

re: vcl
NOV 19 2015

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FILED
NOV 19 2015
CLERK OF THE SUPERIOR COURT
BY Kelly Allen

7 Attorney for Defendant,
8 CHRISTINA DEFILIPPO

9
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF STANISLAUS

12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA,

14 Plaintiffs,

15 v.

16 FRANK CARSON, et al.,

17 Defendant.

) Case No.: 1490969

) NOTICE OF MOTION AND MOTION TO
) DISMISS FOR OUTRAGEOUS LAW
) ENFORCEMENT CONDUCT

) DATE: TBA

) TIME: TBA

) DEPT.: 26

18
19 TO THE DISTRICT ATTORNEY OF STANISLAUS COUNTY AND/OR HER

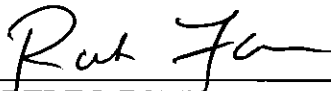
20 REPRESENTATIVE:

21
22 PLEASE TAKE NOTICE that on _____, at _____, or as soon thereafter as the
23 matter may be heard in the courtroom of Department 26 of the above-entitled court, the
24 defendant will move for an order dismissing all charges in this action.
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1 This motion will be made on the ground that the actions of the police agents were so outrageous
2 as to violate the fundamental fairness required by the due process clause of the Fifth
3 Amendment.
4

5 The motion will be based on this notice of motion, on the attached declaration and
6 memorandum of points and authorities served and filed herewith, on such supplemental
7 declarations and memoranda of points and authorities as may hereafter be filed with the court, on
8 all the papers and records on file in this action, and on such oral and documentary evidence as
9 may be presented at the hearing of the motion.
10

11 DATED: 11/19/15

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14 ROBERT L.FORKNER
15 Attorney for the Defendant,
16 CHRISTINA DEFILIPPO
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18 FRANK CARSON, et al.,

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)
) POINTS AND AUTHORITIES
) IN SUPPORT OF MOTION
) TO DISMISS FOR
) OUTRAGEOUS
) POLICE CONDUCT

20 The defendant submits the following points and authorities in support of the motion to
21 dismiss for outrageous police conduct:

22 **I.**
23 **CRIMINAL CHARGES MUST BE DISMISSED WHEN POLICE CONDUCT IS SO**
24 **OUTRAGEOUS AS TO VIOLATE THE PRINCIPLES OF DUE PROCESS**

25 In U.S. v. Russell, 411 U.S. 423, 431-432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), the
26 United States Supreme Court recognized that instances of police misconduct may be so
27 outrageous that the principles of due process would require that criminal charges be dismissed:
28

1 [W]e may some day be presented with a situation in which the conduct of law
2 enforcement agents is so outrageous that due process principles would absolutely
3 bar the government from invoking judicial processes to obtain a conviction. . .

4 The standard against which the court suggested that such conduct should be measured
5 was whether it violated that " 'fundamental fairness, shocking to the universal standard of justice'
6 mandated by the Due Process Clause of the Fifth Amendment."

7 California cases have treated this defense as viable. (People v. Thoi, 213 Cal.
8 App. 3d 689, 696, 261 Cal. Rptr. 789 (4th Dist. 1989)). As the California
9 Supreme Court observed in People v. McIntire, 23 Cal. 3d 742, 748, 153 Cal.
10 Rptr. 237, 591 P.2d 527 (1979), [s]ufficiently gross police misconduct could
11 conceivably lead to a finding that conviction of the accused would violate his
12 constitutional right to due process of the law.

13 As the court reasoned in Boulas v. Superior Court, 188 Cal. App. 3d 422, 429, 233 Cal.
14 Rptr. 487 (2d Dist. 1986), the remedy for such outrageous police conduct may be dismissal:

15 When conduct on the part of authorities is so outrageous as to interfere with an
16 accused's right of due process of law, proceedings against the accused are thereby
17 rendered improper. [Citations omitted.] Dismissal is, on occasion, used by courts
18 to discourage flagrant and shocking misconduct by overzealous governmental
19 officials in subsequent cases.

20 **II.**
21 **THE ISSUE OF OUTRAGEOUS POLICE CONDUCT**
22 **SHOULD BE RAISED IN A PRETRIAL MOTION**

23 In People v. Thoi, 213 Cal. App. 3d 689, 697, 261 Cal. Rptr. 789 (4th Dist. 1989), the
24 court suggested that when the issue of outrageous police conduct arises outside the context of an
25 entrapment defense, the defendant should "raise the issue by a pretrial motion with appropriate
26 pleadings and proof."
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**III.
ELEMENTS OF THE DEFENSE**

In People v. Smith, 31 Cal. 4th 1207, 7 Cal. Rptr. 3d 559, 80 P.3d 662 (2003) the court stated the factors required for outrageous government conduct: “(1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace. (People v. Wesley, 224 Cal. App. 3d 1130, 1142, 274 Cal. Rptr. 326 (2d Dist. 1990))

DATED: 11 / 19 / 15

Respectfully submitted,



ROBERT L. FORKNER
Attorney for defendant
CHRISTINA DEFILIPPO

PROOF OF SERVICE

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

I am a resident of or employed in the County of Stanislaus, State of California at 722 Thirteenth St., Modesto, where the service took place. I am over the age of 18 and not a party to the within action.

On 11/19/15 I served the document(s) described as:
(DATE)

NOTICE OF MOTION AND MOTION TO DISMISS FOR OUTRAGEOUS LAW ENFORCEMENT CONDUCT

on the interested parties in this action by providing a copy thereof to:

STANISLAUS COUNTY DISTRICT ATTORNEY'S OFFICE

____ (BY MAIL) I am readily familiar with this business's practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the U.S. Postal Service on the date herein above in the ordinary course of business, at Modesto, California.

X (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee(s).

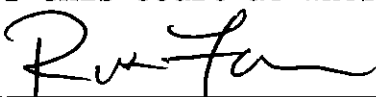
____ (BY OVERNIGHT COURIER) I caused the above-referenced envelope(s) to be delivered to an overnight courier service for delivery to the addressee(s).

____ (BY FACSIMILE/E-MAIL) I caused the above-referenced document(s) to be faxed to the offices of the addressee(s).

Executed on 11/19/15 at MODESTO, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

____ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



ROBERT L. FORKNER

PEOPLE v. CHRISTINA DEFILIPPO

Case No.: **1490969**

SERVICE LIST

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