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U.S. COURT OF APPEALS**

C.A. NO. 05-50236
D.C. NO. CR 03-00232

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,)
)
 Plaintiff and Appellee,)
)
 v.)
)
 JOHN W. SELJAN,)
)
 Defendant and Appellant.)
_____)

**APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION
HONORABLE ALICEMARIE STOTLER, JUDGE PRESIDING

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Petitioner JOHN W. SELJAN respectfully petitions this Court for rehearing and suggests rehearing en banc pursuant to Federal Rules of Appellate Procedure, Rules 35 and 40 and Ninth Circuit Rules 35-1 to 4. Rehearing is necessary in order to clarify material points of fact or law that the reviewing panel either overlooked or misconstrued in deciding the case. En banc rehearing is necessary to reconsider the split in the decision and the impact the panel majority's decision will have on the fundamental personal protection provided by the Fourth Amendment to the Constitution.

A copy of this Court's unpublished memorandum, filed on August 14, 2007, is attached hereto as Appendix "A"¹.

ARGUMENT

A. Introduction

On direct appeal, Seljan challenged the district court's denial of his motion to suppress all evidence discovered as result of a customs officer's overly invasive search of his FedEx package, which was bound for the Philippines. He argued that the inspector violated his Fourth Amendment rights when he opened a sealed envelope inside the FedEx package, removed the letter and read it². On direct appeal, he argued that the custom inspector's reading of the letter exceeded the scope of the authorized customs search and was not otherwise justified by reasonable suspicion. He challenged two subsequent package searches as fruits of the initial search.

At the time of the first search, November 21, 2002, customs inspectors were conducting what was described as an outbound currency interdiction operation targeting Philippines bound packages to determine if they contained illegal monetary instruments in violation 31 U.S.C § 5316. The

¹ The appendix is cited using its original pagination in the upper right hand corner of each page.

² The first envelope contained a \$100 bill in U.S. currency and a pamphlet for a hotel in Bangkok, and the second contained a one page letter and a 500 peso note. App. 2.

panel majority rejected Seljan's theory that the inspection of the envelopes was or should have been limited by 19 U.S.C § 1583, which requires that customs officials have reasonable suspicion to open sealed envelopes carried by the U.S. Postal Service in outbound mail. Instead, the panel relied on 31 U.S.C § 5317(b) to justify the search, which provides that a customs officer may search at the boarder, among other things, "...any envelope or other container, and any person entering or departing from the United States." App. 5.

Regardless of the stated authorization for the search, Seljan argued that it was unreasonably intrusive in manner and scope because, upon opening the FedEx package and examining its contents, it would have been immediately clear to any customs officer, without reading any personal correspondence, that the package contained no unlawful monetary instruments, nor any evidence of narcotics, or weapons³.

³ Agents were instructed to scan parcels for large amounts of currency, monetary instruments, drugs, and weapons, and specifically instructed not to read personal correspondence.

B. The Scope Of The Customs Search Was Unreasonably Invasive And Violated Petitioner's Fourth Amendment Rights.

1. The Panel Majority Misconstrued The Statutory Authority For The Overly Invasive Border The Search.

Title 19 U.S.C. § 1583(a)(1), which is entitled "Examination of Outbound Mail," allows a customs officer to "...stop and search at the border, without a search warrant, mail of domestic origin transmitted for export by the United States Postal Service and foreign mail transiting the United States that is being imported or export by the United States Postal Service. However, §1583(d) exempts from subsection (a)(1) "...mail weighing 16 ounces or less sealed against inspection under the postal laws and regulations of the United States."

Title 31 U.S.C § 5317(b), which is entitled "Search and Forfeiture of Monetary Instruments," reads

"Searches at border: For purposes of ensuring compliance with the requirements of section 5316 a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States."

Section 5317(b) is specifically directed at "ensuring compliance with the requirements of § 5316." Section 5316 provides that any person or their agent or bailee, who transports, has transported, or is about to transport or

receive monetary instruments of more than \$10,000 at one time shall file a report with the Secretary of the Treasury.

The reviewing panel's reliance on § 5317(b) to justify the opening of the envelopes and the reading of Seljan's personal correspondence, despite the fact that a cursory examination of the envelopes did not reveal anything resembling the contraband identified in §§ 5317(b) and 5316, is misplaced. Section 5317(b) is specifically limited to searches for illegal currency or monetary instruments.

In support of its position, the panel majority cites *United States v. Sutter*, 340 F.3d 1022, 1025 (9th Cir. 2003) for the proposition that the border search exception is "codified at 19 U.S.C. §§ 1581 and 1582, [authorizing] 'routine searches of persons and their effects entering the country [to] be conducted without any suspicion whatsoever.'" (quoting *United States v. Molina-Tarazon*, 279 F.3d 709, 712 (9th Cir.2002)). Section 1581 authorizes customs officer to search

"...any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, with a customs enforcement area established under the Anti-Smuggling Act or at any other authorized place ...and examine the manifest, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

Sutter involved the search of a car and trunk at the US/Mexico border.

Neither *Sutter* nor §1581 addresses the circumstances reviewed by the panel in this case, which involved the reading of personal correspondence removed from sealed envelope within a FedEx package that obviously did not contain any of the specified target objects authorized by the customs search. Nor do *Sutter* and §1581 trump the statutory authority prohibiting the search of sealed envelopes under §1583.

In sum, the panel majority's conclusion that § 5317(b) authorized the search of Seljan's personal correspondence violated the Fourth Amendment. Contrary to the majority's decision § 1583 is not irrelevant when weighed against the specific "suspicionless search authority [granted] under 31 U.S.C § 5317(b)," or irrelevant when considered along side §1581. App. 5.

2. The Panel Majority Misconstrued The Facts Surrounding The Search.

Lead Customs Inspector LeBlanc instructed his interdiction team to search for "monetary instruments of a certain value," as well as weapons and illegal narcotics⁴. (ER 91.) LeBlanc explained that the usual protocol for inspectors when opening packages was first to "...*scan, not read any documents.*" (ER 90-91; emphasis added.) LeBlanc's protocol, to the extent

⁴Defense counsel noted for the court that the government in its opposition brief had conceded that section 1583 did not provide authority for the search and changed its tactic to rely on the border search theory. (ER 181-182.)

that it authorized the scanning of sealed personal correspondence, violates the mandate of §1583(d). Even assuming LeBlanc's protocol was statutorily authorized, Inspector Oliva admitted that he "...was reading as [he] was scanning..." and therefore exceeded the scope of the authorized search. App.

7. His testimony confirms the simple truth that there is little if any difference between scanning and reading. Scanning is simply a form of speed reading, but reading nonetheless, since both the scanner and reader are pulling detailed information off the page. In any event, Oliva admitted that he read parts of the letter. LeBlanc's approach therefore described a distinction without a difference, on which the panel majority has chosen to rely.

The panel majority states that Oliva

"...did not act contrary to objective reasonableness. Although he was checking for compliance with currency declaration requirements under ... § 5316, according to his testimony, no more than a glance was necessary to detect evidence of pedophilia." App. 7.

The majority concludes with the following:

"We refuse to impose an unworkable and reasonable constraint on the nation's customs officials by requiring that they avert their eyes from obvious unlawfulness.

The problem with this reasoning is apparent. It is indisputable that anyone examining the envelope would have immediately recognized that it contained a personal correspondence, the contents of which could not be detected without reading.

The panel majority attempts to avoid this conclusion by characterizing Oliva's search as a search under the plain view doctrine where police have a warrant to search a given area for specified objects, and in the course of that search come across some other article of incriminating character. App. 7. Although the border search at issue here was authorized to specifically search for illegal monetary instruments (officers were also told to search for drugs and weapons), a reasonable search limited to these items would not have required the scanning/reading of what was obviously nothing more than a letter. App. 13. Because the incriminating nature of the letter was only apparent after Oliva read its contents, the plain view search doctrine simply does not apply to these circumstances.

The cases cited in the memorandum in support of the contention that the plain view doctrine applies to justify Oliva's search do not support the application of the plain view doctrine. In *United States v. Bulacan*, 156 F.3d 963, 968 (9th Cir. 1998), this Court held that warrantless seizures are constitutional under the plain view doctrine in situations where "the incriminating nature of the object must be immediately apparent and the officer must 'have a lawful right of access to the object itself.'" (citation omitted.) In *Bulacan*, the panel invalidated the initial administrative search of the defendant's bag at the entrance to a federal building, which was

premised on protecting the safety of its occupants, because it was applied to not only weapons and explosives, but also narcotics, alcohol and gambling devices. *Id.* at 967, 973-974. Because narcotics, alcohol and gambling devices posed no immediate threat to the building's occupants, the officer's initial search of the bag under the regulation was deemed to be invalid. *Id.* at 974-974.

The situation here is similar. The initial search of the FedEx package for monetary instruments was authorized by statute. However, the incriminating evidence was not discovered in the course of the authorized search, but only after Oliva had, as he admitted, read the personal correspondence he removed from the envelope. Just as the alcohol, narcotics, and gambling devices were outside of the scope of the authorized search in *Bulacan*, so were the contents of Seljan's letter, which were not immediately apparent from merely glancing at a piece of paper that was obviously a personal correspondence. App. 13.

The panel majority cited two additional cases that are inapposite to the circumstances in this case. (App. 8.) *United States v. Soto-Camacho*, 58 F.3d 408 (9th Cir. 1995) and *United States v. Watson*, 678 F.2d 765 (9th Cir. 1982) both involved suspicionless administrative searches that featured a secondary rationale to monitor criminal activity, and which the courts used

to justify the searches. In *Watson*, U.S. Coast Guard officers searched a vessel that fell within the parameters of an administrative search plan. The primary purpose of the plan was to inspect for compliance with document and safety regulations. The secondary purpose, as the government conceded, was to search for marijuana. *Id.* at 766. Under these circumstances the court held that the search of the vessel "...did not exceed in scope what was permissible under th[e] administrative justification." *Id.* at 771.

Soto-Camacho involved an administrative search conducted at a border checkpoint whose primary purpose was to prevent the flow of undocumented immigrants into the United States. 58 F.3d 410-411. However, the border patrol was also timing the activation of the checkpoint based in part on intelligence regarding the movement of drugs. The reviewing panel held that the scope of the search was permissible under the administrative justification. *Id.* at 412.

The primary purpose of the suspicionless border search in this case was to stop the flow of illegal monetary instruments. The secondary goal, as clearly stated by the lead customs inspector, was to search for narcotics and weapons. There were no other specified search targets, nor any suspicion of other criminal activity. Inspector Oliva could have searched the FedEx package for any one of these items without scanning/reading the personal

correspondence that he removed from the sealed envelope. Unlike the circumstances faced in *Soto-Camacho* and *Watson*, the customs inspectors on the interdiction team received no secondary authorization to read personal correspondence. In fact, they were specifically instructed not to do so.

3. The Panel Majority's Decision Imposes Unreasonable And Unnecessary Constraints On The Individual Freedoms Guaranteed By The Fourth Amendment.

Judge Pregerson dissented from the panel majority's decision, concluding that Officer Oliva's search exceeded its authorized limits and violated Seljan's constitutional rights. His analysis is based on what is arguably the only reasonable reading of the record.

He acknowledged that the expectation of privacy is less at the border than in the interior, but emphasized that privacy is not distinguished entirely citing *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004). App. 11. He cautioned that "[a]ny rule allowing government officials to read private papers without individualized suspicion risks serious intrusions on privacy," the ramifications of which would be extensive. App. 11.

Judge Pregerson acknowledged the indisputable truth that:

"...looking at a piece of paper is not the same as reading its contents. Moreover, I disagree with the majority's assessment that the criminality of the letter was 'immediately apparent.' (citation.) Only by reading individual lines carefully can a reader find any hint of

wrongdoing or base intentions. App. 11, 13.

“What was immediately apparent is that the paper was personal correspondence. It was formatted like an informal letter and displayed a large cartoon character. Inspector Oliva, at a glance, could determine that the paper before him was a letter rather than contraband or a dutiable article. At that point, he should have put the letter back in its envelope...” App. 12.

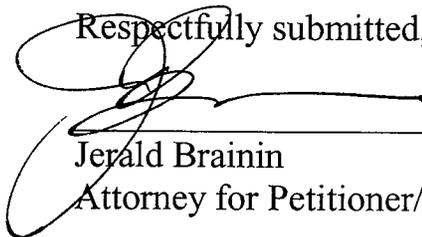
Finally, Judge Pregerson appropriately questions the majority’s willingness to invoke the “specter of terrorism to support its position,” and thereby insulates its judgment within a cloak of fear. App. 7, fn. 8. In response to the majority, he wisely notes the availability of other means by which terrorists might transport dangerous documents, including the U.S. Postal Service: “...federal regulations for U.S. Mail already impose a standard more stringent than what the majority today deems an ‘unworkable and unreasonable constraint’ on customs officials.” App. 12. What Judge Pregerson also could have included in his list is the unlimited availability of the internet, which could easily be used to transmit dangerous documents to operatives all over the world within minutes. For these reasons, it makes little sense to allow customs officials, searching for monetary instruments, weapons and drugs, to read personal correspondence.

C. Conclusion

This Court should grant review to reconsider the extensive, unnecessary constraint imposed by the panel majority on the personal freedoms guaranteed by the Fourth Amendment.

Dated: August 23, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jerald Brainin', is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

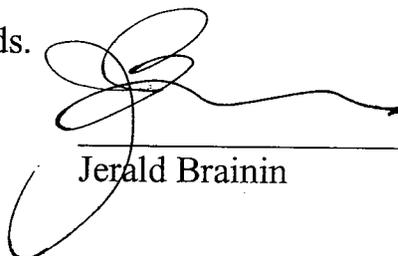
Jerald Brainin

Attorney for Petitioner/Appellant

CERTIFICATION PURSUANT TO CIRCUIT RULE 32

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the appellant's petition for rehearing is proportionately space, has a typeface of 14 points and does not exceed 2650 words.

Dated: August 23, 2007



Jerald Brainin

No. 05-50236

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

INTRODUCTION

On August 14, 2007, this court affirmed the district court's denial of a motion to suppress a border search. United States v. Seljan, 497 F.3d 1035 (9th Cir. 2007) (per curiam). Defendant now seeks rehearing en banc and/or panel rehearing. He fails, however, to demonstrate an intra- or inter-circuit split or identify a question of exceptional importance warranting en-banc review. Further, defendant fails to identify a legal or factual error warranting panel rehearing.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. STATEMENT OF FACTS

International Federal Express ("FedEx") packages sent from southern California are routed through the company's hub at Oakland International Airport for sorting. (ER 122, 127).¹ Customs periodically conducts inspections of outbound international FedEx packages at Oakland. (ER 125). Customs' searches at these hubs occurred at the functional equivalent of the border. Seljan, 497 F.3d at 1039-40.

1. Two-Tier Approach

Customs Inspector Tom LeBlanc was the supervisory customs inspector for each of the three nights that defendant's FedEx package was intercepted and searched. According to LeBlanc, Customs inspectors adopt a two-tier approach when searching outbound international packages. First, they scan, not read, any documents. If something during their scan gives inspectors reasonable suspicion of a violation of law, the inspectors give a closer inspection. If the package does not appear to violate the law or create reasonable suspicion, the contents of the package

¹ "PFR" refers to defendant's petition for rehearing, "ER" refers to defendant's excerpts of records, and "GER" refers to the government's excerpts of record. Each reference is followed by the page number. "RT" refers to the reporter's transcript and is preceded by the date and followed by the page number.

are re-packaged and the package is loaded onto an airplane. (ER 90-91).

2. November 20, 2002 FedEx Package

On November 20, 2002, defendant sent an international FedEx package to the Phillipines containing an envelope addressed to an eight-year old girl. (GER 1-2). The envelope contained 500 pesos (Philippine currency), a \$100 bill, return address labels for defendant's address in California, and literature for the Sheraton Bangkok Hotel. (GER 2-19). In a second envelope, there was a typed letter that stated:

Yes, Honey, I like little girls like you, but you did not send me a picture of your-self. . . . For only 8 yrs old, you do have very nice handwriting. . . . I'm not coming to Manila in December and I'm not sure when I'll be coming, But I'll let you know the date for sure, Coz I do want to see you, so please send me a picture of your-self in your next letter. I know at your age that your "PEANUT" smells like "SWEET" Roses.

(GER 4) (errors in original).

During a currency interdiction operation in November 2002, Customs Inspector Phil Oliva searched defendant's FedEx package. (ER 91-92). While searching the package, Oliva discovered the letter in the second envelope. (ER 92). Oliva scanned the letter in conformity with the two-tiered approach. Oliva caught a couple of references to an eight-year-old girl, to "I love you," and a reference to "little girl's peanuts smell[ing] like roses." Oliva did not have a complete understanding as to what these references meant, but he had developed reasonable suspicion

of pedophilia, so he then read the letter thoroughly to understand what the letter was saying. After reading the letter thoroughly, Oliva brought the letter to the attention of his team leader, LeBlanc. (11/16/2004 RT 23-25; GER 221-23).

3. August 2, and September 26, 2003 Packages

On August 2, and September 26, 2003, defendant sent additional FedEx packages to the Phillippines. (ER 93; GER 20-29). The August 2, 2003 package was searched pursuant to the two-tier method by Customs Inspector Shawn Mohr. (ER 92). That package contained two letters and several pages of adult pornography. (GER 20-29). One letter made reference to another female minor approximately eleven years old and discussed how defendant was sending sex videos and how defendant wanted the two minors to meet him. (GER 22). The other letter, which was inside an envelope addressed to the eight year old described how defendant would "teach" the minor about "'MAKING-LOVE' (incercource)"; how defendant would "suck on your 'PEANUT' until you start going to 'HEAVEN'" on their first night together; and other sexual references such as "my 'HARD' 'PETER' touching you." (GER 24).

The September 26, 2003 package was searched by Customs Inspector George Kisel. (ER 93). Inside the package were nine photocopied letters and one sealed business envelope. (GER 30-47). One of the letters was a duplicate copy of the letter sent

in August 2003 to the eight-year old girl. (GER 35). Inside the sealed envelope was a "Triple A" Automobile Club brochure, which concealed a \$100 bill. (GER 42-47).

4. FedEx Air Waybills

On each of the three Air Waybills accompanying the FedEx packages, defendant executed his signature under section nine, which is the "Required Signature" section. Immediately above defendant's signature was the following paragraph:

Use of this Air Waybill constitutes your agreement to the Conditions of Contract on the back of this Air Waybill

(GER 1, 20, 30, 68-70; 5/10/2004 RT 19-21). Further, the Conditions of Contract printed on the back stated, in part:

Agreement to Terms By giving us your shipment you agree, regardless of whether you sign the front of this Air Waybill, for yourself or as an agent for and on behalf of any other person having an interest in this shipment, to all terms on this NON-NEGOTIABLE Air Waybill

Right to Inspect Your shipment may, at our option or at the request of governmental authorities, be opened and inspected by us or such authorities at any time.

(GER 48).

5. Defendant's Arrest at LAX

On October 3, 2003, as defendant was boarding his international flight to the Philippines, he was detained by agents, escorted to an adjacent room, and interviewed, while his two carry-on belongings were searched. (Id.).

Inside defendant's carry-on bags, agents found adult

pornographic magazines, letters from defendant addressed to the Philippines (some of which appeared to match documents previously seized from the FedEx packages), a Polaroid camera and film, a child pornography book/magazine, approximately \$8,000 in cash, and approximately 127 photographs of defendant and young Filipino females -- approximately 52 of which depicted defendant and what appeared to be pre-pubescent Filipino females engaging in sexual acts. (ER 95). Inside defendant's luggage that was checked in at the ticket counter, agents found numerous sexual aid devices, pornography, and two suitcases filled with candy and chocolates. (GER 223.17-223.21; 11/16/2004 RT 173-77).

After waiving his Miranda rights, defendant admitted that he was going to the Philippines, he was going to meet minor females for sexual activities, and he had been doing that for 20 years. (GER 223.7-223.15; 11/16/2004 RT 56-64).

B. SUPPRESSION MOTION AND RULING

On February 2, 2004, defendant filed a motion to suppress arguing that his international FedEx packages were searched in violation of the Fourth Amendment. (ER 18-52). (Id.). In denying defendant's motion to suppress, the district court made more than 30 findings of fact and held that the searches of the three FedEx packages took place at the functional equivalent of the border and that the searches were reasonable. United States v. Seljan, 328 F. Supp. 2d 1077, 1078-83 (C.D. Cal. 2004).

Further, the district court rejected defendant's argument that the three searches were invalid because the agents involved were operating under the mistaken belief that their activities were authorized by 19 U.S.C. § 1583. Id. at 1084-85. The district court held that the searches were permissible under 19 U.S.C. §§ 1581, 1582, and 31 U.S.C. § 5317 and the subjective beliefs of the officers were irrelevant. Id. at 1084-85. In addition, the district court ruled that defendant contractually consented to the searches by his signature on the air waybills and concomitant agreement to the terms of the shipment agreement, which allowed searches by FedEx or law enforcement. Id. at 1085.

C. THE APPEAL

On appeal, defendant challenged, in part, whether the district court properly denied his motion to suppress. In its published opinion, the panel held that customs searches at hubs like the Oakland FedEx sorting facility take place at the functional equivalent of the border. Seljan, 497 F.3d at 1039-40. The panel also rejected defendant's argument that 19 U.S.C. § 1583 -- requiring customs officials to have reasonable suspicion before opening envelopes in outbound mail carried by the United States Postal Service -- applied here. Instead, the panel held that Oliva's search was authorized under 31 U.S.C. § 5317 which permits Customs to stop and search, "at the border and without a search warrant, any vehicle, vessel, aircraft, or

other conveyance, any envelope or other container, and any person entering or departing from the United States." Id. at 1040-41 (emphasis in original).

The panel further held that the manner and scope of the search was reasonable and that the search at issue here was not so intrusive or unreasonable that it should be invalidated under the Fourth Amendment. Id. at 1042-43. Oliva could ascertain by a glance that evidence of pedophilia was present in the personal correspondence enclosed in the FedEx package. The panel further reasoned that the two-tiered approach adopted by the inspectors provided a second layer of protection against over-intrusive searches. Id. at 1043. The panel concluded that, Oliva did not act contrary to objective reasonableness and further drew support from prior cases involving the plain-view doctrine. Id. at 1043-44.

In dissent, Judge Pregerson noted that, although he agreed that the searches took place at the functional equivalent of the border, he disagreed that inspectors should be allowed to "scan" or read individual papers without reasonable suspicion.² Judge Pregerson also disagreed that the criminality of the letter was

² Judge Pregerson cited United States v. Arnold, 454 F.Supp.2d 999 (C.D. Cal. 2006) for the degree of intrusion into privacy in searches such as this. In that case, the district court granted the defendant's motion to suppress evidence where Customs searched a computer at the border without reasonable suspicion. The government appealed and the matter was argued and submitted on October 18, 2007. (No. 06-50581).

immediately apparent and pointed to the fact that, under regulations governing letters sent through the United States Postal Service, Customs must first obtain either written consent or a search warrant to open letters that appear to contain only correspondence. Id. at 1048-49.

III

ARGUMENT

A. NEITHER REHEARING EN BANC NOR PANEL REHEARING IS APPROPRIATE

Federal Rule of Appellate Procedure 35(a) limits en banc review, which "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions or (2) when the proceeding involves a question of exceptional importance." Ninth Circuit Rule 35-1 further provides that rehearing en banc may be appropriate when "the opinion . . . directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." As demonstrated below, en banc consideration is inappropriate, given that defendant does not identify an inter- or intra-circuit conflict, nor does he explain why the issues here are exceptionally important.

Federal Rule of Appellate Procedure 40 allows for the panel to rehear a matter if the court has "overlooked or misapprehended" a point of law or fact. But defendant likewise

fails to identify facts or law that the panel overlooked. Indeed, defendant's complaint about the panel's decision is, in reality, simply a disagreement with the result reached by the panel, which does not warrant panel rehearing.

1. The Panel Correctly Declined to Apply 19 U.S.C. § 1583 to Limit Custom's Authority to Conduct this Border Search

The government's interest in protecting its territorial integrity is at its "zenith" at the border (and functional equivalent) and the Executive Branch generally has plenary authority to conduct searches at the border, without probable cause or a warrant to prevent the introduction of contraband in this country. See United States v. Flores-Montano, 541 U.S. 149, 152 (2004); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). "Time and again," the Supreme Court has "stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. Flores-Montano, 541 U.S. at 152-53 (quoting United States v. Ramsey, 431 U.S. 606, 616 (1977)). Thus, both the Supreme Court and this court have long made clear that the government has plenary authority to search personal belongings and items at the border without a warrant, probable cause, or even reasonable suspicion. See e.g., Montoya de Hernandez, 473 U.S. at 538;

United States v. Alfonso, 759 F.2d 728, 733-34 (9th Cir. 1985).

The suspicionless border search rule has a history as old as the Fourth Amendment itself and is justified by the nation's longstanding right to protect itself. Moreover, as a corollary of the government's sovereign interest in protecting its borders, people crossing or sending materials across the border have a substantially reduced expectation of privacy. Hence, as this court explained four decades ago, "it is too well established to require citation of authority that [border] searches are unique, that the mere fact that a person [or property] is crossing the border is sufficient cause for a search[,] " that "every person crossing our border may be required to disclose the contents of his baggage," and that "[e]ven 'mere suspicion' is not required." Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

Despite the government's broad authority to search at the border (and the functional equivalent of the border), defendant attempts to rely on a statute, 19 U.S.C. § 1583, to limit the government's ability to conduct the initial search here. (PFR 4-6). But, as the Panel recognized in response to defendant's same argument on appeal, Section 1583 does not govern this case. Section 1583, by its own terms, refers only to mail exported by the "United States Postal Service" and requires that customs officials have reasonable suspicion to open such sealed envelopes. Section 1583 does not apply here because the FedEx

packages are not mail exported by the "United States Postal Service." Instead, FedEx is an "express consignment operator" and its packages are "cargo". See, e.g., 19 C.F.R.

§ 128.1(a), (b). Customs' broad authority allows it to search cargo like FedEx packages. Indeed, as the panel held, the search at issue was permissibly conducted under 31 U.S.C. § 5317, which authorizes the opening and searching of envelopes and other containers (and, which, does not require reasonable suspicion). Seljan, 497 F.3d at 1041.

Defendant suggests, however, that Section 5317 is designed to permit searches to ensure compliance with currency-reporting obligations and that the evidence ultimately discovered here was not of such violations. (PFR 4-5). Defendant's argument, however, lacks merit for two reasons. First, Customs was "conducting an outbound currency interdiction" at the time of the initial search. Seljan, 497 F.3d at 1040-41. Defendant's challenge is in, reality, to the execution of that search -- not the authority to conduct the search -- which, as discussed in the section below, the Panel correctly upheld. Second, even if Section 5317 did not apply, under the plain wording of Section 1583, Section 1583 still would not apply here. If Section 5317 did not control, then as the district court correctly recognized, both 19 U.S.C. §§ 1581 and 1582 -- which codify the border-search doctrine -- also authorized the search and did not place the

limitations on the authority to search that defendant seeks. Seljan, 328 F. Supp. 2d at 1085; see also United States v. Sutter, 340 F.3d 1022, 1025 (9th Cir. 2003) ("Pursuant to this [border-search] exception codified at 19 U.S.C. §§ 1581 and 1582, routine searches of persons and their effects entering the country may be conducted without an suspicion whatsoever.") (citation, footnote, and internal quotation marks omitted).³

Because the Panel correctly rejected defendant's challenge to the Customs' authority to conduct the search, neither panel rehearing nor rehearing en banc is warranted.⁴ (PFR 6-11).

2. The Border Search Was Reasonable In Manner And Scope

After determining that Customs under border-search authority could search the packages, the panel analyzed whether the manner and scope of the search was unreasonably intrusive. In answering

³ Although the panel did not explicitly adopt that reasoning, the panel included a "cf" citation to Sutter for the proposition that the border-search exception is codified at sections 1581 and 1582 and authorizes searches of persons and their effects at the border without suspicion. Seljan, 497 F.3d at 1041. Contrary to defendant's position, nothing in Sutter nor section 1581 requires section 1583 to apply in a non-United States Postal mail context.

⁴ The government notes that, even if section 1583 did apply, defendant would still not prevail. First, that statute specifically allows Customs to search mail if the sender or addressee has consented in writing. 19 U.S.C. § 1583(b). Although the panel held that it need not decide this issue, the district court found that defendant consented to a search of his FedEx packages by agreeing to the terms on the Air Waybill. Second, the exclusionary rule would not apply to a violation of the statute and regulations at issue here. United States v. Ani, 138 F.3d 390, 392 (9th Cir. 1998).

that question, the majority panel noted that there have been only a limited number of situations where a border search was invalidated because of the intrusive manner or scope of the search. Seljan, 497 F.3d at 1042 (citing United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995) (strip search requires real suspicion); United States v. Hernandez, 424 F.3d 1056, 1059 (9th Cir. 2005) (dismantling internal car door panels not excessively destructive to be unreasonable); United States v. Chaudhry, 424 F.3d 1051, 1053 (9th Cir. 2005) (exploratory drilling of a hole in the bed of a pickup truck was reasonable); United States v. Gonzalez-Rincon, 36 F.3d 859, 861, 863-64 (9th Cir. 1994) (prolonged detention of several hours was reasonable to monitor bowel movements for balloons containing cocaine)).

The panel concluded that the scope and manner of the search was constrained, as the letter had to be initially scanned when the package was opened and the evidence of pedophilia was present at a glance. Seljan, 497 F.3d at 1043, 1045). Further, the court held that the review of the package's contents was nothing like an intrusive body search or the dismantling of a car. Id. at 1045.

Defendant argues, however, that the panel made a mistake of fact because there is no difference between reading and scanning a letter. But defendant's argument is, in reality, the same argument that he made to the panel, which it rejected. Moreover,

defendant's assertion lacks merit. As the panel acknowledged, Oliva's method of "scanning," included reading a few words.⁵ Id. at 1043. However, this is a far cry from concluding that scanning and thoroughly reading a document intrude on a person's privacy to the same degree. Moreover, it is evident from Oliva's testimony that his "scan" only picked up a few phrases whose criminality was immediately apparent, yet Oliva had no context for these phrases and thus had to re-read the letter after developing reasonable suspicion. This minimal level of intrusion as a result of the "scan" was reasonable in both manner and scope.

The panel also relied on the plain-view doctrine to support the search. The panel held that, under Section 5317, Customs had authority to open any envelope and that the incriminating nature of the letter was immediately apparent upon scanning it. 497 F.3d at 1042-43. The panel correctly analyzed the current facts under the plain-view doctrine. United States v. Bulacan, 156 F.3d 963, 968 (9th Cir. 1998), teaches that warrantless seizures are constitutional under the plain-view doctrine where the incriminating nature of the object is immediately apparent and the officers have a lawful right of access to the object itself.

⁵ The government believes that, under border-search precedent, Customs had authority under the Fourth Amendment to read the entire letter in question. There is, however, no need to reach this issue to resolve this petition.

Further, United States v. Soto-Camacho, 58 F.3d 408, 410-11 (9th Cir. 1995) (administrative search conducted at border checkpoint) and United States v. Watson, 678 F.2d 765, 766, 769 (9th Cir. 1982) (Coast Guard conducted administrative search of vessel), both of which dealt with the border context, held that the search was legitimate at the outset because it had an independent justification and did not exceed in scope what was permissible under that administrative function.

Like the searches in Soto-Camacho, and Watson, Oliva was authorized to open the FedEx package and "any" particular envelopes contained within it. 31 U.S.C. § 5317(b). He was likewise authorized to look at the letter because discussion of illegal activity can easily be included or disguised in correspondence, such as the illegal transfer of monetary instruments (or narcotics, possible weapons sales, and other crimes). Oliva thus had a lawful right of access to the object to be searched. See Horton v. California, 496 U.S. 128, 137 (1990). And, in determining the subject matter of the letter, Oliva could not have avoided noticing the "immediately apparent" evidence of pedophilia. The criminality was thus in "plain view."

Lastly, defendant complains that the panel's decision imposes unreasonable and unnecessary constraints on the individual freedoms guaranteed by the Fourth Amendment. (PFR

11). But, as the panel correctly noted, defendant's expectation of privacy during a border search was very limited. Flores-Montano, 541 U.S. at 154; Ramsey, 431 U.S. at 623 n.17 ("Not only is there the longstanding, constitutionally authorized right of customs officials to search incoming persons and goods, . . . there is no statutorily created expectation of privacy."); Bulacan, 156 F.3d at 973 ("The Government's interests in preventing the entry of contraband at the border is substantial, and the protections of the Fourth Amendment are weakened). "Different considerations and different rules of constitutional law" apply at the border. United States v. 12 200 Ft. Reels of Super 8MM Film, 413 U.S. 123, 125 (1973). No matter how much the Fourth Amendment may protect the "freedom of thought and mind in the privacy of the home," that consideration loses its force at the border because "a port of entry is not a traveler's home." United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971). In this context, the search was reasonable.

Indeed, adopting defendant's argument to the contrary would create unreasonable and unworkable constraints on Customs officials, as the Panel correctly recognized. Seljan 497 F.3d at 1043. Moreover, defendant's view intimates that customs inspectors will arbitrarily conduct their operations in an abusive manner trampling on people's privacy rights. As United States v. Cortez-Rocha, 394 F.3d 1115 (9th Cir. 2005) points out,

this fear discredits the men and women who protect our borders, as well as the agencies for which they work:

As do most government employees, all sworn to uphold the Constitution, they exercise informed judgment as they work at their difficult tasks, and do not waste time on dead-end adventures. . . . We believe that these employees and their supervisors and their agencies can be counted on to be intelligent and respectful -- as the facts and circumstances of this case demonstrate -- as they carry out tasks assigned to them by Congress. On this point, we take our lead from Justice Breyer who said in his concurring opinion in *Flores-Montano*, "Customs keeps track of the border searches its agents conduct, including the reasons for the searches. This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.

Id. at 1122 (quoting *Flores-Montano*, 541 U.S. at 156).

Oliva's search did not run afoul of the Constitution, statutes, or Customs regulations. Further, the procedures put in place, namely the two-tiered approach provided an added layer of protection further minimizing the intrusion on privacy. Under all of these conditions, the search was reasonable. Because the panel correctly ruled, and because defendant has not even alleged an error that satisfies the standards for rehearing en banc nor panel rehearing in Federal Rules of Appellate Procedure 35 and 40, rehearing is unwarranted.

CONCLUSION

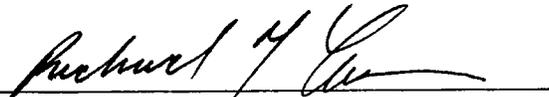
This court should thus deny defendant's petition.

Dated: November 6, 2007

Respectfully submitted,

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**Form 11. Certificate of Compliance Pursuant to
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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

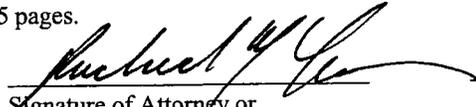
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Signature of Attorney or
Unrepresented Litigant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,) C.A. No. 05-50236
) D. Ct. No. SA CR 03-232-AHS
Plaintiff-Appellee,) (Central District of California)
)
v.)
) DECLARATION OF SERVICE
JOHN W. SELJAN,)
)
Defendant-Appellant.)
_____)

I, Arthur Moreno declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 312 North Spring Street, Los Angeles, California 90012; that I am over the age of 18 years, and I am not a party to the above-entitled action; that on ~~October 2,~~ ^{November 6,} 2007 delivered by United States Postal Service in Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: **GOVERNMENT'S RESPONSE TO APPELLANT'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.**

addressed to: **JERALD BRAININ, ESQ.
LAW OFFICES OF JERALD BRAININ
P.O. BOX 66365
LOS ANGELES, CA 90066**

at his/her/their last known mailing address, at which place there is a delivery service by United States Post Office. I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 6 day of November, 2007.

Arthur Moreno