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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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| UNITED STATES OF AMERICA,<br><br>Appellant,<br><br>v.<br><br>GRETCHEN BARLEY,<br>DONALD KIESELHORST,<br>STEPHEN S. SAYAD,<br><br>Appellees. | ) | No. CR04-00408 WHA<br><br>OPPOSITION TO REQUEST FOR JUDICIAL NOTICE AND MOTION TO STRIKE EVIDENCE NOT INTRODUCED BEFORE MAGISTRATE LAPORTE |

Both the government and its entry[1] have supplemented their briefs with declarations seeking to expand the record in this case. This Court should not

[1] If two horses in one race are owned or trained by similar interests, they are termed an entry for betting purposes in acknowledgment that there is no reasonable way to guarantee the individual horses run separate races. Here, amici rely upon incident reports and other materials allegedly obtained "via hand delivery from the Golden Gate National Recreation Area in response to a Freedom of Information Request." Counsel has personal experience in attempting to obtain incident reports from the government in general and the GGNRA in

consider those declarations and the material attached to the declarations; should strike those declarations and the material attached to those declarations; and not consider any argument based upon those declarations or material attached to them.

This Court is sitting as a Court of Appeal. It is not sitting as the trier of fact. The government's ability to get another bite at the appeal via an appeal has always "been considered subject to strict construction, for appeals by the government in criminal cases 'are something unusual, exceptional, not favored.'" Carroll v. United States, 354 U.S. 394, 77 S.Ct. 1332 (1957) quoted in United States v. Kanan, 341 F.2d 509, 514 (9th Cir. 1965).

Although, purely legal issues may be subject to de novo review, the government and its amici partners are not entitled to submit additional material to support their claims, and we hereby move to strike that material.

Fed.R. Crim.P. 58(D) governs the scope of this appeal. That Rule expressly states that:

> (D) Scope of Appeal. The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

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particular, generally it is a long and involved process, and the length of that process has increased since Attorney General Ashcroft's Memorandum dated October 12, 2001 replacing Former Attorney General Reno's policy discouraging discretionary exemptions with one encouraging the use of discretionary exemptions, protecting information and encouraging privacy.

Fed.R.Crim.P. 58(C) governs the record on appeal. That Rule expressly states that:

> (C) Record. The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

There is no rule or authority allowing the government, after it has lost below, or its stalking horse amici to supplement the record on appeal with new evidence. To the contrary, "It is Hornbook law that neither party can rely on evidence outside the record of the case on appeal (...). We are limited on this appeal to the record made in the court below." Duran v. United States, 413 F.2d 596, 605 (9th Cir. 1969).

In United States v. Rivera-Rosario, 300 F.3d 1 (1st Cir. 2002), the government, relying upon F.R.App. P. 10(e) authorizing appellate courts to supplement the record to correct omissions or misstatements requested that the record on appeal be supplemented by English translations of Spanish tapes that had been played to the jury, after the jury had indicated that they could understand the untranslated, Spanish tapes. The First Circuit held that "[t]hough tantalizingly efficient" there was simply no authority to allow even such a rudimentary supplementation of the record on appeal. The Court held that "[a] 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects

what occurred before the district court. It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court."

The only case cited by amici in support of this attempt to expand the record on appeal is Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998). Kottle, however, discusses judicial notice in a civil, trial court. It does not support the introduction of additional evidence on appeal in a criminal case.

Moreover, the additional declarations and attached materials are unreliable hearsay and would not have been properly admissible below.

The declarations proffered by the government and amici have attached as exhibits: hearsay incident reports of alleged other off leash dog walking incidents in the GGNRA, newspaper and journal articles, leaflets emphasizing the negative characteristics of dogs, a draft snowy plover management plan and materials designed to buttress claims the government is making on appeal that the defendants were given actual notice of the changed regulation[2] and that the Superintendent of the GGNRA did not have authority to act contrary to a regulation of general application. The consideration of any of these documents below or on appeal would violate defendants' rights to confront and cross examine the witnesses against them, their rights to due process of law, the hearsay rule and general considerations of relevancy and materiality.

[2] This claim is an ingenious attempt to morph the APA's requirements of publication and comment before a controversial or substantial change in use into a claim that the defendants had actual notice of the allegedly changed policy.

Although Fed.R.Ev.803(8) would have allowed defendants to introduce public records against the government before Magistrate LaPorte, if they choose to do so, Fed.R.Ev.803(8) forbids the introduction of such evidence against the defendants. "When public records are used against a defendant in a criminal prosecution, the public records exception is the exclusive applicable hearsay exception. It is the exception that speaks directly to public records and carefully delineates the distinction between criminal and civil proceedings in order to protect a defendant's rights under the confrontation clause." United States v. Orellana-Blanco, 294 F.3d 1143, 1149 (9th Cir. 2002).

Accordingly, the government, and amici, should not have submitted additional evidence on this appeal, and we request the Court to strike all of the additional materials submitted by the government and amici and ignore the arguments based upon that material from outside the record, specifically included by not limited to:

Page 5 lines 9-27;

Page 8 lines 11-15;

Page 11 line 21 –Page 12 line 1;

Page 17 line 9-16 and 21-28; and

Page 20 line 21-Page 24 line 14 of the Government's Brief; and

All of Amici's Brief except for the last 5 lines of Section III.

This is an appeal from Magistrate LaPorte's decision. It is not a hearing de novo. Apparently both the government and amici have realized that if this Court simply looks at Magistrate LaPorte's decision and the evidence in front of her, this Court will affirm her decision as not clearly erroneous. Quite rationally, the government and amici have attempted to supplement the record on appeal with material with material they believe strengthens their case. Unfortunately, this appeal is not the appropriate venue for the submission of additional material. The rule making process required by the APA is the appropriate place to submit additional material. It is time for the government to stop attempting to support its unconsidered decision to close traditional off leash dog areas and engage in real dialogue with all of the interest groups at Crissy Field so that a reasonable and appropriate accommodation of all the varying interests can be achieved.

This Court should not have to decide what is the appropriate policy governing dog walking at Crispy Field. The APA requires that decision be made though an administrative process where the public can comment. It is time for the government to participate in that process. The additional material submitted by the government and Amici should be stricken and the arguments based upon that material should not be considered.

DATED: April ___, 2005

Respectfully Submitted,

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and Donald Kieselhorst