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1 Honorable Chief Judge

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1. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
2. AT SEATTLE

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UNITED STATES OF AMERICA,

Plaintiff,

v.

,

Defendant.

1. No.
2. MOTION FOR ISSUANCE OF

RULE 17(C) OUT OF DISTRICT

1. SUBPOENA
2. NOTE ON MOTION CALENDAR:

Friday, February 22, 2013

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# MOTION

1. Defendant , by and through undersigned counsel, hereby moves this
2. Court for issuance of a subpoena pursuant to Federal Rule of Criminal Procedure 17(c). This
3. motion is based on the memorandum of law below and the November 14, 2012 Declaration
4. of Colette Tvedt (Dkt. No. 676), which is hereby incorporated by reference.

# MEMORANDUM OF LAW

1. The Shasta County Domestic Highway Enforcement (DHE) Program uses
2. “pretextual” stops based on traffic violations to begin roadside investigations into potential
3. smuggling activity. DHE officers disproportionately stop Hispanic drivers, and search
4. Hispanic drivers at a significantly higher rate than they search white drivers. Although
5. Mexican drug cartels control a large percentage of “high-level smuggling,” the vast majority 26

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* 1. of the DHE’s searches affect innocent Hispanic drivers. The DHE’s selective enforcement of
  2. California traffic law is unconstitutional.
  3. Mr. incorporates by reference the facts and arguments in his November 14,
  4. 2012 Motion and Memorandum of Law in Support of Motion for Order Issuing Rule 17(c)
  5. Out-of-District Subpoenas. (Dkt. No. 675.) That Motion, which this Court granted, resulted
  6. in the production of documents relating to the traffic stops, citations, and arrest reports on
  7. Interstate 5 initiated by the Cal-MMET generally and Deputies and
  8. specifically, for the time period between November 1, 2010 and November 1, 2011.
  9. A preliminary review of the records returned from those subpoenas supports the
  10. defense argument that the California traffic code has been selectively enforced against
  11. Hispanic males as a pretext to search for narcotics. Sixty percent of the citations defense
  12. counsel has reviewed involved Hispanic drivers, compared to thirty-eight percent involving
  13. non-Hispanic drivers. Sixty-six percent of the drivers searched were Hispanic. Eighty-seven
  14. percent of the searches involving K-9 units involved Hispanic drivers. According to 2010
  15. United States Census records, Hispanics make up only 8.4% of the total Shasta County,
  16. California population.
  17. The defense anticipates an objection to inferences drawn from these sources on the
  18. grounds that census data for residents of Shasta County does not necessarily correspond to
  19. the population of drivers on Interstate 5 in Shasta County. The ideal solution to this problem
  20. is to place observers on the highway to watch and count drivers of different ethnicities, but
  21. this approach has clear drawbacks. Observers would have to pick non-random observation
  22. points, and to gather enough data to extrapolate the sample across all parts of the county
  23. would be extremely time and resource intensive. One expert advised defense counsel that
  24. this kind of project would take at least one year to accomplish and would likely cost in 25

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* + 1. excess of one million dollars. A better, easier, and more cost effective approach is to review
    2. accident records for not-at-fault drivers.
    3. A number of studies over the past forty years have noted the usefulness of not-at-fault
    4. crash data as a proxy for the driving population in a certain area. In 2004, researchers at the
    5. University of South Carolina concluded “that not-at-fault drivers in two-vehicle crashes
    6. represent a reasonably accurate estimate of the racial composition of drivers on the road” in a
    7. given area. Geoffrey P. Alpert, et al., *Toward a Better Benchmark: Assessing the Utility of*
    8. *Not-at-Fault Traffic Crash Data in Racial Profiling Research*, 6 JUSTICE RESEARCH
    9. AND POLICY 43 (2004). That study used not-at-fault traffic crash victims to estimate the
    10. racial and ethnic composition of the driving population at a number of intersections in the
    11. Miami-Dade County area. It compared the crash data with more than 65,000 traffic
    12. observations of the apparent racial background of drivers at the same intersections. When
    13. data from all of the intersections were aggregated, the overall difference between the
    14. percentage of drivers observed to be either black or non-black, and those involved in traffic
    15. crashes as not-at-fault victims was “small and statistically insignificant.” *Id*. at 62.
    16. In *United States of America, v. Jose Sanchez-Palomino*, United States District Court
    17. Eastern District of California Case No. CR09-0094-MCE, counsel for Mr. Sanchez Palomino
    18. subpoenaed and reviewed crash data for Interstate 5 in Shasta County for the time period

19 January 1, 2008 and February 28, 2009. Their review of the census data, citation and arrest

1. data, and crash data showed that while 50% of the drivers stopped by Cal-MMET officers are
2. Hispanic, only 5.5% of the not-at-fault drivers in accidents on I-5 in Shasta County are
3. Hispanic. (*See United States v. Sanchez-Palomino*, CR09-0094-MCE, Dkt. No. 118.) The
4. crash data in that case clearly demonstrated that Hispanics were stopped by Cal-MMET at a
5. far greater proportion than their population as drivers on the road. Defense counsel for Mr.
6. Silva anticipates similar data for the time period requested here. 26

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* 1. For all of the reasons laid out in Mr. November 12, 2012 Motion, this
  2. information is relevant to his defense. Mr. has raised the issue of selective
  3. enforcement, and he cannot develop this issue without access to the requested records.
  4. Without a subpoena, Mr. cannot otherwise obtain the records. The documents cannot
  5. be obtained from any other source and the Government has objected to the issuance of the
  6. subpoena. If the subpoena is issued, the documents can be produced without undue delay.
  7. Defense counsel has been informed that the same documents, albeit for a different time
  8. period, were produced expeditiously in the *Sanchez-Palomino* case. This evidence is
  9. requested in good faith. Records received to date indicate a disparate treatment of Hispanics
  10. relative to their population in Shasta County, and similar records obtained in the *Sanchez*
  11. *Palomino* case supported that conclusion. Finally, pursuant to Federal Rule of Criminal
  12. Procedure 17(b), Mr. Silva requests that the cost of the subpoenas be borne by the
  13. government.

# CONCLUSION

* 1. For the foregoing reasons, Mr. a respectfully requests the Court grant his Motion
  2. for Issuance of Rule 17(c) Out-of-District Subpoena and that the expense of such subpoenas
  3. be covered at government expense.
  4. DATED this 12th day of February, 2013. 19

Respectfully submitted,

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SCHROETER, GOLDMARK & BENDER

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*s/ Colette Tvedt*

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# CERTIFICATE OF SERVICE

* 1. I hereby certify that on February 12, 2013, I electronically filed the foregoing with the
  2. Clerk of the Court using the CM/ECF system, which will send notification of such filing to
  3. Assistant United States Attorneys Matthew Pittman and Katheryn Frierson, attorneys of
  4. record for co-defendants, and all others requesting electronic notice.
  5. *s/ Andrea Crabtree*

ANDREA CRABTREE

* 1. Paralegal

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