

1 John Doe

2 [REDACTED]
3 jackbauer230@gmail.com

4 Plaintiff



ADR

ORIGINAL FILED

OCT 21 2010

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

United States District Court
Northern District of California

11 JOHN DOE,

12 Plaintiff

13 v.

15 GRAHM L. CODER,
16 ABBY M. HALLE,
17 VALRIE R. KOSH,
18 MONTCHELL C. BRICE
19 ROES 1-50,

20 Defendants.

Case No. **CV 10-4756**

COMPLAINT

1. DEFAMATION PER SE
2. DEFAMATION PER QUOD
3. VIOLATION OF CONSTITUTIONAL RIGHTS

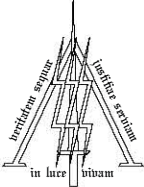
Complaint Filed:
October 21, 2010

MEJ

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2 [REDACTED]
3 jackbauer230@gmail.com

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9 **Northern District of California**

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TABLE OF CONTENTS

I.	Introduction.....	3
II.	Subject Matter Jurisdiction.....	3
III.	Personal Jurisdiction.....	4
IV.	Venue.....	11
V.	Intradistrict Assignment.....	12
VI.	Statement of Facts.....	12
	A. Inside the FBI Application Process.....	12
	B. Plaintiff's Application.....	20
	C. The Special Agent Clearance Unit.....	21
	D. Damages.....	24
	E. Statute of Limitations.....	26
VII.	First Claim - Defamation Per Se.....	27
VIII.	Second Claim - Defamation Per Quod.....	29
IX.	Third Claim - "Bivens".....	30
X.	Prayer for Relief.....	32
	Exhibit A.....	33-60

1 I.

2 INTRODUCTION

3 1. The purpose of this action is to rectify abuses of
4 power by employees of the United States of America.

5 2. The abuses of power relate to a private citizen's
6 application for employment and conditional appointment to the
7 office of Special Agent in the Federal Bureau of Investigation.

8 3. The Defendants are sued individually, although their
9 misconduct arises out of their employment with the United States.

10 II.

11 SUBJECT MATTER JURISDICTION

12 4. Under the Tort Claims Act, 28 U.S.C. § 1346(b)(1) would
13 normally confer subject matter jurisdiction upon the District
14 Court based on the fact that the Defendants are employees of the
15 United States and engaged in wrongful acts.

16 5. However, libel and slander are excepted from the Tort
17 Claims Act pursuant to 28 U.S.C. § 2680(h). Libel and slander
18 are also excepted from the law regarding the "United States as a
19 party" found in 28 U.S.C. § 1346(b). The United States is not
20 a party to this action, which is against some of its individual
21 officers and employees for their violations of law.

22 6. This is also a Bivens case, based on the Defendants'
23 violations of the Plaintiff's Constitutional rights. A Bivens
24 action is also outside the scope of the Tort Claims Act.

25 7. Accordingly, this action is founded upon diversity of
26 citizenship. 28 U.S.C. § 1332(a) confers original jurisdiction
27 upon the District Court of actions founded on diversity of

1 citizenship where the amount in controversy exceeds \$75,000.

2 8. Here, there is complete diversity and the amount
3 in controversy exceeds \$75,000. More specifically, the
4 Defendants are all residents of Virginia, Maryland, Washington
5 D.C., or nearby States, because they work at FBI Headquarters
6 in Washington, D.C. and FBI employees are supposed to live
7 relatively close to where they work.

8 9. Plaintiff is a resident of California, the forum state.

9 10. The amount in controversy is comprised of the medical
10 specials, other special damages, general damages, and punitive
11 damages requested in this action, as well as any other relief
12 according to proof.

13 11. The medical specials exceed twenty thousand four
14 hundred dollars (\$20,450¹) and general damages exceed two hundred
15 four thousand five hundred dollars (\$204,500²).

16 12. Punitive damages are two million two hundred forty-nine
17 thousand five hundred dollars (\$2,249,500) or higher.

18 13. The total possible recovery at this time, unless higher
19 general damages are awarded, is two million four hundred seventy
20 four thousand four hundred fifty dollars (\$2,474,450).

21 III.

22 PERSONAL JURISDICTION

23 A. The Defendants

24 14. The Defendants are sued individually, and are:

25 1 At this time. Plaintiff continues to incur charges for
26 treatment related to his injuries on a weekly basis.

27 2 Does not include the value of Plaintiff's lost Federal
career or lost job satisfaction.

1 A1. GRAHM L. CODER, who was a Special Agent in the
2 FBI at the times in which he committed the misconduct at issue in
3 this case. He is still a Special Agent in the FBI, working at
4 Headquarters. Special Agent Coder lives in or within 100 miles
5 of Washington, D.C., in an undetermined State.

6 A2. ABBY M. HALLE, who was a Personnel Security
7 Specialist in the FBI at the times in which she committed the
8 misconduct at issue in this case. She is still a Personnel
9 Security Specialist in the FBI, working at Headquarters. PSS
10 Halle lives in or within 100 miles of Washington, D.C., in an
11 undetermined State.

12 A3. VALRIE R. KOSH, who was a Supervisory Personnel
13 Security Specialist in the FBI at the times in which she
14 committed the misconduct at issue in this case. She is still a
15 Supervisory Personnel Security Specialist in the FBI, working
16 at Headquarters. SPSS Kosh lives in or within 100 miles of
17 Washington, D.C., in an undetermined State.

18 A4. MONTCHELL C. BRICE, who was an Acting Unit Chief
19 in the FBI at the times in which he committed the misconduct at
20 issue in this case. He is still an Acting Unit Chief in the FBI,
21 working at Headquarters. AUC Brice lives in or within 100 miles
22 of Washington, D.C., in an undetermined State.

23 A5. RICHARD ROES 1-50, who are employees of the FBI/
24 United States Department of Justice, and potentially other
25 Agencies. They live in or within 100 miles of Washington, D.C.,
26 in undetermined States.

27 15. Plaintiff does not know the true names of Roes

1 1-50, and therefore sues Roes 1-50 under fictitious names.
2 Plaintiff will seek leave to amend the Complaint at the earliest
3 opportunity as Roes 1-50 are identified.

4 16. Complete diversity exists.

5 **B. Minimum Contacts**

6 17. The Defendants are subject to personal jurisdiction
7 in the courts of the forum state, in that California's long-
8 arm statute permits the exercise of personal jurisdiction to the
9 fullest extent that the Federal Constitution permits.

10 18. In addition to being employees of the United States
11 of America, which is present in every State in the Union, and
12 in addition to having directed intentional torts and violations
13 of Constitutional rights at Plaintiff, a resident of the forum
14 state, the Defendants have the requisite "minimum contacts" with
15 the forum state, such that the exercise of personal jurisdiction
16 is consistent with notions of fair play and substantial justice.
17 International Shoe v. Washington, 326 U.S. 310 (1945).

18 19. More specifically, the Defendants receive, respond to,
19 analyze, accept, reject, and/or otherwise process applications
20 for employment with the FBI that originate from residents of the
21 forum state. The Defendants actively communicate with residents
22 of the forum state, directly and indirectly.

23 20. By the very nature of the applications, which
24 include detailed hiring information such as places of birth
25 and residence, the Defendants have actual and/or constructive
26 knowledge that residents of the forum state have submitted the
27 applications. The Defendants also actually and/or constructively

1 know that any actions taken by them on the applications will
2 necessarily impact the applicants residing in the forum state, as
3 well as the applicants' rights, privileges, and immunities.

4 21. For example, a denial of an application in the manner
5 that occurred in this case goes into the "Scattered Castles"
6 interagency database in the form of a summary. Scattered Castles
7 contains, among other things, polygraph results on applicants for
8 Federal employment.

9 22. Ostensibly, Scattered Castles is for Federal agencies
10 to share information so that investigations of applicants are not
11 duplicative. However, in this case, Scattered Castles became a
12 repository for the false and defamatory matter generated by the
13 Defendants and resulted in Plaintiff being disqualified from the
14 Central Intelligence Agency.

15 22a. In terms of the continuous and systematic nature
16 of Defendants' contacts with the forum state, the following
17 information is provided.

18 23. California has a population of 36,961,664 (est.),
19 which is 12.3% of the U.S. population of 300,006,956 (according
20 to the U.S. Census Bureau). California residents represent
21 between 12.3% and 18% of all FBI applications, at every stage of
22 the application process, for both support staff (over 250,000
23 applications in FY2009) and Special Agent positions (80,000
24 applications).

25 24. The Defendants are required to process all applications
26 because they work in the Initial Clearance Section, Special
27 Agent Clearance Unit, and/or the Special Agent Applicant Unit,

1 which are all components of the Security Division and which all
2 applications must pass through. Processing the applications
3 includes, among other things, contacting the applicants multiple
4 times to obtain additional information and clarify existing
5 information.

6 25. In this case, all of the named Defendants and at least
7 one "Roe" Defendant knew that Plaintiff was a California resident
8 as they processed Plaintiff's application.

9 26. In this case, the Defendants processed Plaintiff's
10 application and Roe #1 provided legal assistance knowing that
11 Plaintiff was a California resident.

12 27. In this case, Special Agent Coder personally called
13 and emailed Plaintiff multiple times and received replies and
14 return calls from Plaintiff over a five day period, knowing that
15 Plaintiff was a California resident.

16 28. The suitability determination made in this case
17 references [REDACTED], which everyone knows is in California.

18 29. Special Agent Coder also handles communications with
19 other California residents by virtue of his job, which is to
20 communicate with both support and Special Agent applicants and
21 make records of his communications with them.

22 30. The other Defendants have other forms of contact
23 with the forum state. Acting Unit Chief Brice, for example, is
24 the principal of his agent, Special Agent Coder, and therefore
25 SA Coder's contacts with the forum state and direction of
26 intentional torts at Plaintiff are imputed to AUC Brice.
27 Supervisory Personnel Security Specialist Kosh is the principal

1 of her agent, Personnel Security Specialist Halle, and therefore
2 PSS Halle's direction of intentional torts at Plaintiff is
3 imputed to SPSS Kosh.

4 31. Acting Unit Chief Brice also sent a detailed letter
5 to multiple recipients in the FBI, including the Plaintiff's
6 Applicant Coordinator in San Francisco.

7 32. In the letter, Acting Unit Chief Brice libeled
8 Plaintiff. Plaintiff was defamed when the letter was received
9 by the recipients, who included another California resident—
10 Plaintiff's Applicant Coordinator, Special Agent [REDACTED].

11 33. Special Agent Coder initiated and wrote the primary
12 libelous matter, which is contained in a falsified record of
13 investigation that has been the subject of multiple complaints to
14 the FBI Office of Professional Responsibility.

15 34. SPSS Kosh signed off on the libelous matter that caused
16 Plaintiff's damages and thereby re-published it.

17 35. PSS Halle re-published the libelous matter generated by
18 Special Agent Coder, and created libelous matter of her own that
19 Plaintiff also discovered.

20 36. AUC Brice bore the ultimate responsibility for
21 Plaintiff's rejection by signing off on the defamatory and ill-
22 advised decree prepared by PSS Halle.

23 37. Roe #1, an attorney in the FBI Office of General
24 Counsel, also libeled Plaintiff knowing Plaintiff was a
25 California resident.

26 38. Roe #1 gave a wrong opinion of law that a crime
27 occurred, and a wrong opinion of law that Plaintiff violated his

1 attorney's oath and ethical duties under California law.

2 39. Roe #1 was not licensed to practice law in California,
3 and he knew or should have known that he was unqualified to make
4 the opinions.

5 40. Roe #1 should have deferred to The Director of the FBI,
6 ROBERT S. MUELLER III, who is a licensed California attorney and
7 who has had a long and distinguished career in the Department
8 of Justice. The Director of the FBI and Plaintiff were equally
9 qualified to make the opinions that Roe #1 presumed to make
10 without even being licensed in this jurisdiction.

11 41. The opinions of Roe #1 caused "facts" of the
12 Plaintiff committing a crime, violating his attorney's oath, and
13 violating ethical duties to be used to disqualify the Plaintiff
14 from employment. In addition, the opinions themselves were
15 defamatory. Roe #1 thereby defamed Plaintiff.

16 42. In mitigation, Roe #1 was manipulated by PSS Halle and
17 SA Coder with partial and false information. In aggravation,
18 Roe #1 failed to take reasonable steps to ensure he was being
19 provided with all of the information necessary to develop a legal
20 opinion.

21 C. Equity

22 43. One of the maxims of equity is that "[h]e who takes
23 the benefit must bear the burden." California Civil Code § 3521.
24 Here, Defendants happily took the benefit of Plaintiff's honesty
25 and forthrightness in the FBI application process, and now they
26 must bear the burden of being held to account for failing to live
27 up to the standards to which they held Plaintiff.

1 44. Defendants took the benefit of attaining positions
2 of power with the FBI from which to issue judgmental and
3 inappropriate opinions of character from partial information,
4 such as the pronouncements issued in Plaintiff's case.

5 45. Defendants took and abused the benefits of the
6 Scattered Castles system by allowing their defamatory matter to
7 be placed into an interagency database, causing Plaintiff to be
8 disqualified from the CIA, which was Plaintiff's second choice.

9 46. Defendants must now bear the burden of being held to
10 account for their actions in disqualifying Plaintiff from serving
11 his country after he had already been selected to do so by two
12 different and equally prestigious government agencies.

13 47. The Defendants injured a resident of the forum
14 state, knowing that he was a resident of the forum state. The
15 Defendants directed their intentional torts at a resident of
16 the forum state. It would be unfair to allow the Defendants to
17 defame Plaintiff in this fashion and then escape the jurisdiction
18 of this Court by claiming they did not have minimum contacts or
19 did not direct their actions at or cause injury to a resident of
20 the forum state.

21 48. Holding the Defendants accountable in this State is
22 consistent with fair play and substantial justice as envisioned
23 by the highest court in the land in International Shoe and its
24 progeny.

25 **IV.**

26 **VENUE**

27 49. Venue in this District is proper because a substantial

1 part of the events at issue in this case occurred in this
2 District. For example, the significant injuries to Plaintiff and
3 the communications between Special Agent Coder and Plaintiff all
4 occurred in this District.

5 50. An example of the injuries to plaintiff follows.³

6 51. A package containing the defamatory matter was sent to
7 Plaintiff on October 26, 2009. Plaintiff received the package on
8 October 28, 2009. Plaintiff actually discovered the defamatory
9 matter on November 3, 2009. Within seven days, Plaintiff had
10 to go to the hospital to obtain treatment for severe emotional
11 distress caused by the defamation perpetrated and effected by the
12 Defendants.

13 **V.**

14 **INTRADISTRICT ASSIGNMENT**

15 52. A substantial part of the events or omissions giving
16 rise to this action occurred in [REDACTED] County. Pursuant to
17 Civil Local Rule 3-2(e), the matter arises in the County of [REDACTED]
18 [REDACTED] and is therefore respectfully requested to be assigned to
19 the San Francisco Division of this Court.

20 **VI.**

21 **STATEMENT OF FACTS**

22 **A. Inside the FBI Application Process**

23 **(1) The Job**

24 53. The Special Agent position in the FBI is considered to
25 be the most exclusive in law enforcement. For applicants such as
26 Plaintiff, it is the most elusive of all government positions.

27 ³ Full discussion of damages commences at paragraph 114.

1 **(1) The Online Application**

2 54. At the time Plaintiff filed his application, the FBI
3 application process began with an online application at
4 <http://www.fbijobs.gov> (since moved to <http://www.usajobs.gov>).
5 The online application seeks a variety of basic information about
6 the applicant, such as compliance with the FBI drug policy, lack
7 of felony convictions, and other basic qualifications.

8 55. If the applicant reports a felony conviction or
9 drug use outside of acceptable parameters, or a range of other
10 disqualifiers, the applicant is disqualified.

11 56. Although the FBI reports receiving some 80,000
12 applications per year for approximately 800-900 Special Agent
13 positions, the vast majority of applicants are disqualified with
14 the online application.

15 57. If an applicant's basic qualifications are
16 preliminarily competitive, the applicant is invited to take the
17 Phase I written test. Approximately 10,000-12,000 applicants
18 took the Phase I test in FY2009.

19 **(3) The Phase I Test**

20 58. The Phase I written test consists of three parts:
21 (1) logical reasoning, (2) biodata inventory, and (3) situational
22 judgment. The contents are subject to a Non-Disclosure
23 Agreement.

24 59. If the applicant scores competitively on the Phase I
25 test, the applicant's online application and résumé are submitted
26 to FBI Headquarters for consideration for Phase II. About half
27 of Phase I applicants do not attain a competitive score, and each

1 Field Office has an allocation of spots, leaving approximately
2 5,000 applicants submitted for Phase II consideration in FY2009.
3 The Human Resources Division at Headquarters determines who is
4 competitive enough to receive an invitation to Phase II.

5 60. Of the applicants considered for Phase II, a portion
6 are selected, perhaps 3,500 applicants for FY2009.

7 **(4) The Phase II Interview and Written Exercise**

8 61. Phase II consists of a lengthy behavioral interview
9 as well as a written exercise designed to test the applicant's
10 ability to draw inferences from partial information.

11 62. After the applicant completes Phase II, his Test
12 Ranking Grade for the written test and his grades from Phase II
13 are combined to give the applicant a Percentile Ranking Grade.
14 The PRG is the applicant's total score under the Special Agent
15 Selection System, and "is utilized to rank each applicant in the
16 program(s) under which he/she may qualify." 67-110 MIOG⁴
17 § 67-17.3.7.

18 63. Applicants are ranked in order of objectively tested
19 merit because "[a]ppointments are made on a competitive basis due
20 to the limited number of vacancies occurring in this position."
21 67-101 MIOG § 67-17.2.3.

22 **(5) Conditional Appointment**

23 64. Applicants who pass Phase II and whose ranks are
24 competitive receive a Conditional Appointment as a Special Agent
25 in the FBI. Some 2,100 applicants received the conditional
26 appointment in FY2009. The conditional appointment is made by

27 ⁴ Manual of Investigative Operations and Guidelines.

1 way of a letter from the appointing official, who is the Chief of
2 the Human Resources Division.

3 65. The conditional appointment letter specifies the
4 conditions required for further processing and for entrance on
5 duty at the FBI Academy. For example, successful completion
6 of the background investigation. The appointment letter also
7 discusses the grounds under which the appointment may be
8 rescinded. One of the specified grounds is suitability.

9 66. According to Supervisory Special Agent Mark Gant, who
10 is Section Chief of the Initial Clearance Section,
11 "[o]ur background investigation is bifurcated. We do a
12 suitability portion and we also do a security portion. The
13 suitability standards are determined by the Office of Personnel
14 Management (OPM). The security standards are established by the
15 Office of the Directorate of the National Intelligence. We
16 utilize governmental standards in order to qualify our candidates
17 on suitability and security."⁵

18 **(6) Suitability and the Background Investigation**

19 67. Essentially, throughout the application process and
20 continuing into the background investigation, the applicant's
21 suitability is continuously monitored.

22 68. The applicant's suitability is monitored because
23 the Manual of Investigative Operations and Guidelines states,
24 at 67-15, "[d]o not protract investigation when derogatory
25 information developed obviously disqualifies applicant for Bureau

26 ⁵ Audio interview accessible at <http://www.fbi.gov/news/podcasts/inside/background-checks-for-new-applicants/view>
27 (accessed October 17, 2010).

1 employment." 67-15 MIOG at § 67-7.7(8). There is no point in
2 the FBI continuing to process an applicant who is not suitable
3 for employment. Thus, section 67-7.7(8) of the FBI manual
4 figures prominently in Plaintiff's case because Plaintiff's self-
5 reported conduct was reviewed numerous times and did not rise to
6 the level of a disqualifying suitability issue until Plaintiff
7 was defamed.

8 69. The continuous monitoring of an applicant's suitability
9 begins with the online application, but continues with the
10 mandated hiring forms provided to the applicant with the
11 conditional appointment letter. One of these forms is the SF-86
12 Questionnaire For National Security Positions. The SF-86 Cover
13 Sheet containing FBI-specific questions and conditions is also
14 required to be submitted with the SF-86.

15 70. Once filled out, the SF-86 and Cover Sheet are
16 transmitted to the Special Agent Clearance Unit at Headquarters.
17 An intake analyst reviews all of the information. If the
18 applicant reports disqualifying information in the SF-86 or Cover
19 Sheet, the applicant is promptly adjudicated not suitable and
20 receives a rejection letter.

21 71. If the applicant is still suitable after submitting
22 the SF-86 and Cover Sheet, the applicant is given a Personnel
23 Security Interview. The PSI form is filled out by the
24 interviewing agent, and records more information about the
25 applicant—both suitability (e.g., drug and alcohol use)
26 and security (e.g., foreign contacts). The PSI instruction
27 form provided to the interviewer advises the interviewer to

1 immediately report negative information developed during the
2 interview. The applicant is also fingerprinted after the PSI.
3 If the applicant reports disqualifying information in the PSI or
4 if indices checks are unfavorable, the applicant is adjudicated
5 not suitable and receives a rejection letter.

6 72. If the applicant is still suitable after completing the
7 PSI and the applicant passes criminal records and fingerprinting
8 checks, the applicant is moved forward and receives a polygraph
9 examination.

10 73. The polygraph examination asks at least two series
11 of questions: Suitability Series I or others, and Security
12 Series II or others. According to a Human Resources Division
13 officer interviewed on television in 2008 (Plaintiff is unable
14 to locate the video), some thirty percent of applicants do not
15 pass the polygraph examination. This leaves approximately
16 1,400 applicants per year for some 800-900 Special Agent slots
17 at the Academy. At some point or another, about 500-600 of
18 these applicants will be removed from the process or otherwise
19 deferred.

20 74. After the polygraph, the Special Agent Applicant Unit
21 (SAAU) reviews the report to determine whether the applicant's
22 drug use and other conduct disclosed at the polygraph are within
23 acceptable parameters. If the applicant is still suitable, SAAU
24 writes "CONTINUE" on the polygraph report and the applicant's
25 completed file is submitted to the Special Agent Clearance Unit
26 (SACU) with a directive to initiate the substantive portion of
27 the applicant background investigation. This includes contacts

1 with references and former employers, for example.

2 75. Although the term "background investigation" is used
3 in memoranda transmitting the applicant file, SACU has already
4 received and reviewed substantially all of the information
5 through other channels and the investigation technically starts
6 with the submission of the SF-86 and other materials.

7 76. The stated function of SACU, which is a component of
8 the Initial Clearance Section, is to conduct investigations on
9 applicants and approve them for security clearances, or else make
10 suitability determinations or security denials on the applicants.
11 In other words, SACU is stated to conduct the suitability
12 and security phases of the background investigation. If the
13 applicant's background investigation is not completed favorably,
14 the applicant is adjudicated unsuitable or is denied a clearance,
15 and the applicant receives a rejection letter.

16 77. If the applicant's background investigation is
17 completed favorably, SACU transmits the file to the Human
18 Resources Division, which makes final selections for the FBI
19 Academy. Applicants who receive "The Call" to report to the
20 Academy are those who actually enter on duty as trainees.

21 78. One of the components of the background investigation
22 is adjudication. In adjudication, the analyst creates "leads"
23 for SACU Special Agents to reinterview the applicant in areas
24 covered in the background investigation. The applicant "may be
25 reinterviewed for the purpose of procuring additional information
26 not previously furnished by him/her or to clarify information
27 received during investigation." 67-25 MIOG at § 67-7.8(16)(a).

1 79. A "lead" is an assignment to a Special Agent, Field
2 Office, or other component of the FBI to conduct a mini-
3 investigation. The analyst prepares talking points or other
4 matter for use by the Special Agent in communicating with the
5 applicant. The analyst does not communicate directly with the
6 applicant, although the analyst's actions affect the applicant
7 directly.

8 80. The Special Agent "covers" the lead and reports the
9 results of his or her investigation to the analyst in a
10 FD-302 or other standard forms, and the analyst makes a decision
11 with the information.

12 81. SACU is a component of the FBI in the Security
13 Division, completely separate and apart from the Human Resources
14 Division.

15 82. SACU is not authorized to make its own determinations
16 about an applicant's competitiveness.

17 83. SACU is also not authorized to decide which applicants
18 to investigate and which applicants not to investigate.

19 84. SACU is also not authorized to discriminate between
20 applicants on any basis except what is authorized by law, namely
21 criminal convictions and conduct that rises to the level of OPM
22 suitability.

23 85. SACU is expressly not authorized to determine that some
24 applicants need to be disqualified while others do not.

25 86. SACU is also not authorized to decide on its own to
26 pursue particular applicants for disqualifying information, as
27 opposed to other applicants who are not so pursued.

1 87. SACU is, most importantly, not authorized to "select"
2 or "non-select" applicants. Those decisions are supposed to be
3 made by the Human Resources Division on a merit basis, not by
4 SACU on a judgmental basis. As demonstrated in Plaintiff's case,
5 SACU is overstepping its bounds.

6 **B. Plaintiff's Application**

7 88. Plaintiff filed the online application on 12/2/08 and
8 passed.

9 89. Plaintiff was invited to and passed the Phase I test
10 conducted on 1/8/09.

11 90. Plaintiff was invited to and passed the Phase II
12 interview and written test conducted on 5/1/09.

13 91. Plaintiff was conditionally appointed a Special Agent
14 in the FBI on 5/6/09 and accepted the appointment.

15 92. Plaintiff completed the SF-86 and Cover Sheet, which
16 were transmitted to SACU on 5/22/09.

17 93. Plaintiff's SF-86, Cover Sheet, and all attachments
18 were reviewed by intake analyst Kimberly Ann Maggi. Plaintiff
19 was not unsuitable and was approved to move forward.

20 94. Plaintiff completed the Personnel Security Interview on
21 5/28/09 and was not unsuitable. Plaintiff was fingerprinted and
22 passed standard indices checks.

23 95. The completed PSI form and completed SF-86 were
24 transmitted to SACU between 5/28/09 and 6/8/09, then again on
25 6/15/09. All conduct reported by the Plaintiff in the PSI, SF-
26 86, and Cover Sheet was preliminarily adjudicated in Plaintiff's
27 favor.

1 96. Plaintiff was given a polygraph examination on
2 6/9/09. Plaintiff passed the polygraph examination and was not
3 unsuitable. All conduct reported by Plaintiff in the polygraph
4 had already been reported in his written application and was
5 adjudicated in Plaintiff's favor.

6 97. Plaintiff's file was transmitted to SACU on 6/15/09
7 with a directive to initiate the substantive background
8 investigation, and Plaintiff was not unsuitable.

9 **C. The Special Agent Clearance Unit**

10 98. ROES #2 through #10 improperly and illegally decided to
11 disqualify Plaintiff from employment prior to Plaintiff receiving
12 a full background investigation.

13 99. The decision was based on Plaintiff's perceived moral
14 character being compared with other applicants' perceived moral
15 character, which is a prohibited personnel practice under 5
16 U.S.C. § 2301 and § 2302.

17 100. The Department of Justice has directed all of its
18 components to follow the Merit System Principles and not engage
19 in Prohibited Personnel Practices.

20 101. The illegal decision to place Plaintiff in a "reject
21 pile" at SACU and intentionally develop disqualifying information
22 was made some time during the 20 day period following Plaintiff's
23 file being transmitted to SACU. Had this discrimination not
24 occurred, Plaintiff would have been asked to enter his SF-86 into
25 the E-QIP system for further processing like any other applicant.
26 Instead, Plaintiff was diverted by an artifice to final
27 adjudication after additional negative information was developed.

1 102. Between June 25, 2009 and June 30, 2009, Special Agent
2 Coder communicated with Plaintiff numerous times.

3 103. The purpose of Special Agent Coder's communications
4 with Plaintiff was to develop disqualifying information that went
5 above and beyond Plaintiff's SF-86 and polygraph report, because
6 the conduct previously reported to and approved by SACU was
7 insufficiently negative to sustain a suitability determination if
8 appealed in the FBI's internal appeal process.⁶

9 **(1) The 6/25/2009 Phone Conversation with Special Agent Coder**

10 104. Plaintiff was contacted by phone on 6/25/09 by Special
11 Agent Grahm Coder.

12 105. SA Coder read aloud an attachment to Plaintiffs' SF-
13 86 describing an incident in which Plaintiff was present when a
14 friend purchased less than \$100 of marijuana. This incident was
15 approved by the Special Agent Applicant Unit when it reviewed
16 Plaintiff's polygraph report. SA Coder asked whether the SF-86
17 attachment was true. Plaintiff stated it was true.

18 106. Plaintiff's Applicant Appeal, which is Exhibit A
19 attached hereto, explains the 6/25/2009 conversation and issues
20 in sufficient detail that it is incorporated by reference and
21 need not be repeated here.

22 107. The author of the Declaration in Support of Applicant
23 Appeal⁷ is JAMES DOE, who is the Plaintiff's best friend from
24 college. The other party involved in the transaction is
25 CHRISTOPHER DOE, another of the Plaintiff's friends from college.

26 ⁶ The FBI has a review board, but the board did not hear
27 Plaintiff's Applicant Appeal of February 7, 2010.

⁷ The Declaration commences at page 17 of the Appeal.

1 Mr. Doe and Mr. Doe are identified by their pseudonymous first
2 names in the redacted Applicant Appeal. The FBI already has the
3 unredacted, full version, which was also sent to AUC Brice.

4 108. In sum, a FD-302 (report of interview) prepared
5 by Special Agent Coder falsely states that Plaintiff, acting
6 as an attorney, negotiated an illegal drug buy. This is all
7 false. Because negotiating an illegal drug buy is a crime, as
8 is negotiating an illegal drug buy as an attorney, the FD-302 is
9 defamatory per se. The FD-302 is also defamatory per quod.

10 **(2) The 6/30/09 Phone Conversation with Special Agent Coder**

11 109. Plaintiff had a final telephone conversation on 6/30/09
12 with Special Agent Coder. This conversation is not disclosed in
13 Special Agent Coder's FD-302, although factual information from
14 the conversation appears in the backdated FD-302.

15 **(3) Special Agent Coder's Communications with the**
16 **Analyst and Roe #1**

17 110. When communicating with an analyst or any other
18 personnel in an applicant investigation, a Special Agent in
19 the FBI is required to always state the truth, and to make any
20 statements necessary to make the statements made not misleading.
21 Special Agent Coder violated these rules in communicating with
22 PSS Halle and Roe #1.

23 **(4) Outcome of Defamation**

24 111. Plaintiff was adjudicated not suitable for "drug use"
25 and "criminal conduct," and Plaintiff received a rejection letter
26 from SACU dated 7/1/09. The letter was worded to avoid stating
27 that it indicated a negative suitability determination, and the

1 letter did not advise of any right of appeal, both of which
2 delayed Plaintiff's discovery of the true bases for the decision.

3 112. The Special Agent Selection System is designed to
4 predict an applicant's ability to serve as well as his or her
5 success in the FBI. MIOG at § 67-17.2.4. The Human Resources
6 Division made its initial determinations in these areas in
7 Plaintiff's case, selected Plaintiff, and made the conditional
8 appointment of Plaintiff.

9 113. Had the Defendants not defamed Plaintiff, and had
10 Plaintiff passed the background investigation, Plaintiff would
11 have had the opportunity to compete with other cleared applicants
12 based on merit, as well as the specialized needs of the FBI, for
13 a slot at the Academy. Alternatively, Plaintiff would now be a
14 CIA intelligence officer.

15 **D. Damages**

16 **(1) Shame, Mortification, and Severe Emotional Distress**

17 114. Before the Plaintiff's rejection from the FBI, the
18 Plaintiff was at his baseline. After the rejection, Plaintiff
19 was devastated, but was relatively close to his baseline because
20 Plaintiff had no information why he was disqualified. Plaintiff
21 simply believed he was not competitive, as the letter from AUC
22 Brice indicated, and Plaintiff grieved the loss.

23 115. When Plaintiff discovered the defamatory matter, he
24 was felt mortified, ashamed, worthless, helpless, and hopeless,
25 beyond words.

26 116. Plaintiff suffered severe emotional distress when he
27 discovered the defamatory matter. This manifested in an eight

1 day hospitalization, a portion of which was involuntary, after
2 Plaintiff suffered a condition known as brief reactive psychosis.
3 Brief reactive psychosis occurs as a result of traumatic events,
4 such as Plaintiff's severe emotional distress at being defamed,
5 with no apparent recourse, despite telling the truth at every
6 stage of the application process and living a life of brutal
7 honesty.

8 117. Plaintiff's hospitalization was successful in treating
9 the short-term effects of the severe emotional distress, but
10 plaintiff requires continued therapy and psychiatric care in
11 order to return to baseline levels. Plaintiff's therapist and
12 psychiatrist have advised that treatment will continue for at
13 least another year (two years total) and probably longer, due
14 to the long-term effects of the trauma suffered by Plaintiff.
15 Although Plaintiff believes he has no underlying mental illness,
16 Plaintiff's emotional distress was severe enough to cause lasting
17 damage of some type, and his health care providers are still in
18 the process of figuring out what Plaintiff has. Whatever it is
19 was set off by the defamation in this case.

20 (3) Harm to Plaintiff's Reputation

21 118. The defamatory matter or a summary thereof was placed
22 in the Scattered Castles system, which explains Plaintiff's
23 rejection from the CIA. Plaintiff's reputation in the entire
24 United States government was ruined by being officially
25 determined by the FBI to be a criminal and unethical attorney.

26 119. The defamatory matter was re-published within the FBI.
27 Plaintiff's reputation within the FBI was ruined such that no

1 further correspondence from Plaintiff was taken seriously.

2 120. Plaintiff had to send the defamatory matter to three
3 law firms for the purpose of obtaining representation in this
4 matter. All three firms declined. Plaintiff's coerced self-
5 publication of the defamatory matter irreparably harmed his
6 reputation with these firms, which are in the San Francisco Bay
7 Area, and anyone else they may have told about this case.

8 **E. Statute of Limitations**

9 **(1) Libel and Slander**

10 121. The statute of limitations for libel and slander
11 is normally one year from the date of the utterance of the
12 defamatory statement or writing. California Code of Civil
13 Procedure § 340(c).

14 122. However, "application of the [delayed] discovery
15 rule may be justified when the defamation was communicated in
16 confidence, that is, 'in an inherently secretive manner.'"
17 Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th
18 883, 894 (emphasis added) (citing Manguso v. Oceanside Unified
19 School Dist. (1979) 88 Cal. App. 3d 725).

20 123. In Mancuso, the accrual of a schoolteacher's cause
21 of action for defamation was delayed until she discovered the
22 defamatory matter in her confidential personnel file. The
23 schoolteacher had been trying to obtain employment for sixteen
24 years and been rejected continuously. Finally, she obtained her
25 personnel file from her job with the Oceanside School District
26 and saw a defamatory letter written by her school principal.
27 Held: delayed discovery was justified.

1 124. Here, the case is on point with Mancuso. Defamatory
2 matter was actively concealed from Plaintiff and was "published"
3 in an inherently secretive manner. Plaintiff only discovered
4 the defamatory matter after an Administrative Judge of the Merit
5 Systems Protection Board ordered its production to Plaintiff.
6 Plaintiff could have discovered the claim no earlier than October
7 28, 2009, when he received the defamatory matter. Plaintiff
8 actually discovered the matter on 11/3/2009. As such, this
9 action filed before October 28, 2009 is timely.

10 (2) Bivens Claims

11 125. Bivens claims are subject to the state statute of
12 limitations for personal injury. California's statute of
13 limitations in personal injury actions other than libel and
14 slander is two years.

15 VII.

16 FIRST CLAIM — DEFAMATION PER SE

17 126. The above paragraphs are incorporated by reference.

18 127. Plaintiff is a private figure.

19 128. Plaintiff's FBI application and the conduct reported
20 in his application are matters of private concern, and the
21 statements made by the Defendants are about matters of private
22 concern.

23 129. The Defendants, by their actions and words described
24 herein, made multiple statements of fact, including libelous
25 opinions taken as fact, to persons other than Plaintiff.

26 130. The recipients of the statements reasonably understood
27 that the statements were about Plaintiff.

1 131. The recipients of the statements reasonably understood
2 the statements to mean that Plaintiff had committed crimes, as
3 shown, e.g., in the Adjudicative Recommendation prepared by PSS
4 Halle, which states that "criminal conduct" and "drug use" are
5 the basis for the determination.

6 132. The Defendants failed to use reasonable care to
7 determine the truth or falsity of the statements made.

8 133. As to Special Agent Grahm L. Coder, Special Agent Coder
9 knew that his defamatory statements were false when he made them,
10 and he manipulated Roe #1 into giving wrong opinions of law. SA
11 Coder also intentionally disqualified Plaintiff from employment
12 with the FBI because Plaintiff laughed at him. Special Agent
13 Coder thereby acted with malice, oppression, or fraud.

14 134. As to Personnel Security Specialist Abby M. Halle, PSS
15 Halle acted with malice, oppression, or fraud by intentionally
16 disqualifying Plaintiff, manipulating Roe #1, failing to disclose
17 to SPSS Kosh and AUC Brice mitigating more serious ethical
18 dilemmas and Plaintiff's appropriate choices, and attempting to
19 prevent Plaintiff from appealing the determination that PSS Halle
20 made.

21 135. Acting Unit Chief Brice was the principal of his agent,
22 Special Agent Coder, and is liable for SA Coder's misconduct.

23 136. Supervisory Personnel Security Specialist Valrie R.
24 Kosh was the principal of her agent, PSS Halle, and is liable for
25 PSS Halle's misconduct.

26 137. As a result of the defamation per se, Plaintiff was
27 harmed in his person, profession, reputation, feelings, and mind,

1 in an amount to be proved at trial and preliminarily set forth
2 herein.

3 **VIII.**

4 **SECOND CLAIM — DEFAMATION PER QUOD**

5 138. The above paragraphs are incorporated by reference.

6 139. Plaintiff is a private figure.

7 140. Plaintiff's FBI application and the conduct reported
8 in his application are matters of private concern, and the
9 statements made by the Defendants are about matters of private
10 concern.

11 141. The Defendants, by their actions and words described
12 herein, made multiple statements of fact, including libelous
13 opinions taken as fact, to persons other than Plaintiff.

14 142. Because of facts and circumstances known to the readers
15 of the statements, the statements tended to expose Plaintiff
16 to hatred, contempt, ridicule, and shame. The statements also
17 tended to discourage others from associating or dealing with
18 Plaintiff.

19 143. The Defendants failed to use reasonable care to
20 determine the truth or falsity of the statements.

21 144. As to Special Agent Grahm L. Coder, Special Agent
22 Coder knew that his defamatory statements were false when he made
23 them, and manipulated Roe #1 into giving wrong opinions of law.
24 Special Agent Coder thereby acted with malice, oppression, or
25 fraud.

26 145. As to Personnel Security Specialist Abby M. Halle, PSS
27 Halle acted with malice, oppression, or fraud by intentionally

1 disqualifying Plaintiff, manipulating Roe #1, failing to disclose
2 mitigating more serious ethical dilemmas and Plaintiff's
3 appropriate choices, and attempting to prevent Plaintiff from
4 appealing the determination that PSS Halle made.

5 146. Acting Unit Chief Brice was the principal of his agent,
6 Special Agent Coder.

7 147. Supervisory Personnel Security Specialist Valrie R.
8 Kosh was the principal of her agent, PSS Halle.

9 148. As a result of the defamation per quod, Plaintiff was
10 harmed in his person, profession, reputation, feelings, and mind,
11 in an amount to be proved at trial and preliminarily set forth
12 herein.

13 **IX.**

14 **THIRD CLAIM — BIVENS**

15 149. The above paragraphs are incorporated by reference.

16 150. The Defendants acted under color of Federal law.

17 151. The Defendants violated Plaintiff's Constitutional
18 rights. For example, the Plaintiff's Constitutional right to
19 due process of law in the pursuit of employment with the FBI and
20 the CIA. Roes #11 to #20 prevented the hearing of Plaintiff's
21 Applicant Appeal on the merits, itself a violation of due process
22 of law because FBI policy has created a review board to hear
23 applicant appeals, and this remedy was denied despite Plaintiff
24 sending a properly formatted and well-supported appeal.

25 152. Instead of affording Plaintiff a full and fair
26 opportunity to be investigated, the Defendants aggressively
27 pursued Plaintiff for any possible basis to disqualify him. This

1 is amply demonstrated in a series of communications with SA
2 Coder in which he interrogated Plaintiff about the most minor
3 misconduct reported by Plaintiff in his hiring forms: among other
4 minor issues, parking tickets that Plaintiff received that may or
5 may not have gone to collection.

6 153. Defendants succeeded in disqualifying Plaintiff only
7 because SA Coder was willing to risk his career and those of
8 his superiors by falsifying information in a national security
9 investigation involving the most important work of the FBI:
10 properly conducted applicant selection.

11 154. Special Agent Coder further violated Plaintiff's
12 Constitutional rights by illegally backdating a FD-302 and
13 falsifying its contents, in violation of 18 U.S.C. § 1001.⁸

14 155. The Defendants violated the FBI manual, which provides
15 controls to ensure that due process is given to applicants.
16 Had Defendants simply followed their own manual, the harm to
17 Plaintiff in this case would not have occurred and Plaintiff
18 would have received a full background investigation just like
19 other similarly situated applicants. The Defendants thereby
20 violated the due process and equal protection clauses of the
21 Constitution.

22 156. Attached as Exhibit A is Plaintiff's Applicant Appeal
23 of February 7, 2010,⁹ which discusses the Bivens misconduct in

24 8 False statements, concealment of material facts, and false
25 writings made to the United States of America.

26 9 The Appeal is written for an audience that has familiarity
27 with the FBI manuals. Fourteen pages of exhibits are omitted
for the sake of brevity, but are available upon request. The
Plaintiff also offers the Court the FBI manuals, each of which
exceeds 1,000 pages, upon request.

1 more detail and is respectfully incorporated by reference.¹⁰

2 157. Plaintiff incurred damages as a result of the violation
3 of his Constitutional rights. These include the severe emotional
4 distress described above as well as a permanent bar of Plaintiff
5 from Federal employment. Plaintiff also consulted with a former
6 FBI polygraph examiner regarding the merits of the Applicant
7 Appeal, at a cost of \$450.

8 X.

9 PRAYER FOR RELIEF

10 A. A jury trial is demanded.

11 B. Special damages in the amount of \$20,450 or according
12 to proof, whichever is higher.

13 C. General damages in an amount according to proof, and
14 not less than \$204,500.

15 D. Punitive damages of ten times the amount of Special and
16 General damages, not less than \$2,249,500.

17 E. Total damages of at least \$2,474,450.

18 F. All of Plaintiff's costs in prosecuting this matter,
19 to the extent permitted by law. Each party shall bear his or her
20 own attorney fees.

21
22 Respectfully Submitted By:

23
24 Date: 10/21/2010

X John Doe

John Doe
Plaintiff
Pro Se

25
26
27 ¹⁰ With extreme apologies for nearly doubling the length of the
Complaint.

EXHIBIT A

Federal Bureau of Investigation

Agency.

Filed: 2/7/2010

TABLE OF CONTENTS

INTRODUCTION	3
CHRONOLOGY	3
PROBLEM	3
FACTS	5
A. Declaration of John Doe	5
B. Declaration of James Doe	17
KEY LAW	20
A. Required Scope of Investigation	20
B. Drug Policy	20
ARGUMENT	21
A. The Polygraph Report Establishes the True Facts	21
B. Witness James Doe Confirms the True Facts	22
C. SAAU Approved the True Facts	23
D. The True Facts are not a Crime	23
E. The True Facts are not an Ethical Violation under California Law	24
F. An Investigation in Accordance With the FBI Manual Would Have Developed the True Facts	25
G. Supplemental Declaration	26
REQUESTED RELIEF	27
EXHIBITS	

1 **INTRODUCTION**

2 This appeal concerns a negative suitability determination made on 6/30/2009 by
3 Personnel Security Specialist Abby M. Halle, and the discontinuation of my Special Agent
4 application on 7/1/2009 by Acting Unit Chief Montchell Brice of the Special Agent Clearance
5 Unit.

6 I appeal the negative suitability determination and the discontinuation of my application
7 to the Adjudication Review Board. I request a hearing before the Board.

8 The decisions should be reversed because they are based on false information, which was
9 reported by a SACU Special Agent who manipulated the process to ensure my disqualification.

10 **CHRONOLOGY**

11	12/2/2008	Special Agent application filed.
12	1/8/2009	Phase I written test.
13	5/1/2009	Phase II interview and written exercise.
14	5/6/2009	Phase II passing results, and Conditional Appointment is made.
15	5/18/2009	SF-86 and Cover Sheet turned in.
16	5/28/2009	Personnel Security Interview.
17	6/9/2009	Polygraph Examination.
18	6/15/2009	Background Investigation initiated.
19	6/25/2009	First contact with Special Agent Clearance Unit.
20	6/30/2009	Last contact with SACU.
21	6/30/2009	Suitability determination made.
22	7/1/2009	Conditional appointment rescinded.

23 **PROBLEM**

24 I was deemed not suitable for employment on the basis of "drug use" for reportedly being
25 involved in a drug transaction in May 2008.

26 Although I was present in the same house, I was not involved in the transaction of less
27 than \$100 of marijuana between two friends, and I did not use drugs. The reports of three

1 Special Agents and the Declaration of witness James Doe in support hereof confirm
2 that I was not involved in the transaction and did not use drugs. On 6/12/2009, the Special
3 Agent Applicant Unit approved my continued processing despite this incident, confirming its
4 understanding from my polygraph report that I was not involved in the transaction and did not
5 use drugs.

6 The problem lies with Special Agent Graham Coder of SACU ("SA Coder"). After
7 speaking with me on 6/25/2009 and 6/30/2009, SA Coder prepared a FD-302 in which he
8 represented to the FBI that I said I was involved in various aspects of the May 2008 transaction.
9 I did not make or adopt the statements that SA Coder attributed to me. Therefore, SA Coder
10 made false statements to the FBI. He did this apparently because he decided to disqualify me
11 after I inadvertently laughed at one of his questions and offended him.

12 In addition to making false statements, SA Coder willfully failed to fully investigate the
13 incident. Specifically, SA Coder chose not to contact the very witnesses he asked for and that
14 I provided. SA Coder omitted the witnesses' names and information from his FD-302 and the
15 file, apparently to prevent anyone else from contacting the witnesses to see what they had to say.
16 After the discontinuation of my application, I contacted the witnesses myself. Both witnesses
17 stated that I was not involved in the subject transaction and never should have reported it to
18 the FBI. SA Coder's failure to pursue these leads to their logical conclusion—contacting the
19 witnesses who were in the best position to judge my "involvement" in the transaction—as well as
20 his concealment of their identities from the FBI, makes his FD-302 a false investigative record.

21 The FD-302 is highly damaging because it is the basis for an opinion of law by the Office
22 of General Counsel that I was involved in the drug transaction, that I was acting as an attorney,
23 and that I acted unethically and with poor judgment. It was this opinion and its basis that were
24 used to disqualify me.

25 The three Special Agents who (1) reviewed my SF-86, (2) interviewed me on the
26 subject in the Personnel Security Interview, and (3) conducted my polygraph examination
27 also filed reports. These three Special Agents contradict SA Coder and report that I was

1 merely “present” or “accompanied a friend,” without any mention of me being involved in the
2 transaction. Analyst Abby M. Halle omitted these other versions of the facts from her suitability
3 determination, and from her communications with the Office of General Counsel.

4 Because of these conflicting versions of the facts, it is now up to the Board to decide who
5 to believe. Should the Board believe SA Coder? Or should the Board believe Special Agent
6 [REDACTED], Special Agent [REDACTED] the Special Agent who reviewed my SF-86, witness
7 James Doe, and me?

8 Being present in the same house but not involved when two friends exchange less than
9 \$100 of marijuana is not a violation of the FBI drug policy stated in the manual, OPM suitability
10 guidelines, California or Federal law, or ethical rules controlling attorneys licensed in my State.
11 OGC’s legal opinion was given by an attorney who is not licensed to practice law in California
12 and who is therefore unqualified to judge me under the standards of professional conduct of my
13 State.

14 Because the suitability determination and discontinuation of my application were based
15 on false information, an incomplete investigation, and a wrong legal opinion, the decisions
16 should be reversed and my application reprocessed by different SACU personnel.

17 **FACTS**

18 **A. Declaration of John Doe**

19 1. This summarizes an incident that I reported in my SF-86, and what I reported to
20 FBI personnel at the Personnel Security Interview and Polygraph Examination. For additional
21 factual information, please see the Declaration of James Doe at page 17.

22 2. In May 2008, at the suggestion of my college friend James with whom I was
23 staying for the weekend for an event, I accompanied James to our mutual friend Chris's house.
24 James intended to obtain a small amount of marijuana (less than \$100) from Chris and I intended
25 to visit with Chris. Chris was not a drug dealer, but he did keep extra marijuana around to share
26 with friends. While on the way over to Chris's place, James lamented Chris's eccentric behavior
27 concerning prices, and I half-jokingly offered James a few tips in negotiating that I had picked

1 up in a recent mediation at work. When we got to Chris's I initially made a few comments
2 on what Chris was asking for and what James was willing to pay, but I ended up embarrassing
3 myself because I know little to nothing about drugs, and I was not taken seriously. I excused
4 myself and left the room, which is why I used the phrase "I believe" in my SF-86 attachment—I
5 had no personal knowledge of what James and Chris agreed to or of any crime that may have
6 occurred after I left. I did not use any of the marijuana. I did not contribute in any fashion to the
7 purchase, financially or otherwise.

8 3. In my attempt to be as forthcoming as possible with the FBI and in an abundance
9 of caution, I reported this incident as being "involved" in a drug transaction when responding to
10 questions in my SF-86. My original SF-86 attachment is attached as **Exhibit 1**. I later learned
11 from both James and Chris that I was wrong about being involved, and I was not involved in
12 this transaction. Supporting this, even my original attachment stops short of saying I had any
13 substantive role in the transaction; I was simply there and talking with James and Chris

14 The SF-86

15 4. The unnamed Special Agent who reviewed my SF-86 shortly after I submitted
16 it on 5/17/2009 wrote a handwritten sheet of notes, which are attached as **Exhibit 2**. The
17 Special Agent wrote "In May 2008 Applicant ~~assisted~~ accompanied a roommate [sic] to purchase
18 marijuana, but did not smoke." The agent clearly understood the statement, as he crossed out the
19 word "assisted" on his notes before writing that I merely accompanied my friend James.

20 Personnel Security Interview

21 5. The Personnel Security Interviewer, SA [REDACTED] heard substantially the
22 above information, and she wrote in the PSI Form that I "Accompanied a friend who was buying
23 marijuana." This page is attached as **Exhibit 3**.

24 6. Also at the PSI, I filled out the illegal drug use questionnaire, which is attached
25 as **Exhibit 4**. I answered "no" for the question "Did you ever buy?" I have never purchased
26 marijuana or any other illegal drugs, or contributed money or otherwise to any other person's
27 purchase of marijuana or other illegal drugs.

1 **Polygraph Examination**

2 7. The polygraph examiner, SA [REDACTED] heard all of the above information,
3 including the key fact that I was not present when any crime occurred, because I had excused
4 myself and left the room. Under appropriate questioning directed to whether I had “lawyered”
5 my SF-86 attachment, I explained to SA [REDACTED] that this is why I used the phrase “I believe;”
6 because I did not have personal knowledge of what happened after I left. SA [REDACTED] wrote in his
7 report: “Applicant was present in 2008 when a friend purchased less than \$100 of marijuana.”
8 A Supervisory Special Agent from the Special Agent Applicant Unit appears to have approved
9 the report and my continued processing, because he/she circled and initialed the “CONTINUE”
10 directive on 6/12/2009. The report is attached as **Exhibit 5**.

11 **Special Agent Coder**

12 **a. 6/25/2009 Phone Interview**

13 8. On 6/25/2009, I received a phone call from a person who identified himself as
14 Special Agent Grahm Coder, FBI (“SA Coder”).

15 9. SA Coder stated that he was “temporarily assigned to move the case forward” and
16 that my background investigation “should be starting soon.” SA Coder explained that his job
17 was to act as a central repository for information coming in from the field during my background
18 investigation. SA Coder described the background investigation in a manner that indicated that
19 SA Coder was somehow in charge of the background investigation.

20 10. Referring to my SF-86 attachment, SA Coder then asked whether I had used
21 any of the marijuana purchased by my friend James [REDACTED] and whether I contributed any money to
22 the purchase. I clearly stated that I did not use any of the marijuana or contribute money to the
23 purchase. SA Coder then attempted to get me to change my answer by pretending to be my
24 friend. He stated “it’s ok...you can tell me” in a sympathetic voice. I cannot change the truth
25 and I did not change my answer. I did not use any of the marijuana or contribute to its purchase,
26 and I am in compliance with the FBI’s policy on drug use stated on its web page and in the FBI
27 manual.

1 11. SA Coder then asked substantially the following question:

2 Q. “Were you involved in the decision to go to the house to buy the drugs?”

3 12. I reflexively laughed at his question. This is like asking someone, “when did
4 you start beating your spouse?” There is no reasonable answer. I have heard, read, and/or
5 responded to hundreds of these types of deliberately misleading questions or statements in my
6 career. In this case, SA Coder’s question inappropriately combined (1) my decision to go “along
7 for the ride” to visit Chris with (2) James’s decisions to go to the house and to buy the less than
8 \$100 of marijuana. If I answered “yes,” it would later be claimed that I had decided to buy the
9 marijuana. If I answered “no,” I would have denied deciding to go along to the house, which
10 would not be true. This is why I did not answer the question.

11 13. Despite my not answering his question, SA Coder states in his FD-302 “[h]e said
12 that he was involved in the decision to travel to the house to buy the drugs” This is a false
13 statement because I never answered his question, and I said nothing to that effect.

14 14. The statement that I “traveled with a friend to another friend’s house for the
15 purpose of buying marijuana” is also a false statement, because my purpose was to visit with
16 Chris, not buy marijuana. This is clearly indicated in my SF-86.

17 15. After I responded to SA Coder’s initial question with a mild laugh, he withdrew
18 the question. Instead of asking me questions that would establish the propositions stated in his
19 FD-302, he said “let’s do it this way” and he proceeded to read aloud from my SF-86 attachment,
20 and then ask me whether it was true. What could I say? That I filed a false statement with
21 my application? Of course my SF-86 statement is true—but it stops short of admitting any
22 substantive role in the transaction. For example, “Chris didn’t take [my comments] seriously
23 because I knew nothing about drugs or their prices, or how to handle a drug purchase.” SA
24 Coder did not ask me follow up questions after he read my statement to me, so I had no chance
25 to add more information.

26 16. SA Coder did not read aloud to me the statements in his FD-302, and I did not
27 adopt SA Coder’s statements as my own.

1 17. SA Coder did not ask me whether I assisted in negotiating the price of the
2 marijuana purchase between my friends. I did not tell him that I assisted in negotiating the price
3 of the marijuana purchase between my friends.

4 18. SA Coder did not ask me whether I acted as a “representative” of the buyer of the
5 marijuana to the seller. I did not tell him that I acted as a representative of the buyer to the seller.

6 19. SA Coder did not ask me whether I was involved in the negotiation of the
7 purchase price. I did not tell him that I was involved in the negotiation of the purchase price.

8 20. Instead of asking me these questions, SA Coder read to me from my own written
9 statement. Other than me denying using any of the marijuana or contributing money, no new
10 information about the May 2008 incident was developed in our phone conversations. Essentially,
11 with his FD-302 SA Coder has changed my SF-86 attachment to his own version of the facts, in
12 accordance with his apparent bias and goal of disqualifying me.

13 21. Had SA Coder actually asked me the questions that would establish the facts
14 stated in his FD-302, I would have answered “no” to each of them. Please see my Supplemental
15 Declaration at the end of this appeal where I finally get a chance to answer the questions that
16 were not asked.

17 22. I did not assist in the negotiation of the price of the marijuana purchase between
18 my friends. I did not act as an attorney or representative for either party in this transaction.

19 23. I had advised James on the way over to Chris's house that I could not act as his
20 attorney, because an attorney may not advise a violation of law. We both understood that. Under
21 California law, an attorney-client relationship is only created by the agreement of both parties.
22 No attorney-client relationship was created here, and this is one reason I did not assert the
23 attorney-client privilege in response to Question 23 of the SF-86.

24 24. I have prepared my own FD-302 of the 6/25/2009 conversation with SA Coder,
25 which is attached as Exhibit 6. This is what I would have written if I had been in SA Coder's
26 position.

27 25. I did not check with James or Chris before answering “yes” to Question 23 of the

1 SF-86 regarding involvement in the illegal handling, purchase, delivery, etc. of drugs. I did not
2 check with them first for two reasons. One, it was the most honest thing to do to just report it
3 and let the FBI sort it out. Two, I didn't want it to be claimed that I had ever asked my friends to
4 "cover" for me. If I didn't contact them, no one could say I asked them to cover for me.

5 26. Both James and Chris advised me on two separate occasions in July 2009 and
6 November 2009 that I was not involved, that I should not have reported that I was involved,
7 and that they did not consider me to be involved. Chris also advised me that he had a Medical
8 Marijuana license at the time of the incident. I do not know what the terms of Chris's license are;
9 whatever they are, he legally obtained his marijuana under California law.

10 27. James and Chris have advised that they are available any time to set the record
11 straight. Their contact information follows:

12 James Doe

13 c/o John Doe

Christopher Doe

14 [Will not be called as a
15 witness - information omitted
on privacy grounds]

16 28. On 6/25/2009, SA Coder asked me for both James and Chris's contact information.
17 I told him that James's information was in my SF-86 roommate attachment, and that I would
18 have to look up Chris's. SA Coder put me on hold for a few moments, presumably to confirm this
19 with Analyst Halle. Then SA Coder came back on and told me that this was fine as to James but
20 that we would "hold off" on Chris's information at that time.

21 29. At the time of the 6/25/2009 conversation, I could not figure out why SA Coder
22 only read my written statement to me without asking further questions. It seemed like a pointless
23 conversation at the time.

24 30. In an email message to SA Coder with follow up information, I suggested that
25 he check with the polygraph examiner or look at his report, because my Attachment 23 and the
26 incident were discussed in detail at the polygraph. My email is attached as part of Exhibit 7. I
27 didn't say more because I know that as an applicant I am not supposed to tell a Special Agent

1 how to do his job. I did not anticipate that SA Coder would do what he did.

2 **b. 6/30/2009 Phone Interview**

3 31. I had two separate phone conversations with Special Agent Coder. One on
4 6/25/2009, and one on 6/30/2009. The 6/30/2009 conversation included information on software
5 downloading I did when I was a minor and in college, which is a paragraph on the first page of
6 the FD-302. For some reason, the FD-302 is backdated to 6/25/2009 even though it reports two
7 separate interviews about different subjects on different days. The FD-302 also inaccurately
8 states that the investigation was telephonic when much of the FD-302 is from my emails.

9 32. On 6/30/2009, SA Coder contacted me and said that it turned out he did need
10 Chris's contact information. So I sent an email message with my friend Chris's contact information.
11 Neither this email message nor any reference to Chris's information appear in SA Coder's FD-302
12 or the file.

13 33. The key take-home point here is that I never told SA Coder any of the statements
14 attributed to me in the first paragraph on page two of his FD-302. He read my own statements to
15 me, did not ask me the questions that his FD-302 implies were asked, and made up his own facts.
16 SA Coder's version of the facts appears to be what was used to disqualify me.

17 **Other False Statements in the FD-302**

18 34. "He stated that on his 2007 tax return, he neglected to pay his state income tax
19 for California. He stated that he did this because he forgot that he was obligated to pay." I never
20 told SA Coder that I forgot that I was obligated to pay or anything remotely similar to this. Like
21 I told the PSI agent, I told SA Coder that I lost track of the return due to work, and the PSI form
22 reflects this (it states I "overlooked it"). In October 2008, when the return was due, I worked
23 over 300 hours on a five day court trial involving approximately \$1 million, for which I was
24 solely responsible. This is why I lost track of the return.

25 35. "He stated that he has illegally downloaded commercial computer application
26 software" This paragraph is from our 6/30/2009 phone conversation, not our 6/25/2009
27 phone conversation. The FD-302 could not have been written, dictated, transcribed, and initialed

on 6/25/2009 like it claims to be. This is significant because it appears SA Coder wrote his FD-302 after OGC gave its legal opinion about the drug transaction.

36. “He stated that there are no pending issues related to the organization for which he incurred expenses on its behalf, and the improper reimbursement procedures.” This issue was not mentioned at all during either phone conversation. SA Coder sent me questions on this issue by email after our 6/25/2009 phone conversation, and I answered them by email. The subject did not come up again.

37. I have attached all of the pre-rejection emails I exchanged with SA Coder as Exhibit 7. I note that the file does not contain any of these email messages, even though the information is relevant and much of it forms the basis for the FD-302.

California and Federal Law, and Medical Marijuana

38. As an attorney licensed under California law, I am qualified to give an authoritative professional opinion of the legality of my actions in May 2008 under the law of my State and its ethical rules applicable to attorneys in my State. I am also admitted to practice in the U.S. District Court for the Northern District of California, and therefore I am qualified to give an opinion of Federal criminal law.

39. I note that attorney Edward M. Broussard of the FBI Office of General Counsel does not appear on the roster of California-licensed attorneys. (Ms. Halle emailed Mr. Broussard for his opinion about my SF-86 attachment).

40. My professional opinion of the law of my State, ethical rules applicable in my State, and the Federal criminal law follows.

41. I did not commit any crime in the May 2008 incident. I was simply in the same house as my two friends. I was not a party to the transaction between James and Chris.

42. I was not an aider, abettor, or accessory to any crime that may have occurred in the May 2008 incident, and I excused myself prior to any transaction or crime occurring.

43. For purposes of criminal liability, a person is either a principal, accessory, or aider and abettor. No crime occurs when someone merely witnesses part of a crime.

1 44. Ethical duties of an attorney in California only arise from an attorney-client
2 relationship, not personal life conduct, unless otherwise stated in the Rules of Professional
3 Conduct. I did not commit an ethical violation in the May 2008 incident, because no attorney-
4 client relationship was created. Thus, the OGC attorney's opinion that I acted unethically is
5 wrong. I also question the appropriateness of including this curbstome opinion of law, ethics,
6 and judgment in a factual investigative report. See Manual of Administrative Operations and
7 Procedures at 10-17.11.2: "Do not include in details of report opinions or conclusions of Special
8 Agents or other employees drawn from information gained by virtue of investigation."

9 45. Although there are rules of procedure and various duties that arise from filing
10 actions in Federal court, there are no separate Federal ethical rules for attorneys—or for that
11 matter, any nationwide ethical rules that apply in my State.

12 46. As an attorney in California, I do have a general duty to "uphold" the law and
13 not commit felonies involving moral turpitude. Upholding the law means, among other things,
14 giving full faith and credit to judgments and opinions of any court; obeying the orders of any
15 judge; not misleading a judge or jury with a false statement of law; and not claiming that a
16 particular law is invalid unless there is a non-frivolous argument to the contrary.

17 47. Although I regret the incident and will not make the same choices again, being
18 present in the same house when a friend purchases a small amount of marijuana is not an offense
19 at all, much less one involving moral turpitude.

20 48. Moral turpitude means dishonesty or some other serious offense. For example,
21 the [Confidential] series of polygraph questions that I was asked and successfully passed
22 would be offenses involving moral turpitude under California law.

23 49. I am not a prosecutor or law enforcement officer, and so I am not required to
24 "enforce" the law or remove myself from unlawful situations involving others.

25 50. The law of simple possession of marijuana in California is generally not enforced
26 in [redacted], California where the May 2008 incident occurred, unless some more serious
27 offense occurs in combination. When punished, the offense of simple possession is punishable

1 by a statutory maximum \$100 fine, mandatory diversion, and no jail time or even “booking.”
2 Health and Safety Code sec. 11357(b). In other words, it is punished less severely than a
3 speeding ticket. The State statute of limitations on any crime committed by James in the May
4 2008 incident ran in May 2009 at the latest. No one was charged, investigated, or otherwise.

5 51. I never had possession of any marijuana, money, or anything else that was
6 involved in the May 2008 incident.

7 52. I was not an applicant to the FBI or any other law enforcement agency, or any
8 prosecuting attorney’s office in May 2008.

9 53. Nevertheless, I freely admit that it was not a good idea to even be present for
10 the May 2008 incident. I certainly am not going to repeat the behavior. But if I am going to be
11 judged, I want to be judged for the words that I actually say and write, not the version of the facts
12 that someone else has created.

13 Other Ethical Choices

14 54. In my SF-86, I wrote a page-long description of a serious ethical dilemma I faced
15 in April-May 2009, yet my appropriate ethical choices were not even mentioned in the suitability
16 determination as mitigating information. This mitigating information was also not provided to
17 OGC before OGC “recommended” my disqualification. My statement in the SF-86 that recounts
18 this ethical dilemma and my appropriate choices is attached as **Exhibit 8**.

19 55. To summarize, in May 2009—a year more recently than the May 2008 incident—
20 I lost my job because I chose to comply with an ethical duty.

21 56. The dilemma I faced was whether to disclose my FBI application to my employer,
22 because my Phase II interview conflicted with a jury trial in which I had a prominent role.

23 57. I chose to protect my clients at my own expense, and I disclosed my Phase II
24 interview to my employer so that the employer could minimize the impact of my absence from
25 the portion of the trial that conflicted with Phase II. Although I performed my role in the trial
26 successfully, my employer laid me off in response to this disclosure of my FBI application and
27 conditional appointment.

58. After I was laid off from my law firm for pursuing a career with the FBI, I went to work for a sole practitioner in my hometown in August 2009.

59. I soon learned that this attorney was the subject of a State Bar investigation for allegedly overbilling clients. I was also asked to do some things I felt uncomfortable with. I quit for ethical reasons in September 2009 and at that time I no longer actively practiced law.

CIA

60. After the discontinuation of my FBI application in July 2009, I applied to the CIA. I was tentatively selected for a Staff Operations Officer position and received a lengthy telephone interview in August 2009. However, the recruiter was very curious about how it is that I passed the FBI polygraph but was later rejected. Two weeks after this phone call, I was non-selected from the CIA. I assume this is because, like the FBI, the CIA does not want an attorney who was reportedly a party to a drug transaction in the recent past. I only wish that if a single Special Agent was going to decide to disqualify me, I would have had the opportunity to withdraw my FBI application in order to pursue opportunities with other Federal agencies that serve the American people equally well.

Alcohol Use

61. In her suitability determination, the Analyst quotes from my SF-86 regarding my past alcohol use.

62. It is true that, like many young attorneys, I turned to alcohol at one point in my career to relieve the stress and pressures that I faced. I drank, but it was not to a level of abuse. Case in point, I have never been counseled on the job, gotten a DUI, or been charged with any alcohol-related offenses.

63. It is true that, from 2006-2008, I occasionally took mornings off and once or twice took a whole day off, after drinking more than I should have the night before. However, this was allowed at my law firm, which was not a traditional “9 to 5.” Unlike the support staff at my firm, which had set hours, the attorneys were allowed and encouraged to make their own schedules, could take unlimited mornings or days off as long as billable hour requirements were met, and

1 could also work from home as we saw fit.

2 64. I significantly exceeded my hours requirements in all three years I was there,
3 and I brought in a large amount of money for the firm. As noted in my SF-86 and PSI, I have
4 never been disciplined or warned for my attendance or performance, and I never drank before
5 important events or legal proceedings. I never missed any deadlines or legal proceedings due to
6 alcohol use. I also made it a point to check in with the staff before taking any time off.

7 65. This is all a moot point because one day in September 2008, several months
8 before I applied to the FBI, I stopped drinking alcohol. Starting the following week, I worked
9 approximately 70 consecutive 12-20 hour days on a five day court trial involving \$1 million,
10 for which I was solely responsible. My successful preparation for and presentation of this trial
11 without drinking and with no ill effects proved to me that I don't need to drink alcohol to relieve
12 stress or for any other reason. I didn't drink at all for fifteen months, and now I barely drink.

13 **Life Coach**

14 66. The Analyst states in her determination that it is "important to note" that I had
15 been seeing a psychologist since 2005 for personal development, life issues, and stress.

16 67. It is true that, from September 2005 to December 2009, I saw psychologist Kristin
17 Zoe, Ph.D. of Anytown, California as my counselor and life coach.

18 68. I do not have any mental illness, and I did not seek treatment from Dr. Zoe for
19 such a condition. Rather, our approximately monthly sessions were devoted to optimizing my
20 life, career, and personal relationships, and Dr. Zoe basically acted as my facilitator in helping
21 me pursue life goals.

22 69. One interesting outcome is Dr. Zoe's professional opinion. With four years of
23 monthly sessions to draw from, Dr. Zoe has advised me that I am well-suited for the FBI.

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct.

26 /S/ JOHN DOE

27 Date: 2/7/2010

28 John Doe

Witness

-17-

1 I, James Doe, [REDACTED] declare as follows:

2 1. I am over the age of 18 and I have personal knowledge of all matters stated
3 herein, except as to those matters stated on information and belief, in which case the matters
4 are stated to my best recollection and I believe them to be true. If called as a witness, I could
5 competently attest to same.

6 **BACKGROUND**

7 2. John Doe [REDACTED] and I have been friends for 10 years—since January 2000 when
8 [REDACTED] [REDACTED] [REDACTED]
9 [REDACTED] [REDACTED] [REDACTED]

10 **MAY 2008 INCIDENT**

11 3. From May 2-4, 2008, Mr. Doe [REDACTED] stayed with me for the weekend for a [REDACTED]
12 [REDACTED] event in [REDACTED], CA.

13 4. In the evening of May 2, 2008, Mr. Doe [REDACTED] accompanied me to our mutual friend
14 Chris's house. I intended to obtain a small amount of marijuana (less than \$100) from Chris [REDACTED] and
15 Mr. Doe [REDACTED] and I both intended to visit with our friend Chris [REDACTED].

16 5. Chris [REDACTED] was not a drug dealer, but he did keep extra marijuana around to share with
17 friends. I know that Chris [REDACTED] has a Medical Marijuana license, but I do not know what the terms of
18 Chris's license are.

19 6. Mr. Doe [REDACTED] advised me on the way over to Chris's house that he could not be my
20 attorney in any transaction that violated the law. I understood that he could not be my attorney
21 in this transaction. Mr. Doe [REDACTED] was not my attorney, and did not act as my attorney in this
22 transaction.

23 7. When we got to Chris's house, Mr. Doe [REDACTED] initially made a few comments about
24 Chris's price and what I was willing to offer Chris [REDACTED], but he was not taken seriously at all. Mr.
25 Doe [REDACTED] was, at worst, comic relief to me and Chris [REDACTED] due to Mr. Doe's [REDACTED] 's ignorance of drugs. After
26 embarrassing himself, Mr. Doe [REDACTED] excused himself and was not present when Chris [REDACTED] and I actually
27 came to our agreement and exchanged the marijuana.

1 8. Mr. Doe did not use any of the marijuana. Mr. Doe did not contribute in
2 any fashion to the purchase, financially or otherwise.

3 9. Mr. Doe has informed me that he reported this incident in his FBI application
4 as him being "involved" in a drug transaction. This was a mistake, because Mr. Doe was not
5 involved in the transaction. Neither I nor Chris considered Mr. Doe to be involved. When Mr.
6 Doe contacted me about this incident in July 2009 and November 2009, I told him he should
7 never have reported this incident because he was not involved.

8 10. In my opinion from knowing Mr. Doe for 10 years, he reported this incident
9 because he is sometimes too cautious for his own good. No one with any knowledge of drugs
10 would consider Mr. Doe to have been involved in this transaction, and he should have asked
11 me before reporting this.

12 11. Here, Mr. Doe was not involved in the decision to make the purchase. Mr.
13 Doe was not involved in the decision to travel to the house; he simply agreed to go.

14 12. Mr. Doe was not involved and did not assist in the "negotiation" of the
15 purchase price between me and Chris. Mr. Doe did not act as my representative or attorney.
16 Mr. Doe did not contribute in any fashion, financially or otherwise, to the purchase.

17 13. Until July 2009, I had never spoken with Mr. Doe about this incident.

18 14. No one was investigated or charged with any crime arising out of this incident.

19 15. Mr. Doe has not asked me to "cover" for him in any fashion.

20 16. As of this writing, no one from the FBI has ever contacted me about this incident.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Date: 1/20/10

/S/ JAMES DOE

James Doe

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ARGUMENT

A. The Polygraph Report Establishes the True Facts.

Special Agent [REDACTED] of the San Francisco field office conducted my polygraph examination on 6/9/2009. SA [REDACTED] questioned me in the pre-test interview about the May 2008 incident, and we discussed it in detail. The key facts developed by SA [REDACTED] were that I did not use any of the marijuana, I did not purchase it or contribute any money, and I was not present when James and Chris actually made their agreement and exchanged the marijuana. Essentially, I was “along for the ride.”

On the actual test, SA [REDACTED] asked me the drug-related polygraph question, which was substantially “[Relevant questions and answers are omitted for security reasons.] [REDACTED]?” I answered [] and when I passed the exam it was officially determined that I was telling the truth. The true facts are that I was “present in 2008 when a friend purchased less than \$100 of marijuana,” and that I had no other involvement.

One of the best ways to test an argument is to temporarily take the contrary position. Here, assume for a moment that SA Coder’s FD-302 states the truth. What logically follows? If SA Coder is to be believed, his FD-302 indicates that I successfully duped the polygraph examiner into passing me, and SAAU into continuing me, while concealing my involvement in the drug transaction. That would be impossible; if there were any more to my involvement than simply being present, the polygraph examiner would have reported it.

Because it was officially determined that I told the truth at the polygraph examination, the Board must decide whether to believe the polygraph examiner’s version of the facts or SA Coder’s. I suggest that the polygraph examiner, clearly a more senior agent, did the better investigating and filed the more accurate report.

Given that I have offered to take a supplemental polygraph examination regarding the veracity of the facts in this appeal,¹ I do not expect SA Coder to dispute the fact that he read from my own written statement and did not ask the questions that his FD-302 implies were

¹ Offer made in Office of Professional Responsibility complaint, filed 1/3/2010.

asked. What this means is that four Special Agents heard or read the same information, and three of them including the polygraph examiner independently wrote that I “accompanied a friend” or was “present,” without mentioning any other involvement. My question for the Board is whether it believes that the fourth Special Agent, SA Coder, has some special ability to develop information that the other three agents do not.

B. Witness James Doe Confirms the True Facts.

The issue, of course, is not what was said or not said to SA Coder. The issue is whether I was involved in the drug transaction. My friend James Doe is in the best position to determine my involvement in the transaction. Mr. Doe has filed a declaration in which he clearly states that I was not involved in the transaction. The following table shows SA Coder’s FD-302 contrasted with the true facts:

SA Coder’s FD-302	Declaration of James Doe
“He said that he was involved in the decision to travel to the house to buy the drugs”	“Mr. Doe was not involved in the decision to make the purchase. Mr. Doe was not involved in the decision to travel to the house”
“He stated that he assisted in negotiating the price of the marijuana purchase between the friends.”	“Mr. Doe was not involved and did not assist in the ‘negotiation’ of the purchase price between me and Chris.”
“He stated that he acted as a ‘representative’ of the buyer of the marijuana to the seller.”	“Mr. Doe did not act as my representative or attorney.”

Mr. Doe continues: “Mr. Doe was not involved in the transaction. Neither I nor Chris considered Mr. Doe to be involved.” “No one with any knowledge of drugs would consider Mr. Doe to have been involved in this transaction, and he should have asked me before reporting this.” “Mr. Doe was, at worst, comic relief to me and Chris due to Mr. Doe’s ignorance of drugs.” “Mr. Doe excused himself and was not present when Chris and I actually came to our agreement and exchanged the marijuana.”

Mr. Doe’s declaration conclusively establishes the true facts.

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1 **C. SAAU Approved the True Facts.**

2 The rule is that the Special Agent Applicant Unit is the authority in situations in which an
3 applicant is reported to be involved in a drug transaction, or other unusual circumstances. MIOG
4 § 67-3.2.3(5)(d).

5 Here, SAAU reviewed the polygraph report and SAAU approved the version of the facts
6 I reported at the polygraph and in my written application. (The report references my written
7 application). The “CONTINUE” directive is circled by the reviewer, indicating that SAAU
8 decided to continue my processing. This may explain why SA Coder wrote his FD-302 the way
9 he did—my written statement in the SF-86 was not enough to disqualify me, so SA Coder had to
10 report facts that went above and beyond my SF-86.

11 Because SAAU was aware of this incident and approved my processing, the decision was
12 made before my file went to SACU and it seems inappropriate to revisit it.

13 **D. The True Facts are not a Crime.**

14 The rule is that possession of marijuana is unlawful.

15 Here, although I was present in the same house, I did not have possession of any
16 marijuana or money in this incident. I did not use any of the drug. In other words, I committed
17 no crime.

18 The rule is that anyone who aids and abets a crime may be held liable as a principal.
19 Aiding and abetting means providing material support or other resources to parties to a criminal
20 act.

21 Here, I was not an aider or abettor because I did not provide any support, money, or
22 other resources. I also excused myself and was not present when James and Chris came to their
23 agreement and exchanged the marijuana. A person who withdraws may not be held liable as an
24 aider or abettor.

25 No one was charged or convicted of any crime arising out of this incident. Pursuant to
26 OPM criteria, I question the propriety of considering conduct that is not “use” of a drug and that
27 did not result in a criminal conviction. The Analyst appears to have been aware of this problem,

1 because the beginning of her determination says the basis for her adjudicative recommendation is
2 “drug use,” while the end of her report states the basis is “criminal conduct.”

3 **E. The True Facts are not an Ethical Violation Under California Law.**

4 The Rules of Professional Conduct establish the ethical duties of California-licensed
5 attorneys. There are no comparable Federal rules.

6 Rule 3-210 of the Rules of Professional Conduct states that an attorney may not advise a
7 violation of law unless there is a non-frivolous argument that the law is invalid.

8 Here, I advised James that I could not act as his attorney in this transaction. As James
9 states, I did not act as his attorney or representative, and I was not involved and did not assist in
10 any aspect of the transaction. I complied with Rule 3-210.

11 The Rules of Professional Conduct impose ethical duties when an attorney is in an
12 attorney-client relationship, and do not regulate personal life conduct of the attorney unless
13 otherwise stated in the Rules.

14 Here, there was no attorney-client relationship. I happen to be well-versed in the area of
15 formation of the attorney-client relationship, because [identifying information redacted]

16 [redacted]
17 [redacted]. Contrary to the OGC attorney’s opinion, I was not acting as an
18 attorney by merely being present.

19 The rule is that an attorney has a general duty to “uphold” the law and not commit
20 felonies involving moral turpitude. Moral turpitude generally means dishonesty or serious
21 crimes.

22 I am sorry this incident ever happened. However, being present in the same house when
23 a friend purchases less than \$100 of marijuana is not an ethical violation. I also take issue
24 with being informally judged by an attorney who is not licensed to practice in my State. What
25 happened here is that I was held to a higher standard than the actual law or ethical rules of my
26 State, based on SA Coder’s version of the facts, with no opportunity to provide a response.

27 //

**F. An Investigation in Accordance with the FBI Manual Would have
Developed the True Facts.**

The rule is that an applicant investigation must be exacting, fair, and unbiased. MIOG § 67-7.7(4).

The rule is that a Special Agent conducting an applicant investigation “should be persistent in his/her effort to pursue every lead to its logical conclusion.” MIOG § sec. 67-7.7(7) (emphasis added).

The rule is that “[d]erogatory information should be fully developed and reported in detail. Ascertain facts on which derogatory conclusions [sic] predicated and follow through in questioning to obtain such facts.” MIOG at § 67-7.7(8) (emphasis added).

The rule is that “[r]eports should show unbiased and complete inquiry. If some question exists regarding accuracy of derogatory information, identify original sources.” *Id.* (emphasis added).

Here, in addition to making false statements as discussed in my declaration, SA Coder failed to conduct his investigations of 6/25/2009 and 6/30/2009 in accordance with the FBI manual.

SA Coder knew there were additional leads to pursue, because he twice asked me for **James** and **Chris's** contact information. I provided SA Coder with **James** and **Chris's** contact information as requested. The logical conclusion of SA Coder asking for and being provided two witnesses to a drug-related incident would be contacting the witnesses to see what they had to say. An unbiased and complete inquiry would include at a minimum simply calling **James** and **Chris** to ask if they had any comments. As the purchaser and seller, **James** and **Chris** were clearly in the best position to judge whether I was involved.

By failing to follow these leads to their logical conclusion, SA Coder exhibited bias, unfairness, and prejudice by manipulating his investigation. By manipulating his investigation with willful blindness to the information **James** and **Chris** would have provided, SA Coder concealed the true facts and the specific factual basis of my conduct.

1 Had SA Coder pursued the leads I gave him, the investigation would have revealed
2 that I was not involved in the transaction and that I never should have reported the incident, as
3 James has shown in his declaration. At worst, I misjudged my involvement when I reported this
4 incident in my SF-86 in my effort to be forthcoming with the FBI. I find it difficult to believe
5 that the FBI has not previously been faced with a situation in which an applicant over-reported
6 negative information that was later cleared up in the investigation. The problem is that here,
7 because SA Coder conducted an incomplete investigation and did not fully develop the facts, I
8 never had that chance.

9 G. Supplemental Declaration

10 Because SA Coder never asked and I never answered the questions that would establish
11 the propositions in his FD-302, I take this opportunity to ask and answer them:

12 I, John Doe declare:

13 Q. Were you involved in the decision to travel to the house?

14 A. No.

15 Q. Were you involved in the decision to buy the drugs?

16 A. No.

17 Q. Did you accompany James for the purpose of buying marijuana?

18 A. No, my purpose was to visit with Chris.

19 Q. Did you assist in the negotiation of the purchase price?

20 A. No.

21 Q. Did you act as a representative or attorney to either party?

22 A. No.

23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct.

/S/ JOHN DOE

25 Date: 2/7/2010

26 //

27 //

1 **REQUESTED RELIEF**

2 The Analyst indicates in her email message to Edward M. Broussard of the Office
3 of General Counsel that this incident was all that stood between me and the full background
4 investigation that I was going to receive: "I was going through the process of scoping the case
5 so that leads could be sent out and his BI could get started, when I came across an attachment he
6 included in the SF-86 about Marijuana."

7 Because the suitability determination and discontinuation are based on wrong information
8 reported by a Special Agent who (1) contradicts other Special Agents, the polygraph report,
9 witness James Doe, and the applicant, and (2) failed to conduct his investigation in accordance
10 with the FBI manual, the decisions should be reversed and my case reprocessed by different
11 SACU personnel.

12 Respectfully submitted by:

13 /S/ JOHN DOE

14 2/7/2010

15 Date

16 John Doe
17 Applicant