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7 UNITED STATES DISTRICT COURT

8 DISTRICT OF ARIZONA

9	United States of America,	)	
		)	CR 05 - 1329 TUC FRZ (bpv)
10	Plaintiff,	)	
		)	
11	v.	)	GOVERNMENT’S RESPONSE TO
		)	DEFENDANT’S SECOND MOTION
12	Ephraim Cruz,	)	TO DISMISS THE INDICTMENT
		)	FOR SELECTIVE PROSECUTION
13	Defendant.	)	
		)	

14

15 Now comes the United States of America, by and through its attorney, DANIEL G.  
 16 KNAUSS, United States Attorney, and Cynthia R. Wood, Assistant United States Attorney,  
 17 and requests that this Court deny the defendant’s second motion to dismiss on the grounds  
 18 of selective prosecution, and deny his request for a further evidentiary hearing. Although the  
 19 defendant alleges that information was hidden from him, the Government made a timely  
 20 disclosure consistent with this Court’s disclosure order. The defendant further alleges that  
 21 there are two other Border Patrol Agents who were similarly situated in that they transported  
 22 illegal aliens and this information would have impacted this Court and the Magistrate’s  
 23 decision regarding his first Motion to Dismiss for Selective Prosecution. A cursory reading  
 24 of the disclosure provided, however, reveals that one of the agents the defendant accuses of  
 25 transporting illegal aliens, believed that the two women in the car had authorization to be in  
 26 the United States, and a records check confirmed that at least one of the women did in fact

1 have authorization to be in the United States. The defendant has failed to meet his burden  
2 to establish that there are others who are similarly situated who have not been prosecuted,  
3 nor has he established that his prosecution is based on an impermissible motive. The  
4 defendant is not therefore entitled to dismissal of the indictment, or an evidentiary hearing.

5 FACTS

6 The defendant alleges that the information provided pursuant to *United States v.*  
7 *Henthorn*, was hidden from him until after the evidentiary hearing.

8 According to the Government records, the documents bates numbered 197 to 284 were  
9 submitted to this Court for its review on August 8, 2006. These documents concerned an  
10 allegation of misconduct by Border Patrol Agent Oscar Cornejo. In its cover letter to the  
11 Court, the government requested permission to redact any personal information regarding  
12 Agent Cornejo, including his date of birth and social security number, as well as any  
13 references to any other border patrol agents.<sup>1</sup> This Court issued a sealed Henthorn Order on  
14 August 30, 2006. It was received in the United States Attorney's Office on August 31, and  
15 the ordered disclosure was mailed to defense on September 5, 2006. The redactions made  
16 to the disclosure were in accordance with this Court's order.

17 Legal Argument

18 The defendant's second motion to dismiss and request for an evidentiary hearing  
19 should be denied as untimely and unsupported by the evidence.

20 The defendant's second motion to dismiss and request for evidentiary hearing should  
21 be denied as untimely. This is actually a motion for reconsideration, based on new evidence,  
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23 <sup>1</sup>Government employees are prohibited from disclosing personal identifying  
24 information in their possession pursuant to their employment by Title 5 United States  
25 Code § 552a. The information can only be released under certain circumstances,  
26 including pursuant to a court order.

1 which according to the Local Rule 7.2 (g) should have been filed within ten days of the  
2 Court's ruling. In spite of the defendant's claims to the contrary, by his own admission he  
3 has had the disclosure since September 7, 2006, (Defense Motion p. 3 line 12.) The  
4 defendant's objections to the magistrate's report and recommendation were filed on  
5 September 20, 2006. This Court's order adopting the report and recommendation of the  
6 Magistrate Judge was not filed until October 24, 2006. No continuance was requested in  
7 order to permit further investigation, and the defendant should not be permitted to re-litigate  
8 these matters when he has had the evidence well in advance of the order denying his motion.

9 The defendant's second motion to dismiss on the grounds of selective prosecution and  
10 request for an evidentiary hearing should also be denied on the grounds that it is unsupported  
11 by any evidence. The defendant alleges that Border Patrol Agents Oscar Cornejo and Javier  
12 Cardoza were caught in the act of transporting illegal aliens, but were not charged. This, he  
13 alleges, is proof of retaliation by management of Customs and Border Protection as  
14 evidenced by its failure to refer the case to the Office of the Inspector General. However a  
15 cursory reading of the disclosure reveals why these individuals were not charged with  
16 transporting illegal aliens. There is no proof that either woman was illegally in the United  
17 States, and Agent Cornejo specifically stated that he believed that the two women were  
18 border crossers. Defendant's exhibit attached to his motion, page 4, second paragraph states:

19 Cornejo stated that he knows Rosa and RIVERA from the clubs in Agua  
20 Prieta, Sonora, Mexico, and he stated that as far as he knows both females  
21 have Border Crosser Cards and were present in the United States legally.  
22 Cornejo stated that he has never had contact with either of the females in an  
23 on-duty capacity.

24 Although only the first name of one of the women was provided, the full name and date of  
25 birth of the woman referred to as "Rivera" had been obtained by the DPS officer. As a result,  
26 defendant's exhibit attached to his motion, page 5, the last paragraph states:

1 A search of Central Index System (CIS) revealed that RIVERA-Duarte, Celia  
2 Del Carmen **is a Border Crossing Card holder** under \_\_\_\_\_. (A-  
3 number) Records could not be run on Rosa since her last name and DOB are  
4 not known. (Emphasis added.)

5 To state the obvious, there is simply no way to charge Agent Cornejo or Agent  
6 Cardoza with transporting illegal aliens if the individuals they are accused of transporting  
7 have legal authorization to be in the United States. Even without confirmation of Rosa's  
8 status, it would still be the government's burden to establish that she was here illegally,  
9 which cannot be done given the current evidence. Furthermore, there is no information that  
10 Agent Cornejo or Cardoza knew or even thought she was in the U.S. illegally. To compare  
11 this case with the defendant's case is to merely highlight the differences. There is  
12 overwhelming evidence of the defendant's guilt in this case. The defendant in a taped  
13 interview confessed to transporting the illegal alien through the Douglas port of entry, and  
14 admitted that he had been told that she was illegally in the U.S., and had previously been  
15 deported.

16 Finally although the defendant assumes that because the investigation was conducted  
17 by the Office of Internal Audit, that it was not referred to the Office of the Inspector General,  
18 he is incorrect. Customs and Border Protection management, per policy, generated a serious  
19 incident report (SIR), which according to the cover sheet was faxed to the OIG and Joint  
20 Intake Center in Washington, D.C.

21 As stated in *United States v. Aguilar*, 883 F.2d 662, 706 (9<sup>th</sup> Cir. 1989) overruled on  
22 other grounds by *United States v. Gonzalez-Torres*, 309 F.3d. 594 (9<sup>th</sup> Cir. 2002):

23 The goal of identifying a similarly situated class of law breakers is to isolate  
24 the factor allegedly subject to impermissible discrimination. The similarly  
25 situated group is the control group. The control group and the defendant are  
26 the same in all relevant respects, except that defendant was, for instance,  
exercising his first amendment rights. If all other things are equal, the  
prosecution of only those persons exercising their constitutional rights give  
rise to an inference of discrimination. But where the comparison group has less  
in common with [the] defendant, then factors other than the protected

1 expression may very well play a part in the prosecution.

2 *Aguilar*, at 706.

3 Absent a similarly situated control group the government's prosecution of a defendant  
4 exercising his constitutional rights proves nothing. *Aguilar*, at 706.

5 Citizens are entitled to equal protection of the law but these decisions do not  
6 hold that citizens are entitled to equal protection from the laws. The fact that  
7 not all criminals are prosecuted is no valid defense to one prosecuted ... The  
8 administration of such a matter lies in the discretion of the prosecuting  
9 attorney.

9 *United States v. Choate*, 619 F.2d 21, 23 (9<sup>th</sup> Cir. 1980) citing *United States v. Manno*, 118  
10 F.Supp. 511, 515 (N.D. Ill. 1954.)

11 CONCLUSION

12 Based on all of the above the government respectfully requests that this Court deny  
13 any request for an evidentiary hearing regarding this matter, and deny the second motion to  
14 dismiss for selective prosecution.

15 Respectfully submitted this 20th day of February, 2007.

16 DANIEL G. KNAUSS  
17 United States Attorney  
18 District of Arizona

19 *s/ Cynthia R. Wood*

20 CYNTHIA R. WOOD  
21 Assistant U.S. Attorney

22  
23  
24 Copy of the foregoing sent electronically  
25 and otherwise this 20th day of February, 2007, to:

1 Roger Sigal  
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