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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF, vs. WESLEY ALLEN MODES DEFENDANT,	Case No.: SCT 77272 NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY AND PROPOSED ORDER; POINTS AND AUTHORITIES. (PENAL CODE SECTION 1054.5) (<i>MURGIA v. MUNICIPAL COURT</i>) <hr/> DATE: July 16, 2010 TIME: 1:30 PM DEPT. 2
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TO THE HONORABLE COURT AND TO DISTRICT ATTORNEY OF SANTA CRUZ COUNTY:

PLEASE TAKE NOTICE that on the above noted date and time, Defendant, Wesley Modes, will move this Court for an order to compel immediate discovery of the items pursuant to *Murgia v. Municipal Court* (1975) 15 Cal.3d 286.

This motion will be made on the grounds that the defendant is entitled to discovery pursuant to *Murgia, supra*, and federal constitutional law.

The motion will also be based on this notice of motion, the attached memorandum of points and authorities served and filed herewith, the attached exhibits, and such evidence as may be presented on the hearing in this motion.

Dated: July 2, 2010

Jonathan Che Gettleman
Attorney for the Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I. BACKGROUND

3 This case arises out of a municipal prosecution for participating in a noncommercial event
4 without a permit with knowledge that no permit was obtained pursuant to section 10,.65.030 of the
5 Santa Cruz Municipal Code. The defense asserts that this prosecution is being pursued for selective
6 and discriminatory reasons based on Mr. Mode’s participation in an invidious groups and professed
7 political beliefs. Mr. Modes is known to the local community as a self professed anarchist. Over the
8 past several years, Mr. Modes participated in a discrete group of like minded individuals who expressed
9 a common desire to organize several events in the downtown area of Santa Cruz without requesting
10 permits as an exercise of their First Amendment rights to free association and speech.

11 One event in particular with which Mr. Modes is associated caught the attention of law
12 enforcement and the city council. The event is called the “Do It Yourself” parade and it has occurred on
13 New Year’s Eve annually for several years. One aspect of the planning was that the same group
14 expressed an intention to not request a permit as required by the City Santa Cruz Municipal Code. In
15 the fall of 2005, the Santa Cruz Police Department covertly infiltrated meetings held in private
16 residences by this same discrete group, who will be referred to as “the DIY Parade Group” for ease of
17 reference.
18

19 In the spring of 2006, Robert Aaronson, and independent police auditor for the City of Santa
20 Cruz conducted an investigation into the police infiltration of the DIY Parade Group meetings by the
21 Santa Cruz Police Department. (See Aaronson Report attached as Exhibit 1 to Declaration of Jonathan
22 Che Gettleman). In pertinent part the report quotes Deputy Chief Vogel who stated the following
23 regarding what was reported back to him by one of the undercover officers:
24

25 I directed the Deputy Chief’s attention to the OIC report from the first meeting and
paraphrased the language from it to the effect that “all of the people, other than
26 **Wesley Modes**, voiced the opinion of not- that they did not want to get arrested on

1 New Year's Eve. The group as well agreed to abide by the police presence and
2 extinguish their sources of fire if asked by law enforcement. (Exhibit 1 to
3 Gettleman Dec., Aaronson Report, p. 18.) [Bold Added]

4 In his "how the decision was made" section, the police auditor's report states that,

5 As I gathered, Lt. Escalante's threshold for what constituted protected
6 'political activity' was rather high; his view hinged on whether it was a 'political
7 movement' rather than whether there was any political purpose in their intended
8 activity.

9 The very website statements offered by Vogel and Escalante in their
10 interviews demonstrate that, at least in part, the organizers had a political purpose
11 in their efforts to arrange a DIY parade in contravention of local law, the City
12 Council and the City Manager. **I am hard-pressed to see any reasonable reading
13 of the website that does not recognize its unabashed political expression as a
14 core aspect of its message.** (Exhibit 1 to Gettleman Dec., Aaronson Report, p. 26,
15 ¶ 4.) [Bold Added]

16 As to the likelihood of getting cited for attendance at one of these events Aaronson opines,

17 As to the former, the violation is no more than an infraction. I suspect that no one
18 gets a permit for the annual Halloween events either. No one was arrested on New
19 Year's Eve for this infraction [2006] and I doubt whether anyone's ever been
20 arrested on Halloween on that basis. (Exhibit 1 to Gettleman Dec., Aaronson
21 Report, p. 31, ¶4.)

22 The Aaronson report concluded that, "[I]n my opinion, the Santa Cruz Police Department
23 violated the Last Night DIY Parade organizer's rights to privacy, freedom of speech and freedom of
24 assembly in the manner in which they went about obtaining information about the organizers'
25 activities." (Exhibit 1 to Gettleman Dec., Aaronson Report, p. 32, ¶ 6- 33, ¶ 1.)

26 Several other events have since transpired in the interim that have caused the Santa Cruz County
27 Police Department to target Mr. Modes, and specifically, Mr. Modes' activity regarding the DIY parade
28 group. On February 19, 2010, Mr. Modes was cited for participating in a noncommercial event, with
29 knowledge that a permit has not been issued for the event, pursuant to Santa Cruz Municipal Code
30 Section 10.65.030. The City Police went through the unusual formality of filing a complaint on this
31 infraction. On information and belief, Mr. Modes is the only person who has been prosecuted by City

1 Attorney for the above named section of the municipal after the DIY parade despite the attendance of
2 thousands of people at the event.

3 Mr. Modes believes and asserts that the only reason this selective and discriminatory prosecution
4 is being pursued is because of Mr. Modes' participation in the discrete "anarchist" group that planned
5 the DIY parade and because of Mr. Modes' political beliefs as a self professed "anarchist." Mr. Modes
6 also believes that the same prosecution is being pursued as a prior restraint on Mr. Modes' right to
7 freedom of speech and assembly in violation of the First Amendment of the United States Constitution.
8 (See generally Exhibit 2 to the Gettleman Dec., Declaration of Wesley Modes.)

9
10 Mr. Modes has also submitted several declarations from DIY parade participants in support of
11 his motion including his own.

12 ARGUMENT

I. 13 THE DEFENDANT IS ENTITLED TO DISCOVERY NECESSARY TO
14 SUBSTANTIATE A CLAIM OF SELECTIVE PROSECUTION.

15 A. Legal Standard

16 *Yick Wo v Hopkins* makes clear that it is the province of the courts to prohibit that unequal
17 administration of law. (1886) 118 U.S. 356 at 373-374. A criminal defendant may obtain a dismissal of
18 the criminal charges brought by the government on the ground that such prosecution is being conducted
19 in an arbitrary or discriminatory manner, particularly where persons are targeted because of political
20 activities. *Murgia v. Municipal Court* (1975) 15 Cal. 3d 286 at 301 ('A conscious policy of selective
21 enforcement directed against members of supporters of a labor organization is prime facie
22 discriminatory and invalid under the equal protection clause.'). The equal protection guarantee simply
23 prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate
24 treatment on an invidiously discriminatory basis. *Id.* at 297.

25 A *Murgia* dismissal usually involves two motions. First, the defense makes a motion to obtain
discovery that would prove the government is acting in a discriminatory manner. Second, assuming that

1 the discovery establishes that the prosecution is discriminatory, the defendant moves to have the charges
2 dismissed. To succeed in a *Murgia* discovery motion, the defendant must usually be a member of the
3 group against which discrimination is claimed. *Murgia, supra*, 15 Cal. 3d at 303. Allegations of a
4 conscious policy of selective enforcement directed against a primary guiding member of a insular
5 anarchist organization meeting for the purpose of planning political speech activities is clearly sufficient
6 to support a claim of invidious discrimination which is a prime facie invalid under the equal protection
7 clause. *Id.* at 301.

8 A criminal defendant making a *Murgia* discovery motion has the burden of proof. *Murgia,*
9 *supra*, 15 Cal. 3d at 298. The applicable standard for discovery related to the defense of discriminatory
10 prosecution is the “same evidence” standard established by the United States Supreme Court in *People*
11 *v. Armstrong* (1996) 517 U.S. 456. The California Supreme Court adopted this standard and stated that
12 what is required is “some evidence tending to show the existence of the essential elements of the
13 defense, discriminatory effect and discriminatory intent.” *People v. Superior Court (Baez)* (2000) 79
14 Cal. 4th 1177, 1189.

15 *Murgia* motions are based on the United States Constitution and are not subject to the discovery
16 provisions of the Penal Code. *Murgia, supra*, 15 Cal. 3d at 294; Pen Code Section 1054(e). Therefore,
17 defendant need not have requested the same documents in a prior informal discovery request pursuant to
18 Penal Code section 1054.5(b).

19
20 **B. The Evidence Supports a Prime Facie Showing of Invidious Selective Prosecution.**

21 The evidence more than meets the burden to establish the right to the requested discovery. As
22 the court records and the attached exhibits make clear, the defendant is undisputedly a member of, or
23 associated with, the DIY organizing group with anarchist backgrounds. As a matter of law, significant
24 participation in this insular political action group satisfies the threshold inquiry of a protected category
25 as required by *Murgia*. What remains to be shown is that the City of Santa Cruz has singled out for
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1 prosecution defendant for the invidious purpose of punishing or preventing association with the DIY
2 group. Such an inference is sufficient to make a prime facie case as discriminatory intent. *See Batson v.*
3 *Kentucky* (1986) 476 U.S. 79, 96. Where prosecution is based on an impermissible classification, the
4 “discriminatory purpose” prong is met. *People v. Berrios* (1974) 501 F.2d 1207, 1211.

5 In the seminal case of *Murgia*, the California Supreme Court recognized the inherent danger of
6 using the force of law to persecute union activists for the benefit of an employer in an underlying labor
7 dispute. *See* 15 Cal.3d 286 at 302 (“In light of the constitutional and statutory foundations of workers’
8 freedom of association, we have no doubt that an administrative policy which singles out individuals for
9 prosecution on the basis of their exercise of the right to join the union of their choice is, at least
10 presumptively, unjustifiable and invidious.”) (internal citations omitted). Here, the evidence
11 demonstrates a **likelihood** of unlawful collaboration between the City Council, the City Police
12 Department, the City Manager (who are employees and agents of the City which requires permits for
13 noncommercial gatherings), and the prosecuting City Attorney’s Office.

14 Remarkably, the attached Exhibit 1 to the Declaration of Jonathan Che Gettleman demonstrates
15 that the police have already been determined by an independent police auditor to have violated Mr.
16 Modes’ constitutional rights to privacy, freedom of speech, and freedom of association in relation to the
17 police infiltration of this same DIY Parade group. (Exhibit 1 to Gettleman Dec., p. 32, ¶ 6- 33, ¶ 1.)
18 This same report clearly identified the DIY Parade Group as having an articulable political purpose and
19 intention. (*Ibid* at p. 26, ¶ 4.)

20 Mr. Modes was the only DIY Parade group member specifically named by the infiltrating police
21 officers by name. The context of that mention was in regards to Mr. Modes’ alleged willingness to be
22 arrested. (*Ibid* at p. 18.)

23 Mr. Modes’ declaration clearly demonstrates that Mr. Modes is well known in the community as
24 both an anarchist and as a member of the DIY Parade group. (Exhibit 2 to Gettleman Dec.) Further, the
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1 chronology attached to Mr. Modes' declaration clearly demonstrates the selective focus on Mr. Modes'
2 political and protected first amendment activities by the City and its police department.

3 Also compelling is the fact that no one else of the thousands of people "participating" at the DIY
4 parade has been prosecuted under the municipal code section forbidding participating in a non-permitted
5 noncommercial gathering. Almost everyone at that event could reasonably be expected to have
6 knowledge that no permit existed for the event because that is exactly how the event was billed. Robert
7 Aaronson, the independent police auditor, observed in his report that, "I suspect that no one gets a
8 permit for the annual Halloween events either. No one was arrested on New Year's Eve [2006] for this
9 infraction and I doubt whether anyone's ever been arrested on Halloween on that basis." (Exhibit 1,
10 Aaronson Report, p. 31, ¶4.)

11 Several affidavits from persons also in attendance, including Mr. Modes' declaration and a
12 police video of the event illustrate that the police made no effort to stop the event or cite individuals for
13 participating. (Exhibit 3-11 of Gettleman Dec.) Sherry Conable, a parade participant, declares that
14 when she heard Mr. Modes was cited she emailed the Santa Cruz City Attorney John Barisone, the
15 Chief of the Santa Cruz Police Department, the City Manager and all off the members of the City
16 Council stating that Ms. Conable had also participated in the parade and asking that she be ticketed as
17 well. Ms. Conable's email was not responded to by any of its recipients. (Exhibit 3 to the Declaration
18 of Jonathan Che Gettleman, Declaration of Sherry Conable, p. 2, lines 14-23.) All declarations indicate
19 that each declarant participated in the parade and did not see or know of one person other than Mr.
20 Modes being cited for their participation.

21 Therefore, the only reasonable inference that can be drawn from the present prosecution is that it
22 is taken with the intent to single out Mr. Modes for his participation in the DIY Parade group and
23 because of his anarchist beliefs in an effort to chill his further participation in the same group and his
24 further public espousal of anarchist beliefs. (Exhibit 3-11 of the Gettleman Declaration)

1 The instant case far surpasses the showing made in other California cases in which the courts
2 approved the discovery motions. *See People v. Superior Court (Baez)* (2000) 79 Cal. App. 4th 1177.
3 (Court ordered discovery in selective prosecution claim of Medical Marijuana advocate on the basis of
4 declarations of counsel). *People v. Municipal Court (Street)* (1979) 89 Cal. App. 3d 739 (Court ordered
5 discovery of selective prosecution of female prostitutes based on declarations that homosexual men
6 were not prosecuted in similar establishments). *Bortin v. Superior Court* (1976) 64 Cal. App. 3d 873
7 (Setting aside an order denying discovery on the basis that the defendant made statements that he was
8 singled out because of his political beliefs).

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10 **C. The Defendants Have Made a Prime Facie Showing of Invidious Selective Prosecution.**

11 The defendant’s proffered evidence demonstrates that the prosecution is collaborating or
12 otherwise aligned with the City Attorney to punish Mr. Modes for his planning role in the DIY parade
13 and his professed anarchist beliefs and to chill future constitutionally protected association and speech.

14 The courts have recognized discriminatory enforcement is difficult to prove since evidence of it
15 “lies buried in the consciences and files of the law enforcement agencies involved.” *People v. Gray*
16 (1967) 254 Cal. App. 2d 256, 266. Here, however, the instant facts present the court an unusual scenario
17 where the court can and should reasonably infer unlawful motive based on all the direct and
18 circumstantial evidence cited above. The defendant is now entitled to, and respectfully asks the court to
19 compel discovery of the information and items necessary to fully investigate the claim.

20 The defendant is also entitled to records that would indicate a disparity in the prosecution of
21 laws at unpermitted events, and particularly. The California Supreme Court has recognized the right to
22 discovery of information in police reports to establish disparate treatment. *Griffin v. municipal Court*
23 (1977) 20 Cal. 3d 300. (Ordering the compilation of statistical summaries of Fourteen years of police
24 records). In this case, a less onerous production is requested by merely asking for the report themselves.

25 **D. Requested Disclosure**
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1 Based on the authority cited above Defendant Wesley Modes now respectfully request this
2 Honorable Court order the disclosures of the following documents in the possession of the City Attorney
3 or any of its clients including, the City Council, the City of Santa Cruz Police Department and the City
4 Manager's Office:

5 i) Definition

6 **Document** - The term "DOCUMENTS" means each "original" as that term is defined in
7 California Evidence Code § 255, and if the original is not available, each "duplicate," as that term is
8 defined in California Evidence Code § 260, of items defined as "documents" in California Code of Civil
9 Procedure § 2016(b)(3), and shall specifically include, but is not limited to letters, memoranda,
10 handwritten notes, ledgers, journals, business or financial records of any kind, personal diaries,
11 calendars, travel records, telephone logs, telephone bills for long distance calls, photographs, reports,
12 diagrams, illustrations, or any other tangible repositories of information, including that stored in a
13 computer or similar device and/or preserved on backup tapes or other archival media, e-mail, voice
14 mail, magnetically and optically recorded documents, archival copies of magnetically or optically
15 recorded documents, documents that have been logically deleted but not physically erased, actual media
16 (whether magnetic, optical, or other) that have been used to record or store data. Each document which
17 is in whole or in part a duplicate or copy of another document, but which is not in every respect identical
18 to the original from which it was copied or duplicated shall be a separate original document, regardless
19 of the nature of the difference (i.e. whether the difference is because the duplicate identifies margin
20 notes, comments or deletions not appearing on the original).

21 ii) Requested Disclosures

- 22 1) Any and all photographs or video recordings of 2009 DIY Parade or individuals therein.
23 2) Any and all citations issued at or near Pacific Avenue before, during, or immediately
24 following DIY Parade for years 2005 to 2009 for violations of section 10.65.030 of the Santa
25 Cruz Municipal code (Participating in an Unpermitted Noncommercial Event.)

- 1 3) List of all officers on duty before, during, or immediately following DIY Parade 2009.
- 2 4) Any and all reports created by officers on duty before, during, or immediately following DIY
- 3 Parade 2009, specifically including the report of Officer Wes Hanson.
- 4 5) Any and all documents that name DIY Parade or defendant Wes Modes in relation to first
- 5 amendment or political protest activities.
- 6 6) Documents that describe changes in policy, changes in procedure, or evaluation of
- 7 performance by the SCPD or other agencies regarding first amendment activities in general, and
- 8 the DIY Parade in particular in the two months preceding the 2009 DIY Parade.
- 9 7) All non-privileged emails between SCPD, Santa Cruz City Manager, Santa Cruz City
- 10 Attorney, or Santa Cruz City Council members that refer to any of the following topics: the DIY
- 11 parade organizing group, the DIY parade, Last Night Parade, New Year's parade, or Wes Modes
- 12 between 11/1/09 and 03/30/10. This request is intended to cover any of the same content called
- 13 by a different name.
- 14 8) Any and all documents from 2006 to 2009 that name Guerilla Drive-In, Guerilla Theater,
- 15 SubRosa Cafe, or Trash Orchestra in possession of plaintiff.
- 16 9) Any and all names and contact information of material informants or undercover officers who
- 17 may have worked or may currently work within anarchist or DIY Parade organizing group
- 18 within the City of Santa Cruz within the last five years, whether paid or unpaid, whether working
- 19 with SCPD or other agencies.
- 20 10) Minutes from closed-session Santa Cruz City Council meeting RE the above entitled case
- 21 case on or about Tuesday June 22nd, 2010.
- 22 11) Santa Cruz Police Department General Orders for New Year's Eve 2009.

23 Defendant requests that a log be created for all communications for which a privilege is being
24 asserted by plaintiff.

25 ///

1 **CONCLUSION**

2 The defense has made a prima facie showing that the Santa Cruz City Attorney's Office has
3 singled out Defendant for selective prosecution because of his membership and/or support of the DIY
4 Parade group and because of his anarchist beliefs in its effort to prevent future non-permitted
5 noncommercial public events. Additionally, the defendants are entitled to the requested statutory and
6 *Brady* related item as part of the ordinary course of their defense. Therefore, in addition to the above
7 request, the defense respectfully requests that the Court order the prosecution to provide any non-
8 disclosed *Brady* or other statutorily required discovery.

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10 Dated: July 2, 2010

Respectfully submitted,

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Jonathan Che Gettleman
Attorney for Defendant
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