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Dept.: C-45

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Motion: 2-28-14

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,* v. SCOTT EVANS DEKRAAI, *Defendant.*	Case No.: 12ZF0128 NOTICE AND NONSTATUTORY MOTION TO DISMISS THE DEATH PENALTY; POINTS AND AUTHORITIES IN SUPPORT THEREOF; EXHIBITS AND DECLARATION OF COUNSEL.

PLEASE TAKE NOTICE that on February 28, 2014, at 9:00 a.m. or as soon thereafter as the matter may be heard in Department C-45 of the above-entitled court, Defendant Scott Dekraai will move this Court for an order prohibiting a penalty phase or alternatively dismissing the special circumstances allegations in this case should Dekraai be convicted of the murders alleged in the indictment.

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MOTION

Defendant Scott Dekraai hereby moves this Court for an order prohibiting a penalty phase in this case should Dekraai be convicted of the special circumstances murders alleged in the indictment, or alternatively an order dismissing the special circumstances allegations. Said motion is based upon this notice and motion, these Points and Authorities, the exhibits, the declaration of counsel, the testimony and evidence presented at the hearing on the motion, Dekraai's state and federal constitutional rights to counsel, a fair trial, due process, and the right to be free from cruel and unusual punishment, the outrageous governmental conduct engaged in by the prosecution and law enforcement, this Court's inherent judicial power, Penal Code section 1385, and any argument of counsel presented at the hearing on the motion.

Should the Court prohibit the imposition of the death penalty, it is anticipated that if Dekraai is convicted of the special circumstance murders, he would be sentenced to eight consecutive life sentences without the possibility of parole, along with consecutive sentences for additional charges and enhancements. Alternatively, should the Court dismiss the special circumstance allegations, it is anticipated Dekraai would be sentenced to more than 400 years to life in prison.

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STATEMENT OF THE CASE

Defendant Scott Dekraai was arrested on October 12, 2011 and taken into custody. On October 14, 2011, the prosecution filed a complaint against Dekraai in case number 11CF2781.[1] On the same date, Dekraai appeared for arraignment on the Complaint while represented by private attorney Robert Curtis. The arraignment was continued at Dekraai's request to October 24, 2011.[2]

On January 24, 2012, the prosecution first provided discovery related to Dekraai's contact with Inmate F.[3] According to that discovery, on October 19, 2011, at approximately 2:30 p.m., members of the Dekraai prosecution team, which included Assistant Orange County District Attorney ("OCDA") Dan Wagner and Senior Deputy District Attorney Scott Simmons, OCDA Investigator Bob Erickson, Seal Beach Police Department ("SBPD") Detective Gary Krogman, and Orange County Sheriff's Department ("OCSD") Deputies Ben Garcia and Bieker, met with an Orange County Jail inmate named Inmate F. at the Orange County Jail. Inmate F. was questioned about statements made to him by Dekraai while the men were incarcerated together at the Orange County Jail.

After interviewing Inmate F., several members of the prosecution team met with OCSD personnel and requested that a covert audio recording device be installed in

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[1] An indictment against Dekraai was filed on January 17, 2012, under the current case number.

[2] Pursuant to Evidence Code section 452, subdivision (d)(1), Dekraai respectfully requests the Court take judicial notice of the minute orders from October 14 and October 24, 2011, in case number 11CF2781.

[3] Dekraai is honoring the prosecution's previous request to use "Inmate F." in place of the witness' actual name. Additionally, similar language is being used in place of other individuals' names mentioned in this brief, who have pending matters, where facts related to their case are discussed. Oscar Moriel, another informant referenced in this motion, is being identified by his actual name as prosecutors have revealed his identity in discovery in multiple cases. Moriel has also testified in three trials using his complete name.

Dekraai's cell at the Intake and Release Center. The device was installed on October 19, 2011, and began recording that day at 5:37 p.m. The device recorded conversations in Dekraai's cell from that date and time until October 25, 2011, at 4:39 a.m.[4] The device was removed from Dekraai's cell on October 25, 2011, and the recordings were copied to a compact disc. The recording device captured a number of conversations between Dekraai and Inmate F.

Dekraai's counsel, Assistant Public Defender Scott Sanders, filed an informal request for discovery on October 16, 2012, seeking discovery exclusively related to Inmate F. (Declaration of Attorney Scott Sanders, attached herein as Exhibit A; Defendant's informal discovery request, filed October 16, 2012, attached herein as Exhibit B.) The prosecution had provided the discovery requested in paragraph one. None of the other requested items had been discovered. (Exhibit A.)

On October 19, 2012, Sanders and Wagner[5] spoke about the informal discovery request. Wagner stated he would not provide the requested discovery, as he did not intend to call Inmate F. as a witness. Sanders stated that, nonetheless, the defense intended to call Inmate F. at a motion to suppress Dekraai's recorded conversations with Inmate F. as violative of Dekraai's Sixth Amendment right to counsel. Wagner reiterated that he would not provide the requested discovery absent an order from this Court. (Exhibit A.)

On December 28, 2012, Dekraai filed a Motion to Compel Discovery, seeking the discovery identified in the informal discovery request. (Defendant's Amended Motion to Compel Discovery, *People v. Dekraai* (Super Ct. Orange County, No. 12ZF0128), attached herein as Exhibit C.)

On January 18, 2013, the prosecution filed its Opposition to Defendant's Motion to

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[4] On October 24, 2011, Dekraai appeared in court and the Public Defender was appointed to represent him.

[5] Individuals referenced in this motion will hereafter be referred to only by their last names for clarity and brevity, and not out of disrespect.

Compel Discovery, arguing the Court should not order disclosure of any of the identified items within the discovery motion. (People's Opposition to Defendant's Motion to Compel Discovery, *People v. Dekraai* (Super Ct. Orange County, No. 12ZF0128) and Declaration of Dan Wagner in support of People's Opposition to Defendant's Motion to Compel Discovery, *People v. Dekraai* (Super Ct. Orange County, No. 12ZF0128), attached herein as Exhibit D, p. 7.)

On January 24, 2013, Dekraai filed a Reply to the Prosecution's Opposition to Defendant's Motion to Compel Discovery. (Defendant's Reply to People's Opposition to Defendant's Motion to Compel Discovery, *People v. Dekraai* (Super Ct. Orange County, No. 12ZF0128), attached herein as Exhibit E.)

On January 25, 2013, this Court heard oral argument on Defendant's Amended Motion to Compel Discovery. This Court ordered the items requested in Defendant's Motion to Compel Discovery.

On February 8, 2013, the prosecution provided 45 DVDs. The DVDs included 5,490 pages related to Inmate F. There are an estimated total of 1936 audio and video files with an approximate total length of approximately 970 hours. On February 13, 2013, the prosecution provided a single CD with 271 pages related to Inmate F. On March 21, 2013, the prosecution provided 68 CDs, including one with 2479 pages of discovery related to Inmate F. On April 5, 2013, the prosecution provided 13 pages of discovery related to Inmate F. On April 11, 2013, the prosecution provided 14 pages of discovery related to Inmate F. On June 7, 2013, the prosecution provided 3 CDs and 16 pages of discovery related to Inmate F. On September 27, 2013, the prosecution provided a single one page memorandum related to Inmate F.

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SUMMARY OF MOTION AND FINDINGS

The right to a fair trial is only meaningful when those who prosecute and investigate crimes are committed to both honoring defendants' constitutional rights and disclosing evidence that is favorable and material, as mandated by state and federal law. The government cannot justify ignoring legal and ethical responsibilities because of the seriousness of the crime, contempt for the accused, or the "need" to win. Because of the relative ease with which evidence can be suppressed or destroyed and fundamental rights ignored, citizens must be able to trust those vested with this tremendous power to scrupulously honor their responsibility to follow their legal and ethical obligations. This motion presents compelling evidence of shocking misconduct specific to this case and systemic in nature, which shatters that trust.

For those who experience the daily pain of having lost loved ones during the shooting on October 12, 2011, it will be difficult to conceive of conduct by the prosecutors and local law enforcement involved in this case that would warrant this type of motion. Perhaps it will be even more difficult to understand why Orange County's custodial informant program has come to play such a critical role in this case and the discussions herein.

The evidence of Dekraai's culpability, after all, was overwhelming. Dekraai was stopped in his vehicle and surrendered only a few blocks from the location where he had killed eight people and seriously wounded a ninth victim. Within a few hours, he provided a complete confession to investigators with the SBPD.

However, the prosecution would not measure its success in this case by a conviction ensuring Dekraai's incarceration for the remainder of his life, but by whether prosecutors could convince jurors to return a verdict in favor of the death penalty. As will be shown in this motion, the prosecution quickly turned their attention to accumulating evidence that would both prevent Dekraai's successful use of mental health evidence and push the jury's ultimate consideration of mitigating and aggravating factors toward a verdict of death.

With these objectives in mind, it would have been understandably tempting to find some way to learn more about what Dekraai was thinking and what he and his attorney were discussing. However, the prosecution team was comprised of experienced attorneys and members of law enforcement, including Wagner, the supervisor of the homicide unit. They were undoubtedly well-versed on the prohibition against eliciting statements from charged and represented defendants under *Massiah v. United States* (1964) 377 US 201, and appreciative of their legal and ethical obligations with regard to discovery.

It also would have appeared that the OCDA, as an agency, was committed to ensuring that the informant program operating within the local jails ("custodial informant program") would honor these legal principles and protect the interests of justice both for the prosecution and the defense. In fact, the former supervisor of the OCDA's Tri-Agency Resource/Gang Enforcement Team ("TARGET") Unit, Assistant DA John Anderson, and Westminster Police Department Detective Mark Nye were given the significant honor and responsibility of writing a chapter in the United States Department of Justice's *Gang Prosecution Manual*, which included a section that articulated the fundamental principles of an ethical and successful informant program:

> … Police and prosecutors should carefully log all benefits conferred on a CI during an investigation and disclose the benefits before trial to the defense. Such benefits are viewed legally as motivation for a CI to favor law enforcement while testifying. Great care must also be given to disclosing to the defense any exculpatory *Brady* material that might be discovered as a result of the CI's cooperation, *Brady v. Maryland*, 373 U.S. 83 (1963). [¶] CIs should only be used after a written agreement is signed that fully discloses the agreement between the CI and the police (in conjunction with the prosecution). Police should also maintain a log of all supervision of and direction given to a CI and document the performance of the CI, both good and bad. It is critical to present the CI in the most accurate light possible to avoid the appearance that the police and prosecution are hiding things.

(National Youth Gang Center, U.S. Dept. of Justice, Gang Prosecution Manual (July 2009), attached herein as Exhibit F, p. 21.)

Perhaps few understood the immense value of a well-directed informant program better than Anderson. In 2008, the Santa Ana Gang Task Force initiated a multiagency

effort entitled "Operation Black Flag" aimed at weakening the Mexican Mafia's control of local jails and their influence over local gangs. Three years later, the filing of criminal charges against 99 defendants in local and federal court gained national attention. The OCDA's press release announced on July 13, 2011, that the "[o]ffice has charged 26 defendants for their participation in conspiracies to commit murders and aggravated assaults on seven inmates in the Orange County jail at the direction of a violent, Hispanic California Prison Gang..." (Press Release by OCDA, *26 Charged with Conspiracies to Commit Murder and/or Assaults at the Direction of Hispanic California Prison Gangs* (July 13, 2011), attached herein as Exhibit G.) The local and federal effort relied heavily upon inmates participating in the custodial informant program.

One Deputy DA from the TARGET unit was given the responsibility of prosecuting all of the local Operation Black Flag cases: Erik Petersen.[6] Petersen has tried one Operation Black Flag case. During that trial, he relied upon a custodial informant's testimony. Petersen had previously called the same informant as a witness in two gang murder trials. He is scheduled to begin trial this year on another gang murder case in which two custodial informants are scheduled to testify. However, for reasons that will be discussed, Petersen's zeal for prosecuting the referenced murder case and the remaining Black Flag cases has disappeared in the year since this Court ordered discovery.

What significance could this have to *People v. Dekraai*? The prosecution team in this case would ultimately partner with Petersen and Orange County's custodial informant program, including one of its principal informant handlers, Special Handling Deputy Ben Garcia. While the partnership would yield additional incriminating statements from Dekraai, it would also lead to a discovery order from this Court that the OCDA vehemently opposed. The reasons for their opposition would become increasingly clear as the defense

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[6] Petersen is also the assigned DA on each of 2013 cases in the related prosecutions that arose from the "Operation Smokin Aces."

studied the discovery and related materials. These items offered a glimpse into just how far prosecutors and local law enforcement will go to accomplish their perceived mission. **The Court-ordered discovery reveals investigative and discovery practices by the Dekraai prosecution team that are rooted in deception and concealment; an unchecked and lawless custodial informant program overseen by the OCDA; and a string of prosecutions which confirm a culture that confuses winning with justice—prosecutions marked by repeated and stunning *Brady* violations, suborned perjury, and a myriad of other misconduct.**

Soon after his arrest, Dekraai was moved from a tank in the Orange County Jail ("OCJ") where he had been housed into the same one where Inmate F. was located. Dekraai was actually placed in the exact cell that Inmate F. had been occupying just hours earlier. Just before Dekraai arrived, though, Inmate F. was moved into the adjoining cell. Inmate F. befriended Dekraai and ultimately asked him about the crime. Their conversations were memorialized in detailed notes by Inmate F. that were turned over to Deputy Garcia. Prosecutors and members of law enforcement conducted a recorded interview of Inmate F. and shortly thereafter placed a recording device in Dekraai's cell. The device captured Dekraai's discussions of the crime, his mental state, his meetings with his former counsel, as well as his conversations with jail mental health staff. The device also recorded Inmate F.'s persistent efforts to build what Dekraai perceived was a growing friendship between the two men.

In the prosecution team's single recorded interview of Inmate F., which took place prior to the introduction of the recording device into Dekraai's jail cell, Inmate F. explained how he found himself speaking to Dekraai. Inmate F. said that he asked Dekraai why the crime occurred, and then assured him that he really wanted to know what happened. Dekraai purportedly responded by opening up about his life and the incident. After listening to Dekraai, Inmate F. said that his conscience propelled him to contact law enforcement because he believed Dekraai needed to receive the death penalty for his

actions and what he expressed about the crime. Neither the recorded interview nor the subsequent reports indicated that Inmate F. was a custodial informant, nor did they explain how Inmate F. and Dekraai came to be housed in adjoining cells.

It appeared that the prosecution had been the recipient of extraordinarily good luck. The inmate housed closest to Dekraai was a good listener, a great note taker, and someone so selfless that he wanted to assist the OCDA and local law enforcement without wishing for anything in return. OCDA Investigator Erickson's subsequently written report confirmed this picture of Inmate F. The prosecution promised nothing in return for his assistance, which was perfect for Inmate F. because he wanted nothing.

Although Inmate F. told the prosecution team he wanted Dekraai to get the death penalty, the recorded conversations presented a vastly different picture of his feelings toward Dekraai. Inmate F. appeared to express genuine affection for Dekraai, calling him "brother," offering him food and even guidance to make his life in custody easier. He inquired about Dekraai's well-being and his meetings with counsel. Per Inmate F.'s notes, when he observed Dekraai appearing despondent with his head in his hands, he asked, "What's up?" Dekraai began speaking about his life and the crime again.

The prosecution did not disclose any evidence related to Inmate F.'s contact with Dekraai until three months after the recording device was removed from Dekraai's cell. During that window in time, Dekraai's private counsel asked to be relieved and was replaced by two attorneys from the Orange County Public Defender's Office. By happenstance, one of Dekraai's newly appointed attorneys was serving as counsel for another defendant in a special circumstances murder case in which Inmate F. had also elicited statements. Initiating its own study of Inmate F., the defense soon determined from an entry within court minutes that Inmate F. had been transported to testify in a federal case. It was becoming increasingly clear that the prosecution had been far from transparent in its presentation of Inmate F. However, when Sanders requested more information about Inmate F.'s criminal and informant background, the prosecution refused.

Nonetheless, all was still proceeding smoothly for the Dekraai prosecution team until January 25, 2013. That was the date scheduled for the hearing on Dekraai's Motion to Compel Discovery. Wagner had argued, in writing and orally, against disclosure of any information related to Inmate F. In his responsive brief and declaration, Wagner attempted to convince the Court not to order discovery. He conceded and agreed to stipulate that the first prong of a *Massiah* violation had been met during the time the recording device was placed in the cell. Wagner declared that Inmate F. "… was (1) acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage…" (Exhibit D, pp. 6-7, (citing *In re Neely* (1996) 6 Cal. 4th 901, 915).) However, elsewhere in the same Opposition and in his attached declaration filed under penalty of perjury, Wagner stated that Inmate F. never expected nor wanted a benefit for his assistance. He wrote, "The prosecution team told Inmate F. that it would not be giving Inmate F. any consideration or leniency for his efforts. Inmate F. said that he was not looking for any consideration, but that due to the seriousness of the case, he believed the prosecution should hear what defendant had told him." (Exhibit D, pp. 2, 16.)

Wagner made another statement in his declaration that seemed equally suspicious – though the deception surrounding it would not become clear until September of 2013. He wrote the following: "…OCDA does not anticipate nor intend to make any request or recommendation for leniency at sentencing as a result of Inmate F.'s involvement in the present case" and that the prosecution would give a fact-based "appraisal of the value to the case," but only "[i]f summoned." (Exhibit D, pp. 3, 17.) **As will be discussed, neither the Court nor the defense could have known that Wagner and his team were hiding a memorandum to Petersen—concealed for nearly two years—that called into question the veracity of Wagner's declaration and exposed just how far the prosecution would go to defeat the discovery motion and obtain a death verdict**.

Despite the prosecution's efforts to keep the defense from learning more about

Inmate F., this Court ordered compliance with the informal discovery request made many months earlier. The provided discovery related to Inmate F. consists of approximately 5,000 pages and 1,000 hours of recordings. As the Court may recall, Wagner suggested during a subsequently litigated Motion to Continue that the defense was overstating the time required to prepare and that only a few hundred pages were germane to Inmate F.'s informant history. Wagner was partly correct. Not every page was critical. But finding the needles in the haystack has required an enormous undertaking. Dekraai's understanding of the misconduct committed by the Dekraai prosecution team detailed in this motion resulted from studies of Inmate F.'s notes found in OCSD's Confidential Informant ("CI") files. However, notes written by a second informant named Oscar Moriel, which appear in varying quantities in several of the case discoveries provided, will perhaps prove even more important in finally bringing the custodial informant program into the light. **As will be shown, the OCDA, the OCSD, and local law enforcement have exploited the lack of transparency inherent in an investigative program run within the jails. This has allowed them to gather and introduce evidence in violation of the Sixth Amendment with impunity.**

Inmate F.'s Rise to Informant Status and Motivations for His Assistance

The Court-ordered discovery has helped illuminate what prompted the prosecution's aggressive efforts to conceal Inmate F.'s background. The responsive items included reports memorializing Inmate F.'s informant history, his criminal background, as well as prosecution discovery in nine Orange County cases in which Inmate F. was referenced.

The discovery revealed that Inmate F.'s informant history appears to have begun disastrously 14 years ago, when he sought consideration on his first felony case. An Anaheim Police Department detective submitted an entry in the OCDA's CI file for Inmate F., which states the following: "[Inmate F.] WAS TERMINATED AS A C.I. – DO NOT USE AS A C.I." (Criminal and informant history of Inmate F. and OCDA CI file, attached herein as Exhibit H, p. 5760.) As will be seen from an examination of his criminal

background, Inmate F.'s response to nearly all of his arrests was to proclaim his innocence and shift the blame to the "true" wrongdoer. Therefore, it is not surprising that despite his initial failure at informant work, he was drawn to return to a job that values deception. In 2001, he asked if he could receive consideration on another felony case by providing information about other crimes. The Garden Grove Police Department either missed or ignored the warning from the Anaheim detective and agreed.

In 2009 and 2010, Inmate F. found a new and even more compelling set of reasons to re-dedicate himself to informant work. In 2009, he was convicted in one of his two Third Strike cases prosecuted by Petersen. (Inmate F. was also charged in 2006 with a second Third Strike case. To date, he has not been sentenced on either of his cases.) During the trial, Inmate F. lied by testifying that he had left behind his gang and the gang life several years earlier. In fact, he not only had remained in his street gang, but had risen to a leadership position within the Mexican Mafia. At trial, Petersen did not mention Inmate F.'s involvement in the Mexican Mafia, likely because Inmate F. was then a key target in an ongoing Federal RICO investigation related to his Mexican Mafia activities. Nonetheless, Petersen attacked Inmate F. for his dishonesty during closing argument.

After his conviction, Petersen wrote a sentencing brief asking that Inmate F. receive a life sentence. Because Petersen did not mention his Mexican Mafia involvement, Inmate F. believed the government was unaware of the crimes he was committing in the jail, including conspiracies to kill fellow inmates. As a result, Inmate F. unabashedly pleaded with the court to reject Petersen's sentencing request, asking that the court and the probation department recognize him as a changed person who deserved a second chance.

For Inmate F., though, his future as an inmate was growing more bleak. There were increasing signs in 2010 that his ruling "mesa" was being challenged and his opponents were gaining ground. Yet, in an ironic twist, Inmate F.'s crimes and his deceitfulness saved him from life in prison while a target of the Mexican Mafia. Inmate F.'s access to one of the organization's ruling factions within the jail made him a prized commodity for

investigators working on Operation Black Flag and the prosecutor on the related cases, Petersen. The prosecution team also realized that Inmate F.'s own predicaments would motivate him to supply a prolific quantity of information. Therefore, Petersen and his team decided to give Inmate F. a transformative makeover: deceptive and violent inmate to truth-telling and socially responsible informant.

Fully energized, Inmate F. went to work. Special Handling deputies have acknowledged having numerous meetings with Inmate F. in the year that followed. However, the Court-ordered discovery included less than a handful of law enforcement reports. Nonetheless, Inmate F.'s efforts and the secret operations of the custodial informant program have been gradually revealed through a study of selected passages from the 133 pages of Inmate F.'s handwritten notes included in the OCSD's CI file. Inmate F. elicited dozens of statements related to Mexican Mafia activities. However, his work extended beyond that subject matter. Discovery obtained pursuant to the Court order shows that Inmate F. obtained statements from at least three different charged defendants, in addition to Dekraai, which related to murder or attempted murder allegations.

Court-Ordered Discovery Reveals Dekraai Prosecution Team's Efforts to Circumvent *Massiah* and Hide Evidence of Their Intentional Violation

Inmate F.'s informant and criminal history explains the prosecution's opposition to the discovery request and Wagner's declaration. In the 15 months prior to the order, the prosecution team had been concealing evidence that could end their hopes of admitting Dekraai's statements and expose a conspiracy to hide the truth about Inmate F.

The discovery offers insights about the steps taken to suppress the truth about Inmate F., to present his contact with Dekraai as "coincidental," and to keep the custodial informant program's deceptive practices under wraps. With the receipt of the materials, it became clear that prior to their meeting with Inmate F., the prosecution team was well informed about his background. Erickson spoke to Deputy Garcia on the phone the day before the interview. The entire team met with Garcia the following day, just prior to

Inmate F.'s interview—a point that was not disclosed until Garcia was interviewed by Wagner in March of 2013.

Moreover, the discovery revealed that Garcia was not a random deputy from the OCSD who stumbled upon an inmate with information about this case. He was Inmate F.'s primary handler throughout the preceding year and someone who engineered numerous inmate movements so that the informant could elicit statements. Garcia would have had no reason to hide Inmate F.'s informant background from the prosecution team. Fellow prosecution team members also would have asked him about the circumstances that led to Inmate F. and Dekraai being housed in adjoining cells. Yet not a single word of these discussions was included within reports by Erickson or SBPD Detective Krogman. Unquestionably, Wagner read those reports before they were discovered to the defense and approved the contents and their concealment.

The discovery offered insights into just how far the prosecution was willing to go in order to succeed. Wagner and his team decided before the interview that if this Court knew Inmate F. was a veteran informant, it would never believe that the contact between Inmate F. and Dekraai was coincidental. They devised a simple solution for their predicament; they would hide the fact that Inmate F. was an informant. In order to ensure that the defense was misled about Inmate F.'s informant status during the recorded interview, they spoke to Inmate F. prior to activating the recording device to make sure that he did not reveal on tape who he really was or what he wanted. (A slip-up during the recording would also reveal that the team questioned Inmate F. about issues such as defense strategies prior to activating the recorder.)

With the recorder then activated, Inmate F. stated on cue that his reason for coming forward was that Dekraai "needs to be put away forever and I think that this…this man is…-- needs to be put to death…you know, for what he did…and what he explained to me." (Transcription of interview of Inmate F. by OCDA Investigator Bob Erickson, OCSD Deputy Bieker and OCSD Deputy Garcia (Oct. 19, 2011), attached herein as Exhibit I, p.

2.)

What aspect of the prosecution team's conduct pertaining to the interview of Inmate F. was the most unethical? Perhaps it was the conspiracy among prosecutors and law enforcement to hide Inmate F.'s informant history during the recorded portion of the interview. Perhaps it was the willingness of everyone in the room to allow Inmate F.'s statement of his purported motivation to go unchallenged, even though they believed his answers were not completely truthful. In hindsight, their commitment to silence and reasons for it were clear: a single follow-up question could have prompted Inmate F. to mention his informant history and acknowledge that he was seeking assistance on his cases. They understood that if a court learned that Inmate F. had worked tirelessly for more than a year to obtain maximum consideration in his two "life" cases, it would be nearly impossible to believe that the very same informant neither wanted nor anticipated a benefit for his assistance in the biggest mass murder case in Orange County history.

The Hidden "Informant Assistance" Memorandum

As discussed previously, Wagner wrote in his declaration in support of the prosecution's Opposition to the discovery motion that the "…OCDA does not anticipate nor intend to make any request or recommendation for leniency at sentencing as a result of Inmate F.'s involvement in the present case" and that the prosecution would give a fact-based "appraisal of the value of the case," but only "[i]f summoned."

However, in November 2011, just one month after interviewing Inmate F., OCDA Investigator Erickson sent a memorandum to Petersen expressing the OCDA's actual plans for Inmate F.'s cases. The memo was certainly either penned by Wagner or sent at his direction. For reasons Wagner will have to explain, it was withheld from the defense until September 26, 2013. In contrast to what Wagner stated in his declaration, the memo was intended to ensure that Inmate F. would receive consideration for his valuable efforts. Erickson wrote:

> …In summary, Inmate F. provided facts and intelligence about the events of the day of October 12, 2011, that only Dekraai could have known. Those facts and intelligence will likely greatly enhance the prosecution of Dekraai, especially in the event there is an insanity plea entered by Dekraai. Following Inmate F.'s interview, a covert investigation conducted with the jail facility further established the validity of the information provided by Inmate F. Inmate F. may eventually be called as a witness in the case against Scott Dekraai. [¶] **As the prosecutor handling Inmate F.'s case, this memorandum is being directed to you for your consideration and information only.** I respectfully request that you keep Inmate F.'s name in [*sic*] information, as it relates to the Dekraai case, confidential. Nothing about Inmate F. or his statements regarding the Dekraai case have been discovered to the defense.

(Memorandum to Deputy DA Erik Petersen from Investigator Robert Erickson (Nov. 17, 2011), attached herein as Exhibit J, emphasis added.)

The concealment of this memo was a stunning *Brady* violation by a leader within the OCDA. The memo was directly inconsistent with Wagner's representations in his declaration and the Opposition to the Motion to Compel Discovery. If Wagner was lying to the Court when he wrote that the "OCDA does not anticipate nor intend to make any request or recommendation for leniency" based upon Inmate F.'s assistance in *Dekraai*, the legal and ethical implications are obvious. Assuming arguendo he was not lying, the ethical implications are equally serious and provoke numerous questions. For example, did Wagner tell Petersen to disregard the November memo and to instead withhold "consideration"? Did he give this command even though he believed "consideration" was deserved based upon Inmate F.'s valuable assistance? Did he tell Petersen why he no longer wanted Inmate F. to have "consideration" for his work on Dekraai?

The most obvious reason that Wagner would have withheld benefits is a terribly troubling and unethical one: he and others had already conspired in their interview of Inmate F. to hide his informant status. The team believed that their false presentation of Inmate F. was enhanced by suggesting he would receive nothing in return. Erickson reiterated that point in his report. Wagner wanted to be consistent on this issue in his representations to the Court. Wagner could tell the "truth"—Inmate F. would not be

receiving a benefit from the OCDA for his assistance in *Dekraai*—as long as he instructed Petersen to no longer follow the request that Inmate F. be given consideration in the November 2011 memo.

Petersen has as many questions to answer about the memo as Wagner. For example, was Petersen told at some point after receiving the memo to give Inmate F. consideration for his work on *People v. Dekraai*, but to not acknowledge the connection to this case in any discussions with the court? What was his response to whatever direction came from Wagner or another member of the Dekraai prosecution team?

The memo is also significant because it corroborates that shortly after their interview of Inmate F., the prosecution team began taking steps to hide his informant work in the instant matter. Toward that end, the memo instructed Petersen not to disclose to anyone Inmate F.'s assistance in eliciting statements from Dekraai—noting that the prosecution had not given Dekraai the evidence obtained with the assistance of Inmate F.

Wagner knew that Inmate F. was working as an informant in other cases prosecuted by Petersen, and that Inmate F.'s efforts with Dekraai were discoverable in those matters. Wagner knew that evidence of his own team's conspiracy to conceal Inmate F.'s identity, the informant's misleading statements about his motives for providing assistance, and the recordings that captured Inmate F.'s talent for ingratiating targets, was unquestionably required *Brady* discovery in Petersen's cases in which Inmate F. was an informant.

For Wagner, though, this memo's directive was entirely logical considering the risk that existed: if other defendants received discovery related to the instant matter, it was only a matter of time before Dekraai's defense team would learn that Inmate F. was an informant on those cases, as well. This memo corroborated that the Dekraai prosecution team was not only fully committed to hiding *Brady* evidence in the instant matter, but was unconcerned that the price for keeping *Brady* material from Dekraai was violating the discovery rights of other defendants.

Dekraai Prosecution Hides Information from Confidential Informant Files

The prosecution's perspective on its *Brady* obligations in the instant matter and in other cases where Inmate F. may be a witness is evidenced by additional acts of concealment pertaining to Inmate F's confidential informant files. First, the prosecution team decided not to create an entry in Inmate F.'s OCDA CI file, which should have noted his assistance in the instant matter. Second, Special Handling Deputy Garcia was apparently directed by the Dekraai prosecution team to exclude from the OCSD's CI file Inmate F.'s notes describing the statements elicited from Dekraai, as well as any reference to his assistance in *People v. Dekraai*. Again, both of these steps were designed to reduce the chances that a prosecutor in another case would disclose to a defendant evidence of Inmate F.'s assistance related to Dekraai, which in turn would lead to Dekraai learning about Inmate F's additional informant work. Separate of what these acts confirm about the commitment of the Dekraai prosecution team to hiding evidence from Dekraai, they also corroborate that the team was completely indifferent to the rights of other defendants who were entitled to discovery on Inmate F.'s informant efforts in the instant matter.

Wagner Conceals Other Custodial Informant Deception and Repays Favor by Helping Conceal Petersen-Led "Coincidental Contact" Scam

Wagner and his team have been presented with numerous opportunities to demonstrate they will abide by their *Brady* obligations, and each time they have answered the challenge similarly. One particularly compelling example of the prosecution's perspective on *Brady* was Wagner's response to receiving information that Petersen was engaged in a "coincidental contact" scam designed to circumvent *Massiah* in *People v. Inmate I.* The discovery from *Inmate I.* was provided pursuant to this Court's order because Inmate F. is a witness in that case, as he allegedly obtained confessions from Inmate I. regarding both of his charged homicides. Inmate F.'s notes confirm that he had **obtained the statements from Inmate I. nearly one year after the accused was incarcerated and charged**. If Wagner examined the notes in Inmate I.'s case file, he

would have immediately seen that Petersen planned to employ a nearly identical approach to avoiding exclusion based upon *Massiah* as the one he and his team were using in *Dekraai*.

However, before March 29, 2013, perhaps Wagner would have been able to claim that due to the volume of the discovery he had somehow overlooked the details of Inmate I.'s case. On that date, though, he interviewed Special Handling Deputy Seth Tunstall. During that interview, Wagner received answers that either informed him for the first time of a potential *Massiah* violation in *People v. Inmate I.* or eliminated any continuing plausible deniability that he was uninformed of this serious problem:

> Q2: Okay. Um, was any other type of, uh, criminal case ever discussed that you, uh, were aware of where law enforcement was talking to Inmate F about, um, providing information concerning a criminal case that was **outside of Eme politics**, uh, jail beatings and assaults, or cases committed by, um--crimes committed by suspected members and associates of Eme?
> **A: I believe in his notes there's a reference possibly to [Inmate I.], um, reference his, uh, murder case. Um…**
> Q2: And so [Inmate I.], is that--that sounds like, uh--is he a street gang member?
> A: He's a Delhi street gang member.
> Q2: All right.
> A: Um, he falls under the southern Hispanics. Um…
> Q2: Is he a Sereno?
> A: He's a Sereno.
> Q2: So he's loyal to Eme?
> A: Correct.
> Q2: Uh…
> A: He follows the-the rules of the Eme.
> Q2: Was he part of the, um, Eme leadership structure within the, um, local, um, penal institutions?
> A: Um, no he was not.

((Interview transcription of OCSD Deputy Seth Tunstall by OCDA Investigator Bob Erickson and Assistant DA Dan Wagner (Mar. 29, 2013), attached herein as Exhibit K, p. 22, emphasis added.)

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Wagner asked one final question:

> Q2: Okay. Um, so-so you're identifying [Inmate I.] as one individual. Um, **is that the only individual that you're aware of that-that, uh, Inmate F--there was a discussion with Inmate F about eliciting, um, gathering, uh, providing information, um, that was outside of the Eme politics?**
>
> A: I don't recall any others offhand. **There may have been, but right now I'd have to review his notes**, which unfortunately are lengthy.

(Exhibit K, p. 22, emphasis added.)

The lead prosecutor on Dekraai and the supervising attorney for the homicide unit understood the implications of what he had been told—demonstrated by his obvious failure to ask any meaningful follow-up questions. If Wagner truly did not recognize the name, Inmate I., all he needed to do was return to his office and study Inmate I.'s file and Inmate F.'s notes, which were included within the Court-ordered discovery. This would have quickly confirmed a likely *Massiah* violation in the works and Petersen's shocking concealment of evidence relevant to Inmate F.'s informant and criminal background. The supervising prosecutor for the OCDA's homicide division should have then taken, at a minimum, the following actions: order Petersen to disclose to Inmate I. evidence relevant to Inmate F.'s informant and criminal background, including a **copy of the recorded conversation with Tunstall that Wagner had just conducted**; investigate and report to appropriate authorities if Petersen violated legal and ethical rules; and initiate an investigation to determine whether Petersen, other prosecutors, deputies from Special Handling, and members of other agencies had also attempted to purposefully violate *Massiah* and conceal it. He also had an obligation to Dekraai. If Wagner examined Inmate F.'s notes and realized that the government had set up a fraudulent "coincidental contact" in Inmate I.'s case, he was required to disclose it to the defense in the instant matter, rather than simply hope that Dekraai's defense team would miss it. Even if Wagner, the OCDA, and the SBPD take the position that they had no role in facilitating the contact between Dekraai and Inmate F., evidence of other coordinated "coincidental contacts" between Inmate F. and represented murder defendants remains highly relevant to whether the

Special Handling Unit orchestrated the contacts in both *People v. Dekraai* and *People v. Inmate I.*

For Wagner, though, he knew that any objective investigation into Petersen's actions in *Inmate I.*'s case would lead directly back to his own team's misconduct. How could Wagner take Petersen to task when his own team had engaged in nearly identical misconduct related to Inmate F.? **How could Wagner direct Petersen to turn over *Brady* material when he had ordered the very same prosecutor, via Erickson's memo, not to disclose *Dekraai* discovery in Petersen's cases**? How could he launch the investigation into whether the OCDA and local law enforcement were regularly violating *Massiah* when it would inevitably reveal that these types of violations were an open secret within his office and among local law enforcement? Wagner knew he lacked a solution that would avoid tremendous damage to this case, his office, local law enforcement, and his own reputation and career. So he crossed his fingers and did nothing.

Wagner Hides From Evidence of OCDA-Directed *Massiah* Violations

Each interview with Inmate F.'s three handlers seemed to present its own unique challenge to Wagner's commitment to evading his legal and ethical responsibilities. Sadly, each time the veteran prosecutor responded similarly. In his interview with SAPD Detective Gonzalo Gallardo, Wagner found himself confronted with information both helpful to Dekraai and relevant to whether the OCDA was directing Sixth Amendment violations within the jails.

Wagner attempted to lock down that Gallardo never directed Inmate F. to elicit statements from a high profile murder defendant disconnected from the Mexican Mafia investigation. (Transcription of interview of SAPD Detective Gallardo by OCDA Investigator Erickson and Assistant DA Dan Wagner (May 13, 2013), attached herein as Exhibit L, p. 14.)

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The answers were not what Wagner wanted to hear:

> Wagner: All right. Okay. Um, did you ever -- I guess to get very specific to this case, um, did you ever direct Inmate F., um, to try to gather information against, uh, **like a high profile, uh, murder defendant** who was not a part of -- was not connected in any way with the Mexican Mafia?
> Gallardo: **There was times we did -- we did use informants, um, and we basically under the direction of a district attorney, we would use inmates.**
> Wagner: Okay. Now I'm going **specifically towards Inmate F. now.**
> Gallardo: Uh, I believe we did. I think **he did provide some information on -- on some murder suspects.**

(Exhibit L, p. 14, emphasis added.)

Thus, according to Gallardo, custodial informants—including Inmate F.—had obtained such statements from murder defendants "under the direction of a district attorney." Wagner was stuck. He had received information that was beyond what he asked, but information that was, nonetheless, highly relevant to this case and to systemic issues related to *Massiah*.

The first case that must have come to Wagner's mind was *People v. Inmate I*. It had been over a month since Tunstall had told Wagner about Inmate F.'s elicitation of statements from murder defendant Inmate I. Wagner knew he had turned his back on what Tunstall disclosed. While Wagner could have confirmed with one question the name of the Deputy DA to whom Gallardo was referring, his instinct was to hide the identity of the prosecutor from future listeners to the recording, and hope they would overlook its significance. Yet, the significance was great, as Wagner knew. Gallardo's answer went beyond those of Tunstall's—indicating that a prosecutor with the OCDA had directed informants, including Inmate F., to elicit statements from incarcerated murder defendants. Wagner knew he had not handed over to Dekraai any discovery indicating that a prosecutor had directed Inmate F. to question a charged murder defendant.

Wagner's response to Gallardo provides just one example of why the Dekraai prosecution team cannot be trusted, and why Dekraai will never have a fair penalty phase

in this case. From Wagner's perspective, Gallardo's disclosure was not seen as an opportunity to learn critical information, but a reason to switch subject matters. **Not a single follow-up question was asked**. Wagner's discomfort is apparent as he attempted to escape what he had been told. Wagner seemed unsure how to navigate away from Gallardo's unwanted responses without making their significance obvious to the listener. Wagner then asked Gallardo the absurd question of whether the **Santa Ana** detective had directed Inmate F. to question Dekraai about the **Seal Beach** murders. Wagner finally received the simple "no" he wanted and moved on.

Evidence That Prosecution Team Remains Committed to Concealment

Wagner's reactions during the interviews of Tunstall and Gallardo demonstrate the ease with which some prosecutors scamper past evidence helpful to the defense—only glancing back to make sure no one else has seen it. However, Wagner and his team demonstrate throughout this study that they are also willing to take more proactive steps to deceive the defense. Wagner's interview with Inmate F.'s primary handler, Deputy Garcia, would provide another example.

Wagner interviewed Deputy Garcia on the same day as Tunstall, on March 29, 2013. Before the interview, the prosecution team provided Garcia with a list of high profile inmates and purportedly asked him to determine whether Inmate F. had any contact with them and whether he had elicited any statements. The investigation of this issue and the questioning of Garcia on the subject matter would turn out to be a pre-arranged fraud.

During the recorded interview, Wagner asked Garcia to confirm that he had compared the housing locations of the listed inmates and Inmate F. and determined that none of the inmates on the list had been in contact with Inmate F. One of the inmates on the list was Inmate M., another capital defendant. During questioning, Garcia stated that Inmate F. did not have contact with any of the inmates on the list, including Inmate M., who was identified by name during this line of questioning. However, a few minutes further into the interview, Garcia made a mistake. **The recording suggests that Garcia**

forgot Wagner's off the record directive not to acknowledge that Inmate F. had been in contact with Inmate M. and had elicited a statement. Garcia suddenly mentioned his off the record discussion with Wagner, during which Garcia apparently described Inmate F. eliciting a statement from Inmate M. Before the recording began, Garcia also apparently explained to Wagner that he told Inmate F. not to elicit additional statements from Inmate M. When Garcia revealed this, Wagner quickly moved to another subject matter.

There are several reasons that Wagner believed it was critical to conceal the contact between Inmate F. and Inmate M. His interview of Garcia revealed one of them. Wagner's questions indicated that he hoped to assert at the anticipated *Massiah* motion that if the prosecution had wished to plant an informant next to Dekraai, there were better choices than Inmate F. Wagner knew this argument was already weakened by the fact that Inmate F. had elicited statements from a second capital defendant, Inmate D. The last thing Wagner wanted the defense to learn was that Inmate F. had elicited statements from yet another capital defendant prior to Dekraai's arrest. Wagner probably imagined Inmate F.'s uncomfortable responses as he answered questions about his motives for eliciting statements from Inmate M. Did Inmate F. seek inculpatory statements from Inmate M. because of his hatred of what the defendant had done in that case, as well? Were his efforts to obtain statements from Inmate M. simply another "freebie" for the prosecution for which he neither wanted nor anticipated consideration?

The implications of this behavior are obvious and the damage is irreparable in this proceeding. As will be shown, the lead prosecutor in this case has repeatedly concealed evidence material and helpful to the defense, eviscerating any reasonable faith that he will comply with *Brady* obligations pertaining to issues of mitigation and aggravation.

But, as with so much of the misconduct uncovered in this study, there was still more lurking beneath the surface. A review of the CI files maintained by both the OCDA and OCSD reveal that the decision to hide Inmate F.'s contact with Inmate M. actually began prior to Garcia's interview. During Garcia's same interview with Wagner, he stated that

upon receiving informant information about a crime investigated by an outside agency, he would immediately contact the investigating agency and the OCDA. Inmate F.'s OCSD CI file confirms that Garcia or another Special Handling Deputy would also place a copy of the relevant notes in the file and type a brief summary of the pertinent information. **However, neither CI file includes any reference to Inmate F.'s assistance in *People v. Inmate M*.** The inexplicable absence of any mention of Inmate M. raises yet more questions relevant to both the manipulation of information pertaining to Inmate F., and to systemic issues of deception that have infested the custodial informant program.

The "Coincidental Contact" Fraud and Evidence of a Key Prosecution Witness's Dishonesty

Independent of the Dekraai prosecution team's actions, the government's conduct in four cases involving Inmate F. delegitimizes the "coincidental contact" claim in this case. As will be shown, it appears that the OCDA, Special Handling, and local law enforcement were laying the groundwork to introduce statements elicited by Inmate F. from charged and represented defendants; that is, Inmate F. was not working with the expectation of a benefit and the contact between him and the targeted defendants was merely coincidental. Among these four matters, the cases of *People v. Inmate I.* and *People v. Inmate S*. are among the most instructive.

Inmate I. and Inmate S. are Delhi street gang members. As referenced above, Inmate I. is currently awaiting trial in two "cold case" gang murders that Petersen is prosecuting. Inmate S. is charged with two counts of attempted murder for the benefit of his gang. He was found incompetent to stand trial in 2011, and proceedings are currently suspended. Inmate F. elicited multiple statements about the charged crimes from both defendants. If Inmate F. decided to elicit statements from these two defendants while trolling the jails for confessions, it would have given rise to a *Massiah* violation. But is that what occurred? Was he on his own without any assistance or guidance from the government?

The hidden truth is that the prosecution teams in both of these cases were suppressing evidence and manipulating the contents of investigative documents in order to mislead the defense. These actions mirrored those by the Dekraai prosecution team, which also sought to avoid a *Massiah* violation through similarly deceptive methods. As will become increasingly apparent, these methods allow prosecution teams to repeatedly make the same "coincidental contact" argument with a straight face. And the plan was working perfectly until this Court's discovery order on January 25, 2013.

While prosecution teams have repeatedly shown that they need little motivation to violate *Massiah*, Inmate F.'s focus on **two** Delhi gang members beginning in March of 2011 was perplexing. Inmate F.'s OCSD CI file provided one possible reason why some aligned with the prosecution may have felt particular anger toward the Delhi street gang: that very same month, a fellow Delhi member named Leonel Vega, whom Petersen successfully prosecuted for murder, allegedly told Inmate F. that he planned to harm Petersen because he had "…done [him] dirty at trial." (OCSD CI file of Inmate F., attached herein as Exhibit M, p. 5490). An examination of the prosecution of *People v. Vega* begins at page 248.

People v. Inmate I.*: The Mirror Image of *People v. Dekraai

The discovery provided to Inmate I.—and turned over to Dekraai pursuant to this Court's order—reveals that the prosecution intends to call Inmate F. and informant Moriel to testify about confessions they separately obtained from Inmate I.[7] To understand how

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[7] In contrast to this case where the prosecution has constantly expressed its eagerness to go to trial, Petersen's enthusiasm to prosecute a man charged in two murders now appears non-existent. He has agreed to continuances three times since this Court ordered discovery in this matter, despite the fact that the crimes are seven and eight years old, respectively, and the charges were filed thirty-two months ago. **The most logical explanation for the continuances since this Court's discovery order is that both he and Wagner wanted to wait to see if the Dekraai defense team would find the significant discovery violations documented herein.**

the prosecution planned to introduce Inmate I.'s confession to Inmate F. despite *Massiah*, one only needs to compare the lack of discovery in that case with the state of discovery in this case prior to this Court's discovery order. What Petersen concealed from Inmate I. is strikingly similar to what the Dekraai prosecution team hid: the OCSD and OCDA's CI files on Inmate F., with the exception of a small quantity of notes; both of Inmate F.'s informant agreements with the SAPD and with the federal government; and all information related to Inmate F.'s criminal background, including evidence that he committed perjury at the trial that Petersen prosecuted. Finally, Petersen and his team, which includes the OCSD and SAPD, hid one other critical piece of information: **compelling evidence that Special Handling moved Inmate I. near Inmate F. so that he could elicit incriminating statements.**

In retrospect, Petersen should consider himself quite fortunate. If *People v. Inmate I.* had proceeded to trial prior to this Court's discovery ruling, he would have likely convinced the Honorable Patrick Donahue that Inmate F. and Inmate I.'s contact was coincidental, and that Inmate F. was neither directed to elicit statements nor anticipated a benefit for his work. This instant motion would have subsequently established that Petersen and his team purposefully violated *Massiah* and engaged in shocking discovery violations in *People v. Inmate I.* and other cases.[8] Because of the delays in Inmate I.'s trial, Petersen remains free to explain to Judge Donahue—and this Court when he testifies—that his failure to turn over *Brady* discovery prior to several trial dates was an oversight, or that he never planned to introduce the statements, or anything else he can invent to explain the

[8] Astonishingly, the case against Inmate I. was not the first one in which Petersen used an array of similarly deceptive practices to avoid a *Massiah* violation in a murder case. In the analysis of *People v. Leonel Vega,* provided herein, this Court will have an opportunity to observe how the prosecution successfully manipulated informant evidence to avoid a *Massiah* violation and concealed evidence relevant to informant credibility. That case study will demonstrate exactly what the teams prosecuting Dekraai and Inmate I. had hoped to accomplish at pre-trial hearings, trial, and appeal.

state of the discovery prior to this Court's ruling in January of 2013. How will Petersen try to convince court and counsel that his intentions were in good faith? He will need to find an approach different than the one he used in *People v. Vega*. In that case, he assured opposing counsel and the court that he could be trusted to disclose critical discovery as he simultaneously concealed evidence of his team's *Massiah* violation and committed a stunning assortment of other serious misconduct.

Regardless of how they deliver their respective responses to the issues presented in this motion, Wagner and Petersen should be compelled to explain what led them to "coincidentally" hide nearly identical evidence of Inmate F.'s informant history under the same pretense that it was irrelevant to a *Massiah* analysis.

The Other *Inmate I.* Informant: Oscar Moriel

Amazingly, the misconduct in *People v. Inmate I*. was not limited to a single informant. As mentioned previously, Petersen also intended to introduce statements obtained by informant Oscar Moriel. In fact, the prosecution will have insufficient evidence to succeed at Inmate I.'s trial—once the statements to Inmate F. are excluded—unless Petersen introduces those statements that Moriel obtained.

As has been his practice in other informant cases, Petersen concealed numerous relevant notes written by Moriel. A considerable quantity of suppressed notes included those documenting a coordinated and secret effort on the part of Moriel, the SAPD, and the OCSD's Special Handling division to manipulate housing locations in order to allow Moriel to obtain a confession from Inmate I. and many other inmates. As will be explained, those notes were **not** hidden to prevent a *Massiah* motion involving Moriel in *People v. Inmate I*., because the confession to Moriel was obtained prior to when Inmate I. was charged. Instead, the notes were concealed primarily to prevent revelations of vast misconduct related to the custodial informant program.

Among the most important of Moriel's hidden notes are those describing what will heretofore be referred to as the "Dis-iso" scam. This term refers to Special Handling's

effort to place an informant and his target in a disciplinary isolation module together so that the target will be less suspicious that the inmate is an informant; the theory being that an inmate working for the government would be unlikely to commit serious rules violations and even less likely to face severe punishment for such a violation. In one critical note, Moriel reflects upon the "Dis-iso" scam successfully employed against Leonel Vega, and ruminates about a plan previously discussed with the SAPD and Special Handling to use the same scam against Inmate I.

If the prosecution concealed Moriel's notes from Inmate I., how did the Dekraai defense team become aware of their existence? Extraordinary luck. The discovery in an Operation Black Flag case, *People v. Inmate E.*, was turned over to Dekraai in response to this Court's order because it includes several discussions and investigations related to Inmate F. However, in addition to the materials related to Inmate F., the discovery also included 196 pages pertaining to informant Oscar Moriel. **As will be seen, those 196 pages unlocked the vault of custodial informant deception, including the "Dis-iso" scam**.

Special Handling's Independent and Joint Effort to Violate *Massiah* Prior to *People v. Dekraai*: Coordinated Jail Movements and Hidden Direction

Inmate F. repeatedly proved himself capable of juggling numerous informant tasks at the same time. Notes from Inmate F.'s OCSD CI file reflect that while eliciting incriminating statements from Inmate I., he was also focused on another Delhi gang member, Inmate S. The Court-ordered materials do not include the set of the discovery turned over to the defendant in *People v. Inmate S.*, whereas the set of discovery from *People v. Inmate I*. was provided. Because this Court's order required the prosecution to provide discovery in all cases in which Inmate F. provided information, and because the prosecution did not disclose Inmate S.'s case discovery to Dekraai, it would appear that the prosecution has withheld Inmate F. discovery from Inmate S.

The effort to secrete evidence obtained from Inmate S. by Inmate F. required a

multi-agency cover up—similar to the one in the instant matter—dedicated to obtaining the full benefits of an undetected *Massiah* violation. Furthermore, the prosecution's suppression of the informant evidence in *People v. Inmate S.*, and several others cases discussed herein, demonstrates that incarcerated defendants are frequently left without even a hint of the *Massiah* violations committed in their own cases.

The contents of Inmate F.'s notes related to Inmate S., and a single report written by Deputy Garcia, have critical implications for the instant motion and the Motion to Exclude Dekraai's statements to Inmate F. During an interview conducted with Wagner in March of 2013, Garcia's answers strongly implied that he did not work with Inmate F. to perpetuate *Massiah* violations. He also stated that when informants supplied notes or information related to an investigation by a police department other than the OCSD, his role was limited to merely sharing the evidence with that agency. These responses were designed to mislead those not associated with the OCDA or local law enforcement about the extent of his role in directing informant contact with targets. The truth is that Garcia worked both in coordination with outside agencies to facilitate contact with informants, and independently when he believed the agency would view informant assistance as helpful.

In furtherance of Special Handling's objective of independently assisting the SAPD on Inmate S.'s case, Garcia facilitated contact between Inmate S. and Inmate F. in late August of 2011—intentionally violating *Massiah*. A study of Inmate F.'s notes show that Garcia and his informant hatched a plan for Inmate F. to elicit statements from Inmate S. in order to help prove the defendant was competent to stand trial. After Inmate F. completed his work, Garcia carefully crafted a report to "[a]ssist outside agency", the SAPD. The report and the attached note were designed to mislead by omission, in order to avoid the defendant's recognition of a *Massiah* violation. Garcia only attached a single page of Inmate F.'s notes, knowing that other hidden pages would have revealed Inmate F.'s relationship with law enforcement, additional incriminating statements he had already elicited from Inmate S., and Inmate F.'s communication with Special Handling about

Inmate S.'s competency issues prior to the contact described in the report.

Significantly, Garcia's intentionally misleading report was written less than two months before the supposed "coincidental contact" between Inmate F. and Dekraai. Thus, the deceptive report and hidden notes are highly relevant to a number of issues, including the truthfulness of Garcia's contention in his interview with Wagner that he did not independently bring Inmate F. and Dekraai together nor give Inmate F. direction to contact particular inmates.

Furthermore, a review of the entire discovery confirms that Garcia was the Special Handling Deputy most consistently involved in moving inmates so that Inmate F. and Moriel could elicit statements in violation of *Massiah*. It also appears that Garcia, in full recognition of his role in violating *Massiah* and misrepresenting informant contacts, has never documented these movements in any reports—unless the OCDA subsequently concealed those reports from Dekraai and all other defendants referenced in this motion.

Unraveling the Web of Misconduct Related to Inmate F.

With regard to the misconduct committed in this case, the motivations for the concealment are now clear. First, the prosecution realized that if they had complied with their discovery obligations prior to this Court's order, the defense would have learned that Inmate F. was a highly valued and productive jail informant, not someone offering his cooperation altruistically. The prosecution appreciated that if the defense presented the hidden information, this Court would be far less likely to believe that Inmate F. and Dekraai's jail contact was coincidental. Second, and relatedly, the prosecution recognized that their chances of introducing Dekraai's statements and avoiding a successful *Massiah* motion would improve significantly if they could hide and manipulate critical evidence about Inmate F.'s informant background, which demonstrated that he was working for the government and expected a benefit when he first began to ingratiate himself with Dekraai and ask him questions. Third, the prosecution team grasped that if the limited discovery turned over prior to the Court order was compared to what the prosecution team truly knew

about Inmate F. prior to the installment of the recording device, it would reveal that team members had conspired to manipulate the presentation of Inmate F. in his interview and the subsequently written report. Fourth, the prosecution team knew that the hidden discovery, if exposed, could raise alarming concerns about the operations of Orange County's custodial informant program, and the legal and ethical violations that are part and parcel of its daily operations. In essence, the suppressed discovery could reveal that in separate cases, prosecution team members entered into similar conspiracies to conceal evidence about other custodial informants. The prosecution understood that the release of Inmate F.'s informant background would be extremely damaging to achieving its immediate goals in *People v. Dekraai,* and to concealing similar misconduct in numerous other cases.

Revelations of Systemic Misconduct in the Custodial Informant Program

The reality is that despite Assistant DA Anderson's stated concern about "hiding things," law enforcement agencies and the OCDA have decided that concealment is the preferable tool for success, rather than an honest presentation of facts. As such, they have identified and incorporated a wide range of deceptive practices to effectuate their goals. How has this been accomplished without their efforts being discovered earlier? Planning, teamwork, and dedication. The OCSD, the OCDA, and local law enforcement agencies have worked cohesively to ensure that their objectives are achieved without defendants and their counsel recognizing the misconduct upon which their success has often been built.

An analysis of numerous sources of information, including the discovery in this case, confirms the following:

1) The custodial informant program has created a network of informants who correctly believe that their future is entirely dependent on the mercy of prosecutors and their team members. This has created a situation in which informants not only attempt to gather information in identified areas of investigation, but also perpetually troll the jails for other statements that could earn them consideration from their prosecutor. This program, which encourages informants to continually

supply incriminating statements, has become toxic to the Sixth Amendment because prosecutors and local law enforcement are unwilling to honor *Massiah* or teach their informants to act in conformity with its principles. In essence, the jails have become a cesspool for violations of inmates' right to counsel. This is particularly significant in the instant matter because, regardless of whether members of local law enforcement or the prosecution specifically instructed Inmate F. to question Dekraai, he was trained a) that the final outcome on his own cases would be based upon the quantity and quality of his assistance, b) that he should relentlessly pursue valuable targets, and c) that this pursuit should take place regardless of whether he was eliciting statements about charged crimes.

2) The OCSD's Special Handling Unit, in cooperation with the OCDA and local law enforcement agencies, **secretly** coordinate the movements of inmates in order to enable informants to obtain incriminating statements. Two techniques have been identified that facilitate questioning of high-value defendants. The first is to simply place the suspect defendant in a location near the informant, or vice versa. Second, as previously mentioned, Special Handling will relocate the informant and defendant into another housing location, such as a disciplinary isolation module. The use of the "Dis-iso" scam has proven to be an extremely effective tool in convincing the targeted inmate that the person he is speaking with is not an informant. This motion also identifies one instance in which Special Handling created fake paperwork of rules violations to convince the targeted inmate that the informant's violence within the jail was the reason for his protective custody status.

While these movements clearly improve the chances of obtaining incriminating statements from a defendant, they are also evidence relevant to a *Massiah* violation when the movement culminates in the elicitation of statements about an inmate's charged crimes. Of course, *Massiah* can be violated regardless of whether that evidence is ultimately used in a court proceeding. For instance, the

prosecution violates a defendant's Sixth Amendment right to counsel when the statements are then used to develop investigative leads that are unattenuated from the initial violation. (*People v. Neely* (1999) 70 Cal. App. 4th 767, pp. 784-787.) Moreover, the prosecution is required to reveal jail movements whenever knowledge of the movements would be relevant and helpful to the defense, per *Brady*. Therefore, orchestrated movements designed to elicit statements are relevant not only to potential *Massiah* issues, but to other material matters such as informant credibility. The discovery that would have revealed orchestrated movements has been repeatedly hidden in cases where the information would have been relevant.

It will be shown that this evidence is consistently concealed from defendants in order a) to avoid court determinations of a *Massiah* violation; b) to secrete derivative evidence obtained through *Massiah* violations; c) to avoid disclosure of evidence contradicting the prosecution's presentation of the informant's role in obtaining the confession; and d) to keep hidden the operations of the custodial informant program. **In view of the practices uncovered in this motion, *Massiah* violations have likely occurred on a daily basis in the Orange County jails.**

3) Members of the OCDA and local law enforcement have been trained to aggressively conceal both their communications with custodial informants and their manipulation of jail movements, designed to allow informants easy access to targets in order to elicit incriminating statements. This concealment is certainly at odds with the principles and practices articulated by Assistant DA Anderson. He correctly recognized that nothing is more essential to a fundamentally fair informant program than to "maintain a log of all supervision of and direction given to a CI and document the performance of the CI, both good and bad." It also seems inconceivable that Anderson would have heralded the importance of maintaining a log unless this was, in fact, something that law enforcement actually utilized and provided to the defense when the prosecution relied upon informants. **But where**

are the logs and reports, which detail "all supervision of and direction given" to Inmate F.? They necessarily exist unless each of the prosecution team members who interview and meet with informants possess photographic memories that they only call upon in custodial informant cases.

The defense recently received a log created by the SAPD pertaining to Inmate F., but it includes entries written on two dates only, and does not include any details of the supervision and direction. As will be discussed, prosecution team members are fully committed to hiding any direction given to informants, as well as their verbal communications with informants. Inmate F. and Moriel worked with the government for a combined total of more than two years. Setting aside the reports pertaining specifically to Dekraai, the Court-ordered discovery includes less than twenty pages of reports in which the informants describe criminal conduct. None of these reports include a single word describing direction given to informants.

Moreover, the conduct described herein, and the consistent absence of reports and recordings from prosecution discovery, demonstrates unequivocally that the custodial informant training program encourages prosecution members not to record informant interviews, or alternatively to hide recordings from the defense. **At this point it is simply unknown whether prosecutorial agencies are in the possession of hundreds of recorded interviews with informants that they have never discovered, or whether hundreds of interviews were never recorded.** These efforts at concealment, once again, are motivated by several objectives, including the desire to conceal *Massiah* violations and foreclose the meaningful impeachment of custodial informants.

4) Anderson and Nye wrote that "Great care must also be given to disclosing to the defense any exculpatory *Brady* material that might be discovered as a result of the CI's cooperation, *Brady v. Maryland*, 373 U.S. 83 (1963)." (Exhibit F, p. 21.)

Court-ordered discovery confirms that the OCDA maintains CI files. This CI file catalogue would seemingly have been created in order to diligently track informants, thereby ensuring that the defense has complete knowledge of their efforts to assist the government. An accurate informant history is critical to understanding the individual's bias, motive to fabricate, and relationship with the government, and thus discovery of this information is mandated under *Brady*.

However, the CI file system appears to be another casualty of a culture that devalues *Brady*. This is demonstrated quite compellingly by examining the OCDA's CI file associated with Inmate F. **Inmate F.'s informant file reveals that prosecutors did not create entries documenting his efforts to provide statements elicited from three capital defendants (Dekraai, Inmate D., and Inmate M.), nor from Inmate S., who is charged with attempted murder.** It appears that the failure to create an entry that memorializes Inmate F.'s informant efforts with Dekraai and Inmate M. was done purposefully for tactical reasons that will be explained. These "missing" entries are not only highly relevant to understanding the Dekraai prosecution team's misconduct, but also have implications in every other case in which a custodial informant from Orange County has been used in a state or federal case. Unless there is a "secret CI file index" that exists but was not revealed via the Court-ordered discovery, prosecutors necessarily rely upon the referenced CI files to identify informant work that must be shared with the defense per *Brady*. Based upon the stunning omissions related to Inmate F., the only logical conclusion is that there have been systemic failures in the creation and maintenance of the CI file catalogue, which have resulted in *Brady* violations in numerous cases.

5) One of the most disturbing aspects of the custodial informant program is the commitment to concealing evidence collected from informants that is helpful to the defense of charged or convicted defendants, including evidence that defendants are

innocent. Local prosecutorial agencies have decided that informants should be available solely to further the prosecution's narrowly defined view of success. **The revelations discussed make it abundantly clear that prosecution team members have been concealing such evidence of innocence for years.**

How could those who hold the public's trust repeatedly betray their responsibility to the justice system and to fellow human beings? There are two reasons. First, a significant number of individuals within the local prosecutorial agencies do not view the suspects or defendants discussed in the motion as deserving of due process. In essence, defendants, such as those discussed in this motion, are considered sub-human and deserving of the most extreme punishment, regardless of due process or their culpability. Second, many members of these agencies clearly believe that effectuating their version of justice is more important than observing the laws they have sworn to protect.

6) While local prosecutorial agencies have encouraged "cowboy justice" for despised individuals charged with serious crimes, that policy objective ranks well beneath the commitment to concealing misconduct required to carry out their version of justice. Ultimately, the effort to hide illegal and unethical acts has come at an enormous price: it has made the county far less safe. In order to effectively conceal their own misconduct, prosecution teams have repeatedly hidden evidence that would have contributed to the successful prosecution of individuals the same prosecution team members believe are among the most dangerous within the county.

7) In their quest to protect the viability of informant witnesses, the **OCDA and local law enforcement made the joint decision not to investigate previously unsolved criminal cases committed by informants.** While the prosecution should certainly honor their "hidden" agreements with informants not to prosecute them based upon facts provided while serving as informants, this does not explain their refusal to learn about serious crimes that they and their cohorts committed. It is

clear from testimony discussed below that informants have been willing to answer law enforcement's questions about their crimes, including inquiries about numerous local murders. However, law enforcement not only ignores the answers, but actively blocks others from uncovering the truth.

There are at least four reasons for the failure to investigate these crimes. First, details of previously undiscovered criminal conduct would open informants to additional impeachment, as they may be required to describe the unpleasant details of their violent crimes before a court and jury. Second, many of the crimes were likely carried out by multiple people. While the informants have expressed a willingness to talk about their crimes, including murders, the prosecution has forsaken the opportunity to investigate and prosecute accomplices for an unacceptable reason: their informant's credibility could be severely damaged if accomplices either denied culpability or provided compelling accounts inconsistent with the informant's version. Third, the prosecution wishes to avoid potential outrage by the public at large, and victims' families in particular, for having provided substantial benefits and leniency to the killers of their family members. Presently, the prosecution does not have to face victims' families who have no idea that informants have killed and injured their loved ones. **It should be unsettling that while the OCDA has emphasized the importance of expedient justice to ensure closure to the victims' families in the instant matter, prosecution teams have aggressively delayed and prevented closure for family members of victims on many other cases.** Fourth, interviews of informants could lead to information that crimes committed by the informants were not "unsolved," but rather solved incorrectly. The revelation that government agents working with informants allowed the wrongfully convicted to remain in custody would potentially devastate the credibility of informants and create enormous embarrassment for the government. Moreover, these agencies recognized that public exposure of their willingness to

turn a blind eye to wrongful convictions would severely and appropriately damage the public's faith in their morality and ethics.

In sum, it is difficult to imagine an informant program more opposed to the values and safeguards that Assistant DA Anderson correctly professed as essential. Local prosecutorial agencies have created a program that is solely committed to obtaining and presenting evidence that will assist in convicting and imposing maximum punishment upon high-value defendants. This effort has been undertaken without the slightest concern for the legal and ethical obligations put in place to ensure due process. Prosecution teams have consistently failed to provide defendants with an accurate understanding of the informant's relationship with the government, as well as material information regarding his background. When their relentless concealment of evidence is finally revealed, so is the hypocrisy in instructing the rest of this nation "to present the CI in the most accurate light possible to avoid the appearance that the police and prosecution are hiding things."

Serious Misconduct Revealed in Informant Materials Corroborates Systemic Failings

Significantly, Dekraai will analyze in considerable detail several cases in which a suspect or defendant was referenced in the discovery. It should be emphasized that while Dekraai will describe misconduct perpetuated against numerous defendants, he is certainly not an advocate for their innocence morally or legally. Many have likely committed the very serious conduct for which they were accused—though guilt and innocence certainly have become muddled at times, as prosecutors and investigators have repeatedly demonstrated a willingness to lie and mislead. However, the point lost on the OCDA and local law enforcement is that neither the quality of the defendant's character nor the seriousness of the charges will ever justify misconduct.

There are several purposes for identifying and examining the misconduct discussed in this motion. Much of the case analysis is relevant to the credibility of the Dekraai prosecution team's past and anticipated assertions about what led to the contact between

Inmate F. and Dekraai. The credibility of their claim of "coincidental contact" gradually fades as other false claims of "coincidental contact" are revealed.

The numerous instances of misconduct also reveal the seriousness and scope of the legal and ethical violations that have occurred, and the ramifications that persist over time. These cases confirm a deeply rooted culture that views due process rights, the Sixth Amendment, and *Brady* as inconveniences for prosecutors and law enforcement who wish to play by their own rules. The case studies compellingly confirm that Wagner and his team, as noted earlier, were following an operational model for the handling of custodial informant cases, which encourages deception and misdirection.

The case studies within this motion are also significant because of the misconduct engaged in by several other prosecution teams. The misconduct corroborates the systemic disdain for *Brady* and the inculcated belief that winning is the sole measure of good work.

Petersen is featured prominently in the following discussions. His efforts in three cases that he tried to juries offer unique insights into the relationship between the OCDA, local law enforcement and custodial informants—though the insights will be unsettling. Dekraai intends to call Petersen as a witness at hearings related both to this motion, the motion to recuse the OCDA from this case, the *Massiah* motion, and almost certainly again at trial. He is among the most important witnesses to the relationship between Inmate F. and the prosecution, the misconduct perpetuated by the Dekraai prosecution team, his communications with members of the Dekraai prosecution team, and the expected benefit that Inmate F. was to receive both before and after Petersen received the "Informant Assistance" memorandum. Petersen will also provide important insights into the custodial informant program by explaining the details of the conspiracies to conceal evidence as described herein, including specifics of the training and instruction, which ensured that all with knowledge of the wrongdoing remained silent. In sum, Petersen's role in the instant matter, his actions in the identified cases, and his connection to Inmate F. and Moriel are critical.

The following is a brief summary of what has been learned:

PEOPLE v. LEONEL VEGA (07CF2786/GO45613)

The trial of Leonel Vega for a special circumstance gang murder offers some of the most important and disturbing insights into the operations of Orange County's custodial informant program. The conduct of Petersen and his team is relevant to analyzing the systemic nature of the government's misconduct, and to confirming the existence of policies that promote a wide array of deceptive techniques in the presentation of informant evidence. This case has direct significance to *People v. Dekraai*, as Petersen used a similar approach in the concealment of informant evidence to what was employed in the instant matter.

What type of misconduct occurred in this case? Nearly every form imaginable. Petersen withheld critical discovery—turning over four pages of Moriel's writings—even though Moriel wrote hundreds of pages of notes. Found within the discovery in *People v. Inmate E.* are notes written by Moriel that would have established that Vega's confession (introduced at trial) was obtained in violation of *Massiah*. The hidden notes—including one page that was written on the same day as the four pages that were discovered—would have revealed a coordinated effort to place Vega and Moriel in disciplinary isolation in order to diminish Vega's suspicions that Moriel was an informant. However, Petersen and SAPD investigators did not stop with the concealment of notes. They repeatedly misled court and counsel through deceptive statements, material omissions, and suborned perjury.

The misconduct assured a conviction and its affirmance on an appeal. The unpublished opinion written by Justice Thompson is based, in part, upon provably false and misleading testimony by Moriel, who could have been powerfully impeached if the prosecution had simply complied with its discovery obligations.

PEOPLE V. RODRIGUEZ (10CF0433)

*People v. Rodrig*uez involved another cold case gang homicide by three alleged Delhi gang members, which Petersen also prosecuted. Moriel provided notes documenting

a confession by Defendant Sergio Elizarraraz. Moriel also claimed that he could identify each of the three defendants from a video in which the three suspects were seen minutes before the shooting.

As will be discussed, the misconduct in *People v. Vega* was still in the prosecution's rearview mirror as *Rodriguez* moved toward the preliminary hearing. Elizarraraz's attorney, Robison Harley, was the same counsel who was repeatedly misled in *People v. Vega*. As a result, Petersen possessed additional incentives to continue to hide Moriel's notes that would have revealed his vast informant work. Consistent with that objective, a SAPD detective falsely claimed at the preliminary hearing that his office had still not taken possession of Moriel's notes eighteen months after they were written, including those which memorialized Elizarraraz's confession.

Petersen ultimately turned over 20 pages of Moriel's notes, concealing, once again, nearly all of the 500 pages he wrote. Petersen also held back what would have been obviously relevant evidence demonstrating Moriel's bias and motive to lie, including specific notes in which Elizarraraz gave another version of the charged crime. These notes were suppressed because they would have revealed other concealment. Additionally, the prosecution withheld notes and jail records that would have uncovered that the OCSD, at the SAPD's request, moved Elizarraraz, and later co-defendant Juan Lopez, into locations so that Moriel could obtain their confessions.

At the severed trial of Lopez and Rodriguez, Petersen conspired with SAPD investigators to present a fabricated and convoluted explanation as to why neither of Moriel's interviews were recorded; they were unwilling to admit that they were following the general protocol not to record interviews with local custodial informants (or alternatively to hide or destroy the recordings).

Petersen's successful severance of Elizarraraz paid enormous dividends. It kept Harley from hearing portions of Moriel's testimony that would have immediately demonstrated the fraud perpetrated upon him and his client in *People v. Vega*. Moriel

acknowledged on cross-examination that he had been engaged in far more extensive informant work than had been disclosed in *People v. Vega*. Although Harley was not present during the testimony, the same judge in *People v. Vega* was assigned *People v. Rodriguez*. However, in an amazing and undeserved break for the prosecution, the Honorable William Froeberg did not remember Moriel's prior testimony, nor Petersen's repeated efforts to keep Harley from questioning Moriel about the extent of his informant work.

Interestingly, the prosecution's knack for getting away with misconduct was no guarantee for trial success; the two defendants were acquitted. This left Elizarraraz to proceed to trial on his own. The prosecution's case against Elizarraraz seemed far stronger, because Moriel claimed that Elizarraraz confessed to the crime. However, Petersen may have sensed that his luck might be running out and that it was time to protect himself and his partners in the conspiracy. The prosecution team walked away from the chance to incarcerate Elizarraraz for the rest of his life, allowing him instead to return immediately to the streets with a reduced charge of manslaughter.

PEOPLE V. CAMARILLO (11CF2418)

In *People v. Camarillo*, the defendant and two others were charged with a conspiracy to commit murder upon an inmate at the Theo Lacy Facility. The case was the first Black Flag prosecution to proceed to trial. At trial, Moriel took on the role of expert witness in Mexican Mafia operations and discussed at length his relationship with Leonel Vega, who in addition to being a Delhi gang member was also a former local leader of the Mexican Mafia.

Once again, Petersen delayed identifying Moriel as a witness until the eve of trial and withheld nearly all of the relevant discovery pertaining to his work as an informant. The lead investigator for the prosecution was OCSD Deputy Seth Tunstall.

The acts of misconduct by the prosecution in *Camarillo*, which are only understood because Dekraai received possession of the far more comprehensive set of Moriel's notes

from *People v. Inmate E.*, are stunning. Taking full advantage of the concealment of Moriel's notes, Petersen suborned perjury from Moriel on several subjects, including the nature of his relationship with Vega. This questioning was principally designed to again hide revelations of the "Dis-iso" scam. Significantly, it appears that Petersen and Tunstall prepared Moriel in advance of his testimony to testify falsely.

During some of the more striking moments in the trial, Petersen watched silently as Moriel provided perjured testimony about acts of violence he supposedly committed against inmates and deputies—acts that had actually been fabricated to convince Vega that he was not an informant. Tunstall, one of the leaders of the Special Handling Unit, also remained silent as Moriel repeatedly provided very believable, yet provably false testimony, though the proof resided in the notes the prosecution was hiding from the defendants.

The defendants in *People v. Camarillo* resolved their cases for substantial sentences during jury deliberations, unaware of the misconduct committed in their own trial and how their discovery of that misconduct would have led to a far more favorable outcome.

PEOPLE V. LUIS FRANCISCO VEGA AND ALVARO SANCHEZ (09CF0572/09CF0687)

The two defendants in this case were alleged Delhi gang members charged with attempted murder and enhancements that would have resulted in life sentences upon conviction. During a witness proffer, a fellow gang member named Juan Calderon told SAPD detectives that Sanchez described the crime to him and his role in it. However, according to Calderon, Sanchez also told him that Defendant Luis Vega ("Luis V.") was not present. After Calderon shared this information about the crime, neither the detectives nor Deputy DA Mark Geller, who was also present, elicited any further information about the incident, Sanchez's culpability, or Luis V.'s innocence.

A few months after Calderon's proffer, informant Moriel turned over notes to law

enforcement documenting an in custody conversation with Alvaro Sanchez about the attempted murder. One month later, Moriel spoke with Sergio Elizarraraz about the crime. According to the notes, both Delhi gang members admitted to participating in the shooting and identically described who was present. And both omitted Luis V. from the group responsible. According to Moriel's notes, though, **Sanchez went further by expressing his disbelief that Luis V. had been charged despite his innocence, while also expressing his dislike for his co-defendant.**

A few months after the Calderon proffer and one month after Moriel turned over the notes of his conversation with Sanchez, the assigned Deputy DA Steven Schriver filed a motion requesting a line-up for Luis V. It appears that this motion was motivated by Calderon's statements in his proffer about Luis V.'s innocence and Sanchez's statements to Moriel, though the moving papers were silent about what prompted the request. Subsequent to the denial of the line-up motion, Schriver turned over the Calderon proffer. However, Schriver never disclosed Moriel's notes about his conversations with either Sanchez or Elizarraraz. Moreover, it took Schriver nine more months after Moriel turned over his notes about his conversation with Elizarraraz—notes that were forever concealed from defense counsel— before finally dismissing the case against Luis V. This meant Luis V. was incarcerated for a total of two years for a crime he never committed.

After the trial court excluded Sanchez's statements to detectives, the prosecution could have benefitted from Sanchez's alleged confession to Calderon. However, the failure of detectives to question Calderon thoroughly about Sanchez's statements—apparently because the discussion had veered into Luis V.'s innocence—ultimately made Calderon a less compelling witness for the prosecution . After the court's ruling excluding Sanchez's statements, the prosecution abandoned its pursuit of a life sentence and the case settled.

Additionally, the OCDA never filed charges against Elizarraraz for this crime, even though he purportedly admitted his responsibility to Moriel. After Petersen allowed

Elizarraraz to receive "credit for time served" on the special circumstances murder discussed above, the prosecution certainly would have liked to have filed charges against Elizarraraz for his involvement in this shooting. However, the prosecution's misconduct had boxed them into a corner yet again; they could not rationally explain why they had concealed discovery of notes memorializing his admitted participation in the above referenced crime. **It appears that the prosecution team correctly recognized that the desire to conceal evidence of Luis V.'s innocence was not a particularly compelling justification for the delayed filing of attempted murder charges against Elizarraraz.**

Elizarraraz would never know why he got away with murder and attempted murder several times. And probably he will never appreciate that the biggest beneficiaries of Orange County's corrupt custodial informant program and its steadfast commitment to self-preservation, are people just like him.

PEOPLE V. RICARDO LOPEZ (02CF1819/G042168)

In 2002, Lopez was charged in the murder of Carmen Zamora, which occurred in a cul-de-sac close to Kilson Street and Edinger Avenue in Santa Ana. The proceedings were delayed after Lopez was found incompetent to stand trial due to serious mental health issues. At his trial in 2009, the prosecution presented several witnesses who identified Lopez as taking out a firearm shortly before Zamora was killed. The defense did not dispute that Lopez was present at the scene, and even acknowledged the possibility that he fired a gun. However, they argued that another male suspect shot Zamora. The defense pinned its hopes, in part, on the testimony of the only two witnesses who saw the killer fire his weapon. Neither of these witnesses identified Lopez. Both said the shooter was bald. Lopez was arrested the same day and had hair. Both witnesses also described the shooter as being between sixteen and eighteen. Lopez was twenty-two.

In his closing argument, Alternate Defender Frank Davis discussed why he felt compelled to address the culpability of a third party whose identity was unknown:

> A week from now, **a year from now**, 20 years from now, if an individual says I was that second guy out there, I was the 17 year old who chased the car with a shaved head. You open the newspaper and you read that, are you going to say, wow, Mr. Davis never brought that up. We didn't have any idea there was a second suspect…"

(RT (trial), Feb. 10, 2009, *People v. Lopez*, (Super. Ct. Orange County, 2009, No. 02CF1819), attached herein as Exhibit N, p. 1070:2-8, emphasis added.)

The prosecutor's rebuttal was committed almost entirely to mocking the possibility of a second suspect being at the scene, whom he repeatedly and derisively described as the "magic man." The jury rejected the defense arguments and convicted Lopez, who later received a life sentence. Jurors, though, would never have guessed how prophetic Davis's words would be. Almost one year to the day after Davis's closing argument, Moriel gave law enforcement his notes documenting a conversation with fellow Delhi gang member Alvaro Sanchez. Moriel wrote the following:

> We talked about a few other scenarios that took place about Gato (Joseph Galarza)[9] R.I.P. killing a chick on Edinger and East Kilson. In the cul de sac when he got in a shootout with the guys from McClay St. a few years ago…"

(Discovery in *People v. Inmate E.* (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit O, p. 2248.)

SAPD detectives examining the note would have immediately known that Sanchez was speaking about the Zamora murder. The shooting of a female in the "cul de sac" at Edinger and Kilson clearly referred to the murder of Zamora. Moreover, a quick check of Galarza's age at the time of the crime might have convinced detectives that Lopez's counsel could see into the future. He was only one year off. Galarza was sixteen when Zamora was killed.

But there was far more to Galarza that would have caught the eye of any member of the prosecution team open to exploring the possibility of a wrongful conviction. Galarza

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[9] It should be emphasized that Dekraai is not asserting that Joseph Galarza was responsible for the murder of Zamora, nor several other crimes in which he is identified. Rather, this discussion is relevant to the persistent refusal of prosecution team members to share information generated through the custodial informant program, when that information is favorable to defendants.

was a Delhi gang member well known to every SAPD officer. A SAPD officer had killed Galarza in 2009, while he was on the run from a felony warrant for possessing a firearm to benefit his gang. Furthermore, the lead detective in *Lopez*, Detective David Rondou, would soon come across far more evidence about Galarza's propensity for violence. One month after receiving the note pertaining to Zamora's murder, Oscar Moriel wrote notes indicating that Galarza had twice admitted to being the shooter in another homicide. (One year later, Petersen charged Inmate I. as the shooter in that crime. His team, which included Rondou, thereafter concealed evidence that Galarza, not Inmate I, had committed the murder.)

Although not discussed at Lopez's trial, the location of the crime would have further corroborated what Sanchez had described. The crime took place within Delhi gang territory. Additionally, the note suggested that members of another local gang were present during the shooting and involved in the violence. Prosecution team members would have recalled that witnesses had provided information about the possibility of other armed individuals driving through the area, including one who was identified by name. Upon receipt of Moriel's note, a review of that individual's criminal history would have revealed pending gang charges against him connected to the specific gang that Sanchez mentioned.

What did prosecution team members do with the evidence suggesting Lopez may not have been responsible for Zamora's death? The same thing they have likely done many times when coming across exculpatory evidence: absolutely nothing. Four years have now passed since authorities received Moriel's note. Neither Lopez nor his counsel has been shown this note, nor have they been informed of its contents. Rather, the prosecution has permitted year after year to pass as memories have further faded and potential investigative leads have eroded with time. Yet none of this should come as a surprise; far too often prosecutors and law enforcement officers in Orange County have demonstrated a belief that the only informant evidence to which defendants are entitled is

that which will help convict them.

THE HENRY CABRERA CASES

The story of Henry Cabrera within the criminal justice system is uniquely illustrative of the corrupted ethics imbedded within the custodial informant program and of the existing prosecutorial and law enforcement culture that devalues defendants' rights. The cases involving Henry Cabrera and the actions of prosecution teams are also significant because they powerfully corroborate that neither the Dekraai team nor the Petersen-led teams created their own playbook for misconduct.

In February of 2010, members of local law enforcement were provided with what was seemingly an extraordinary example of the custodial informant program's value in solving cold cases. Oscar Moriel handed over a note to law enforcement documenting a conversation he had with Sergio Elizarraraz—a note never disclosed to Elizarraraz and his co-defendants in *People v. Rodriguez*, but located by Dekraai in the *People v. Inmate E.* discovery. Elizarraraz had given Moriel a detailed description of the unsolved murder of Ruben Cabanas by Delhi gang members, which occurred on November 28, 2007. Included within the note was a tremendous lead: the name of the purported driver of the suspect vehicle. For prosecutors and detectives, though, "Henry Cabrera" was the one lead they never wanted.

During the past decade, Cabrera, also known as "Stomper," has been a gang member very much on the radar of prosecutors and detectives. In fact, their efforts led to the successful prosecution of Cabrera for carjacking and gang charges in 2009, culminating in the imposition of a life sentence. However, a closer examination of the prosecution's attempts to present and suppress evidence about Cabrera's gang membership since 2005 offers stunning revelations about the manipulation of evidence, misleading expert testimony, significant *Brady* violations, and the unwillingness of the OCDA to disclose evidence of a wrongful conviction.

The one prosecutor who unquestionably studied Moriel's note was the same one

who concealed it in *People v. Rodriguez*: Deputy DA Petersen. The name "Henry Cabrera" had particular significance to Petersen. Petersen was the prosecutor who secured Cabrera's conviction and life sentence. Only six months after obtaining that life sentence, Moriel handed over his notes regarding the Cabanas murder. Petersen and the detectives who read the note seemingly would have been thrilled to hold Cabrera accountable for the murder of a man who was simply in the wrong place at the wrong time. But there was an enormous problem. During Cabrera's trial, Petersen convinced jurors that Cabrera committed a carjacking for the benefit of the **Highland Street** gang. The problem was that Moriel's note identified Cabrera and his fellow gang members who participated in the murder of Cabanas as members of the **Delhi gang**, a known rival of the Highland Street gang. In evaluating whether to prosecute Cabrera for murder, the prosecution knew they would be unable to construct a believable scenario in which Cabrera had recently switched gangs. Cabrera participated in the Delhi murder of Cabanas just **17 days** before he committed a carjacking as a member of the Highland Street gang—at least according to Petersen, Supervising Gang Detective Ronald Castillo, and jurors in Henry Cabrera's case.

Therefore, when deciding whether to pursue charges against Cabrera for the murder of Cabanas, prosecutors and detectives likely thought it was better to leave well enough alone. Unburdened by concerns such as due process and *Brady*, the prosecution team relied upon considerations that appear far too prevalent throughout this motion: keeping "bad people" in custody regardless of their case-specific criminal liability and protecting against revelations of misconduct. As a result, they determined that if they charged Cabrera as a Delhi gang member, it might lead to 1) his life sentence connected to his supposed membership in the Highland Street gang being thrown out, with no assurances he would be convicted of the Cabanas murder; and 2) troubling revelations about both the earlier prosecution of Cabrera as a member of Highland Street and the actions of multiple detectives.

Despite their deliberate efforts, prosecutors and law enforcement found it

increasingly difficult to avoid both Cabrera and the Cabanas murder. In August of 2010, SAPD detectives spoke with Juan Calderon, a Delhi gang member charged in a separate homicide. Calderon claimed that he was with Cabrera and other Delhi gang members during the Cabanas murder. Consistent with Moriel's note, Calderon said that Cabrera drove the vehicle used in the crime and was a veteran member of the Delhi gang.

Deputy DA Geller, who was prosecuting Calderon and had already decided to use him as a witness in several Delhi cases, was likely conflicted about how to proceed. In 2005, Geller also had tried Cabrera in a gang case for the benefit of the Highland Street gang—a prosecution that in hindsight raises a number of concerns. The jury acquitted Cabrera of attempted murder but found that he had committed street terrorism on behalf of the gang. In 2008 (while Cabrera was awaiting trial for the carjacking charge) and 2009 (after he was convicted), Geller received information showing that Cabrera was not a member of the Highland Street gang at the time of the carjacking. The information also raised doubts about whether Cabrera was a member of the gang at the time of the 2005 crime that Geller prosecuted. Geller apparently did not act on this information.

Geller ultimately filed charges in the Cabanas murder, but not against Cabrera. Instead, Geller charged **two other** alleged Delhi gang members, whom Calderon identified as participating in the murder—including a passenger who never left the vehicle during the shooting. Calderon testified in two separate trials about Cabrera's role in the shooting and Cabrera's position as a veteran member of Delhi. Two prosecutors, Geller and Rahul Gupta, introduced evidence at preliminary hearings and trials related to this murder and two others in which Calderon provided information that Cabrera was a member of the Delhi gang at the time of the Cabanas murder.

The Cabrera cover up offers important insights into a prosecutorial culture disinterested in discovery and ethical obligations. Evidence drawn from numerous cases proves that prosecutors and detectives realized that Cabrera was not a member of the Highland Street gang prior to the filing of the complaint alleging his active participation in

2007. Additionally, prosecution team members were persistently confronted with evidence over a five-year period—**beginning with an interview of a supposed Delhi gang member only ten days after the carjacking**—that allegations of Cabrera's membership in Highland Street gang were erroneous. In order to protect cases and reputations, prosecutors and detectives joined a conspiracy, beginning in 2008 and adding loyalists along the way, committed to 1) allowing SAPD Detective Ronald Castillo to provide misleading and unimpeached expert testimony about the subject of Cabrera's gang affiliation, and 2) ensuring Cabrera's wrongful conviction and the finality of that conviction.

What about the prosecution's responsibility to inform Cabrera's counsel that they possessed *Brady* evidence that Cabrera was incorrectly charged as a Highland Street gang member and later wrongfully found in violation of enhancements that resulted in a life sentence? What about their responsibility to disclose that Castillo had offered a "mistaken" or purposefully misleading opinion that Cabrera was a member of the Highland Street gang in five hearings related to two cases? The conspirators knew that because Castillo had served as the supervising detective for the SAPD's gang unit for over a decade, there were unquestionably dozens of cases where critical juror decisions were based upon his reliability in determining gang membership. What about the prosecution's duty to share Castillo's previous testimony in two cases that Cabrera was a member of the Highland Street gang, which could have been used to impeach Calderon's testimony that Cabrera was a long time Delhi gang member? Castillo's opinion had the potential to powerfully undercut Calderon's claim that he was just a minor player in the Cabanas murder, who was simply following the lead of a veteran member of his gang. And what about the prosecution team members' responsibility to reveal their own complicity in the Cabrera cover up? The questions are rhetorical. Prosecutors and their team members never seriously considered taking any steps that would damage reputations, reduce their chances of winning cases, and raise issues about the validity of their past and future

convictions.

Aided by the unimpeached testimony of Juan Calderon and SAPD detectives who participated in the Cabrera cover up, Defendant Guillermo Brambila was convicted in the Cabanas murder. Dekraai will also present a brief analysis of how prosecutors' decisions to hide *Brady* evidence may have deprived defendants in two other cases of their right to a fair trial: *People v. Damien Galarza* and *People v. Gabriel Castillo*. These two cases and the others connected to the Cabrera cover up corroborate that the misconduct in *Dekraai* is not isolated but rather the product of policies and training aimed at circumventing *Massiah* and *Brady,* especially when compliance could lead to something deemed unacceptable: a favorable verdict for the defendant.

Effort to Obtain Dekraai's Psychological Records

This motion will also demonstrate that the Dekraai prosecution team's misconduct in this case is not limited to the custodial informant program. Dekraai signed a general release for his medical records at the time of his interview with law enforcement on October 12, 2014. The prosecution team subsequently requested a copy of Dekraai's psychological records from one of his treatment providers, Dr. Ronald Silverstein. However, Dr. Silverstein's counsel, Joel Douglas, informed the prosecution team that that the release was legally insufficient because it did not specify the disclosure of psychotherapist records. At the direction of the prosecutors—although not acknowledged in any report—Detective Krogman visited Dekraai again at the jail. Dekraai had been already charged and was represented by counsel when Krogman met with the Dekraai. Therefore, the contact was made despite the failure to request and receive authorization from defense counsel prior to speaking with him on October 17, 2011. Krogman asked that Dekraai sign an expanded release allowing the prosecution to take possession of his psychological records. This request was made in violation of both the Sixth Amendment's right to counsel and ethical guidelines that prohibit contact with a represented party. Dekraai refused to sign the new release.

After Dekraai's refusal, it appeared the prosecution had given up. However, two days later the prosecution team interviewed Inmate F. about his conversations with Dekraai and learned about possible legal strategies and defenses based upon mental health issues. The prosecution team, thereafter, initiated an aggressive attempt to obtain Dekraai's psychological records. Wagner and his team subsequently obtained a search warrant for the records based upon an affidavit that was highly misleading and included material omissions. Despite a subsequent court order directing the prosecution to not take possession of the records until a hearing occurred, Wagner refused to direct his investigators to delay the seizure. Ultimately, the investigators took the records from the office of counsel for the psychologist, even though Sanders informed Krogman of the court's ruling after Wagner refused to do so. The records were also taken despite the objection of the psychiatrist's counsel, who attached written opposition to the seized documents. The records were subsequently transported to the court, where they have remained sealed.

Effort to Further Inflame Potential Jurors and Family Members Against the Defense

Finally, this motion will discuss the prosecution team's repeated public denigration of the Dekraai defense team. In the midst of repeatedly committing serious discovery violations, the prosecution has, nevertheless, rarely lost the opportunity to contrast a conscientious prosecution with a defense team that is not only insensitive to the pain of victims' families, but also creates delays to simply frustrate the judicial process.

It must be emphasized that the victims' loved ones have every right to express their desire for swift justice and their anger that the case has not been tried more quickly. A responsible prosecution team would empathize with those sentiments and also explain the enormity of what is required for the defense to be sufficiently prepared—perhaps emphasizing that future reviewing courts will closely examine defense counsel's preparedness when determining the finality of this case. A responsible prosecution team

would not possibly have taken the approach pursued privately and publicly by the OCDA. And it is almost inconceivable that any prosecution team would inflame emotions against a defendant and his attorneys while simultaneously engaging in persistent, serious acts of concealment described in this motion. Ultimately, the prosecution's efforts to hide the ball and then blame the defense for the time required to find it, provides another powerful example of a prosecutorial culture that only values winning.

The Requested Sanctions

In summary, the prosecution team's misconduct in this case, and in other cases discussed herein, epitomizes the term "outrageous governmental conduct." The greatest casualty of their actions is the loss of trust. This Court can have no confidence the prosecution team will comply with its obligations under *Brady*. As such, and as is discussed below, this Court is unable to ensure a fair trial in the penalty phase for Dekraai. Consequently, it is respectfully requested that this Court issue an order precluding the prosecution from seeking the death penalty in this case, or alternatively dismissing the special circumstance allegations. The Court should make such an order as a remedy for the outrageous governmental conduct, the violation of Dekraai's state and federal due process rights, under the Court's inherent judicial power, and to ensure Dekraai's right to be free from cruel and unusual punishment under the federal and state Constitution is enforced.

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ISSUES PRESENTED

I. WHETHER THE PROSECUTION TEAM'S MISCONDUCT IN THIS CASE CONSTITUTES OUTRAGEOUS GOVERNMENTAL CONDUCT REQUIRING DISMISSAL OF THE SPECIAL CIRCUMSTANCES ALLEGATIONS OR THE DEATH PENALTY?

II. WHETHER THE PROSECUTION TEAM'S MISCONDUCT VIOLATED DEKRAAI'S STATE AND FEDERAL DUE PROCESS RIGHTS, REQUIRING DISMISSAL OF THE SPECIAL CIRCUMSTANCES ALLEGATIONS OR THE DEATH PENALTY?

III. WHETHER THIS COURT SHOULD DISMISS THE SPECIAL CIRCUMSTANCES ALLEGATIONS OR THE DEATH PENALTY UNDER ITS INHERENT JUDICIAL POWER AS A REMEDY FOR THE PROSECUTION TEAM'S MISCONDUCT?

IV. WHETHER THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND STATE CONSTITUTION?

POINTS AND AUTHORITIES

I. THE PROSECUTION TEAM'S MISCONDUCT IN THIS CASE CONSTITUTES OUTRAGEOUS GOVERNMENTAL CONDUCT, REQUIIRING DISMISSAL OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OR ALTERNATIVELY DIMISSAL OF THE DEATH PENALTY.

When law enforcement engages in outrageous governmental conduct, especially when such conduct infringes upon a defendant's constitutional right to counsel, dismissal of a criminal action is an appropriate remedy. (See *People v. Uribe* (2011) 199 Cal.App.4th 836, 866-869.) The power of a court to dismiss a criminal case based upon outrageous governmental conduct arises from the due process clause of the United States Constitution. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1259.) "When conduct on the part of authorities is so outrageous as to interfere with an accused's due process of law, proceedings against the accused are thereby rendered improper. [Citations.]" (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429.)

In the instant case, the prosecution team collectively engaged in repeated acts of

misconduct. Before discussing the misconduct, it is important to note that through this motion Dekraai is not seeking dismissal of the entire case, but rather is seeking dismissal of the special circumstance allegations or alternatively an order prohibiting the prosecution from seeking the death penalty. The reason for this limited remedy is that all of the misconduct appears to have been committed in order to obtain evidence for the penalty phase. This must be the case, because as the defense has acknowledged many times, the evidence of Dekraai's guilt is substantial and was acquired within hours of his arrest. But in many ways this makes the misconduct so much worse. Why, in a case like this with such overwhelming evidence of guilt, would the prosecution team engage in such outrageous conduct?

The misconduct here includes, but is not limited to, two separate *Massiah* violations (that the defense is currently aware of), a misleading and false affidavit submitted in support of a search warrant, intentional concealment of *Brady* evidence as it relates to the *Massiah* violation involving Inmate F., misleading and false statements made in open court, misleading and false statements made in declarations, and withholding and unjustifiably delaying discovery. The prosecution has also made repeated public statements to the media and the victims' families accusing the defense of unnecessary delays. Finally, especially as it relates to the custodial informant program, this type of misconduct has been ongoing for years and has infected numerous other cases. The misconduct is detailed herein and will be more thoroughly presented to the Court in an evidentiary hearing. A review of appellate decisions discussing outrageous governmental conduct demonstrates that the government has engaged in such conduct here. Accordingly, this Court should dismiss the special circumstance allegations or alternatively issue an order prohibiting the prosecution from seeking the death penalty against Dekraai.

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A. FACTS

Inmate F. and the Dekraai Prosecution Team

Summary of the Inmate F. Analysis

The prosecution team's misconduct related to Inmate F. has relevance to two areas of the outrageous governmental conduct analysis. First, the Dekraai prosecution team engaged in deliberate efforts to conceal Inmate F.'s informant history, along with details about his contact with Dekraai, in order to avoid a successful *Massiah* motion, and to hide the policies and practices of Orange County's custodial informant program. Second, law enforcement and the OCDA's handling of Inmate F. is critical to understanding the seriousness and scope of the misconduct that has taken hold of the custodial informant program.

As noted above, Inmate F. and Oscar Moriel are the two informants analyzed in depth in this motion. Even though Moriel's informant career predates that of Inmate F., Inmate F. is discussed first because he obtained information from Dekraai. In many respects, though, it is impossible to fully appreciate the misconduct surrounding Inmate F., and the corruption that governs the custodial informant program, without studying the Moriel section first. Not only did Moriel become an informant before Inmate F., he also testified as a prosecution witness in two murder trials and one Black Flag case. Therefore, Moriel's tenure offers a more complete picture of how prosecution teams manage informants and manipulate their presentation to defense counsel and the court.

The Moriel section in this motion also helps place several issues in their appropriate context. For example, the history of Moriel's movements within the jail and the concealment of those movements is critical to analyzing the prosecution team's claims in this case that Dekraai coincidentally found himself next to Inmate F. The prosecution's failure to hand over law enforcement reports, recordings, or notes detailing Moriel and Inmate F.'s informant work corroborates the existence of an operational scheme that systematically conceals evidence of its informants. The prosecution's management and

presentation of Moriel's prior work at trial also strongly suggest that the Dekraai prosecution team would have proceeded along a similar path but for this Court's discovery order and Dekraai's subsequent investigation. Additionally, Moriel's energetic elicitation of statements from dozens of inmates and his corresponding sentencing delay until he had completed all of his responsibilities for the prosecution corroborates that the "carrot and stick" method employed with Inmate F. is standard operating procedure.

To fully comprehend what the Dekraai prosecution team intended to keep hidden from the defense, it is imperative to begin with a discussion of what the prosecution knew from the moment Inmate F. first made contact with Dekraai. Therefore, this section does not begin with Inmate F.'s first contact with Dekraai. Rather, it begins with a discussion of the facts about Inmate F. that the prosecution knew, or reasonably should have known, were relevant *Brady* evidence, but were nevertheless concealed from Dekraai's defense team.

Inmate F.'s Previous History as an Informant

The Dekraai prosecution team certainly had little interest in disclosing Inmate F.'s previous forays into trading information for assistance in his cases. They recognized that additional efforts as an informant would powerfully undercut the notion that Inmate F. elicited statements from Dekraai and came forward with those statements out of a sense of social responsibility. Inmate F.'s career as an informant actually began a decade prior to being enlisted by the custodial informant program in 2010.

The fact that Inmate F. sought work as an informant as far back as 1999—after being charged with a felony—is relevant to analyzing his actual motives in providing government assistance in the instant matter. That year, he was charged with Penal Code section[10] 12021, subdivision (d) [convicted person in possession of weapon while on probation], section 186.22, subdivision (a) [street terrorism] and the gang enhancement

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[10] All further section references are to the Penal Code unless otherwise noted.

under section 186.22, subdivision (b). (Minutes in *People v. Inmate F.*, (Super. Ct. Orange County, 2000, No. 99NF****), attached herein as Exhibit P.)

Inmate F. pleaded guilty to the charges and enhancement, but not before attempting to improve his situation through informant assistance. The attempt was a dramatic failure, though the defense does not presently possess details. An entry in the OCDA's CI file for Inmate F., written by Anaheim Police Department Gang Unit Investigator David Hermann, stated the following on August 30, 1999: "[Inmate F.] WAS TERMINATED AS A C.I. – DO NOT USE AS A C.I." (Exhibit H, p. 5760.)

The Dekraai prosecution team did not deem the entry discoverable prior to this Court's discovery order. It also appears that multiple other investigative agencies ignored the warning about Inmate F.'s use as an informant. Inmate F. was clearly undeterred by his initial failure. In his next felony case, which was filed in 2001, he again offered to provide assistance in exchange for consideration in his case. Inmate F. was charged with violating section 12025, subdivisions (a)(1)/(b)(3) [gang member carrying concealed firearm in vehicle] and the gang enhancement. (Minutes in *People v. Inmate F. (*Super. Ct. Orange County, 2001, No. 01WF****), attached herein as Exhibit Q.)

On May 6, 2001, Kevin Raney, a commander with the Gang Suppression Unit for the Garden Grove Police Department wrote a letter to former Deputy DA Vickie Hix, praising Inmate F.'s cooperation and asking that she " . . . please give consideration regarding [Inmate F.'s] pending charges." (Exhibit H, p. 5763.) The letter leaves little doubt that Inmate F. had conditioned his assistance upon receiving consideration on his pending case: "[Inmate F.] requested to cooperate with GGPD Gang Suppression Unit in lieu of possible consideration towards only these pending cases." (Exhibit H, p. 5763.)

Whether these entries reflect the entirety of Inmate F.'s informant efforts prior to 2010 cannot be known with any real confidence. As will be discussed herein, the OCDA's CI file associated with Inmate F. is missing at least three entries that should reflect his efforts on three capital cases. There is little doubt that the information described above

was material and helpful to the defense, which is precisely why it was withheld prior to this Court's order.

Evidence of Relevant Criminal Conduct by Inmate F.

The prosecutors charged with the responsibility of disclosing evidence related to Inmate F.'s credibility will never be able to successfully claim mistake or lack of knowledge about his relevant criminal background. All of his criminal conduct, with the exception of crimes he committed in state prison, was apparently committed in Orange County. Moreover, those defendants whose cases could be potentially affected by Inmate F.'s credibility were fortunate to have an opponent who was intimately familiar with Inmate F.'s criminal history and evidence pertaining to his honesty. Deputy DA Petersen prosecuted Inmate F.'s Third Strike trial, studied his background, cross-examined him, and offered his findings about Inmate F.'s truthfulness during closing argument.

The Prosecutions of Inmate F.

In 2006 and 2007, Inmate F. was facing two cases that carried a potential life sentence under the Three Strikes law. He was charged in Orange County Superior Court case number 06WF**** (and later re-filed under case number 06WF****) with possessing and transporting methamphetamines with the intent to sell (Health and Safety Code sections 11378 and 11379) and street terrorism. (Minutes in *People v. Inmate F. (*Super. Ct. Orange County, No. 06WF****), attached herein as Exhibit R.) The complaints also alleged that Inmate F. was previously convicted of three serious and violent felonies. (Felony Complaint, filed Nov. 2, 2006, *People v. Inmate F. (*Super. Ct. Orange County, No. 06WF****), attached herein as Exhibit S; Felony Complaint, filed Jan. 17, 2007, *People v. Inmate F. (*Super. Ct. Orange County, No. 07WF****), attached herein as Exhibit T.)

In January of 2007, Inmate F. was charged in Orange County Superior Court case number 07WF**** with violations of section 12021, subdivision (a) [felon in possession of a firearm], section 12031, subdivisions (a)(1)/(a)(2)(C) [gang member carrying a loaded

firearm], and street terrorism, as well as the gang enhancement and another enhancement for committing the crimes while on bail. (Minutes in *People v. Inmate F. (*Super. Ct. Orange County, No. 07WF****), attached herein as Exhibit U.) This case also alleged the three serious and violent prior convictions. (Exhibit U.) Inmate F.'s maximum sentence for both cases exceeds 100 years to life in prison. (Exhibit U; Exhibit R.)

The 2007 case was tried in front of the Honorable Gregg L. Prickett in April of 2009. (Exhibit U.) As noted above, Inmate F. took the stand in his own defense and claimed that he never touched the gun found within inches of where he was arrested. He asserted this despite DNA evidence that "[a]pproximately one in one million unrelated individuals also would not be excluded as a minor contributor to the DNA detected on the grip," according to Forensic Scientist Richard Gustilo. (Exhibit H, p. 5516.)

The defense rested entirely upon convincing the jury that Inmate F. was truthful in claiming that he never touched the firearm. His believability about whether he handled the gun also hinged on whether the jury thought he was lying about leaving his gang five years earlier. He made this claim despite compelling evidence to the contrary. Petersen familiarized himself with Inmate F.'s criminal and gang background and then confronted him with it to demonstrate his rather startling dishonesty. The court-ordered discovery includes the following underlined entry in the arresting officer's police report: "[Inmate F.] said he was jumped into the criminal street gang of West Side 18 Street when he was 15. He said he is not jumped out. [Inmate F.] admitted to be a member of 18 Street and said he had been in the system for over 10 years." (Exhibit H, p. 5505.)

The gang verification form written on the date of the arrest in 2007 provided additional statements by Inmate F.

> [Inmate F.] stated he was jumped into 18 Street at the age of 15 and is not jumped out. Stated in good standing w/18 street and is respect by other 18 St. GM's. Stated 18 St. members from OC are allowed to be jumped out and he has chosen not to be jumped out.

(Exhibit H, p. 5512.)

These passages are just two of the many within the discovery that suggested Inmate

F. was a liar, who hoped to deceive the jury. Defense counsel asked Inmate F. about whether he continued to be a member of a gang:

Q: Are you currently a member of the 18th Street?
A: No, I am not.
Q: When did you stop becoming a member of 18th Street?
A: In 2004.

(RT (trial), April 7, 2009, *People v. Inmate F.* (Super. Ct. Orange County, No. 07WF****), attached herein as Exhibit V, pp. 331:24-332:2.)

Defense counsel then asked about his purported decision to leave the gang life:

Q: And why?
A: Because when I went to prison in 2002, I was around people that, I used to go out on the streets with. And you know, I kind of realized that, you know, when we are incarcerated we take care of each other and we look out for one another. And it is pointless. And that's why I realized that everything that I did for my gang was worthless. You know, because we tend to take care of each other and we love each other on the inside.
Q. Is it –
A: And that's the reason why I changed my life.

(Exhibit V, pp. 337: 26-338:11.)

Inmate F. said that he wanted to have his tattoos removed in 2007 " . . . because I'm no longer a gang member. I'm a married man. And I just, my life has changed." (Exhibit V, p. 351:4-8.) Inmate F. testified that the prosecution expert's earlier testimony was incorrect in asserting that a gang member could not simply walk away from the gang. (Exhibit V, p. 338: 8-15.)

Petersen, in his cross-examination, was incredulous:

Q: [Inmate F.], in essence, you are here to tell us that, one, as of 2007, you were not an active criminal street gang participant with 18th Street, correct?
A: Correct.
Q: And two, on that date, you had no idea that there was a weapon inches from your body?
A: Correct

(Exhibit V, p. 362:5-11.)

Petersen impeached Inmate F. with a juvenile adjudication and his prior felony convictions for crimes involving moral turpitude. (Exhibit V, pp. 362:19-363:9, 370:2-16.)

He then zeroed in on proving that Inmate F. had committed perjury. When Inmate F. was asked whether in 2004 he left his gang behind, he answered "Exactly." (Exhibit V, p. 363:13-15.) Petersen then introduced evidence that this was not the first time Inmate F. had made claims about leaving the gang; he told Garden Grove officers in 1998 that he was going to be jumped out of the gang the following day. (Exhibit V, pp. 364:14-365:15.)

Referencing the underlined passage of the police report discussed above, Petersen asked Inmate F. if he recalled being stopped in January of 2006 and telling officers that he was jumped in at the age of 15, that he claimed 18th Street, and that he had problems with Silver Aces. (Exhibit V, p. 367:12-21.) Inmate F. responded by claiming that the arresting officer, Deputy Ramirez, was lying. (Exhibit V, p. 371:16-22.) According to Inmate F., Deputy Ramirez fabricated Inmate F.'s admission to being jumped into 18th Street when he was 15, and the other statements suggesting he was still in good standing with the 18th Street gang members. (Exhibit V, pp. 370:26-371:9.)

The critical issue for this section of the motion is not whether Inmate F. is a liar—there is little doubt about that point. The issue is whether the OCDA was aware of evidence that was relevant to that dishonesty prior to this Court's discovery order. Petersen was certainly aware based upon his description of Inmate F.'s veracity during his closing argument:

> And when [Inmate F.] tells you that he dropped out in '04 but by '06 he has a large 18th street tattoo on his abdomen, **you can basically take everything he said and throw it in the trash. Because the defendant is being less than truthful with you.**

(Exhibit V, p. 420:9-13, emphasis added.)

Inmate F. was convicted of the offenses alleged and the matter was continued to May 29, 2009 for a trial on the prior allegations and sentencing. (Exhibit U.) His 2006 case was continued to the same date for jury trial. To date, that case has never been tried or resolved. (Exhibit U; Exhibit R.)

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Petersen Asks for Life Sentence as Inmate F. Simultaneously Claims Wrongful Conviction and Pleads for Mercy

With respect to the 2007 case in which he was convicted, the prosecution filed a Sentencing Brief on May 4, 2009. (People's Sentencing Brief, filed May 4, 2009, *People v. Inmate F. (*Super. Ct. Orange County, No. 07WF****), attached herein as Exhibit W.) In that brief, Petersen wrote that "[Inmate F.'s] conduct warrants an indeterminate sentence." (Exhibit W.) Petersen also noted that the maximum sentence was 47 years to life. (Exhibit W.)

Inmate F. wrote a letter to the court expressing the reasons that its mercy was warranted. (Letter from Inmate F. to Judge Prickett, dated May 13, 2009, filed May 21, 2009, attached herein as Exhibit X.) That letter demonstrates that Inmate F. remained steadfast to his claims that he was falsely convicted, and that he is a non-violent person with a good heart who did not deserve a life sentence. Inmate F. also suggested that he had previously pleaded guilty to crimes he never committed, stating that, "I never took the time to stop and think just what it was I was signing too [*sic*] … " Inmate F. wrote that, "…I sit facing life for sitting in a vehical [*sic*] with a gun in the car in which no crime was committed. . . . Please take into consideration that although I've made bad choices, [Inmate F.] is not a bad person." He added, "I am asking your honor for one last chance to show that I will be a productive citizen in this community. I understand that I have to pay for my non-sense [*sic*] when it comes to riding in a vehical [*sic*] without knowing whats [*sic*] inside, but I do not feel I deserve to spend the rest of my life sitting in prison." (Exhibit X.) He returned to the issue of his criminal history:

> Please take into consideration that I've never been **arrested** for any violence. From the bottom of my heart your honor I regret my choice as a teenager to become a part of an organization that can care less about me and my loved ones. I was young and dumb. If I can go back and change the path I chose "I would change it in a heart beat without hesitation."

(Exhibit X, emphasis added.)

He begged the court to "…please have leniency on my sentencing." He implored

the court not to impose a life sentence, stating, "I realize I'm a 3rd strike candidate, but I'm scared to spend the rest of my life in prison." He stated that "I realize you must get these all the time but can only hope that you can put a lot of trust in me and hear my crys [*sic*] for help." (Exhibit X.)

In a letter to the court undated but filed May 21, 2009, Inmate F. blamed his attorney for his defeat at trial:

> I have written this letter to you because I do not know what else to do or who I should turn to. My life now hangs in the balance because my attorney failed to perform his duty in competent an effective manner and did not defend me in any way that I asked him to. If my attorney had presented the witnesses I asked him to subpoena then my trial would more likely have had a different outcome.

(Letter from Inmate F. to Judge Prickett, undated, filed May 21, 2009, attached herein as Exhibit Y.)

Inmate F.'s Efforts to Persuade the Probation Officer that He Was a Changed Man

Inmate F. shifted his focus to Deputy Probation Officer Precious Johnson, hoping perhaps that she would believe the fabricated story he was pushing in which a changed man seeks to avoid punishment for crimes that he never committed. Inmate F. also continued to claim that he had been wrongfully convicted, asserting that "he was unaware that a gun was there. He denied the gun belonged to him and instead insisted it belonged to his companion." He added that "[h]e feels as though he was convicted of a crime which he did not commit and will ask for a re-trial of the case." (Exhibit H, p. 5534.)

One can only imagine Petersen's reaction when he read Inmate F.'s complaint about the unfairness of possibly receiving a prison sentence for "being in a car with a gun," requesting instead that he be sentenced to a drug rehabilitation program. (Exhibit H, p. 5534.) Before receiving the report, Petersen reiterated in an e-mail that "[g]iven the defendant's prior history and gang-related conduct, **I believe an indeterminate sentence of 25 years to life is appropriate**." (Exhibit H, p. 5535, emphasis added.) The arresting officer, Detective Ramirez, also said the case warranted a life sentence. He said the

following:

> . . . the defendant was "very evasive" and immediately disassociated himself from the gun, even though it was located next to him in the passenger side door. The defendant initially said he was unaware there was a gun present, then said the gun belonged to his companion. During the course of the investigation, it was discovered that the defendant's girlfriend had kept ammunition for the gun at her house . . .

(Exhibit H, p. 5535.)

Furthermore, a passage within the pre-sentence report demonstrates that Inmate F. possesses an immense ability to convince others about the veracity of his life history and ability to change. The Probation Officer wrote:

> While the defendant did appear **forthcoming with regards to his previous criminal activity** and drug history, it is noted that **he related to the undersigned that he no longer wants to be involved with the '18th Street' criminal street gang**; however he reportedly informed the investigating detective that he wishes to remain in the gang. [¶] To his credit, the defendant recognizes that he has a problem with drugs and is requesting help from the Court to address his addiction. Additionally, numerous character reference letters were submitted on his behalf supporting his claim of innocence in the instant offense, yet acknowledging his past mistakes.

(Exhibit H, pp. 5548-5549, emphasis added.)

Johnson's conclusion that Inmate F. was "forthcoming with regards to his previous criminal activity" is a stunning testament to his formidable powers of persuasion. No one would have been more taken aback by what he was reading than Petersen. On the other hand, when Petersen decided to employ Inmate F. as an informant, he likely viewed Inmate F.'s ability to masterfully deceive the probation officer as a valuable skill worth developing.

The following information, nearly all of which was referenced in her report, would suggest, though, that Inmate F. has been anything but candid about his criminal background:

1) Inmate F. claimed he was wrongfully convicted of his most recent offense, despite the convincing evidence to the contrary described above. (Exhibit H, p.

5534.)

2) Inmate F. said that he was wrongfully charged and convicted of grand theft person in 1999, telling Johnson, "his friends robbed the two victims and [he] denied any criminal involvement." (Exhibit H, p. 5538.)

3) Inmate F. stated that he was wrongfully convicted of possession of a firearm in 2001. He told Johnson that, at the time of the allegations, he took the blame for the passenger of the vehicle, who was actually in possession of the firearm. (Exhibit H, p. 5539.) In reality, Inmate F. never took the blame for the passenger. Rather, Inmate F. was unwavering in his claim that he never possessed the firearm and that the passenger was the only individual who possessed the firearm. (Exhibit H, p. 5611-5612.) He made these claims to the police initially and to Johnson several years later, despite the fact that a bullet matching the bullets found inside the weapon was recovered from between mattresses in the room where Inmate F. resided. (Exhibit H, p. 5616.)

4) Inmate F. stated that he was wrongfully convicted of possession of stolen property in 2002. He said that his friends carjacked someone and then picked him up later in the stolen car. He said that he accepted the plea to help his friend avoid a third strike. (Exhibit H, p. 5539.) Although not specifically referenced in the probation report, the police report includes information that Inmate F. was identified by the victim as having carjacked him and was also found to be in possession of the victim's property. Moreover, Inmate F. offered the fantastic claim that he was in the area where he was arrested because he was fleeing from rival gang members. He stated the following: "Awe sir, I been hiding back there since 9:00 (2100 hours). I got hit up (Gang terminology for confronted) by some dudes from Highland Street (an area criminal street gang) on McFadden and Bristol and I just ran through the neighborhood to get away. I just been hiding 'cause it was two car loads of them and I got stranded here." (Exhibit H, p. 5578.) He failed to explain how he

obtained the victim's property while in flight from rival gang members. (Exhibit H, p. 5578.)

5) Johnson referenced Inmate F.'s other felony case that was awaiting trial, involving the possession and transportation of methamphetamine for sale and the gang enhancement. According to the probation report, Inmate F. acknowledged smoking methamphetamine at the time of his arrest, claiming that the three grams of methamphetamine and thirteen empty baggies were used by him "to divide up his daily amount of drugs he used on a daily basis." (Exhibit H, p. 5540.) In other words, Inmate F. maintained that he was guilty of possession of drugs, but not possession for sale. Petersen, of course, was well aware of the fact that there were more problems with Inmate F.'s account than what was included in the probation report. The largest quantity of narcotics was stashed in a hidden compartment within the car. Moreover, Inmate F., as is his practice, claimed he did not know there were drugs in the compartment and said he lent the car to a friend three days earlier—a friend whose name he did not know—suggesting that this person must have placed it within Inmate F.'s car. (Exhibit H, p. 5558.)

In sum, the prosecution had a mountain of information relevant to Inmate F.'s credibility, including evidence that he lied to law enforcement, committed perjury at his trial, and attempted to deceive the court and the probation officer both overtly and through omission. Inmate F. also demonstrated a seemingly pathological willingness to blame others for crimes he committed. All of this showed his character for dishonesty and proclivity for false allegations that should have been discovered to Dekraai prior to this Court's discovery order.

But, as will be shown, the OCDA hid this evidence and later invented their own dubious theories as to why *Brady* was inapplicable here and in at least one other murder case.

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Prosecution Conceals Evidence of Inmate F.'s Gang and Mexican Mafia Involvement.

In the paragraphs that follow, the defense will detail evidence known by the OCDA about significant acts of moral turpitude that Inmate F. committed in the jail, which further demonstrates Inmate F.'s perjury at trial and his dishonesty in subsequent communications with the court and the probation officer. With the exception of a debriefing with law enforcement that will be discussed later, it appears this evidence was not separately discovered to Dekraai pursuant to this Court's order, but instead happened to be located within the discovery in several other Black Flag cases.

The existence of the information detailed below is also significant because none of these reports are found within Inmate F.'s CI file. The omission of this information from Inmate F.'s file suggests that the OCDA and the OCSD hide another category of *Brady* evidence related to informants: uncharged conduct involving moral turpitude that occurs at the jail.

In 2009 and 2010, law enforcement agencies in Orange County were monitoring a struggle between two members of the Mexican Mafia who sought control of the local jails. Petersen described this struggle in his opening statements in the 2013 trial of *People v. Camarillo*. (RT (trial), Jan. 30, 2013, Vol. 1, *People v. Camarillo* (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit Z, pp. 24:26-40:4.) He explained that before 2009, Peter Ojeda, a veteran leader known as "Sana," ran the jails exclusively. (Exhibit Z, p. 25:1-4.) Consistent with Mexican Mafia tradition, he exerted his power through a small group of inmates, known as the "mesa." (Exhibit Z, p. 26:22-24.) However, Armando Moreno, with the help of his own mesa, initiated an effort to take control from Ojeda, who had been moved to federal prison outside of California. (Exhibit Z, p. 28:6-16.)

Few members of local law enforcement were studying the battle for Orange County's jails with more focus than OCSD Special Handling Deputy Seth Tunstall and

SAPD Detective Gonzalo Gallardo. Petersen actually called Tunstall as a witness in *People v. Inmate F.* to impeach a gang expert for the defense. (Exhibit V, pp. 295:20-326:18.) Even Tunstall, an experienced law enforcement officer, must have been taken aback by Inmate F.'s brazenness in asserting that he left the gang life in 2004. Tunstall knew that not only had Inmate F. never separated himself from the 18th Street gang in 2004, but had actually begun a steady advance through the Mexican Mafia's ranks while incarcerated.

Detective Gallardo, who would ultimately become one of Inmate F.'s primary handlers, would have been equally taken aback by his false claims. In Inmate F.'s Informant Briefing Log, dated January 10, 2011, Detective Gallardo described Inmate F. as "…being a key target in the RICO case…." (Defendant Informant Waiver and Agreement between Inmate F. and Santa Ana Police Department (Jan. 12, 2011), Informant Debriefing Log by SAPD Detective Gallardo (Jan. 10, 2011), attached herein as Exhibit AA.) Of course, evidence that Inmate F. was a key target of a federal prosecution should have been revealed to the defense in the instant matter and each case in which he was a potential witness, since the possibility that he faced federal prosecution would have significantly affected his motivation to cooperate.

As both officers knew, Inmate F. had hitched his star to Moreno and was fully committed to supporting Moreno's efforts to take control of Mexican Mafia activities within the OCJ. In Tunstall's report dated December 23, 2009, under OCSD Number 09-181933, he wrote: "[Inmate F.'s] cell and property [have been] searched multiple times over the last few months. During these searches, multiple items of evidence have been confiscated and booked in as evidence" related to the Mexican Mafia investigation. (Exhibit O, p. 1769.) What were the OCSD and the Santa Ana Gang Task Force learning about Inmate F.?

Less than two months after Inmate F. wrote his letter to Judge Prickett begging for leniency, he was using his power as a Mexican Mafia leader to coerce others to kill an

enemy inmate. On June 27, 2009, Inmate A. and two others allegedly committed an assault upon "Pino." (Minutes in *People v. Inmate A.*, (Super. Ct. Orange County, 2013, No. 11CF***), attached herein as Exhibit BB; Exhibit O, p. 2460.) On December 20, 2012, Petersen and Tunstall interviewed Inmate A. regarding the incident. Inmate A. said that he "went to court and was verbally told by '[Inmate F.]' from '18th Street' (identified as '[Inmate F.])', that 'Pino' was 'hard candy' (to be killed) Inmate A. spoke with 'Pelon' and stated 'Pelon' confirmed what '[Inmate F.]' had said about Pino . . ." (Exhibit O, p. 2461.) In June 2011, the defendants were charged with aggravated assault and the gang enhancement for that June 27, 2009 incident, as well as other prior allegations specific to the three defendants. (Exhibit BB.)

Interestingly, this report, documenting Petersen and Tunstall's interview with Inmate A., was not disclosed to the defendants charged with "Pino's" assault.[11] (Exhibit A; Partial Discovery in *People v. Inmate A.* (Super. Ct. Orange County, 2013, No. 11CF***), attached herein as Exhibit CC.) But it was disclosed to Dekraai pursuant to this Court's order. The Dekraai defense team found the report within the discovery of another Black Flag case, *People v. Inmate E.* (Exhibit O, pp. 2460-2461.) As stated above, the *Inmate E.* discovery has included previously undisclosed notes of Oscar Moriel and other reports that have been essential to understanding how the custodial informant program operates. Why was this report not shared with the other two *Inmate A.* defendants? Perhaps to protect *Inmate A.* from consequences of his cooperation. **Or perhaps the prosecution wanted to avoid awkward questions about why one of the masterminds of "Pino's" assault was not prosecuted while those acting under his direction were punished so severely.**

Considering his position of leadership within the Mexican Mafia, the solicitation to commit murder, or at a minimum felony assault, was likely just one example of the criminal violations that Inmate F. committed on a regular basis while in the OCJ. All of

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[11] This report is also not included in Inmate F.'s OCSD CI file. (Exhibit M.)

this section, should have been discovered in every case in which he was a witness or his credibility was at issue. This information should have been turned over because it provided further evidence of his character for dishonesty, his efforts at deception, his perjury at trial, his attempts to mislead the probation officer assigned to his case, and his motivation for cooperating with the government.

Moreover, Inmate F. committed additional acts of misconduct that the OCSD discovered, but that were not included in his CI file. On October 24, 2009, a search of Inmate F.'s cell uncovered evidence which showed, once again, that he was hardly ready to be a productive citizen in the community—as Inmate F. had suggested to the court and probation officer—unless the productivity he was speaking about involved violence and injury. First, according to Tunstall, deputies seized from Inmate F.'s cell an envelope with identifying information for Richard Aguilar. The letter led Tunstall to believe that Aguilar was placed on the "…'Hard Candy' list to be targeted by Southern Hispanic inmates to be seriously assaulted/killed.'" (Exhibit O, p. 1733.) Aguilar was interviewed and immediately placed in total separation status. (Exhibit O, p. 1733.)

The next item deputies confiscated from Inmate F.'s cell that was of particular interest to Tunstall was a court printout that included information related to Eric Contreras. (Exhibit O, p. 1734.) Contreras was scheduled to testify against another Inmate, Daniel Gonzalez, in an attempted murder gang case. (Exhibit O, p. 1734.) Tunstall wrote the following in reference to the court printout: "Gonzalez is currently housed in the same sector as [Inmate F.] Per information obtained in a confiscated 'kite' [Inmate F.] is on the 'Mesa' for Armando Moreno and has the authority to put inmates on the 'hard candy' list to be killed. This is further explained in my follow-up under the same DR number. By [Inmate F.] having Contreras' info and being in close contact with inmate Gonzalez; I believe [Inmate F.] was getting ready to issue orders for Contreras to be killed." (Exhibit O, p. 1734.) Tunstall contacted the prosecuting attorney, Deputy DA Gupta. Gonzalez was subsequently placed in total separation. (Exhibit O, p. 1734.)

Tunstall also stated that Inmate F. had two inmate names written in ink on the opposite side of the Superior Court printout. Tunstall wrote that, "I will explain the significance of these names in my CPC 182 a 1-Conspiracy to commit a murder against Robert Zuniga report, DR#09-214516, dated 10-16-09." (Exhibit O, p. 1735.) This report was not provided to Dekraai and will be sought through an informal discovery request and a formal motion if necessary.

Furthermore, in a report dated December 23, 2009, Tunstall described several letters written by Inmate F. in his capacity as a Mexican Mafia leader. Petersen discovered these letters to the defense in *People v. Inmate E.* Tunstall summarized and analyzed one of the letters written by Inmate F. on December 23, 2009:

> While reading the "kite", I noticed several sentences of interest to this investigation. The "kite" stated, "LLAVES…LET ME TAKE THIS BRIEF MOMENT TO ADDRESS ALL CURRENT EVENTS. ALL LLAVEROS ARE TO REPORT TO P-48 LLAVES FOR ANY INSTRUCTIONS REGARDING THE COUNTY. NOW OSO ESSA AND BABY SLUGGO ARE H/C ASAP. ANYONE WHO CHOOSES TO ASSIST THUMPER OVC NEEDS TO BE SMASHED ON SIGHT! IF ANY CAMARADS GO TO "N" HOLE, "T" OVC IS TO BE DISREGARDED COMPLETELY. NOW 1/3 IS MANDO ON ALL CLAVO AND TO BE SENT THIS WAY. IF ANYONE CHOOSES TO DISREGARD THIS THEY WILL BE DEALT WITH SEVERLY [*SIC*]. ALSO, ANYONE WHO GETS CAUGHT FUMBLING ANY AMAPILS IS TO BE SMASHED BLACK AND BLUE SO THAT THEY'D KNOW TO KEEP THINGS SAFE…SIX SANTA ANA IS TO BE TAKEN OFF THE LISTA. RAZORS ARE NEEDE [*SIC*] OVER HERE. SO POR FAVOR SHOOT SOME…TLOCMIEL TECHPA W. MESERO." On the back of the "kite" were the words, "LLAVES HOT LLAVES HOT R MOD."
>
> **I believe the "kite" was written by "[Inmate F.]", who is currently the right-hand man for Ernie Melendez, "Camel."** This "kite" is very detailed and explicit on what is supposed to happen in regards to drugs within the jail system; who is considered "Hard Candy", (people who are targeted to be seriously assaulted and or killed) referring to Manuel Guillen "Oso" from "East Side Santa Ana" and Josh Torres "Baby Slugger" from "East Side Santa"; how all Southern Hispanics are to disrespect anything said or done by Tyrone Rye (inmate who assisting Peter Ojeda); that "Southside Santa Ana" is to be taken off of the green-light list; and what physically harm that is supposed to happen to those "Surenos" who lose their "kites" that they are

carrying/transporting to other inmates. . . ."
(Exhibit O, p. 1482, emphasis added.)

Additionally, on February 18, 2010, informant Oscar Moriel wrote a note to Special Handling indicating that Vanessa Murillo ("Precious") had said that Armando Moreno sent her ". . . another letter and that she took it to his boys (I'm assuming Camel or [Inmate F.] or both) at Theo Lacy so that they can see it to keep holding this county jail down for Mando. . . . " (Exhibit O, p. 2277, emphasis added.) This letter confirms Inmate F.'s important role in Mexican Mafia politics in early 2010.

A kite sent from inmate Aaron to Inmate F. "W 18 St." corroborates that several years after Inmate F. testified that he left the gang, he remained very much active in the eyes of other inmates. (Exhibit O, p. 1535-1536.) The "W" is the first initial of Inmate F.'s moniker of and "18 Street" refers to his gang. (Exhibit O, p. 1536.) In his report, Tunstall wrote that, "[Inmate F.] is an identified member of '18th Street' with the moniker of '[***]'" (Exhibit O, p. 1536.)

On April 20, 2010, Inmate F. demonstrated that his claimed metamorphosis as a human being did not prevent him from enlisting others to explore whether violence was required to prevent a potential informant, Anthony Navarro, from testifying. Moriel, Inmate F.'s informant predecessor, wrote that " . . . [Inmate F.] asked me if could call some chick for him to run a make on Anthony Navarro a.k.a. Droopy from Pacas Flats because he [Inmate F.] thinks that Droopy is snitching on Crook & Pirate from Pacas who were Droopy's co-defendants…I told [Inmate F.] that I would call her for him. No problem. For him to just write it all down for me. Which he did." (Exhibit O, p. 2394.)

Special handling also summarized notes from Moriel that documented a conversation between him and Inmate F., after an apparently coordinated Special Handling effort to bring the two together. This note should have also been disclosed for several reasons, including perhaps most importantly, Inmate F.'s refusal to take responsibility for his criminal acts and his willingness to shift blame to others whenever possible. The note stated the following:

> "Scar" asked "[Inmate F.]" if he had heard from "Chente" about "Mando's" status. . . . "Scar" asked "[Inmate F.]" what he would do if "Mando's" status comes all bad, "[Inmate F.]" tells "Scar" that if he has something coming for taking orders from one of them (La EME) and for being loyal to the [*sic*], then so be it. "Scar" asked "[Inmate F.]" if anybody got hurt behind him and [Inmate F.] told him of a couple but blamed the rest on "Camel."

(Exhibit O, p. 2397.)

On January 19, 2011, after Inmate F. had already been working as an informant, he was interviewed by members of the OCSD, the SAPD, and the FBI. (Transcription of interview of Inmate F. by FBI Special Agent Garcia, SAPD Detective Gallardo, OCSD Deputy Foster, OCSD Deputy Larson, and SAPD C.R.A. Krutsinger (January 19, 2011), attached herein as Exhibit DD.) Like all of the evidence discussed in this section, this interview was hidden from Dekraai prior to this Court's order.

Inmate F. likely had long forgotten about his testimony at his own trial. However, in his very first answer to FBI Special Agent Anthony Garcia, he provided evidence that he committed perjury in his own trial when he stated that he left his gang in 2004:

> Q: This is Special Agent Anthony Garcia; the date is January 19th 2011. This is the interview of [Inmate F.], A.K.A. [Inmate F.'s moniker]. Um why don't you go ahead and state your name, date of birth and your gang affiliation.
>
> A: I'm [Inmate F.], ... is my date of birth and **I belong to the 18th Street gang.**

(Exhibit DD, p. 1, emphasis added.)

The questioning then focused on his involvement in the Mexican Mafia. Inmate F. acknowledged that under the organization's direction, he engaged in drug sales, extortion and assaults. (Exhibit DD, pp. 2-3.) He specifically admitted to selling heroin. (Exhibit DD, p. 65.) Additionally, he stated that when an individual is placed on the "hard candy" list, this means that they are to be killed. (Exhibit DD, p. 5.) Inmate F. said that Armando Moreno selected him to serve on his mesa. (Exhibit DD, p. 17-18.) He confirmed that he had communicated with other members of the mesa regarding who should be placed on the "hard candy" list. (Exhibit DD, pp. 31-32.) He further stated that he had passed down orders to kill, per the "hard candy" list. The targets included "Thumper," a supporter of the

rival gang vying for control of the jails. (Exhibit DD, pp. 95-97.)

In sum, the materials pertaining to Inmate F.'s relationship with the Mexican Mafia—and the failure to provide this evidence prior to the Court's order—is significant for several reasons. First, the information discussed above is undeniably relevant to Inmate F.'s motive to provide a mountain of valuable information for the prosecution. He knew that his future rested entirely on the mercy of prosecutors and the court. If the prosecution revealed his Mexican Mafia activities it would provide a powerful disincentive for the court to reduce his sentence. He also would have reasonably believed that the failure to provide sufficient and valuable informant work could lead Petersen or members of law enforcement to encourage federal authorities to proceed with a RICO prosecution.

Second, the OCDA knew that the suppressed evidence of Inmate F.'s relationship with the Mexican Mafia was highly relevant to proving that he lied by claiming that his civic duty and personal repulsion to the crimes motivated his involvement. Evidence that Inmate F. held a leadership role in an organization that kills its opponents—and that he directed such operations—should have been turned over to the defense.

Third, Inmate F.'s perjury and subsequent dishonesty with the court and the probation officer about his gang history is highly relevant to the credibility of all aspects of his testimony at the *Massiah* hearing. And the virulent strain of deceitfulness that drives him can only be appreciated with an understanding of his Mexican Mafia background. While it is one thing to deny gang membership to an officer in the streets, it is another to adamantly testify to having long left the gang life and then return to the jail the very same night to help run mafia operations. It is also understandable that a defendant may minimize his criminal past when asking for a reduced sentence. It reveals a wanton disregard for the truth, however, to write to the sentencing judge "[p]lease take into consideration that I've never been **arrested** for any violence," with the same pen used to write inmates directing them to assault or kill fellow inmates. (Exhibit X.) Moreover, Inmate F.'s realization that the prosecution knew of his pathological dishonesty—he admitted his Mexican Mafia work

in his proffer in January of 2011—supplied additional motive to provide as much assistance as possible in the hope that Petersen would not disclose his lies to the sentencing court.

Fourth, the prosecution's refusal to turn over evidence of Inmate F.'s relationship with the Mexican Mafia is relevant to evaluating their purported reasons for refusing to turn over evidence prior to this Court's ruling. Knowing the truth about his history with the Mexican Mafia and recognizing its critical importance in evaluating his honesty and his motives, the prosecution essentially claimed that this evidence should remain hidden even if there was a dispute about the truthfulness of his testimony. In the end this argument should be recognized as a two-step trick—one used by prosecutors who would prefer that their custodial informants not be saddled with who they actually are. The first step is to hide the evidence that is potentially damaging to the credibility of the informant, while the second is to subsequently devise a rationale why the defense was never entitled to have the evidence in the first place.

Fifth, the evidence of Inmate F.'s criminal activities as a Mexican Mafia member is relevant to the OCSD's practice of hiding evidence damaging to the credibility of its informants. As indicated above, Inmate F.'s CI file did include any evidence of the misconduct or criminal conduct within the jail that would have been harmful to his reliability, and relevant to his motives to lie and curry favor with the prosecution. The evidence of Inmate F.'s jail crimes was only uncovered because it happened to be included in one of the case discoveries ordered by this Court. As such, this Court should have little faith that the discovery related to Inmate F.'s jail misconduct is even close to being complete. The failure to include Inmate F.'s uncharged criminal conduct in the OCSD's CI file also raises the specter of serious discovery violations in each and every case involving a custodial informant witness.

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Evidence that Inmate F. Was Placed on "Hard Candy List" as His Mesa Loses Power, and the Motive to Become an Informant Emerges

By March of 2010, the fears of the Moreno Mesa appeared to have come to fruition. In a report dated March 30, 2010, Tunstall wrote that Ojeda had regained control of the Orange County Jails. (Exhibit O, p. 1861.) Inmate Tyrone Rye, who was given authority under Ojeda to run the jails, allegedly wrote a kite saying that members of the Moreno Mesa, including Inmate F., were "ALL HC. NO QUESTIONS ASKED." (Exhibit O, p. 1861.) Tunstall explained that " . . . Rye is putting out/authorizing the list of those inmates who are to be killed. All of these inmates were previously part of Armando Moreno's 'Mesa' and chose to go against the orders of Peter Ojeda. This list is commonly called the 'Hard Candy' list." (Exhibit O, p. 1862.) Tunstall wrote that "[t]he following are the inmates who are on Rye's and Ojeda's 'Hard Candy' list: . . . '[Inmate F.'s moniker] 18 Street' is identified as [Inmate F.'s moniker], Bkg #23*** who is self claiming member of the '18th Street' gang with the moniker of '[Inmate F.'s moniker]'. . . . " (Exhibit O, p. 1862.)

Overnight, Inmate F. had gone from a leader within the Mexican Mafia to one of its prime targets. The Dekraai prosecution team cannot justify its refusal to conceal evidence, not only of Inmate F.'s Mexican Mafia work, but also that the organization targeted him to be killed around the same time that he accepted employment with the government. This change of circumstance was unquestionably relevant to making a reasonable assessment of his motives for joining the government, and to staying within their good graces to avoid retribution from the Mexican Mafia.

Again, it appears that at some point near the middle of 2010, Inmate F. became a government informant. While it should be easily discernible when Inmate F. and the government's relationship began, it is not. As will be seen throughout the motion, local law enforcement's policy and practice of concealing its management and communication with custodial informants has meant that answers to even the most straightforward

questions remain elusive.

Inmate F.'s Pre-*Dekraai* Efforts as an Informant in 2010 and 2011

Dekraai's attempt to obtain a complete picture of Inmate F.'s informant work has been made enormously difficult by the prosecution team, including most notably the Special Handling Unit of the OCSD, which manages the custodial informant program on a daily basis in coordination with the OCDA and local law enforcement. This unit, along with the OCDA and local law enforcement agencies, has shown a steadfast commitment to hiding their communications with informants, their movements of inmates to improve informant opportunities for eliciting incriminating statements, and other evidence that they consider damaging to their interests.

Apparently, their success at hiding evidence also fomented a sense of invincibility, as well as complacency. Selected informant notes provide valuable insights into how the custodial program truly operates and regularly violates the law. With a one hundred percent success rate at avoiding detection of their misconduct, prosecutors and law enforcement likely forgot some of the critical contents of the notes or thought it unlikely that the defense would connect the necessary dots to understand their significance. Uncovering the government's misconduct has required a word-by-word analysis of notes, reports, and transcripts in different cases, which was only possible through discovery that encompassed multiple cases in which informants were referenced.

It is now clear that, as an informant, Inmate F. offered exactly what the program seeks. Like Moriel, Inmate F. has proven himself to be highly skilled at developing the confidence of his fellow inmates. Additionally, his own legal predicament and fear of reprisals from the Mexican Mafia made him highly motivated to provide the prosecution with a plethora of statements and information that he felt might improve the outcome in his two cases. The prosecution was delighted to own a driven and capable informant who could follow directions and also work independently to obtain statements from inmates illegally. The *Massiah* violations would be their little secret, and it would be easy to push

an informant to present his contact with a defendant as the prosecution preferred, since they have complete control over his future. The OCDA—which bears ultimate responsibility for overseeing the program—fully grasped that by delaying decisions about informant benefits and consideration until sentencing, they were engendering *Massiah* violations even in those situations where they did not purposefully direct informants to elicit incriminating statements. However, they decided that a judicial finding consistent with the violations could be avoided through manipulating evidence and discovery.

In *People v. Whitt* (1984) 36 Cal. 3d 724, 741, the California Supreme Court cited approvingly to *United States v. Sampol* (D.C. Cir. 1980) 636 F.2d 621. In *Sampol,* an informant was placed on probation with the condition that he spend six months in jail and provide the government with information about criminal activity. Although the government did not direct the informant to obtain statements from a particular person, the informant faced substantial jail time if he did not provide satisfactory information. The informant received statements from a defendant, which he then shared with law enforcement. Thereafter the informant was told not to initiate any further conversations with the defendant. The statements were introduced at trial. (*United States v. Sampol, supra,* 636 F.2d at pp. 630-637.) The D.C. Circuit Court of Appeals found that the informant obtained statements from the defendant in violation of *Massiah,* even though the informant was not told specifically to elicit them. (*Id.*at pp. 637-638.)

While the informant in *Sampol* did not directly question the defendant, he obtained the information through his "ability to 'ingratiate' himself with criminals" and encourage their confidences. (*United States v. Sampol, supra,* 636 F.2d at p. 638.) Because the government was aware of the informant's ability and need to elicit information from criminals, it was irrelevant that the government did not direct the informant towards the defendant or a particular inmate. (*Ibid.*) By giving the informant a powerful incentive to bring back incriminating statements from inmates, the government "trolled in the jail, using [the informant] as bait, and was ready to net any unwary inmate who rose to the lure."

(*Ibid*.) Thus, any statements that the informant obtained after his deal with the government were deliberately elicited for purposes of *Massiah.* (*Ibid*.)

Orange County's custodial informant program invites "trolling," but that hardly represents the only path toward obtaining statements in violation of *Massiah*. On many occasions, prosecution teams direct their informants to question targets on particular subject matters, including the subject matter of their pending cases. In other situations, Special Handling sends targets into the proximity of informants, who are then expected to take the cue and spring into action. This practice is even more egregious than the one described in *Sampol,* as it reveals a much more intentional, aggressive effort to have informants question specific targets. The subsequent cover up of these actions—through the OCDA and Special Handling's concealment of records and reports that discuss those movements—further offends the principles of *Massiah*. Garcia admitted that there is an understanding between Special Handling and its informants about what should occur when a high-value inmate is sent into the informant's unit:

Wagner: …I guess kind of the terms that you were using--um, do you give him instructions about how he's to go about gathering information that would be useful to you?

Garcia: Um, I personally don't. Um, what may have been said, you know, with the task force, that I'm not sure. Um, a lot of it--the way we work it inside is we put somebody next to him unless there's a specific operation. And if they talk to them and they find out information, great. If they don't we don't--you know, we don't get anything, but we don't say, "Hey, this is your mission. This guy committed this particular crime. Um, find out what you can find out about it." Uh, we're very, very vague. He's in a housing location. **We just might move somebody else in there next to him.**

Wagner: Would you ever give him a heads up that somebody's coming to be close--in to close--is being moved to be close to him and that you'd like to find out some information about that individual?

Garcia: A lot of times he'll know. It's-it's funny, a lot of these guys, **they'll know right off the bat if somebody new rolls in, he'll--they'll call us up and say, "Hey, so and so from so and so just came in."**

(Transcription of interview of Deputy Ben Garcia by OCDA Investigator Erickson and Assistant DA Dan Wagner (March 29, 2013), attached herein as Exhibit EE, pp. 17-18, emphasis added.)

Garcia apparently had forgotten his earlier description within the interview, in which he explained how he purportedly first learned of Inmate F.'s contact with Dekraai: "Inmate F reached out to me and he, uh, said that, um, **a guy just rolled up next to him in his housing unit** and 'It's the guy that, um, is here for the Seal Beach murders.'" (Exhibit EE, p. 3, emphasis added.) Therefore, assuming arguendo that Special Handling did not direct Inmate F. to question a particular, high-value defendant who was charged and represented, they should not be surprised that Inmate F. would take the cue, ingratiate himself with the inmate, and question him about his crimes. That is precisely what Special Handling's Pavlovian training had accomplished.

And the message could not have been clearer after the housing locations of Inmate F. and the highest value inmate in the entire county were manipulated so that they were in adjoining cells: It was time to go to work. Even if Inmate F. somehow did not see the movements as a cue in such a situation, he would have snapped into action for the same reason as the informant in *Sampol*: to provide the prosecution with additional incentives to assist him in his two pending cases.

The study of Inmate F.'s recent informant career begins with an examination of when and how he came into the government's fold. Dekraai will then analyze Inmate F.'s informant work in three time periods: 1) June 17 – July 8, 2010; 2) July 9 – March 10, 2011; and 3) March 11 – September 14, 2011. These periods provide a rough timeframe for analyzing Inmate F.'s focus areas, and how the directions he was given changed over time.

The First Phase of Inmate F.'s Informant Efforts: June 17 – July 8, 2010

A Test Case for Inmate F.

Housing records reveal that on June 16, 2010, Deputy Garcia moved Inmate F. out of disciplinary isolation and into Mod J. (Exhibit FF, p. 8348.) According to Garcia's interview, an individual identified as Inmate D. arrived in Mod J on June 17, 2010**, only one day after Inmate F. had been relocated to that unit.** (Exhibit EE, pp. 24-25,

emphasis added.) As referenced in the Summary of Motion and Findings, Inmate D. is also represented by Sanders, and he is also being prosecuted for capital murder.

Inmate F. elicited statements from Inmate D. and Dekraai 15 months apart. If one were inclined to believe Garcia, Inmate F.'s efforts in both instances were merely coincidental and unprompted by the OCSD, the OCDA, or local law enforcement. However, this motion will show that Special Handling, the OCDA, and local law enforcement have habitually engaged in deception when the subject turns to how informants and represented defendants find themselves in communication. This pattern of deception is alone sufficient to find that Special Handling orchestrated the meeting between Inmate F. and Inmate D. But a cascade of other facts also supports this finding.

Inmate F.'s CI file created by the OCSD offers important insights about Inmate F.'s first assignment after June 14, 2010. **The only contact that Inmate F. documented with another inmate during the following three weeks—after providing deputies with his biography, the roster, and request for clarification of his assignments—was his contact with Inmate D.** The next entry in Inmate F.'s CI File is dated July 1, 2010, which is also the date of the first notes he wrote describing the statements of any fellow inmate. On that date, Inmate F. turned over two pages of notes documenting an alleged confession by Inmate D. Why did Inmate F. write **notes** about his discussions with an inmate, rather than just share them verbally? Garcia answered that question during his interview on March 29, 2013:

Wagner: Okay. Uh, besides contacting the D.A.'s office about, uh, Inmate's--Inmate F's report that [Inmate D.] was talking, um, do you recall having a conversation with Inmate F about [Inmate D.]?

Garcia: Not-not in detail. I have him write it all down, and I'd rather him talk to the D.A. I-I didn't--I don't like it to go through me and then through the D.A. I want them to hear it firsthand. The reason I make him write it down is for, one, so they don't forget what they just heard, um, but I don't get into detail on that or trying to add to that or anything else. I-I like to keep it clear to him that, um, "This is what you heard. If they come and talk to you, just share that with them." (Exhibit EE, p. 30.)

This response confirms that **before** Inmate F. wrote his notes about his contact with Inmate D., Garcia trained him to document statements from targets in writing. Nonetheless, Garcia and Special Handling were apparently shocked to learn that Inmate F. then used that training to document his conversations with a high profile defendant charged with special circumstances murder, rather than waiting for an actual assignment from Special Handling. Seemingly, this unauthorized action would have ended Inmate F.'s chances of working for the government. Quite the opposite. Inmate F.'s "rogue" effort actually locked him into full-time employment. Why? It turned out that Special Handling was "coincidentally" hoping that Inmate F. would generate some proof that he could be trusted. Garcia told Wagner the following:

> So Operation Black Flag--so I brought over, um--I believe at the time it was Seth Tunstall, um, uh, Gonzo [phonetic spelling], a lot of the guys from Santa Ana came over and sat down, talked to him, and we kinda feeled him out to see if in fact he wasn't playing both sides, if he was true to this ...

(Exhibit EE, p. 7.)

Garcia later added:

> Yeah, look--they were there--yeah, I compared to when they were moved into that housing unit and when I received that, and it was a couple weeks. So it took a while for them to build a rapport. It wasn't that he went in there and just, you know, threw it all out to him. He had to build a rapport with this guy, and I think that was one of the first things he really gave us showing that, "Hey, you know, I'm gonna tell you what people tell me, and share this with you."

(Exhibit EE, p. 31.)

In essence, Garcia would have it be believed that although Special Handling never created a "test" to determine the quality of Inmate F.'s informant skills and his fidelity to law enforcement, he still passed it with flying colors.

Garcia's response to Wagner's question had another interesting element. He said that it took time for Inmate F. to ingratiate himself with Inmate D., noting that "it took a while for them to build a rapport." (Exhibit EE, p. 31.) However, in his notes, Inmate F. never wrote anything about needing to build a rapport with Inmate D. How did Garcia

know that Inmate D. did not simply offer incriminating statements in response to the first question? The reason, of course, is that Garcia's analysis was not the product of clever skills of deduction based upon his study of the file, as he had suggested.

Special Handling had not left its new informant alone in the weeks immediately preceding their discussions with him about his "work assignment." They were meeting with him regularly and encouraging his work. Garcia was not speculating when he told Wagner that it took some time for Inmate F. to build a rapport with Inmate D. Rather, he was describing what Inmate F. told him. Garcia then hid evidence of these conversations with Inmate F. to prevent exposing Special Handling's efforts to seek information from represented defendants in willful defiance of *Massiah*. And, as will be shown throughout this motion, the concealment of evidence damaging to the prosecution's goals was the rule, not the exception.

In sum, the following facts—without consideration of the prosecution's practice of concealing *Massiah* violations—demonstrate the government's active role in eliciting statements from Inmate D.: 1) Inmate F. received an unidentified "work assignment" in June; 2) Before bringing Inmate F. into Operation Black Flag, Special Handling needed to determine whether Inmate F. could establish a relationship with a target and then be relied upon to document what was said; 3) There was a one day period separating the arrival of Inmate D. and Inmate F. in the same unit; 4) Inmate F. did not document notes about conversations with any other inmate during the three week period following the unidentified assignment; and 5) Inmate F. wrote notes to Special Handling documenting Inmate D.'s confession on July 1, 2010 and July 8, 2010.

Costa Mesa Police Department's Interview of Inmate D. and its Report: A Hint of the Concealment to Come

As indicated in the Summary of Motion and Findings, two issues explored in this motion are determining when the Dekraai prosecution team knew Inmate F. was an informant, and when the decision to cover up that knowledge began. In analyzing the

prosecution team's misconduct and whether it was demonstrative of a trained policy for the use of custodial informants, it is worth considering how another local prosecution team managed its contact with Inmate F.

As will be discussed, the Dekraai prosecution team's interview of Inmate F. was conducted by OCDA Investigator Erickson and described in his subsequent report. That interview and report purposefully concealed the Dekraai prosecution team's knowledge that Inmate F.'s was an informant. What did the interview and report by Costa Mesa Police Department ("CMPD") Detective Jose Morales indicate about his knowledge of Inmate F.'s background as an informant and his relationship with Special Handling? Detective Morales' report, **which he did not write for nearly one year**, does not give any hint that he had even spoken with a member Special Handling in advance of the interview about Inmate F. Nor does it indicate that Morales was aware of Inmate F.'s developing role as an informant. (Report of Detective Morales, dated May 22, 2011, attached herein as Exhibit KKKKKKK) While Erickson's report about the *Dekraai* investigation and his interview with Inmate F. acknowledged the contact with Garcia, neither Erickson's report nor the recorded interview hinted at the significance of Garcia's role. In addition, neither the Dekraai team's interview of Inmate F. nor the subsequent report revealed that they had any knowledge that Inmate F. was a government informant (for the previous 15 months.)

While both reports and recorded interviews fail to mention any knowledge of Inmate F.'s informant status, one of the reasons that neither the Inmate D. prosecution team nor the Dekraai prosecution team can credibly claim they were unaware of Inmate F.'s status as an informant is a matter of common sense. These homicide prosecution teams would not have permitted a witness from the jail to become entangled in their capital prosecutions without first learning the inmate's informant history and the potential motivations for providing assistance.

Nonetheless, it would take three years before a government official finally acknowledged Morales's contact with Garcia prior to the Inmate F. interview in *People v.*

Inmate D. During Wagner's 2013 interview with Garcia, the following dialogue took place:

> Q2: Do you recall, um, having to make any contacts as a result of notes that Inmate F wrote concerning [Inmate D.]?
> A: I-I believe I contacted the D.A. behind that one, too.
> Q2: All right.
> A: Yeah.
> Q2: So-so just saying, um--kind of the same contact you made with us concerning…
> A: Absolutely.
> Q2: …Scott Dekraai, just that, "Hey, you may want to know that it sounds like [Inmate D.] is talking, and you've got somebody who's a cooperating individual who reports having a conversation"?
> A: That is correct.

(Exhibit EE, p. 29.)

Additionally a Special Handling summary that precedes Inmate F.'s notes in his OCSD CI file pertaining to Inmate F.'s contact with Inmate D., states that "…[Inmate F.] documents the conversation and forwards it to Special Handling. The original copies were sent to Detective Morales from Costa Mesa P.D." (Exhibit M, p. 5147.) Although the prosecutor on Inmate D.'s case has indicated he does not intend to call Inmate F. as a witness, it remains mysterious why Morales waited so long to write a report about a seemingly important interview and why his instinct after the delay was to continue to hide Inmate F.'s informant status (and the detective's communication with Special Handling.) (Exhibit A.)

The most logical explanation why Morales failed to be transparent about his knowledge of Inmate F.'s informant status is that he realized the statements from Inmate D. had been obtained in violation of *Massiah* and that his questioning of Inmate F. and the subsequent receipt of additional notes where further violations of *Massiah*—the identical reason that the head of the same homicide unit prosecuting Inmate D. led the concealment of Inmate F.'s informant status in *People v. Dekraai*.

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More Lessons from Inmate F.'s Contact with Inmate D.: The Truth About Inmate F.'s Motivations

When the Dekraai prosecution team met with Inmate F., they believed they would be able to successfully hide Inmate F.'s informant background, by aiding him and presenting a motive for his assistance that at the very least, was not completely candid. However, fifteen months earlier, before Inmate F. was far more schooled in the informant handbook, Inmate F. he was considerably more careless with expressing his true motivations for his work. Inmate F. had expressed his most powerful motivation for providing assistance in his first letter to law enforcement, dated July 1, 2010:

> Padilla & Garcia, Grover & Paraja. I extend all mines. **I am just looking to change my life and get back to my kids** I will do what it takes to get there. Just to inform you my DA is Gang DA "Eric" Peterson [sic.]" & my lawyer is Richard Curran (714) 8**-****

(Exhibit M, 5149, emphasis added)

Interestingly, when he was interviewed one week later by Morales on July 8, 2010, Inmate F. showed that he could express contempt for a target's conduct and still be motivated by hope for consideration on his cases. As he would when speaking about his feelings toward Dekraai, Inmate F. expressed enmity toward Inmate D. when speaking to Morales, calling Inmate D. a "creep." (Exhibit LLLLLLL, page 9.) But toward the end of the interview, he articulated perfectly why he would brought a desperation to his everyday informant efforts for the government: "…**I just want to get back home with my kids and I'll do whatever it takes to get there**…" (Exhibit LLLLLLL, p. 14.)

Interestingly, as soon as the interview terminated, it appears that Inmate F. immediately renewed his efforts to obtain additional information from Inmate D. Inmate F. created a new set of notes that were dated July 8, 2010—the same day as the CMPD interview. In those notes, Inmate F. memorialized additional statements about the crime and the culpability of a third party. (Exhibit M, pp. 5150-5151.) Questioning at the hearing will show how the OCSD helped to facilitated this second round of questioning of Inmate D., just as the OCSD would facilitate Inmate F.'s questioning of Dekraai more than

one year later.

The Second Phase of Inmate F.'s Informant Efforts: July 9, 2010 through March 10, 2011

Inmate F. Focuses on the Mexican Mafia

Having passed his test with Inmate D., Inmate F. turned his attention primarily to eliciting statements and collecting evidence on the Mexican Mafia. This new focus is not described in any law enforcement reports or notes. Rather, it is gleaned, once again, from Inmate F.'s handwritten notes and other documents that he turned over to Special Handling. Between July 9, 2010 and March 10, 2011, Inmate F. wrote 62 pages of notes, turned over 71 pages of kites, letters, and other documents, and wrote 31 pages translating letters and kites written by other inmates. (Exhibit M, pp. 5147-5389.)

More Evidence of Hidden Recordings, Notes and Reports; An Agreement Reached Months After the Work Began

SAPD Detective Gallardo was the first law enforcement officer to write a statement describing Inmate F.'s agreement to work for the government, which is found in Gallardo's Informant Debriefing Log. The statement was written on January 10, 2011, but not turned over to Dekraai until April 11, 2013. Gallardo wrote the following:

> 1-10-11: SA Garcia and I met with [redacted] regarding **OBF [redacted] expressed interest that he wanted to assist SAGTF for state consideration in his pending case [redacted] was convicted in Nov. 2010 for being in possession with a handgun along with gang enhancements and a 3rd strike. He is scheduled to be sentenced in March 2011. DA Petersen stated [redacted] may receive a 25 to 40 years to life when he goes to court in March. However with [redacted] cooperating in OBF and being a key target in the RICO case** [redacted] has agreed to assist OBF in confirming that all the mafia activity that occurred under Armando "Mando" Moreno, a validated EME member, while in custody at OCJ. With [redacted] cooperating and willing to testify, SA Garcia will approach AUSA T. Flynn and ask that [redacted] become a federal witness and be house at BOP witness protection facility to serve his state time. . . . SA Garcia and I will meet with [redacted] next week to complete and document a debrief regarding Operation Black Flag.

(Exhibit AA, emphasis added.)

The log confirms that Inmate F.'s purpose for agreeing to work with the government was consideration on his pending cases. This type of confirmation is only required in a fictional world where Orange County prosecutors assert that inmates facing life in prison snitch out of the goodness of their hearts—though they clearly prefer to make this argument when court and counsel are left in the dark about the same inmate's career as an informant.

This notation left unanswered another question that warranted an explanation. Between July 8, 2010 (when Inmate F. wrote his second note about statements elicited from Inmate D.), and January 19, 2011, Inmate F. wrote 62 pages of notes that documented statements related to the Mexican Mafia. Therefore, what was the agreement that existed between the government and Inmate F. prior to January of 2011, and why was that agreement not formalized in writing? The court-ordered discovery is silent on these issues.

Testimony And Other Evidence Revealing Constant Communications With Inmate F.

Considering the amount work Inmate F. was doing in the first five months of his employment, is it feasible that law enforcement failed to create any record of their communications and directions? While Inmate F. had a degree of independence in identifying targets, he was not working entirely on his own. This was reaffirmed through Sergeant Tunstall's testimony at the preliminary hearing in *People v. Camarillo*. During the hearing, he offered insight into the volume of communications between law enforcement and their valued informant:

> Q: Have you had numerous contacts with [Inmate F.] pertaining to Mexican Mafia politics?
> A: Yes, I have.
> Q: And you have had numerous conversations with [Inmate F.] on how kites are delivered in order to facilitate assaults within the Orange County Jail?
> A: Yes, I have.

(RT (prelim. hr'g), Apr. 10, 2012, *People v. Camarillo* (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit GG, p. 67:8-14.)

Petersen reiterated the point later in questioning:

> Q: And have you had numerous conversations with [Inmate F.] relating to Mexican Mafia politics assault [sic.] committed on behalf of Armando Moreno?
> A: Yes, I have.

(Exhibit GG, p. 86:23-26.)

As indicated earlier, Inmate F.'s stream of communications with the government were an asset for the prosecution's litigation of the Black Flag cases. The fact that Inmate F. was regularly sharing information about the Mexican Mafia enhanced Tunstall's knowledge on the subject. And, luckily for Tunstall, he was able to complete his testimony without being asked whether he had created a single note or report to document these critical communications.

Significantly, Tunstall was not the only officer from Special Handling who spoke frequently with Inmate F. Nearly every note that Inmate F. wrote was directed to Deputy Ben Garcia. In his interview earlier this year, Garcia acknowledged his regular discussions with Inmate F. Garcia said "…our communication was huge on the phone, unless there was something--a real hot topic, then we'd pull him out." (Exhibit EE, p. 21.) Surely, when he was speaking with Inmate F. on the phone Garcia was writing down what was said—at least the key aspects. But the prosecution has failed to turn over any notes or reports that memorialize these communications as well.

Inmate F.'s Participation in "Dis-iso" Scam(s); Significant Concerns About *People v. Vega*; and the Persistent Concealment of Relevant Reports and Records

As discussed in the Summary of Motion and Findings and in more detail in the discussion of *People v. Vega*, beginning at page 248, one of the prosecution's favorite methods of winning the confidence of targeted inmates is to place informants with them in disciplinary isolation units. This is done to allay the fears of targets that informants may indeed be informants, as those working for the government would seemingly not face such punishment. In *Vega*, the government worked this to perfection and, as a result, informant

Oscar Moriel was able to seek and obtain inculpatory statements about both Vega's pending homicide (in violation of *Massiah*) and activities in the Mexican Mafia.

Apparently, Garcia and the prosecution team decided they had so much success in developing the relationship between Moriel and Vega through the "Dis-iso" scam that they would try it again—but this time using Inmate F. instead of Moriel as the informant. On October 10, 2010, Garcia placed Inmate F. in disciplinary isolation. (Exhibit FF, p. 8348.) It appears that Vega ("Downer") was either placed in disciplinary isolation or was already housed at that location when Inmate F. arrived. This is confirmed by several notes including one apparently written on or about October 26, 2010, in which Inmate F. wrote that Downer was getting heroin through the mail. (Exhibit M, pp. 5259, 5262-5263.) The barely legible note also includes the following sentences:

> Garcia it would be a good idea to move Downer to North Hole and move Eddie Boy In for a minute. So I could work these dudes. (Illegible) move (illegible) me. Also I'll speak to you in person about something else! Also I wanted you to hit me with a fake validation packet just like you did (illegible) Downer. Talk to you about that later.

(Exhibit M, pp. 5259, 5263.)

In the excerpt, it appears that Inmate F. is requesting that Vega be relocated and another target, "Eddie Boy," be brought in so he can begin to "work these dudes." Whether he knew that Vega had already fallen prey to the scam previously through the work of Garcia and Moriel is unknown. However, there are several interesting coincidences at play, including Inmate F.'s request to "…hit me with a fake validation packet just like you did (illegible) Downer." It is not clear whether Inmate F. knew that Special Handling had taken a similar step to further build Vega's trust in Moriel, and the sentence referred to this. As discussed at page 251, Garcia and his team provided Moriel with fake paperwork documenting fabricated violence committed by Moriel within the jail, in order to convince Vega that his jail classification was based upon his violence versus working as a "snitch." (Exhibit O, pp. 2061, 2064-2065.)

From Vega and his counsel's perspective, another informant's government-initiated

contact with Vega in the months leading up to his trial would have been immensely disturbing—particularly if the prosecution had fulfilled its *Brady* obligations and revealed both the "Dis-iso" scam and the *Massiah* violation related to Moriel. In October of 2011, the prosecution had still not revealed Vega's allegedly inculpatory statements made to Moriel. (RT (trial), Dec. 2, 6, 7, and 9, 2010, *People v. Vega*, (Super. Ct. Orange County, 2010, No. 07CF2786), attached herein as Exhibit HH, p. 23:13-22.) In fact, they would wait until shortly before trial to reveal that Moriel would be a witness and discover four pages of what were apparently 500 pages of notes. (Exhibit HH, p. 23:13-22.) (Last minute revelations relating to the informants would, in fact, become Petersen's modus operandi.) It is highly likely that Petersen, Garcia, and the rest of the team decided to take another shot at a "Dis-iso" scam with Inmate F. before alerting Vega to Moriel's role as an informant and causing him to remember that he also met Moriel in disciplinary isolation.

For Vega, his greatest concern should be that the prosecution likely learned via Inmate F. defense strategies and analysis discussed by Vega, just as Inmate F. would obtain such information from Dekraai the following year. The rampant deception intertwined in the program, the refusal to turn over notes and reports, and the proven willingness to invade defendants' Sixth Amendment rights—all in order to obtain privileged information—suggests that this pursuit of privileged and protected information was more than likely included in Inmate F.'s job responsibilities.

The government's refusal to turn over the above referenced note to Dekraai prior to this Court's discovery order and in other cases where Inmate F. is a witness has additional implications. First, the note corroborates that Inmate F. was not simply responding to directives and memorializing what he happened to hear. He was fully engaged in identifying targets and making suggestions so that law enforcement would be fully satisfied with his production.

Second, Inmate F.'s comment that he "could work these dudes" is significant. It confirms that Inmate F. was anything but a listening post, merely collecting statements

from talkative and unsuspecting inmates. He sought opportunities to feign an interest in his targets in order to mine them for information helpful to the prosecution. Vega, for example, was a fellow member of Armando Moreno's mesa. Inmate F.'s desire to exploit their relationship and his connection to the mesa reflects his commitment to mining the jails for information helpful to the government and his own future.

Third, while law enforcement's creation of fraudulent jail and prison materials is not per se prohibited, the disclosure of their use is mandatory if relevant to *Massiah* and other material issues; an informant's use, or even a request, for a "fake validation packet" is relevant to analyzing the informant's honesty, and whether his depiction of the circumstances surrounding an alleged confession are complete and accurate. For instance, an inmate's claim that a targeted inmate spoke about a crime without prodding is more suspect if the informant determined that a fake validation packet was necessary to convince the inmate that he could be trusted. Additionally, the mere request of a validation packet is relevant to the prosecution's presentation of its informant as anything other than a self-motivated and enthusiastic seeker of incriminating statements.

Fourth, Inmate F.'s comment that he wanted to speak with Garcia at a later point about a subject not included in his notes indicates that notes and/or a report exist that memorializes that discussion. Of course, this example is hardly necessary for establishing the existence of outstanding notes and reports; Tunstall, Garcia, and Gallardo were speaking with Inmate F. regularly, and were obviously writing down what he told them. Nevertheless, to date, the prosecution has turned over only five brief reports that memorialize conversations between Special Handling and Inmate F. (Exhibit M, pp. 5219-5224, 5462-5467, 5470-5475, 5476, 5490)

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The Third Phase of Inmate F.'s Informant Efforts: March 11 - September 14,

2011: *People v. Inmate I.* and *People v. Inmate S.*

***People v. Inmate I.*: Summary of Critical Issues**

Among the cases discussed in this motion, *People v. I.* is perhaps the most instructive in examining and understanding Inmate F.'s contact with Dekraai, the custodial informant program operational procedures, and the actions of prosecutors and officers that manage and utilize that program. Inmate I. is charged with committing two "cold case" homicides. Deputy DA Petersen and the SAPD appear to have built both cases almost entirely on statements obtained by two informants: Inmate F. and Moriel. For a number of years, the investigations of the 2005 and 2006 homicides seemed destined to remain unsolved. However, in 2010, Oscar Moriel disclosed to law enforcement that he had obtained confessions from Inmate I. one day after his arrest on an unrelated case. Approximately one year later, after Inmate I. was charged with both homicides, Inmate F. reported that he had also obtained confessions to both homicides from Inmate I.

Neither informant found their way to these inmates nor obtained their confessions on their own. However, Petersen, the SAPD, and Special Handling were not the least bit interested in disclosing the truth about what they had done behind the scenes. For this prosecution team, much like Dekraai's, "coincidental contact" was, once again, the far more appealing—albeit untruthful—explanation.

Summary of Charges

On March 18, 2011, Inmate I. was charged with a murder that occurred on January 19, 2005. (Minutes in *People v. Inmate I. (*Super. Ct. Orange County, No. 11CF****), attached herein as Exhibit II.) He was charged with murder, street terrorism, gang and firearm use enhancements, and the gang special circumstance allegation. (Exhibit II.)

On March 25, 2011, Inmate I. was charged with an additional murder; this one occurred on September 2, 2006. This second murder also included a street terrorism charge, gang and firearm use enhancements, and the gang special circumstance allegation. (Exhibit II.)

2005 Shooting of Alberto Gutierrez: Gutierrez Murder Investigation Prior to Moriel's Informant Assistance

The assigned prosecutor in *People v. Inmate I.* is Petersen. The preliminary hearing was held on March 15, 2012. SAPD Sergeant Fidencio Zepeda testified that on January 19, 2005, he was called to the area of 1012 St. Gertrude in Santa Ana to investigate a homicide. (RT (prelim. hr'g), March 15, 2012, *People v. Inmate I.*, (Super. Ct. Orange County, No. 11CF****), attached herein as Exhibit JJ, p. 7:9-15.) Upon arriving at the scene, Zepeda observed two shotgun shells. (Exhibit JJ, p. 7:23-24.) He then interviewed a witness named Miguel Torres. Torres told Zepeda that he was walking eastbound on St. Gertrude Place when he saw the victim across the street, and that he appeared to be shot. (Exhibit JJ, p. 8:13-19.) Torres did not hear any gunshots. (Exhibit JJ, p. 8:17-18.) Torres told Zepeda he saw the suspect, who seemed to be attacking the victim. Torres believed that he then saw the suspect with keys in his hands, which appeared to be covered in blood. (Exhibit JJ, p. 8:22-24.) According to Torres, the suspect then entered a grey Nissan and fled the scene. (Exhibit JJ, p. 8:25-26.) Torres also said that he overheard a conversation between the victim and his mother before he died. (Exhibit JJ, p. 10:20-23.) The victim told his mother that prior to being shot, the perpetrator asked him where he was from. (Exhibit JJ, p. 10:24-11:1.)

Moriel Provides Evidence of Inmate I.'s Culpability in the Gutierrez Murder

Detective Rondou testified at the preliminary hearing that he spoke with Oscar Moriel about conversations Moriel had with Inmate I. He said that Moriel provided information about the 2005 and 2006 shootings that implicated Inmate I. (Exhibit JJ, p. 17:7-9) Rondou said that Moriel took copious notes regarding conversations they had in jail, in which Inmate I. discussed his role in the two murders. Rondou stated that he reviewed these notes and then had a conversation with Moriel, but did not memorialize the interview in a report. (Exhibit JJ, p. 23:14-15.) Rondou testified that he also listened to jail recordings of conversations between Moriel and Inmate I. (Exhibit JJ, p. 21:12-19.)

Rondou testified that Moriel told him about a discussion he had with Inmate I., during which Inmate I. confessed to the 2005 murder of Gutierrez. According to Moriel, Inmate I. told him the following: Inmate I. was hanging out with Gutierrez and "Smokey" from Delhi. According to Rondou, Gutierrez was a Walnut Street gang member. (Exhibit JJ, p. 19:4-5.) Inmate I. and Gutierrez got into a verbal confrontation and Inmate I. pulled out a gun, but decided not to shoot because there were too many people around. (Exhibit JJ, p. 18:13-18.) Inmate I. then left the location. A short time later, Inmate I. was walking down the street when "Smokey" and Gutierrez pulled up next to him in a car. "Smokey" approached Inmate I. and had a conversation with him about the argument with Gutierrez. Inmate I. told "Smokey" to get Gutierrez from the car so that they could fight. When Gutierrez exited the vehicle, Inmate I. made sure no one was watching and then shot Gutierrez multiple times with a shotgun. (Exhibit JJ, 18:19-26.) Inmate I. also purportedly told Moriel that he took the car keys out of Gutierrez' pocket before fleeing. (Exhibit JJ, p. 19:11-19.)

2006 Shooting of Randy Adame: Adame Murder Investigation Prior to Moriel's Informant Assistance

At the preliminary hearing, SAPD Detective Julian Rodriguez testified that on September 2, 2006, he responded to the area of 919 Berkeley in Santa Ana to investigate a homicide. (Exhibit JJ, pp. 12:23-13:3.) At the scene, Rodriguez observed the victim, later identified as Randy Adame. (Exhibit JJ, p. 13:6-11.) His body was located partially inside a vehicle. (Exhibit JJ, p. 13:8-9.) Rodriguez also observed 15 shell casings in the street of 9 millimeter caliber. (Exhibit JJ, p. 13:14-18.)

Rondou testified about his conversation with witness Marina Lopez. (Exhibit JJ, p. 16:4-8.) Lopez told him that she was driving down Berkeley when she observed a brown vehicle coming in her direction. She then saw a male exit the brown car and walk towards a vehicle in a driveway. A car subsequently collided with Lopez's vehicle, after which she observed the male fire a handgun into the car in the driveway. (Exhibit JJ, p. 16:11-22.)

The prosecution team had identified other suspects prior to Inmate I.'s confession to Moriel. However this was not discussed in the preliminary hearing. These suspects were revealed in the discovery provided by the OCDA pursuant to this Court's order.[12]

Moriel Provides Evidence of Inmate I.'s Culpability in the Adame Murder

At the preliminary hearing, Rondou described his interview with Moriel about the Adame murder. (Exhibit JJ, p. 19:22-25) Rondou did not state when this interview with Moriel occurred. According to Moriel, Inmate I. told him the following: On the night of the incident, Inmate I. was cruising around Alley Boys territory with another Delhi gang member, looking for someone to shoot. Inmate I. and the unidentified Delhi member then saw Adame, whom they recognized as an Alley Boys member, pulling out of a driveway. Inmate I. jumped out of the car and walked towards Adame, who was in the driver's seat. Adame tried to back out of the driveway, but crashed into another car in the street. Adame drove forward to get away and crashed into a wall. Inmate I. then shot 15 rounds with a 9 millimeter handgun into the car. Inmate I. purportedly said that Adame's head hit the horn, which he could hear going off. (Exhibit JJ, pp. 19:20-20:17.)

On cross-examination, Rondou was asked to clarify what Inmate I. told Moriel about his search for Alley Boys members to shoot prior to the murder. Rondou explained

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[12] In April of 2007, Ezequiel Felix told SAPD investigators that he was seated in Adame's car when his friend was killed. (Discovery in *People v. Inmate I. (*Super. Ct. Orange County, No. 11CF****), attached herein as Exhibit KK, pp. 4125-4126.) He said that he saw Michael Sandoval, known as "Monster," exit a vehicle. (Exhibit KK, p. 4125) Michael Sandoval walked towards them and said, "Where you vatos from?" (Exhibit KK, pp. 4125-4126.) He then began shooting at their vehicle with a semiautomatic handgun. (Exhibit KK, p. 4126.) He said Edward Sandoval and two other passengers were also in the car. (Exhibit KK, p. 4125.) Felix gave varying responses about his ability to identify the suspects, but ultimately named Michael Sandoval as the shooter. Felix said that he had been afraid that if he identified Michael Sandoval, then he would be labeled a "snitch." (Exhibit KK, pp. 4125, 4132.) Both Felix and Marina Lopez, as well as a third witness, said a photo of a car associated with the Sandoval brothers looked similar to the suspect's vehicle. (Exhibit KK, pp. 4143-4145, 4148-4154, 4161, 4167-4169.) Police interviewed Michael Sandoval, but he denied any involvement in the crime. (Exhibit KK, p. 4486.)

that this information came from Moriel's handwritten notes dated May 24, 2010. (Exhibit JJ, pp. 31:21-32:6.) Rondou testified that according to page two of these notes, there had been a "disrespect" a couple days prior to Adame's shooting, and that Inmate I. and another Delhi member were cruising around with an AR-15 looking for Alley Boys. (Exhibit JJ, p. 32:9-12.)

Evidence That Inmate I. Was Not Responsible For the Murder of Randy Adame: Delayed and Hidden Discovery

As emphasized throughout this motion, the actions of the OCDA and local law enforcement demonstrate that informants are seen as tools merely for supporting the prosecution's theory of culpability. Therefore, it should come as no surprise that the prosecution hid evidence that Moriel had obtained information from other inmates that Inmate I. was not responsible for the killing of Adame.

Before Moriel obtained Inmate I.'s supposed confession to the Adame murder, Moriel spoke with another Delhi gang member about the crime, Sergio Elizarraraz. Elizarraraz, known as "Bad Boy," was one of the co-defendants in *People v. Rodriguez* discussed herein. The prosecution of Elizarraraz, which also involved substantial misconduct, was based almost entirely upon his alleged statements to Moriel. Moriel's notes documented Elizarraraz's admissions and confessions to several gang crimes, as well as Elizarraraz's descriptions of crimes committed by other members of his gang. According to Moriel, Elizarraraz gave the following detailed account of the murder of Adame, known as "Goofy":

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Bad Boy told me that Chano [Inmate L.], Gato (Joseph Galarza R.I.P.), and

> Termite all told him that they were the ones that got Goofy from Alley Boys over there by the 7-eleven on 1st and Flower St. Bad Boy said that they were all getting high together and kicking back when they all told him the story of how they were there when Termite killed Goofy from Alley Boys. Bad Boy says that they told him they were in a G-ride (A stolen car of unknown make or model) cruising by the 7-Eleven on 1st and Flower St. Gato was driving, Chano was in the back seat and Termite was sitting in the passenger seat armed with an AR-15 assault rifle. A car of unknown make or model pulled up next to them with guys who looked like gang members. So Termite asked them where they were from and they said, "Alley Boys" And once they said "Alley Boys" Termite lifted up the AR-15, pointed it in their direction from inside the vehicle and opened fire on them. The car occupied by "Alley Boys" sped off South on Flower St. while Gato chased after them in the G-ride and while Termite continued to open fire on them from inside the vehicle. The "Alley Boys car" turned on Berkely [*sic.*] (I believe his said turned right) and Termite kept firing at them until the Alley Boys crashed into another parked car. And when Termite finished firing the AR-15 at them, killing Goofy (who was in that car) in the process. They drove back to the varrio to let the homies know that they just killed an Alley-Rat (a term used to dis-respect the Alley Boys)

(Exhibit KK, pp. 4792-4793.)

Petersen eventually turned over to Inmate I. a total of 26 pages of notes that memorialized some of the conversations between Moriel and Elizarraraz. However, Petersen did not turn over this evidence until at least one year after the charges were filed.[13] (Exhibit JJ, p. 27:3-9.) Additionally, as will be discussed in the section Petersen

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[13] In *People v. Rodriguez*, the prosecution team did not acknowledge the existence of any of Moriel's notes pertaining to the charged murder until cross-examination during the preliminary hearing. (RT (prelim. hr'g), June 30, 2011, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit LL, pp. 57:21-58:3.) During that questioning, Rondou finally admitted that Moriel had documented his conversation with Elizarraraz about the charged crimes. However, Rondou did not reveal at that time that "Termite" had purportedly taken responsibility for the Adame murder. (Exhibit LL; Discovery, pp. 4792-4793.)

At some point subsequent to the preliminary hearing in *People v. Inmate I.*, Petersen finally turned over all of Moriel's notes about his discussions with Elizarraraz, including the above referenced page regarding "Termite's" responsibility for the crime, with the exception of one page. (Exhibit LL; Discovery, pp. 4785-4710.) Peterson also turned over five additional pages of Moriel's notes that document conversations with other inmates,

had secreted six of those pages from the defendants in *People v. Rodriguez*, as discussed beginning at page 348.

But the evidence from Elizarraraz was far from the most compelling third party culpability evidence that should have been made available to Inmate I. **As of the date of this Court's discovery order, Petersen had not turned over evidence that Joseph Galarza confessed to two other fellow Delhi gang members that he was the shooter in the Adame murder.** Galarza was killed by a Santa Ana Police Department officer in April of 2009. In notes dated February 1, 2010, Moriel wrote that Alvaro Sanchez and Trujillo (known as "Vicious") told him that Galarza admitted to the Adame murder. (Exhibit O, pp. 2315, 2316.) Detectives with the SAPD would have had little trouble identifying Trujillo, as Moriel provided his exact cell location. (Exhibit O, p. 2316.)

Trujillo's rendition to Moriel was the most compelling in establishing Galarza's culpability. Moriel wrote the following:

> I talked to Vicious (Trujillo L-20-15) when he came out of dayroom this morning and he said he want to bang the neighborhood (Delhi) . . . He was also telling me that when Joseph Galarza (Gato) was still alive that the two of

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including Vega. (Exhibit LL; Discovery, pp. 4780-4784.) (The one page of Elizarraraz's notes that Petersen secreted was Elizarraraz's second confession in *People. v Rodriguez*, which he also withheld in that case). (Exhibit O, p. 2379.)

Petersen likely made a risk assessment after the preliminary hearing in Inmate I.'s case and decided it was best to include the notes discussing Termite's confession. He had already discovered the notes, which documented "Termite's" purported responsibility, to the three defendants in *People v. Rodriguez*. Therefore, he knew that potentially one of the defendants in that case or their counsel could speak with Inmate I. or his counsel about "Termite's" purported culpability. In making his analysis, Petersen may have felt there was minimal risk that the evidence of "Termite's" culpability would ever be introduced at Inmate I.'s trial, even with the note given to the defense. To accomplish the introduction, Inmate I. would have to call Elizarraraz at trial if "Termite" refused to admit his culpability. In his own case, Elizarraraz would later be allowed to plead to lesser charges and "credit time served," even though he was supposedly the admitted shooter in a case that carried life without possibility of parole. The prosecution in *Inmate I.* likely contemplated that Elizarraraz would have little incentive to answer questions about the Adame murder, particularly if he would also potentially face Petersen's questions about his culpability in the other uncharged crimes he supposedly admitted to Moriel.

> them were really tight. I told him that Gato had stripes when it came to pulling the trigger for the neighborhood. That is well known. And he (Trujillo) told me that Gato told him personally that he (Gato) was the one who pulled the trigger that killed Goofy from Alley Boys and the he (Trujillo) knew Goofy by his 1st name Randy because Randy sold dope for Trujillo's uncle. And that he did not know if Gato was by himself or not when Gato killed Goofy. Trujillo had told Gato that a guy from Alley Boys just got killed and that he (Trujillo) knew him and Gato told him where it happened to see if Trujillo was talking about the same person (Flower & Berkeley) and Trujillo say, "Yeah that's the one" And then Gato told him "I'm the one that pulled the trigger".

(Exhibit O, p. 2316.)

It would have also required little analysis for the prosecution to realize that Galarza's statements to Trujillo were far more problematic than those allegedly made to Elizarraraz. Elizarraraz did not state with specificity what each person told him about their role in the Adame murder, making the confession of any of the individuals far more difficult to identify and to introduce at trial. In contrast, the confession to Trujillo occurred during a one-on-one conversation with Galarza. During that conversation, Galarza asked Trujillo whether they were talking about the same murder: the one that occurred on Flower and Berkeley, which was the location of the Adame murder. Trujillo responded to Galarza, "Yeah that's the one." (Exhibit O, p. 2316.) Galarza then admitted to the crime: "I'm the one that pulled the trigger." (Exhibit O, p. 2316.)

Moreover, as discussed in footnote 13, Elizarraraz's discussions of multiple crimes in which he was involved made it less likely that he would be willing to take the stand and subject himself to perilous cross examination. On the face of it, Trujillo would have far less reason to worry about what could emerge from his testimony. In his discussions with Moriel, he did not admit to participating in any other crimes and had little fear that his testimony could result in new charges.

Of course, the prosecution may not avoid its *Brady* responsibilities by "concluding" that the evidence will not be admitted at trial in order to rationalize withholding discovery. Inmate I. was obviously entitled to receive all of these statements in a timely fashion so

that his team could interview witnesses and proceed with the investigation before memories faded and evidence disappeared. However, because local prosecutors such as Petersen believe that discovery obligations should yield when compliance could endanger a successful prosecution, he had still not turned over these notes or revealed their contents at the time of Inmate I.'s preliminary hearing. **This meant that as of the date of this Court's discovery order, the prosecution had been in possession of Moriel's notes, which contained the exculpatory evidence from Trujillo and Sanchez, for three years without having done any follow-up investigation. Moreover, the prosecution had still not turned the discovery over to Inmate I. almost two years after Inmate I. was charged with the murder.**

Hidden Notes Begin to Unravel the "Dis-iso" and "Coincidental Contact" Scams

Each act of deception carried out by the prosecution team in *People v. Inmate I.* carries independent significance and corroborates that other, similar acts of concealment cannot be reasonably attributed to inadvertent error. By the time *People v. Inmate I.* proceeded to preliminary hearing, the prosecution team, which consisted of Petersen, SAPD investigators, and the OCSD's Special Handling Unit, was already intertwined in a conspiracy. The goal was to hide *Massiah* violations, impeachment evidence pertaining to informants, and the illegal operations of the custodial informant program. Therefore, when Rondou took the witness stand at Inmate I.'s preliminary hearing, the team was attempting to ensure a victory without revealing past and continuing misdeeds.

No area of the custodial informant program has been more consistently subject to manipulation than the discovery of informant notes. Petersen and Rondou's performance at the preliminary hearing demonstrates that their commitment to deception has not wavered over time. The transcript of those proceedings reveals that Petersen waited almost one year before finally discovering the six pages of Moriel's notes to Inmate I. which pertained to his conversations about the charged murders. (Exhibit JJ, 27:3-9.)

Defense counsel asked Rondou about the six pages dated "5-24-10" that he had received **on the date of the preliminary hearing**:

> Q: But the total amount of notes was just these six pages?
> A: Regarding [Inmate I.]?
> Q: Yes.
> A: That I am aware of, I think this was the only times that he wrote notes regarding just [Inmate I.] He gave us other stuff, but I think if we are just talking about [Inmate I.], these are the only set of notes I have."

(Exhibit JJ, p. 26:7-15.)

As will be shown, it appears that Rondou was being untruthful, once again. The defense does not possess the notes dated "5-24-10", as they were not included in the materials provided per this Court's discovery order. Although Dekraai did receive the defense discovery from Inmate I.'s case, it appears that Petersen elected not to rediscover these pages as numbered discovery after personally handing a copy to his opponent at the preliminary hearing.

It is, once again, the discovery from *People v. Inmate E.* that raises significant concerns about whether these were in fact the complete set of notes documenting Inmate I.'s purported statements. The discovery from *Inmate E.* includes nearly 200 pages of notes written by Moriel. Among those are several pages of notes in which Moriel described a conversation he had with Inmate I ("Slim"). The note about the murder of Gutierrez began as follows:

> "For Gonzo and Garcia
> *[Inmate I.] AKA Slim from Delhi just got here a few hours ago and landed in cell 1. (The cell right next to mine.) Him and I were talking on the Return Air Flow Vent and I mentioned to him that my grandmother's house is directly across the street from our home boy Roach (Jaime Roach) and that one of my primas saw him do that. (Referring to that murder that he committed on that 17 year old from Walnut St on the corner of Evergreen and St. Gertrude) But he told me right away that was bullshit because nobody saw. . . . "

(Exhibit O, p. 2399.)

He also wrote the following about the murder of Adame, aka "Goofy:"

> *Slim also admitted to me on the vent that he was the one that got Goofy

from Alley Boys. He referred to him as a Disney character at first. But I asked like I didn't pick it up. So he said, "Goofy" . . .

(Exhibit O, p. 2400.)

That page and the two pages that follow are solely committed to memorializing Inmate I.'s conversations with Moriel. They included descriptions of the two murders that would shortly be charged and descriptions of other crimes that Inmate I. purportedly committed. (Exhibit O, pp. 2399-2401.) These pages of notes seemingly correspond with the notes that Rondou said were the only ones that Moriel wrote about Inmate I.'s crimes. **However, the notes referenced above do not appear to be the same notes that were turned over to Inmate I.'s counsel at the preliminary hearing.** Rondou said that the notes he was referring to were dated "5-24-10", and were six pages in length. However, there are only three pages—not six pages— found within the *Inmate E.* discovery that contain Inmate I.'s discussions about the two homicides. Those pages are numbered "1" to "3." Additionally, while the month of the note found in the *Inmate E.* discovery cannot be determined because a hole punch pierced the number, there is a different day of the month in the *Inmate E.* set: "-20-10." (Exhibit O, p. 2399.)

Furthermore, the notes found in *Inmate E.* do not include the same details of the crime as the notes turned over at the preliminary hearing. For instance, Rondou testified that on page two of the six pages dated May 24, 2010, Moriel documented Inmate I.'s description of Inmate I. and another Delhi member driving around the area looking for an Alley Boys member to shoot with an AR-15 assault rifle. (Exhibit JJ, p. 32:4-15.) However, **page two of the set of notes from *Inmate E.* does not include any such description**. (Exhibit O, p. 2400.)

The fact that the notes dated May 24, 2010, as described by Rondou, are not found within the *Inmate E.* discovery raises additional concerns. It is unclear why the notes from May 20, 2010 would have been included in the discovery, but not those written four days later relating to the identical subject matter. If the OCSD's Special Handling possessed the notes from both dates and turned over copies of both to Petersen or the SAPD, why do the

Moriel notes found in *Inmate E*. not contain both and why did defense counsel for Inmate I. not receive both?

Their absence from the *Inmate E*. discovery could be explained by a member of the Inmate I. prosecution team removing the May 24, 2010 notes from the group of materials that were turned over. It is also plausible that the OCSD did not receive or retain a copy of the May 24 notes. This raises two concerns: The first is whether OCSD reliably maintains a complete set of informant writings within its CI file. Second, the absence of this particular note from the *Inmate E.* discovery it suggests the likely possibility that SAPD may have requested that Moriel rewrite the notes from May 20, 2010 and date them May 24, 2010 because of concerns discussed below, while never providing a copy of the May 24, 2010 notes to the OCSD.

The Impetus for Note Gamesmanship: Continued Concealment of the "Coincidental Contact" Scam

Petersen and Rondou had numerous reasons for wanting to manipulate and delay discovery of Moriel's notes even though they memorialized a lawfully obtained description of two unsolved murders. Petersen's mind was certainly on past and present defense counsel as he analyzed his options. As referenced in the Summary of Motion and Findings, Wagner attempted to close the loop of informant discovery related to the instant matter by taking steps to keep other defendants from learning about Inmate F.'s contacts with Dekraai. Petersen was engaged in identical efforts over a period of several years involving multiple cases.

Petersen was understandably concerned about what defense counsel for Inmate I. might glean from a close examination of Moriel's notes on both dates and whether additional discovery requests could follow if they were carefully analyzed. He was also understandably worried that revelations of concealment could make their way to other defrauded defendants. The prosecution teams discussed in this motion do not appear to have any remorse about their misconduct, as their distorted sense of justice has seemingly

convinced them that misconduct is justifiable when they deem it necessary or simply helpful. Nevertheless, their actions exhibit concerns about how revealed misconduct could affect themselves and their cases.

To fully appreciate the motivations for a prosecution team's decision to hide seemingly inculpatory statements from Inmate I., it is critical for this Court to study the section addressing the misconduct related to Moriel beginning at page 239. However, a brief discussion of the critical points is also necessary at this juncture.

By the time of Inmate I.'s preliminary hearing, the Petersen-led team, which included Deputy Garcia, had woven a tangled web of informant misconduct and concealment that poisoned the proceedings in *People v. Vega* and *People v. Rodriguez.* The egregious misconduct in those cases included the suppression of Moriel's informant efforts related to Inmate I. Petersen hid the notes related to Moriel's contact with Inmate I. from the four defendants in those two cases because he knew the notes would decimate the "coincidental contact" scam being used in those cases and blow the lid off one of the preferred methods of effectuating it: the "Dis-iso" scam.

A single hidden page of Moriel's notes speaks most clearly to the use of these scams. This page elucidates the prosecution's contempt for *Massiah* and discovery obligations, and helps explain Petersen's concerns about Inmate I.'s counsel reading the note dated " -20-10". The critical page of Moriel's notes, hidden in *People v. Vega, People v. Rodriguez* and *People v. Inmate I.*, appears in the discovery from *People v. Inmate E*. On August 1, 2009, Moriel wrote a note to "Deputy Garcia" that included the following paragraph:

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> Last time I talked to Flynn with you & Grover in that room **Flynn said that he was going to try to bring Slim [Inmate I.] over sometime this week. But I don't see a safe way. Me being a total sep unless we do the Dis-ISO thing again** which might work because Slim isn't used to doing jail time so he wouldn't be on the ball or as suspicious as somebody like Downer who's got years in the system…the only problem is that Downer will see Slim going to dayroom to other sectors and know that he's in the hole with me. And that'll look real funny…just giving you a heads up."

(Exhibit O, p. 2075, emphasis added.)

"Deputy Garcia" is Special Handling Deputy Ben Garcia. "Grover" is Special Handling Deputy William Grover. "Flynn" is SAPD Detective Matthew Flynn. This single paragraph offers a window into the effort by prosecution teams to convince targeted inmates, and later court and counsel, that the inmate's contact with an informant is coincidental. In *Vega*, the "coincidental contact" scam was used in large part to avoid *Massiah* implications. Moriel was harkening back to the team's successful use of the "Dis-ISO thing" to fool Vega, as well as the plan of Moriel, Special Handling deputies, and SAPD Detective Flynn to use the same scam on Inmate I.

As mentioned in the summary, the "Dis-iso" scam involves coordinated efforts by the Special Handling Unit of the OCSD, SAPD, and likely the OCDA, to place informants next to high-value defendants in disciplinary isolation housing to dispel suspicions that the inmate is an informant. Disciplinary isolation—which inmates call "the hole"—is a punishment imposed for serious jail rules violations. The Special Handling Unit understood that the protective custody status of an informant, such as Moriel, would naturally provoke other inmates to suspect the person is a "snitch." (Exhibit O, pp. 2064-2065.) Special Handling also knew that fellow inmates would doubt that an informant working with law enforcement would commit a qualifying rules violation. Even if he did, it was unlikely he would be punished by being placed in isolation. Therefore, the objective of this scam has been to convince the targeted inmate that the informant's presence in disciplinary isolation necessarily means that he is not working for the government. The

scam was successful, and Vega's suspicions regarding Moriel melted away.[14]

With the scam having worked to perfection against Vega, the team wanted to use it again, but this time to facilitate Moriel's questioning of Inmate I. about two unfiled homicides. Moriel was a full-fledged member of the team. Again, the "Dis-iso" scam does not have *Massiah* implications for Inmate I., as he was uncharged at the time of Moriel's contact. Rather, the prosecution wished to utilize the scam because of the other benefit it provides: a targeted inmate who trusts an informant is far more likely to make statements about the identified crimes.

At the same time, the prosecution team could never reveal this particular page of notes for two reasons. First, it exposed a *Massiah* violation in *People v. Vega*. Second, it would demonstrate compellingly that Moriel was anything but a listening post. At Vega's trial and at the preliminary hearing in *People v. Rodriguez*, Petersen presented Moriel in an identical fashion: the lucky listener in the presence of talkative Delhi members. Petersen was able to credibly offer this picture—in large part—because he had engaged in massive concealment of Moriel's informant work, which included hiding the above referenced note.

In *People v. Vega*, the brazenness of Petersen's concealment was most powerfully demonstrated by the fact that Petersen turned over four pages of notes memorializing Vega's confession to the charged homicide, but hid the single page referenced above that was written on the **exact same date**; the prosecution knew it would have revealed the truth about how Moriel and Vega came together, proving a *Massiah* violation. In regard to *People v. Rodriguez*, Petersen hid the above referenced note as well as the notes related to Inmate I. because Petersen promoted a false image of Moriel as a listening post, rather than someone working side by side with law enforcement to obtain confessions.

Therefore, when it was time to decide what to turn over to Inmate I., the prosecution

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[14] The successful consummation of the "Dis-iso" scam related to Vega would also require that Special Handling fabricate paperwork "proving" that Moriel had assaulted deputies and child molesters.

was mindful of this misconduct and numerous other improper acts, which they desperately needed to remain hidden. Petersen knew that if he immediately provided Inmate I. with Moriel's note, dated May 20, 2010, there was a significant risk that it would begin to unravel all that they had illegally and unethically accomplished.

Analysis of Moriel's Note Dated May 20, 2010: Further Evidence of "Coincidental Contact" Scams

Moriel's first few sentences of the note written on May 20, 2010 would have raised immediate concerns for prosecution team members. Moriel indicated that law enforcement moved Inmate I. closer to him so that he could elicit incriminating statements, and that Moriel knew Inmate I. was coming: "[Inmate I.] AKA Slim from Delhi just got here a few hours ago and landed in cell 1. (The cell right next to mine.)" (Exhibit O, p. 2399.) Petersen likely feared that Inmate I. and his counsel would immediately realize that Inmate I. did not "land" next to an informant one day after his arrest without the careful planning of the prosecution team, especially since the confession was purportedly taken the very same day.[15] This realization by the defense would have led to litigated battles for all of Moriel's informant notes, which the prosecution had heretofore avoided through a combination of deception and luck.

The prosecution team knew that the May 20, 2010 contact between Moriel and Inmate I. was the result of another successful "coincidental contact" scam planned nine months earlier. In fact, it appears that the only reason the effort was not completed in 2009 is because Inmate I. was transported to state prison on another case before the scam could be effectuated. (Minutes in *People v. Inmate I.* (Super. Ct. Orange County, 2009, No. 08CF****, attached herein as Exhibit OO.)

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[15] Defense counsel might also have some well-founded suspicions about the arrest of Inmate I. in Orange County Superior Court Case number 10CF***, and whether that arrest was entirely legitimate considering how quickly Inmate I. was placed in a cell near Moriel. (Minutes in *People v. Inmate I.* (Super. Ct. Orange County, 2010, No. 10CF****, attached herein as Exhibit NN.)

Significantly, additional hidden discovery confirms that SAPD detectives had suspected Inmate I.'s role in the Gutierrez homicide, and the team had met to discuss the planned contact in advance of the coordinated housing movements and the probing of Inmate I. In another page of Moriel's notes found within *People v. Inmate E.*, turned over to Deputy Garcia on or about July 1, 2009, Moriel wrote that, "Downer [Vega] says that Prowler also spoke up to the cops that Slim killed the dude from Walnut St. . . ." (Exhibit O, p. 2054.) It appears that Vega learned about the statements of Julio Ceballos, known as "Prowler," seemingly because Ceballos was a witness in Vega's own case. Consistent with his practice, Petersen then hid these notes from Inmate I., lest he and his counsel begin to suspect that the contact with Moriel was not coincidental and that the conversation about the Gutierrez murder—that Moriel immediately initiated with Inmate I.—was planned months in advance.

Petersen knew that concealing Vega's conversation with Moriel about Inmate I.'s responsibility for the Gutierrez murder would not alleviate the problems caused by Moriel's notes written on May 20, 2010. Another reason for concern about the May 20, 2010 notes was that Moriel's words were insufficiently ambiguous, and read very much like the words of an informant prepared to go to work. He began his note by revealing that he **immediately** began questioning Inmate I. about a homicide that occurred more than four years earlier. (Exhibit O, pp. 2399-2401.) This sentence alone would have led competent counsel to suspect that the idea for these questions originated with law enforcement rather than Moriel. It is the next few sentences, though, that the prosecution knew—if read—would have eviscerated the notion that Moriel was simply a listening post and prompted immediate discovery requests.

In the following sentence, Moriel described what he said to Inmate I. prior to the purported confession. Before Inmate I. confessed, Moriel presented Inmate I. with facts designed to convince him to admit his culpability. Moriel suggested that a cousin ("prima") saw Inmate I. commit the Gutierrez murder. (Exhibit O, p. 2399.) Who is this

cousin? The Inmate I. discovery does not discuss the existence of any witness who identified Inmate I. as the shooter. Moriel's act of confronting a suspect with false facts was certainly a lawful method for obtaining a confession. However, it also allowed a portrait of Moriel and his relationship with law enforcement, which was entirely inconsistent with how Moriel was presented in the two prior Delhi murder trials, and with how they wished to present him in *People v. Inmate. I.*

Moriel's rendition of the conversation, in which Inmate I. confessed after he was confronted with purported evidence of his culpability, raised serious concerns for the prosecution team. It suggested compellingly that Moriel worked with law enforcement in advance of his questioning of targets. As Rondou denied writing reports about his contact regarding Inmate I., and no other detective reports have been discovered that memorialize contact with Moriel, the contents of the note suggest that the team was attempting to cover up the direction they gave to Moriel. The note also rebutted the preferred presentation of Moriel as a listening post, which was relevant to the other Delhi cases in which he obtained confessions: *People v. Vega* and *People v. Rodriguez*. Of course, its relevance and helpfulness to those cases is what mandated its discovery in all three cases per *Brady,* and explained why the prosecution was hesitant to reveal it.

Additionally, one of the most important reasons why the prosecution disfavored discovery of these notes is because they gave the defense an argument that Inmate I. had merely acquiesced to the suggestion that he was responsible and falsely confessed to the crime. Although the prosecution continued to conceal evidence of third party culpability, they knew that at least two of the three people who allegedly admitted to killing Gutierrez—Inmate I., "Termite," and Joseph Galarza—had not told the truth. The last thing the prosecution wanted to do was help Inmate I. argue that he was one of those two people that falsely confessed, by revealing that he was fed evidence of culpability in advance of his statements.

In the notes, dated May 20, 2010, Moriel also documented Inmate I.'s purported

confession to the Adame murder. Moriel's description of his conversation with Inmate I. about the murder of Adame, known as "Goofy," was problematic from the prosecution's perspective. In Moriel's rendition of the interaction, he confirmed that the victim Inmate I. was speaking about was Adame by feigning ignorance of the victim's identity: "But I asked **like I didn't pick it up.** So he said, 'Goofy'…" (Exhibit O, p. 2400,emphasis added.) They proceeded to engage in a conversation about the murder once Inmate I. came out for dayroom. (Exhibit O, p. 2400.) This language, if seen by Inmate I. and his counsel, would also have indicated that the prosecution team instructed Moriel to question Inmate I. about the Adame murder.

The Prosecution Team's Concealment of Communications with Inmate I. Raises New Questions about Moriel's Rendition

As shown above, Moriel and the prosecution team targeted Inmate I. for nearly a year for the two "cold case" murders. In May of 2010, the plan worked to perfection: Inmate I. came into custody and within a day the prosecution team that included Special Handling coordinated his placement next to Moriel.

At Inmate I.'s preliminary hearing, Rondou testified about the first time he spoke to Moriel about Inmate I. Rondou said he received a note from Moriel detailing Inmate I.'s admission, which was dated "5/24/10."[16] (Exhibit JJ, p. 25:16-18.) According to Rondou, upon receipt of this note and before the recording device was placed in Moriel's cell, he interviewed Moriel at the jail. (Exhibit JJ, p. 23:7-12.) In essence Rondou testified that he received the note after May 24, 2010; he then interviewed Moriel; and after that a recording device was placed in the cell.

However, this could not have been the actual sequence of events. Moriel's comments during the recorded conversation compellingly indicate he was receiving Inmate

[16] Rondou did not specifically address the existence of the May 20, 2010 note, because Inmate I.'s counsel had no idea it existed. However, he said that the note dated May 24, 2010 "…are the only set of notes I have." (Exhibit JJ, p. 26: 12-15.)

I.'s confession to the Adame murder for the first time. Moriel, referring to the Adame murder, can be heard stating the following: "Hey that little fuckers name was Goofy? Oh you got him too?" (Exhibit A.) (This dialogue is consistent with the dialogue in the concealed May 20 note, where Moriel wrote "…I asked like I didn't pick it up. So he said, 'Goofy'…" (Exhibit O, p. 2400.) After Inmate I. describes where the shooting took place and what weapon he used, Moriel replies, "Yeah I heard about that one. That was you? Fucking fuck man." (Exhibit A.)

Obviously, if the recordings memorialize Inmate I.'s **first** confession to the Adame murder sometime after May 24, then it would have been impossible for Moriel to have received the confession documented in either the discovered May 24 note or the concealed May 20 note. The answer to this puzzle, though, is ultimately quite simple. Special Handling was recording Moriel's conversations with Inmate I. beginning the very day he was moved next to Moriel, on May 20, 2010. This explains why the hidden note contains summaries of a confession soon after "Slim from Delhi just got here a few hours ago and landed in cell 1. (The cell right next to mine.)" (Exhibit O, p. 2399.) The note dated May 24, 2010, either documented a second conversation with Inmate I. or is a re-written version of the note created by Moriel on May 20, 2010—done at the direction of the prosecution team. By hiding the May 20 note, the prosecution team was able to conceal a note that contained far too much information from their perspective, as well as evidence indicating that the recording device was already placed in Moriel's cell before Inmate I. was moved into his proximity. That the SAPD and Special Handling were ready with a recording device before Inmate I. was moved next to Moriel is certainly not far-fetched considering Inmate I. had been targeted for a Dis-iso scam almost one year earlier. (Exhibit O, p. 2075.)

Perhaps the most critical issue about the use of the recording device is whether the following explanation for the recording device being present in Moriel's cell at the time of Inmate I.'s movement is actually the correct one; that is, Special Handling was recording

conversations from Moriel's cells perpetually and wherever he was located. This makes sense, particularly considering the fact the device was placed in Moriel's cell and not Inmate I.'s. **If this is what took place, it raises the specter that thousands of hours of recordings between informants and other inmates have not been discovered**.

Conveniently, Rondou did not write a report about the recording device, which seemingly would have indicated the dates when it was introduced into Moriel's cell and other facts surrounding its use. If the above analysis was incorrect, the details of Rondou's interview of Moriel would certainly have helped provide insights. But Rondou had few facts in his grasp. During the preliminary hearing, Rondou was questioned about the interview. When did the interview with Moriel take place? Rondou did not know. (Exhibit JJ, p. 23:7-20.) Which investigator accompanied him? He thought it was Detective Flynn. (Exhibit JJ, p. 23:26-24:8.) Rondou was unable (or unwilling) to give informed responses to basic questions about the investigation, including one aimed at finding out the date the jail recording commenced. (Exhibit JJ, p. 24:18-24.)

All Rondou needed to do was review a transcript of the interview or examine his report. But, he had neither. (Exhibit JJ, pp. 23:14-15; 24:9-11.) The interview with Moriel had not been recorded. (Exhibit JJ, p. 40:21-23.) Recognizing the improbability that a veteran gang homicide detective would failed to record an interview with the witness who had just broken two cold case murders, Rondou tried to reframe the conversation as a "chat." (Exhibit JJ, p. 40:18-23.) He never addressed why this "chat" with the most important witness was not even the subject of a report.

This was not the first time Rondou found himself having to explain why he did not record a vital interview with Moriel. Both Rondou and Petersen had previously experienced the unintended consequences of a custodial informant program policy that discourages the recording of interviews. In *People v. Rodriguez*, the failure of Detective Rondou and Detective Matthew McLeod to offer a reasonable explanation why they did not record two interviews with Moriel severely damaged their credibility. Arguably, this

failure was among the most critical factors leading to the acquittal of the two defendants, as well as the decision by Petersen to let Elizarraraz get away with a murder the prosecution team was convinced he committed. As will be discussed later in this motion, in the trial of *People v. Rodriguez,* detectives also scrambled to recharacterize their interview with Moriel as a "chat" to justify their failure to record. Their fabricated explanation, though, arguably worsened their position as both detectives changed their story at trial and claimed that they wanted to record the interview but each believed the other had brought the recording device. Rondou also emphasized in his testimony that he records every interview that he conducts with witnesses. (RT (trial), February 16 and 21, 2012, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit PP, pp. 355:18-22, 369:22-370:16.) He did this to convince the jury that the failure to record in that case was simply an error.

The trial in *People v. Rodriguez* ended less than two months before the preliminary hearing in *People v. Inmate I.* When Rondou testified at Inmate I.'s preliminary hearing that he did not record his interview with Inmate I., it triggered an immediate *Brady* obligation, regardless of whether Rondou tried to recharacterize the interview as a "chat." **The same detective had testified in *Vega* and *Rodriguez* that he records all of his interviews, except when he makes a "mistake" as he did twice in the latter case**. Upon receiving a transcript of those proceedings, Inmate I.'s counsel would have appreciated the full value of what that testimony revealed about the willingness of Petersen and Rondou to deceive. Rondou's testimony on this subject at *Vega*'s trial was egregious not only because he knew that he had not recorded the interviews of Moriel related to *People v. Inmate I.* and *People v. Rodriguez*, but because Rondou's stated policy of always recording interviews was used to shred the credibility of a defense investigator who had not taped a witness interview. (RT (trial), Dec. 13, 2010, *People v. Vega*, (Super. Ct. Orange County, 2010, No. 07CF2786), attached herein as Exhibit QQ, pp. 1186:20-1187:26.) But, as he would do so many times during the course of three trials analyzed herein, Petersen

refused to turn over evidence that would have impeached a witness for the prosecution.

The truth was that Rondou and his team did not record or report what Moriel said for numerous reasons. The foremost one is that they were engaging in massive misconduct in several cases, and as such the last thing they needed was a trail of reports and recordings documenting all that was discussed with the informant. They were unwilling to tell the full story about what led to the alleged confessions, and they were concerned about how the inclusion and exclusion of details could be viewed if the misconduct ever caught up with them.

Additionally, if Rondou indeed did not record Moriel—there remains the possibility that the recording exists but was hidden—there were other reasons for their decision to conceal it. While Moriel was a professional informant, leaders of the custodial informant program realized that the informants were not always sufficiently guarded with their words to adequately hide the deception taking place. Moriel's notes from August 1, 2009 and May 20, 2010, are just two examples of what a few words can reveal. This further explains the general sense among those connected with the custodial informant program that it is the better practice not to record informants. The practice recognizes the risk of something being said that could uncover their deception, which would then necessitate the destruction of the tape or its permanent concealment.

Other Misconduct by the Prosecution Team Related to Inmate I.

While several discovery violations related to Moriel and Inmate I. are identified above, there were far more. Petersen, like Wagner, appears to take the position that discovery obligations are not based upon the true state of facts, but how the prosecution prefers that they exist to allow the maximum tactical advantage. The prosecution wished to present Moriel as a listening post, once again, and they were well on their way to accomplishing this objective prior to this Court's discovery order.

The Court-ordered discovery clarified how much was hidden from Inmate I. and the other Delhi members charged with murder. The entire set of Moriel's notes, his federal

and local informant agreements, his proffer with these agencies and all other evidence related to his informant services should have been turned over long ago. The failure to do so further corroborates that the legal rationales presented to prevent informant discovery, which have been made in cases such as the instant matter, are rooted not in good faith legal analysis but in simply reducing the quantity of helpful evidence available the defense.

Of course, Petersen and his team were also obligated to disclose to Inmate I. each and every act of misconduct that they committed in *People v. Vega, People v. Rodriguez* and *People v. Camarillo,* all of which are detailed in this motion. The required discovery included but was not limited to evidence of the perjured testimony of Rondou and Moriel, as well as the numerous acts of deception and concealment by Petersen.

Inmate F.'s Role as Witness in *People v. Inmate I.*

The misconduct related to Moriel in *People v. Inmate I.* is shocking. However, the prosecution team still had more in its arsenal of deception. Approximately one year after charging Inmate I. with the two murders, the prosecution team decided to seek additional inculpatory statements. This time, though, the informant was Inmate F., and the effort would involve a purposeful violation of *Massiah*.

On March 22, 2011, Inmate F. wrote that Vega asked him to relay a message to Inmate I. "to be very careful on who he talks to because he is under investigation on a murder. . . . " He added that "Downer [Vega] told me please tell my homeboy to be very careful and it doesn't matter around here whether your red bands orange band yellow band. NOT TO TALK to anyone about the murder he did with Smokey! There are informants everywhere . . . " (Exhibit KK, p. 5407.) In the same note, Inmate F. described what Vega told him about his furor toward Moriel for testifying against him in his murder case. (Exhibit KK, pp. 5438-5439.) According to a report written by Garcia, Vega also spoke about harming Petersen with the help of another Delhi gang member, who apparently was

not incarcerated at the time. (Exhibit KK, p. 5490.)[17]

From Inmate F.'s perspective, Vega's request was both ironic and fortuitous. Inmate F. was not only being let in on another murder case, but being asked by Vega—who had just suffered a loss in part with the help of informant Moriel—to convey to Inmate I. the importance of not speaking to anyone about his case. Vega's request provided Inmate F. with an opportunity to build the trust of another defendant charged with murder, Inmate I. On April 12, 2011, Inmate F. spoke to Inmate I., though the note does not reflect any conversations about Inmate I.'s pending case. (Exhibit KK, p. 5420.)

On April 20, 2011, Inmate F. obtained a confession, but likely not with the detail that the SAPD wanted. He wrote the following:

> Today as I was using the non collect telephone I was speaking to Inmate [I.] Slim Delhi! He specifically told me that he shot & killed some fool by the name of "Randy" I believe either from Walnut or Alley Boys. He specifically told me fuk them both this is Delhi gang, I believe (yrs) "05" "06" Our conversation was brief cuz the deputies in the hole were mad dogging me.

(Exhibit KK, p. 5424.)

A month had passed between the time when Vega told Inmate F. about Inmate I.'s murder case and the first purported confession. During that time period, Inmate F. would have had multiple contacts with law enforcement—and likely Petersen, if Gallardo was speaking of him when he said that a "district attorney" was involved in Inmate F. obtaining statements. But, again, the communications and direction that pre-dated the confession were hidden. Nevertheless, prosecution team members were likely unsatisfied with the substance of what Inmate F. provided.

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[17] The report indicates that Moriel spoke with Deputy Garcia about the alleged threat to Petersen. However, the *People v. Camarillo* discovery does not contain any notes that memorialize this conversation between Vega and Moriel. This provides further evidence that Moriel did not document all of his conversations with targets within his notes, but rather re-told them in conversations with Special Handling deputies. This report is the only one by a member of Special Handling that describes a conversation between Moriel and an inmate.

There were several problems with the first confession purportedly obtained from Inmate I. Inmate F. described Inmate I.'s confession to one murder, but then interjected facts from the other charged murder. Inmate F. said that he believed the victim "Randy" was either from "Walnut or Alley Boys." Randy Adame was allegedly a member of Alley Boys and Alberto Gutierrez, the victim of the other homicide, was purportedly from Walnut Street gang. In sum, Inmate F.'s note does not include any information about Inmate I.'s participation in Alberto Gutierrez's murder.

Moreover, Adame was killed in 2006, while Gutierrez was killed in 2005. Perhaps the confusion about the dates and the deficit in details could be explained by the brevity of the conversation. However, Petersen and his team also likely recognized that alternatively the note permitted the defense to offer a less appealing analysis: that Inmate F. had received a general description of the **alleged** facts that Inmate I. had killed two people—one named "Randy," from Alley Boys, and another from Walnut Street, taking place in 2005 and 2006—then weaved this information into the note while falsely claiming it was the product of a confession. It would soon become clear that the prosecution team was unsatisfied and wanted Inmate F. to continue pressing Inmate I.

OCDA, SAPD and Special Handling Coordinate "Coincidental Contact" Between Inmate F. and Inmate I.

The previously referenced conversations between Inmate F. and Inmate I. took place when Inmate F. apparently left his unit to use the non-collect phone, likely to update law enforcement on his activities. Per the notes, it appears that the phones were located next to the "hole" where Inmate I. was housed either for a real or fabricated disciplinary rule violation. At some point, Inmate I.'s punishment for a rules violation came to an end and he needed to be moved from the "hole." What better place to "coincidentally" relocate him than the unit where Inmate F. was housed? When Inmate I. left disciplinary isolation, he was then moved to a unit where Inmate F. was located, so that their "friendship" and Inmate I.'s trust could continue to build.

Just as with many of his other targets, including Dekraai, contact during dayroom was critical. During dayroom, Inmate F. was permitted to approach and speak to targeted inmates within the cells. Once Inmate I. was moved into the same unit, Inmate F. apparently approached Inmate I., as directed, and began manipulating the conversations toward the charged crimes. And if one believes Inmate F., it worked.

The change in locations is confirmed by Inmate F.'s next note memorializing his interview of Inmate I. On May 3, 2011, he wrote the following:

> I believe my mission is done. Today while I was in the dayroom I was talking to Inmate [I.] AKA Slim Delhi. He specifically told me he was on a sick ass run on dope gang bangin and havin fun. He told me specifically that he shot and killed some fool from alley boys and one fool from Walnut St. . . He told me he killed Randy Gutierrez and some fool Alberto Adame & that it happend [*sic*] sometime in 02 and in 05 sometime. . . .

(Exhibit KK, p. 5438.)

The note illustrates not only the full manifestation of a planned *Massiah* violation, but also why the custodial informant program disfavors recorded interviews. Quite obviously, the prosecution team would have preferred that Inmate F. not refer to his efforts with Inmate I. as being part of a "mission." On the other hand, it was far better that "mission" appeared as a single word on paper versus on a recording where Inmate F. may have cleared up any ambiguity about what he meant.

Of course, the SAPD interviewed Inmate F. more than once about his conversations with Inmate I. Rondou and another detective were present at these interviews and meetings. Special Handling Deputy Garcia was also present, as confirmed by the fact that Inmate F. continued to direct his communications related to Inmate I.'s gang crimes to "Garcia," and reference their previous discussions. During their conversations, law enforcement necessarily provided him with direction, but again, none of this is memorialized in any discovery.

Interestingly, at some point Rondou or his partner almost certainly told Inmate F. that he was incorrect and that his "mission" was not done. Although Inmate F. said that Inmate I. "specifically" told him that he committed the murders, the prosecution team was

undoubtedly looking for more specific details. On May 21, 2011, Inmate F. wrote another note regarding what appeared to be the Gutierrez murder:

> Today, as I was speaking to Inmate [I.] (Slim Delhi) he specifically told me that one of the murders that he committed was during mid day around 12-2:00 p.m. He specifically told me he was a bit worried cuz he left a "shot-gun" shell (1) and didn't know if it was retrieved & if his DNA will be on it. He also told me that he was trippin on a wire tape between him & Scar Delhi talking about the murder.

(Exhibit KK, p. 5449.)

Inmate F. had written notes on May 4, 2011 and May 9, 2011 that documented Inmate I.'s discussions about other crimes that he allegedly committed. (Exhibit KK, pp. 5444-5447.) However, those discussions did not touch upon the charged murders. This information contained in the note dated May 21, 2011 appears to be have been sought in response to the detectives' request to obtain additional specifics, such as the time of the crime and the weapon used. Inmate F. actually underlined the word "shot-gun" twice, which was the type of weapon allegedly used in the Gutierrez murder, and which investigators had likely told Inmate F. in advance of this round of questioning.

Deputy Garcia's Role in the *Massiah* Violations

The magnitude of the *Massiah* violation in *People v. Inmate I.* cannot be fully appreciated without fully comprehending the prosecution teams' misconduct in *People v. Vega, People v. Rodriguez* and *People v. Camarillo.* Among these three cases, *People v. Vega* is the most critical. The misconduct in that case included a *Massiah* violation that was accomplished through the preferred method of violating the Sixth Amendment and getting away with it. This method involves concealing the coordination of housing locations and law enforcement's direction to its informants.

Who was the Special Handling deputy responsible for manipulating the movements of Moriel and Vega by delivering them to the same disciplinary isolation tank, known as the "hole?" None other than Special Handling Deputy Ben Garcia, one of the lead "handlers" for both Moriel and Inmate F., and perhaps the most important witness in determining whether Dekraai and Inmate F. also found each other coincidentally. (Exhibit

O, p. 2075.) Garcia and his fellow team members' pact to not create (or alternatively reveal) reports relevant to informant efforts has prevented the identification of the officer who directed and then facilitated Inmate I.'s contact with informants. It appears that Garcia either acted on his own or at the SAPD's request to bring Inmate I. to Moriel after his arrest, and Inmate I. to Inmate F. when Inmate I. left the "hole."

Regardless of who initiated the contact, though, prosecution team members were all operating from the same playbook. Once Special Handling and the investigating police agency did their part by not documenting the circumstances that led to the contact and their communications with informants, prosecutors could take over the heavy lifting. As seen throughout this motion, Petersen consistently did his part by hiding nearly all of the informant notes, including those containing inconvenient remarks that could have revealed that the contacts between the target and the informant were not coincidental.

As it relates to Inmate I., perhaps the most telling and disturbing aspect of the misconduct pertaining to Inmate F. is that it was orchestrated only six months after Vega's trial ended in December of 2010. The misconduct in Vega's case, and the prosecution's narrow escape from having it discovered, should have served as a wake up call and a powerful deterrent to committing similar misconduct in the future. Instead, it either had no effect or emboldened the prosecution to believe that they could continue along the same path with impunity.

There is little question about how the prosecution hoped to avoid a finding that Inmate I.'s statements to Inmate F. were obtained in violation of *Massiah.* Just like the Dekraai prosecution team, Petersen planned to withhold from Inmate I. nearly everything he could that would reveal the truth about Inmate F.'s informant and criminal background. However, while the Dekraai prosecution team was able to concoct a theory that they could withhold additional information about Inmate F. because some of the conversations were recorded, this excuse was not available to Petersen and his team. The statements attributed to Inmate I. will only be admitted if Inmate F. testified.

It is unclear when the prosecution first revealed to Inmate I.'s counsel that Inmate F. had obtained statements. It seems unlikely though that this occurred before the preliminary hearing, as the statements are not referenced in the transcript. A review of defense billing that is contained in Inmate I.'s file suggests that the discovery may have been turned over close in time to this Court's discovery order. (Exhibit A.) This would make sense. Based upon Petersen's past practices, he likely planned to wait until the last possible moment to turn over the statements allegedly obtained by Inmate F., but had to accelerate that process because of this Court's discovery order.

Nevertheless, Inmate I. was entitled to the discovery provided per this Court's order, as well as all of the hidden evidence pertaining to Inmate F.'s communications with the prosecution team leading to the elicitation of statements. But all Petersen has provided to Inmate I. as of the writing of this motion, appears to be a mere 17 pages of notes from Inmate F. And even that discovery was delayed approximately two years. Most likely, Petersen was hoping that Inmate I.'s counsel would be content with the 17 pages. He knew from his successful trickery of attorney Harley in *Vega*, that if additional discovery was requested, he could resort to other techniques to keep the defense from receiving more information. Petersen seemingly continues to withhold the following items from Inmate I.:

1) OCSD'S CI file for Inmate F., including 344 of the 361 pages of notes written by Inmate F., brief summaries of those notes written by members of Special Handling, a federal witness protection agreement, and three brief reports documenting investigations of law violations within the jail by other inmates, and one report describing information that Inmate F. allegedly obtained from Vega regarding threats that he made against Petersen. (Exhibit M, pp. 5219-5224, 5462-5467, 5470-5475, 5490.)
2) OCDA's CI file for Inmate F. (Exhibit H, pp. 5756-5763.)
3) Separate witness agreements between Inmate F. and the U.S. Attorney and the SAPD (Exhibit AA; Memorandum by U.S. Dept. of Justice Witness Security and

Special Operations Unit to Federal Bureau of Prisons Inmate Monitoring Section and Assistant United States Attorney, dated Apr. 6, 2011, with attached Protective Custody Unit Summary signed by Inmate F. on May 27, 2011; attached herein as Exhibit RR.)

4) Evidence of Inmate F.'s criminal background, including evidence of Inmate F.'s moral turpitude, as described earlier, beginning at page 64;
5) The evidence of Inmate F.'s other efforts related to targets not referenced in either of the CI files, including those involving Dekraai and Inmate M. In the section beginning at page 187, Defendant Dekraai will discuss Dekraai prosecution team's directive that Petersen not release discovery related to the instant matter.

Petersen was holding back even more, though. He chose not to reveal Moriel's critical note that revealed the plan to use the "Dis-iso" scam against Inmate I., after its successful use with Vega. As Petersen knew, this single note would eviscerate the planned argument that Inmate F. and Inmate I.'s contact was coincidental, and not done at the prompting of law enforcement. Additionally, because Petersen and his team planned to make the fraudulent "coincidental contact" argument to avoid exclusion of the statements to Inmate F., the defense was entitled to all informant notes that corroborated the use of coordinated housing movements to assist informants in eliciting statements. Additionally, although there was no chance that he would comply with his obligation, Petersen was also required to turn over evidence of his own misconduct and acts of moral turpitude that he and his team had engaged in during the investigation and litigation of *People v. Vega*, *People v. Rodriguez*, and *People v. Camarillo*.

As discussed in the Summary of Motion and Findings, Petersen was tremendously fortunate that *People v. Inmate I.* was continued beyond the filing of this motion. If it had not been continued, he would have already engaged in his planned misconduct, and this motion's findings would have robbed him of whatever explanation he could imaginatively

create for concealing evidence related to Inmate F. and Moriel. It appears that this Court's discovery order caused Petersen to realize that it was in his best interest to delay *People v. Inmate I*. and the Operation Black Flag cases. The trial of Inmate I. has been delayed three times since the date of the discovery order. (Exhibit II.) Proceedings in the Operation Black Flag cases have been continued at total of 41 times. (Chart of continuances in Black Flag cases created by defense, attached herein as Exhibit SS; Exhibit II.) In fact, none of the local Operation Black Flag cases, all of which are handled by Petersen, have gone to trial since this Court's January 25, 2013, discovery order. (Exhibit SS; Exhibit II.) The prosecution teams in *Dekraai* and *Inmate I.* were likely waiting for the filing and litigation of the *Massiah* motion in the instant matter to determine what the defense had deduced from its investigation.

The Disturbing and Relentless Pursuit of Inmate S.

Brief Summary of Case Against Inmate S.

On April 11, 2011, Inmate S. was charged in a felony complaint with two counts of attempted murder, street terrorism, and gang and firearm use enhancements. (Minutes in *People v. Inmate S.*, (Super. Ct. Orange County, No. 11CF****), attached herein as Exhibit TT.) He was appointed counsel on the same date.

Dekraai has not received discovery regarding this case and relatively little is known about its facts beyond what is described in Inmate F.'s notes found within his OCSD CI file, as the case has not advanced to preliminary hearing.

Suppression of Discovery in *People v. Inmate S.* and Another Missing Entry in the OCDA CI File

As will be discussed, Inmate F. allegedly received several inculpatory statements from Inmate S. related to the charges in the above referenced case. The notes documenting these statements, as well as one report created by Deputy Ben Garcia, are found within Inmate F.'s OCSD CI file. The Dekraai prosecution team failed to provide Dekraai with the discovery from Inmate S.'s case, even though such discovery is encompassed in this

Court's January 25, 2013 order. The Dekraai prosecution team's failure to discover Inmate S.'s case may be attributable to the fact that Inmate F.'s OCDA CI file does not reflect that Inmate F. provided information on Inmate S's case. As will be discussed, the refusal and failure to consistently document informant efforts in the OCDA CI file ensures discovery deficiencies and violations in those cases where an informant's credibility or motivations are at issue. Most likely, Inmate S. did not receive Inmate F.'s notes, interviews of Inmate F., or any reports memorializing the prosecution's interaction with Inmate F. about this subject matter. Dekraai intends to again request the discovery from *People v. Inmate S*. in a formal discovery motion if necessary.

Inmate F.'s OCSD CI file also fails to include any reports, recordings, or notes created by prosecution team members that memorialize any efforts to direct or instruct Inmate F. about his contact with Inmate S. or any verbal communications between prosecution team members and Inmate F. about the case. However, the absence of law enforcement reports memorializing contact with custodial informants is the single least reliable indicator of whether prosecution team members have coordinated movements or directed the actions of informants.

Inmate F.'s First Contacts With Inmate S.

Inmate F.'s notes reveal that on the same day as Inmate S.'s arraignment, Vega spoke to Inmate F. about a conversation he had with Inmate S. Vega told Inmate F. that Inmate S. described to him the attempted homicide for which he was incarcerated. Purportedly, Vega also told Inmate F. that Inmate S. was housed in the "hole" where Inmate F. uses the non-collect phones. (Exhibit KK, p. 5417.)

The following day on April 12, 2011, Inmate F. spoke to Inmate S. For reasons that are not revealed from his notes, Inmate F. requested the telephone numbers of three individuals who "…are running all Delhi right now." (Exhibit KK, p. 5420.) The attempt to get these numbers may have been in furtherance of the investigation of the purported threat by Vega against Petersen, subsequent to Vega's conviction. The inquiry, though,

may also have been connected to Operation Smokin' Aces, the follow-up investigation to Operation Black Flag, which included the Delhi gang (also known as "Aces") as one of its areas of focus. (Press release by FBI, *Operation Smokin' Aces Targets Mexican Mafia Operations in Orange County*, (Sept. 24, 2013), attached herein as Exhibit UU.)

Whatever the reason for these initial questions, it would soon become clear that the principal goal of Inmate F.'s contact with Inmate S. was to elicit incriminating statements about the crime for which he was charged. On April 21, 2011, Inmate F. wrote a note describing another conversation with Inmate S. According to that note, Inmate S. detailed his participation in the shooting for which he was incarcerated and charged. (Exhibit KK, p. 5425.) Two days later, on April 23, 2011, Inmate F. wrote another note describing a discussion with Inmate S., in which Inmate S. again purportedly described his participation in the charged incident. Inmate F. also wrote that, "This kid wants to post bail and leave the Country so just the heads up on that." (Exhibit KK, p. 5432.)

On the same page of notes in which he described the second purported confession, he included another entry, dated "4-25-11." Below that date, Inmate F. described how he cajoled Inmate S. into identifying one of the suspects in the crime. Inmate F. ended this portion of the summary with language confirming that he was fully entrenched in his role as a member of the prosecution team: "I think a arrest should be made." (Exhibit KK, pp. 5432-5433.) He underlined the word "arrest." (Exhibit KK, p. 5433.) Inmate F.'s self-congratulatory comments in the same note corroborate that he had attempted to obtain information that he believed the government desired. He wrote the following: "It took me so long to find out who he was with and finally after some hardworking conversation he finally spilt who he was with that got away and is still out there." (Exhibit KK, p. 5433.)

Of course, the most rational explanation for why Inmate F. perceived the accomplice's identity as valuable was because the prosecution team told him that it was.

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Evidence of Prosecution Team's Efforts to Direct Inmate F.'s Attention Toward Inmate S.'s Charged Crimes

Why did Inmate F. seek statements from Inmate S. regarding his charged crimes? Why was he suddenly so interested in obtaining information about potential accomplices? Perhaps Inmate F. will explain his enthusiasm for engaging in "hardworking conversation" similar to how he described his pursuit of Dekraai: that Inmate S.'s conduct was so despicable that his only motivation was to protect society from his presence. On the other hand, Inmate F. may be reluctant to offer this explanation a second time, since it would make his claimed humanitarian motivations in the instant matter that much more difficult to believe. He also might realize that he will have a hard time explaining why he decided to assist the prosecution in some cases altruistically, while in others he wanted a benefit in the sentencing and resolution of his cases.

It is plausible that his initial interest in Inmate S. was spurred by Vega's threats toward Petersen, and a sense that his prosecutor would appreciate his assistance in convicting a fellow Delhi member. However, any initial independence in his efforts would have been extremely short lived. The role of prosecution team members in violating *Massiah* again is ultimately confirmed by the practices, actions and words of the primary players including, most notably, Deputy Garcia. As discussed earlier, Garcia told Wagner during his interview that when he receives informant notes, he immediately forwards them to the investigating agency, which in this instance was the SAPD. (Exhibit EE, pp. 28-29.) The OCSD's CI file for Inmate F. shows that upon receiving a note, a Special Handling deputy creates a summary of the note for the CI file, which is then placed together with the pertinent notes in the CI file. The summaries confirm that on April 13, 2011, Special Handling "[r]eceived and filed 2-pages of notes" regarding what " . . . [Inmate S.] told [Vega] about his case. . . . " (Exhibit KK, p. 5414.) On April 21, 2011, Special Handling received a one page note in which Inmate S. made inculpatory statements about his role in the charged shooting. (Exhibit KK, p. 5421.) On April 27, 2011, Special Handling

documented receiving the note in which Inmate S. further detailed the crime and provided the name of the accomplice. (Exhibit KK, p. 5426.) Certainly, each note was passed to SAPD detectives, who then contacted Inmate F. about how they wanted him to proceed in his communications with Inmate F. **Moreover, it is absolutely clear that neither Garcia—the deputy to whom the notes were directed—nor anyone from the SAPD or the OCSD told Inmate F. to cease his questioning of Inmate S. about the charged crimes.**

Moreover, regardless of whether specific direction was initially given, prosecution team members were obligated to instruct their informants to stop questioning charged and represented defendants once they received information that this occurred. This is truly a hypothetical situation as it relates to the contact between Inmate F. and Inmate S. As will be shown, the prosecution team did not passively encourage him to question Inmate S. They told him what they wanted, and he delivered.

Inmate F. Attempts to Develop Evidence of Inmate S.' Competence

Inmate S.'s prosecution turned in an unexpected direction after Inmate F. purportedly obtained confessions. This change is corroborated by the court minutes, a letter written as part of an LPS conservatorship investigation, and a note written by Inmate F. It appears that Inmate S. hung himself in the Orange County Jail. (Investigation Report Re: Court Ordered Evaluation and Assessment by Deputy, filed February 8, 2013, *In the Matter of the Conservatorship of the Person and Estate of [Inmate S.]* (Super. Ct. Orange County, No. 11CF****), attached herein as Exhibit VV.) Beginning on May 6, 2011, and continuing for the next eight scheduled hearing dates, Inmate S. was hospitalized due to the incident, and thus was not transported to court for those hearings. Court minutes reflect that on May 19, 2011, a hearing was conducted at the Western Medical Center. (Exhibit TT.) He remained hospitalized and was not transported for the following three appearances. (Exhibit TT.) On June 30, 2011, attorney Robert Viefhaus raised a doubt about Inmate S.'s competence, per section 1368, and two doctors were appointed to

evaluate him. On the same date, criminal proceedings were suspended. (Exhibit TT.)

Eight days later, on August 7, 2011, Inmate F. wrote a letter to Garcia about a conversation that he had with Inmate S. (Exhibit KK, p. 5468.)

> Garcia, Well today I was in Sector (16) L Mod. I ran into [Inmate S.] (***Delhi) When he saw me he through (sic.) up his Delhi gang at me and recognized me clearly. A surprise to my eyes. **I've heard so much from you all saying that [Inmate S.] is a lost cause.** Well he's not. He flashed Delhi on his back to me as if so proud. We talked about his family and all and he responded well. I asked him what was the reason he hung himself he told me that he was bored. I just feel he's a little burnt out but other than that don't let it fool you. Take my word for it !! He just doesn't know how to program.

(Exhibit KK, p. 5469, emphasis added.)

The contents of this note eviscerate any claim that the previously discussed statements obtained by Inmate F. were done without the direction and guidance of the prosecution team. In particular, the italicized language offers compelling evidence that the prosecution had been directing and conspiring with Inmate F. to violate *Massiah*. Inmate F.'s comment that "I've heard so much from you all…" shows that multiple conversations occurred between members of law enforcement and Inmate F. regarding his case. It also corroborates the prominent role that this informant plays in discussing and strategizing about building cases against inmates through elicited statements—including inmates represented by counsel.

Furthermore, the August 7 note demonstrates that Inmate F. wanted to convince the prosecution to fight against defense counsel's claims that Inmate S. was incompetent so that the case could proceed. Inmate F. clearly wished to have a role in the trial in order to receive the benefits of providing assistance at that stage. The August 7 note indicates that Inmate F. was probing into the issue of Inmate S.'s mental state by asking him why he hung himself. The reference to his inability to "program" is also important. A defendant "programs" when he abides by jail rules both by the OCSD and those established by Mexican Mafia leadership that "runs" the jail. Inmate F. wanted to communicate that

Inmate S. was not suffering from an inability to program because of mental health issues, but rather because of his inexperience. This note was almost certainly followed by meetings with the SAPD and Garcia, but again no reports or notes were apparently turned over to counsel for Inmate S.

The August 7, 2011 Note Compellingly Establishes Group Effort by Prosecution Team to Violate and Cover Up *Massiah* Violations

Neither the SAPD nor the OCSD has provided a single report documenting the conversations that unquestionably took place between the prosecution team and Inmate F. regarding the viability of the prosecution of Inmate S. Again, it is inconceivable that the prosecution team failed to memorialize any of their direction, questioning, or conversations with Inmate F. on this subject or issues related to Inmate S.'s culpability. On the other hand, their concealment is one of the modus operandi for effectuating *Massiah* violations without detection. And they are fully aware that the disclosure of such recordings, reports, or notes would dramatically reduce the chances that the misconduct could remain hidden.

The aversion to recorded interviews with informants is understandable when the goal is deception. In fact, the recording of Inmate F. in *People v. Dekraai* perfectly demonstrates the problem of recording when the prosecution is involved in deception. There now exists a permanent record of the prosecution failing to ask obvious questions and letting the informant purposefully mislead them.

Notes and Report Confirms Deputy Garcia and His Unit Work Jointly and Independently to Assist Other Law Enforcement Agencies in Violating *Massiah*

The note dated August 7, 2011, also has important implications for the Special Handling Unit, and specifically Deputy Garcia, the individual to whom the note was directed. Undeniably, Garcia participated in interviews and strategy meetings with the SAPD and Inmate F. This is corroborated by the fact that Inmate F. directed his note not to as SAPD specifically, but rather to Garcia and included a reference to "you guys." Garcia's active participation undermines the suggestion made in a subsequent interview

with Wagner, in which Garcia claimed that he simply passes information to the investigating agency and then gets out of their way. (Exhibit EE, pp. 28-29.)

This August 7th note is critical in showing that Special Handling's efforts extend beyond responding to the requests of outside agencies, coordinating contacts, attending interviews and meetings with informants, and covering up all of these efforts. The note, when examined alongside another page of notes written by Inmate F. and a report by Garcia related to that note, demonstrates that Special Handling will also independently initiate efforts to assist outside agencies when they perceive the assistance as beneficial to the case. In fact, three of the most important pages found within the entire Court-ordered discovery, in terms of demonstrating both the OCSD's independent efforts to assist outside agencies and their unabashed commitment to violating and covering up *Massiah* violations are the following: the August 7, 2011 note, a report written by Garcia on August 31, 2011, and a single page of notes dated August 29, 2011, attached to Garcia's report. All of these are found within Inmate F.'s OCSD CI file. (Exhibit KK, pp. 5469, 5476-5477.)

Garcia wrote a report dated August 31, 2011, to "Assist Outside Agency – Santa Ana Police Depart." (Exhibit KK, p. 5476.) In the report, he said that "[t]he note is a summary about the conversation that took place between the reliable source [Inmate F.] and [Inmate S.] from Delhi street gang . . . " (Exhibit KK, p. 5476.) The note attached to the report is dated two days earlier, "8-29-11", and is directed to Special Handling Deputies "Grover/Garcia." Inmate F. relayed Inmate S.'s comments that he was "programming" and speaking about "family issues & his daughters & all was pretty much cool." (Exhibit KK, p. 5477.) Inmate S. allegedly said that he "wanted to start programming with the homies, that he hated it there." Allegedly, at one point, Inmate F. changed clothing and Inmate S. claimed that he looked like a member of the Loper gang, and Inmate S. would kill Inmate F. if he had a gun. He further commented that, " . . . my uncle went down for one of them fools." (Exhibit KK, p. 5477.)

Analysis of Garcia's Report and Inmate F.'s Note: An Intentional *Massiah* Violation Disguised by "Coincidental Contact"

The August 29, 2011 note contains little information on its face that would be of particular value to the SAPD. In fact, if Garcia and the SAPD were not on the same page, detectives would have had no idea why he created a report and attached the note. Garcia received, after all, more than 100 pages of notes from Inmate F. that included statements by inmates describing their murders. Garcia never wrote a report to an outside agency essentially introducing a note written by Inmate F. But Garcia knew that the SAPD would understand why he sent it, and would very much appreciate his efforts.

The origin of Garcia's report dated August 31, 2011, and the motivations for writing it, traces back to the note written 22 days earlier, in which Inmate F. tried to convince prosecution team members that Inmate S.'s case should proceed despite the anticipated court determination that Inmate S. was incompetent to stand trial. A careful examination of Garcia's report dated August 31, 2011, and notes from August 29, 2011, corroborate that after Inmate F. submitted his note dated August 7, 2011, Garcia decided that his informant was correct and that he and Inmate F. could do more to develop evidence that Inmate S. was competent to stand trial. At the time of the first contact, Inmate F. was in disciplinary isolation as part of the most recent rounds of "Dis-iso" scams. (Exhibit FF, p. 8348.) During this time, Inmate F. was apparently given dayroom in "Mod L," Tank 16 of Mod L. (Exhibit FF, p. 8348; Exhibit M, p. 5469.) Deputy Garcia, Deputy Grover, and Inmate F. decided that it would be helpful at that time if Inmate F. could enjoy his dayroom in the same "mod" where Inmate S. was housed.

On August 29, 2011, it appears that Inmate F. had his conversation with Inmate S. in Tank 17 of Mod L, if his notes are accurate. This suggests that Special Handling may have needed to alter Inmate F.'s dayroom location so that he could have contact with Inmate S. in that area. (Exhibit M, p. 5477.) Inmate F.'s notes from that date stated the following:

> Today, I was programming in sector (17) L-Mod. I was speaking to Inmate [S.] Delhi. We conversated about family issues & his daughters & all was pretty much cool. He then told me that he wanted to start programming with the homies, that he hated in there. Then I stepped back from his cell taking off my jail house oranges & as I did that he seen that I was wearing the colors black & white and he commented to me that "you look like a "lop" I said what! What do you mean! He said you look like a Loper they sport black & white. He said if I had a gun right now I would kill you. I said like that he said yea I hate them fools my uncle went down for one of them fools. Well that's all. Have a good day. Daylight.

(Exhibit M, p. 5477.)

When this note is examined closely with the one dated August 7, 2011, OCSD's deception comes into focus. In the note dated August 7, 2011, Inmate F. wrote that "We talked about his family and all and he responded well." (Exhibit M, p. 5469.) The inclusion of the words "responded well" indicated that Inmate F. was essentially conducting a clinical exam to determine Inmate S.'s competence. It certainly would have been revealing to anyone who read it that Inmate F. was probing on issues of incompetence. Therefore, with Garcia and Grover's prodding, a similar description emerged in the notes from August 29, 2011. However, this time Inmate F. simply wrote that he spoke with Inmate S. about "family issues & his daughters & all was pretty much cool." (Exhibit M, p. 5477.) This reads like a discussion between two perfectly "competent" inmates. To someone unacquainted with the history of the case or the earlier notes, there would not have been the slightest clue that it was written for the particular purpose of showing that Inmate S. was acting normally. It was exactly what Garcia wanted—and, of course, it may have been written with Garcia standing right next to Inmate F.

Similarly, in the note dated August 7, 2011, Inmate F. suggested that Inmate S.'s behavior leading him to hang himself was not due to mental health issues, but rather that Inmate S. was "a little burnt out but other than that don't let it fool you. Take my word for it!! He just doesn't know how to program. " (Exhibit M, p. 5469.) Garcia recognized that this type of language revealed far too much about Inmate F.'s contact with law

enforcement and his reasons for questioning Inmate S. Therefore, Inmate F.'s note dated August 29, 2011, written 22 days later, references the same issue, but omits any language hinting at previous discussions about Inmate S. and Inmate F.'s analysis of the target's mental state. The note dated August 29, 2011, jumped straight to the fact that Inmate S. was "wanting to start programming with the homies…" (Exhibit M, p. 5477.) This was indeed the perfect statement by Inmate S. After all, what truly incompetent person makes the analytical decision to start programming?

Finally, in the earlier note, Inmate F. stated that Inmate S. flashed the Delhi gang sign and appeared to be filled with pride. (Exhibit M, p. 5469.) This behavior also appears inconsistent with someone who is incompetent. Coincidentally, in the August 29 note, Inmate S. allegedly showed, once again, that he was invested in gang life by expressing anger that Inmate F. was wearing rival gang colors, while lamenting that he did not have a weapon to shoot him. (Exhibit M, p. 5477.) These statements depict Inmate S. as a rational gang member, rather than a befuddled man awaiting competency proceedings. However, this description did not include a sentence similar to the one found in the previous note that depicted his gang behavior: "…I've heard so much from you all saying that [Inmate S.] is a lost cause. Well, he's not he flashed delhi on his back to me as if so proud. . . . " (Exhibit M, p. 5469.)

A comparison of the notes dated August 7 and August 29 raises enormous questions. What led Inmate F. to return to the same three issues—the well-being of Inmate S.'s family, issues related to his "programming," and his continued zest for the gang life—in a second conversation three weeks later? Did the second conversation even occur, and if so, did it even faintly resemble what was discussed with Inmate S.?

The August 29th note does not appear chronologically with the other notes within the OCSD's CI file. Instead, it is attached directly to Garcia's report. Moreover, unlike the procedure used with Inmate F.'s other notes, Special Handling chose not to create a summary of the note, which is its practice. If the note was written without direction from

Garcia, it would have been treated like every other note written by Inmate F. But it was not. Again, this particular note was of seemingly little value to the OCSD as compared to other notes, which described serious crimes. Thus, it is difficult to believe that upon receiving the note, Garcia would have immediately plucked it from the others and decided that it needed to be attached to an OCSD report. There are only a few reasonable explanations for Garcia's actions: 1) Inmate F. was directed to question Inmate S. about these same topics and instructed to exclude any extraneous commentary from his note that would have revealed his purpose for questioning; 2) Inmate F. was directed to question Inmate S. and he subsequently sat down with Garcia and Grover and went over how it should be written to diminish suspicions; or 3) the note dated August 29 was a fabricated re-write of the note dated August 7, 2011.

Garcia's efforts at deception were aimed at preventing Inmate S.'s defense counsel from going through the analysis described above. Garcia and Special Handling wanted to help the SAPD—**just as they did 47 days later when they tried to help the SBPD and the OCDA in *People v. Dekraai*.** The steps were relatively simple. Garcia supplied the SAPD with evidence from Inmate F., and carefully limited the attached notes to a single page for the prosecution to turn over to the defense and doctors who would examine his competency. For at least the time being, Garcia also was able to avoid the disclosure of Inmate F.'s identity, as he did not include Inmate F.'s name on the report. (Exhibit M, p. 5476.) The SAPD knew there were many other relevant notes that would have shown that this information was obtained in violation of *Massiah*, including most importantly the note from 22 days earlier. But, as they have demonstrated repeatedly, this was not their concern.

When Garcia testifies in this matter, he will have to explain his justification for selectively attaching a single note to his report dated August 31, 2011. After all, other notes documenting the previous contact between Inmate F. and Inmate S.—including the note from August 7, 2011—would have revealed that the prosecution team had been

eliciting information from Inmate S. in violation of *Massiah* over a period of months. In particular, he should be compelled to explain why he thought it was legally and ethically acceptable to exclude the note from August 7, 2011, when it pertained to the exact same subject matter: Inmate F.'s conversations relevant to Inmate S.'s competence to stand trial. Regardless of his explanation, it is clear that Garcia and his unit are highly motivated to show their essential value to the OCDA and local law enforcement. And naturally, Garcia and his fellow deputies from Special Handling recognize that they offer little to the process if they acknowledge that the custodial informant program wantonly violates the Sixth Amendment.

Inmate S. Deemed Gravely Disabled

Because Dekraai has not been provided with discovery from Inmate S., it is uncertain whether Garcia's report and the attached note were turned over to the defense or the court appointed psychologists. However, on October 28, 2011, the Honorable Vicki Hix found Inmate S. incompetent to stand trial after reviewing reports from two psychologists and one psychiatrist. (Exhibit TT.) On April 30, 2013, court minutes reflect a report from Patton State Hospital dated August 9, 2012, which found that there was "no substantial likelihood that the defendant will regain competence in the foreseeable future and that he is gravely disabled." (Exhibit TT.) A report from an Orange County Conservatorship Investigator stated that Inmate S.'s "mental state is brought about by an organic condition and does not qualify for LPS, as the condition is based in organicity, and treatment isn't available, other than medications used for the primary organic disorder." (Investigation Report Re: Court Ordered Evaluation and Assessment by Deputy, filed February 8, 2013, *In the Matter of the Conservatorship of the Person and Estate of [Inmate S.]* (Super. Ct. Orange County, No. 11CF****).) Criminal proceedings remain suspended until such time that he can be restored to competence.

Inmate F. and Dekraai: Deception from Beginning to End

The section that follows will examine the government's efforts 1) to have Inmate F.

elicit statements from Dekraai; 2) to keep Dekraai from learning about Inmate F.'s informant background; 3) to exploit the Sixth Amendment violation to obtain additional evidence; 4) to deceive court and counsel to prevent the defense request for discovery from being granted; 5) to cover up evidence of systemic Sixth Amendment and *Brady* violations; and 6) to deceptively persuade the jury pool and victims' families that the continuances are the result of defense delay tactics.

Before examining the areas noted above, a brief discussion of the law as it relates to the Sixth Amendment and *Massiah* is necessary. The California Supreme Court has described the test for a *Massiah* violation as follows: "Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." (*In re Neely* (1993) 6 Cal.4th 901, 915.) The preexisting arrangement need not be explicit or formal, but rather may be "inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a period of time. [Citation.]" (*Ibid.*) The preexisting agreement can also be inferred from a prior working relationship between the informant and law enforcement. (*People v. Williams* (1997) 16 Cal.4th 153, 204-205.) As to the deliberate elicitation, actual interrogation by the informant is not required. (*In re Neely, supra,* 6 Cal.4th at p. 915.) Rather, the prong is met when the informant stimulates conversation about the charged offense, or actively engages the defendant in such conversation. (*Id.* at pp. 915-916.) When the accused and the informant are both in custody, the "confinement may bring into play subtle influences that will make [defendant] particularly susceptible to the ploys of Government agents." (*United States v. Henry* (1980) 447 U.S. 264, 274.)

The Beginning of the "Coincidental Contact" Between Inmate F. and Dekraai

On June 7, 2013, the OCDA provided a small portion of the requested OCJ records

pertaining to Inmate F., which were originally requested from the OCSD.[18] Those records documented the housing locations for Inmate F. from when he was first incarcerated in January 2007 until he was released into federal custody in December of 2011. (Exhibit FF, pp. 8348-8349.) The provided documents also included automated jail records for Mod L of the Orange County Jail between October 11, 2011 at 3:01 a.m. and October 25, 2011 at 7:59 p.m. (Exhibit FF, pp. 8351-8440.)

Per those records, Inmate F. was housed in Mod L, Tank 17, Cell 3, beginning on September 16, 2011. (Exhibit FF, p. 8349.) Dekraai was housed in Mod L, Tank 19, cell 13, beginning on October 13, 2011. (Exhibit FF, p. 8350.) Sometime between 2:58 a.m. and 7:14 p.m. on October 15, 2011, Inmate F. was moved from cell 3 into cell 1 in Tank 17. (Exhibit FF, pp. 8349, 8378.) During that same time period, Dekraai was then moved from Tank 19 to Tank 17, cell 3. (Exhibit FF, pp. 8350, 8378.) Cells 1 and 3 are adjoining cells, as confirmed by photographs and a diagram provided in discovery. (Exhibit FF, pp. 8338-8347.) Dekraai and Inmate F. remained in adjoining cells from October 15, 2011 until October 25, 2011, when Dekraai was moved into the Theo Lacy Facility. (Exhibit FF, pp. 8350, 8438.)

As referenced earlier, in March of 2013, Wagner and his team interviewed Deputy Ben Garcia about a number of issues. Garcia was provided with a number of the questions well in advance of the interview. (Exhibit FF, pp. 8335-8336; pp. 8441-8443) In the

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[18] Dekraai subpoenaed housing records from the OCSD related to Inmate F. to be provided on May 15, 2013. (Subpoena for jail records related to Inmate F., with service date of May 15, 2013, attached herein as Exhibit ZZ.) The OCSD refused to provide any records responsive to the request. The Declaration of the Custodian of Records stated the following: " . . . 3. The records are 'local summary criminal history information as defined in the California Penal Code 13300. . . . 4. The records are confidential/privileged based on the following statutes: Evidence Code Section 1040; Penal Code Section 1054.'" (Declaration of the Custodian of Records, attached herein as Exhibit AAA.) At Dekraai's request, this Court did not rule on the validity of the OCSD's objections, and this will be litigated further.

interview, Garcia explained that it was an "accident" that four days after Dekraai's arrest in the biggest mass murder in Orange County history, Dekraai and one of Orange County's most successful and valued informants were housed in adjoining cells. Garcia told Wagner that Dekraai was not placed next to Inmate F. in the hope he would elicit statements. (Exhibit EE, pp. 48-49, 53.)

According to Garcia, Inmate F. was placed in Mod L. in mid September of 2011 because he was tired of doing informant work and wanted to "kick back." (Exhibit EE, p. 40.) As a result, Garcia moved Inmate F. into Mod L. (Exhibit EE, p. 40.) According to Garcia, there were no more expectations that Inmate F. would produce as an informant. (Exhibit EE, p. 40.) He said that he told Inmate F. that federal authorities were going "to pick him up any day." (Exhibit EE, p. 40.)

Garcia also explained that upon Dekraai's arrival in the OCJ, he had been placed in Tank 19, which is one of the two "acute" tanks—number 18 being the other. (Exhibit EE, p. 42.) According to Garcia, after a few days Dekraai was ready to be transferred to a "step-down" tank where he could be observed. (Exhibit EE, pp. 45-46.) Per Garcia, Tank 17 was one of the "step-down" tanks and cells 3 and 5 allowed the best opportunities for observation from the guard station. (Exhibit EE, p. 46.) Therefore, Inmate F. exited cell 3 so that Dekraai could be placed in cell 3. (Exhibit EE, p. 47.) Inmate F. entered cell 1, which had an obstructed view. (Exhibit EE, p. 50.) Wagner confirmed that Inmate F. did not have any observation needs. (Exhibit EE, p. 51.)

A Multitude of Coincidences Work to the Enormous Benefit of the Prosecution

Setting aside momentarily Garcia and Special Handling's persistent and disturbing role in violating defendants' Sixth Amendment right to counsel, it is worth examining some of the reasons that Garcia suggested that Inmate F.'s contact with Dekraai was coincidental.

The Claim that Inmate F. Requested Retirement

Garcia told Wagner that Inmate F. had requested to stop working as an informant,

which precipitated his movement into Mod L on September 16, 2011. A review of Inmate F.'s notes suggests that his purported decision to stop working as an informant would have been extremely recent, relative to the date of his movement into Mod L. On August 29, 2011, Garcia and Inmate F. were working together to violate the Sixth Amendment rights of Inmate S., as discussed at page 136. Moreover, it was Inmate F. who had enthusiastically sought the opportunity to help develop evidence of Inmate S.'s competence to stand trial. (Exhibit M, pp. 5469, 5476-5477.)

Interestingly, if Inmate F.'s notes from his OCSD CI file are correct, it appears that while he was housed in disciplinary isolation on August 29, Garcia arranged so that he could use dayroom located in Mod L, Tank 17 (where Inmate S. was apparently located.) (Exhibit FF, p. 8349; Exhibit M, pp. 5476-5477.) This was apparently done so that he could be in close proximity to Inmate S. and elicit incriminating responses, which he did. Eighteen days later, Garcia moved Inmate F. into **Mod L, Tank 17**. Records reveal that Inmate S. was located in Mod L, Tank 16 on October 11, 2011, which is the first date that appears on the automated inmate housing records provided by the OCDA. (Exhibit FF, p. 8351.) While it is unknown at this time whether Inmate S. was in Tank 17 when Inmate F. arrived, it certainly is just as likely that Garcia and Inmate F. were focusing on other targets located in that unit.

In the next consecutive set of notes found within Inmate F.'s OCSD CI file, which are undated but were certainly written after August 29, 2011, Inmate F. wrote about the purported efforts of the OCDA to utilize housing status to manipulate a witness to testify in the Chamberlain cases, *People v. Carlstrom et al.* (Super. Ct. Orange County, 2011, 2012 No. 06CF3677). (Exhibit M, pp. 5478-5479.) Later in the same note, Inmate F. continued to present a picture of himself as being anything but ready to exit the informant game. In fact, few notes in the CI file capture his enthusiasm for his work more than the following: "**Look Garcia this is crucial but anything for you and our boys across the way.** Bowls and Jurusick need to be gone and put Bullet next to me. **He trusts me like no other and I**

can have fun with this one." (Exhibit M, p. 5478, emphasis added.) Later in the same note, he wrote, "**I can search and help in a major way**. Bring Bullet Over here." (Exhibit M, p. 5479, emphasis added.)

The note requires no interpretation. Inmate F. was totally committed to Garcia and law enforcement, referring specifically to the SAPD, FBI or both. He wanted to work and was having fun. He hardly sounded like an informant ready to call it quits. In fact, just the opposite. Garcia moved Inmate F. on September 10, 2011, so that he could facilitate contact with "Bullet," referenced above. (Exhibit FF, p. 8349) In the next note the following day, September 11, 2011, Inmate F. included the following sentence: **"Garcia, I love my little job I got."** (Exhibit M, p. 5481, emphasis added.)

Yet Garcia claimed that he moved Inmate F. to Mod L four days later because Inmate F. did not want to work anymore. (Exhibit EE, p. 38.) This would have represented a significant and sudden change of heart. Likely Garcia was not telling the complete truth about Inmate F.'s purported request to end his informant career. Moreover, regardless of what actually precipitated Inmate F.'s movement into a new location, his notes reflect how Inmate F. felt and what Garcia actually knew about Inmate F. He still had plenty of work left in him just one month later, when Inmate F. happened to notice that the inmate located closest to him in the entire OCJ just happened to be Scott Dekraai.

Whether Mod L Was a Location for Informant Activity

Garcia attempted to characterize Mod L as a location particularly suited for an informant to decompress and take a break from informant activities. However, Garcia, wrote in response to questions given to him prior to his interview with Wagner, that Mod L is housed with inmates of "All types and all levels-(PC, TS, Lvl-1 through Lvl-3and Ad-Seg. It may also include all high profile inmates that maybe housed there for psychological observation." (Exhibit FF, p. 8337.)

Inmate F.'s history in the very same module also paints a picture of a location in the jail where informants can very much ply their trade. In fact, Mod L was the location where

Inmate F. was arguably the most productive over the course of his informant career. Inmate F. was housed in Unit 20 of Mod L, from January 22, 2011 until June 11, 2011. (Exhibit FF, pp. 8348-8349.) As mentioned previously, before he arrived in Mod L, Inmate F. sent Garcia the following, barely legible note pertaining to Leonel Vega ("Downer"), which appears to have been written on or about October 26, 2010, based upon Special Handling's description of its receipt:

> Garcia it would be a good idea to move Downer to North Hole and move Eddie Boy in for a minute. So I could work these dudes. (Illegible) move (illegible) me. Also I'll speak to you in person about something else! Also I wanted you to hit me with a fake validation packet just like you did (illegible) Downer. Talk to you about that later."[19]

(Exhibit M, pp. 5259, 5263.)

Several months later, Garcia rehoused Vega, a critical target in Operation Black Flag, in Inmate F.'s tank within Mod L. The two remained in Mod L from January to June of 2011, and their conversations became the subject of almost daily notes. Moriel's notes also detailed discussions with numerous other targeted inmates as well. (Exhibit M, pp. 5344-5458.)

Additionally, in terms of analyzing Inmate F.'s activity level in Mod L, a comparison of his productivity in that mod versus other areas is illuminating. Inmate F.'s entire OCSD CI file totals 361 pages, consisting of notes, Special Handling summaries, and reports. The total number of pages within that file between the date of January 19, 2011,

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[19] Inmate F. was fully acquainted with the "Dis-iso" scam because he had apparently been working that scam with Vega and others beginning on or around October 9, 2010, when Inmate F. was moved into disciplinary isolation. (Exhibit FF, p. 8348.) In the note, it appears that Inmate F. is asking that Vega be taken out and "Eddie Boy" brought in so he can begin to "work these dudes." Whether he knew that Vega had already fallen prey to the scam previously through the work of Garcia and Moriel is unknown. However, it is an interesting coincidence that Inmate F. asked for a fake validation packet "just like you did (illegible) Downer" and that Garcia and Special Handling created fake paper work for Moriel documenting fake assaults and write-ups to convince Vega that he was not an informant. (The "Dis-iso" scam and the creation of false paperwork is discussed in detail beginning at pages 112 and 253.)

when he arrived in Mod L, and June 11, 2011, when he was reassigned five months later to disciplinary isolation, is 148 pages. (Exhibit M, pp. 5344-5458.) In sum, despite Garcia's responses to Wagner, Mod L was an ideal location for continuing to carry out informant work.

The Coincidental Placement of Dekraai in Mod L, Tank 17, Cell 3

According to Garcia, when Dekraai arrived at OCJ, he was placed in a tank designed to serve inmates with acute mental health needs and observation. (Exhibit EE, p. 46.) After spending two days in Tank 19, which along with Tank 18, are designed to accommodate those with the most serious health concerns, Garcia said that Dekraai needed to be moved to a "step-down" tank in the unit where staff could continue to observe him. (Exhibit EE, p. 46.) There are 99 cells in Mod L. (Exhibit FF, p. 8337.) Tanks 18 and 19 have a combined total of 31 cells. (Exhibit FF, pp. 8351, 8352.) This left four other tanks within Mod L, if OCSD wanted to have Dekraai subject to observation in this particular Mod: Tank 15, 16, 17 and 20. There were 68 cells within those "step down" Tanks in which Dekraai could have been relocated. And, of course, the OCSD could have moved Dekraai to Theo Lacy Facility on October 15, 2011. That is the same facility where he was rehoused on October 25, 2010. Dekraai remained in the Theo Lacy Facility for more than one year following his movement into that facility. (Exhibit FF, p. 8350.)

Perhaps on October 15, 2011, deputies in Classifications forgot about Theo Lacy as an option. Perhaps it was not until 10 days later—coincidentally the very same day the recording device was removed from his cell—that the ideal observation cell in the ideal step down tank within the Theo Lacy Facility finally became available. (Exhibit EE, p. 51.) In any event, Dekraai was moved into cell 3 in Mod 17. As previously mentioned, Inmate F. was settled into cell 3 in Mod 17 for a month when **the jail staff decided that of the 68 available cells in Mod L, Dekraai needed to occupy their star informant's cell.** Inmate F. was moved into cell 1, the recently vacated cell next to Dekraai, hours or minutes before Dekraai arrived. (Exhibit EE, p. 45.)

According to Garcia, there were no observation needs for Inmate F., yet he had occupied cell 3 during the one-month period prior to Dekraai's arrival. (Exhibit FF, p. 8349.) According to Garcia, cell 3 offered the best observation angle for jail staff in that particular Mod. If cell 3 was occupied for an entire month by Inmate F. even though there were no observation needs associated with him, it would appear that in the month preceding Dekraai's movement into cell 3, there were necessarily more observation cells available in Mod L than were actually being used or were needed. Yet, on October 15, 2011, the OCSD allegedly needed to move Inmate F. out of cell 3 so that it could be occupied by Dekraai.

Therefore, adding to the long list of coincidences in this case, the OCSD decided to move Inmate F. out of cell 3, where he was seemingly set to stay long term in anticipation of his purportedly planned transport into federal custody. Moreover, Classifications moved Dekraai into that particular cell, rather than place him in an observation cell in any of the other three step down units at OCJ or those located at the Theo Lacy Facility.

History of Concealed "Coincidental Contacts" Preceding Inmate F. and Dekraai

In order to accept the proposition that only a few days after his arrest in the biggest mass murder in Orange County history, Dekraai was coincidentally rehoused in a cell next to one of the government's most trusted and successful informants, the Court would have to ignore common sense. However, in many respects, this is the least of the prosecution's problems. It is the history of the custodial informant program and Garcia's role in facilitating fabricated "coincidental contact" that ultimately makes the claim in this case embarrassingly deceptive.

During Wagner's interview of Garcia, which was purportedly designed to obtain an understanding of how Inmate F. found himself repeatedly eliciting statements from valuable inmates, Garcia carefully hid the truth about important aspects of his role in the program. For instance, Garcia apparently never thought it was important to speak about his

movement of targeted inmates and custodial informants into close proximity, resulting in statements being obtained about crimes not pertaining to the Mexican Mafia. The coordinated movements of the following inmates resulting in such statements are analyzed in this motion:

1) Inmate I. (with Inmate F. and Moriel), discussed beginning at page 99.
2) Inmate S. (with Inmate F.) discussed beginning at page 130.
3) Leonel Vega (with Moriel) discussed beginning at page 248.
4) Sergio Elizarraraz (with Moriel) discussed beginning at page 320.
5) Juan Lopez (with Moriel) discussed beginning at page 347.

Clearly, Garcia was not in a volunteering mood when it came to this subject matter. However, as luck would have it, he was offered the opportunity to come clean about his role in coordinating contact with targeted inmates when Wagner posed a question on that particular topic during the interview but chose to lie, as discussed in footnote 22.

Garcia recalled perfectly well that he had been a key contributor in the effort to assist the OCDA and local law enforcement in the "Dis-iso" and “coincidental contact” scams, always at the expense of transparency and often in violation of the Sixth Amendment. As will be discussed, Wagner also believed that Garcia was not being candid, but—as be shown toward the latter part of this section—the last thing Wagner wanted from Garcia was “candid.”

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Summary of Evidence that Special Handling Orchestrated Movements of Inmate F. and Dekraai to Allow Inmate F. to Successfully Elicit Incriminating Statements

The following is a brief summary of the evidence that prosecution team members, including the OCSD's Special Handling, coordinated the movements of Dekraai and Inmate F. in hope that Inmate F. would elicit incriminating statements:

1) A key component of the Special Handling Unit's operation with regard to its custodial informant program is coordinating the movements of inmates, including represented defendants, and then concealing those movements;
2) Deputy Garcia was the primary handler for both Inmate F. and Moriel. He coordinated dozens of movements to facilitate confessions from inmates targeted because of criminal acts outside of custody or because of Mexican Mafia activity. The provided discovery strongly suggests that neither Garcia, nor any other member of Special Handling, has turned over a single note or report documenting these efforts;
3) Deputy Garcia has demonstrated that he will seek opportunities to assist the OCDA and outside police agencies, regardless of whether there has been a direct request for assistance or whether these acts violate *Massiah*, as evidenced in *People v. Inmate S.*, beginning at page 130;
4) The OCSD decided that the defendant in the largest mass murder in Orange County history needed to be moved into the cell occupied by one of Orange County's most successful informants in recent history. They elected not to place Dekraai under observation in any of the other three step down tanks that were available or one in the Theo Lacy Facility, where he was moved as soon as the recording device was removed from his cell;
5) Fully aware of Inmate F.'s pending Third Strike cases, his informant history, his previous targeting of high profile inmates (Inmate D. and Inmate M.), one

defendant charged with two murders (Inmate I.), and one charged with attempted murder (Inmate S.), as well his enthusiasm for seeking opportunities to assist the prosecution, they elected to move Inmate F. into the vacant cell immediately next to where Dekraai would enter minutes or hours later.

Dekraai's Presence in Observation Cell Backfires for Prosecution in *Massiah* Analysis

The OCSD purportedly placed Dekraai in Tank 17, cell 3, solely because that cell uniquely offered the best opportunity for observation. Inmate F. would be at his side, literally. Their placement next to one another and what would soon follow, was just the prosecution experiencing enormously good luck, the prosecution would claim. But, as would often prove the case when the prosecution has claimed that everything is merely coincidental, they made mistakes that ultimately helped reveal the truth.

The OCSD purportedly needed to watch Dekraai very closely, which is why he was placed in the best cell for observation. What did they see as they watched him, particularly in the days just following his arrival in the unit when they would be presumably most attentive? Just what they hoped to observe. Their perfect view allowed them to watch one of their best informants doing what he does best: having conversations with an extremely high value inmate. **Moreover, they were able to see the preferred method of building trust: face-to-face conversations between the informant and the target.** At first glance, that was seemingly impossible because the two inmates were in adjoining cells separated by a large wall of cement. But there was a way around it, requiring the teamwork of Special Handling and mod deputies.[20]

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[20] It hardly should come as a surprise that Special Handling works with and often relies upon the assistance of the OCSD deputies who are in the modules. They provide daily observations about informants and targets, and pass on information to Garcia and other Special Handling Deputies when there is the need for urgent contact between the informant and their handler. One example of their integrated efforts is discussed beginning at page 259. When Special Handling carried out its first "Dis-iso" scam related to Leonel Vega, Special Handling apparently talked to deputies working in the disciplinary isolation

On October 19, 2011, Inmate F. explained to the prosecution team how he was able to develop Dekraai's growing trust during the first few minutes of the recorded portion of that interview. He said the following:

> Q1: Can you talk to him from cell-to-cell, or do you have to be out or--
> A: Um, I can talk to him from cell-to-cell…um…**but when I come out**, I usually get a, you know, better…better conversation with, uh, Scott.
> Q1: Okay…how did this conversation come about…(..?) (..?) -- yesterday, about what time? What -- tell us how it started, and then tell us kind of what he said.
> A: Um…basically, you know, it started -- **well, they popped me off the day room** [unclear]…and, um, I was conversating with him and…I just asked him, like, you know…"Why?" You know, "What was [interference-inaudible]...what happened?" you know? Then [unclear] he would just -- he just told me. He goes…
> Q1: Did--
> A: …"You really wanna know?" And I said, "Yeah. Hey," you know, "explain to me what happened" And…can I go on? (..?) [Q1 talking-A inaudible]...

(Exhibit I, p. 3, emphasis added.)

Inmate F. also explained that after Dekraai arrived he spent some time attempting to make Dekraai more comfortable opening up to him:

> Q3: How long had you known him before this conversation?
> A: Probably, like, two days…probably [unclear]. About a day…two days. (..?)-
> Q3: What did you talk about in those first two days whenever you saw him?
> A: Nothin'…nothing much, just, like, just **kinda…keep trying to get comfortable with him** to see if he was really…you know…crazy and…--you know what I mean? But…nothing, nothing much [unclear]. (..?)—

(Exhibit I, p. 9, emphasis added.)

In essence, Inmate F. walked up to Dekraai's cell during his dayroom so that he could have clearer, more understandable conversations with Dekraai, getting "comfortable with him." The mod deputies could have stopped these conversations with a single shout:

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module and asked them to look for opportunities to tell Vega that informant Moriel was incarcerated because of violence perpetuated against deputies and a child molester. (Exhibit O, p. 2061.) The plan, formulated by the prosecution team and its informant, included the creation of fake paperwork that would support Moriel's claim and the suggestions of mod deputies to Vega that he was in disciplinary isolation because of his jail violence and not because he had been a "snitch."

"Inmate F., get away from Dekraai!" After all, when Inmate F. stood in front of Dekraai's cell, he was obstructing their view of Dekraai, which they allegedly believed was so critical. Needless to say, though, Inmate F. standing in front of Dekraai was precisely how they wanted to have their view obstructed.

If there was any question about whether the mod deputies were fully aware that Inmate F. was an informant, that he was closely connected to Garcia, and that he had a special relationship with the mod deputies akin to being a fellow team member, a conversation captured by the subsequently planted recording device illuminates the subject:

(voice over loudspeaker)	Hey, what's up, bro?
Inmate:	Hey, is Hammill right there?
(voice over loudspeaker)	What's up?
Inmate:	Hey, if you talk to Garcia, tell him that I said it's like this, "Ha ha ha, much love."
(voice over loudspeaker)	(unintelligible) Alright, what's up?
Inmate:	Hey, if you can, if you talk to Garcia, tell him that I said, "Ha ha ha LOL." He knows what I'm talking about.
(voice over loudspeaker)	Alright, (unintelligible)
Inmate:	He's not here, dude, but if you get his number, send him a text message.
(voice over loudspeaker)	(unintelligible)
Inmate:	All right, thanks
(voice over loudspeaker)	Hey Dekraai!

(Transcript of conversations in Orange County Jail (Oct. 19 and Oct. 20, 2011), attached herein as Exhibit BBB, p. 11795.)

The "voice over the loudspeaker" is one of the deputies in the unit who was sitting in the guard station. The "Inmate" is Inmate F.

Garcia'a Story of His Contact With Inmate F. About Dekraai

Wagner asked Garcia about when and what he first learned about the meeting between Inmate F. and Dekraai and their discussions:

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A: Inmate F? Okay. Inmate F. reached out to me and he, uh, said that, um, a guy just rolled up next to him in his housing unit and, "It's the guy that, um, is here for the Seal Beach murders."

…

Q2: …what happened?

A: I asked him--I go, um, you know, "So what's happening?" He goes, "He's talking to me." He goes, "He's-he's said some things to me. He kinda laid out what, uh, transpired during that shooting." So I kind of stopped it right there, and I contacted you guys. And, um, I didn't talk to him again, I think, 'til after you guys had spoke with him. I didn't speak with [Inmate F.] after that. I just re--as soon as he told me that, I called you guys, and then I-- I believe we all set up a meeting, and you sat down, and we…

Q1: We came over to your shop.

A: Correct.

(Exhibit EE, p. 3.)

The story does not quite ring true. The Seal Beach murders were a significant event for the County of Orange. Assuming arguendo that Garcia was not involved with placing Dekraai and Inmate F. in adjoining cells, it is perhaps even more unlikely that Garcia first learned about their proximity when Inmate F. told him so on October 18, 2011, after all of the critical pre-recording questioning by Inmate F. had been completed. Considering just the excerpt of communications between the mod deputies and Inmate F., it would seem unrealistic that neither Inmate F. nor the mod deputies contacted Garcia or another member of Special Handling prior to October 18. This would mean that the mod deputies watched one of Special Handling's prized informants build a relationship with Dekraai over a period of more than two days and none of them contacted Garcia or any other member of Special Handling. Of course, there is a reasonable explanation why they may not have contacted Special Handling: Garcia or his team members told them in advance about the plan with regard to Dekraai and they were observing exactly what they expected to see.

Moreover, while Garcia was obtuse in his interview with Wagner about whether his communication with Inmate F., on October 18, 2011, took place on the phone or in person, he claimed that there was only one contact with Inmate F. until his interview with Garcia and the other members of the prosecution team. (Exhibit EE, p. 3) But, if that were true,

they must have met in person because Garcia needed to receive the notes that Inmate F. had written, as he always did when he elicited a statement that he believed the prosecution wanted. Garcia confirmed that he had the notes when he first met with the OCDA staff and Detective Krogman prior to interviewing Dekraai:

> A: But I want to say he did write something down, because I had details that I shared with you.
> Q1: I think so. If memory serves me right, there was something written down.
> A: Because I know we met by ourselves, and I had something that I showed you guys, because I know there was a comment made that there's no way he would have known this without, you know…
> Q1: Right.
> A: …talking to this guy. And I'm like…
> Q2: And there--and there was something written down, yeah.
> A: So--okay. Yeah, then--yeah, he gave me something, which I shared with you guys, and then later on, um…
> Q1: Yeah.
> A: …you sat down and met with him.

(Exhibit EE, pp. 43-44.)

Therefore, in the prosecution's version, the following set of facts relevant to Inmate F. and Special Handling, took place: Dekraai found himself in the cell previously occupied by Orange County's star informant, who had just moved one cell over so that Dekraai could take his spot; Inmate F. did not tell Special Handling that the inmate in closest proximity to him was, coincidentally, the man arrested in the Seal Beach murder; mod deputies did not tell Special Handling that they were watching Inmate F. "work" Dekraai, nor did they even check to see if this was something that they should let happen; Inmate F. waited until he had obtained Dekraai's confession on October 18, 2011 before telling Special Handling about the unique opportunity that was presenting itself; Inmate F. then contacted Garcia to let him know he had completed the job he was never asked to do, and simultaneously provided the notes documenting their conversations and confession, as he did in all of the cases on which he worked.

The entire experience must have felt like déjà vu to Garcia. Slightly more than one

year earlier, Inmate F. was enlisted as an informant and began cultivating a relationship with another represented capital defendant, Inmate D. As discussed beginning at page 86, Inmate F. passed a test that was never officially given when he forwarded an alleged confession in that case, as well. In that instance, Inmate F. also built Inmate D.'s trust after repeatedly approaching the target's cell during dayroom, as mod deputies watched approvingly (likely after discussions in advance with Garcia).

Interestingly, Garcia had to make the impossible claim that he was in the dark about the pre-confession communications between Inmate F. and Inmate D., as well. (Exhibit EE, p. 24.) Otherwise, as he knew, it would have appeared that he had also directly or indirectly supported a *Massiah* violation in that case. Therefore, having allegedly never been contacted by mod deputies in that situation or having spoken directly to Inmate F. about what enabled him to obtain a confession from Inmate D., Garcia was still able to explain to Wagner the following about Inmate F.'s relationship with Inmate D.:

> So it took a while for them to build a rapport. It wasn't that he went in there and just, you know, threw it all out to him. He had to build a rapport with this guy, and I think that was one of the first things he really gave us showing that, "Hey, you know, I'm gonna tell you what people tell me, and share this with you."

(Exhibit EE, p. 31.)

It turns out that Garcia either has the magical ability to understand what Inmate F. does to obtain a confession without having ever spoken to the informant or the less impressive ability to speak to informants and, when helpful, lie about the discussions having ever taken place.

A Battle the Prosecution Cannot Win: The Pre-Recording *Massiah* Violation

Giving every deference to the absurd litany of purported coincidences that led to Dekraai and Inmate F.'s accidental contact—thereby miraculously avoiding *Massiah* implications in their contact—the prosecution ultimately still finds themselves in a spot from which they cannot escape.

The prosecution elected to construct a custodial informant program that incentivizes

informants to produce as much as they can by constantly dangling a carrot that has the words "reduced sentence" written on it. The more high quality information they provide, the better the outcome on their cases. SAPD Detective Gallardo explained in a nutshell how the program works, and said that he explained this directly to Inmate F.:

> Q: Okay. So did you leave it with [Inmate F.] as--sort of as you've explained to us earlier in this conversation that, um, "It's gonna ultimately be up to a judge. The DA will make a sentencing recommendation to the judge, and that's gonna be based upon, you know, **how hard you've worked, the value of your information**, the truthfulness of your information, um, but it's ultimately gonna be up to the judge"?
> A: Yeah, multiple times.

(Exhibit L, pp. 17-18.)

With regard to Dekraai, the prosecution team sent the message loud and clear that they wanted Inmate F. to begin working, regardless of whether he was on active or semi-active duty as an informant at the time. Moreover, Garcia emphasized in his interview with Wagner that Inmate F. and other informants were highly experienced and did not need to be given pre-instructions before they approached a target. Garcia was asked whether Inmate F. was always told when a target was coming into his area and given instructions in advance. He said it was unnecessary:

> Q2: …I guess kind of the terms that you were using--um, do you give him instructions about how he's to go about gathering information that would be useful to you?
> A: Um, I personally don't. Um, what may have been said, you know, with the task force, that I'm not sure. Um, a lot of it--the way we work it inside is we put somebody next to him unless there's a specific operation. And if they talk to them and they find out information, great. If they don't we don't--you know, we don't get anything, but we don't say, "Hey, this is your mission. This guy committed this particular crime. Um, find out what you can find out about it." Uh, we're very, very vague. He's in a housing location. We just might move somebody else in there next to him.
> Q2: Would you ever give him a heads up that somebody's coming to be close--in to close--is being moved to be close to him and that you'd like to find out some information about that individual?
> A: A lot of times he'll know. It's-it's funny, a lot of these guys, they'll know right off the bat if somebody new rolls in, he'll--they'll call us up and say, "Hey, so and so from so and so just came in." (Exhibit EE, pp.17-18.)

While Garcia would have preferred to have others believe that this scenario only applied to the Mexican Mafia investigation, his lies and concealment about non-Mexican Mafia investigations undermine his trustworthiness. Additionally, the description above is nearly identical to Garcia's version of what took place with Dekraai and Inmate F. The government moved an obviously high value target into Inmate F.'s actual cell, then relocated him to the adjacent cell. **Exactly as occurred in the past, he was given the clearest of signals and then some: positioning a target not only in the same mod, but right at his side**. Inmate F. went to work. The silence of the mod deputies as he conversed with Dekraai in front of his cell sent the next signal that this is what was wanted. Inmate F. then called Garcia and told him "…a guy just rolled up next to him in his housing unit, and 'It's the guy that, um, is here for the Seal Beach murders.'" (Exhibit EE, p. 3.) He then delivered the confession on paper, as he always did. He accomplished the mission he reasonably believed the prosecution wanted him to undertake, and one for which he would have reasonably anticipated a benefit.

Even if the prosecution could somehow avoid the obvious logic in the analysis above, it would still leave them staring at a *Massiah* violation. The enormous upside of the custodial informant program is that it creates an energized group of informants who look for every opportunity to troll the jails for the chance to provide assistance on their cases. By creating a custodial program that encourages its informants to troll the jails for targets, those who oversee, utilize, and manage the program accept that informants will violate *Massiah*. The problem is that they simply refuse to be accountable for creating this type of program. Their perspective is particularly appalling when one considers that the government not only fails to instruct informants to avoid questioning represented and charged defendants, but instead actively encourages it.

Significantly, the actions by the prosecution team that followed Garcia's communications with the OCDA corroborated that the entire team soon fully appreciated the predicament they had found themselves in. Those actions also show that the

prosecution understood that the best chance of assuring the admissibility of Dekraai's statements would be to take a path previously traveled. And like the others who are discussed throughout this motion, this meant deciding to hide critical evidence about their informant. If they were effective, they would even prevent the defense from knowing that Inmate F. was an informant. The prosecution knew they would be engaging in deception and misconduct but—just like other violators discussed in this motion—they analyzed the situation and decided it was a small price to pay to accomplish their vision of justice.

The First Violation of *Massiah*

Assuming arguendo that the contact between Dekraai and Inmate F. was miraculously coincidental, the prosecution nonetheless violated *Massiah* beginning no later than the moment their informant began describing what Dekraai said and when Garcia took possession of the notes documenting their conversations.

Those notes documented Dekraai's description of the incident, along with his emotions in the hours preceding and during the shooting. (Notes written by Inmate F. describing conversations with Scott Dekraai in Orange County Jail, attached herein as Exhibit CCC.) Dekraai also purportedly spoke about his medication use and what he told investigators about that subject. Additionally, Dekraai detailed his emotions about Michelle Fournier, his ex-wife, who was one of the victims. Finally, the notes describe Dekraai coming back to his cell after Seal Beach detectives came to the jail and requested that he sign the release for psychological records, discussed below. (Exhibit CCC.) If Krogman's affidavit about his contact with Dekraai is correct, he attempted to obtain Dekraai's signature on October 17, 2011. (Exhibit WW.)

The Prosecution Learns More About Inmate F. As They Contemplate Next Step

Erickson wrote a report, dated December 29, 2011, in which he documented information related to Inmate F. (Interview Report by OCDA Investigator Erickson (Dec. 29, 2011), attached herein as Exhibit DDD.) The report makes it clear that the prosecution

team did not just show up at the jail and begin interviewing Inmate F. Garcia contacted Erickson one day before the recorded interview took place on October 19, 2011. (Exhibit DDD.) It is nearly certain that within the first few moments of their telephone conversation, Garcia spoke about Inmate F.'s informant background or Erickson inquired about it. One of the critical responsibilities of those working in Special Handling—a fact certainly understood by the experienced Erickson—is "handling" informants. By the end of their conversation, Erickson had certainly become aware of Inmate F.'s background. Even if he did not know all of the specifics, Erickson now possessed, at the very least, a general understanding of Inmate F.'s body of work, current status, and pending cases. Additionally, Erickson would have logically inquired about how an established informant found himself so close to Dekraai that he was able to have conversation(s) with him.

Moreover, the prosecution did not immediately sprint to the jail to conduct the interview after Garcia made contact. The interview took place the following day. Two of the most experienced prosecutors in the office, Wagner and Simmons, were assigned to the case—a rare event in itself—and each would have insisted on more details before questioning a witness located within the jail, particularly in this case. They certainly recognized the implications of relying upon an inmate informant in terms of creating a possible *Massiah* violation.

Part of developing a clearer picture of Inmate F. would have included finding out what benefits he reasonably may have expected in return for his assistance. Members of the team made at least a cursory search of his criminal background, which would have showed that he had two Third Strike cases pending since 2007, and that his conviction on one of them meant he was eligible for a life sentence. If the word "informant" had been unspoken up until that point, the five-year delay from filing to sentencing would have raised giant red flags.

A member of the prosecution team logically would have also spoken with Petersen to learn more about Inmate F. This would have occurred most likely after either one of the

Dekraai prosecutors saw that Petersen was the prosecutor on Inmate F.'s case or examined the OCDA's CI file and saw that a card was created by Petersen in 2010. The file also revealed that Inmate F. had worked as an informant on several other occasions, dating back to 1999. And obviously the Dekraai prosecution team would have had serious concerns about an entry in Inmate F.'s OCDA CI file, written by Investigator Hermann of the Anaheim Police Department, which stated "[INMATE F.] WAS TERMINATED AS A C.I. – DO NOT USE AS A C.I." (Exhibit H, p. 5760.)

Prosecution Team Further Briefed and Solidify Conspiracy to Obtain Additional Dekraai Statements While Circumventing *Massiah*

Although not referenced in Erickson's report, Simmons, Wagner, Erickson, OCSD Deputy Bieker, and Garcia met in a room prior to beginning their recorded interview with Inmate F. (Exhibit EE, pp. 3-4.) This meeting is significant in that it eliminates the possibility that somehow Inmate F.'s informant background was missed by the remainder of the team prior to the interview with Inmate F.

Although the prosecution may wish it were an option, they will be unable to suggest that Garcia was a lone wolf who helped obtain statements for the government while masterfully hiding Inmate F.'s informant background from prosecutors and other members of law enforcement. Everyone in the room fully understood that Inmate F. was a professional informant. The experienced prosecutors and investigators knew how the custodial informant background worked, and that Inmate F. would receive his benefit when all of his services were completed. They also knew that by receiving Dekraai's statements via his notes prior to commencing the recorded interview—as confirmed in Garcia's interview—they were already violating *Massiah*.

Ultimately, though, the opportunity to discover more about what Dekraai was thinking and planning was simply too good to pass up. Their anxiousness to learn additional details about his thoughts and possible defense strategies was further intensified by Dekraai's refusal two days earlier to sign the expanded release for psychological

records, which is discussed herein.

The Decision to Record the Interview—Hedging their Bets with Instruction and a Pre-Interview Interview

From their collective perspective, there was likely only one impediment to the plan's success: the recording. Nobody in the group was perhaps as concerned about the prospect of recording Inmate F. as Deputy Garcia. As discussed in an earlier section and as will become more evident during the discussion of informant Oscar Moriel, Deputy Garcia was present and set up dozens of interviews with Inmate F. and Moriel. If he was aware that any of those interviews were recorded, neither he nor any member of Special Handling has revealed that fact. In fact, as discussed throughout this motion, there were not any recorded interviews of informants referenced or found within any of the discovery with the exception of the FBI debriefing in January of 2011—and at that point Inmate F. was only questioned about his experiences and understanding of Mexican Mafia activities. (Exhibit DD.)

Garcia had additional reason for trepidation about recording Inmate F. Although the other team members were delighted with his work, Garcia knew that he had either personally set up the "coincidental contact" scam—as he had so many other times before—or was fully informed of it, along with the OCSD's subsequent efforts to permit Inmate F. to elicit the statements. He also understood as well as anyone why prosecution teams were so averse to recording interviews with informants. If Inmate F. stated something revealing, Garcia knew it could have implications for the entire program.

Prosecution teams have generally recognized that even with an experienced informant, there exists a significant risk that he will say something that could unveil aspects of the program's secret efforts, which have often involved trampling the law that governs contacts between informants and defendants. However, the Dekraai prosecution team decided that they needed to record Inmate F. for at least two significant reasons. First, they wanted to be able to claim in a capital case, particularly one with the amount of

attention it was bound to receive, that they recorded all of their witness interviews. If the defense zeroed in on the conspicuous absence of a recording of Inmate F., it would appear even more likely that he was an informant. Second, this group of veteran prosecutors and investigators likely believed that they could skillfully manage their deception and keep it from being detected by the defense. With that mindset, they were almost ready to begin the recorded interview of Inmate F.

But, they first wanted to take a few steps to reduce the chances of any embarrassing revelations occurring on tape. That was relatively easy for the prosecution team members. A review of the questioning in the recorded portion of the interview—and the absence of obvious questioning—strongly suggests that Wagner or another member of the team reiterated to the others that logical or material questions about Inmate F.'s informant history or motives should not be asked. Erickson would clarify right off the bat that Inmate F. was not looking for anything in return in order to make it appear that Inmate F. was not an informant but just a curious inmate who stumbled upon a talkative mass murderer. Again, the prosecution team that knew that one poorly formulated question could result in a truthful statement about what Inmate F. hoped for in return or the defense beginning to understand Inmate F.'s true history as an informant.

There was still one more step. Before they began the recorded portion of the informant interview, they needed to talk to one more person: Inmate F. While the entirety of what was spoken about during that pre-recording meeting is unknown, there was far more to it than the prosecution revealed, as will be addressed below. One point that the prosecution wanted to make sure about before the recording began was that everyone "understood" that there would be nothing promised in exchange for the cooperation:

> Q1: Okay. Um…before we turned this on…we just wanted to make…absolutely certain you are here because you wanna be here, not because we're making any sorta promises or anything to you.
> A: Exactly. I understand.

(Exhibit I, pp. 1-2.)

As discussed above, the veteran informant had been instructed on this very point

by his handlers previously, so Inmate F. certainly understood the wink and the nod meant that "We cannot promise you anything on tape, but your work on this will all go into the bucket of good work that the prosecution will take into consideration when the moment is right." Based upon what Gallardo, Garcia and others told him, Inmate F. believed that eliciting the information documented in his notes would be helpful to the prosecution and rewarded, but no that no "promises" could be made. While Inmate F. may not have been familiar specifically with *Massiah*, he certainly was made to understand previously that the prosecution did not want him to ever suggest a "quid pro quo" relationship. But, the prosecution likely thought this was not the time to assume so they reiterated the point.

Additionally, the prosecution also wanted to make it abundantly clear that he was not to mention that the only thing he had been doing the past year was "this little job I got" and loved – being a government informant. (Exhibit M, p. 5481.) With everyone finally on the same page that this was not the time for straight talk, the recorded portion of their interview could begin.

The Interview of Inmate F.: Another *Massiah* Violation as the Conspiracy to Conceal Further Reveals Itself

The prosecution discovered the recorded interview of Inmate F. on January 24, 2012. Again, the interview was attended by Wagner, Simmons, Erickson, Krogman, Bieker and Garcia. (Exhibit I.) Erickson began the questioning as follows:

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Q1: [Inmate F.], uh…the reason we're here is…[Inmate F.], uh….talked to Deputy Garcia some time yesterday?
Q3?: Right.
Q1: And, uh…[Inmate F.] has information that he thinks would be helpful to the investigation of a shooting involving inmate Scott Dekraai…in Seal Beach that occurred on October 12th. Um…I just turned on the tape, but before the tape went on…[Inmate F.], uh…-- let's get your booking number…
A: 23.....
Q1: Okay…[pause w/writing]…and it's…[Inmate F.], right?
A: Exactly.
Q1: Okay. Um…before we turned this on…we just wanted to make…absolutely certain you are here because you wanna be here, not because we're making any sorta promises or anything to you.
A: Exactly. I understand.
Q1: But is that correct, that we haven't made any promises to you of anything whatsoever?
A: No promises were made…to--
Q1: Just tell me in your own words…why it is you feel you need to do this today?
A: Because I think this dude is…is, uh…needs to be put away forever and I think that this…this man is…-- needs to be put to death…you know, for what he did…and what he explained to me.

(Exhibit I, pp. 1-2.)

It had gone off just as planned in the pre-interview meeting. The phrasing of Erickson was smartly delivered. He and the attorneys knew that the test for the first prong of *Massiah* is not whether the witness reasonably anticipates a benefit when he briefs the prosecution on what the target told him, but whether he reasonably anticipated it when questioning the target. (*In re Neely, supra,* 6 Cal.4th at p. 915.) But exploring what Inmate F. anticipated as he spoke with the target probably felt a little too close for comfort in terms of revealing what the team knew. Instead, Erickson, as planned, locked Inmate F. to the notion that he was not assured a benefit for his assistance moving forward.

Moreover, Inmate F. claimed that he came forward not because he was an experienced and trained informant looking for essentially a "Get out of Jail Free" card after committing two Third Strike cases, and avoiding prosecution in Operation Black Flag despite being a Mexican Mafia leader. Rather, he needed to contact authorities because of

his moral outrage about the crime and Dekraai's statements. His decision had nothing to do with him being a professional informant or believing that help on the biggest mass murder case in the county's history could be a reason for immense appreciation. Everyone in the room had listened attentively at the meeting and followed the instructions given; no one asked any responsive questions that could have moved the interview in an honest direction, although they certainly believed what Inmate F. was saying was untrue or at the very least, highly misleading.

Garcia was in the room and knew as well as anyone that Inmate F. was not nearly as offended by violence as his response suggested. Before the interview with Inmate F., Garcia had certainly told the other prosecution team members that Inmate F. was a former Mexican Mafia leader and street gang member. Therefore, everyone present would have reasonably believed that Inmate F. had previously ordered violence against others and participated in gang violence that may have included murders. Garcia also knew that Inmate F. had documented admissions about other murders and that his expressed disgust for the purported wrongdoers in those crimes did not diminish his hope that his assistance would result in a benefit.

For instance, in *People v. Inmate D.*, Garcia knew that Inmate F. wrote at least two letters documenting alleged confessions he received from Inmate D. In one of the letters directed to the detectives who had interviewed him earlier, Inmate F. wrote about two of Inmate D.'s alleged accomplices and his purported belief about the consequences they should face: "I feel in my heart that [R**] and [Inmate D.'s brother] shall face justice as well." (Exhibit M, p. 5151.)

However, one week earlier in his first letter, Inmate F. made it absolutely clear that his internal sense of justice existed alongside a desperate hope that he would be rewarded with a lesser sentence, when he pleaded with the detectives: "…I'm just asking for your help to change my life and get back to my kids. **I will do what it takes to get there**." (Exhibit M, p. 5149, emphasis added.)

Even if the other team members present were unaware of this letter, they certainly did not need it to understand his motivations. They knew that Inmate F. was facing the possibility of multiple life sentences and was hoping that he would get a substantial benefit for his cooperation in the dozens of other cases in which he had worked as a snitch in the previous year. In fact, his letter simply articulates what the prosecution team knew existed in the heart of every informant with whom they had ever worked: they were working so that they could be released as quickly as possible. In sum, the prosecution team knew that while Inmate F. may have been bothered by Dekraai's conduct and statements, the suggestion that he was coming forward solely because of his moral outrage was preposterous.

However, the questions and answers regarding "benefits" were not presented to foster the truth, but to deceive Dekraai's defense counsel. They knew that absent real questions, Inmate's F.'s claimed motivation for coming forward would leave the listener misled—and that was exactly how they wanted the defense to find themselves.

Inmate F. Describes the *Massiah Violation* on the First Substantive Question and Prosecution Refuses to Stop

Almost as quickly as the prosecution escaped what seemed to be the biggest land mine in the case, they stepped into a larger one. Before the prosecution received a single statement about what Dekraai had told Inmate F., the following dialogue occurred:

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Q1: Okay. Are you in a cell -- not knowing what the layout of L-MOD is, are you in a cell, like, right next to him, nearby?
A: Yeah, he's my next store [*sic*] neighbor. I'm in cell…1 -- number 1, and he's in cell number 3.
Q1: Okay.
A: So, he's my next store [*sic*] neighbor.
Q1: Can you talk to him from cell-to-cell, or do you have to be out or--
A: Um, I can talk to him from cell-to-cell…um…but **when I come out, I usually get a, you know, better…better conversation with, uh, Scott**.
Q1: Okay…how did this conversation come about…(..?) (..?) -- yesterday, about what time? What -- tell us how it started, and then tell us kind of what he said.
A: Um…basically, you know, it started -- well, **they popped me off the day room [unclear]…and, um, I was conversating with him and…I just asked him, like, you know…"Why?" You know, "What was [interference-inaudible]...what happened?" you know? Then [unclear] he would just -- he just told me. He goes…**
Q1: Did--
A: …"You really wanna know?" And I said, "Yeah. Hey," you know, "explain to me what happened" And…can I go on? (..?) [Q1 talking-A inaudible]...
Q1: Yeah, absolutely. Absolutely, just make sure…
A: He…
Q1: …you speak up (..?)…
A: …he said -- he…
Q1: …kinda--
A: …specifically, told me that…um…his-his e[x] -- his son…used to go to the house…to his house, whatever…in a custody battle and all…
(Exhibit I, pp. 3-4)

Later in the interview with Inmate F., the following dialogue occurred:
Q3? How long had you known him before this conversation?
A: Probably, like, two days…probably [unclear]. About a day…two days. (…?)—
Q3: What did you talk about in those first two days whenever you saw him?
A: Nothin'…nothing much, just, like, just kinda…**keep trying to get comfortable with him** to see if he was really…you know…crazy and…-- you know what I mean? But…nothing, nothing much [unclear]. (..?)—
(Exhibit I, p. 9, emphasis added.)

Before Inmate F. spoke a word, Garcia unquestionably understood what the mod deputies and Inmate F. had done to enable Inmate F. and Dekraai's contact. However, Inmate F.'s answer laid it out for the remainder of the team. Inmate F. spoke to Dekraai cell to cell. However, he explained that the best conversations happened when they were standing face to face, at a time when Inmate F. was in the dayroom area and directly approach Dekraai's cell. Assuming arguendo that the remainder of the team did not understand this earlier, the others in the interview room were learning from Inmate F. that the mod deputies had facilitated his conversations by allowing Inmate F. to approach and stand in front of Dekraai's cell door. Inmate F. walking up to Dekraai—without interference from law enforcement—should have been seen as immediately problematic to the prosecution team. However, it was the other portion of his answer that eliminated any possibility that the prosecution would lawfully admit the statements at trial, if the defense discovered the truth about Inmate F. as an informant.

The second prong of the test for a *Massiah* violation is whether the informant deliberately elicited incriminating responses. (*In re Neely, supra,* 6 Cal.4th 901 at p. 915.) Inmate F. could not have been any more clear in acknowledging that he directly elicited the incriminating statements that followed. Moreover, before Dekraai was ready to answer the question, "What happened?" Dekraai asked whether this was something Inmate F. really wanted to learn more about: **"You really wanna know?"** (Exhibit I, p. 3, emphasis added.) Inmate F. responded with the following: "'**Yeah. Hey,' you know, 'explain to me what happened…'"** (Exhibit I, p. 3, emphasis added.)

Inmate F. admitted that it was his direct questioning of Dekraai that led to the description of the crimes. Those working with custodial informants in Orange County have generally prevented the discovery of direct questioning by their informants by not recording their interviews and withholding evidence that would contradict the prosecution's depiction of the informant as a passive listener. However, in this instance the prosecution team was confident that this Court would never get to the second prong of a

Massiah analysis –deliberate elicitation of incriminating statements - because court and counsel would be misled into believing the first prong was not met.

The Prosecution Refuses to Honor *Massiah* and Continues to Question Inmate F.

The prosecution team was obligated to end the interview the moment they were told that Inmate F. had not simply listened, but instead had questioned Dekraai and even assured Dekraai that he wanted to hear what his target had to say. Inmate F. had admitted without qualification that he "…deliberately elicited incriminating statements." (*In re Neely*, 6 Cal.4th at p. 915.) But why would the prosecution lose the opportunity to hear more about what Dekraai said simply because it was unlawful to continue in their questioning? Moreover, they were simply carrying out their conspiracy to violate *Massiah*, which they planned before the interview began. They needed to get to the information they so desperately wanted.

The Prosecution Obtains Critical Evidence From Inmate F. about Dekraai's Life and the Crime

Inmate F. proceeded to describe what Dekraai allegedly told him about the events leading up the crime, and the shooting itself. (Exhibit I, p. 4.) The statements included a moment-by-moment description of the crime and his thoughts about particular victims. (Exhibit I, pp. 4-6.) Dekraai also discussed his reasons for the crime. (Exhibit I, pp. 4-6.) Erickson asked Inmate F. about what medications Dekraai said that "…he might….need to take of anything like that?" (Exhibit I, p. 11.) Inmate F. then described what medications Dekraai said he took he took. This in turn led to a discussion of the tugboat accident that left him injured. (Exhibit I, p. 11.)

Prosecution Seeks Evidence of Defense Strategies While Revealing Additional Unrecorded Conversations

After questioning Inmate F. regarding Dekraai's medications and the tugboat accident, Erickson asked Inmate F. a series of questions about defense strategies, a

potential insanity plea, and Dekraai's mental health. Erickson asked Inmate F. the following about Dekraai's legal strategies:

> Q1: Okay…**I think you told me, you said somethin' about his plans and how he was gonna proceed with court**.
> A: Hm [unclear]
> Q1: Did he talk to you about that at all?

(Exhibit I, p. 12, emphasis added.)

Inmate F. then described Dekraai's statements about the plea he had contemplated, and Dekraai's emotions about the death penalty. (Exhibit I, p. 12.)

Erickson pressed the issue and asked Inmate F. what Dekraai said on that subject. This line of questioning led back to the discussion of pleas based upon Dekraai's mental health at the time of the crime. (Exhibit I, pp. 12-13.) Interestingly, Inmate F. spoke energetically about mental health issues related to Dekraai, in a manner wholly reminiscent of his competence analysis in *People v. Inmate S.*, discussed previously beginning at page 134. (Exhibit I, p. 13.)

Erickson continued to probe about Dekraai's mental health, asking whether Dekraai "…seem[s] to have a good grip of reality?" (Exhibit I, p. 13.) Trying to develop evidence to thwart any possible insanity plea or mitigation evidence relevant to mental health, Erickson asked whether Dekraai expressed that he knew what he did was wrong. (Exhibit I, p. 13.) Erickson then questioned whether Dekraai was emotional in speaking about the crime. (Exhibit I, p. 13.) Inmate F. provided his recollection of Dekraai's responses to each of these questions. (Exhibit I, pp. 12-13.)

These questions are enormously troubling for several reasons. First, the prosecution team demonstrated an inability to restrain from obtaining information that they knew was gathered in violation of *Massiah*. And significantly, while violating *Massiah,* they elected to penetrate another specific area protected by the Sixth Amendment: Dekraai's right to confidentiality in his defense strategies.

Second, this effort is even more aggravated because the two prosecutors assigned to the case were present. This is not simply a situation of an overzealous officer crossing a

line that he failed to see because he was ignorant of the law. The director of the homicide unit and one of the office's most experienced homicide prosecutors did nothing to stop Erickson from crossing that line, because quite obviously this was precisely what they wanted. Erickson was doing the attorneys' dirty work. He was asking the questions that the attorneys wanted him to ask, which were designed to gain specific information about defense strategies in order to understand them, and aid in planning the prosecution's response.

Third, Erickson's initial question on this subject matter confirms that the prosecution had already interviewed Inmate F. about Dekraai's articulated defense strategies before Erickson activated his recording device. As noted earlier, Erickson, said … "I think you told me, you said somethin' about his plans and how he was gonna proceed with court." (Exhibit I, p. 12.) **However, the recording does not include this discussion, confirming that it was spoken about before the recording began**. (Exhibit I, pp. 1-12.) The revelation also confirmed that the unrecorded questioning was far from limited to the "agreement" that no benefit was wanted and none was promised.

This question also confirms that the prosecution team was on the very same page in their approach to the informant from the moment they spoke with Inmate F. on October 19, 2011. Just two days earlier, Dekraai refused to sign the expanded release for psychological records. Wagner and his team anxiously wanted information about Dekraai's mental health condition, along with insights on defense strategies indicating how he would potentially use that condition at trial. But counsel for Dr. Silverstein had gotten in their way. Their zeal to obtain information about this subject matter would be further demonstrated in the weeks following the interview, as they began an illegal and unethical effort to obtain Dekraai's psychological records. However, what is clear is that the prosecution team interviewed Inmate F. before the recording began, and that their

questions included Dekraai's statements to Inmate F. about his plans for an insanity plea.[21]

Significantly, because of the prior, unrecorded interview, the attorneys on the prosecution team were entirely unsurprised by Erickson's questions of Inmate F. during the recorded portion of the interview regarding Dekraai's legal strategies. And, of course, if the prosecutors had been willing to honor their legal and ethical responsibilities they would have immediately instructed Erickson to stop questioning on this subject matter after he had asked about it the first time off tape; the power to stop this violation of Dekraai's Sixth Amendment rights rested entirely in their hands. Instead, the entire team decided to use their power to get the information they wanted and cover up the wrongfulness of their conduct.

The Evidence of Unrecorded Interview with Inmate F. Confirms a Back Up Plan for Deception

The decision to interview Inmate F. before the recording device was activated was entirely logical for a group desperate to start building their response to whatever Dekraai might do that could interfere with a death verdict. If after the "off the record" interrogation, the team felt the risk was too high that Inmate F. would say something revealing about his informant status, they could part ways with Inmate F. at that point and not proceed with the recorded interview. But even without the recorded interview, the prosecution team would be left in a far better position. After the unrecorded conversation with Inmate F., they would have known what Dekraai was saying about the crime and his

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[21] On January 24, 2013, the prosecution finally turned over Inmate F.'s interview. It included the questions and answers detailed above. The transcript illuminated the comments that Assistant DA Simmons made to the press two months earlier, in which he said that if Dekraai tried an insanity defense the District Attorney's Office would be ready. (KPCC, *Alleged shooter in Seal Beach salon spree arraigned* (Nov. 29, 2011) (audio), available at http://www.scpr.org/news/2011/11/29/30101/man-charged-seal-beach-killings-arraigned-today/, attached herein as Exhibit EEE.) Simmons' sentence would have been technically more accurate if he had ended it with "…even if it means violating the Sixth Amendment and covering up the illegal acts that helped us achieve our readiness."

mental state, as well as what strategies he and his former counsel were contemplating for the case.

Interestingly, the motives for the unrecorded conversation were similar to those that fueled the prosecution team's renewed effort to obtain Dekraai's psychotherapist records a few days later. The prosecution similarly knew that the records were inadmissible once the court determined that they were privileged and had been obtained illegally. However, the prosecution team also knew they would still benefit from the opportunity to study those records and make investigative and trial strategy decisions based upon what they had read.

The Prosecution Plants Recording Device

According to a report written by Detective Krogman, the prosecution made arrangements to place a recording device in Dekraai's cell in order to capture conversations between Inmate F. and Dekraai. (Report of SBPD Detective Krogman, dated February 23, 2012), attached herein as Exhibit FFF.) But before getting under way, Krogman said the following: "…[at] the conclusion of our interview of [Inmate F.] he was told not to ask any questions or to bring up the homicide during the conversations with Dekraai." (Exhibit FFF.) No such conversation between the prosecution team and Inmate F. took place on the recorded portion of the interview, confirming that another off the record conversation occurred. However, as the team knew from conversations with Garcia and likely Petersen, Inmate F. was a government informant with natural skills that handlers from the custodial informant program, such as Garcia, further cultivated. It is certainly plausible that they would have directed Inmate F. not to ask Dekraai direct questions about the crime, in case the defense learned of Inmate F.'s informant status. In light of the prosecution team's ongoing concealment in this case, it is impossible to know for sure how these instructions were given prior to the introduction of the recording device. The recordings between Inmate F. and Dekraai, though, capture an informant committed to building Dekraai's trust. While only a portion of the recordings are analyzed below, what leaps from the pages is an individual who ostensibly cares deeply about Dekraai and who wants Dekraai to share all

of his thoughts. As discussed above, only Inmate F.'s desire to obtain additional statements was sincere.

It is critical, of course, that Inmate F. had already asked Dekraai about the crime, encouraged him to speak about it, and received significant statements before the introduction of the recording device. After the recording device was introduced, the goal was to convince Dekraai to feel that he could continue to speak about subjects that would be important to the prosecution. For Inmate F., this meant showing in an interest in other aspects of Dekraai's life so that he would see Inmate F. as a true friend with whom he could confide.

The recording, analyzed below, also shows that Inmate F.'s efforts to gain Dekraai's trust pre-dated the government's interview with Inmate F., and then intensified once the recording was activated. The following are a few of the exchanges that transpired and a brief analysis of the dialogue.

1) Efforts to Encourage Dekraai to Speak

I: How you feeling now?
D: Huh?
I: How do you feel about it (inaudible)?
D: I still have to shower. I'm fuckin' trippin' because I got this fuckin' clean shirt, but I still smell…
I: (unintelligible). So your wife gonna come visit you?
D: I don't know. Jim is concerned that . . . about my blood pressure.
I: Why?

(Exhibit BBB, pp. 11729-11730.)

ANALYSIS: Inmate F. asked open-ended questions, seemingly designed to encourage Dekraai to speak about the most pressing matters on his mind. These questions also achieved the purpose of demonstrating a continuing interest in Dekraai and his well-being.

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2) Evidence that Inmate F. Developed Dekraai's Trust Prior to Planting of Recording Device

I: Wow.
D: It's been cool meeting you, man. You're a cool dude.
I: Yeah, a pleasure.
(Exhibit BBB, p. 11732.)

ANALYSIS: After explaining to prosecution team members earlier in the very same day that he despised Dekraai and believed he should get the death penalty, Inmate F. returned Dekraai's kind words by falsely expressing that it was a pleasure to meet him.

3) Inmate F. Asks Questions About Dekraai's Life As He further Ingratiates the Target

I: You ever use drugs in your life?
D: I smoked a little weed back in the day. A little coke. That's about it. I didn't need to get high. I was high on life.
I: How old is your son?
D: Eight.
I: Eight years old?
D: You'll see a picture of him. I'm gonna get some photos. My wife's. . .
I: Does he look like you?
D: I would say. He doesn't have no fuckin' facial hair.
I: Of course. Of course.
D: His name is Dominic.
I: What's his name?
D: Dominic.
I: Dominic?
D: Dominic.
I: (unintelligible) My daughter is Dominique.
D: D-o-m-i-n-i-c.
I: Yeah, mine's D-o-m-i-n-i-q-u-e. That's my daughter. Wow that's cool.
D: Mm-hmm.
I: How's he doing?
D: I don't know. . . My ex-wife's brother has children his age, Dominic's age.
I: Who is this?
…
(Exhibit BBB, pp. 11737-11738.)

ANALYSIS:

Inmate F. showed a false interest in Dekraai's personal life in order to continue to build his trust. He also played on the similarity between their children's names to foster a fake kinship between the two.

4) Inmate F. Expresses Plan to Help Dekraai Ease into Custodial Life

I: I'm gonna teach you a little bit about how to live. Like, put lines up, you know, things like that, so you can hang up your clothes.

(Exhibit BBB, p. 11744.)

ANALYSIS:

Despite his purported wish that Dekraai receive the death penalty, Inmate F. continued to ingratiate Dekraai, by promising to teach his target techniques to make his life in custody more manageable.

5) Demonstrated Empathy About Dekraai's Personal Issues

I: It's gonna be…
D: Hard to stay married.
I: Of course bud, you know.
D: Yeah, I've been thinking about that.
I: That there is something that you need to…
D: I've been thinking about that.
I: You need to cope with it, brother. And that's one thing that is a lot of people's downfalls, you know. So you need to except [*sic*] it.

(Exhibit BBB, p.10.)

ANALYSIS: Inmate F. encouraged his "bud" and "brother" to attempt to address the difficult challenge of staying married while in custody. His language was designed to further Dekraai's sense that Inmate F. was like family and could be trusted. (Exhibit BBB, p. 11754.)

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6) Continued Efforts To Foster Camaraderie with Dekraai

I: Scott!
D: Yeah.
I: Scott!
D: Yeah.
I: Good morning, brother.
D: Good morning, [Inmate F.].
…
I: How you feeling this morning?
…
I: You sleep well?

(Exhibit BBB, p. 11758.)

7) Inmate F. Attempts to Encourage Conversation As He Expresses Generosity Toward Dekraai

I: **So what are you thinking about, buddy?**
D: What's that bud?
I: **What are you thinking about?**
D: I'm just reading this book.
I: Oh, you're reading?
D: Yeah. How about you?
I: Is it pretty good?
I: I've got a good one over here for you.
D: Huh?
I: I'm gonna give you another one

(Exhibit BBB, p. 1759, emphasis added.)

ANALYSIS: This conversation demonstrates Inmate F.'s efforts to elicit additional statements from Dekraai just one day after the recording device was introduced into the cell. As Inmate F. had clearly stated in his interview with the prosecution team, he wanted Dekraai to be executed. Therefore, questions such as those above had one true objective: make Dekraai feel comfortable unburdening himself with any and all thoughts valuable to the prosecution. Inmate F.'s expressed desire to ease Dekraai's experience in jail by giving him a book is another a tactic employed to show Dekraai that he cares about him and could be trusted.

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8) Inmate F. Gives His Food to Dekraai

I: Did you get your soup?
D: I did, thank you.
I: Did you eat it?
D: No, I'm saving it for a special day.
I: Oh, wow.
D: (laughs) Special occasion. Maybe later. I got it this morning. Thank you very much.
I: All right.
D: It's very cool of you.
(Exhibit BBB, p. 11760.)

ANALYIS:

Inmate F. continued to foster Dekraai's appreciation and trust, checking to make sure that he received the soup he gave to him as a gift.

9) Inmate F. Simultaneously Ingratiates and Digs for Information

D: Lukewarm ramen.
I: Hey, I got a fuckin'… I got one with pieces for your seat, so you can have. Like one of those things to fuckin'…
D: I was… You made one today?
I: Yeah, I made one for you today.
D: Oh. That's fuckin'… I was in the process of making one when fuckin' my attorney came.
I: Who?
D: My attorney.
I: Is that right?
D: Yeah.
I: Yeah, I was wondering where you went.
D: Yeah, I was up there, fuckin' chit-chatting.
I: What about?
D: Same old just whatever.
I: I made two.
D: For real?
I: Check this one out. See if that'll work.
D: Oh yeah, that'll work just fuckin' fine. Gracias.
I: All right.
D: Thanks, bro.
I: All right. Oh, shit, (unintelligible). (Talks to others, unintelligible) Did it work? Did it work?
D: Oh, the deal?

I: Yeah.
D: I didn't even try it, but I'm sure it will.
I: Try it.
D: Fuckin A, you know it will, bro. You're the fuckin' magician.
I: It's the fuckin' ways of the world, bro. It's the way of the world.
I: You just gotta adjust it to where you gotta push it together. There you go. See, you're an easy learner, bro. No, you gotta put it on the side, like this. On the side. Is it going, or no?...
I: Yeah, come on, dude. Come on, go ahead. See if that works. Come on, brother!
D: Don't give me yours. This is the one you had… This is the one from yesterday.
I: Dude, that doesn't mean shit to me.
D: It does.
I: No fuckin'. Brother… Really? Come on. Just keep one where you can use… Try that one…
D: Thank you, [Inmate F.]. Thanks a million.
I: Hey, how do you pronounce your last name anyway?...
D: The. K-r-a-a-i is raven, or crow. The Raven.
I: Really?
D: Our family crest is the raven.
I: Really?
D: Mm-hmm.
I: Wow, that's interesting. Like that.
D: Yeah.
I: Hey, where'd you go earlier?
D: See my attorney.
I: Oh, really?
D: Yeah. Just signing papers and shit. My…my little boy, he's…he's in the…he's in the custody of my ex-wife's daughter. His biological sister.
I: Right…
D: Harsh reality that I signed away today. Today wasn't really a good day for me, but I have to accept it. But it's… It is what it is. It's part of being a fuckin' murderer, I found out today…
I: Huh?
D: …that life goes on. It's part of what you said to me, you know what I mean, yesterday.

(Exhibit BBB, pp. 11767-11772, emphasis added.)

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ANALYSIS:

This lengthy excerpt of conversations between Inmate F. and Dekraai illustrates to perfection why Inmate F. enjoyed enormous success as a custodial informant and why prosecution teams valued him so highly. He convincingly presented himself as a caring inmate whose curiosity and generosity is the manifestation of a generous and noble heart. He asked about Dekraai's conversation with his attorney, fully cognizant of the prosecution's expressed interest in Dekraai's trial strategies. When Dekraai responded with little information, he resumed his show of selflessness. He informed Dekraai that he made an extra heating device for soup so that Dekraai could have one. After Dekraai expresses reluctance to take something that belongs to Inmate F., he assured Dekraai that this was something he wanted to give him. Inmate F. succeeded, as shown by Dekraai's response: "Thanks a million."

Inmate F.'s efforts were masterful. After touching on several subjects including the proper pronunciation of Dekraai's name, Inmate F. returned to what he really wanted to know: what Dekraai had discussed during his earlier meeting with his attorney. This would lead back to conversations about Dekraai's son and the child custody matter. When Dekraai does not speak loudly enough, Inmate F. encouraged him to "Talk louder, dude." (Exhibit BBB, p. 11775.) When Dekraai expressed concern that others could hear their conversation, Inmate F. assured him: "Ain't nobody here but me and you. And they ain't fuckin'…" (Exhibit BBB, p. 11775.)

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10) More Evidence of Inmate F.'s Success at Gaining Dekraai's Trust and Affection

I: Hey, you want some?
D: What?
I: Coffee? You want me for the morning?
D: I've weaned myself off that shit.
I: Good. It saves me money, bro.
D: I know. Hey, once I get my fuckin' thing on my books or whatever, I'll fuckin' hook you up.
Inmate: Yeah, I (unintelligible), bro…
D: That's a good one. At least I think it is. Inmate F.?
I: Yeah?
D: It's the knowledge that I'm thinking about. It's the talk that, you know, the wisdom.
I: Oh.
D: Your conversation and all that, it's…it's helpful.
I: It's comforting?
D: Yeah, it's comforting. No, I mean, yeah, you know. You've been real cool.
I: Yeah, of course. Yeah, dude we're convicts. You know what I mean? We're…you know. I mean, we're in here. We're on this side.
D: I'm gonna be tripping when they take me over to… I mean, it's already kind of wacky here, but I'm gonna be trippin' when they fuckin' take me over to the fuckin' med side. What's it gonna be like over there?

(Exhibit BBB, p. 11780.)

ANALYSIS:

It is difficult to imagine more effective informant work. Inmate F. was fully manipulating Dekraai, as evidenced by his expression of gratitude for Inmate F.'s perceived kindness and wisdom. To cap off his performance, Inmate F. suggested that this graciousness was simply due to their common experience of being on the same side of the bars.

Defendant's Inculpatory Statements: A Hidden Moment Caught in Inmate F.'s Notes—Not the Recording

Within thirty minutes of the conversation referenced above in number 10, Dekraai spoke about the crime and provided critical statements that the prosecution hopes to

introduce at trial. (Exhibit BBB, pp. 11784-11787.) A specific question cannot be heard on the audio recording immediately preceding Dekraai's statements. **However, Inmate F.'s notes amazingly filled in the gap**. In the nearly 48 hours after the introduction of the recording device, Inmate F. applied the tricks of the trade to perfection in the quest to convince Dekraai that he was a trusted confidant with whom he could continue to divulge his most important thoughts and secrets. As Inmate F. discussed in his earlier interview, he had attempted to get Dekraai "comfortable" with him prior to the installation of the recording device, and the recording confirms he simply turned up the charm thereafter. (Exhibit I, p. 9.)

Based upon Inmate F.'s notes, the informant took a shower after his efforts at ingratiation described in number 10 above. (Exhibit CCC, p. 2992.) As Inmate F. walked toward his cell, he saw a despondent Dekraai with his head in his hands. (Exhibit CCC, p. 2992.) It was the perfect opportunity for Inmate F. With the assistance of the mod deputies, who permitted Inmate F. to stay at Dekraai's door, he purportedly asked "What's up"? At that moment Dekraai began speaking about how he had destroyed his life, which led into statements about the crime. (Exhibit CCC, p. 2992.)

Inmate F. spoke almost one year earlier about "work[ing]" inmates in a letter to Garcia requesting the movements of other targets. (Exhibit M, pp. 5259, 5263.) The recording in *People v. Dekraai* provides a moment-by-moment understanding of how "working" an inmate takes shape in real life. **The statements that the prosecution seeks to introduce can hardly be explained as a noble Inmate F. listening to a talkative inmate. The statements followed ingratiation by a veteran informant beginning soon after they were placed in adjoining cells; a deliberate elicitation of incriminating statements on or about October 17, 2011, in violation of *Massiah*, intensified efforts to build Dekraai's trust and false sense of friendship; numerous questions designed to get Dekraai talking about his life and the crime; and a question when the informant caught sight of Dekraai seeming despondent.**

Special Handling Gives Inmate F. an Opportunity to Work Dekraai Without Witnesses Nearby

It would certainly be preferable, from the prosecution's perspective, for an informant to be able to ingratiate his target with a measure of privacy. The OCSD took steps—though not revealed in any report—to ensure that Inmate F. had that opportunity available to him in the instant matter.

The interview between Inmate F. and the prosecution team occurred at approximately 2:25 p.m. on October 19, 2011. (Exhibit FFF, p. 2604.) According to Garcia, he walked Dekraai from his cell to the rooftop while the device was being installed in Dekraai's cell shortly after the interview. (Exhibit EE, pp. 47-48.) The cell on the other side of Dekraai is cell 5, and had been occupied by William Turner. (Exhibit FF, p. 8399.) In fact, Turner had been in the cell since October 11, 2011, which is the first date of the provided records. (Exhibit FF, pp. 8352-8401.) However, on October 19, 2011, between 3:01 a.m. and 7:22 p.m., Turner was moved out of his cell and Mod L. entirely. (Exhibit FF, pp. 8402, 8403.)

William Turner's housing needs had not disappeared. He was incarcerated at the time in a robbery case, charged in Orange County Superior Court Case number 08NF3645. (Minutes in *People v. Turner*, (Super. Ct. Orange County, No. 08NF3645), attached herein as Exhibit GGG.) Court minutes confirm that he remained incarcerated after October 19, 2011, and did not plead guilty until November 10, 2011. The prosecution may argue that this was another coincidence. Perhaps, they decided that it was important to move Turner so he did not report to Dekraai that deputies were within his cell when he went upstairs. But that would not explain why the cell then remained vacant until an inmate occupied it again for the first time on October 21, 2011 (after the critical statements had been made and Inmate F. documented them in notes that were certainly passed on to deputies.) (Exhibit FF, p. 8413.)

The explanation for the vacancy is that the prosecution knew fully well that Inmate F. was not going to simply sit back and wait for the golden moment when Dekraai began to speak. Whoever occupied cell 5 would have seen Inmate F. spending as much time as he could at Dekraai's cell door feverishly building a friendship with Dekraai—and the prosecution preferred there not be a witness to Inmate F.'s actions or to any of the dialogue not directly captured on tape.

Prosecution's Concealed Memo to Petersen: Prosecution Attempts to Hide Efforts to Give Benefit to Inmate F.

Nearly **two years** after it was written, the prosecution finally turned over what would eventually turn out to be one of the critical pieces of evidence in this motion: a memo from DA Investigator Erickson to Deputy DA Petersen, who was both the prosecutor on Inmate F.'s Third Strike cases and the prosecutor in the local cases in which he was a witness. (Exhibit J; Exhibit A.) The memo, dated November 17, 2011, was quite clearly written at the direction of Wagner. Erickson wrote the following within the memo entitled "**Informant Assistance on Scott Dekraai Murder Case**":

> ...
> In summary, [Inmate F.] provided facts and intelligence about the events of the day of October 12, 2011, that only Dekraai could have known. Those facts and intelligence will likely greatly enhance the prosecution of Dekraai, especially in the event there is an insanity plea entered by Dekraai. Following [Inmate F.'s] interview, a covert investigation conducted within the jail facility further established the validity of the information provided by [Inmate F.] [Inmate F.] may eventually be called as a witness in the case against Scott Dekraai. [¶] As the prosecutor handling Inmate F.'s case, this memorandum is being directed to you for your consideration and information only. I respectfully request that you keep [Inmate F.'s] name in [*sic*] information, as it relates to the Dekraai case, confidential. Nothing about [Inmate F.] or his statements regarding the Dekraai case has been discovered to the defense. (Exhibit J.)

Wagner and his team recognized the enormous value of Inmate F.'s assistance on *Dekraai*. This letter expressed their appreciation and belief that his "assistance" merited Petersen's "consideration." However, Wagner and his team very much wanted the

intended benefit for Inmate F. to remain a secret among prosecutors and law enforcement.

Why did Wagner and his team view it as critical to hide this memo for almost two years? It begins first with the title: "Informant Assistance on the Scott Dekraai Case." One month earlier, the prosecution had perpetuated a fraud that they hoped would last the duration of the case. The term "informant" at the top of the memo would have certainly hit a little too close to the truth. In their interviews, Inmate F. was presented as a concerned and conscientious inmate, and Wagner's team wanted to maintain this characterization. Second, after the on-tape "wink and nod" to Inmate F. that no promises were made and nothing was expected, they feared that this letter, coming so quickly after they suggested that Inmate F. would not get anything in return, could raise a number of questions about the interview and the authenticity of or representations made by prosecution teams regarding benefits.

The third reason for concealing the letter—which will also be addressed below—is the significance of the communication with Petersen. This letter confirmed that the Dekraai prosecution was well aware of Inmate F.'s relationship with Petersen both as a defendant and an informant. Discovery of the letter earlier in time would have confirmed that the Dekraai prosecution team was fully aware of Inmate F.'s background at an early stage.

The Other Half of the Informant Assistance Letter: The Dekraai Prosecution Team Attempts to "Close the Loop" on Informant Evidence While Facilitating *Brady* Violations in Other Cases

Certainly, before they interviewed Inmate F., the Dekraai prosecution team knew that Petersen was utilizing Inmate F. as an informant on other cases. The Dekraai prosecution realized this prior to their interview of Inmate F. because of the entry in the OCDA CI file showing that Petersen was using Inmate F. as an informant. They also knew this because of their conversations with Garcia, who was well aware of Petersen's use of Inmate F. in both Operation Black Flag cases and at least one other murder prosecution,

People v. Inmate I. Additionally, members of the prosecution team almost certainly had a conversation with Petersen before they proceeded to interview Inmate F, although this has not been disclosed in any discovery. However, as discussed previously, the Dekraai prosecution team made the decision in advance of their interview to avoid questions that could reveal Inmate F.'s role as an informant.

In addition to explaining to Petersen why a benefit was warranted, this letter was part of a larger effort to make sure that the Dekraai defense team did not learn of the prosecution team's knowledge of Inmate F.'s informant background, which would have revealed their significant misconduct underway since at least October 19, 2011.

The memo crafted by the Dekraai prosecution team "respectfully request[s] that you [Petersen] keep Inmate F.'s name in [*sic*] information, as it relates to the Dekraai case, confidential." (Exhibit J.) Notably, it was the first few words of Erickson's last sentence that expressed the team's motivation for writing the above sentence: "**Nothing about Inmate F**. or his statements regarding the Dekraai case has been discovered to the defense." (Exhibit J, emphasis added.) With these words, Petersen understood the Dekraai prosecution team's message. The team wanted to hide Inmate F.'s informant background.

But how did the memo seek to keep Inmate F.'s background from Dekraai? The Dekraai prosecution team wanted to make sure that Petersen did not disclose Inmate F.'s assistance in Dekraai to any defendants in which Inmate F. was a potential witness. The logical concern was that if a defendant received information about the Dekraai case, that information could make its way to the Dekraai defense team. This, in turn, would reveal that Inmate F. had been an informant on other cases. If that happened, the prosecution could find themselves in a position similar to the one that they find themselves in today: Having to explain their egregious conspiracy to cover up Inmate F.'s informant background.

The implications of the Dekraai prosecution team's conduct are not limited to the instant matter. **The director of the homicide unit, through his lead investigator, had**

directed a subordinate attorney to withhold materials related to *Dekraai* in other cases. Perhaps that decision could be justified until the date that Inmate F. departed from local custody, a month after the letter was written. (Exhibit A.) But the excuse no longer existed after that date. If Wagner instructed Petersen it was acceptable to disclose Inmate F.'s work on *Dekraai* after Inmate F. was transferred to federal custody, Dekraai is not in receipt of any evidence of such an instruction.

Petersen was assigned to all of the Operation Black Flag Cases, as well as the special circumstance murder prosecution of Inmate I., in which Inmate F. had been an informant. Additionally, the OCDA was in a cooperative relationship with the federal government in Operation Black Flag, in which Petersen was the point person from the prosecutor's office—something Wagner certainly knew.

The Dekraai prosecution team unquestionably understood why evidence related to Inmate F.'s work in *Dekraai* was highly relevant to all other cases in which prosecutors intended to call Inmate F. or intended to have an expert rely upon statements he made in his capacity as an informant.

The Dekraai prosecution team also realized that prosecutors prefer to present informants as individuals who are "coincidentally" at the right place at the right time. As discussed earlier, that is precisely how Petersen planned to present Inmate F.'s contact with Inmate I. In fact, that is the only way Petersen could present their encounter and avoid a finding of a *Massiah* violation. What actions on the part of Inmate F. and the Dekraai prosecution team were relevant to *People v. Inmate I*? Almost everything. Just as the manufactured "coincidental contact" arguments planned for *Inmate I.* are relevant to gauging the authenticity of similar arguments in *Dekraai*, the conduct of the prosecution and Inmate F. in *Dekraai* is highly relevant to assessing the validity of the prosecution theory in *Inmate I.*

What did the Dekraai prosecution team know about Inmate F. and his involvement in *People v. Dekraai* that would have been highly relevant to other cases in which Inmate

F. is a potential witness?

1) The OCSD placed Dekraai in the cell previously occupied by Inmate F., who had moved into the adjoining cell to accommodate Dekraai's arrival;
2) Per his own admissions, Inmate F. began ingratiating himself with Dekraai shortly after Dekraai's arrival;
3) Jail deputies helped facilitate face to face contact between Inmate F. and Dekraai by permitting Inmate F. to stand at Dekraai's cell door and have conversations;
4) The prosecution team decided before interviewing Inmate F. to enter a conspiracy to hide evidence of his informant background;
5) The prosecution team interviewed Inmate F. off the record, and recorded a subsequent interview after receiving "fake" assurances that Inmate F. did not want a benefit for his assistance but rather was only motivated by his outrage over Dekraai's acts and statements;
6) Per his own admissions, Inmate F. elicited a confession from Dekraai;
7) The prosecution team was in possession of a recording of Inmate F.'s subsequent communications with Dekraai, in which he continually ingratiated Dekraai by demonstrating constant kindness, compassion, and generosity, while also interspersing subtle questioning in an effort to obtain additional incriminating statements;
8) The Dekraai prosecution team continued to hide both Inmate F.'s informant background and their conspiracy to conceal it in the months that followed.

The information described above was certainly material and helpful, per *Brady*, in the other cases in which Inmate F. was a potential witness. Did Petersen know about the information described above, or did he attempt to learn more so that he could determine whether he needed to pursue discovery despite the directive from the Dekraai prosecution

team? Petersen should answer those questions during testimony. However, as his conduct throughout this motion demonstrates, convincing Petersen to hold back *Brady* evidence would not have been a difficult task. He was already hiding stunning quantities of *Brady* evidence in *Inmate I*. and other cases discussed herein.

All of this, though, is highly demonstrative of the enormous systemic problems within the OCDA and local law enforcement. If winning is at the forefront of a prosecutor's analysis, the easiest path to that objective is to withhold *Brady* evidence. **And when the leaders within the OCDA view *Brady* violations as a strategy for success versus an unacceptable act by its prosecutors, there is no chance that fairness and due process will result.**

Closing the Loop: The CI files of the OCDA and the OCSD

The prosecution team knew what they wanted and understood the impediments. They wished to introduce Dekraai's statements, but they also knew that this would depend upon whether they could keep this Court and Dekraai and his attorneys from understanding Inmate F.'s history as informant. The memo to Petersen was a critical step in achieving that objective. But the prosecution seemingly had identified other areas of concern that could interfere with achieving their goal. For instance, the prosecution understood that if a prosecutor, state or federal, examined the OCDA's CI file they would see evidence that Inmate F. was an informant in *Dekraai*. If they examined Inmate F.'s OCSD CI file, they would see Inmate F.'s notes, and Special Handling's summary of those notes relating to Dekraai.

For the prosecution team, the problem could be taken care of easily enough with regard to the OCDA's CI file. **The prosecution team members within the OCDA reached an agreement that they would not create an entry documenting Inmate F.'s assistance in *Dekraai* within the OCDA CI file, which is confirmed by an examination of the OCDA's CI file. (**Exhibit H, pp. 5756-5763.)

In order to keep information related to Dekraai from appearing in the OCSD's CI

file, however, it would require Wagner or his emissary to direct Garcia to exclude the notes related to Dekraai from the file and to not create his summary of those notes that is also usually included in the informant's file. The OCSD's CI file for Inmate F. consists of the informants' notes and a brief summary of each set of notes received by Special Handling. **The OCSD's CI file does not include Inmate F.'s notes related to Dekraai nor a summary of those notes. (**Exhibit M, pp. 5133-5490.)

The seriousness of this conduct, and what it reveals about the Dekraai prosecution team's willingness to engage in serious deception, cannot be overstated. These acts also have tremendous implications for each case in which custodial informants have been used. If the prosecution and Special Handling treat the decision to include materials within CI files as optional, the justice system lacks any reasonable assurance that prosecutions relying upon custodial informants are being fairly adjudicated. Assuming arguendo that a prosecutor wants to comply with *Brady* when using an informant, the first step is to examine the OCDA's CI file. This may or may not lead to a study of the OCSD's CI file. A prosecutor who examined either file for Inmate F. would have had no idea that he had provided "informant assistance" in *Dekraai.* While this is precisely what Wagner and his team wanted, that decision was made without any concern about the due process rights of other defendants. As will be seen, this is not the only instance where CI files were not updated. In sum, there is every reason to believe that prosecutors have withheld significant *Brady* materials because of the conduct related to CI files.

Closing the Loop: Dekraai Team's Reports Related to Inmate F.

On January 24, 2012, the prosecution discovered the recorded interview of Inmate F., the recorded conversations between Dekraai and Inmate F., Inmate F.'s notes on the subject, and several law enforcement reports, including Erickson's regarding the events surrounding the contact with Inmate F. (Exhibit DDD.) Erickson's report was certainly reviewed by attorneys prior to its release, particularly because the prosecution remained committed to hiding Inmate F.'s informant background and ensuring that no clues were

given in any discovery to the defense.

Consistent with their cover up, Erickson's report did not make any reference to Inmate F.'s informant history. Rather, he simply explained that Garcia told him "…that an inmate contacted him about information he had from SCOTT DEKRAAI, and that this inmate wanted to provide information to the investigators working on DEKRAAI's case." (Exhibit DDD.) Erickson purposefully omitted what he learned about Inmate F. from that conversation with Garcia, along with the steps he and other members of the team took in order learn more about the witness's informant background. The report also omits any discussion of what was known about Inmate F. and Dekraai's location, such that they would have found themselves in a position to speak with one another. (Exhibit DDD.)

The next sentence in the report details Erickson's contact with Inmate F. at OCSD. (Exhibit DDD.) However, the report omits that members of the prosecution team met with their newest addition, Deputy Garcia, prior to beginning the interview with Inmate F. (Exhibit EE, p. 3.) Erickson does not document any of these conversations, which certainly would have addressed in more depth Inmate F.'s informant background, and the prosecution team's plan to not bring up Inmate F.'s informant background during the questioning. (Exhibit DDD.) Erickson wrote the following:

> I explained to him that we were not meeting with him in exchange for any promises or leniency on any charges he may have pending against him. [Inmate F.] acknowledged he was not looking for any favors. [Inmate F.] stated that because of the seriousness of the incident, he felt that we needed to know what fellow inmate SCOTT DEKRAAI had said to him. I then conducted an audio digitally recorded interview of [Inmate F.]

(Exhibit DDD.)

Interestingly, in these two sentences Erickson suggests that in the unrecorded conversation he told Inmate F. that he would not receive any promises, and that Inmate F. was specifically told he would not receive leniency for his cooperation. (Exhibit DDD.) This version would later be adopted in Wagner's Opposition to the formal discovery motion. However, Erickson failed to document the remainder of the unrecorded conversation, including the questions and responses about what plea Dekraai planned to

enter, as discussed earlier. (Exhibit DDD.)

Additionally, SBPD Detective Krogman wrote a report describing briefly the prosecution team's contact with Inmate F., as well as a discussion of the covert recordings. (Exhibit FFF.) The report also did not give any indication that the prosecution had received information that Inmate F. was working as an informant prior to involvement in the instant matter. (Exhibit FFF.) Krogman then proceeded to describe particular sections of the jail recordings, without making any reference to Inmate F.'s efforts to ingratiate Dekraai described above. (Exhibit FFF.)

Unanticipated Insights: The OCDA's CI File Burns the Prosecution Team

The greatest dangers associated with the lack of strict documentation practices for CI files is that defendants will be deprived of *Brady* evidence to which they are entitled relating to informants. In view of the shocking misconduct in this case, neither Dekraai nor this Court can have the slightest confidence that the defense has all the material to which it is entitled regarding Inmate F. **or other informants who may have assisted the prosecution.**

Ironically, though, it appears that the Dekraai prosecution team was damaged by the same lack of reliability in the OCDA CI file that they, themselves, fostered. **Inexplicably, the OCDA CI file does not have an entry regarding Inmate D.** Therefore, unless the prosecution team studied the OCSD's CI file prior to the litigated discovery motion, they would not have realized that Inmate F. had been an informant on that case.

If Wagner and his team did not know specifically about Inmate F.'s efforts related to Inmate D. until after the discovery hearing, they also would not have realized that one of the counsel (Sanders) who replaced Dekraai's private attorney was aware of Inmate F.'s informant work on that case, because he was also counsel for Inmate D. If the prosecution was unaware of Inmate F.'s efforts as an informant with Inmate D., and therefore also unaware of Sanders' knowledge of that connection, it further explains why the prosecution believed they could avoid detection of their deception about Inmate F. On the other hand,

if they knew about Inmate D. at the time of their original interview with Inmate F.—which was prior to the appointment of the Public Defender—it would further demonstrate the effort to hide Inmate F.'s informant background at the earliest stage.

It is possible that Wagner and his team found out about Inmate D., and the fact that he and Dekraai shared the same counsel, after the interview of Inmate F. but before the discovery motion was litigated. If so, he would seemingly have been content to let counsel believe that Inmate F. was only a "local informant" on those two cases.

As will be addressed in the discussion of *People v. Vega*, Petersen found himself in a nearly identical situation. Robison Harley was counsel for both Leonel Vega and Sergio Elizarraraz, both of whom were murder defendants in cases involving Oscar Moriel. Relying on a shocking array of misconduct, including significant discovery violations, Petersen let the court and counsel believe that those two cases were the only local prosecutions in which Moriel engaged in informant work.

Litigation of Discovery Motion: Misconduct Aimed at Preventing Court-Ordered Discovery

In the instant matter, the Dekraai defense team's preliminary background searches on Inmate F. and its realization that the same informant was involved in Inmate D.'s case caused suspicions to grow that the Dekraai prosecution team was purposefully concealing its knowledge of Inmate F.'s informant status. As detailed in the briefs submitted by the defense for the January 2013 discovery motion, a study of Inmate F.'s criminal history revealed that he had two Three Strike Cases still pending, and that he had been incarcerated for seven years without being sentenced on either case. (Exhibit R; Exhibit U.) The defense soon realized that after successfully obtaining a conviction on one of the cases, Petersen asked for a life sentence, but subsequently agreed to multiple continuances. (Exhibit R; Exhibit U; Exhibit W.)

Perhaps most significantly, an entry in the minutes on January 31, 2011 indicated that the Honorable Craig E. Robison signed a "Court Order to Allow SAPD/OCSD to

Transport Defendant to the U.S. Federal Court for Testimony." (Exhibit U.) The order was prepared by DDA Petersen. (Exhibit U.) The defense discovered that despite having a no bail hold on his convicted case and another life case pending trial, Inmate F. was no longer in the Orange County Jail. (Exhibit C.)

On October 16, 2012, Sanders filed an informal request for discovery exclusively to obtain evidence related to Inmate F.'s informant and criminal background. (Exhibit B.) On October 19, 2012, Sanders and Dan Wagner spoke about the informal discovery request. Wagner stated he would not provide the requested discovery, as he did not intend to call Inmate F. as a witness. Sanders stated that, nonetheless, the defense intended to call Inmate F. at a motion to suppress Dekraai's recorded conversations with Inmate F. as violative of Dekraai's Sixth Amendment right to counsel. Wagner reiterated that he would not provide the requested discovery absent a ruling from this Court. (Exhibit A.)

The defense filed a formal discovery motion seeking discovery of the items identified in the informal discovery request. (Exhibit C.) The prosecution's efforts in opposition to the motion shed light on their commitment to concealing what they knew about Inmate F., the lengths they would go to hide that information, and their significant misconduct involving the informant.

A Motion, Declaration, and the Hidden Memo Reveal Egregious Misconduct

A section of the prosecution's Opposition to the Discovery Motion is poorly titled as "Facts." It includes the following two paragraphs:

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11. OCDA has not given Inmate F any leniency or consideration for his efforts on this case, and– as stated to Inmate F on October 19 — **does not intend to give Inmate F any leniency or consideration in exchange for his efforts on this case**.

12. However, it is privately anticipated by OCDA that at Inmate F's eventual sentencing hearing, Inmate F's counsel may seek to inform the sentencing court of Inmate F's involvement in this case. If summoned by Inmate F's counsel to speak to the sentencing court, OCDA anticipates that it would give the court an accurate, percipient-witness description of Inmate F's involvement in the case and an objective appraisal of the value to the case of the information obtained by Inmate F. **OCDA does not anticipate nor intend to make any request or recommendation for leniency at sentencing as a result of Inmate F's involvement in the present case**.

(Exhibit D, p. 3:9-19, emphasis added.)

An identical word-for-word restatement of the above is included within the attached declaration written and signed by Wagner. (Exhibit D, p. 17:3-13.)

These statements may in fact be true, but only if Wagner and Petersen conspired to change their previous plans. As discussed above, Wagner asked Erickson to write a memo to Petersen, entitled "Informant Assistance," less than one month after Inmate F.'s contact with Dekraai. That memorandum evidenced vastly different intentions for Inmate F.'s case than Wagner's representations to this Court suggest. The memorandum states the following:

In summary, [Inmate F] provided facts and intelligence about the events of the day of October 12, 2011, that only Dekraai could have known. Those facts and intelligence will likely greatly enhance the prosecution of Dekraai, especially in the event there is an insanity plea entered by Dekraai.

Following [Inmate F's] interview, a covert investigation conducted within the jail facility further established the validity of the information provided by [Inmate F]. [Inmate F] may eventually be called as a witness in the case against Scott Dekraai.

As the prosecutor handling [Inmate F's] case, this memorandum is being directed to you for your consideration and information only….

(Exhibit J.)

Wagner should be compelled to provide testimony explaining why he did not reveal this memo or its contents prior to the motion, in his Opposition, in the declaration, or when

he addressed this Court orally. Of course, it is also imperative that he and Erickson explain the reason that they concealed the memo from Dekraai and this Court for nearly two years. Petersen's testimony on this subject is similarly essential. In fact, Petersen is arguably the most important witness for evaluating the extent of the significant misconduct revealed by Wagner's representations and Erickson's memo. For instance, Petersen should describe what follow-up conversations or correspondence occurred after the memo on the subject of benefits. What instructions was he given about benefits arising from Inmate F.'s work related to Dekraai? Was he told specifically to state that the prosecution was not requesting a benefit for his work on Dekraai? If he was told this, did he question why he was given this direction considering what was stated in the memo? Was he told the reasons that the prosecution had a "change of heart," which seemed irreconcilable with what was articulated in the memo? Did he agree to follow the directive of Wagner or Erickson? Did he intend to act consistently with Wagner's declaration? Why? Of course, these are just a few of the many questions required.

Testimony will illuminate what took place between Wagner, Petersen, Erickson, and perhaps others. As discussed above, Wagner stated in his declaration that Inmate F. would not be receiving a benefit for his assistance in *Dekraai*. Assuming that Wagner did not lie in his declaration, what would be required to make his declaration truthful is arguably just as disturbing as if Wagner had simply been dishonest: two prosecutors and perhaps others joined in a conspiracy to withhold a benefit from Inmate F., which the Dekraai prosecution team believed he deserved, so that Wagner could "honestly" declare to this Court that Inmate F. would not receive leniency or consideration for his assistance in *Dekraai*.

The Court's complete understanding of the misconduct surrounding Wagner's representations and the concealed memorandum is critical to all of the issues and arguments made herein. If this misconduct is at it appears, Wagner and his team have convincingly demonstrated that they will stop at nothing to achieve their objectives. What is most shocking is that this example of extremely serious misconduct is not an isolated

incident, but rather one of many that epitomizes a culture that prioritizes winning over all else.

Other Deception Within the Declaration and Motion

Throughout the discovery litigation, it became clear that the veteran prosecutor wanted to accomplish two things: 1) introduce the recordings, and 2) avoid disclosure of the informant evidence that he and his team had so aggressively worked to hide. Toward meeting these objectives, Wagner vacillated between hedging his bets and throwing all caution to the wind. The latter approach seemed to motivate the following rendition of facts, found again in his declaration:

> 3. On October 18, 2011 OCSD Deputy Ben Garcia called OCDA Investigator Bob Erickson and told him that an inmate whom I will hereinafter refer to as "Inmate F," who was incarcerated in the same area of OCJ as defendant, had told Deputy Garcia that defendant had been talking to him about the shootings charged in this case.
> 4. On October, 19, 2011, Investigator Erickson and several other members of the prosecution team visited OCJ to speak to Inmate F about defendant's comments.
> 5. The prosecution team told Inmate F. that it would not be giving Inmate F. any consideration or leniency for his efforts. Inmate F. said that he was not looking for any consideration, but that due to the seriousness of the case, he believed the prosecution should hear what defendant had told him.

(Exhibit D, p. 16:5-14.)

The quantity of material information omitted from this rendition of facts is stunning. Wagner chose to omit nearly everything the prosecution team learned from discussions and meetings with Garcia about Inmate F.'s history as an informant. He also omitted what he and other members learned about Inmate F. from other people and sources prior to and after their contact with Inmate F.

But perhaps the most appalling sentence that he included in this section was that Inmate F. was not "looking for any consideration, but due to the seriousness of the case, he believed the prosecution should hear what defendant had told him." (Exhibit D, p. 16:5-14.) Wagner almost certainly did not believe Inmate F., a long time gang member and

former leader in the Mexican Mafia, was being truthful when he made this claim. Instead, Inmate F. provided this statement because of the pre-recording questioning that telegraphed to Inmate F. that it was in his best interests to make it appear that his motivation was a noble one rather than to gain a benefit in his cases. Of course, separate of his belief, Wagner knew there existed a plethora of evidence which showed that Inmate F. had worked aggressively for the government for more than one year in the hope of receiving a reduced sentence. Wagner knew that if this Court realized how many cases Inmate F. had worked as an informant, it would powerfully contradict the credibility of Inmate F.'s purported motive. And, of course, that was exactly why the prosecution hid this information.

Hedging His Bets: Wagner's Convoluted Attempted to Win Now and Win Later

In its Opposition to the discovery motion, the prosecution argued that the only issue that would be relevant to a future *Massiah* motion was the second prong, which addresses whether the informant "deliberately elicited incriminating statements." (Exhibit D, p. 6:27-38.) In a bold effort to convince the Court not to compel the prosecution to reveal any information about Inmate F., Wagner offered a startling concession: he asserted that "[t]here is **no dispute** that defendant Dekraai can meet Prong One…" (Exhibit D, p. 7:1-2.) Prong one was described earlier as a showing that the informant "was acting as a government agent, i.e. under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage.." (Exhibit D, p. 6:25-26.)

This concession was entirely inconsistent with what had been suggested up to that point within the previously provided discovery. The reports and the recorded contact between law enforcement and Inmate F. were designed to project to the reader and listener that Wagner and his team were unaware of Inmate F.'s informant background, and that Inmate F. neither asked for a benefit nor was provided any reason to expect a benefit.

The concession and "offer to stipulate" to Prong One and the acknowledgement that Inmate F. was a government agent after meeting with the prosecution team on October 19th was simply a ploy intended to block the defense from obtaining more information about Inmate F. This was made even more clear once the defense received the Court-ordered discovery. In fact, Wagner was careful to preserve a way of getting back what he was giving up by predicating the stipulation on the Court denying the discovery motion. He stated:

> They still want the discovery anyway. And so I guess I'm making clear, as I've told Mr. Sanders already, that offer was somewhat conditional. It's based upon, if the discovery is ordered, there is no stipulation left on the table.

(Transcript of hearing on Motion to Compel Discovery (Jan. 25, 2013), attached herein as Exhibit HHH, p. 133:1-5.)

Wagner, though, was talking in circles. Separate of the conditional stipulation that he was offering, he had already written into his motion there was **"no dispute"** over Prong One. (Exhibit D, p. 7:1-2.) Wagner confirmed this concession in oral argument: "We've already given them information that after October 19th, the meeting with law enforcement, **this inmate indeed was working as an agent for law enforcement**. We've offered to stipulate to that as well." (Exhibit HHH, p. 132:16-18, emphasis added.) And later he added that "…because prong one is already so provable and proven by stipulation, the material issue is prong two…." (Exhibit HHH, p. 133:10-11.) Yet, Wagner wanted to introduce this evidence so badly that he reserved the right to later argue that there was a dispute over Prong One; that it was not entirely provable; and that in fact, Inmate F. was not acting as an agent for law enforcement.

What the Court could not have realized at the time was the bind that Wagner and his team had placed themselves in through their concealment and deception. They would do just about anything to stop discovery from being ordered. But if it were ordered, they wanted to retain their ability to make each and every argument they could formulate, even though Wagner had already conceded that there was nothing to argue. Wagner wanted to

remain consistent with how the recorded interview with Inmate F., as well as Erickson's report, presented Inmate F.'s motives and the prosecution's position regarding consideration. But deception can be hard to manage, and Wagner had become so entangled in his confused effort to stop discovery that he was literally arguing against himself.

Wagner's Deceptive Arguments that the Requested Discovery Was Not *Brady*

In the Opposition, the prosecution reiterated the same response given in Wagner's earlier letter to Sanders refusing to turn over additional discovery:

> The People are aware of their obligation to discover *Brady* evidence and have made, and will continue to make, discovery to the defense pursuant to that obligation. **At present, the People do [*sic*] are not in possession of any non-disclosed *Brady* material.**

(Exhibit D, p. 15:11-13, emphasis added.)

This response and Wagner's arguments in court show how little the *Brady* obligation means to the OCDA, including to one of its highest ranking leaders. Wagner knew that he was holding back evidence subject to *Brady* regardless of whether its disclosure would reasonably lead to success in a *Massiah* motion—although it was *Brady* evidence for that reason, as well. At some point after the memo to Petersen was written, Wagner devised a strategy that would provide him "cover" for not disclosing the informant discovery. His new plan was to no longer call Inmate F. as a witness and instead just play the tape, using another witness to authenticate it. Part of his new argument was that because Inmate F. did not specifically ask Dekraai "about the crime" prior to Dekraai providing the most damaging statements on the tape, any evidence of Inmate F.'s informant history became irrelevant. In sum, Wagner would concede that Inmate F. was acting as a government agent as of October 19, 2011 to help justify evading his discovery obligation—even though the prosecution team had specifically conspired to show that he was not an agent at any time.

Wagner's first problem was that well before he devised his new theory, he had already entered into a conspiracy to mislead and had taken steps in furtherance of that deception. Evidence of that conspiracy and deception was material and helpful to the

defense, thereby requiring discovery under *Brady*. As described above, Wagner and his team had conspired to produce a recording and reports that were misleading. They knew that Inmate F. was an informant in advance of questioning, yet they allowed Inmate F. to provide a motive for coming forward that they realized, at the very least, was highly unlikely to be true. Furthermore, they conspired not to ask questions or say anything during the recorded interview to reveal that they knew of Inmate F.'s informant history. There were two objectives for this conspiracy. First, they wanted to hide evidence that would impeach Inmate F.'s stated motive for cooperating because of the *Massiah* implications and potential credibility attacks that would come. Second, by agreeing to this conspiracy, they were engaged in misconduct, that they needed to keep hidden to protect themselves. Erickson and Krogman's reports were then crafted to make the deception believable—primarily by omitting any reference to Inmate F.'s status as an informant. Therefore, aside from the relevance of Inmate F.'s informant history to a *Massiah* motion, their conspiracy to conceal evidence required *Brady* discovery because it was highly relevant to the reliability of their investigation and presentation of other evidence in this case, including the evidence that had been obtained during their investigation of penalty phase issues.

Additionally, Wagner re-confirmed the existence of the original conspiracy, and showed that the prosecution planned to continue to mislead about Inmate F.'s informant background even after the court made its ruling, and regardless of the outcome. As discussed above, Wagner simply could not stop himself from putting forward Inmate F.'s purportedly altruistic motive and the prosecution's intention not to give him a benefit, even though Wagner knew of the existence of impeachment evidence and the memo written by Erickson to Petersen. Why did he do this? The only rational explanation is that he believed this would help him win at the discovery hearing and the *Massiah* hearing.

What about the argument that *Brady* did not separately mandate discovery because of its relevance to the *Massiah* motion? Wagner said the following at the hearing:

> …the due process right that attaches on a suppression hearing…that it's evidence which, if suppressed, would have made a material difference that – a reasonably probability of a different outcome at the hearing. And they cannot and have not made that showing regarding this because everything they're asking for is going toward prong one of a *Massiah* violation.

(Exhibit HHH, p. 132:6-14.)

With hindsight available only because this Court ordered discovery, the argument is disgraceful. Of course, the defense was having some difficulty in making the showing he claimed was necessary. The prosecution was hiding the evidence necessary to make that showing. If indeed all this Court had in front of it was a government informant as of October 19, 2011, who ingratiated his target until later the next day and then asked him "What's up?", the defense may or may not be successful at a *Massiah* hearing. But those were not the facts available to the prosecution. They more closely resembled the following:

1) A custodial informant program operates in Orange County that prides itself on secretly facilitating contact between targeted inmates and their informants;
2) That same program, in cooperation with the OCDA and local law enforcement, has engaged in numerous conspiracies to make the contact between informants and targets appear coincidental. Toward that end, the prosecution teams do not document any of their efforts with informants or reveal such efforts to the defense;
3) Inmate F. is facing two potential life sentences for Third Strike cases. He was convicted in one of the cases in 2009. During that trial, the prosecutor contended that he had lied repeatedly, and evidence contained within Inmate F.'s OCSD CI file proves that he unarguably committed perjury during his testimony;
4) Prior to becoming an informant, Inmate F. was a high-ranking leader of the Mexican Mafia within the jails who was facing federal prosecution as part of

Operation Black Flag. In that capacity, he ordered and communicated orders for violence against other inmates;

5) The same prosecutor who convinced a jury that Inmate F. was dishonest on the stand, decided to have him begin working as an informant. He did this despite information within the OCDA CI file indicating that Inmate F. had previously failed as an informant and should not be used in that capacity;
6) Inmate F. had worked as an informant in the jails for more than a year when he and Dekraai came into contact. Inmate F. had elicited statements from at least two other capital defendants and is an informant discovered to the defense in *People v. Inmate I.*, a special circumstances murder case;
7) *Inmate I.* also involves Inmate F.'s elicitation of the statements from a charged and represented defendant. The prosecution in that case was poised to make a similar "coincidental contact" argument as the one being made in this case. The prosecution in *Inmate I.* had similarly withheld nearly all discovery relevant to Inmate F.'s informant and criminal background, including the evidence related to Inmate F.'s work in *Dekraai*, which the Dekraai team told Petersen not to disclose;
8) Forty-five days before Inmate F.'s contact with Dekraai, Deputy Garcia was involved in one of his many conspiracies to have inmates make "coincidental contact" with a targeted inmate. It appears on that particular occasion Garcia attempted—without the request of the OCDA or the investigating police agency—to bring Inmate F. and Inmate S. together. He did this even though Inmate S. was charged with attempted murder many months earlier. Garcia, Inmate F., and others members of the prosecution team apparently orchestrated this contact in the hope that Inmate F. could accumulate evidence that would defeat a defense claim of incompetence under section 1368. Garcia subsequently forwarded a report to the SAPD that had significant omissions

designed to mislead defense counsel about the events leading up to the contact, and to hide the fact that the statements were obtained in violation of *Massiah*;

9) Thirty days before his contact with Dekraai, Inmate F. wrote Garcia about how much he liked his job as an informant;

10) After Dekraai committed the largest mass murder in Orange County history, he and Inmate F. were placed in adjoining cells;

11) Inmate F. tried to get Dekraai to feel comfortable. The module deputies permitted Inmate F. to stand at Dekraai's cell when he was out for dayroom so that they could have conversations, despite the fact that Dekraai was purportedly placed in the particular cell because they needed to closely observe Dekraai;

12) Within a few days, Inmate F. asked Dekraai about the crime. When Dekraai asked whether he really wanted to know what took place, Inmate F. answered in the affirmative. Dekraai then spoke to him about the crime;

13) Garcia spoke to Erickson and then the prosecution team about what Inmate F. was claiming to have heard. Garcia clearly briefed them on Inmate F.'s informant background, though this was hidden from the recording and subsequent notes;

14) The prosecution had both an off the record and a recorded interview of Inmate F. The team received "assurances" off the record—apparently unlike every other case in which Inmate F. provided assistance—that he did not want a benefit for his help on a case in which the informant assistance could seemingly warrant a significant benefit. The prosecution devised a plan to have everyone in the room play along with this claim so that it would not be revealed on the recording. No questions were asked that could undermine Inmate F.'s claim that he was helping solely because of his feelings about Dekraai and the crime. Nobody in the room asked whether, when Inmate F. was getting Dekraai "comfortable," he anticipated a benefit;

15) The recording device captured the efforts of ingratiation by a talented and trained informant. Inmate F.'s false affection and empathy for his target's situation are demonstrated on a nearly non-stop basis. Inmate F. presents himself as a source of comfort, and Dekraai expresses gratitude for his support. Inmate F. constantly addresses Dekraai as "Brother" as he offers him soup, a heating device, and more importantly, moral support. These "kind" acts are accompanied by questions designed to get Dekraai to continue to speak. At one point, when Dekraai gets diverted from talking about his conversation with his attorney, Inmate F. slowly bring the discussion back to this subject, while demonstrating continual kindness towards his target;

16) When Inmate F. sees a despondent Dekraai with his hands in his head, he asks his dear friend "What's up?" The mod deputies enable Inmate F. to stand at the cell as Dekraai provides the statements that the prosecution seeks to introduce;

17) Erickson wrote a memo to Petersen telling him to take into "consideration" the enormous informant assistance Inmate F. provided, and instructing him not to disclose Inmate F.'s role in *Dekraai*—effectively ordering Petersen to commit *Brady* violations in other cases*;*

18) Consistent with the recording and the Dekraai team's plan, Erickson and Krogman wrote reports that hid information learned from Garcia about Inmate F., as well as other evidence they reviewed about Inmate F.'s informant activities. Erickson's report, in particular, gives the impression that the prosecution was unaware of any information suggesting that Inmate F.'s assistance was driven by anything other than his disgust for the crime and his interest in justice.

The above list includes just some of the material information hidden by the prosecution and obtained pursuant to this Court's order. Other sections of this motion demonstrate with even greater specificity the egregiousness of the prosecution's claim that

as of January 25, 2013, the date of the discovery motion, they were in full compliance with their *Brady* obligations. In sum, Wagner understood before this Court ordered discovery, there existed a mountain of evidence that could dramatically change a court's understanding of the recorded statements and bring about a different ruling at a Motion to Exclude the recorded statements.

Interrupted Deception: The Prosecution's Plan to Conceal Their Way to Victory

In providing analysis, it is rarely helpful to speculate about what would have taken place if the events had turned out differently. It is enormously useful here. In terms of analyzing the systemic misconduct issues presented by this motion, it is apparent that the planned actions of the Dekraai prosecution team—had this Court denied the discovery motion—would have been strikingly similar to those carried out by Petersen and his team in *People v. Vega*, discussed beginning at page 248.

In *Vega*, Petersen's deception with the court was completely successful, and thus the court did not order *Brady* discovery relating to informant Oscar Moriel. Petersen's unrelenting deception and strategic objections at trial enabled him to prevent further disclosure during the trial. It also allowed him to avoid what should have been a successful *Massiah* motion by the defense, which helped him to secure a special circumstance murder conviction.

Quite clearly, the Dekraai prosecution team hoped to achieve the same outcome by similar means. They wanted to continue to be able conceal *Brady* evidence. For instance, they obviously would have never turned over any evidence related to Inmate F., including the memo from Erickson to Petersen, if not for this Court's order. This point seems inarguable because they withheld this evidence in large part to defeat the discovery motion, and ultimately waited nearly two years to reveal it.

At the *Massiah* motion, Wagner would have objected—-just like Petersen in *Vega*—to each and every question about his informant's background, contending it was

irrelevant to the proceedings consistent with what he asserted during the litigation of the discovery motion. Wagner wrote in the Opposition and his declaration that "the People can and will make Inmate F. available to be interviewed by the defense if the defense wants to interview him." (Exhibit D, p. 18:3-4.) If that interview had occurred after the prosecution defeated the discovery motion, the prosecution team would have prevented questioning that could have allowed further insights into Inmate F.'s work as an informant, exactly as Petersen did with informant Moriel on *Vega*. (Exhibit HH, p. 26:9-18.)

When the prosecution finally allowed the defense the opportunity to interview Inmate F., many months after the discovery order, Inmate F. refused to answer any questions. (Exhibit A.) While the prosecution team might wish to assert that Inmate F.'s decision to remain silent was entirely his own, that notion is laughable. If the prosecution that holds the keys to his jail cell had encouraged to him speak, he would have. However, once the discovery was ordered, the prosecution had little interest in having the defense ask Inmate F. a barrage of questions about his informant work—since they knew they lacked any reasonable legal objections to questions about Inmate F.'s entire informant background.

In the instant matter, the prosecution was arguably lucky in the same way Petersen was in *Inmate I.* In that case, Petersen's failure to start his trial prevented additional misconduct that would have been exposed in this motion. Perhaps Wagner and his team should be thankful for the discovery motion and the Court's order compelling discovery. It stopped them from engaging in even more of the misconduct they intended to commit. Nonetheless, a reasonable analysis of their misconduct and planned misconduct devastates the credibility of this prosecution team as one that should participate in the criminal justice process, particularly in the context of death penalty litigation.

Dekraai Prosecution Team Continues to Conceal *Massiah* and *Brady* Violations After this Court's Discovery Order

On March 29, 2013, when Wagner interviewed Tunstall and Garcia, there were

several objectives. One of them seemingly was to present the prosecution's version of "coming clean" about Special Handling's movements of inmates to facilitate questioning by Inmate F. Wagner and his team knew that even a cursory review of Inmate F.'s notes by the defense would alert it to these movements. The goal of the questioning was to emphasize that orchestrated movements were limited to those involving inmates who were uncharged as part of Operation Black Flag, and therefore not subject to *Massiah* protections. Tunstall's response to one of Wagner's questions, however, turned problematic:

> Q2: All right. And at that time, um, was the understanding that Inmate F would be providing information concerning, uh, Eme politics and any cases that suspected Eme members and associates, um, may have been involved in?
> A: Yes, that was my understanding.
> Q2: Okay. Um, was any other type of, uh, **criminal case ever discussed that you, uh, were aware of where law enforcement was talking to Inmate F about, um, providing information concerning a criminal case that was outside of Eme politics, uh, jail beatings and assaults, or cases committed by, um--crimes committed by suspected members and associates of Eme?**
> **A: I believe in his notes there's a reference possibly to [Inmate I.], um, reference his, uh, murder case. Um…**
> Q2: And so [Inmate I.], is that--that sounds like, uh--is he a street gang member?
> A: He's a Delhi street gang member.
> Q2: All right.
> A: Um, he falls under the southern Hispanics. Um…
> Q2: Is he a Sereno?
> A: He's a Sereno.
> Q2: So he's loyal to Eme?
> A: Correct.
> Q2: Uh…
> A: He follows the-the rules of the Eme.
> Q2: Was he part of the, um, Eme leadership structure within the, um, local, um, penal institutions?
> A: Um, no he was not.

(Exhibit K, p. 22, emphasis added.)

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Wagner continued:

> Q2: Okay. Um, so-so you're identifying [Inmate I.] as one individual. Um, **is that the only individual that you're aware of that-that, uh, Inmate F--there was a discussion with Inmate F about eliciting, um, gathering, uh, providing information, um, that was outside of the Eme politics?**
> A: I don't recall any others offhand. There may have been, but right now I'd have to review his notes, which unfortunately are lengthy
> Q: Okay. Um, so, so you're identifying [Inmate I.] as one individual, um, is that the only individual that you're aware of that, that um…Inmate F., there was a discussion with Inmate F. about eliciting um, gathering, providing information um, that was outside of the Eme politics?
> A: I don't recall any others offhand; there may have been, but…right now I'd have to review his notes which unfortunately are lengthy.[22]

(Exhibit K, p. 22, emphasis added.)

If Wagner did not recognize the actual name of "Inmate I.," he should have. Among the nine case discovery files that the prosecutor had turned over to Dekraai in response to this Court's order, Inmate I.'s case was the only that involved murder allegations.

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[22] Wagner's interview with Tunstall would have all but convinced a truth-seeking prosecutor that Special Handling had been involved in coordinating movement to allow Inmate F. to elicit statements from at least one represented defendant, Inmate I. When Wagner spoke with Garcia later the same day, he waded gingerly into the subject of coordinated inmate movements. The trepidation of the interviewer and interviewee was palpable:

> Q2: Did you ever, uh--did you ever put, um, anybody in the--did you ever intentionally put anybody in the proximity of Inmate F with hopes that Inmate F would generate information on them? Did you ever put anybody who was not part of the Operation Black Flag, um, investigation near Inmate F…
> A: No.
> Q2: …with those hopes?
> A: Not-not that I can recall, no.

(Exhibit EE, p. 56-57.)

As noted, Tunstall said Inmate F. did elicit statements from Inmate I., who was not part of Operation Black Flag. But when Wagner asked Garcia, Inmate F.'s primary handler, essentially the same question, Garcia said Inmate F. did not elicit statements from a defendant unconnected with Operation Black Flag. If Wagner was actually seeking honesty about this issue, he certainly would have asked Garcia a follow-up question specifically about Inmate I. Wagner did not.

However, if he had failed to remember the case, the next step would have been to immediately find out more, as Tunstall's response suggested the likely possibility that the government had facilitated Inmate F.'s contact with Inmate I. Again, Wagner had the discovery in that case back in his office, where he would have quickly seen that Petersen was planning to introduce Inmate I.'s statements to Inmate F. in violation of *Massiah.* Inmate F. elicited the statements approximately one year after Inmate I. had been charged.

Wagner should be compelled to answer what steps he took as the lead prosecutor on Dekraai and the supervising prosecutor for the OCDA's homicide division. Did he meet with Petersen and inquire why the only discovery he had turned over to defense counsel was a small quantity of Inmate F.'s notes? Did he instruct Petersen to immediately comply with *Brady* and disclose evidence similar to what this Court had ordered on January 25, 2013? Did he tell Petersen that despite the Informant Assistance Memorandum from Erickson, he should now disclose *Dekraai* discovery to Inmate I.—discovery which would be highly relevant to any claim of "coincidental contact" that Petersen intended to make in *People* v. *Inmate I.?* Did Wagner immediately direct Petersen to discover to counsel for Inmate I. a copy of the audio taped interview with Tunstall, in which Tunstall stated that Inmate F. elicited statements from Inmate I? What was Petersen's response to each of these questions? Did Wagner ask Petersen the role of individual participants in the effort to obtain statements in violation of *Massiah*? Did he ask whether there were other cases in which Petersen directed or was aware of efforts to obtain evidence unlawfully? After Wagner read Inmate F.'s notes from "4-20-11" directed specifically to "Garcia," in which Inmate F. describes the confession he allegedly received from Inmate I. on his charged crimes, did he re-interview Garcia and ask him to explain his response detailed in footnote 22? Did Wagner begin an investigation of practices involving the custodial informant program that seeks to obtain evidence from charged defendants in violation of *Massiah* and then conceal those efforts? Why did Wagner not inform counsel for Dekraai and counsel for Inmate I. about his findings?

Wagner Attempts to Hide Potential *Brady* Evidence and More Deception of Custodial Informant Program is Revealed: Inmate F.'s Contact with Inmate M.

Prior to Wagner's interview with Deputy Garcia in March of 2013, the Dekraai prosecution team gave Inmate F.'s lead handler a list of high profile inmates purportedly to make sure that Inmate F. did not elicit statements from any of them. One of the inmates on that list was Inmate M., another capital murder defendant. (First page of minutes in *People v. Inmate M.* (Super. Ct. Orange County, No. 07NF****), attached herein as Exhibit III.) The following recorded discussion occurred between Wagner and Garcia:

> Q2: Okay. Um, I think we'd asked you some--to-to come with housing records, just to come prepared to answering questions, um, concerning some other high-profile individuals, um, that had been in and through the system, um, in the last several years. People like, uh, Izzy [phonetic spelling] Ocampo [phonetic spelling], [Inmate M.], etcetera.
> A: Correct.
> Q2: **Um, and I think that, um, the findings were that, uh, such individuals were not, uh, ever in the same housing areas, uh, as Inmate F, is that right?**
> **A: That is correct.**

(Exhibit EE, pp. 52-53, emphasis added.)

What occurred a few minutes later was reminiscent of Erickson's recorded questioning of Inmate F., in which Erickson mentioned a discussion not found on the tape, thereby accidentally revealing that the subject was talked about off the record. Garcia appeared to misunderstand one of Wagner's questions and found himself far off course:

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A: You got odds on the bottom, evens on the top.
Q1: On top?
A: Yes.
Q1: Okay.
A: So it's be one--you know, one, three, five, seven, so on.
Q1: Okay. Anybody else?
A: A lot of these guys on the bottom here, like you were asking, the--Ocampo--a lot of these guys came after F was already gone, too. Um…
Q2: Okay.
A: …and some of them--I mean I looked up every housing location, cross-referenced everything, and some of them never came in contact. **I think the only contact one was, um, with Inmate M is for one day. And like I said, the conversation may have came out, and I'm like, "No." You know?** (Exhibit EE, pp. 56-57, emphasis added.)

Wagner's questions were about the numbering system used for jail cells, and somehow Garcia ended up responding by mentioning his previous discussion with Wagner regarding contact between Inmate F. and Inmate M. As with Erickson and Inmate F., though, the problem was that there is no earlier reference in the recording to Garcia speaking with Wagner about Inmate M. specifically or about a conversation between Inmate F. and Inmate M.—let alone, one that Garcia tried to stop. Quite the opposite, in fact. Earlier in the interview, Wagner locked down Garcia's agreement that Inmate F. did **not** have contact with any of the other high profile inmates on his list, including specifically Inmate M. (Exhibit EE, p. 56.)

What really occurred? Garcia apparently told Wagner about a concerning contact between Inmate F. and Inmate M., and the fact that Inmate F. elicited a statement from another capital defendant. This certainly would not have fit well with the portrait of Inmate F. that the prosecution wished to present. Was this another capital defendant in which Inmate F. sought to obtain statements because of his moral outrage over the conduct without any hope for assistance? What were the circumstances of that meeting? Why did Garcia supposedly stop what was taking place? What did he do with the notes and the information he received?

Wagner did not like where this evidence was heading so he simply decided before turning the tape on to make it disappear from view. But Garcia stumbled, forgetting momentarily their discussions off tape. There is a conspicuous absence of any follow-up questions by Wagner. Of course, if Wagner possessed the most minimal interest in his *Brad*y responsibilities, he would have never conspired to hide the evidence in the first place. Instead, he would have honored his responsibility as a prosecutor and a leader within his office and probed on issues surrounding the contact to determine if this evidence may have actually shown that Inmate F. had misled them in their interview about his motivations. (This is a somewhat absurd suggestion, because the prosecution team wanted to be "misled" on the recording.) This very serious misconduct is yet another illustration of why it is unreasonable to believe that Dekraai can have a fair adjudication of the penalty phase in the case. **In essence, if Wagner and his team are willing to go to these lengths to suppress evidence on ancillary issues in the case, what have they done to conceal evidence truly helpful to the defense on issues of penalty?**

More Revelations about Reliability of CI Files Maintained by the OCDA and OCSD

As with so much of the misconduct uncovered in this contact, the significant implications do not end with the simple act of concealment. Garcia, for instance, was aware that Inmate F. had elicited statements from Inmate M. Additionally, when Inmate F. elicited statements he had been trained to write down what was said within the notes. But what has become of the notes? The OCSD's CI file does not contain them, nor does it include a summary from Special Handling about the statements and Inmate F.'s contact with Inmate M. If Inmate F. had contact with the OCDA or local law enforcement, it did not result in an entry in the OCDA's CI file either. **In sum, the contact between Inmate M. and Inmate F. has seemingly disappeared from view.**

In the absence of notes or reports, it is unknown what precisely led to the decision to hide evidence of this contact. A reasonable inference, though, is that there was something

about that contact that the OCDA, the OCSD, or the investigating police agency did not want revealed. Garcia suggested in the interview that he told Inmate F. to stop his contact with Inmate M. Again, it is unclear what prompted this response by Garcia, assuming that his brief description of what transpired is even truthful. Whether a detective or prosecutor directed Garcia not to reference it is also unknown, but there is certainly precedent, because Wagner apparently directed Garcia not to include Inmate F.'s contact with Dekraai within the OCSD's CI file. It is, of course, unknown whether Wagner, or one of his team members at his direction, has hidden other contacts between informants and Dekraai.

Wagner Attempts to Avoid Evidence of Additional Informant Efforts by Inmate F. and the OCDA's Role in Violating *Massiah*

In March of 2013, Wagner interviewed the third of Inmate F.'s handlers, Detective Gonzalo Gallardo. The conversations with the other two, Garcia and Tunstall, had included unfortunate moments from the prosecutor's perspective: Tunstall speaking of Inmate F.'s apparently planned elicitation of murder defendant Inmate I., and Garcia inadvertently revealing an off the record discussion with Wagner about Inmate F.'s elicitation of Inmate M. and the planned concealment of that discussion. As Wagner began his conversation with Gallardo, he must have hoped that the third time was a charm when it came to issues of concealment related to Inmate F. and *Massiah*. It was not.

Gallardo was familiar with the custodial informant program and Inmate F., whom he worked with for more than a year on the Black Flag investigation. (Exhibit L, pp. 2-3.) Wagner thought, therefore, that he could cover relatively safe ground. He would simply confirm Gallardo's direction of Inmate F. was limited to the investigation of Mexican Mafia investigations. That is when the interview took an unexpected twist:

> Q2: All right. Okay. Um, did you ever--I guess to get very specific to this case, um, **did you ever direct Inmate F, um, to try to gather information against, uh, like a high-profile, uh, murder defendant who was not a part of--was not connected in any way with the Mexican mafia?**

A: There was times we did--we did use informants, um, and we basically under the direction of a district attorney, we would use inmates.
Q2: Okay. Now, I'm going specifically towards Inmate F now.
A: Uh, I believe--I believe we did. I think he did provide some information on-on some murder suspects.
Q2: Okay. Let's get specific about Scott [phonetic spelling] Dekraai [phonetic spelling], who's, uh, accused of committing a mass murder at a Seal Beach hair salon.
(Exhibit L, p. 14, emphasis added.)

Again, all Wagner had wanted was an on the record statement that Gallardo had never directed Inmate F. to gather information from a high profile defendant. Not only did Gallardo fail to provide Wagner the answer he sought, but he gave him the worst set of responses imaginable from the Dekraai prosecution team's perspective. Gallardo shared that the SAPD used informants with high profile murder defendants, and that these efforts were "**under the direction of a district attorney**." Trying to get himself out of a tightening bind, Wagner had tried to move the dialogue specifically to Inmate F. But the veteran prosecutor could not catch a break in his effort to conceal. Gallardo stated that, indeed, it was his belief that Inmate F. was one of the informants who gathered information from a high profile defendant. (Exhibit L, p. 14.)

If Wagner was serving the higher calling of his position, the supervising prosecutor would have immediately responded to having just received information indicating that a prosecutor had directed informants to obtain statements in violation of the Sixth Amendment. If he was ready to honor his role, the first few responsive questions were obvious: **What is the name of the "district attorney**"? What were the names of the cases where Inmate F. elicited statements while working with this district attorney? What members of law enforcement participated in these actions? How do you know about these efforts?

The significance of what Gallardo shared was also specifically relevant to Inmate F., the full scope of his informant work, and the nature and specifics of his relationship with the prosecutor's office. This information was relevant to *Massiah* issues in *Dekraai* and

other cases in which Inmate F. would be called as a witness to statements he had elicited. Wagner knew, for instance, that Gallardo's answers suggested that it was very likely there were additional murder cases in which Inmate F. had elicited statements, which were not documented in the Court-ordered discovery in *Dekraai*. As discussed earlier, Garcia told Wagner that Inmate F. had not been directed by Special Handling to elicit statements from Inmate D., which another police agency had investigated. (Exhibit EE, pp. 24-25.) In Garcia's inadvertent acknowledgement about Inmate F.'s elicitation of statements from Inmate M., he stated that he stopped the informant from working further on the matter, suggesting that the government had not initiated that effort either. The discovery in Inmate I.'s case did not include a single report even mentioning that Inmate F. had elicited a statement. (Exhibit KK.) **So what case or cases did a district attorney direct the elicitation of statements?**

After specifically directed questions designed to uncover more not less, a prosecutor committed simply to honoring the criminal justice system would have returned to his or her office and looked at the discovery ordered by this Court. Of course, he or she would have already suspected that one of the prosecutors who was directing that informants obtain evidence in violation of *Massiah* was Petersen, and one of the cases where direction may have been given by him was *People v. Inmate I.*—despite the absence of any law enforcement reporting on the subject. This prosecutor then would have looked at the remainder of the files from the Court-ordered discovery to see if there were any reports written by members of law enforcement which showed that the OCDA had directed Inmate F. to question defendants. He or she would have seen that there were none. If this prosecutor was a supervisor, he or she would have then launched an investigation into the practices of prosecutors and local law enforcement related to the custodial informant program. After carefully studying and investigating the materials available to him, he or she would have ultimately reached the conclusions that are made about the custodial informant program detailed herein.

But sadly, this type of response could not be reasonably expected from Wagner, who was engaged in the same acts of concealment he needed to investigate. Wagner was too concerned about covering up his own misconduct to have been able to see beyond the damage these revelations would inflict upon the Dekraai prosecution. Evidence of Inmate F. having sought more incriminating statements in other murder cases was the last thing he needed. Quite obviously, Wagner could not have cared less whether statements had been improperly admitted or would be improperly admitted in other cases. His focus was razor sharp and three fold: First, do not reveal anything that would interfere with a death verdict for Dekraai. Second, cover the tracks of misconduct by the prosecution team and its partners such as Petersen. Third, protect the OCDA, the OCSD, and local law enforcement from embarrassing revelations damaging to the agencies and the cases with which they have been involved.

So what did Wagner do when he received these answers he wished he could make vanish? He ran from them as fast as he could. He asked an embarrassing question to transition the conversation away from the precarious spot in which he found himself: whether a detective from the **Santa Ana** Police Department had directed Inmate F. to question Dekraai about the crimes committed in **Seal Beach**. It made little sense, but it was the best he could think of at the moment:

> Q2: Okay. Let's get specific about Scott [phonetic spelling] Dekraai [phonetic spelling], who's, uh, accused of committing a mass murder at a Seal Beach hair salon.
> A: Okay.
> Q2: Okay. Um, did you ever direct Inmate F to do anything about, uh-- about, uh, investigating Scott Dekraai?
> A: I did not.

(Exhibit L, p. 14.)

This was Wagner's awkward way out, and as one would expect, he would never return to questioning Gallardo about anything that could have led to an increased understanding of issues germane to the *Massiah* motion. Once again, he had refused to heed his ethical and legal obligations, once again.

The OCDA's CI File System: A Symptom of a Broken Commitment to *Brady*

As discussed throughout this section, the OCDA's CI file system is a sham. An organization committed to the principles articulated by John Anderson for running an ethical informant system would mandate that its prosecutors and local law enforcement make an entry in the OCDA's CI file each time an informant provides evidence related to a case, or at least each time he assists in a case handled by a different prosecutor. In Inmate F.'s OCDA CI file, however, there is no entry related to Dekraai. There is no entry related to Inmate M. There is no entry related to Inmate D. There is no entry related to Inmate S.

Of course a leader of the OCDA who respects *Brady* and due process would want to get to the bottom of the other missing entries and ask questions such as the following: Which omissions were purposeful? Which were accidental? Have defendants been denied evidence to which they were entitled? But instead of driving an aggressive effort to fix an enormous problem, Wagner was committed to ensuring that the Dekraai defense team did not, at the very least, find out about Inmate F.'s contact with Inmate M.

It is, again, this deeply imbedded commitment to winning at all costs that should compel this Court to conclude that the only way to effectuate change is to impose sanctions that teach prosecutors that they will not win when they cheat.

People v. Dekraai

Intentional *Massiah* Violations by the Prosecution: Repeated Efforts to Violate Dekraai's Sixth Amendment Rights by Seizing Confidential Psychotherapist Records[23]

As will be discussed in the next three sections, the Dekraai prosecution team's misconduct in the instant case is not limited to issues surrounding Inmate F.

Prior to his arrest, Dekraai was a patient of Dr. Ronald Silverstein, a psychiatrist.

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[23] Part of the misconduct surrounding the first *Massiah* violation overlaps with the misconduct in the search warrant issues. The misconduct detailed here is further expounded upon in the search warrant issues section below.

When Dekraai was arrested, he signed a general medical release authorizing the disclosure of his medical records to law enforcement. On October 17, 2011, OCDA Investigator Erickson attempted to obtain Dekraai's psychiatric records from Silverstein with the general release. Silverstein, through his business attorney, refused to provide the records, explaining that under federal and state law regarding the privacy of psychiatric records, he could only release the records pursuant to a specific authorization for psychiatric records.

On October 17, 2011, SBPD Detective Gary Krogman went to the Orange County Jail to speak with Dekraai. Without first contacting defense counsel or advising Dekraai of his right to counsel, Krogman spoke to Dekraai about the current case. Specifically, Krogman asked Dekraai to sign a new release for his medical records that specifically authorized the release of Dekraai's psychiatric records in the possession of Dr. Silverstein. Dekraai refused to sign the release. This contact by Krogman violated *Massiah*.

The only California case to discuss whether asking a charged and represented defendant for consent constitutes a *Massiah* violation is *Tidwell v. Superior Court* (1971) 17 Cal.App.3d 780. As relevant here, in *Tidwell*, the defendant was charged with burglary and arraigned on August 23. (*Id.* at p. 789.) Counsel was appointed the same day. On September 1, while defendant was in custody, a police officer contacted him and asked for consent to search his car. Defendant agreed to the search. The officer conducted a search of the car and found several items of evidence. The prosecution argued that even though defendant was charged and represented by counsel, there was no *Massiah* violation because *Massiah* only applied to questioning defendants and not to seeking a defendant's consent. (*Id.* at p. 790.) The Court of Appeal rejected this argument, holding the distinction claimed by the prosecution "is very thin considering the incriminating effect a consent to search may have. The reasoning of [California cases following *Massiah*], which protects defendants' right to the effective aid of counsel, applies equally to a consent given at the instigation of the police." (*Ibid.*) Accordingly, the court found that asking the defendant for consent to search his car violated *Massiah,* and as such ordered the evidence

recovered from the car suppressed.

In the instant case, as in *Tidwell*, Dekraai had been charged and was represented by counsel when Krogman contacted him and asked him to consent to signing the release for his psychiatric records. Therefore, as in *Tidwell*, Krogman seeking Dekraai's consent to release his records violated Dekraai's Sixth Amendment right to counsel.[24]

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[24] Wagner certainly directed Krogman to seek the psychiatric records release from Dekraai. As such, Wagner's direction to Krogman also violated California Rules of Professional Conduct, rule 2-100, which governs communication with a represented party. It reads as follows:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.
(C) This rule shall not prohibit:
(1) Communications with a public officer, board, committee, or body; or
(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
(3) Communications otherwise authorized by law.
(California Rules of Court, rule 2-100.)

The exception in (C)(3) is not applicable, because the communication here is not otherwise authorized by law. (See *U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1458-1463 [negotiations with defendant by prosecutor without notifying defendant's lawyer violated rule]; *People v. Sharp* (1983) 150 Cal.App.3d 13, 18-19 [prosecutor directing police to conduct lineup with defendant without contacting defendant's attorney violated the predecessor of the rule].)

Search Warrant Issues Related to Seizure of Psychotherapist Records

When Dekraai was arrested and interrogated by police about the case on October 12, 2011, at law enforcement's request he signed a general release for medical records. (Search Warrant and Affidavit for Office of Joel Douglas with attached Authorization for Release of Medical Records, issued Nov. 3, 2011, attached herein as Exhibit WW.) On October 17, 2011, District Attorney Investigator Erickson went to the office of Dekraai's psychiatrist, Dr. Ronald Silverstein. Erickson provided Silverstein with the signed release for medical records and asked for Dekraai's records. (Exhibit WW.) Erickson was instructed to contact Silverstein's attorney, Joel Douglas, from the law firm Bonne, Bridges, Mueller, O'Keefe & Nichols. Erickson did so, and Douglas explained that under state and federal law regarding the privacy of psychiatric records, the general medical release signed by Dekraai was not sufficient to permit the release of Dekraai's psychiatric records. (Exhibit WW.) Instead, in order to release the records Douglas would need a release signed by Dekraai that specifically authorized the release of his psychiatric records. (Exhibit WW.)

Douglas next spoke with Wagner. (Dr. Silverstein's Response and Objection to Search Warrant, Declaration of Joel Douglas, signed Nov. 3, 2011, People v. Dekraai (Super. Ct. Orange County, No. 12ZF0128), attached herein as Exhibit XX.) Douglas reiterated that the general medical release would not permit him to turn over psychotherapist records, and explained that a release specifically authorizing the disclosure of Dekraai's psychiatric records was necessary. According to Douglas, Wagner assured him that Dekraai would agree to such a release, but stated that it may be difficult to obtain a signed release. (Exhibit XX.) Douglas emphasized to Wagner that the records would not be lost or destroyed, and that he was personally maintaining a copy of them. Douglas said he would provide the records to law enforcement as soon as he received the necessary release. (Exhibit XX.)

Dekraai was charged with capital murder on October 14, 2011, and his counsel made an appearance on the case the same day. The prosecution, knowing there was little

chance that counsel would advise his client to sign the expanded release, decided to contact Dekraai directly in the jail without informing his counsel. As previously noted, Krogman went to the OCJ on October 17, 2011 and asked Dekraai to sign the new release. Dekraai refused. (Exhibit WW.)

Unable to obtain a specific release for psychotherapist records, it appeared that the prosecution decided to halt their pursuit of the records. However, as previously discussed, on October 19, 2011, the prosecution team spoke to Inmate F. and received additional information about the crime, defense strategies, Dekraai's mental health issues, and a possible insanity plea. Concerned that Dekraai and his attorneys would mount a defense that they believed could allow him to avoid the death penalty, the prosecution returned its focus to obtaining his psychiatric records.

The prosecution developed a plan to obtain Dekraai's psychiatric records via a search warrant. The first three pages of the affidavit in support of the warrant describe Krogman's training and experience and gives a summary of the events surrounding the shooting, Dekraai's arrest, and Krogman's interview with Dekraai after his arrest. Krogman writes that Dekraai said he was motivated by the ongoing custody battle with his ex-wife, one of the victims. Dekraai also said he was seeing Dr. Silverstein, that their sessions primarily focused on his frustration over the custody battle, and that he was diagnosed with post-traumatic stress disorder and bipolar disorder. Krogman explained that he believed the records would provide evidence that Dekraai committed the murders with premeditation and deliberation. (Exhibit WW.)

Beginning on page four, Krogman states that he spoke with Erickson about his unsuccessful efforts to obtain Dekraai's records through the general release signed by Dekraai, and that Douglas had explained to Erickson that a more specific release was required. Krogman then writes, "Your affiant decided to visit with Dekraai at the Orange County Jail on October 17" to get Dekraai to sign the new release. (Exhibit WW.) This statement is misleading, as it is evident that the decision to re-contact Dekraai was not

made solely by Krogman, but was made after consulting with either Wagner or Simmons. Krogman writes that he contacted Dekraai at the jail and Dekraai refused to sign the new release. (Exhibit WW.)

Krogman then describes speaking with Wagner, who said that he had a conversation with Douglas about the records. According to Wagner, Douglas said he possessed the records but would not release them without a more specific waiver. Douglas also told Wagner that he would release the records if provided with a court order. Further, according to the affidavit, Douglas told Wagner that if a search warrant was issued for the records, a special master did not need to be appointed because Douglas had the records segregated from other patient and client files, and would give the records to Krogman upon being served a copy of the warrant. Krogman concludes the affidavit by asking for a search warrant for Douglas's office in order to seize Dekraai's records. (Exhibit WW.)

There is compelling evidence that the description of Wagner's conversation with Douglas as it relates to the waiver of the special master is false. However, before discussing and analyzing this evidence, a brief discussion of the special master procedure is necessary.

Section 1524 governs the procedure that must be followed whenever a search warrant is issued for documentary evidence in the possession of physician, psychotherapist, or member of the clergy. (Pen. Code, § 1524, subd. (c), attached herein as Exhibit YY.) As a psychiatrist, Silverstein is a psychotherapist. (Evid. Code, § 1010, subd. (a).) At the time a search warrant is issued, "the court **shall** appoint a special master ... to accompany the person who will serve the warrant." (Pen. Code, § 1524, subd. (c)(1), emphasis added.) Upon service of the warrant, the special master shall inform the party served of what documents are sought in the warrant and give the party an opportunity to provide the records. (Ibid.) If the party who has been served with the warrant states that any of the items shall not be disclosed, the items shall be sealed by the special master and taken to court for a hearing. (Pen. Code, § 1524, subd. (c)(2)(A).) At the hearing, the party

searched shall be entitled to raise any privileges that would prohibit the disclosure of the items. (Pen. Code, § 1524, subd. (c)(2)(B).) *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1705-1707, contains a history of the special master statute. And the procedure required under the statute is explained in detail in *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1549.

When Silverstein refused to provide Dekraai's psychiatric records without the necessary release and Dekraai refused to sign one, the prosecution had only two other methods to get the records: a subpoena duces tecum or a search warrant. However, if the records were subpoenaed, they would first go to the court. Dekraai would then be able to file a motion to quash the records **before** the prosecution got to see them. That motion would be successful, as Dekraai's psychiatric records are clearly privileged under Evidence Code section 1012, none of the exceptions to the privilege in Evidence Code sections 1018-1027 are applicable, and the prosecution's right to due process and its interest in successful prosecutions does not trump a defendant's psychotherapist-patient privilege. (*Menendez v. Superior Court* (1992) 3 Cal.4th 435, 456, fn. 18; *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014.)

Using a search warrant to obtain the records presented the same problem. Because the search warrant was for records maintained by a psychiatrist, the records would have to go to a special master and be sealed until a Court ordered its release. Thus, the prosecution would be unable to review the records **before** Dekraai successfully asserted the privilege to prohibit their release.

As a result, it appears the prosecution team falsely claimed that Douglas said a special master was not necessary. Notably, section 1524 does not contain any provision for a waiver of the special master procedure. To the contrary, it expressly states that when a warrant is issued for documents in possession of, inter alia, a psychotherapist, the court "shall" appoint a special master. (Pen. Code, § 1524, subd. (c)(1).) The defense is unaware of any appellate decision that even contemplates the waiver of a special master,

much less endorses such a waiver. Furthermore, as discussed below, when Douglas was presented with the search warrant, he refused to turn over the records. Thus, it is not believable that Douglas told Wagner he would waive the special master. Yet because of the claim in the affidavit, the magistrate issued the search warrant for **a lawyer's office** in order to obtain **privileged psychiatric records** without appointing a special master.[25]

Douglas's actions upon being served with the warrant demonstrate that he did not agree that a special master was unnecessary. On November 3, 2011, law enforcement served the warrant on Douglas at his law office. He did not simply hand over the records to Krogman in the absence of a special master, as the warrant affidavit indicated he said he would do. To the contrary, Douglas called the Public Defender's office to let Dekraai's assigned attorney know that investigators were attempting to seize the records, and determine if Dekraai had consented to their release. This action is extraordinary because at this point the Public Defender's office had never spoken to Douglas. (Exhibit A.) After calling the office, Douglas told Sanders about the warrant. Sanders explained that Dekraai did not consent to the release of the records, that the search warrant was improper and was issued without Dekraai or the Public Defender's knowledge, and that Sanders would move to quash the warrant. (Exhibit A.) Furthermore, Douglas wrote a five-page objection to the warrant, which included a detailed declaration describing his conversations with Erickson and Wagner. He gave the objection and declaration to the law enforcement officers who seized the records. Douglas stated he was providing the records under seal, subject to objections on behalf of Dekraai and Silverstein. (Exhibit XX.)

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[25] It should also be noted that despite the fact that the warrant was issued on a Thursday at 10:35 a.m., no district attorney signed the affidavit to indicate that it was reviewed by a prosecutor. The pre-printed space for a prosecutor to sign the affidavit is blank. In the undersigned's experience in Orange County, virtually every warrant affidavit is signed by a prosecutor to indicate it was reviewed prior to being submitted to the magistrate. (Exhibit A.) For example, the search warrant issued on October 13, 2011, for Dekraai's home and vehicle was reviewed and signed by a prosecutor prior to being submitted to a magistrate, even though that review took place at **12:30 a.m.** on October 13.

Sanders immediately attempted to contact Wagner to inform him that Dekraai did not consent to the release of the records, and to the extent he was relying upon a previously signed consent, it was revoked. (Exhibit A.) However, Sanders' calls were not returned. (Exhibit A.) Sanders then personally served the OCDA with a Motion to Quash the Subpoena and served the motion in Department 55 of the Orange County Superior Court, where the case was set for further arraignment. (Exhibit A.) The time for the hearing was set for 1:30 p.m. on the moving papers and Sanders left a message for Wagner indicating that this would be the time of the hearing. Sanders appeared at that time. (Exhibit A.) While in the courthouse, Sanders spoke on the telephone with Douglas who said that detectives who had arrived earlier at his office indicated that they would seize the records at 3:00 p.m. Sanders contacted Deputy District Attorney Rick Welsh who was at counsel table and informed him of the motion and the situation. (Exhibit A.) Welsh said he could not appear on the matter. Sanders requested that he contact his office and locate someone who could appear. (Exhibit A.) The Honorable Erick Larsh took the bench. Welsh said that he had contact with his office and indicated that a representative of the office could not appear until 3:30 p.m. Sanders explained that by 3:30 p.m. the records would have already been illegally seized, and he requested that Judge Larsh order the prosecution not to take possession of the records until the Court addressed the pending issues. (Exhibit A.) During this time, Assistant District Attorney Kal Kaliban entered the courtroom and made an appearance on the case. However, Kaliban also stated that a representative from the Homicide unit would not be available until 3:30 p.m. Judge Larsh issued an order directing Kaliban to inform his office that the records were not to be seized until the Court had heard from both parties. (Exhibit A.)

At approximately 3:00 p.m., Wagner was seated in the back of Department 55. Douglas called Sanders near that time to inform him that investigators still intended to seize the records. (Exhibit A.) Sanders spoke directly to Wagner and asked that he direct his investigators not to take the records until the Court ruled on the matter. (Exhibit A.)

Wagner refused. (Exhibit A.) Sanders called Douglas and asked to speak directly to SBPD Investigator Krogman. Sanders told Krogman that per Judge Larsh's order, he was to delay seizure until the Court had ruled on its lawfulness. Krogman was non-committal and said he needed to speak to Wagner. (Exhibit A.)

Despite Judge Larsh's order that the police not seize the records, Wagner undeniably instructed Krogman to take the records, which he did. After disobeying Judge Larsh's first order not to seize the records, officers finally complied with a second order to bring the records directly to the Orange County Superior Court, where they remain.

In sum, there is nothing about Douglas's actions that support the affidavit's claim that Douglas told Wagner a special master did not need to be appointed. Rather than providing Krogman with the records without a special master, as the affidavit claimed he would, Douglas immediately called the Public Defender's office to alert Sanders to the situation, and then wrote a five-page objection and declaration, requesting that the records be sealed subject to Dekraai and Silverstein's objections. Thus, Wagner's claim, articulated by Krogman in the affidavit, that Douglas told him a special master was unnecessary appears to be false. Wagner knew that Douglas had never agreed to waive a special master, which seemingly explains Wagner's decision not to sign off on the search warrant; the absence of his signature would allow Krogman to assert that the inclusion of the waiver claim in the affidavit was the result of his misunderstanding of the conversation between Wagner and Douglas. They could fall back upon this position when their claim that Douglas had waived the special master was subsequently disputed.

Why would the prosecution team engage in repeated acts of misconduct in order to obtain Dekraai's psychiatric records? There were two reasons. First, as indicated earlier, Inmate F. had obtained information from Dekraai that provided insights about the defense team's strategies for trial, including a possible insanity plea. From the prosecution's perspective, it was necessary to do almost anything to learn more about Dekraai's mental health treatment in order to defeat any effort that could prevent the imposition of the death

penalty. Second, the prosecution knew that if the special master procedure were followed, the records would be sealed and the prosecution would not be able to overcome the privilege attached to the records. The prosecution did not care that the records were inadmissible. Rather, they wanted to review them to obtain a tactical advantage at trial that was otherwise unavailable; the records would offer insights into any mental defenses or mitigating evidence Dekraai may pursue at trial. The prosecution team also believed that they would obtain their own psychological advantage over the defense. That is, the defense would henceforth realize that the prosecution had already seen confidential records and had potentially taken further steps in preparation unknown to the defense. The prosecution likely hoped this would leave the defense team in a perpetual state of uncertainty about what the prosecution had obtained that could defeat their arguments at trial.

Setting aside the many possible motivations, the prosecution clearly committed multiple, unlawful acts of misconduct in its attempt to obtain Dekraai's psychiatric records.

Efforts to Inflame the Public and Victims' Families Against Dekraai and His Counsel

In view of the misconduct detailed in this motion, the prosecution team's public comments and private conversations with family members about issues of trial delays have been particularly reprehensible. The prosecution has repeatedly emphasized the delays in this case and inculcated in the press and with victims' families—who have then often spoken to the press—that the cause of those delays is a "foot-dragging" and callous defense team. These attempts to further incense jurors and family members is not especially surprising considering other misconduct. However, what makes this behavior so egregious is that the prosecution has actually caused much of the delays by engaging in a massive concealment from nearly day one.

From the time of the first appearance on the case, the prosecution recognized that the family and friends of victims desperately wanted to bring the case to a close as quickly

as possible. After Dekraai appeared for the first time in court on October 14, 2011, the Los Angeles Times reported the following: "[DA Rackauckas] said family members were upset, in part, because they were unhappy with the continuance and want the proceedings to go quickly. 'They're just terribly distraught,' he said. 'There's just all of the emotions, including anger.'" (*The Seal Beach shooting: D.A. expects an insanity defense,* L.A. Times (Oct. 14, 2011), attached herein as Exhibit JJJ.)

A reader response to the Los Angeles Times article also expressed frustration about the speed of the process:

> This is the perfect example of a major flaw in our so-called Justice system. This killer put on a bullet-proof vest, drove his pick-up truck to the beauty salon, shot 9 people, killing 8, and was captured quickly with the weapon by the police. There is no need for wasting our time and tax dollars on this idiot with a trial. Does anyone see what is wrong with this picture? The killer should go in front of a judge, receive his sentence, and then straight to a hanging noose or firing squad.

(*The Seal Beach shooting: D.A. expects an insanity defense,* L.A. Times (Oct. 14, 2011), attached herein as Exhibit JJJ, comment by Cathy O***.)

Reader responses to an article appearing in the Orange County Register following Dekraai's first appearance expressed similar sentiments. Philip C*** wrote, "…there should be some form of summary execution to prevent vigilante justice- if my family were affected, I personally would not be able to eat or sleep until this guy was under ground." Kevin T*** wrote: "…the legal proceedings should be very short--this is a slam dunk for the prosecution----get rid of this human garbage!" (Welborn et al., *Seal Beach shootings: Death penalty sought,* O.C. Register (Oct. 14, 2011), attached herein as Exhibit JJJ.)

Another article written after Dekraai's first court appearance, published in the Los Alamitos/Seal Beach Patch, conveyed concern about the impact of court delays on family members: "The delay of Dekraai's arraignment seemed to upset victim family members. One husband buried his head in his hands." (Austin, *Victims' families scream at Dekraai in court*, Los Alamitos/Seal Beach Patch (Oct. 24, 2011), attached herein as Exhibit JJJ.)

Articles published after Dekraai's arraignment on November 29, 2011, hinted that

the defense was to blame for delays. An article in the Los Alamitos/Seal Beach Patch quoted Deputy DA Simmons: "We're hoping the defense won't request another continuance." (Austin, *Alleged Salon Shooter to Face Charges Today*, Los Alamitos/Seal Beach Patch (Nov. 29. 2011), attached herein as Exhibit JJJ.) A reader commented on an article in the Orange County Register: "It's sad to see that I was home for this and now I'm months into my deployment and he hasn't been sentenced yet?" (Welborn, *Not Guilty Plea in Seal Beach Slayings,* O.C. Register (Nov. 29, 2011), attached herein as Exhibit JJJ, comment by Austin H***, Dec. 21, 2011.)

Following Dekraai's indictment and not guilty plea in January 2012, OCDA Tony Rackauckas was quoted in several media outlets expressing his desire for swift justice. DA Rackauckas spoke to reporters outside the courtroom, including CBS 2 news: "What we want to do here is get this case to trial as soon as we can and get it over with for the people, for the victims' families, so that we have justice at the earliest time we can get it." (CBS 2*, Scott Dekraai Indicted in Seal Beach Salon Massacre* (Jan. 18, 2012), attached herein as Exhibit JJJ.) Rackauckas' statements were published in the Orange County Register: "Outside the courtroom, District Attorney Tony Rackauckas said he hopes to get the case to trial within a year. . . . 'What we want to do here is get this case to trial as soon as we can, get it over with for the victims' families,' he said." (Irving and Welborn, *Suspect in Seal Beach shootings pleads not guilty*, O.C. Register (Jan. 18, 2012), attached herein as Exhibit JJJ.) The Los Alamitos/Seal Beach Patch published a similar quote: "'What we want to do here is get this case to trial as soon as we can and get it over with for the people, for the victims' families and so we can have justice as soon as possible,' Rackauckas said." (Austin, *Alleged Seal Beach Shooter Pleads Not Guilty, Trial Could Be Expedited*, Los Alamitos/Seal Beach Patch, (Jan. 18, 2012), attached herein as Exhibit JJJ.)

Other representatives of the OCDA reiterated the need to proceed to trial as quickly as possible, and continued to blame the defense team for slowing down the process. Wagner was quoted by the Los Alamitos/Seal Beach Patch: "'The defense indicated they

wouldn't be ready for a preliminary hearing until the fall, and we didn't want to wait that long,' added Deputy District Attorney Dan Wagner." (Austin, *Alleged Seal Beach Shooter Pleads Not Guilty, Trial Could Be Expedited*, Los Alamitos/Seal Beach Patch, (Jan. 18, 2012), attached herein as Exhibit JJJ.) The OCDA's chief of staff was also quoted in the Los Alamitos/Seal Beach Patch: "The indictment process, which is done in secret, was done to speed up the trial, said Susan Kang Schroeder, the Orange County District Attorney's chief of staff. A grand jury indictment negates the need for a preliminary hearing, which can take months of preparation and several days of testimony leading up to the actual trial. 'One of the benefits is that we are able to skip the prelim so we can have a trial as soon as possible, and the victims will get their day in court,' Kang Schroeder said Tuesday." (Austin, *Grand Jury Indicts Alleged Salon Shooter in Secret Proceeding, The move is designed to speed up the death penalty trial of Scott Evans Dekraai*, Los Alamitos/Seal Beach Patch (Jan. 18, 2012), attached herein as Exhibit JJJ.)

On August 10, 2012, Dekraai's trial was continued until March 2013. KPCC reported that the prosecution was ready for trial: "'We're ready to go to trial,' Orange County prosecutor Scott Simmons told the court." In addition, the audio from the news report reiterated the prosecution's readiness: "County Prosecutor Scott Simmons said he'd be ready to argue his case on October 15 – Dekraai's original trial date." (89.3 KPCC, *Alleged Seal Beach salon shooter Scott Dekraai gets a new trial date – March 2013* (audio), (Aug. 10, 2012), attached herein as Exhibit JJJ.) The Orange County Register also reported on the continuance: "Assistant District Attorney Dan Wagner announced during the brief hearing that the prosecution 'is ready to try this case. … We want to go forward as soon as possible.'" (Welborn, *Seal Beach salon shootings trial set for March*, O.C. Register (August 10, 2012), attached herein as Exhibit JJJ.)

On January 25, 2013, this Court granted the defense discovery motion. Multiple media outlets reported on the event. The Los Alamitos/Seal Beach Patch quoted a victim's husband expressing outrage at the delays: "Paul Wilson, the husband of victim Christy

Wilson, said after the hearing that the delays are, 'Disgusting. This case is pretty black and white.'" (Crandall, *Seal Beach Salon Shooting Trial Shifts Focus to Jailhouse Informant*, Los Alamitos/Seal Beach Patch (Jan. 25, 2013), attached herein as Exhibit JJJ.) An article in the Orange County Register about the discovery order spurred approximately 31 reader comments. Beckah T*** commented, "We need swift justice. He took away so many wonderful souls and now all we want is justice. I understand that his rights must not be violated for the trial to be done in proper fashion." Sarah F*** commented, "man this makes me sick to my stomach!" Doug C*** commented on the previous comment: "more delays…so sorry". (Welborn, *Seal Beach shootings: Defense Will Get Jailhouse Recording*, O.C. Register, (Jan. 25, 2013), attached herein as Exhibit JJJ.)

In February 2013, after the trial date was postponed to allow the defense to examine the thousands of pages of discovery compelled by this Court, a reader commented on an article published in the Orange County Register: "This monster killed my sister and shot my mother. They had NO time to prepare. It's just more painful the longer that we have to wait for him to be convicted." (Welborn, *Seal Beach shootings trial put off until November*, O.C. Register (Feb. 22, 2013), attached herein as Exhibit JJJ, comment by Christina S***, Feb. 22, 2013.)

In October 2013, when a trial date was set for 2014, the Los Angeles Times published an article with the headline, *Relatives of Seal Beach shooting victims want trial to start soon*. The article stated: "Family members of those killed in the Seal Beach salon shooting two years ago urged a judge Friday to end their 'agony' by ordering the accused killer to stand trial this fall." The article also quoted the husband of one of the victims: "'This needs to move on and we need to be allowed to heal,' said Paul Wilson, whose wife, Christy, was among the eight people slain." (Esquivel, *Relatives of Seal Beach shooting victims want trial to start soon*, L.A. Times (Aug. 30, 2013), attached herein as Exhibit JJJ.) An article published in the Daily Pilot under the headline, *Despite Emotional Family Pleas, Seal Beach Shooting Trial Delayed*, quoted several family members of victims:

> Family members of those killed in a shooting at a Seal Beach salon two years ago urged a judge Friday to end their "agony" by ordering the accused killer to stand trial this fall. . . . "This needs to move on and we need to be allowed to heal," said Paul Wilson, whose wife, Christy Wilson, was killed in the shooting. "The agony you are putting us through with delay after delay after delay, you don't understand," Bill Webb told the judge. Webb's daughter Laura Elody was killed in the shooting. "Our lives are forever changed and every time we come here we sit 5 feet away, 15 feet away, from a monster," said Bethany Webb, Elody's sister. Fournier's daughter, Chelsea Huff, also addressed the court, saying the defense would continue to delay indefinitely. "They're always going to say they're not ready," she said. "They're always going to say they need more time."

(Esquivel, *Despite Emotional Family Pleas, Seal Beach Shooting Trial Delayed*, Daily Pilot, (Aug. 30, 2013), attached herein as Exhibit JJJ.)

Esquivel's article was also published in the Huntington Beach Independent. In the comments following the article, readers expressed anger at a "broken" system and called for vigilante justice. Tim F*** commented, " . . . The families should not have to wait this long for justice. The system is broken. The legislature and courts lack the will to fix it." Steve J*** commented, "Scott Sanders…. Let him out….the public will administer justice in about 20 minutes." (Esquivel, *Despite Emotional Family Pleas, Seal Beach Shooting Trial Delayed*, Huntington Beach Independent, (Aug. 30, 2013), attached herein as Exhibit JJJ.)

Local TV and radio stations also reported on the continuance. A story by CBS News and KNX 1070 quoted a family member of one of the victims: "Outside court, Paul Wilson, the husband of murder victim Christy Wilson, says he's not optimistic [the March trial date] will happen. 'I do think [the judge] means it. Will we get going on that March date? I don't think so.'" (KNX 1070/CBS 2/KCAL 9, *Trial Delayed Again For Man Accused of Killing 8 At Seal Beach Hair Salon* (audio), (Aug. 30, 2013), attached herein as Exhibit JJJ.) KPCC quoted Paul Wilson in an article published online: "Christy Wilson was one of the salon employees killed. Her husband, Paul Wilson, said the evidence is 'pretty clear' and called the trial delay 'unfair' to families of the victims." (Joyce, *Trial*

date postponed until 2014 for man charged in beauty salon mass killing, 89.3 KPCC (Aug. 30, 2013), attached herein as Exhibit JJJ.)

Paul Wilson was quoted in The Fountain Valley Patch regarding the continuance: "'I'm not happy about it, obviously,' said Paul Wilson, husband of 47- year-old Christy Wilson, who was killed in the Oct. 12, 2011, massacre at Salon Meritage in Seal Beach….'It's very unfair to us,' Wilson said, referring to the families of the victims. 'We're approaching two years and the evidence is pretty clear.'" Joker Joe commented on the article, "The delay does not make sense! Didn't the prosecution tell the defense a year ago that they were seeking the death penalty? Or did they tell them last week? And what difference does it make? Trial and execute." (Schiavone, *Trial Again Delayed in Seal Beach Salon Massacre*, Fountain Valley Patch (Aug. 30, 2013), attached herein as Exhibit JJJ.) The Los Alamitos/Seal Beach Patch also quoted Paul Wilson: "'It's very unfair to us,' Wilson said, referring to the families of the victims. 'We're approaching two years and the evidence is pretty clear.'" (Gutierrez-Jaime, *Trial for Alleged Seal Beach Mass Murderer Delayed Again*, Los Alamitos/Seal Beach Patch, (Aug. 30, 2013), attached herein as Exhibit JJJ.) Reader comments on the article expressed outrage at defense attorneys. Sharman K** commented, "Many suffer emotional pain while attorneys make financial gain." Shelly G commented:

> This is so ridiculous and wrong. When someone is clearly guilty they should be sentenced immediately. But the lawyers claim they have 19,000 pages to review and thousands of recordings so they asked for another delay? What the hell have they been doing for two long years. How long does it take when facts are facts and there is absolutely no doubt! This animal does not deserve to waste our money or time. Put him to sleep permanently!

(Gutierrez-Jaime, *Trial for Alleged Seal Beach Mass Murderer Delayed Again*, Los Alamitos – Seal Beach Patch, (Aug. 30, 2013), attached herein as Exhibit JJJ, comment by Shelly G.)

In October 2013, several media outlets reported on the OCDA's decision to continue to pursue the death penalty in the *Dekraai* case despite family members of victims asking the OCDA to accept a plea deal removing the death penalty. OCDA's Chief of

Staff Susan Schroeder was quoted in an article in the Los Alamitos/Seal Beach Patch:

> "Some of the family wanted to talk to the district attorney and illustrate their frustration, and we understand their frustration, and we're frustrated the defense keeps up with delay tactics," Schroeder said. "We've been ready to go to trial for a long time. . . . Unfortunately, the defense gets to dictate by telling the court that they're not ready when it goes to trial."

(City News Service, *DA Continuing Death Penalty Plans Against Dekraai*, Los Alamitos/Seal Beach Patch (Oct. 11, 2013), attached herein as Exhibit JJJ.)

Those most directly involved in the prosecution of Dekraai should have long ago refrained from making the comments detailed above and taken steps to prevent similarly inflammatory comments from being made by representatives of the OCDA. But that would take courage and a moral sense of responsibility, which does not exist.

The truth is that the prosecution team was delighted in how the defense was being portrayed as compared to them. Nonetheless, it shocks the conscience that the prosecution would have the audacity to make repeated statements about their commitment to begin trial as quickly as possible, when it was the **prosecution** that had delayed discovery of Dekraai's statements to Inmate F. It was the prosecution—through a deceptive interview of Inmate F. and misleading reports—that had attempted to mislead Court and counsel about Inmate F.'s criminal and informant background, his reasons for providing assistance, and the benefits they would provide for that assistance. It was the prosecution that hid critical evidence about Inmate F. both before and after this Court's discovery order. And it was the prosecution, through its unwillingness to be self-regulated by their ethical and legal obligations, which has made this motion necessary.

It should also be emphasized that there are additional significant ramifications for this uniquely egregious misconduct, beyond the most obvious. For instance, at the conclusion of this motion, the prosecution may be forced to make the ironic argument that the remedy for their own misconduct should be a continuance. While a lengthy continuance is clearly needed because of the time lost to uncovering and documenting the prosecution's misconduct, it will not serve as even a partial remedy. Repeated public comments about purported defense delay tactics have left an indelible mark. As a result, a

significant continuance in the hostile environment that presently exists will only further damage Dekraai's ability to receive a fair trial.

A Corrupt Informant Program Revealed Through Oscar Moriel;

A Brief Explanation of Moriel's Role in Orange County's Custodial Informant Program

In the pages that follow, the defense embarks upon an analysis of charged crimes, as well as unfiled allegations, that are referenced in Moriel's handwritten notes. Moriel, like Inmate F., documented his communications with inmates during the course of his work as an informant in the Orange County Jail. The study that follows is extensive—though by no means exhaustive—due to the time limitations inherent in the instant matter. Nonetheless, it reveals conduct by Moriel, his handlers, local prosecutors, and law enforcement that should be deeply disturbing to those interested in a criminal justice system that values due process and integrity. The efforts of numerous prosecution team members corroborate the findings discussed in the previous section, confirm that the misconduct previously identified was not isolated, and further demonstrate the enormous and extensive ramifications of a prosecutorial culture that is obsessed with winning to the detriment of justice.

A Summary of Moriel's Criminal and Informant History

Like Inmate F., Moriel is currently facing a life sentence. On December 13, 2005, Moriel was charged with attempted murder, street terrorism, and gang and firearm use enhancements. (Minutes in *People v. Moriel* (Super. Ct. Orange County, No. 05CF3926), attached herein as Exhibit KKK.) While it may seem unfathomable that Inmate F. has still not been sentenced after seven years in custody, at least one of his felony cases has been tried. The same cannot be said for Moriel, who has been in custody for almost **eight years** without being tried or reaching a settlement.

Although there is little transparency on the issue of when he began serving as an informant, discovered notes suggest that Moriel began no later than July of 2009. As will

be seen, he fully embraced his role, working virtually non-stop during a seven-month period. (Exhibit O, pp. 2013-2390.) According to Orange County Sheriff's Department Deputy Seth Tunstall, Moriel wrote approximately 500 pages of notes documenting conversations with fellow inmates during this time. (RT (prelim. hr'g), June 6, 2012, *People v. Inmate N.* (Super. Ct. Orange County, 2012, No. 11CF***), attached herein as Exhibit LLL, pp. 44:26-45:2.)

Deputy DA Petersen discovered different quantities of Moriel's notes in each of the nine cases referenced and discussed in this motion. Dekraai is in possession of 196 pages of those notes, found in their most complete quantity in the discovery from *People v. Inmate E*. (Table of all pages containing notes provided to Special Handling by Oscar Moriel, compiled by defense, attached herein as Exhibit MMM.)

The criminal cases of both Inmate F. and Moriel were prosecuted by Petersen, who is also prosecuting each of the Black Flag cases. To date, Petersen has tried one Black Flag case (*People v. Camarillo*) and two murder cases (*People v. Vega* and *People v. Rodriguez*), in which Moriel testified as an informant. As discussed earlier, Moriel will also testify in *People v. Inmate I*., which Petersen is also prosecuting.

Confessions and Admissions Obtained from Moriel and Shared with Local Prosecutorial Agencies

A substantial amount of the information contained in Moriel's discovered notes pertains to the Mexican Mafia. As indicated above, the notes are also replete with statements relating to gang crimes that occurred on the streets, many of which were allegedly committed by members of Moriel's own gang, Delhi. The descriptions of Mexican Mafia activities and gang crimes are significant because of Petersen's persistent efforts to conceal Moriel's writings and other relevant discovery in order to manipulate the presentation of Moriel as a witness. As will be discussed, Petersen concealed nearly all of these admissions and confessions from defendants in the Delhi prosecutions in *People v. Vega* and *People v. Rodriguez,* as well as the pending trial of *People v. Inmate I.*

The following is a brief summary of the direct admissions that Moriel described in the 196 pages discovered in *People v. Inmate E.*:

1) On an undetermined date, Leonel Vega said that he spread the message that anyone going against Armando Moreno was to be dealt with "full force." (Exhibit O, p. 2020.)
2) On an undetermined date, Vega ordered that two people be placed on the "hard candy" list, and for that message to be spread in the jails and on the streets. (Exhibit O, p. 2021.)
3) On July 1, 2009, Vega claimed that he gave Julio Ceballos a pass from getting stabbed by loyalists of the Mexican Mafia in the prison yard where he was housed in exchange for refusing to testify in Vega's case. (Exhibit O, p. 2013.)
4) On July 1, 2009, Vega claimed to have earned his Aztec Warrior Shield and #13 tattoos by carrying out an order for the Mexican Mafia in which he stabbed someone during a race riot. (Exhibit O, p. 2015.)
5) On July 1, 2009, Vega claimed that he was the one who sent the county-wide kite that ordered all Surenos "to rush all blacks, 'on-site'…" (Exhibit O, p. 2015.)
6) On July 2, 2009, Vega admitted to ordering and selling methamphetamine for Michael Salinas, a Mexican Mafia leader associated with Armando Moreno. (Exhibit O, p. 2016.)
7) On July 3, 2009, Vega claimed that he committed his first murder in 1993 on Bristol Street, that he had five murders under his belt, and that he shot at a car in 2004 on the corner of Oak and St. Andrews streets. (Exhibit O, p. 2017.)
8) On July 8, 2009, Vega told Moriel that Moriel had to pay $500 to $1,000 as a way to show appreciation and allegiance to Vega. (Exhibit O, p. 2062.)
9) On August 1, 2009, Vega said that he shot a young Alley Boys gang member after luring the boy into his car. (Exhibit O, pp. 2078-2079.)

10) On August 10, 2009, Vega said that he gave orders for another inmate to assault someone who had disrespected him. (Exhibit O, pp. 2081-2082.)
11) On September 10, 2009, Vega said that he was trying to get help with "smoking" (killing) a gang member by the name of Jacob, then chopping off his head and leaving it on Peter Ojeda's ("Sana") wife's doorstep as a warning. (Exhibit O, p. 2113.)
12) On September 17, 2009, Moriel admitted to collecting drug money and "rent" from his neighborhood in order to benefit the Delhi gang (Exhibit O, pp. 2131-2132.)
13) On September 30, 2009, Vega said that he had Franky Banda "hit" for not following one of the "rules." (Exhibit O, p. 2154.)
14) On September 30, 2009, Vega said that he told Ray Salcido (known as "Chuco") that he would have to pay Vega some money in return for Vega's help cleaning up his "mess" in the jail. (Exhibit O, p. 2154.)
15) On October 6, 2009, Vega said that he had been stalking Michael Salinas so that he could kill him if presented with the opportunity. (Exhibit O, p. 2183.)
16) On October 6, 2009, Vega said that he had someone ready to hit Paul Longacre, a supposed snitch. He asked Moriel to spread the word. (Exhibit O, pp. 2184-2185.)
17) On October 27, 2009, Vega said that he and his girlfriend, Vanessa Murillo, ran an operation in which Murillo bailed inmates out of jail with the understanding that they would then turn themselves in later on a warrant and transport drugs into the jail. (Exhibit O, pp. 2197-2198.)
18) On October 31, 2009, "Stranger" discussed allegations in his pending murder case, his belief that his cousin was an informant, the violence of his co-defendant, and his efforts on behalf of the Mexican Mafia. (Exhibit O, pp. 2199-2200.)

19) On November 16, 2009, Vega ordered fellow inmates to "go full force" against opponents of Armando Moreno. (Exhibit O, pp. 2216-2217.)

20) On November 17, 2009, Vega ordered that inmate Bala get beaten once per week until he paid $1500 to clear his "rape jacket". (Exhibit O, pp. 1529, 2219-2221.)

21) On November 29, 2009, "Stranger" said that he and his co-defendant went on a shooting spree in six to eight different cities while they were high on methamphetamine. The inmate said that they almost turned themselves in but changed their minds. He said that they never got charged. (Exhibit O, pp. 2228-2229.)

22) On December 20, 2009, Kirk Butterfas said that he and another inmate bought 25 grams of heroin to transport into the jail. (Exhibit O, pp. 2237-2238.)

23) On January 5, 2010, Alvaro Sanchez ("Pave") said that he shot at some Highland Street gang members and that Sergio Elizarraraz ("Bad Boy") killed one of them; that Joseph Galarza ("Gato") killed a girl on Edinger and East Kilson Streets; that Marvin Gutierrez ("Jasper") shot someone by the name of "Mickey" in the face on Evergreen Street; and that "Casper" shot "Shotgun's" son. (Exhibit O, pp. 2247-2248.)

24) On January 18, 2010, Alvaro Sanchez said that he committed a murder by Towner and Central streets and then burned his getaway vehicle. (Exhibit O, pp. 2276-2277.)

25) On February 7, 2010, Amaury Luqueno ("Spy") said that he and Elizarraraz ("Bad Boy") were involved in a shooting with an off-duty police officer and that they fled to Las Vegas shortly after the shooting in order to avoid being arrested. (Exhibit O, 2338-2339.)

26) On February 8, 2010, Luqueno ("Spy") admitted that he and Elizarraraz ("Bad Boy") committed the officer-involved shooting on Oak and St. Andrews streets.

(Exhibit O, pp. 2346-2347.)

27) On February 14, 2010, Elizarraraz ("Bad Boy") admitted to numerous murders and attempted murders committed from 2005 to 2007. (Exhibit O, pp. 2349-2359.)

28) On February 15, 2010, Elizarraraz ("Bad Boy") admitted to several attempted murders in which he pulled the trigger. (Exhibit O, pp. 2363-2371.)

29) On February 23, 2010, Elizarraraz ("Bad Boy") said that he was involved in a shooting on Edinger and Main streets, behind the gas station, and that "Combo" was with him. (Exhibit O, p. 2379.)

30) On February 26, 2010, Alvaro Sanchez ("Pave") said that he and Elizarraraz ("Bad Boy") shot at someone on Olive and St. Andrews Streets but that the person got up and ran away after being hit in the stomach. (Exhibit O, pp. 2385-2390.)

31) On February 26, 2010, an inmate by the name of "Mad" said that he had committed several robberies in order to fund his drug habit. One of the robberies took place at a Mercedes dealership where he stole $1,300. (Exhibit O, pp. 2385-2390.)

32) On April 20, 2010, an inmate named "Chino" from West Side Los Compadres said that he "took the heat" for his girlfriend on a gun possession charge. (Exhibit O, pp. 2392-2396.)

33) On an unknown date in 2010, likely on or about April 20, 2010, Inmate I. said that he shot and killed a kid from the Walnut Street gang, that he had 13 murders under his belt, and that he shot and killed Randy Adame ("Goofy") from Alley Boys. (Exhibit O, pp. 2399-2401.)

Notes and Testimony Related to Moriel that Corroborate the Massive Concealment of Communications and Movements

As discussed previously, the prosecution in *People v. Dekraai* has hidden numerous

recordings, reports and writings by prosecution team members memorializing their communications with Inmate F. Prosecution teams in other cases have engaged in similar concealment involving Moriel. The marked similarities in the concealment of numerous cases involving informants corroborate that local prosecutorial agencies have created policies and training that promote the concealment of reports, recordings, or notes that document conversations with informants.

In *People v. Inmate V.*, a Black Flag prosecution, Petersen elicited the following testimony from Tunstall:

> Q: And at some point in time, Oscar Morreale [*sic*] became an informant; Is that correct?
> A: Yes, he was one of the informants on Operation Black Flag.
> Q: And did Oscar Morreale [*sic*] take notes of his conversations with members of the Armando Moreno mesa?
> A: Yes, I would say hundreds of pages.
> Q: Did he then turn those notes over to you?
> A: Yes, we would get copies of them probably weekly.
> Q: Okay. And did you discuss with Mr. Morreale [*sic*] these notes?
> A: Yes, I did.

(RT (prelim. hr'g), Feb. 22, 2013, *People v. Inmate V.* (Super. Ct. Orange County, 2011, 2012, No. 11CF***), attached herein as Exhibit NNN, p. 77:8-20.)

While Special Handling took possession of large quantities of informant notes, what is inexplicably missing are the reports and notes that Tunstall and other Special Handling deputies wrote memorializing their discussions with Moriel.

Moriel's notes detail his interactions and communications with members of law enforcement. These notes unquestionably should have been turned over to the defense in *People v. Vega*, *People v. Rodriguez*, and *People v. Inmate I*. as relevant evidence of Moriel's relationship with law enforcement. However, none of these notes were discovered in the cases.

Below are but a few of the relevant notes that were hidden in these three cases:

1) On August 28, 2009, Moriel asked Garcia to get him access to non-collect phones so that he could relay info to "you guys" without being overheard by

other inmates. He stated, "…this shit is stressing me out because I can only say certain things on that non-collect phone to you guys. Could you possibly pull me for a visit so that I could run a few scenarios by you so that you can help me out here??? It'll be very much appreciated. Thank you!" (Exhibit O, p. 2097.) Clearly, Moriel has had numerous phone conversations with Special Handling memorialized by notes or reports that have not been disclosed.

2) On September 14, 2009, Moriel said: "Also, at court tomorrow I'm going to probably postpone for another 3 months or so. And if you guys or Tony or Gonzo or Flynn Need me to go to court in between Now and Then, I'm going to need a date. Because as soon as I get back from court, Downer's going to ask me when I go back. And I don't want to give him a date and then get pulled out to court out of the Blue…won't look right…I've been trying to get ahold of Special Handling to work these 2 scenarios out but it's very hard to relay or discuss these forms of messages over these phones." (Exhibit O, p. 2123.)

   This note strongly indicates that Special Handling had previously provided a fake court date so that Moriel could travel to court on the appearance date of a targeted inmate. This certainly would have been memorialized, but evidence of these efforts has been hidden. "Tony" is Tony Garcia from the F.B.I. "Gonzo" is SAPD Officer Gonzalo Gallardo and "Flynn" is SAPD Gang Detective Chuck Flynn.

3) On December 19, 2009, Moriel described a conversation with Vega, in which Moriel was asked to call Vanessa Murillo (known as "Precious") "tonight" or "tomorrow" to set up bringing some drugs into the jail. Moriel provided a list of drug-related "Code Words" and definitions, which were almost certainly requested by law enforcement. After he mentioned when he would be making the call, Moriel reiterated that the code word for dope is "pictures," which was also on the list he provided on the previous page. (Exhibit O, pp. 2234-2235.)

Murillo, who was **Leonel Vega's girlfriend**, is charged in a federal RICO indictment with having "participated in a recorded telephone conversation with CI#2 in which MURILLO agreed to provide CI#2's uncle (the UC) with heroin to be smuggled into the OCJ." (Indictment, filed June 29, 2011, in *People v. Ojeda*, (C.D. Cal., No. SACR11-0148), attached herein as Exhibit OOO, p. 29.) This coordinated effort of federal and local authorities is significant for a number of reasons. First, this joint effort must have been memorialized in law enforcement notes and/or reports. Second, the coordinated nature of this effort between local and federal authorities is at odds with Petersen's implied representation in the trial of *People v. Vega* that he did not have access to the discovery in the federal Black Flag cases. (Exhibit HH, pp. 30:13-16, 34:10-13.) Obviously, Vega was entitled to this note and all related investigative efforts. Defendants such as Sergio Elizarraraz, Juan Lopez, Joe Rodriquez, and Inmate I. were entitled to this information and other evidence that reflects on Moriel's credibility and bias.

4) On January 8, 2010, Moriel wrote: "I still need Mando's full name, C.D.C. # and address of where he's currently at…Still need those photos from Nick Torrez (Joker Dx3) to go over with Pave Dx3 (Sanchez)." (Exhibit O, p. 2252.) This note reveals that Moriel had conversations with SAPD detectives about their efforts to develop evidence against Delhi members through Alvaro Sanchez, who was charged with murder at the time. This significance of this note is discussed further in the sections discussing *People v. Rodriguez* and *People v. Brambila*.
5) On January 20, 2010, Moriel said, "I still need those CDC #s for those 3 guys I **asked you for** Sanchez" (Exhibit O, p. 2280, emphasis added.) This note again reflects pre-existing discussions between law enforcement and Moriel regarding efforts to gain the appreciation of Alvaro Sanchez, or alternatively to stimulate

communications with Sanchez and other inmates that officers believe will be fruitful. The communications with Moriel on this subject must have been memorialized, but have been concealed.

6) On February 2, 2010, Moriel wrote a note to "Garcia & Gonzo." The note stated that he was going to write to "Perico" to say that "my Uncle Joey" is going to visit or alternatively should be given Uncle Joey's cell number, so that "Perico" can call him. "Uncle Joey" was actually Officer Gallarza, and was pretending to accept drugs so they could be brought to Downer in OCJ. (Exhibit O, pp. 2242, 2322-2323.) These efforts were carried out in support of the federal RICO investigation and indictment. This note is significant for a number of reasons. First, this note was necessarily preceded by planning and substantial communications with Moriel that have been hidden. Second, these coordinated efforts between local law enforcement and the federal authorities, and the OCDA's access to notes memorializing the efforts, are inconsistent with Petersen's misleading statements and material omissions at *Vega's* trial implying that he did not have access to Moriel's work on the federal RICO investigation.

People v. Leonel Vega (07CF2786/GO45613)

Summary of Case

On February 20, 2008, Leonel Vega was arraigned and appointed counsel on a felony complaint charging special circumstance murder for the benefit of a gang as well as other allegations relating to the murder of Giovanni Onofre in March 2004. (Minutes in *People v. Vega* (Super. Ct. Orange County, 2010, No. 07CF2786) attached herein as Exhibit PPP.) While the court-ordered discovery in *People v. Dekraai* included DA materials in nine criminal cases, it did not include materials form *People v. Vega,* because Inmate F. was not a witness in the case. However, Moriel's notes pertaining to Vega are found within several of the nine cases. This has enabled the defense to compare notes pertaining to Vega with court transcripts and other documents.

The case proceeded to trial in December of 2010 before the Honorable William R. Froeberg. (Exhibit PPP.) On December 16, 2010, Vega was found guilty of murder, the special circumstance of committing the crime for the benefit of a gang, use of a firearm, and street terrorism. On July 2, 2011, Vega was sentenced to life without the possibility of parole, as well as a consecutive sentence of 25 years to life. (Exhibit PPP.)

The case was appealed. On April 29, 2013, the Fourth District Court of Appeal issued an unpublished opinion affirming the conviction. (*People v. Vega* (Apr. 23, 2013, G045613) [nonpub. opn.] (2013 Cal. App. Unpub. LEXIS 2837), attached herein as Exhibit QQQ.) The court summarized the prosecution's case against Vega, which was built primarily on the alleged admissions of three informants: Oscar Moriel, Johnny Belcher and Julio Ceballos. The three, along with Vega, had been members of the Delhi street gang. (Exhibit QQQ, pp. 5-7.)

The appellate opinion stated that Giovanni Onofre, Andrew Onofre and Hector Lopez were waiting at a bus stop in an area claimed both by Delhi and one of its major rivals, Alley Boys. (Exhibit QQQ, p. 2.) A white Lincoln Town Car pulled up and Vega, located in the passenger seat, made a "D" handsign. (Exhibit QQQ, p. 2.) Giovanni approached the car, thinking that he recognized someone within. (Exhibit QQQ, p. 2.) Vega exited the car and asked where they were from. (Exhibit QQQ, p. 2.) Giovanni responded that he was from Alley Boys. (Exhibit QQQ, p. 2.) Vega went back in the car and grabbed a firearm. (Exhibit QQQ, p. 2-3.) Giovanni, Andrew, and Lopez fled. (Exhibit QQQ, p. 3.) The suspect vehicle circled the nearby park a few times. (Exhibit QQQ, p. 3.) Andrew heard a gunshot. (Exhibit QQQ, p. 3.) Shortly thereafter, Giovanni was found dead a short distance away, as a result of a gunshot to the head. (Exhibit QQQ, p. 3.)

A few days later, Vega was arrested following a high-speed pursuit. (Exhibit QQQ, p. 3-4.) Vega yelled "This is Delhi" as he was arrested. (Exhibit QQQ, p. 4.) Ammunition was found in the vehicle. (Exhibit QQQ, p. 4.) In 2007, Andrew Onofre identified Vega

from a photographic lineup. (Exhibit QQQ, pp. 4-5.) He also told police officers that the car's passenger had a darker complexion and appeared younger in the lineup. Andrew identified Vega at trial and said, "I can't forget his eyes." (Exhibit QQQ, p. 5.)

At trial, Julio Ceballos testified that Vega showed him a newspaper article about the shooting the next day and bragged that he had been the shooter. (Exhibit QQQ, pp. 5-6.) Two other prosecution witnesses, Oscar Moriel and Johnny Belcher, claimed that in separate encounters while in custody, Vega admitted his responsibility for the killing. (Exhibit QQQ, pp. 6-7.) The versions of Moriel and Belcher are similar, but quite different from those provided by the percipient witnesses. According to Moriel and Belcher, Vega said that he had convinced the victim to enter the car while at the bus stop and went with him to a location where Vega shot him in the head. (Exhibit QQQ, pp. 6-8.) Vega also purportedly told Moriel that he later made threats against Ceballos to dissuade him from testifying at trial. (Exhibit QQQ, p. 7.)

The appeal was based upon the trial court's refusal to allow Vega to call two expert witnesses who arguably would have shed light on Moriel's motives for testifying. The stated purpose of the experts' testimony was to provide evidence on the "culture of inmate informants" to assist the jury's credibility assessment of the prosecution's informants. (Exhibit QQQ, p. 1-2, 16-18.) Vega argued that the exclusion of the expert witnesses violated due process and his right to present a defense. (Exhibit QQQ, pp. 1-2, 16-18.) The appellate court affirmed, holding that the trial court did not abuse its discretion by excluding the expert witnesses. (Exhibit QQQ, p. 26.)

Brief Summary of Moriel's Role in *People v. Vega*

A prosecution team unwilling to honor their sacred role in the criminal justice system would view Vega as among the least deserving of protection. He was seen as a killer and a leader within the Mexican Mafia. As with Dekraai, the prosecution team viewed Vega as having earned the roughest justice they could deliver.

To deliver their version of justice—as in *Dekraai*—multiple agencies needed to

work cohesively with the objective of fooling the defendant and his counsel. The first step was to plan a *Massiah* violation. SAPD and Special Handling moved Moriel and Vega into the disciplinary isolation unit, where Moriel could begin cultivating a fake friendship to gain Vega's trust. (Exhibit O, pp. 1814, 1839, 2013-2017.) As they grew closer, Vega stated that he would help Moriel—who had been viewed as a "snitch" by his fellow inmates—return to good standing in the Mexican Mafia. (Exhibit O, pp. 2016, 2061.) The government then provided Moriel with fake paperwork to convince Vega, and other Mexican Mafia members, that he had been placed in protective custody because of his violence in jail, rather than his work for the government.[26] (Exhibit O, pp. 2064-2065.) The government also provided $1,500 allegedly required by Mexican Mafia leadership as an additional showing of good faith. (Exhibit O, p. 2071.) After both left their isolation cells, Moriel and Vega were moved near one another once again. (Exhibit O, pp. 1621,1646, 2074.) By placing them in cells connected via plumbing lines, jail authorities ensured Moriel and Vega's on-going communication and trust building.[27]

Approximately one month after they were first brought together, Vega allegedly confessed to the charged crime. (Exhibit O, pp. 2078-2079.) **Significantly, the**

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[26] On July 11, 2009, Moriel told Special Handling that he needed the fake paperwork. (Exhibit O, pp. 2064-2065.) By July 29, 2009, Moriel wrote in his notes that "Precious" received the paperwork, and she received $1,500 from him to pass along to the Mexican Mafia leadership (Exhibit O, p. 2071.) According to the 2011 federal Black Flag indictment, on July 17, 2009, Vanessa "Precious" Murillo received $1,500 from an undercover officer; we have every reason to believe she received the fake paperwork concocted by Special Handling in the same interchange. (Exhibit OOO, p. 21.)

[27] On July 16, 2009, Moriel was moved from "Dis-iso" to L-20, Cell 8. (Exhibit O, p. 1646.) Four days later, Vega told Moriel that the L-Mod deputies told Vega that he would be moved from "Dis-iso." Moriel then offered Special Handling the following advice: "If that's true and you guys decide to move him here to L-20, keep in mind that cells 5, 6, 7 & 8 are all connected through the plumbing in the back so…" (Exhibit O, p. 2067.) On July 29, 2009, Vega was moved to L-20, Cell 5 **per Moriel's** suggestion. (Exhibit O, p. 1621.) Three days later, Moriel and Vega were communicating "fine" through the plumbing connecting their cells. (Exhibit O, p. 2074.)

prosecution never disclosed evidence of any of what is described in the previous paragraphs, except, of course, the confession.

But this was only the beginning. Prosecution teams would continue to hide and manipulate evidence of Moriel's informant work in other cases in which he was an identified witness. Thus, an understanding of what the prosecution team did in *People v. Vega* is critical to comprehending the overall moral and ethical bankruptcy of the informant program. Petersen's efforts to hide and distort Moriel's informant history are particularly significant because they are strikingly similar to those employed by Wagner and his team in the instant matter. The efforts in *Vega* and *Dekraai* also corroborate that the misconduct within all of these cases described herein is far from coincidental. Rather, it is the manifestation of a program designed to mine information and mislead the defense.

The Prosecution's Concealment of Critical Notes Written by Moriel

Petersen has proven himself to be excruciatingly proficient at misleading defendants and their counsel. He displayed his skills from the first moment that Moriel was discussed with the court through closing argument. On December 6, 2010, Harley told Judge Froeberg he had received " . . . a four-page written statement about an alleged confession made by my client while the two were housed together in the jail. That was dated August 1, 2009. It was disclosed to me I believe by an e-mail on November 4, 2010 . . . " (Exhibit HH, p. 23:13-22.)

The four pages turned over to Harley consist of a letter written by Moriel, **dated August 1, 2009**. (Exhibit O, p. 2076.) At the top of the letter Moriel wrote "For Flynn." (Exhibit O, p. 2076.) The "Flynn" being referred to is certainly Detective Flynn from the SAPD. In isolation, Moriel's four pages of notes suggest, at the very least, a curious interest in the activities of Vega's case, as Moriel wrote that Vega didn't believe that Belcher would testify against him. (Exhibit O, p. 2076.) Moriel then wrote that he finally asked "what exactly happened" because Vega had only told Moriel what Belcher said, and not what had actually occurred. (Exhibit O, pp. 2077, 2078.) At that point, Vega

purportedly confessed to his role in the homicide as described earlier. (Exhibit O, p. 2078.)

It is difficult to imagine how a prosecutor familiar with the most basic legal and ethical rules could justify hiding the remaining 123 pages of notes in which Moriel referenced Vega, particularly considering that nearly all of those hidden pages documented conversations between the two. (Table of notes where Oscar Moriel references Leonel Vega, complied by defense, attached herein as Exhibit SSS.) Petersen certainly knew that all memorialized conversations between Vega and Moriel should have been disclosed, as they were relevant to an array of issues including, most significantly, whether Moriel was working at the behest of the government at the time of Vega's confession—an issue that Petersen did not concede.

The Prosecution's Use "Coincidental Contact" and "Dis-iso" Scams to Hide Compelling Evidence of *Massiah* Violations

Was Moriel just a curious inmate who had been the lucky beneficiary of a valuable confession? Or was Moriel carrying out his mission as an informant? Was Moriel directing the note to SAPD Detective Flynn because SAPD had asked him to obtain this particular information or was the name "Flynn" just one that he happened to remember, when he stumbled upon helpful information? Petersen knew that the hidden 123 pages of notes—and a few in particular—would have answered each of these questions to the detriment of the prosecution. Thus, Vega and his counsel would never see them.

The four pages memorializing the confession are found in only one of the nine cases in the Court-ordered discovery: *People v. Inmate E*. Those pages are found at 2076 to 2079 of the *Inmate E*. discovery. However, Moriel wrote another note, found at pages pages **2074 and 2075** of the *Inmate E*. discovery. This note was directed "To Garcia", the same deputy whose actions as Inmate F.'s handler and fellow Dekraai prosecution team member are so critical in analyzing the core issues of this motion.

The note on pages 2074 and 2075, like the discovered letter on pages 2076 to 2079, was **also dated August 1, 2009**. (Exhibit O, p. 2074.) Petersen and his team, though,

were determined to keep Vega and Harley from ever reading pages 2074 and 2075. The note, beginning on page 2074, stated the following:

> Today, During Vegas Dayroom he came up to my cell door and we were talking about his visit with Precious and the messages that she received for him….she told him that Thumper pretty much took over most of Lacy for Sana…He's telling people "fuck Mando" (which isn't going to be good for him in the near future) and that Thumper put Richard Gaona AKA Travieso from Delhi on the Hard Candy list for going against Sana's word…

(Exhibit O, p. 2074.)

Petersen and his team knew that disclosure of this portion of the note would have revealed not only that Moriel was working as an informant in the Mexican Mafia investigation, but also that Petersen had complete access to the related investigatory materials. **The discovery of this page of notes to the defense would have interfered with Petersen's plan to claim that he was blocked from information relating to Moriel's assistance in the federal investigation. With Harley never seeing this page of notes, Petersen was free to mislead court and counsel about this issue during pre-trial and trial proceedings.**

Petersen had other compelling reasons for hiding this page and its contents. Moriel continued:

> I'm going to be requesting my phone calls in between 4-5 pm from now on so that if Gonzo, Flynn, or Tony come to pull me out I'll look like I'm just going out for my call in Vega's eyes…And I'll obviously skip my call for that day.

(Exhibit O, p. 2074.)

What problems did this section of the hidden notes present? First, it confirmed that Moriel had been in communication with Detective Flynn, a gang homicide investigator from the SAPD prior to obtaining the murder confession on the case in which Vega had been charged. This powerfully showed that Moriel had been directed to seek a confession to the charged murder in violation of Vega's Sixth Amendment right to counsel. Second, the language was entirely inconsistent with the preferred, but false image of Moriel as a passive listener. Third, the writing showed that on the same day that Moriel purportedly obtained Vega's confession to the murder, Moriel and his handlers were hatching a plan to

further deceive Vega.

Moriel, though, was just getting started. At the bottom of the same page Moriel wrote that, "Everything is going smooth with Vega . . . No **suspicions** whatsoever…the **toilet communication** works fine." (Exhibit O, p. 2074, emphasis added.) That line alone would have stopped Harley in his tracks, as it demonstrated that Moriel was working directly with law enforcement to obtain confessions. Thus, the discovery of this page alone would have prompted the filing of a *Massiah* motion and a request for additional discovery.

The next page began with a request to bring the plumber over to clear the lines. (Exhibit O, p. 2075.) That makes sense. An informant wants to hear what his target is saying. While Petersen could live with the defense knowing they were talking through the toilets as "friends," the defense could not be permitted to learn that OCSD was so committed to obtaining statements from a represented defendant that it was making plumbing repairs to improve the communications at the request of an informant.

Petersen's decision to hide what is written on pages 2074 and 2075 becomes even more disturbing when examining the following paragraph found in the latter page:

> Last time I talked to Flynn with you & Grover in that room Flynn said that he was going to try to bring Slim [Inmate I.] over sometime this week. But I don't see a safe way. Me being a total sep **unless we do the Dis-ISO thing again** which might work because Slim isn't used to doing jail time so he wouldn't be on the ball or as suspicious as somebody like Downer who's got years in the system…the only problem is that Downer will see Slim going to dayroom to other sectors and know that he's in the hole with me. And that'll look real funny…just giving you a heads up.

(Exhibit O, p. 2075, emphasis added.)

This paragraph, if discovered, would have shown conclusively that Moriel was working at the direction of and in coordination with the OCSD and the SAPD to obtain confessions to Delhi crimes by Vega ("Downer") and Inmate I. ("Slim"). Moreover, Moriel wrote this note **the exact same day** he purportedly received Vega's confession to the charged murder. If examined alongside the pages documenting the confession, it

would have been immediately obvious that a *Massiah* violation had occurred and the confession to Moriel was inadmissible.

As discussed previously, the "Dis-iso" scam involves coordinated efforts by the Special Handling Unit of the OCSD, the SAPD, and likely the OCDA, to have informants placed next to high-value defendants in a disciplinary isolation unit to dispel suspicions that the inmate was actually an informant. Disciplinary isolation—called "the hole" by inmates—is a punishment imposed for serious jail rules violations.

Moriel's protective custody status had provoked inmates' suspicions that Moriel was an informant. (Exhibit O, pp. 2064-2065.) The Special Handling Unit of the OCSD knew that inmates would believe that an informant attempting to impress law enforcement would probably not commit a qualifying rules violation, and that even if he did, it was unlikely he would be punished in this manner. Therefore, the targeted defendant would think that the informant's presence in disciplinary isolation meant that the person was not working for the government. As will be discussed, the "Dis-iso" scam worked to perfection because Special Handling supported the prosecution team's effort by fabricating paperwork showing that his placement in disciplinary isolation was because of assaults on deputies and child molesters, and not because he was an informant. The scam was successful, and Vega's suspicions regarding Moriel were diminished.

Moriel's notes indicate that he obtained Vega's confidence while they were in "the hole" together, and that Vega's trust continued to grow after they were transferred to the same housing sector into cells with connected plumbing, which is where Moriel finally extracted the murder confession. (Exhibit O, pp. 2061, 2074, 2077-2078.) To ensure the complete success of the effort, **neither the OCSD nor the SAPD would produce any notes or reports showing that they met with Moriel to orchestrate the "Dis-iso" scam or give him direction on how to make it successful.**

There is additional evidence—also found in the *Inmate E.* discovery—that corroborates the use of the "Dis-iso" scam with Vega. A report written by Deputy Tunstall

regarding Mexican Mafia activities detailed the housing locations of numerous inmates over time, including Leonel Vega and Oscar Moriel. (Exhibit O, pp. 1620-1647.) **There is little chance this report was discovered in *People v. Vega*, because it would have demonstrated Petersen's access to just the type of information he was pretending was beyond his grasp. That report includes a notation that both Vega and Moriel were moved to disciplinary isolation on June 30, 2009**. (Exhibit O, pp. 1621, 1646.) **One day later**, on July 1, 2009, Moriel wrote his first page of notes memorializing conversations with Vega. (Exhibit O, p. 2013.)

If the "Dis-iso" paragraph on page 2075 had been discovered, it would have revealed other connections that the prosecution team also preferred to keep hidden. For instance, Moriel's suggestion that "we could do the Dis-ISO thing again" would have immediately shown that Special Handling Deputies Garcia and Grover, SAPD Detective Flynn, and Moriel had, at least on some occasions, worked as a team in developing a plan to bring informants and targeted defendants together. This discovery, therefore, would have immediately raised questions about the existence of reports documenting these efforts and why none were discovered to the defense.

Moreover, the hidden pages revealed that prior to August 1, 2009, Moriel had clearly been in discussions with the SAPD about obtaining information regarding another Delhi gang member, Inmate I. As discussed previously, Inmate I. was charged with murder in 2011. At the preliminary hearing, Petersen relied upon a purported confession made by Inmate I. to Moriel in 2010. (Exhibit O, pp. 2399-2401.) While the coordinated movements in that case did not have *Massiah* implications because Inmate I. had not yet been charged with the murder, they were highly relevant for analyzing the prosecution's version of the circumstances leading to the confession. However, as he did in Vega's case and others, Petersen withheld substantial discovery in *People v. Inmate I.*, including the page that referenced the "Dis-ISO thing."

Petersen and his team cannot escape their blatant misconduct in *People v. Vega*.

The excuses that team members may attempt to advance—in this case and in others—to justify their actions must always be analyzed with the *Vega* misconduct in mind. **There exists no legal justification for withholding from Vega the notes found on the two pages immediately preceding the disclosed confession, nor the other 190 pages.** These notes were concealed in *Vega* in order to further the following prosecutorial objectives: 1) avoiding the court's determination that a Sixth Amendment violation occurred in this case (and likely others); 2) concealing evidence that could damage Moriel's credibility as a passive informant in other cases where *Massiah* was not an issue; and 3) protecting against revelations that could threaten the inmate informant program's continued existence, including that many coordinated jail movements were being done in support of efforts to obtain incriminating statements by defendants in violation of the Sixth Amendment.

The inescapable truth is that the prosecution had long since entered a conspiracy to mislead, and there was far more to come.

Hidden Communications Underlying the "Dis-iso" Scam and the Extortion of Moriel

As discussed above, Moriel and Vega were placed in disciplinary isolation in order to help convince Vega that Moriel was trustworthy. Fellow inmates had come to believe that Moriel was likely a "snitch" because he was reclassified as a "P.C." If Vega could be convinced that Moriel was not an informant, then ironically enough, Moriel would have a tremendous pathway to success as an informant. In essence, if Vega began to trust that Moriel was not a snitch, Vega might agree to use his power in the Mexican Mafia to help restore Moriel's standing in the organization. Once he obtained Vega's trust, Vega was also far more likely to open up about his criminal past and activities within the Mexican Mafia. Finally, Moriel's restored status would also enable him to initiate informant efforts with numerous other targeted inmates.

Beginning shortly after Vega and Moriel first made contact in disciplinary isolation, the hidden notes from the *Inmate E*. discovery show that the two spoke regularly about

Moriel's return to good standing with the Mexican Mafia. (Exhibit O, pp. 2016, 2061-2062, 2064-2065, 2070-2071.) The "Dis-iso" scam was working to perfection. Moriel talked up the supposed violence he committed while in custody, which, if true, would surely convince Vega that Moriel was not an informant. Per a note dated July 2, 2009, Vega encouraged Moriel to keep a list of "P.C.s" he was beating up so that Vega could advocate for his return to good standing. (Exhibit O, p. 2016.)

A note dated July 8, 2009 revealed that Special Handling had also enlisted jail deputies to convince Vega that Moriel was in disciplinary isolation as a result of serious rules violations. Vega apparently told Moriel that multiple deputies told him that Moriel was in disciplinary isolation for "violently attacking and injuring a child molester", ripping off his blue band, and attacking multiple deputies. (Exhibit O, p. 2061.) Again, no reports were discovered memorializing these significant, planned and coordinated efforts to convince Vega that Moriel's housing was the direct result of violence that he never committed. **The enlistment of non-Special Handling deputies to effectuate the unit's objectives is also critical to analyzing issues related to the movements of Dekraai and Inmate F. As discussed previously, Deputy Garcia claimed that the movements of Dekraai and Inmate F. on the day that they were placed in adjoining cells were ordered by deputies not within his unit. As the above referenced efforts show—efforts almost certainly managed by Garcia—Special Handling is fully capable of having others do their dirty work.**

With the scam working to perfection, Vega said that he would clear Moriel's name of being "a rat, chester, or rapist." (Exhibit O, p. 2061.) Vega, though, apparently decided that Moriel would also have to pay. Per the same notes, Vega required that Moriel pay $500 to $1,000 to return to good standing and to demonstrate his allegiance to the Mexican Mafia. (Exhibit O, pp. 2061, 2062.)

Three days later, on July 11, 2009, Moriel wrote a two page note suggesting that Special Handling fabricate "paperwork" in order to prove he was not an informant.

(Exhibit O, pp. 2064-2065.) On the first page of the note, Moriel quoted a message sent to Vega from another inmate, "Chente." The note, which either Vega or Vanessa Murillo shared with Moriel, stated the following: "'Tell Downer that vato Oscar from Delhi who's next to him is a rat. To watch out what he tells him.' (How Chente found out that I was right next to Downer is beyond me)." (Exhibit O, p. 2064.)

In the note, Moriel then described his plan for convincing Vega that "Chente" was wrong:

> I might also need to obtain mock copies of major write ups for assaulting multiple deputies on 2 different dates…for assaulting 3-5 child molesters and rapists on separate dates. And maybe a couple for ripping off my blue band. That way I can provide evidence that what I've been saying is true. Especially with why I'm in the hole right now for. . . .

(Exhibit O, p. 2064.)

Later in the same page, Moriel indicated to Special Handling that he would need to give Murillo $500 to $800 to help clear his name with the Mexican Mafia. (Exhibit O, p. 2064.) In addition, in the note found at page 2064, Moriel wrote that he shared with Downer "**some very serious lies concerning my case that he ultimately took for truth**." (Exhibit O, p. 2064, emphasis added.) This note was hidden from Vega despite its relevance to a *Massiah* violation; it was written three weeks before his purported confession to the murder.

In response to Moriel's request, Special Handling provided the fake write-ups. (Exhibit O, pp. 2064-2065, 2071.) A note dated August 22, 2009, stated that as soon as the paperwork was verified, Murillo would forward the $1,500 to Moreno so that Moriel could be cleared.[28] (Exhibit O, pp. 2085-2086.) Again, there is no discovery memorializing the OCSD's decision and efforts to create falsified write-ups.

As will be discussed in the section addressing proceedings in *People v. Camarillo*, Moriel committed perjury three years later when he testified that the fabricated assaults

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[28] The amount needed to pay off the Mexican Mafia appeared to fluctuate throughout the Moriel's notes, with the final figure settling at $1,500.

actually occurred. (Exhibit MM, p. 542:20-24.) Petersen's last minute discovery practices and perpetual willingness to withhold *Brady* evidence worked to perfection. Defense counsel never had the slightest idea of Moriel's concealed writings, which proved that the assaults never took place and instead were concocted as part of an elaborate prosecution scheme.

On September 9, 2009, Moriel was purportedly cleared for his return to good standing with the Mexican Mafia. (Exhibit O, p. 2106.) However, Vega apparently had decided to change the arrangements for how the $1,500 would be distributed. He told Moriel that he was going to keep $500 for himself. (Exhibit O, p. 2106.) Another inmate later suggested to Moriel that Vega had actually kept the entire $1,500 for himself. The inmate asked Vega why he was playing both sides and, "Downer laughed and said that it was for the $1500." (Exhibit O, p. 2375.) Additionally, during an interview with the FBI and other members of law enforcement, Inmate F. stated that Vega told him he ripped off Moriel for the entire $1,500. (Exhibit DD, pp. 44-45.)

Over time, Moriel continued to demonstrate the skills of a trained actor. He convincingly expressed his gratitude for Vega's efforts stating, "I still tell him that I can't believe it. I can't believe he pulled it of [*sic*] and thanking him." (Exhibit O, p. 2106.) He also called Vanessa Murillo to express his appreciation for her efforts. (Exhibit O, p. 2106.) Petersen knew he was required to share evidence that a witness had been extorted—regardless of whether the government provided the funds—because of its relevance to a motive to fabricate. Instead, he hid all of the pertinent notes, including those that clearly showed that Vega had extorted Moriel and was siphoning off at least $500 for himself. (Exhibit O, p. 2106.)

Prosecution Team Hides Additional Evidence Regarding Moriel and Law Enforcement's Indifference to Vega's Safety

Per Moriel's notes, it appears that in January of 2010, Peter Ojeda ("Sana") was gaining traction in an effort to take back control of the Orange County Jail from Armando

Moreno. At the same time, Vega appeared to be falling out of favor with the leaders of the Mexican Mafia. (Exhibit O, p. 2276.) The unusual aspect of his fall is that law enforcement, via Moriel, was doing a considerable amount of the pushing. As usual, the prosecution failed to discover any reports memorializing this effort, but Moriel's notes found in the *Inmate E.* discovery speak rather clearly to the issue. (Exhibit O, pp. 2258-2261, 2285-2289, 2292, 2300-2302.)

From early 2010, Moriel's notes document his changing relationship with Vega and his increased expressions of animosity and hostility toward him. On January 18, 2010, Moriel described a conversation with "Rascal," who told him that leaders of the Mexican Mafia were unhappy with Armando Moreno and Vega. Referring to Vega, "Rascal" said "they want that ass." (Exhibit O, p. 2276.) In the same note, Moriel wrote about a conversation with Vega who complained that other inmates were "talking shit on him." (Exhibit O, p. 2277.) Moriel wrote that "And I **acted** as if I was upset for him constantly doubting me and my loyalties after all I've done for him and Let him know that I'm tired of that shit." (Exhibit O, p. 2277, emphasis added.) This note demonstrates Moriel's ability to deceive and his talent for false indignation—evidence that should have been presented to the jury so that they could have properly assessed the authenticity of his testimony.

As Vega's fall from leadership appeared imminent, law enforcement and Moriel apparently wanted to build a relationship with another member of the Mexican Mafia named Tommie Rodriguez (known as "Fox"), who was more closely associated with the rival Ojeda faction. It appears that the OCSD quickly moved Rodriguez near Moriel after his return from state prison. On January 3, 2010, Moriel was relocated to Mod L, Sector 20. (Exhibit O, p. 1840.) When Rodriguez arrived two days later, he too was housed in Mod L, Section 20. (Exhibit O, pp. 1838, 1839.) On January 20, 2010, Rodriguez told Moriel that Moreno would no longer be able to control territory in Orange County. (Exhibit O, p. 2279.)

Playing both sides, Moriel described a letter that he wrote to Armando Moreno in

which he said that the way "Downer" is running the jail is "all fucked up" and that Moriel will not support him because of "Downer's" "lying" and "manipulation." (Exhibit O, p. 2282.) On January 29, 2010, Moriel wrote the following:

> I came back to the tank and told all of the camaradas how [Vega] put me in a cross to make himself look good. And that we are going spread word about him thru-out the county jail of him being a scandalous 2 faced… Also, that I got at Mando myself to let him know that I'm here for him (Mando) but that Downer is a lying, manipulating, greedy dude who is not for the team. Just out for himself…I told him that me and the fellas in L-20 are not here for him and that when he fails. He is going to fall alone. I told him that I've been thru this with him many times and that I'm done playing games with him….

(Exhibit O, p. 2300.)

These notes and the conduct they memorialized were unquestionably relevant to a potential assessment of Moriel's credibility at a *Massiah* hearing and jury trial, as the notes reflect ill will toward Vega and a character trait of duplicity. If he was feigning anger and disgust, Moriel's writing demonstrates his ability to convincingly show false indignation, a trait also relevant to a credibility determination. Furthermore, these writings entirely undermine Petersen's presentation of Moriel as a listening post, and thus discovery was mandated for that reason as well.

Whether or not Moriel was being sincere in his description of Vega, the conduct of Moriel and his partners in law enforcement amounted to stunning acts of moral turpitude. They had provided a killer, "Moreno," and his loyalists with reasons to assault, if not kill, Vega. By giving Moriel the opportunity to broadcast scathing attacks against Vega and other inmates, law enforcement had joined a conspiracy to place Vega in danger. Special Handling was certainly screening Moriel's outgoing mail, and would not have permitted his letter condemning Vega to be sent to Moreno unless this is precisely what they wanted. (Exhibit O, pp. 2285-2289.) **Special Handling's complicity in this effort is further evidence of an out of control informant program, wielding dangerous power without a moral compass.**

The Trial of *People v. Vega*

Vega's Counsel Identifies Possible *Brady* Violation Relevant to *Massiah*

On November 29, 2010, Vega filed a Discovery Motion. (Defendant's Motion for Discovery with attached supporting Declaration and Points and Authorities, filed Nov. 29, 2010, *People v. Vega* (Super. Ct. Orange County, 2010, No. 07CF2786), attached herein as Exhibit TTT.)

The discovery requests by Vega included the following:

1) "All favorable evidence must be disclosed to the defense. Evidence is favorable and must be disclosed if it will help the defendant or hurt the prosecution. *People v. Coddington*, (2001) 23 Cal.4th 529, 589-590; *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215." (Exhibit TTT, p. 1.)
2) "A prosecutor must make effort to find out impeaching information in possession of other agencies and can't turn a blind eye to what others know about the informant. *Giglio v. United States*, (1972) 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104." (Exhibit TTT, p. 1.)
3) "Cooperation between the state and federal agencies does not insulate the state prosecutor from obtaining and discovering from the federal agencies *Brady* material for the state trial. *United States v. Antone*, (5th Cir. 1979) 603 F.2d 566, 570. There is no ostrich defense to *Brady* obligations. *United States v. Burnside et al.*, (N.D. Ill, 1993) 824 F. Supp. 1215. Prosecutors can't turn a blind eye by not thoroughly investigating whether their witnesses are telling the truth. *Commonwealth of Northern Marianna Islands v. Bowie*, (4th Cir. 2001) 236 F.3d 1083." (Exhibit TTT, p. 2.)
4) "Impeaching information pertaining to a police informant who testified against the defendant and denied his extensive informant role must be disclosed. *In re Pratt,* (1999) 69 Cal.App.4th 1294." (Exhibit TTT, p. 2.)
5) "Due process requires disclosure of any reports containing evidence that

undermines the credibility or probative value of prosecution witnesses. *United States v. Strifler*, (9th Cir. 1988) 851 F.2d 1197; *Davis v. Alaska*, (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347." (Exhibit TTT, p. 3.)

Harley's declaration filed in support of the motion and statements to the court confirmed that he had just received four pages of Moriel's notes. (Exhibit TTT, p. 1; Exhibit HH, pp. 23:13-22.) He also stated the following:

> I am informed and believe that Oscar Moriel is a snitch on numerous other Delhi gang members and that the federal authorities are using his statements and testimony in federal court. This means that he is providing a lot more information to law enforcement and is working lots of other cases in hopes of getting favorable treatment in his current case. . . .

(Exhibit TTT, p. 2.)

Any potential claim that Petersen was uncertain about his legal and ethical responsibilities, or that he was unclear about what Vega was seeking in terms of discovery, disappeared with his receipt of this motion. Petersen was the prosecutor assigned to other Delhi gang crimes arising from Moriel's assistance. He was in possession of Moriel's notes describing confessions to more than two dozen crimes, and statements relevant to the Black Flag prosecutions. Nonetheless, Petersen successfully created the false impression that he did not know or have access to this information.

Harley stated:

> Even though **the prosecutor does not know very much about the benefits that Moriel is getting from the state and federal government in exchange for his cooperation**, based on my experience in dealing with snitch cases, the *Brady* and *Giglio* material I have received so far does not satisfy due process.

(Exhibit TTT, p. 2, emphasis added)

Harley's statement also confirms that Petersen had decided, in advance of the disclosure of Moriel as a witness, to deceive Harley about the nature and scope of Moriel's informant history and the benefits he would receive. **In reality, Petersen was the only prosecutor who fully understood Moriel's role in the state and federal cases and its impact on Moriel's sentence**. Petersen possessed all of the notes pertaining to Moriel's

work on local and federal Black Flag cases, as revealed via the discovery in *People v. Inmate E.*, and was building criminal cases against five Delhi members for murder. Furthermore, Moriel has only been charged in the Orange County Superior Court and the prosecutor in his case is Petersen. Therefore, Petersen is the **only** prosecutor who could provide a benefit to Moriel for his cooperation on OCDA and federal cases.

In advance of Moriel's testimony, Harley asked to be heard. Harley reiterated that he had only very recently learned that Moriel was a witness. Harley stated that on November 4, 2010, the prosecution discovered to Harley a four-page letter written by Moriel to Special Handling Deputy Ben Garcia, in which Moriel described Vega's confession to the charged crime. (Exhibit HH, p. 23:13-22.) As discussed above, that letter, dated August 1, 2009, described Vega's alleged confession to Moriel. (Exhibit HH, p. 23:13-22.) Harley said that he was "concerned enough that I filed a discovery motion with the court, but at the time I answered ready, it was represented to me that I would have the opportunity to go down and talk to this individual, Oscar Moriel." (Exhibit HH, pp. 23:24-24:2.) Harley said that before he interviewed Moriel, he learned that Moriel " . . . is in Federal witness protection because there's a big R.I.C.O. investigation going on." (Exhibit HH, p. 24:8-11.) Harley said that he was " . . . absolutely convinced that there are a lot of conversations going on between Mr. Moriel and his federal handlers in connection with that case that has specific relevancy to his informing on Delhi people, which I have no clue about." (Exhibit HH, p. 24:17-21.) He added that, "It sounds to me that Delhi is going to be the quote, 'corrupt organization' to support the 18 U.S.C. 1961, 1962 prosecution." (Exhibit HH, p. 25:12-14.)

Harley said that when he was given the opportunity to interview Moriel, " . . . I was strictly limited by Detective Rondou on the issues about just my client, couldn't go anywhere else, even though I'm on another special circs homicide case where I understand he is the informant who is identifying the client in that case . . . it's the Elizarraraz case. . . . But there is a confession in the jail on that particular case. And who knows how many

other jailhouse confessions this guy is involved with?" (Exhibit HH, p. 26:9 -18.)

Harley emphasized the importance of receiving additional details of Moriel's work as an informant in order to facilitate competent representation:

> So this is the type of information, in order to adequately represent my client, I need to discover, and I have no clue what's out there. Needless to say, I went over and interviewed Mr. Moriel under these circumstances, and I was just limited to that one issue about the dealings with my client. So I really have gotten nothing as far as what I know exists as far as the information he has against other people . . .

(Exhibit HH, pp. 26:19-27:1.)

Judge Froeberg asked Harley what specifically he was asking to be disclosed. (Exhibit HH, p. 27:8.) Harley responded:

> **I'm asking to be disclosed all the other jailhouse confessions that he allegedly overheard** because, you know, I think it's -- I've been doing this for a while. Every once in a while there is a jailhouse confession that becomes an issue. This guy seems to be a magnet for jailhouse confessions. I know of at least two, and I'm just one single defense attorney. I'm sure there's probably more jailhouse confessions out there that he was privy to and he is prepared to come to court and testify about. It just defies common sense at some point in time for him to be coming to court and saying, "well, four or five or six people just happened to confess with me." Then there's a concern I have – I know there's an ongoing relationship just based on the little -- the trivial amount of information I was able to glean during this interview I had last Friday with this individual, because he's feeding this information to a special handling deputy, Ben Garcia, a deputy in Orange County and evidently his point of contact to the federal authorities, I think. I don't know. But if this guy is extracting information as an agent of the federal authorities, I think I might have some constitutional issues as a competent defense attorney to raise because – the court's aware of the law. **You can't send somebody down there who is an agent of the government extracting confessions from people who are represented by counsel. So there are some sixth amendment issues involved or potentially, but I have no clue if they are at this point in time.** Right now I feel I have an inadequate amount of information on what this guy has said to other people and what he plans on saying in the immediate future to adequately bring to the jury's attention all those relevant inquiries that would have a direct impact on whether they should believe him or not.

(Exhibit HH, pp. 27: 9-28:16, emphasis added.)

As indicated above, Harley knew that Moriel had given information solely on two

Orange County prosecutions: *People v. Vega* and *People v. Elizarraraz*. However, Harley also voiced his concerns that Moriel had engaged in other informant work, and that there may be evidence that the contact between Moriel and other inmates was engineered by law enforcement. The court turned to Petersen to clarify:

> Thank you, your Honor. To assume that Oscar Moriel is the linchpin of this large R.I.C.O. case, if it is, in fact, a large R.I.C.O. case, is pure speculation on Mr. Harley's part. To assume that the Delhi criminal street gang is the target of this R.I.C.O. case is pure speculation on Mr. Harley's part. Mr. Moriel has no pending cases in the Federal jurisdiction. His only open case is a state case which I am handling. As far as we are aware both through conversation with other Santa Ana detectives as well as the assistant U.S. attorney, Terri Flynn, Oscar Moriel has not given any testimony concerning bragging by other gang members or testimony regarding a R.I.C.O. case. In this case, the defendant's lie detector test results were turned over, his prior criminal history was turned over to Mr. Harley, and Mr. Harley was allowed to interview him regarding his prior testimony as well as Oscar Moriel's conversation with his client. With that, the people would submit.

(Exhibit HH, pp. 28:18-29:11.)

Petersen knew that if he directly addressed issues raised by Harley—acknowledging 500 pages of informant notes, dozens of other confessions and, most significantly, the "Dis-iso" scam—Moriel would be prohibited from testifying, per *Massiah*. So Petersen filled his answer with words that never answered the essential issue raised: whether Moriel had been an informant in other investigations. Petersen knew as he was responding that Moriel had provided information related to dozens of inmates, including Delhi members such as Inmate I. and Alvaro Sanchez.

In addition to his failure to comply with *Brady* obligations, Petersen's response included the following misconduct:

1) Presenting opposing counsel in a negative light before the court by suggesting Harley engaged in irresponsible speculation was deplorable. Petersen knew that Harley's instincts regarding Moriel made sense and any inaccuracies were due entirely to Peterson's concealment and deception. Petersen's ability to muster false indignation by attacking Harley's "speculation" that the Delhi gang was

the target of a federal investigation was outrageous, considering that Petersen was purposefully hiding the fact that the OCDA and the SAPD were targeting Delhi through their coordinated efforts with Moriel. If Petersen wished to hide the Black Flag and Operation Smokin' Aces investigations until charges would be filed, he had the option of addressing these issues in camera and asking the court to rule on what discovery was legally mandated. Of course, Petersen had no interest in asking the court to review Moriel's notes. He recognized that this process would expose that Vega's statements were obtained in violation of *Massiah* and that the prosecution had committed misconduct.

2) Petersen attempted to mislead Harley and the court by emphasizing that Moriel had not given any **testimony** about the confessions of other gang members or **testimony** regarding a RICO case. His goal was to focus the court on the fact that Moriel had not previously testified. However, this was a smokescreen. Petersen fully understood that Harley was seeking any evidence of admissions or confessions he had received, regardless of whether Moriel had testified about them or whether the information pertained to RICO or state prosecutions.
3) Petersen's insinuation that he was being transparent by allowing Harley to question Moriel "regarding his prior testimony as well as Oscar Moriel's conversation with his client" was misleading. His not-so-gracious offer meant that Harley could only question Moriel about what he had learned from Vega relating to the case that was about to begin trial.[29] This response furthered Petersen's goal of leaving Harley in the dark about activities that would have illuminated Moriel's informant history and led to requests for additional discovery that may have revealed the prosecution team's cover up.

[29] In *People v. Dekraai*, Wagner also offered the defense the opportunity to interview Inmate F. prior to the discovery order. However, the offer went cold until September of 2013, when Wagner said he was ready to set up an interview. When Inmate F. appeared at the OCDA's office in November of 2013, he refused to answer any questions.

Petersen's response was apparently acceptable to the court, as it then moved on to a request by Petersen.

Petersen Hides His Deception, Exploits Harley's Trust and Unintentionally Acknowledges Discovery Violations

The court knew that Petersen wanted to stop Harley from doing something, but was unclear about exactly what it was.

> The court: What evidence or what inquiry are the People trying to exclude?
> Mr. Petersen: Pursuant to his discovery request, your Honor?
> The court: You mentioned in chambers that you didn't want something mentioned.
> Mr. Petersen: Any questions regarding the federal R.I.C.O. case I find to be irrelevant. The fact is he has not given any testimony. He may never give testimony, so I don't think it's relevant at this time.
> Mr. Harley: Your Honor, that's not the touchstone for the decision as to whether this is *Brady* material. If he's got information that he shared with any Federal handling officer, I think that type of stuff has to be disclosed. In my opinion, his working for the federal government is on cases involving Mr. Vega, and I'm sure he's told the federal authorities about Mr. Vega, given his alleged position in the Delhi gang, about the confession. He's already told the state authorities about the alleged confession of Mr. Elizarraraz, who is another special circ client of mine, who supposedly made a jailhouse confession to him. And that's just the tip of the iceberg as far as I'm concerned. Me, just one little defense attorney, has information of two jailhouse confessions. You know, there's got to be a heck of a lot more. I'm concerned this is just the tip of the iceberg of potential *Giglio* and *Brady* material, not to mention material that should be disclosed pursuant to 1054. **I realize there's difficulty Mr. Petersen has because you're talking about the Federal government, and they can pretty much stonewall us**, but that is not an issue I have. My issue is making sure I can do the best job I can and do the best job of cross-examining Mr. Moriel, based on the information which I have a strong suspicion, based on my work in State court and also my work in Federal court, that there's stuff out there I know exists. It's just if you ask me what it is, your Honor, I can't give it to you, because I can't get it. The Federal government won't give it to me.

(Exhibit HH, pp. 29:12-30:23, emphasis added.)

Petersen responded: "I have no objection to Mr. Harley cross-examining Mr. Moriel as to his conversations with Sergio Elizarraraz. Mr. Elizarraraz is also a Delhi gang

member who bragged about a murder he committed. That's fine. I think it's **highly relevant**, and I have no objection that." (Exhibit HH, pp. 30:24-31:3, emphasis added.)

Harley correctly took issue with Petersen's stated position that disclosure of informant discovery hinged on whether it culminated in actual testimony. However, Harley incorrectly believed that Petersen's articulated position was simply an inaccurate analysis of the law, rather than an act of bad faith. Moriel's informant work on other cases would, of course, have been relevant to whether Moriel had questioned Vega at the direction of the government with the expectation of receiving a benefit, thereby potentially providing grounds for a *Massiah* violation. His other informant work would have also been significant to other issues including credibility, his close relationship with law enforcement, and his motive to reduce his sentence. The other informant work was relevant to these issues, regardless of whether the admissions and confessions were precipitated by a "Dis-iso" scam or simply a cell transfer designed to place the two in close proximity.

Obviously, Petersen realized all of the reasons that the suppressed evidence was critical to the case and why he had to do just about anything to keep the discovery from reaching Harley. He also recognized that if Harley were able to question Moriel about his vast work as an informant, Moriel could potentially give responses that would reveal the government's deception, with tremendous consequences to the case and Petersen's career.

The dialogue above is a painful example of a prosecutor determined to exploit his opponent's trust. Harley clearly believed that he and Petersen were being equally "stonewall[ed]" by the federal government. Nothing could be further from the truth. **Petersen and his team were in possession of everything that Harley was requesting.** The local and federal Black Flag investigations were based upon investigation by the OCSD. Everything that Moriel had written was given to OCSD handlers, who then distributed copies to local law enforcement agencies and the federal authorities; namely the SAPD, the FBI, and the U.S. Attorney's Office. Decisions were then made about whether

prosecutions were to be undertaken locally or federally. None of the information requested was possessed exclusively by federal authorities. Petersen himself would ultimately prosecute three Delhi members for murder and 23 other inmates for violent acts committed in the county jails at the Mexican Mafia's direction.

In sum, Petersen fully took advantage of Harley's trust. The federal government was not denying Petersen access to materials. It was Petersen who was denying access to the defense by allowing his trusting opponent to believe that he would have turned over the materials if he had them.

It should also be emphasized that Petersen made a critical concession with regard to his discovery obligations. Petersen agreed that Harley should be able to cross-examine Moriel about Elizarraraz's alleged confession, describing it as "highly relevant." This was a calculated decision. Petersen's conciliatory tone made him seem reasonable, which dispelled suspicion that he was hiding something. But Petersen's recognition that Elizarraraz's contact with Moriel was "highly relevant" actually proves that he was **knowingly** committing discovery violations. If Moriel's informant efforts with Elizarraraz were relevant to Moriel's case, Moriel's other informant work was also equally and "highly relevant." The relevance of other cases in which Moriel obtained confessions certainly did not hinge upon whether the same counsel represented the other defendants. Petersen fully understood that he was violating his legal and ethical obligations.

Petersen also knew that there were considerable risks for Harley, in cross-examining Moriel about Elizarraraz's confession in Vega's trial. He was still in the dark about the substance of the conversations between Elizarraraz and Moriel. As will be discussed in the section addressing *People v. Rodriguez*, at the time of Vega's trial, Petersen had still not turned over Moriel's notes documenting his conversations with Elizarraraz. [30] Petersen was

[30] Petersen delayed discovery of Moriel's notes in that case until after the preliminary hearing that took place in early 2011, even though the notes memorialized numerous discussions and admissions of multiple homicides and serious crimes.

deliberately hiding that information at the time of the Vega trial because of concerns that it would reveal the extensive nature of Moriel's informant work.

At the time of trial in *People v. Vega*, Harley had only received a police report memorializing an interview with Detectives Rondou and McLeod regarding Elizarraraz's charged homicide. (RT (trial), Feb. 8, 9, 14 and 15, 2012, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit UUU, pp. 9:13-19; 56:4-7.) The report, written by Detective McLeod, apparently suggested that Elizarraraz was just another talkative Delhi gang member; there was no reference to the fact that the OCSD and the SAPD actually brought Moriel and Elizarraraz together so that Moriel could gather information about Delhi crimes. (Exhibit UUU, pp. 9:13-19, 56:4-7.) Clearly, evidence that Elizarraraz's confession had been preceded by coordinated jail movements was highly relevant to a potential *Massiah* motion in *People v. Vega* because it would refute the prosecution's false portrayal of Moriel as simply a lucky listening post.

It goes without saying that the prosecution was required to disclose to Vega evidence of law enforcement's directed efforts to have Moriel elicit confessions from any and all targeted inmates. Therefore, Petersen's false graciousness in "agreeing" that Harley could cross-examine Moriel about Elizarraraz's confession was a trap. Petersen was more than happy to watch Harley cross-examine Moriel on this subject with both arms tied behind his back. He knew that Harley would be taking an enormous risk by questioning on this subject matter, as jurors would probably view Elizarraraz's statements as more evidence of the Delhi gang's violence and the willingness of its members to talk about their crimes. Harley ultimately decided to take that risk.

Petersen Willfully Violates Court's Ruling on Discovery as Harley Reiterates His Trust in Petersen

The pre-trial discussion turned to the parameters of Moriel's trial testimony. The following dialogue took place:

> The Court: I'm just asking what it is you're attempting to elicit, because it does have a bearing on the scope of cross-examination. It seems to me that the fact that he is in Federal custody is relevant. That goes to his bias, interest, or motive. **I think it's certainly relevant to determine how many jailhouse confessions he's allegedly been a party to**. I'm not sure, other than that, what relevance the material would have. Certainly taking a polygraph test is inadmissible.

(Exhibit HH, p. 31:11-20, emphasis added.)

As Harley continued to express his concern that he was in the dark about Moriel's relationship with what he incorrectly perceived was primarily federal authorities, the court further clarified its position.

> The Court: Here's the deal: the People have a *Brady* obligation to disclose anything that's exculpatory. If they're not going to use that evidence, that would be the rule. If they are going to use it, then they have to disclose it. If it's merely inculpatory, whatever it is, there's no obligation to disclose it. **So I'm assuming Mr. Petersen is going to comply with *Brady* and will disclose anything that's exculpatory to your client**.
>
> Mr. Harley: Your Honor, I hear that, and I'm sure Mr. Petersen would. **My concern is Terri Flynn, the A.U.S.A. across the street, I'm sure is not sharing the information, all the information going on with Mr. Moriel with Mr. Petersen. That's my concern. I've known that in the past, and I'm sure she is not giving him all the information** based on –

(Exhibit HH, pp. 33:14-34:2, emphasis added.)

> ---
>
> Mr. Harley: Okay. I hear that. **My only answer to that is if he can't get this exculpatory information because the federal authorities are not giving it to him, he is not in a position to reveal the exculpatory information. Also, over and above that, he's unable to comply. I'm not saying he's doing it on his own. I'm just saying he's prevented from doing it because of the federal authorities**.

(Exhibit HH, p. 34:6-13, emphasis added.)

It seemed that Petersen was finally left with no choice. The court reminded him of his *Brady* obligation, and specifically stated that Vega was entitled to know the number of times Moriel had obtained confessions from other informants. But the court and Harley had made a terrible assumption that Petersen would follow his ethical and legal obligations, even where to do so could damage his case, his reputation, and the future of the custodial

informant program. The truth, though, as would become increasingly clear, is that the prosecution teams discussed in this motion were unmotivated by legal or ethical obligations. Petersen responded with silence, exploiting the unwavering trust that both the court and his opposing counsel placed in him.

Testimony in *Vega* Begins

Clues Emerge of a Conspiracy Between Vega Prosecution Team and Moriel to Mislead the Jury

With Moriel on the witness stand, Petersen needed to offer a reasonable explanation why Vega and Moriel happened to come together in a jail of thousands. Moriel testified that he had never crossed paths with Vega when he was out of custody. (Exhibit HH, p. 99:1-3.) The questioning continued as follows:

> Q: When did you first meet up with Downer while in custody?
> A: I believe it was sometime in June, 2008 I want to say. '8 or '9, I can' t remember.
> Q: How did that take place?
> A: I went to the hole.
> Q: Can you tell us what the hole is?
> A: Uh, it's disciplinary isolation. It's a single man cell, no windows, just a bed and toilet and sink. You can't see outside or anything.
> Q: How long were you in the hole for?
> A: I think that time I was there for two weeks.
> Q: Was Downer in the hole also? (Exhibit HH, pp. 103:24-104:10.)
> …
> The witness: Yes. Downer was my neighbor.
> Q by Mr. Petersen: When you say "neighbor," what do you mean by that?
> A: He was right next to me.
> Q: Is it possible to communicate with individuals in the cell next to you while you're in the hole?
> A: Yes
> Q: Can you tell us how that's done?
> A: Um, usually you could yell out the door or something, and you could hear your neighbor, and everybody can hear you that way, but if -- if you want to talk in secret or whatever, you -- you empty out the water in the toilet, and you could speak through the drain or the sink.
> Q: And you told us that you never known Downer out on the street; Is that correct?

A: That's correct.
Q: Had you heard of Downer?
A: Yes. (Exhibit HH, pp. 104:13-105:4.)
…
Q by Mr. Petersen: You'd heard of him?
A: Yes.
Q: Knew he was a Delhi gang member?
A: Yes
Q: First time you met up was while you were in the hole?
A: Yes
Q: How long were you guys in there together?
A: I was there for two weeks. I think he stayed there . . . two weeks
Q by Mr. Petersen: In those two weeks, did you guys
talk?
A: Yes.
Q: Talk about anything and everything?
A: Yes.
Q: I know this is an understatement, but there's not much else to do other than talk, is that fair to say?
A: It's fair to say, yes.
Q: Spend hours at a time in conversation with Downer?
A: Yes.
Q: When is the next -- after you got out of the hole or after Downer got out of the hole, when is the next time you guys met up or were able to communicate?
A: It was about a month and a half after I got -- I got moved to a tank straight from the hole, and he came about a month and a half after, two months maybe.
Q: You heard the term High Power?
A: Yes.
Q: What does high power mean to you?
Mr. Harley: Objection; 352, 210. Evidence Code 352, 210 and Due Process.
The Court: Overruled.
The Witness: High power -- it's a term used for inmates that are associated with either the Mexican Mafia --
Mr. Harley: Objection; 352, Motion to Strike.
The Court: See counsel at sidebar.
(THE FOLLOWING PROCEEDINGS WERE HAD AT THE SIDEBAR OUT OF THE PRESENCE OF THE JURORS)
Mr. Petersen: I'm not going to ask whether Leonel Vega is high power. I'm going to ask whether he's [Moriel's] high power.
Mr. Harley: I have no objection if he's high power, but my concern is –

where I'm going, your honor –
The Court: I thought we talked about we weren't going to do incidents while he was in the jail.
Mr. Petersen: We're not. (Exhibit HH, pp. 105:8-107:10.)
…
Mr. Harley: My concern is we've already established that Mr. Vega was in the hole for a longer period of time than this witness. That is bad – it is certainly suggestive of bad behavior inside the jailhouse walls, that's why I'm objecting 352, due process. I think it's just inadmissible character evidence at this point in time and then especially he referenced to the Mexican Mafia. . . .
The Court: Once again, it's a 352 analysis. It's otherwise irrelevant, but it's probative to establish a relationship between the two. There hasn't been any indication as to why he was there, just that he was there. On that analysis, that's why I overruled the objection. (Exhibit HH, p. 107:13-26.)
…
Mr. Petersen: For the record, I elicited that testimony to prove up a relationship.
The court: I think that's what it's relevant for, to explain why Mr. Vega would talk to Mr. Moriel under those circumstances.
(Exhibit HH, p. 108:8-12.)
…
Q: What does High Power mean to you?
A: High Power means an inmate who's got affiliations or associations with prison gangs like the Mexican Mafia, Aryan Brotherhood or a person who has a lot of violence on his record. The -- the cops got to put 'em in High Power.
Q: I'm only talking about you now, Oscar. While in Orange County Jail, were you High Power?
A: Yes.
Q: Does that mean you have certain restrictions on your movement while in custody?
A: Yes.
Q: Is a High Power inmate someone who is respected by other gang members in custody?
A: Yes.
Q: Is it a badge of honor?
A: Yes. (Exhibit HH, pp. 108:22-109:12.)

Petersen's questioning about the two inmates' disciplinary isolation housing and other aspects of their communication was stunning. Petersen knew that the "Dis-iso" scam

had caused the two to be housed together. Yet he allowed the jury, the court, and counsel to falsely infer that they were coincidentally housed in nearby cells because of actual disciplinary violations.

What makes Petersen's actions especially egregious is that in order to present this misleading version of events, Petersen had to prepare Moriel in advance to ensure that Moriel did not tell the truth about how he found himself in isolation. Moriel knew that he had not committed a violation that resulted in him being placed in disciplinary isolation. But how could he have known that the prosecution wanted him to lie about this particular point without Petersen's instruction? **Petersen suborned perjury by directing him to hide the truth about the government's efforts to place the two in close proximity where Moriel could elicit incriminating statements.**

Moriel knew exactly how Petersen wanted to falsely present the initial contact between Vega and Moriel to make their relationship appear coincidental and their constant conversations motivated solely from an abundance of time, with little else to do but talk. Moriel was careful not to let it slip that he was getting information from Vega and sharing it with Special Handling from nearly the first moment of their contact. Deputy Garcia wrote a report that was provided to SAPD and Petersen, which stated that Garcia started collecting notes from Moriel on July 6, 2009. (Exhibit O, p. 2012.) In a summary of those notes, Garcia described letters detailing Vega's statements to Moriel beginning on July 1, 2009. (Exhibit O, p. 2012.) Tunstall's report indicated that Moriel entered disciplinary isolation on June 30, 2009 and was placed back in general housing on July 14, 2009. (Exhibit O, p. 1646.) During that brief time period, Moriel wrote 11 pages of notes that appeared to comprehensively document what Vega said about the Mexican Mafia, issues between gangs, and gang related crimes. These notes are found in *People v. Inmate E*. (Exhibit O, pp. 2013-2019, 2061-2062, 2064-2065.)

Petersen also encouraged Moriel to fabricate testimony to explain why Vega would confess to an individual he had met just a few weeks earlier. Completely unrestrained by

ethical obligations, Petersen chose to characterize Moriel as a "high power inmate" who was widely respected by his fellow inmates because of his Mexican Mafia connection. Nothing could be further from the truth. However, the explanation worked perfectly because Petersen had suppressed the 11 pages of notes referenced above, as well as dozens of others. Those writings revealed how Moriel was truly perceived in the jail, beginning with the very first set of informant notes turned over to Garcia: Moriel wrote that Vega said that he would try to help Moriel regain his good standing with the Mexican Mafia, as he was distrusted because of his protective custody status. (Exhibit O, pp. 2016 -2017.)

Law enforcement worked with Moriel to assist in this effort by providing evidence of (fake) rules violations to help convince the Mexican Mafia that Moriel could again be a trusted member of the organization. (Exhibit O, pp. 2064-2065, 2070-2071.) The subsequently filed RICO indictment also confirms the timing of a pay off that Moriel was required to make before he could have his standing restored. Overt Act No. 53 of the indictment in *United States v. Ojeda* stated the following:

> On or about **July 11, 2009**, an unindicated co-conspirator informed CI#2 that if CI#2 paid MORENO $1500[31] through defendant MURILLO, defendant MORENO would take CI#2's name off the "Hard Candy" list, a list CI#2 was placed on because it was believed CI#2 was cooperating with law enforcement.

(Exhibit OOO, p. 20, emphasis added.)

"CI#2" is Moriel. "Hard candy" list is a list of inmates to be killed on sight by order of the Mexican Mafia. The indictment and Moriel's notes confirm that Moriel was anything but a "high power" member with the Mexican Mafia when he first met Vega ten days earlier and began eliciting statements. The indictment corroborates that Moriel was perceived to be an informant, "cooperating with law enforcement." It also reveals a significant fact that is not mentioned in any notes or reports provided to any local

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[31] Interestingly, the discovery provided pursuant to this Court's order fails to reveal the use of an undercover officer to deliver the $1,500. This further confirms that additional reports and other information on this subject exist and were hidden from defendants in at least those Black Flag cases prosecuted locally.

defendant. When Vega and Moriel met and until the point that he was "cleared," Moriel was actually on the "hard candy" list. In Inmate F.'s proffer with members of law enforcement on January 19, 2011, he confirmed that once an inmate is placed on the "hard candy" list, other inmates are expected to try to kill the targeted individual on sight. (Exhibit DD, p. 5.)

Significantly, other concealed notes confirm that Moriel was not cleared by the Mexican Mafia until at least **one month after** Moriel elicited the August 1 confession from Vega. In a noted dated "9-9-09" Moriel described learning the following on that date:

> Precious [Vega's girlfriend, Murillo] got a response back from his tio (Mando) saying that it's all good and that he trust his judgement [*sic*] I can hear him explain to Precious that she needs to go and see (visit) my primo Travieso (Richard Gaona) at the Theo Lacy and show him my paperwork along with the stamp of approval letter from Mando so that he can see with his own eyes that I've been cleared by a Pili (Big homie or ccan in Nahuatl) And from there have him get at the mesa and the rest of the homies to tell them Scar from Delhi is now cleared….

(Exhibit O, p. 2105.)

After Vega personally told Moriel that he had been cleared, Moriel wrote "…I still tell him [Moriel] I can't believe it. I can't believe he pulled if of [*sic*] and thanking him." (Exhibit O, p. 2106.) His words were far from heartfelt, though he may have legitimately been in disbelief about what he and his partners in law enforcement had accomplished. The "Dis-iso" scam, the use of fraudulent paperwork, and Moriel's skills at ingratiation had enabled the informant to be received back into the Mexican Mafia's good graces. Moriel undoubtedly was thrilled about his restored status, which he would have perceived as greatly increasing his value to the OCDA and local law enforcement.

Even by Petersen's own standards of professional responsibility, his concealment and deception were shocking. As he spoke with court and counsel, he was actively hiding the evidence from Vega's counsel that would show the truth about Moriel's standing with the Mexican Mafia when Vega first met him and a short time later, when he purportedly confessed to him. Petersen knew very well that Moriel was seen as a "snitch" during this

time period in issue and was thus within a group of perhaps the least respected and trusted inmates in the jail system. He was as far from "high power" as any inmate in the jail at the time of the confession, having been placed on the Mexican Mafia's "hard candy" list. Yet Petersen convinced the court that he needed to introduce highly prejudicial evidence about the Mexican Mafia under the pretense that it was necessary for jurors to understand why Vega would speak so freely with an inmate he had never met before.

Harley was also concerned that evidence that his client was placed in disciplinary isolation would prejudice jurors, who would logically conclude that Vega's conduct in jail was so bad that he needed to be isolated from other inmates. In contrast, Petersen relished the opportunity to paint Vega as someone who was disreputable both in and out of jail. After all, Petersen had already hid the "Dis-iso" scam and then turned around and introduced Vega's placement in disciplinary isolation to falsely explain the coincidence of him being housed next to Moriel. Petersen apparently thought that he might as well get the additional benefit of having jurors believe Vega was a menace within the jail.

The Questionable Legitimacy of OCSD's Rules Violation Process

The "Dis-iso" scam raises significant likelihood that the OCSD manipulates evidence and "fixes" its adjudication of rules violations to cover up unjustified movements of inmates into disciplinary isolation. Common sense undercuts the notion that these rules violations are legitimate. It is highly unlikely that Vega (and others) committed a rules violation at the exact moment that law enforcement decided to target them. Additionally, it is difficult to believe that Special Handling was patiently checking each day to see if the target finally committed a rules violation that would permit them to lawfully place the target in the disciplinary isolation unit next to Moriel. Finally, and perhaps most importantly, it is impossible to believe that a team that has cheated so much and without reservation was concerned in the slightest about whether people like Vega were legitimately charged with a rules violation.

It obviously did not bother Petersen that the violation placing Vega in disciplinary

isolation was likely exaggerated or fabricated in order to rationalize the movement next to Moriel.[32] Unfortunately, it would have never crossed Harley's mind that the rules violation was unfounded. But, again, Petersen and his team had no interest in enlightening him.

It should be emphasized that the testimony of OCSD Special Handling Deputy Tunstall corroborated that he and his unit were acting in unison with the OCDA and the SAPD, including when engaging in those actions designed to hide the truth about the "Dis-iso" scam. Tunstall testified that for nearly seven months, Moriel and Vega were housed in the same module within the jail. (Exhibit HH, p. 179:13-18.) Tunstall said that he was able to learn this by examining housing records. (Exhibit HH, p. 179:5-18.) Tunstall, who was certainly aware of the "Dis-iso" scam, specifically omitted from his response anything that would have made the jury aware of the truth: Special Handling had fabricated rules violation(s) and manipulated housing locations in order to put Vega and Moriel together during this time period.

There are troubling implications to the OCSD falsifying jail rule violations. For instance, Special Handling recognizes that rule violations become part of an inmate's records, and will be included for consideration by other facilities, such as local jails and state prisons. While the local prosecutorial agencies discussed herein are clearly unconcerned about the implications of a fabricated rule violation on a prison classification analysis, these violations may potentially affect housing conditions for the entire period of an inmate's incarceration. Thus, their willingness to allow false allegations to enter and remain within a defendant's permanent incarceration record is deeply troubling.

The willingness of prosecutors and local law enforcement to perpetuate false or exaggerated accusations confirms a systemic breakdown that imperils anyone accused of wrongdoing in this county. That no one within these agencies has come forward to stop this type of misconduct presents even greater cause for concern.

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[32] Vega and Moriel were moved from the general population into adjoining cells in disciplinary isolation on the very same day. (Exhibit O, pp. 1814, 1839.)

Petersen and Moriel Work As One to Hide Facts Surrounding Confession and Present Suborned Perjury

As discussed previously, Petersen and his team decided to disclose only those notes documenting the confession purportedly received by Vega on August 1, 2009. Petersen never discovered Moriel's note directed to Deputy Garcia written on the **same date** as the note turned over to Harley. The undiscovered note to Garcia referenced, among other things, the following: 1) prior use of the "Dis-iso" scam against Vega and the possibility of ensnaring another inmate in a similar effort (Exhibit O, p. 2075); 2) Moriel's description of Vega being "…very comfortable here. No suspicions whatsoever. . ." (Exhibit O, p. 2074); 3) Moriel's request to have the sink fixed so that he could better hear conversations (Exhibit O, p. 2074); and 4) Moriel and Vega's discussions about Mexican Mafia issues. (Exhibit O, p. 2074.)

Questions and answers during the trial demonstrate that the prosecution team was working in concert with Moriel to continue the concealment. Petersen questioned Moriel about his notes:

Q: How do you recognize the writing?
A: I wrote it.
Q: Did you look at all the pages?
A: Yes.
Q: That is your writing?
Q: Yes.
A: **And that appears to reflect the complete writing as of the date at the top?**
A: Yes.
Q: You dated this letter, People's 29; Is that correct?
A: Yes.
Q: At the top left hand August 1st, 2009?
A: Yeah, that's correct. (Exhibit HH, pp. 111:12-111:26, emphasis added.)

///
///

Petersen continued:

Q: What is contained in this letter?

A: Uh, the conversation that we had while Vega was at my door, Downer was at my door, and I was inside my cell during his dayroom.

A: You had a conversation with Downer, then afterwards you wrote this letter, People's 29, to memorialize the conversation that you had with Downer, is that correct?

A: Yes.

…

Q: And just briefly, how long would you estimate the conversation between yourself and Downer was?

A: How long?

Q: How long?

A: It was about an hour.

Q: How long is a person's dayroom privileges?

A: Depending on which deputy's working, it's an hour a day, but a lot of other deputies give two hours, two-and-a-half.

Q: After your hour-long conversation, did you immediately put pen to paper and begin to write this letter, People's 29?

A: Yeah. About a minute after.

Q: If you recall, do you know how long it took you to complete this letter in People's 29?

A: Probably about 45 minutes.

Q: And **did you attempt to write down everything that you remembered from your conversation with Downer?**

A: **Yes.**

(Exhibit HH, pp. 112:1-112:7, 112:18-113:10, emphasis added.)

Petersen had suborned perjury. Petersen knew that the letter discussed before the jury and discovered to Harley did not memorialize the **entire** conversation at the dayroom door on August 1, 2009. There are two letters dated August 1, 2009—only one of which was discovered to the defense. The headings at the top of the two letters demonstrate that Moriel intended for Detective Flynn to receive the letter describing what Vega said in the dayroom about the murder. Deputy Garcia was to receive the information obtained in the dayroom that addressed Mexican Mafia issues, as well as discussions of a "Dis-iso" scam upon Inmate I., and the request for a plumber to clear the lines for better communications. The letter directed specifically to Detective Flynn, containing the confession, was the only letter which was discovered to Vega. Furthermore, the discovered letter, dated "8-1-09"

began, “Today during **Vega’s dayroom** at or around 3 p.m. Vega was at my door and we were conversing about when he goes back to court…” (Exhibit O, p. 2076, emphasis added.) The **hidden** letter addressed to OCSD Deputy Garcia, also dated “8-1-09” has a strikingly similar beginning: “Today During **Vegas Dayroom** he came up to my cell Door and we were talking about his visit…” (Exhibit O, p. 2074, emphasis added.)

An analysis of the two notes on the same date also corroborates that the OCSD and SAPD directed Moriel to separate any confession he was able to obtain about the charged murder from any other statements or observations. This is the only reasonable explanation for the two notes sharing the same date, having nearly identical opening statements, but then including separate named recipients and different contents. The existence of a plan to split the conversations in notes is equally disturbing because it strongly suggests that the plan to manipulate the discovery of evidence existed months before Petersen carried it out in court. The decision of the prosecution team to withhold their notes and reports memorializing this plan and the directions to Moriel on this subject is an additional example of serious misconduct.

Petersen knew that the writings discovered were not complete when he asked Moriel whether the letter “appears to reflect the complete writing as of the date at the top.” (Exhibit HH, p. 111:18-19.) When Moriel answered in the affirmative, Petersen knew he was providing the untruthful and misleading testimony he sought. Petersen also recognized that when Moriel affirmatively answered the question whether he “attempt[ed] to write down everything that [he] remembered from [his] conversation with Downer” within Exhibit 29, that this was false and misleading. (Exhibit HH, p. 113:8-9.) Petersen went beyond the serious legal and ethical violation of withholding significant evidence helpful to the defense. He took the additional step of exploiting his concealment by asking questions in bad faith, as he knew the writings were far from “complete.” These answers were certainly discussed and planned in advance because of the serious consequences of a “wrong” answer. The planning and coordination required for successful deception

amounted to a conspiracy to deceive the court, counsel, and the jury.

Petersen Plays on Harley's Trust While Misleading Court and Counsel

During Harley' cross-examination, he focused on the important issue of Moriel's motivations for working with the government. Petersen emphasized on direct that the prosecution had not promised Moriel anything in return for his testimony. (Exhibit HH, pp. 113:14-114:2.) Harley responded by questioning Moriel about whether he was delaying his own case—already five years old—so that he could complete his testimony in the instant matter. (Exhibit HH, pp. 124:21-126:23.) Moriel agreed that he had "put [his] case behind the time period" when he testified in Vega's case. (Exhibit HH, p. 126:20-23.) He then denied that this was the sole reason for the continuance. (Exhibit HH, pp. 126:24-127:1.)

When Harley pressed Moriel about the reason for the recent continuances and whether it stemmed from the need to complete his testimony in the present matter, Petersen reacted. Fearing that Harley was gaining ground, Petersen objected and asked to approach the court. (Exhibit HH, p. 127:5-8.) Moriel's counsel, who was in attendance, also interposed an objection. (Exhibit HH, p. 127:12-16.) It was Petersen, though, who took control of the situation. He stated the following:

> I'm not even -- setting that totally aside, and I think he might tell you, but the reason this keeps getting continued is because there's an ongoing federal R.I.C.O. case that he's working, so -- I just don't want to get into that. His **sole** motivation for continuing the case is not this case, Rob. He's working on a federal R.I.C.O. case.

(Exhibit HH, p. 127:17-23, emphasis added.)

Petersen had again demonstrated his ability to quickly create a deceptive response to obtain a tactical advantage. Adopting the role of truth teller and trustworthy opponent, Petersen was nothing of the sort. While Moriel likely hoped that federal authorities would put in a good word with Petersen to lessen the sentence, it was highly misleading to suggest that Moriel wanted to continue his own case solely because of his informant work on the federal matter. Local prosecutors, as a rule, do not reach sentence agreements with

their custodial informants until they have completed their services as witnesses. And it was Petersen who would make the decisions about how to prosecute Moriel's only pending case and whether to seek a life sentence.

In fact, the two people who most wanted to delay Moriel's sentence were Petersen and Moriel. Petersen knew that Moriel would be far less beholden to local prosecution teams if he was sentenced prior to completing his testimony in each of the local prosecutions in which he was a key witness—all of which were being prosecuted by Petersen. As discussed by Deputy Gallardo in his interview by Wagner, Orange County's custodial informants are told that their sentence reduction will ultimately be based upon the quantity and quality of their work. (Exhibit EE, pp. 17-18.) Therefore, Moriel knew that there was nothing worse for the informant who lacks a written agreement than terminating cooperation prior to sentencing. More than eight years after being charged and still unsentenced, Moriel still knows his future rests upon delivering everything that Petersen wants.

Moriel, himself, alluded to the predicament of unwritten agreements and blind hope during his testimony in *People v. Camarillo* in 2013.

> . . . I still have an open case. I'm still pretrial. You know there's nothing written in stone. I've seen people in my situation, you know, get fucked, people that where I'm at and other people in my situation, I've seen them do all the testifying they can do and I've seen them get life. So when I, you know, really tell you I don't know is because I don't know. I've seen -- I've seen people who do this and still end up with a life sentence or with 40, 50, 60 years. So I don't know. You know, I could only hope.

(Exhibit MM, p. 584:16-26.)

Of course, it was far easier for Petersen to get away with his deceptive representation to the court because he was hiding the fact that he needed Moriel to testify in at least one other murder case (*People v. Inmate I*.) and likely several other Black Flag cases, once they were charged.

Petersen Blocks Harley From Learning More About Moriel's Informant Work

After addressing Moriel's role in *People v. Rodriguez*, Harley tried to get a better

understanding of the scope of Moriel's informant work. He asked, "What other people have you provided information on to law enforcement? (Exhibit HH, p. 140:13-14.) Petersen objected on relevance grounds. (Exhibit HH, p. 140:15-16.) Likely to Harley's surprise, the court sustained the objection without comment. Nonetheless, Harley did not relent. He asked twice more how many others, in addition to those discussed, did Moriel provide information on to law enforcement. (Exhibit HH, pp. 140:17-20, 141:8-10.) Petersen objected to both questions—to the first question on vagueness grounds and to the second on vagueness and pursuant to Evidence Code section 352. The court sustained the objections. (Exhibit HH, pp. 140:21-22, 141:11-12.) It is unclear why the court did not overrule the objections after its earlier rulings, in which it correctly recognized the relevance of Moriel's other informant work to the proceedings. Perhaps the court felt counsel needed to specifically ask about the number of inmates who had given statements. However, it is most likely that Petersen's misleading and persistent efforts throughout the pretrial and trial proceedings convinced the court that Harley was on a "fishing expedition." The court likely reasoned it was fruitless to permit inquiry in this area because Petersen would have honored the court's earlier reminder to turn over all *Brady* evidence and provide discovery consistent with its finding that it was "relevant to determine how many jailhouse confessions he's allegedly been a party to." One can reasonably read the court's mind: "Enough already Mr. Harley. If there was any more information about this witness' other informant work, Mr. Petersen would have provided it to you."

The Prosecution Team Destroys Credibility of Defense Investigator Through Perjured Testimony

As discussed in the sections specific to the misconduct in *Dekraai*, once legal and ethical barriers are broken, it becomes nearly impossible to know where prosecution teams will stop. In *Vega*, the prosecution team provided an example of their lack of restraint in the quest to win by ruining the credibility of Vega's defense investigator through a

detective's perjured testimony.

Witness Ceballos, who claimed Vega confessed the charged murder to him, testified that he was interviewed in state prison prior to trial by Vega's investigator, Joseph Szeles. (RT (trial), Dec. 6, 2010, *People v. Vega*, (Super. Ct. Orange County, 2010, No. 07CF2786), attached herein as Exhibit VVV, p. 56:12-26.) During the testimony, Ceballos said that the investigator had suggested that he should commit perjury. (Exhibit VVV, pp. 52:5-53:17.) Szeles denied that he encouraged Ceballos to lie at trial. (Exhibit QQ, pp. 7:24-8:9.)

This was a serious allegation by Ceballos that, if believed, could undercut the entire defense case and the credibility of the defense team. Additionally, Szeles admitted that he did not record the interview of Ceballos at the state prison, claiming that the prison had not permitted it. (Exhibit QQ, pp. 14:9-11; 16:18-22.) Petersen, who apparently deplores **defense** misconduct, sensed a cover up, or at least wished to make it appear as such. Perhaps relying upon his own experiences, Petersen believed that any investigator who failed to record a witness interview was hiding something. On cross-examination, Petersen pressed Szeles on his failure to record the interview:

> Q: In fact [tape recording is] the **best and really only way outside of video to take down an accurate depiction of what occurred**, correct?
> …
> A: Correct, if it's permitted by the circumstances.
> Q: For instance, if a witness says that maybe during an interview you said X, Y, and Z, you can simply play the recording to prove that you didn't say X, Y and Z, correct?
> …
> A: Correct, or have the tape transcribed and have the transcription available, yes.

(Exhibit QQ, pp. 10:8-21, 11:4-5, emphasis added.)

Before Szeles left the stand, Petersen asked permission to question Szeles about his refusal to cooperate with the SAPD's investigation of him for possible witness intimidation charges. (Exhibit QQ, p. 31:9-12.) After the court prohibited that line of questioning, Petersen came up with another way to denigrate Szeles and convince the jury he was

dishonorable. (Exhibit QQ, p. 31:13-18.)

He recalled Rondou to the stand. Rondou testified that he also interviewed Ceballos at the prison located in San Luis Obispo. (Exhibit QQ, p. 1186:13-17.) Through Petersen's questioning it was emphasized that Rondou tape-recorded the conversation, in contrast to Szeles. (Exhibit QQ, p. 1186:18-19.) But Rondou went further. He stated that "[e]very interview we have done on this case is under recording." (Exhibit QQ, p. 1186:20-22.)

They continued:

Q. And you record all your interviews?
A. Every one of them.
Q. Why is that?
A. A couple of reasons, if you want me to explain.

(Exhibit QQ, p. 1186:23-26.)

…

The Witness: First and foremost you want to capture everything everybody says, so you are not relying on notes or memory or anything of that nature. What is said is what is said and that can't be changed. Number two, to be frank, I don't like being called a liar. And I have done gang cases for the last 14 years, and it never fails that someone comes in when it comes time to testify and says I didn't say that or I didn't do it, and we have the tape to show that's exactly what was said. So you can't go wrong with a recording, **the truth is the truth**.

(Exhibit QQ, p. 1187:3-13, emphasis added.)

Petersen was not done. He bolstered the credibility of his detective—as compared to Szeles—by eliciting that Rondou not only had a strict procedure for every case, but he was a respected teacher among law enforcement.

Q: Detective, do you teach interviewing?
A: I do.
Q: Where do you teach interviewing?
A: Across the nation with a number of departments. I teach for the international Chiefs of Police Association. I teach D.A.'s how to prosecute homicides, and part of it involves interviewing. And I also teach through the Santa Ana Police Department, a three-day course and a one-day course, which incorporates interviewing and interrogation.

(Exhibit QQ, pp. 1189:23-1190:5.)

Petersen, who was then serving as the President of the Orange County Gang

Investigators Association, must have felt immensely fortunate to have as his "case agent" a detective with such impressive credentials on proper investigation and interviewing practices. (Exhibit QQ, p. 1190:10-14.)

Rondou's testimony almost certainly delivered the intended effect. On the one side was a paid defense investigator whom the prosecution suggested had dissuaded a witness and purposefully failed to tape record a critical interview. On the other side was an experienced gang investigator, who teaches his own department and international police chiefs on appropriate investigative techniques. Furthermore, Rondou **could** declare that his department tape-recorded every interview in the case, and he tape-records every one of his interviews. For jurors, David Rondou was seemingly the ideal officer: unbiased and willing to let the facts dictate outcomes regardless of whether they aided the prosecution or the defense. When Harley—lacking information to impeach Rondou's testimony—elected not to cross-examine, it may have very well been the last dagger in the defense case. (Exhibit QQ, p. 1196:13-14.)

In hindsight, what were the chances that Rondou was actually forthright about the tape recording practices utilized in *Vega* and in the other cases he investigates? While the "truth is the truth," Rondou had spoken little of it. And while Dekraai does not have possession of the discovery provided to Vega, Harley's written discovery motion and his comments during the trial clearly corroborate that the prosecution did not turn over any reports or recordings related to Moriel.

Moriel directed his note containing Vega's confession to Detective Flynn. After receiving it, Flynn and Rondou obviously interviewed Moriel.[33] Why hadn't Rondou's

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[33] At the preliminary hearing in *People v. Inmate I.*, Rondou's testimony corroborated that he participated in the interview of Moriel regarding Leonel Vega. He stated that he worked with Moriel regarding, "These two murders here with [Inmate I.] and two others. I believe a total of four killings. Don't hold me to that number, but I believe it was somewhere around four." (Exhibit JJ, p. 41:16-19.) Rondou testified in *People v. Rodriguez* that he interviewed Moriel regarding the murder in that case. (Exhibit LL, p.

testimony that all of the interviews had been recorded trigger a question about an interview with Moriel? Almost certainly, Harley's failure to catch on was another example of his misplaced faith that Petersen had turned over all of the legally mandated evidence in the prosecution's possession.

Proof of Rondou's perjury—suborned by Petersen—is not limited to the analysis above. At the time of Rondou's testimony in Vega's case, the prosecution had completed its investigation in two other cases in which Moriel claimed Delhi members gave confessions: *People v. Rodriguez* and *People v. Inmate I*. In each of the cases, Rondou participated in the interviews conducted with Moriel. **As will be discussed in detail herein, neither Rondou nor his partner recorded their interviews with Moriel on either case**, **unless they falsely testified that they did not record and then hid them.**

During the testimony of Rondou and Detective Matthew McLeod in *People v. Rodriguez*, both stated that they did not record two interviews with Moriel, and offered a desperate and unbelievable explanation of how each thought the other brought the recorder. (Exhibit LL, pp. 58:12-13, 92:2-6, 105:13-19; Exhibit PP, pp. 352:26-353:12.) At the preliminary hearing in *People v. Inmate I.*, Rondou said he had neither notes, reports, nor a recording of his interview of Moriel pertaining to Inmate I.'s culpability in two separate homicides. (Exhibit JJ, pp. 17:10-12; 31:18-20; 40:21-23.) Petersen and Rondou both knew at the time of Rondou's testimony in *People v. Vega* that he had not recorded "all" of his interviews with witnesses as he claimed, and among the interviews that had not been recorded were those with Moriel in three separate cases. Rondou had committed planned perjury, suborned again by Petersen.

Stated Policies Versus Actual Practices in Interviewing Custodial Informants

Rondou certainly is not alone in his stated belief that all witness interviews should be recorded. Local law enforcement outwardly heralds the notion that recorded interviews

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51:2-5.) This would seemingly leave the murder charged in *People v. Vega* as the fourth murder in which a defendant was prosecuted.

are one of the essential requirements of an investigation. Interestingly, in 2006, SAPD Detectives Watkins and Ashby authored a book entitled *Gang Investigations: A Street Cop's Guide*. Three of the individuals who received acknowledgements in that book were Rondou, Flynn, and Matthew McLeod. The book echoed Rondou's strict policy on recordings: "All interviews of witnesses to and victims of gang crimes should be tape recorded for this simple reason: When you get to court, those witnesses will probably change their stories or outright lie on the witness stand. The recorded conversations can then be used to impeach any witnesses who lie or change their stories." (Ashby and Watkins, *Gang Investigations: A Street Cop's Guide* (2006), p. 80.) Obviously, Petersen, who served as President of the Orange County Gang Investigators Association (OCGIA) and was one of the OCDA deputies assigned to the TARGET unit at the SAPD, would naturally embrace the principles within the book. OCSD Special Handling Deputy Tunstall, the most veteran of the Special Handling deputies who participated in the cases referenced in this motion, was well-trained by OCGIA and would have seemingly followed its principles, as well. Tunstall actually testified as far back as 2006 at a preliminary hearing in *People v. Corcoles* that he attended monthly trainings by OCGIA. (RT (trial), June 5, 2008, *People v. Corcoles*, (Super. Ct. Orange County, 2008, No. 06WF1592), attached herein as Exhibit WWW, p. 4:1-7.)

What explains the fact that neither the OCSD nor the SAPD has any recorded interviews of Moriel, a critical witness in several filed murders and numerous other investigated cases? The answer is obvious: there has been specific training on this topic. First, prosecution teams realize that informants are working on these cases for benefits, and that they tend to return to this subject when they speak with law enforcement. Thus, the absence of recorded interviews allows the prosecution to falsely suggest that the informants neither requested nor were offered benefits in exchange for their work. Second, informants tend to make mistakes in revealing critical evidence helpful to the defense. The revelation in Moriel's notes about the "Dis-iso" scam is a perfect example. While Petersen and his

team could have lived without Moriel having described the scam on paper, at least they could take comfort that it did not come up in a recording. Third, despite the lofty principles articulated by Anderson and Nye in the *Gang Prosecution Manual*, prosecution teams want to manipulate the presentation of informants. This is accomplished, in part, by falsely presenting the number of cases in which the informant has worked, which is made more difficult if a recording captures the informant drifting into a discussion of other cases. In sum, prosecution teams know that the absence of recordings increases the chances of successfully hiding *Massiah* violations and impeachment evidence.

In fact, future custodial informant training will likely include the *Dekraai* case as a demonstration of what goes wrong when informants are recorded. The prosecution wanted to accomplish the objectives identified above, but likely felt they had to record because it was a capital case. As a result, the prosecution was caught in a conspiracy to falsely present Inmate F. as mere witness to a confession, and not an informant with a history of extracting information from inmates at the behest of government officials.

Hidden Inmate I. Evidence Relevant to Moriel's Truthfulness

Informants, such as Moriel and Inmate F., can often be unreliable contributors to the criminal justice process because of their motivation to please the prosecution, their ability to be compelling to the jury even when their testimony is untruthful, and their long history of engaging in acts of moral turpitude. All of these factors can make the discernment of their truthfulness nearly impossible. As discussed throughout this motion, the most important safeguard for maintaining the integrity of an informant program is a vigilant prosecution that makes transparency and honesty the highest priority. The unwillingness to meet this responsibility was displayed, once again, in the concealment of recorded conversations in which Moriel discussed his own pending criminal case and the delayed filing of a homicide case designed to keep the recording and other evidence from Vega.

Moriel remains in custody because of the case filed against him in 2005, in which he was charged as the shooter in an attempted murder with numerous enhancements. (Exhibit

KKK.) His co-defendant in the case was fellow Delhi gang member Luciano Hernandez, also known as "Chano." Joel Elias, who was identified as the shooting victim in the case, was interviewed by SAPD detectives on November 6, 2005. (RT (prelim. hr'g), October 31, 2006, *People v. Moriel*, (Super. Ct. Orange County, No. 05CF3926), attached herein as Exhibit XXX, p. 12:13-16.) Although the complaint identified Moriel as the shooter and the prosecution introduced evidence supporting that finding during the course of the preliminary hearing, SAPD Detective Jeff Launi testified that he had originally received information that another suspect fired the weapon. Launi described an early interview he conducted with Elias:

> Q: And was this interview at the victim's home?
> A: Yes.
> Q: On this particular day did you ask Mr. Elias again if he knew who shot him?
> A: Yes.
> Q: And what did he tell you this time?
> A: He told us that he knew who shot him.
> Q: And who did he say shot him?
> A: An individual, he gave me a nickname or moniker of Gato.

(Exhibit XXX, pp. 12:17-13:1)

Detective Launi subsequently identified "Gato" as Joseph Galarza. (Exhibit XXX, pp. 90:25-91:4) Elias's belief that the shooter was Galarza was then reinforced during the cross-examination:

> Q: Going back to the interview of the victim, Mr. Elias, did you have a subsequent interview with Mr. Elias in regards to how he knew or how he believed the shooter to be a person by the name of Gato? [34]

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[34] Later in the same preliminary hearing, the prosecution introduced several pieces of evidence intended to show that Elias was mistaken in his initial identification of Galarza as the shooter, and that Moriel was responsible. Launi testified that Elias admitted he never saw Galarza shoot him, but had rather only heard others claim that Galarza was the shooter. (Exhibit XXX, p. 37:3.) Elias and an independent witness both identified Moriel as the shooter in photographic lineups. (Exhibit XXX, pp. 32:15-33:1, 40:21-41:11.) Finally, co-defendant Hernandez told detectives that Moriel was the shooter. (Exhibit XXX, pp. 26:19-27:4.)

A: Yes.
(Exhibit XXX, p. 31:8-12.)

Four years later, when he testified in *People v. Vega*, Moriel acknowledged on cross-examination that he participated in the shooting of Elias. (Exhibit HH, p. 161:21-22.) Interestingly, though, during questioning about his co-defendant, Hernandez, agreeing to become a witness for the prosecution, Moriel said that prior to that occurring, " . . . we were both gonna take it to trial all the way to the end. . . . " (Exhibit HH, p. 169:3-4.) This response could have potentially damaged the credibility of Moriel because it suggested an unwillingness to take responsibility for his culpability; Moriel knew he committed the charged crime but was hoping that a jury would believe he had not. Of course, Petersen was banking on the *Vega* jury concluding that his comment was reflective of Moriel's sentiments before he joined the government and saw the proverbial light of truth and justice.

It should come as no surprise that the prosecution was concealing information that would have shown that Moriel's relationship with the government had somehow changed his core ethics. As discussed earlier, in April of 2010, Moriel had obtained confessions to two homicides allegedly committed by another Delhi gang member, Inmate I. Petersen and his team were hiding information about Inmate I.'s confessions from Vega and his counsel.

One piece of concealed evidence from *People v. Inmate I*. would have been particularly helpful to the defense in *Vega*. During the preliminary hearing in *People v. Inmate I*., Rondou testified that he listened to the recorded conversations between Inmate I. and Moriel. (Exhibit JJ, p. 21:12-15.) The following excerpt was captured on the recording—although not elicited by Petersen or mentioned by Rondou in the *Inmate I.* preliminary hearing:

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Moriel: Hey trip on that real quick
Inmate I: …
Moriel: No that piece of paper. Just read it where I marked it on the other side
Inmate I: Long pause (2 minutes)
Moriel: Cuz of that lil faggot eh. **I would have been out right now**.
Inmate I: inaudible
Moriel: They said Gato did it. They said, that's Gato. They said, he, the victim, said it was me. Then that lil fuckin (inaudible) said it was me.
Inmate I: inaudible
Moriel: Your homeboy
Inmate I: Chano?
Moriel: Chano. And he's all afraid to go upstate

(Partial transcription of recorded jail conversation between Oscar Moriel and Inmate I. (undated), attached herein as Exhibit YYY.)

As noted earlier, Joseph Galarza ("Gato") had been mistakenly identified as committing the offense with which Moriel was charged. As he acknowledged in his trial testimony in *Vega*, Moriel had earlier wanted to take the case to trial and apparently blame Galarza, although Moriel knew that he was responsible. What this recording revealed, though, was that one year after becoming an informant and five years after shooting his victim in the face, the "changed" Moriel was still outraged that his co-defendant had prevented him from getting away with the crime.

The *Vega* jury likely would have discounted Moriel's testimony if they heard this informant's furor and contempt in 2010, as he hypocritically ripped a defendant for daring to come forward and "rat" **him** out for something he had done. The jury would have likely extended their contempt to the prosecution for relying upon an informant who was unconcerned about a person being falsely convicted for a crime that he actually committed.

The prosecution team knew that this dialogue would have been vital to the defense in *People v. Vega,* and every other case in which Moriel was a potential witness. However, it has only been turned over to **Inmate I**. In *Vega* and in the other referenced cases, this evidence would have undercut the depiction of Moriel as changed person who become

truthful as soon as he joined forces with the "good guys."

Prosecution's Teams Desire to Hide the "Dis-iso" Note and its Relationship to *People v. Inmate* I.

The prosecution team had numerous reasons for wanting to hide the August 1, 2009 note that revealed the "Dis-iso" scam. First, as discussed earlier, if Petersen honored *Brady* and disclosed the note it would have immediately revealed to Harley that Vega' statement was obtained in violation of *Massiah* and that the prosecution team had coordinated jail movements to circumvent the Sixth Amendment. Second, Petersen and his team were committed to deceiving Vega and his counsel about Moriel's other informant efforts directed toward Delhi gang members. The note identified the prosecution team's next target, Inmate I. The last thing Petersen wanted was for Harley to learn that Moriel had obtained confessions to two more Delhi homicides.[35] Third, the prosecution was appropriately concerned about some of the dialogue captured in the recorded conversations between Inmate I. and Moriel, as will be discussed in this section.

In fact, the prosecution team's commitment to hiding from Vega the efforts by Moriel related to Inmate I. explains Petersen's decision about when to file *People v. Inmate I*. Vega's trial concluded in late December of 2010. (Exhibit PPP.) Three months later on March 18, 2011, Inmate I. was charged with one count of special circumstances murder. (Exhibit II.) Significantly, the discovery in *People v. Inmate I*. indicates that there had not been any substantive investigation between May of 2010, when Moriel allegedly obtained a confession from Inmate I., and the filing of the complaint in March of 2011. (Exhibit O, pp. 2399-2401; Exhibit KK, pp. 4098-4856.) Considering 1) the last minute revelation to Vega that Moriel would be a witness, 2) the delay of the filing in *People v. Inmate I's* case

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[35] In hindsight, it is obvious that Petersen would have never revealed to Vega the confession from Elizarraraz, but for the coincidence that Harley was counsel for both he and Vega.

until after Vega's case was completed, and 3) the concealment in *Vega* of Moriel's informant efforts related to Inmate I., it appears that Petersen waited to file charges against Inmate I. with the objective of preventing Vega from learning about Moriel's informant efforts related to Inmate I. The willingness to manipulate a homicide filing in order to hide discovery from another homicide defendant corroborates—if corroboration is needed—that Petersen and his team will do just about anything to win.

The Purported Absence of Promises or Consideration

One of the final issues to be addressed in the specific context of *People v. Vega* is the subject of promises and consideration in exchange for informant work. Petersen emphasized that the prosecution team did not make any specific promises to the two informants, Moriel and Belcher, about their pending cases. Moriel said he had not been promised anything by Petersen, federal authorities, the OCDA, or the SAPD. (Exhibit HH, pp. 113:14-114:2.) However, Moriel admitted that he was hoping for "reduction or leniency" in his sentence. (Exhibit HH, p. 129:7-10.)

Belcher was facing felony drug charges at the time of his testimony. (Exhibit HH, p. 5:13-17.) He said that neither the SAPD nor the OCDA had promised anything in exchange for his testimony. (Exhibit HH, p. 5:21-25.) Belcher said this despite the fact that in an earlier conversation with law enforcement he had asked, "What type of deal? What type of help can I get?" (Exhibit HH, p. 67:7-10.)

Given the repeated acts of misconduct in this case, it is fair ask to whether these witnesses were truly uninformed about how their cases would be resolved or whether their purported lack of knowledge was an attempt to manipulate the jury. In actuality, these witnesses likely had some idea where things were heading, but were being led to believe that their fate ultimately depended upon their performance.

Interestingly, at the preliminary hearing in *People v. Rodriguez*[36]—the next of the

[36] *People v. Rodriguez* describes the case originally filed against Sergio Elizarraraz, Juan Lopez, and Joe Nunez Rodriguez. It is referred to as *People v. Rodriguez* within this

Moriel-based Delhi murder prosecutions—Rondou testified that he believed that Moriel received a "deal" in exchange for his testimony in *People v. Vega*. (Exhibit LL, p. 49:3-9.) Rondou then quickly tried to retreat from this testimony. (Exhibit LL, p. 50:3-5.)

However, in the trial of *People v. Rodriguez*, **Petersen decided to introduce evidence of Moriel's deal in his own closing argument**, announcing to the jury that Moriel would not be serving a life sentence and that the exact sentence was still yet to be determined. (Exhibit PP, p. 403:18-21.) (The reasons that he elected to make this statement in closing argument and its implications are analyzed in detail in the section addressing the prosecution of Elizarraraz, Rodriguez and Lopez.) If what Petersen said was true, the failure to disclose the existence of an agreement with Moriel would be yet another serious discovery violation in the prosecution of Vega.

The reality is that Moriel and Inmate F. were almost certainly told that they would receive sentence reductions and that the amount would be dependent on the quantity and quality of the work they completed. This information, of course, has been well-hidden through the refusal to turn over notes, logs, reports, recordings, and clear informant agreements.

While Belcher does not fall into the category of custodial informant—which is the focus of this motion—the history of his case raises additional issues regarding representations of benefits for prosecution witnesses. On December 2, 2011, Belcher testified against Vega. (Exhibit PPP.) Belcher was not in custody at the time of his testimony, but in closing argument Petersen found a way to subtly suggest that he was more reliable because he was courageous enough to implicate Vega, even though he believed he would be in custody for his pending crimes. Petersen stated:

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motion because Petersen filed a motion to sever Lopez and Rodriguez from Elizarraraz at his first appearance in front of Judge Froeberg on July 29, 2011. (Minutes for Sergio Elizarraraz, in *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit ZZZ.)

> Johnny Belcher got up and he took the seat right here. Out of custody. Pending drug case, ladies and gentlemen. Pending drug cases. And he sat in this seat and he had to tell you what Leonel Vega, his homeboy, his friend, told him. Do you think it was easy for John Belcher to do that? John Belcher knows what happens to snitches and rats in custody. He knows by testifying against Leonel Vega his life could be in jeopardy. . . .

(RT (trial), Dec. 14, 2010, *People v. Vega*, (Super. Ct. Orange County, 2010, No. 07CF2786), attached herein as Exhibit AAAA, p. 58:9-17.)

Belcher certainly understood the dangers for "rats" in custody, but did he ever really believe that he was going to face those dangers? Petersen suggested as much—at least to bolster his credibility with jurors—that Belcher was willing to speak the truth even though he knew the incredible danger awaiting him by being in custody with a target on his back. But what Petersen does to support a win and the actual truth are often miles apart. On December 17, 2011, Petersen and Belcher agreed to a sentence that was either beyond his wildest dreams or exactly what he expected. Belcher received what is unquestionably a remarkable sentence for someone with his criminal background and pending charges. Petersen permitted Belcher to plead guilty to violations of Health and Safety Code sections 11378 (possession of controlled substance with intent to sell), and 11351 (possession of controlled substance with intent to sell), as well as a street terrorism charge. (Minutes in *People v. Johnny Belcher*, (Super. Ct. Orange County, 2010, No. 09CF1110), attached herein as Exhibit BBBB.) In addition, the following enhancements attached to the felonies were all dismissed: four gang enhancements, two enhancements based on prior convictions for drug sales or transportation charges, and four prison priors. It is all but impossible to believe that Belcher testified without any idea what he could expect in terms of the resolution of his case. Did he actually believe he was going into custody? If so, he had quite a surprise waiting for him. He received a suspended sentence and a **terminal** sentence, which not only kept him out of custody but also ensured that he would not return via a probation or parole violation.

More Implications of the Prosecution Team's Outrageous Misconduct in *People v. Vega*

There were significant consequences for the repeated instances of concealment in *People v. Vega*. The most obvious ramification was that Moriel was permitted to testify, despite the evidence being obtained in violation of *Massiah.* Of course, Petersen and Rondou's efforts to destroy the credibility of defense investigator Szeles would have dramatically backfired if the jury had known that Rondou, the SAPD, and the OCSD did not actually tape record their informants (or alternatively hid the recordings) in order to get a tactical advantage at trial. And, of course, if Vega had known about the repeated instances of deception by law enforcement and the prosecutor, the jury may have viewed all of the evidence in a dramatically different light.

But there were also less direct consequences. Because of the prosecution team's deception, Vega and his counsel believed that Moriel's informant work was primarily for the federal government and that any benefits were only known to the U.S. Attorney's Office and the FBI. Petersen's misleading statements and material omissions convinced Harley that he and Petersen were equally prevented from accessing information about the mysterious arrangement with Moriel. Therefore, Vega turned to experts to help explain how informants operate and the benefits that they receive when providing assistance in federal investigations. The trial court's refusal to permit two experts to be called was the central issue in the appellate court's ruling.

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Justice Thompson wrote:

> As part of the defense case, Vega sought to introduce the testimony of Steven Strong, a former Los Angeles Police Department homicide gang investigator with over 20 years of experience and expert on jailhouse informants, and Alexandra Natapov, "an academician expert who was very familiar with the federal system and the state system who is qualified in the area of jailhouse informants in federal courts." The stated purpose for their testimony was to assist the jury in its credibility assessment of the prosecution's informants by providing evidence about how the jail setting creates unique opportunities for them to obtain information about other inmates, their sophisticated methods of obtaining information, and the incentives and conditions that may compel them to manufacture evidence.

(Exhibit QQQ, p. 12.)

Of course, prior to the appellate court conducting its analysis and authoring its opinion, counsel for the appellant and the respondent necessarily invested many hours researching and writing about these issues. Little did appellate counsel and Justice Thompson know that their work resembled a moot court project with creatively managed facts and issues. Some of the appellate court's statements regarding the evidence pertaining to Moriel are worthy of discussion:

1) The court wrote that "Moriel testified in ankle chains due to his incarceration on a pending attempted murder charge, a crime which he knew carried the risk of a life sentence." (Exhibit QQQ, p. 10.) Perhaps not. It is highly likely that, based upon testimony in *People v. Rodriguez* and Petersen's closing argument in that case, Moriel knew he would not be facing a life sentence, but was unsure about the precise time.
2) The court stated that "[a]lthough Moriel claimed membership in the Delhi gang, he said he had not met Vega until he was incarcerated and spent two weeks in the 'hole' with him when both were sent into isolation for disciplinary violations." (Exhibit QQQ, p. 11.) Actually, in *People v. Camarillo*, Moriel changed his testimony and claimed that he knew Vega on the streets. (Exhibit RRR, p. 366:19-20.) More importantly, though, Moriel was not sent to the

"hole" for a disciplinary violation. Rather, he was sent to the hole by Special Handling to build a friendship with Vega and to regain his status with the Mexican Mafia and obtain confessions. Vega was likely sent to the hole for a fabricated or exaggerated rule violation so that he could be exposed to Moriel.

3) The court wrote that, "Later, they were housed in an area with single-man cells and limited prisoner contact. However, during this period, Vega would often stand at Moriel's cell door and talk." (Exhibit QQQ, p. 11.) Actually, their contact over the next six months was nearly non-stop. They talked on a daily basis about a wide range of issues at the direction of law enforcement, often through a sink that apparently had its lines cleaned for increased clarity of communications. Moriel wrote 123 pages of notes that referenced Vega, which he turned over to the Special Handling. Those were in addition to the four pages memorializing the confession. Each and every one of the additional pages was withheld from the defense.

4) The court stated that, "He also acknowledged his jailhouse informant status, stating he had been working with state authorities, or 'handlers,' for about six months when Vega crossed his path. Moriel said he had informed on another inmate charged with murder, and at least one other person charged with a lesser crime." (Exhibit QQQ, p. 11.) If he started working with state handlers six months before his contact with Vega it would explain why Tunstall stated that Moriel wrote 500 pages of notes versus the 196 pages found in *Inmate E*. (Exhibit LLL, pp. 44:22-45:2.) However, Special Handling Deputy Garcia wrote that he did not begin collecting notes from Moriel until July 6, 2009, which suggests that Moriel's contact with Vega (through the "Dis-iso" scam) marked the inception of his informant career. (Exhibit O, p. 2012.) Additionally, Moriel's acknowledgement of informant efforts on three cases does not do justice to the amount of work he was really doing, since he was

providing information on dozens of violent crimes and turning over daily information on Black Flag cases requiring 500 pages of notes, per Deputy Tunstall's later testimony.

5) Finally, the court stated that "defense counsel vigorously cross-examined" the witnesses, including Moriel. (Exhibit QQQ, p. 3.) Harley's examination of Moriel was certainly vigorous, but not effective because of the prosecution's massive concealment of critical information. Justice Thompson neither realized nor likely believed that such deception was plausible.

While the most direct consequences of the misconduct detailed in this motion are fundamental violations of due process that deprived defendants of a fair trial, there are other serious consequences for the criminal justice system that warrant consideration when this Court considers the requested sanction. When trial courts and defendants are deceived, the tentacles of that deception extend out to reach appellate counsel, courts of appeal and their staffs. Valuable resources are allocated to studying and determining issues that are skewed because of a record that is incomplete and incorrectly analyzed because of concealment. Appellate decisions are, therefore, inevitably made unreliable or erroneous.

Shockingly, the only reasonable conclusion about the prosecutors discussed in this motion is that they are undisturbed appellate opinions like this one in which the author is deceived and the verdict—tainted by misconduct—remains intact.

Witness Only For The Prosecution: The Troubling Case of *People v. Luis Vega and Alvaro Sanchez*

Summary of Misconduct

Two months prior to the trial of Leonel Vega, another serious case involving alleged Delhi gang members headed toward preliminary hearing. As indicated in the initial summary, Luis Vega will be referred to as "Luis V." in order to avoid confusion with Leonel Vega. Luis V. and Alvaro Sanchez were charged in the shooting of Carlos Vega and Brian Marin. (Minutes for Alvaro Sanchez in *People v. Sanchez*, (Super. Ct. Orange

County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit CCCC; Minutes for Luis Vega in *People v. Sanchez*, (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572), attached herein as Exhibit WWWWW.) The defendants were charged with attempted murder with premeditation and deliberation, street terrorism, and gang and firearm use enhancements. (Exhibit CCCC; Exhibit WWWWW.)

This Court's discovery order in *People v. Dekraai* did not encompass any materials from *People v. Sanchez*. Therefore, Dekraai did not initially possess the prosecution discovery in that case. However, information pertaining to this case was gleaned from Moriel's notes and transcripts from the preliminary hearing and trial, as well as court documents. Additionally, Damien Galarza provided Dekraai with additional documents and recordings related to the prosecution of Sanchez.

The assigned Deputy DA in this matter was not Erik Petersen, but rather Steven Schriver. The conduct of Schriver and other members of law enforcement corroborates the existence of broadly based policy objectives of discouraging the disclosure of *Brady* evidence, which appear to plague the OCDA. The case also offers an example of another disturbing aspect of the custodial informant program: the active concealment of informant evidence related to factual innocence.

As the OCDA, the SAPD (and almost certainly the OCSD) realized, **Moriel had received compelling evidence from two separate inmates that Luis V. was innocent. This evidence would forever remain hidden from the defendant and his counsel and the prosecution would leave Luis V. in custody for nine months after receipt of both relevant notes before finally dismissing the case.**

Summary of Facts

The shooting, which is the subject matter of the criminal case, occurred on February 5, 2009. (RT (prelim. hr'g), October 22, 2009, Vol. I, *People v. Sanchez*, (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit DDDD, p. 113:10.) At the preliminary hearing, Detective Andy Alvarez of the SAPD

testified about his conversation with one of the victims, Brian Marin, which occurred on February 17, 2009. (Exhibit DDDD, p. 73:14-20.) According to Marin, he and his friends were standing outside of a house located at 2609 South Towner. Marin indicated that a photograph of a Jeep Liberty shown to him resembled a vehicle that drove up alongside their vehicle. (Exhibit DDDD, pp. 74:6-75:20.) He said the left rear passenger exited the car and asked Marin what gang he was from. (Exhibit DDDD, p. 76:5-16.) Marin said that he was not from a gang. (Exhibit DDDD, p. 76:17-18.) The individual then fired three shots at Marin. (Exhibit DDDD, p. 76:19-24.) Marin was hit in the left forearm as he tried to run away. (Exhibit DDDD, p. 77:6-8.) Soon thereafter, Marin realized that his friend Ventura had also been shot. (Exhibit DDDD, p. 77:9-16.) Marin described hearing the words "Delhi" coming from the suspect vehicle as it fled the area. (Exhibit DDDD, p. 77:17-20.) Marin identified Luis V. as being in the suspect vehicle, but said that he was not the shooter. (Exhibit DDDD, pp. 79:4-80:8.) Marin said that he knew Luis V. from "attending Saddleback High School with him and had seen him on a pretty regular basis at school." (Exhibit DDDD, p. 80:13-15.) Marin said there were several people in the suspect car. (Exhibit DDDD, p. 80:16-22.) He said that Luis V. was in the right rear passenger seat. (Exhibit DDDD, p. 173:12-14.)

Detective Alvarez also testified regarding his interview with Carlos Vega. (Exhibit DDDD, p. 108:15-21.) Carlos said he was also present at the above referenced shooting. (Exhibit DDDD, pp. 108:15-109:1.) Carlos described the right front passenger as Luis V. (Exhibit DDDD, p. 111:17-22.) Carlos said that he knew Luis V. from Saddleback High School. (Exhibit DDDD, p. 107:7-8.) Carlos said that he and Luis V. had been in a fight sometime between Christmas of 2008 and New Years of 2009. (Exhibit DDDD, p. 107:18-24.) He said that during the fight Luis V. yelled "Delhi." (Exhibit DDDD, p. 151:2-3.)

Detective Alvarez interviewed Luis V. at the Riverside County Sheriff substation in Indio. (Exhibit DDDD, p. 114:15-17.) Luis V. denied being involved in the shooting and denied being present in the suspect vehicle. (RT (prelim. hr'g), October 26, 2009, Vol. II,

People v. Sanchez, (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit EEEE, p. 57:2-7.) Luis V. denied being affiliated with any street gang. (Exhibit EEEE, 115:1-3.) Luis V. initially denied being familiar with Delhi, but later acknowledged he knew of the rivalry between Delhi and Alley Boys. (Exhibit DDDD, p. 156:9-14.) He said he did not get along with Alley Boys, but denied that it was because of Delhi. (Exhibit DDDD, p. 156:12-14.) Detective Alvarez was unable to locate any field interview cards or step notices pertaining to Luis V. (Exhibit DDDD, p. 148:2-7.) Alvarez located a P.V.C. tattoo on Luis V., which is a Riverside gang not connected to the Delhi gang. (Exhibit DDDD, pp. 149:16-150:4.) Alvarez said that he had received information from the Dixon Police Department that Luis V. attempted to start a gang in that Northern California town in 2008. (Exhibit DDDD, pp. 152:25-153:22.)

Detective Rondou interviewed Alvaro Sanchez on February 5, 2009. (Exhibit DDDD, p. 84:5-14.) Detective Flynn was also present during the interview. (Exhibit DDDD, p. 85:10-11.) Prior to that interview, Detectives Rodriguez and Paulson had also interviewed Sanchez. (Exhibit DDDD, p. 85:12-20.) During the earlier interview, Sanchez apparently admitted that "[h]e thought there was going to be a fight. He got out of the car and a shooting took place." (Exhibit DDDD, p. 88:4-6.) However, he denied both being the shooter and knowing that anyone in the car had a gun. (Exhibit DDDD, p. 99:15-19.) Sanchez would not say who was in the vehicle with him. (Exhibit DDDD, p. 101:13-17.)

The Prosecution Receives First Clues of Luis V.'s Innocence

The discovery relating to the criminal case against Inmate I.—included in the January 25, 2013 Court-ordered discovery—includes a report pertaining to Juan Calderon, a "self-admitted" Delhi gang member charged in another murder. (Exhibit KK, pp. 4104-4107.) According to that report, on November 3, 2009, Calderon gave a witness proffer regarding his own pending homicide case. (Transcription of interview of Juan Calderon by Santa Ana Police Department Detectives Rondou and Flynn, Deputy DA Geller, and Mr. Stapleton (Nov. 3, 2009), attached herein as Exhibit FFFF.) Detectives Rondou and Flynn

were identified as being present, as well as Marlin Stapleton, counsel for Calderon. (Exhibit FFFF, p. 5.) Deputy DA Mark Geller, the prosecutor on Calderon's case, also attended. (Exhibit FFFF, p. 9.) According to the report, Calderon provided information regarding other Delhi crimes, including second-hand information about one of the murders charged against Inmate I. (Exhibit KK, pp. 4106-4107.) The SAPD purportedly determined that the information regarding that homicide was incorrect. (Exhibit KK, p. 4107.)

Dekraai obtained a copy of the recording of Calderon's proffer via Damien Galarza, as referenced earlier. (Exhibit FFFF.) At the outset of this proffer, Calderon was questioned at length about the case in which he was charged. The questioning then turned to other Delhi crimes in which Calderon was either present or which he had spoken about with fellow gang members. Flynn and Rondou were curious if Calderon had come across any information relating to the case against Luis V. and Alvaro Sanchez, as both detectives had been actively involved in the investigation. The following dialogue occurred.

Q2 (Flynn):	Did you, uh, meet, uh, Butters brother in here?
A (Calderon):	Yeah.
Q2:	What'd he say he was in here for?
A:	Attempt…and robberies.
Q2:	Did he say anything about the crimes?
A:	Yeah.
Q2:	What'd he say?
A:	Basically…**the guy that's busted with him…you know, is -- that's right there with me**.
Q2:	Uh huh.
A:	**He wasn't there**…but…he was there…and he had done -- uh, I guess, he had got off…and he had sh -- he had…-- uh, he hit him up, or something…and he had said, "Hey, you know, this is…-- what's-what's going on, you know? Where you fools from?" Those fools said, "Highland"…and…he just started dumping, I guess, and then…I guess, he hit him, or something, and he got back in the car…in the PT Cruiser.
Q1 (Rondou):	Uh huh.
A:	He had never told me who was…who was there…but he

had told me he had did it.
Q1: And who are we talking about?
A: Um, uh, Sanchez, Albert…Al [unclear]…Alvaro [unclear].
Q2: Alvaro?
A: Sanchez.
Q1: Were you kickin' it with him in here?
A: Yeah, we're [Q1 talking-A inaudible]...
Q1: What does he look like?
A: Pretty nice…[short pause]…tall, light skin…(..?) (..?), too.
Q1: Did he talk about anything else he had been involved in?

(Exhibit FFFF, pp. 71-72, emphasis added.)

In the dialogue above, Calderon told the prosecution team that Luis V.—"the guy that's busted with [Sanchez]…wasn't there" at the shooting for which he had been charged. Just eight days earlier, Rondou and Flynn had testified against Luis V. at the preliminary hearing in Sanchez and Luis V.'s case. They were now receiving information—perhaps for the first time—that a principal in the crime (Sanchez) told Calderon that his co-defendant, Luis V., was not present.

Perhaps, Rondou, Flynn and Geller will suggest that they were uncertain about the suspect who "wasn't there"—though a subsequently filed motion by the assigned prosecutor Schriver, would unintentionally corroborate that it was understood perfectly well to whom Calderon was referring. Additionally, any uncertainty would not explain the failure of the detectives or Geller to ask follow-up questions aimed at receiving more information. Interestingly, the detectives almost immediately navigated away from any further questioning about the case even though they had clearly been very interested just moments before. Neither Flynn, Rondou, nor Geller asked any questions about what Sanchez had said about the case and his involvement, although this was precisely what the detectives were seeking from Calderon. In fact, an examination of the remainder of the proffer confirms that this was the only instance in the entire interview in which Calderon provided specific inculpatory evidence related to a crime without detectives following up with additional questions. (Exhibit FFFF.)

When Flynn initially questioned Calderon about the crime during the proffer, he realized that additional evidence of Sanchez's responsibility would be helpful. Calderon had the exact information that law enforcement sought and yet they became immediately disinterested once he began providing it. Calderon's response, which only takes up four lines in the transcript, left holes. Critical questions were left unasked: Where did the conversation occur? How did the subject come up? Who else was there?

Their sudden disinterest in learning more about what Sanchez said—the moment after probing on this subject— is particularly odd because the preliminary hearing transcript presents a picture of a case that appeared to be far from solid. Prior to his arrest and contact with Calderon, Sanchez had been interviewed by Detectives Paulson, Rodriguez, Rondou and Flynn—the latter two being the detectives who interviewed Calderon. (Transcription of interview of Alvaro Sanchez by SAPD detectives (undated), Pre-Trial Exhibit 2, *People v. Sanchez* (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit GGGG.) At the time of the Calderon proffer, prosecution team members certainly recognized there were issues pertaining to the admissibility of Sanchez statements made to Rondou. These issues would later support the trial Court's ruling to exclude the statements. At one point during his interview with law enforcement, Sanchez stated, "…I don't know anything so don't ask me any questions." (Exhibit GGGG, p. 24.) Later Rondou asked, "You don't want to answer?" Sanchez replied, "I want to stay quiet." (Exhibit GGGG, p. 36.) After Rondou had been asking questions for a period of time, he asked Sanchez, "So what happened? What happened? How did it go down?" Sanchez replied, "I don't want to talk about that any more." (Exhibit GGGG, p. 79.)

There were also problems with the identification of Luis V. He was picked out by two people who knew him, but they each placed him at different locations within the car. (Exhibit DDDD, pp. 80:13-15, 107:7, 108:25-109:18, 111:17-23, 173:12-14.) In addition, Luis V. denied involvement in the crime, and the evidence connecting him to the Delhi

gang was primarily that he allegedly shouted out the gang name during a previous fight with one of the individuals who identified him as participating in the shooting. (Exhibit EEEE, pp. 57:2-7, 151:2-3.) Questioning at the preliminary hearing also suggested the possibility that Luis V. may not have been located within the city of Santa Ana when the crime occurred. (Exhibit EEEE, pp. 47:24–48:2.)

Moreover, the very limited questioning of Calderon during the proffer revealed evidence of motive that detectives would seeming have wanted to explore further. The preliminary hearing transcript did not include any reference to statements or clear evidence explaining why the shooting occurred. However, per the proffer, Sanchez told Calderon that the victim said he was a member of "Highland" after being "hit up." This would seemingly clarify the gang motive. Though, for reasons that will be explained in the section addressing Henry Cabrera, the reference to a rivalry between the Delhi gang and the Highland Street gang only provided additional disincentive for questioning Calderon further about Sanchez's statements.

Moriel Allegedly Receives Confessions From Both Shooters—But The Price is Too Steep

Confession of Alvaro Sanchez

Two months after the proffer with Calderon, Moriel sent a note, "For Garcia." (Exhibit O, p. 2247.) In the note, written on January 5, 2010, Moriel described his conversation with Sanchez (known as "Pave.") (Exhibit O, pp. 2247-2248.) After some preliminary discussions with Sanchez, Moriel purportedly talked to him during dayroom through Moriel's cell door. (Exhibit O, pp. 2247-2248.) Moriel brought up Mike Salinas ("Muscle Head") and his oldest grandson, "Mikey." Sanchez said the following to Moriel:

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> . . . Mikey was there when the shooting that he (Pave) is currently busted for took place. I was actually pretty surprised to get that answer. And then Pave begins to tell me what happened. He says that him (Pave), Bad Boy, Mikey and Lil Soldier were driving around in a stolen Jeep Liberty looking for the guys from Alley Boys to shoot….Bad Boy was in the passenger seat and he (Pave) was sitting in the rear Driver seat…So they (Delhi Boys) pull up to the car and "Pave" get out of the Jeep armed with a 38 revolver. And asks the guy with the bald head . . . where he was from (what gang)? And the guy answered, "Highland Street." Who are also one of Delhi's gang rivals on the streets. And once the guy claimed Highland, Pave started shooting him with the 38. And right after Pave started shooting, Bad Boy started shooting at the car from inside of the Jeep (never got out of Jeep) and hit the driver of the car and third guy fled on foot…

(Exhibit O, p. 2247.)

The statement was seemingly among the most valuable of those delivered by Moriel in his tenure as an informant. It was a direct confession from Sanchez and far more detailed than what law enforcement had obtained in the proffer with Calderon. For instance, unlike what Calderon remembered and re-described to law enforcement, the description that Sanchez provided to Moriel of the suspect vehicle matched known facts.[37] The version to Moriel also identified a second shooter, "Bad Boy," who was specifically identified as Sergio Elizarraraz. In addition, Sanchez named the two other people in the suspect car. In essence, it was a conclusive rebuttal to what they certainly believed was Sanchez's evasive and misleading interview. It was also a far more detailed rendition than Calderon had received, though this is somewhat hard to judge because Rondou and Flynn cut off the questioning on this subject so quickly.

Considering the prosecution's comfort in violating *Massiah*, it is difficult to believe that they passed on the opportunity to introduce these statements based upon legal concerns. In fact, the prosecution could have relied upon Moriel's expression of surprise within his notes to support and argue that Moriel did not question Sanchez about the murder, asserting it was an unprompted confession (just as prosecutors would attempt do in

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[37] Calderon incorrectly described the suspect vehicle as a PT Cruiser, not the stolen Jeep Liberty, which was used. (Exhibit FFFF, p. 71; Exhibit DDDD, pp. 74:6-75:20.)

all of the custodial informant cases when plausible, including in *People v. Dekraai.*)

But there was a problem with the statement from the prosecution's perspective that had nothing to do with *Massiah*. Sanchez's statement to Moriel continued:

> **Pave tells me that his co-defendant that got busted for this shooting wasn't even there** and that he doesn't even really like the guy cause he's a pan (pussy) and isn't down for the neighborhood. And Pave tells me that it's kind of fucked up because this guy (his co-Defendant) get's popped for this case while three other people who were actually there, one of the other 3 being the other shooter were still out there. . . .

(Exhibit O, p. 2247, emphasis added.)

One of the reasons that prosecution teams are so drawn to custodial informants is that they can catch suspects in moments of candor in a way that traditional law enforcement interviews often cannot. Sanchez's identification of the involved parties and the display of an almost surprising sense of injustice for someone whom he didn't particularly like, was the most compelling evidence yet that Luis V. had being wrongfully charged.

The prosecution would have to admit that they mistakenly charged Luis V., but this seemed a small price for freeing an innocent man. Why would they forego this opportunity? As often would be the situation, they were balancing a set of entirely illegitimate concerns. Assuming arguendo that the prosecution even cared about Luis V.'s innocence, in February of 2010, they likely were not ready to reveal Moriel's identity as an informant. It would have seemingly been unfathomable to the prosecution that the desire to hide an informant's identity should yield to releasing from custody a perceived gang member simply because he did not commit the charged crime.

As seen in the previous section and several that follow, the prosecution wished to present Moriel as minimally active as possible in his role as an informant. This would have weighed against disclosing the fact that Moriel received yet another confession from a Delhi gang member. They also may have thought that they had a strong enough case against Sanchez and that he would likely be convicted without Moriel's involvement,

which, because of his informant status, would necessarily add complications. **Finally and most disturbingly, at least some members of the prosecution team may have wanted to convict Luis V., even though they knew he was probably innocent**. At the very least, they wanted to keep him in custody as long as possible.

Prosecution's Line-Up Motion Reveals Hidden Knowledge of Innocence Evidence

If there was any question that Deputy DA Schriver was aware of the evidence that Luis V. was possibly innocent, he answered that question by filing an unusual motion. He authored a formal line-up motion requesting that Luis V. be ordered to participated. (People's Motion for Live Line-up, filed Feb. 5, 2010, *People v. Sanchez*, (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit HHHH.) The request for a line-up, on its face, made little sense, because Luis V. was identified by individuals who purportedly knew him before the crime. The only credible reason for the motion being filed was Calderon's proffer conducted three months earlier and Sanchez's recent statements to Moriel, in which they shared Sanchez's statements about Luis V.'s innocence.

Interestingly, the prosecution's moving papers, filed on February 5, 2010, omitted any reference to the evidence of Luis V.'s possible innocence from Calderon or Moriel. (Exhibit HHHH.) Why then did the prosecution file the motion? Perhaps Schriver and his team hoped the victims would somehow fail to identify Luis V., which would provide them "cover" for a dismissal without having to reveal the evidence from Calderon or Moriel. More troubling is the possibility that Schriver hoped that Luis V. would be identified, giving him some odd moral justification for withholding the evidence of his innocence.

Counsel for Luis V., though, was left in the dark about the motivations for filing the motion. Reasonably believing that a lineup would be without value and highly suggestive considering the previous identification, the defense filed opposition paperwork. (Opposition to People's Motion for Live Lineup, filed March 18, 2010, *People v. Vega and*

Sanchez, (Super. Ct. Orange County, 2009, 2010, 2012, No. 09CF0572, 09CF0687), attached herein as Exhibit IIII.)

Elizarraraz Corroborates Luis V.'s Innocence and More Evidence of Hidden "Coordinated Contact"

As both parties prepared for the lineup motion, Moriel turned over the above referenced notes about his conversations with Sanchez. Soon, though, Moriel received additional evidence regarding the shooting from a conversation with Elizarraraz. Elizarraraz was arrested on an unrelated incident on February 4, 2010. (Irving, *Arrests follow confrontation, officer gunfire*, O.C. Register (Feb. 5, 2010), attached herein as Exhibit JJJJ.) A few weeks earlier, Elizarraraz and his co-defendant Amaury Luqueno had been involved in an incident with an off-duty sheriff's department officer who discharged his weapon at both defendants. (Exhibit JJJJ.) Apparently, Luqueno was placed next to Moriel in hopes that Moriel would obtain a confession and other information of assistance in the officer-involved shooting. (Exhibit O, pp. 2338-2339.) On February 7, 2010, Moriel wrote that Luqueno "…tells me that him and our homeboy Bad Boy (Sergio) go busted for this." (Exhibit O, p. 2338.) Per the notes, Luqueno described the shooting and the roles of both him and Elizarraraz in the crime. He also stated that shortly after the incident they fled to Las Vegas in order to avoid being arrested. (Exhibit O, pp. 2338-2339.) One day later, Moriel wrote that Luqueno told him the charges had been dropped against both defendants—though, in actuality, they were never filed. (Exhibit O, p. 2346, Exhibit A.)

Moriel, like Inmate F., did not rely solely on the prosecution to find ways for him to be useful. He proposed a path to resuscitating the case against Luqueno and Elizarraraz. On February 8, 2010, Moriel wrote to "Garcia and Gonzo: . . . I have both their numbers and I'm pretty positive that I can get confession out of the both of them for the parts that they played in that incident if I were to call them and bring the subject up. It might be

worth recording the phone calls I make with them???" (Exhibit O, p. 2346.)[38]

A call to Elizarraraz, at least, would not have been fruitful. Elizarraraz remained in custody, charged with a probation violation in *People v. Elizarraraz*, (Super. Ct. Orange County, 2009, No. 09CF0891), stemming from his most recent arrest. (Minutes for Sergio Elizarraraz in *People v. Elizarraraz* (Super. Ct. Orange County, 2009, No. 09CF0891, attached herein as Exhibit FFFFFF.) Special Handling responded quickly and brought Elizarraraz to Moriel. (Exhibit O, p. 2349.) On February 14, 2010, Moriel wrote notes directed to OCSD Deputy Garcia and Flynn of SAPD, memorializing Elizarraraz's alleged admission to the officer-involved shooting. (Exhibit O, pp. 2349-2359.)

However the next few weeks the officer-involved shooting would fade into the background.[39] But included within the statements obtained from Elizarraraz by Moriel was another confession: Elizarraraz's purported description of his participation in the shooting of Carlos Vega and Brian Marin. That description, found in Moriel's notes dated February 15, 2010, was strikingly similar to Alvaro Sanchez's version of events, memorialized in Moriel's January 5, 2010 note. (Exhibit O, pp. 2363-2365, 2247.) Elizarraraz identified the exact same individuals as Sanchez as participating in the crime—including himself. **Notably, neither Elizarraraz nor Sanchez described Luis V as being present**. (Exhibit O, pp. 2363-2365, 2247.) Having a second suspect inculpate himself and exculpate Luis V. should have compelled someone on the prosecution team to finally come forward with the information. It did not.

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[38] Quite obviously, the prosecution should have disclosed this note to each of the defendants who supposedly made statements to Moriel, as his proposal and belief that he could get a confession powerfully demonstrates an active approach to informant work inconsistent with his testimony and the prosecution's presentation of him.

[39] It is unclear why the prosecution abandoned this prosecution. Perhaps this was because of problems with the account given by the off-duty officer; perhaps because the prosecution had concerns about disclosing Moriel's identity too soon; and perhaps because Elizarraraz had also provided Moriel with alleged confessions to numerous other, more serious crimes for which they believed they could more easily achieve a conviction.

The Prosecution Finally Turns Over Calderon's Proffer While Continuing to Hide Exculpatory Statements of Sanchez and Elizarraraz

Subsequent to losing its motion for a lineup, Schriver finally turned over Calderon's proffer. (Exhibit A.) Schriver probably disclosed it because he realized that the OCDA would need to distribute the proffer to counsel on several other cases in which Calderon would become a witness, as discussed beginning at page 308. The prosecution team likely calculated that because Calderon's statements would need to be discovered to other counsel, it was simply too risky to continue to withhold Calderon's proffer. To do so would risk embarrassing revelations that they had suppressed evidence of Luis V.'s innocence. Moreover, as discussed earlier, the presence of attorney Stapleton at the proffer likely increased concerns that evidence of Luis V.'s innocence and the suppression of that evidence could be shared with other counsel.

Significantly, though, the prosecution **never disclosed Moriel's notes containing evidence of Luis V.'s innocence to counsel for Luis V. or Sanchez.** (Exhibit A.) **The prosecution also never turned over interviews of Moriel with law enforcement regarding what Elizarraraz and Sanchez said about these crimes.** (Exhibit A.)

The details of the statements made by Sanchez and Elizarraraz offered compelling proof that Luis V. did not participate in the crime. **But it would take nearly two years from the date of Luis V.'s arrest before Schriver finally dismissed the charges. (Exhibit WWWWW.) Eleven months passed between the time that Sanchez told Moriel Luis V. was innocent and when he was released from custody.**

The prosecution teams, including Petersen and Schriver, should be compelled to explain what they did with the evidence of Luis V.'s innocence after receiving it. Was Moriel interviewed about the statements pertaining to Luis V.'s innocence? Where are those interviews? What follow-up investigation was done on this issue and what became of it?

Moreover, as discussed in the Summary of Motion and Findings, the suppression of

exculpatory evidence in violation of *Brady*, is not limited in significance to Luis V.'s case. Every defendant who has been the subject of a prosecution or investigation by one of the offending parties is entitled to know of this conduct and to analyze whether similarly deceptive and dishonorable practices were employed in their case. Again, each *Brady* violation creates a new self-reporting obligation. Each violator is required to disclose to the other defendants being prosecuted or previously prosecuted that they have concealed evidence. This obligation has been ignored.

Misconduct Saves Alvaro Sanchez from Life Imprisonment and Helps Two Others Go Unpunished

One group that has ironically benefitted from a custodial informant program built on deception and concealment are gang members charged with serious crimes. That was certainly the case in *People v. Sanchez*. Only one of the four participants in that crime was ultimately convicted. Three others were never charged. Moreover, discovery from *People v. Sanchez*, which was independently obtained by Dekraai, appears to confirm that the prosecution did not direct any investigation of the other suspects who were apparently involved in the shooting. (Exhibit A.)

The most reasonable explanation for its decision was that the prosecution team wanted to hide their *Brady* violations pertaining to Luis V. To accomplish this, it was vital that they keep hidden the statements about the crime made by Sanchez and Elizarraraz to Moriel. It appears that the prosecution thought they could conceal Elizarraraz and Sanchez's statements and still secure the maximum punishment for Alvaro Sanchez. They were wrong. On March 27, 2012, the Honorable Sheila Hanson excluded Sanchez's post-arrest interview described above. (Exhibit CCCC.) The prosecution was then left with only Calderon's proffer to strengthen the case. However, as discussed earlier, Calderon's description of Sanchez's statement was bereft of details because of the prosecution team's decision to not question Calderon further about the crime after Calderon mentioned Luis V.'s innocence.

Instead of securing a term of consecutive life sentences against Sanchez, he was offered 13 years in state prison. Quite understandably, he accepted. This resolution demonstrates the willingness of local prosecution teams and those connected to the custodial informant program to do whatever is necessary 1) to keep defendants from benefitting from informant efforts and 2) to keep their concealment of evidence from endangering their own reputations and careers. The unintended consequences can be significant and wholly inconsistent with fundamental objectives of law enforcement. In this instance, even though prosecutors and members of law enforcement certainly believed that Sanchez and the other uncharged accomplices should be incarcerated for the rest of their lives, they decided that the cost of a successful prosecution would require more honesty than their careers and reputations could afford.

People v. Rodriguez

The Misconduct of the OCDA, SAPD, and Special Handling Offers Another Opportunity to Convict Elizarraraz

Prosecution team members likely believed that they could have the best of all worlds when it came to Sergio Elizarraraz. While they relinquished the chance to prosecute him for the February 5, 2009 shooting of Carlos Vega and Brian Marin, despite his confession to the crime to Moriel, they could still secure a life sentence by prosecuting him for one of the other serious crimes he admitted to Moriel. This path, they believed, would assure the perfect outcome in the warped world of the custodial informant program: punishment for a reviled gang member without having to disclose Elizarraraz's confession to the Vega/Marin shooting, which exculpated Luis V.

The OCDA ultimately chose to prosecute Elizarraraz for an unsolved murder from 2006, in which a rival Alley Boys gang member named Miguel Fernandez was shot and killed.

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Summary of Prosecution's Case Regarding the Murder of Miguel Fernandez Prior to Oscar Moriel's Assistance

On April 15, 2007, Detective Flores of the Santa Ana Police Department responded to a radio call of a car-to-car shooting at 1131 South Main. (Exhibit LL pp. 7:20–8:14.) Flores interviewed the driver of the car, David Martinez, in which the victim, Miguel Fernandez, was a passenger. (Exhibit LL, p. 9:2-3.) Martinez said that he was getting gas at a Chevron Station located at 10501 South Broadway. (Exhibit LL, p. 9:5-12.) Fernandez was located in the front passenger seat. (Exhibit LL, p. 9:13-15.) Martinez said that prior to arriving at the gas station, he noticed a green four-door Honda Accord, with three to four individuals inside. (Exhibit LL, pp. 9:24-10:4.) As he was traveling eastbound on Edinger, Martinez observed the suspect vehicle parked along the curb line on Sycamore and Edinger. (Exhibit LL, pp. 10:24-11:1.) When Martinez was in the left hand turn lane on Main at a red light, the vehicle pulled up next to him. (Exhibit LL, p. 11:2-7.) As the two cars then traveled northbound, the right front passenger of the Honda Accord asked, "'Where are you from' several times…" (Exhibit LL, pp. 11:19-12:7.) Martinez also noticed that the right front passenger was holding a semi-automatic handgun. (Exhibit LL, p. 12:17-19.) While ducking down in the car, Martinez tried to drive away. He then heard six gunshots. (Exhibit LL, p. 12:20-23.) After the shooting, he noticed that Fernandez was bleeding from his head. (Exhibit LL, p. 13:3-5.)

SAPD officers located an abandoned vehicle nearby that was seen leaving the area where the shooting occurred. Martinez later identified that car as the suspect vehicle. (Exhibit LL, pp. 14:2-15:3.) During a search of the vehicle, officers located ammunition and identification for Juan Lopez. (Exhibit LL, pp. 71:15-72:10.)

Detective Rondou subsequently obtained a videotape from the Chevron station that appeared to capture the suspect vehicle shortly before the shooting. (Exhibit LL, pp. 28:15-29:2.) The video showed three individuals exit the car, with one of them walking to pay for gas at the clerk area. (Exhibit LL, p. 29:3-7.)

Special Circumstance Homicide Charges Filed Against Elizarraraz, Lopez and Rodriguez in the Murder of Miguel Fernandez

The Fernandez murder was another Santa Ana gang shooting that appeared destined to go unprosecuted. For a period of three years following Fernandez's death, there was seemingly little activity on the case. In February of 2010, though, prosecution team members engaged in a coordinated effort with Moriel to enable him to obtain statements from Elizarraraz about a shooting of an off-duty officer for which he had been arrested. In February of 2010, Garcia brought Elizarraraz and Moriel together in the Orange County Jail. The haul of confessions and information about serious Delhi gang crimes that Moriel obtained through Elizarraraz was stunning. **Moriel detailed his conversations with Elizarraraz in 27 pages of notes**. According to notes on February 14, 2010 and February 23, 2010, Elizarraraz purportedly confessed to the murder of Fernandez and identified Lopez and Rodriguez as participants, as well. (Exhibit O, pp. 2349-2354.) According to SAPD detectives, they learned of the confession and interviewed Moriel on February 23, 2010. (Exhibit LL, p. 47:7-12.) Either the day of their interview or one day later, Moriel purportedly identified Elizarraraz, Juan Lopez, and Joe Nunez Rodriguez as the individuals seen in the gas station video. (Exhibit LL, pp. 38:1-10, 51:15-20.)

On February 25, 2010, a felony complaint was filed. However, the only named defendant was Juan Lopez (known as "Combo"). (Felony Complaint, filed Feb. 25, 2010, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), Felony Complaint Warrant Amendment 1, filed June 30, 2010, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), Felony Complaint Warrant Amendment 2, filed October 12, 2010, *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit KKKK.) Lopez was charged with murder, street terrorism, gang and firearm use enhancements, and the gang special circumstance allegation. On March 4, 2010, Lopez appeared with counsel for the first time. (Minutes for Juan Lopez in *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit

LLLL.) Marlin Stapleton was appointed to represent Lopez on July 6, 2010. Stapleton was also the attorney for Juan Calderon. (Minutes in *People v. Calderon* (Super. Ct. Orange County, No. 08CF0137), attached herein as Exhibit MMMM.)

Interestingly, on June 30, 2010, an amended felony complaint was filed, adding Rodriguez to the complaint. (Exhibit KKKK.) On September 30, 2010, Rodriguez appeared for the first time on the case and was appointed counsel. (Minutes for Joe Rodriguez in *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit NNNN.) On October 5, 2010, attorney Robert Viefhaus was appointed to represent Rodriguez. (Exhibit NNNN.) Viefhaus was simultaneously serving as the attorney for Alvaro Sanchez in his attempted murder case. (Exhibit CCCC.) On October 12, 2010, Sergio Elizarraraz was charged in the case. (Exhibit KKKK.) He appeared for the first time on the charges the same day and was appointed Robison Harley as his counsel. (Exhibit ZZZ.)

The defendants likely never realized the reason they were charged at different times. The most reasonable explanation is that the prosecution was unwilling to disclose Moriel as a witness until after he completed all of his efforts eliciting statements within the jail. Moriel continued to seek confessions at the Orange County Jail until sometime around April of 2010, when he obtained statements from Inmate I. about the murders discussed earlier. Petersen was able to charge Lopez in February of 2010, unlike the other two suspects, without revealing Moriel's role because there existed evidence of Lopez's culpability separate from Moriel: Lopez's personal identification was recovered from the suspect vehicle and he was linked independently to that car within hours of the crime. (Exhibit LL, pp. 71:15-72:10.) In addition, per Petersen, "A gun that's used to commit the murder is found in his possession weeks later. Bullets that match the casings left at the scene are located in Juan Lopez's vehicle." (Exhibit UUU, p. 8:8-10.) Petersen waited until a few months after Moriel completed his informant work in the jail to file felony complaints against Rodriguez and Elizarraraz.

The Case Proceeds to Preliminary Hearing

The Prosecution Withholds Discovery Related to Moriel's Informant History and Elizarraraz's Statements.

In *People v. Dekraai*, this Court's order did not mandate discovery of the materials in *People v. Rodriguez*. Nevertheless, court transcripts in *Rodriguez* confirm that **Petersen did not turn over any of Moriel's notes prior to the preliminary hearing, even though it was conducted 15 months after the original complaint was filed against Lopez**. (Exhibit LL.)

Instead, Dekraai learned of the existence of the notes memorializing Elizarraraz's statements to Moriel through discovery in *People v. Inmate E.* The 27 pages documenting their conversations can be divided, for purposes of discussion, into five sets. The first set was dated February 14, 2010 and contained 11 pages. The second and third sets were dated February 15, 2010 and contained three pages and six pages, respectively. The fourth set is dated February 23, 2010 and is one page. The fifth set is dated February 26, 2010 and is six pages. (Exhibit O, pp. 2349-2359, 2363-2371, 2379, 2385-2390.)

Within the notes found in the *Inmate E.* discovery are two relatively detailed descriptions of the Fernandez murder. The first description, which is found in notes dated "2-14-10", was withheld from the defendants in *Rodriguez* until some point **after the preliminary hearing,** and is directed to OCSD Deputy Garcia and SAPD Investigator Flynn:

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> Bad-Boy told me that sometime in 2006 Him and Minor from Delhi . . . were driving a green Honda Accord or Civic. Both of them were armed with 40 caliber handguns at the time. And had stopped at the gas station on the North East Corner of Edinger and Main St. to get some gas. And while they were getting gas they noticed Another Honda . . . so Minor tells Bad-Boy to check out this fool . . . then Minor tells Bad-Boy that they're probably from Alley Boys. And Bad Boy tells Minor to follow them. . . . Minor pulls up right next to them and Bad-Boy hits them up, "where you from?" And the driver said that he didn't gang bang. But the passenger said "Alley Boys." And Bad Boy started firing at him. . . . They made a couple of turns and ended up coming to a dead end street and Minor stopped the car behind them so that they were blocked in. Both Minor and Bad-Boy got out and unloaded their guns on the passenger of the other Honda and fled. . . .

(Exhibit O, pp. 2352-2353.)

In a single page of notes, found in the fourth set, and dated "2-23-10", Moriel documented a second purported confession by Elizarraraz to the Fernandez murder. Moriel wrote the following.

> "For Garcia @ Gonzo" * The other day when I was talking to Bad Boy (Elizarraraz) he told me that the shooting incident he was involved in that started at the gas station on Edinger & Main St And Ended on A dead end street behind Lathrop Jr. High School. His homeboy Combo was the driver of his own personal car. (A mid 90's green Honda Accord)…and after the shooting took place. They got chased by A black & white police cruiser. But after they rounded the 1st corner Bad Boy and Minor took off running with guns. And Combo drove away after he dropped them off. Hit a few blocks and then got out and took off running and hitting fences too. Bad Boy tells me that combo reported his car stolen and had forgot his I.D. in the car when he fled. And not too long after that incident Combo sold his car. Bad Boy says that shooting took place around 7 in the morning.

(Exhibit O, p. 2379.)

This note included several important details not included in the first description, such as the time of the incident, a more exact location of the shooting, the specific make and model of the suspect vehicle, and what transpired with the vehicle after the incident. **Despite its apparent value to the prosecution's case and their legal obligation to disclose it, this note was never discovered to the defendants in *People v. Rodriguez*.** (Exhibit PP, p. 20: 12-14; Exhibit PPPP.)

Why would Petersen and his team have wanted to conceal any of Moriel's notes that

documented Elizarraraz's violence and his confession to a murder they were prosecuting? Vega's conviction had demonstrated the prosecution could turn over a small portion of Moriel's notes—four pages of the 500 he had written—and still win. However, the situation was more complicated in *Rodriguez*. In *Vega*, the prosecution team was so focused on winning that they failed to foresee how their misconduct would impact future cases such as *Rodriguez*. For instance, while they may have been unbothered by conning Harley into believing that there were only four pages of relevant discovery in *Vega*, they seemingly forgot that at some point they were going to have to figure out what to do about discovery of Moriel's notes in *Rodriguez*. How could the prosecution team suddenly produce 27 pages of notes in *Rodriguez*, which detailed crime after crime, or the several hundred other pages to which the defendants were entitled, having never revealed those notes in *Vega*? As soon as they committed themselves to handing over a tiny fraction of his notes and misrepresenting Moriel's informant activities in *Vega*, though, they were stuck.

The prosecution possessed several additional, compelling reasons to keep the 27 pages of notes hidden—or at least as many pages as possible for as long as possible. First, Judge Froeberg had specifically ruled in *Vega* that the defense was entitled to know how many confessions Moriel had obtained. (Exhibit HH, p. 31:11-20.) If the 27 pages of notes were turned over in *Rodriguez*, Petersen would essentially be admitting to Harley, the attorney for both Vega and Elizarraraz, that he violated the court order and committed serious legal and ethical violations in *Vega*. This could also lead to a new trial for Vega. In addition, the prosecution team had found themselves in an awkward position with Vega. In March of 2011, Inmate F. revealed that Vega allegedly was so angered by Petersen doing "[him] dirty at trial" that he was planning an assault upon the prosecutor. (Exhibit M, p. 5490.) Likely the last thing that Petersen wanted was for information to come to light that, indeed, the trial proceedings were tainted by misconduct.

Second, Petersen knew that in *Vega* he had engaged in gross misconduct when he

let Harley and the court believe that he was only aware of Moriel obtaining information about two crimes: one allegedly committed by Vega and one committed by Elizarraraz. This was egregiously deceptive. Petersen fully realized that Moriel had worked closely with law enforcement to obtain information about many gang crimes from numerous inmates, including more than a half dozen by Elizarraraz. As a result, Petersen wanted to avoid turning over these notes—particularly to Harley, the attorney for Vega and Elizarraraz.

Third, the 27 pages of notes included numerous entries that powerfully contradicted Moriel's testimony in *Vega* suggesting that the two confessions he received—one from Vega and one from Elizarraraz—literally fell into his lap. The concealed notes showed not only that he had obtained numerous confessions, but that he had worked closely with the government to aggressively elicit as many inculpatory statements as possible. This was relevant to a *Massiah* motion that was never filed, and which Petersen knew the defense would have won if he had complied with his discovery obligations.

Fourth, the prosecution team was highly motivated to conceal portions of the 27 pages because they recognized that disclosure of particular entries risked unveiling separate cover ups in *People v. Sanchez*[40], *People v. Inmate I.* [41], and the Cabrera cases, as

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[40] Elizarraraz's account of the shooting in which Alvaro Sanchez was charged is an example of a crime described within the 27 pages that the prosecution wished to keep hidden. As mentioned in the previous section, Rodriguez and Alvaro Sanchez shared the same defense counsel, Robert Viefhaus. If Moriel's notes were suddenly turned over, Viefhaus would have obtained Elizarraraz's version of the "Jeep Liberty" shooting. While his account implicated Sanchez, it also included compelling evidence of Luis V.'s innocence. Prosecution team members, including Rondou, who were involved with that cover up, knew that if Viefhaus revealed the contents of the notes to Luis V.'s attorney, Deputy DA Schriver and his team would have faced troubling questions about their failure to discover exculpatory evidence in *People v. Sanchez*.

[41] As discussed beginning at page 103, Petersen delayed discovery in *People v. Inmate I.* of evidence that "Termite" committed the charged murder of Randy Adame. (Exhibit JJ, p. 27:3-9.)

discussed beginning at pages 99, 305 and 410.

The prosecution team also faced a very practical problem if they wished to limit their discovery to the description of the Fernandez murder, found in the notes written on February 14, 2010. In *People v. Vega*, Moriel described the confession on four consecutively numbered pages with the corresponding page numbers of "1" through "4" at the top of each page. The information contained in those four pages solely pertained to the charged murder and did not include information about any other subject matter. Therefore, Petersen could discover those four pages in *Vega* without creating suspicions that there were other pages of notes written by Moriel that had not been disclosed.

In contrast, the description of the Fernandez shooting provided in the February 14 notes was located on two pages, numbered "6" and "7" within 11 consecutive pages numbered "1" through "11." If the prosecution only revealed the two pages on which the Fernandez murder was described, numbered "6" and "7," this would undoubtedly lead the defense to inquiries about undisclosed pages that came before and after these two. On the other hand, turning over the entire 11 pages from February 14, 2010, would immediately reveal that the prosecution had hidden critical evidence in *Vega* about the extent of Moriel's known informant work. In fact, the very first paragraph on page one would function as an excellent summary of that concealment:

> *I've been speaking with Bad Boy from Delhi (Sergio "something" in L-20-3) for the past couple of days and he has laid out for me in detail, numerous murders, attempted murder, the crime that he's currently in custody for (off duty officer involved shooting in Santa Ana) and a murder that his homeboys had confessed to him. . . .

(Exhibit O, p. 2349.)

Again, one of the ironies of the custodial informant program is that it tends to turn traditional perspectives of favorable prosecution evidence upside down. Whereas prosecutors in most situations would be thrilled to let opposing counsel know that they had significant evidence that his or her client had committed other crimes, the opposite is generally true for the prosecution teams utilizing custodial informant evidence. Just as in

Dekraai, the last thing the *Rodriguez* team wanted was for it to appear that their informant was doing considerable informant work.

As the prosecution headed toward the preliminary hearing in *People v. Rodriguez*, they had ample reasons to conceal Moriel's notes and were seemingly confident that they could get away with it, based in part on their success in *People v. Vega*. What would soon become clear, though, is that they underestimated the challenges of keeping their deception straight while explaining decisions that were illogical and contrary to what they previously acknowledged as standard law enforcement practices.

Rondou Misleads Court and Counsel, as Petersen Watches in Silence

During the preliminary hearing, Rondou addressed Moriel's background of documenting homicide admissions, how Moriel and Elizarraraz found themselves communicating with one another in jail, and what led detectives to interview Moriel about the Fernandez murder:

> Q: It was during these times that you were talking to him on several other homicides that he then disclosed this case, which was in '07 right?
> A: The murder was in '07. I wouldn't say many homicides. He did tell us about a couple, and I believe what happened was, Mr. Elizarraraz got put into custody, they came into contact, they were housed together or next to each other, Sergio bragged to him about this murder, he got a hold of us and said I got a homey that's in custody that told me about a murder, come over and talk to me, so we went over and talked to him.

(Exhibit LL, p. 49:14-24.)

On cross-examination, Rondou changed his account about what led to the interview and suggested that it was probably Deputy Garcia who contacted SAPD with information about the homicide. (Exhibit LL, pp. 56:10-57:3.)

Rondou's answers were impressively deceptive. Prior to his contact with Elizarraraz, Moriel had documented receiving admissions to **seven** homicides, based upon his conversations with Leonel Vega and Alvaro Sanchez. (Exhibit O, pp. 2017, 2078-9, 2247-8, 2277.) Moreover, before his contact with Elizarraraz, Moriel had already documented direct confessions to numerous other violent crimes, as well as third party

information detailing more than a dozen serious crimes. Rondou, the supervisor for the unit, could not truthfully claim ignorance of what Moriel had shared. Although Rondou never acknowledged it, the SAPD was obviously keeping copies of Moriel's notes—at the very least those relevant to gang conduct in Santa Ana. Significantly, if Rondou was suffering from complete memory failure, he had backup for his memory gaps. Petersen, the most well versed prosecutor in the OCDA on Moriel's informant work, was present in the courtroom as Rondou misled defense counsel about the scope of Moriel's informant work.

Rondou Utilizes Concealment of Notes to Mislead About What Prompted Interview

During the preliminary hearing, Rondou testified that Elizarraraz and Moriel "came into contact, they were housed together or next to each other . . . " (Exhibit LL, p. 49:14-24.) He added that Moriel contacted the SAPD about the Fernandez murder and said to "come over and talk to me." (Exhibit LL, p. 49:14-24.)

The purposeful omission of material information about what actually precipitated the contact between Elizarraraz and Moriel, as well as the untruthfulness in the assertion that detectives were somehow alerted specifically about the Fernandez murder, is revealed through an analysis of several hidden notes that appear within the discovery from *Inmate E.* Those notes clarify what actually brought about the contact between Moriel and Elizarraraz.

On February 7, 2010, Moriel wrote to "Garcia and Flynn," and described his conversation with Amaury Luqueno regarding an off-duty officer shooting for which he and Elizarraraz had been arrested. Luqueno allegedly told Moriel that he parked the car involved in the shooting in front of a friend's house to avoid capture, but his friend's sister " . . . called investigator Chuck Flynn to tell him what she knew and that Amaury's car is parked at her house." (Exhibit O, p. 2338.) According to Moriel's note, the police placed the car and the house under surveillance. As a result, Luqueno and Elizarraraz went to Las

Vegas to avoid capture, but were arrested upon their return. (Exhibit O, p. 2338.)

In another note found within the *Inmate E.* discovery, which was dated the next day, February 8, 2010, Moriel voiced his confidence that he could obtain confessions from both Luqueno and Elizarraraz to the shooting of the off-duty officer. (Exhibit O, p. 2346.) **OCSD Deputy Garcia then moved Elizarraraz into a location where Moriel could elicit statements, which Garcia then concealed (as he always did.)** Either Flynn requested this movement or Garcia initiated it on his own without prompting. Neither the request nor the movement, though, were apparently documented. As a result, the defendants in *Rodriguez* and their attorneys never suspected that the contact had been coordinated by the SAPD and Special Handling.

Moriel's next note is dated "2-14-10" and begins with "Garcia and Flynn." (Exhibit O, p. 2349.) As referenced above, the very first page of the notes documenting conversations with Elizarraraz, and dated February 14, 2010, begin with Moriel proclaiming that, "I've been speaking with Bad Boy from Delhi . . . for the past couple of days and he has laid out for me in detail, numerous murders, attempted murders, **the crime that he's currently in custody for (off duty officer involved shooting in Santa Ana)** and a murder that his home boys had confessed to him. . . . " (Exhibit O, p. 2349, emphasis added.) Elizarraraz proceeded to describe the crimes beginning with the officer-involved shooting. The Fernandez murder appears for the first time at page six of the notes. (Exhibit O, p. 2349-2357.)

Moriel's job was to get a confession about the off-duty officer shooting, which he did. Elizarraraz's confessions to several other crimes were secondary to that objective, and thus were described after the officer-involved incident. The notes on February 14, 2010 were directed specifically to SAPD Detective Flynn, who was involved in 1) the investigation of the officer-involved shooting, 2) the request that Garcia and Special Handling manipulate housing locations so that Moriel would have an opportunity to elicit a confession about the officer-involved shooting (unless Garcia did that on his own), and 3)

directing Moriel after he forwarded his notes on February 7 and February 8 regarding the effort to obtain a confession. Of course, the prosecution did not discover to the defense any reports or notes that reflected any of the steps delineated above.

The preliminary hearing and trial testimony in *Rodriguez* suggest that Elizarraraz was not viewed as a suspect in the Fernandez murder prior to the SAPD receiving the alleged confession memorialized in the notes written on February 14, 2010. Therefore, while it is certainly possible that the SAPD had a list of crimes that they wanted Moriel to question Elizarraraz about, the Fernandez murder was almost unquestionably not among them.

In actuality, Flynn obtained the notes and saw that Moriel accomplished probably far more than detectives anticipated—information identifying those potentially responsible for numerous unsolved homicides and other crimes. Flynn and other detectives, including Rondou and McLeod, then studied the notes, and interviewed Moriel, perhaps regarding all of the crimes at one time, or possibly about each of them independently.

Why did Rondou, with Petersen's assistance and consent, falsely suggest that Moriel contacted SAPD regarding the homicide that was specifically charged? Again, they were in a pinch caused by their deception in *Vega*. They were desperately attempting to avoid any reference to Moriel's notes, which could result in a request for them. The prosecution team knew that if Harley and the other counsel read those notes they would soon realize that Petersen had engaged in misconduct by misleading Harley and the *Vega* court into believing that Moriel had only received statements about the Fernandez and Onofre murders. It was imperative, therefore, that they describe a scenario in which they came to the jail specifically to investigate the Fernandez murder—or one in which that murder coincidentally came up in conversation. Rondou would try out both versions over the course of the preliminary hearing and trial.

Interestingly, it appears that the prosecution team also hoped to convince the defense that Moriel had not written notes about the Fernandez murder. They hoped to

accomplish this by withholding relevant notes and instead providing a report of their contact with Moriel, in which they could suggest a version consistent with Rondou's testimony. But as would be seen so many times throughout this study, the act of hiding misconduct would only lead to more. The report, which is not in the possession of *Dekraai*, likely hid evidence that would have given an accurate understanding of Moriel's informant activities, including 1) that detectives spoke to Moriel about other murders, and 2) that they had read Moriel's notes documenting Elizarraraz's description of numerous crimes in advance of their interviews.

The nearly certain truth is that Rondou and McLeod went to the OCSD after reading the notes from February 14 and 15. They then questioned Moriel about the Fernandez murder and perhaps about the various crimes that Elizarraraz described, as well. It is unknown whether they actually recorded the interview—though they would claim they did not. If the interview was recorded, they certainly had a good reason for hiding it if it captured discussions of multiple crimes, which the detectives could not afford to reveal. Ultimately, they denied recording two interviews with Moriel. To overcome suspicions, the prosecution team concocted for trial a sadly comical story about two hurried detectives who read each other's minds identically and incorrectly.

Rondou Offers More Conflicting Tales of How Detectives and Moriel Came Together

As one lie led to another, though, Rondou oddly suggested another possibility of how he ended up seeing Moriel at the jail, claiming that "…[W]e ended up, Oscar got information on [the Fernandez] murder, Matt being Detective McLeod was the lead detective on the '07 case, so we went over to the jail and talked to him." (Exhibit LL, p. 51:2-5.) Later, Rondou clarified that Deputy Garcia or someone from the jail may have provided the information leading to their decision to interview Moriel about the Fernandez murder. (Exhibit LL, pp. 56:10-57:3.)

Rondou was lying again, which Petersen fully realized. Deputy Garcia did not

study the numerous Elizarraraz crimes, select the Fernandez murder, analyze the gang names and the location of the crime, and divine that McLeod was the original investigating officer. In fact, Garcia wrote a brief summary of the notes from February 14 and 15, written by a Special Handling Deputy, and he only identified one specific crime, the " . . . OIS OCSD SSO incident . . . " (Exhibit O, p. 2348.) Rondou was seemingly trying a "shotgun approach" to explain why he found himself at the jail talking about the Fernandez murder, rather than simply telling the truth: the SAPD detectives obtained the notes in advance of their arrival and either 1) McLeod recognized the crime as one that he had previously investigated or 2) they went to the jail and talked to him about each of the described crimes.

At the preliminary hearing, Rondou jumped from one lie to another. When asked to explain why they contacted Moriel twice, Rondou claimed that they went back the "same day or a few days later" to show the video. He said the following:

> **We didn't know what he was going to talk about, other than Sergio is in custody and he's talking about a murder, come talk to me.** So we didn't know, I believe, at that point what murder he was talking about. So from what I remember, we went over, talked to him, came back, got the video and then sometime later within a day or two went back and showed him the video.

(Exhibit LL, pp. 51:15-20, 57:10-17, emphasis added.)

Rondou apparently had forgotten that minutes earlier he said, "Matt being Detective McLeod was the lead detective on the '07 case, so we went over to the jail and talked to him." (Exhibit LL, p. 51:2-5, emphasis added.)

Interestingly, the detectives would ultimately claim that they did not arrive at the jail until February 23, 2010. (Exhibit LL, p. 47:7-12.) This was likely another falsehood as it is extremely unlikely that Garcia failed to share the notes or the information contained within them for 10 days; Garcia said in an interview with the OCDA on March 29, 2013, that he immediately would contact outside agencies upon receiving information about crimes in their jurisdiction. (Exhibit EE, pp. 28-29.)

Petersen and Rondou both knew that Rondou's testimony was bordering on

nonsensical. Likely worried that continued efforts to conceal knowledge of the notes would enhance the appearance of a cover up, Rondou finally acknowledged their existence during Harley's cross-examination: "I want to say at some point [during the first interview] he gave us a handwritten letter of his notes that he took…" (Exhibit LL, p. 57:21-22.) Harley was clearly surprised and what followed corroborated that defense counsel had never seen any such notes.

Mr. Harley: Do we have a copy of them?
Q: So they – these handwritten notes were preserved?
A: I think so. That's why I started out with "I want to say," Mr. Harley.
(Exhibit LL, pp. 57:25 – 58:3.)

The questioning of McLeod, detailed below, confirms that the prosecution had not turned over notes memorializing any of what Elizarraraz told Moriel. It bears repeating that as a result of the prosecution's misconduct, the three defense counsel remained oblivious to the fact that Moriel detailed each of his interactions with targeted inmates—amassing 500 pages of notes, according to Tunstall. (Exhibit LLL, pp. 44:26-45:2.) Moreover, while it may have seemed odd to defense counsel that the prosecution somehow failed to preserve and discover the critical notes of the key witness in a homicide case prior to the preliminary hearing, Petersen still apparently held Harley's trust. The other two counsel probably did not suspect that the notes were ever created—again relying upon Petersen to turn over statements if they existed—unless they had read Moriel's testimony in *People v. Vega* or Harley mentioned it. It appears that did not happen.

Petersen and McLeod, though, must have watched anxiously while Rondou scrambled, trying to figure out which fabricated response would be the least damaging. Petersen and Rondou knew that the OCDA, the OCSD, and the SAPD were all in possession of the notes pertaining to the case. **Petersen also knew that Rondou had lied repeatedly, and that as the prosecutor, he was doing nothing to stop it.** While it was inconceivable that Petersen would pause the proceedings to turn over the notes in the prosecution's possession, Petersen knew that he would soon need to make difficult decisions about which of Moriel's notes to hide and which to discover.

McLeod Attempts to Avoid the Note Predicament through More Deception

Once Rondou acknowledged the existence of pertinent notes, he and McLeod began a game of "hot potato." It was soon McLeod's turn to explain what the team had done with the notes.

Harley questioned him:

> Q: Now, he also gave you a handwritten letter where he wrote down what was communicated. Is that right?
> A: I have the information, or I received the information that he had presented a handwritten letter to some form or personnel in law enforcement. I didn't receive it. Nothing was given to me.
> Q: Between February of 2010 and today's date, what efforts have been made in order to retrieve that handwritten note?
> A: As I heard from my request was such a letter exists, but I don't have it in my possession. I haven't gone further than just to ask if it exists and can I have a copy of it, and I was told yes, so -- "

(Exhibit LL, pp. 99:21-100:7.)

McLeod was lying and didn't seem to know what direction to turn.

> Q: You haven't gotten a copy.
> A: No.
> Q: You did see it?
> A: I've heard of it, and I believe I've seen it or I've seen notes provided by Moriel once.
> Q: Okay. Did you check the notes to see if they were consistent or inconsistent with what he was telling you?
> A: Yes.

(Exhibit LL, p. 100:18-26.)

McLeod committed perjury. His initial response was, "I have the information, or I received the information that he had presented a handwritten letter to some form or personnel in law enforcement. I hadn't received it. Nothing was given to me." He obviously had hoped that the questioning would end there. If it had, court and counsel would have been left dramatically misled. McLeod's first answer gave the impression that he had not looked at the notes but rather that members of another agency—presumably the OCSD—had obtained the notes, and told him of their existence. With each answer, though, McLeod realized the hole he was digging was getting deeper.

He was then asked whether he had seen the notes. McLeod wanted to stick with his first response, so he began by stating, "I've heard of it . . . " In small incremental movements, though, he began to yield to the truth. He quickly added to his first few words: " . . . and I believe I've seen it . . . " Was he truly uncertain about whether he had seen the notes? His next few words answered that, as well: " . . . or I've seen notes provided by Moriel once." Having offered gradually more revealing responses, Harley's final question on the subject, which was whether he had compared the actual notes to what Moriel had said directly to the detectives, left McLeod in a box. He had finally admitted to seeing the notes. However, if he also acknowledged comparing the notes to what Moriel described, his initial response that he "heard of" the notes would be more clearly perceived as intentionally misleading. On the other hand, it would make little sense for the veteran detective to have never compared the notes to the witness's statement to determine their consistency. Lacking a safe way out, he finally capitulated and said he had done the comparison. This series of questions and answers powerfully corroborated that the prosecution team's plan entering into the preliminary hearing was to 1) attempt to avoid the subject of the notes and 2) deny possessing or studying the notes if they decided there was no choice other than to acknowledge their existence.

Unfortunately, Harley did not question McLeod about his false and fascinating claim that during the prior 14 months—from the date detectives interviewed Moriel to the date of the preliminary hearing—they had never obtained Moriel's freshly written notes. (Exhibit LL, pp. 47:7-12, 99:17-100:19.) Petersen declined to return to this subject on re-direct examination. Though, why would he? Petersen knew that he and his detectives had copies of the notes. Petersen also knew that McLeod had simply done his best to carry out the prosecution team's planned effort to conceal from the defense a more complete understanding of Moriel's informant work—just as the Dekraai prosecution team worked in unison to achieve a similar objective with Inmate F.

SAPD Detectives Attempt to Hide Policy Discouraging the Recording of Custodial Informant Interviews

The increasingly insurmountable challenge for the Petersen-led prosecution team was to keep track of their ever-expanding deception. Yet, with the defense still in the dark about nearly all of the prosecution's concealment and their reasons for it, McLeod actually emerged relatively unscathed from his performance. The prosecution team's next obstacle, though, was to provide a rational explanation for why they did not record their interview with the most important witness in the case, Oscar Moriel.

Interestingly, the prosecution admitted that Moriel was interviewed about his conversation with Elizarraraz, and that McLeod wrote a report about that interview. As indicated above, this decision was originally made in hopes that the defendants would not suspect that Moriel wrote notes about his conversation with Elizarraraz. After Rondou finally relented and admitted the existence of these notes, the prosecution was left with the worst of both worlds. Having neither turned over the notes nor recorded the interview with the key witness in a homicide investigation, the questioning on the latter issue intensified.

In *Vega,* a different approach by the prosecution apparently kept Harley from ever realizing that detectives actually interviewed Moriel about Vega's confession. Upon receiving four pages of notes documenting the confession—but not a report or recording of the subsequent interview with Moriel—Harley apparently believed that the detectives were content to just have the four pages of notes without conducting a follow-up interview of Moriel. In essence, he believed Petersen would comply with his discovery obligations.[42]

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[42] In *Roland v. Superior Court* (2004) 124 Cal.App. 4th 154, the court addressed whether California's statutory discovery provisions requires parties to disclose oral statements of witnesses they intend to call at trial. In *Roland*, the defendant asserted that he was not required to turn over oral statements to the prosecution from a testifying witness. Specifically, the trial court ruled that the defendant was required to inform the prosecution of any relevant statements of witnesses, regardless of whether the statements were memorialized in written reports, per section 1054.3. (*Id.* at p. 160.)
The Court of Appeal agreed, stating:

But in *Rodriguez*, Rondou acknowledged that Moriel was interviewed about the admissions of Elizarraraz and the identification of the suspects. So Harley began probing. He asked whether the first interview with Moriel was, in fact, recorded. Rondou stated, "…I don't know if McLeod recorded that one or not. I know I didn't." (Exhibit LL, p. 58:12-13.) Not true. Eighteen months after having interviewed the witness who broke a "cold case" murder, Rondou knew whether he or McLeod recorded it. **But the significance of this response—one of uncertainty about whether the conversation was**

> We conclude the latter interpretation is more reasonable because it comports with the voters' intent to promote the ascertainment of truth in trials by requiring timely pretrial discovery of all relevant and reasonably accessible information. (*In re Littlefield*, supra, 5 Cal.4th at pp. 130–131; § 1054, subd. (a).) This objective is achieved only if section 1054.3 is interpreted to require not only the disclosure of relevant written and recorded statements of intended witnesses, other than the defendant, but also the disclosure of relevant oral statements communicated directly to counsel by such a witness or communicated to counsel via an investigator or some other third party.

(*Id*. at pp. 166-167.)

The appellate court thus held that the language of the statute requires disclosure of all relevant statements, **including oral statements** by witnesses whom the party intends to have testify at trial. (*Id*. at pp. 167-168.) In reaching its decision, the court emphasized that the required disclosure of oral statements is consistent with the voters' intent in passing Proposition 115, which was created to make sure that both parties obtain the most information possible, helping to ensure that both parties are prepared and that the truth is ascertained at trial. (*Id*. at pp. 161-162.)

Lest there be any question whether the ruling was limited to defense discovery, the court stated the following:

> Interpreting section 1054.3, **and concomitantly section 1054.1**, to include witnesses' oral statements contained in oral reports to counsel will help ensure that both parties receive the maximum possible amount of information with which to prepare their cases, which in turn facilitates the ascertainment of the truth at trial. This objective is undermined if oral statements reported to counsel are excluded from the statute's disclosure requirement. Roland does not proffer any cogent reasons why the search for the truth should be limited to written, videotaped, or tape-recorded statements of intended witnesses.

(*Id*. at p. 165, emphasis added.)

actually recorded—can only be fully appreciated when analyzed alongside the detectives' discussion of the "recording issue" at trial.

When McLeod testified at the preliminary hearing, he stated that the first time he **ever** spoke with Moriel was in February of 2010 regarding the Fernandez murder. (Exhibit LL, pp. 90:22-91:17.) McLeod offered an explanation about the failure to record, which he should have regretted the moment he said it: "I don't believe there was a decision made. There was an agreement between Detective Rondou and I, due to the fact that we didn't know any of the information that he would provide would be of evidentiary value, so we just went." (Exhibit LL, p. 92:2-6.)

This testimony was a bald-faced lie and entirely inconsistent with Rondou's earlier account. It also begs the following question: Did these detectives believe that they had the power to make testimony vanish by simply replacing it with a different story? McLeod was the investigative officer and sat through the entire preliminary hearing. (Exhibit LL, p. 6:20-22.) He listened to Rondou testify earlier in the proceeding that " . . . Sergio bragged to him about this murder, he got a hold of us and said I got a homey that's in custody that he told me about a murder, come over and talk to me, so we went over and talked to him." (Exhibit LL, p. 49:21-24.) Rondou later testified, " . . . we ended up, Oscar got information on his murder, Matt being Detective McLeod was the lead detective on the '07 case, so we went over to the jail and talked to him." (Exhibit LL, p. 51:2-5.) Assuming arguendo that either of these versions was true, certainly a gang member's confession to an unsolved murder would have spurred a recorded interview of the person who heard it.

In the desperate attempt to hide the fact that local law enforcement avoids recording interviews with informants, McLeod suggested the existence of an investigative protocol that has far reaching implications. McLeod's answer confirmed that detectives do not always tape their initial interviews with witnesses. Rather, they first decide whether the information is valuable enough (to the prosecution) to justify using a recording device, even in situations where the evidence **could potentially break open a case.** Notably, the

policy of recording all witness interviews was set forth in the book authored by SAPD detectives, *Gang Investigations: A Street Officer's Guide*, and was endorsed by Rondou fully in *Vega*. (Ashby and Watkins, *Gang Investigations: A Street Cop's Guide* (2006) pp. 80-81; Exhibit QQ, pp. 1186:23-1187:13.)

McLeod had enveloped himself in dishonesty and deception—regardless of whether defense counsel appreciated it at the moment. Attorney Viefhaus pressed him further on whether there were any recordings of Moriel related to the Fernandez murder:

> Q: Detective, how many times did you interview Oscar Moriel?
> A: I have interviewed him three or four times.
> Q: Talk about this case or other cases as well?
> A: No, always about this case.
> Q: How many of those interviews did you tape?
> A: **I don't believe I taped any of them.**

(Exhibit LL, 105:13-19, emphasis added.)

This was another one of McLeod's half-truths. He was not the least bit unsure about whether he taped the interviews. He knew he had not. McLeod was fortunate to avoid further questioning about why none of the interviews were tape-recorded. Nonetheless, the admission that he never taped any of Moriel's interviews showed the absurdity of McLeod's earlier testimony that they did not record their first interview because of uncertainty about its evidentiary value. **The truth was that SAPD has not turned over a single recorded interview with Moriel or Inmate F. about any of the confessions documented in their notes that pertain to Delhi crimes, which confirms that they either do not record custodial informant interviews, they conceal them, or they destroy them.**

Of course, the suggestion that the detectives had no idea in advance whether Moriel would provide valuable information was another lie. Their informant worked in the jails at the direction of law enforcement. Most witnesses provide their stories for the first time when they sit down with detectives. By contrast, Orange County officers generally direct their custodial informants to obtain confessions; those confessions are documented in notes; detectives then interview the informants about their notes. In *Vega*, the prosecution

team that included Detective Flynn utilized the "Dis-iso" scam to facilitate Moriel's questioning of Vega about the Onofre murder. Moriel accomplished his mission and provided four pages of handwritten notes documenting Vega's confession. Detectives then went to the Orange County Jail, where they interviewed Moriel about the Onofre murder he had described in writing. Similarly, Flynn and Garcia coordinated the contact with Elizarraraz and directed Moriel about what they wanted from his questioning. He once again delivered and documented what he learned, which allowed detectives to be fully apprised about what Moriel would say when they interviewed him. Yet detectives did not record the interview or apparently even write a report about it. That decision—just like the decision not to record their interview with Moriel about the Onofre murder—had absolutely nothing to do with uncertainty about whether Moriel could provide valuable information.

McLeod's Efforts to Hide *Brady* evidence and Mislead During the Preliminary Hearing Revealed in Subsequent Cases

A considerable amount of McLeod's preliminary hearing testimony was perjured. Most of it, though, could never be identified by the defendants and their counsel because the most powerful evidence of the dishonesty was also being hidden. Moreover, as becomes clear in case after case, local defense counsel tend to put their faith in the justice system and believe that prosecution team members will ultimately honor their legal and ethical responsibilities. While many counsel certainly recognize that prosecutors and detectives will tweak their presentation to give the prosecution the best chance to succeed, most could never have imagined just how far some prosecutors would go to gain an advantage.

Another striking example of the corrupted ethics that dominate the custodial informant program is nestled in McLeod's answers to Viefhaus' questions about recording his interviews with Moriel. Beyond the lies already identified, McLeod said that he interviewed Moriel three or four times and "…always about this case." (Exhibit LL, p.

105:13-19.) This response fell somewhere between blatantly untrue and exceptionally misleading, though it was impossible for the defense counsel to know it at the moment—or in the future—unless their legal practice permitted an opportunity to study each of the Santa Ana gang cases prosecuted in Orange County.

In the discussion of the **Henry Cabrera cases**, this Court will have the opportunity to examine a number of other prosecutions also infected by terrible misconduct. The participants in the Cabrera misconduct include many of the same prosecution team members who are integrally connected to the deception in *Vega, Luis V., Rodriguez* and *People v. Ricardo Lopez*. McLeod is among the most important. In two cases related to the murder of Ruben Cabanas, *People v. Garcia* and *People v. Brambila*, McLeod revealed the existence of evidence that was directly relevant to the *Rodriguez* prosecution.

As discussed in more detail, beginning at page 463, McLeod testified that he interviewed Moriel about photos found in two large photo albums of Delhi gang members. Viefhaus' questions and McLeod's answers suggest compellingly that this evidence was never disclosed to the defendants in *Rodriguez*. The prosecution of Rodriguez and his co-defendant Lopez rested to a significant measure upon Moriel's identification of alleged Delhi members in the gas station video. Thus, the decision not to disclose the interview of Moriel related to those photos, and the photos themselves that Moriel examined, would only be justifiable if they were shown after Moriel completed his testimony in *Rodriguez*.

However, in the 2013 *Brambila* trial, McLeod disclosed, not only that the source of the photo albums was actually the incarcerated Moriel, but also that Moriel made identifications of Delhi gang members from several photos in **February of 2010**—the exact same month and year that McLeod showed Moriel the video related to the Rodriguez prosecution. (RT (trial), Nov. 13, 14 and 15, 2012, *People v. Brambila*, (Super. Ct. Orange County, 2012, No. 10CF3025), attached herein as Exhibit OOOO, pp. 44:19-45:5; Exhibit UUU, pp. 194:18-20, 195:21-196:7.) For a full discussion on this issue, refer to the section discussing *Brambila II*, beginning at page 463. The possibility that Moriel was studying

photographs of Delhi members in advance of identifying the three suspects in *Rodriguez* is hinted at in another concealed note written by Moriel. On January 8, 2010, 45 days prior to the purported identification of the three defendants in *Rodriguez*, Moriel wrote the following in one of notes: "*Still need those photo's from Nick Torrez (Joker DX3) to go over with Pave Dx3 (Sanchez)" (Exhibit O, p. 2252.) DX3 refers to the Deli gang.

Counsel for the defendants in *Rodriguez* would have correctly believed they were entitled to all of the above referenced evidence for the purpose of establishing: 1) that Moriel's identification of the defendants in *Rodriguez* was potentially tainted or influenced (initially or subsequently) by viewing photos of the Delhi gang members, including one or more of the defendants; 2) that Moriel's desire to have the photos so that he could show them to another gang member, Alvaro Sanchez ("Pave"), demonstrated a lack of familiarity with members of the gang and suggested that his identification may not have been independently formed; 3) that McLeod had committed perjury and the prosecution team had hidden the evidence related to the photos to avoid the above revelations and the resulting erosion of their case; and 4) Moriel was not simply a listening post who let evidence find him. Rather, as demonstrated by his effort to obtain photos of Delhi gang members, Moriel had aggressively been seeking opportunities to help build cases against potential targets.

The Missing Moriel Interviews

During the *Rodriguez* preliminary hearing, Rondou said that the next time he spoke with Moriel, the following individuals were present: Flynn, an unnamed prosecutor, and Moriel's attorney. (Exhibit LL, p. 48:18-26.) Rondou's description of this interview had a mysterious quality because Rondou omitted the name of the prosecutor who was present. Although the defendants did not ask Rondou to provide the name of the prosecutor, that individual was most likely Petersen. Additionally, it appears from a review of transcripts and the Court-ordered discovery in *Dekraai* that the prosecution did not disclose to any defendant a report or notes memorializing this contact.

This is particularly troubling because the meeting with Moriel's counsel would logically have included a discussion of potential benefits, as well as a description of what was expected from Moriel in exchange for his cooperation with the SAPD. Moreover, none of the discovery reveals the existence of a written agreement between Moriel and the SAPD, although one likely existed. In June of 2013, the prosecution in *People v. Dekraai* finally revealed an informant agreement between the SAPD and Inmate F. (Exhibit AA.) There is little question that a similar agreement was reached with Moriel.

During his examination at Rodriguez's preliminary hearing, Rondou admitted that it was "pretty accurate" that Moriel wanted something in exchange for his work as an informant. (Exhibit LL, p. 49:3-6.) Rondou then disclosed that he "believe(d) [Moriel] got a deal. He's testified in a homicide case against Mr. Harley. I believe he has a deal in place." (Exhibit LL, p. 49:6-9.) Bells and whistles should have gone off for Harley, since Moriel testified in *Vega* that no deal was reached, and Petersen emphasized during closing argument that Moriel received nothing in exchange for his testimony. (Exhibit HH, pp. 113:14-114:2; Exhibit AAAA, p. 60:21-23.) However, Rondou quickly retreated by suggesting that the agreement was not a "set-in-stone deal," which probably kept Harley from pressing further. (Exhibit LL, p. 50:3-6.)

During this testimony, Rondou utilized both of the prosecution's talking points on "expected benefits." Their first objective in addressing the expected benefits issue is to suggest that the informant was never promised a defined benefit. However, if evidence emerges that a benefit is forthcoming, the prosecution will suggest that the yet to be determined benefit will be derived from the informant's assistance on another case or cases—certainly not the one presently before the court. Rondou tried both approaches in the preliminary hearing. But he apparently forgot that acknowledging a benefit to Moriel for cooperating in *People v. Vega* was entirely inconsistent with Petersen's representations in that proceeding.

The Trial of Lopez and Rodriguez

Petersen's Misconduct Follows Him to Department 40

On February 12, 2011, the prosecution team learned the case was randomly assigned for trial to the Honorable William Froeberg. It could not have been a worse draw, and should have been viewed as an omen to the prosecution that they were on the wrong path. Judge Froeberg was the same judicial officer who presided over *People v. Vega*. They knew, therefore, that depending on the Court's recollection of what had transpired with Moriel in the previous case, the trial in *People v. Rodriguez* could turn disastrous; greater latitude in the questioning of Moriel could lead to revelations about his extensive informant work and the realization that Petersen had misled court and counsel about his knowledge of that work within *People v. Vega*.

Petersen and his team had probably been weighing a number of difficult decisions for some time. After it was revealed at the preliminary hearing that Moriel had, in fact, written notes about his conversations with Elizarraraz, Petersen was forced to contemplate which notes to discover and which to hide. Additionally, while the preliminary hearing confirms that McLeod was fully on board with the deception of Petersen and Rondou, the prosecutor knew that managing the misleading testimony of two witnesses at trial would require more luck and more planning.

Another source of concern for Petersen was that there would be two additional attorneys at the *Rodriguez* trial. A few good (or lucky) questions from either of them in the presence of Harley or Judge Froeberg could bring the deception in *Vega* into the spotlight.

Petersen Again Hides Critical Discovery

Petersen decided to turn over only 20 pages of notes dated February 14 and February 15, 2010. This was confirmed through Petersen's questioning of Moriel, in which he specifically identified the discovery provided to the defense, stating that the notes were "…bate stamped 290 through 209, so it is approximately 19 pages…" (Exhibit PP, p. 20: 12-14) There were actually 20 bases based upon the bate stamp calculation, which is also confirmed by review of the Trial Exhibit, which was made part of the record.

(Trial Exhibit No. 35 in *People v. Rodriguez* (Super. Ct. Orange County, 2012, No. 10CF0433), attached herein as Exhibit PPPP.)[43] However, as he had in *Vega*, Petersen ultimately suppressed nearly all of the discovery related to Moriel: almost 500 pages of notes that would have revealed coordinated efforts by law enforcement and Moriel to obtain inculpatory statements from inmates. (Exhibit LLL, pp. 44:26-45:2.)

In addition to the discovery previously identified as being concealed, the prosecution also hid a critical statement from Moriel about his efforts to obtain a confession from Juan Lopez (known as "Combo"). On April 20, 2010, Moriel wrote a letter to "Garcia and Gonzo" that included the following: **"I've been talking to Combo really well lately. I'm building trust between the two of us so he's not being standoffish. However he is avoiding speaking about his case."** (Exhibit O, p. 2394, emphasis added.) That letter, like so much of the other hidden discovery, was found by Dekraai in the case discovery from *People v. Inmate E*.

This note had implications for the *Massiah* analysis in each of the cases in which Moriel solicited a confession from an inmate who was both charged and represented by counsel. The writing, as the prosecution fully recognized, also powerfully undercut the presentation of Moriel as simply a good listener, who repeatedly found himself at the fortunate spot to receive confession after confession—which is precisely how the prosecution presented Inmate F. in *People v. Dekraai*. Furthermore, this note would have been particularly relevant to the defense in *People v. Vega*, as the note offered another example of the prosecution team directing Moriel to obtain confessions from represented and charged defendants. If the prosecution had revealed this evidence, Vega would have immediately brought a *Massiah* motion. At the very least, discovery of the "Combo" note

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[43] The discovered notes included Elizarraraz's confession in the shooting of Carlos Vega and Brian Marin, which indicated Luis V. was not involved. (Exhibit O, pp. 2363-2365.) However, by delaying discovery of this note prosecution team members diminished the likelihood that counsel would identify or raise the issue of a *Brady* violation, as the case against Luis V. had been already dismissed.

would have supported a discovery motion similar to the one filed in the instant matter, and likely resulted in a court order to disclose the critical information discussed throughout this motion.

The discovery of a note showing that Moriel continued to solicit a confession from Lopez after Moriel had supposedly identified him on the video would have been immensely helpful to Lopez's defense, as well. First, the note would have enabled the defense to argue that detectives were pressing for a confession because of an undisclosed weakness in their case, such as Moriel's expressed lack of confidence that the person on the video was indeed Lopez, despite the certainty apparently described in McLeod's report. Second, the note would have demonstrated a willingness of the prosecution and members of law enforcement to purposefully violate the law. This disclosure may have undermined the credibility of the prosecution and exposed a desire to win regardless of the cost.

And again, for Sergio Elizarraraz (and Inmate I.), Moriel's persistent commitment to obtaining a confession from Lopez would have been critically valuable in dispelling the prosecution's presentation of Moriel as a mere listening post for confessions and the lucky recipient of inculpatory statements thrust upon him by inmates in his "proximity."

The Prosecution Hides February 26, 2010 Notes

Concealment of Details Regarding Unsolved Murder of Daniel Gallegos and Moriel's Efforts on Operation Black Flag

The prosecution also chose not to turn over a series of notes dated February 26, 2010. Those notes were numbered "1" through "6," and nearly each page presented a different dilemma for the prosecution. Pages one and two primarily documented Elizarraraz's description of his own criminal conduct and that of fellow Delhi members, including Lopez. On pages one and two, Moriel described a murder for which Elizarraraz and Lopez were clearly responsible, assuming that Moriel's notes were accurate. (Exhibit O, pp. 2385-2386.) Elizarraraz told Moriel that he, Lopez, and a third Delhi member were outside Lopez's home when they saw an individual from a rival gang pass them in a car,

and then exit the vehicle. In preparation for a preemptive attack, Elizarraraz purportedly handed Lopez a firearm with one bullet in the chamber. After a shot was fired, Lopez allegedly returned and told Elizarraraz that he shot and killed the "little brother" of "Slugger from TFK." (Exhibit O, pp. 2385-2386.)

From a comparison of documents, including press reports and an unpublished court opinion, the deceased was very likely Daniel Gallegos, who was killed on the same block of V** where Lopez lived close in time to the date of the shooting, March 24, 2007. (*Santa Ana Shooting Likely Fatal for Man*, Orange County Register (March 25, 2007) and Delson, *2 Friends Witness a Killing and a Movement is Born*, L.A. Times (May 5, 2007), attached herein as Exhibit QQQQ; Minutes in *People v. Lopez* (Super. Ct. Orange County, 2008, No. 08CF1532) and Minutes in *People v. Lopez* (Super. Ct. Orange County, 2008, No. 07HF0981), attached herein as Exhibit RRRR.) Per Moriel's notes, ". . . him (Bad Boy) Taz (Moises Cabrera), and Combo were kicking back on V** St. at Combos Family's house…" (Exhibit O, p. 2385.) According to court records from Juan Lopez's 2008 case, Lopez lived on the same block of V** where the shooting occurred. (Exhibit RRRR.) Significantly, Daniel Gallegos' brother, Jamie Gallegos, was identified as a TFK member in *People v. Sanchez*. (*People v. Sanchez* (2002) 2002 Cal. App. Unpub. LEXIS 6272, attached herein as Exhibit SSSS, p. 2.) Elizarraraz also claimed in his alleged admission to Moriel that the gun used in the Gallegos murder—a Glock 9mm—was the same one used to kill Miguel Fernandez. (Exhibit O, p. 2386.)

Did anything in particular motivate the decision to withhold these notes, or was the prosecution merely engaging in its usual practice of providing the most minimal discovery possible related to informants? Perhaps in the immediate aftermath of receiving the description of this crime and the identification of the participants, they withheld the notes in order to first complete the investigation, including possibly a comparison of any bullets and/or casings recovered in the two incidents. But three years passed between the time that they received these notes and when *People v. Rodriguez* proceeded to trial. Thus, there

was no justifiable excuse for not turning over these particular notes.

The failure to provide these notes and any findings of the subsequent investigation further illustrates a systematic aversion on the part of the prosecution to fulfilling their legally mandated discovery obligations. If the investigation corroborated the information within the notes, that information needed to be shared, at the very least, with Rodriguez, who could have introduced the crime as evidence of Lopez's moral turpitude if Lopez testified at trial. Alternatively, Rodriguez could have offered the crime as character evidence for violence if he elected to argue that the other two defendants were responsible. Furthermore, even in the absence of an additional investigation, Elizarraraz's description of his own culpability could have been introduced as a statement against penal interest.

On the other hand, if the police investigation showed that Elizarraraz's version of the events as described in the notes was inaccurate, that evidence should have been available to all of the defendants. That information would have been relevant to whether Elizarraraz has a character trait for making false confessions. If, however, the police investigation found that the crime was inaccurately described by Moriel, one or more of the defendants could have used this information to argue that Moriel's descriptions of conversations with targeted inmates are unreliable.

The prosecution's responsibility to turn over helpful evidence often times requires thoughtful contemplation in analyzing how particular evidence could benefit the defense. This is illustrated above in the discussion of how evidence of the Gallegos murder could have benefitted Rodriguez's case. Unfortunately, the prosecution did not want to help any of the defendants in presenting their case and, therefore, there was simply no reason from their perspective to turn over the above referenced notes.

There is another potential motivation for the prosecution's decision to hide these particular notes, dated February 26, 2010. As discussed above, Petersen and his team orchestrated a fraudulent plan in *People v. Vega* to make it appear that they were unaware of Moriel's involvement in Mexican Mafia investigations. However, there are a few

noteworthy lines on this issue at the bottom of the second page of Moriel's notes detailing the "Gallegos murder." Moriel wrote the following:

> *I asked Cyco from Hard Times (Zapata) what his homeboy Crow from Hard Times real name is. And Cyco told me "Oscar Zamora." I asked if Cyco if Crow (Oscar Zamora) was the same guy that went those meetings with the Mexican Mafia members (Perico & Cisco) There with his homeboy Gato? And Cyco said "Yes, same guy!"

(Exhibit O, p. 2386.)

The prosecution knew that discovery of these six lines would have revealed that Moriel was working with local law enforcement, and that Petersen and local prosecutors were fully on notice of this. Discovery of this note, therefore, would have immediately exposed Petersen's misconduct in *People v. Vega*. For Petersen and his team, it was an easy call. A jury would certainly convict Elizarraraz, Rodriguez, and Lopez, just as a jury had convicted Vega. By hiding Moriel's notes describing the Gallegos murder, Petersen and his team could protect themselves and their informant system. They also believed that they could forgo a prosecution of the Gallegos murder, as well as other crimes, and still ensure that the three defendants remain incarcerated for the rest of their lives. They were wrong.

Petersen Takes Steps to Reduce Chances that Harley and Judge Froeberg Will Recognize the Misconduct in *People v. Vega*

Petersen filed a motion to sever Lopez and Rodriguez from Elizarraraz at his first appearance in front of Judge Froeberg on July 29, 2011. (People's Notice of Motion and Motion to Sever Defendant Elizarraraz, filed July 29, 2011, *People v. Rodriguez* (Super. Ct. Orange County, 2011, No. 10CF0433), attached herein as Exhibit TTTT.) Written severance motions by the prosecution are relatively uncommon, and this was one Petersen could not risk losing. The motion made sense legally for the prosecution, as Elizarraraz's

statements were inadmissible against his co-defendants.[44] Petersen also believed that he had a greater chance of concealing his informant misconduct in *People v. Vega* if Harley was not present to hear Moriel's statements, which would be inconsistent with Moriel's testimony in the previous trial. The absence of Harley from the trial also reduced the chances that Judge Froeberg would be alerted to deception that was relevant to *People v. Vega*.

Petersen wanted his best opportunity at convicting as many of the defendants as possible without exposing his team's legal and ethical violations. Petersen wisely recognized that if Moriel revealed more details about his informant background in front of Harley than had been revealed in *People v. Vega*, there was a far greater chance that Petersen and his team would finally face consequences for their actions.

A Stunning Effort to Explain the Detectives' Failure to Record Interview(s) of Moriel

Detectives Stuck in the "Anti-Recording" Policy of the Custodial Informant Program Create Fabricated Version of Interviews with Moriel

The trial transcripts reveal a prosecution team greatly concerned both about the implications of their decision—consistent with custodial informant program training—to not record their conversations with Moriel. Their "fix" to this problem was fascinating.

The first solution was McLeod's attempt to morph two interviews of Moriel into one single interview. This made sense for a group willing to lie, as it was harder to rationalize why two interviews were not recorded, versus one. As discussed earlier,

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[44] Although the severance was justified, one can only wonder if Petersen felt any shame as he expressed a worry that Moriel's statements "…would be impermissibly prejudicial to the other Defendants…" (Exhibit TTTT, p. 5.) His expression of concern about the two gang members' rights to a fair trial was the height of hypocrisy as he was attempting to trample their due process rights in just about every way conceivable. In reality, Petersen could not have cared less how these three were convicted as long as their convictions were upheld on appeal and his misconduct was not uncovered.

McLeod testified at the preliminary hearing that the first conversation with Moriel was an exploratory interview that was "…very brief, maybe 20, 30 minutes, something like that." (Exhibit LL, p. 92:11-15.) He first testified that he went back the same day or the next day to show him the videotape, but later said he went back the next day. (Exhibit LL, pp. 101:11-14, 101:23-26.)

At trial, however, McLeod testified that there had not been two contacts but rather only one, with the video being shown "…on our initial contact." (Exhibit UUU, p. 231:23-26.) On re-direct, he further "clarified" by testifying that he did **not** come back the next day to show the video. (Exhibit UUU, p. 232:3-5.) The prosecution team knew these statements entirely contradicted McLeod's preliminary hearing testimony, but they were more concerned with explaining why two interviews went unrecorded. **McLeod never explained, nor was he forced to explain, why he decided to bring a copy of the videotape from the gas station for Oscar Moriel to examine.** Perhaps he was channeling Rondou's preliminary hearing testimony, in which he falsely suggested that Moriel relayed his knowledge of the Fernandez murder prior to their first interview of Moriel at the jail. At trial, Rondou supplemented McLeod's new version of what led to their first contact with Moriel on this case. At the preliminary hearing, Rondou testified:

> . . . I believe what happened was, Mr. Elizarraraz got put into custody, **they came into contact, they were housed together or next to each other**, Sergio bragged to him about this murder, he got a hold of us and said I got a homey that's in custody that he told me about a murder, come over and talk to me, so we went over and talked to him.

(Exhibit LL, p. 49:18-24, emphasis added.)

In contrast, **his testimony on the identical subject at trial**, was the following:

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A: …The initial time we had gone over there was [to] talk with Oscar because I had a couple other cases with him. And during that conversation, some names came up as to who he kicked back with out in the street. And I believe that, based upon some of what you've been hearing, that's when your guy's name came up. They grew up together. That was one of his tight friends. So then, when we had gone back, it was: "Hey" -- because I didn't go over there the initial time to talk to Oscar about this case. And then, when we headed back over there with the video, that's when he -- we showed him the video. And it was: "Hey, if you recognize anybody, take a peek." Your guy's name came up, and it wasn't just regarding this case. But as far as just this case goes, I never said, "Hey, is that Combo? Or "I'm going to show you a picture of Combo, and you tell me if you recognize it."
Q: Okay.
A: Make sense?

(Exhibit PP, pp. 371:25-372:16.)

The answer to this seemingly rhetorical question should have been a resounding "No!" His explanation was neither logical nor truthful. Rondou's testimony was entirely inconsistent with his preliminary hearing testimony, during which he said that he went over to the jail precisely because he received information that Moriel had something to share about the Fernandez murder.

In this version presented at trial, Rondou and McLeod just happened to stop by the jail; they started talking about who Moriel hung out with from Delhi on the streets; Moriel mentioned Lopez; it turned out that nine days earlier Moriel had written notes about his conversation with Elizarraraz in which he implicated Lopez in the Fernandez homicide; but Rondou was unaware of those notes or his purported involvement in the homicide (although he testified at the preliminary hearing that he originally went over because Moriel had communicated that he had information about the homicide.)

Rondou's account becomes even more preposterous when one considers that on the day of this purported conversation, February 23, 2010, Moriel "coincidentally" documented a second confession by Elizarraraz to the murder, which also happened to mention Lopez's involvement. **That note was found in the discovery from *People v. Inmate E.* and was never turned over to the defense.** It will be discussed in greater

detail below.

This version of how the detectives ended up seeing Moriel at the jail on February 23, 2010, still did not explain why they failed to at least record the interview in which Moriel was shown the videotape. Petersen, McLeod, and Rondou had attempted to devise a solution in advance for that problem, as well. Their explanation required confabulation and a hearty helping of false contrition. According to Rondou, OCSD deputies told them that there was only a brief moment in time in which they could interview Moriel. (Exhibit UUU, p. 195:7-17.) This urgency—apparently forgotten about at the preliminary hearing—made little sense. Moriel had been an extremely cooperative prosecution informant for the past 12 months, working closely with law enforcement on a number of ongoing investigations. Neither the newly recalled urgency nor the purportedly small window for contact with Moriel rings true. But Rondou and McLeod were only halfway through the tall tale. However, the small window of time and energized rush to the jail still did not explain why neither of them had a handheld recorder, particularly when they had the presence of mind to bring the video player and video. McLeod gave his prepared answers to Petersen's questions:

> Q: Can you describe why you were rushed?
> A: Well, according to the individuals who were in contact with Moriel, we had, for a lack of a better term, a tight window in order to interview him and in gathering the tools that we would need in terms of a laptop computer, and that was the main thing that I remember grabbing, we rushed out of the station so as to not miss that small window.
> Q: Is it fair to say that it was probably a mistake as to why you didn't bring a tape recorder?
> A: Yes.

(Exhibit UUU, p. 195:7-17.)

Apparently, the prosecution was unconcerned about the preliminary hearing transcript, in which the "tight window" excuse was never mentioned—as it clearly had not yet been concocted. In fact, at the preliminary hearing, McLeod stated that he only interviewed Moriel once regarding the crime and that, "There was an agreement between Detective Rondou and I, due to the fact that we didn't know any of the information that he

would provide would be of evidentiary value, so we just went." (Exhibit LL, p. 92:1-6.)

With Petersen's help in questioning, Rondou joined McLeod in this fabricated presentation of well-intentioned, but rushed detectives, embarrassed by their error. After regaling the jury with his extensive training and teaching about interview techniques, Rondou also took one for the team:

> Q: You've heard testimony about an interview that you and Detective McLeod had with Oscar Moriel, when you showed him a video?
> A: Yes.
> Q: Did you break any rules that you, in fact, teach around the country?
> A: Did I break any rules? No.
> Q: Did you break any of your teachings?
> A: Yes.
> Q: Can you tell us what that is?
> A: I didn't bring a tape recorder…

(Exhibit PP, p. 352:12-22.)

Petersen asked how this unfortunate error could have taken place. Rondou thought he could improve McLeod's new version of events slightly, by adding an additional detail:

> A: Like Detective McLeod said, I had gotten a call from the sheriff saying, "Hey you got a short window get over here if you want to have a few minutes with Oscar." Detective McLeod grabbed the laptop computer and the video we wanted to show him, and **I'm sure he thought I was grabbing the tape recorder. I assumed he was.** At the end of the day, that's my fault. I'm the supervisor involved in that. It's the number one thing I teach, record it, because when you think you're recording something, you don't take notes. If I know I don't have a recorder available, I'm going to take notes regarding the interview. And we talked to Oscar regarding that video and nothing was recorded. That was my fault."

(Exhibit PP, p. 352:26-353:12, emphasis added.)

Petersen then asked whether the volume of interviews makes it essential that the interviews be recorded. Rondou stated the following:

> A: 100 percent. **We record everything we do** and the recording catches it all. You review the recordings and come in and testify.

(Exhibit PP, 355:18-22, emphasis added.)

On cross examination, Rondou finally faltered at the end of his performance:

Q: Obviously it's been a big bone of contention here. You basically come in to tell us today that you screwed up?
A: 100 percent.
Q: Okay. That you should have tape recorded the interview and you didn't.
A: Correct.
Q: You told us that you've been – you teach how to interview. We got to hear you interview Mr. Rodriguez, and that one of the things you teach is: Hey you need to interview people in these cases – I mean, you need to tape record them in these cases, correct?
A: Correct.
Q: Witnesses, especially somebody as important as Oscar, right?
A: I tape record everybody. Me and you have done enough cases, you know that I tape record everybody.
Q: You do. Oscar Moriel, in the scheme of witnesses that we see in these types of cases, is a big fish?
A: Bad evidence for you.

(Exhibit PP, pp. 369:22-370:16.)

In what would ultimately prove to be an unsuccessful effort to save their case, Petersen and his team shamelessly misled the jury, the court, and counsel. **Petersen knew very well that Rondou did not record "everything we do"—unless those recordings have been hidden from the defense. Again, neither the SAPD nor Petersen have ever produced a single recording of the multiple interviews with Moriel.** Furthermore, Petersen and his team knew there were no "short windows" to speak to an informant who has now spent five years in jail; they could coordinate a visit that would avoid suspicions any day of the week. Petersen knew the entire story was false, but he was invested as one of the co-creators of the fictional account.

Petersen Tries to Save the Case and in the Process Corroborates the Custodial Informant Policy Discouraging Recorded Interviews

The failure to tape record Moriel did not emerge as an issue in *People v. Vega*, as the prosecution never even revealed that detectives had interviewed Moriel. However, in the trial of Lopez and Rodriguez, Moriel was the linchpin witness and the prosecution recognized that the failure to twice record his interviews had become difficult to explain.

The story had turned absurd. The prosecution was asking jurors to believe a series of absurd coincidences: detectives found themselves in a "short window" to speak to an informant who is seemingly always available; detectives who supposedly always record interviews then assumed the other brought their recording device; however, both failed to speak to each other about their assumption. It likely sounded better in the pre-game meeting than in the courtroom. But Petersen was desperate. He knew that detectives never recorded Moriel—unless those recordings were made and either were destroyed or remain in an office within the SAPD. He realized that he had kept this practice hidden in *People v. Vega*. Most importantly, he fully recognized that the failure to record Moriel in this case could cost him a murder conviction.

> On re-cross-examination, counsel for Rodriguez questioned Rondou further:
> Q: Did you have a recorder the first time you interviewed this important witness?
> A: No. But I'm not going to say it was an interview.
> Q: When you first spoke to this important witness, did you have a recorder?
> A: No.
> Q: When you spoke with him a second time, did you have a recorder?
> A: At the second time I interviewed him, no.
> Q: Nothing further.

(Exhibit PP, p. 388:7-17.)

Petersen seemingly could no longer stomach what he was watching. The policy of discouraging the recording of informant interviews had boomeranged around and dealt a powerful blow to his case. With the "short window/big rush" explanation for not recording the interviews with Moriel appearing increasingly more preposterous, Petersen must have believed that desperate measures were necessary. The prosecutor attempted to sweep away Rondou's earlier testimony, in which he attributed his failure to record Moriel to a once in a career accident caused by urgency and a confluence of bad luck. Petersen asked Rondou how many times he had not recorded conversations with Moriel:

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Q: How many times have you spoken to Oscar Moriel where you haven't used a tape recorder?
A: Oscar specifically or other informants?
Q: Let's start with Oscar.
A: Probably **ten times.**
Q: Nothing further.
(Exhibit PP, p. 388:21-26.)

Petersen hoped that these answers would convey to jurors that there was nothing unusual about the detectives failing to record Moriel. But what happened to the earlier version that it was simply terrible luck that had caused him to break the rule that he taught around the country that detectives must always bring their recorder? Apparently sensing a disbelieving jury, Petersen threw a Hail Mary and decided that jurors would be more forgiving if Rondou hardly ever recorded his interviews with Moriel. Of course, while Rondou's answer may have seemed momentarily helpful to Petersen, it flatly contradicted Rondou's earlier testimony that, **"We record everything we do."** (Exhibit PP, p. 355:20, emphasis added.)

Rondou's acknowledgement that he spoke with Moriel 10 times without recording him was also stunningly inconsistent with his testimony on the exact same subject in *People v. Vega*. As discussed earlier, beginning at page 288, Harley and Judge Froeberg watched Petersen and Rondou decimate the credibility of Vega's private investigator for failing to record a conversation with a witness in state prison. They did this by contrasting the morally suspect investigator Szeles with the ethically upstanding Rondou. Rondou had proudly stated that he recorded "[e]very one" of **his** interviews" during *Vega*, and earlier in *Rodriguez* had said, "I tape record everybody." (Exhibit QQ, p. 1186:24, emphasis added); (Exhibit PP, pp. 369:22-370:16.) In *Vega*, Rondou had self-righteously reminded jurors that there is nothing to fear in recording because "the truth is the truth." (Exhibit QQ, p. 1187:12-13.)

When Rondou testified in *Vega* about his interview practices, both he and Petersen knew that Rondou never recorded interviews with custodial informants, including the one with Moriel pertaining to *Rodriguez*. But this team would never allow facts to deter them

from introducing testimony that could gut the credibility of Szeles and destroy the defenses of "bad people" such as Vega, Rodriguez, or Lopez. The moral depravity required for their conduct is almost unfathomable—**and participants in the justice system are left to imagine the number of cases in which similarly unconscionable behavior deprived other defendants of their right to a fair trial**.

Moreover, for Rondou and Petersen, the individual who was most likely to fully comprehend the significance of Rondou's testimony was not in the courtroom. With Petersen having wisely obtained severance of Elizarraraz, Harley missed the chance to see Rondou unintentionally provide incontrovertible evidence that he lied in *Vega*.

Deception Made Possible by Yet Another Discovery Violation: Moriel's Undiscovered Notes from February 23, 2010

The fabricated account of an "accidentally" unrecorded conversation with Moriel on February 23, 2010 could only be sold to the jury if the prosecution withheld another key piece of evidence: a note written by Moriel describing a second conversation with Elizarraraz about the Fernandez murder. The concealed note, found in the *Inmate E.* discovery, was purportedly written on the very same date that detectives supposedly showed up to speak with Moriel for the first time about the Fernandez murder: "2-23-10." As will be shown, the note strongly suggests that detectives—in contrast to their testimony—met with Moriel prior to February 23, 2010, and then requested that the informant craft a "clean" note only describing the Fernandez murder to avoid disclosure of other information surrounding the pages of the February 14 note.

On its face, this "2-23-10" note would have seemed ideal for discovery—far better than those written on February 14 and 15, which included descriptions of multiple crimes in addition to the Fernandez murder. However, the "2-23-10" note presented several problems, the first of which was the date itself. The note was allegedly written the **exact same day** that McLeod claimed in his testimony that he had interviewed Moriel for the first time about the murder. This coincidence was problematic.

The notion that it took eight days from when Moriel first wrote about the Fernandez murder until detectives arrived was already suspicious. Moriel testified that when Elizarraraz gave him information he began writing down the information "like 30 seconds [later]. As soon as he left my door, I'd start writing." (Exhibit UUU, p. 19:13-14.) Additionally, OCSD Deputy Garcia emphasized to Assistant DA Wagner the speed with which his agency distributed informant information to outside agencies, which makes sense particularly when the subject matter is murder. (Exhibit EE, pp. 28-29.) However, at a time when the prosecution team believed they could avoid discovery of any notes related to Moriel's conversations, they committed themselves in their report to having interviewed Moriel for the first time on February 23, 2010. Their appearance on that date would make sense as long as they could suppress their earlier notes. As the preliminary hearing shows, they certainly did their best.

There are numerous reasons why the "2-23-10" note appears to be the product of foul play, and the prosecution's realization that it could be viewed as such was likely the primary motivating factor in hiding it from defense. For instance, there was the highly unusual coincidence that Moriel wrote a follow-up note about the Fernandez murder on the exact same day that the detectives happened to arrive; their arrival spurred by any number of the fabricated reasons presented during the preliminary hearing and trial, including that 1) Moriel got in touch with the SAPD about the murder; 2) Garcia contacted SAPD detectives about the murder; and 3) they were at the jail to touch base with Moriel when they found themselves in a discussion of the Fernandez murder. Also, the note, quite fortuitously, seemed to meet the prosecution's precise need: a "clean" description of only the Fernandez murder contained on a single page without any reference to the other confessions obtained by Moriel, which they wanted to hide.

Additionally, the date of "2-23-10" on the note did not make sense if detectives spoke with Moriel for the first time that day. Moriel began the note by stating, "The other day when I was talking to Bad Boy (Elizarraraz) he told me…." (Exhibit O, p. 2379.) If

the detectives arrived after he wrote the note, he would not have written about anything written "[t]he other day" – because he would have told the detectives about it during the interview on February 23, 2010.

If Moriel wrote the note before the interview with detectives on February 23, 2010, that would mean he just happened to write a second Fernandez murder note hours or minutes before detectives arrived to interview him about that case. This prosecution team had long since used up its "coincidence" excuses. In order to believe that Moriel wrote an unsolicited note on "2-23-10," the following would have had to occur: the detectives inexplicably did not arrive at the jail on February 16, February 17, February 18, February 19, February 20, February 21 or February 22, 2010.

Again, it was interesting that Moriel did not "spontaneously" begin documenting what was told to him a few days earlier about any of the other crimes. His delayed recollections about the Fernandez murder were impressive: the name of the junior high where the crime occurred, as well as the color, make, model and decade of the suspect vehicle. Of course, it is not credible that the Fernandez murder was the only crime, out of the many discussed in the 20 pages of discovered notes, that Elizarraraz and Moriel discussed for a second time—unless detectives led Moriel in that direction.

What likely happened is that the detectives met with Moriel closer in time to February 14 or February 15, 2010. At some point, the prosecution team became concerned about turning over the notes dated February 14 and February 15, 2010, because they also documented other confessions and details relevant to Vega. Since the prosecution team wanted to downplay the extent of Moriel's informant work, the detectives likely asked Moriel to speak with the target again and requested that he document the confession on a separate note that they could actually turn over, if needed.

If this was the plan, why not simply turn over the note from February 23, 2010? It appears that the prosecution team decided to first see if they could avoid the disclosure of notes altogether. They made a mistake, though. The detectives decided to claim that their

first interview took place on February 23, 2010, and McLeod wrote a report consistent with that proposition. After they reluctantly acknowledged at the preliminary hearing that notes existed, they likely reexamined the "2-23-10" note and recognized the same signs of deception addressed in this motion.

The prosecution team may have also been concerned about a line in the note that suggested that Moriel had already viewed the videotape prior to the purported meeting on February 23, 2010. Elizarraraz's first description of the suspect vehicle—detailed in Moriel's notes of February 14 and 15—was far more general than the one documented on February 23, 2010. In the note dated February 23, 2010, Moriel wrote that Elizarraraz told him that the suspect car was "a mid 90's green Honda Accord"—an odd detail for Elizarraraz to communicate, and coincidentally the exact description that one might expect from someone viewing a video. (Exhibit O, p. 2379.) Of course, if Moriel viewed the videotape before February 23, 2010, then the detectives lied about the chronology of events at the preliminary hearing.

Ultimately, Petersen and his team should answer to their repeated failure to turn over legally required discovery, including—but certainly not limited to—the notes written by Moriel on February 23, 2010.

The Conclusion of the Cases against Defendants Lopez and Rodriguez and the Settlement of Sergio Elizarraraz's Case

On February 23, 2012, Lopez and Rodriguez were found not guilty of all charges. (Exhibit LLLL; Exhibit NNNN.) The loss certainly was a difficult one for the prosecution to accept. Seemingly, Petersen could at least take comfort in the fact that the evidence against Elizarraraz seemed far stronger than what was available against Lopez and Rodriguez, as Elizarraraz was the only one of the three defendants to have confessed.

However, the prosecution's discovery violations and misconduct from the trials of Vega, Lopez and Rodriguez would not go away. Petersen had chosen to conceal the "2-23-10" confession, and certainly could not turn it over to Elizarraraz. He knew, therefore, that

he would need to commit additional misconduct by manipulating the presentation of Elizarraraz's statements—guiding Moriel not to mention the supposed February 23, 2010 confession, because the prosecution was concealing the related note.

Petersen was understandably concerned that the prosecution team's misconduct in *People v. Vega* might be revealed in a second trial with Harley, which would also be heard by Judge Froeberg. Petersen knew that Harley would have access to the trial transcripts documenting Rondou and McLeod's perjured testimony, along with information on Moriel's extensive informant work that had been intentionally concealed in *People v. Vega*. In *People v. Rodriguez*, Moriel testified that he had received statements from perhaps about **20** inmates. (Exhibit PP, p. 338:3-9.) In *People v. Vega*, Judge Froeberg stated the following: "**I think it's certainly relevant to determine how many jailhouse confessions he's allegedly been a party to.** I'm not sure, other than that, what relevance the material would have." (Exhibit HH, p. 31:11-20, emphasis added.)

Petersen, though, never disclosed any confessions other than the Vega confession to the Onofre murder and the Elizarraraz confession to the Fernandez murder. Judge Froeberg understandably did not remember that ruling at the time that Moriel gave an estimate of 20 confessions in *Rodriguez*. However, Petersen realized that after Harley studied the transcripts, he could raise discovery issues that could impact the viability of the *Vega* conviction, and raise serious concerns over Petersen's conduct in that case.

Furthermore, during closing argument in *People v. Rodriguez*, Petersen made a surprising comment in his effort to gain credibility with the jurors. He stated: "If Oscar Moriel were to go to trial and lose, the chances are he'd do life, but he's testifying, he's going to do less than life. How much time? I don't know. But he's going to do less than life." (Exhibit PP, p. 403:18-21.)

This disclosure was typical of Petersen. It certainly was not done to comply with his discovery obligations; the fact that Moriel was no longer facing a life sentence unquestionably needed to be disclosed before that moment. Rather, he made this statement

because it provided a tactical advantage. It made him appear reasonable in front of the jury. By disclosing that "he's going to do less than life" after he testified, Petersen also deprived defense counsel of the opportunity to examine Moriel about his knowledge of this arrangement and what Petersen or his team had specifically told him about his sentence. Petersen likely contemplated that if Harley picked up on this disclosure, it would raise significant questions about when this decision was made, and when it was communicated to Moriel. As discussed earlier, during closing argument in *Vega*, Petersen had forcefully declared that there was no known sentence or offer awaiting Moriel. (Exhibit AAAA, p. 60:21-23.)

If Elizarraraz did in fact commit multiple murders and other serious crimes, as documented in Moriel's notes, then Elizarraraz deserved to be incarcerated for the remainder of his life. However, for the prosecution team, community safety was a secondary concern compared to protecting themselves and the custodial informant program. On October 19, 2012, Petersen dismissed the murder and street terrorism charges against Elizarraraz. (Exhibit ZZZ.) Instead, Petersen allowed Elizarraraz to plead guilty to a lesser charge of voluntary manslaughter with a gang enhancement. (Exhibit ZZZ.) He received a sentence of six years in state prison with credits of 2,315 days. (Exhibit ZZZ.) This offer meant that Elizarraraz received "credit for time served" on a special circumstances murder and was released to the streets on the day he entered his plea.

PEOPLE V. CAMARILLO, et al.

Summary of Charges

On August 26, 2011, Jose Camarillo, Mark Garcia, Fernando Gallegos, and Bernardo Guardado were charged with conspiracy, aggravated assault, and the gang enhancement. (Minutes for Jose Camarillo and Mark Garcia in *People v. Camarillo* (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit UUUU.) The case proceeded to preliminary hearing on April 10, 2012. (Exhibit UUUU.)

One of the four originally charged defendants, Mark Garcia, subsequently agreed to testify for the prosecution at trial. On February 13, 2013, he pled guilty to aggravated assault, and all the other charges, enhancement, and prior conviction allegations were dismissed. Garcia was sentenced to four years in state prison after testifying. (Exhibit UUUU.)

Summary of Issues and Facts

As noted in the Summary of Motion and Findings, Petersen was responsible for each of the Black Flag prosecutions filed in the Orange County Superior Court. The first local case to proceed to trial was *People v. Camarillo*.

The following is a summary of the prosecution's case based principally on its opening statement. The alleged assault that was the subject matter of the felony information arose out of a dispute between two competing Mexican Mafia leaders. Prior to 2009, Peter Ojeda, also known as "Sana," had exclusive control of the Orange County Mexican Mafia. Ojeda maintained his power within the jails through a group of his closest lieutenants, known as the "mesa." (Exhibit Z, p. 26:22-24.) One of the members of Ojeda's mesa, and his closest associate, was Donald "Sluggo" Aguilar. (Exhibit Z, pp. 26:22-27:2.)

In 2009, Armando Moreno began an effort to wrest control of Orange County's Mexican Mafia from Peter Ojeda, who had been moved to federal prison outside of California. (Exhibit Z, p. 28:6-16.) Moreno created his own "mesa," which included Leonel Vega and Inmate F. (Exhibit Z, pp. 28:25-29:11.) Soon thereafter, Moreno distributed a "hard candy" list, which named inmates whom he wanted to have killed on sight. (Exhibit Z, p. 30:7-17.) Among those that Moreno had placed on his "hard candy" list was Donald "Sluggo" Aguilar. (Exhibit Z, pp. 33:16-23, 35:8-21.) Aguilar is a former F-Troop gang member, who is also known as "Big Sluggo." However, another F-Troop gang member named Sergio Castillo, and nicknamed "Lil Sluggo," was in jail at the same time. This apparently led to confusion about whether the desired target of Moreno's "hard candy" list was Donald Aguilar or Sergio Castillo. (Exhibit Z, pp. 34:22-35:7.) Before the

inmates could obtain clarification, the four charged defendants allegedly assaulted Sergio Castillo instead of Donald Aguilar. (Exhibit Z, p. 35:11-20.)

Moriel's Role As a Prosecution Witness at Trial

In *People v. Vega* and *People v. Rodriguez*, Petersen and his team carefully manipulated the disclosure of information related to Moriel to further several goals, including the following: 1) avoiding potential *Massiah* issues by hiding the coordinated movements of targeted inmates to locations near Moriel; 2) diminishing the chances of successful attacks on Moriel's credibility by falsely suggesting that Moriel did not initiate contacts with inmates; and 3) concealing the operations of Orange County's custodial informant program. However, in *People v. Camarillo,* Moriel assumed a different role and the knowledge of what he learned through his informant efforts related to Operation Black Flag became an asset. Petersen explained his purpose for calling Moriel during a pre-trial hearing:

> He's going to testify to the politics of the Orange County Jail Mexican Mafia, specifically he was housed next to Leonel Downer Vega, one of the individuals who sat on Mando Moreno's Mesa. Both Mr. Vega and Mr. Moriel were Delhi gang members. So he's going to testify to the movements and the politics of the Armando Moreno Mesa specifically from an inmate's point of view. He's also going to testify what it's like to be a Southern California inmate when they go into jail, how they sign up for roll call, how kites are passed, how orders are taken, how orders are followed. Things of that nature.

(Exhibit RRR, p. 351:9-21.)

Petersen wanted to present Moriel as an expert witness on the inner workings of the Mexican Mafia, much as he had relied upon McLeod and Rondou as purported experts about the Delhi street gang. Through his informant work, Moriel had made contacts with inmates connected to the Mexican Mafia, which allowed him unique access to the organization. As Petersen stated, Moriel's connection to Vega was particularly valuable because Vega was a member of the Moreno mesa at the time of the Aguilar assault. (Exhibit Z, pp. 28:25-29:11.)

Petersen Obtains Tactical Advantage Through Delayed and Hidden Discovery

In each of the cases in which Moriel was a likely witness, Petersen delayed notice of his intent to call Moriel as a witness and delayed discovery of his notes. The objective of these maneuvers was to leave opposing counsel 1) with a limited understanding of Moriel's history as an informant, 2) ill prepared to uncover the governmental misconduct that has surrounded his efforts, and 3) unable to realize that the prosecutor routinely claims that decisions regarding Moriel are made at the last minute, and that this is done in order to obtain the tactical advantages described above.

In *People v. Vega*, Petersen claimed that the decision to call Moriel as a witness was not formed until shortly before the trial date. He then turned over only four pages of Moriel's notes in order to hide a *Massiah* violation and to conceal Moriel's extensive informant work. In *People v. Rodriguez*, Petersen failed to turn over Moriel's notes about the charged crime until after the preliminary hearing, and then only discovered 20 pages of notes. In *People v. Inmate I*., Petersen waited until the day of the preliminary hearing to turn over a small quantity of Moriel's notes, hiding a large quantity of highly relevant writings. It should come as no surprise, therefore, that in *People v. Camarillo,* Petersen again made another "last-minute decision" that he would call Moriel as a witness. Defense counsel addressed Moriel's sudden appearance on the prosecution's witness list during the cross-examination of Moriel:

> Mr. Carreon: If we had known before the **first day of trial** that Mr. Moriel was going to be presented and what he was going to testify to and that we had been provided with his transcripts of his prior testimony, we might have been able to check on these things, but we weren't, through no fault, you know, of Mr. Petersen. He made a decision at last minute I have no problem with that. But that doesn't mean that we should be tied, you know, to almost discovery during the middle of the trial because we were provided with late discovery.

(Exhibit MM, p. 504:16-25, emphasis added.)

Again, Petersen's delayed disclosure worked to perfection. Defense counsel, having no idea that these false assertions were part of Petersen's modus operandi for the disclosure

of custodial informant discovery, trusted that the prosecutor was telling the truth. Additionally, by hiding nearly all of Moriel's notes, Petersen not only set in motion the plan to deceive counsel, court, and the jury, but likely left defense counsel with the impression that Moriel was not a witness of particular importance. **Petersen limited the discovery to a single Special Handling summary and seven pages of handwritten notes**. (Notes of Moriel and one page summary created by Special Handling, discovered to defense in *People v. Camarillo*, (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit VVVV.)

Although defense counsel fought diligently in representing their clients, they never had even an inkling of the numerous entries within Moriel's hidden notes that would have impeached his testimony at trial on material issues and shown that Petersen was suborning perjury. They joined the rest of the defense attorneys discussed in this motion who wrongly believed that prosecutors would at least honor their most obvious discovery obligations. It is the repeated willingness by prosecutors to breach the trust of their opponent and the system, which is at the core of this motion.

There are other compelling clues that Petersen lied by claiming that on the day of trial he woke up with an epiphany to call Oscar Moriel as a witness. *People v. Camarillo* was the first local Black Flag case to proceed to trial. It was a high profile proceeding followed by the press and featured in a front page article in the Orange County Register. (Hernandez, *A Rare Peek into the Mexican Mafia*, O.C. Register (April 6, 2013), attached herein as Exhibit WWWW.) This was a trial Petersen very much wanted to win, and had obviously thought about well in advance. Regardless of how Petersen represented Moriel's role to defense counsel before the trial commenced, Moriel ultimately played a prominent role in the prosecution's case—thereby corroborating that he was not a witness whose value suddenly dawned upon Petersen on the day of trial, two years after the case was filed.

In a hearing to determine whether Moriel should even be permitted to testify, Petersen unwittingly revealed that he had analyzed Moriel's particular value to the

prosecution's case well in advance. Petersen explained why it was insufficient to rely upon OCSD Deputy Seth Tunstall as the gang expert on issues related to the Mexican Mafia:

> …Seth Tunstall has never been in a locked facility where he wasn't able to leave. Oscar Moriel is – he precises [verbatim] unique insight to the mindset of a Mexican Mafia, someone who's given orders, passed orders for the Mexican Mafia and has acted as a sureno gang member under the control of the Mexican Mafia.

(Exhibit RRR, p. 414:1-7.)

Petersen added in the same hearing that Moriel was familiar with the method of communication of Mexican Mafia members, which is purportedly based on an ancient Nahuatl language. (Exhibit RRR, p. 415:14-17.)

Finally, facilitating Moriel's appearance at trial was far more complicated than that of other witnesses. He needed to be transported in custody from a federal prison. Petersen or his team members were necessarily in communication with federal authorities in advance of the trial date to coordinate the timing of his arrival.

Petersen Again Misleads Court by Adopting Defense Counsel's Representations Through Silence

Petersen misled his opponents in claiming that he decided to call Moriel as a witness on the trial date. But he also misled the court by allowing it to believe that Carreon's rendition of his decision making process was accurate. Petersen's silence was reminiscent of his conduct in *Vega*, in which defense counsel articulated on the record that both he and Petersen were unable to obtain critical discovery regarding Moriel, and Petersen did not correct him, despite being in possession of relevant discovery. (Exhibit HH, pp. 29:12-30:23, 34:6-13) In *Vega*, Harley, assuming that his opponent would comply with *Brady* if he could access the relevant materials, said, "[Petersen] is unable to comply [with providing additional discovery]. I'm not saying he's doing it on his own. I'm just saying he's prevented from doing it because of the federal authorities." (Exhibit HH, p. 34:6-13.) Petersen knew that the only impediment to his compliance was the lack of any desire to

copy the materials and hand them over to Harley. Therefore, he said nothing. (Exhibit HH, p. 34:14.)

Similarly in *Camarillo*, Attorney Carreon excused Petersen's late notification of Moriel as a witness: "…[W]e might have been able to check on these things, but we weren't, through no fault, you know, of Mr. Petersen. He made a decision at last minute I have no problem with that…" (Exhibit MM, p. 504:16-25.) Again, Petersen allowed the court to be misled that this was the truth, rather than shed light on what was truly transpiring. Petersen's response should have more closely resembled the following: "I misled my opponents. This was not a decision made at the last minute. I only said that to them to gain several tactical advantages in this case. I wanted to leave them less prepared to cross examine Mr. Moriel, which is also the reason I am withholding evidence that would allow them to recognize the perjured testimony of Moriel that I orchestrated in advance with Deputy Tunstall and the witness."

If Petersen had demonstrated this level of honesty, this case would have likely ended at that very moment.

The OCSD Provides Another Example of Its Shared Commitment With the OCDA to Deception

The OCSD has engaged in massive concealment of its communications with inmates and its coordinated movements of inmates to produce confessions. However, with regard to at least the informant notes, might the OCSD be able to assert that its deputies turned them over to the OCDA and that any failure to comply with discovery provisions lies entirely with that agency? One of the more compelling reasons that such a claim would be untrue is the "missing" 493 pages of notes. Tunstall testified in another proceeding that Moriel had written approximately 500 pages of daily notes. (Exhibit LLL, pp. 44:26-45:2.) Assuming arguendo that the number of notes was closer to the 196 pages found in *People v. Inmate E.*, Tunstall knew the defendants in Camarillo did not have 189 of the 196 pages, including, as will be seen, critical notes that would have proven Moriel

committed perjury in *Camarillo*, and that Petersen suborned it. Considering the amount of Moriel's notes from the *Inmate E.* discovery that reveal significant information about the operation of the custodial informant program, it is hardly speculative that there exists large quantities of additional, highly relevant notes that have not been revealed to any defendant.

Furthermore, in *People v. Camarillo*, the OCSD demonstrated that it is perfectly willing to conspire with the OCDA to mislead about informant issues. In his opening statement, Petersen introduced Tunstall, who was sitting at counsel table, as his investigating officer. (Exhibit Z, pp. 20:26-21:1.) Few within the OCSD had a better grasp of the operational procedures of the custodial informant program and the specifics of Moriel's work, including the government's role in facilitating it. Tunstall's silence during the *Camarillo* trial, as Petersen and Moriel deceived the court and counsel, powerfully confirms that he and his agency were full partners in the deception undertaken and the shared belief that the rule of law is not applicable to the custodial informant program.

Petersen and Moriel Mislead Defendants Directly and By Omission With Perjured Testimony

Petersen Suborns Perjury in Violation of Penal Code Section 127

Moriel's testimony regarding his relationship with Leonel Vega would confirm again the shocking lengths to which prosecution teams would go to protect the secrets of the custodial informant program. The government's prosecutor repeatedly suborned perjury, while his star informant provided the desired lies on cue.

During his examination of Moriel in *Camarillo*, Petersen emphasized the closeness of Moriel's relationship with Vega in order to explain the basis of his knowledge and expertise about the Moreno mesa. Moriel testified that he spoke with Vega on a "daily basis" over approximately six months. (Exhibit MM, p. 464:15-17.) He also agreed with Petersen that Vega was "…basically running the mesa for Armando Moreno." (Exhibit MM, p. 464:18-21.) Additionally, he discussed Mexican Mafia politics with Vega and carried out business on Vega's behalf. (Exhibit MM, p. 464:21-26.) Moriel said that

Moreno used Vega to get his message to the Theo Lacy jail, where the attack occurred. (Exhibit MM, p. 488:4-7.) Furthermore, Moriel said that he gave Vanessa Murillo, Vega's girlfriend, the names of individuals placed on the "hard candy" list. (Exhibit MM, pp. 490:21-491:5.)

But how did Moriel and Vega grow so close? At a pre-trial hearing, Petersen elicited the answer to that question:

> Q: In fact, Mr. Vega was a Delhi gang member, also?
> A: Yes.
> Q: **You know him on the streets?**
> A: **Yes.**

(Exhibit RRR, p. 366:17-20, emphasis added.)

Petersen reiterated the point, adding that not only were they fellow gang members but friends:

> Q: Okay, and is it fair to say that you and Vega were friends before jail, correct?
> A: Yeah.
> Q: **And even though you guys were friends, what came first, was it your friendship or was it loyalty to the Mexican Mafia?**
> **A: Loyalty to the Mexican Mafia**.
> Q: Why is that?
> A: I think, you, know, when you start getting in the political arena of trying to be somebody, a representative of the Mexican Mafia, you have to put yourself first, you know, because it's – you're the one who's rising in the ranks. **So even though we were friends and we had ties to our gang and our neighborhood, ultimately he had to watch his own back and do what was best for him, you know, as well as I**.

(Exhibit RRR, p. 371:1-14, emphasis added.)

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During questioning before the jury, Petersen focused on the same point:

Q: **You knew Leonel Vega out on the street, correct?**
A: **Yes.**
Q: Was a fellow Delhi street gang member?
A: That's correct, yes.
Q: Was also a member of the Los Aces clique?
A: Yes. (Exhibit MM, p. 464:1-6, emphasis added.)

Petersen then stressed that they were more than passing acquaintances, but two people who had a friendship based in trust:

Q: So you knew him from the streets, correct?
A: Yeah.
Q: Did he trust you?
A: Yes.
(Exhibit MM, p. 488:22-25.)

Moriel's testimony would have seemed perfectly logical to defense counsel, given that they knew nothing of Moriel's existence before the first day of trial. Members of the same gang would naturally share friendship, mutual respect, and trust. What could defense counsel possibly accomplish through cross-examination to undercut Moriel's testimony on this subject? Moriel and Vega were both Delhi gang members—that much was true. However, the remainder of Moriel's testimony on the subject was provably false. **Petersen had repeatedly suborned perjury, in violation of section 127**. Sadly, the evidence that Moriel's testimony was perjured is found in the very trial transcripts that defense counsel lacked time to study sufficiently because of Petersen's "last-minute" decision to call Moriel as a witness.

In *Vega*, Petersen asked Moriel nearly identical questions about his relationship with Vega prior to their contact in disciplinary isolation. His answers, though, were remarkably different. In *Vega*, Moriel stated the following:

Q: Did you know Mr. Vega out on the streets or only in custody?
A: **Only in custody**.
(Exhibit HH, p. 99:1-3, emphasis added.)

If there was any question whether Moriel misheard the question or misspoke, defense counsel returned to the subject on cross-examination:

Q: **And you told us that you never known Downer out on the street; Is that correct?**
A: **That's correct.**
Q: Had you heard of Downer?
A: Yes.
(Exhibit HH, pp. 104:26-105:4, emphasis added.)

The testimony in the two trials is irreconcilable. Petersen suborned perjury from Moriel in *Camarillo*—though it was hardly the first or the last time. The truth, which emerges from the *Inmate E.* discovery, was that the entire time that Moriel knew Vega, Moriel was working for the government—informing against both Vega and the Mexican Mafia. Moriel never experienced competing loyalties between the Mexican Mafia and Vega, as he claimed, because he was loyal to neither during the time period he knew Vega. Moreover, there was never a moment in Moriel's life when he was "friends" with Vega. The first time they met was when Moriel was placed in a disciplinary isolation unit as part of the "Dis-iso" scam. The truth about their friendship could have been verified in a place the defense would never realize existed: the notes Petersen was hiding. In a note to Special Handling, Moriel specifically wrote about his conversations with fellow inmate Tommie Rodriguez ("Fox"). He stated, "…And I end up in the hole next to [Vega]…Now all this time I've been trying to come back and fix my mistake. I've been getting shot down by my own Jente. **And I've never met Downer before, even when we were growing up**. But he opened the door for me thru "M[ando]" (Exhibit O, p. 2255, emphasis added.)

A few weeks later, Moriel wrote another note to Special Handling in which he summarized the contents of his letter to Armando Moreno: "…Also letting [Mando] know that **even though Downer is from my varrio, I've never met the guy before this** and the way he (Downer) is running the county is all fucked up" (Exhibit O, p. 2282, emphasis added.) Unfortunately, the two pages referenced above, in which Moriel admits that he did not have a pre-detention relationship with Vega, were among (at least) 189 pages of notes and letters hidden by Petersen from the defense in *Carmarillo*. Due to Petersen's *Brady*

violations, Camarillo's attorney was unable to show that the prosecutor suborned perjured testimony from Moriel regarding his relationship with Vega.

In sum, Moriel never had a genuine relationship with Vega. His role, as directed by Special Handling and the SAPD, was to act like Vega's friend. In fact, other concealed notes suggest that Moriel actually despised Vega. (Exhibit O, p. 2276-2278, 2301-2302.) To exacerbate the concealment, after Vega facilitated Moriel's return to good standing in the Mexican Mafia, Moriel—acting under law enforcement's guidance—turned his attention to destroying the reputation of Vega within the organization. These developments are addressed at length at page 261.

Why change the version of how Vega and Moriel met from how it was presented in *People v. Vega*? In both cases, the prosecution desperately wanted to avoid revealing how the relationship between Moriel and Vega was actually built: the "Dis-iso" scam, which was used to bring the two inmates together in order to develop Vega's trust and to convince him that Moriel sincerely wanted his friendship. In *Vega*, Petersen presented their coming together as "coincidental contact."

For *Camarillo*, the prosecution team devised an even "cleaner" way to deceive. Without Harley and Vega in the courtroom—and again having not turned over the discovery that would reveal the dishonesty of what they were doing—the prosecution decided it was simpler to have Moriel testify that he and Vega were friends before arriving in custody. With a fabricated pre-existing friendship, there was a built-in explanation for why Vega was so free in sharing information with Moriel about the Mexican Mafia from the moment they were housed with one another. By falsely claiming they were friends before meeting in custody and by supporting that claim through the concealment of impeachment evidence, the informant could also falsely present himself as a member in good standing with the Mexican Mafia from day one of his contact with Vega, thereby staying even further away from the complicated efforts that were actually undertaken to restore him to good standing with Vega's assistance.

Evidence of Perjury Orchestrated by Petersen and Tunstall in Advance

Moriel's perjury would not have been his own spontaneous creation, but instead was almost certainly concocted by Petersen and Tunstall in advance of Moriel's testimony. Unlike Petersen, Moriel would not have understood the "big picture" as to why confabulating a story in which he and Vega were friends out of custody was preferable. He had told the truthful version about how they met in *Vega* previously, and it had seemingly worked well enough. It was Petersen and Tunstall who would have had to formulate the plan to combine suppressed discovery with a new, fabricated version of the relationship between Moriel and Vega.

Moriel necessarily spoke with the prosecution team in advance of his testimony and was informed by Petersen that he should testify they had been friends on the streets and that during that time period his first loyalty was to the Mexican Mafia. When Petersen asked, "[a]nd even though you guys were friends, what came first, was it your friendship or was it loyalty to the Mexican Mafia," Moriel already had been instructed that the desired response was "Loyalty to the Mexican Mafia." (Exhibit RRR, p. 371:2-5.) It was a great illustration of a point that Petersen very much wanted to make: gang members understand their responsibility to support the Mexican Mafia. The problem was that Moriel was never loyal to the Mexican Mafia during any time when he knew Vega.

The visual image of a prosecutor and veteran officer sitting down with their informant and instructing him on how to lie during his testimony should be terribly disturbing. But it is the fact that this was at least the second trial in which the prosecution team had instructed Moriel on how to commit perjury, which reveals just how far prosecutors and their partners in the custodial informant program will go to win.

An Emboldened Moriel Spins More Tales on Cross-Examination As the Prosecution Observes Approvingly

Through suborned perjury, Petersen was able to provide a fabricated explanation for why Moriel learned so much from Vega about Mexican Mafia activities, without ever

having to reveal the "Dis-iso" scam. By sidestepping the truth, the prosecution team was able to also avoid revealing the rest of what was required to return Moriel to "good standing" with the Mexican Mafia. In actuality, per Moriel's hidden notes, Vega claimed that he needed two things from Moriel. First, Vega required Moriel to pay $1,500 to Armando Moreno, a fact which was purposefully concealed during each of the three trials in which he testified. (Exhibit OOO, p. 20; Exhibit O, p. 2375.) Second, Vega wanted Moriel to prove that he was in protective custody for the reason he claimed: that he committed violent acts against other inmates and jail deputies. In order to provide this proof, he asked the OCSD to prepare falsified jail rule violation reports, and they agreed. (Exhibit O, pp. 2064-2065, 2071.)

However, the three defense counsel in *Camarillo* had no idea any of this evidence existed, because Petersen concealed all of the notes that would have revealed the truth. In sum, defense counsel never knew 1) that the "Dis-iso" scam had been used with Vega, 2) that fake paperwork was created to convince Vega and Mexican Mafia leaders that Moriel was not a snitch, and 3) that the government, via an undercover officer, had given Vega's girlfriend $1,500 to help buy Moreno's support of Moriel's return to good standing. Quite obviously, the defense attorneys also never suspected that Petersen and his team were capable of operating so beyond legal and ethical rules that they would introduce testimony completely divorced from the truth.

Even without a comprehensive understanding of the notes, one of the defense attorneys pressed Moriel about how he explained his protective custody ("PC") status to his fellow Delhi members:

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Q: And you know that when you went into PC the last thing you wanted Delhi to find out was that you dropped out, correct?

A: That's correct.

Q: You played that game with Delhi for a couple of years, right?

A: Yes.

Q: So finally Delhi says, getting back to when you said you were cleared, Delhi finally buys into the lie and says okay, right, nothing happened. You didn't like it. You fought it, right? Yes?

A: Yeah. There's actions behind them believing that. I assaulted a couple deputies and I assaulted another inmate. I slashed his face open, so I was in the hole a lot during that time, so it was believable based on my actions and me being in the hole.

Q: You sold it?

A: I did it.

Q: You sold it?

A: I lived it, yes.

(Exhibit MM, pp. 542:9-543:2.)

The last few lines had a cinematic quality: the veteran defense counsel attempting to score an advantage, only to be blocked by a resilient witness who stood firm for the truth. Only he hadn't. **Moriel neither "did it" nor "lived it."** However, without the notes specifically proving this was a lie, counsel had little reason to disbelieve Moriel's story, nor the facts to impeach him. As he had done in his discussions of Vega, Moriel had sprinkled a bit of the truth around a mound of lies. For instance, in 2009, Moriel was able to convince Vega, along with other Delhi and Mexican Mafia members, that his jail violence proved he was not an informant and that he should be returned to good standing. **But the jail violence never actually occurred.** It was rather the imaginative creation of Moriel and Special Handling, as corroborated by the requests for fake paperwork within Moriel's notes and his subsequent return to good standing. (Exhibit O, pp. 2064-2065.)

The perjured testimony in *Camarillo* was a shocking display of an informant program at its very worst: an informant willing to do anything to reduce his sentence and a prosecution team prepared to take full advantage. If the prosecution team was interested in upholding the integrity of the judicial system, either Petersen or Tunstall would have immediately stopped the proceedings and informed counsel that Moriel had committed

perjury in this case and others. But of course, Moriel was delivering just what they had asked of him. And with the full support and guidance of an unscrupulous prosecution team, Moriel was able to effectively mislead inmates, defense counsel, judges, and jurors.

It should come as no surprise that Moriel had a vast reservoir of lies that he could draw from during cross-examination by defense counsel:

> Q: The period of time we're talking about when you were in protective custody where you assaulted inmates and guards to convince Delhi that you hadn't dropped out or snitched, that was between '07 and '09 –
> A: Yes.
> Q: Wasn't it? Yes?
> A: That's correct.
> Q: You're selling Delhi a lie, right?
> A: At the time I had to act upon what was, you know, brought to me so I dealt with it, but I used those incidents to lie, yes.
> Q: Why didn't you just tell Delhi the truth, I'm done, guys. Love playing peewee with you. Love playing pop warner. Love little league. Great time going through 4th grade all together. I'm done. Bye.
> A: It's embarrassing.
> Q: Embarrassing?
> A: Yeah. You know, it's embarrassing. You live your life a certain way for a certain time, you represented certain things for a certain time, you believe in something for certain periods of time in your life and you've developed relationships and you've experienced things with people during these parts of your life. And there's a certain trust there. There's a bond there, and these people at the time you think are your friends and you don't want to seem less than – than what you've created yourself to be. And it's embarrassing.

(Exhibit MM, pp. 544:17-545:17.)

Part of Moriel's effectiveness as a witness is explained by his ability to weave believable emotions and experiences—his connection to the gang and the difficulty of admitting that he no longer wanted to be part of it anymore—with lies. Nonetheless, even the most skillful liars can find it difficult to keep everything straight. Moriel was no exception. He claimed that he was too embarrassed to admit that he chose PC status because he wanted out of the gang. Instead, he used his alleged jail violence to show gang members that his classification as PC could not have been based on being a dropout or an

informant. However, Moriel later testified that if the gang members asked questions about dropping out, one could be candid about it:

> You get on the phone and you call your homeboys, you're still in contact, you know, you got people who you grew up, played football with, baseball with, you know had barbecues with, were cousins with, nephews. So you're going to have contact to that community, to that lifestyle. So you get on your phone and you talk to your cousin who may be running the streets through your neighborhood, who's got the keys to the neighborhood, and he asks you, hey, what's up? I heard you dropped out. And you tell him yeah, bro, I'm done, you know, I don't want to fuck around in here. It's too much politics here. Sometimes it gets hectic with not being able to confirm things between different Mexican Mafia members or whatever the case may be.

(Exhibit MM, p. 574:5-18.)

Which answer was the truth? Was it too embarrassing to admit the reasons for going into PC or was it something a gang member just explains to his homeboys? This is another example of the difficulty of discerning the truth from ethically challenged informants, supported by a prosecution team that encourages them to say anything to secure a conviction.

While it will likely never be known with certainty why Moriel entered PC status, he clearly did not commit actual assaults within the jail. His notes requesting fake write-ups are instructive as to when the idea originated to utilize his purported jail violence as an explanation for his PC status. He wrote on July 11, 2009, "**I might also need to obtain mock copies of major write ups** for assaulting multiple deputies on 2 different dates…for assaulting 3-5 child molesters and rapists on separate dates. And maybe a couple for ripping off my blue band. That way I can provide in house evidence that what I've been saying is true." (Exhibit O, pp. 2064-2065, emphasis added.) Obviously, if he had actually committed this violence he would not have asked for fake or "mock" documentation of it.

Later, Moriel told yet another lie on this subject. He was asked if he was eventually cleared by the Mexican Mafia:

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> I got cleared to the good, meaning a Mexican Mafia member overlooked my case as far as me dropping out, the reasons, what I did while I was alleging in PC house, trying to get out, and he decided that no action – no negative actions were to be taken against me, against any other Surenos and I was to be looked at as an active Sureno again.

(Exhibit MM, p. 549:12-18.)

This was highly deceptive and misleading testimony that Petersen and Tunstall fully appreciated, and were silently applauding. Moriel said the "reason" he returned to active status was because of "what I did," clearly referring to the above referenced jail violence. But Moriel did not actually commit the violent acts that convinced the Mexican Mafia to clear him. Instead, he presented fraudulent paperwork documenting violence that never occurred and paid $1,500 to the organization through an undercover officer. Petersen knew all of this, but left the defendants in *Camarillo* in the dark.

Undisclosed Recordings of Moriel and Inmate I.: A Stolen Opportunity to Damage Moriel's Credibility

As discussed in the section addressing the misconduct in *People v. Vega*, Petersen's team hid the Inmate I. recordings, which showed Moriel's frustration that he was unable to avoid a conviction by falsely accusing Joseph Galarza ("Gato") of the crime.

The recordings and their concealment had renewed significance in *Camarillo*. Moriel stated that one of the reasons he went into protective custody in 2007 was the perception that he had become an informant against his co-defendant. (Exhibit MM, p. 596:1-15.) However, earlier in his testimony, Moriel attributed his decision to an emerging understanding of gangs and gang lifestyle:

> …As you get older, you start find out that when things unravel in the process of how the politics work and who's who and what they're doing, what you have to do to benefit them people, you start seeing different things. You start seeing the greed. And you start seeing the treachery. You start seeing the truths behind what you originally thought was true. So you start seeing things differently as you experience more in that gang. And as you do that you have to decide differently.

(Exhibit MM, p. 582:24-583:6.)

Moriel may have decided to make a change in his life, but it was not based upon an

epiphany about the empty existence of a gang life. Instead, he found himself one day on the Mexican Mafia's "hard candy" list as a perceived snitch. Additionally, it would have been immensely helpful in eviscerating the believability of this former killer's transformation, if jurors had access to a critical piece of impeachment evidence captured in the Inmate I. recordings: Two years after his supposed awakening, Moriel still wanted to be acquitted of attempted murder and remained furious at his co-defendant for ruining his plan to blame a third party who did not commit a crime. (Exhibit YYY.)

> Moriel: Cuz of that lil faggot eh. I would have been out right now.
> Inmate I: inaudible
> Moriel: They said Gato did it. They said, that's Gato. They said, he, the Victim, said it was me. Then that lil fuckin (inaudible) said it was me.
> Inmate I: inaudible
> Moriel: Your homeboy
> Inmate I: Chano?
> Moriel: Chano. And he's all afraid to go upstate

(Partial transcription of recorded jail conversation between Oscar Moriel and Inmate I. (undated), attached herein as Exhibit YYY.)

The recordings of his conversations with Inmate I. were also relevant for demonstrating that Moriel still viewed deception as an option in his pending case. Moriel admitted, "I shot them . . . about three or four times," referring to the victim in his own case. (Exhibit MM, p. 531:9-14.) But he also referenced the fact that such admissions could not be used against him, due to his immunity agreement. He stated that "As far as my knowledge, like I said, whatever I say can't be used against me, but if they find any criminal evidence against me as far as DNA or fingerprints then that could be used against me." (Exhibit MM, pp. 510:25-511:2.)

Moriel stated that "I still have the right to go trial and if I feel – you know, if I feel that's a necessary step I have to take, I can still take that. . . ." (Exhibit MM, p. 580:21-24.) He reiterated this point later, stating that even if he were offered 12 years—requiring only three additional years in custody—he still might not accept the offer and instead proceed to trial. (Exhibit MM, pp. 611:12-612:5.) In *People v. Rodriguez*, Moriel had gone even further in stating that he was unsure that he would accept a hypothetical 12 year offer

because "I still have an option to go to trial and I have an option to beat it." (Exhibit PP, p. 317:9-10.) For the "changed" Moriel, "bea[ting] it" remained a viable option—one that entailed presenting a defense consistent with what he said in the recording, which meant blaming someone else for the crime he committed.

Petersen Contaminates Testimony and Exploits Late Discovery In Order to Mislead on the Issue of Moriel's Sentence

The prosecution's concealment of the benefits informants expect to receive in exchange for their cooperation is one of the more troubling aspects of the custodial informant program. Having placed a veil over the direct communications between informants and prosecution team members, prosecutors have been free to create an image of the expectations that they believe will present their informants in the best light. As has been discussed, prosecutors have fully exploited this issue in order to diminish Sixth Amendment challenges and to protect their informants' credibility.

In *People v. Rodriguez*, Petersen finally acknowledged in closing argument that Moriel's assistance meant that he was no longer facing a life sentence:

> If Oscar Moriel were to go to trial and lose, the chances are he'd do life, but, because he's testifying, he's going to do less than life. How much time? I don't know. But he's going to do less than life.

(Exhibit PP, p. 403:18-21.)

There was no nobility in that disclosure. Petersen was imbuing himself with credibility with the jury by seeming up-front and reasonable, while disclosing it during a stage in the proceedings when Moriel was protected from cross-examination on the issue. Was Moriel aware that he was no longer facing a life sentence? Almost certainly he was informed that a reduced sentence awaited him, but by waiting until closing statements to drop this bombshell, Petersen cleverly—albeit unethically—avoided Moriel's examination on that issue.

Fast forward to the trial in *People v. Camarillo*, which took place one year after the trial in *People v. Rodriguez*. Even Petersen must have realized that his admission during his closing in *Rodriguez* could not be erased from the record. While he could not waive a

magic wand and make it disappear, he could do the next best thing: disclose Moriel as a witness at the last moment. With only a matter of days to prepare, he knew defense counsel was unlikely to obtain the transcripts in the closing argument of *People v. Rodriguez*. Petersen questioned Moriel:

> Q: You've ultimately decided to become what's known as an informant in hopes that you may be given consideration for helping law enforcement and the prosecution out; Is that correct?
> A: That's correct.
> Q: Have you been made any promises by either myself or Deputy Tunstall or any other members of both state and federal government of what you would receive if you testified?
> A: No, nothing.
> **Q: It's fair to say, though, you're looking at a crime that entails the rest of your life in prison, correct?**
> **A: That's correct**
> Q: I also imagine that you hope that one day you'll be released, is that correct?
> A: Yes.
> Q: Okay. And that's one of the reasons you've agreed to cooperate, correct?
> A: Yes.

(Exhibit MM, pp. 452:12-453:5, emphasis added.)

But did Moriel himself realize that he was no longer facing a life sentence? Was there a hidden agreement—the kind that Assistant DA Anderson had warned against in the *Gang Prosecution Manual*? (Exhibit F, p. 21.) Moriel testified on cross-examination that he had not been promised anything: "…other than consideration, I haven't been promised nothing." (Exhibit MM, p. 514:19-20.) He spoke to Petersen directly, but all he was told was that he would receive "consideration." (Exhibit MM, p. 515:4-6.) He was asked the following:

> Q: But you know that the possible sentence is a life sentence, correct?
> A: Yes. (Exhibit MM, p. 515:16-18.)

Another counsel questioned Moriel further on whether he expected a sentence reduction:

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Q: And you are willing to testify and cooperate for the feds and the state, correct?
A: Yes.
Q: In exchange for – that you want some time off, right?
A: I would hope.
Q: Is that what you want or is that what you hope you want?
A: I mean, it's kind of cloudy, man
….
Q: Mr. Moriel, that's not what I asked you, sir. You expect time off in this case –
A: Yes.
Q: -- Correct?
A: I would hope so.
Q: You expect that?
A: I can't expect it. I mean, I don't know. Honestly, I don't know, but I would hope so.

(Exhibit MM, pp. 580:13-581:14.)

Petersen should be required to answer questions about what he shared with Moriel—and Inmate F.—regarding sentence reductions. Will he claim that he hid from Moriel what he told the *Rodriguez* jury: that Moriel was no longer looking at a life sentence? It is certainly plausible, though the failure to share this would have been just as relevant in each of the cases. The decision to hide a sentence reduction is symptomatic of a prosecution that intentionally deceives its informants in order to obtain their full obedience.

The "carrot and stick" approach of the custodial informant program has already caused immeasurable damage to the criminal justice system. When members of prosecution teams send the message to informants that decisions on leniency are contingent on performance, they also knowingly invite testimony that is loosely connected to the truth as informants strive to deliver what they think prosecutors and law enforcement want to hear. This type of approach is, of course, most dangerous when the informant program is operated by prosecution teams that find it perfectly acceptable to deceive courts, counsel, and juries.

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The Prosecution's Commitment to Not Solving Moriel's Crimes

One of the many startling aspects of the prosecution's commitment to winning is what they have been willing to give up in order to maintain the credibility of their informants and the program from which they sprung. For instance, Oscar Moriel was not simply someone who could mine a plethora of statements about the crimes of others. He had committed his own share of violent crimes.

In *Camarillo,* defense counsel aggressively questioned Moriel about the homicides he committed. (Exhibit MM, p. 499:10-12.) Moriel acknowledged that "…it might be up to five, maybe six." (Exhibit MM, p. 500:1.) As Attorney Carreon began seeking specifics about the murders, Petersen objected. (Exhibit MM, p. 500:3.) In response, defense counsel made several arguments about the relevance of details, including the names of victims. They argued that this information was relevant to exploring vital issues, including whether Moriel was falsely claiming to have committed crimes. (Exhibit MM, pp. 500:13-501:6.)

The court allowed brief inquiry into the murders, but sustained Petersen's objections to questioning about the names of the victims. (Exhibit MM, pp. 507:25-508:2.) Moriel described his first shooting when he was 19. (Exhibit MM, p. 508:15-19.) He said he knew the name of the person with him during the first murder. (Exhibit MM, p. 511:13-26.) He said he committed a second murder possibly in the same year, but the court prohibited defense counsel from seeking the names or the dates of when the crime occurred. (Exhibit MM, pp. 509:4-8, 512:1-5.) He said the second murder occurred in Santa Ana on Warner and Cypress and he was alone. (Exhibit MM, p. 512:6-16.) Moriel said the third murder occurred when he was 20. (Exhibit MM, p. 509:18-22.) He remembered that two people were with him during the third murder. (Exhibit MM, pp. 512:25-513:7.) He said the murder occurred on Hagrey [*sic*] and McFadden. (Exhibit MM, p. 513:10-13.) He said the fourth murder occurred when he was probably 24. (Exhibit MM, p. 509:23-24.) The court sustained the objection to requests that Moriel

identify the names of his accomplices. (Exhibit MM, p. 511:6-11.) Of course, the court had no idea that this was the third trial in which the prosecutor was engaged in shocking misconduct with the same informant. Perhaps if it had known, the court would have extended additional latitude in the questioning.

In response to questions, Moriel said he never told law enforcement who was with him, but he remembered their names. (Exhibit MM, p. 511:22-26.) He later reiterated that he never told law enforcement the names of the victims. (Exhibit MM, pp. 577:7-578:6.) It seemed odd that law enforcement never asked him about the names of the accomplices or the victims. What, then, did they ask about the murders he committed? The answer seemed almost nonsensical:

> Q: And you've also testified that you haven't spoken to any law enforcement agent about your participation in these murders. You've also said that other people were with you on at least two or three occasions of these murders, right?
> A: That's correct.

(Exhibit MM, p. 591:7-12.)

It seems impossible to believe that law enforcement had relinquished the opportunity to explore Moriel's homicides, along with the many other crimes he committed. He certainly would have spoken about the crimes. Did not the prosecution believe that the families of victims in those cases deserved closure? What about killers still on the streets who were committing more crimes because they were never prosecuted for the murders they committed with Moriel? What about the possibility that others had been convicted wrongfully of the crimes for which Moriel was responsible?

The undeniable truth is that local law enforcement, lacking moral leadership from the OCDA, lost sight of true justice. They became vested in a corrupt custodial informant program and then did everything possible to protect it. They recognized that investigations into the crimes Moriel and other informants have committed would open a Pandora's box that could swallow up the credibility of informants, the custodial informant program, as well as the OCDA and local law enforcement. They did not want to have Moriel's

testimony unraveled by mini-trials in which witnesses would testify that Moriel had lied. They did not want the embarrassment, the lawsuits, and the myriad of problems caused by revelations of wrongful convictions. They did not want to hear the screams of victims' families who demanded the death penalty for Oscar Moriel, and wanted explanations why their children's killer thought 12 years was too much time.

And now what can they do? They could get answers from Moriel and free anyone who was wrongfully convicted. But can the criminal justice system trust that the same agencies that perpetuated the damage will honorably seek the truth when they are incentivized to reach the conclusion that no mistakes were made and nothing was lost since they first brought Moriel in as an informant more than four years ago? If they interview Moriel at this point and he identifies other responsible parties, what justification can prosecutors present to courts for why it took so long to bring charges against the defendants? The truth is unsavory: prosecution teams are so committed to having their informants appear credible that they are willing to let unsolved crimes remain that way.

A Prosecutor Impervious To His Own Hypocrisy

While local prosecutors may think themselves immune from punishment for their misconduct, it is reasonable to ask whether the worst offenders might occasionally think about the damage to the criminal justice system caused by their actions. If anyone was due for considerable self-reflection, it certainly was Petersen. In *Camarillo*, Petersen suborned perjury. He and Tunstall silently watched as a prized informant repeatedly misled counsel, the court, and the jury. Could this experience finally cause introspection and a commitment to taking a more honorable path? That possibility was perhaps unrealistic, but would Petersen at least employ a measured tone in discussing his opponents' ethics? During his closing, Petersen discussed how he anticipated defense counsel would analyze the evidence in their final arguments, and made a disturbing pre-emptive attack:

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> …Don't feel sorry for me. Okay. But they're going to bring 100 years of closing argument experience. And **they have a job. That job is to mislead you. That job is to confuse you**.

(RT (trial), Feb. 5 and 6, 2013, Vol. 4, *People v. Camarillo et al.*, (Super. Ct. Orange County, 2013, No. 11CF2418), attached herein as Exhibit XXXX, pp. 808:24-809:1, emphasis added.)

The court correctly sustained an objection to this improper and unprovoked misconduct. (Exhibit XXXX, p. 809:2-5) But setting aside the impropriety of such an argument on purely legal grounds—particularly when the defense had done nothing to warrant such a stunning allegation—it is the height of hypocrisy that a person with Petersen's track record for misconduct could ever speak disparagingly about the moral character of defense counsel.

The sad truth, though, is that far too many prosecutors seem to believe that "misconduct" is a finding that should be reserved for defense counsel, whereas their own deception is justified as long as it helps put the "bad guys" away and accomplishes the desired verdict. Petersen embodies this culture, and demonstrates his loyalty to it through his willingness to say and do just about anything necessary to win. Interestingly, Petersen had forgotten, or no longer cared, about how he described one of his opponents in an interview with the Orange County Register just nine months earlier. Discussing attorney Gil Carreon, Petersen said that "[a]ny time I see Gil assigned to one of my cases, I'm happy because he is always professional, polite, cordial and pleasant." (Welborn, *The Lawyer Wore Bugs Bunny*, O.C. Register (June 21, 2012), attached herein as Exhibit YYYY.) Carreon certainly did not sound like someone whose job it was to mislead and confuse. Of course, at the moment he spoke to the Register, Petersen was not engaged in a trial he wanted desperately to win. Carreon began his closing argument in *Camarillo* by patiently scolding Petersen for his comment:

> You know, I have to comment on Mr. Petersen's statement that we may be trying to confuse you, to misdirect you, to mislead you, and I do know him. He's an honorable prosecutor, but he's still in the early stages of his career. Because when I started this job, I thought it was all about winning and losing. (Exhibit XXXX, p. 811:4-9.)

The truth is that Carreon did not really know Petersen. Petersen was not suffering from a moment of overzealousness. He and his teams have been anything but honorable. Furthermore, Petersen hardly deserved a pass for being in the early stages of his career, having worked for OCDA for more than a decade when he made this comment. However, thanks to years of successful deception, Carreon and his co-counsel lacked any sense of the breadth and seriousness of Petersen's deceptive practices.

The Settlement in *People v. Camarillo*

On February 8, 2013, after several questions from deliberating jurors, the parties agreed to settle their cases by pleading guilty to aggravated assault and admitting the gang enhancement. (Exhibit UUUU.) Camarillo accepted a sentence of eight years in prison. He likely felt immensely relieved that he had avoided a life sentence. (Exhibit UUUU.) Petersen may have felt his own relief that there would not be an appellate process, perhaps reducing the chances that his team's misconduct would be uncovered.

Setting aside whether the defendants were culpable of the charged crimes, they were unquestionably deprived of their right to a fair trial, though they likely never had the slightest idea. They were entitled to know that the prosecutor, investigator, and a key witness had conspired to present perjured testimony. They were entitled to know that the prosecutor was hiding *Brady* evidence that would not only have impeached the witness but shown jurors that the government was entirely untrustworthy. They were entitled to have Moriel's testimony excluded as untimely, as the last minute disclosure of Moriel as a witness was motivated by Petersen's efforts to obtain a tactical advantage and keep prior misconduct hidden. The defendants were also entitled to bring a motion similar to this one requesting that the case be dismissed.

People v. Lopez

Summary of Issues and Charges

On July 14, 2002, Carmen Zamora was shot to death in the area of Kilson Drive and Edinger Avenue in Santa Ana. A complaint was filed three days later charging Ricardo

Lopez with the murder. Over the course of the next several years, the case was delayed repeatedly, primarily because the matter was suspended due to Lopez being found mentally incompetent to stand trial. In 2009, the trial began. The prosecution argued that Lopez was the single assailant in a shooting that occurred after a fight between two groups of girls. The defense argued that Lopez did not fire the murder weapon, and that a second suspect killed Zamora. The jury convicted Lopez, and in June of 2009, he was sentenced to life in prison. (Minutes in *People v. Ricardo Lopez* (Super. Ct. Orange County, 2009, No. 02CF1819), attached herein as Exhibit ZZZZ.)

On June 5, 2010, informant Oscar Moriel documented a conversation in his notes that he had with fellow Delhi gang member, Alvaro Sanchez. Those notes, once again, were found in the discovery from *People v. Inmate E.* Moriel wrote the following:

> We talked about a few other scenarios that took place about Gato (Joseph Galarza) R.I.P. killing a chick on Edinger and East Kilson. In the cul de sac when he got in a shoot out with the guys from McClay St. a few years ago…

(Exhibit O, p. 2248.)

As discussed previously, Galarza was shot and killed by a SAPD police officer on April 17, 2009. (Obituary of Joseph Galarza, April 30, 2009, O.C. Register (April 30, 2009) p. Local 9, attached herein as Exhibit AAAAA; *Charlene Galarza v. City of Santa Ana et al.*, (Super. Ct. Orange County, 2012, No. SAC10-01078), attached herein as Exhibit BBBBB.)

As will be discussed, this description included several critical details, which corroborated that the murder Sanchez said Galarza committed was the same one that Lopez was convicted of the previous year. Nevertheless, **the prosecution team never disclosed this note to Ricardo Lopez or his counsel.** (Exhibit A.)

Summary of Charges and Procedural History

On July 17, 2002, Lopez was charged with murder, a firearm use enhancement, and a strike prior. (Exhibit ZZZZ.) On October 25, 2002, the case proceeded to preliminary hearing. Detective Rondou, the lead investigator on the case, testified at the preliminary hearing. (Exhibit CCCCC, p. 645:18-20.) Lopez was held to answer on the charges and

enhancements. (Exhibit ZZZZ.) Lopez was arraigned on the felony information on December 9, 2002. (Exhibit ZZZZ.) The case was assigned for all purposes to the Honorable Theodore Briseno. (Exhibit ZZZZ.)

In July of 2004, Lopez was deemed incompetent to stand trial under section 1368. (Exhibit ZZZZ.) In April of 2005, the proceedings were reinstated. (Exhibit ZZZZ.) On February 28, 2007, Lopez requested to proceed pro per in the case. His attorney, Alternate Defender Frank Davis, and the prosecutor, Deputy DA John Christl, expressed doubt as to whether Lopez was competent to represent himself. Davis raised a doubt, under section 1368, about Lopez's competence to stand trial and the court appointed doctors to evaluate Lopez. (Exhibit ZZZZ.) On May 18, 2007, the court found Lopez incompetent to stand trial. On April 22, 2008, proceedings were reinstated. Jury selection commenced on January 28, 2009. (Exhibit ZZZZ.) On February 11, 2009, the jury found the defendant guilty of murder in the first degree and found the enhancement to be true. (Exhibit ZZZZ.) On June 5, 2009, Lopez was sentenced to 50 years to life. On November 10, 2010, the Court of Appeal affirmed the verdict in an unpublished opinion. (*People v. Lopez* (2010) 2010 Cal. App. Unpub. LEXIS 8931, attached herein as Exhibit DDDDD.)

Summary of Facts:

On July 14, 2002, two teenage girls, Monica Chavez and Terry Bonilla, got into an argument at a high school basketball game. After the game, Chavez, Bonilla, and their friends went to the cul-de-sac on Kilson Street, just south of Edinger Avenue, where the girls engaged in a fistfight. Several onlookers observed the fight, including approximately 10 to 20 boys and young men from the neighborhood. (Exhibit N, pp. 962:1-18, 1021:25-26.) After the fight, Chavez entered her friend's car, a blue Corolla, which was parked along the cul-de-sac. (RT (trial), February 2, 2009, *People v. Lopez*, (Super. Ct. Orange County, 2009, No. 02CF1819), RT (trial), February 3, 2009, *People v. Lopez* (Super. Ct. Orange County, 2009, No. 02CF1819), RT (trial), February 4, 2009, *People v. Lopez*, (Super. Ct. Orange County, 2009, No. 02CF1819), RT (trial) February 5, 2009, *People v.*

Lopez, (Super Ct. Orange County, 2009, No. 02CF1819), RT (trial), February 9, 2009, *People v. Lopez*, (Super. Ct. Orange County, 2009, No. 02CF1819), attached herein as Exhibit CCCCC, pp. 849:23, 963:10-17.) Members of the same large group started shouting at Chavez and her friends to leave the area. Chavez's friend, Luisa Lopez, then called Zamora, the victim, and asked her to come to Kilson for "backup." (Exhibit N, p. 963:1-9.) The girls inside the blue Corolla waited until Zamora and three other girls arrived in a blue hatchback. (Exhibit N, p. 963:10-17.)

As both cars drove away, some witnesses believed Defendant Lopez threw a soda can that struck one of the cars. (Exhibit N, p. 963:18-19.) Chavez and her friends were angered and decided to leave the cul-de-sac and return "with guys." (Exhibit N, p. 963:22.) The blue Corolla and the blue hatchback then caravanned to a nearby apartment complex, where the girls picked up Gorgonio Godinez and possibly one or two other young men, and headed back to the cul-de-sac. (Exhibit CCCCC, pp. 269:13-15, 858:5-11.) On the way back, the now-crowded blue hatchback pulled over at a bike path, and Zamora, Godinez, and another girl got out and headed back to the cul-de-sac on foot. (Exhibit CCCCC, p. 269:13-22.)

Meanwhile, the blue Corolla returned to the cul-de-sac and parked on the corner of Kilson and Stanford. Lopez approached the Corolla on his bike, and began to speak with the girls inside. He told them that he was the one who threw the soda can earlier. (Exhibit N, p. 965:8-16.) A Honda appeared on Kilson and made a U-turn as it approached the cul-de-sac, then it drove out of view. (Exhibit N, p. 965:17-19.) The blue hatchback returned to the scene, made a U-turn on Kilson, and then headed back towards Edinger. (Exhibit N, p. 965:19-21.) Lopez rode his bike into the street after the blue hatchback. (Exhibit N, p. 981:17-20.) He then dropped the bike near the sidewalk, pulled out a gun and racked it, releasing a live cartridge into the street. (Exhibit N, pp. 981:20-22, 982:1, 984:25-26.)

At trial, the prosecution called as witnesses four of the five girls from the Corolla, all of whom testified that Lopez was the person they believed responsible for Zamora's

death—although none saw Lopez fire the weapon. (Exhibit N, p. 1005:8-12.) According to the prosecutor's closing argument, Lopez began "looking for something to shoot" when he saw the blue hatchback disappear down Edinger. (Exhibit N, p. 967:16.) Lopez purportedly went around the back of a red Suburban parked at the stop sign at Kilson and Edinger. (Exhibit N, p. 978:25-26.) Simultaneously, Zamora and her two friends were running down the sidewalk on the south side of Edinger towards Kilson. They were almost to Kilson when one of them shouted that someone had a gun. The three friends turned around and fled in the other direction. The prosecutor argued that Lopez then fired his gun and killed Zamora. (Exhibit N, pp. 981:17-982:9, 992:7-9, 997:1-5.)

The defense acknowledged that Lopez was carrying a gun, that he racked the weapon, and may have even fired the weapon at the blue hatchback. (Exhibit N, pp. 1001:10-17, 1059:12-13.) However, defense counsel emphasized that Lopez was chasing the blue hatchback, and that it was this vehicle that he focused upon, rather than the two females and male running down Edinger. (Exhibit N, pp. 1031:23-1032:3, 1032:24-1033:3.) Defense counsel argued that Lopez did not fire the shot that killed Carmen Zamora. Instead, defense counsel argued that Zamora was killed by another gunman at the scene. (Exhibit N, pp. 1016:14-1017:4, 1023:12-16, 1025:12-22.)

Evidence That a Second Suspect Was Responsible For the Murder

The two individuals in the above referenced red Suburban were Edna Sandoval and Jose Casillas. They were the only witnesses referenced in the transcript who described seeing the suspect fire the shot that killed Zamora. (Exhibit N, p. 1005:13-22.)

Jose Casillas was located in the driver's seat of the vehicle. At trial, he testified on direct examination that he only saw one gunman. (Exhibit CCCCC, pp. 398:16-399:9.) Jose Casillas also testified that he did not remember telling Public Defender investigators in 2006 and in 2009 that he saw two gunmen on the night of the incident. (Exhibit CCCCC, pp. 426:10-427:16.) However, the defense called as a witness former Public Defender investigator Linda Rowell, who interviewed Casillas in 2006. Rowell testified

that Casillas told her that prior to the shooting, he saw two teen males standing on the southeast corner of Kilson and Edinger, and **both had guns.**[45] (Exhibit CCCCC, p. 920:3-9.) Additionally, Rowell said that Casillas told her that one of the males ran east on Edinger after the blue car, and the other ran towards the center divider on Edinger. (Exhibit CCCCC, p. 920:3-9.)

Sandoval testified that she was seated in the back seat of the Suburban while it was stopped at Kilson and Edinger. She then saw a person with a gun run in front of the car. (Exhibit CCCCC, p. 324:3-15.) She estimated that the gunman was about 16 or 17 years old. (Exhibit CCCCC, p. 348:22-25.) She also stated that the gunman was not wearing a hat. (Exhibit CCCCC, pp. 349:9-11, 350:15-16.) According to Sandoval, the gunman ran

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[45] During cross-examination, the defense questioned Casillas about what led to the change in his recollection of events in the 10 days leading up to the trial. Questioning uncovered that the very same morning Casillas was to testify, he met with DA investigator Mike Ginther in the OCDA's office. The investigator informed Casillas that the defense theory was that there were two people with guns:

> Q: Did the D.A. investigator tell you that the defense was saying there was a second suspect with a gun?
> A: Yes.
> Q: Okay. . . . How did it come out that a D.A. investigator was talking to you about our defense theory in the middle of trial?
> A: I don't remember how that came out.
> Q: . . . The D.A. tells you that the defense was saying there were two suspects with guns, did the D.A. investigator ask you then, so there was just one with a gun, right?
> A. Yes.
> Q. Did he explain to you what our theory was, and then he said you only saw one guy, right?
> A. Yes.
> Q. Did he explain to you what our theory was, and then he said and you only saw one guy, right?
> A. Yes.
> Q. This just took place this morning.
> A. Yes.

(Exhibit CCCCC, pp. 431:17-26, 432:1-8.)

around her car, and then went into the middle of the street and "pointed the gun at the girl or the three people who were running." (Exhibit CCCCC, pp. 329:14-20, 330:16-17, 331:1-3.) Sandoval heard three or four shots, and saw a girl fall after the third shot. (Exhibit CCCCC, pp. 332:23-24, 337:4-13.)

Casillas testified that while waiting at the stop sign, he saw a blue car drive onto Kilson, pause near the group of teenagers on the corner, and then make a U-turn just before the cul-de-sac. (Exhibit CCCCC, p. 382:9-23.) The occupants of the blue car were three male Hispanics with shaved heads. (Exhibit CCCCC, p. 405:19-22.) As Casillas turned right onto Kilson, he saw an individual with a shaved head, who was not wearing a hat, begin running after the blue car, holding a gun. (Exhibit CCCCC, pp. 407:6-19, 408:8-9, 409:6-410:10.) The individual with the gun appeared to be approximately 17 or 18 years old. (Exhibit CCCCC, p. 408:22-23.) After the gunman went around the back of the suburban and ran towards the center divider of the street, Casillas made a left turn and drove ahead of him. (Exhibit CCCCC, pp. 393:14-26, 394:22-395:5.) From the rearview mirror, he saw the same gunman facing west on Edinger. (Exhibit CCCCC, p. 395:24-26.) He then heard two shots from behind, and saw a girl fall in front of him. (Exhibit CCCCC, pp. 397:25-398:5, 398:19-399:15.)

Casillas' description of a bald shooter without a hat was critical to the defense case. Lopez's booking photograph, taken just hours after the shooting, clearly showed that he had hair when the crime occurred. (Exhibit N, p. 1008:3-19.) The defense contended that if the shooter was bald, it could not have been Ricardo Lopez. Significantly, the description of a bald shooter, without a hat was inconsistent with the description of three critical prosecution witnesses, who said that Lopez was wearing a hat on the night of the incident. (Exhibit N, pp. 1024:22-1025:11.) The defense also stressed that Casillas and Sandoval had collectively estimated the age of the shooter as between 16 to 18. (Exhibit N, pp. 1041:10, 1042:3-7, 1070:2-5.) Lopez was 22 at the time of the shooting. (Exhibit ZZZZ.)

Analysis of Discovery Violation

Moriel's note describing his conversation with Alvaro Sanchez about the murder of a female near the cul-de-sac on Kilson in Santa Ana was found in the discovery from *People v. Inmate E*. This note appears on the second page of a two-page set, dated June 5, 2010. A Special Handling deputy also wrote a brief summary of the contents of the two pages of notes and placed a copy within the CI file. The typewritten summary states the following:

> 01/05/10— (01/06/10 received and filed 2-pages of notes) "Pave" tells "Scar" some information related to Delhi members involved in several shootings with rival gangs and what his involvement was in his current case. . . ."

(Exhibit O, p. 2246.)

Members of law enforcement unquestionably took possession of Moriel's note. Although a discovery violation does not rest upon whether the exculpatory evidence is passed along to the specific agency responsible for investigating the crime, it undoubtedly was received by the SAPD. As discussed previously, Special Handling's protocol when receiving informant notes is to forward them directly to the police agency responsible for investigating the alleged crime. (Exhibit EE, pp. 28-29.) The page documenting Sanchez's discussion of the Zamora murder was the second of two pages in which he discussed a crime committed by Delhi gang members. (Exhibit O, pp. 2246-2248.) Like the dozens of other pages from informant notes that also documented statements by alleged Delhi gang members about street crimes, these two pages of notes were unquestionably given to the SAPD.

The first of the two pages of these notes includes Sanchez's description of his culpability in his own attempted murder case. **That page also documents Sanchez's discussion about his co-defendant Luis V.'s innocence in the charged crimes, as discussed in more detail beginning at page 312. This page was apparently never revealed to either Sanchez or Luis V.** (Exhibit A) Detective Rondou was one of the investigating officers in *People v. Sanchez*. (Exhibit DDDD, p. 84:6-10.) His duties

included interviewing Alvaro Sanchez about his participation in the charged crimes. (Exhibit DDDD, p. 84:11-14.) Rondou was also the lead investigative officer in *People v. Ricardo Lopez,* and according to court minutes was permitted to remain in the courtroom at the time of the preliminary hearing. (Exhibit ZZZZ.)

Rondou and the SAPD cannot reasonably argue that they failed to take possession of the note from June 5, 2010. It is also clear that they fully comprehended the significance of its contents, and that it related to the murder of Carmen Zamora. Sanchez's description of the crime included two distinct references that would have immediately alerted detectives that Sanchez was speaking of Zamora's murder. First, the crime occurred in a unique location: the cul-de-sac located on Kilson near Edinger. Detectives surely did not need to do a computer search of homicides that took place at that location to determine whether Galarza, through Sanchez, was describing the Zamora homicide. If they had, though, it would have revealed that this appears to have been the only murder committed in this location. (Exhibit A.) Second, while the shooting death of a female on Santa Ana's streets is not unheard of, when considered together with the unique location of the shooting, it powerfully corroborated that the note pertained to the Zamora murder.

The Aggravated Nature of the Discovery Violation

The discovery violation occurred when prosecution team members realized that Sanchez was speaking of the Zamora murder and decided not to disclose the note to the defense, despite its exculpatory value. The violation is particularly egregious, though, for several reasons. First, each and every member of the prosecution team recognized that the defense asserted that a third person had killed Zamora and that its case rested on whether it was believable that such a person existed. Therefore, the team members were fully on notice that any information leading to the identification of that person was critical, and would have refuted the persistent attack upon the defense for making this claim.

In his rebuttal closing argument, the prosecutor scathingly disparaged the defense counsel's claim that such a person existed, whom he mockingly referred to 11 times as the

"magic man." (Exhibit N, pp. 1071:7, 1074:2, 7, 1078:10, 1080:24, 1081:1-2, 1082:8, 19, 23, 1084:25, 1085:12-13.) The following is illustrative of the prosecutor's theme that dominated his rebuttal argument: "Well, it was the defendant, you know, he had a gun, he racked a round, but he didn't shoot. No, no, no. Wait a minute. It was the magic man with the magic gun and the magic bullet that they were unable to find. (Exhibit N, p. 1071:5-9.) If indeed, there was evidence that this "magic man" was real, the prosecution was fully on notice that this evidence was both helpful and material to Lopez.

Second, as will be shown, Detective Rondou had knowledge of several facts—and could access others—that corroborated the contents of Moriel's note. Third, the prosecution team members knew that with each day and year they secreted the note, they were permitting memories to further erode, decreasing the chances of rectifying a wrongful conviction. The response of prosecution team members to the note and the information contained within it is yet another powerful illustration of a culture that discourages discovery of evidence helpful to defendants, particularly when those defendants are seen as having "earned" the concealment.

Prosecution team members could justify leaving Ricardo Lopez in prison for the remainder of his life—just as the prosecution team in the instant matter could justify a death penalty based in part upon incomplete evidence—because from their perspective of moral justice, that punishment is appropriate. Rondou, and likely others on the team, believed that even if the jury incorrectly concluded Lopez was Zamora's killer, there was no reason to revisit his conviction. In essence, Lopez deserved the punishment regardless of whether the conviction was suspect. It is this type of thinking, displayed throughout this motion, which devastates the credibility of a justice system that requires prosecutors and officers to set aside their personal value systems and follow the law. Local prosecutors and members of law enforcement have too often forgotten that their first responsibility is not to obtain (or maintain) the verdict their office desires or which comports with their personal

definition of justice. Upon receiving the note, Rondou was presented with a perfect opportunity to serve the justice system with distinction. Instead, he turned his back on it.

Whether the Description of Witnesses Indicated that Galarza May Have Been the Shooter

For Rondou, the lead investigator on the case, the trial of Lopez could hardly have been a distant memory when he received Moriel's note one year after both parties presented closing arguments. Rondou should have been floored that the "magic man" actually existed. But, considering his response to the note and the amount of misconduct described herein, it just as reasonable to question whether he knew of Galarza's presence much earlier. If Rondou was even slightly interested in the contents of the note, he would have realized that the age of the killer—as described by the only two witnesses who purportedly saw the shooter fire his weapon—was closer to Galarza's age at the time of the incident than to Ricardo Lopez's age. Casillas testified that the suspect appeared to be approximately 17 or 18 years old. (Exhibit CCCCC, p. 408:22-23.) Sandoval's estimate was similar. She stated that the gunman was about 16 or 17 years old. (Exhibit CCCCC, p. 348:22-25.) Lopez was 22 at the time of the incident. Galarza was born on June 10, 1986, making him **16** at the time of the shooting. (Minutes in *People v. Galarza* (Super. Ct. Orange County, 2009, No. 09CF0891), attached herein as Exhibit EEEEE.)

Evidence Suggesting that the Shooter May Have Been from the Delhi Gang

Was it a reasonable possibility that a second suspect could have been a Delhi gang member, which would have been the case if Galarza had participated in the crime? This was also likely, as Rondou well knew. Although not addressed at the trial, the crime occurred in Delhi territory. In fact, just four months after Moriel wrote his note, another alleged Delhi member, Rolando Arevalo, was charged with committing a crime for the benefit of Delhi that took place at the very location of the homicide.

In *People v. Rolando Arevalo*, the defendant was charged with several law violations including possessing methamphetamine for purposes of sales and possession of

cocaine for sales. It was also charged that Arevalo committed these crimes for the benefit of the Delhi gang. (Minutes in *People v. Rolando Arevalo*, (Super. Ct. Orange County, 2011, No. 10CF1650), attached herein as Exhibit FFFFF.)

At the preliminary hearing in the case, SAPD Officer Jose Mendoza testified that he observed Arevalo inside his vehicle, when a pedestrian walked up to his car to purportedly engage in a drug transaction. (RT (prelim. hr'g), Oct. 13, 2010, *People v. Rolando Arevalo* (Super. Ct. Orange County, 2011, No. 10CF1650), attached herein as Exhibit GGGGG, pp. 15:3-16:13.) The spot of this contact was within feet of the location where the confrontation took place that lead to Zamora's death. Officer Mendoza said that Arevalo was stopped in his vehicle, which was located on Kilson in the cul-de-sac. (Exhibit GGGGG, p. 15:5-15.)

SAPD Detective Roland Andrade testified as the prosecution's gang expert. He stated this area was "…**within the Delhi claimed turf**…" (Exhibit GGGGG, p. 41:8-10, emphasis added.) Adding to the odd coincidences between the two cases, one of the predicate priors used to prove that Delhi qualified as a criminal street gang was a conviction of Joseph Galarza, who had faced similar charges to those brought against Arevalo.[46] (Exhibit FFFFF.)

Evidence of Galarza's propensity for gang violence and the reliability of Alvaro Sanchez

Rondou realized before reading Moriel's note that Joseph Galarza was fully capable of murder—and not just because he was a Delhi gang member. Rondou would have known that Galarza was killed in 2009 by a SAPD officer, who contended that Galarza presented a lethal threat. A quick record search by Rondou would have confirmed what he likely already knew: at the time of Galarza's death, there was an arrest warrant for him

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[46] The preliminary hearing referenced another odd coincidence: Arevalo apparently tattooed "Gato", the nickname for Galarza, onto his hand after Galarza died. (Exhibit GGGGG, p. 56:21-24.)

based upon allegations that he was a felon in the presence of other gang members and possessed a firearm to benefit that gang. (Exhibit EEEEE.)

Rondou, though, had a far greater understanding of Galarza's gang activities than his prior convictions indicated. Moriel had written several other notes about his fellow Delhi member's prominent role in gang violence and his contact with weapons. (Exhibit O, pp. 2315-2316, 2357.) Two Delhi members told Moriel that Galarza was also responsible for the shooting death of Randy Adame. (Exhibit O, pp. 2316, 4792-4793.) As discussed in the *People v. Inmate I*. section, Rondou's awareness of this information is corroborated by the fact that the prosecution team finally turned over to the defense—after a lengthy delay—a portion of Moriel's notes purportedly describing Galarza's role in the Adame murder. As previously discussed, the prosecution team also craftily withheld the most compelling evidence that Galarza was responsible for that crime—Galarza's direct confession to that crime, which another inmate described to Moriel. (Exhibit O, pp. 2315-2316.) This is discussed beginning at page 105.

Significantly, Moriel had not just shared what others told him about Galarza within his notes. He also described his own experiences with Galarza. In a note that was finally turned over in two Delhi murder cases in which Rondou testified, *People v. Rodriguez* and *People v. Vega,* Moriel wrote the following:

> . . . The AR-15 was entrusted to Gato for safe-keeping and usage. The last time I saw Gato was on New Year's Eve of 2004 turning into 2005. We were all kicking back in front of Mike Salinas' (Muscle head) house on Adams St. And Gato had that same AR-15 slung over his should with a shoulder strap…

(Exhibit O, p. 2358.)

Thus, Rondou was well aware of considerable evidence—some of which he and his team members continued to conceal in other cases—corroborating that Galarza was a committed Delhi member, who had possibly committed at least one other murder, and appeared to have a significant propensity for violence. The failure to turn over relevant evidence from Moriel's notes pertaining to Galarza further aggravated the concealment of the note connecting Galarza to the Zamora murder.

Alvaro Sanchez's Honesty About Luis V. Further Discourages Disclosure to Lopez

The first of the two numbered pages of Moriel's notes, dated January 5, 2010, include Sanchez's statements exculpating his co-defendant in his own case. Although the prosecution did not have the right to assess the credibility of Sanchez before disclosing the statements to Lopez, his discussion of his own crime nonetheless provided powerful evidence that Sanchez was capable of providing reliable evidence.

As discussed previously, Sanchez spoke to Moriel about his role in his charged crimes, and in the process shared the fact that his co-defendant was innocent. Although Sanchez held little affection for Luis V.—he told Moriel that he didn't like him, called him a "pussy" and said he "isn't down for the neighborhood"—Sanchez nonetheless thought it was "fucked up" that Luis V. could be convicted of a crime that another person committed. (Exhibit O, p. 2247.)

While his own criminal conduct was deplorable, Sanchez's intuitive sense of fairness—that a wrongful conviction is always wrong—was ironically more advanced than many of the prosecution team members discussed in this motion. In contrast, prosecution team members did not show any angst about whether Luis V. might have been incarcerated for a crime he did not commit.

Most importantly, Rondou and others on his team, knew that Sanchez had been honest about Luis V.'s role in the charged crimes, which was corroborated by the prosecution's dismissal of the case after a significant delay. Ironically, Sanchez's honesty about Luis V., and the presence of his statements about Luis V. within the same two-page set of notes in which the Zamora murder was discussed, actually worked as an additional disincentive for turning over evidence about Galarza's role. Rondou and his team in *Sanchez* were involved in covering up Moriel's writings related to Luis V. If they turned over the two pages of notes, the first page would necessarily include Sanchez's description of Luis V.'s innocence. This page was never discovered to Sanchez or Luis V. (Exhibit

A.) If they turned over just the second page that has the description of the Zamora murder and has a number "2" on it, Lopez would certainly ask for the first page and the misconduct from Luis V.'s case could come to light. Lacking any concern for Lopez, it is unlikely that the prosecution team ever seriously contemplated turning over evidence of Galarza's culpability.

Whether Participants in the Crime Reasonably Believed that McClay Street Member(s) Were Present at the Time of the Shooting

What should the prosecution team have taken from the reference in Moriel's note that the incident arose out of ". . . a shoot out with the guys from McClay St . . . "? This sentence indicates that whoever shared the information with Sanchez—likely Galarza—believed that member(s) of the McClay Street gang were on the scene and engaged in a "shoot out," or in conduct that could have supported the use of this term. The McClay Street gang is never mentioned in the *Lopez* trial transcripts and Lopez was not charged with any gang charges or enhancements. (Exhibit ZZZZ.)

Nonetheless, members of the SAPD's gang homicide unit had numerous reasons to suspect that there was more to the incident than simply an angry male shooting into a group. There existed evidence presented at trial indicating that the passengers of the Honda, that drove through the cul-de-sac immediately before the shooting, may have been armed. (Exhibit CCCCC, pp. 605:15-25, 618:19-24, 830:1-13.) Detective Rondou testified that in 2002, Rafael Martinez told him that two bald teens in a green Honda made two U-turns in the cul-de-sac prior to the shooting. He also told Rondou that both of them were looking down and that one was leaning over. (Exhibit CCCCC, pp. 900:20-901:15.)

Additionally, a single name was brought up several times during the trial that would have peaked the curiosity of investigators wanting to fully understand what occurred that day. In 2002, Rosa Lopez, the girlfriend of the defendant, told Detective Rondou that there were two Hispanic males in the Honda that drove through the cul-de-sac prior to the shooting. (Exhibit CCCCC, p. 806:8-11.) At trial, Rosa testified that Carlos Corona was

in the passenger seat of the green Honda, and that he had a gun. (Exhibit CCCCC, pp. 601:17-26, 617:21-24.) Soon after Rosa saw the Honda, she heard shots. (Exhibit CCCCC, p. 618:19-24.)

Significantly, Carlos Corona's name and his connection to the Honda did not come up for the first time during the trial. Carlos Corona's sister, Luisa, was present at the scene. She was a passenger in the blue Corolla and played an important role in the events of the evening. While waiting at the scene, Luisa telephoned Carmen Zamora and asked her to come to Kilson for "backup." (Exhibit N, p. 963:5-8.)

At trial, Luisa addressed the issue of whether Carlos was present at the Kilson cul-de-sac that day. She said that she only called Carlos after Carmen was shot, and even then he did not come. (Exhibit CCCCC, pp. 189:19-190:4.) However, Mayra Linares, who was in the car with Luisa, apparently told a defense investigator in 2003 that Lucy called her brother to meet her at the cul-de-sac, and that Carlos drove through the Kilson cul-de-sac in a little green Honda prior to the shooting. (Exhibit CCCCC, p. 890:3-18.)

If Rondou or his teammates had been committed to justice, rather than simply putting "bad guys" away, Moriel's note would have immediately prompted him and his team to examine or re-examine the possible involvement of McClay Street members. The earlier descriptions of the passengers in the green Honda and Carlos Corona's presence certainly raised the possibility that gangs played a larger role in the incident than the jury realized. If, after receiving Moriel's note, Rondou had simply searched Corona's name for criminal cases he would have noticed that one was filed just two weeks prior to the date Moriel turned over the relevant note to law enforcement. Of course, it is just as likely that he was aware of the case and its relevance, but simply ignored it.

On December 22, 2009, Carlos Corona was charged with possession and transportation of a controlled substance for sale, felon in possession of a firearm, gang member carrying a loaded firearm in public, possession of a controlled substance with a firearm, street terrorism, and the gang enhancement, which alleged he committed the

crimes for the benefit of the **McLay Street** gang. (Exhibit HHHHH.) Two others were similarly charged in the complaint. (Exhibit HHHHH.) Petersen took over the case. In April of 2010, Corona pled to a simple count of possession of heroin. (Exhibit HHHHH.) The following year, Petersen filed another complaint against Corona alleging he had possessed for sale and sold heroin, street terrorism, and another gang enhancement alleging the crimes were committed for the benefit of the McClay Street gang. (Exhibit HHHHH.)

Considering the disturbing ease with which Rondou and other team members disregard *Brady* evidence, it is quite conceivable that before Moriel's note was turned over, prosecution members were already aware of Corona's membership in McClay Street and its significance to the case. Interestingly, a computer records search indicates that since the year 2000, Corona has lived just one block outside of the relatively tiny geographical territory purportedly claimed by McClay Street.[47] (Comprehensive Public Record Report for Carlos Corona and Ricardo Corona, RT (prelim. hr'g) May 10, 2005, *People v. Ricardo Corona*, (Super. Ct. Orange County, 2005, No. 05CF1040), RT (trial) Oct. 19 and 20, 2005, *People v. Ricardo Corona*, (Super. Ct. Orange County, 2005, No. 05CF1040, attached herein as Exhibit IIIII.) During the past seven years, another relative of Corona, Ricardo Corona, was connected to the very same address, as well as another address that falls within the McClay Street territory.[48] (Exhibit IIIII.)

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[47] During the preliminary hearing in *People v. Michael Ayala*, Orange County Superior Court Case Number 08CF0708, Detective Castillo testified that "The historical original location was the one - - the 400 block of North McCley [*sic*]. However, over the years, it did move over to the 6th and Eastwood area, which would include 518 North Eastwood and also the 400 to 500 block of North E Side." (RT (prelim. hr'g), April 23, 2008, *People v. Ayala*, (Super. Ct. Orange County, 2009, No. O8CF0708), attached herein as Exhibit JJJJJ, pp. 93:25-95:4.)

[48] In *People v. Ayala*, Detective Castillo was cross-examined about his opinion that Ayala was a member of the McClay Street gang. Defense counsel asked about a police contact in which Ayala and Ricardo Corona were found together. Castillo initially testified that Corona was a member of the McClay Street gang. But, after continuing to answer questions, Castillo suddenly interrupted counsel and said he wanted to correct himself. He

Summary of Misconduct Related to *People v. Lopez*

Almost four years have now passed since the note was written by Moriel. If Alvaro Sanchez can no longer recall the details of what he knew at the time, what is the remedy? If Sandoval and Casillas are unable to identify Galarza as the shooter, is Lopez simply out of luck? Now, to ensure that Lopez's conviction stays in place, the prosecution will need to make an awkward and ethically dubious argument: even if they had not concealed the note, it is speculative that the defense would have uncovered additional evidence of Lopez's innocence to support his acquittal at a new trial.

The prosecution team's response to the receipt of exculpatory evidence in *People v. Lopez* offers an additional, compelling example of the unwillingness of local prosecutorial and law enforcement agencies to give defendants access to meaningful evidence—particularly when the source of that evidence is a government informant. Because of the entrenched and corrupted informant system that exists, it is almost too painful to contemplate how a prosecutorial team guided by principles of due process would have reacted to Moriel's note.

Of course, the lead detective on this prosecution team would have called a meeting with other team members to determine how best to investigate this new information. Certainly, they would have asked Moriel to obtain more details from Sanchez about the Zamora murder, such as specifics about what Sanchez knew and the sources for his statements. After all, this is exactly how the prosecution teams have directed Moriel and Inmate F. when they wanted to put the final dagger in many defendants' cases. What

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then stated that Corona was actually a member of the Southside gang. Upon further questioning, Castillo claimed that he forgot about having testified as the gang expert in Ricardo Corona's preliminary hearing and trial during which he gave the opinion that Ricardo Corona was a member of the Southside street gang. (Exhibit IIIII.) Whether Ricardo Corona was a member of the Southside gang versus the McClay Street gang is impossible to reliably know based upon Castillo's opinion, particularly in light of his testimony and actions related to Henry Cabrera, analyzed in the next section of this motion.

justification exists for not employing the same energy and skills to determine whether a defendant may have been wrongfully convicted?

Leaders of the OCDA, such as Wagner, have brazenly endorsed concealment as strategy for winning and inculcated this perspective in local law enforcement. As a result, prosecution team members have repeatedly shown that they operate with little fear that their misconduct will be uncovered or that the judiciary will punish them if their wrongdoing is ever detected. This institutional mindset is further evidenced to an alarming degree by the study of the "Henry Cabrera" cases in the section that follows.

Eight years with "Stomper:" How the OCDA's decisions regarding the prosecution of Henry Cabrera corroborate systemic efforts to violate legal and ethical obligations.

The notes of Inmate F. and Moriel are replete with nicknames (or monikers) used by members of local gangs and the Mexican Mafia. A name that shows up only a few times is an individual referred to as "Stomper," later identified as Henry Cabrera. The most important of Moriel's notes regarding Cabrera includes a description of his participation in a shooting with Delhi gang members, which was provided to Moriel by Sergio Elizarraraz ("Bad Boy"). (Exhibit O, p. 2386.) Other individuals would ultimately be prosecuted for the murder documented in these notes, but not Cabrera.

The reasons for the failure to seemingly prosecute or even investigate Cabrera's participation offer compelling yet painful lessons in a local prosecutorial and law enforcement culture that is at ease with the manipulation and concealment of evidence. Ironically, the story of Henry Cabrera is not particularly sad as it relates to him. He may avoid a murder prosecution and have his life sentenced vacated because of the concealment and deception of prosecutors and members of law enforcement.

The significance of that concealment for purposes of this motion is the shocking misconduct that multiple prosecution teams engaged in over the years in their charging and discovery decisions related to Cabrera. Those decisions provide formidable evidence of

wide-ranging governmental misconduct, and corroborate that the legal and ethical violations in *People v. Dekraai* are consistent with systemic policies and practices that are designed to thwart defendants' due process and discovery rights.

***People v. Henry Cabrera I*.: The First Step on a Long Road of Deception about Henry Cabrera's Gang Affiliation**

On August 2, 2005, Deputy DA Colleen Crommett filed a complaint against Henry Cabrera and Steven Lopez, under Superior Court case number 05CF2448 (Minutes in *People v. Henry Cabrera I* (Super. Ct. Orange County, No. 05CF2448), attached herein as Exhibit KKKKK.) This case will be referred to henceforth as "*People v. Henry Cabrera I*." This case was certainly memorable to the prosecutors who handled it. The defendants were charged with several serious offenses including premeditated attempted murder. However, there was an unusual twist. Cabrera and Lopez allegedly fired weapons at each other. Significantly, the complaint also included substantive and enhancing gang allegations under section 186.22, which is the most important aspect of the filing for the purposes of this motion. The complaint alleged that Lopez was an active participant in the United Assassins street gang ("UAK"). In regards to Cabrera, the original and first amended complaint actually listed three gangs: **"Delhi/**Highland Street/F-Troop." (Complaint, filed Aug. 2, 2005, *People v. Henry Cabrera I*., (Super. Ct. Orange County, No. 05CF2448), First Amended Complaint, filed Aug. 19, 2005, *People v. Henry Cabrera I*., (Super. Ct. Orange County, No. 05CF2448)attached herein as Exhibit LLLLL, emphasis added.) Highland Street and F-Troop were at one time associated gangs, but why was Delhi listed? **Moriel's notes confirm that the Highland Street gang and the Delhi gang are rivals.** (Exhibit O, p. 2247.) So why was Delhi listed in the original complaint? To defense counsel, the inclusion of Delhi on the complaint may have seemed to be nothing more than a ministerial error.

The supervising investigator for the gang unit, Ronald Castillo, testified about Cabrera's participation in the Highland Street gang. (RT (prelim. hr'g), Nov. 28, 2005,

People v. Henry Cabrera I (Super Ct. Orange County, 2006, No. 05CF2448), attached herein as Exhibit MMMMM, p. 99:16-22.) However, Crommett did not elicit any information pointing to Henry Cabrera's participation in Delhi, and Castillo did not offer any evidence indicating why Delhi was the first gang listed on the complaint. (Exhibit MMMMM, pp. 94:14-110:25.)

As would become clear over time, Crommett's inclusion of Delhi in the complaint was not an accident. At the very least, it reflected a difference of opinion in the SAPD gang unit about Cabrera's gang affiliation. But this, of course, assumes that the SAPD gang unit was assessing Cabrera's gang affiliation honestly. Crommett was required to provide the defense with evidence that Cabrera was actually a participant in the Delhi gang at the time of the crime. **In fact, either she or her successor, Mark Geller, did provide at least one report from 2003 suggesting Cabrera's association with Delhi, as it was referenced on cross-examination at Cabrera's first trial.** However, it is unclear whether the prosecution team provided this report prior to the first preliminary hearing as counsel did not ask any questions about Delhi, and Castillo's responses did not give the slightest clue why "Delhi" was ever listed on the complaint. In fact, the only mention of Delhi during the preliminary hearing was made by the defense attorney for Lopez, who said that evidence had not been presented regarding "Del high [*sic*]." (Exhibit MMMMM, p. 143:14-16.)

When Crommett filed the felony information, she deleted "Delhi" from the charging document. (Felony information, filed Dec. 7, 2005, *People v. Henry Cabrera I*., (Super. Ct. Orange County, No. 05CF2448), First Amended Information, filed Mar. 7, 2006, *People v. Henry Cabrera I*., (Super. Ct. Orange County, No. 05CF2448), Second Amended Information, filed Mar. 7, 2006, *People v. Henry Cabrera I*., (Super. Ct. Orange County, No. 05CF2448), attached herein as Exhibit NNNNN.) On March 6, 2006, the day set for Defendant Lopez's Motion to Sever, Deputy DA Geller made his first appearance. (Exhibit KKKKK.) The following day Geller filed the First Amended Information, and

later in the same day, the Second Amended Information. (Exhibit NNNNN.) On March 8, 2006, Defendant Lopez's Motion to Sever was granted. (Exhibit KKKKK.) On March 9, 2006, Geller dismissed the information rather than proceed on two separate trials. (Exhibit KKKKK.)

Geller filed a new complaint under Orange County Superior Court case number 06CF0765. (Complaint in *People v. Henry Cabrera I*, (Super. Ct. Orange County, No. 06CF0765, attached herein as Exhibit OOOOO.) The preliminary hearing that followed provided another indication that Cabrera's attorney, Ed Hall, was unaware of the possible difference of opinion and competing evidence regarding Cabrera's gang affiliation, because he offered to stipulate that Highland Street qualified as a criminal street gang. (RT (prelim. hr'g), March 21, 2006, *People v. Henry Cabrera I*, (Super. Ct. Orange County, 2006, No. 06CF0765), attached herein as Exhibit PPPPP, p. 18:5-11.) Furthermore, after the presentation of evidence, there were no arguments about whether there was sufficient evidence for either the substantive gang charge or the gang enhancement. (Exhibit MMMMM, pp. 135:19-143:6.) After Cabrera and Lopez were held to answer, a new information was filed and another battle began about whether the defendants could be tried together. This time, after submitting his own motions, Geller succeeded, as the Honorable Richard F. Toohey denied the motion to sever. (Minutes in *People v. Henry Cabrera I*, (Super. Ct. Orange County, No. 06CF0765, attached herein as Exhibit QQQQQ.)

At trial, Castillo testified consistently with his testimony at the earlier preliminary hearings. To support the argument that Cabrera was a member of Highland Street, Castillo referenced three gang notices, as well as other evidence that he said supported his opinion. In March of 2003, Cabrera was reportedly found with two other Highland Street members, with whom Cabrera claimed he was associated. (RT (trial), Sept. 28, 2006, *People v. Henry Cabrera I*, (Super Ct. Orange County, 2006, No. 06CF0765), attached herein as Exhibit RRRRR, pp. 28:23-24:1.) In a second gang notice dated December 1, 2003, Cabrera said that he no longer associated with Highland Street. (Exhibit RRRRR, p. 29:2-

4.) In the third notice, dated December 1, 2005, he allegedly said "that he grew up next to Highland Street and had been claiming Highland Street since the sixth grade." (Exhibit RRRRR, p. 29:5-8.) Castillo also testified that a police report from 2002 stated that Cabrera had written "Highland" on a school door. (Exhibit RRRRR, p. 29:11.) In another report from 2003, Castillo said that officers saw "Highland Street" written on a leather CD case in Cabrera's bedroom. (Exhibit RRRRR, p. 29:12-14.) Castillo also testified that when Cabrera was booked on the charged case on August 1, 2005, he told officers he was from Highland Street. (Exhibit RRRRR, p. 29:15-18.)

Oddly, Castillo never mentioned during direct examination the gang notice Cabrera received on the date of the crime, July 31, 2005, in which he denied being an active member of Highland Street. On cross-examination, Castillo acknowledged the existence of that notice and Cabrera's statements during that contact. He stated that he did not "give any weight" to Cabrera's statement denying active membership in the gang, though Castillo never explained the reason. (Exhibit RRRRR, p. 74:9-20.)

Geller also obtained testimony that the location of the crime, Main and Edinger, was not part of Highland Street territory, instead it's "…kind of a neutral territory." (Exhibit RRRRR, p. 24:7-11.) This depiction of the area being neutral territory may not have been accurate, at least according to Detective Rondou. In *People v. Rodriguez*, Rondou testified in a preliminary hearing that Delhi's territory is "…basically Edinger to about Segerstrom. Edinger to the north, about Segerstrom to the south. Roughly Standard, maybe Grand to the east and right at about Flower to the west. It covers the south, south central area of Santa Ana." (Exhibit PP, p. 363:5-12.) If Rondou was correct, the incident occurred in central Delhi territory. But this was probably not a point that Castillo wished to highlight.

The direct examination did not offer any inkling of Cabrera's possible participation in the Delhi street gang. However, during cross-examination, Lopez's counsel began to crack the door open slightly. He probed Castillo about a police report that had been discovered relating to an incident on December 14, 2003, in which Cabrera was contacted

with ten other individuals. (Exhibit RRRRR, pp. 47:20-24, 49:16-18.) Castillo was asked the following:

> Q: …And in reviewing that particular report, did that help you form the opinions that you reached today with respect to Mr. Cabrera?
> A: No, I did not use that document.
> Q: Not at all?
> A: No
> Q: Any reason why not?
> A: The circumstances of the contact, lack of statements being made. I didn't use it to form the opinion regarding Mr. Cabrera and his membership to Highland Street gang.

(Exhibit RRRRR, p. 48:10-20.)

This response was technically accurate. He did not use this contact to assist him "to form the opinion" regarding Cabrera's membership in the Highland Street gang. But the reason had nothing to do with the "circumstances of the contact" or the "lack of statements being made." He did not consider this contact, as would be seen shortly, because the SAPD and OCDA had already decided that Cabrera was going to be a Highland Street gang member, regardless of whether that conclusion was true.

When Castillo claimed that he was unable to remember the names of the individuals identified in the report documenting the December 14, 2003 incident, counsel offered him the opportunity to refresh his recollection. (Exhibit RRRRR, pp. 49:3-50:13.) Castillo finally acknowledged that he recognized the name of one of the ten individuals listed in the report, Ismael Nunez. (Exhibit RRRRR, p. 49:22-26.) Castillo said that Nunez was not from Highland Street and agreed that this was "…one of the reasons why this particular report didn't have any bearing on [his] opinion[.]" (Exhibit RRRRR, p. 50:1-8.) Interestingly, while Castillo said that Nunez was not from Highland Street, he did not immediately state the name of Nunez's affiliated gang.

Castillo made it through the first counsel's cross-examination without having to provide the name of the unidentified gang. However, Cabrera's counsel, Michael Currier, returned to the subject of the December 14, 2003, incident during his cross-examination. Castillo finally acknowledged that "[m]embers of that group were crossing out graffiti

from the Alley Boys gang and I believe placing up graffiti for the Delhi gang, they're two rival gangs here in Santa Ana." (Exhibit RRRRR, p. 71:9-13.) When asked who "that group" consisted of, Castillo stated the following: "I don't recall because I didn't do a background check on them so I can't make an opinion they were part of Delhi group or active participation or members, I don't know." (Exhibit RRRRR, p. 71:13-19.)

Castillo, the long time head of the gang unit, already knew or could easily have determined the gang affiliation of the individuals at the park. The group being discussed included a Delhi gang member in a location considered a turf battleground with the Alley Boys gang. Currier pressed Castillo on the significance of Delhi graffiti being placed over Alley Boy graffiti. Castillo finally relented: "From my training and experience it would be active participants or members of that gang placing graffiti over the Alley Boys graffiti." (Exhibit RRRRR, p. 71:20-25.) He then acknowledged that this act would mean that Delhi members were present on the day of the incident. (Exhibit RRRRR, p. 71:23-72:3.) Counsel then asked the critical question:

> Q: If Mr. Cabrera was there with that group, would that also make him an associate or member of the Delhi gang?
> A: In my opinion, no. Just based on that one incident. No.

(Exhibit RRRRR, p. 72:4-8.)

Did Castillo truly have only one incident that pointed to Cabrera's association with the Delhi gang? If this were the situation and it was so insignificant, why did the original complaint—the important details of which were likely not realized by the two defense counsel in this proceeding—allege that the crime was committed for the benefit of the Delhi gang?

In actuality, Castillo fully understood the significance of the incident at the park (as well as other information that led him to believe it was at least just as likely that Cabrera was a Delhi gang member). Highland Street and Delhi are rivals, and rivals would not congregate together. Unfortunately, defense counsel did not ask Castillo to explain how Cabrera, an alleged Highland Street member, could have avoided being beaten or killed by the Delhi gang members in the park. Of course, Castillo had little interest in informing

defense counsel of the rivalry between the two gangs, and the lack of questioning on the subject suggested Cabrera's counsel was unaware of it.

In his closing argument, Geller said that Cabrera's membership in the Highland Street gang was indisputable:

> What's important is who he was with and what he is doing and his own self admissions in those contacts that he's Highland Street. He's claiming Highland Street to police officers for goodness sake. Cabrera knew that members of that gang engage in a pattern of criminal activity.

(RT (trial), Oct. 4, 2006, *People v. Henry Cabrera I*, (Super Ct. Orange County, 2006, No. 06CF0765), attached herein as Exhibit SSSSS, pp. 5:24-6:3.)

In his rebuttal argument, Geller added the following:

> One constant is the truth never changes. Truth is the truth.[49] And it never changes. If somebody is speaking the truth and they're speaking the truth in July of '05 and they're speaking the truth in September of '06, it remains true.

(Exhibit SSSSS, p. 103:12-16.)

Ultimately, Geller and his team suffered a significant loss, as both defendants were acquitted of the attempted murder charges, and thus avoided potential life sentences. Instead, Cabrera and Lopez were each sentenced to 3 years and 8 months in state prison. Lopez was convicted of discharging a firearm in violation of section 246.3 and felon in possession of a firearm. Cabrera was found guilty of possessing a firearm while on probation and street terrorism. (Exhibit QQQQQ.) Cabrera's conviction of a "serious felony" for street terrorism was significant because it would have long-lasting consequences for his sentence in a later prosecution.

For Geller, the unique nature of the filing and the defeat at trial on the "life" offense meant that Henry Cabrera was a defendant he would not easily forget. Whether Geller

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[49] Ironically, Geller used the same folksy line that Rondou invoked several years later in *People v. Vega*. Rondou proclaimed that the "truth is the truth" in explaining to the jury why he always recorded his interviews with witnesses. (Exhibit QQ, p. 1187:3-13.) Rondou's testimony in *Vega* was aimed at damaging the credibility of a defense investigator who did not record an interview. However, Rondou himself was lying, since he either never recorded his interviews of custodial informants or kept the recordings concealed.

truly believed that Cabrera was a member of the Highland Street gang and that he had complied with his discovery responsibilities is unknown, though his conduct in the succeeding years would raise serious questions about what transpired in this case.

Why the Prosecution Preferred Highland Street: The Hidden Motive for Cabrera's Membership

Although never actually addressed at trial, two critical questions remained unanswered in the aftermath of the case: if indeed the evidence so overwhelmingly pointed to Cabrera's membership in the Highland Street gang, why did Castillo recommend—as reflected in the first charging document—that Cabrera was an active participant in "**Delhi**/Highland Street/F-Troop"? And if the evidence of Cabrera being at Memorial Park with Delhi gang members was so insignificant to Castillo's analysis of Cabrera's gang membership, what evidence was he relying upon when he first recommended "Delhi/Highland Street/F-Troop"?

When the case was originally filed the prosecution team must have been convinced that there was sufficient evidence that Cabrera was a Delhi member. However, at some point his affiliation with the Delhi gang became inconvenient for the prosecution's ultimate theory of the case. But what about the evidence of Cabrera's Highland Street affiliation referenced in Castillo's testimony? Some of that evidence certainly exists. But as will be discussed below, given the persistent concealment of relevant evidence that Cabrera was a member of the Delhi gang, evidence that Castillo identified as supporting Cabrera's membership in the Highland Street gang warrants careful reexamination.

The reasons that the prosecution team preferred Cabrera to be an active member of Highland Street rather than Delhi were not readily apparent. The answer, though, appears to hinge on the issue of motive. The prosecution in *People v. Henry Cabrera I*—as it does in nearly every gang case —seeks to find the gang related motive for the crime that will also support allegations pursuant to section 186.22. It was their desire to have a clear gang motive that offers the most plausible explanation for why the prosecution tilted their

determination of Cabrera's membership towards Highland Street and away from Delhi. At the preliminary hearing and at trial, Castillo testified that the county's gang members had a "green light" from the Mexican Mafia to commit violence upon United Assassins.[50] (Exhibit PPPPP, p. 107:22-26; Exhibit RRRRR, p. 64:21-26.) Steven Lopez was an alleged member of UAK. The prosecution thus argued that Cabrera shot at Steven Lopez because of the alleged green light. (Exhibit RRRRR, pp. 35:21-36:14.)

But if Cabrera had been affiliated with the Delhi street gang, why wouldn't he have had an identical motive to shoot a UAK member as someone in Highland Street? The answer is that **UAK and Delhi are allies.** In fact, the alliance is so close that UAK—which is less-established—serves as a feeder organization to Delhi by providing them with individuals who eventually become Delhi members. The alliance was confirmed by the testimony of another experienced SAPD gang investigator in *People v. Robert Cruz*. (Super. Ct. Orange County, 2004, No. 02CF0796/ G035177.) On September 29, 2006, the Court of Appeal issued an opinion upholding the convictions of Cruz and his co-defendant, Abel Castillo, for first-degree murder and other allegations. (Coincidentally, Detective Castillo testified in Henry Cabrera's trial, one day before the issuance of the opinion, on September 28, 2006.) The opinion stated the following:

> Matthew Craig**,** a gang investigator with the Santa Ana Police Department, testified as an expert for the prosecution. He described the Alley Boys and Delhi gangs as rival groups, with the Alley Boys claiming the intersection of the shooting as their territory. Both Castillo and Cruz were admitted gang members, Castillo having boasted of Alley Boys membership and Cruz having bragged of membership in the Alley Tiny Criminals, which was later subsumed within the Alley Boys. Craig concluded that the killings were committed to benefit the Alley Boys gang, due to the shooting's location and the victims' association or membership with Brown Pride and **United Assassins, a group in alliance with the Delhi gang**.

(*People v. Cruz* (Sept. 29, 2006, G035177) [nonpub. opn.] (2006 Cal. App. Unpub. LEXIS 8820), attached herein at Exhibit TTTTT, p. 7, emphasis added.)

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[50] United Assassins is also referred to as United Assassins Krew or UAK. For purposes of consistency, the acronym UAK is used throughout the motion.

Detective Castillo was certainly familiar with *People v. Cruz*. In fact, **Castillo was the first witness called for the prosecution at the preliminary hearing in *Cruz*, held on July 14, 2003**. (RT (prelim hr'g), July 14, 2003, *People v. Cruz* (Super. Ct. Orange County, No. 02CF0796), attached herein as Exhibit UUUUU, p. 16:4.) At the preliminary hearing, Craig testified—as he did at trial—that UAK and Delhi were allies. (Exhibit UUUUU, p. 285:12-14.)

Additionally, in *People v. Sifuentes* (2011) 195 Cal. App. 4th 1410, the Court of Appeal reviewed the testimony of another SAPD gang expert, who testified about the gang association of Defendant Sifuentes after his arrest in May of 2007. The witness was Investigator McLeod, and his testimony in Sifuentes's case would become highly significant to the issues surrounding Cabrera. Although the case was filed subsequent to *Henry Cabrera I*, McLeod's 2008 testimony regarding the relationship between UAK and Delhi suggested that the relationship remained the same between 2000 and the date of his testimony. (RT (trial), July 14, 2008, *People v. Sifuentes* (Super. Ct. Orange County, 2008, No. 07HF0981), attached herein as Exhibit VVVVV, pp. 349:25-350:17.) After the conviction, the court discussed McLeod's opinion that Sifuentes was an active participant in the Delhi gang, stating the following:

> In 2000, police officers arrested Sifuentes and other members of his group, which included several members of the United Assassin Krew gang (UAK) and another Delhi gang member. Police learned that a member of the group possessed a weapon. McLeod explained UAK allied itself with Delhi and members from UAK often became Delhi gang members. Investigators searched Sifuentes's bedroom on this occasion and found UAK paraphernalia. This incident prompted Santa Ana police officers to issue a STEP notice to Sifuentes.

(*People v. Sifuentes*, *supra,* 195 Cal.App.4th at p. 1414, attached herein as Exhibit WWWWW.)

McLeod's actual testimony in *Sifuentes* provided additional insights into the relationship between UAK and the Delhi Street gang:

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Q: And is there any type of relationship between U.A.K. and Delhi Criminal Street Gang?
A: Yes.
Q: What is that relationship?
A: In regards to Delhi being one of the oldest established traditional street gangs, U.A.K. is a newer gang. It grew out of a tagging crew, which I guess changed into or adapted itself into a traditional criminal street gang. Specifically, in regards to Delhi and U.A.K., you'll often find members of U.A.K. who, for lack of a better term, graduate into membership or association with the Delhi gang. The Delhi owning or controlling the larger area, they allow U.A.K. members to operate, congregate, what have you, within their area given specific guidelines. To give you an analogy, if I could, it's almost as if you have a junior high school which is a feeder group into a high school.

(Exhibit VVVVV, pp. 349:25-350:17.)

Thus, none of the information about the relationship between Delhi and UAK was new to Castillo. It appears, though, that at some point after the initial filing of the complaint in *Henry Cabrera I,* the prosecution team decided 1) that Cabrera needed to be a Highland Street member because if he were in Delhi, he would not have shot at a UAK member for the gang motive Castillo had invented, which was the green light; or 2) it would devastate the prosecution's chances of presenting a gang motive and of succeeding on the alleged section 186.22 charges in *Henry Cabrera I* if the jury believed Cabrera was a Delhi gang member. Consequently, Castillo used the green light theory to provide motive, and the defense never made the discovery about Delhi's relationship with UAK.

In sum, at some point after the filing of the original complaint, prosecution team members further mulled the relationship between Delhi and UAK. The prosecution team believed—as they knew a jury would, as well—that a Delhi member would not intentionally shoot at someone from UAK regardless of an active green light, just as Delhi members would not shoot at fellow Delhi members if a green light were placed on their own gang. On the other hand, if Cabrera were a member of Highland Street, the problem of motive disappeared. The prosecution team thus worked backwards to resolve any initial uncertainty about Cabrera's affiliation with Delhi by taking into account the preferred outcome: a conviction for Cabrera and findings on each of the charges including the

substantive and enhancing gang allegations, even if it meant misleading the jury into believing that he was a member of the wrong gang.

Geller Begins Prosecution of Delhi Member Moises Cabrera

Castillo testified in *People v. Henry Cabrera I* on September 28, 2006. Six months earlier, on March 4, 2006, Jose Guzman, a member of the West Myrtle gang, was shot and killed. (RT (prelim. hr'g), May 20, 2008, *People v. Moises Cabrera* (Super. Ct. Orange County, 2010, No. 07CF2123/07CF2154), attached herein as Exhibit XXXXX, p. 8:5-21.) On May 10, 2007, Investigators Rondou and Rodriguez traveled to a state prison where they interviewed Claudia Ruelas. Ruelas was Moises Cabrera's girlfriend. In that interview, she stated that she was present when Moises and three other **Delhi** gang members killed Guzman. (Exhibit XXXXX, pp. 11:1-18:19.)

The prosecutor who filed the complaint against Moises Cabrera**—Henry Cabrera's brother**—was Mark Geller. The complaint was filed on June 25, 2007. (Minutes in *People v. Moises Cabrera* (Super. Ct. Orange County, No. 07CF2123), attached herein as Exhibit YYYYY.)

The OCDA Begins its Next Prosecution of Henry Cabrera as More Clues Emerge that the OCDA and the SAPD Did Not Believe Cabrera Was a Member of the Highland Street Gang

Summary of Facts and Charges in *People v. Henry Cabrera II* (07CF4087)

Approximately eight months after Moises Cabrera's arraignment on murder charges for the benefit of the Delhi street gang, his brother Henry was charged in a new felony complaint, referred to herein as *People v. Henry Cabrera II*. (Minutes for Henry Cabrera and Pablo Jimenez in *People v. Henry Cabrera II* (Super. Ct. Orange County, No. 07CF4087), attached herein as Exhibit ZZZZZ.) This time around Highland Street was the only gang listed on the complaint; "Delhi" was nowhere to be found. (Complaint in *People v. Henry Cabrera II*, (Super. Ct. Orange County, No. 07CF4087, attached herein as Exhibit AAAAAA.) On December 18, 2007, Henry Cabrera was arraigned on a complaint based

upon crimes he allegedly committed on December 15, 2007. (Exhibit ZZZZZ.) The date of the conduct would ultimately prove critical to the analysis of perhaps the most egregious misconduct related to Henry Cabrera, which would begin nine days later.

The following is a summary of the facts allegedly supporting Henry Cabrera's prosecution, as described in the unpublished opinion that followed his conviction:

> On an evening in December 2007 as Julio Torrez was parking his car, two men, wearing dark blue or black sweatshirts with hoods, ran toward his car. One of them, holding a gun, demanded Torrez give him all his money and his car keys. The second man entered the passenger side and the man with the gun got into the driver's side of the car and drove away.
>
> After receiving a report of a carjacking police found the car. Inside were two Hispanic men wearing dark sweatshirts with hoods, as described in the report. When the police first began following the car they saw the passenger throw a gun out the window, after which followed a high-speed chase. When the car stopped, the passenger, Pablo Jimenez, jumped out and ran. Defendant, in the driver's seat, surrendered. Several items, including the stereo and tools, were found missing from the car.
>
> Torrez could not positively identify the gun as the one used but said it looked similar. At an in-field showup, Torrez was not absolutely sure defendant was the one who had taken the car. He was afraid of retaliation by the two men. About six weeks later Torrez picked defendant out of a six-pack photo lineup but at trial testified he did not recall whether he had identified him. A search of defendant's residence revealed a dark blue sweatshirt and other dark blue clothes, and a holster.

(*People v. Cabrera* (Nov. 30, 2010, G042390) [nonpub. opn.] (2010 Cal. App. Unpub. LEXIS 9530), pp. 2-3), and attached herein as Exhibit BBBBBB.)

The list of charges against Cabrera included carjacking and the use of a firearm. (Exhibit ZZZZZ.) However, it was the allegation that Cabrera committed the crime for the benefit of a gang that would be the most significant in determining Cabrera's future. (Exhibit ZZZZZ.) If he were to be convicted of carjacking and the gang enhancement was found to be true, Cabrera would receive a life sentence. The complaint alleged that Henry Cabrera was an active participant, once again, in the **Highland Street** gang and that his actions were done to benefit that gang. (Exhibit AAAAAA.) Moreover, the complaint charged co-defendant Pablo Jimenez similarly, with the exception that he was not alleged to be an active participant in the Highland Street gang. (Exhibit AAAAAA.) **Jimenez,**

who had no prior gang contacts, would also face a life sentence if jurors found that he committed the carjacking while knowingly in association with a Highland Street gang member for the benefit of the Highland Street gang, pursuant to the gang enhancement.)

This time around the prosecutor would not be Geller, who apparently had been transferred from the OCDA's Gang Unit to its TARGET Unit. Instead, Erik Petersen would direct the effort against Henry Cabrera**.**

SAPD Hides Evidence of Henry Cabrera's Membership in the Delhi Street Gang Nine Days After Petersen Charges Him As a Member of the Highland Street gang

On November 27, 2007, a Delhi gang member named Jonathan Dizon was killed in Santa Ana. (Partial set of police reports discovered to Damien Galarza in *People v. Brambila,* (Super. Ct. Orange County, No. 07CF4182), attached herein as Exhibit CCCCCC, p. 61.)[51] The following day Ruben Cabanas was killed in what was suspected to be a retaliatory murder. (Exhibit CCCCCC, pp. 98-101.) On December 6, 2007, Rodriguez and Rondou interviewed a potential witness, Trung Ly, about the murders. (Exhibit CCCCCC, p. 63.) Ly told the detectives that he spoke to "Chino," later identified as Guillermo Brambila, about the murder. (Exhibit CCCCCC, pp. 64-65.) According to Ly, Brambila said that he was with Dizon shortly before he was shot and killed. (Exhibit CCCCCC, p. 64.) Ly said that Brambila admitted having a pistol with him before the shooting. (Exhibit CCCCCC, p. 64.) He said that both Brambila and Dizon observed a vehicle. (Exhibit CCCCCC, p. 64.) Brambila then gave Dizon the pistol to "light it up."

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[51] Dekraai obtained discovery from Damien Galarza related to the prosecution of Juan Calderon and several cases in which he provided information about crimes allegedly committed by Delhi members. The relevance of Calderon to the issues surrounding Cabrera is discussed in the next section and several others. The reports referenced in this section were located in the portion of the discovery related to the prosecution of Guillermo Brambila and Eduardo Garcia in Orange County Superior Court Case number 10CF3025.

(Exhibit CCCCCC, p. 64.) Dizon approached the car, had words with the occupants and began firing at the car. (Exhibit CCCCCC, p. 64.) The occupants fired back, killing Dizon. (Exhibit CCCCCC, p. 64.) Brambila then took the weapon from Dizon and fled the area. (Exhibit CCCCCC, p. 64.) Additionally, Ly said that he was told that "Oso" from the Delhi gang orchestrated the retaliatory murder that occurred the next day (which killed Ruben Cabanas) and that two suspects were involved. (Exhibit CCCCCC, p. 65.) He said that he did not know if "Oso" was present at the time of the shooting. (Exhibit CCCCCC, p. 65.)

On December 27, 2007, McLeod and Rondou interviewed Brambila at the SAPD. (Exhibit CCCCCC, p. 206.) Brambila denied having a weapon before the shooting and standing next to Dizon prior to the shooting. (Exhibit CCCCCC, p. 206.) Rather, he said that he was a short distance from Dizon when he saw the suspect vehicle approach Dizon. (Exhibit CCCCCC, p. 206.) He yelled out a warning to Dizon to be careful. (Exhibit CCCCCC, p. 207.) He said that Dizon "hit-up" the occupants. (Exhibit CCCCCC, p. 207.) Brambila then heard several shots from the vehicle and saw Dizon fall. (Exhibit CCCCCC, p. 207.) He ran to Dizon. He saw the firearm that Dizon was holding, which he grabbed. He then left the area before the police arrived. (Exhibit CCCCCC, p. 207.)

The following is McLeod's summary of what Brambila said regarding his contact with Dizon prior to the shooting:

> …approximately four hours prior to the shooting, he was at a Delhi gang member's residence. **He described this Delhi gang member by the moniker of "Stomper" and said that his residence was on V** Avenue.** While he was there, he received a telephone call from Dizon inquiring as to his whereabouts. After speaking, the two met at Stomper's house in order to hang out.

(Exhibit CCCCCC, p. 207, emphasis added.)

Brambila said that after the call, Dizon left while he remained at the residence. Brambila then went to another residence and did not see Dizon again until the shooting occurred. (Exhibit CCCCCC, p. 208.)

The following excerpt of McLeod's report is an example of how he described those

individuals for whom Brambila only provided monikers or partial names:

> He identified these individuals by the names/monikers of "Magic," Arturo, Cici and Brianna. By the mention of the names Magic and Arturo, I understood Brambila to be speaking of Michael Flores and Arturo Sepulveda respectively.

(Exhibit CCCCCC, p. 206.)

Of the four Delhi gang members who were identified by a moniker in the report, "Stomper" was the only one not referred to by his actual name in the report. (Exhibit CCCCCC, pp. 206-207.) Additionally, the list of "Person(s)" in the face sheet of the report appears to reference everyone Brambila had spoken about with the exception of "Stomper." (Exhibit CCCCCC, pp. 201-204.) McLeod wrote "Brianna Unknown," "Cecilia Unknown," and "Alicia Unknown" for the individuals that were not completely identified in the interview. McLeod also included specific physical descriptions under their names. (Exhibit CCCCCC, pp. 203-204.) However, there is no additional identifying information for "Stomper." The fair inference to be drawn from the failure to include (or obtain) additional identifying information for Stomper would be 1) that they either did not need additional information because they knew who he was; or 2) they were not interested in contacting him or having anyone else contact him.

In contrast to the presentation in the report, the transcript of the interview of Brambila shows that detectives knew exactly who "Stomper" was, recognized him as Delhi gang member Henry Cabrera, and were familiar with his address. Rondou and Brambila had the following dialogue referencing Brambila's contact with Dizon prior to the shooting:

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Q: I believe that. What I'm telling you is I don't believe you were with [Dizon] at the time he was shot, but you were with him prior to. You were with him—
A: I seen him, I seen him—
Q: --before.
A: --earlier. I seen him earlier. I hung out with him earlier at—
Q: Tell us about that.
A: **--a guy from Delhi's house**.
Q: When—tell us about that. How long earlier?
A: Probably like, probably a good like four hours before he got shot maybe.
Q: Where were you?
A: [Unintelligible]. We didn't do nothing. We were just hanging out right here.
Q: Where were you?
A: On, um, on V**
Q: V** and what?
A: At, um, V** and...
Q: Well, just tell me the Delhi guy. **I know all the Delhi people. Whose Delhi house were you at?**
A: No, he wasn't there. Um, what's his face, Stomper lives there, but I was hanging out-
Q: **I know who Stomper is**.

(Transcription of interview of Guillermo Brambila by Santa Ana Police Detectives Rondou and McLeod, (Dec. 27, 2007), attached herein as Exhibit DDDDDD, pp. 51-52, emphasis added.)

Rondou referenced "Stomper" three more times in the interview. (Exhibit DDDDDD, pp. 54-55.) Furthermore, Rondou's lack of any questioning about where he lived confirmed that he was being truthful when he said that he knew "who Stomper is." (Exhibit DDDDDD, pp. 51-55.)

Rondou was indeed quite familiar with the address on V** where Henry and his brother Moises had lived. In fact, at the special circumstances murder trial of *People v. Moises Cabrera*, Rondou testified, "I've been there before", referring to the residence of Moises Cabrera (and Henry Cabrera), on V**." (RT (trial), Jan. 14, 19, and 21, 2010, *People v. Moises Cabrera* (Super. Ct. Orange County, 2010, No. 07CF2123), attached herein as Exhibit EEEEEE, pp. 12:23-13:1.) Rondou also knew that at the time of the

Dizon and Cabanas murders, Moises Cabrera was incarcerated on another homicide. (Exhibit YYYYY.)

Moreover, just seven months before the Dizon murder, Rondou traveled to a state prison in Northern California to interview Moises's girlfriend, Claudia Ruelas, about the 2006 murder in which Moises was eventually charged. (Exhibit XXXXX, pp. 10:22-11:4.) Ruelas became the key prosecution witness against Moises and two other alleged Delhi gang members. (Exhibit XXXXX, pp. 10:22-11:8; Exhibit EEEEEE, p. 18.) In her interview with Rondou, she described driving to the Cabrera's home located on V** after the homicide. (Transcription of interview of Claudia Ruelas by Santa Ana Police Detectives Rondou and Rodriguez, Part 2 of 1, (May 10, 2007), attached herein as Exhibit GGGGGG, pp. 45, 78.) (During the time period when the murder occurred, she was also living at the residence with Moises.) (Exhibit EEEEEE, pp. 33:25-34:9.) Brambila, Dizon, and Henry Cabrera's sister were purportedly at the same address hours before Dizon was killed. (Exhibit DDDDDD, pp. 51-52.)

Detective McLeod, the author of the report documenting the Brambila interview, also knew that Henry Cabrera was "Stomper" from the Delhi gang. *People v. Garcia*, a November 2007 murder case tried five years later, in which Brambila was separately tried for the killing of Ruben Cabanas, is discussed in greater detail herein. During his testimony as the gang expert in that case, McLeod stated the following:

> Q: And looking at the person in position number 5, did you know about Mr. Henry Cranberra [*sic*], also known as Stomper from Delhi?
> A: Yes.
> Q: **Have you personally met Cabrera?**
> A: **Oh yes.**
> Q: **Do you know him as a Delhi as November 28, 2007?**
> A: **Oh, yes.**

(RT (trial), Jan. 29, 2013, *People v. Garcia*, (Super. Ct. Orange County, 2013, No. 10CF3025), attached herein as Exhibit HHHHHH, p. 241:9-17, emphasis added.)

McLeod's encounter(s) with Henry Cabrera, which helped shape his opinion that he was unquestionably a Delhi gang member in November of 2007, necessarily occurred

before the date of the Cabanas murder. The Cabanas murder took place one day after the murder of Dizon. The information detailed above therefore further confirms that when both detectives interviewed Brambila in December of 2007, they had sufficient information to include "Stomper's" name and identifying information within the report.

In addition, McLeod would have wanted to include the name of Cabrera's sister in the report. The detectives certainly would have wished to interview Cabrera's sister to determine if Brambila was telling the truth about his whereabouts and his contact with Dizon in the hours leading up to his murder. (Exhibit A.) The discovery, though, does not include an interview with the sister nor with Henry Cabrera. (Exhibit A.) Moreover, McLeod chose to omit identifying information from the report, which would have indicated Cabrera's home residence on V** or that Cabrera was incarcerated in the Orange County Jail (having been charged with carjacking to benefit the Highland Street gang in *People v. Henry Cabrera II*.) The truth, which would become more apparent over time, is that before McLeod wrote his report, the detectives took into consideration that Cabrera was simultaneously incarcerated and being prosecuted as a member of the rival Highland Street gang. The detectives decided—likely after speaking with Castillo and Petersen who were leading the prosecution of Henry Cabrera as a member of Highland Street—that they could protect their comrades and their prosecution of Cabrera with minimal impact on the case filed against Brambila. To do this, all they had to do was misleadingly omit identifying information about Cabrera within the report. And that is precisely what McLeod did.

Of course, the prosecution team, which included Rondou and McLeod, had a responsibility to share *Brady* evidence with Cabrera: Brambila's statements and the opinions of both Rondou and McLeod that Henry Cabrera was a member of the Delhi gang. This vital evidence directly contradicted the allegations of Highland Street membership in *Henry Cabrera II* and the findings of the jury in *Henry Cabrera I*. The *Brady* obligation and violation would continue as Detective Castillo provided testimony

that Henry Cabrera was a member of the Highland Street gang in the preliminary hearing and trial prosecuted by Petersen—with Rondou and McLeod still not coming forward with the evidence contradicting that opinion.[52]

Evidence of Cabrera's Membership in Delhi from Damien Galarza

Among the materials that Dekraai obtained from Damien Galarza is discovery related to the murder prosecution of Juan Calderon and his two co-defendants, Damien Galarza and Rodrigo Sanchez. On January 4, 2008, Rondou and Flynn interviewed Damien Galarza. (Transcript of interview of Damien Galarza by Santa Ana Police Detectives Rondou and Flynn, (Jan. 4, 2008) attached herein as Exhibit JJJJJJ.) (Geller ultimately prosecuted Galarza, Sanchez, and Calderon for this murder allegedly committed by Delhi members.)

During the interview with the detectives, Galarza spoke about members of the Delhi gang that he knew. (Exhibit JJJJJJ, p. 123.) At one point he stated that he knew "Stomper." In the next page of the interview, Galarza said that "Stomper" was incarcerated. Indeed, Henry Cabrera was incarcerated on his carjacking case in *Cabrera II*, corroborating that he was speaking of Henry Cabrera. Of course, Rondou did not need additional corroboration. Eight days earlier, in his interview of Guillermo Brambila, Rondou specifically stated that he knew "Stomper" from Delhi. (Exhibit DDDDDD, p. 52.) Significantly, at the time of this interview, Cabrera was in custody and still seven months away from his preliminary hearing on a complaint alleging armed carjacking for

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[52] In *People v. Johnson* (1974) 38 Cal. 3d 228, 234, the court discussed whether the prosecution was required to disclose the identities of experts who had reached opinions regarding bloody palm prints at the scene in a first degree murder case. In reversing the defendant's murder conviction, the court held that "[t]he experts whose names he sought would have impeached or cast doubt upon the testimony of those who believed the print was not his, as well as those who thought it was." *(Id.* at p. 237.) Detective Rondou's opinion, in contrast, requires far less speculation as to its value in *People v. Cabrera II*, as it directly contradicts the opinion of an expert in the exact same department.

the benefit of the Highland Street gang.

With Galarza's statements, SAPD detectives possessed evidence from two alleged Delhi gang members that **a defendant being prosecuted at that very moment as a Highland Street gang member was actually a member of a rival gang.** Moreover, Geller, who would prosecute Galarza and Calderon, would certainly soon receive the interview with Galarza and have this information, as well. Geller, as has been discussed, was particularly familiar with Cabrera, because he prosecuted him in the previously discussed attempted murder case (*Henry Cabrera I*) in which jurors found Cabrera to be a member of the Highland Street gang.

Rondou will have little choice but to claim he was unaware of Cabrera's pending prosecution. **This response would be untruthful, though, particularly given Rondou's comments in the recorded interview of Brambila related to Dizon's murder followed by McLeod's report about that interview, in which McLeod attempted to shroud "Stomper's" identity in secrecy.** Additionally, it is not believable that both Rondou and McLeod failed to remember or realize that Castillo testified in three proceedings between 2005 and 2007 that Henry Cabrera was a member of the Highland Street gang (and later at the preliminary hearing in 2008 and trial in 2009 in *Henry Cabrera II*.)

The sad reality was that Galarza's interview added little to the prosecution team's understanding of Cabrera's gang membership—and added even less to their desire to bring out the truth or share this helpful information with Cabrera or his counsel.

Prosecution's Success at Preliminary Hearing, at Trial, and on Appeal

Preliminary Hearing in *People v. Cabrera II*

Six months after Galarza's interview that corroborated Cabrera's membership in the Delhi gang, Henry Cabrera and his co-defendant were held to answer on all of the allegations, including that the crime was done to benefit the **Highland Street gang**. (RT (prelim. hr'g), July 7, 2008, *People v. Henry Cabrera II*, (Super Ct. Orange County, 2009, No. 07CF4087), attached herein as Exhibit KKKKKK, pp. 89:1-91:2.) At the preliminary

hearing, Castillo testified once more as the gang expert, offering the opinion that Cabrera was an active participant in the Highland Street gang. (Exhibit KKKKKK, pp. 54:18-55:2.) Petersen did not elicit any information suggesting that Cabrera may have actually been a member of the Delhi gang, and Castillo did not suggest this possibility in his answers. It is unknown whether the prosecution discovered the incident on December 14, 2003, in which Cabrera was found in the company of Delhi members, but it was not referenced during Castillo's examination. (Exhibit KKKKKK, pp. 46:12-84:19.) Michael Currier was once again Henry Cabrera's attorney. Currier did not ask any questions on the subject of Delhi, indicating he either did not remember the initial Delhi/Highland Street issue or believed that in light of the finding in the prior trial, another challenge to Castillo's analysis would be equally unsuccessful.

The Trial in *People v. Cabrera II*

The trial was conducted before Honorable Justice David Thompson, then sitting as Judge of the Orange County Superior Court. (Exhibit ZZZZZ.) At the trial, Petersen further developed facts supporting Henry Cabrera's active participation in the Highland Street gang. Detective Mauricio Estrada of SAPD testified that on December 16, 2007, he participated in a search conducted at Henry Cabrera's residence on South V**. (RT (trial), April 22, 2009, *People v. Henry Cabrera II* (Super. Ct. Orange County, 2009, No. 07CF4087), p. 281:19-23, RT (trial), April 27, 2009, *People v. Henry Cabrera II* (Super. Ct. Orange County, 2009, No. 07CF4087), attached herein as Exhibit LLLLLL.)

Estrada offered an interesting description of the person who opened the door. He said that "[t]he door was opened by Moises Cabrera, **Senior**." (Exhibit LLLLLL, p. 282:5, emphasis added.) In this response, he implicitly acknowledged a familiarity with Moises Cabrera Senior and **Junior**. (Exhibit LLLLLL, pp. 280:12-13, 281:2-3.) This familiarity would have meant nothing to jurors, but Moises Cabrera's connection to the residence certainly was not lost on SAPD officers, including Estrada.

Estrada testified that he was the "supervisor in the gang suppression unit" and the

"President of the Orange County Gang Investigators Association…" (Exhibit LLLLLL, pp. 280:12-13, 281:2-3.) Later, when asked what was found in the converted bedroom within the garage that purportedly was used by Henry Cabrera, he mentioned that he **"found pictures of Henry Cabrera and Moises Cabrera, his brother."** (Exhibit LLLLLL, pp. 284:2-5, 285:6-9, emphasis added.) Those pictures were never introduced into evidence and **Moises Cabrera's name was not uttered again in the trial. Of course, the prosecution team also never mentioned that Moises and his girlfriend-turned-prosecution witness had resided at the same home that was the apparent launching pad for a Delhi murder the previous year.**

The prosecution's interest in the search had nothing to do with Moises Cabrera, but rather with something seemingly innocuous: the color of clothing found in Henry Cabrera's room (or perhaps Moises's bedroom before his incarceration.) In response to Petersen's questions on the subject, Estrada said that he found a number of dark blue clothing items. (Exhibit LLLLLL, pp. 286:17-287:10.) He said that this color of clothing is worn to show solidarity among Southern California gang members against Northern California members. (Exhibit LLLLLL, p. 287:13-19.) However, Estrada added that he found a dark blue and yellow jersey, and said that those are the "colors I've often seen being worn by members of the Highland Street gang." (Exhibit LLLLLL, p. 287:20-24.)

In his testimony, Castillo reiterated that he had been the supervising corporal for the other gang detectives in the unit. (Exhibit LLLLLL, p. 318:11-19.) He stated that "one of his primary duties is to review all in-custody cases…to see if we want to recommend gang charges to the District Attorney's Office." (Exhibit LLLLLL, pp. 318:24-319:2.) Thus, Castillo was certainly aware of the murder prosecution of Moises Cabrera that was proceeding concurrently with Henry Cabrera's case.

Castillo said that he relied upon S.T.E.P. notices between 2003 and 2007 to form his opinion that Henry Cabrera was a Highland Street member. (Exhibit LLLLLL, p. 347:11-19.) Castillo testified that on July 13, 2005, Henry Cabrera said "he grew up next to

Highland Street, and had been claiming Highland Street since sixth grade." (Exhibit LLLLLL, p. 348:9-11.) But 18 days later, after an altercation with another gang member—the identity of that individual and his gang were not referenced—Cabrera denied being an active member of Highland Street. (Exhibit LLLLLL, p. 348:12-15.) Additionally, Castillo cited several police reports from 2002. (Exhibit LLLLLL, p. 348:21-26.) Castillo added that in a police contact on August 1, 2007, Cabrera said he was from the Highland street gang. (Exhibit LLLLLL, p. 349:5-6.) He also said that according to an interview subsequent to his arrest in the instant matter, Cabrera "…was documented as a Highland Street member back in 2003. He said that he never jumped in because he grew up in the neighborhood. He said this is why he associated with Highland Street." (Exhibit LLLLLL, p. 349:8-11.)

Petersen had inquired earlier in his examination about whether there was a preferred color for Highland Street members:

> Q: Okay. Is there a color that Highland street gang members associate themselves with?
> A: Yes.
> Q: What is that color?
> A: Dark blue. (Exhibit LLLLLL, p. 324:15-19.)

In order to lock down Cabrera's membership in the Highland Street gang, Petersen asked if there was anything else that Castillo relied upon. Castillo stated: "Yes. During this or just shortly after the arrest in the case before us, a check was done of his belongings at this residence and I noted there were several items of dark blue upper body clothing that was found." (Exhibit LLLLLL, p. 349:23-26.) He had also testified earlier that Highland Street members associate themselves with "[d]ark blue." (Exhibit LLLLLL, p. 324:15-19.) (Castillo did not suggest that the combination of blue and yellow were suggestive of Highland Street membership, as Estrada had.)

Petersen emphasized the importance of this issue in his closing argument stating that "[t[he officers found blue clothing in his closet. Several articles of blue clothing, which the officer told you that blue clothing is a color that Highland Street associates themselves

with." (Exhibit LLLLLL, p. 560:3-6.)

Prosecutors and gang detectives would have found such an argument laughable, but only because they were playing an inside joke on defense counsel Currier. They recognized that the presence of dark blue clothing indicated just as compellingly that the Cabreras were both members of the Delhi Street gang. During a preliminary hearing in a case against Ismael Nunez and two others, SAPD Detective Stow testified that the color worn by Delhi is "navy blue." (RT (prelim. h'rg) Vol. 1, June 27, 2006, *People v. Nunez* (Super. Ct. Orange County, 2006, No. 06CF1264), attached herein as Exhibit MMMMMM, p. 77:4-13.) He contrasted Delhi's use of navy blue with the color worn by the F-Troop gang, which is brown. (Exhibit MMMMMM, pp. 67:26-68:1.) Stow noted that three defendants were stopped in a vehicle. During a search they found a blue spray paint can and a weapon that was covered by a blue shirt. (Exhibit MMMMMM, pp. 93:8-10, 94:1-5.) In *Gang Investigations, A Street Cop's Guide*, the authors even discussed the significance of the color blue to the Delhi gang within a search warrant statement "based on an actual gang-related attempted murder." (Ashby and Watkins, *Gang Investigations: A Street Cop's Guide* (2006), p. 130.) The author wrote that a blue bandana was found in the search of a suspect vehicle and that "...the blue bandana is used by the 'Delhi' gang to represent membership in the gang as well as a show of loyalty." (Ashby and Watkins, *Gang Investigations: A Street Cop's Guide* (2006), p. 135.) Oscar Moriel, a former Delhi member, testified that the Delhi's color was blue. (Exhibit PP, p. 273:7-8)

Is there any possibility that Castillo's expertise did not extend to the Delhi Street gang? Neither the Riverside District Attorney's Office nor the Fourth District Court of Appeal believed that to be the situation. On January 11, 2006, Derek Ochoa was killed in Riverside, California. Andres Munoz was subsequently charged with special circumstances murder for the benefit of the Delhi Street gang. (*People v. Munoz* (Jan. 20, 2012, E051722) [nonpub. opn.] (2012 Cal. App. Unpub. LEXIS 447), RT (trial), May 20, 2013, *People v. Munoz* (Super. Ct. Riverside County, 2013, No. RIF1234419), attached

herein as Exhibit NNNNNN, p. 1.) After the jury deadlocked in the first trial of Munoz, the prosecution apparently decided to fortify its case by bringing in a witness with particular expertise in the Santa Ana-based Delhi street gang. Castillo seemed the perfect choice.

Justice Hollenhorst, in his unpublished opinion for the Court of Appeal, summarized Castillo's testimony, which took place on May 2, 2010:

> …Detective Castillo had been a police officer for nearly 30 years. He had spent the past 14 years as a supervising corporal in the Santa Ana Police Department gang unit, where he supervised other detectives in gang cases, investigated cases himself, trained officers in gang identification, and advised the district attorney's office on gang charges. He investigated over 1,500[53] gang cases, spoke to over 5,000 gang members, taught gang classes to law enforcement officials, attended numerous conferences on gang training, and continuously spoke with other law enforcement officials about gangs. According to Detective Castillo, "Delhi" is a Hispanic street gang that controls the southern part of Santa Ana. One of the oldest gangs in the area, it had over 40 members when Ochoa was murdered. Detective Castillo testified that Delhi's primary activities include assaults, murders, and narcotic violations, and that Delhi fits the statutory definition of a criminal street gang…
>
> He testified that he stayed current on gang culture in Santa Ana by speaking to gang members and their rivals, as well as to other gang detectives and probation officers, and he reviewed reports and field calls involving gang activity. He was familiar specifically with Delhi by speaking to its members, allies, and rivals, and to probation officers and parole officers who supervised its members, and he had been involved with search warrants for Delhi members and in recommending gang charges for participants and members. He testified that Delhi's primary activities include assaults, attempted murders, murders, and narcotics violations. He also testified as to the crimes of possession of a concealed firearm by one Delhi member and of murder by

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[53] Justice Hollenhorst may have expressed more uncertainty about Castillo's experience if the record on appeal had included Castillo's description of his investigative experience in other cases. On June 23, 2002, Castillo said that he had been in the gang unit for eight and one half years and investigated over "700 gang-related cases." (RT (trial), June 23, 2002, *People v. Rodriguez* (Super. Ct. Orange County, 2002, No. 01CF1846), attached herein as Exhibit OOOOOO, pp. 3:21-4:4.) On September 28, 2006, Castillo testified that he been in the gang unit for eleven years and had investigated over 600 cases. (Exhibit RRRRR, p. 3:16.) On April 22, 2009, he testified that he had investigated "over a thousand gang cases." (Exhibit LLLLLL, p. 319:22.)

another Delhi member.
(Exhibit NNNNNN, pp. 2-3, 8-9.)

During the trial, the Riverside prosecutor asked Castillo about the color most closely associated with the Delhi street gang.

Q: Does this gang have a specific color that they recognize?
A: Yes.
Q: What is that?
A: **A dark blue.**
(Exhibit NNNNNN, p. 10:4-8, emphasis added.)

The question was nearly identical to the one Petersen asked. The only difference was that in Munoz's trial, dark blue clothing assisted a prosecutor in proving Delhi gang membership versus Highland Street. It must be emphasized that even if Cabrera's counsel had been aware of Delhi's preferred color, this information would have had little value for impeaching Castillo without the additional evidence in the prosecution team's possession.

The issue of clothing color is a perfect example of prosecution teams' willingness to gain a tactical advantage through material omissions. The prosecution team in *Henry Cabrera II* realized that the photographs of Moises Cabrera suggested that the clothing Detective Estrada found in the closet was just as likely to have belonged to Moises as Henry. And, if the clothing was truly Henry's, then they also realized that the dark blue color pointed just as strongly to Delhi as Highland Street membership.

The prosecution team's misleading use of gang color evidence was deplorable, especially because they knew that Moises Cabrera, Henry's brother, was a Delhi member who lived at Henry's residence. The prosecution's actions were also particularly egregious because of the potential effect upon co-defendant Jimenez. Jimenez was staring at a possible life sentence. If convicted, that sentence would have been based upon his association with a Highland Street gang member—even though the prosecution possessed significant evidence that Cabrera was not actually a member of that gang. The sad reality is the prosecution team did not care. Unfortunately, this type of behavior is hardly surprising in light of other misconduct described throughout this motion.

Justice William Rylaarsdam wrote the unpublished opinion for the Court of Appeal

in *People v. Henry Cabrera II*. As was the situation with Justice Thompson in his review of *People v. Vega*, the prosecution team's deception related to the appellant was invisible in the record on appeal. Justice Rylaarsdam could never have known that another SAPD detective and two alleged Delhi members had specifically identified Cabrera as a member of their gang within weeks of the carjacking. Of course, Justice Rylaarsdam also never would have imagined that prosecutors would boldly introduce multiple expert opinions in other cases in subsequent years that Cabrera was a member of the Delhi gang at the time of the carjacking, as will be discussed. In its holding, the Court of Appeal pointed to the vast experience of Castillo. The court noted the following:

> Corporal Ronald Castillo testified as the gang expert. He had 15 years in the gang unit and had served for 12 as the supervisor. His duties included assisting other gang detectives, determining whether gang charges are to be filed, and interacting with gang members. He had investigated more than 1,000 gang cases. He had also interviewed more than 5,000 gang members about their territories, allies, rivals, loyalty, respect, guns, and graffiti.

(Exhibit BBBBBB, pp. 3-4.)

The question that becomes even more excruciating as this study examines the ensuing years of governmental misconduct related to Henry Cabrera is the following: what other injustices has Ronald Castillo (and the people he has trained) perpetuated while investigating gang cases and "determining whether gang charges are to be filed?"

The Sentencing Impact of the Jury's Finding the Charged Crimes Benefitted the Highland Street Gang.

On April 30, 2009, the jury convicted Cabrera of seven felony counts and numerous enhancements, including those alleging that he committed the crimes for the benefit of the Highland Street gang, in violation of section 186.22, subdivision (b). (Exhibit ZZZZZ.) The Honorable David Thompson sentenced Cabrera on June 9, 2009. The jury's findings that Cabrera committed crimes to benefit the Highland Street gang (section 186.22, subdivision (b)) had the single greatest impact upon his sentencing. Cabrera's carjacking conviction, pursuant to section 215, subdivision (b), required a sentence of three, five or nine years in state prison, in the absence of sentencing enhancements. However, the jury

found that the crime was committed to benefit a street gang, to wit "Highland Street," pursuant to section 186.22, subdivision (b)(4)(B), which mandated instead a sentence of 15 years to life. Additionally, Cabrera received an additional five years sentence, under section 667, subdivision (a)(1), as a result of his prior conviction for the "serious felony" of street terrorism as a Highland Street gang member in *Henry Cabrera I.* As a result of a ten-year gun use enhancement, per section 12022.53, his sentence on count 1 was 30 years to life. (Exhibit ZZZZZ.) Therefore**, the life sentence and the additional five years that were imposed were directly the result of the jury's findings in Cabrera's two felony trials that he had committed crimes as a member of the Highland Street gang or to benefit that gang.**

In addition, Cabrera received a concurrent sentence of 33 years. In calculating that sentence, the Court imposed a ten-year enhancement attaching to Count 2, based upon the jury's finding that attempted robbery was committed to benefit the Highland Street gang, also in violation of section 186.22, subdivision (b). The court also imposed additional consecutive sentences totaling 12 years for having committed the following crimes for the benefit of the Highland Street gang, in violation of 186.22, subdivision (b): felon in possession of a firearm; felony evading; carrying a loaded firearm in public; and vehicle theft. The court again imposed a consecutive five-year sentence as a result of his prior conviction for street terrorism. (Exhibit ZZZZZ.) **In sum, 27 years of the 33 year concurrent sentence were based upon jury findings in Cabrera's two felony trials that he had committed the crimes as a member of the Highland Street gang or to benefit that gang.**

Between the Trials of the Two Cabrera Brothers: Geller and His team Conceal New Evidence That Henry Cabrera Was a Member of Delhi

SAPD detectives, and likely Geller, breathed a collective sigh of relief that Henry Cabrera's conviction was accomplished without any embarrassing discoveries about his Delhi gang membership. However, it is just as likely they never worried that their

misconduct would be uncovered or that serious sanctions would be imposed. All that was left for Geller was to convict Moises without Henry Cabrera coming into the picture. However, **the last vestige of plausible deniability for the prosecution's failure to share evidence about Henry Cabrera's true gang membership was about to disappear.**

In the earlier discussion of the prosecution of Alvaro Sanchez and Luis V., the proffer of Juan Calderon was discussed, which occurred November 3, 2009. During the proffer, Geller and his investigators demonstrated a disturbing disinterest in Luis V.'s possible innocence. However, Calderon's brief statements regarding Luis V. were not the only words that the prosecution team wished Calderon had left unspoken.

Minutes into the proffer, Rondou pressed Calderon on whether he was being truthful in his claim that he had broken off contact with all Delhi gang members. Calderon relented. He admitted that there was only one Delhi gang member with whom he had maintained contact since coming into custody: **Henry Cabrera**. (Exhibit FFFF, pp. 4-5.) Lest there be any confusion, Rondou then confirmed Calderon was speaking of Taz's (Moises Cabrera) brother. (Exhibit FFFF, p. 5.) Significantly, Calderon stated that Henry Cabrera had written him to say that he would cease communicating with him because he had heard that Calderon was helping authorities convict his Delhi co-defendants. (Exhibit FFFF, p. 5.) **What better testament to Henry Cabrera's commitment to the Delhi gang than his anger that one of his fellow brothers would break the gang's code of loyalty?**

Henry Cabrera's arrest dates and periods of incarceration powerfully support the conclusion that Cabrera was a Delhi member at the time of his arrest in *People v. Henry Cabrera I*. In that case, Cabrera was sentenced to 3 years and 8 months on December 1, 2006, with 734 days of total credits. (Exhibit QQQQQ.) Therefore, Cabrera had approximately 601 days remaining on his sentence on that date. With credits, he would have served approximately ten additional months and would likely have been released from prison in the fall of 2007.

The carjacking occurred on December 15, 2007, and Cabrera was arrested the same day. Calderon, a juvenile, was arrested three weeks later on January 5, 2008. (Exhibit MMMM.) If Calderon's rendition is truthful, then his relationship with fellow Delhi gang member, Henry Cabrera, began before Cabrera's arrest leading to *People v. Henry Cabrera I*. It is unreasonable that Cabrera built this close relationship with Calderon based upon their shared affiliation with Delhi in just two months. Taking into account Calderon's statements, Rondou's statements to Brambila, as well as Brambila and Damien Galarza's statements about Henry Cabrera's membership in Delhi, **the only reasonable inference was that Cabrera was a Delhi member when he was arrested and charged in People v. Henry Cabrera I**.

The prosecution team's inaction despite their proven knowledge of and exposure to evidence of Henry Cabrera's membership in the Delhi gang has cost them the right to plead ignorance or inadvertent error. Any microscopic doubt that any member of the interviewing group failed to understand that the person whom Calderon was speaking about was Henry Cabrera disappeared with a single question from Geller. While Geller remained in the background during most of the questioning, his interest in obtaining more evidence to support his prosecution of Moises Cabrera led the discussion back to the relationship between Henry and Moises Cabrera:

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Q3 (Geller): And what about Flaco, uh, with Taz and all those guys over off of, uh, St. Andrew and…
Q1 (Rondou): Broadway?
A (Calderon): Oh, that -- wasn't it on….by Flower?
A: The one -- the guy from -- Danny…that got shot, who got killed…was the guys from UBC?
A: Isn't…isn't Taz busted for that?
Q1: What about it?
A: (..?)--
Q1: Did you ever hear about it or did they ever talk about it? Have you ever heard Taz talk about a killing?
A: Not-not Taz himself, but everybody knows that he did it…or, I mean, everyone knows that.
Q1: Okay, but you've never directly spoke to Taz?
A: Nah, I-I've never even met him…pers -- I mean, I've seen him and, like, from, like-like, that, 'oh, that's Taz'…I never talked or nothing.
Q1: You knew his brother?
[music in background]
A: Yeah, I was cool with his brother.
(Exhibit FFFF, pp. 68-69.)

What should Geller and/or his officers have done upon the conclusion of the conversation? Their legal and ethical obligation was unmistakable. They should have immediately contacted Cabrera's counsel, Michael Currier, and informed him and the court that they had received information inconsistent with the jury's finding regarding the gang charges and allegations that the crimes were committed for the benefit of Highland Street in both *Henry Cabrera I* and *Henry Cabrera II*. They should have informed Currier that they had received evidence that Cabrera was a member of the Delhi gang at the time of both incidents.

Geller Carefully Maneuvers Around Henry Cabrera As He proceeds to Trial Against His Brother Moises Cabrera

Only two months after the Calderon proffer, Geller began Moises's severed trial. Geller and his team had tied themselves into a knot. Evidence that Henry Cabrera, Moises's brother, was a member of Delhi would have provided additional support for the jury's finding that Moises too was a member of the Delhi gang. It was Rondou's secret

opinion that Henry Cabrera was a member of the Delhi gang, and that conclusion was supported by statements he received from Eduardo Brambila, Damien Galarza, and Juan Calderon. Certainly the jury might find it helpful that Moises's brother Henry, also had lived at the same address. As noted earlier, Rondou knew that both brothers lived there. He said as much in his interview of Brambila during the Dizon murder investigation, when he acknowledged knowing "Stomper" from Delhi after being told he lived V**. (Exhibit DDDDDD, p. 52.) During Moises Cabrera's trial, Rondou also stated the following:

Q:…2*** South V**, are you familiar with that address, Sir?
A: I am.
Q: How are you familiar with that address?
A: I've been there before.
Q: And whose address is that, sir?
A: It's the defendant, Mr. Cabrera's residence.

(Exhibit EEEEEE, p. 12:23-13:3.)

Not surprisingly, though, Geller never said a word about Henry Cabrera in his opening statement or closing arguments, nor did he question his gang expert (Rondou) about Henry, Moises's brother. Interestingly, Geller never mentioned Moises Cabrera's name in the trial of *Henry Cabrera I*. Rondou did his part, never letting "Henry Cabrera" or "Stomper" slip out during questioning. Given the potential consequences of introducing evidence of Henry Cabrera's gang membership, Geller and his team's decision was clear-cut. They would hide all evidence pertaining to Henry Cabrera's gang membership, and hope that defense counsel did not realize that Henry Cabrera was convicted twice as a Highland Street gang member. Luck was on their side, once again. Jurors never learned that the prosecution team was claiming that these two brothers were living at the same residence—supposedly as members of rival gangs.

Inconsistent Discovery of Sibling Gang Evidence Provides Additional Proof of Systemic Practices in Violation of *Brady*

Perhaps the prosecution will suggest that the defense unfairly deems "coincidences" as proof of prosecutorial misconduct. Perhaps one sibling's membership in a particular gang is insignificant to determining whether another sibling is a member of the same gang?

Ironically, though, Geller and McLeod indicated that sibling gang connections do in fact matter—though only if it helps prove the prosecution's case. In *People v. Moises Cabrera*, Geller inquired about the residence of co-defendant Ismael Nunez.

> Q: By Mr. Geller: And the 2*** South G***, which is a little bit south of the V*** address, are you familiar with that location?
> A: I am.
> Q: And what is that?
> A: That is the residence of the **Nunez brothers**…

(Exhibit EEEEEE, p. 13:13-18, emphasis added.)

There were further discussions of Nunez's brother, Abraham Nunez, in the severed trial of Ismael Nunez and Porfirio Garcia, in which the prosecution focused on Defendant Nunez's gang affiliation. Abraham Nunez was already incarcerated at the time of the murder—just as Henry Cabrera had been incarcerated in his attempted murder case at the time of the charged crime involving his brother Moises Cabrera. (RT (trial), Oct. 6, 7, 8, 14 and 15, 2009, *People v. Nunez*, (Super. Ct. Orange County, 2010, No. 07CF2123), attached herein as Exhibit PPPPPP, pp. 56:17-57:4.) McLeod was called to the stand to discuss, among other things, evidence supporting Ismael Nunez's active participation in Delhi. **Geller presented corroborating information, including the fact that his brother, Abraham Nunez, was a Delhi member as far back as 1998**. (Exhibit PPPPPP, pp. 135:13-136:14.)

Why did Geller, who clearly saw the significance of a sibling's gang membership, not introduce evidence of Moises Cabrera's membership in *People v. Henry Cabrera I*? Is it possible that investigators were unaware of Moises's Delhi membership at the time of *Henry Cabrera I*? In *People v. Moises Cabrera*, Geller's questioning and the answers of his gang experts clearly indicated that the SAPD knew of Moises's membership in Delhi since before 2000. Geller introduced photographs of numerous tattoos on Moises's body connecting him to Delhi. (Exhibit EEEEEE, pp. 141:6-145:17.) McLeod testified that he had met Moises "several times" before the incident. (Exhibit EEEEEE, p. 140:15-17.) McLeod said, "Oh yes," he had seen Moises with "Delhi" tattooed on the top of his head

previous to his arrest. (Exhibit EEEEEE, p. 141: 6-19.) Interestingly, McLeod said that in one prior discussion, Moises said that he had some association with Highland Street before joining Delhi. (Exhibit EEEEEE, p.147:2-20.) However, McLeod pointed to Field Identification cards, S.T.E.P. determinations, and admissions pre-dating his arrest as further evidence that he was an active participant in the Delhi gang. Rondou testified that Moises told him he joined the Delhi gang when he was "about 16 or 17…" (Exhibit EEEEEE, p. 78:9-16.) If all of this were true, Moises had been a member of the gang since approximately eight years earlier, which would have been 1999—six years prior to when his brother was charged as a rival gang member in *Henry Cabrera I*.

The reaction of the prosecutors and their detectives to information about sibling gang membership offers another compelling example of a systemic commitment to manipulating discovery and shaping expert opinions to gain tactical advantages. In *People v. Nunez*, evidence of the Delhi membership of the defendant's brother was helpful, and thus the prosecution was more than willing to share and discuss evidence connecting the sibling to Delhi. However, in *People v. Henry Cabrera I* and *II*, evidence of Moises's Delhi membership would have helped disprove Henry's membership in the Highland Street gang. Therefore, the prosecutors did not discover the relevant evidence, and the gang expert fastidiously avoided the subject.

The Trial of Ismael Nunez Corroborates Self-Serving Interpretations by Gang "Experts"

As discussed earlier, Detective Castillo testified in *Henry Cabrera I* that the fact that Henry was with a group of Delhi members on December 14, 2003—who were writing over their rival gang's name—was irrelevant for determining his gang affiliation. Geller never even asked about the incident during his examination. Moreover, he certainly understood that Castillo was not being candid in his answers during cross-examination, but allowed the contact to appear unimportant to the analysis of Cabrera's gang membership because it benefitted the prosecution tremendously. Castillo and Geller knew that if jurors realized

the truth, that Henry Cabrera's presence with other Delhi gang members committing a gang crime was powerful evidence of his membership in that gang, they might believe Cabrera was not a member of Highland Street.

A few years later, Geller's questioning of another gang expert about a stunningly similar piece of evidence provided yet another example of how prosecutors and their gang experts work together to present opinions to further their particular need or objective, regardless of its truthfulness. In *People v. Nunez*, Geller introduced evidence about an event at Memorial Park on September 8, 2000, involving Ismael Nunez to help establish his membership in the Delhi gang. The event was nearly identical to the vandalism incident occurring at the very same park, on December 14, 2003, in which Henry Cabrera was contacted. Ismael Nunez's[54] role in the 2003 incident was nearly indistinguishable from Cabrera's role in the 2000 incident. Geller asked about why the incident in 2000 was important to establishing that Nunez was a member of the Delhi gang:

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[54] Amazingly, Ismael Nunez was actually present during the 2000 incident from *People v. Henry Cabrera I* and was the key player in the deception perpetuated by Castillo regarding that contact. Nunez was the only individual Castillo acknowledged remembering. However, hoping to successfully downplay the significance of the event because he wanted to minimize Cabrera's connection to the Delhi gang, it took questioning by a second defense counsel during trial before Castillo finally relented and admitted that Nunez was with a group putting up Delhi graffiti and affiliated with Delhi. (Exhibit RRRRR, pp. 70:20-72:3.)

Q: Can you talk about that and what significance if any you attach to it in forming the basis of your opinion here today?
A: During or on that date there was a vandalism investigation I believe was in the area I want to say of Memorial Park, an area that has been battled over, for a lack of a better term, for a great while by the Alley Boys gang and the Delhi gang. During that investigation, there was graffiti that was located that was Delhi graffiti and Mr. Nunez was contacted on that date while in the company of other or of Delhi gang members.
Q: And part of that spray painting was "Delhi 13 Los Aces."
A: That's correct.
(Exhibit PPPPPP, p. 124:8-22.)

…

Q: So "Delhi 13 Los Aces" is that consistent with Delhi gang graffiti?
A: Yes.
Q: And the defendant was found with others in proximity to that?
A: Yes.
(Exhibit PPPPPP, p. 125:17-22.)

If it would have been helpful for Henry Cabrera to be in Delhi, there is little doubt that Castillo would have emphasized the significance of Cabrera being "in the company" of Delhi gang members.

The Unsolved Murder of Ruben Cabanas Haunts Prosecutors and Detectives

Beginning in 2005, Geller and other prosecution team members were repeatedly confronted with opportunities to make appropriate legal and ethical decisions about Henry Cabrera and related cases. After repeatedly dodging discovery obligations and deciding against taking any action to rectify past errors, prosecution team members probably thought they had seen the last of Henry Cabrera and the problems that surrounded his gang membership. They were wrong.

Moriel Shares Information about the Murder of Ruben Cabanas, Triggering New Discovery Obligations—and Violations

On February 26, 2010, Special Handling received notes from Oscar Moriel in which he documented his conversations with fellow Delhi gang member Sergio Elizarraraz. Per those notes, Elizarraraz discussed his involvement in numerous violent crimes, as well as his knowledge of gang crimes committed by others.

The notes described a moment-by-moment account of a shooting, details about the escape, the streets traveled, and the landmarks along the route. (Exhibit O, p. 2387) The note begins as follows:

> 2-26-10: Bad Boy tells me yesterday when he was at my cell door during his dayroom time that the day after our homeboy Risky got killed in the Bradford apartments that **Stomper (Henry Cabrera)** and OSO went on a hunt to find anybody from the Alley Boys gang so that they could kill in retaliation for them killing one of our homeboys. Oso & Stomper went driving all thru Alley Boys territory by Saddleback High School, the Bradford Apartments, and then they came to Flower and Pomona St. And they noticed a guy standing by the driveway of a house that looked like a gang member. Stomper was driving and Oso was passenger and packing a 44 caliber handgun and OSO told Stomper to stop the car. And Oso gets out and walks towards this guy with the 44 in his hand and asks this guy where he's from….and the guy doesn't answer this time either…this guy reaches the car as if he's trying to get inside of it and Oso just unloads the 44 into this guy and leaves him laying there dead…

(Exhibit O, p. 2387.)

It was a tremendous break on a cold case homicide. Elizarraraz had unquestionably described the murder of Ruben Cabanas. (Exhibit IIIIII, pp. 12-14.) In fact, the first sentence in the very first page of prosecution discovery on the homicide case that would eventually be filed read as follows: "On 11/28/2007 at approximately 1800 hours I was dispatched to the vicinity of **South Flower and West Pomona** reference a homicide…" (Exhibit IIIIII, p. 1, emphasis added.)

Three of the detectives who appeared on scene per the attached log were Rondou, McLeod, and Ronald Castillo. (Exhibit IIIIII, p. 2.) Detective McLeod was the assigned case agent in the murder of Ruben Cabanas, and Rondou worked as one of the principal investigators. (RT (prelim. hr'g), April 5, 2012, *People v. Brambila* (Super. Ct. Orange County, 2012, No. 10CF3025), attached herein as Exhibit QQQQQQ, pp. 4, 15:17-16:13.) In what should have been a tremendous break on the Cabanas murder, McLeod and Rondou were among the first two members of law enforcement to read the notes. Soon thereafter, Erik Petersen, the Deputy DA who had led the prosecution of *Henry Cabrera II*

culminating in a life sentence six months before Moriel documented what Elizarraraz told him, would also see the notes.

What assurances exist that Petersen, McLeod and Rondou read and studied these notes? As discussed beginning at page 320, these three led the prosecution in *People v. Rodriguez,* in which the defendants were accused of killing Miguel Fernandez. The defendants in that case were Elizarraraz, Juan Lopez, and Joe Rodriguez. That case was built almost entirely upon the informant work of Oscar Moriel. Moriel turned over 26 pages of notes documenting his conversations with Elizarraraz about numerous crimes, including the Fernandez murder. After Petersen and his team unsuccessfully attempted to conceal all of Moriel's notes documenting his conversations with Elizarraraz, they reluctantly turned over 20 pages (14 months after the first complaint was filed). **The prosecution, however, never disclosed the notes about the Cabanas murder to the *Rodriguez* defendants, despite the fact that they documented statements made to Moriel by Defendant Elizarraraz.**[55]

As mentioned earlier, Dekraai obtained discovery from Damien Galarza relating to several cases, including the Cabanas murder. Included within the discovery from that case is an interview with a witness named Trung Ly. Trung Ly indicated that Brambila told him that "'Oso" from Delhi orchestrated the Cabanas murder and that there were two suspects involved. (Exhibit CCCCCC, p. 65.) Ly did not have any information about whether Abonce participated in the shooting. (Exhibit CCCCCC, p. 65.) On December 7, 2009, Detectives Rodriguez and Alvarez conducted an interview of Abonce ("Oso") at a correctional facility located in Mississippi. (Exhibit CCCCCC, p. 493.) Unfortunately, the

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[55] Rondou and Petersen's receipt of the note pertaining to the Cabanas murder is further corroborated by the fact that the pages documenting the Cabanas murder were disclosed by Petersen in *People v. Inmate I.* The lead investigator in that case is Detective Rondou. These notes were actually among a set of Moriel's notes that were suppressed for more than a year in *Inmate I*. even though they contained evidence of third party culpability. See page 104 for a discussion of the discovery in *People v. Inmate I.*

trip yielded little helpful information. Abonce denied any involvement in the crime and "terminated the interview by telling us he wanted to consult with an attorney." (Exhibit CCCCCC, p. 494.)

Therefore, when Elizarraraz identified the alleged driver in the Cabanas murder two months after the failed interview with Abonce, the detectives were given a golden opportunity to resuscitate the investigation and bring those responsible to justice. Additionally, Moriel seemed to have a psychic sense that he should make it abundantly clear that "Henry Cabrera" and "Stomper" were one in the same—specifically including both names in his description of the driver. The first step for the detectives upon receiving the note seemed simple enough: interview Cabrera. He was certainly available and not nearly as far away as Abonce. He had been sentenced just six months earlier on his carjacking case and was sitting in one of California's prisons. Rodriguez's efforts to interview Abonce in Mississippi made it clear that travel distance would never impede a murder investigation. Rondou confirmed his willingness to travel in *People v. Vega*, stating that "I have been to pretty much every prison in California, and a lot outside…" (Exhibit QQ, pp. 1187:19-20.)

As will be discussed, Guillermo Brambila and Eduardo Garcia were the only suspects charged in the Cabanas murder. Their cases would later be severed for trial. (Complaint in *People v. Garcia*, (Super. Ct. Orange County, No. 10CF3025), attached herein as Exhibit SSSSSS.)[56] The discovery relating to the Cabanas murder—that was turned over to several defendants who had Calderon as a potential witness—likely would not have been turned over until after the filing of the complaint in *People v. Brambil*a on November 4, 2010. (Felony Complaint Warrant in *People v. Brambila,* (Super. Ct. Orange County, No. 10CF3025, attached herein as Exhibit TTTTTT.) The discovered materials

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[56] Brambila was charged in another special circumstances gang murder that was charged earlier in time and thus will be referred to as *People v. Brambila I*. (Complaint in *People v. Brambila*, (Super. Ct. Orange County, No. 07CF4182), attached herein as Exhibit UUUUUU.)

include printout dates at the bottom of the pages, with the most recent date being October 13, 2010. (Exhibit IIIIII, p. 96.) As mentioned previously, the discovery provided to that defendant does not include a report or recording memorializing an interview with Henry Cabrera or an attempt to interview him. (Exhibit IIIIII; Exhibit A.)

Moreover, it appears that 20 months after Moriel turned over his notes, the SAPD had still not initiated any effort to interview Henry Cabrera about the Cabanas murder. Juan Calderon's co-defendant, Damien Galarza, was among those defendants who received discovery related to Brambila. In a Declaration in Support of a Motion to Continue in *People v. Galarza*, his counsel summarized the state of the discovery on the date that the motion was filed. The declaration memorializes the discovery he had received on *Brambila II* as of October 5, 2011, which oddly did not include any recordings related to that case, although recordings were discovered in each of the other cases in which Calderon was a potential witness. The discovery from *Brambila II*, possessed by Galarza on October 5, 2011, is the same 109 pages possessed by Dekraai. (Motion to Continue and Declaration of David Swanson in support of Motion to Continue, *People v. Galarza* (Super. Ct. Orange County, No. 08CF0137), attached herein as Exhibit RRRRRR, pp. 1-4.) This confirms that as of at least October 5, 2011, no recording or report regarding contact or attempted contact by the SAPD with Henry Cabrera about the Cabanas murder had been memorialized.

If the prosecution team's objective was truly solving the case and holding all wrongdoers accountable, it is illogical that Cabrera was never interviewed in the **twenty** months following the disclosure of Elizarraraz's statement. But the truth was that the prosecution did not want to solve the Cabanas case nearly as much as they wanted to keep hidden their secret about Henry Cabrera's gang membership. When the prosecution received Moriel's notes detailing Henry Cabrera's alleged role in the Cabanas murder, it was just another reminder of what they already knew, and what Delhi members had repeatedly told them: Henry Cabrera was a Delhi member, not a Highland Street gang

member, even though he had been twice convicted as one.

Henry Cabrera is serving a sentence of 33 years to life based upon the gang enhancement. If Moriel's note accurately identified Cabrera as participating in the Cabanas murder, the only way he could have possibly been a member of Highland Street on the date that he committed the carjacking is if Henry Cabrera changed gang affiliations three times in a matter of months. That is, he exited prison as a member of Highland Street in the fall of 2007. He then immediately joined Delhi and committed a murder with fellow members in November of 2007, before rejoining the Highland Street gang in December of 2007, when he committed the carjacking.

It is certainly understandable why the prosecution team lacked enthusiasm for turning over a note that could bring Henry Cabrera a new trial, destroy the reputation of Detective Castillo, and potentially raise many of the questions addressed in this motion. This is particularly true given that Moriel's note demonstrated Henry Cabrera's participation in a Delhi murder less than one month prior to the December 2007 carjacking. Turning over this type of evidence required a firm commitment to following legal and ethical obligations, and setting aside any personal sense of justice not rooted in the law. As they would have known, the disclosure of Moriel's note could lead to Cabrera's life sentence being vacated, without any assurance that Cabrera would be successfully prosecuted for the Cabanas murder. For this reason and many others, Petersen's prosecution team began the next stage of concealment: avoiding the prosecution of Henry Cabrera for murder and hiding Moriel's note from his counsel.

Of course, from Henry Cabrera's perspective, the note possessed exculpatory value regardless of whether it accurately depicted his involvement in the homicide. Two Delhi members, Moriel and Elizarraraz, were essentially identifying themselves as witnesses to Cabrera's Delhi gang membership prior to his incarceration for conduct that was allegedly committed to benefit the Highland Street gang. Therefore, if the notes were disclosed, Cabrera could call Moriel and Elizarraraz to testify at a habeas corpus proceeding about his

membership in Delhi at the time of the carjacking. Alternatively, he could call a gang expert to rely upon the notes. Additionally, if the prosecution turned over the other exculpatory evidence on the issue of Highland Street gang membership, Eduardo Brambila, Damien Galarza, Juan Calderon, Detective Rondou and Detective McLeod were potential, powerful witnesses who could corroborate Henry Cabrera's membership in Delhi.

Calderon Comes Forward with Critical Information about the Murder of Ruben Cabanas—As Cabrera's Membership in the Delhi Gang Stalks the Prosecution

On June 4, 2010, Calderon had a second meeting with SAPD detectives, at his request. Rondou and Rodriguez attended, but Geller was not present. Rodriguez wrote a report about the interview and said that it was recorded, but Dekraai does not have possession of the recording. (Exhibit IIIIII, pp. 98-102.) Calderon explained that he had omitted one other murder from the Delhi crimes he documented in his earlier proffer. Just five months after Elizarraraz described the Ruben Cabanas murder to Oscar Moriel, Juan Calderon offered his own detailed account of the shooting. He corroborated Elizarraraz's version on several critical points, but also added some new information. (Exhibit IIIIII, pp. 100-102.)

Calderon said that he, Guillermo Brambila ("Chino"), Eduardo Garcia ("Cub"), and Agustin Abonce ("Oso") entered a car driven by **Henry Cabrera ("Stomper").** (Exhibit IIIIII, p. 101.**)** They then went to the city of Anaheim to pick up "memorial tee shirts" for Johnny Dizon's funeral—Dizon had been killed the previous day. (Exhibit IIIIII, p. 101.) According to Calderon, Cabrera was driving Abonce's car. (Exhibit IIIIII, p. 101.) Calderon claimed he had fallen asleep. (Exhibit IIIIII, p. 101.) He said that upon returning to Santa Ana, Cabrera made a U-turn that awakened him. (Exhibit IIIIII, p. 101.) Garcia and Abonce exited the car and began firing at Cabanas. (Exhibit IIIIII, p. 101.) After the murder, Cabrera drove the gang members to his residence. (Exhibit IIIIII, p. 101.) He said the shooting was done in retaliation for Dizon's murder. (Exhibit IIIIII, p. 101.)

Prosecution teams will have little choice but to offer up contrived rationalizations for their apparent failure to investigate Cabrera's culpability after receiving Moriel's note. However, Calderon's proffer, which occurred four months after Moriel's notes, created new, difficult dilemmas for the prosecution team members. Unlike Elizarraraz, Calderon was not only a witness to the crime but admitted to being a participant. He was also fully accessible to the prosecution who were already enlisting him as a government witness against his co-defendants, and potentially against defendants in two other shootings. Geller and his team likely felt they had no choice but to move forward with prosecuting the Cabanas murder. But if Geller believed that Calderon was a credible witness—as the eventual filings on the case confirm—there was certainly no reason to exclude the driver who changed the path of the suspect vehicle so that two gang members could kill an innocent because of their anger about a homeboy's death.

Cabrera remained available for questioning in state prison, just as he had been when Moriel released his notes. But the predicament has certainly not improved with Calderon's statements; if the prosecution team questioned Cabrera about his role in a December 2007 murder committed by Delhi gang members, it would alert him to the fact that law enforcement did not believe he was a member of Highland Street when he committed the carjacking for which he was incarcerated. Therefore, if Cabrera denied his role in the murder, as he very likely would, and then pursued the correction of his life verdict for the carjacking, the prosecution could end up in the worst of all worlds: a gang member with a significantly reduced sentence; a prosecution for the Cabanas murder with no guarantee of success; and the increasing possibility that at least some of the significant misconduct detailed in this motion could be exposed.

For all of these reasons, it appears that Cabrera was the only one of the five suspects in the Cabanas murder whom SAPD detectives never attempted to interview.[57] Geller

[57]On October 8, 2010, Garcia was arrested on another matter and was interviewed by Rondou and McLeod at the Santa Ana Police Department. (Exhibit IIIIII, p. 95.)

filed murder charges against Eduardo Garcia and Guillermo Brambila. (Minutes in *People v. Brambila II*, (Super. Ct. Orange County, No. 10CF3025), Minutes in *People v. Garcia*, (Super. Ct. Orange County, No. 10CF3025), attached herein as Exhibit VVVVVV.) He also decided **that the best option for the prosecution team was to let Cabrera get away with murder.** This hardly required much thought considering all of the misconduct that pre-dated the Calderon interview. Geller and his team never seriously considered prosecuting Cabrera or taking any steps to correct the convictions on Cabrera's prior cases, nor apparently pursuing murder charges against him.

Any contrived rationalization for their failure to pursue Cabrera for the Cabanas murder—such as it was unnecessary because he was already facing a life sentence—would be untrue. Cabrera's life sentence was based upon a gang enhancement, making it relatively likely that he would someday be released from prison. Based upon the filings against Garcia and Brambila, the prosecution believed that those responsible for the Cabanas murder should never have the opportunity for parole.

One does not have to look far for evidence that the OCDA will unhesitatingly file murder charges against a defendant facing a separate life sentence by looking at the prosecution's history with Eduardo Brambila. When he was charged in the Cabanas murder, it became his second pending special circumstance murder case, carrying life without possibility of parole. (Exhibit UUUUUU; Exhibit VVVVVV.) Certainly, Cabrera's role in the Cabanas murder, as the purportedly veteran Delhi gang member who

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McLeod wrote that "[a]s we mentioned the brother of the Delhi gang member known by the moniker of 'Taz' (Moises Cabrera) Garcia immediately referred to this individual by the nickname of 'Stomps.' By the mention of the person, I knew Garcia to be speaking of Henry Cabrera. As we continued to discuss Henry, however, Garcia denied associating with him." (Exhibit IIIIII, p. 96.) Garcia denied his involvement in the crime before ultimately invoking his right to counsel. (Exhibit IIIIII, p. 96.) As indicated earlier, on December 27, 2007, Brambila was interviewed by Rondou and McLeod. (Exhibit CCCCCC, p. 206.)

maneuvered the car so others could kill, was as morally reprehensible as the role of Brambila, who the prosecution agreed did not fire a weapon at the scene. Ultimately, the conduct of Mark Geller, a generally well-regarded prosecutor, is a disappointing testament to the OCDA's pervasive culture that promotes self-protection and winning at all costs.

As *Brady* Violations Stack Up, Prosecution Teams Set Their Course for Additional and Serious Acts of Misconduct

Evidence that Cabrera could not have been a member of the Highland Street gang at the time of the carjacking was beginning to pile up. For the fifth time in three years, alleged Delhi members had identified Henry Cabrera as a member of their gang. In 2007, Eduardo Brambila identified Cabrera as a Delhi gang member. (Exhibit DDDDDD, p. 52.) Rondou did nothing and McLeod created a deceptive report that hid Cabrera's identity. In 2008, Damien Galarza identified Cabrera as a Delhi member. (Exhibit JJJJJJ, p. 123.) Rondou did nothing, and neither did Geller when he received the interview. In 2009, Delhi member Juan Calderon stated that Cabrera was the only Delhi gang member that he remained in contact with for a period following his murder arrest in 2008. (Exhibit FFFF, pp. 4-5.) Geller was present at that interview and chose not to share the information with Cabrera or his counsel. And in 2010, Oscar Moriel's note verified that he and Elizarraraz recognized Henry Cabrera as a member of their gang prior to December of 2007. (Exhibit O, pp. 2387-2388.) Petersen, who was aware of that note and was the prosecutor in Cabrera's carjacking case, also did nothing. Finally, Calderon described Cabrera as playing a major role in the Cabanas murder, which pre-dated the carjacking for which he is serving a life sentence. (RT (trial), Jan. 28 and 29, 2013, *People v. Garcia* (Super. Ct. Orange County, 2013, No. 10CF3025), RT (trial), Jan. 29, 2013, *People v. Garcia*, (Super. Ct. Orange County, 2013, No. 10CF3025), attached herein as Exhibit HHHHHH, pp. 44:18-24, 46:19-47:6.) Geller and his team attempted to hide the tracks leading back to Cabrera's prior wrongful convictions by not pursuing Cabrera for murder.

It is unlikely that those associated with the Cabrera cover up will own up to their

misconduct. The ramifications are too great. There will likely be several excuses, from memory failure to inadvertent error. These excuses will likely be similar to those offered by Wagner and his team for withholding evidence related to Inmate F.

If Geller thought he could somehow avoid further consequences of the Cabrera cover up by not filing charges against him for the Cabanas murder, he was wrong. Geller's decision to prosecute two defendants in the Cabanas murder created new discovery obligations. For example, he was required to share evidence relevant to Calderon's claim that Cabrera was a veteran member of the Delhi gang, including the testimony by Castillo––the supervising detective in the SAPD's gang unit— that Cabrera was a member of the rival Highland Street gang from at least 2005 through the time of the homicide in 2007, and the documents supporting that opinion. **This evidence was relevant to whether Calderon's depiction of his role in the Cabanas murder was truthful; Calderon described himself as a less experienced member of the Delhi gang, and that the veteran members, Cabrera and Abonce, were the main perpetrators of the crime.**

Moreover, as discussed in the Summary of Motion and Findings, Geller's serious misconduct and his decision to enter a conspiracy related to Cabrera created a responsibility to self-report his legal and ethical violations, and those of other conspirators, such as Rondou and McLeod. This reporting responsibility was owed to each defendant whom Geller has prosecuted and to each defendant whose case relied upon the investigation or credibility of one of the offending investigators. Petersen, of course, owed the same reporting responsibility to each and every one of the defendants whom he or his co-conspirators prosecuted or investigated in a case culminating in a conviction, whether the misconduct was related to Cabrera or the other acts enumerated in this motion.

The Prosecution of Eduardo Garcia and Guillermo Brambila

Brief Summary of Charges and Facts

Within weeks of obtaining a special circumstance murder conviction against Moises Cabrera, Geller filed special circumstance murder allegations against Guillermo Brambila

and Eduardo Garcia. (Exhibit VVVVVV.) On November 4, 2010, they were charged with murder, street terrorism, gang and firearm use enhancements, and the special circumstance gang allegation. (Exhibit VVVVVV.)

Ruben Cabanas was killed on November 28, 2007. (Exhibit QQQQQQ, p. 6:10-12.) Calderon testified in *People v. Brambila II* that on that day, he, Brambila, Garcia, Abonce, and Henry Cabrera were returning from Anaheim, where they bought t-shirts in honor of Jonathan Dizon ("Risky"), who had been recently killed. (Exhibit OOOO, pp. 115:14-26, 116:1-7.) Henry Cabrera was driving the car and Abonce was in the front passenger seat. Calderon, Brambila, and Garcia were in the back seat. (Exhibit OOOO, p. 118:4-19.) Calderon testified that he was asleep in the backseat when the car suddenly made a U-turn and approached Cabanas, the victim. (Exhibit OOOO, pp. 118:25-119:2.) Garcia and Abonce exited the vehicle and then started shooting at Cabana from the car. (Exhibit OOOO, pp. 119:19-120:21.) Calderon was the only individual that identified Brambila as a participant in the shooting. (Exhibit QQQQQQ, p. 28:12-16.)

Geller Elicits Evidence of Henry Cabrera's Gang Membership and Crosses Another Ethical Firewall

The preliminary hearing in *People v. Brambila II* did not take place until 2012. By that time, it appears that Geller had changed his thinking. Perhaps to avert any suspicions about Henry Cabrera not being joined as a defendant in the proceedings or to convince himself he had done nothing wrong, Geller boldly put Henry and Moises Cabrera's Delhi membership before the magistrate. He did this even though he knew that the evidence and verdicts in Henry Cabrera's cases were completely at odds with said membership at the time of the Cabanas murder.

First, Geller brazenly introduced as one of the predicate acts the conviction he had obtained against Moises Cabrera. (Exhibit QQQQQQ, pp. 30:25-31:10.) This was stunning, particularly considering the careful effort in *People v. Moises Cabrera* to avoid referencing or having any member of his team reference the name "Henry Cabrera."

Second, Detective McLeod testified about his interview with Guillermo Brambila and his statements regarding "his involvement with Delhi." (Exhibit QQQQQQ, p. 35:10-22.) McLeod said the following in reference to Brambila's statements:

> …I don't believe he gave a specific number of years, but extended length of time. He told us he had been associating with different members for a great while, naming those individuals by their monikers. I believe one was Stomper…

(Exhibit QQQQQQ, p. 35:14-18.)

Relying upon McLeod as his gang expert, Geller turned to the issue of Augustin Abonce and Henry Cabrera's membership in Delhi.

> Q: Do you have an opinion whether those two individuals were also members of the Delhi gang?
> A: Yes.
> Q: And your opinion is?
> A: **They were at that time, and I believe continue to be members of the Delhi criminal street gang.**

(Exhibit QQQQQQ, pp. 44:24-45:7, emphasis added.)

Brambila's statement, in conjunction with McLeod's opinion, provided important evidence that Henry Cabrera had been a member of Delhi in late November of 2007, and for some time period preceding that date. This was the first affirmative evidence introduced in a courtroom—and the first opinion by a SAPD gang detective—that Henry Cabrera was a Delhi member in November of 2007. Again, this evidence was entirely inconsistent with Castillo's opinion in *People v. Henry Cabrera I* and *II* that he was a Highland Street member at least one month before he allegedly committed the carjacking in 2007 that was prosecuted by Petersen (*Henry Cabrera II*), and likely a member in 2005, when he committed the crime prosecuted by Geller (*Henry Cabrera I).* If McLeod's testimony was truthful and accurate, then Cabrera was wrongfully convicted for the December 2007 carjacking for the benefit of the Highland Street gang, for which he is currently serving a life sentence.

Cabrera certainly would have been stunned if he knew that Geller, the same Deputy DA who had prosecuted him in *Henry Cabrera I*, introduced evidence inconsistent with

testimony of the SAPD's most experienced gang expert, Ronald Castillo, and the jury's findings in *Henry Cabrera I* and *II*. By introducing Brambila's statement on Cabrera's Delhi membership, along with McLeod's opinion on the subject, Geller essentially established that Cabrera was improperly convicted of violating section 186.22, subdivision (b). **Based upon what is detailed throughout this motion, Geller's unwillingness to share this evidence with Cabrera or his counsel is sadly not surprising.**

Additionally, Geller committed a *Brady* violation at the preliminary hearing in *People v. Brambila II* by withholding impeachment evidence of a prosecution witness. Geller, a prosecutor with over a decade of experience, understood that his obligation to turn over *Brady* evidence extends to preliminary hearings. (*People v. Gutierrez* (2013) 214 Cal.App.4th 343.) Castillo's testimony, along with the supporting documents buttressing his opinion in *People v. Henry Cabrera I* and *II*, could have been used to impeach McLeod, who should have been forced to answer the following questions, among many more: When did you first determine that Cabrera was a member of the Delhi gang? With whom did you share your opinion? What materials did you review that supported that opinion and contradicted it? If you learned before his testimony in either *Henry Cabrera I* or *II* that your supervisor intended to testify that Cabrera was a member of Highland Street and you believed he was mistaken, what steps did you take to convince him to change his opinion? What conversations have you had with Deputy District Attorneys regarding the subject of Cabrera's prior convictions, and what steps have you personally taken to correct those convictions based on his erroneous affiliation to Highland Street?

Geller Separates Himself from the Cabanas Murder Prosecutions but Not the Misconduct.

After the preliminary hearing in *People v. Brambila II,* Defendants Bramblia and Garcia were severed. On September 14, 2012, Deputy DA Rahul Gupta made his first appearance in *People v. Garcia*, replacing Mark Geller. (Exhibit VVVVVV.) Geller's disappearance from the case warrants suspicion, particularly considering that he had

committed serious misconduct at the preliminary hearing. Interestingly, Geller remained the prosecutor in the case against Damien Galarza, after the co-defendant Juan Calderon agreed to a sentence of 13 years for voluntary manslaughter, rather than a conviction for murder, in return for his testimony on several cases. (Exhibit HHHHHH, pp. 32:12-33:8.) If Geller believed he could be cleansed of his *Brady* violations by merely passing the baton to another trial counsel, he was incorrect. Moreover, an examination of the trial transcripts and discovery practices in *People v. Brambila II* and the severed Co-Defendant Garcia strongly suggests that Gupta was also aware of the cover up pertaining to Cabrera. Additionally, this evidence reveals that Gupta took no action to unveil the misconduct, and then continued along the same path as his predecessor.

It does not make sense that a neutral prosecutor, disconnected from the Cabrera cover up, would allow the driver of the Cabanas murder to go un-prosecuted. If Calderon was to be believed, Cabrera and Abonce were veteran members of the gang and the leaders in the critical decision to kill. Moments before the shooting, Cabrera allegedly made a U-turn while driving Abonce's car towards the intended victim—whereas Brambila neither shot a weapon nor drove the suspect vehicle. (Exhibit OOOO, pp. 118:22-24, 119:19-120:21.) Furthermore, the suspects returned to Cabrera's home after the homicide. (Exhibit OOOO, p. 122:16-18.) These facts would have unquestionably supported Gupta's decision to prosecute Cabrera for special circumstances murder.

The discovery obtained from Damien Galarza does not include any evidence relevant to establishing the gang membership of either the charged or uncharged accomplices in the Cabanas murder. In terms of evidence of Henry Cabrera's gang membership, it would be interesting to see what Gupta discovered to Garcia and Brambila. If he provided them with the same evidence of Henry Cabrera's gang membership that Geller, Petersen, and Castillo had presented to juries in *Henry Cabrera I* and *II*, it would have seemed inconceivable that Cabrera was a member of the Delhi gang. Having seen the materials establishing Henry Cabrera's membership in the Highland Street gang, counsel

seemingly would have asked questions about the discrepancy in the gang packet and the conclusion by Calderon and the gang experts that Cabrera instead was a veteran Delhi gang member.

One potential path for Gupta was to take a stand against years of misconduct and a prosecutorial culture that has strayed far off-course. However, he likely saw the immediate beneficiaries of his courage would be gang members, while those most damaged would be his friends and colleagues. He would be reviled. And so, Gupta, like so many others, took the far easier path and stayed the course.

The Trial of Guillermo Brambila

On November 7, 2012, the trial was sent to the Honorable William Froeberg. Detective McLeod was designated the lead investigator. McLeod, and very likely Rondou, who would also testify, would have preferred a different courtroom for reasons that will be discussed.

Calderon testified that on the date of the murder, he, Garcia, Brambila, Abonce and Cabrera went to the swap meet in Anaheim to obtain "Gone But Not Forgotten" t-shirts in honor of Johnny Dizon. (Exhibit OOOO, p. 116:8-17.) He said that the older, more respected members of the gang, like Cabrera and Abonce, obtained better shirts with more writing on them, because they cost more. (Exhibit OOOO, p. 116:17-21.) Calderon said that Cabrera and Abonce had a better reputation and more respect in the gang because "…they were older so they'd been through more. They've gone to prison. They were – they were already jumped in. They knew more – they had more – they just have more respect 'cause of those things." (Exhibit OOOO, p. 117:3-6.)

Calderon testified that while they were driving back to Santa Ana, he fell asleep. When he woke up, Cabrera was driving. (Exhibit OOOO, pp. 117:24-118:6.) He believes he was awakened by Cabrera's U-turn, which occurred moments before the shooting. (Exhibit OOOO, pp. 118:22-119:7.) He described the car pulling up to a Latino male, the victim. The car's occupants then confronted the victim about what gang he was with, and

then both Abonce and Garcia fired their weapons. (Exhibit OOOO, pp. 119:21-120:21.) After the incident they drove to Cabrera's house on V** that was only two blocks away. (Exhibit OOOO, p. 122:13-20.)

The prosecution called Detective Rondou as its gang expert. Through McLeod and Calderon, an entirely new picture of Henry Cabrera was coming into focus—one completely at odds with the prosecution's case in *People v. Henry Cabrera I* and *II*. According to their testimony, Cabrera was not a member of the rival Highland Street gang at the time of the crime. He was actually an older, established member of the Delhi gang, who had the respect of the younger members. In a startling touch of irony, after numerous cases in which every member of the prosecution team forgot that Henry and Moises Cabrera were brothers, this prosecution team finally decided it would be beneficial to embrace their relationship:

> Q: Looking at the person in position number five do you know that individual, Mr. Cabrera.
> A: Yeah, Henry Cabrera, Stomper.
> Q: Is he a member of Delhi as well?
> A: He is, him and his brother.

(Exhibit OOOO, 203:25-204:3.)

Interestingly, Rondou tried to somewhat rein in Calderon's description of Henry Cabrera as a well-respected and long standing member in the gang by suggesting that he "wasn't in the gang that long, but his brother had a lot of respect with the gang, so he kind of rode his coattails." (Exhibit OOOO, p. 207:5-8.) Rondou's statements throughout this motion indicate that his unsupported assertion requires extreme skepticism and the most careful scrutiny. Did Rondou truly have any idea when Cabrera joined the gang or whether he really rode his brother's coattails? Was he trying in some unconscious way to help his compatriots Castillo and Geller, if they ever had to explain the "mistaken" Henry Cabrera convictions? With Rondou, there is no apparent dividing line between truth and lies, making it all but impossible to discern moments of veracity.

Of course, if Brambila had been appropriately informed of the fact that the very

same prosecutorial agency and the SAPD's most experienced gang officer (Ronald Castillo) testified that Cabrera was acting as a member of the Highland Street gang one month after he supposedly participated in a retaliatory murder as a member of the rival Delhi gang, competent counsel certainly would have cross-examined Rondou on this subject matter. If the prosecution had turned over the packet of information that Castillo had purportedly relied upon to make the call that Cabrera was a Highland Street member, counsel would have also likely probed Rondou further. **Of course, if competent defense counsel would have been informed that Rondou and Gupta were involved in a cover up of Cabrera's gang membership that also implicated other detectives and called into question the integrity of the SAPD's commitment to fairly investigate, he would have had reason to explore those issues, and had legitimate arguments about the trustworthiness of the prosecution in its entirety.** However, the defendant did not receive the *Brady* discovery to which he was entitled and his counsel chose not to cross-examine Rondou.

The Cabrera Cover Up and Custodial Informant Misconduct Collide

During his testimony in *Brambila II*, McLeod spoke about photographs he had obtained, which captured images of the individuals allegedly involved in the Cabanas murder. The photographs were of alleged Delhi gang members surrounding Jesus Rodriguez ("Balloon") in or about October of 2007, in a hospital room after he was shot and paralyzed. (Exhibit OOOO, pp. 25:9-18, 103:26-104:18; Exhibit HHHHHH, p. 242:3-10.) McLeod identified five of the individuals surrounding Rodriguez in the photograph as Delhi gang members: Johnny Dizon, Guillermo Brambila, Henry Cabrera, Edward Garcia, and Agustin Abonce. (Exhibit OOOO, pp. 25:20-26:15, 40:22-41:2, 41:25-42:2, 42:20-24, 42:12-19.) In that photograph, Dizon, Brambila and an unidentified individual are flashing the gang sign for Delhi. (Exhibit 19 of photograph of men at hospital in *People v. Brambila* (Super. Ct. Orange County, No. 10CF3025), attached as Exhibit WWWWWW.) Cabrera is laughing in the photograph. (Exhibit WWWWWW.)

In *People v. Brambila II*, McLeod expressed less than complete certainly about the person from whom he received the photographs. Gupta questioned him about the above referenced photograph:

> Q: Which [Delhi] member did you speak to about the photograph?
> A: Um, I believe the individual who showed me the photographs was named Oscar Moriel, a Delhi gang member. As I sit here, I can't recall his moniker, but Oscar Moriel.
> Q: He also identified the individuals in the photograph to you?
> A: Yes. And then I spoke to one other individual about the photograph.

(Exhibit OOOO, pp. 44:23-45:5.)

It likely never crossed defense counsel's mind that the expression of lingering uncertainty about where the Stanford-educated McLeod had obtained the photographs was insincere. (Exhibit OOOO, p. 64:21-23.) Considering the immense value to the prosecution of images capturing the entire Cabanas killing crew surrounding a "fallen soldier," perhaps it should have seemed odd that McLeod did not have ready details.[58] (Exhibit OOOO, p. 34:13.) Additionally, McLeod would seemingly have written a report about receiving the pictures and Moriel's identification of the individuals depicted—he actually referred to such a report in the subsequent trial of Garcia. (Exhibit HHHHHH, p. 263:12-19.) However, in *Brambila II*, McLeod never mentioned the report. Defense counsel only asked one question of McLeod on cross-examination. And Gupta did not seek to refresh his recollection.

The *Brambila* discovery provided to Galarza's counsel as of October 5, 2011, did not include the report, nor the note that Moriel had written about the Cabanas murder. (Exhibit RRRRRR; Exhibit A.) This would seemingly suggest that the contact with Moriel and his identification of the suspects in the photographs must have taken place after

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[58] The importance of the hospital photographs to the prosecution case is evidenced by their introduction of both Exhibits 2 and 19, and the extensive discussions about those photographs with both McLeod and Calderon. (Exhibit OOOO, pp. 40:25-41:7, 41:8-9, 44:19-45:4, 114:6-9, 116:22-117:1,126:1-2.) By way of comparison, the entire defense closing argument occupied six pages of the transcript. (Exhibit OOOO, pp. 256-261.)

October of 2011. But that was not the case.

Interestingly, at Eduardo Garcia's severed trial in the Cabanas murder that began three months later, McLeod's ability to recall the history of the hospital photographs sharpened dramatically. On January 28 and January 29, 2013, McLeod testified -- much to his relief, not before Judge Froeberg, but instead before the Honorable Lance Jensen. Gupta again asked McLeod about the hospital room photographs:

> Q: Can you describe to the jurors where you received these photographs from?
> A: Yes, I received those photographs from an individual, he's a Delhi gang member or was a Delhi gang member. His name is Oscar Moriel. That's spelled M-O-R-I-E-L. I had had a discussion with him in February of 2010. At that time, he had in his possession several photo albums of different Delhi gang members.

(Exhibit HHHHHH, pp. 238:25-239:6.)

When counsel for Garcia questioned McLeod, even more details emerged:

> Q: Did you ascertain where Mr. Moriel obtained these photographs from?
> A: Yes, I asked him. I didn't verify, but I asked him.
> Q: What did he say?
> A: He said that he had to get them, and provided the photographs. Basically, they were two large photo albums that he got from a fellow Delhi gang member. And they depicted these photographs, amongst other, in different venues with different individuals at different time periods.
> Q: And did he identify who this individual was?
> A: He identified him as a Person by the moniker of Joker.
> Q: Did you know who Joker was?
> A: From the information that I had received, that was an individual by the name of Nick Torres.

(Exhibit HHHHHH, pp. 262:18-263:8.)

As the questioning continued, McLeod also revealed that he had written a four-page report about what defense counsel termed "the receipt of these photographs from Mr. Moriel." (Exhibit HHHHHH, p. 263:12-19.)

The transformation in McLeod's ability to recall the details surrounding the hospital photos in a two month period was dramatic. McLeod went from not being entirely certain about whether he obtained the hospital photos to the following: 1) Moriel "had to get them"; 2) the photos in court were just a few out of two large photo albums; 3) Moriel

obtained them from a fellow Delhi gang member; 4) the discussion with Moriel occurred in February 2010; and 5) McLeod had written a four page report on the topic.

It is unknown whether Brambila's counsel was aware of the four-page report, though there is no logical reason why the writing of the report would have been delayed twenty or more months. More importantly, perhaps, what explains the stark difference in this very bright detective's ability to "recall" details during the two trials? **The answer lies in the location of the trials**. McLeod knew that two other Delhi murder cases, *People v. Rodriguez* and *People v. Vega*, had been tried before Judge Froeberg and that Moriel had been a critical prosecution witness in both. McLeod fully appreciated that the description of Moriel's pursuit and possession of photo albums in **February of 2010** would likely have been shocking and enormously disturbing to counsel for the defendants in *People v. Rodriguez* and *People v. Vega*, and the judge who heard those trials, Judge Froeberg. Moriel's successful efforts to obtain these albums and his possession of them within the jail would have powerfully undercut the prosecution's presentation of Moriel as a witness who was not seeking opportunities to elicit statements from fellow Delhi members, but rather just listening attentively to what his fellow inmates said. **Defense counsel in these cases––as well as Inmate I., who is awaiting trial—were entitled to argue that because Moriel had no authentic connection to the Delhi gang in 2010, he would have had no reason to seek out and keep gang photo albums in his jail cell unless the purpose was to assist prosecution teams in developing leads for Delhi prosecutions and identifying members of that gang.** The failure to disclose in *People v. Vega*, *People v. Rodriguez* and *People v. Inmate I.*, that Moriel had possession within the jail of a Delhi photo album is unconscionable—and McLeod knew it.

McLeod's feigned inability to recall where he got the photo albums in *People v. Brambila*, though, was tied most closely to his concern about what he and his prosecution team had done in *Rodriguez,* nine months earlier. McLeod was the lead investigator in *Rodriguez*, discussed beginning at page 320, which culminated in an acquittal for two

defendants, and the third—who happened to be the shooter—received "credit for time served." Moriel was the key prosecution witness in the case, testifying that he could identify the suspects from a gas station video. In that case, the prosecution team, which included McLeod, withheld the above referenced four-page report and the evidence related to Moriel's possession of the photo album. This evidence was withheld even though it showed that Moriel had Delhi photo albums in the jail the very same month (February of 2010) that he identified Delhi suspects in the video. The prosecution team unquestionably knew that the defendants in *Rodriguez* and the other cases were entitled to cross-examine Moriel about his possession of those albums; the true story of how and when he obtained those albums in custody; why he obtained them; whether he looked at them before or after he examined the video related to the defendants in *People v. Rodriguez*; whether the albums contained photographs of any of the defendants in those cases; and whether he believed any other members of the gang included within the album also resembled those individuals whom he identified. The prosecution team's failure to turn over this evidence shows their absolute disinterest in complying with *Brady* obligations, and ensuring that defendants receive a fair trial.

But the significance of Moriel's possession of the photo albums did not end there. Dekraai does not have the report generated about McLeod's contact with Moriel regarding the photo albums and his examination of the photos. It is also unknown what date McLeod claimed to have received the photo albums. The date of the report, however, is highly relevant to the issue of McLeod's deception in *People v. Rodriguez*, wherein he claimed he had never met Moriel prior to his first contact on February 23, 2010. (Exhibit UUU, p. 55:4-7.) It is unclear whether the report referenced in *People v. Garcia* indicates that McLeod had contact with Moriel before or after February 23, 2010. If the report indicates that the contact with Moriel indeed occurred before that date, it would ultimately add another act of deception and dishonesty to the already long lost list of misconduct committed by the aforementioned prosecution teams.

Overview of Misconduct in *Brambila*

With their discovery obligations completely ignored, the prosecution case could not have gone more smoothly. Defense counsel never knew that the prosecution team, which included two testifying detectives, was involved in a cover up regarding Cabrera's gang membership, which the prosecutor and his predecessor aided. Additionally, defense counsel also had no idea that Detective McLeod was engaged in a separate cover up aimed at hiding a significant discovery violation related most profoundly to *People v. Rodriguez*. The prosecutor was required under *Brady* to discover evidence of McLeod and Rondou's acts of deception that are detailed throughout this motion. However the concealment of *Brady* evidence has seemingly become a natural part of the prosecutorial practice at this time. Thus there was literally no chance of a prosecutor or member of law enforcement reporting the misconduct of an offending party.

This case could very well have been quite challenging for the prosecution. Brambila was a non-shooter, sitting in the middle of the backseat of a car not under his control, and the main witness was an accomplice conveniently asleep when the crime got underway. With the defense deprived of critical evidence, though, the jury convicted Brambila of special circumstance murder in approximately two hours and he was subsequently sentenced to life without possibility of parole. (Exhibit VVVVVV.)

The transition from Geller to Gupta was seamless. Gupta was equally as disinterested as his predecessor in sharing critical impeachment evidence pertaining to the key prosecution witness, Calderon. And just like Geller, he would do nothing to correct the verdicts of Henry Cabrera.

The Trial of Eduardo Garcia

The trial of Eduardo Garcia proceeded similarly to Brambila's trial. The only major change in how Gupta proceeded was that he used McLeod as the gang expert in place of Rondou.

Calderon testified that he and Garcia were younger members of the gang and that

Cabrera and Abonce "…both had done time and they had already done a lot of things for the neighborhood so older dudes respected them. So we – me and Edward right there, we respected and looked up to them and wanted to be just like them." (Exhibit HHHHHH, pp. 36:24-37:2.) He said that "…their word was what we went by." (Exhibit HHHHHH, p. 36:21-22.) Cabrera drove the other three. (Exhibit HHHHHH, pp. 42:26-43:2.) Calderon stated that the reason he did not want to speak about the homicide during the first proffer was that he did not want to give information against Cabrera, whom he claimed was like a brother to him. (Exhibit HHHHHH, p. 133:1-11.) Calderon claimed he had fallen asleep and was only awakened as they entered Alley Boys territory. (Exhibit HHHHHH, pp. 45:18-46:4.) Calderon then described the killing of the victim. He testified: "[Abonce] shot first, but then cubs shot first and then simultaneously Oso started shooting. So they were shooting at the same time." (Exhibit HHHHHH, p. 47:17-18.) After the incident, they went to Cabrera's home. (Exhibit HHHHHH, p. 47:19-20.) He lived on V**. (Exhibit HHHHHH, 48:20-26) This residence was confirmed by McLeod. (Exhibit OOOO, pp. 43:23-44:2.)

More Troubling Testimony for McLeod

The gang expert in the case, Matthew McLeod, stated the following with regard to Henry Cabrera:

Q: Have you personally met Cabrera?
A: Oh yes.
Q: Do you know him as a Delhi as November 28, 2007?
A: Oh, yes.

(Exhibit HHHHHH, 241:13-17.)

McLeod's emphatic attestation to Cabrera's Delhi membership indicates that he certainly met him prior to November 28, 2007, and knew that he was in Delhi well before that date. But if he knew that Cabrera was in Delhi prior to November 28, 2007, then he also necessarily realized that he was a Delhi member prior to the carjacking committed by Cabrera in December of 2007. Moreover, considering the relatively brief period that Cabrera was out of custody after his incarceration for *Henry Cabrera I*, McLeod's contacts

with Cabrera seemingly took place before he was arrested on that case. On December 1, 2006, Henry Cabrera was sentenced on that case to 3 years and 8 months (1335 days) in prison, having total credits of 734 days. This would have left 601 days to be served. If he received his entire custody conduct credits without deductions he would have been released in the fall of 2011. (Exhibit ZZZZZ.) (The calculations suggest he was released in October, but it is possible that the prison may have released him earlier.) Cabrera appeared for his arraignment on *Henry Cabrera II* on December 18, 2007. If McLeod was telling the truth that he knew Cabrera in November 2007—and just like with Rondou, there is no rational reason to reach that conclusion—then McLeod would have spoken with Cabrera about his Delhi membership in 2005 or earlier. This would mean that McLeod hid this contact with Henry Cabrera and what he knew about his Delhi membership from his defense counsel, or Castillo hid it after receiving McLeod's opinion.

Once again, because of the concealment of evidence pertaining to Cabrera's two cases, defendant Garcia was deprived of critical impeachment evidence of McLeod that would have also contradicted Calderon, and generally impeached the integrity of SAPD-led investigations. If the prosecution had not unfairly withheld this evidence, Garcia would have seen the Delhi/Highland issue and probed McLeod about where he had memorialized the contact(s) with Cabrera and why he did not reveal them when Cabrera proceeded to trial. He would have also asked what conversations McLeod had with fellow SAPD detectives and OCDA prosecutors about the irreconcilable conflict in the determination of Cabrera's membership.

Gupta Triumphs the Courage of a Brave Prosecution Witness While He Shows None

Defense counsel struck at the believability of Calderon's explanation that he failed to mention this particular homicide at the first proffer because of his hesitation to harm Henry Cabrera, an elder and respected member of Delhi. He continued this attack in closing argument. (Exhibit HHHHHH, pp. 96:22-97:7; RT (trial), Jan. 23 and 30, 2013,

People v. Garcia, (Super. Ct. Orange County, 2013, No. 10CF3025), attached herein as Exhibit XXXXXX, p. 120:13-15.)

In Gupta's closing argument, he emphasized the veracity of Calderon's explanation of the delayed reporting. Gupta said the following:

> So understand that when he's revealing what happened at Flower and Pomona, he's also implicating himself. And the person he didn't want to implicate was Mr. Cabrera, Stomper. For a 15-year-old kid, who's seen three murders his Dad and in and out of jail, the role model he had was Mr. Cabrera, the guy that was like a brother to him, that would share his shoes, share his blanket, give him a place to stay. He didn't want to turn him in. He didn't want to I.D. him. But he did because he told you, he wanted to change his life and walk away from the gang. He could have easily just said, you know what, I'll tell you everyone who's in the truck and left Mr. Cabrera's name out of it. **How would anyone ever know?** But he didn't. He implicated the person he considers to be a brother because he had to come clean.

(Exhibit XXXXXX, pp. 77:22-78:11, emphasis added.)

The righteousness in Gupta's words jumps from the printed pages. Once again, it is almost as if the prosecution teams are able to completely disassociate themselves from their own misconduct. If counsel knew what the prosecution had hidden, he would have been stunned by Gupta's hypocrisy in exalting Calderon's courage in coming forward while the prosecution cowardly elected not to prosecute Cabrera solely to cover up their own misconduct.

Finally, in the last portion of Gupta's rebuttal argument he clearly states that the entire group, including Henry Cabrera, is legally responsible for murder:

> With aiding and abetting, what that means is, he has the intent of the shooters. What that basically means is, all the guys in the truck, it's one for all, all for one; that they all want to murder this person they think is an Alley Boy member when they do the U-turn. One guy is the driver, two guys are the lookout. The driver and the lookout also have the same intent. That's why they're there, is to commit the murder.

(Exhibit XXXXXX, p. 144:11-19.)

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> He returned to the theme that everyone who was in the car was equally responsible: …The degree is first degree because it was premeditated and it was deliberate. They thought about it the night before, committing the retaliation. They made the U-turn. It was deliberate; they understood the consequences of their actions…

(Exhibit XXXXXX, p. 145:15-20.)

In his final few remarks Gupta said that, "All I ask for you to do is hold the defendant accountable for his actions and his conduct on November 28th, 2007…" (Exhibit XXXXXX, p. 146:15-17.)

Gupta was trying to put the final dagger in the defense case. His effort would be in vain, though, as Garcia was acquitted. But one can only wonder if he saw the irony and hypocrisy in his final plea for justice. **The OCDA was not prosecuting a man whom they apparently believed was equally responsible for special circumstances murder because the OCDA and SAPD had premeditated and deliberated a cover up of wrongful conviction(s) over not days—but years—so that they themselves would never be held accountable for their misconduct.**

Detective Castillo Stares at His Own Misconduct

As mentioned previously, McLeod said that he obtained photo albums and specific photographs that showed Delhi gang members surrounding Jesus Rodriguez ("Balloon") in October of 2007, in a hospital room after he was shot and paralyzed. During Garcia's trial, McLeod said that among the individuals in the photograph is Henry Cabrera, known as "Stomper" within the gang. (Exhibit HHHHHH, p. 241:9-12.) However, he added something significant in *Garcia* that was not mentioned in *Brambila II*, in terms of McLeod's rendition of how he actually identified several of the individuals in the photographs. In *Brambila II*, McLeod said that he showed the photographs to Moriel and one other Delhi member. (Exhibit OOOO, pp. 44:23-45:5.) However, in *Garcia*, he said that the identification of people within the photograph from the hospital introduced at trial was based upon Moriel's assistance, his own knowledge, and the contributions of other detectives. (Exhibit HHHHHH, pp. 261:23-262:17.)

As defense counsel for Garcia probed further, there was yet another fascinating revelation. McLeod had consulted with several detectives in an effort to determine the identity of the individual in the hospital bed. McLeod stated the following:

> That came from discussions, one again, with other detectives, specifically Detective Corporal Rondou, also older detectives. I want to say Detective – well he's retired right now. He's a reserve officer, **Ronny Castillo**. Also, in just looking at the other photos in addition to these and the other individuals.

(Exhibit HHHHHH, 262:12-17, emphasis added.)

McLeod's statement reiterates that SAPD officers engage in a collaborative effort to investigate cases, which is typical for specialized police units, including the gang unit of the SAPD. This corroborative process makes perfect sense in the context of gang investigations and helps explain why it was nearly impossible for detectives such as Rondou and McLeod to have missed the fact that Castillo, the then supervising detective of the gang unit, repeatedly testified about Cabrera's membership in the Highland Street gang. Moreover, Castillo's examination of the photographs further demonstrates his disinterest in accurately analyzing Cabrera's gang membership and following legal and ethical obligations, which is consistent with the attitude of other prosecution team members. **When Castillo looked at the photographs from the hospital room, he saw Henry Cabrera—the same man whom he had looked over at in two trials and three preliminary hearings and described as a member of Highland Street— surrounded by Delhi gang members.**

In the next case that will be discussed, *People v. Galarza*, Rondou ironically spoke about how gang members view those who want the privileges of gang membership but not the responsibility. (RT (trial), March 13, 2012, *People v. Galarza*, (Super. Ct. Orange County, 2012, No. 08CF0137), attached herein as Exhibit YYYYYY, p. 281:4-20.) Too many involved in Orange County prosecution and law enforcement want all of the privileges of holding such an office, while refusing to accept the responsibilities. Those responsibilities include helping the suspects they despise when the law requires it. The SAPD had turned to one of its most experienced detectives to help identify Delhi gang

members. There were probably few individuals more familiar with the roster than Castillo. As Castillo stared at the photograph, he was given a reminder that his testimony had twice misled jurors into believing Cabrera was a member of the Highland Street gang. At that moment, Castillo was morally, ethically, and legally required to contact Petersen, Geller or Cabrera's counsel and inform them of the truth about Henry Cabrera's gang membership.

But, of course, neither Castillo nor the others who saw Henry Cabrera in the photograph took action**.** There were three reasons. First, what they saw in the photograph did nothing to change their understanding of Henry Cabrera's gang membership, because they had known for a long time that he was a Delhi member. Second, hiding this type of evidence is common and viewed as perfectly acceptable, especially when it supports the punishment of people such as Cabrera. Prosecution team members had recognized for years the compelling evidence that Henry Cabrera was a member of the Delhi gang, but it did not fit with the prosecution's desired gang motive beginning with his first case. And third, this misconduct was intertwined with the concealment of Moriel's notes and the deception of the custodial informant program. After a jury accepted their presentation and arguments, they believed it was simpler to keep Cabrera as a Highland Street gang member.

Implications from the Cabrera Cover Up

Interestingly, the fact that Henry Cabrera was not with another Delhi gang member in either of his felony cases discussed herein was a blessing and a curse for those willing to play fast and loose with the criminal justice system. It offered the prosecution team a tremendous opportunity to shape Cabrera's gang background around the desired motive in *Henry Cabrera I*: a green light upon UAK gang members. When it was time for *Henry Cabrera II*, again his co-defendant was not a gang member, making it easier to continue to deem Cabrera a Highland Street member, even though Castillo (and other prosecution team members) knew it was untrue. Alternatively, if Cabrera had been with a member of his actual gang, the government may not have been able to successfully and incorrectly

prosecute him in *Cabrera I*. This would have stopped this particular course of deception and misconduct related to Cabrera, which was increasing with each passing year, and would ultimately corroborate the willingness of too many prosecutors and detectives to deceive and conceal.

The demonstrated lack of conscience and the ease with which multiple prosecutors and detectives have concealed evidence and engaged in significant misconduct corroborates that this is a systemic calamity. How many times have local prosecutors and members of law enforcement tweaked, omitted or destroyed evidence to allow a presentation more favorable to the prosecution's case? The perpetrators of these frauds will never say, but logic says hundreds if not thousands of times.

Moreover, as noted in the Summary of Motion and Findings, the violators discussed herein appear so confident in their ability to deceive and their impunity, that they likely never considered the fact that their decision to cross the line has implications for all of their past and present cases. The deceptive acts of prosecutors and members of law enforcement become immediately relevant to each case that they have prosecuted or investigated. In the section below, Dekraai will illustrate how the refusal to turn over evidence related to Cabrera affected cases in which Juan Calderon—Cabrera's purportedly close friend, fellow Delhi member, and accomplice in the Cabanas murder—provided information or testified.

The Other "Calderon/Cabrera" Cases

***People v. Damien Galarza* (08CF0137)**

As referenced above, Calderon was initially charged with Rodrigo Sanchez and Damien Galarza in Orange County Superior Court Case Number 08CF0137. The defendants were charged with murder, street terrorism, gang and firearm use enhancements, and the special circumstance gang allegations for lying in wait. (Minutes in *People v. Galarza*, (Super. Ct. Orange County, No. 08CF0137, attached herein as Exhibit ZZZZZZ.)

Juan Orejel was killed on January 3, 2008. (*People v. Galarza* (Oct. 15, 2013,

G046827) [nonpub. opn.] (2013, Cal. App. Unpub. LEXIS 7360), attached herein as Exhibit AAAAAAA, p. 2.) On the day of the shooting, Orejel went to the Azteca Market in Santa Ana with his brother, Eulises Orejel, and three other individuals ("victim group"). (Exhibit AAAAAAA, p. 3.) Eulises was a member of a tagging crew called F.T.L., which is a rival of N.W.O., another local tagging crew. (Exhibit AAAAAAA, p. 3.) As they walked into the Azteca market, they passed a parked Suburban, which Eulises associated with N.W.O. (Exhibit AAAAAAA, p. 3.) There was a brief exchange between the victim group and the passengers of the Suburban, which prompted Eulises to "flip them off." (Exhibit AAAAAAA, p. 4.) The victim group then entered the store, and the Suburban drove away and parked nearby. (Exhibit AAAAAAA, p. 4.)

There were three passengers in the Suburban. Damien Galarza was the driver, Rodrigo Sanchez was the front-seat passenger, and Juan Calderon was in the backseat. (RT (trial), March 14, 2012, *People v. Galarza*, (Super Ct. Orange County, 2012, No. 08CF0137), attached herein as Exhibit BBBBBBB, p. 441:2-18.) According to Galarza and Sanchez's testimony, they both exited the Suburban simultaneously to follow the victim group that was walking away from the Azteca Market. (Exhibit BBBBBBB, pp. 473:20-474:6); (RT (trial), March 20, 2012, *People v. Galarza*, (Super Ct. Orange County, 2012, No. 08CF0137), attached herein as Exhibit CCCCCCC, p. 667:13-14.) According to Sanchez and Galarza, he told Galarza that he wanted to fight the guys from F.T.L., and that Galarza told Calderon to stay in the vehicle. (Exhibit BBBBBBB, pp. 465:24-466:15, 478:13-15; Exhibit CCCCCCC, pp. 664:13-17, 665:7-9.) Per Galarza and Sanchez's testimony, when they were about 30-35 feet behind the victim group, Sanchez and Galarza were challenging them to a fistfight by calling them names. (Exhibit BBBBBBB, 476:3-12; Exhibit CCCCCCC, pp. 664:16-17, 670:14, 668:18-23.) According to Sanchez and Galarza, when the group did not respond, they stopped pursuing them, but Calderon suddenly appeared in the street with his gun drawn. (Exhibit BBBBBBB, pp. 480:26-481:11; Exhibit CCCCCCC, pp. 672:12-673:20.) Galarza and Sanchez both testified that

Calderon then fired the gun that killed Orejel. (Exhibit BBBBBBB, p. 481:9-11; Exhibit CCCCCCC, p. 674:6-9.)

If Calderon were convicted of the charged offenses, he faced life without the possibility of parole. Instead, he elected to provide authorities with information on this case and others, in exchange for a thirteen-year sentence for his involvement in the Orejel shooting. During his proffer on November 3, 2009, Calderon stated that Galarza was the one who shot the gun, which contradicted Sanchez and Galarza's accounts of the incident. (The prosecution ultimately did not call Calderon as a witness in Galarza's trial, although per court minutes he was named on the prosecution's witness list). (Exhibit ZZZZZZ.)

Rondou was introduced to the jury in opening statement as Geller's "investigating officer." (RT (trial), March 12, 2012, *People v. Galarza*, (Super. Ct. Orange County, 2012, No. 08CF0137), attached herein as Exhibit DDDDDDD, p. 2:11-14.) He testified that Galarza was a member of Delhi at the time of Orejel's murder, and that the murder was done to benefit the Delhi gang. (Exhibit YYYYYY, pp. 297:24-298:18, 300:19-23.) His opinion was partly based on admissions by Galarza to membership in Delhi during police interrogation, after denying it through much of the interview. Galarza testified, however, that he was not a member of Delhi, and that he only said that in the interview because he was nervous and thought it was what Detectives Rondou and Flynn wanted to hear. (Exhibit BBBBBBB, p. 467:23-24.) Additionally, Calderon said in his January 5, 2008 interview with Rondou and Flynn that he was a Delhi member, but not Galarza and Sanchez, who were in the tagging group N.W.O. (RT (prelim. hr'g), Sept. 29, 2008, *People v. Galarza* (Super. Ct. Orange County, 2012, No. 08CF0137), attached herein as Exhibit EEEEEEE, pp. 81:13-16, 81:23-82:3.) In a subsequent interview, Calderon also said that the gun used in the shooting was his. (Exhibit FFFF, pp. 15-17.)

Galarza testified that he, like Sanchez, was a member of N.W.O. (Exhibit CCCCCCC, pp. 623:19-624:3, 698:5-7.) He confirmed that N.W.O. and F.T.L. were rivals that got into fistfights, but he never carried or used a weapon, nor did any other N.W.O

members. (Exhibit CCCCCCC, pp. 627:7-628:1, 629:21-630:2, 632:12-19.) Galarza testified that when he exited the Suburban with Sanchez, he thought there was going to be a fistfight with the F.T.L. group. (Exhibit CCCCCCC, p. 664:13-17.) He told Calderon to stay in the car because he knew that Calderon had a gun. (Exhibit CCCCCCC, p. 665:7-16.) Furthermore, the confrontation had nothing to do with him, since Calderon was in Delhi, not a tagging crew. (Exhibit CCCCCCC, p. 665:7-16.) Sanchez confirmed the distinction between Delhi, a criminal street gang, and N.W.O., a tagging crew, in his testimony. (Exhibit BBBBBBB, p. 573:15-17.) He also stated that he had never heard of anyone going from N.W.O. to Delhi, which contradicted Rondou's testimony that N.W.O. is a feeder group into Delhi. (Exhibit BBBBBBB, pp. 572:25-573:3; Exhibit YYYYYY, p. 288:5-12.)

Geller's Closing Argument and Rebuttal

In his closing argument, Geller contrasted the credible Rondou with Galarza and Rodrigo Sanchez, who testified they were not members of the Delhi gang:

> …And don't be swayed for a second simply because Sanchez and Galarza get up there and say they're not Delhi. And I'm going to talk more about his later. But **Detective Rondou, a very seasoned gang homicide detective,** based upon the totality circumstances says, you know what, regardless of what he says, that guy is Delhi.

(Exhibit FFFFFFF, 13:12-18, emphasis added.)

Geller returned to the credibility of Rondou in making a determination about gang membership:

> Detective Rondou's been doing gang investigations for the better part of 20 years in two counties here. And again there's nothing absolute here, and I'm not saying he's perfect, but he evaluates people based upon their conduct, based upon what he sees. And **he shared with you his expert opinion, and you can take that for what it's worth, but I would suggest to you it's worth plenty, that the defendant and – all three of these guys are gang members, members of Delhi**.

(Exhibit FFFFFFF, pp. 81:24-82:6, emphasis added.)

Geller used Galarza's interview with Rondou to support the argument that Galarza was lying when he claimed that he was not a Delhi member at the time of the shooting:

> And Rondou says, "Who do you know that's locked up?" And the defendant says, "I know Cub. I know fucking **Stomper**, I know fucking Oso. I know fucking anybody you can think of that I know." He knows them all. That's one of the things they talk about because they brag about their crimes because that's how they get their respect. That's how they attain status in that gang is to brag about what happens to them, and that gets trickled down…

(Exhibit FFFFFFF, p. 84:6-15, emphasis added.)

Sadly, Geller was comfortable using Galarza's relationship with Henry Cabrera to bring home the point that Galarza was a Delhi gang member—knowing Cabrera was serving a life sentence based upon his membership in the Highland Street gang. Geller expressed outrage that Galarza would even dare suggest that he was not a member of the Delhi gang:

> Gang members brag about their crimes, plain and simple. And that's how the defendant knows about all these guys being locked up to support the point ultimately, as I said earlier, that he's lying to you when he says he's not Delhi. **He got up here and looked you folks in the eye and said: I'm not a Delhi gang member. And that's B.S.**

(Exhibit FFFFFFF, pp. 84:22-85:2, emphasis added.)

A Brief Analysis of the Impact of Systemic Brady Failings in *People v. Galarza*

Geller's closing was powerful, passionate and compelling. He expressed what seemed to be sincere disgust that Galarza would have the audacity to deny his membership in the Delhi gang, particularly when the counter to his purportedly self-serving testimony was a "seasoned," experienced and honest police officer in Rondou. Neither opposing counsel nor the jury would have any idea how far the scales of justice had been tipped because of the refusal of Geller and others to comply with their *Brady* obligations. The jury found Galarza guilty of first-degree murder for the benefit of the Delhi gang. He was sentenced to life without the possibility of parole. The Court of Appeal affirmed the decision on October 15, 2013.

What if prosecutors in the OCDA, including Geller, had actually respected the principles of *Brady* and the right of all defendants to a fair trial? The case would have probably taken a far different course if the following had occurred:

1) Geller admitted to Galarza that he had engaged in a conspiracy with Rondou and other prosecution team members to conceal *Brady* evidence that would have kept Henry Cabrera ("Stomper") from being wrongly found to have committed crimes for the benefit of the Highland Street Gang, resulting in a life sentence;
2) Geller revealed that even after Henry Cabrera was convicted, the prosecutor remained unwilling to share compelling evidence that would have shown that his conviction was wrongful;
3) Geller acknowledged that he had chosen not to prosecute Cabrera for special circumstance murder in order to cover up the wrongful convictions in *Henry Cabrera I* and *Henry Cabrera II*, and his complicity in those outcomes;
4) Geller, along with Rondou and others, shared that he had conspired to hide evidence that former supervising Detective Ronald Castillo had provided false testimony on at least one case, and likely two, in order to secure wrongful convictions against Henry Cabrera, with Geller being the prosecutor in one of those cases.
5) Petersen revealed that in two Delhi gang cases, he and Rondou had conspired with others to hide evidence that statements from Leonel Vega had been obtained illegally, in violation of *Massiah*;
6) Petersen disclosed that Rondou had committed perjury in *Vega* (which the prosecutor suborned) when he testified that he recorded all of his interviews, knowing that he had conducted multiple interviews with Oscar Moriel that were not recorded;
7) Petersen admitted that in *People v. Inmate I.*, he and Rondou were actively conspiring to hide entries in Moriel's notes that other Delhi gang members had admitted to committing one of the murders for which Inmate I. was charged.
8) Rondou hid from Ricardo Lopez and his counsel a note from Oscar Moriel indicating that another suspect may have been committed the murder for which

he was serving a life sentence;

This list above represents only a small sampling of the misconduct discussed in this motion, which prosecutors were required to disclose to Galarza per *Brady*. When the existence of this misconduct is examined alongside a case in which the defendant did not have the access to it, it becomes far easier to conceptualize the impact of a culture that encourages discovery violations and their concealment. The partial recitation of misconduct identified above also serves as an important reminder that while the conduct engaged in by the prosecution team in *Dekraai* was outrageous, it is not uncommon.

***People v. Gabriel Castillo* (07CF1098)**

Gabriel Castillo (hereinafter referred to as "Gabriel C." to avoid confusion with Detective Ronald Castillo) was arraigned on special circumstance murder allegations on February 29, 2008, for the October 11, 2007 murder of Jesus Segura. (Minutes in *People v. Castillo*, (Super. Ct. Orange County, No. 08CF0198), attached herein as Exhibit GGGGGGG.) Gabriel C. was charged with murder, street terrorism, gang and firearm use enhancements, and the special circumstance gang allegation. (Exhibit GGGGGGG.)

The trial in the case began in October of 2012, and thus pre-dates the trials of Brambila and Garcia. The assigned prosecutor was Deputy DA Jeanine Madera and the trial was heard by the Honorable Sheila Hanson. The prosecution case can be summarized as follows: Delhi gang member Jesus Rodriguez (aka "Balloon") was shot and paralyzed on August 11, 2007. (RT (trial), October 15, 2012, *People v. Castillo*, (Super Ct. Orange County, 2012, No. 08CF0198), attached herein as Exhibit HHHHHHH, p. 523:2-4.) Calderon testified for the prosecution. According to Calderon, Delhi members believed that Rafael Ochoa ("Clever"), from the rival gang Locotes, was responsible for Rodriguez's shooting. (RT (trial), Oct. 9 and 10, 2012, *People v. Castillo*, (Super. Ct. Orange County, 2012, No. 08CF0198); RT (trial), Oct. 10, 2012, *People v. Castillo*, (Super. Ct. Orange County, 2012, No. 08CF0198), attached herein as Exhibit IIIIIII, p. 59:14-18.)

Approximately three to four weeks after Rodriguez was shot, Rafael Ochoa and another Locotes member, Jesus Segura (known as "Troubles," who was the murder victim in *People v. Castillo*), shot at Calderon and another Delhi member nicknamed "Sleepy." (Exhibit IIIIIII, pp. 56:20-58:10.) According to Calderon, Locotes deserved "payback" for shooting at him and Calderon, as well as Rodriguez. (Exhibit IIIIIII, pp. 145:14-146:13.)

Calderon testified that on the day of Segura's murder, he was with Gabriel C. at an apartment building selling drugs. (Exhibit IIIIIII, pp. 60:23-61:26.) A little boy from the neighborhood approached Calderon and told him that a Locotes member was nearby. (Exhibit IIIIIII, p. 62:9-25.) According to Calderon, Gabriel C. then retrieved his glock 9 millimeter gun that was kept on the apartment grounds in case of an emergency. (Exhibit IIIIIII, pp. 63:4-17, 64:12-15.) Calderon stated that he wanted to do the shooting himself, but Gabriel C. insisted on doing it. (Exhibit IIIIIII, p. 63:4-17.) Gabriel C. then walked through the alley towards Segura. (Exhibit IIIIIII, pp. 65:22-25, 67:5-7.) Calderon followed Gabriel C., and from a short distance, saw Gabriel C. shoot and kill Segura. (Exhibit IIIIIII, pp. 66:11-20, 67:15-68:1.) Three or four hours later, Gabriel C. described the murder to Calderon. (Exhibit IIIIIII, pp. 74:2-77:26.) According to Calderon, Gabriel C. told him that Segura was a "ranker" because right before the shooting, Segura denied his gang affiliation when Gabriel C. asked him. (Exhibit IIIIIII, pp. 75:11-76:5.)

According to Calderon, while he was in custody—but prior to his first proffer—Gabriel C. accused him of providing information to the police. (Exhibit IIIIIII, p. 83:3-19.) On January 4, 2008, Calderon was arrested for murder in which he was a named defendant. (Exhibit HHHHHHH, p. 523:11-13.)

Jesus Pulido also testified for the prosecution. On January 11, 2008, he was arrested for possession for sale of cocaine base. (Exhibit HHHHHHH, p. 555:2-7.) One day later, and while Pulido was still in custody, Rondou interviewed him about the Segura murder. (Exhibit HHHHHHH, pp. 555:2-556:3.) During the interview, Pulido said he was present at the shooting and saw Gabriel C. kill Segura. (Exhibit IIIIIII, p. 273:16-18.)

On the stand, however, Pulido testified that he was on heavy drugs at the time of the shooting, his back was turned, and that he did not remember much about the incident. (Exhibit IIIIIII, pp. 200:6-8, 224:7-13, 233:10-11, 243:11-12.) He also testified that he is a long-time heroin user, and at the time of the shooting, he was using heroin approximately fifteen times a day. (Exhibit IIIIIII, pp. 233:24-26, 234:19-20.) Pulido further testified that when he was arrested on January 11, 2008, he swallowed the cocaine base to avoid detection, along with $100 worth of heroin, and thus he was still high when Rondou interviewed him the following day. (Exhibit IIIIIII, pp. 238:19-24, 239:2-25.) Additionally, Pulido confirmed that he was known as a "rat" in his neighborhood because he was always back on the streets after his frequent arrests. (Exhibit IIIIIII, pp. 241:2-242:9.) Pulido also testified that he wanted a good deal in his case, and that he asked Rondou during the interview about the Segura shooting and what he could get out of it. (Exhibit IIIIIII, pp. 237:25-238:8.)

Damien Galarza testified for the defense. Galarza said that one day after "Risky" was killed, he saw Calderon at a friend's house (Rolando Arevalo). (Exhibit IIIIIII, p. 418:2-16.) Per Galarza's testimony, Calderon said that he had shot and killed a "rat" (a derogatory term for an Alley Boys member), and described the murder weapon that was used. (Exhibit IIIIIII, p. 418:16-19.) Additionally, Galarza testified that he saw Calderon the same day that Jesus Segura was killed, October 11, 2007. (Exhibit IIIIIII, p. 421:4-9.) Galarza testified that Calderon said that he had "…finally [shot] that moco," which is a derogatory term for a Locotes gang member. (Exhibit IIIIIII, p. 421:21-26.) Galarza testified that Calderon falsely told the police that Galarza was the shooter in the case in which both defendants were charged. (Exhibit IIIIIII, p. 426:6-13.) Galarza also described the events preceding that shooting, which was consistent with his testimony in *People v. Galarza*. (Exhibit IIIIIII, pp. 394:25-418:1.)

Analysis of Brady Violations in *People v. Castillo*

Cases such as *People v. Galarza* and *People v. Castillo* illustrate how acts of

misconduct—much like those committed by the prosecution team in *People v. Dekraai*—undermine the credibility of each of the investigations and prosecutions handled by one who has broken legal or ethical principles. In *People v. Castillo*, it is entirely reasonable that the assigned prosecutor, Madera, was oblivious to the misconduct that will ultimately generate a reexamination of the trial proceedings and the validity of the verdict. *Brady* responsibilities, though, encompass the entire prosecutorial agency in which the assigned Deputy DA works, and all who serve that agency appropriately pay the price for those who commit misconduct.

The suppression of evidence related to Henry Cabrera was as significant to the case against Gabriel C. as any of the cases touched by Juan Calderon. While the prosecution had a second percipient witness in Pulido, he did not come forward immediately and was saddled with his own felony drug case when he implicated Gabriel C. Thus, Calderon's credibility was crucial for the prosecution's case. Moreover, Gabriel C.'s decision to call Galarza as a witness to a purported confession by Calderon brought back into play many of the same credibility issues that Galarza and his counsel had addressed in *People v. Galarza*, discussed in the previous case analysis.

Ultimately, Gabriel C. and his counsel were deprived of wide ranging evidence that would have damaged the credibility of Calderon and decimated the believability of Rondou.

Defense Theory and Argument

In the defense closing argument, counsel zeroed in on Calderon, arguing that he had the motive and willingness to kill Segura. (Exhibit HHHHHHH, p. 563:4-13.) He emphasized Calderon's admission that Segura had previously shot at him and that Segura was believed to have been involved in the shooting of "Balloon." (Exhibit HHHHHHH, p. 563:6-10.) Counsel stated the following with regard to Calderon:

> So we talked about these things. And we talk about his cases, his participation in all of these crimes, because we're trying to show you that he is not a credible person. We're trying to show you that he's a person of bad moral turpitude. That he is – and all these things that he's involved in you

should know about to determine for yourself whether you're going to believe this guy or not. Okay.

Exhibit HHHHHHH, p. 564:2-9.)

Counsel ultimately focused on the Ruben Cabanas murder, assailing Calderon for his claim "…that he forgot and he just now is thinking six months later that he was at a homicide that occurred around Thanksgiving is ludicrous." (Exhibit HHHHHHH, p. 569:1-3.)

Counsel concluded his argument by reiterating that the jury's decision came down to whether Calderon and Pulido had been truthful:

> Juan Calderon certainly – most certainly, you're not going to say that he's the standard, that his testimony was credible; that he's the person that the People should rely on for presenting their case and asking you to find proof beyond a reasonable doubt. They're gone. They don't have those two people. If you don't find the testimony of those individuals credible, then there's no case. It's gone. And that's what I'm asking you to find. Thank you.

(Exhibit HHHHHHH, p. 572:12-20.)

A Prosecutor's Closing Argument Protected by Misconduct

To appreciate how concealed misconduct and discovery violations can effectively cloak a prosecution case and a prosecutor's arguments with undeserved credibility, it is helpful to examine selected comments by Madera.

Madera vouched for Calderon's honesty: "He was honest on the stand." (Exhibit HHHHHHH, p. 530:23.) In her final remarks she emphasized the same point, asserting that both Calderon and Pulido were to be believed:

> Here's the question. Do you believe them? Because if you do, then the defendant needs to be held responsible for his actions. He gunned down another human being. He did it for the glory of his gang. And beyond a reasonable doubt two people that know the defendant put him there without a doubt.

(Exhibit HHHHHHH, pp. 581:26-582:6.)

However, Gabriel C. was without critical evidence that may have allowed jurors to reach a different conclusion about Calderon's credibility. Gabriel C. was entitled to receive evidence that one of the supervising gang experts for SAPD, Ronald Castillo, provided testimony that was wholly inconsistent with Calderon's depiction of his role in the Cabanas

murder. This is particularly significant, because Attorney Osajima asserted that Calderon was minimizing his role and responsibility in that murder. In Calderon's proffer and prior testimony he had suggested that during the Cabanas murder he was effectively under control of the more established Delhi participants in that crime, Augustin Abonce and Henry Cabrera.

Detective Castillo's testimony in *Henry Cabrera II* is completely at odds with Calderon's description of Henry Cabrera's role in the Delhi gang and therefore is relevant to Calderon's credibility. It should be emphasized that the findings in this motion suggest that Castillo was clearly wrong when he opined in both of Henry Cabrera's cases that Cabrera was a Highland Street gang member. However, Gabriel C. and his counsel were entitled to analyze Castillo's opinions and evidence of Cabrera's gang membership for themselves. Further, even if at the time of Gabriel C.'s trial the OCDA believed that Castillo was wrong about Cabrera, it does not permit the prosecution to conveniently hide Castillo's opinion in cases where it would be helpful to the defense. Gabriel C. and his counsel should have been provided with all of the gang evidence that purportedly supported Castillo's opinion about Henry Cabrera's membership in Highland Street in December of 2007 and earlier. A study of the previously referenced discovery provided by Damien Galarza to Dekraai suggests that Gabriel C. never received any materials related to Cabrera's gang membership. (Exhibit A.)

Madera also argued that it was simply not believable that the government was in possession of exculpatory evidence that would have assisted Gabriel C. She stated the following:

> If there was any evidence out there that someone had pointed to Mr. Calderon as the shooter, you would have heard it. If there was any evidence out there where somebody had given a description that matched Mr. Calderon as the shooter, you would have heard it. (Exhibit HHHHHHH, pp. 534:9-10; 529:19-23.)

A few minutes later she emphasized that if there had been more than met the eye in regards to what Pulido received (or would receive) from the government for his assistance

in the case, this would have been disclosed:

> …Corporal Rondou told you, "Yeah, I didn't end up talking to anybody. He didn't get any deal. He didn't get anything about [*sic*] it." And if there had been anything more than just a brief mention of it, again, you would have heard it.

(Exhibit HHHHHHH, p. 534:6-10.)

By making these arguments, Madera had, unwittingly, stepped in to the principal consequence of the systemic failure of the OCDA and local law enforcement to provide mandated discovery; there is absolutely no reason to trust that the prosecution or its investigators would turn over *Brady* evidence relevant to any issues in this case or many others. Based upon Rondou's repeated acts of misconduct detailed throughout this motion, he should never be relied upon as a credible witness. But because of the systemic failure of the OCDA with respect to its *Brady* obligations, counsel for Gabriel C. was unaware of Rondou's misconduct. The partial list of discovery failures enumerated earlier in the discussion of *People v. Galarza* is equally relevant to *Gabriel C*.

B. LEGAL ANALYSIS

The impact on the criminal justice system of the numerous acts of misconduct described within this motion is yet to be determined. But the impact on this case is readily identifiable and devastating to Dekraai's ability to receive a fair adjudication of the penalty phase. The deception and concealment of the Dekraai prosecution team is the very embodiment of outrageous governmental conduct.

In *People v. Moore* (1976) 57 Cal.App.3d 437, the defendant was arraigned on felony theft charges and an attorney was appointed to represent him. Defendant attempted to contact a district attorney investigator who previously sought his cooperation in investigating organized crime, but instead spoke with a different investigator. That investigator, with the approval of prosecutors, met with defendant in the jail and came to an agreement with the defendant to work undercover investigating organized crime and to testify in an unrelated robbery trial. In return, the defendant was to be released from custody, the fact of his cooperation would be conveyed by the prosecution to his

sentencing judge, and the defendant was led to believe that if his efforts resulted in the arrest and conviction of a specific person, his case would receive additional benefits. (*Id.* at p. 440.)

Defendant's attorney was not informed of the deal. In fact, defendant was told not to inform his attorney about anything. One of the investigators falsely told defendant his attorney was inadequate and previously disbarred. Additional meetings were held between defendant and law enforcement without knowledge of his attorney. Defendant testified at the robbery trial and then did extensive undercover work. He was told not to appear for his scheduled trial date and to give his attorney a fake phone number so the attorney could not reach him. After testifying in another case for the prosecution, defendant was beaten by four men, shot at, and two contracts were placed on his life. After later being arrested for a parole violation, defendant was not released from custody to prevent him from attending his trial readiness conference. As a result, his attorney believed he failed to appear and a bench warrant was issued. After defendant's original attorney was replaced due to illness, the trial court granted defendant's motion to dismiss on the grounds he was denied due process of law and effective aid of counsel. (*People v. Moore, supra,* 57 Cal.App.3d at p. 441.) The prosecution appealed.

The prosecution claimed defendant was not denied the aid of counsel at a critical stage of the proceedings because no plea bargain was achieved and its use of defendant was for purposes unrelated to his case. (*People v. Moore, supra,* 57 Cal.App.3d at p. 441.) The Court of Appeal rejected this claim, noting that during the entire time period defendant was entitled to the assistance of counsel. (*Ibid.*) Not only did the prosecution make no efforts to inform defendant's lawyer of the arrangements, it also sullied the attorney-client relationship by falsely maligning defendant's lawyer. As such, speculation about whether defendant would have been able to achieve a favorable plea bargain was unnecessary because the violation occurred when his attorney was prevented from trying to do so. (*Id.* at pp. 441-442.) The prosecution also argued its intrusion into defendant's right to counsel

was akin to a *Miranda* violation, and as such his remedy was not dismissal but rather the exclusion from his trial of any evidence gained by their acts. (*Id.* at p. 442.) The court also rejected this argument, holding:

> This is not a case where the [prosecution] have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of *Miranda* rights is tainted evidence, and the exclusionary rule is adequate to cope with the violation. [¶] Here the [prosecution] actively interfered with an attorney-client relationship established to defend [defendant] against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of [defendant's] right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is [defendant's] right to counsel.

(*People v. Moore, supra,* 57 Cal.App.3d at p. 442.)

Finally, noting that due process "is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice," the court observed that the right to counsel can be violated under circumstances which do not constitute an outright deprivation of counsel. (*People v. Moore, supra,* 57 Cal.App.3d at p. 442.) Because the prosecution intentionally undermined defendant's right to counsel, the dismissal was an appropriate remedy. (*Id.* at pp. 442-443.)

In *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, defendant was charged with selling cocaine and hired Attorney S. to represent him. Defendant (through an intermediary) contacted the police to see if they were willing to offer a plea bargain in exchange for his cooperation, but defendant did not inform his attorney. The prosecution agreed to make a deal, but only if defendant would replace Attorney S. with a lawyer who was acceptable to the prosecution. Defendant fired Attorney S. and attempted to hire a new attorney the prosecution specifically said was acceptable. After speaking with the prosecutor and learning defendant was going to cooperate with law enforcement, the new attorney declined the representation. Without representation by counsel, defendant provided detailed information to the prosecution about drug dealers. The prosecution subsequently told defendant it was no longer interested in a plea bargain, and defendant

rehired Attorney S., but failed to tell him about the previous agreement. Defendant eventually obtained a new lawyer and advised him of everything. The new lawyer invited the trial court to dismiss the case under Penal Code section 1385, arguing law enforcement's conduct interfered with his right to counsel and to a fair trial. Although the trial court found a clear violation of the right to counsel, it did not dismiss the case because it believed defendant was not prejudiced and could be adequately protected by excluding the fruits of any inculpatory information obtained by law enforcement from its intrusion into defendant's relationship with Attorney S. (*Id.* at pp. 428-429.) Defendant sought writ relief.

The Court of Appeal began its analysis by noting there was no question that defendant's right to counsel was impaired by law enforcement's actions. (*Boulas v. Superior Court, supra,* 188 Cal.App.3d at p. 429.) The only issue was whether dismissal was an appropriate remedy. (*Ibid.*) The prosecution claimed that mere governmental intrusion into the attorney-client relationship does not necessarily require dismissal, and that defendant was not prejudiced because he currently had competent counsel and no information relating to the present charges was obtained by law enforcement. (*Id.* at p. 430.) The court rejected this claim, explaining "[t]he prosecution's argument fundamentally misunderstands the scope and breadth of the state's invasion of [defendant's] right to be represented by counsel of choice." (*Ibid.*) Further, "[i]t is not always easy to compute the effect of governmental tampering with the attorney-client relationship. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' [Citations.]" (*Id.* at p. 431.) The court also found it significant that the interference with the right to counsel was accomplished with the prosecution's help. (*Id.* at pp. 431-433.) With respect to exclusion rather than dismissal being an appropriate remedy, the court held the following:

> The remedy of exclusion of evidence is inadequate in instances of intentional subversion of the attorney client relationship by governmental

> agents. "An exclusionary remedy is not only ineffective as a deterrent, but the problems of proof inherent in the remedy when applied to violations of the right to counsel would be inadequate to assure that the prosecution does not benefit from the illegality. [Citation.]" .... [¶] No relief, such as suppression or reversal of conviction, would remedy the violation. Furthermore, considering the extent and seriousness of the conduct of those in positions of authority and public trust, we find the grave sanction of dismissal to be the sole appropriate remedy for intentional and calculated violation of [defendant's] rights.

(*Boulas v. Superior Court, supra,* 188 Cal.App.3d at p. 434.)

In *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, the defendant was in custody and charged with a felony. On the day the case was set for trial, the prosecutor told defendant's attorney that he had no defense because an alibi witness recanted. She told the attorney she would have to cancel an upcoming vacation if the case went to trial, and as such she wanted either a guilty plea or a time waiver and continuance. The attorney said she would talk to defendant and went into the courtroom holding area to do so. The door to the holding area was slightly ajar, and the prosecutor told her investigator to sit next to the holding cell and listen to the conversation between defendant and his attorney. The investigator appeared to do so. Defendant refused to waive time but the trial was continued over defendant's objection. The next day the bailiff told the judge what happened and wrote a crime report. Investigations were conducted by the prosecutor's office and the Attorney General, and the prosecutor and investigator were removed from the case. After the prosecutor and investigator offered inconsistent accounts of their actions, the Attorney General filed charges against the prosecutor and investigator for eavesdropping, but those charges were dismissed. Defendant filed a motion to dismiss based upon prosecutorial misconduct and an evidentiary hearing was conducted. The prosecution did not dispute any of the facts; rather, it argued that dismissal was inappropriate because defendant was not prejudiced by the misconduct. The trial court ruled that dismissal was not appropriate because defendant was not prejudiced. Defendant sought writ relief.

The Court of Appeal began its analysis by finding that in addition to violating the Sixth Amendment right to counsel, the prosecution's actions violated a number of other

state and federal constitutional rights, including the right of due process. (*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1259.) The court was particularly troubled by the fact that the misconduct was not committed solely by a peace officer but also a prosecutor. (*Id.* at pp. 1260-1261.) Significantly for the issue here, the court found that even when the issue was narrowed to a Sixth Amendment violation, dismissal was still an appropriate remedy because there was a "substantial threat of demonstrable prejudice" as a matter of law. (*Id.* at p. 1261, citing *United States v. Morrison* (1981) 449 U.S. 361, 365.) Thus, the court held:

> [T]he harm is apparent and the substantial threat of demonstrable prejudice is inherent. There must be an "... incentive for state agents to refrain from such violations. [Citation.]" The instant violation is not a "no harm no foul" situation. Past cases recognize that per se dismissal may be appropriate under certain circumstances.

(*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1263, fn. omitted.)

The court concluded its opinion by noting "[w]e would be remiss in our oaths of office were we to discount or trivialize what happened here. [Citation.] The judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process of law, and basic fairness. What has happened here must not happen again." (*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1263.)

In the instant case, as in the three cases above, the prosecution team engaged in outrageous governmental conduct. This outrageous governmental conduct has impaired Dekraai's Sixth Amendment right to counsel, violated his due process rights, and deprived him of the ability to receive a fair trial during the penalty phase. The prosecution team's actions here certainly demonstrate outrageous governmental conduct to a much higher degree than the misconduct found to merit a dismissal in *Moore, Boulas,* and *Morrow.* Because of this misconduct, the prosecution simply cannot be trusted to turn over exculpatory or helpful evidence to the defense. As a result, as in *Moore, Boulas,* and *Morrow,* the remedy for this misconduct is a dismissal. Because of the strength of the guilt phase of the case, the outrageous governmental conduct had to have been committed for

the penalty phase. Consequently, the appropriate remedy here is to dismiss the special circumstances allegations or alternatively prohibit the prosecution from seeking the death penalty.

II. LAW ENFORCEMENT'S MISCONDUCT VIOLATED DEKRAAI'S STATE AND FEDERAL DUE PROCESS RIGHTS, REQUIRING DISMISSAL OF THE SPECIAL CIRCUMSTANCES ALLEGATIONS OR THE DEATH PENALTY.

In addition to constituting outrageous governmental conduct, the prosecution team's actions also violated Dekraai's state and federal due process rights. Although outrageous governmental conduct claims are rooted in due process, appellate courts have analyzed claims of outrageous governmental conduct and substantive due process violations differently. (See, e.g. *People v. Uribe, supra,* 199 Cal.App.4th at p. 861.)

The Due Process Clause specifically protects those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721, citations omitted.) Substantive due process has historically been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, and to prevent the arbitrary and oppressive exercise of government power. (*People v. Uribe, supra,* 199 Cal.App.4th at p. 862.) "[T[he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips* (1982) 455 U.S. 209, 219.)

In the instant case, as detailed previously, the prosecution's misconduct goes to the heart of the fairness of the penalty phase of the trial. *People v. Alexander* (2010) 49 Cal.4th 846 is illustrative of why. In *Alexander*, the defendant claimed he was entitled to a dismissal based on a due process violation because of law enforcement's interception of a confidential phone call between defendant, his mother, and a defense investigator. The court rejected this claim because "there was no evidence of an unjustifiable intent to harm

defendant by invading his attorney-client privilege." (*Id.* at p. 893.) By contrast, here all of the actions of the prosecution team with respect to Inmate F. were designed specifically to invade Dekraai's Sixth Amendment right to counsel. Further, in order to implement the plan, the prosecution has intentionally concealed evidence from the defense that would have revealed its misconduct. And just in case there was any doubt the concealment was intentional, the prosecution eliminated that doubt by doing the same thing in previous cases involving the custodial informant program. Finally, the prosecution team committed a separate *Massiah* violation, submitted a false and misleading search warrant affidavit, and intentionally ignored a court order, all in an attempt to unlawfully obtain Dekraai's psychological records.

The prosecution's misconduct here rises to the level of a due process violation because its actions in this case and in previous cases involving the custodial informant program cannot leave this Court with any confidence the prosecution can be trusted. The essence of the right to due process is the ability for the accused to receive a fair trial. The lack of trust caused by the prosecution team's multiple acts of misconduct means Dekraai cannot receive a fair trial in the penalty phase of this case. Consequently, this Court should preclude the prosecution from seeking the death penalty against Dekraai as a remedy for the due process violation.

III. THIS COURT SHOULD DISMISS THE SPECIAL CIRCUMSTANCES ALLEGATIONS OR THE DEATH PENALTY UNDER ITS INHERENT JUDICIAL POWER AS A REMEDY FOR LAW ENFORCEMENT'S MISCONDUCT.

Apart from any statutory authority, California courts have inherent supervisory powers which are derived from the state Constitution. (*Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1174.) These broad administrative powers include the right to conduct the court's business to ensure the rights of all parties before the court are safeguarded. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1248.) This inherent power "arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function. [Citations.]" (*In re Amber S.*

*(*1993) 15 Cal.App.4th at 1260, 1264.)

Here, in addition to precluding the prosecution from seeking the death penalty because of the outrageous governmental conduct and due process violation, this Court should also preclude the death penalty under its inherent judicial power because no other remedy can allow Dekraai to receive a fair hearing in the penalty phase of the trial.

Illustrative of this concept is *Stephen Slesinger, Inc. v. Walt Disney Co. (*2007) 155 Cal.App.4th 736. In *Slesinger,* an investigator hired by the plaintiff committed numerous illegal acts in gathering confidential documents from the defendant, including breaking into the defendant's offices, stealing its trash from secured facilities, and trespassing onto the facility of a company hired by the defendant to destroy its confidential documents. After concluding that no lesser sanction could adequately protect the defendant from the plaintiff's use of the illegally obtained materials, the trial court dismissed the action as a sanction for the plaintiff's misconduct. The Court of Appeal affirmed the dismissal, holding that a California court may, "when faced with pervasive litigation abuse, use its inherent judicial power to dismiss the action." (*Id.* at p. 758, italics omitted.)

The *Slesinger* court observed that the doctrine of inherent judicial power developed early in English common law and was embraced by early American courts. (*Stephen Slesinger, Inc. v. Walt Disney Co., supra,* 155 Cal.App.4th at p. 758.) And from their creation by the California Constitution, California courts also possess broad inherent power which is not derived from nor dependent upon a statute. (*Ibid.*) Included in this inherent judicial power is the authority to dismiss an action. (*Ibid.*) "[T]he existence of inherent power to terminate litigation for deliberate and egregious misconduct -- conduct that makes lesser sanctions inadequate to ensure a fair trial -- is essential for the court to preserve the integrity of its proceedings." (*Id.* at p. 761.) The court went on to discuss when such a sanction is appropriate.

> The essential requirement is to calibrate the sanction to the wrong. Whether the misconduct violates a court order is relevant to the exercise of inherent power, but it does not define the boundary of the power. [Citations.] The decision whether to exercise the inherent power to dismiss requires

> consideration of all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the courts as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm.

(*Stephen Slesinger, Inc. v. Walt Disney Co., supra,* 155 Cal.App.4th at p. 764, fn. omitted.)

Although *Slesinger* is a civil case, the court's inherent power to dismiss is equally applicable to a criminal case. (*People v. Uribe, supra,* 199 Cal.App.4th at p. 884, fn. 23 [a court may dismiss a criminal case to address egregious prosecutorial misconduct that is prejudicial to a defendant's right to a fair trial.].) Here, precluding the prosecution from seeking the death penalty is a precise "calibrat[ion of] the sanction to the wrong." The "wrong" takes many forms, including concealing evidence, misleading judges, and intentionally violating Dekraai's right to counsel. As demonstrated by the misconduct in previous cases involving the custodial informant program, the misconduct is egregious and deliberate, spanning a number of years and infecting a number of cases. And the misconduct is exacerbated by public claims of the defense inflicting additional pain and suffering on the victims' families through unnecessary delays, when the delays are solely the product of the prosecution withholding critical evidence, misleading courts and counsel, and the time spent by the defense to uncover the misconduct. Finally, as in *Slesinger,* no other sanction can remedy the harm. Dekraai recognizes preclusion of the death penalty is an extreme sanction. However, what other sanction can remedy the harm caused to the defense in the penalty phase by the prosecution's egregious and pervasive misconduct? That the prosecution chose to commit such misconduct in a case with such overwhelming evidence of guilt speaks volumes about the lengths the prosecution will go in order to obtain the result it wants. Consequently, as in *Slesinger,* this Court should preclude the prosecution from seeking the death penalty under its inherent judicial power.

IV. THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND STATE CONSTITUTION.

The United States Supreme Court has made it clear in a series of decisions that the death penalty is constitutionally imposed only in cases in which the jury is given, and is allowed to consider, potential mitigation evidence. It is the jury's ability to consider mitigation that prevents capital punishment from being inflicted capriciously or arbitrarily.

As a result of the wanton and repeated acts of misconduct detailed herein, the prosecution has proven that it cannot be relied upon to comply with its legal obligation to turn over evidence that is helpful to the defense and relevant to issues of mitigation and aggravation. The prosecution's contempt for its discovery obligations in this case has particularly serious implications for the jury's consideration of mitigation evidence and the ten allegations filed in aggravation pursuant to section 190.3.

The prosecution brought significant energy and investigative resources to issues of mitigation and aggravation in this case. Of course, as has been detailed, they aggressively sought evidence highly relevant to the penalty phase of these proceedings. Their misconduct in obtaining the evidence and secreting evidence that would be damaging to its admissibility is described in this motion and suggests that the prosecution will stop at nothing to acquire or conceal evidence to enable them to achieve their objective of obtaining a death verdict.

Additionally, the OCDA is the sole investigating agency for the ten incidents that support the enumerated acts in aggravation, pursuant to section 190.3. (People's First Amended Notice of Aggravation Evidence (Penal Code section 190.3) submitted May 2, 2013, *People v. Dekraai* (Super. Ct. Orange County, No. 12ZF0128), attached herein as Exhibit JJJJJJJ.) These allegations have potentially devastating implications for the penalty phase, because they support a prosecution theory that Dekraai's acts were not a one-time explosion of rage but rather the final and most extreme act of violence in a significant pattern. None of these incidents were previously adjudicated, which makes the reliability of the investigation and discovery practices by the Dekraai prosecution team

pertaining to these incidents critically important.

The other essential aspect of their investigation of the alleged acts in aggravation is that all but the last of the ten allegations center upon incidents with individuals closely connected to Dekraai's life or that pertain to important personal moments in his life. The following is a very brief summary of the alleged incidents:

1. Battery causing great bodily injury (section 243, subdivision (d)): This incident allegedly took place in September of 1995 and involved an alleged assault upon Dekraai's ex-wife, Kristen W.

2. Battery against spouse (section 243, subdivision (e)): This incident allegedly took place in May of 1998 and also allegedly involved an assault upon Kristen W.

3. Criminal Threats, Brandishing Handgun, Assault with Deadly Weapon (sections 422, 417, subdivision (a)(2), 245, subdivision (a)(2)): Dekraai allegedly waved a gun at his wife and threatened to kill his ex-wife Michelle Fournier if she did not leave the house. Fournier was killed in the shooting on October 12, 2011. The principal witness to this crime is Chelsea Huff, Fournier's daughter and the individual who has custody of Dekraai and Fournier's child.

4. Battery (section 242): The prosecution alleges that Dekraai assaulted Monte Moore between September 2004 and March 2005. Moore, who is no longer living, is defendant's step-grandfather and was an integral part of his childhood and young adulthood.

5. Criminal Threats (section 422): It is alleged that between November of 2004 and March of 2005, Dekraai threatened Darlene B. Darlene B. was a friend of Moore, who had increased her role in Moore's life in the several years preceding his death. The relationship between Darlene B. and Dekraai turned contentious prior to Moore's passing, as the two had disputes over the method of care for Moore and many other issues.

6. Criminal Threats (section 422): The Notice in Aggravation alleges additional threats made against Darlene B. to bring great bodily harm.

7. Criminal Threats (section 422): The Notice in Aggravation alleges additional threats made against Darlene B. to bring great bodily harm on or about May 12, 2005.

8. Battery (section 242): It is alleged that on or about August 19, 2007, Dekraai "argued with [Leroy H.] and punched him repeatedly, causing bruises." Leroy H. is Dekraai's stepfather during most of Dekraai's childhood and resided with the alleged victim.

9. Criminal Threats (section 422): The Notice in Aggravation alleges additional threats made against Darlene B. to bring great bodily harm on or about October 2, 2009.

Has the prosecution shared information material and helpful to Dekraai related to these allegations, or which may have been obtained during the course of these investigations, and is helpful and material to mitigation? The prosecution's concealment of evidence as demonstrated throughout this motion supports one reasonable conclusion: there is an extremely high likelihood that the prosecution team has hidden favorable and material evidence related to issues of aggravation and mitigation.

The concerns raised above regarding the prosecution's willingness to disclose mitigating evidence to Dekraai discovered during the prosecution team's investigation of the aggravating factors are not the only reason why imposition of the death penalty would constitute cruel and unusual punishment. The prosecution's continual efforts to inflame potential jurors, as detailed in this motion, have also effectively denied Dekraai the right to be free from cruel and unusual punishment. This effort has been accomplished by repeatedly contrasting a conscientious prosecution with a defense team that is not only insensitive to the pain of victims' families, but also creates delays to simply frustrate the judicial process. Remarkably and unconscionably, the prosecution has made these efforts while hiding significant *Brady* materials—and it is their concealment that has and will continue to be the cause of significant delays in this case.

In *Furman v. Georgia* (1972) 408 U.S. 238, a plurality of the Supreme Court held that the death penalty violated the Eighth Amendment because of its capriciousness. In so holding, Justice Stewart noted:

> The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is

embodied in our concept of humanity.

(*Id.* at p. 306 (conc. opn. of Stewart, J.).)

Following *Furman*, a number of states enacted new death penalty legislation in an effort to meet the concerns of the Court. The Court examined those statutory schemes in *Gregg v. Georgia* (1976) 428 U.S. 153, and a number of companion cases. The Court focused first on what it found offensive in pre-*Furman* laws:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

(*Id.* at p. 189.)

The Court then set forth its solution:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

(*Id.* at p. 195.)

In this respect, the Court noted: "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (*Id.* at p. 204.)

The Supreme Court made the importance of an informed jury making the sentencing decision in capital cases clear in *Gregg*'s companion cases. In *Woodson v. North Carolina* (1976) 428 U.S. 280 and *Roberts v. Louisiana* (1976) 428 U.S. 325, the Court held that mandatory death sentence statutes were unconstitutional because these statutes did not permit the consideration of information that might cause a jury to believe that the appropriate punishment in a given case was not death:

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> In *Furman*, members of the Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree. [Citations.] A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. [¶] ...While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eight Amendment, [citation], requires consideration for the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. [¶] This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. **Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."**

(*Woodson v. North Carolina, supra,* 428 U.S. at pp. 303-305, emphasis added, fn. omitted.)

Throughout the years since *Gregg*, one of the issues consistently addressed and emphasized by the Court has been the importance to the constitutionality of the death penalty of allowing the jury to consider any possible mitigating evidence. In *Lockett v. Ohio* (1978) 438 U.S. 586, the Court struck down an Ohio statute which made death mandatory unless the trial judge found that one of the limited and narrow mitigating factors enumerated in the statute were established by the defendant. The Court found that this scheme impermissibly limited the mitigating factors that the sentencer should be allowed to consider in determining whether death was the appropriate penalty. (*Id.* at pp. 604-605.) The Court noted that the risk inherent in Ohio's statute was that a defendant might be sentenced to death despite the existence of other mitigating factors which may support a less severe penalty. (*Id.* at p. 605.) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth

Amendments." (*Ibid*.)[59]

This requirement of a sentencer being allowed to consider any mitigating factors in order for a death sentence to pass constitutional muster is a common theme in the Court's death penalty jurisprudence. In *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116, the Supreme Court reversed a death sentence because the trial court refused to consider as mitigating factors any facts which did not constitute a legal excuse for the crime. In *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8, the Court held that it violated the Eighth Amendment to disallow presentation in the penalty phase of evidence about the defendant's ability to adjust to prison. In *Wiggins v. Smith* (2003) 539 U.S. 510, 534-538, the Supreme Court reversed a death sentence based on ineffective assistance of counsel because defendant's attorney did not completely investigate potential mitigating evidence. In *Rompilla v. Beard* (2005) 545 U.S. 374, 390-393, the Court reversed a death sentence because defense counsel did not adequately investigate the aggravating evidence introduced by the prosecution at penalty phase.

Thus, the Supreme Court has repeatedly held that the Constitution requires a jury to be in possession of all potential mitigating evidence at the time it makes its sentencing decision. Put simply, the difference between a jury given the information necessary to assess whether death is appropriate in a given case and a jury which is not given that information (or is not allowed to use it) is the difference between a death sentence which satisfies the Eighth Amendment and one which violates it.

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[59] Similarly, the Supreme Court reversed death sentences in *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399, *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, and *Penry v. Johnson* (2001) 532 U.S. 782, 803-804, because the sentencer was limited in the mitigation evidence it could consider.

> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [Citations.] That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. [Citations.]

(*Tuilaepa v. California* (1994) 512 U.S. 967, 972.)

In *Beck v. Alabama* (1980) 447 U.S. 625, 627, the Supreme Court held that an Alabama statute prohibiting trial courts from giving juries in capital cases the option of convicting defendants of lesser included offenses when supported by the evidence violated the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment. In so doing, the Court noted that failure to instruct on lesser included offenses created the risk of an unwarranted conviction. (*Id.* at p. 637.) It went on to state:

> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments: [¶] "[D]eath is a different kind of punishment from any other which may be imposed in this country … From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. [Citation.]" [¶] To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

(*Id.* at pp. 637-638, fn. omitted.)

Because a penalty trial is the individualized determination of appropriate punishment, and because the decision as to penalty is based on individual jurors' assessment of the correct balance between aggravation and mitigation, the repeatedly demonstrated commitment of the prosecution team to hide evidence helpful and material to the defense creates an unjustifiable risk that the prosecution has hidden mitigating evidence and/or evidence helpful to the defense as related to the aggravating factors alleged in this

case. Any penalty phase in the case at bar would thus run the risk of resulting in a capricious and arbitrary result because the jury will not have the necessary evidence to consider before making such an irrevocable and weighty decision. If Dekraai is to be sentenced to death, it should be because the facts and circumstances warrant it, not because the prosecution will stop at nothing to achieve a death verdict. As the United States Supreme Court has consistently held, death is different, and thus should not, and cannot, be imposed when the jury is not given all appropriate mitigating evidence. Because 1) there is no reasonable assurance that the prosecution team will disclose evidence favorable and material pertaining to issues of mitigation and aggravation, and 2) the prosecution has unfairly inflamed the jury pool against Dekraai for continuances in this case, it would be a violation of the proscription against cruel and unusual punishment to sentence Dekraai to death. Therefore, the prosecution must be precluded from seeking a death sentence in the case at bar.

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CONCLUSION

This motion has detailed the repeated and shocking acts of misconduct that the Dekraai prosecution team has committed, as well as the misconduct of other prosecution teams, which reveal a culture that devalues defendants and their right to a fair trial. However, while the requested sanction will help ensure that what has been documented in this motion will not be repeated, that is not the principal reason to impose it.

Ultimately, this Court's analysis should return to the issue of trust. Can the Dekraai prosecution team be trusted to turn over evidence that is material and helpful to the defense, related to the penalty phase of this case? The truth is that Dekraai cannot receive a fair hearing in the penalty phase, and consequently, the only remedy is to preclude the prosecution from seeking death.

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Respectfully submitted,

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