreasonable.

18 In this case, the Court is already aware from government proffers that the
19 FBI has had no contact with the informant since late May or early June 2007. In
20 July, the government told this Court that they intended to go forward without
21 the informant, but failed to disclose the fact that the informant was not returning
22 FBI calls. However, on April 24, 2007 Mr. Carman made the following motion to
23 produce the informant for defense questioning(emphasis added) (Docket Entry
24 No. 25):

25 The government's obligation is not fully satisfied
26 by merely disclosing the identity and location of the
27 confidential informant[s]. **Mr. Carman specifically**
28 **requests that E.F. be produced. The government has**
the duty to produce the informant[s] or to show that,

1 **despite reasonable efforts, it was not able to do so.**
2 **United States v. Hart, 546 F.2d 798, 799 (9th Cir. 1976).**

3 Mr. Carman respectfully requests that the Court
4 permit defense counsel to question the informant before
5 trial. Mr. Carman believes he knows the full name of
6 E.F. but has no idea where he lives. Mr. Carman should
7 therefore be permitted to interview the informant well in
8 advance of trial. See United States v. Hernandez, 608
9 F.2d 741 (9th Cir. 1979); United States v. Bower, 575 F.2d
10 499 (5th Cir.), cert. denied, 439 U.S. 983 (1978).

11 In Callahan v. United States, 371 F.2d 658 (9th Cir.
12 1967), the court held that both the defense and the
13 prosecution had the right to interview witnesses before
14 trial, and that exceptions to such rules were justifiable
15 only by the clearest and most compelling circumstances.
16 It is beyond dispute that witnesses to a crime are the
17 property of neither the prosecution nor the defense, and
18 that both sides have an equal right and should have and
19 equal opportunity to interview them.

20 For the reasons cited above, it is clear that the
21 informant in this case is a material witness. The
22 government is required to disclose the identity of all
23 material witnesses and their whereabouts, and to make
24 them available for the defense. **Failure to do so would
25 require dismissal of the case.**

26 The government never advised the Court or counsel that they no longer
27 had access to the informant as he had stopped returning calls until the last few
28 weeks. In fact, the government's assertions on July 23, 2007 can be described as
nothing less than misleading: "We may not need the informant to introduce the
phone calls . . ." (RT, 7/23/07, page 7:22-23.) The conduct of the government has
distorted the fact finding process, obstructed justice, and denied Mr. Carman his
due process right to a fair trial by denying his the time to find the informant or

1 to call the informant. This Court should dismiss or impose evidentiary
2 sanctions.

3 **III.**

4 **THIS COURT SHOULD ADMIT THE INFORMANT'S SOURCE**
5 **FILES**

6 **A. The Source Files are Not Hearsay**

7 Federal Rules of Evidence, Rule 803(8), provides as follows that records of
8 public agencies are admissible even though the declarant is available:

9 Records, reports, statements, or data compilations, in
10 any form, of public offices or agencies, setting forth (A)
11 the activities of the office or agency, or (B) matters
12 observed pursuant to duty imposed by law as to which
13 matters there was a duty to report, excluding, however,
14 in criminal cases matters observed by police officers
15 and other law enforcement personnel, or (C) in civil
16 actions and proceedings and against the Government
17 in criminal cases, factual findings resulting from an
18 investigation made pursuant to authority granted by
19 law, unless the sources of information or other
20 circumstances indicate lack of trustworthiness.

21 In this case, the Court has previously reviewed the "Source Files" for the
22 informant in this case. Those files were prepared by public agencies and document the
23 activities of those agencies and the informant. Those documents include information
24 about payments made to the informant, efforts to obtain a visa for the informant,
25 contracts entered into by the informant, information provided by the informant, and
26 other information. All this information documents the activities of the various agencies
27 and the matters observed pursuant to the agencies' duties. Thus, these source files are
28 admissible over a hearsay objection.

In *United States v. Pena-Guierrez*, 222 F. 3d 1080 (9th Cir. 2000), the Ninth Circuit
considered the admissibility of the report of an INS Inspector's interview of a party.
That court noted that "district courts should admit such law-enforcement reports, if at

1 all, only under the Public Records Exception, contained in Federal Rule of Evidence
2 803(8).” Id. at 1086-1087 (citations omitted.). The *Pena-Gutierrez* court noted that the
3 exclusion under Rule 803(8)(B) for excluding “matters observed by . . . law enforcement
4 personnel” from this exception refers to matters observed at the scene of a crime or the
5 apprehension of an accused, and not “records of routine, nonadversarial matters’
6 made in a nonadversarial setting.” Id. (Quoting *United States v. Wilmer*, 799 F. 2d 495,
7 501 (9th Cir. 1986).

8 In this case, the source files do not include scene observations or suspect
9 interviews. Instead, the source files record routine, nonadversarial matters regarding
10 the use of the informant.

11 **B. The Source Files and Information Related to the Informants Expertise**
12 **and Experience as a Long Time Informant Are Relevant**

13 The defense in this case is, in part, that the informant defrauded the FBI into
14 thinking that this case involved a kidnapping. Instead, the informant used his 30 years
15 of experience and expertise as an informant to double deal and set up John Carman.
16 The source files prove that the informant had the training, experience, and motivation
17 to create a situation that looked superficially like a conspiracy when in fact there was
18 no illegal object for any agreement. The source files also tend to prove that Mr.
19 Carman was fooled by the informant, as were many law enforcement agencies. The
20 source files also tend to prove the sloppiness of the investigation and reliance upon the
21 informant that occurred in this case.

22 In particular, the source files show that the informant claimed to have been paid
23 \$300,000.00 by various agencies. They also show his conviction for lying in order to
24 falsely set up a customs officer in the hopes of getting a visa. In addition, the just
25 released source files show that the U.S. Customs (Mr. Carman’s former agency) was
26 trying to utilize the informant as a documented informant at the same time that he was
27 providing information to the FBI. In addition, the just provided documents provide
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1 proof that the defense can use to argue that Customs falsified a report before providing
2 it to this Court about this case.

3 Also, those recently provided source files corroborate that Mr. Carman was
4 helping the informant provide information to the government to benefit the informant,
5 which tends to show that Mr. Carman wanted the informant to obey the law, not to
6 violate the law. Furthermore, that information bolsters the argument (and proves the
7 facts supporting the argument) that Mr. Carman would not conspire with a person he
8 was suggesting should report crime to law enforcement.

9 As noted in a previously filed motion, the Ninth Circuit Court of Appeals
10 in *United States v. Howell*, 231 F. 3d 615, 625 (9th Cir. 2000) held that a defendant
11 may argue the defense of a sloppy investigation:

12 In *Kyles v. Whitley*, the Court explained that
13 information which might "have raised opportunities to
14 attack . . . the thoroughness and even good faith of the
15 investigation . . ." constitutes exculpatory, material
16 evidence. 514 U.S. at 443; see also *Bowen v. Maynard*, 799
17 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of
18 defense lawyers is to discredit the caliber of the
19 investigation or the decision to charge the defendant
20 and we may consider such evidence in assessing a
21 possible *Brady* violation."). "When, for example, the
22 probative force of evidence depends on the
23 circumstances in which it was obtained and those
24 circumstances raise the possibility of fraud, indications
25 of conscientious police work will enhance probative
26 force and slovenly work will diminish it." *Kyles*, 514
27 U.S. at 446 n.15.

24 In this case, the government has presented the defense with a
25 "sloppy investigation" defense in the source files. Mr. Carman
26 plans to aggressively argue that the investigation in this case was
27 flawed because of reliance on a known liar with expertise and
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1 almost thirty years of experience as a government informant. Thus,
2 under Howell the source files and other information are relevant.

3 IV.

4 **THIS COURT SHOULD ADMIT THE TRANSCRIPT AND**
5 **SENTENCING DOCUMENT OF THE INFORMANT'S PLEA**

6 The government has provided in discovery the transcripts and sentencing
7 documents for the informant's plea. That evidence is relevant as discussed
8 above to the defense in this case as direct evidence supporting the defense as
9 well as under Federal Rules of Evidence, Rule 404(b). That judgment, other
10 court files, and the transcript of the plea have been attached as an exhibit hereto.

11 V.

12 **THE GOVERNMENT SHOULD BE PRECLUDED FROM**
13 **CALLING KAM THE "VICTIM"**

14 The question at this trial is whether or not kam was a "victim" (the
15 prosecution theory), and will be decided by the jury. Neither the prosecutor,
16 court personnel, nor the government's witnesses should be allowed to
17 characterize KAM during the trial as "the victim" any more than the defense
18 should call the defendant throughout the trial as "the framed victim." This
19 prohibition would include voir dire, opening statement (which is not to be
20 argumentative), and trial testimony.

21 Common sense dictates that at least until the jury decides the case, KAM
22 may or may not be a victim, and not "the victim." The "victim" characterization
23 is argumentative and subverts the defendant's presumption of innocence by the
24 government's repeated characterizing for the jury the government's version as
25 the correct one. As such, it violates the defendant's right under due process to
26 his presumption of innocence as protected by the due process clause of the 5th
27 and 14th Amendments to the U.S. Constitution. It also violates the defendant's
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Sixth Amendment and 14th Amendment right to a jury determination of the facts.

VI.
CONCLUSION

Mr. Carman asks this Court to grant the above motions and to deny the government's motions.

Dated: September 7, 2007

Respectfully submitted,
KNUT S. JOHNSON

 /S/ Knut Johnson
Attorney for Defendant JOHN ALAN
CARMAN