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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

v.

BRADLEY STUART ALLEN AND  
ALEX DAROCY, et al.,

Defendants.

No. F22195 and F22193  
DEFENDANTS BRADLEY STUART  
ALLEN'S AND ALEX DAROCY'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS FOR SELECTIVE  
PROSECUTION; MEMORANDUM OF  
POINTS AND AUTHORITIES

Hearing: May 8, 2012  
Dept. 6  
Time: 9:00 a.m.

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TO: BOB LEE, DISTRICT ATTORNEY OF SANTA CRUZ COUNTY, STATE OF  
CALIFORNIA and to his duly authorized deputies:

NOTICE IS HEREBY GIVEN that on May 8, 2012 in Department #6 of the above-entitled court, defendants Bradley Stuart Allen and Alex Darocy will move this court for an order dismissing the charges pending against them on the grounds that the District Attorney is selectively prosecuting Mr. Allen and Mr. Darocy in violation of the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

This motion is based upon: this notice of motion and the points & authorities incorporated herewith; all other pleadings, records, and files herein; and such evidence and argument that may be presented at the hearing of this motion.

Dated: April \_\_, 2012

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Ben Rice  
Attorney for Bradley Stuart Allen

Dated: April \_\_, 2012

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George J. Gigarjian  
Attorney for Alex Darocy

**STATEMENT OF THE CASE**

On February 7, 2012, the District Attorney filed a complaint charging Mr. Allen, Mr. Darocy, and nine other codefendants with conspiracy to commit vandalism and/or trespass (count 1; § 182, subd. (a)(1)), felony vandalism (count 2; § 594, subd. (b)(1)), misdemeanor trespass by entering and occupying property (count 3; § 602, subd. (m)), and misdemeanor trespass by refusing to leave private property (count 4; § 602, subd. (o)). The cases of Mr. Allen and Mr. Darocy were bifurcated from the other codefendants' cases, as their cases shared common factual and legal issues.

A preliminary hearing for Mr. Allen and Mr. Darocy was held over three days, on March 13, 14, and 15, 2012. All parties filed multiple briefs concerning the legal issues, and Mr. Allen and Mr. Darocy presented affirmative evidence on their behalf. After the preliminary hearing, Mr. Allen and Mr. Darocy were held to answer on counts 1, 3, and 4 (conspiracy and the two misdemeanor trespass counts), but were not held to answer on count 2 (felony vandalism). (3RT 68.) The trial court denied a defense motion to reduce count 1 to a misdemeanor, without prejudice. (See § 17, subd. (b).) (3RT 71-72.)

On March 12, 2012, the District Attorney filed an information that included all four of the original charges.

## **STATEMENT OF FACTS**

The facts adduced at the preliminary hearing are summarized in the Penal Code section 995 motion that Mr. Allen and Mr. Darocy are filing simultaneously with the instant motion. For judicial economy, the Statement of Facts from that motion are incorporated by reference herein. An abbreviated factual summary is provided herein.

Briefly, a large number of people entered a vacant building at 75 River Street on November 30, 2011. The incident occurred during the time of the “Occupy” movement across the country, and at least some of the participants considered themselves part of that movement. An unknown number of people remained in the building for four nights, ultimately causing property damage estimated at over \$400.00.

Only ten of the people seen entering the building are being prosecuted. Those ten include Mr. Allen and Mr. Darocy, who were both established photojournalists who regularly contributed to an alternative, internet-based media outlet called Indybay. The work of both Mr. Allen and Mr. Darocy frequently included protests and sometimes focused on law enforcement’s response to social uprisings. (See 2RT 89-90, 106, 110-111.) Both defendants were known to law enforcement because of their past photojournalism work. (See 1RT 33.) Neither defendant was seen inside the building for a significant period of time, and there is no evidence either defendant participated in the vandalism.

During the four days, at least one member of the Santa Cruz City Council entered the building, but she was not among those charged with any crimes. (1RT 60, 106.) A photographer from the Santa Cruz Sentinel, (the County’s principal newspaper) also entered and took photographs, but he has not been charged either. (1RT 108-109.)

## **POINTS AND AUTHORITIES**

The pending charges of conspiracy, trespass, and vandalism must be dismissed because Mr. Allen and Mr. Darocy are being selectively prosecuted in violation of federal equal protection clause and due process guarantees. (U.S. Const., Amends. V, XIV.) The evidence at

the preliminary hearing established that they were singled out for prosecution due to their history and actions of publishing photographs of political demonstrations in the alternative press – i.e., their exercise of the First Amendment right to free speech.

The People's discretion to prosecute and what to charge is constrained by, among other principles, “the equal protection component of the Due Process Clause of the Fifth Amendment.” (*United States v. Armstrong* (1996) 517 U.S. 456, 464; *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1188; *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-832.) “The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’ [Citation.]” (*Baluyut v. Superior Court, supra*, 12 Cal.4th at pp. 831-832.)

To succeed on a discriminatory-prosecution discovery motion, a defendant must make a “credible showing of different treatment of similarly situated persons.” (*United States v. Armstrong, supra*, 517 U.S. at p. 470.) The defendants must show that they would not have been prosecuted but for their membership in a constitutionally protected, or suspect, class, or their exercise of a statutory or constitutional right. (*Id.* at p. 464; see also *Wayte v. United States* (1985) 470 U.S. 598, 608; *United States v. Taylor* (9th Cir. 1982) 693 F.2d 919, 923.) A discriminatory prosecution claim may be based on prosecution that is retaliation for the exercise of the First Amendment right to free speech. (See *Osborne v. Grussing* (8th Cir. 2007) 477 F.3d 1002, 1006; *United States v. Scott* (9th Cir. 1975) 521 F.2d 1188, 1195.)

These principles are illustrated by in *United States v. Steele* (9th Cir. 1972) 461 F.2d 1148, where the defendant was prosecuted for failing to answer questions on his census form. The defendant had publicly advocated for non-compliance with the census requests, and he provided evidence that the government had not prosecuted six people who had not taken such a public stand. (*Id.* at pp. 1150-1151.) The Ninth Circuit noted, “An enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally

protected right.” (*Id.* at p. 1152.) It also rejected the government’s assertion that its selection of the defendants was based on “prosecutorial discretion”:

Since Steele had presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground. Mere random selection would suffice, since the government is not obligated to prosecute all offenders, but no effort was made to justify these prosecutions as the result of random selection and Steele’s evidence was inconsistent with such a theory. Since no valid basis for the selection of defendants was ever presented, the only plausible explanation on this record is the one urged by Steele. We conclude that Steele demonstrated a purposeful discrimination by census authorities against those who had publicly expressed their opinions about the census.

(*United States v. Steele, supra*, 461 F.2d at p. 1152.)

In the instant case, the preliminary hearing established that the defendants were selected for prosecution while other, similarly-situated persons, were not. Specifically, a photographer from the Santa Cruz Sentinel – a mainstream media publication – was not prosecuted despite similar actions: he, too, entered the building during the occupation in order to take photographs and he, too, later published the photographs. The evidence established that the defendants were known members of the alternative media and that their work often focused on hot social issues as well as the police response. Their selection for prosecution over the mainstream media photographer was a clear case of discrimination based on an exercise of the First Amendment right to free speech and press. Their prosecution was not the “result of random selection” and, in light of the inference of discrimination raised by the evidence, may not be justified as mere “prosecutorial discretion.” (*United States v. Steele, supra*, 461 F.2d at p. 1152.)

The evidence at the preliminary hearing established that Mr. Allen and Mr. Darocy are being “punished for their expression of ideas, a constitutionally protected right.” (*United States v. Steele, supra*, 461 F.2d at p. 1152.) As they have made a “credible showing of different treatment of similarly situated persons,” the charges must be dismissed. (*United States v. Armstrong, supra*, 517 U.S. at p. 470.)

**CONCLUSION**

For the reasons stated herein, Mr. Allen or Mr. Darocy respectfully request that this Court dismiss the pending charges.

Dated: April \_\_\_, 2012

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Ben Rice  
Attorney for Bradley Stuart Allen

Dated: April \_\_\_, 2012

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George J. Gigarjian  
Attorney for Alex Darocy