MARTIN SCHWARZ
Public Defender
Orange County
SCOTT SANDERS
Assistant Public Defender
State Bar No. 159406
801 West Civic Center Drive, Suite 400
Santa Ana, California 92701

Telephone: (657) 251-6090
Fax: (714) 479-0825

*Attorneys for Defendant Paul Gentile Smith*

Dept. C-41
Pre-trial: September 8, 2023



**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br>*Plaintiff,*<br>v.<br>PAUL GENTILE SMITH<br>*Defendant.* | Case No.: 09ZF0071<br>**REDACTED** MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENTAL CONDUCT; REQUEST FOR EVIDENTIARY HEARING; POINTS AND AUTHORITIES. |

**NOTICE IS HEREBY GIVEN** that on September 8, 2023, or as soon thereafter as counsel may be heard in Department C41 of the above-entitled court, Defendant Paul Smith will move to dismiss the indictment with prejudice based upon the attached Points and Authorities, argument of counsel, and any evidence introduced at the hearing.

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## INTRODUCTION

Defendant describes in this motion, and will establish at an evidentiary hearing, how members of the prosecution team[1] in this case committed outrageous governmental conduct by 1) concealing numerous items of evidence and producing false and misleading evidence in order to secure Paul Smith's 2010 conviction for special circumstances murder, and 2) carrying out a fourteen-year cover-up of historic proportions. The acts described below have irredeemably eroded Smith's right to a fair re-trial, unfairly delayed Smith's re-trial, and eviscerated any reasonable belief that all favorable and material evidence will ever be disclosed to this defendant. The only appropriate remedy is dismissal.

The wrongdoing has been carried out through individual acts, as well as those committed in furtherance of a criminal conspiracy[2] led by former Senior Assistant Orange County District Attorney ("OCDA") Ebrahim Baytieh, and which included former Orange County Sheriff's Department ("OCSD") Sergeant Raymond Wert, former Sergeant Donald Voght, and former Investigator Bill Beeman. Additionally, Sergeant Anton Pereyra, Sergeant Michael Padilla, Sergeant Michael Carrillo, and Captain Joseph Sandoval

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[1] When Defendant refers to the "prosecution team" or the "prosecution" in this case, he is referring to the trial prosecutor and the law enforcement personnel that participated in the case investigation leading up to Smith's 2010 conviction.

[2] The crime of federal conspiracy is defined by Section 371 of Title 18 as occurring when "two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." When Defendant refers to the conspiracy committed by the *Smith* prosecution team, he is referring to their conspiracy to violate Section 242 of Title 18. Under Section 242, it is a crime whenever a person acting "under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States[.]"

participated in acts that facilitated violations of Defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.[3]

All of these individuals share particular traits: a belief that they and their colleagues are above the law, a disrespect for the rights of the accused, and a lack of courage to tell the truth when doing so would be personally damaging or damaging to the perception of them by those they value. For the leader, Baytieh, the combination of an addiction to winning and a desperate need to protect his long-cultivated image as an honorable and ethical prosecutor fueled misconduct that has been nothing short of diabolical. Baytieh understood that a successful cover-up would require not only doing everything in his power to ensure Smith died in prison without discovering the truth, but violating the due process rights of each and every defendant perceived as posing even a slight threat to his impunity. He never hesitated.

## I. First Phase of the Misconduct: Massive Pre-Trial Concealment

The first phase of the misconduct directed at Smith was carried out prior to his 2010 trial and conviction, during which time **the prosecution withheld at least 15 items of evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83, and Penal Code ("PC") Section 1054. Most significantly for purposes of this motion, nearly all of these items were unearthed in the last two years—<u>after</u> the new trial was ordered**. A number of items remain undisclosed.[4]

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[3] Whether they also joined the conspiracy to conceal evidence will be determined at the requested hearing if they testify willingly or with a grant of immunity. The defense has attempted to interview each of the above-listed members of law enforcement. Each has refused directly or failed to respond to inquiries. (Declaration of Attorney Scott Sanders, attached herein as Exhibit A1.)

[4] Exh. A1.

The specific objectives of the pre-trial concealment included preventing the defendant from ever realizing the following:

a) Inmates Jeffrey Platt and Paul Martin were undisclosed informants who had been secretly assigned to Smith's dayroom along with veteran informant Arthur Palacios so that they could question the defendant about his charged murder in blatant violation of the Sixth Amendment;

b) Platt told investigators in a recorded interview how the three informants repeatedly questioned Smith about the crime, which led Baytieh and his prosecution team to bury the recording, the related report, and all evidence that would have revealed Platt and Martin were informants and that Smith's rights had been violated;

c) The prosecution team, under Baytieh's leadership, had conspired to make it appear through misleading testimony elicited from Palacios, and deceptive discovery provided to the defense, that neither Platt nor Martin were informants and that Platt had genuinely attempted to assist Smith in placing a "hit" on the lead investigator in the case; and

d) There existed an exculpatory recorded telephone call from Smith to Platt (after Platt was released from jail but still working as an informant), which was inconsistent with the defendant having ever admitted to any informant that he committed the murder.

The misconduct paved the way for Smith's conviction and preserved an ill-gotten winning streak for California's 2012 Prosecutor of the Year.[5] Along the way, however, the conspirators were creating loose ends and plot holes[6] that now devastate their ability to attribute what they did to error or ignorance.

## II. Second Phase of the Misconduct: Protecting the Verdict and Prosecution Team Members' Impunity through Widespread *Brady* Violations in Other Cases

Of course, none of the cheating would have been worth it to Baytieh if Smith ever realized the truth about what had been hidden in order to achieve his conviction. Therefore, well before Smith's misled jury announced its verdict, Baytieh had already initiated the second phase of the misconduct: a cover-up designed to keep the conviction intact and protect team members from ever being held accountable. Indeed, Baytieh will soon be recognized as the **principal architect of an evidence disclosure disaster unlike any other in this nation's history.** That is, **no other state or federal court has been confronted with a comparable quantity of cases infected with discovery violations stemming from a prosecutor's attempts to cover up the wrongdoing committed in a single case**. (Exh. A1.)

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[5] Baytieh had purportedly won 43 straight homicide cases at the time he was awarded California Prosecutor of the Year. (Jolly and Welborn, *Deputy D.A. Baytieh Recognized as State Prosecutor of Year*, OC Register, June 29, 2012.)

[6] The term refers to a fundamental gap or inconsistency in a storyline. The plot holes continued to grow after Smith's conviction—exposed through evidence uncovered as a result of the jailhouse informant scandal, the critically important investigation by the Department of Justice ("DOJ"), the defense investigation, and the above-referenced discoveries about the booking of key items of evidence in this case.

**Specifically, this motion identifies 98 defendants' cases in which Baytieh violated his *Brady* obligations by failing to disclose evidence of the misconduct committed in *Smith*.**

Baytieh's obligations under *Brady* and its progeny required that he disclose evidence from *Smith* in other cases where that evidence would enable defendants to a) impeach the credibility of the seven law enforcement members from the *Smith* prosecution team whenever they were called to testify by the prosecution; or b) challenge the admissibility of jailhouse informant testimony by presenting evidence from *Smith* documenting how housing and dayroom decisions were coordinated to promote questioning of targets, how informants were encouraged to illegally question charged defendants about their crimes, and how the OCSD and OCDA worked together to hide the truth from the accused.

**Among the more than eight dozen cases where Baytieh was responsible for *Brady* violations are 45 where the defendant was charged with murder**. They include some of the most consequential cases in Orange County history.[7]

In *People v. Miguel Guillen*, Baytieh successfully prosecuted multiple defendants in the custodial death of John Derek Chamberlain. Defendants in *Guillen* raised outrageous governmental conduct arguments[8] that were rejected by the trial court and the Court of Appeal. However, those courts did not have the faintest idea that Baytieh had violated his

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[7] Baytieh's decision to enter into a conspiracy to conceal meant that his co-conspirators would receive career-long protection from being impeached with their misconduct in *Smith*—destroying the integrity of numerous convictions, including those emerging from an effort that targeted white supremacist gangs through what was referred to as "Operation Stormfront." One of the worst of the bad actors from *Smith*, Sergeant Beeman, was freed as a result of Baytieh's non-disclosure to lead the Stormfront investigation, and to become the most important witness in each of the tainted felony prosecutions that followed. (Hardesty, *D.A. Arrests Cripple White-Supremacist Gangs*, OC Register, Dec. 17, 2010; Serna, *Three Locals Charged in White Supremacist Case*, LA Times, Dec. 16, 2010.)

[8] In *Guillen*, the defendants argued that jail deputies had encouraged the inmate attack on Chamberlain.

disclosure obligations by hiding evidence from *Smith* relevant to two informants in the case.[9]

Baytieh's failure to honor his legal and ethical obligations in *Smith* would also have enormous implications for the capital murder prosecution in *People v. Scott Dekraai*. In fact, **if Baytieh had disclosed to Defendant Dekraai the truth about what occurred in *Smith* in terms of the hidden informant operation and the cover-up that followed, it would have made the entire jailhouse informant scandal unnecessary**. Sadly, neither the impact on victims' family members resulting from three years of evidentiary hearings, the potential (and eventual) recusal of his entire office, nor even the possible prohibition on the death penalty in *Dekraai* that was ultimately ordered, could motivate Baytieh to break his silence.

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[9] One of the informants in *Guillen*, Sean Pough, testified at trial to statements attributed to two of the defendants. A second informant, Lance Lawrence, claimed that a third defendant made multiple admissions. That defendant subsequently pled guilty before trial to a lesser charge of manslaughter. Defendant will describe Baytieh's efforts to conceal Pough's role in *Guillen* after the informant scandal erupted because of what Pough stated in an interview about the then-undisclosed jailhouse informant program. Defendant will also analyze significant concerns about the transparency of consideration delivered to informant Lawrence with the assistance of former Senior District Attorney Cameron Talley.

Talley twice provided Lawrence with extraordinary consideration on his felony cases—once in connection with Lawrence's cooperation in a murder case for which Talley obtained a conviction, which he later dismissed. Two years later, Talley mysteriously appeared for the first time on a series of subsequent serious felony cases that Lawrence was facing, and then delivered the very definition of a "sweetheart deal." As will be explained, it appears that the resolution was connected in part to Lawrence's services in *Guillen*—though the amount of secret consideration and how it was delivered raise enormous concerns.

## III. Third Phase of the Misconduct: Conspiracy to Systemically Conceal the Special Handling Log ("SH Log")

Baytieh feared the cover-up might be inadequate. Therefore, in late 2016, after the Court of Appeal affirmed the recusal of the OCDA in *Dekraai* and the DOJ announced an investigation of constitutional violations related to the use of custodial informants,[10] Baytieh initiated the third phase of the misconduct. This required that he seize a leadership role in a conspiracy with fellow prosecutors. This conspiracy was created to prevent defendants from obtaining *Brady* evidence from the most important discovery of the jailhouse informant scandal: a long-hidden Special Handling Log ("SH Log") of notes written by deputies who managed the jailhouse informant program.

Baytieh's role in the conspiracy was critically important because the Special Prosecutions Unit he supervised was responsible for the OCDA's *Brady* Notification System. Although the System's stated goal is to ensure that defendants receive evidence of officers' prior misconduct and acts of moral turpitude, in the three years following the formation of the prosecutors' conspiracy, it would have been more accurately named the *Brady* Concealment System, as Baytieh used his position and knowledge to make certain that no officer would be added to the System in whole or in part based upon what was described in SH Log entries. This systematic non-disclosure of SH Log entries advanced Baytieh's true goal related to the log: blocking defendants and their attorneys from reading about the *Smith* prosecution team's misconduct.

Baytieh's fear was well-founded. **Entries in the SH Log both describe in shockingly clear language OCSD officers' role in an operation designed to have Smith questioned in violation of the Sixth Amendment, and reference undisclosed interviews with informants Platt and Martin.** Baytieh correctly recognized that the dissemination of these entries in every future case where an implicated officer became a witness heightened

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[10] "Custodial informant" and "jailhouse informant" are used interchangeably in this motion.

the chances that a defense counsel would finally figure out the prosecutor's wrongdoing in *Smith*. **In sum, this phase of Baytieh's expansion of the cover-up—accomplished by systematically blocking the disclosure of evidence that could be used to impeach officers based upon their misconduct identified in the SH Log—has led to *Brady* violations in hundreds, if not thousands, of unidentified cases.** While it will be incumbent upon individual defendants to determine whether they are among those who suffered a *Brady* violation at the hands of Baytieh, the former prosecutor's willingness to wantonly violate the due process rights of so many in order to safeguard his own undeserved impunity is highly relevant to the ruling and remedy requested in this matter.

## IV. The DOJ Uncovers Case-Changing Evidence in *Smith*, but the Deception and Concealment Was Far More Aggravated than the Department Realized

In its 2022 Report, the DOJ presented *People v. Smith* as the first of four "exemplars of the broader pattern or practice" by the OCDA and the OCSD of unlawfully using jailhouse informants and hiding evidence related to their use. However, the importance of the DOJ investigation to this case extends well beyond even the report and its findings. The department's investigative efforts led to the uncovering of a previously hidden interview with Platt, in which the informant described to Sergeants Wert and Voght how he and the other two informants illegally questioned Smith about the crime. Two years after this discovery, "important [OCSD] witnesses"[11] responded to the new evidence by invoking

[11] On April 1, 2022, an attorney representing the lead investigator, former Sergeant Raymond Wert, confirmed that he had been among those officers that had previously "provided notice they would invoke the protection of the Fifth Amendment." (Letter from Attorney Lolita Kirk to the Honorable Michael Cassidy, dated April 1, 2022, and filed April 7, 2022, attached herein as Exhibit B1.)

The prosecution subsequently dismissed the related convictions pertaining to solicitation and conspiracy to commit aggravated assault against Wert and a witness in the case. Through his counsel, Wert expressed an opposition to the dismissal—an

their right to silence under the Fifth Amendment and refusing to testify at the evidentiary hearing on the writ of habeas corpus. After learning of the witness' intended refusal to answer questions, the current prosecutor, Senior District Attorney Seton Hunt, conceded the writ, and a new trial was granted and ordered by the Honorable Patrick Donahue.

As critical as the DOJ investigation was in uncovering Platt's interview and obtaining a new trial, the greater significance of the investigation to this particular motion is in answering the question of whether there exists any force or fear-inducing entity that is capable of persuading members of the *Smith* prosecution team to finally and fully honor their disclosure responsibilities. The prosecution team's response to the DOJ investigation (and the investigations by other entities that preceded and followed it) provides an answer that is beyond reasonable dispute: the threat of being revealed and held accountable only re-energized the commitment of prosecution team members to prevent the concealment and misconduct from ever being uncovered.

This commitment is demonstrated in two ways. First, prosecution team members refused to come forward with any of the hidden evidence, even after the DOJ initiated its investigation in 2016—and even after Baytieh was informed by the DOJ in 2019 that *Smith* was a case of interest. As indicated above, **at the time of the release of its 2022 report, the DOJ was unaware of most of the 15 items of evidence identified in this motion. Moreover, the entirety of Baytieh's misconduct committed in furtherance of the cover-up was hidden from the DOJ, including the prosecutor's role in systematically blocking the dissemination of SH Log entries, which began soon after the DOJ launched its investigation in 2016.**[12]

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extraordinary position considering his refusal to testify and the misconduct that precipitated that decision.

[12] Both a) the defendant, at the time the new trial was ordered in 2021; and b) a law firm hired by the OCDA, which in 2022 completed its analysis as to whether Baytieh "properly turn[ed] over discovery and whether the prosecutor was truthful in all subsequent and

Baytieh efforts to deceive are seen throughout his two-day 2019 interview. For instance, Baytieh insisted that he was never required to even review the Orange County Informant Index ("OCII") for Palacios, the testifying informant. A version of that file was obtained in 2022, and is replete with favorable evidence that explains why Baytieh hid it. Nonetheless, Baytieh turned *Brady* on its head as he insisted a review was unnecessary as long as the defendant could be questioned on the witness stand—apparently "forgetting" that just three years earlier he co-authored an article for the California District Attorneys Association, which emphasized that prosecutors are obligated to "meticulously and thoroughly investigate the background of such informant, and prior history and instances of providing cooperation or testimony, to make sure that the prosecution is providing the defense with all relevant discovery." This aspect of his performance was not an illustration of a memory problem, but of an individual who has come to believe his powers of persuasion can overcome even the most severe predicaments.

Baytieh's single greatest concern entering the interview, however, was how he would address questions regarding the non-disclosures in *Smith* related to informants Platt and Martin. It was conduct that had been detailed in the then-pending habeas corpus motion, filings in *Dekraai*, and in news stories after the unconstitutional informant operation in this case was first revealed through the SH Log in 2016. Baytieh decided he would try to convince those questioning him that what was revealed through the log was so insignificant that the names of the hidden informants barely registered in his mind. Toward that end, he feigned uncertainty about who informant Platt even was—stating, when first asked, only that the name "sounded familiar." When asked about his familiarity with the second hidden informant, Paul Martin, he tried the same trick: "I think he's one of the people that were in that same group. So I'm not familiar with him…" It was a significant tactical error in his effort to deceive, and one which becomes even more apparent when the

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related inquiries by the United States Department of Justice" were similarly only aware of a fraction of the 15 items of evidence that were concealed.

entire interview is examined. This is because Baytieh continually displayed his impressive memory and his careful study of the four cases that had been flagged in advance for discussion by the DOJ, with *Smith* being one of them. He presented with ease details about the different cases, aspects of the litigation, his thought processes, and the name of witnesses and their roles. Therefore, the attempt to pretend in 2019 that he was unfamiliar with the two informants whose illegal activities in *Smith* came to light three years earlier and spurred press coverage about Baytieh's alleged misconduct can best be described as cringeworthy.

This was still not the most revealing of Baytieh's responses when it came to Platt. Going into the interview, Baytieh had every reason to believe the DOJ had none of the mountain of evidence that was still being hidden from Smith. However, in a flash, Baytieh's confidence about what the DOJ possessed disintegrated:

> Q: But my question was more specific. Did you see a police report indicating that Jeffrey Platt was a confidential informant, and he took a -- and he had a statement from Paul Smith?
>
> A: Yeah. I can't -- **I really can't answer your question off the top of my head just because, you know, I don't remember**. It's been six years, I think, since I dealt with this case…

(Bolding added.)

To describe Baytieh's response in the simplest of terms, he choked. Two years earlier, **he claimed to remember perfectly how and when he learned Platt was an informant on this case**. He told his agency's spokesperson in 2017 that he "became aware of [Platt and Martin being informants on the case] when our office received/reviewed the log, which was May 10, 2016." (Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017.) That answer left no room for the possibility that Baytieh had come across a report or recording describing Platt as an informant in the six years between his 2010 trial and when he read the log. Moreover, as he did not turn over a single report or recording to the defense between 2016 and 2019, he was in the exact same position when he participated in the DOJ interview.

What logically occurred during the 2019 interview was that the framing of the questioning caused Baytieh to fear not only that the DOJ obtained a copy of the report he had been hiding for a decade, but that someone from his prosecution team might have spoken to the DOJ and described his communications with Baytieh about the evidence. **Unable to quickly decide which false statement aided him the most, Baytieh hedged his bets and claimed his memory was inadequate**. The selection he made, though, was not one available to him after his comments to the spokesperson. It is noteworthy that even when he was confronted with the actual report shortly thereafter, Baytieh refused to commit himself to not having never seen it previously.

In sum, Baytieh had gotten trapped in his own web of deception. It certainly was not the first nor the last time this would happen. By the time he returned the next day, Baytieh had contemplated the predicament his responses had created, as well as the difficulty he had experienced feigning surprise, anger, or even interest about how the department had uncovered this evidence. His fix, though, was one that should have remained on the drawing board.

Understandably concerned that blaming other members of the prosecution team for the failure to disclose evidence could lead the DOJ to probe the investigators about the concealment and their prosecutor's role, Baytieh overcorrected with a jaw dropping claim: The prosecution "…**provided the required discovery that the Constitution mandates**"—his shocking contention being that the discovery provided to the defense in 2010 was adequate simply because it included Platt and Martin's names and described them as being in the dayroom with the testifying informant, Palacios, when Smith allegedly spoke about the crime. **In essence, Baytieh's response was, "Yes, the prosecution hid that two of the dayroom members were informants, never disclosed the illegal informant operation in the case, and concealed that Platt had described to investigators how the statements were unlawfully obtained, but the defense has no reason to complain because they knew the names of the inmates."** It was an argument one would have never expected from a first-year law student, let alone the OCDA's reigning *Brady* expert.

Baytieh, though, desperately wanted it believed there was no *Brady* violation—and at the very least that no violations were intentional. One of the reasons for his deserved concern likely was a point he had emphasized during the rebuttal phase of his closing argument:

> It's my burden of proof. I'm not suggesting they have to prove anything, but because the defendant provided a story to you, when did they call witnesses to back it up? **Where is Martin?** Remember, Martin is involved in all this stuff. We know he's in jail. The Defendant told you he's looking at 20 years. **If Palacios is making up all these things, bring him bring in. He always says he didn't do it.**

(Bolding added.)

**There have likely been few arguments in a prosecutor's closing presentation that rival the egregiousness of this violation of legal and ethical responsibilities.** Having concealed evidence related to Platt and Martin that would have impeached Palacios and shown the statements he attributed to Smith were obtained unlawfully, Baytieh told jurors it was the defense that was running from the truth. **Moral turpitude is defined as the "readiness to do evil." This was evil in action.**

It must also be emphasized that Baytieh's efforts to convince the DOJ that the prosecution was in *Brady* compliance were laced with other deception. As Baytieh cited discovery page after discovery page referencing Platt and Martin, DOJ personnel would reasonably not have picked up on the pathological quality of what he was doing. That is, while the page numbers he cited unquestionably revealed to the defense that Platt and Martin were fellow dayroom members, Baytieh intentionally failed to share the reason these particular items of evidence were disclosed prior to trial: **The content of what was provided to the defense had been manipulated with the specific intent of hiding that Platt and Martin were more than just inmates randomly assigned to Smith's dayroom, but instead informants who were placed there with Palacios in order to obtain statements about the crime in violation of Smith's constitutional rights**.

These were just examples of a prosecutor who will say and do anything to get out of harm's way. The implication from his comments throughout the interview was that no one in the room that day possessed the equivalent experience in writing and training others

about *Brady* to challenge Baytieh's analysis of his obligations, and thus no one but him would appreciate why the law justified the concealment of evidence—evidence that he supposedly knew nothing about prior to the previous day, but which he so vehemently wanted the DOJ to agree was not constitutionally mandated for disclosure. Baytieh is such a seasoned and skilled manipulator that it must have actually seemed for those present that he believed what he was saying. In reality, he believed none of it.

## V. Baytieh's Claimed Lack of Knowledge About All Items of Concealed Evidence Now Must Rest on the Embarrassing and Provably False Narrative that He Was a Victim of Rogue Investigators

Since Baytieh's DOJ interview, the understanding of the magnitude of the misconduct has grown still greater thanks both to new revelations over the last four years and a closer study of the endless string of loose ends left by Baytieh and his overconfident band of co-conspirators. Indeed, the only narrative that would now allow for a claim that Baytieh was ignorant of all the evidence withheld from the defendant, and all of the misconduct committed by the prosecution team, is the following: He was neither the leader of the conspiracy to conceal, nor even a member. Instead, he was a victim of his own investigators' plot to hide evidence from him—including evidence that was helpful to the prosecution (prior to Platt's disastrous interview.) In other words, the same investigators who worked with Baytieh on numerous cases supposedly went rogue in *Smith* and somehow were able to hide all of the evidence identified in this motion not only from the defendant but from the county's most successful prosecutor. The credibility of this narrative does not just hinge on the believability that this plot was created and carried out to perfection. It also requires believing that in each and every one of the many instances when the concealed evidence in *Smith* was within his easy reach, Baytieh's legendary talents and dedication to protecting victims simply vanished into thin air.

Among the most important of the recent discoveries that devastate Baytieh's required alternate reality is the list that memorializes which items of evidence *Smith*

investigators booked into OCSD property, and the date and time when those items were booked.[13] That "Remedy System" report has proven invaluable in identifying key additional items of previously hidden evidence, as well as in devastating the only narrative that would allow for the claim of innocence to which Baytieh now must cling. To his great misfortune, the defense can now see that **investigators actually timely booked into the OCSD's property system** numerous important items of evidence that Baytieh then concealed from the defendant. It is, of course, nonsensical that investigators would have booked evidence they then hoped to conceal from their prosecutor, or that they would have decided to conceal evidence from Baytieh that they had already booked—or believed they could ever accomplish that objective. On the other hand, it makes perfect sense that it was Baytieh as the prosecutor who 1) made the decision to conceal each item of evidence that was hidden from Smith; and 2) worked closely with his investigators to make sure that evidence created through interviews with informant Palacios and his testimony furthered their objectives in preventing their deception from being uncovered. Ultimately, the reasons for rejecting a narrative of Baytieh's ignorance and innocence are enough to fill several hundred pages of a motion to dismiss.

[13] In 2019, a two-year audit by the OCSD of the booking practices of its deputies and investigators came to light for the first time publicly, and in the process revealed the agency's "Remedy System," which tracks who has booked evidence and when. Juan Viramontes, the president of the Association of Orange County Deputy Sheriffs Association, stated that "[t]he deputies did their job by booking the evidence. Providing the evidence is the job of the D.A." (Saavedra, *Finger-Pointing Continues Among OC Prosecutors, Deputies and Lawyers in Soon-to-Be Overturned Murder Conviction*, OCRegister, Aug. 6, 2021.) As discussed, many of the key items were timely booked, while others were not.

## A. A Brief Chronological Summary of Key Events and Developments

### i. The Perfect Case and Prosecution Team for an Unconstitutional Jailhouse Informant Operation

It must be emphasized that the scheme for the prosecution team's law-breaking in this case was almost certainly devised before Smith even entered the Orange County Jail in 2009. At the time of his arrival, the prosecution had a significant gap in its case: the defendant had not admitted to the crime. During an interview with investigators at a Las Vegas jail, Smith persistently denied having committed the crime. In addition, while at that same jail, recordings of calls from Smith captured him speaking about his hatred of Investigator Wert. As a result, the prosecution became focused on obtaining both an admission to the murder and evidence consistent with its purported belief that Smith wanted to solicit a "hit" on Wert, the lead investigator in the case.

In hindsight, it was a situation made-to-order for an operation run through the jailhouse informant program managed by the OCSD: a murder without a confession, a Sheriff's investigator facing supposedly imminent peril, and a prosecutor—specially assigned to the Sheriff's homicide cases—who appreciated, perhaps more than anyone in the OCSD, what informants could offer as case closers in close cases. Between 2007 and 2011, it appears that more jailhouse informants had worked in Baytieh's cases than in those of any other Orange County prosecutor. This was seemingly corroborated by the DOJ Report. Although the following paragraph within the report does not identify the referenced prosecutor by name, the authors were either referring to Baytieh or a prosecutor with an identical set of informant experiences within the OCDA:

> **Even when prosecutors saw obvious indications that OCSD's informants were operating outside constitutional bounds across a number of cases, they failed to act to stop the pattern. From 2007 to 2011, one senior prosecutor handled six cases that together involved a total of 12 custodial informants**.[14] In two of those six cases, informants elicited statements in violation of *Massiah*, and in another case, the prosecutor limited the testimony of a custodial informant to prevent him from testifying about the defendant's in-custody statements, which meant that there was no evidence about any potential *Massiah* issues. In another case, after the defense moved to continue based on OCDA's disclosures regarding one custodial informant witness, the prosecutor responded that he would simply not call the informant because of the "difficulty" in obtaining all discovery relevant to the informant, as well as his "nature as a 'professional snitch.'" The prosecutor also dropped two additional custodial informant witnesses in the same case without any explanation.

Baytieh unquestionably saw, before and after the 2009 informant operation in *Smith*, "obvious indications that OCSD's informants were operating outside constitutional bounds across a number of cases…" and "failed to act to stop the pattern." However, the wrongdoing by Baytieh can now be seen as far more than the important failure to honor his ethical obligation to stop what he fully understood was a pattern of informants operating unconstitutionally. As detailed for the first time in this motion, Baytieh energetically worked to prevent both the informant program from being uncovered and evidence about specific informants being disclosed because he knew that these disclosures would make it more difficult to win particular cases.

Moreover, Baytieh had ideal partners taking the lead role on his prosecution team. Wert's now-corroborated conduct shows he decided he was justified in violating his sworn oath in order to obtain convictions for a defendant who purportedly posed a threat to him

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[14] It would be remarkable if the report was referring to someone other than Baytieh. He had six cases and 12 informants between 2007 and 2011: *People v. Paul Smith* (3 informants) *People v. Michael Lamb* and *Jacob Rump* (2 informants), *People v. Billy Joe Johnson* (1 informant), *People v. Hilbert Thomas* (1 informant), *People v. Shawkey* (3 informants), and *People v. Guillen* (2 informants). (Exh. A1.)

and his family. It is not surprising that his partner Voght was on board with the misconduct as well. Moreover, Special Operations Investigator Beeman, who would act as the handler for both the testifying informant, Palacios, and the discarded informant, Platt, had been a key figure in the informant program for years—and in its cover-up. Beeman's name appears no less than 86 times in the publicly disclosed version of the SH Log. Moreover, he was a key officer in two cases examined by the DOJ, *Smith* and *People v. Joseph Govey.* The analysis of Beeman's role in *Govey* is extensive and his efforts to encourage the unlawful use of an informant and the concealment of key evidence in that case is revealed for the first time in the DOJ Report. **The seriousness of Beeman's conduct likely contributed to the DOJ's decision to refer to him by his name—making Beeman the only law enforcement member whose name appears in the report.** At the same time, the report does not key in on Beeman's critical role as a wrongdoer and conspirator in *Smith*, in part because of how much was still being concealed. However, his important role in this case will soon be understood.

### ii. A Multi-Informant Operation is Initiated and Pays Off Immediately

The scheme to unlawfully obtain statements from the defendant was quickly put into action. Smith was housed in Module L-20 of the Intake Release Center. This module would become known five years later as a "snitch tank" because of its use as a housing location intentionally designed to place informants near high-value targets.

It all went as planned. According to the SH Log (hidden until 2016[15]), informants Platt and Martin quickly told then-Special Handling Deputy Michael Padilla that "[t]hey feel if they get this time with Smith, they can get details on his crime." Although facilitating such an effort was an obvious violation of the Sixth Amendment, Padilla wrote

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[15] The SH Log was first uncovered during litigation in the capital murder case of *People v. Daniel Wozniak.*

that "I told them I didn't have a problem with this and would pass it on." Padilla shared the information with Sergeant Roger Guevara, and a dayroom group was quickly created with Smith and informants Platt, Martin, and Palacios.[16]

The jailhouse informant operation directed at Smith functioned exactly as intended. Just one week after the dayroom group was established, Platt told Wert and Beeman in an interview at the jail that Smith admitted to the murder and wanted to arrange a hit on Wert and his family. It was a breakthrough on both the murder case and the yet-to-be-filed charges of solicitation and conspiracy. Quite obviously, this case-breaking information and the immediate danger posed to Wert and his family would have been immediately communicated to Baytieh—and Wert's report would have quickly followed. However, because all of the evidence related to this interview was then hidden from the defense, Baytieh is left to make the absurd claim that he remained unaware of what Platt did for the next decade.

### iii. An Informant's Recorded Truths Spur Massive Misconduct and an Embarrassing Tactical Error as Prosecution Attempts to Make it Appear Platt was Not an Informant

Although Platt was facing numerous felony charges at the time and potentially years in prison, he was released on his own recognizance the day after his first interview—in part so he could continue working with Smith on behalf of the prosecution to "hire" a hitman in hopes of building solicitation for murder charges. These efforts backfired and led to additional evidence favorable to the defense, including an exculpatory phone call from Smith to Platt and a letter to the defendant encouraging him to move forward with the hit. Both items were successfully concealed until 2022.

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[16] As will be discussed, thanks to Baytieh, none of the OCSD wrongdoers implicated in this case saw their careers negatively impacted in the slightest by their misconduct. In fact, each was subsequently promoted at least one rank. For instance, Padilla was promoted to sergeant in 2017, just one year after his wrongdoing was uncovered through the SH Log.

However, it was undoubtedly Platt's recorded interview with Wert and Voght at OCSD headquarters in late July 2009 that would seal the decision to conceal all evidence of Platt's role as an informant. During that interview, Platt told far too much truth for Baytieh and his team to tolerate, as Platt described how he and the other two informants had questioned Smith (in violation of *Massiah*) and convinced him to speak about the crime. He not only described having spent days illegally questioning Smith about the crime, but also detailed the scams employed, which included fabricating that "[Platt's] father was a DA and might be able to help."

Quite obviously, Baytieh and prosecution team members realized that the Sixth Amendment's prohibition on government agents questioning defendants had been violated, and that the failure to disclose everything that Smith had supposedly said to the informants and the details of the informant operation would, in turn, violate *Brady* and PC Section 1054.1. On the other hand, because they were unconcerned about breaking the law, the prosecution team turned its attention to creating an alternative plan: **The team would replace one law-violating dayroom group informant (Platt) with another (Palacios) as its future testifying witness.** However, the team members also recognized that the informant-swap would only work if the defense could be misled into believing that neither Platt nor Martin were informants. This meant hiding all items in the prosecution's possession showing their work on the case, including Platt's recorded interview and multiple reports. Wert and Voght then re-invented the history of what occurred in the dayroom during interviews with the more experienced and malleable replacement informant, Palacios. Although Beeman worked closely with Platt in and out of custody to build the solicitation/conspiracy charges against Smith, all those efforts and all that was collected in terms of evidence would be hidden.

At the same time, the cover-up was creating loose ends. The reinvented version of Platt—presented in both the discovery to the defense and Palacios' Grand Jury testimony—was that he had authentically attempted to help carry out a violent attack against Wert. In response to questioning during his recorded interview, Palacios said the following:

> Okay. This note is a – **this is a copy letter I have in my hand of a letter that came in to Paul Smith from Platt out on the street**. It's in -- it's **regarding a -- basically some information on Ray Wert** -- Investigator Wert. It's dealing with -- **he wants your home address, he wants your California Driver's License, information and a picture of you, vehicles you drive**. He's willing to pay a price for that. Also, he was wanting the price for -- to have somebody basically jump [Wert], have [Wert] taken care of out there on the streets. **He said the price that he got quoted was $8,000 and that's just to hurt him real bad, to beat him up, jump him, rob him**.

(Bolding added.)

Wert, Voght, and Palacios were performing for the recordings: All three knew Platt had been working as an informant, rather than being someone truly seeking to help Smith carry out a hit. Indeed, prior to Palacios' recorded conversation in September 2009, Platt had already spoken on multiple occasions to the investigators about his informant efforts in the case.

Wert then aggravated the misconduct of the prosecution team still further through the report he wrote documenting Palacios' interview. In it, Wert corroborates that, at the time, he was concerned about documenting his role in the effort to deceive. This can be seen by Wert's decision to omit Platt's name completely from his report, writing instead that Smith told "CI [Palacios] that he has **someone** who will get information on and assault and[sic] Investigator (myself) for $8,000.00. For further details see photocopy of letter that the CI said SMITH had given to him to look at…" (bolding added.) However, it was far too late and he was far too involved to employ this type of maneuver. Not only had Wert authorized the operation and interviewed Platt in June and July 2009, but a) in Wert and Voght's September 2009 recorded interview, Palacios had identified "Platt" by name as the individual who orchestrated the exchange of cash for a completed assault; b) Wert took possession of the letter from Platt about the subject matter; and c) Wert awkwardly wrote the report about the Palacios interview and note, subtracting "Platt" from it. Wert's hope was that by replacing "Platt" with "someone" he could both somehow lessen the chances that the misconduct related to Platt would be detected, and lessen his perceived role if that detection ever occurred. Instead, with the Platt and Martin cover-up now revealed once and

for all, Wert's report offers additional confirmation that he was one of Baytieh's all-in partners in the attempt to deceive and a law enforcement officer willing to write false police reports that advance the prosecution team's version of the "greater good."

**iv. Baytieh Wrecks Future Narrative that He Was Unaware Platt Was Informant by Failing in 2009 to Prosecute, Investigate or Re-Incarcerate Him for Aiding and Abetting "Hit" on Sergeant Wert**

Unfortunately for Baytieh, Palacios' interview and Wert's report do not just demonstrate that Palacios, Voght and Wert attempted to hide Platt's true role through the interview of Palacios and Wert's related report. The interview and report—again presenting Platt/"someone" as seeking $8,000 to coordinate an attack on Wert at or near Wert's home—were then given to Baytieh and discovered to the defense. Additionally, Baytieh confirmed that he studied and understood what Palacios said about Platt, and not just because he disclosed the recorded interview and report to the defense. During 2010 Grand Jury proceedings, the prosecutor elicited from Palacios facts about Platt and his role consistent with what Palacios described in his recorded interview.

Baytieh's response to what he would have necessarily believed about Platt's criminal activities—as a result of his review of Palacios' interview and his own questioning of Palacios—is all that is needed to prove that Baytieh knew who Platt was from day one, and that his claims to the contrary have been untruthful. As can be seen, Baytieh and his co-conspirators made a catastrophic error in their plan to replace Platt with Palacios as the testifying informant—and then in their plan to re-image Platt as ruthlessly trying to facilitate the hit on Wert. More specifically, the conspirators failed to adequately contemplate how law-abiding prosecution team members would have necessarily responded to the fabricated version of Platt that investigators presented through the 2009 interview of Palacios discovered to the defense, and which Baytieh then presented through his 2010 questioning of Palacios before the Grand Jury.

**In an ironic twist, it is Baytieh himself who best explains why, with certainty, he knew that Platt was working as an informant in the case well before Smith's trial—despite his current claims to the contrary**. Confident after Smith's conviction that he and his team's misconduct was safely in the rear-view mirror, Baytieh and his currently-unwilling-to-speak accomplice Wert had the audacity to participate in an episode of the docu-drama program "Murder She Solved," which both featured this case and heralded their work. To the defendant's tremendous fortune, Baytieh took a moment with the tape rolling to discuss his fear in 2009 that Smith would attempt to orchestrate a plot against Wert with an inmate—other than Palacios—who was not cooperating with the prosecution: "But what I was worried about is what if [Smith] talks to another inmate at the jail who's willing to help him who's not gonna come and tell us. So we needed to move fast."[17] Baytieh's articulated concerns were completely rational, but they also cannot be reconciled in the slightest with how he actually responded to the version of Platt that he shared with the defense and he claims to have believed. In fact, the 2010 version of Platt that Baytieh presented to the Grand Jury was of someone far more dangerous than the hypothetical inmate whom Baytieh described to viewers as causing him such grave concern. The "Platt" who Baytieh presented to the Grand Jury was not only an "inmate at the jail who's willing to help [Smith] who's not gonna come and tell us[,]" but someone who had then been released from custody, where he continued to encourage Smith to allow him to help facilitate the "hit" on Wert. Nevertheless, **Platt was neither prosecuted, re-incarcerated, nor even investigated by Baytieh and his investigators**. Of course, **the only possible explanation for Baytieh's indifference to Platt's supposed threat was that he knew Platt was working in and out of custody as an informant with his team**. Prior to Smith's 2010 trial, Baytieh realized the error, and adjusted his presentation so that Platt's name was never spoken during the proceedings. However, that "fix" now simply adds to

[17] Robert Haugen | Murder She Solved | S03E03, https://www.youtube.com/watch?v=nw1S7uI2gbA; 38:44-38:55.

the overwhelming proof that Baytieh always knew who Platt was and what he was doing on this case.

In the years following his conviction, what Smith needed was not a television program he would never see from his prison cell, but rather newly discovered evidence that would lead lawyers to take another look at his case. Baytieh's precise focus was to keep that from happening. By preventing other defendants from rightfully receiving evidence from this case that would have impeached law-breaking prosecution team members in other matters or established how the jailhouse informant program truly worked, Baytieh protected the prosecution team's impunity and helped prevent his winning streak from being disturbed through post-conviction relief. Astoundingly, by 2013, Baytieh was already responsible for more than two dozen *Brady* violations in cases where the defendants were entitled to evidence from *Smith*—with most of these defendants facing murder charges.

### v. Baytieh's Knowledge of Platt Pre-Dated *Smith*: *People v. Gary Shawkey*

In response to a defense request based upon Baytieh's DOJ interview, in February 2023, Senior District Attorney Hunt turned over a report from *People v. Shawkey*—another murder case prosecuted by Baytieh and investigated by the OCSD, which involved multiple jailhouse informants. While Platt was not one of the jailhouse informants on that case, it is now known that he was a listed witness for the Baytieh-led prosecution. Moreover, Platt's involvement in *Shawkey* pre-dated his informant operation in *Smith* that began in June 2009. While released from custody on the first of what would become multiple felony cases between 2007 and 2010, Platt told a member of the OCSD that he saw Shawkey and the alleged victim shortly before the victim's disappearance. Baytieh cannot claim that he failed to timely receive the report. This is confirmed by the fact that a) prosecutor Hunt obtained it from the OCDA's file in 2023; b) there is an OCDA bates stamped discovery

page number on the bottom right corner; and c) in 2011, Baytieh placed Platt on his witness list (but did not call him).

Of course, Baytieh did not truly believe Platt was both helping to solve a murder in one of his cases (*Shawkey*) and trying to effectuate a "hit" on a police officer in another (*Smith*). Baytieh's "Platt Predicament" came to the surface during his 2019 DOJ interview. Baytieh had attempted to avoid speaking the name "Platt" while being questioned about the use of informants in *Smith*. In fact, he initially only acknowledged that the name "sounds familiar" when confronted with a question about Platt. However, once Platt was out of the proverbial bag, Baytieh hoped to pre-empt the DOJ from picking up on the fact that someone whom Baytieh supposedly believed was an aspiring cop-killer in *Smith* was also one of his listed witnesses in *Shawkey*, having purportedly seen Shawkey and the victim together shortly before the victim's disappearance. Baytieh's approach with the DOJ was to nonchalantly mention that Platt had been a named witness in *Shawkey*, while adding that he never actually had Platt testify.

When he returned the next day to resume his interview, Baytieh decided to go further in attempting to remedy the enormous predicament of having Jeffrey Platt in two of his murder cases. **Baytieh claimed that the cases involved two different people named "Jeffrey Platt."** One can certainly understand how desperately Baytieh wished this claim to have been true. Having the same Platt on both cases would not only have further undermined the notion that Baytieh ever believed that Platt had authentically worked with Smith to carry out a violent attack on Wert (versus being an informant), but it also meant that he would have violated his discovery obligations in *Shawkey* to turn over moral turpitude evidence arising from his multiple felony fraud cases.

The problem is that Baytieh was not telling the truth—as he added to the hours already spent misleading attorneys from the DOJ who were investigating federal civil rights violations. The February 21, 2008 report in *Shawkey*, created by Deputy Jose Pelayo, lists Platt's date of birth and his California Driver's License Number. That listed date of birth is

identical to the one associated with each of Platt's other cases. It is also identical to the information associated with Platt in the OCII.

### vi. Investigators in the Supposed Plot to Conceal Evidence from Baytieh Forget their Own Conspiracy

In the aftermath of Smith's conviction, the *Smith* prosecution team was increasingly confident that their malfeasance would remain forever undiscovered. On a single day, just months after Smith's conviction, a long-used maneuver for rewarding helpful informants was utilized with enormous consequences.

Members of law enforcement met with Judge Donahue, Senior Deputy District Attorney Yvette Patko, and Platt's attorney, David Swanson, to discuss the sentencing of Platt. After the in camera hearing was completed, Swanson described in open court what had been discussed in chambers. He began by noting that "a number of – several law enforcement officers have come in and talked about what Platt had done." Swanson continued:

> And as the court also heard today, the situation with **the homicide case and the solicitation of murder of law enforcement and witnesses, that Mr. Platt was instrumental in bringing that to light and dealing with that**. And so I think one can only characterize what he has done as extraordinary.

(Bolding added.)

The "homicide case and the solicitation of murder of law enforcement and witnesses" unquestionably refers to *People v. Smith*. Thus, the transcript serves as one of the most important pieces of evidence corroborating 1) the *Smith* prosecution team lacked the slightest fidelity to its legal and ethical obligations; and 2) Baytieh was a full partner in the conspiracy. It is, of course, outrageous that investigators attempted to influence Platt's sentence based upon conduct that they knew included violations of the United States Constitution and which had been improperly hidden from the target of the informant's efforts. **On the other hand, their willingness to describe Platt's conduct before one of Baytieh's fellow prosecutors confirms that prosecution team investigators hid nothing**

**from Baytieh.** It is simply not believable that *Smith* investigators united in a conspiracy to conceal from Baytieh Platt's role as an informant in *Smith* would have been comfortable describing Platt's role in front of an OCDA prosecutor whom they would have logically assumed would then consult with Baytieh about the work Platt did on *Smith* to determine what consideration Baytieh believed was appropriate based upon "Mr. Platt [being] instrumental in bringing that [solicitation of murder of law enforcement and witnesses] to light and dealing with that."

### vii. Baytieh Wantonly Infects Other Cases with Discovery Violations to Prevent Uncovering of Misconduct in *Smith*

Baytieh knew that the misconduct his investigators committed in *Smith* (with his blessing) required *Brady* disclosures in every case where they became a witness. He also recognized that evidence from *Smith,* demonstrating the misuse of jailhouse informants and concealment of related evidence, needed to be disclosed in every case where the OCDA sought to introduce jailhouse informant evidence. Baytieh rejected these obligations in their entirety, as honoring them would have defeated key objectives: preserving the tainted verdict and preventing others from learning what the prosecution team had done.

Disclosing the misconduct in other cases was a non-starter. Doing so would make evidence of the *Smith* misconduct available to dozens of attorneys—each posing the enormous risk of figuring out what had gone so terribly wrong and revealing it to the criminal justice system.

Many of the cases affected by Baytieh's deliberate non-disclosure are discussed in this brief. Others remain unidentified because this defendant is simply unable to locate each and every case in which *Brady* obligations were implicated because of the misconduct committed in *Smith*. Those gaps have certainly not been filled by Baytieh and his co-conspirators, as they have refused for the past fourteen years to tell any truth perceived as damaging to their interests. As a result, even after this motion is filed, it is highly likely that a large number of the defendants who were entitled to *Brady* evidence from this case

will remain in the dark about how their due process rights were violated by Baytieh and the *Smith* prosecution team.

### viii. Sergeant Wert Attempts to Block Defendants from Learning about Special Handling Log Filled with Damaging Evidence about *Smith* Informant Operations

Sergeant Wert had been doing his part, as well, to promote the continuing injustice and the impunity that he and his co-conspirators desperately wanted to last a lifetime. In late January of 2013, Wert, who had been promoted and was supervising the OCSD's Special Handling Unit that secretly managed the county's jailhouse informant program, abruptly ordered deputies to stop making entries in the SH Log. As has been discussed, the log, not coincidentally, includes entries identifying the hidden informants in *Smith* and describing the illegal informant operation that had been employed and concealed. While the log's termination was sudden, the timing and logic of the decision made perfect sense. Wert ordered use of the log be shut down two days before Judge Thomas Goethals[18] was set to rule on whether the prosecution would have to provide comprehensive informant discovery in the capital murder case, *People v. Scott Dekraai*. The order was issued, but the disclosed materials did not include the log. Four years later, Judge Goethals pointed to the prolonged concealment of the SH Log as one of the most important considerations in his decision to prohibit the prosecution from seeking the death penalty in that case.

[18] The Honorable Thomas Goethals currently serves as an associate justice for the Fourth District of the California Court of Appeal. However, his role as the presiding judge in *People v. Dekraai* is discussed extensively, and to avoid any confusion will be referred to as "Judge Goethals."

### ix. Baytieh Creates Image of Prosecutor Incapable of Committing Informant Misconduct while Simultaneously Attempting to Delegitimize the "Baloney"-Filled Scandal Before It Reaches *Smith*

Despite Wert's efforts, counsel for Dekraai—after receiving and analyzing discovery ordered by Judge Goethals over prosecutors' objections and conducting his own investigation—filed motions in 2014 alleging a long-standing and hidden jailhouse informant program in which prosecutors and law enforcement worked together to unlawfully use informants and illegally conceal related evidence. Smith and his former attorney were unlikely to have immediately recognized what connected the two cases. The same cannot be said for Baytieh. Selected that year to serve as head of the Special Prosecutions Unit and supervisor of the *Brady* Notification System, Baytieh knew his disclosure obligations were implicated, as the concealed evidence from *Smith* compellingly corroborated the defense allegations in *Dekraai*. Indeed, had he notified the parties in *Dekraai* in 2014 about what occurred in *Smith*, the scandal would have been months-long, rather than now in its ninth year.

Between the time that Baytieh and his prosecution team created the conspiracy and when the informant scandal emerged in 2014, Baytieh had already withheld evidence from numerous defendants in an attempt to prevent detection of what occurred in *Smith.* While the efforts to that point had been successful, Baytieh logically viewed the scandal as representing the greatest threat yet to the continued impunity of him and his team. His response was to begin working to foster the image of a prosecutor incapable of committing misconduct, while simultaneously engineering efforts to enhance his credibility as he attempted to kill the scandal. He already possessed undeserved trustworthiness among many. Anxious to further enhance a perception within the community that he was committed to due process, he took the lead role in training prosecutors and members of law enforcement on proper practices both in the use of informants and in disclosing evidence—never hinting that the most instructive case in how to decimate a defendant's due process

rights was his own.[19] Few would have believed that the OCDA's guru on the lawful use of informants and the author of the 2016 *Brady* Policy for Law Enforcement would be its greatest violator. And that was exactly the point.

These efforts unquestionably strengthened the credibility of Baytieh, as he led the OCDA's public effort to delegitimize the allegations of systemic jailhouse informant misconduct raised in *People v. Scott Dekraai*. Baytieh insisted to local audiences that there was not a "shred of evidence" that a single prosecutor concealed jailhouse informant evidence, and that such allegations were "baloney."[20] For many, his indignation would have seemed sincere—a genuine manifestation of his significant experience and meticulous practice, which in turn justified assailing the allegations and those who endorsed them. No one was off limits.

In early 2016, he ratcheted up his rhetoric, excoriating one of the nation's most well-respected legal figures, then-Dean of the University of California, Irvine School of Law Erwin Chemerinsky, for his purported "intellectual dishonesty" in leading a group of scholars and ex-prosecutors who called for a federal investigation of the OCSD and the OCDA—insisting the Dean never did the hard work required to "know the facts" such that he could author a letter requesting that the DOJ launch an investigation. Baytieh's willingness to speak these words seven years into a conspiracy designed to hide critically important informant-related evidence from this defendant (and so many others) is illustrative of the capacity for deception that will be his legacy. Years later, Baytieh told

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[19] Saavedra and Ferrell, *Inside The "Snitch Tank:" Salon Massacre Case Sparks Hard Look at Jailhouse Informants*, Press Enterprise, Nov. 23, 2015.

[20] Saavedra, *Attorney Official Calls Claims of Intentional Misconduct in Use Of Jailhouse Informants "Baloney*[,]*"* OC Register, Oct. 1, 2015; Saavedra, At UCI Debate, *Lawyers Spar Over Use of Jailhouse Informants, Say Federal Investigation Needed,* OC Register, Feb. 17, 2016; Orange County Register Snitch Tank Community Forum, https://www.youtube.com/watch? v=zVuv0jLxpAs; 59:28-59:33.

the DOJ that he never actually studied any of the evidence underlying the allegations in *Dekraai*. He also made it clear that he had not relied upon the analysis of the *Dekraai* prosecutors, whom he simultaneously assailed for their failure to know the facts before claiming the defense allegations were erroneous—apparently hoping that his earlier attacks had been forgotten. In 2021, Baytieh reiterated that he was fully committed to re-writing history—telling the press that he never actually studied the evidence presented in support of the allegations: "I had an assignment," referring to his attempt to refute the defense claims raised in *Dekraai*.[21]

Setting aside his self-serving flip-flop, the almost certain truth is that Baytieh thoroughly studied the allegations and concluded they were accurate, but claimed the opposite because having the allegations be disbelieved was in his best interests. Then, when the winds shifted because the Court of Appeal had affirmed the OCDA's recusal in *Dekraai*[22] and the DOJ had launched its investigation, he decided it was better to claim a new "truth:" that he sincerely believed the allegations were false, but he had never actually studied them—again, the latter being wholly inconsistent with his pronouncement years earlier that the allegations were without a "shred of evidence" that any prosecutor intentionally withheld informant-related evidence.

Hopefully, Baytieh will soon be compelled to answer related questions that he apparently failed to consider when he decided to assert that he had never studied the evidence in *Dekraai*: First, what possible justification did he possess for insisting publicly that the allegations pertaining to the informant-related misconduct were false if he had never actually studied them? Second, as supervisor of the Special Prosecutions Unit, why would he have not separately studied the *Dekraai* motions and supporting evidence to determine whether the described misconduct by members of law enforcement warranted

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[21] Saavedra, *High-profile Orange County DA Official Brushes Off Critics, Launches Campaign for Judge*, OC Register, April 8, 2021.

[22] *People v. Dekraai*, 5 Cal. App. 5th 1110 (2016).

their addition to the *Brady* Notification System and, alternatively, their prosecution for law violations committed in the course of the alleged misconduct?

### x. The Head of the *Brady* Notification System Takes a Leadership Role in the Conspiracy to Systematically Conceal the SH Log

Baytieh's misconduct expanded still greater as the informant scandal continued to grow. To the terrible misfortune of this county's criminal justice system, by the time that the SH Log was uncovered in 2016, Baytieh had already spent years preventing his co-conspirators from being a) questioned about their misconduct in subsequent cases where they were witnesses; and b) added to the *Brady* Notification System once it was created by the OCDA. After the SH Log was uncovered, Baytieh was able to ensure the omission from the *Brady* Notification System of additional law enforcement personnel implicated in entries found within the SH Log: Padilla, Carrillo, Pereyra, and Guevara.

However, even this level of concealment was inadequate to create the level of security Baytieh wanted. Therefore, he seized a leadership role in his agency's successful effort to systematically block **all** disclosures from the SH Log. The effort to re-bury the log was undertaken just months after the agency publicly insisted it had created a "concrete action plan" for disclosure. Reasonably concerned that solely blocking the additions of SH Log-implicated personnel from *Smith* could raise red flags, Baytieh conspired with other prosecutors to ensure that no member of the OCSD would be added to the *Brady* Notification System based upon misconduct identified within the SH Log.[23] Significantly, the conspiracy to stop all SH Log disclosures continued for at least three years and was

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[23] It should be emphasized that Smith's counsel alleged during litigation in a separate criminal case, beginning in 2018, that the agency had systematically withheld the SH Log from defendants. Assistant Public Defender Scott Sanders represented Oscar Galeno Garcia in a 2018 felony drug case. During that litigation, the defense argued, after studying 146 cases involving 177 defendants, that the OCDA systematically hid the SH Log. Reports released by the OCDA in 2020 and the DOJ in 2022 determined that those allegations had been accurate.

undertaken while the DOJ, the California Attorney General ("CAG"), and the Orange County Grand Jury were investigating the OCDA for its role in the informant-related misconduct.

### xi. Baytieh Attempts to Mislead Smith's Defense Counsel about the Implications of the Special Handling Log, While Continuing to Conceal all Informant Evidence Related to Platt and Martin

Unfortunately for Baytieh, his karma reached its breaking point. Shortly after insisting there was not a "shred of evidence" that a prosecutor had concealed jailhouse informant evidence, the hidden informant operation from *Smith* appeared for the very first time. Responding to a defense subpoena in *People v. Daniel Wozniak*, the OCSD finally turned over the SH Log. The log contained entries in which deputies described an undisclosed informant operation designed to have Smith questioned about his charged crimes by Platt and Martin. As Baytieh knew, their role as informants had been hidden in testimony, as well as the reports and interviews that had been disclosed. Once Baytieh regrouped, he focused on what he does best: misleading in such a way as to make it seem as if he were on the straight and narrow. Baytieh wrote a letter to Smith's counsel five months later, summarizing the relevant contents of the SH Log without identifying Platt or Martin by name. Baytieh suggested that the new information would not have impacted the admissibility of Smith's statements testified to by informant Palacios—ending the body of the letter by stating that his summary was "being provided to you to make sure that the OCDA is in **total compliance with all discovery obligations**." (Bolding added.) It was a deplorably deceptive claim. After all, if this was completely new to him, Baytieh had just learned for the first time from reading the SH Log that 1) his testifying informant was actually involved in a three-person informant operation facilitated and encouraged directly by the OCSD; 2) the prosecution team had misled Defendant, the Grand Jury, and the trial jury by hiding the fact that two of the inmates in Smith's dayroom were informants participating in that operation; 3) there were additional undisclosed informant interviews;

and 4) his veteran investigators had hidden all of this from him. Unquestionably, Baytieh would have been shocked and humiliated if his narrative were true. Indeed, every prosecutor in this nation faced with this type of unethical betrayal would have—before even writing such a letter—marched into his investigators' office, demanded an explanation for what had occurred, and insisted he be shown every last item of evidence in the case, including those referred to in the SH Log. Baytieh did none of this and he cannot claim otherwise at this late date—particularly without a single item of evidence disclosed in the three years that followed.

The reality is that the leader of a conspiracy to conceal was not going to ask his investigators for answers he already possessed, or evidence they all had agreed to hide. Rather, he would declare "total compliance with all discovery obligations" and bet on the undeserved trust he gained over the years being enough. It was a wager he would eventually lose.

### xii. The OCSD Investigators Refuse to Testify and the OCDA Concedes Habeas Corpus Motion and New Trial

As indicated above, despite the non-stop efforts to conceal the misconduct described herein, the refusal of Wert and other fellow investigators to testify at the 2021 habeas corpus evidentiary hearing[24] prompted a concession by the OCDA and a new trial. While Baytieh has not had to answer questions from the witness stand, it became clear from a

[24] Reporter's Transcript, *In re Paul Smith*, Orange County Superior Court Case Number M-17101, dated August 5, 2021, attached herein as Exhibit C1, pp. 4-5. Unlike the other members of his team, Baytieh would undoubtedly have testified at the evidentiary hearing, and will certainly testify at the hearing requested in this motion. His willingness to speak, though, should not be conflated with a commitment to speak truthfully. He recognizes that the refusal to testify about prior misconduct would be fatal to the career of a prosecutor or a prosecutor-turned judge. Additionally, the invocation of his right to silence would have been wholly inconsistent with Baytieh's pathologically cultivated self-portrait of a member of the justice system beyond reproach.

news article in 2017 that he would claim to have first realized Platt and Martin were informants in 2016 as a result of reading the SH Log.[25] He confirmed that this was his position during the DOJ interview. It was a contention that is only credible if Baytieh was unaware of any and all of the multitude of reports, recordings, letters, and other items related to Platt and Martin that have been uncovered since 2016.

### xiii. The OCDA Concedes Baytieh Concealed Informant Evidence Prior to Trial

In 2022, the OCDA rejected Baytieh's claim that he was unaware of *Brady* evidence that had been concealed from Defendant Smith. District Attorney Todd Spitzer announced that, based upon the investigation of an outside law firm, it was concluded that Baytieh violated the constitutional rights of Smith by improperly withholding evidence. Although not addressed in its public statements, the OCDA's findings allow for only one conclusion regarding whether Baytieh was truthful during his two-day interview with the DOJ in June 2019: He was repeatedly dishonest and misleading in his answers.

### xiv. Investigative Members of the Prosecution Team Failed to Disclose Evidence and their Malfeasance to Senior District Attorney Hunt

It must be emphasized that even if one were to suspend disbelief and adopt that Baytieh lacked any knowledge of the evidence concealment—a point with which the OCDA stands in firm disagreement—the prosecution would stand in no greater position in opposing this motion. In that narrative, Baytieh remains unable to offer insights or assurances about the completeness of the discovery, because his team would consist of out-of-control officers who supposedly hid a vast quantity of evidence from their own prosecutor. Prosecutor Hunt stands in no better position and is unable to articulate a good

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[25] Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017.

faith belief that all *Brady* evidence has been turned over to the defense, as the *Smith* law enforcement team years ago entered a state of law breaking-induced silence. **In the five years since Hunt first appeared on the writ of habeas corpus, he has not received a single spoken or written word from law enforcement members of the prosecution team a) regarding the numerous items of evidence uncovered since 2018 without the officers' assistance; b) describing the circumstances surrounding the rampant concealment; or c) denying the existence of still more undisclosed evidence.**

Ultimately, the belief in facts and logic need not be suspended. Baytieh's leadership role in the conspiracy, his misuse of prosecutorial authority, his incessant efforts to deceive, and his contempt for the rule of law borders on surreal. While it will be left to the affected defendants to seek justice in their cases, Baytieh's willingness to lay waste to the due process rights of so many, in order to preserve the *Smith* verdict and his own impunity, is critical to an analysis of whether it is reasonable to believe that all favorable and material evidence will ever be disclosed in this case.

### xv. This County's Most Flagrant Violator of Constitutional Rights Leads His Prosecution Team to Commit Historic Misconduct

Many in the local criminal justice community have remained unwavering in their faith in Baytieh and their belief that the image he has painstakingly developed is an authentic reflection of his prosecutorial ethic. It is understandable. Baytieh is a generational talent when it comes to deception—bolstered by a rare combination of charm and rhetorical skills that are wielded non-stop. Nonetheless, the mask will finally be ripped off to reveal the most dangerous and destructive prosecutor this county has ever seen, and the leader of a prosecution team that has viewed winning and self-protection as their only objectives. The remedy of dismissal will stand as the only fair and just response to what Baytieh and his team have created: the unjustifiable delay in the re-trial of Paul Smith, and the complete impossibility that he will ever receive a fair trial.

### B. Baytieh's Claims of Ignorance and Innocence are Undone by Embarrassing Plot Holes

Once again, the believability of Baytieh being oblivious to the existence of every single item of concealed evidence in this case is ruined by a long list of humiliating plot holes. Their unintentional creation makes perfect sense: In 2009 and 2010, he could not have foreseen a jailhouse informant scandal, or that he would need to formulate in the future a shifting narrative about why he repeatedly failed to disclose evidence damaging to the prosecution. In 2023, a finding that Baytieh did not conceal evidence rests upon the credibility of the following iteration of his narrative: His investigators—investigators with whom the prosecutor worked with on cases before, during and after *Smith*—created a plot to hide evidence in this one particular case.

The logical problems that arise from Baytieh's narrative hardly end there. Ultimately, the following plot holes in Baytieh's claim of ignorance and innocence must be overcome:

1) The investigative members of the *Smith* prosecution team inexplicably created an elaborate, years-long conspiracy to hide from Baytieh that Jeffrey Platt and Paul Martin were informants in the case;

2) As part of that conspiracy, the *Smith* investigative team inexplicably hid from Baytieh that Platt was the original leader of a three-informant operation, with Martin and Arthur Palacios, that was dedicated to obtaining Smith's confession to the murder;

3) Even though Wert would have had every reason to bring to Baytieh's immediate attention evidence helpful to the prosecution of Smith, Wert inexplicably concealed from Baytieh that during Platt's first interview he became the first witness to tell investigators that the defendant a) admitted to the murder, and b) was seeking to kill Wert and harm his family;

4) Investigators inexplicably hid from Baytieh that informant Platt was released from custody on his own recognizance the day after the above-referenced interview and continued working with *Smith* investigators to develop evidence of solicitation to commit murder charges against Smith;

5) Investigators inexplicably created and carried out a plan to hide from Baytieh all informant evidence related to Platt, including Platt's recorded (and booked) interview, in which he described how all three informants questioned Smith in violation of the Sixth Amendment;

6) Wert supposedly wanted to hide from Baytieh the recorded interview of Martin, despite booking the interview into evidence in 2009 and telling Martin during the interview, "I will let the D.A.'s office know, um, that I did speak to you, and I'll write a report, um, and let them know that, you know, whatever you told me, if you were cooperative, not cooperative, didn't want to talk, whatever the case is[;]"

7) Baytieh's inexplicable unawareness of each and every item of concealed evidence coincidentally enabled him to introduce illegally obtained statements and secure a special circumstances murder conviction against Smith;

8) Baytieh inexplicably "forgot" to investigate, prosecute, or incarcerate Platt despite Palacios telling investigators that Platt had attempted to assist Smith in carrying out a violent attack against Wert in exchange for $8,000, and Baytieh introducing this version of events through Palacios' Grand Jury testimony;

9) Baytieh inexplicably "forgot" to disclose to the defense that the inmate who replaced Platt when he was released from custody, Paul Longacre, was an informant whom Baytieh had transported to the Orange County Jail to testify in his capital murder prosecution of Billy Joe Johnson;

10) At the same time that the *Smith* investigators were supposedly hiding informant evidence from Baytieh, the prosecutor coincidentally was hiding from the defense the entirety of the OCII file of testifying informant Palacios, including a) entries showing Palacios had been previously rejected as an informant and was never approved prior to the operation in *Smith*; b) a memo written by Baytieh to the Orange County Informant Coordinator nearly identical to one he sent to Smith's trial attorney—except, most notably, the letter to the defense did not include the description of communications between Palacios and "OCS[D] investigators" after Palacios failed to abide by his agreement with Baytieh requiring him to turn himself in to custody; c) a note written by OCSD Investigator Joseph Sandoval to the Orange County Informant Coordinator stating that Palacios **"would be working solely for financial gain and consideration when he gets back I/C in one of our county facilities…"**; d) a note from Sandoval requesting to have Palacios authorized as an informant by the Orange County Informant Coordinator **one day after both sides rested** in *People v. Smith*—**indicating that Palacios was working as an informant for the OCSD and/or the OCDA near the time of the trial**; e) an entry in Palacios' informant file by the OCII Coordinator, created less than two weeks after

Smith's trial concluded, in which Palacios was rejected again as an informant and described as a "mercenary;" f) a letter in Palacios' OCII file[26]—from a Garden Grove Police investigator describing Palacios working previously as a jailhouse informant and obtaining statements from an inmate about two murders and a robbery; and g) numerous written communications from law enforcement agencies to the OCDA about Palacios' prior informant work and consideration for his efforts;

11) Baytieh inexplicably never reviewed Palacios' informant file filled with *Brady* material, according to what he told DOJ staff in his 2019 interview, even though he sent a 2010 email to the Orange County Informant Coordinator (found within the file) stating that he would "make arrangements for my investigator to meet with you to get copies of the above-named defendant's file relating to discovery[;]"

12) Baytieh inexplicably insisted during his 2019 DOJ interview that prosecutors are not required to review a testifying informant's OCII file, even though he co-authored, in 2016, a California District Attorneys Association Special Report on jailhouse informants, reminding its members that *Brady* "**requires a prosecutor who is using an in-custody informant to meticulously and thoroughly investigate the background of such informant**, and prior history and instances of providing cooperation or testimony, to make sure that the prosecution is providing the defense with all relevant discovery[;] (bolding added)"

[26] This document and a number of others from Palacios' OCII file were not included in the version recently provided to the defendant. Smith is not alleging that the current prosecutor, Senior District Attorney Hunt, had any role in withholding this document.

13) Baytieh's inexplicable decision not to make any *Brady* disclosures from Palacios' OCII file—having supposedly never even reviewed the file—coincidentally preventing the defendant, the Grand Jury, and the trial jury from learning about any and all of the *Brady* evidence related to Palacios, including that identified in plot hole #10;

14) While prosecuting *Smith*, a case that relied on the admissibility of informant testimony, Baytieh inexplicably elected not to disclose evidence from *People v. Guillen*, which demonstrated the hidden jailhouse informant program in action, as detailed in informant Sean Pough's interview in which he described a) receiving extra time in dayroom that produced statements from two of the co-defendants; b) being housed in the same module with the two defendants in the high profile case; and c) being offered the chance by OCSD deputies to have another defendant moved into his module;

15) Baytieh inexplicably "forgot," during the entire course of the *Smith* prosecution, that informant Platt was also a prosecution witness in one of his other homicide cases, *People v. Gary Shawkey*—forgetfulness that fortuitously kept him from questioning himself about the plausibility of Platt authentically aspiring to assist Smith in a conspiracy to violently attack Wert;

16) Even though the date of birth and California Driver's License number that appear in the *Shawkey* report are identical to those listed in each of Platt's criminal cases, Baytieh inexplicably told DOJ attorneys that the "Jeffrey Platt" from *Smith* and the "Jeffrey Platt" from *Shawkey* were two different people;

17) Members of the investigative team supposedly schemed for nearly two years to prevent Baytieh from learning about the assistance of informant Platt, but inexplicably decided to attend Platt's sentencing where they described the informant's valuable assistance to the prosecution of Paul Smith in front of a judge, defense counsel, and an OCDA prosecutor—with the investigators exhibiting no concern that Platt's prosecutor would reach out to Baytieh, talk to him about his role in *Smith*, and reveal their conspiracy to hide Platt's informant work from Baytieh;

18) During the litigation of *People v. Scott Dekraai*, *People v. Daniel Wozniak*, and other related cases in which it was alleged that the OCSD and OCDA orchestrated jail movements and directed informant questioning of charged defendants, the inexplicable effort of a supposedly rogue investigative team to conceal evidence from Baytieh coincidentally helped the then-prosecutor avoid revealing how *Smith* corroborated that defense allegations of an illegally operated jailhouse informant program were spot-on;

19) When Baytieh's Special Prosecutions Unit provided a list of informants who had testified and a redacted summary of their role in cases, in response to a 2016 Public Records Act Request ("PRA") by Scott Sanders, it inexplicably did not include a description of Pough's involvement in *People v. Guillen*—the case from Baytieh's caseload prior to *Smith* which most clearly demonstrated an illegally operated jailhouse informant program, even though a) other cases in which Baytieh used informants were included in the PRA response, and b) Baytieh's signature on the response letter is found above the following: "**Read and Approved by Ebrahim Baytieh, Assistant District Attorney, Supervising Head of Court — Special Prosecutions Unit**[;]" (Bolding added)

20) After Baytieh read the long-hidden SH Log of jail deputies' notes in 2016, and saw June 2009 entries that included descriptions of a) a plan to have Platt, Martin, and Palacios assigned to Smith's dayroom so they could "get details on his crime[;]" b) "operations currently in the works [that] have been properly maneuvered for Paul Martin and Art Palacios to take over should [Platt] leave[;]" and c) interviews of informants that had not been disclosed, Baytieh inexplicably never attempted to find out from the officers identified in the log why they hid these investigative efforts and whether there were additional reports and interviews that needed to be disclosed;

21) Beginning in 2016, Baytieh inexplicably decided that he would not ask his Special Prosecutions Unit to review content from the SH Log to determine whether law enforcement personnel should be added to the *Brady* Notification System—with this practice coincidentally occurring at the same time the OCDA systematically began blocking disclosures to the defense from the SH Log (as subsequently described in a 2020 report from the OCDA and the DOJ's 2022 report);

22) Baytieh, the head of the *Brady* Notification System from 2014 to 2018, inexplicably failed to submit to the Special Prosecutions Unit for consideration as additions to the system a) Wert, Voght, and Beeman, who carried out the effort to conceal informant evidence in the case through misleading and deceptive interviews and reports; and b) Sergeants Carrillo and Padilla, who facilitated the plan within the jail to have informants illegally question Smith;

23) Even after the DOJ confronted Baytieh with an undisclosed report documenting Wert and Voght's July 2009 interview of Platt, Baytieh once again inexplicably "forgot" to ask his investigators why evidence showing Platt was an informant had been hidden from him; and

24) Despite having been confronted with Platt's concealed report that described questioning of Smith by three informants in violation of the Sixth Amendment, Baytieh insisted to DOJ interviewers in 2019 that the prosecution team "…**provided the required discovery that the Constitution mandates**."

Baytieh should, of course, have his opportunity to explain at an evidentiary hearing why his ignorance and innocence should be believed. Until then, the narrative that Baytieh is an innocent victim of a rogue investigative team will stand as the unbelievable, fully confabulated story that it is.

The prosecution team's win-at-all-costs approach to investigation and prosecution has deprived the defendant and this court of even a modicum of faith that all favorable and material evidence will ever be disclosed. Dismissal is the only just remedy.

## STATEMENT OF THE CASE

On March 26, 2009, Defendant was charged in a felony complaint in Orange County Superior Court Case Number 09CF0579 with a violation of PC Section 187(a) for the murder of Robert Haugen with a date of violation on October 24, 1988. On June 17, 2009, Defendant was arraigned and entered a plea of not guilty. Defendant was later indicted on the same charge under Orange County Superior Court Case Number 09ZF0071 on October 1, 2009. On February 5, 2010, Defendant was charged in a Second Amended Indictment with two counts of violations of Section 653f(a), as well as violations of 664(a)–245(a)(1) and 182(a)(1)/245(a)(1) [counts 2, 3, 4, and 5]. On March 5, 2010, Defendant pled not guilty on those counts.

On November 2, 2010, Defendant was convicted by a jury of violating Section 187(a) and sentenced to life in prison without the possibility of parole. The jury found true a special circumstance of murder by torture.

On November 29, 2010, Defendant withdrew his not guilty pleas as to counts 2, 3, 4, and 5. The defendant was then sentenced to life without the possibility of parole.

On January 6, 2011, Defendant filed an appeal in Orange County Superior Court. The conviction was affirmed on August 31, 2012.

On June 30, 2017, Defendant filed a petition for writ of habeas corpus under Case Number M-17101. On April 2, 2018, the case was assigned to the Honorable Patrick Donahue.

On October 22, 2018, Defendant filed a request for a hearing on disclosure of jail records and a Motion to Compel Disclosure of *Brady* material on November 30, 2018. On December 7, 2018, County Counsel made an oral motion for a Protective Order for Sheriff's Special Handling Logs for inmate Arthur Palacios for the dates of June 24, 2009; June 25, 2009; September 18, 2009; December 8, 2009; and January 8, 2009. Defendant made an oral motion for all logs pertaining to himself and Mr. Palacios. County Counsel agreed to conduct a search of the records to determine whether anything in the logs

pertained to those individuals and to provide copies to the District Attorney for review. On January 24, 2019, subpoenaed documents were received from the Orange County Sheriff-Coroner. On March 1, 2019, further discussion was held in chambers wherein the Court agreed to review redacted and unredacted documents and notify County Counsel if it found documents that needed to be unredacted.

Defendant and the prosecution filed both informal and formal briefings related to the petition for habeas corpus. On October 9, 2020, after reviewing the petition, the informal briefing, the return, traverse, and exhibits, Judge Donahue granted the request for an evidentiary hearing.

The evidentiary hearing was set to commence in July 2021. On July 23, 2021, the prosecution provided *Brady* material regarding two potential witnesses to the evidentiary hearing. On August 5, 2021, the prosecution made a statement in open court indicating that it did not oppose the court granting the petition and vacating Defendant's convictions. On August 9, 2021, the Court vacated and set aside Defendant's conviction.

Defendant was rearraigned on August 13, 2021, and the case was assigned to the Honorable Kimberly Menninger. Defendant filed a request to recuse Judge Menninger, pursuant to Civil Code of Procedure 170.6. The case was then reassigned to the Honorable Gregg L. Prickett.

On September 10, 2021, Defendant filed a Statement of Disqualification against Judge Prickett, which was granted. On September 14, 2021, Judge Prickett disqualified himself.

On September 14, 2021, the case was assigned to the Honorable Michael Cassidy for all purposes.

The case is currently set for a pre-trial hearing on September 8, 2023.

## STATEMENT OF FACTS BASED UPON THE OPINION OF THE CALIFORNIA COURT OF APPEAL

The version of events described below is based upon the unpublished opinion in *People v. Paul Smith* (2012) WL 3745268. This allows for a brief rendition of the testimony and evidence presented at the trial. The opinion also illustrates how concealment and deception infect appellate determination.

On October 24, 1988, shortly after 1:00 p.m., firefighters responded to the burning residence of Robert Haugen and Christina Marrah. Firefighters found the nude body of Haugen on his bed, with his legs spread apart, his feet touching the floor, a pillow over his face, and a floor-style stereo leaning against his genitals. Marrah was away from the residence at work. Haugen's body was extensively burned, excluding his back and face. The autopsy later revealed that Haugen had been stabbed 18 times and the cause of death was noted as blood loss. No defensive wounds were noted. (*People v. Smith* (Cal. Ct. App., Aug. 30, 2012, No. G044672) 2012 Cal.App.Unpub.WL 3745268, p. 1.)

A fire investigator determined that the fire started on top of the bed, towards the rear of the bed. It was determined that the fire was lit by an open flame, likely a match or cigarette lighter. No accelerant was used. The stereo was also burned. Haugen was lying on the bed prior to the fire and his nose and mouth lacked soot, indicating that he died prior to the fire. (*Ibid*.) Evidence found in the apartment included the following: 1) a pair of Levi jeans, 2) a Levi jacket with red stains, 3) a pair of scissors with melted plastic handles on top of the jacket, 4) marijuana residue, 5) blood droplets on the kitchen floor and a cabinet beneath the kitchen sink, and 6) a washcloth with blood. (*Id.* at pp. 1, 2.)

Following the initial investigation, the case went cold for over two decades. Blood from the kitchen floor, cabinet, and washcloth were examined for DNA. The blood found in the kitchen and washcloth were determined to be from the same person, but it was not Haugen's blood. Based upon a comparison of the profile from those items to Defendant's

profile, an expert testified that the likelihood that the DNA profiles came from two unrelated individuals is less than one in one trillion. (*Id.* at p. 2.)

In 2009, Defendant was incarcerated in Las Vegas, following an incident with his former girlfriend, Tina Smith. (*Id.* at p. 3.) In March of 2009, investigators from the OCSD interviewed the defendant in Las Vegas. When discussing the incident, Smith admitted to knowing Haugen and stated that he had bought marijuana from him. Defendant told the investigators that he had been at Haugen's apartment the day before the murder to purchase marijuana and only stayed around 20 minutes. Around 9:00 a.m. or 10:00 a.m. on the day of the murder, the defendant called the victim to arrange to purchase more marijuana. Smith called again at approximately 1:00 p.m. but the telephone was out of order at that point. (*Id*. at p. 4.)

Defendant was later transported to the Orange County Jail to face murder charges. While there, the defendant was housed with Palacios, Martin, and Paul Longacre. **Jeffrey Platt is not referenced in the appellate opinion.**[27] Palacios testified against the defendant in hopes of receiving consideration on an unrelated felony matter. Palacios wrote down conversations he had with the defendant and eventually turned the information over to law enforcement. (*Ibid*.)

According to Palacios, Defendant stated that he went to Haugen's apartment to purchase drugs and an altercation broke out before Defendant stabbed him to death. The defendant stated, per Palacios, that there could not have been any blood droplets because he had cleaned everything very well. Additionally, he complained that the police were wrong about where the scale was located in the room. (*Id.* at pp. 4-5.)

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[27] As discussed briefly in the introduction, Palacios' testimony before the Grand Jury included a discussion of Platt's role in obtaining statements from Smith and attempting to assist Smith in carrying out an assault on Wert. Baytieh did not seek testimony about Platt during the trial, and instead had Palacios start his description of events after Platt had been released from jail on his own recognizance.

Palacios also testified that the defendant asked him to visit Darcy Smith when Palacios was released. Darcy Smith had been married to the defendant from 1981 to 2004, with their divorce becoming final in 2007 or 2008. (*Id.* at p. 2.) Palacios alleged that Defendant told him to make it clear that Darcy Smith was to give him an alibi. Palacios also stated that the defendant was angry at Christina Marrah for testifying before the Grand Jury. Palacios testified that Defendant had told Tina Smith to deal with Marrah to prevent her from testifying at trial. (*Id.* at pp. 4-5.)

## POINTS, AUTHORITIES, AND ARGUMENTS

### I. The Prosecution is Prohibited from Violating the Sixth Amendment

The Sixth Amendment of the United States Constitution provides, in pertinent part, that "in all criminal prosecutions, the accused shall [...] have the Assistance of Counsel for his defense." (U.S. Const., 6th Amend.) While the prosecution does not dispute that a Sixth Amendment violation occurred in this case, the malfeasance in accomplishing and covering it up is critical to the outrageous governmental conduct determination.

The Sixth Amendment right to counsel in all criminal proceedings does not attach until a prosecution is commenced. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.) A prosecution commences, for right to counsel purposes, at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (*United States v. Gouveia* (1984) 467 U.S. 180, 188.) The rule regarding when a prosecution commences is not "mere formalism," but rather a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." (*Kirby v. Illinois* (1972) 406 U.S. 682, 689.)

In *Massiah v. United States, supra,* 377 U.S. at pp. 205-206, the United States Supreme Court held that the Sixth Amendment is violated when the government

deliberately elicits statements from the accused after he has been charged and represented by counsel. The California Supreme Court has endorsed a two-prong test to determine whether a *Massiah* violation has occurred: "[T]he 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 first prong of the test is not met where law enforcement merely accepts information elicited by the informant on his own initiative with no official promises or guidance. (*In re Neely, supra,* 6 Cal.4th at p. 915.) However, the necessary preexisting arrangement "need not be explicit or informal, but 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." (*Ibid.* quoting *U.S. v York* (7th Cir. 1991) 933 F.2d 1343, 1357.) Circumstances probative of a preexisting arrangement include the government directing the informant to focus upon a specific person or instructing the informant on the specific information sought by the government. (*Ibid.*) Additionally, evidence of a preexisting arrangement between law enforcement and an informant can be inferred from a prior working relationship between the informant and the police. (*People v. Williams* (1997) 16 Cal.4th 153, 204-205; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241.)

As to the second prong of the test, actual interrogation by the informant of the accused is not required. (*In re Neely, supra,* 6 Cal.4th at p. 915.) Rather, "where a fellow inmate, acting pursuant to a prearrangement with the government, 'stimulates' conversation with a defendant relating to the charged offense, or actively engages the defendant in such conversation, the defendant's right to the assistance of counsel, as defined by *Massiah,* is violated." (*Id.* at pp. 915-916.) Furthermore, when the government informant and the defendant are both in custody, the "confinement may bring into play subtle influences that will make [defendant] particularly susceptible to the ploys of undercover Government

agents." (*United States v. Henry* (1980) 447 U.S. 264, 274.) When deciding whether an informant has deliberately elicited information from a defendant, courts must focus on "the state's conduct as a whole," rather than just on the informant's conduct. (*People v. Whitt* (1984) 36 Cal.3d 724, 741.) "In sum, the critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused. If it has, it may not disclaim responsibility for this information by the simple device of telling an informant to 'listen but don't ask.'" (*Id.* at p. 742.)

Illustrative of these principles is *United States v. Sampol* (D.C. Cir. 1980) 636 F.2d 621.[28] 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 informant was not directed by the government to obtain information from a particular person, the informant faced substantial jail time if he did not provide satisfactory information. The informant obtained information from a defendant and provided law enforcement with that information. Thereafter, the informant was told not to initiate any further conversations with the defendant. The D.C. Circuit Court found the informant obtained statements from the defendant in violation of *Massiah,* even though the informant was not directed specifically to the defendant. (*United States v. Sampol, supra,* 636 F.2d at pp. 637-638.) Despite the fact that the informant did not directly question the defendant, the informant was able to obtain the information through his "ability to 'ingratiate' himself with criminals" and encourage their confidences. (*Id.* 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.*)

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[28] The California Supreme Court cited approvingly to *Sampol* in *People v. Whitt, supra,* 36 Cal.3d at p. 741.

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

## II. Outrageous Governmental Conduct

### A. The Unprecedented Actions of the Prosecution Team in *Smith* Qualify as Outrageous Governmental Conduct

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.) The United States Supreme Court has held that the Due Process Clause grants courts the power to dismiss criminal cases when the government's conduct goes beyond "private sentimentalism about combatting crime too energetically" to the point that it "shocks the conscience." (*Rochin v. California* (1952) 342 U.S. 165, 171-172; see also *United States v. Russell* (1973) 411 U.S. 423, 431-432.) California courts have also acknowledged that there may be circumstances under which the conduct of the government in a criminal prosecution violates a defendant's constitutional rights to the extent that the only appropriate remedy is dismissal of the charges. (*People v. Smith* (2003) 31 Cal.4th 1207, 1223-1224.) However, a dismissal for outrageous government conduct "come[s] into play only when the Government activity in question violates some protected right of the Defendant." (*Hampton v. United States* (1976) 425 U.S. 484, 490.) Additionally, cases in which California courts have concluded that dismissal is required for outrageous government conduct involved significant violations of the defendants' fundamental rights which prevented them from receiving a fair trial, specifically the right to counsel. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1007, citing *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1260; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429; *People v. Moore* (1976) 57 Cal.App.3d 437, 440-442.)

In *People v. Guillen*, *supra*, 227 Cal.App.4th at p. 944, John Derek Chamberlain, a criminal defendant in Orange County, was beaten to death over the course of about 30 minutes while three OCSD personnel sat in an enclosed guard station approximately 68 feet

away. The defendants filed a motion to dismiss based on outrageous government conduct. (*Id.* at pp. 1002-1013.) The court ultimately concluded that the appellants were unable to establish that the OCSD or the OCDA interfered with a constitutional right preventing them from receiving a fair trial. (*Id.* at p. 1010.) However, in so doing, the court recognized "that because of the extreme nature of their conduct, which violated the public trust and the spirit of what we expect from those we entrust to enforce the law, it is unreasonable, nay impossible, to find a case analogous to the case we have before us." (*Id.* at pp. 1009-1010.)

Once again, the court is faced with an Orange County case for which it is thankfully impossible to find a perfect analogue. However, the court cannot simply wash its hands of the matter and summarily deny Smith's motion because the outrageous government conduct in question did not involve a violation of his right to counsel. To do so would allow the prosecution team to gain the advantage of the disadvantage to which they have placed Smith through their decades of pioneering misconduct, and would run counter to the spirit of the remedy set forth in *Rochin v. California*, which was designed to quash the notion that prosecutors and police are above the law.

An examination of *People v. Guillen* and *People v. Uribe* (2011) 199 Cal.App.4th 836 reveals why neither case can be used as a shield for the prosecution team to hide behind in this matter. In *Guillen*, *supra*, 227 Cal.App.4th at p. 1009, the defendants, who were charged with Chamberlain's murder, argued that their due process rights were violated, emphasizing the following: (1) OCSD deputies were derelict in their duties to protect inmates and enabled Chamberlain's murder; (2) the OCSD had a conflict of interest in investigating itself and should have referred the matter to the Attorney General; (3) the OCSD conducted a biased investigation; (4) the OCDA failed to prosecute the OCSD deputies involved in Chamberlain's murder; and (5) dismissal of the case would send a message to the OCSD. As described above, the court concluded that the appellants were unable to establish that the OCSD or the OCDA interfered with a constitutional right preventing them from receiving a fair trial. (*Id.* at p. 1010.)

In *People v. Uribe*, *supra*, 199 Cal.App.4th at p. 840, the court reversed the judgment entered against the defendant based on *Brady* error. The defendant filed a non-statutory motion to dismiss the information based on outrageous government conduct. (*Id.* at p. 841.) After evidentiary hearings on the motion, the court granted the motion. (*Ibid.*) The court concluded that the deputy district attorney who had prosecuted the first trial had testified untruthfully in the hearings on the motion. (*Ibid.*) The appellate court reversed the dismissal, concluding that the prosecutor's false testimony occurred in a peripheral hearing and was not shown to have prejudiced the defendant's right to a fair trial. (*Ibid.*)

Neither *Uribe* nor *Guillen* involved allegations of a conspiracy between the lead prosecutor—Baytieh in *Guillen*—and the investigators to violate the defendant's constitutional rights, launched from the outset of the investigation. While *Uribe* involved false testimony by the prosecutor in a motion to dismiss after the case had already been reversed for *Brady* error, *Guillen* involved the incompleteness of the OCSD's investigation into its own deputies. Neither *Uribe* nor *Guillen* alleged a cover-up of the original constitutional violation that lasted for more than a decade and culminated in the lead prosecutor lying to the DOJ. Defendants in neither case alleged the prosecutor had violated the due process rights of dozens of accused individuals in order to prevent the defendant from uncovering favorable evidence. It should also be noted that, as discussed beginning at page 309, the defendants in *Guillen* who allegedly made incriminating statements to two informants did not raise allegations about informant-related misconduct. This was because Baytieh was hiding evidence from *Smith* that, if disclosed, would have alerted the defendants in *Guillen* to the jailhouse informant program's existence and potential credibility issues associated with the individual informants.

The United States Supreme Court's guidance in *United States v. Russell* provides a path out of grappling with how to apply precedent to the unprecedented. In *Russell*, *supra*, 411 U.S. at pp. 431-432, the Supreme Court reaffirmed its holding in *Rochin v. California* that outrageous government conduct may require reversal of a criminal conviction. Citing *Rochin*, the Court anticipated that "we may some day be presented with a situation in which

the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." (*Ibid.*) Similarly, the California Supreme Court has stated that "[s]ufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of law." (*People v. McIntire* (1979) 23 Cal.3d 742, 748 fn. 1.)

The conduct in this case—a snowballing conspiracy by the lead prosecutor and investigators to conceal evidence of their wrongdoing that trampled on the *Brady* rights of dozens of other defendants and fed lies to everyone up the chain–presents a due process catastrophe, unprecedented on a local and national scale. Such a calamity is sadly the exact type of situation the Supreme Court anticipated when it described how it could one day be faced with conduct shocking and outrageous enough to bar the government from continuing its crusade to obtain a conviction. After decades of constitutional violations and endless, brazen lies, the notion that Smith could receive a fair trial is laughable, particularly in light of the prosecution team's ongoing withholding of evidence.

The Due Process Clause of the United States Constitution requires prosecutors to turn over exculpatory evidence in their possession to criminal defendants. (*Brady v. Maryland* (1963) 373 U.S. 83.) As described herein, Smith has identified 15 items of previously hidden informant-related evidence, many of which were only uncovered during the past eighteen months. Several items of discoverable evidence have still not been provided to the defense, and have likely now been destroyed. The prosecution team's longstanding concealment of evidence relevant to their interference with Smith's Sixth Amendment rights should rob the court of any confidence that all exculpatory evidence will be turned over in this case.

Further, investigators in this case refused to testify at the evidentiary hearing that had been set for the habeas corpus motion. They will likely invoke their right to remain silent at the evidentiary hearing on this motion, and will do so again if this case proceeds to trial. If the prosecution elects not to grant the investigators immunity, the investigators'

subsequent refusal to testify will deprive Smith of his Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.) Only through the testimony of the key players in this case can Smith convey how untrustworthy, unreliable, and rotten to the core the investigation was from the start. The individuals responsible for building the case against Smith were willing to disregard their legal obligations entirely. Excising the testimony of these individuals from the trial would leave jurors with the false impression that the conduct of the investigation team was proper, when nothing could be further from the truth.

Even if the investigators do not invoke their right to remain silent at the trial, how can this Court have any confidence that the investigators will testify truthfully? In *People v. Uribe*, *supra*, 199 Cal.App.4th at p. 841, which is described above, the appellate court ultimately reversed the dismissal of the case because the prosecutor's false testimony occurred in a peripheral hearing and was not shown to have prejudiced the defendant's right to a fair trial. In so doing, the court noted:

> "A prosecutor's false testimony in any court proceeding is a grave affront to the judicial system. It is undoubtedly an act that is "outrageous" in a general, nonconstitutional sense. When such prosecutorial misconduct impairs a defendant's constitutional right to a fair trial, it may constitute outrageous governmental conduct warranting dismissal." (*Ibid.*)

Here, the deceptive, extralegal tactics employed by investigators make it clear that even if they were granted immunity and testified at trial, no court could reasonably have confidence that these same investigators will honor their oath to tell the truth. Moreover, unlike in *Uribe*, where the misconduct was centered solely on the misconduct of the prosecutor during a hearing, in this case the investigators will be called as trial witnesses (at least, by the defense). Their credibility at trial—both about the completeness of their investigation and whether they have disclosed all favorable evidence—are central to the defense contention that an acquittal is required.

In addition, given these circumstances, nothing short of a dismissal will deter the government from future misconduct. In *People v. Velasco-Palacios* (2015) 235

Cal.App.4th 439, 442, the court discovered prior to trial that the prosecution had inserted a false confession into a transcript of the defendant's police interrogation in order to induce a plea agreement. The court granted the defendant's motion to dismiss for outrageous government misconduct. (*Ibid.*) The appellate court affirmed the order of dismissal. (*Ibid.*) In so doing, the court noted that any remedy short of dismissal would fail to provide an incentive for state agents to refrain from such violations. (*Id.* at p. 451, citing *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 759.) If the sole penalty for attempting to induce a plea agreement through fraudulent evidence was to simply discard the fraudulent evidence and continue the proceedings, "'the state would merely prove its case by the use of other, untainted evidence,' and '[t]he prosecution would proceed as if the unlawful conduct had not occurred.'" (*Ibid.*) "Such a result would do little to deter future misconduct and nothing to vindicate defendant's constitutional rights." (*Ibid.*) As in *Velasco-Palacios*, merely discarding the evidence obtained in violation of Smith's Sixth Amendment rights would do nothing to either redress the decades-long abuse of said rights and the ongoing concealment of the abuse, or address the deep-seated issues that continue to plague this county's criminal justice system.

In sum, although defendants must overcome a "high bar" to obtain a dismissal based on outrageous government conduct, the conduct of both Baytieh and the OCSD goes well-beyond "*passive tolerance*" or overly energetic law enforcement. Here, the prosecution's conduct shocks the conscience, and the evidence and argument to support that claim will be fortified once the requested discovery is provided.

If governmental misconduct irremediably deprives the defendant of a protected right and thus his right to a fair trial, the defendant's right to due process is violated under both the United States and California Constitutions. (U.S. Constitution, 5th and 14th Amendments; Calif. Constitution, article I, section 7.)

### B. The Delays in Defendant Smith's Re-Trial Caused by Continuing, Egregious Misconduct, Require Dismissal

The misconduct engaged in by the prosecution resulted in a delay of fifteen years from the time the misconduct was originated, and seven years since the first of that evidence came to light via the SH Log. Those delays are unfairly and directly due to the prosecution's intentional concealment of evidence and deception about the investigation of the case.

A criminal defendant has a right to a speedy trial. This right is protected by both the Speedy Trial Clauses of the United States and California Constitutions (U.S. Constitution, 6th and 14th Amendments; Calif. Constitution article I, section 15) and the Due Process Clauses of the United States and California Constitutions (U.S. Constitution, 5th and 14th Amendments; Calif. Constitution article I, section 7).

> "A delay between the commission of an offense and the filing of a criminal charge does not implicate the constitutional right to a speedy trial. [Citation omitted] However, the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution " 'protect[] a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.] Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions.' " [Citation omitted] Although the statute of limitations is the general guarantee against the bringing of criminal charges in an untimely fashion, a defendant's due process rights under the state and federal Constitutions may be violated by an unreasonable delay in bringing criminal charges. [Citation omitted]
>
> In determining whether a criminal defendant's due process right has been violated, courts employ a three-step test. [Citation omitted]The defendant has the initial burden of showing prejudice as a result of the delay; the prosecution then must show justification for the delay; thereafter, the court balances the harm against the justification. [Citation omitted]" *(People v. Smothers*, (2021) 66 Cal. App. 5th 829, 855-856)

The courts have explained how to assess the prosecution's justification for a delay in prosecution:

> "A showing of prejudice having been made by petitioners, the burden shifts to the People to establish a legitimate justification for the delay. [Citations omitted]. The cases indicate that this requires a reasonable "police purpose" such as time needed to discover additional evidence [Citation omitted], delays necessary to complete a narcotic buy program where it is essential that the undercover operator not be identified [Citation omitted], defendant awaiting trial on other more serious charges [Citation omitted], defendant left state, unable to apprehend [Citation omitted], defendant charged with state crime in custody of federal authorities [Citation omitted]. The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A "legitimate reason" logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial. By this statement we are not suggesting that a decision not to prosecute, based on a good faith evaluation of the evidence, followed later by a good faith re-evaluation of the same evidence cannot under any circumstances be considered as some justification for a delay. Clearly, a good faith decision not to prosecute on the basis of insufficient evidence should be classified as something more than an absence of bad faith in determining whether a defendant can receive a fair trial. Whether such minimal justification is sufficient to overcome a showing of prejudice will depend upon the substantiality of the prejudice. Each case must be judged separately on its facts and the particular circumstances surrounding the decision not to prosecute, the length of the delay, and the reasons for the subsequent re-evaluation and prosecution must all be considered.

(*Penney v. Superior Court* (1972) 28 Cal. App. 3d 941, 953-954)

Thus, the courts have found that the justification for delays was strong in cases where the delay was caused by the need for DNA testing before charges could be brought (*People v. Nelson* (2008) 43 Cal.4th 1242; *People v. Smothers* (2021) 66 Cal.App.5th 829) or by the inability to test a murder victim for paraquat. (*People v. Catlin* (2001) 26 Cal.4th 81) On the other hand, in *People v. Hartman* (1985) 170 Cal.App.3d 572, the issue was whether the alleged murder victim died of natural causes. The conclusion reached after the initial autopsy was that the decedent died from a heart attack. The decedent's widow hired other

pathologists who concluded that the cause of death was homicide. That information was passed on to the district attorney's office, the coroner's office, and the police department. Five years elapsed before the DA reopened the case and charged the defendant with murder. By the time that charges were brought, the original pathologist and his supervisor had died and the decedent's brain and heart were missing. The trial court found that there was no rational explanation for the lapse of time before the defendant was charged and that thus the prejudice created by the passage of time necessitated the dismissal of the case. Similarly, in *People v. Pellegrino* (1978) 86 Cal.App.3d 776, a 17-24 month delay was caused by the prosecuting agency's lack of interest in proceeding with a case involving receiving stolen property and theft charges until the defendant committed another offense. The court held that this justification did not outweigh the prejudice caused by the defendant's loss of memory over the period of time of the delay and upheld the dismissal of the case.

In the case at bar, the defendant will present at the anticipated hearing his prejudice caused by the lapse of time before he discovered that evidence had been deliberately withheld from him. Once the SH Log came to light and gave the first hint of a hidden informant operation, the prosecution team doubled down and continued to hide nearly all of the evidence detailed in this motion. This lapse of time devastated his due process right to a fair trial. The government's misconduct not only caused him to be illegally convicted, it ensured that enough time passed such that his ability to defend himself was irreparably crippled. The delay was not caused by the defendant's recourse to his appellate rights (compare with *People v. McDowell* (2012) 54 Cal.4th 395). Rather, it was caused by the deliberate and prolonged wrongdoing of the prosecutor and the investigating agency. Therefore, the outrageous governmental misconduct which occurred in the case at bar resulted in the defendant being robbed of his constitutional right to defend himself and to have a fair trial. It is a violation of due process to force the defendant to stand trial when the government's deliberate misconduct has made it impossible for him to defend himself. The case must thus be dismissed.

## ANALYSIS OF FACTS RELEVANT TO THE MOTION TO DISMISS

### I. A List of the Favorable Informant-Related Evidence Obtained by the Defense After 2019, and Other Evidence that Remains Undisclosed

The following informant-related items of evidence were withheld until at least 2019. Disclosures have not been made for a number of the identified items:

1) The audio recorded interview of Platt by Wert and Voght, on July 28, 2009, conducted at the office of the Sheriff's Department. This item was booked into evidence at the OCSD on September 30, 2009, and discovered to the defense in July 2019;

2) The Department Report ("DR") documenting the above interview, written by Voght, and dated September 22, 2009. This item was discovered to the defense in July 2019;

3) The DR documenting Wert's interview of Platt at the Orange County Jail, dated July 16, 2009, and discovered to the defense in July 2019;

4) A recorded call between Platt and Tina Smith, which also appears to have been booked on September 30, 2009. It has not been provided to the defense to date;

5) A second recorded call between Platt and Tina Smith, referenced in the July 28, 2009 interview of Platt. It has not been provided to the defense to date;

6) A recorded call, on July 25, 2009, between Paul Smith and Jeffrey Platt, obtained by former Investigator Bill Beeman, which was booked on September 30, 2009. It was discovered to the defense in July 2022;

7) The interview of Platt by former OCSD Investigator Guevara that occurred at the Orange County Jail on June 24, 2009, according to the SH Log. Neither a recording, report, nor notes memorializing the interview have ever been provided;

8) The interview of Platt by former OCSD Investigator Guevara and former Investigator Bill Beeman that occurred at the Orange County Jail on June 28, 2009, according to the SH Log. Neither the report nor notes memorializing the interview have ever been provided;

9) The letter from Platt to Smith and the envelope for said letter. It was discovered to the defense in August 2022;

10) The OCII for Platt, documenting his informant status at the time of his questioning of Smith. This item was discovered to the defense in 2021;

11) The recorded interview of Paul Martin, conducted at the Orange County Jail on December 29, 2009. The item was discovered to the defense in August 2022;

12) A letter from Martin to Sergeant Wert, which was booked on January 13, 2010. This item was discovered to the defense in August 2022;

13) A letter from Smith to Martin, which was booked on January 13, 2010, and was provided to the defense in 2023;

14) The OCII for Palacios, which was discovered to the defense in 2022; and

15) The police report from *People v. Gary Shawkey*, revealing that Platt was a witness for the Baytieh-led prosecution in that matter, which was provided to the defense in 2022.

## II. Recent Revelations of Misconduct Offer Insights about Prosecution Team's Concealment that Began in 2009

One of the consequences of the immense misconduct in this case is the difficulty of telling the story of what occurred in a fully chronological fashion. This is because the revelations have been spread out over years, and information about events learned more recently will need to be discussed at multiple points in this brief to provide a better understanding of what those responsible knew and were contemplating when decisions to conceal evidence were formed.

Two items of evidence in particular will be discussed in and out of chronological order: DOJ interview of Baytieh that took place in 2019, and the SH Log, uncovered in 2016. Both offer critical insights about information that was not timely disclosed to the defense, and specifically about what Baytieh and his prosecution team knew and were working toward from the inception of the case.

### A. Baytieh's 2019 DOJ Interview Unintentionally Ruins His Intended Narrative

It is abundantly clear that when Baytieh arrived for his June 2019 interview with DOJ attorneys, he was well prepared to deliver a version of events in *People v. Smith* crafted to convince the questioners that neither he nor his investigative team engaged in any intentional wrongdoing related to informants. Baytieh's plan was to exit the interview without generating suspicion about undisclosed evidence or the team's role in accomplishing its concealment. He reasonably would have believed he had already dodged a bullet through his response to the uncovering of the SH Log in 2016. Although the entries in the SH Log flagged the existence of additional recorded interviews, or at least

reports related to interviews of Platt and Martin, Baytieh made no effort to obtain any of them. This made sense from a purely tactical vantage point: "locating" and disclosing evidence that he and his team concealed for years did not exactly further the plan for preserving the conviction and achieving lifetime impunity. Moreover, as he had not disclosed any of the evidence between 2016 and 2019, Baytieh would have logically felt safe in the assumption that the DOJ had not independently obtained any of the at least 15 items still hidden from the defense. He was wrong.

Efforts to advance the truth about what was concealed in this case benefitted immensely from a disadvantage that Baytieh unknowingly, but deservedly, faced. He did not realize at the time he began answering questions that the DOJ attorneys possessed a critically important piece of then-undisclosed evidence: Voght's report about the July 2009 recorded interview of Platt. (DOJ Interview of Ebrahim Baytieh, dated June 25, 2019, attached herein as Exhibit E1, pp. 80-81; Voght's Report, dated September 22, 2009, attached herein as Exhibit Q6.) The result was that Baytieh received a serving of ironic justice, when he found himself similarly situated to many of the accused who had been questioned in cases he personally prosecuted—responding to probing, unaware that his interrogators had far more evidence of his wrongdoing than he realized.

DOJ attorneys questioned Baytieh about the informant evidence introduced in *Smith*. The result was a series of reactions and responses that further undermined Baytieh's narrative that he was unaware of every item of evidence concealed from the defendant in this case.[29]

Baytieh discussed his role in calling Palacios as an informant witness, and articulated his established practice for the use of informants in his cases. However, the key

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[29] Baytieh's required narrative has been previously stated and is repeated herein: Every item of informant-related evidence was hidden without his knowledge, with this occurring because of a conspiracy by his investigators to hide evidence from the defendant and the case prosecutor.

was that the discussion of this subject matter began while Baytieh was still in the dark about the DOJ's possession of the OCSD report regarding Platt's recorded interview. Thus, Baytieh likely did not appreciate the implication of his answers to the believability of his claim that he was ignorant of Platt's role as an informant. Early on, one of the questioners asked Baytieh about his familiarity with informant Palacios. (Exh. E1, p. 52.) Baytieh said that "[i]n late June, early July of 2009, the lead investigator in the *Smith* case that I was prosecuting received information that brought Arthur Palacios to my sphere of information that I know. So that's kind of the approximate date." (Exh. E1, p. 52.) (The DOJ attorney then clarified the timeframe, reading from Wert's report, which indicated that it was "sometime on or prior to July 9, 2009, that he was advised by Investigator Beeman in reference to Arthur Palacios." (Exh. E1, p. 54.))

Of course, it would have only made sense that in a case of this seriousness and with an active threat to a law enforcement member, that investigators would communicate to their prosecutor how informants were being used to develop evidence and what they were learning from the informants. Baytieh suggested that Wert and Beeman had rapidly communicated the information Palacios had shared, which was that Smith had spoken about the murder and the threat to Wert and others. However, the fact that this information from Palacios was timely delivered completely undercuts Baytieh's now-needed claim that Wert, Voght, and Beeman went rogue as it related to Platt and Martin. **That is, if Wert and Beeman quickly shared with Baytieh information regarding Palacios and what he communicated, there is no reason to believe these same investigators hid what they had learned about Platt.** In fact, a decision to hide information about Platt makes even less sense, considering Platt a) was originally the lead informant in the case; and b) continued his informant work after he was released from custody in an effort to build solicitation for murder charges against Smith. Moreover, there would have been an even greater impetus to communicate with Baytieh about Platt, as Platt was the first person in any interview to claim he heard admissions to the murder and statements related to attacks on Wert. Thus, even if the investigators who questioned Platt during several interviews—

Wert, Beeman, Guevara and Voght—decided that the disclosure of evidence to the defense would be damaging to the prosecution because of his July 2009 recorded interview, it would have been too late to conceal Platt's informant identity from Baytieh.

### B. Baytieh-Led Investigative Team Follows Prosecutor's Rules for the Use of Informant Evidence Related to Palacios and Thus Damages Narrative of Rogue Investigative Efforts as to Platt and Martin

Approximately thirty minutes into his DOJ interview, Baytieh continued to wax poetic about informant issues in the case, emphasizing how responsible his investigators were when working with him on informant issues. (Exh. E1, p. 51.)

Baytieh still had no sense that soon, several of his responses would be painfully inconsistent with any continuing claim of ignorance regarding the massive evidence concealment that was still unrevealed. For instance, Baytieh described his rules for the use of informants and his level of involvement in developing evidence before and after filing. Baytieh said, "I made it very clear in certain cases -- in all my cases. **Before we go to talk to anybody that wants to be an informant, you've got to let me know because sometimes we may even not want to go talk to them**." (Exh. E1, p. 59, bolding added.) In other words, per Baytieh, his team was on the same page as him when it came to speaking with informants: The investigators needed his approval before discussions with an informant were even commenced. That is important. The interview took place three years after the SH Log was uncovered and provided documentation of Platt and Martin being placed in Smith's dayroom to get answers about the murder. If his narrative of ignorance was true, then three years earlier he learned for the first time that his investigators had violated his rules about dealing with informants. Yet, there was no hint of this in his interview. In fact, while speaking to the DOJ attorney as if Palacios was the only informant on the case, Baytieh made it abundantly clear that his team understood his protocols and followed them.

Baytieh discussed how Palacios originally became involved, stating that "we started getting information—that's how Palacios came into the picture—that he was trying to hire **somebody** to now not just kill the investigator. He wanted to kill his best friend and brother-in-law, Mr. Smith's best friend and brother-in-law, because he had given information to the police." (Exh. E1, p. 65, bolding added.) Baytieh continued: "Palacios comes to the sheriffs, and he says, 'Hey, this guy is trying to get me to help him hire a hitman.' Palacios wasn't the only one that that was said to. Smith was saying it to **everybody** in the jail." (Exh. E1, p. 65, bolding added.) Incredibly, Baytieh was speaking to the interviewers as if he believed (or hoped) they had not studied the SH Log that had been uncovered three years earlier, and which had shown **Smith was not talking to "everybody in the jail."** Rather, the entries described how Smith indisputably had been the subject of an unlawful informant operation in place well before Palacios first came forward. Moreover, the dayroom where the operation was focused included three informants—Platt, Martin, and Palacios—not just one, as presented by Baytieh at both the Grand Jury and trial proceedings.[30] In sum, Baytieh was floating a version about what had occurred in terms of Smith's communications regarding a "hitman"—pretending that those inmates with whom Smith spoke besides Palacios were not informants—even though that version had been disproven three years earlier when the SH Log was uncovered.

It is fascinating, as well, that Baytieh tripped himself up in a manner similar to Wert. In his July 2009 report about Palacios' interview, in which Palacios had presented Platt as genuinely attempting to assist Smith in committing a violent assault upon himself, Sergeant Wert tipped off the consciousness of his wrongdoing by replacing Platt's name in the report with the pronoun "someone." Ten years later, in 2019, Baytieh tried the nearly identical

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[30] As discussed beginning on pages 155 and 345, there would soon be a fourth informant, Paul Longacre, who not only replaced Platt in the dayroom, but had been transported to the Orange County Jail at Baytieh's request so that he could testify as an informant in one of the prosecutor's other homicide cases. Longacre was also a testifying informant for Baytieh in *People v. Billy Joe Johnson*.

trick: Baytieh's turn to feigned ignorance that the "everybody in the jail" with whom Smith was speaking were actually the planted informants, Platt and Martin.

Even if one were to absurdly assume for argument's sake that Baytieh was not in on the concealment at the time of trial, once the SH Log surfaced in 2016—with details of the three-informant operation—Baytieh could no longer honestly make the claim that Smith was speaking to random inmates (rather than informants.) Yet, there was Baytieh speaking to the DOJ as if he was still in the dark about the informant operation, when **the truth was that he simply had decided he would not speak the names "Platt" and "Martin" unless and until the interviewers compelled him to do so**.

### C. Baytieh Admits to DOJ that *Smith* Investigators were Ordered to Consult with Him Regarding Use of Informants, and Followed Directives as it Related to Palacios

Pretending that he still believed Smith was talking to inmates (rather than informants) about a "hit" was just one of Baytieh's many missteps during the DOJ interview. Having still not mentioned Platt or Martin as the interview about *Smith* moved along, he continued to emphasize that, as it related to Palacios, he had worked closely with Beeman and his other investigators. Those investigators, Baytieh asserted, were given clear instructions about how Palacios should and should not acquire information from Smith:

> Now, this is not by coincidence that the investigator says in his report, "I emphasized to [Investigator Beeman] that I didn't want [Palacios] to initiate any conversation with Smith regarding the Investigator Wert situation." That wasn't something that the investigator put there by coincidence. It was by design because **I told the investigator, "I don't want this guy" -- "I understand we're making him give him the number, but I don't want him to go initiate contact with him. My -- I had a homicide case that I was prosecuting. Building a case on Smith for solicitation, the only -- the main objective we had on that is we don't want him to kill somebody while he's in the jail.**

> **And you have to take my word for it, and take my word for it. As a homicide prosecutor who's seen a lot of people do horrible stuff, this guy wasn't just talking. This guy wanted to kill these two people on the outside.**
>
> **So the instruction that we gave [Palacios] is "Don't go ask him any questions. But if he talks to you, give him the name of that guy.**
>
> Some people talk, and it's just talk. Some people talk, and as a prosecutor, you go, "This guy may act on his talk." So our main thing is we wanted to try to funnel any attempt to hire a hitman to go through the undercover investigator because we can make sure it doesn't happen.

(Exh. E1, p. 71, bolding added.)

Everything that Baytieh was describing was consistent with the widely understood perception of him as a hands-on prosecutor who would never take his eyes off something as important as a murder defendant orchestrating violence against his own investigator and members of the community. His team fully recognized and respected the role Baytieh demanded in selecting and managing informants. Wert and Beeman, the latter going undercover as "Blade," and promising Smith he would assault Wert in exchange for money, understood that this was Baytieh's case, and he alone would decide who would be used and how far to go with each informant. The problem for Baytieh is that this very credible version of the investigative team and their prosecutor working in unison when it came to Palacios is wholly inconsistent with the notion that these same investigators would have a) utilized Platt and Martin as informants and interviewed them without ever telling Baytieh; and b) concealed from Baytieh what Platt and Martin did and said during the course of their informant services.

Moreover, Baytieh provided additional information earlier in the interview about his role in the case that was also entirely at odds with the narrative of his investigators going rogue, and with Baytieh perpetually falling asleep at the wheel when it came to all things Platt and Martin:

> In early 2009, Investigator Wert and a second investigator go to Vegas and interview Mr. Smith, and **they had to brief me on the case. It was my case. We hadn't filed it, but that court case was mine. So we kind of sat down and strategized about the case**. We had a DNA hit. We had a report that said that the suspect -- Mr. Smith's DNA was found.

(Exh. E1, p. 63, bolding added.)

Baytieh corroborated during the interview that this case was not an outlier in terms of his long-standing prosecutorial approach. That is, *Smith* was not the one case that somehow fell through the cracks, nor the one case in his caseload where he was passively involved. Indeed, it is difficult to imagine a case in which a prosecutor would have been more intensely focused on a criminal prosecution than this one: a case in which a defendant was charged with murder, while also being investigated in a planned "hit" upon a police officer and other witnesses.

## III. The Prosecution Team Attempts to Fill the Confession Gap and Build Solicitation for Murder Case at the Inception of the Concealment

Having summarized the DOJ's questioning of Baytieh about *Smith* prior to probing him bout Platt, this brief now returns to a presentation of the events in largely chronological order. The analysis begins with Smith's arrival at the Orange County Jail on June 15, 2009.

### A. Smith Transported from Las Vegas to the Orange County Jail, Where an Illegal Plan Awaits

As Wert and Voght drove Smith from Las Vegas to the city of Orange on the above date, they had two objectives: obtain a confession on a case where there was none and develop evidence that Smith—based upon calls from the jail in Las Vegas—was orchestrating an attempt to kill Wert. Significantly, the plans were in the works three days before Smith had even arrived. An SH Log entry by Deputy Anton Pereyra from June 12, 2009 stated the following: [redacted]

[redacted] (Redacted Excerpts from the SH Log, attached herein as Exhibit F1.)

Three days later, with Platt in transit, Beeman wanted to make sure the plan for him was in place. Former Special Handling Deputy Bill Grover wrote on the day of Smith's arrival on June 15, 2009 the following: [redacted] (Exh. F1.)

### B. Investigator Beeman, Investigator Guevara, Deputy Padilla, and Deputy Carrillo Participate in Plan to Obtain Statements by Violating Smith's Sixth Amendment Rights

Shortly after his arrival at the Orange County Jail, Smith was moved into Module L-20, which would years later be identified as a "snitch tank:" a location where informants and high-value inmates were placed to increase the chances of obtaining statements from targeted inmates. On June 24, 2009, Deputy Michael Padilla of the Special Handling Unit wrote an entry within the SH Log that was hidden until 2016:

> Mike, please follow up on this. Platt and Martin have info on Smith they want to give to Guevara. Guevara is coming in the morning at approximately 18:00 hours to talk to Platt. I have made arrangements w/Deputy Schneider for the group in L-20. **Martin, Platt, Palacios, Smith to get day room from just after morning chow until around 11:00.** This is at the request of Martin and Platt. **They feel if they get this time with Smith, they can get details on his crime. I told them I didn't have a problem with this and would pass it on. I am leaving an e-mail with Guevara.** Schneider said he would let Mitchell know in the morning. Thanks. Martin asked if he could get out for a non-collect call as well. I told him I would do my best to accommodate him.

(Exh. E1, pp. 116-117, bolding added.)

"Mike" is then-Special Handling Deputy Michael Carrillo. "Guevara" is former OCSD Sergeant Roger Guevara. The next day Carrillo wrote the following entry regarding the scheduled interview referenced above: "Sat in on interview between Platt, Jeffrey XXX

and DPI/ATF. It looks like **Paul Martin will be spear-heading the case** on Smith, Paul #XXXXX who is also housed in L-20." (Exh. E1**,** p. 118, bolding added.)

The "DPI/AFT" investigators being referred to were Guevara and almost unquestionably Beeman. Guevara was cross-designated as a member of the OCSD's Dignitaries Protection Investigations ("DPI")[31] and the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). Beeman was an investigator with DPI. That Beeman was there also appears to be confirmed by Platt's July 2009 recorded interview with Wert and Voght. Platt said that he met with Beeman shortly after he asked to be placed in the dayroom with Smith. (Redacted Transcript of Interview of Platt, July 28, 2009, attached herein as Exhibit G1**,** pp. 59-60.)

Q: So Investigator Beeman came over shortly after you saw Deputy Garcia
A: Right.
Q: and talked to you about this.
A: Right.
Q: Okay.
A: That would be the first time that I ever met Investigator Beeman.
Q: Okay.
A: And then the second time I met him uh he came to the jail with you.

(Exh. G1, pp. 60-61.)

Having authorized Platt and Martin's illegal informant operation, Beeman and Guevara were equally at ease with modifying the plan for who would lead the operation a few days later. The decision to provisionally have Martin "spearhead" the informant operation was likely based upon the anticipation that Platt would be released from custody on his own recognizance after he pled guilty on June 30, 2009, to numerous charges on multiple felony cases. (Redacted Court Vision, *People v. Jeffrey Platt*, Orange County Superior Court Case Numbers 08SF1028, 08HF1151, 09HF1361, 0SF011511, attached herein as Exhibit H1.)

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[31] The DPI is also interchangeably referenced to as the Special Operations Bureau.

Significantly, the prosecution has disclosed neither the recording of that interview nor a report from Guevara, Beeman, or Carrillo about the interview.

### C. After Multiple Investigators Question Platt, Wert Creates an Intentionally Misleading Report

In Wert's report about his first interview with Platt, Wert described his interview of "Confidential Informant #815 (Jeffrey Platt)" as occurring the "week of June 29." (Redacted Report of Wert, dated July 16, 2009, attached herein as Exhibit I1.) In the report, Wert wrote that "[d]uring the week of June 29th I was advised by OCSD Investigator Beeman and Guevara of the Special Operations Bureau that a confidential informant (referred from this point as #815) had information regarding the murder of Robert Haugen." (Exh. I1.)

Wert had misled through significant material omission. First, Wert suggested that he was simply led to Platt by Beeman and Guevara, without including critically important facts relevant to how Platt, Martin, and Palacios ended up in Smith's dayroom. Again, Padilla's SH Log note stated that Platt and Martin believed they "can get details on his crime. I told them I didn't have a problem with this and would pass it on. I am leaving an e-mail with Guevara." (Exh. E1, p. 116.) [redacted] (Exh. F1.) This information about the Platt/Martin effort was obviously not hidden from Wert. Moreover, the fact that Guevara and Beeman disclosed the plan related to Platt and Martin to Wert is also corroborated by Wert's decision to conceal from his own report that Beeman and Guevara were present at the June 29 interview. (Exh. I1.) Beeman's presence at the interview with Wert was substantiated by Platt during his subsequent recorded interview. Platt stated that "Beeman came over [to meet with him in the jail] shortly after [he] saw Deputy Garcia." (Exh. G1, p. 60.) He said that he met with Beeman, "then the second time [he] met him uh he came to the jail with you." (Exh. G1, p.

61.) The "you" is Wert, who was questioning him. Moreover, Deputy Carrillo's SH Log entry written on June 29, 2009, states the following:

> Interview in DPI room now with Platt and Guevara. It appears Platt may be out tomorrow. Platt advises any operations currently in the works have been properly maneuvered for Paul Martin and Art Palacios to take over should he leave.

(Exh. E1, p. 120.)

For Wert, whose sole focus was on securing convictions for Smith, it made perfect sense to omit from his own report regarding the Platt interview any reference to Beeman and Guevara having been present. They were key witnesses to the multi-informant operation that had been created, the covert plan to violate Smith's constitutional rights, and the plan to "maneuver" the illegal informant operation to Martin and Palacios once Platt was released. Excluding Beeman and Guevara from the report wisely prevented the defense from learning about additional witnesses to an intentional violation of the defendant's constitutional rights.

The above log entry corroborates that Guevara was also present at the interview, though it is unclear why Carrillo omitted the presence of Wert and Beeman from the log note. Even in the unlikely possibility that there was a separate interview of Platt on the same date that is not reflected in the SH Log, it only makes sense that everything that was taking place in these communications was known to Wert (and Baytieh). Additionally, Wert concealed from his interview that, after Platt's anticipated release the next day, the plan was to have the informant continue working directly with Beeman on developing the solicitation and conspiracy charges, which Wert obviously knew about as the lead investigator in the case.

Wert had decided to hide from his reports all of the information known to him showing that Platt's statements were obtained from Smith in furtherance of the hidden operation to violate Smith's Sixth Amendment rights. This omission of critically favorable evidence was fully reflective of the actual concern that Wert, Beeman, and Guevara had for Smith's rights: None. The only important development for Wert and his colleagues, as the

investigators walked out of the jail on June 29, 2009, was that **Platt became the first informant and first witness to announce to investigators that Smith had admitted to the murder.** Platt did not stop there. He told Wert that Smith was planning violence against the investigator and another witness. It was game breaking on both fronts. The report ended with the following:

> the media. 815 further stated that SMITH wanted to have me murdered for my work on this case and have my family harmed. 815 also stated that SMITH wanted his girlfriend (Tina SMITH) murdered as she had been violently victimized by SMITH on two prior occasions. 815 is willing to testify and assist law enforcement on this case. No promises of any reward were made to 815 for his current and future cooperation to law enforcement.

(Exh. I1.)

There is little doubt that shortly after concluding his interview with Platt, Wert informed Baytieh about this critically important development in the case. Nothing else is believable.

### D. Wert and Voght's July 2009 Recorded Interview of Platt Turns Disastrous for the Prosecution

When Wert and Voght sat down with Jeffrey Platt in the offices of the OCSD, there seemed to be little doubt that they believed that they had just met the informant they needed both to seal the murder case against Smith and to support new charges against Smith for a planned attack on Wert and others.

Near the beginning of the interview, Wert assured Platt near that the prosecutor (Baytieh) would be informed about the information and assistance he was providing, but that no promises could be made. (Exh. G1, p. 5.)

Before they spoke in detail about what Smith said, Platt told the investigators how he and Smith came into contact within the jail—while confirming that he and Wert had discussed this same subject matter during their unrecorded conversation a month earlier.

Wert said: "I understand based on our prior conversation earlier in July that you had uh been part of a group with him, a day room group or a roof recreation group with him." Platt answered: "Right we were placed in a group together with uh you know at his request and my request that we be able to day room together with uh Paul Martin and Art Palacio [sic]." (Exh. G1, pp. 10-11.) While not acknowledging it during the recorded conversation, Wert and Voght already would have known, not only that all three were jailhouse informants, but that the three had been placed in the dayroom at Platt and Martin's request because they believed they could get information about the crimes if placed there.

At the same time, Platt's acknowledgment that Smith did not make admissions to the crime would have been immediately concerning.

Q: Okay but the first time he saw you he didn't just start talking to you about his case?
A: No, no.
Q: It took about, a, you're thinking several days to about a week?
A: Right.
Q: Okay.
A: It took us a while to get in, into the day room group.

(Exh. G1, p. 13.)

**Platt also quickly implicated all three informants in the questioning of Smith that followed: "I mean between me and Art and and[sic.] Paul Martin we would just start talking about stuff and then he would just start you know**." (Exh. G1, p. 14, bolding added.)

Platt clarified that Smith was asked about the murder; this would have clearly been understood by the investigators as a Sixth Amendment violation implicating all three informants from the first moment of the contact:

> Q: Okay um go ahead and tell me about what um Paul told you about his current murder charge.
> A: Well Paul, Paul um asked you know I asked him "What's the deal?" you know what I'm saying? Because uh he at first told me "I don't know? I really don't know I really don't know…"

(Exh. G1, p. 26.)

Wert and Voght would have instantly recognized that Smith's responses to these questions and any statements about the crime that followed would be inadmissible in court proceedings—as Baytieh also knew when he listened later. But Platt was just getting started. Platt thought he had a good way to get Smith to feel "comfortable" with him—a word he used earlier to describe the relationship he was seeking. (Exh. G1, p. 12.) Platt would suggest that he had a track to inside information and a way to help Smith with his case: "…and then um I kinda I kinda you know made a hint to him that I I just you know I asked him I said 'Well you know' I **I lied to him. I told him that my father was a DA and might be able to help him**." (Exh. G1, p. 26, bolding added.)

The investigators also fully realized that they could not make what had just been said somehow unsaid, so they moved on as if the informant had not just admitted to providing Smith with false information to convince him to speak about the crime:

> Q: And tell me about why you um started asking him questions.
> A: I just want, cause what … **So I just wanted to know the truth, I wanted to know if he's bullshitting me or lying to me…**

(Exh. G1, pp. 26-27, bolding added.)

Platt spoke about how the (informant) members of the group had become increasingly frustrated that Smith refused to take responsibility for the crime. "So then I turn around, right after we do that and I would say 'So what the fuck happened?' 'I don't know?' … And so one day I just told him I go 'How do you go from this to I don't fucking know dude? It doesn't make fucking sense what you're telling me" you know? I go 'It makes no sense whatsoever. So you had to have known.'" (Exh. G1, p. 32.) Platt

continues, "What the fuck did he possibly do? He goes 'I don't know?' He goes 'Well I don't know.'" (Exh. G1, p. 33.) Platt made it clear that the denials continued for days:

> [H]e keeps going back to I don't know so **a couple more days go by** and we're outside and now at this time **me and Art and Paul Martin** are are we're fucking cracking jokes at him you know what I'm saying? 'Paul Martin everybody Paul Martin' clapping our hands you know what I'm saying? And then we we'd start going through this fucking ritual with him, he'd start laughing and we'd tell him …

(Exh. G1, p. 33, bolding added.)

According to Platt, the pushing and mocking finally worked, and Smith began speaking about the crime after one more final refrain: "**Well what, come on dude you got to fucking, you got to know**." (Exh. G1, p. 33, bolding added.)

After Platt's description was complete, Wert attempted to find out if the alleged admission might have been said to him alone, as opposed to all three informants being present when Smith allegedly broke:

> Q: Which brings up a point when **when he's telling you this were Palacio [sic.] and Martin there?**
> A: Absolutely.
> Q: Okay so if I go to them um they would they would basically say they were there as well?
> A: Oh **they were there**.

(Exh. G1, p. 55, bolding added.)

At a point in the dialogue, the conversation returned to how he and Smith ended up in the dayroom. Platt explained that he asked former Special Handling Deputy Ben Garcia to assign himself after realizing that he and Smith attended school together. (Exh. G1, p. 59.) Platt agreed that "Beeman came over [to meet with him in the jail] shortly after [he] saw Deputy Garcia." (Exh. G1, p. 60.) He said that he met with Beeman. (Exh. G1, p. 61.)

Wert could not have possibly missed the significance of what Platt had just shared in terms of endangering the introduction of informant evidence. In a desperate effort to

enable the prosecution to admit Smith's statements, Wert asked if Platt remembered being told "not to you know to try and solicit information." (Exh. G1, p. 61.) Wert certainly knew that if that guidance had actually been given, it would have been far too late to somehow make Smith's statements admissible. This is because when Platt was first interviewed by Wert on June 29, 2009[32]—the earliest point in time that Wert could have given Platt his admonishment—it was after Platt and the informant team had already obtained statements from Smith regarding the crime.

Even with Wert's encouragement of Platt to modify his truthful rendition about having solicited information from Smith, Platt did not pick up on the hints. Platt added that he and his informant accomplices had employed "daily prodding" to propel Smith to speak about the crime. (Exh. G1, p. 62.)

As the interview came to a close, Wert and Voght fully appreciated what had just been described and its implications—an unfixable Sixth Amendment violation implicating all three informants. On the other hand, for a prosecution team unmoved by legal and ethical obligations, the solution was a simple one: all evidence related to Platt would be hidden or manipulated to ensure that the Sixth Amendment violations would remain permanently undiscovered.

### E. An Exculpatory Call Between Platt and Smith Provides Further Motivation to Replace Platt and Conceal All Evidence Related to Platt's Informant Efforts

While Platt's clear description of the informants' repeated questioning of Smith about the crime assured that he would never take the witness stand, the concealment of all evidence related to Platt was surely further motivated by another item of evidence he described during the interview. Platt referenced "another call but that call uh Investigator

[32] Platt's reports obtained in 2019 indicate that his first contact with Platt occurred during an interview on or about June 29, 2009.

Beeman has." (Exh. G1, p. 92.) It was a call made by Smith to Platt after Platt had been released.

Per the Remedy System, the call was collected on July 25, 2009, and booked into evidence on September 30, 2009, by Beeman. (Remedy Report, Department Report Number 88-40933, attached herein as Exhibit J1.) **It was obtained by the defense in July 2022.**

The conversation includes Platt asking for a "very small deposit…. he doesn't even care what it is, as long as he gets something[,]" apparently referring to the person who would assault Wert. (Transcription of Jail Call from Smith to Platt, dated July 25, 2009, attached herein as Exhibit K1, p. 5.) Clearly, though, Smith was far more interested in news he had received from his lawyer:

> **A: The first thing he says to me in court is he knows who did it.**
> **Q: He what?**
> **A: He-he said, "I think I know who did it."**
> **Q: Your lawyer said that?**
> **A: Yeah. Apparently, uh, two years after Robert [phonetic spelling] died…**
> Q: Uh-huh.
> A: …somebody-somebody called the police. They have a tape, and somebody called with a confession saying that-that Larry [phonetic spelling] Male [phonetic spelling] had hired some Mexicans to go beat Robert up 'cause he owed him money, and it got a little out of hand.
> Q: Uh-huh.
> A: The police have that on tape.
> Q: Really?
> A: Yeah. That was two years after that happened.
> Q: And it involved Larry Male?
> A: Yeah, they said it was--the person who called said it was Larry Male that hired these Mexicans. [muffled/inaudible]…
> Q: They don't know the person…[muffled/inaudible]…
> A: What's that?
> Q: And they don't--but they don't know the person who actually said that?
> A: No, it was an anonymous call, I think, but that's all on the police report. You know? It's all…
> Q: Uh-huh.

A: …the detectives, so the detectives knew, and that's who I told them--I said that I thought did it. You know? So…
Q: Uh-huh.
A: …he thinks it looks pretty good.
(Exh. K1, pp. 6-7, bolding added.)

While certainly nothing that Platt shared with the *Smith* investigators was as problematic as the content of his July 2009 interview, the telephone call from Smith to Platt was a close runner up. It was a piece of evidence that Baytieh and his investigators would have immediately identified as exculpatory. In the call, Smith can be heard expressing his excitement and relief that his attorney had received evidence about the true killer in the crime for which he was charged. (Exh. K1, pp. 6-8.) Moreover, Smith was sharing the information with one of the three informants to whom he had supposedly confessed to the murder. The problem for the prosecution grew even greater with Platt's response to what Smith was communicating about his innocence. Platt did not express shock or even surprise by what clearly was Smith's relief that evidence of his innocence was finally appearing—even though, according to Platt, Smith had made repeated admissions to him about the murder. (Exh. K1, pp. 5-8.)

Unquestionably, Baytieh was required to disclose this exculpatory recording—and burying all evidence of Smith's purported statements in the jail to Platt when they were incarcerated together certainly did nothing to diminish the need for disclosure of the call; the statements were inconsistent with Smith having admitted the crimes to anyone assigned to Smith's dayroom—most importantly to Palacios, who testified.

The problems with the non-disclosure did not end there. The call indicated that on July 25, 2009, Smith was not seeking to have anyone assault Wert, and was asking only for information. (Exh. K1, pp. 7-8.) As will be discussed, this conversation and the timing would contradict the rendition of events presented by replacement informant Palacios—again adding to the critical need to disclose the call to the defense.

### F. Platt Identifies Additional Evidence that Was Subsequently Concealed

Once Baytieh had made the determination that Platt would not be used as a testifying witness in the case, he decided to hide a) Platt's recorded interview; b) the reports related to his earlier interviews in the jail; and c) his recorded call with Smith. However, to cover his tracks, he went further. Baytieh decided to conceal everything that even hinted at Platt's informant status. Thus, during the recorded interview, Platt identified the existence of still more evidence to be withheld. Platt played Wert and Voght two separate phone calls he had with Tina Smith—both of which were never disclosed prior to trial and have not been turned over at any point. (Exh. G1, pp. 84-92.)

## IV. The September 11, 2009, Interviews of Palacios: Creating a New and Deceptive History of The Defendant's Alleged Admissions and How They were Obtained

With the prosecution in possession of Platt's disastrous recorded interview at jail headquarters in July 2009 and the evidence connected to his informant work—*Brady* evidence that, if revealed, would have prohibited testimony from any of the three informants assigned to Smith's dayroom—the prosecution shifted its plan. Completely unmoved by the discovery violations that would be required to carry out their objectives, the concealment began. They simultaneously auditioned Palacios for the position of informant headliner. The key was whether Palacios could pass a test that Platt did not: He would need to convincingly mislead and deceive in his recorded interview. If he simply repeated truths told by Platt about how Smith was convinced to speak, Palacios would have never seen the witness stand and his interview would have been concealed, like that of Platt and Martin. In sum, Palacios needed to pretend that he was simply the fortuitous recipient of Smith's spontaneous admissions. If he could deliver his deception more adeptly than Platt (and Martin), Palacios would become the anointed informant witness.

On September 11, 2009, Palacios was transported to the OCSD for what would become two separate interviews of the informant.

### A. Wert and Voght Bring Cover-Up to Palacios' Interview and Wert Corroborates the Consciousness of Wrongdoing in His Related Report

Palacios' first interview, on September 11, 2009, was conducted by Beeman and allegedly started at approximately 10:00 am. (Partial and Redacted Report of Bill Beeman, dated November 8, 2009, attached herein as Exhibit L1.) However, Beeman decided to either a) destroy the recorded interview; b) conceal the recorded interview; or c) not record the interview for unjustifiable reasons. As a result, it will be more helpful to analyze Beeman's work related to Palacios following a discussion of the recorded interview conducted by Wert and Voght that began at 11:07 am. (Partial Redacted Transcript of Interview of Arthur Palacios by Wert and Voght, dated September 11, 2009, attached herein as Exhibit M1.)

At the outset of the interview, Wert noted that there were additional off-tape discussions between himself and Palacios: "And prior to going on tape this morning, we had discussions about some information that you had given me in the past on July 9th and August 13th when I met with you over in the Orange County Jail. You had contacted I believe it was Investigator Sandoval." (Exh. M1, p. 2.) Palacios answered in the affirmative. (Exh. M1, p. 2.) Wert continued that "[w]e had a couple informal meeting with you and at that time you had given me another note…" (Exh. M1, p. 3.) Wert also stated that, "[a]nd I had explained to you on prior occasions that I can't make any promise for anything you tell us; however, I am willing to advise the District Attorney's Office of your cooperation of any pertinent information that you have on this homicide case…" (Exh. M1, p. 3.) Wert reiterated: "I think I gave you the same talk on the other two prior occasions about…can't make any promises." (Exh. M1, p. 4.) Significantly, the prosecution has never provided any recordings or notes regarding the interviews of Palacios by Wert "on

two prior occasions," nor any documentation related to the described contact between Palacios and Sandoval.

Palacios stated that he entered the jail on February 18, 2009. (Exh. M1, p. 4.) Palacios said he was initially placed in Mod J for four days. After meeting with OCSD Investigators, Joseph Sandoval, and Jim Sanders, he was moved to L-20. (Exh. M1, p. 5.) According to Palacios, the purpose of the movement to L-20 was to enable to him to work with Sandoval on "some other things" as well as keep his "eyes-and-ears-open". (Exh. M1, p. 64.) Per Palacios, those "other things" were "pretty much shut down."

This is an important part of the narrative that the prosecution advanced prior to Smith's conviction: Palacios had been an informant in the past—including very close in time to when he had contact with Smith—but was not working as one at the moment when Smith coincidentally began talking to him. This characterization was critical to preempting litigation that would have properly alleged a Sixth Amendment violation under *Massiah*. It also connects to an important aspect of Baytieh's subsequent efforts to deceive on this subject matter, which he advanced both when the SH Log was uncovered in 2016 and during his 2019 DOJ interview. More specifically, in his letter to counsel on June 24, 2016, he suggested that the SH Log entries regarding the multi-informant efforts would not have changed the analysis regarding a Sixth Amendment violation, because "the People always took the position that Arthur Palacios was a police informant long before he came into contact with defendant Paul Smith while they were both housed at the Orange County Jail." (Letter from Baytieh to Attorneys Kory Mathewson and Jerome Wallingford, dated June 24, 2016, attached herein as Exhibit N1.) An analysis of the effort to deceive through Baytieh's letter is described in detail beginning at page 181.

Returning to the interview, Palacios said he remembered meeting Paul Smith in custody around June of 2009. (Exh. M1, p. 5.) Palacios noted that he had previously never met Smith or heard of him. (Exh. M1, p. 5.) Palacios stated that "I'm in still in contact with [Sandoval and Sanders] so I figured they want this information when it especially came to a homicide investigator getting killed. That's what really clicked. This is not good. So I

started jotting it down and I gave it to Joe." (Exh. M1, p. 64.) Wert and Voght knew that this vastly misrepresented how Palacios came into possession of statements from Smith, but Palacios' recorded rendition was exactly what the investigators wanted: a *former* informant keeping his eyes and ears open, who, when confronted with the talkative Smith, simply listened. It was not true—Palacios was actually part of a three-informant operation—but with discovery rules being obliterated the defendant had no idea of the false and misleading nature of the presentation.

During the interview, Palacios described Smith's communications with Platt about the murder and Platt's attempts to help Smith facilitate an attack on Wert in exchange for payment. Significantly, Palacios portrayed Platt's efforts as those of a potentially dangerous criminal versus what all three knew: Platt, like Palacios, was a participant in an informant operation. In order to accomplish this recorded subterfuge, a pre-interview plan would have been created for the purpose of presenting the new and improved version of events (from the prosecution's vantage point). It was required that Platt, Wert, and Voght conceal their knowledge that Platt was an informant who had worked with Palacios and Martin. Wert and Voght had also dedicated themselves in advance to ensuring that none of the information shared by Platt about the illegality of the conduct made its way into Palacios' recorded version of events.

Palacios stated that he was placed in the same dayroom with Smith, Platt, and Martin. (Exh. M1, p. 6.) When asked why this happened, Palacios responded that the dayroom arrangement was "just something the deputies did." (Exh. M1**,** p. 6.) Again, Wert and Voght knew that what had occurred was neither coincidence, nor "just something that deputies did." Instead, it was arranged with the approval of Guevara, per the SH Log. The three informants had been assigned with Smith to the dayroom because Platt and Martin told a Special Handling deputy that they "feel if they get this time with Smith, they can get details on his crime…" (Exh. E1, pp. 116-117.) Of course, it was imperative from the prosecution team's perspective that, during the recorded portion of the interview, Palacios not state the truthful rendition of what actually brought the informants and Smith together.

Palacios said that he began keeping handwritten notes, the first of which is dated July 9, 2009. That note memorializes Smith's alleged statements about the murder of Haugen in Sunset Beach from 1988. (Exh. M1, p. 9.) Again, Wert and Voght had no interest in corrections or clarity. Platt had told Wert and Voght in his July 2009 interview that he was certain that Smith, in the presence of all three informants, admitted to the murder before Platt was released from custody on June 30, 2009. It would have been logical, in an authentic interview designed to get to the truth, to have asked Palacios about the inconsistency of him having written his first note approximately ten days after Platt left custody—and thus ten days after he supposedly heard the first admission to the murder—but this was not one of those interviews.

Palacios said that Smith started talking once he learned who Platt was: "He was in the group probably a week, a few days, maybe three…to three days to seven days before him and Mr. Platt had realized that they were high school friends…" (Exh. M1, p. 25.) Palacios added, "He started talking to Jeff because he – ex-high school buddy probably, I'm thinking." (Exh. M1, p. 25.)

Palacios explained that he brought with him to the interview multiple pages of notes purporting to document what Smith said. Palacios said that he wrote the notes on the day Smith gave the information. (Exh. M1, p. 29.) **Again, Wert and Voght knew from their interview of Platt that Palacios was leaving out the repeated and unsuccessful efforts of Palacios, Platt, and Martin to convince Smith to speak about the crime**. The decision not to question Palacios about those efforts was likely part of a plan that was crafted prior to the recorded interview. Nonetheless, whether the plan existed, or the veteran informant knew better than to admit such truths, the investigators were perpetuating the fraud by failing to confront Palacios with any of the unhelpful truths that Platt had admitted two months earlier.

Palacios proceeded to describe Smith admitting to having stabbed the victim approximately 18 times with scissors and then burning the body over a drug dispute. (Exh. M1, pp. 9-11.) According to Palacios, Smith told him that family members had been

contacted by homicide investigators regarding Smith's sexual orientation, and the possibility that the murder was related to a sexual relationship between Smith and Haugen. (Exh. M1**,** p. 33.) Palacios explained that Smith became very angry over the questioning on this subject matter. (Exh. M1, p. 31.)

Palacios stated that on July 17, 2009, Smith received a letter in the mail from Platt. (Exh. M1, p. 34.) Palacios was in possession of the letter (and envelope) during his interview and turned it over to investigators. (Exh. M1, p. 5.) According to Palacios' summary of the letter, Platt requested personal information about Wert, including his address, license, and a picture. (Exh. M1, p. 35.) Platt also stated that Palacios would need to pay $8,000 to have Wert jumped:

> INFORMANT: Okay. This note is a – this is a copy letter I have in my hand of a letter that came in to Paul Smith from Platt out on the street. It's in -- it's regarding a -- basically some information on Ray Wert -- Investigator Wert. It's dealing with -- he wants your home address, he wants your California Driver's License, information and a picture of you, vehicles you drive. He's willing to pay a price for that. Also, he was wanting the price for -- to have somebody basically jump [Wert], have [Wert] taken care of out there on the streets. He said the price that he got quoted was $8,000 and that's just to hurt him real bad, to beat him up, jump him, rob him.

(Exh. M1, p. 35.)

On August 3, 2009, Palacios wrote a note describing a visit between Tina and Smith, during which she expressed concerns about Platt. (Exh. M1**,** p. 51.) According to Palacios, Platt's plan fell apart when he got into an argument with Tina. (Exh. M1, p. 37.) Per Palacios, Platt told Tina that he needed the money upfront, but that Tina was uncomfortable with the change in plan and her communication with Platt. (Exh. M1**,** p. 51.) Staying in character, Palacios, Wert, and Voght never let on what they all knew: Platt was a fellow informant who was merely pretending that he would help carry out an attack.

Palacios stated that after the arrangement with Platt fell through, Smith allegedly turned to Palacios: "That's when Paul Smith approached me and asked if I could get the info for him on Ray Wert." (Exh. M1, p. 52.) Palacios said that Smith approached him to see if he knew anyone to fill Platt's role. (Exh. M1, p. 38.) On three separate occasions,

Smith allegedly consulted with Palacios. (Exh. M1, p. 53.) Palacios then said that his cousin could do some checking for Smith. (Exh. M1, p. 53.) Palacios said that Platt's place in the dayroom was filled by Paul Longacre. (Exh. M1, p. 35.)

According to notes dated July 17, August 1, and August 12, 2009, Palacios and Smith spoke regarding the plot against Wert. (Exh. M1, pp. 48-49, 56.) Palacios said that on one occasion Martin was included in the discussion. (Exh. M1, p. 59.) However, Palacios claimed that Smith became increasingly cautious and began only speaking with Palacios one-on-one. (Exh. M1, pp. 42-43.) Palacios claimed that he did not "pry" and instead allowed Smith to come to him. (Exh. M1, p. 43.) Palacios said that he was told not to ask Smith any questions: "[L]ike I was told to do, just lay back, suck it up, write it down." (Exh. M1, p. 66.)

Wert and Voght knew from their earlier interview of Platt that Palacios was being intentionally misleading about how the statements from Smith had been obtained. But this was precisely what the two investigators wanted. Confronting Palacios with Platt's credible and damaging rendition that all three informants repeatedly and aggressively questioned Smith would have ultimately exposed the fact that all of the statements attributed to Smith were obtained in violation of the Sixth Amendment and *Massiah*.

### B. Wert's Misleading Report Corroborates Prosecution Team's Attempt to Deceive During Palacios Interview

The September 2009 recorded interview of Palacios advanced an intentionally deceptive presentation about how the three informants in this case had obtained statements from Smith about Haugen's murder. It was a presentation specifically created for listeners who were not members of the prosecution team. The next step in the plan to mislead the defendant and his counsel required that either Wert or Voght write a report about both the interview and what Palacios turned over to the investigators during the course of that interview.

The efforts to deceive woven into Wert's report can now be clearly seen. It is apparent that in 2009 Wert was deeply concerned about creating a paper trail memorializing the deception from the interview. His anxiety can be seen through content and language choices, which show the consciousness of wrongdoing by a law enforcement officer brazenly betraying his sworn oath.

For example, Wert did not include within the report what Palacios described about Platt's role, other than to summarize Platt's letter. Most notably, though, Wert did not reference Platt by name, even though it was freely used throughout the recorded interview. The glaring problem for Wert is there exists no legitimate justification for the omission of information related to Platt. After all, in Palacios' deceptive depiction, Platt was an out-of-custody criminal defendant who had encouraged Smith to hire a "hit man" in a violent attack against Wert. Of course, the report now makes perfect sense. Wert was a police officer engaging in a law-breaking cover-up. Thus, he preferred not to document in an official report what Palacios told him about Platt, particularly considering Wert's recognition that a) the report he was creating was dramatically misleading, b) he and Voght helped the misleading account along by their actions during the interview, and c) he would be the author of a report advancing the deception by including Platt's role and actions without revealing the ruse.

Those omissions, though, were probably not the most egregious acts related to his report. Wert apparently decided he needed to include in the report a summary of the notes Palacios had written and turned over before and during the interview. This left Wert with little choice but to include at least a brief description of the note that discussed Platt and referenced Platt's letter to Smith. Wert reasonably worried that excluding any reference to the note and letter would raise suspicions from the defense.

His approach to his predicament was the following:

> SMITH tells the "CI that he has **someone** who will get information on and assault an Investigator (myself) for $8,000.00. For further details see photocopy of letter that the CI said SMITH had given to him to look at…"

(Exh. I1, bolding added.)

That paragraph was an enormous mistake by Wert—though one that could only be appreciated years later when the true story of "someone"/Platt finally came into focus. Wert had decided to reference the author of the letter as "someone" rather than Platt, even though Palacios, Wert, and Voght had referenced Platt by name in the recorded interview. It was the type of revealing error that a prosecutor like Baytieh would have referred to again and again as an illustration of Wert's unintentionally revealed consciousness of wrongdoing, if Wert were the criminal defendant he should have been and should be now. Ironically, Wert's report and this particular paragraph are now a problem of even greater significance for Baytieh.

### C. How the Palacios Interview and Report Devastate Baytieh's Claim that He Was Ignorant Platt Was an Informant in 2009

Wert's report and the recorded interview, once fully analyzed, create another insurmountable impediment to Baytieh's required narrative that immense evidence concealment in this case was somehow carried out solely by an investigative team that blocked the truth from its prosecutor. The problems for Baytieh's narrative in this context include that Wert would have never provided the recording and report to Baytieh if he wanted to keep Platt's informant role hidden from the prosecutor. In addition, Baytieh cannot claim that he somehow failed to read the report or listen to the recording, as they were timely discovered to the defense. Moreover, Baytieh questioned Palacios about Platt's interview during the Grand Jury proceedings—eliciting information that matches what Palacios said during his recorded interview.

In sum, even if one were to assume the absurd and illogical contention by Baytieh—that he still did not know anything about Platt when he received this report and interview—

he would have quickly realized who Platt was soon after he examined the report. Baytieh read that "someone" unidentified in the report wanted $8,000 to get personal information on Wert and assault him. If Baytieh had not listened to the recording of Palacios in that moment and knew nothing about Platt or how Wert and Voght were supposedly trying to hide his informant role from their prosecutor, Baytieh would have drilled Wert about the identity of an immensely dangerous "someone," who wanted thousands of dollars to help kill or assault Wert. Questions would have rained down on Wert: "Who is 'someone?'" "Didn't you get the name during the interview?" Once Wert acknowledged that Palacios actually never used a pronoun, but specifically referenced Platt by his full name and was identified by his photo, Baytieh would have asked: "Why would you possibly not refer to the person as 'Jeff Platt' rather than pretend you didn't know who the person was?" "Where is Platt, and what progress has been made on investigating him?" "Where is the letter you referenced in your report?"

Ultimately, Baytieh will be unable to credibly testify he asked these questions or anything like them, because if the narrative of his innocence were true, he would have received a stream of lies that he would have been required to reveal to the defense no later than when he read the SH Log in 2016. Baytieh also cannot credibly claim he failed to listen to the recordings, as he introduced an abbreviated version of Platt's role—consistent with what Palacios described in his recorded interview—during Palacios' Grand Jury testimony. This is described beginning at page 146.

In sum, Baytieh never asked questions similar to the ones listed above, because he knew exactly who Platt was and exactly what Wert had attempted to accomplish through Palacios' interview and the related report. Baytieh understood all of this because he was the leader of the team that decided to create the misleading interview, to have it documented in a deceptive manner, and then to discover it to the defense so they would be misled.

### D. Baytieh Concealed Letter from Platt—and it Remained Hidden Until July 2022

Baytieh also bears sole responsibility for Platt's letter (and the envelope that identified Platt's full name) being concealed from the defense for thirteen years. This conclusion is compelling for many reasons. Among them is that during Palacios' interview with Wert, Palacios stated that "this is a copy letter I have in my hand of a letter that came in to Paul Smith from Platt out on the street." (Exh. M1, p. 35.) Wert then wrote:

> SMITH tells the "CI that he has someone who will get information on and assault and[sic.] Investigator (myself for $8,000.00. **For further details see photocopy of letter that the CI said SMITH had given to him to look at**…"

(Exh. I1, bolding added.)

Again, Baytieh unquestionably had the referenced report and recording in his possession, as he discovered both items to the defense. He then made the decision not to turn over the letter. If Wert's intent was to hide the letter from Baytieh, none of his actions were consistent with that plan. Wert asked Platt about the letter during a recorded interview, and then booked both the interview and the letter into evidence. Therefore, even if Wert did not hand Platt's letter directly to Baytieh, the prosecutor would have heard the letter being discussed in the interview and read about it in Wert's report. It is inconceivable that a prosecutor operating in good faith would have ignored an out-of-custody defendant's encouragement that a murder defendant pay thousands of dollars for a violent assault on his lead investigator.

Perhaps the greater problem in a narrative where Baytieh was not responsible for the concealment of Platt's letter is that he provided the defense with a set of letters and writings that Palacios had turned over to the investigators in September 2009, which are attached herein as Exhibit O1. **In 2022, it was discovered that the Palacios-provided materials were booked into evidence in 2009**. However, the booked version had one additional document that was never disclosed to the defense: **the letter sent by Platt to Smith**. (Undated Letter from Platt to Martin, attached herein as Exhibit P1.) Considering that Wert

discussed the letter in Palacios' interview and report and then booked a series of documents that included Platt's letter, it is illogical that Wert or his fellow investigators somehow concealed the letter from Baytieh.

Logically, Baytieh made the decision to conceal the letter because a) its disclosure would have increased the chances of the defense inquiring why there had been no investigation of Platt's role in the efforts to carry out an attack on Wert; and b) it referenced calls to a number provided by Platt that resulted in the recorded call described below, which the prosecution also needed to keep concealed in order to diminish questions about Platt and his role. Although no additional motivations for concealment were needed, the substance of the letter was independently problematic. It reeked of entrapment, with Platt pushing Smith aggressively to move forward with a plan to assault Wert. The letter also had an energized tone that, if discovered to the defense, risked raising more red flags about Platt's true role and why he was not the subject of an investigation. (Exh. P1.)

The compelling force of the proof that Baytieh withheld the Platt letter is devastating to Baytieh's larger narrative. That is, the fact that he withheld this item of evidence makes it even more far-fetched that he was victimized by his own investigators when it came to other informant-related evidence pertaining to this case.

## V. Beeman Goes All-In on Cover-Up in His Reports Documenting His Investigation of Conspiracy/Solicitation Charges

Beeman had Palacios transported from the Orange County Jail to OCSD Headquarters for two separate interviews: one with him and one with Sergeants Wert and Voght.

Per Beeman's report, he began his interview of Palacios approximately one hour before the one conducted by Wert and Voght. As noted earlier, Beeman decided not to record the interview, destroyed the interview, or concealed the interview. The only rational explanation for any of the three decisions was Beeman's desire to keep the Platt cover-up under wraps. Moreover, Beeman dated his report nearly two months after he questioned

Palacios—a point in time when he and his co-conspirators well-understood that the truth about Platt and all evidence related to his informant work would be concealed. Part of that truth was that Beeman first worked with Platt to develop evidence of a solicitation to commit murder or assault, as confirmed by Platt's July 2009 recorded interview. However, Beeman's report makes clear that the plan at the time he authored his report was to skip past that reality completely—an omission that he could have only been comfortable with if he was confident that Platt's interview would be forever concealed. He wrote the following at the beginning of the report:

12. DETAILS OF OFFENSE:

**Background:** In June 2009, I was notified by OCSD homicide Investigator Ray Wert that he was the lead Investigator in the cold case murder involving Paul Gentile Smith. Smith has been formally charged with murder for the 1988 slaying of his childhood friend. The case had remained unsolved until a DNA hit on Smith occurred while he was in custody in Nevada for a recent conviction of domestic violence.

On March 1, 2009 Investigator Wert interviewed Smith about the murder. Other OCSD Homicide Investigators interviewed several friends and associates of Smith regarding the case. Following the interview with Wert, an enraged Smith started making verbal threats towards Investigator Wert during recorded collect jail (Nevada Jail) phone calls made to his girlfriend Tina Smith. During these phone calls, Smith made threats to both Wert and Wert"s family. Smith even told Tina that they should hire an investigator to locate Wert"s residence and family. Wert obtained copies of the phone calls from the Las Vegas Jail and listened to the calls. Wert documented the phone calls/threats on OCSD DR 88-40933. For details, refer to Investigator Wert Follow-up report.

**Interview with CI on 9-11-09**

On 9-11-09 at about 1000 hours, I met with a CI, who said he had information regarding Smith's plan to have Investigator Wert killed or injured. This interview was conducted at OCSD headquarters . Prior to the interview, I advised the CI that his interview with me was completely voluntary and if he decided not to talk to

(Exh. L1.)

Beeman certainly had not forgotten that the operation designed to build solicitation and conspiracy charges began with an informant other than Palacios. Beeman also did not forget that the effort to develop evidence of these offenses began in June 2009. And he certainly did not forget that he met with Platt on at least two occasions before Platt was released and began working with the investigator while out of custody. Beeman remembered all of it, and knew exactly how the omission of this information from his report would serve the prosecution's objective of securing a conviction.

Baytieh, who was well aware of Platt's true role in the case months before Beeman formally interviewed Palacios, discovered to the defense Beeman's reports on the solicitation/conspiracy charges. Baytieh fully recognized that, by handing over these reports without acknowledging that they purposefully omitted the informant operation in which Platt participated, the then-prosecutor was furthering the concealment of the initial informant operation and the role of Platt.

### A. The Omission of Platt from Beeman's Report Further Demonstrates the Unified Conspiracy of the Prosecution Team

Beeman's report is demonstrative of an intent to hide Platt's informant activities and to make it appear that, instead, he worked exclusively with one informant (Palacios) to develop evidence of the solicitation/conspiracy for assault charges. His decision to omit entirely the role of Platt in any investigative report he created certainly cannot be attributed to a lack of thoroughness in describing his role and what he had learned. Beeman's reports totaled 20 pages and were single-spaced. They detailed his investigative activities. The reports also included summaries of his recorded calls with Smith while posing as "Blade"—a fictionalized "hit man" offering to help carry out the violence from outside of the jails. (Exh. L1.)

The omission of Platt from his reports also shows that Beeman's fellow investigators and Baytieh were "in the know." That is, Beeman logically would have never created a report that advanced this narrative unless he was fully confident that he would not be betrayed by his fellow investigators and the prosecutor. Beeman certainly would have never been involved in informant operations related to Wert and Voght's homicide investigation—and in developing evidence about a "hit" on Wert—without his fellow prosecution team members' complete knowledge. Beeman, who attended Wert's June 29, 2009 interview of Platt and was working with Platt after his release, would have known that Platt was interviewed by Wert and Voght in July 2009. He also had every reason to believe that, in that interview and the related report, there would be discussions about Platt's work

with Beeman. Thus, **Beeman would have only written a report in which he subtracted Platt out of his investigative narrative if he was certain that neither his fellow investigators nor Baytieh would provide the defense with reports about Platt, the recorded interview of Platt, and the evidence that Beeman had collected related to Platt**. Once again, Beeman had obtained a call between Platt and Smith, the letter between Platt and Smith, and calls between Platt and Tina Smith. In 2009, Beeman booked that evidence into property, but Baytieh chose to hide the items from the defense.

Baytieh subsequently corroborated that Beeman did not hide Platt's informant efforts from the prosecutor. As discussed previously beginning at page 66, Baytieh described to the DOJ in considerable detail how Beeman and he worked closely together to develop informant evidence in the case. Thus, it is not believable that Beeman hid from Baytieh his work with Platt.

## VI. OCSD's Remedy System for the Tracking of Booked Evidence Corroborates Massive Concealment and Offers Additional Evidence of Baytieh's Complicity

In late 2019, another Orange County criminal justice scandal emerged when it was discovered that the OCSD had conducted an audit of personnel's evidence booking practices that revealed widespread evidence handling issues. (Saavedra, *4 Orange County Deputies Fired After Audit Finds Systemic Abuses in Booking Evidence*, OC Register, Nov. 19, 2019; Gerda, *OC Sheriff Kept Evidence Booking Crisis Secret for Almost Two Years*, Dec. 4, 2019, Voice of OC; Romo, *Orange County Sheriff's Dept. Mishandled Evidence*; *Kept It Quiet for Nearly 2 Years*, NPR, Dec. 15, 2019.)

Among the details of the evidence audit that came to light was the system used by the agency for tracking evidence that is ultimately booked into property. The "Remedy" Records System allows a member of the department to make a notation about when the items were purportedly collected and booked. Defendant Smith requested the "Remedy Report" for this case. The Remedy Report was received in 2022, along with the "Legacy

Report," which was the property tracking system in place when the crime was committed in 1988. (Exh. J1; Legacy Report for *People v. Paul Smith*, attached herein as Exhibit Q1.)

A comparison of the two reports clarifies that by the time the investigation of this case was re-initiated in 2009 (following a DNA comparison), the Legacy System had been replaced by the Remedy System. The first item listed as being booked per the Remedy report is a set of photographs from the Las Vegas jail where Smith was located. (Exh. J1.) The 12th item of booked evidence, which is also the first associated with the informant operation or any investigation with the Orange County Jail, is the recorded July 2009 interview with Platt:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| OS88-40933.12 | WB21B5 | 3 CDS CONTAINING AUDIO AND VIDEO RECORDINGS OF CI #815 JEFF P LATT | Filed | Evidence | 187 | None | 9/30/2009 12:00:00AM<br>9/30/2009 12:07:21 PM |

*Suspect Name/DOB:* SMITH, PAUL G
*Victim Name/DOB:* HAUGEN, ROBERT

(Exh. J1.)

Approximately **two minutes** after Wert and Voght's July 2009 interview of Platt was booked, the investigator(s) booked the Wert and Voght September 2009 interview of informant Palacios:

| SW | Consolidated DR # | Location | Descriptions | Status | Type | Crime # | Special Handling | Dt Collected/Booked | Booked By |
|---|---|---|---|---|---|---|---|---|---|
| | OS88-40933.13 | WB21B5 | 2 CD'S CONTAINING AUDIO AND VIDEO RECORDING OF CI ARTHUR PALACIOS | Filed | Evidence | 187 | None | 9/11/2009 12:00:00PM<br>9/30/2009 12:09:35 PM | |

*Suspect Name/DOB:* SMITH, PAUL G
*Victim Name/DOB:* HAUGEN, ROBERT

(Exh. J1.)

**Although both the Palacios and Platt recorded interviews were booked into evidence (within minutes of one another), Baytieh chose to discover to the defense only evidence related to Palacios**. It would take until 2019 for the defense to finally receive the Platt recorded interview and three reports related to the investigation of him—and, again, this only occurred after Baytieh was confronted by the DOJ with the report regarding the above recorded interview.

Approximately three minutes later, another item of evidence related to informant Platt's investigative assistance was booked into evidence:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| OS88-40933.16 | WB21B5 | 1 CD CONTAINING AUDIO RECORDINGS OF INMATE PAUL SMITH AND TIN A SMITH PHONE CALLS ON 7/20/09, 7/21/09, 7/25/09 AND CI#815 | Filed | Evidence | 187 | None | 7/25/2009 8:26:00PM<br>9/30/2009 12:14:14 PM |

*Suspect Name/DOB:* SMITH, PAUL G
*Victim Name/DOB:* HAUGEN, ROBERT

(Exh. J1.)

In sum, the above item was a call made from the jail by Smith on July 25, 2009 to Platt, who had been released weeks earlier to perform informant work out of custody. Platt encouraged Smith to make this call in the letter Platt wrote to him—as Platt attempted to persuade Smith to work with him to carry out a hit on Wert. **This recording was withheld from the defense for the next thirteen years**. The recording and additional details about its significance are described previously beginning at page 79.

Platt referenced having had this call with Smith while being questioned in his July 2009 interview with Wert and Voght—an interview that was soon thereafter booked into evidence, according to both the Remedy and Legacy Systems. (Exh. G1, p. 93.; Exh. J1; Exh. Q1.) During that interview, Platt told Voght that Beeman had possession of the call. (Exh. G1, p. 99.) This is significant to the evidence booking issues. It further corroborates that at least Beeman and Wert were together booking items of evidence, although there exists the possibility that Beeman gave the evidence to Wert so that Wert would book the evidence. The latter possibility appears less likely because two other sets of evidence that were booked in this time period would have been obtained initially by Beeman: recordings of visits at the Orange County Jail between Paul Smith and Tina Smith. (Exh. J1.) Those are identified as the evidentiary items ending in the numbers 14 and 17. (Exh. J1.)

The timing of when this evidence was booked is explainable—but it is also wholly inconsistent with a plan to hide damaging evidence from Baytieh. On October 1, 2009,

Baytieh began presenting his case to the Grand Jury.[33] Thus, the booking of the evidentiary items referenced above occurred on September 30, 2009, the day before the Grand Jury proceedings were set to begin.

The solicitation/conspiracy charges were not filed when the case was originally presented to the Grand Jury—and Palacios was not called as a witness. However, Wert, who again was the lead investigator, was called as the final witness. The timing of when evidence related to Platt's informant work was booked could not have been worse for Baytieh's narrative. Booking that evidence one day before Wert testified indicates an urgency to have law enforcement's accounting of the evidence in order prior to the lead investigator's testimony, and is also a decision entirely at odds with Wert and his colleagues conspiring to hide Platt-related evidentiary items from Baytieh.

## VII. Baytieh Hid Palacios' Orange County Informant Index ("OCII") File from Defendant

One of the most offensive aspects of Baytieh's claim that he knew nothing about the role of informants Platt and Martin and the evidence documenting their work is that he was the prosecution team member solely responsible for the concealment of the informant file related to the testifying informant, Palacios. More specifically, Baytieh hid Palacios' entire informant file from Smith, which included multiple index cards created by the OCDA's informant coordinator(s) and numerous letters and notes. The first index card included the [redacted]. (Redacted OCII File Discovered in *People v. Smith*,

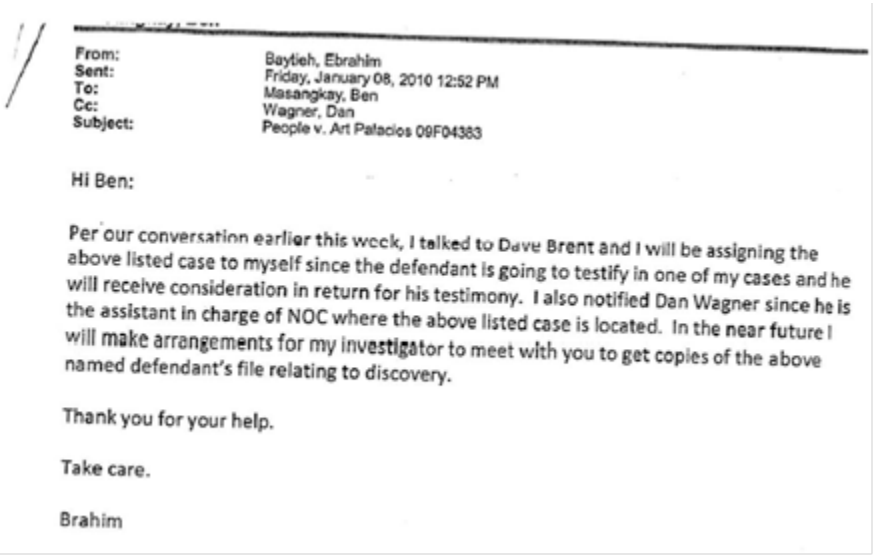
[33]The initial felony charges had been filed under Orange County Superior Court Case Number 09CF0579 and the case had been advancing toward a preliminary hearing, before Baytieh decided to pursue an indictment instead.

referred to as "PalaciosOCII-PS" and attached herein as Exhibit R1.) However, there were other entries on that card that Baytieh also preferred that Smith and his counsel never see:

UNDER SEAL

(Exh. R1, p. 2.)

The second of the three entries seen above references an email that was sent to Ben Masangkay and copied to former Assistant District Attorney Dan Wagner. It is found within the file:



From: Baytieh, Ebrahim
Sent: Friday, January 08, 2010 12:52 PM
To: Masangkay, Ben
Cc: Wagner, Dan
Subject: People v. Art Palacios 09F04383

Hi Ben:

Per our conversation earlier this week, I talked to Dave Brent and I will be assigning the above listed case to myself since the defendant is going to testify in one of my cases and he will receive consideration in return for his testimony. I also notified Dan Wagner since he is the assistant in charge of NOC where the above listed case is located. In the near future I will make arrangements for my investigator to meet with you to get copies of the above named defendant's file relating to discovery.

Thank you for your help.

Take care.

Brahim

(Redacted OCII File Discovered in *People v. Joseph Govey*, referred to as "PalaciosOCII-JG" and attached herein as Exhibit S1.)

Baytieh wrote that "[i]n the near future I will make arrangements for my investigator to meet with you to get copies of the above defendant's file relating to discovery." (Exh. R1, p. 9; Exh. S1, p. 9.) There is little doubt that copies of Palacios' OCII file were obtained and reviewed, and Baytieh was fully knowledgeable of the contents, including the

entry on the index card referencing the email, as well as the corresponding email indicating that Baytieh would meet his discovery obligations by turning over the OCII to Defendant Smith. However, Baytieh decided to instead hide the file entries for the foregoing reasons.

The next entry refers to Baytieh's memorandum to Masangkay on February 22, 2010. (Exh. R1, pp. 7-8; Exh. S1, pp. 7-8.) It was a memorandum that was hidden with the rest of the OCII file—a document that Baytieh wanted no one outside his zone of trust to possess.

### A. A Comparison of Baytieh's Memo to OCII Coordinator Masangkay Found in the OCII File and a Near Identical Letter Sent to Smith's Trial Counsel Demonstrates Baytieh's Effort to Hide Palacios' Special Treatment and Opportunity to Receive Financial Consideration

Baytieh had numerous motivations for concealing Palacios' OCII file, including those more specific than simply limiting his opponent's ability to damage the informant's credibility based upon a long history of exchanging information for consideration. One of them relates to the memo referenced above, which Baytieh sent to the OCII Coordinator Masangkay. (Exh. S1, pp. 7-8.)

During his 2019 interview, Baytieh read at length from the memo to Masangkay. (Exh. E1, pp. 142-143.) His objective was to show DOJ staff that he was completely transparent about how he handled the issue of consideration related to Palacios, before and after the informant broke the terms of his agreement by failing to turn himself in on the required date. (Exh. E1, pp. 142-143.) It is not a coincidence that Baytieh elected not to read the following language from the memo:

> On January 29, 2010, defendant Palacios appeared pursuant to a subpoena before the Grand Jury and testified in connection with the case of People v. Smith. Defendant Palacios was cooperative.
>
> On February 8, 2010 defendant Palacios failed to appear in court and a bench warrant was issued for his arrest. During the day of February 8, 2010, I informed Palacios' attorney that if Palacios does not appear in court and turn himself in, then the 5 years offer will be off the table pursuant to the signed Tahl form and the agreement.
>
> In the few days after February 8, 2010, OCSO investigators made telephonic contact with Palacios and informed him that there is a warrant for his arrest and that he should turn himself in. I was informed by OCSO investigators that Palacios turned himself in on or about Friday, February 12, 2010 and posted bail and bailed out few days later. My understanding is that Palacios' next court date is March 15, 2010.

(Exh. R1, p. 8; Exh. S1, p. 8.)

Again, Smith's trial counsel never saw this memo. It was disclosed to the defense 13 years later, as part of the discovery of Palacios' OCII file. (Exh. R1, pp. 7-8.) However, on March 5, 2010—two weeks after sending the referenced memo to Masangkay—Baytieh wrote a letter to defense counsel that appears extremely similar to Baytieh's memo. (Letter from Baytieh to Attorney Kory Matthewson, dated March 5, 2010, attached herein as Exhibit T1.) The letter to counsel, though, had some subtle but significant differences.

> On January 29, 2010, defendant Palacios appeared pursuant to a subpoena before the Grand Jury and testified in connection with the case of People v. Smith. Defendant Palacios was cooperative.
>
> On February 8, 2010 defendant Palacios failed to appear in court and a bench warrant was issued for his arrest. During the day of February 8, 2010, I informed Palacios' attorney that if Palacios does not appear in court and turn himself in, then the 5 years offer will be off the table pursuant to the signed Tahl form and the agreement.
>
> Defendant Palacios is not going to get any benefit from our office as a result of his cooperation in the Smith case since he did not abide by the terms of the agreement. Attached are copies of the voided agreement and Tahl form.

(Exh. T1.)

Significantly, Baytieh had **removed an entire paragraph from his letter to counsel that appeared in his memo to Masangkay. He did this because he wanted to**

**hide the fact that OCSD investigators spoke to Palacios "in the few days after" he was required to turn himself in to custody, advising him that he "should turn himself in."** (Exh. R1, p. 8; Exh. S1, p. 8; Exh. T1.)

Indeed, Palacios did not appear for the court date on which he was, by agreement, required to go into custody. (Redacted Court Vision, *People v. Arthur Palacios*, Orange County Superior Court Case Number 09NF0584, attached herein as Exhibit U1.) Baytieh's memo—but not the letter to counsel—confirms that investigators had a way to contact Palacios directly and even informed him he "should" turn himself in to custody. Yet, Palacios refused to do this even with a warrant being issued that same day.

Defendant Smith should have been able to explore communications between members of the OCSD and Palacios while he was out of custody on at least two separate occasions: a) at a pre-trial motion to exclude Palacios' testimony about Smith's statements at trial; and b) during Palacios' trial testimony. The probing would have logically included questions about why OCSD failed to serve the warrant until February 11, 2010, and whether any efforts were made to serve it and incarcerate Palacios between February 8, 2010, and February 12, 2010—and if not, why not. Additionally, because the Court Vision for Palacios indicates that OCSD personnel actually served the warrant on February 11, 2010, this means that he was not arrested during service and was instead allowed to turn himself in the next day on February 12, 2010. (Exh. R1, pp. 7-8; Exh. S1, pp. 7-8; Exh. U1.)

Palacios' special treatment may have also included a decision not to apprise the court assigned to his case about what investigators learned were his reasons for the four-day delay before he finally appeared before the court. For instance, if, in Palacios' conversation(s) with investigators, they determined that he had become an increased flight risk or danger to the community, thereby warranting higher bail or release conditions, the decision to conceal that information from the court would amount to a hidden benefit.

In sum, Baytieh re-wrote the above-referenced paragraphs in the letter to counsel for what seems to be a particular tactical objective; that is, he preferred that defense counsel a)

remain unaware of the special treatment given to Palacios that appeared on the face of the memo; b) not explore whether other special treatment was extended, as the language of the memo reasonably suggested; and c) not respond to the memo by seeking details about conversations between investigators and Palacios. Additionally, if Baytieh had disclosed the memo to Masangkay found within the OCII file, it would have appropriately triggered a defense request for any and all communications between Palacios and OCSD investigators between February 8, 2010, and February 12, 2010. Discussions related to this case were highly relevant to the credibility of Palacios' testimony and discoverable under both *Brady* and PC Section 1054.1. Of particular salience were any statements about Palacios' continued intent to testify and any requests he made related to future testimony, in light of the fact that his agreement with Baytieh was to be voided.

Interestingly, Baytieh fully understood the significance of even small benefits given to informant witnesses. Baytieh told the DOJ the following about what he purportedly said during the course of training given to members of law enforcement:

> I tell you what I -- you know, it's silly, but when I train on that, here is what I tell the cops: "If you're picking up the informant from the jail because you don't want him to come on the bus and you stop by Starbucks and you get a cup of coffee and he asks you for a cup of coffee and you give him a cup of coffee, let the DA know that so we can discover that information to the defense attorney."

(Exh. E1, p. 179.)

According to Baytieh, he believed a cup of coffee given to an informant needed to be disclosed to the defendant. Yet, the actual Baytieh went through extraordinary measures to make sure the defense did not learn about the contents of Palacios' OCII file or that OCSD personnel had worked with Palacios so that his transition back into custody after a warrant had been issued was as painless as possible. It was just another example of the complete disconnect between what Baytieh preaches and what he practices. Moreover, the reality was that Baytieh's inconsistent memo/letter strived to hide far more than a cup of coffee.

### A. Baytieh-Led Prosecution Team Concealed OCII Document Revealing Palacios Was Offered Monetary Compensation for Informant Services

Baytieh's *Brady* violation in failing to turn over the memo he sent to Masangkay was further aggravated by the failure to turn over another document found within the OCII file that was thereby concealed from the defense. In the version of Palacios' OCII file provided to Smith in 2021, there is an undated note from Investigator Joseph Sandoval to OCII Coordinator Ben Masangkay:

UNDER SEAL

(Exh. R1, p. 6.)

It seems nearly certain that this note was describing an offer made to Palacios between February 8, 2010, when he failed to appear on his 2009 felony case, and the date of his trial testimony in *People v. Smith*, October 21, 2010. (Exh. U1; Redacted Court Vision, *People v. Paul Smith*, Orange County Superior Court Number 09ZF0071, attached herein as V1.) As mentioned above, Palacios posted bail on February 12, 2010. (Exh. U1.) Thus, this note also appears **to document an offer made to Palacios to allow him to keep working as an informant for the investigating agency in *Smith* and receive what would be secret benefits. The representations are also based upon undisclosed communications between Palacios and the OCSD that Baytieh and his prosecution team wished to hide from the defense**.

This note also appears to confirm the paragraph found in Baytieh's above-referenced memo to Masangkay that was removed from Baytieh's letter to counsel. This is because the memo confirms that Baytieh was in communication with OCSD personnel about their contact with Palacios after he failed to turn himself in. As discussed above, while investigators told Palacios to turn himself into custody, they refrained from forcing him to do so (even after the warrant was served). Sandoval was likely one of the investigators involved in the discussions with Palacios after he failed to appear. His involvement would explain why he wrote that Palacios "will be working solely for financial gain and for consideration **when he gets back I/C** in one of our county facilities." (Exh. R1, p. 6, bolding added.) In other words, the most likely scenario is that Sandoval spoke with Palacios on the phone or in person and explained what would be awaiting him when he finally turned himself into custody: no benefits on his open case, as he had failed to turn himself in per the agreement on *Smith,* but the chance to earn money as an informant once he re-entered the jail.

Baytieh's knowledge of Sandoval's note and offer allowing Palacios to earn money as an informant is corroborated by his a) memo to Masangkay; b) letter to counsel that omits key information regarding OCSD's contact with Palacios after he violated his agreement; and c) complete concealment of the OCII file. It strains credulity to believe that Baytieh unintentionally omitted the communications between OCSD investigators and Palacios from his letter to counsel, when almost certainly it was during those same hidden communications that Sandoval made it clear to Palacios that he would not be receiving any benefit on his pending cases—but could still earn money. Indeed, logic suggests that Sandoval had received and was carrying the message from Baytieh—directly or through one of the case investigators—that he could not earn a benefit on his case after breaking the agreement but could still earn monetary consideration.[34]

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[34] It should be noted, that while a far less likely scenario, the offer to Palacios could have possibly been made between April 13, 2010, and April 14, 2010, when Palacios was

Unquestionably, the note was material information favorable to the Defendant in *People v. Smith* and needed to be disclosed. **An off-the-books opportunity was created to allow Palacios the chance to obtain a benefit for informant work, having temporarily lost the defined benefit on his criminal case**. (Of course, the reality was that even though Palacios no longer had the guaranteed benefit of his informant efforts in *Smith*, he remained able to utilize his cooperation to convince a judge to offer a better resolution. Indeed, he confirmed that this was his intention during his testimony at trial. (Reporter's Transcript*, People v. Smith*, Orange County Superior Court Case Number 09ZF0071, October 21, 2010, attached herein as Exhibit Y1, p. 349.)

By keeping the cash consideration offer secret, Baytieh, his prosecution team, and Palacios were able to create the impression at Smith's trial that he had not received any benefit or any opportunity for a benefit after his initial agreement was terminated. But at minimum, the same investigative agency that was responsible for the investigation of this case incentivized Palacios to earn money as an informant in the lead up to his testimony and potentially beyond that date.

In 2019, when faced with legitimate questions from the DOJ about his non-disclosure, Baytieh picked from a variety of deceptive explanations available to him, and landed upon a claim that reviewing Palacios' informant file was somehow not required under *Brady*. In reality, he always knew that his responsibility to Smith would never have been lawfully met by simply sharing with the defendant, the Grand Jury, and the trial jury

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arrested on new felony charges. (Redacted Court Vision, *People v. Arthur Palacios*, Orange County Superior Court Case Number 10NF1119, attached herein as Exhibit W1.) Palacios would have been on parole during both time periods, as he received a 5-year sentence on April 25, 2007, on another felony case. (Redacted Court Vision, *People v. Arthur Palacios*, Orange County Superior Court Case Number 06NF1723, attached herein as Exhibit X1.) However, the principal reason why it is nearly certain that the offer for consideration was not made in this small window is that Court Vision records suggest that the investigating agency, the La Habra Police Department, made the arrest on April 13, 2010, and immediately took Palacios into custody, which would make this event and time frame inconsistent with Sandoval's notation about "when he gets back in custody…"

that Palacios had a long history as an informant. The fact that the OCII file included the memo to Masangkay and Sandoval's note—items that would have been enormously beneficial to undermining the credibility of Palacios—supports the conclusion that, at the time of the Grand Jury proceedings and trial, Baytieh knew exactly what was in the file and chose to hide it. In sum, the damaging contents of the OCII file, when considered with the fact that Baytieh could not have reasonably believed in 2009 or 2019 that he met his *Brady* obligations, should be viewed as corroboration that he purposefully hid the OCII file from the defense.

### B. Palacios' OCII File Entries Confirm that Baytieh was Reminded Twice After Trial of His Failure to Disclose—and He Responds with Continued Non-Disclosure

After Baytieh obtained Smith's conviction without disclosing any of Palacios' OCII file, he had subsequent contact with the file, as can be seen in the entries located below from the second index card within his file:

UNDER SEAL

(Exh. R1, p. 4.)

On November 8, 2016, five months after he sent a letter to defense counsel purportedly summarizing SH Log entries related to the case, Baytieh contacted OCII Coordinator Masangkay to discuss the entries appearing on the computer. (Exh. R1, p. 4.) His reference to these entries remains a mystery, though Masangkay added that the "inquiry" was related to Palacios' name being in the SH Log. (Exh. R1, p. 4.) Why Baytieh

would have wanted to further discuss the entries is unknown. However, what is known as that this contact with the file took place more than two years into the jailhouse informant scandal. It also occurred months after Baytieh read in the SH Log about the informant operation in *Smith* that had never been revealed to the defense. Yet, Baytieh was still not ready to disclose a single entry from Palacios' long-withheld OCII file. Instead, at a time near when this entry was made, or shortly thereafter, Baytieh would take on a leadership role in the effort to block the disclosure of SH Log entries through the *Brady* Notification System he managed.

Baytieh faced a series of questions during his DOJ interview on June 25, 2019—the day prior to the entry Palacios' OCII file—regarding his decision not to disclose any of Palacios' OCII file. DOJ members read excerpts from the file and probed about the failure to disclose any of the file to the defense. His responses during that day's questioning included that he did not need to review the file before trial, and that to the best of his recollection he had never reviewed the file prior to his interview. However, before beginning the second day of his interview, Baytieh reviewed Palacios' file. (Exh. R1, p. 4.) This made some sense considering Baytieh had listened the day before as members of the DOJ read excerpts from the file and probed about the failure to disclose (or the failure to even review, per Baytieh).

Nonetheless, despite the fact that Smith's habeas corpus proceedings were pending at the time of his interview, Baytieh decided he had far too much to lose to turn over any of Palacios' OCII file to the defense. As a result, the file would remain undisclosed for the next two years—and was only turned over upon request from the defense. As will be discussed, the version of the file ultimately provided would be incomplete.

### C. Palacios' OCII File Includes Correspondence Revealing Existence of Then-Undisclosed Jailhouse Informant Program

In the next section of the motion, Defendant will detail important differences in the versions of Palacios' OCII file disclosed in *Smith* in 2021 and *People v. Govey* in 2014.

Among the documents that were included in both versions are eight communications, via letter or email, from members of law enforcement—again, all of these being withheld from Smith for eleven years. They describe Palacios' prior informant work and seek consideration on his behalf on a number of cases. Among the letters that were concealed prior to Smith's trial was one to prosecutor Nezda from AFT Special Agent Donald Kincaid, sent on February 4, 2004:

> At the direction of ATF Special Agent John Sonnendecker, **Mr. Palacios worked in an undercover capacity, while in the Orange County Men's Jail**, and obtained information, which led to the execution of a federal search warrant. **Mr. Palacios is currently supplying information and has expressed a willingness to continue to work in an undercover capacity**. ATF expects Mr. Palacios to provide information and attempt to purchase evidence from these targets and any other targets that he may develop.

(Exh. R1, p. 19; Exh. S1, p. 26, bolding added.)

Several months later, on September 27, 2004, ATF Resident in Charge John D'Angelo wrote to Nezda, reiterating the helpfulness of Palacios' performance while working within the jail in an "undercover capacity." (Exh. R1, p. 15; Exh. S1, p. 17.)

If these letters had been disclosed, as Baytieh knew was his obligation, it would have alerted the defense to law enforcement agencies working with the OCSD to manipulate housing locations to allow opportunities for informants to question targets. Certainly, targets for this agency were not fortuitously congregating near Palacios. They had been placed near him with the assistance of the OCSD.

While this type of government action would not have implicated the defendant's Sixth Amendment rights under the United States Constitution, Smith would have learned that the OCSD previously moved Palacios and targets together for informant operations. As a result, Smith would have had every reason to believe that Palacios' contact with a veteran informant was not a mere coincidence.

The law enforcement writings were highly relevant to Palacios' credibility and the issue of whether he was acting as a government agent at the time of his contact with Smith. Again, as result of the SH Log and Platt interview, that issue is no longer in dispute.

However, the concealment of the Palacios' OCII file is relevant to analysis of Baytieh's conduct and the honesty of his claims that he did not hide informant evidence related to Palacios, Platt and Martin.

Despite his claims to the contrary, Baytieh understood, upon reviewing Palacios' OCII file prior to trial, that the informant's prior relationship with law enforcement and his history relating to the consideration sought and given for his prior informant work needed to be discovered. He recognized that the information contained in the communications would have strengthened arguments based upon the holding in *Neely, supra*, that there existed a preexisting arrangement that 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. (*U.S. v. York*, *supra*, 933 F.2d at p. 1357.) Of course, the reality is that Baytieh's understanding of both the controlling law and the contents of the OCII file were precisely the reason the file was concealed in its entirety.

### D. Numerous Troubling Issues Emerge with the 2021 Disclosure of a Significantly Incomplete Version of Palacios' OCII File

When Palacios' OCII file was provided in 2021, it soon became apparent that the file was incomplete. The reason why pages were not included in Palacios' OCII file provided to Smith in 2021 is not presently known. However, the inconsistency in the disclosures is provable because Scott Sanders, Smith's attorney, obtained a copy of the version of Palacios' OCII file that was disclosed in 2014 to the defendant in *Govey.* **In fact, 33 pages appear in the version of the OCII file disclosed in 2014 in *People v. Joseph Govey* which were not included in the version provided in this case**.[35] (Exh. S1, pp. 5-6, 10-11, 15, 18-23, 28-29, 32-33, 39-41, 46-60.) The most important questions

[35] The version of Palacios' OCII that was disclosed in *Govey* includes several duplicate pages. Therefore, when calculating the different quantity of pages found within the two, Defendant is not counting the duplicate pages.

regarding the failure to include all of the materials from the OCII files are who was responsible for the decision and what were the reasons. It is strongly presumed that the current prosecutor, Senior District Attorney Seton Hunt, had no role in removing items from the packet of materials provided. This leaves the question as to whether Baytieh, prior to his termination, permanently removed items from Palacios' OCII file or took steps to ensure items would not be provided to the defense.

The most disturbing item included in the version provided to Govey and excluded from the discovery to Smith is arguably a letter, dated January 23, 2004, from Captain John Baker of the Garden Grove Police Department ("GGPD") to former OCII Coordinator and Deputy District Attorney Joseph Nezda. Baker requested that Palacios be given consideration for his assistance in two homicide cases and a robbery case—all three crimes having occurred in Garden Grove. **The letter explained that Palacios obtained incriminating statements from suspects in all three matters, and had agreed to provide informant testimony in those cases**. (Exh. S1, p. 40.) Baker wrote that "[d]uring the last several weeks, Mr. Palacios **was housed at Orange County jail with an inmate who was the prime suspect in a 2000 GGPD gang related homicide**. Mr. Palacios obtained significant incriminating statements from this inmate, implicating the inmate and other gang members with the homicide." (Exh. S1, p. 40, bolding added.) Moreover, "[b]ased in part of [sic] the information obtained by Mr. Palacios, a criminal filing for homicide is anticipated and Mr. Palacios has agreed to testify for the OCDA's office. The homicide filing on this case is currently being reviewed for filing by ODA Jeff Levy..." (Exh. S1, p. 40.) The letter states that the same inmate referenced above "…implicated himself… and two other gang members" in a 1998 Los Alamitos homicide. It further states that "DDA Jeff Levy and Cameron Tally [sic] have been made aware of this information, and it is anticipated that charges may be filed against those implicated on this homicide, in the near future. Mr. Palacios has also agreed to testify in this criminal matter…" (Exh. S1, p. 40.) According to the letter, the inmate also "…bragged to Mr. Palacios that he provided 'the gun' used in a 2003 case, in which two defendants are pending trial." (Exh. S1, p. 40.)

The letter above describes the jailhouse informant program in action—Palacios being the selected informant—five years before the hidden operation in *Smith* occurred. The letter leaves no doubt that Garden Grove Police department asked that the OCSD coordinate the housing of Palacios so that he was "housed at Orange County jail with an inmate who was the prime suspect in a 2000 GGPD gang related homicide…" (Exh. S1, p. 40.) An operation involving Palacios that immediately preceded this one further substantiates the in-custody informant operation. In both versions of Palacios' OCII file there is a letter from GGPD Captain Baker to Nezda, dated January 26, 2004, in which Baker asked for consideration for Palacios' assistance in helping to solve a 2002 death of an infant. (Exh. R1, pp. 17-18; Exh. S1, pp. 24-25.) According to the letter, Palacios contacted a homicide investigator with information regarding the infant's parents on October 16, 2003. (Exh. R1, pp. 17-18; Exh. S1, pp. 24-25.) Palacios was subsequently released from the Orange County Jail and turned over to the GGPD for a four-day period to assist in the investigation. (Exh. R1, pp. 17-18; Exh. S1, pp. 24-25.)

After working with GPPD on the infant death investigation, Palacios was returned to the jail on January 14, 2004. Just nine days later, on January 23, 2004, Baker wrote that "[d]uring the last several weeks, Mr. Palacios was housed at Orange County jail with an inmate who was the prime suspect in a 2000 GGPD gang-related homicide." (Exh. S1, pp. 33, 40.)

The Garden Grove Police Department, the OCDA, and the OCSD were clearly not the lucky beneficiaries of Palacios being in the right place at the right time. Palacios had been returned to jail after working to solve the Garden Grove homicide, and was immediately "housed with an inmate who was the 'prime suspect' in Garden Grove homicide." Palacios then rapidly came forward to claim he had obtained statements implicating the suspect in the Garden Grove homicide, a Garden Grove robbery, and a Los Alamitos homicide.

**Once again, the January 23, 2004 letter was provided to the DOJ—but not to Defendant Smith**. This is confirmed by questioning of Baytieh by DOJ personnel on June

25, 2019. Baytieh was asked about a "letter to the same prosecutor [Nezda] on the date of January the 23rd, 2004." (Exh. E1, p. 175.) The questioner said that the letter "indicates that while housed at OCJ, that he obtained incriminating statements from an inmate who was a suspect in a gang homicide." (Exh. E1, p. 175)

The concealment before trial of this evidence is significant because its timely disclosure would have propelled a study of Palacios' reliability and truthfulness in those cases. The concealed letters, if disclosed, would have revealed to Defendant Smith key clues about a hidden jailhouse informant program that was planting informants such as Palacios near targets in 2004, five years before the informant operation in this case. This evidence would have prompted Defendant to challenge the admissibility of Smith's statement through Palacios, and would have likely eviscerated the notion that Palacios was coincidentally placed in Smith's dayroom.

It should also be noted that the version of Palacios' file disclosed in *Govey*—and not disclosed to *Smith*—also includes an undated, two-page, hand-written summary of three letters in the file, as well as a summary of conversations between former Senior Deputy District Attorneys Jeff Levy and Larry Yellin about Palacios' performance and contribution as an informant. Most likely, that summary was created by Nezda, the OCDA's OCII Coordinator at the time. (Exh. S1, p. 22-23.)

Additionally, three hand-written letters to "Art" were withheld from the version of the OCII file provided to Smith. (Exh. S1, pp. 50-60.) The first two letters focused on a particular female. The third letter asked that Palacios look up a "white pressure group" on YouTube. The author then tells the reader to take care of the "people" who are now the author's people and stay in touch. The author then emphasizes that they are friends for life and "stay white."

### E. Documents in the Version of the OCII Files Turned Over in *Smith* Were Not Disclosed in *Govey*

It is not simply that the recent disclosure to Smith from Palacios' OCII failed to include items from the version discovered in *Govey*. Several key documents from the version of Palacios' OCII disclosed to Smith in 2021 were not included in the materials disclosed in *Govey*. (Exh. R1, pp. 2, 4-6, 10.) **For example, the letter from Sandoval to Masangkay offering the chance for Palacios to earn consideration was concealed in Govey's case**. (Exh. R1, p. 6.) Also concealed was the original index card for Palacios first created in 2006. The card included an entry indicating Palacios was not approved. (Exh. R1, p. 2.) Even more noticeable at this moment in time is that **both of the entries, from January 8, 2010 and February 22, 2010, are about "Baytieh" and about disclosures on this case**.

UNDER SEAL

(Exh. R1, p. 2.)

### F. An Overview of the Failed and Inconsistent OCII Disclosures Related to Palacios

The first and most important aspect of the disclosure violations related to Palacios' OCII file is what Baytieh failed to turn over between 2009 and 2019—the latter year having significance because Baytieh reviewed the OCII file, spoke to the DOJ about the failure to previously turn over any materials, and then responded by continuing to withhold the OCII file. (As discussed, a version of the Palacios' file, found in Exhibit R1, was later turned over by the current prosecutor after defense counsel requested it.) Any analysis of these issues should begin with the obvious: Baytieh knew through the entire eleven-year period beginning prior to Palacios' 2010 Grand Jury testimony that he was obligated to turn over evidence relevant to 1) Palacios' relationship with the OCSD and the OCDA that was developed through his informant services; 2) special treatment given to Palacios after he failed to turn himself in in 2010 per the terms of his agreement, as demonstrated by a comparison of the letter to Smith's counsel and memorandum to the OCII file; 3) the offer for consideration, including compensation, as indicated by OCSD's Sandoval; 4) evidence of coordinated movements within the jail, as shown by documents including, most significantly, the letter from Baker to Nezda on January 23, 2004; and 5) evidence of dishonesty in errors in his reporting of admissions in other cases, including from the inmate in the July 23, 2004 letter who supposedly admitted to two murders and a robbery. (Exh. S1, p. 21.) Baytieh was unwilling to meet his *Brady* obligations.

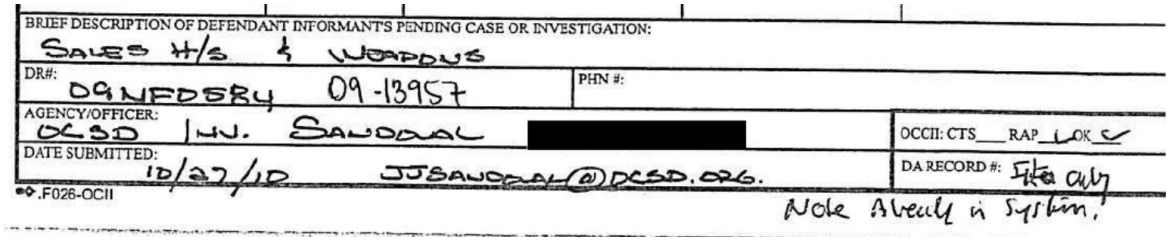
In the late summer of 2014, as jailhouse informant issues heated up, Judge Goethals ordered discovery of informant evidence related to Palacios. (Redacted Court Vision, *People v. Joseph Govey*, Orange County Superior Court Case Number 12ZF0134, attached herein as Exhibit Z1.) There is little question that the decision to withhold from *Govey* the note from Sandoval regarding the opportunity for financial consideration, and the second index card, was intentional. Defendant should be permitted to question Masangkay and Baytieh about that decision, as well as why significant materials—as detailed above—were omitted from the disclosure in this case from the OCII file.

**The recent decision not to fully disclose Palacios' OCII file to Smith, including most notably the 2004 letter from Baker to Nezda describing Palacios' jailhouse informant work, raises troubling issues**. (Exh. S1, p. 21.) As briefly discussed above, knowledge of this letter would have led to a defense investigation of the three named cases and whether the information Palacios provided was reliable and accurate. Additionally, receipt of the letter would have led to questioning of Palacios about his claims in *Smith* that Palacios did not probe, but rather that Smith spoke spontaneously. It is now beyond dispute that Smith was the subject of repeated questioning by the three informants. However, in 2010, evidence of the 2004 informant operation would have opened the defense's eyes to the slim chance that the contact between Smith and Palacios was coincidental. Information showing that Palacios had been returned to the jail after finishing one informant operation so that he could initiate a new one with a dedicated target within the jail—and his efforts to accomplish that government-encouraged objective—would have invited probing that would have likely exposed a Sixth Amendment violation and undercut the presentation of spontaneous contact between Palacios and Smith.

In addition, considering Baytieh's proven willingness to take all steps necessary to keep misconduct hidden and convictions intact, it is reasonable to suspect that the decision to withhold the January 2004 letter to Nezda was also related to non-disclosures in those cases in which Palacios received purported admissions. To the extent that Baytieh and others decided to hide evidence in 2021 from this Defendant because of concerns about protection discovery violations in other cases, such conduct is highly relevant to this court's assessment regarding whether there will ever be reasonable certainty in this case that all favorable evidence will be disclosed.

### G. The Request that Palacios Become an Approved Informant After Both Sides Rested in *People v. Smith*

On Thursday October 21, 2010, the final witness called by the prosecution was Palacios. (Exh. V1.) On October 27, 2010, the prosecution and the defense rested in *People v. Smith*. (Exh. V1.) On that very same day, Sandoval submitted a request for the OCDA to authorize Palacios' use as an informant, which is found on Palacios' second index card, a portion of which can be seen below:


BRIEF DESCRIPTION OF DEFENDANT INFORMANT'S PENDING CASE OR INVESTIGATION:
SALES H/S & WEAPONS
DR#: 09NFD0584 09-13957
PHN #:
AGENCY/OFFICER: OCSD | HN. SANDOVAL [redacted]
OCCII: CTS___ RAP___ LOK ✓
DATE SUBMITTED: 10/27/10 JJSANDOVAL@OCSD.ORG.
DA RECORD #: File only
.F026-OCII
Note Already in System.

(Exh. R1, p. 3; Exh. S1, p. 3.)

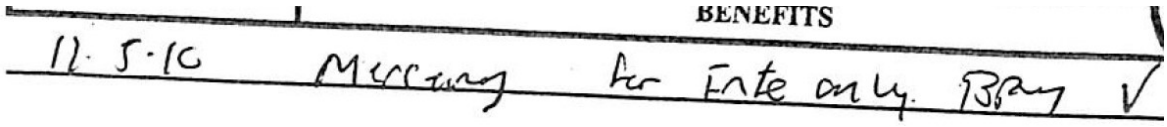
Very clearly Sandoval, whether on his own or at the encouragement of a member of the OCSD and/or the OCDA, intentionally delayed requesting that Palacios be designated an approved informant until after all evidence against Smith had been introduced at trial. The most logical reason for the timing of Sandoval's request would have been his perception—and those with whom he was consulting—that the delay would help avoid disclosure responsibilities. It was an erroneous analysis on their part, however. **The request to add Palacios as an official informant after both sides rested strongly indicates both that Palacios was conducting undisclosed informant work for members of the OCSD and likely the OCDA prior to the trial and was having undisclosed communications with members of one or both agencies prior to the trial.**

Of course, delaying the request to make Palacios an official informant would not have impacted what needed to be turned over to the defense. Unquestionably, Sandoval's request to add Palacios as an approved informant should have instead prompted the OCDA

to determine what had motivated Sandoval to seek this designation for Palacios at that particular moment—especially considering the fact that Sandoval had already shared with the Orange County Informant Coordinator his note describing how Palacios had been given an opportunity to earn money in the run-up to Smith's trial. Of course, there is also a high likelihood that there were communications about this subject matter well in advance of Sandoval's submission, again particularly considering the earlier note sent to Masangkay by Sandoval.

On its face, the intent for requesting that Palacios be designated an official informant after he completed his testimony is obvious: The prosecution team did not want any designation or determination made about Palacios being an official, working informant until after he was off the witness stand and the case had closed.

Perhaps even more disturbing than Sandoval's request is the response to it, when it occurred, and what was shared about that response. On November 5, 2010, Orange County Informant Coordinator Masangkay wrote the following:




(Exh. R1, p. 4; Exh. S1, p. 4.)

Masangkay elected not to approve Palacios, and instead wrote on November 5, 2010, that Palacios would be deemed a "Mercenary for Inte only. BPM." (Exh. R1, p. 4; Exh. S1, p. 4.) This seems to be an attempt to communicate that, based upon the information available, Masangkay believed that Palacios was most appropriately described as a mercenary whose information should deemed as being of value for intelligence purposes only.

This means that just two weeks after Palacios completed his testimony in a special circumstances murder trial—and two weeks after Sandoval asked to have Palacios deemed an official informant—the prosecutor who manages the county's informant program

rejected the request because Palacios was appropriately defined as a "mercenary." This description of Palacios was as far from Baytieh's depiction of his informant as one could imagine. According to Baytieh's closing argument, Palacios was a reliable historian who was willing to testify without any promise of consideration on his then-pending felony cases. The jury, though, would have undoubtedly viewed Palacios in a vastly different, case-changing light if they learned instead that the county's informant coordinator viewed Palacios' informant history as warranting him being described as a "mercenary." Any counter that this designation came later in time and is thus irrelevant does not hold water. Whatever information that supported this analysis was available to the OCDA in advance of the trial and in advance of Palacios' testimony. Again, the full picture of who Palacios was should have been known by the defense. The fact that it was not is explained by common sense: The prosecution realized that the documents in Palacios' file would have undermined its chances of winning.

## VIII. Baytieh Responds to DOJ Questions about His Failure to Disclose Palacios' OCII File in *Smith*

During his 2019 DOJ interview, Baytieh found himself facing questions for the first time about his decision to withhold from Smith the entirety of Palacios' OCII file maintained by the OCDA. It is important in analyzing the responses to keep in mind that when the questioning was posed, Baytieh was in complete cover-up mode: pretending he knew nothing about the massive concealment of evidence related to informants Platt and Martin. At the same time, thanks to the cover-up he was leading, the DOJ was without most of the evidence detailed herein regarding his misconduct. As a result, even though he strained to make sense as he explained why he would have withheld the entire Palacios informant file from the defense, Baytieh did not face the question that would have deprived him of all credibility regarding his reasons for not turning over the file: **Why should we believe your explanation for not turning over Palacios' OCII file when you concealed**

**so much evidence about other informants in the case and then led a decade-plus cover-up of historical proportions?**

The current state of understanding regarding Baytieh's extraordinary misconduct does not logically permit an inference that the non-disclosure of Palacios' OCII file can be explained through an erroneous understanding of *Brady* or poor decision-making.

### A. Baytieh Co-Authored Article in 2016 Contradicting His Claim to DOJ That He Was Not Required to Review Palacios' OCII File

Assuming arguendo that Baytieh had been duped by his own investigative team regarding the three-informant operation in Smith's dayroom, Baytieh nonetheless would have unquestionably understood in 2009 and in 2019 that his *Brady* obligations related to testifying informant Palacios required far more than letting the defense know that he was an informant in the past, which would essentially become his claim. When Baytieh arrived to speak with the DOJ—three years after the Court of Appeal's 2016 recusal of the OCDA in *Dekraai*—he was certainly well-schooled in the holding of *In re Neely* (1993) 6 Cal.4th 901. The 1993 decision was cited in the *Dekraai* appellate ruling as a source of clear (and obvious) guidance about the need to disclose details of an informant's past services, particularly where the prosecution asserts that the informant was not working as an informant when he or she obtained statements about the charged crime:

> Where the informant is a jailhouse inmate, the first prong of the foregoing test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance. **In order for there to be a preexisting arrangement, however, it need not be explicit or formal, but 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**. Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government.

(*Id*. at p. 915; citations omitted; bolding added.)

Again, the need to disclose prior informant work and other evidence of an informal understanding between the informant and the government was settled law sixteen years before the informant operation in *Smith* was initiated, and the importance of *Neely* was reiterated in both the trial court ruling in *Dekraai* ordering recusal of the OCDA, and the 2016 appellate ruling affirming the recusal. (Trial Court Ruling, *People v. Dekraai*, Orange County Superior Court Case Number 12ZF0128, dated March 12, 2015, attached herein as Exhibit A2; *People v. Dekraai*, 5 Cal. App. 5th 1110 (2016).) Unquestionably, Baytieh recognized in 2009, as in 2019, that the pre-existing relationship between Palacios and both the OCDA and the OCSD were relevant to whether there was a pre-existing arrangement to seek statements from Smith that would have then triggered a challenge to Palacios' testimony because of a Sixth Amendment violation. Of course, what makes the situation even more aggravated in this instance is that this is precisely what existed, as later revealed by the SH Log entries and the 2009 recorded interview of Platt.

In further considering the believability of Baytieh's failure to turn over any materials from Palacios' OCII file and whether it is attributable to an erroneous understanding of his *Brady* obligations, again, it must be emphasized that at Smith's 2010 trial he was among the most experienced homicide prosecutors in his office and in 2019, had just completed a three-year stint as supervisor of the OCDA's *Brady* Notification System, and had led the training of members of the OCDA and law enforcement in proper informant and *Brady* practices. It strains credulity to believe that Baytieh could have suffered from a complete misunderstanding of his *Brady* obligations related to Palacios' OCII.

An August 2016 article that Baytieh co-authored for the California District Attorneys Association corroborates his intent to mislead the DOJ. The 19 page document describes prosecutors' responsibilities related to jailhouse informants, based upon the holding in *Brady*, and plainly contradicts his claimed belief that he never needed to review Palacios' OCII file. Most notably, there is the following:

> In addition, the history of the in-custody informant, especially his prior history of cooperation with law enforcement, is also relevant to his credibility in

> general, so **this requires a prosecutor who is using an in-custody informant to meticulously and thoroughly investigate the background of such informant, and prior history and instances of providing cooperation or testimony, to make sure that the prosecution is providing the defense with all relevant discovery**.

(Knox, Blazina and Baytieh, Model Policy of the California District Attorneys Association Foundation, Witness for the Prosecution: The Jailhouse Informant (Aug. 2016), attached herein as Exhibit H8, bolding added.)

Baytieh always knew that the meticulous and thorough investigation of Palacios' background was required. Unfortunately, he has also always been willing to lie about his understanding of his obligations when self-protection was on the line.

### B. Having Never Disclosed Palacios' OCII File, Baytieh Insists He Never Even Needed to Review It

Baytieh essentially had two options as the questions began to pour in about his failure to make any disclosures from Palacios' OCII file. With the DOJ having obtained a copy of the file—or at least a version of it—he could either acknowledge having reviewed the file and concealed the contents, or he could construct an explanation as to why he never examined the file. Baytieh was asked directly: "So as to Mr. Palacios, did you make a request or consult OCII?" (Exh. E1**,** p. 142.) He offered a side-step, combined with a diversionary tactic. It began with the following: "It's not -- I submitted information to OCII about him. So I -- after I -- because he was going to get consideration, I sent copies of his -- the plea form to OCII. I actually sent something more about him because I wanted to make sure he doesn't get any consideration because he did not live up -- he did not turn himself in when he was supposed to turn himself in." (Exh. E1, p. 143.) Baytieh, without any prompting, then referred to his February 22, 2010, memo to the OCII file of Palacios. (Exh. E1, pp. 142-143, Exh. R1, pp. 7-8; Exh. S1, pp. 7-8.) Baytieh began reading from the "last part[,]" which communicated that Palacios' previous offer in exchange for his cooperation was no longer available. (Exh. E1, p. 142.) Again, this was wholly

unresponsive to a question designed to learn why no part of the file had been disclosed to the defendant. Baytieh realized this, but was hoping that he could move the dialogue, and in the process convince his audience that he was an up-front prosecutor who need not be questioned intensively about his discovery failures. The evidence of his supposed forthrightness was having yanked Palacios' offer when the informant did not keep his end of the bargain. However, he was just adding more horrendous deception to the process. As explained beginning at page 102, the memo to Masangkay contained information that Baytieh specifically removed from a letter that was sent to defense counsel.

Nonetheless, Baytieh kept going, clearly hoping to shift the subject matter. After speaking uninterrupted for what amounted to three pages of transcript, Baytieh said that "I called him a snitch. I said, 'He's not doing it out of the goodness of his heart…He's not getting anything because he didn't live up to his term of the agreement.'" (Exh. E1, p. 145.)

DOJ staff refused to move from its point of emphasis, re-directing Baytieh back to original question: "Did you review what is in the OCII file to Arthur Palacios?" (Exh. E1, p. 145.) Baytieh responded, "I did not." (Exh. E1, p. 146.) Moments later, there was the following question and answer:

> Q: Did you review [Palacios' OCII file] for prior cooperation that might need to be disclosed?
>
> A: **I knew that he had previously cooperated with the police. So, I mean, the short -- I did not review -- you asked me that. I did not review the OCII file because I knew he had cooperated with the police. I discovered that information to the defense attorney, and I had him testify about it in open -- in the grand jury and then in open court.**

(Exh. E1, p. 146, bolding added.)

This suggestion in 2019, from the then-supervisor of the *Brady* Notification System—the same prosecutor who also had tasked himself with leading the "training" of prosecutors and members of law enforcement—that he did not need to review the OCII file for discovery purposes, because he knew Palacios "cooperated with the police" and had

testified (generally) about his informant history at trial and before the Grand Jury, is demonstrative of his desperation. (Exh. E1, p. 146.) **Baytieh could not have possibly believed at any time during the course of his career that having an informant testify about his own informant history was a proper substitute for discovery of that informant file or, at the very least, the materials within it.** Baytieh realized that his knowledge that Palacios was an informant was exactly the reason to review the OCII, rather than a justification for ignoring it.

Baytieh also fully appreciated that defense counsel could not meaningfully test Palacios' representations about his informant background or his credibility in prior instances where he worked as an informant without being able to study the evidence that resided in the file that was relevant to those subject matters. Of course, the most logical analysis of what occurred is that the fastidious Baytieh knew precisely what was in the file and hid all of it because the file contained favorable evidence to the defendant, just as he hid the evidence related to Platt and Martin because it was damaging to the case. Baytieh knew that even if he selected what seemed like an innocuous document from the file, discovering it created the risk that the defense would respond by seeking more materials. Moreover, as discussed throughout this motion, there is nothing speculative about Baytieh having a motive to conceal. For the reasons described, there is little doubt that, had Baytieh met his *Brady* responsibilities related to the file, the admissibility of Smith's statements through Palacios' testimony would have been challenged—likely successfully—and at a minimum, Palacios' credibility would have been severely undermined. Baytieh would have also personally faced serious questions about the letter he wrote to defense counsel that hid key communications between OCSD investigators and Palacios. (See analysis beginning at page 81.)

He also realized that his own detail-free knowledge of Palacios' informant background would have done nothing to help answer whether the first prong of *Neely* had been met. In terms of honoring *Brady* obligations, Baytieh also realized that Palacios' testimony would have lent no insights into how his prior informant work and other content

within the file reflected upon his credibility, including whether there were additional motivations to provide the government what it sought in terms of testimony.

In sum, Baytieh's explanation was as illogical as it was unsupported by the law. Once Baytieh became aware of prior cooperation, he was obligated to review the OCII file in order to identify any information regarding Palacios' performance and his relationship with law enforcement. This was needed to determine whether the defense was entitled to information in the file relevant to the first prong under *Neely*. Information within Palacios' OCII file also needed to be disclosed if it was favorable to the defense for any other reason, including that it damaged Palacios' credibility. As already indicated, there was significant information in the file that, if disclosed, would have reasonably undermined Palacios' believability.

Of course, beyond the obligation to disclose to the defense mandated evidence from Palacios' OCII file, every prosecutor operating in good faith would have wanted to know whether the informant's prior service was of such quality that he should be relied upon by jurors. The reality is that Baytieh likely understood Palacios' OCII file completely (or intentionally avoided reviewing the file in order to make it appear that any future discoveries of his non-disclosure appeared less aggravated.) Regardless of the two poorly-intentioned selections Baytieh made with regard to Palacios' OCII, he was committed to using Palacios as his testifying informant, and doing whatever it took so that Palacios could testify as to Smith's statements and do so while appearing as credible as possible. With Platt and Martin effectively unavailable as options, Palacios represented the best and only choice. Moreover, considering the enormous informant-related concealment which was already poisoning the proceedings, hiding the contents of Palacios' file likely barely raised Baytieh's pulse.

Baytieh's responses during his interview represented another disturbing moment for the Orange County justice system: The resident OCDA expert on jailhouse informant issues and *Brady*, insisting that he did not need a review of an informant's OCII file to determine disclosure responsibilities, in order to deceive the DOJ. (Exh. E1, p. 148.)

Baytieh next claimed that he not only never reviewed Palacios' OCII, but that he never reviewed the OCII file of any of the informants involved in his previous cases. (Exh. E1, p. 148.) However, he quickly sought to modify his answer. He was asked about an entry in Palacios' file, which Baytieh was asked to read: "January 8, '10, "Discussed possibility of defendant testifying in 187 conspiracy/solicitation by DDA Baytieh. See e-mail from DDA Baytieh dated 1/8/10." (Exh. E1, p. 169.) Baytieh asked if he could "say something[:]"

> I don't want to interrupt you. So you asked me, "Did you ever review cases?" and I said "No" because I never reviewed them. But it was in certain cases part of my practice to pick up the phone and call and say -- or send an e-mail or discuss.

(Exh. E1, p. 149.)

Baytieh was then asked whether he needed to discover to the defense a specific entry, which he was shown during the interview. It was an entry he believed was written by former Senior District Attorney Elise Hatcher: "**Not approved due to CI's record plus current case**." (Exh. E1, pp. 151-152, bolding added.) That entry is located on an index card found with the version of the OCII file recently provided to the defendant. Palacios had been rejected as an OCDA-approved informant in June 2006. In May 2006, Palacios had been charged with possession of a firearm as a felony, possession of methamphetamine for sale, and an enhancement for being personally armed with a firearm while possessing narcotics for sale. He was also alleged to have served two prior terms of incarceration in a state prison and three prior convictions related to the possession of narcotics for sale. (Exh. X1.)

Certainly, Palacios would have been a worse candidate to work as an informant in 2009 after receiving a five-year sentence on a 2006 case. He was arrested and charged identically in 2009, with the exception of additional enhancements for having been previously convicted of possession for sale and having served an additional term in state prison. (Exh. U1.)

Baytieh further responded to DOJ questioning by stating that he would not have been required to disclose the entry because "[r]eally it's not what the finding of the agency

does that triggers the discovery obligation. It's the underlying fact that triggered that information." (Exh. E1, p. 152.) His response was circular, and absurd in its logic. If Baytieh did not review the file, as claimed, he would not have been unable to understand what "underlying fact[s,]" including those potentially located within the file, led to Palacios being rejected as an informant and thus would have needed to be discovered.

As the DOJ attorneys began proceeding through the many cases referenced in Palacios' OCII file, Baytieh continued to stick to the claim that he never knew of any details found within Palacios' file. The questioners, though, pressed Baytieh again on his ability to make *Brady* analyses of the evidence without having reviewed the actual file: "Okay. When you're disclosing an informant history, how do you know that you fully disclosed without seeing what's in OCII?" (Exh. E1, p. 154.) The answer, follow-up question, and follow-up answer would take the interview on another winding and evasive road:

> A: Well, you're assuming that these two things are mutually exclusive, and they're not. If you're asking me is it the better practice to check OCII, absolutely. You're absolutely right it's a better practice. But I'm looking at it from an analysis of is there any question about is this guy an informant or not, right? ATI will shed more light -- I mean OCII will shed more light on it. But in the case where we're already saying he's an informant, then that information is provided. So let me give you a specific example. Would it have been better to give that information? Sure. Absolutely. No question about that. **But did the defense not receive information about his status as an informant because we didn't look at it? The answer is absolutely no.** They received that information.

(Exh. E1, p. 155, bolding added.)

**Again, the truth was almost certainly that the defense did not receive any information from Palacios' file because the fastidious prosecutor, fully aware of the contents, preferred that the defense not see a single page.** However, assuming arguendo that Baytieh unjustifiably never reviewed the file, his statement was outrageously misleading. First, as *Neely* explains, the "status" of an informant is not understood by

simply revealing that the individual was an informant in the past. It is the nature of the relationship, and what expectations have been created over time, which are pertinent to the *Neely* analysis. None of that was understood simply because Palacios stated in testimony that he had been an informant in the past—a point that Baytieh fully understood. Second, Baytieh knew that *Brady* evidence was not limited to that which would show a witness' status as informant. Even if one were to believe that Baytieh blocked himself from looking at the OCII file, that act would have resulted in preventing the defendant from receiving evidence relevant to the admissibility of Palacios' testimony and his credibility on all questions he answered. But again, Baytieh does not deserve the additional benefit of the doubt. He studied the OCII file and made his non-disclosure decision based upon the impact on his chances of winning.

Throughout the interview, Baytieh hoped and believed that he could talk his way out of his persistently non-responsive answers. While asserting it would have been the "better practice" to study the informant's file, **the agency's expert on *Brady* obligations** actually knew very well that reviewing the OCII file was not the "better practice," but the only practice that would have ensured his responsibilities had been met.

Nonetheless, Baytieh continued attempting to convince DOJ staff that he was unaware of what was in Palacios' file, and that the supposed failure to determine what was in that file was inconsequential. It was not working.

> A: … But did the defense not receive information about his status as an informant because we didn't look at it? The answer is absolutely no. They received that information.
>
> Q: If you could, clarify that distinction. I'm not sure what you mean.

(Exh. E1, p. 155.)

He doubled down: "…[T]he *Brady* obligation is to let the defense attorney know that this witness had previously worked as an informant for law enforcement and received consideration, if that information is provided to the defense attorney without looking at OCII, the fact that you did not look at OCII did not hinder your ability to provide that information." (Exh. E1, pp. 155-156.) Once again, if Baytieh did not know what was in the

OCII file, then he could not have represented with even minimal certainty that all forms of consideration had been disclosed, that all evidence revealing of an ongoing relationship with the prosecution team had been revealed, or that that information bearing on Palacios' credibility was available to the defense. For instance, as discussed above, Sandoval's undisclosed note showed that Palacios was given the chance to earn money for his informant work in the time period leading up to Smith's trial.

During the second day of his interview, a worried Baytieh asked to return to the previously discussed email located within the OCII, dated January 8, 2010, which he sent to OCII Coordinator Ben Masangkay. It stated that he would have his investigator get "**copies of the above named defendant's file for discovery**." (Email from Baytieh to Masangkay, dated January 8, 2010, attached herein as Exhibit B2; Exh. E1, pp. 357-358; bolding added.) **Although discovery from the OCII was never provided**, Baytieh attempted to suggest that this communication was of little importance. Questioning by the DOJ members indicated they held a different perspective, as they repeatedly pressed Baytieh on why actual documents from the OCII were never discovered to the defendant. Baytieh repeatedly side-stepped the issue, while claiming that his investigator probably gave him a verbal response that was satisfactory—not explaining how this would equate to "copies of the above named defendant's file for discovery[:]"

> But I have what I did in front of the grand jury, which in my mind is consistent with investigator saying, "I looked at it, and the guy's been, you know, working as a CI for ten years." So I put that in front of the grand jury, introduced that evidence.

(Exh. E1, p. 366.)

When the DOJ staff again asked whether the investigator took possession of any materials from the OCII file, Baytieh said he had "zero recollection." (Exh. E1, p. 377.)

Soon thereafter, Baytieh again referred to the memo within the OCII file sent to Masangkay regarding Palacios breaking the terms of their cooperation agreement. (Exh. E1, p. 372.) Baytieh said the following regarding the memo:

> The last thing I did with Mr. Palacios when he broke his agreement is I wrote the memo to the file to make sure that whomever is going to be handling his underlying case knows that he's not going to -- he's not to get any benefit in connection with the Smith case. That's the last I did in connection with that case. I made sure that the head of court in North Court was aware of it, and then I made sure that OCII documented it. So that's why I wrote that memo, if you remember, and I highlighted it in bold and red. I said, "It's extremely important that the DA who's handling the case should not give any consideration for my case." Now it becomes somebody else's case. So I don't dictate on somebody else, how they handle their case.

(Exh. E1, pp. 377-378.)

As discussed earlier, the importance of this memo was its content as compared to the letter Baytieh sent to counsel regarding Palacios' failure to comply with the terms of the agreement. Baytieh, certainly, had no interest in sharing the changes made between the memo and the letter counsel. See page 81 for the analysis of how Baytieh manipulated the letter to counsel—adding to his impetus for hiding the OCII file. (Exh. T1; Exh. S1.)

### C. The Absence of DOJ Questioning of Baytieh about Sandoval's Note—Oversight or a Failure to Disclose?

DOJ attorneys questioned Baytieh in detail about the contents of Palacios' OCII file. Surprisingly, however, there were no questions regarding Sandoval's note. Defendant Smith is not in possession of the version of Palacios' OCII that was provided to the DOJ, and thus is unable to determine whether the agency was aware of the Sandoval note. **There certainly exists the possibility that the note was not provided to the DOJ**. It took more than a decade for Smith to obtain it. Additionally, as discussed in more detail above, in 2014, a version of Palacios' OCII file was turned over in *People v. Joseph Govey*. **One of the items that was missing from the *Govey* version was Sandoval's note**. (Exh. R1, p. 6.)

Thus, the question of why the DOJ did not inquire about the note and whether the agency received it persists. One possibility is that DOJ attorneys had the Sandoval note in their possession, and intended to question Baytieh about the subject matter, but passed over the subject unintentionally. It is not reasonable that DOJ staff would fail to have seen the

importance of the note, if it had been received. The questioners remained focused throughout the interview on Baytieh's failure to turn over the OCII, as well as on issues related to consideration provided to informants. In fact, the term "consideration" appears 52 times during the first day of questioning. Baytieh's comments included the following:

> In my mind, at least back then, is, one, if we're giving consideration -- if we're giving consideration to a witness, if we have a witness that has done something that we want to make sure -- in the past, if he is to be used, that we need to provide that information.

(Exh. E1, p. 141.)

Additionally, the DOJ was well familiar with Sandoval and his connection to the case, thereby making it more improbable that they would not have questioned Baytieh about the Sandoval note if they had it. Indeed, Baytieh was probed about his knowledge of multiple entries within the SH Log in which the investigator was referenced. (Exh. E1, pp. 61, 62, 99, 100, 107.)

Finally, if the DOJ did not receive a copy of Sandoval's note, it would raise enormous concerns about how the decision was made and who participated in that decision-making.

### D. The Absence of a DOJ Inquiry about the Second Index Card, and More Evidence of Baytieh's Intent to Hide Evidence Related to Palacios

A perplexing and concerning gap in the DOJ interview of Baytieh relates to the absence of any questions about the second index card for Palacios. Considering the thoroughness of the DOJ's inquiry, it is appropriate to consider whether the second index card was ever provided to the DOJ. If not disclosed to the DOJ, then it is critical to determine why the card was not turned over, who was responsible for hiding it from the DOJ, who was aware of this occurring, and what the objective was behind the non-disclosure.

The first three entries from the second index card were made prior to Baytieh's 2019 interview, and would have been seen by the DOJ if its staff were in possession of the card.

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(Exh. R1, p. 4.)

It appears highly likely that had the DOJ received the second index card, Baytieh would have faced questioning about the first entry appearing above—from "11-5-10"—which again appears to reference Palacios as a mercenary for intelligence purposes only. This entry would have logically been a point of considerable interest for the DOJ, particularly considering the timing of when it was written. If in possession of the DOJ, Baytieh would have likely been asked about his knowledge of Palacios being referred to as a "mercenary," and whether Baytieh had communications with Sandoval or Masangkay about how Palacios earned that description.

Baytieh also was not questioned about the third entry on the card, in which Masangkay describes him as having "[d]iscussed entries as they appeared on the computer." (Exh. R1, p. 4.) This OCII entry, dated November 18, 2016, would have also logically been of keen interest to the DOJ. It reflects Baytieh making contact with Masangkay, and the two discussing the contents of Palacios' file, with that inquiry being related to Palacios' name appearing in the "OCSO 'blog.'" (Exh. R1, p. 4.) The SH Log was also commonly referred to as the Special Handling Blog after it was uncovered.

In speaking with Baytieh about his familiarity with the OCII file for Palacios, and specifically the first index card, there was the following dialogue between the then-prosecutor and DOJ staff:

> Q: Do you recognize what that is?
> A: Yeah. It appears to be an OCII document relating to Arthur Palacios.
> Q: And have you seen an OCII index card before today?
> A: I don't believe so. I may have, but I don't believe so. And I sat -- I sat through a training on OCII years and years ago, so they may have shown it back then. But as I sit here today, I don't remember it off the top of my head.
> Q: For any of the cases that you used informants, did you review the file, relevant file, at the OCII?
> A: Actual OCII file?
> Q: Yeah.
> A: No, sir.

(Exh. E1, pp. 147-148.)

If the DOJ was in receipt of the second index file in 2019, its staff would have had every reason to probe Baytieh regarding why he claimed having never reviewed the OCII file for Palacios, even though the file indicated that three years earlier, in 2016, he and Masangkay discussed "entries as they appeared on the computer."

Of course, if confronted with this particular entry from the second index card, Baytieh was sure to have an answer. He always does. For instance, he might have stated that the precise question did not call for him to reference his communication with Masangkay, or that he forgot having gone over Palacios' OCII file, or anything else he could invent to evade responsibility.

It should be emphasized that the serious issues for Baytieh related to this card do not disappear if the DOJ received the second index card and failed to ask about it or if Baytieh can now craft an explanation as to why he said he never reviewed the file. First, Baytieh's call about Palacios' OCII in November 2016 took place five months after he sent his letter to counsel purporting to summarize the relevant content from the SH Log. Baytieh had

supposedly learned, after reading the SH Log, about a three-informant operation that had been hidden from him. If this were a reality, an ethical prosecutor would have unquestionably launched a new search for information and evidence about what truly took place with these informants. If Baytieh had not at that point ever reviewed Palacios' OCII file, he would have felt an urgency to closely examine the file to determine whether there was evidence related to that operation and evidence that needed to be turned over to the defense.

Instead, when Baytieh reached out to Masangkay in 2016, it appears he was seeking a refresher in what he had personally hidden from Smith in 2010—without any interest in actually facilitating long overdue disclosures.

**Indeed, the fact that after going over the entries, Baytieh failed to disclose a single page of the file corroborates that his commitment to making lawful disclosures remained the same as it was six years earlier**. That is, in 2016, he was as against sharing favorable information from Palacios' file as he was at the time of the 2009 operation in *Smith*. He certainly had no more desire to disclose his 2010 memorandum to Masangkay that contained key information not found in his letter to counsel covering the near-identical subject matter. Baytieh continued to prefer that Smith and his counsel not see the offer—presented to Palacios in the months preceding the informant's trial testimony—allowing him to earn financial consideration in exchange for informant work. Finally, Baytieh remained as committed as ever to concealing from the defense (and the DOJ) that just weeks after Smith's 2010 trial ended, Palacios was deemed a "mercenary" and rejected as an official informant.

In sum, Baytieh remained as steadfastly opposed as ever to turning over those materials within Palacios' file that provided the details of Palacios' past informant work.

### E. Baytieh Tries an Improved Explanation for Withholding Palacios' OCII File to the DOJ after Reviewing it on June 26, 2019

If the DOJ attorneys received the second index card, the final entry from that page was one that they certainly would have not seen, as it was made by Masangkay on what was the second day of Baytieh's interview, June 26, 2019. That morning, Baytieh reviewed Palacios' OCII file. (Exh. R1, p. 4.) This is confirmed by a notation on the second index card, which states that on June 26, 2019, "S. ADA Baytieh **reviewed file**. Made 1 copy of Email dated 1-8-10." (Exh. R1, p. 4.) Years into concealing informant evidence regarding Platt, Martin, and Palacios, Baytieh wanted to review OCII file so he could make sure to give the DOJ the best explanation about why he diverted from the plan of action expressed in the email, which was to disclose Palacios' OCII file to the defense. (Exh. E1, pp. 354-364.) What Baytieh then shared with the DOJ on June 26, 2019, offered nothing in the way of logical insights about his decision-making, but rather served as another piece in a long line of over-answers designed to swamp the listener with sincere-sounding explanations that nevertheless lacked substance. The following is just a small part of what Baytieh said about the email:

> …So I wanted to make sure that all the supervisors or everybody knows what we're doing. So here is the second part of my e-mail. "I also notified Dan Wagner, since he is the assistant in charge of North Court" -- "NOC," What the DOJ did not know in that moment was that North Court -- "where the above-listed case is located. In the near future, I will make arrangements for my investigator to meet with you to get copies of the above-named defendant's file relating to discovery." That's my frame of mind, sir, right? 2009, the idea of informant is now -- you flew from Washington -- wasn't -- but my frame of mind was I want to make sure I satisfied my discovery obligation. I'm going to tell you something, and I mean it. I'm not the exception to the rule. I'm not. The prosecutors in our office by -- the majority of them or some of them -- do they make mistakes sometimes? Absolutely. Do I make mistakes sometimes? Absolutely. I'm a human being. But the frame of mind of our prosecutors is to do the right thing in every single case. This is not just me because I'm Baytieh doing this. This is what we're trained to do. This is what our culture is about. We do the right thing, and the defendants' constitutional rights are part of that right thing. So January 8, 2010, I tell them I'm going to send my investigator. Now, listen to what I did in front of the grand jury because it's clearly -- that's

> why I introduced that evidence in front of the grand jury, because -- based on my investigator's review of this, it makes perfect sense to me right now because what did I do after I told that to Ben Masangkay, to get the information? One, I discovered the entirety of the rap sheet of the defendant -- of Palacios to the defendant. And then let me tell you what I did in front of the grand jury. I'm not required to do that…

(Exh. E1, pp. 357-358.)

It was nonsense heaped on top of more nonsense. Of course, even if his investigator had obtained the OCII file, Baytieh knew that the determinations about whether particular items needed to be disclosed from that file belonged exclusively to him. He knew that asking Palacios general questions before the Grand Jury about his prior informant was not a lawful replacement for discovery compliance. Nonetheless, he offered the following sentence despite its disconnect to common sense: "I tell them I'm going to send my investigator. Now, listen to what I did in front of the grand jury because it's clearly -- that's why I introduced that evidence in front of the grand jury." (Exh. E1, p. 358.) The next portion of the response was even more embarrassing, as he argued he had met his discovery obligations related to Palacios' informant background: "One, I discovered the entirety of the rap sheet of the defendant—of Palacios to the defendant." (Exh. E1, p. 358.) Again, Baytieh knew that giving the defendant the rap sheet for Palacios was wholly irrelevant to the subject matter at hand. That is, a study of Palacios' rap sheet did not advance in the slightest Smith's understanding of Palacios' prior relationship as an informant with law enforcement, as it related to any analysis under *Neely*. Nor would discovering the rap demonstrate whether Palacios had a particular relationship as an informant with the prosecution and law enforcement that could made him a less credible witness. Nonetheless, this was the best Baytieh had to offer having been caught in unlawful non-disclosure—his response just another painful example of a prosecutor acting without fidelity to truth or logic.

### F. Baytieh Refuses to Bring to DOJ's Attention Important Items from Palacios' OCII File That His Review Would Have Revealed to Him

Baytieh hoped to tie up loose ends with the DOJ by reviewing Palacios' OCII file prior to his second day of questioning. The plan was to present a much-improved explanation for some of the more problematic questions he had faced the day before. However, returning to review the file also robbed Baytieh of the argument that he did not know what was within Palacios' file. As he looked at the file, he certainly would have seen the second index card and Sandoval's note describing Palacios being given the chance to earn money for informing. Baytieh, who put his impressive memory on display regularly in his responses, unquestionably remembered that during day one of his questioning he had not been asked a question about the second index card or the Sandoval note.

However, the last thing that he wanted to do on the second and final day of his interview was flag for the DOJ the possibility that additional evidence from the OCII file had been withheld from the DOJ and from the defendant. The decision was an easy one for then-head of the *Brady* Notification System: Say nothing about these items, and thereby avoid any dialogue about additional evidence that was improperly withheld from Smith.

### G. After Baytieh Reviews Palacios' OCII File in 2019, He Again Conceals *Brady* Evidence from Defendant

Soon after Baytieh's interview ended on June 26, 2019, the defense was provided with two previously undisclosed reports related to Platt and his recorded July 2009 interview. However, more than a dozen additional items that have been identified in this motion remained undisclosed for at least the next two years, including Palacios' OCII file, which was the subject of so much discussion during the DOJ interview. What reasonably explains his failure to disclose the additional items of outstanding evidence, much of which we now know was booked into property? Baytieh's verifiable and zealous commitment in

*People v. Smith* has always been to provide the defense with as little *Brady* materials as possible related to the informant deception in this case.

In other words, if Baytieh's narrative during the interview was true, his embarrassment would have been immense. That same embarrassment would have turned to fury, and spurred immediate questioning of the members of the prosecution team regarding the Platt materials, and why they were hidden from him. Simultaneously, he would have wracked his brain to think of any place where undisclosed evidence might be found—including, for instance, the Sheriff's Department where numerous items were booked. However, he took none of these steps. The reason this is known with complete certainty is that Baytieh would have questioned his investigators on the case, and they in turn would have offered explanations that needed to be shared with the defense. Yet, Baytieh has never disclosed a single statement from an investigator explaining how this travesty of non-disclosure occurred. This is not to suggest that Baytieh did not have conversations with his co-conspirator investigators. He almost unquestionably did. It is just that their conversations were never about locating undisclosed evidence, and instead were about how to keep the additional hidden items from everyone other than a trusted team member. In other words, their dialogue was never intended to be disclosed, despite the *Brady* responsibility that accompanied them, because doing so would devastate the entire prosecution team that included Baytieh.

And, of course, this was all déjà vu. Between May 2016, when he read the SH Log entries discussing the informant efforts in this case, and June 25, 2019, when he first sat down for his interview, Baytieh had also failed to take steps to find out whether there were additional reports and recorded interviews connected to the informant efforts on the case.

In sum, while Baytieh disclosed in 2019 the Platt report and his recorded interview, it was only because he was left with no choice but turn them over after the DOJ interview. The moment those materials were sent to the defense, Baytieh returned to the role of hiding everything he could about what had gone so terribly wrong in this case.

## IX. The Concealment of Paul Martin's 2010 Interview

One of the many lingering questions in a vast ocean of non-disclosure in this case was whether it was really possible—in the absence of any discovery being provided related to Paul Martin—that he had actually never been interviewed. However, with the recent disclosure of the Remedy Report, it became clear that the Martin interview was yet another critical piece of evidence intentionally hidden by Baytieh.

Martin's interview was booked on January 13, 2010.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| OS88-40933.59 | WB21B5 | 1 CD WITH AUDIO INTERVIEW OF INMATE PAUL MARTIN | Filed | Evidence | 187 | None | 12/29/2009 11:22:00AM<br>1/13/2010 3:59:03 PM |

*Suspect Name/DOB:* SMITH, PAUL G
*Victim Name/DOB:* HAUGEN, ROBERT

(Exh. J1.)

Martin was interviewed by Wert and Beeman on December 29, 2009—and concealed thanks to Baytieh and his team until 2022. A transcript of said interview is attached herein as Exhibit C2. Wert told Martin that he could not make any promises about what consideration Martin would receive, but "I will let the D.A.'s office know, um, that I did speak to you, and I'll write a report, um, and let them know that, you know, whatever you told me, if you were cooperative, not cooperative, didn't want to talk, whatever the case is. Okay?" (Exh. C2, pp. 2-3.) **Wert had made an identical representation to Platt regarding his promise that the informant's cooperation would be shared with the prosecutor— leaving Baytieh to claim Wert effectively broke his promise to both Platt and Martin**. Additionally, no report related to the interview has ever been discovered to the defense.

Martin provided a letter that he received from Smith, which was also booked into evidence—but was not turned over to the defense until 2022. (Letter from Smith to Martin, attached herein as Exhibit D2.) Martin also sent a letter to Wert and Beeman, which again was booked into evidence, but Baytieh chose not to disclose. That letter, first obtained in 2022, was dated December 12, 2009, and is attached herein as Exhibit E2.

Certainly cognizant that his fellow dayroom members were informants—with the exception of Smith—Martin wanted to make sure he could name Palacios and Platt: "Oh, I remember when they-they first put him with us. Can I mention who else was with me at the time?" (Exh. C2, p. 3.) After being given approval, Martin said the following:

> A: Yeah, I-I was first with, uh, Jeffrey [phonetic spelling] Platt [phonetic spelling], and, uh, Fester [phonetic spelling]. It was me, Fester…
> Q1: Who…
> A: …Paul Smith, uh…
> Q1: Fester's who?
> A: Uh, Jeffrey Platt.
> Q1: Okay.

(Exh. C2, p. 3.)

He later indicated that Palacios was also often present with them. (Exh. C2, p. 8.) Martin also said an unidentified deputy had added Smith to their dayroom:

> So we were talking, and he put him with us--he put him with our group, and then, uh, we would go to outdoor rec and stuff, and he would kinda--**he told us about his case--old DNA case, but it wasn't him and all this stuff.**

(Exh. C2, p. 4, bolding added.)

The early denial—that he was not responsible for the murder—would have been both consistent with Platt's interview and problematic, as it was inconsistent with Palacios' version that he provided in his September 2009 interview and that he would later describe before the Grand Jury and at trial.

As indicated above, Martin was asked about how he ended up in the same dayroom group with Smith. Martin said, "they put him with us-he put him with our group…" (Exh.

C2, p. 4.) In contrast, Platt said "…we were placed in a group together with uh you know at his request and my request that we be able to day room together with uh Paul Martin and Art Palacio [sic.]." (Exh. G1, p. 11.) Platt said that the assignments are "[b]ased on the agreement of individuals, each individual to get along." (Exh. G1, p. 11.) According to Martin, though, Smith was merely placed in his group: "So we were talking, and he put him with us--he put him with our group, and then, uh, we would go to outdoor rec and stuff, and he would kinda--he told us about his case--old DNA case, but it wasn't him and all this stuff." (Exh. C2, p. 4.)

During the interview, Martin spoke at length about their conversations with Smith regarding the crime and the efforts to assault Wert and other witnesses. According to Martin, Smith suggested that Platt take the blame for the murder because of Platt's cancer. (Exh. C2, pp. 9, 45.) Martin said that at some point Smith called him into his cell and asked how much it would cost to get somebody killed. (Exh. C2, p. 11.) Moreover, per Martin, after he learned that the focus was a police officer, he told the others what Smith has asked: "I spread it to them, and Platt said, 'Oh, let me deal with it.'" (Exh. C2, p. 11.)

According to Martin he knew Platt was trying to get information: "I asked him on the phone. I go, 'Dude, what –how do you' – cause we were kind of friends, and I said—I go, 'How do you want me to play this, dude? How can I help?' You know what I mean? And he goes—he goes, 'Hey man, uh, oh, yeah I got it. Uh just tell him to keep talking to me. Tell him to call me and talk to me.'" Martin also told Smith that the phones were safe. (Exh. C2, p. 37.) Martin said that the plans relating to Wert, via Platt, never materialized. (Exh. C2, p. 20.)

Martin offered to keep communicating with Smith: "I was thinking—that's what I wanted to ask you guys. I didn't know how—maybe I could write him back, 'cause… keep in –keep knowing where he's thinking." (Exh. C2, p. 36.) Martin was then asked about his motivations:

Q1: …How come you're telling us this stuff?
A: Well…

Q1: I mean what do you want?
A: Well, you know…
Q1: Or do you want anything?
A: When I--well, I--when I first heard all this stuff, I-I would think--'cause Platt told me, you know, "Maybe you should talk to these guys." 'Cause any good thing I could do right now could help--I mean maybe any good, positive thing I could do in negative situation might help.
Q1: So you want--you were hoping for consideration…
A: Yes.

(Exh. C2, p. 37.)

Martin added that his other motivation was that he was bothered by Smith's conduct. (Exh. C2, p. 38.) Wert attempted to have Martin confirm that none of the discussions with Smith were because a member of the OCSD had suggested this, and Martin—taking the cue—agreed. (Exh. C2, p. 43.) At the time, Wert likely never imagined that a Special Handling deputy was documenting in a log both that Platt and Martin believed they could obtain a confession to the murder, and that he then assigned the informants to Smith's dayroom.

The interview went from bad to worse for the investigators, as Martin became the first witness to indicate that Palacios and the other informants had access to Smith's case discovery:

> Yeah, because usually, like I said, he--like, the time with Platt and me, that was just me and him with the--when he described--'cause he brought up about the cancer, that if--he just came out there, "This would be a good alibi for me," and he--and then that's when I had brought up, "Well, then maybe you should tell us what could he have used." Then the other--like, the other incidents, like, with me and Art, he would call us to his cell separately. **Like, Art would be in the--like, with the discovery,** Art was in the shower, and he had called me in there, "Hey"--talking--then he would--I'd go off about all this crap. Then I would leave, and then Art would--and-and I'm using the phone, and Art goes, "Hey, did he"--I go, "Yeah," and then, yeah, he told me that fucking--and he was all…

(Exh. C2, pp. 44-45, bolding added).)

In the final minutes of the interview, it appeared the investigative team appreciated that the interview was unsalvageable, wrapping it up shortly after the following question and answer:

> Q1: Okay. Now, you said Platt had--when he heard about the-the thing about trying to kill a cop, Platt said, "Hey, let's-let's go with this." Was he trying to--was Platt, like--was he--so I'm not misunderstanding you, was Platt trying to get you, "Hey, let's--we'll kinda, uh, go at him and try and get this information together," or was it like, "Hey, this is good information"? I want to clarify. What was it? Was it, A, "This is good information that the police might want to know," or was it, "Hey, this is about killing a cop, and we can all get help if we do this"?
>
> A: Yeah, he-he--it was brought--we thought, "Let's-let's see where this guy goes with this. Let's see what he talks about. **Let's see what he says, and if it--if it's that, I mean, let's present it to them, and then, yeah, if it can help"--'**cause Platt-Platt did say, "This could help-help us." You know what I mean?
>
> Q1: Okay.
>
> A: You know, uh, "**'Cause this is a--this-this is a cold case, and-and if we can"--**you know, and-and then especially when he told us that stuff with, uh--with--how he described, like, certain details with Platt, Platt goes, "That is--that's good stuff what he just told us." You know? That--and then that's when he got at you guys. You know?

(Exh. C2, p. 45, bolding added.)

The three informants had spoken about getting information together and presenting it to the prosecution. Nothing similar had been stated in Palacios' interview. It was just enough candidness to assure that Baytieh and his team would keep the interview from being seen by the defense—at least until an extraordinary set of circumstances finally led to its unearthing.

### X. The Pre-Trial Concealment of Platt's OCII File and the Circumstantial Evidence that Entries Were Removed from the Version of Platt's OCII File Disclosed to Defendant

In 2022, Defendant Smith finally obtained the OCII for Platt, which Baytieh successfully hid for more than a decade. For all of the reasons stated, Baytieh knew that

Platt was an informant on his case, and was well familiar with the OCII system and the high likelihood that there would be records related to Platt. Indeed, what is most likely is that Baytieh was fully aware of the contents of the OCII for Platt in 2009 and 2010, and simply unwilling to disclose them because of the tactical disadvantages.

The first entry in Platt's OCII appears on March 31, 2008. (Redacted OCII for Jeffrey Platt, attached herein as Exhibit F2.) On April 30, 2008, the OCII Coordinator Masangkay wrote that Platt was "not approved due to victims" and his criminal record, after he was contacted by a Long Beach Police Department detective. However, despite an expanding list of pending cases, he was approved the next year at the request of Sergeant Roger Guevara, who worked with Platt on this case and others. (Exh. F2.) Moreover, on or about the day of Platt's first interview with Wert on June 29, 2009—one day before he was released from custody pending his felony sentencing—Masangkay wrote a log entry stating Platt would be released on his own recognizance to work [redacted] (Exh. F2.) Masangkay indicated that he then called a prosecutor in San Diego regarding the possibility of Platt receiving credit for time served on his probation case. Masangkay's entries also show that he wrote a letter to the San Diego District Attorney's Office, asking for consideration on Platt's felony case based upon his "cooperation on several Orange County cases." (Exh. F2.)

On July 20, 2009, Masangkay wrote that, according to Guevara, Platt was "providing intel. Will commence sting op this month." (Exh. F2.) Platt's July 2009 recorded interview confirms that his sting effort related to this case failed. However, a note from Masangkay on December 18, 2009, confirms that Platt continued to work for the [redacted] after the sting operation related to Smith failed. (Exh. F2.) On April 28, 2010, Masangkay indicated that Platt was "terminated from CI program. He committed new offenses on April 6, 2010…." (Exh. F2.)

This file was hidden from the defendant until 2022, when the current prosecutor provided it. There exist serious concerns about whether the Platt OCII file that has been provided is complete. The reasons for this are two-fold. First, the inconsistent versions of

the OCII file for Palacios provided in *Smith* and *Govey* logically undermine any reasonable faith that OCII discovery related to Platt is complete. Second, there are questions that arise from the entry written by Assistant District Attorney Andrew Bugman. On January 28, 2021, Bugman created another OCII card for Platt, which was based upon a "Review of the Special Handling Log." (Exh. F2.) As has been discussed, the OCDA's 2020 report on the informant scandal included an acknowledgement that prosecutors had failed to meet their obligations to review and make disclosures from the SH Log after it was uncovered in 2016. (Special Report to the District Attorney of Orange County: Prosecutors Role in the *Dekraai* Informant Controversy, July 2020, attached herein as Exhibit G2.)

Both the card and the entry appear to have been created in response to the OCDA's 2020 report. That is, Bugman seemingly supplemented the file with information about Platt that is found within the SH Log. The entry states the following:

> During review of the Special Handling Log it was determined that Platt was providing jail safety and security intel to SH Deputies. SH Log also includes documentation of meetings/assistance for his work as a CI for [redacted] and other cases already documented in the OCII. Platt likely CI referenced in Hobbs search warrant for HBPD case [redacted] See the Conviction Integrity Unit for additional information.

(Exh. F2.)

By the time that Bugman wrote the above entry, the SH Log notes pertaining to Platt and Martin were at the center of a successful petition for habeas corpus relief in this case. Indeed, Smith's conviction was set aside just forty-three days before Bugman wrote the entry. Yet, Bugman's summary of the SH Log notes related to Platt makes no mention of *Smith* or the SH Log entries pertaining to Platt. Interestingly, the entry does state the "SH Log also includes documentation of meeting/assistance for his work as a CI for [redacted] and **other cases already documented in the OCII**." (Exh. F2, bolding added.)" However, in the version of the OCII provided to Defendant Smith, there are no other documented cases to be found. The bolded language above raises the distinct possibility that Bugman was referencing *Smith* when he wrote about "other cases already documented in the OCII[,]"

and that **Baytieh or someone associated with him removed the entries and other documents related to Platt's informant work in *Smith* from the version of the OCII provided to this defendant.**

## XI. Baytieh and Prosecution Team Prove Baytieh Always Knew Platt was Informant

### A. The Combined Effort by Baytieh and Palacios to Mislead during Grand Jury Proceedings

Defendant Smith was originally indicted by the Grand Jury on murder and special circumstances charges on October 1, 2009. On January 29, 2010, Baytieh presented a Second Amended Indictment with two counts of violations of Section 653f(a), as well as violations of Sections 664(a)–245(a)(1) and 182(a)(1)/245(a)(1). (Exh. V1.)

Arthur Palacios appeared before the Grand Jury on January 29, 2010. He would be the key witness in proving the new charges, as Baytieh simultaneously navigated for the first time the "Platt Problem." Baytieh had decided in advance that he would ignore Government Code Section 936.9(c), which states that "the **grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action**, but the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." (Bolding added.) Baytieh knew that the statements attributed to Smith by Palacios would have been inadmissible had an objection been raised. Of course, admitting inadmissible evidence was precisely the goal, which is why Baytieh concealed all informant-related evidence that would have led counsel to raise an objection.

Baytieh would also ignore the California Supreme Court's holding in *Johnson v. Superior Court*, 15 Cal. 3d 248 (1975), which states that "[w]hen a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury

may exercise its power under the statute to order the evidence produced." *(Id*. at p. 255.) Again, Baytieh was required to disclose that Jeffrey Platt had described in his recorded interview a vastly different version of what occurred, as compared to the version from Palacios. And, of course, Platt's recorded interview was just a small part of what Baytieh was concealing from the Grand Jury, as detailed throughout this motion.

Palacios answered in the affirmative to the question of whether "throughout this last kind of 10 years is when you've provided information to law enforcement…as a confidential informant." (Grand Jury Transcript, *People v. Paul Smith* [related to Second Superseding Indictment], dated January 29, 2010 and February 5, 2010, attached herein as Exhibit H2, p. 31.) Baytieh would years later tell the DOJ that he was never actually aware of the contents of Palacios' OCII file—adding that although he requested that the investigator obtain the file, Baytieh himself never reviewed it. (Exh. E1, pp. 142-145.) Defendant contends this rendition of events is not credible for numerous reasons, including Baytieh's history of hiding critically important informant evidence. Baytieh's conduct in this case makes it far less likely that a failure to disclose favorable evidence from Palacios' file was the result of negligence, and far more likely that the non-disclosure was intentional.

However, even if Baytieh's rendition was somehow truthful, it would simply mean that he purposefully avoided obtaining details regarding Palacios' prior informant work to avoid disclosure—particularly because he knew of Palacios' long history as an informant and that the OCDA had created an OCII file for the informant.

Baytieh asked Palacios whether a "part of the reason you're here today is because for your 2009 case you have an agreement with the District Attorney's office in relation to that case." (Exh. H2, p. 32.) Palacios affirmed that his cooperation was, in part, due to the consideration he was to receive. Palacios testified that in earlier meetings with Wert and Beeman, he was told that he could not be promised anything in return. Palacios agreed that Baytieh subsequently told him that in return for his cooperation he would recommend a sentence of five years in state prison, rather than eight that had been offered by the court in which his felony case was pending. (Exh. H2, p. 34.) Baytieh asked whether he was told he

would be prosecuted for perjury if he did not tell the truth and Palacios agreed. (Exh. H2, p. 35.) Palacios was also told that he would need to return to custody on what was his next court date at the time of his guilty plea, and that an agreement was reached with those terms. (Exh. H2, pp. 37, 38.)

Baytieh then began the process of improperly introducing statements in violation of the Sixth Amendment and *Massiah*. Baytieh had also chosen to conceal all 15 items of evidence from the Grand Jury that demonstrated the informant operation underway and the true role of Platt and Martin.

Palacios said that after his arrest in February of 2009, he was housed in "L Mod." (Exh. H2, p. 38.) Per Palacios, his first dayroom group consisted of Jeff Platt, Paul Martin, Paul Smith, and himself. He said that he did not know Paul Smith prior to being in a dayroom with him. (Exh. H2, p. 42.) Palacios agreed that Paul Smith started, "making statements to [him] to why he was in custody as well as other things that he wanted to do to some people on the outside?" (Exh. H2, p. 43.) Baytieh was deceiving the Grand Jury with the assistance of Palacios. It is unknown whether the presentation had been pre-planned and aided by instructions by Baytieh or his investigators, or whether Palacios was merely attempting to remain consistent with what he had said during his September 2009 interview with Wert and Voght. Nonetheless, it was Baytieh's responsibility to not misdirect the Grand Jury, and that was precisely what he did. Again, he knew based upon Platt's July 2009 interview that Smith—prior to him making any statements about the murder—had been repeatedly and aggressively questioned by the three informants. Not only did Baytieh know the statements attributed to Smith were inadmissible, but he then aggravated his misconduct by creating for the Grand Jury an entirely deceptive portrait of what transpired.

Baytieh attempted to emphasize that "[e]very time you were interviewed by investigators from the Sheriff's Department, Bill Beeman or Ray Wert, that they don't want you to ask any questions; they want you to tell them what he was telling you but they don't want you to go out there and fish for information?" (Exh. H2, p. 44.) Palacios responded, "Exactly, yes sir." (Exh. H2, p. 44.) Even if these admonitions were given to Palacios, the

line of question was horrendously misleading. Baytieh knew and was concealing that according to Platt's interview, Palacios, Platt, and Martin had already fished for information prior to the purported admonition. Platt had told Wert and Voght that Palacios and his three informant partners had questioned their target on multiple occasions before Smith broke and spoke about his role in the crime. These were the details that grand jurors (and the defendant) needed to know. Baytieh was seeking to present the prosecution team and its testifying informant as playing by the rules, when he knew those rules had been eviscerated.

Baytieh next turned to the context in which Smith's statements were purportedly made to Palacios:

> Q: So there were times when he would talk to you in front of the other two people, Jeff Platt and Paul Martin, and sometimes just you and him. Correct?
>
> A: Exactly.

(Exh. H2, p. 46.)

Baytieh, in his mind, believed he had found a simple path to addressing the issues created by Platt's interview: keep pretending it never occurred. Baytieh elicited statements from Palacios about the dayroom group conversation regarding the burning of Haugen, without introducing contradictory details provided by Platt during his interview. Once again, sharing Platt's version as to how Smith's statements had been obtained not only would have made Palacios' testimony legally inadmissible, but would have exposed Palacios and Baytieh as misleading the Grand Jury. (Exh. H2, pp. 46-47.)

The next instance of misconduct was in Baytieh's presentation of Platt's role in the conspiracy and solicitation charges—again, maintaining consistency with Palacios' September 2009 interview and Wert's report. There is value in reviewing the entire excerpt:

> Q: During the time that you were there, did you become aware or did you hear him have conversation with Jeffrey Platt where he wanted the -- he wanted Platt to help him get in contact with somebody that would help Paul Smith get rid of some witnesses on the outside?

A: Yes, sir.
Q: Now Jeffrey Platt, did he bail out before you did?
A: I think he went -- was transferred to San Diego.
Q: Okay.
A: That's what I understood.
Q: Okay. Transferred out of Orange County Jail?
A: Yes, sir.
Q: Did he have some kind of an ailment, Jeffrey Platt?
A: Yes, he's -- he supposedly had cancer.
Q: After Jeffrey Platt was transferred out, did Paul Smith come to you and ask you if you can put him in contact with somebody to do something specific?
A: Exactly, yes.
Q: Can you tell the Grand Jury about that?
A: Jeff Platt was supposed to contact somebody that could help Paul Smith.
Q: How do you know that? How do you know what you just told the Grand Jury? How do you know that?
A: Group discussion. I heard it.
Q: In your presence?
A: Yes.
Q: In Paul Smith's presence?
A: Yes.
Q: So you heard Paul Smith ask Jeffrey Platt to do this?
A: Yes.
Q: I want you to keep continuing to tell the Grand Jury how did you get to be the one that Paul Smith asked to help him.
A: **Jeff Platt was supposed to get in contact with Tina Smith. She was outside, not in custody, Paul Smith's girlfriend, and get a payment -- cash payment to start the funding of a hitman or whatever he needed done on the outside. And we didn't -- they talked on the phone**. They were supposed to meet. It didn't happen. They got into a verbal altercation.
Q When you say "they," who are you talking about?
A: Tina Smith and Jeff Platt.
Q: Again, you know that because Paul Smith told you that?
A: Yes.
Q: Okay. Keep going.
A: And then Tina visited Paul that weekend. He came back from visiting and told me that he'd never deal with Jeff Platt again, not talk to him, and he basically asked me if I knew anybody.
Q: What did you do?

A: I said, "Yeah, I got a couple people out there I could talk to."
Q: Why did you say that to him?
A: It was an open door for information.
Q: Now when he told you that and you told him you know some people on the outside, did you provide that information to Investigator Beeman in law enforcement?
A: Yes, sir.

(Exh. H2, pp. 51-53, bolding added.)

The above questioning was not needed to establish that Baytieh was well familiar with Palacios' interview and Wert's corresponding report, but it closed the final escape hatch if he ever wanted to take that route. Even in this abbreviated rendition, it was Baytieh who was introducing evidence that Platt had sought money in order to facilitate the hiring of a "hitman" for Wert. Per Palacios' answers to questions posed by Baytieh, Platt and Smith had "talked on the phone" about this. (Again, that recorded call was booked into evidence, just as the letter from Platt to Smith had been—but neither were disclosed to the defense prior to trial, or for the next twelve years.)

This questioning creates another logic loop from which Baytieh cannot escape. In Baytieh's required narrative, his investigators deceived their innocent prosecutor into believing that Platt was not an informant. That is, Baytieh fell for the investigators' presentation of Platt having attempted to collect money from Smith to facilitate a paid hit on Wert. In this scenario, Baytieh did not see it as odd that his investigative team neglected to investigate Platt for his role in aiding a hit on his lead investigator. Baytieh also failed to find it concerning that his investigators had not created a report about the evidence of Platt's criminal wrongdoing.

However, what is most telling is Baytieh's own reaction to what was right before his eyes. Per Palacios' interview and testimony, **while out of custody, Platt worked with Smith's girlfriend in an attempt to collect money in exchange for the hiring of a "hitman."** It is obviously not credible Baytieh would have failed to initiate an investigation of Platt to determine whether he and his recorded call (that was booked into

evidence) added still more evidence against Smith. It is also not believable that Baytieh would have taken no action to remove Platt from the streets. The life of his lead investigator and his family were on the line. The fact that Smith had purportedly moved on from Platt would have never caused a prosecutor to do the same. Prosecutors do not let bygones be bygones when it comes to efforts to hurt police officers. Moreover, Baytieh would have had no reason to believe that the relationship between Platt and Smith could not be re-initiated at a subsequent point in time. Baytieh did not forget about Platt. He just desperately hoped others would.

Palacios testified that when the arrangement with Platt fell through, he told Smith, "Yeah, I got a couples[sic.] of people out there I could talk to." (Exh. H2, p. 52.) Palacios was then given a phone number from Investigator Beeman to give to Paul Smith. (Exh. H2, pp. 52-53.) Palacios came up with the name "Blade." (Exh. H2, p. 53.) Palacios passed along the name and number saying: "I just talked to my buddy Blade. He can help you out. You need to call him. And don't play games with him 'cause he's not playing games. It'll come back to me." (Exh. H2, p. 53.)

Near the very end of his testimony, it was Grand Jurors who zeroed in on a subject that Baytieh had conveniently avoided. They presented a question about whether Palacios had been paid previously. Palacios said he had only been paid one time for his work as an informant, and it was when he was given one hundred dollars for "doing a [drug] buy" for Buena Park Police Department. (Exh. H2, pp. 72-74.) Baytieh followed:

Q: Is that the only time that you received money for information?
A: Yes, sir.
(Exh. H2, p. 74.)

Whether Palacios received additional payment prior to his testimony remains unknown to the defense because of the continuing concealment that has riddled this case. Per Palacios' OCII file and OCSD Investigator Sandoval's note, Palacios was offered the opportunity to earn money in exchange for informant work in the jail. (Exh. R1, p. 2-6.) It was not the responsibility of Grand Jurors to probe on this matter, which they correctly

understood had relevance to Palacios' credibility. Instead, it was Baytieh who should have elicited from Palacios the circumstances surrounding that offer, why he believed it was made, what additional informant work he did, and any and all consideration he received. Those answers—if truthful—would have brought to light important undisclosed aspects of the relationship between members of the prosecution team and Palacios, as well as the related incentives for Palacios to provide testimony beneficial to members of the *Smith* prosecution team.

Baytieh attempted to further buttress the reliability of Palacios' testimony:

> Q: In all your dealings with the police officers in the past, did you ever lie to any of the police officers when you were dealing with them as an informant?
> A: Everything I ever gave them was fact as I was known.
> Q: As you were –
> A: It might have been a lie, what I told them, but that's what I heard. I didn't intentionally ever lie to them, no.
> Q: Slow down a little bit. So you conveyed to them what ever you heard, correct?
> A: Yes, sir.
> Q: Did you ever intentionally lie to them as an informant, not in being arrested for a crime? After you start working as an informant, did you ever lie to them as an informant?
> A: No, sir.

(Exh. H2, p. 79.)

During the latter part of his questioning, Baytieh could not resist the temptation to bolster Palacios' testimony again. He had just led Palacios into providing false and misleading answers about how statements had been obtained from Smith, leaving out entirely what Platt had admitted about the repeated and persistent questioning of Smith in which Palacios participated. Baytieh had concealed Palacios' OCII file, which contained important information, including that Palacios had been offered the opportunity to earn money as an informant within the jail. Yet, there Baytieh was, doing everything in his power to enable Palacios to present himself as the most trustworthy of witnesses.

### B. Platt Disappears from the Trial and His Replacement Delivers as Requested

On October 21, 2010, Palacios was called by the prosecution as a witness at the jury trial. There had been no progress in terms of discovery of informant-related evidence, with Baytieh remaining just as committed as ever to introducing the statements about the murder attributed to Smith—knowing that they had been unlawfully obtained and their admission was made possible through the stunning concealment of evidence. However, Baytieh had decided he would not offer the same presentation regarding Platt as he had with Grand Jury proceedings. In fact, at trial, he would wipe Platt from the case history to the greatest extent possible. Quite clearly, at some point between the two proceedings, the former prosecutor came to the realization that questions about Platt in front of defense counsel—in contrast to questioning before the Grand Jury when he was not present—ran too great a risk that defense counsel would finally ask himself why the prosecutor had done nothing to protect Wert and the community from this seemingly dangerous criminal, based upon the picture of Platt presented in the provided discovery.

Palacios' trial testimony started on a similar note to what occurred before the Grand Jury. Palacios testified that he had become friendly with the defendant after joining a dayroom group that included Smith. (Exh. Y1, p. 323.) Baytieh knew very well that the first dayroom group in which Palacios met Smith included Platt—not his replacement Paul Longacre, whose name had gone unmentioned during the entire Grand Jury proceedings. Nonetheless, Baytieh led Palacios to describe the dayroom group that existed **after** Platt was released on his own recognizance:

Q: By Mr. Baytieh: While you were housed with the defendant at the Orange County Jail, did you become friendly with him?
A: Yes, sir.
Q: Were you part of a group that you were hanging around with the defendant while you were in custody?
A: Yes.
Q: Did that group include for period of time a man by the name of Paul Martin?

A: Yes, sir.
Q: Did it also include a man by the last name of Longacre?
A: Yes, sir.
Q: What's Longacre's first name?
A: Paul.
Q: Did he go by Art?
A: Yes.

(Exh. Y1, pp. 323-324.)

Baytieh quickly moved from this point back to Palacios' motive for testifying. Palacios agreed that he shared the information he had because of a hope for consideration on his case. (Exh. Y1, p. 324.) He also was asked, "While you're on the street trying to get yourself help, you've done that before where you provided information to law enforcement correct?" Palacios answered, "Yes." (Exh. Y1, pp. 324-325.)

Baytieh later confirmed that Palacios was in a four-man dayroom group with the defendant. (Exh. Y1, p. 330.) Palacios stated that the dayroom group was "myself, Paul Smith, Paul Longacre, and Paul Martin. All three Pauls but me." (Exh. Y1, p. 331.) Palacios stated that he learned of Smith before he arrived, because fellow inmates noted that Smith's case was on the television news:

Q: How would you develop – tell us how you developed that friendship with him. How did that come about?
A: We just met him actually – I just met him. The first dayroom group, I met him. Actually, he was on T.V. the day before – of the day he got there or the day after he was on the news.
Q: His case was on T.V.?
A: Yeah, when they brought him in from Nevada.
Q: Did you see him on T.V.?
A: I didn't see it. I was in the shower. Everybody else saw it. They were all pointing at the T.V.

(Exh. Y1, p. 331.)

Again, as Baytieh well knew, the first dayroom group included Platt, not Longacre, but he made no effort to clarify. Baytieh asked Palacios about his process of memorializing what Smith said to him:

Q: You told us that you would write notes when you have conversation with him. Would you also date as far as when he made those conversations to you?
A: Yes. I just jotted them down like a - - like a diary pretty much, yeah.
Q: I want to ask you about an entry you made for the defendant on August 28 of 2000 and 9. Let me ask you this -- May I approach please, your honor, just very briefly?
The court: Yes.
Q: By Mr. Baytieh: let me just ask you this: Did you make an entry on August 28, '09?
A: Yes, I did.
(Exh. Y1, p. 334.)

**Baytieh also chose not to ask Palacios about any of the notes that he wrote in July 2009, even though they were created earlier in time and included the first alleged admission he received about the murder**. Baytieh's decision, though revealing, made sense if the goal was to distance Platt from key events. Through July 2009, Platt continued to communicate with Smith regarding the subject of an assault on Wert. Baytieh, at the very least, likely felt more comfortable presenting Palacios as working Smith at a time when Platt was no longer part of the active team.

Palacios agreed that it was his belief per the agreement reached that if he testified truthfully before the Grand Jury and during trial, Baytieh would recommend five years in state prison instead of eight. (Exh. Y1, p. 326.) Palacios admitted that he did not turn himself into custody as required, and was arrested for another drug offense. (Exh. Y1, pp. 348-349.) Palacios stated that having not met the original terms of the agreement, he was testifying without any promise related to his own case. (Exh. Y1, p. 349.) However, just as in the Grand Jury proceedings, Baytieh ignored his obligation to elicit from Palacios that he had been given the opportunity to earn money for his informant work in advance of trial.

Baytieh eventually questioned Palacios about alleged statements Smith had made regarding the murder, including those in which Smith purportedly "joke[d] about his ability" to burn others. (Exh. Y1, p. 344.) Interestingly, at the Grand Jury proceedings,

Baytieh had established through his questioning of Palacios that it was Platt, and not Longacre, who was present during this exchange. (Exh. H2, pp. 42-43.)

### C. A Prosecutor Closes His Case Undaunted by Unconscionable Deception

On October 27, 2010, Baytieh rose from counsel table brimming with confidence. It was confidence both that his closing argument would put the finishing touches on another conviction, and that his prosecution team's case-changing misconduct would safely stay hidden forever. Indeed, when Baytieh returned to deliver his rebuttal the next day, he used what had become a trademark phrase—insisting to jurors the case was "not even close." Not once, but nine times. (Partial Reporter's Transcript, *People v. Paul Smith*, Orange County Superior Court Case Number 09ZF0071, dated October 27, 2010, attached herein as Exhibit I2, pp. 672, 674, 680, 682, 685, 695, 702.) He wanted to punctuate the purported lack of doubt about Smith's responsibility for Robert Haugen's murder. Baytieh was unrestrained by the brutal irony of what made the case appear so strong: Cheating that had paved the way for Palacios to testify at trial that Smith admitted to the murder, and to deliver that testimony without facing questions that would have appropriately undermined his credibility.

Baytieh, however, still went further by citing the non-appearance in the case of Martin, who had been mentioned by name as one of the inmates who was in Smith's dayroom when the allegedly inculpatory statements were made. Baytieh elected to point out that the defense possessed equal power to bring in witnesses to rebut prosecution witnesses if they actually believed those witnesses were not telling the truth.

Baytieh stated the following in his rebuttal closing:

> It's my burden of proof. I'm not suggesting they have to prove anything, but because the defendant provided a story to you, when did they call witnesses to back it up? Where is Martin? Remember, Martin is involved in all this stuff. We know he's in jail. The Defendant told you he's looking at 20 years. If

> Palacios is making up all these things, bring him bring in. He always says he didn't do it.

(Exh. I2, p. 694.)

While he was correct that both sides possessed power to call witnesses, Baytieh's decision to raise this issue in the context of analyzing Palacios' credibility offers important insights on a prosecutor who had completely lost his ethical way. Baytieh was suggesting to the jury that if the defense really believed in its version of the truth about what was said or not said in the jail, they would have simply called Martin and examined him about what Smith said to Palacios. Martin's interview by his law enforcement team had been concealed—but not from Baytieh, as recently confirmed by the discovery that it was booked into evidence. Baytieh knew, as these words left his mouth, that Martin was an informant whom he had decided to conceal (along with Platt), in order to clear the path for Palacios to testify to statements that the three had obtained unlawfully. Baytieh's comfort with assailing the defense for failing to call a witness—whom he and his team secretly knew was an informant, and whose interview was being hidden—is another example of a prosecutor committed to winning and self-protection.

It all worked as planned for Baytieh and his prosecution team. On November 2, 2010, the jury convicted Smith of violating PC Section 187(a) and sentenced him to life in prison without the possibility of parole. The jury found true a special circumstance of murder by torture. (Exh. V1.) On November 29, 2010, Smith withdrew his not guilty pleas as to counts 2, 3, and 4. He was sentenced to life without the possibility of parole. (Exh. V1.)

### D. Prosecution Team Members Attempt to Persuade Platt's Sentencing Court to Reward Him for His Informant Role in *Smith*—Eviscerating Baytieh's Narrative that Team Members Hid Platt's Informant Role

Just two months after Smith received his sentence, it was Platt's turn. The event that would take place was just a few courtrooms away. By that point, members of the *Smith*

prosecution team were convinced the coast was clear. That meant they could partake in one of the well-established practices of the Orange County jailhouse informant program: After concealing critical details about an informant's role in the case where he assisted the prosecution—and after waiting until the targeted defendant's case had been completed—member(s) of the prosecution team turned their attention to assisting more directly in the outcome of the informant's case.

On January 31, 2011, Platt and his counsel appeared before Judge Patrick Donahue for his sentencing on three open felony cases, more than two dozen charges, and probation violations. (Exh. H1; Redacted Court Vision, *People v. Jeffrey Platt*, Orange County Superior Court Case Number 07CF1787, attached herein as Exhibit J2.) The Court Vision reflecting the history of what transpired on that case did not include a hint of the most important visitors to the courtroom and the judge's chambers that day. (Exh. J2.)

Nonetheless, a reporter's transcript obtained eleven years later reveals that members of law enforcement met with Judge Donahue, Senior Deputy District Attorney Yvette Patko, and Platt's attorney, David Swanson, to discuss the sentencing of Platt. While the court minutes do not describe an in camera hearing, Swanson referenced the hearing when he subsequently spoke in open court. (Reporter's Transcript, *People v. Jeffrey Platt*, Orange County Case Number 10HF0537, dated January 31, 2011, attached herein as Exhibit K2.) Swanson stated that "a number of – several law enforcement officers have come in and talked about what Platt had done." (Exh. K2, pp. 4-5.) Swanson also stated the following:

> And as the court also heard today, the situation with **the homicide case and the solicitation of murder of law enforcement and witnesses, that Mr. Platt was instrumental in bringing that to light and dealing with that**. And so I think one can only characterize what he has done as extraordinary.

(Exh. K2, pp. 4-5, bolding added.)

The OCDA will certainly agree that the "homicide case and the solicitation of murder of law enforcement and witnesses[,]" identified by Swanson, refers to *People v. Smith*. The effort by the prosecution team members to influence Platt's sentencing by invoking Platt's performance in *Smith* was unconscionable for reasons that Judge Donahue

could have never known at the time—but the investigators fully understood: **The prosecution team members, appearing in what they would have believed was the safe haven of a courtroom chambers, were sharing with Judge Donahue what they had intentionally hidden from Defendant Smith about Platt's actual role.** Thus, even though they unquestionably appreciated the horrendous *Brady* violation spurring a massive and on-going cover-up, it was of little import. They had accomplished the win they desperately wanted and they were ready to express their appreciation to Platt for leading the initial effort to obtain evidence they wanted at any cost.

**i. OCSD Investigators Would Not Have Argued for Platt's Favorable Treatment Based upon His Role in *Smith* if They Had Ever Hidden from Baytieh that Platt Had Worked as an Informant**

Simply stated, it is nonsensical that OCSD personnel would have spoken about Platt's important informant operation in *Smith* during the in camera discussions, if they had ever concealed Platt's informant efforts in *Smith* from Baytieh. This is because **Beeman and anyone else able to speak knowledgeably about Platt's role in *Smith* certainly would have expected that Patko—the prosecutor on Platt's case—would contact Baytieh in order to find out whether Platt's informant work warranted consideration and to what degree.** The only logical conclusion is that investigators from the OCSD were unconcerned about Baytieh being notified regarding Platt, because Baytieh was not only a full-fledged partner in the conspiracy to hide evidence, but its leader.

Additionally, based upon the defense investigation, as detailed in Attorney Scott Sanders' declaration below, former **OCSD Investigator Bill Beeman was one of the participants in the in camera hearing.** (Exh. A1.) Evidence of his attendance at the in camera hearing is significant, because Beeman was not only a critically important investigator in *Smith*, but a key participant in the cover-up of Platt's role as an informant.

As discussed previously and herein, Beeman's role can be understood by analyzing his disclosed investigation in *Smith* alongside the key contents of the SH Log and Platt's 2009 interview, which show that a) Platt met with Beeman in and out of custody to develop evidence that Smith was soliciting and conspiring to kill and/or assault Wert and other witnesses, b) Platt provided Beeman with a recorded call that has still never been disclosed, and c) Beeman took over as the "hit man" after Platt's attempts to obtain payment in exchange for personal information on Wert were unsuccessful. Despite all of this, **Beeman never wrote a report about his contact with Platt, nor once mentioned Platt in the reports he wrote**.

Once again, the only logical inference is that Baytieh and the prosecution team made the decision to subtract Platt out of the case to diminish the chances that Defendant Smith would realize Platt was an informant, and that Platt had described how the informants had violated Smith's Sixth Amendment rights in questioning him about the charged crimes.

### E. Baytieh Places Platt on His 2010 Witness List in *People v. Shawkey*—and Tries to Convince the DOJ in 2021 that He is a Different "Jeffrey Platt" from the Platt in *People v. Smith*

On April 13, 2011, Baytieh submitted his witness list for his pending murder trial in *People v. Shawkey*, Orange County Superior Court Case Number 09ZF0078, attached herein as Exhibit L2. There was the following name:

25. **Duane Capps**
26. **Carlos Brenton**
27. Jeffrey Platt
28. Stephanie Shawkey
29. Richard Krause

(Exh. L2.)

Five months earlier, Smith had been sentenced to life without the possibility of parole. The coast was clear when it came to Platt. Baytieh and his team had gotten away with everything. Incredibly, Shawkey was not just prosecuted by Baytieh. The investigation team included Wert and Voght, both of whom would testify at the trial. (Redacted Court Vision, *People v. Shawkey*, Orange County Superior Court Case Number 09ZF0078, attached herein as Exhibit M2.)

The reality is that Platt's role in a second case prosecuted by Baytieh would have never been known without the DOJ investigation. Baytieh had become a focus of questioning by the DOJ for certainly a number of reasons, not the least of which his history of prosecuting cases in which jailhouse informants participated. Baytieh indicated during the questioning that he was told in advance that he would be questioned about four cases in particular: "I reviewed -- there were four cases that you had told our office, so I kind of reviewed certain notes. I brought certain notes just to refresh my recollection." (Exh. E1, p. 10.) One of the cases that was flagged for him in advance was *Shawkey*, as can be seen from the questioning and responses:

> Q: I'd like to direct your attention to the *Shawkey* case.
> A: Yes, sir.
> Q: And do you know when the complaint was filed in the *Shawkey* case?
> A: Yes, sir. If you want, I'm happy to give you the same kind of factual stuff like I did at the end of *Smith*. But also, I'm happy to wait till the end.

(Exh. E1, p. 205.)

Just moments earlier, Baytieh stated that "with the interview of Platt [from *Smith*,] and I am going to discover it to the defense attorneys because I just became aware of it from you today." (Exh. E1, p. 205.) Baytieh then spent the next 18 pages putting his near-encyclopedic memory of his cases on display. (Exh. E1, pp. 205-223.) During this questioning, it was learned by the *Smith* defense, that Platt was also a witness in *Shawkey*:

> A: **I should mention to you as well that Jeffrey Platt was also on my witness list, and I never called him**. So you can look at it. At that time, I had part of my practice sometimes to list all the names of the

> witnesses, tell the court about people that I anticipate calling. But I obviously discovered his report. Jeffrey Platt was also listed on the witness list, but I never called him. Let me check for you for **Mr. Martin**. Yes. So I stand corrected. Mr. -- Alex Trujillo was listed on my witness list, but I don't believe I ever called him.

(Exh. E1, p. 252, bolding added.)

At the time that Baytieh acknowledged this, he was reviewing the witness list in *Shawkey* to confirm that another informant had not actually been called to the witness stand. Most likely, he had failed to remember that Platt was also on the witness list in *Shawkey*, but was never called at trial. One can almost see Baytieh's mind spinning as he attempted to pre-emptively acknowledge that Platt was a witness in *Shawkey*, while hoping the DOJ would not appreciate its significance. Indeed, he stumbled for a moment—corroborating that *Smith* was very much on his mind. The name "Paul Martin" spilled into his sentence about the informants involved in the *Shawkey* case. Baytieh then quickly corrected himself and moved back to discuss informant Trujillo from *Shawkey*. The questioning ended without further discussion of Platt or his role in *Shawkey*.

Of course, Baytieh knew that the lack of follow-up questioning by the DOJ in that moment by no means eliminated his predicament. There remained an immense risk that the DOJ, which at that time still lacked much of the evidence of Baytieh's leadership role in the cover-up of Platt and Martin would later connect the growing and problematic set of "coincidences." If identified, they would point to the unlikelihood that a) Baytieh had no role in withholding the evidence related to Platt's informant work in *Smith*—including informant work documented in a report the DOJ had just presented to him; b) he failed to take any action against Platt after learning he purportedly helped Smith to carry out an attack on Wert; and c) Baytieh believed Platt was someone attempting to facilitate a violent assault on Wert, when in another case he was prosecuting, Platt was aiding the murder prosecution.

Unquestionably, as Baytieh finished the first of two days of interviews, he was worried that the DOJ might start putting together the pieces. Before the DOJ attorneys

returned to their questioning, Baytieh interjected, anxious to "clarify" Platt's role in *Shawkey*:

> A: …In the *Shawkey* case -- I told you a little bit about the background of the *Shawkey* case. The *Shawkey* case involved Mr. Vendrick, a 73-,72-year-old gentleman, and Mr. Shawkey was in his, I think, late 30s, early 40s. The way that case initially came to the attention of law enforcement is the wife of Mr. Vendrick -- Vendrick was supposed to fly back to Arizona. He didn't fly back. So she reported him missing. So they had it -- it was in the news that these two people are missing. There was a Jeffrey Platt, who's a civilian -- he's not in the jail -- who called law enforcement and said, "Hey, I was walking on the dock in Dana Point Harbor -- in the harbor – in Dana Point at the harbor, and I saw these two guys that look like -- so that -- there was one police report that documented that.
> Q: Understood. So two different Jeffrey Platts, one a civilian. One was from --
> A: Correct.

(Exh. E1, pp. 348-349.)

In sum, Baytieh's hope was that he could persuade the DOJ that there were two different Jeffrey Platts. While the immense motivation to present them as two different individuals was certainly understandable, **Baytieh's deep desire to re-write history took hold and drove him to provide the DOJ with false information.** Defendant Smith requested the *Shawkey* report related to Platt after obtaining the DOJ transcript. In February 2022, the report was received. The February 21, 2008 report was written by OCSD Deputy Jose Pelayo. (Redacted Report by Deputy Jose Pelayo, dated February 21, 2008, attached herein as Exhibit N2.) Platt's role in *Shawkey* began with the claim that on February 16, 2018, he happened to be at the Dana Point Harbor when he saw Shawkey and victim Robert Hendrick. According to Platt, a few days later he saw a news report and learned both were missing. (Exh. N2.) At the time of Platt's supposed observations, **he had been released from custody on the first of what would be six felony cases** for which he would be charged between 2007 and 2010. (Exh. H1.) The version of the Pelayo report

provided to the defense in this case also included handwritten notes by OCSD Investigator Ken Hoffman about his follow-up telephone conversation with Platt. (Exh. N2.)

**The fact that the same "Jeffrey Platt" was a witness for the prosecution in *Smith* and *Shawkey***, is confirmed by Pelayo's report and court records. **The *Shawkey* report by Pelayo listed Platt's date of birth and his California Driver's License Number. Both are identical to the one associated with each of Platt's cases.** (Exh. H1; Exh. N2.) Both are also identical to the information associated with Platt on the OCII card, which was created one month after he came forward as a witness in *Shawkey*.[36] (Exh. F2.)

In sum, Baytieh already knew when he first learned of Platt's role in *Smith*, that he was a potential prosecution witness for him on *Shawkey*. Platt remained a potential witness for Baytieh in *Smith* until his disastrous July 2009 recorded interview with Wert and Voght. Believing that he had successfully buried all of the informant-related evidence pertaining to Platt (and Martin) in *Smith*, Baytieh was ready to add Platt to his witness list in *Shawkey.* At the time of Shawkey's trial, Baytieh elected not to call Platt for reasons that may never be fully known. Baytieh knew, at a minimum, that having Platt testify at trial heightened the risk that he would infect another case with Platt-related misconduct, as he had failed to make any disclosures in *Shawkey*. Specifically, Baytieh had not discovered to the defense in *Shawkey* a) Platt's work as an informant for the OCSD, or b) Platt's role in illegally eliciting statements from Smith. Moreover, Platt's participation in *Shawkey* would have increased the risk that at some point a member of the *Smith* defense team might learn about Platt's status as a witness for Baytieh in *Shawkey*.

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[36] Interestingly, the first entry in Platt's OCII appears on March 31, 2008. (Exh. F2.) On April 30, 2008, the Orange County Informant Coordinator, Senior Deputy District Attorney Ben Masangkay, wrote that Platt was "not approved due to victims" and record. However, on or about the day of Platt's first interview with Wert on June 29, 2009—one day before he was released from custody pending his felony sentencing—Masangkay wrote a letter to the San Diego District Attorney's Office asking for consideration on his felony case there based upon his "cooperation on several Orange County cases." (Exh. F2.)

Platt's role in *Shawkey* would remain fully under the radar, until seeing his name on the witness list during the DOJ interview put Baytieh into a panic. And while the efforts by Baytieh to mislead the DOJ throughout the interview are numerous, certainly among the most important was the attempt to create to a second "Jeffrey Platt." Baytieh will now have to counter that he made a mistake in what he told the DOJ. But that claim would be appalling, particularly considering all of the "mistakes" that he will have to ask be deemed credible related to the concealment of informant evidence in this case. There is certainly the possibility that he desperately wished that the two were not one in the same, and therefore made this claim having failed to take even the basic step of comparing dates of birth and other identifying information. Regardless, it was not an act done in good faith. Rather, it was a move built on the hope that the DOJ staff would not press further. Of course, a plea that his actions be placed in a less damning light should fall on deaf ears considering the volume of compelling evidence that he has been concealing about Platt since 2009.

### F. Baytieh's Comments on Docu-Drama about *People v. Smith* Further Undermine His Claim that He Failed to Realize Platt was Informant

There is also another recent defense discovery that Baytieh certainly wishes would have remained forever out of view: the former prosecutor's appearance on a docudrama about this case, "Murder She Solved—Robert Haugen." More specifically, comments by Baytieh on the program corroborated the obvious: He would have taken immediate action against Platt, had he truly not known Platt was an informant on the case. The program, which was first aired in 2013, but was only discovered by the defense in 2022, also confirms that Baytieh (and Wert) failed to learn, through the course of their careers, a rule essential to successful criminal conspiracies: Do not discuss in a recorded interview what your thoughts were in the midst of an earlier cover-up. Believing his misconduct was in the

rearview mirror, and not wanting to miss a moment of recognition, Baytieh discussed the concerns he logically would have had in 2009 related to an attack on Wert:

> We wanted to make sure that everything that Paul Smith is doing in custody we know about it and hopefully we know about it before he does it…So he's talking to [undercover officer Beeman posing as] Blade and he's talking to him about "you know I want to take out Ray [Wert]" and the concern that I have at that moment is I have control over what he's telling Blade [Beeman.] **But what I was worried about is what if he talks to another inmate at the jail who's willing to help him who's not gonna come and tell us**. **So we needed to move fast**.[37]

The principal problem for Baytieh created by his appearance on the program is the bolded words above and their obvious logic—logic that devastates his claim that he failed to realize Platt was an informant. In other words, the fear that Baytieh supposedly had at the time about the possibility of "another inmate" who could have helped Smith would have focused the prosecutor on the danger that Platt posed, unless he already knew that Platt was an informant. If Platt was not an informant in Baytieh's mind, then Platt would have been seen as an urgent threat to Wert: an "inmate at the jail who's willing to help [Smith] who's not gonna come and tell us."[38] What would have made Platt appear even more dangerous was that he went from being an "inmate" to an out-of-custody defendant, and, thus, would have posed an enhanced risk if he re-connected with Smith on the plan to attack Wert. Yet, despite the apparent danger and urgency, Baytieh did not "move fast" when it came to Platt. He did not prosecute Platt. He did not take steps to incarcerate Platt. He did not even tell his team to investigate Platt. In fact, he did nothing at all. **Of course, he did none of these**

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[37] (Robert Haugen | Murder She Solved | S03E03, https:// www.youtube.com /watch?v=nw1S7uI2gbA )

[38] (Robert Haugen | Murder She Solved | S03E03, https://www.youtube.com /watch?v=nw1S7uI2gbA )

**things because Baytieh knew from day one that Platt was a member of the team he led.**

## XII. Wert and his Partner Order Termination of the SH Log on Eve of 2013 Discovery Determination in *Dekraai*

In *People v. Scott Dekraai*, which involved the killing of eight people at a Seal Beach salon, the defense began to raise questions in early 2013 regarding whether a jailhouse informant named Fernando Perez had obtained statements illegally while working together with the prosecution team in that case. Judge Goethals was set to rule on January 25, 2013, regarding whether the prosecution would have to turn over comprehensive discovery of Perez's history as an informant, which the prosecution was opposing. (Redacted Court Vision, *People v. Scott Dekraai*, Orange County Superior Court Case Number 12ZF0128, attached herein as Exhibit O2.)

Special Handling Unit members, at that moment under the supervision of Sergeant Wert and Sergeant Martin Ramirez, were no doubt aware of the significance of the impending decision. On January 22, 2013, the lead prosecutor in *Dekraai* wrote an email to a senior Special Handling Deputy named Seth Tunstall. Wagner summarized the situation as follows:

> I am opposing the defense requests for discovery. We are litigating the motion on Friday. I believe there is a probably a 50-50 chance the court will order us to make discovery of the following items (excepting any info about Fernando's current whereabouts):

(Email from former Assistant District Attorney Dan Wagner to former Special Handling Deputy Seth Tunstall, dated January 22, 2013, attached herein as Exhibit P2.)

Wagner's list describing what would need to be discovered if the court made an adverse ruling would have quickly been recognized as requiring discovery from the SH log related to Perez. For Wert, the concern was certainly not Perez or *Dekraai.* It was that Wert knew the *Smith* prosecution team had worked with Special Handling deputies to carry

out a hidden informant operation in this case using undisclosed informants Platt and Martin, as well as Palacios. The entries from the SH Log and their obvious significance to this case were discussed previously in this motion. For Wert, he reasonably knew that if the SH Log was discovered in *Dekraai*—making it the first case in which the log would be revealed to a defendant—it was highly likely that defendants in other cases where informants were used would request entries related to their cases. His worry, of course, was that Smith would be one of those defendants.

Logic says that if Wert had not already reviewed the SH Log entries, he did so after Tunstall returned with word of the pending discovery determination. He was also logically aware that an unwanted ruling for the prosecution was then issued on January 25, 2013. (Exh. O2.) Discovery compliance was set for February 28, 2013. (Exh. O2.) The discovery did not include a single page of the SH Log. (Exh. A1.)

On October 28, 2016, Dekraai finally received 247 redacted pages of the SH Log. (Exh. A1.) On the third to last page of the log, the following note, dated January 23, 2013, can be found under "Deputies Grover & Garcia:"

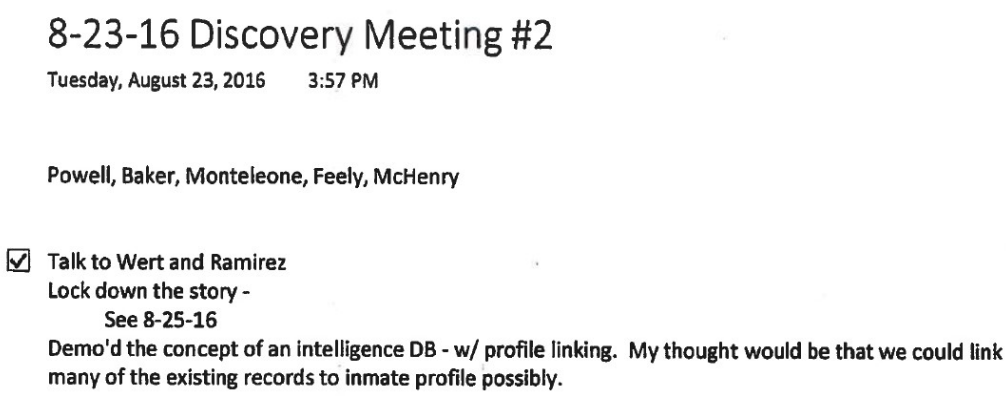
> **A S/H meeting was held by Sergeants Ramirez and Wert. Numerous topics were discussed. One of the biggest changes will be concerning this log … It will NO LONG [*sic*.] BE A LOG … but rather a document of IMPORTANT INFORMATION SHARING ONLY**.

(Partial Special Handling Log pages 1154-1157, disclosed in *People v. Dekraai* on October 28, 2016, attached herein as Exhibit Q2, p. 1155.)

The quoted language above, including the bolding and the capitalization, is presented exactly how the entry appears. It is obvious that the author(s) used these highlighting tools so the words would stand out to Special Handling Deputies who needed to know about the sudden change in the SH Log and the procedure moving forward.

Wert and Ramirez both understandably struggled to come up with an explanation for their actions that could be made to appear sensible. Captain Michael McHenry, who was part of the OCSD team assigned to investigate entries from the SH Log, quickly recognized

the problem. McHenry created notes that followed a meeting with senior OCSD officials. He wrote himself a reminder to speak with Wert and Ramirez so they could "[l]ock down the story[:]"



8-23-16 Discovery Meeting #2

Tuesday, August 23, 2016 3:57 PM

Powell, Baker, Monteleone, Feely, McHenry

☑ Talk to Wert and Ramirez
Lock down the story -
See 8-25-16
Demo'd the concept of an intelligence DB - w/ profile linking. My thought would be that we could link many of the existing records to inmate profile possibly.

(Note written by former OCSD Captain Michael McHenry, dated August 23, 2016, attached herein as Exhibit R2.)

Locking down a believable story that would be based upon a series of lies would certainly be challenging. In a declaration written by former OCSD Commander William Baker, he summarized the explanations given by Wert and Ramirez for the termination of the log. (Declaration of former OCSD Commander William Baker, dated December 16, 2016, attached herein as Exhibit S2.) More interestingly, Baker wrote that Wert "recently informed OCSD that this summary of his interview was factually inaccurate and should not be a reflection the content of his interview. No factual corrections have been provided by Sergeant Wert as of the date of this declaration." (Exh. S2, p. 3.) Similarly, Baker wrote that "Lieutenant Ramirez has recently informed the OCSD that this summary of his interview was inaccurate. No corrections have been provided by Lieutenant Ramirez as of the date of this declaration." (Exh. S2, p. 3.)

Wert, who refused to testify at the habeas corpus proceedings in this case, also refused to testify during the third round of evidentiary hearings in *Dekraai* without a grant of immunity, which he was given. (Reporter's Transcript, *People v. Scott Dekraai*, Orange

County Superior Court Case Number 12ZF0128, dated June 11, 2017, attached herein as Exhibit T2.) When it came time to explain why he decided to terminate a log that had been used for nearly four years, he remained unable to provide an explanation that was sensible. On the other hand, Wert's request for immunity seemed increasingly wise, as he had no plans to integrate the truth into what he would say from the witness stand. In fact, he came to court poised to stretch credulity to the breaking point. Wert claimed to remember with clarity that he actually never set eyes on the log until it appeared in a local newspaper article in 2016:

> Q: Had you never seen the log? You've never seen it in your career?
> A: Not until it was in the [Orange County] Register.

(Exh. T2, p. 8252.)

In Wert's version, he had ordered that use of the log be terminated without ever reading a single entry:

> Q: But you had never seen it before, before 2016?
> A: Correct.
> Q: So am I right in understanding you stopped the log that you never saw?
> A: Correct.
> Q: All right. So you never -- and we'll go back in a moment, but you never looked at the log before you stopped it? You just heard there was a log and you said sight unseen stop making entries in
> A: Yes.

(Exh. T2, p. 8254.)

It was three interwoven claims that individually and separately were preposterous. First, it was not believable that Wert never looked once at the log his deputies used during the approximately five to six months he had supervised them—having arrived in "August or September 2012" and making the decision in late January 2013 that deputies would no longer make entries. (Exh. T2, p. 8266.) Second, it was not credible that he terminated the log without first viewing it and evaluating its usefulness. Third, he would not have realistically terminated the log two days before Judge Goethals' ruling, having never seen

the log, unless the decision was connected to, and motivated by, the then-impending court decision.

Judge Goethals also believed none of it, as he stated in his written ruling striking the death penalty as a potential punishment. Regarding the termination of the SH Log, he wrote the following:

> The truth is it was neither an accident nor a coincidence that on January 23, 2013, two days before this court was scheduled to make its initial discovery order in this matter, the OCSD's "Special Handling Log" was terminated.

(Trial Court Ruling, *People v. Scott Dekraai*, Orange County Superior Court Case Number 12ZF0128, dated August 18, 2017, attached herein as Exhibit U2.)

What should now be clear is that it was "neither an accident nor coincidence" that Wert wanted to keep the SH Log under wraps. He correctly feared that the timely disclosure of the log would have meant coming face to face with the *Smith* prosecution team's misconduct. His actions would delay justice for Smith and extend a scandal that was on the horizon.

## XIII. The Jailhouse Informant Scandal Takes Hold in *People v. Dekraai* and Baytieh Violates *Brady* by Concealing Informant-Related Evidence in *Smith*

On January 31, 2014, the defense filed a 505-page motion in *People v. Scott Dekraai,* alleging an undisclosed jailhouse informant program that systematically violated Constitutional rights by encouraging informants to question charged defendants about their cases. While *Smith* was not among the cases analyzed in the brief, the filing alleged the existence of a custodial/jailhouse informant program that was operational during the time period of the undisclosed informant operation in this case. Those allegations of a custodial informant program are outlined in the appellate ruling that would uphold the 2015 recusal of the OCDA by the Honorable Thomas Goethals: *People v. Scott Dekraai* (2016) 5 Cal.App.5th 1110.

For the next two years, the OCDA and the OCSD insisted that no such program existed. Baytieh had the ability to corroborate the defense allegations—and, unquestionably, the responsibility to do so under *Brady*. The evidence being concealed in *Smith* was also evidence that would have countered the *Dekraai* prosecution team's narrative, and shown how the OCSD personnel worked hand-in-hand with informants to coordinate their placement near targets to obtain statements, and then concealed the evidence that would have revealed this occurred. The true nature of the coordinated efforts by Platt, Martin, and Palacios needed to be disclosed by Baytieh in *Dekraai*—just as it needed to be disclosed in every case where the prosecution was presenting the contact between informants and defendants as being coincidental.

## XIV. Baytieh Attempts to Undermine the Credibility of the Informant Scandal Allegations and Make His Willingness to Violate *Brady* Appear Inconceivable—Before the Scandal Engulfs *Smith*

### A. Baytieh Issues Scathing Attacks on the Reliability of the Informant Allegations and Those Who Found Them Credible

Baytieh recognized that even with the committed effort to conceal evidence from Smith and all the other defendants entitled to evidence from his case, there was a substantial risk that it could still provide inadequate means to keep he and his prosecution team's misconduct from being uncovered—particularly if the allegations raised in *Dekraai* took hold. Therefore, Baytieh leaped at the opportunity to lend his credibility to the OCDA's effort to discredit the allegations being raised. In 2015, Baytieh seized the chance to lead the agency's public campaign to delegitimize the defense allegations raised in legal filings, litigated in evidentiary hearings, and eventually ruled upon three times by Judge Thomas Goethals. Considering that the informant litigation in *Dekraai* involved allegations of law enforcement and prosecutorial misconduct in numerous cases—and at the time Baytieh was overseeing the agency's *Brady* Notification System for law enforcement—arguably no member of the OCDA, with the exception of the prosecutors assigned to

*Dekraai*, should have felt a greater responsibility to vet the filings and testimony to determine the quality of the evidence. Baytieh suggested that this was precisely what he did when he offered commentary at public forums where the issues were being discussed and debated in 2015 and 2016. According to Baytieh, there was not a "shred of evidence" that a single prosecutor intentionally withheld informant-related evidence. (Orange County Register Snitch Tank Community Forum, https://www.youtube.com/watch?v=zVuv0jLxpAs, Transcript of Community Forum, dated February 29, 2016, attached herein as Exhibit V2, p. 34.) Similarly, he had previously told another group that the allegations directed at prosecutors were "baloney." (*Attorney Official Calls Claims of Intentional Misconduct In Use Of Jailhouse Informants "Baloney*[,]*"* OC Register, Oct. 1, 2015.) As this motion shows, Baytieh did not need to read a word of the motions filed in *Dekraai* to know his words were blatantly false.

Baytieh offered no details about how he reached his conclusions, but his assignment and reputation as a highly intelligent and consistently well-prepared prosecutor would have supported the inference, for many, that he had scrutinized the available information and was able to find infirmities that even the presiding judge could not recognize.

At a forum held at University of California, Irvine School of Law, Baytieh took his performance art to a disgraceful level. He appeared with Sanders, who was then serving as Dekraai's counsel. Baytieh presented himself as being unable to contain his fury with the university's then-Dean Erwin Chemerinsky, who was a lead signatory in a letter requesting a DOJ investigation.[39] Baytieh told the group, comprised largely of law students, that their nationally recognized dean had not been "intellectually honest" and that Chemerinsky was "relying [on] nothing more than reading articles in the papers." (Transcript of Community Forum, held at the University of California, Irvine, dated July 26, 2016, attached herein as Exhibit W2, p. 5.) Baytieh made the claim without a scintilla of proof, but that also lacked

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[39] Saavedra, *At UCI Debate, Lawyers Spar Over Use of Jailhouse Informants, Say Federal Investigation Needed,* OC Register, Feb. 17, 2016.

a scintilla of importance for someone in a pathological pursuit to persuade. Chemerinsky was not present to respond or defend himself—likely never anticipating the attacks that Baytieh would level. And while Sanders described the evidence supporting the allegations, he could not personally attest to what Chemerinsky had or had not studied. It was a strawman argument—that Chemerinsky's purported failure to study the issues exemplified the lack of evidence supporting the allegations—but most will only realize with this filing the despicable depths to which Baytieh had sunk.

Anxious to enhance his believability, Baytieh repeatedly pulled from his bag of oratory tricks. For instance, he pretended that he was pained by the need to call out the lack of intellectual integrity he was ascribing to Chemerinsky—claiming that he owed a debt to the dean. That is, Baytieh told the audience that Chemerinsky's bar preparation classes had been crucial to him passing the California Bar Exam many years earlier:

> I am sure [Chemerinsky] is a wonderful human being. I owe part of me passing the bar to him, because I took his classes. But I remember something that he said. He said you know, before you answer the question, and before you take a position, know the facts. He didn't do that. He didn't do that. And that's not fair.

(Exh. W2, p. 18.)

Baytieh was certainly fabricating his recollection of words spoken two decades earlier in a bar class, but Baytieh has never allowed truth to inhibit potentially compelling rhetoric. Again, he thought that invoking this memory, his purported affection for the dean, and his gratitude would make the then-prosecutor more credible in his claims.

Of course, it required an extraordinary disrespect for truth and fairness to suggest that Chemerinsky (and others) who viewed the existing evidence as compelling and supportive of an investigation lacked integrity, when 1) Baytieh had himself committed massive informant-related misconduct that would have independently supported the investigation and corroborated the allegations in *Dekraai*; 2) he had publicly insisted there was no evidence that a prosecutor engaged in informant-related misconduct, when the most

egregious example of it was his own; 3) he had refused to employ his knowledge and power beginning in 2009 to reform the jailhouse informant program and the OCDA's disclosure practices, which, had Baytieh done, would have made the scandal unnecessary; and 4) **he either never actually studied the written allegations nor what occurred in the *Dekraai* hearings, or conducted that study, but lied about his conclusions**.

The crystallizing portrait of a man willing to say and do anything and everything to prevent the world from understanding critical truths in the context of the claims about the evidence in *Dekraai* and those who found the evidence compelling, is further described at page 226.

### B. Baytieh Attempts to Demonstrate a Commitment to *Brady* that Would Make His Misconduct in This Case Inconceivable

As Baytieh took on the legitimacy of the scandal, he found an ingenious pathway to enhance his credibility, while launching a pre-emptive strike against any future allegations from this case (and likely others) of informant-related wrongdoing. He grabbed the mantle as the leader of the OCDA's effort to provide "lawyers in the District Attorney's Office and virtually all of the sheriff's nearly 2,000 sworn personnel" with "special training programs about informants and evidence." He was more than happy to allow the press to observe his "four-hour session for sheriff's deputies, **hitting hard on themes of integrity and full disclosure and emphasizing the dangers of relying on informants**."[40]

Baytieh was projecting himself as his agency's greatest champion for defendants' due process rights. It was hypocrisy in its most despicable iteration. At the same time, the realization that Baytieh repeatedly told others to follow laws he secretly mocked and violated for years adds to the understanding of what a uniquely dangerous prosecutor and person Baytieh is: someone whose words should only be credited if they are accompanied by the most compelling corroboration.

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[40] Saavedra and Ferrell, *Inside The "Snitch Tank:" Salon Massacre Case Sparks Hard Look at Jailhouse Informants*, Press Enterprise, Nov. 23, 2015, bolding added.

## XV. OCDA Admits that SH Log Reveals Jailhouse Informant Program and Evidence that Deputies Misled During Testimony in *Dekraai*

Neither Baytieh nor the OCDA had ever been truly institutionally ignorant of Orange County's jailhouse informant program—and the Court of Appeal expressed its agreement with this analysis in its appellate opinion in *Dekraai*, discussed herein. Not only were informants integrated into criminal investigations and prosecutions, but the OCDA was responsible for tracking and approving informant activities through the OCII.

In May 2016—with the Court of Appeal's ruling on CAG's appeal of *Dekraai* pending—a log of Special Handling notes was uncovered in *People v. Daniel Wozniak*. The significance of the content was not lost on the OCDA, nor was the need to publicly acknowledge its importance in view of the likelihood that Judge Goethals would soon order disclosures. On June 9, 2016, the then-head of the homicide unit and former lead prosecutor in *Dekraai*, Dan Wagner, appeared in court for an ex parte in camera hearing. At that hearing, the OCDA filed a complete and unredacted copy of the log under seal with the court. Later that same day, the OCDA issued a four-page press release regarding the ex parte in camera hearing that just took place. (OCDA Press Release, dated June 9, 2016, attached herein as Exhibit X2.) At the top of the press release, it states that "OCDA sets out concrete action plans to remedy OCSD's previous nonproduction of documents." The release summarizes the OCDA's brief and Wagner's declaration, including how the log came to light and the contents of the log. The press release states that "[b]ased on the Jan. 23, 2013, court order in the *Dekraai* case, the OCDA made repeated requests to the OCSD telephonically, in writing, and at meetings" for records. The press release continues, stating that "[t]he SH Log would have been responsive to this and other subsequent requests made by the OCDA to OCSD." (Exh. X2.)

The press release includes the following:

There are informer names on almost every page as well as numerous mentions

> of high-profile inmates and frequent confidential informer (CI) interaction with numerous inmates, including high-profile inmates. The SH Log also mentions outside agencies interacting with special handling deputies about inmates and their numerous inquiries about running "operations." The "operations" that are unfamiliar to the OCDA[41] appears to be part of informal jail banter with insider references related to jail security and not the case related to the inmate.

(Exh. X2.)

Significantly, the press release marked the first time that the OCDA appeared to acknowledge a jail informant program:

> The jail **special handling deputies cultivated and utilized a group of informers**. The informers were **often kept in a particular sector, and they would often know each other**. In exchange for their information, some informers were given favors such as phone calls and visits. The SH Log contains references to extensive recordings in multiple sectors of the jail.

(Exh. X2, bolding added.)

In Wagner's declaration, attached to the Motion to Regulate Discovery, he used slightly different language, stating that "[t]he SH Log reveals that jail special handling deputies **recruited** and utilized numerous informers. The informers were often kept in a particular sector. In exchange for their information, informers were given favors by the deputies such as phone calls and visits." (Declaration in Support of Motion to Regulate Discovery, *People v. Dekraai*, Orange County Superior Court Case Number 12ZF0128, dated June 9, 2017, attached herein as Exhibit Y2.)

The press release promised that "[a]t present, the OCDA will continue to analyze the extent of the impact of the newly uncovered SH Log on **open and closed criminal cases**." (Exh. X2, bolding added.)

Under the section titled "OCDA's Action Plan to Remedy Legal Issues[,]" the

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[41] The OCDA admits in this sentence that it was familiar with the operations, some of which would have included informants, unless those operations were related to jail security issues.

release states that the OCDA has provided the Attorney General with the log. (Exh. X2.) The press release also asserts that "Dekraai and Wozniak prosecutors are analyzing the SH Log for the purpose of providing the defendants all appropriate discovery." (Exh. X2.) The *Dekraai* prosecutors were Wagner and former Senior District Attorney Scott Simmons. The *Wozniak* prosecutor was former Senior District Attorney Matt Murphy. The press release continues:

> An **experienced prosecutor** will be assigned to review the SH Log for the purpose of identifying all other current and former criminal defendants who are identified in the SH Log. This prosecutor, working with the trial prosecutor assigned to each identified defendant, will then determine whether each identified defendant received the material to which he/she is entitled.
> 3. **This prosecutor will be assisted in his/her review of the SH Log by the *Dekraai* and *Wozniak* prosecutors**, who have already invested significant time in reviewing and analyzing the contents of the SH Log.

(Exh. X2, bolding added.)

The press release claimed the agency would analyze prior courtroom testimony of certain OCSD deputies to determine whether the content of the log "substantially impeaches their testimony such that the OCDA has a duty to notify any criminal defendant of the impeachment material." (Exh. X2.) The *Dekraai* prosecutors were allegedly going to brief other OCDA prosecutors to alert them to the existence of the log and educate them about the general content of the log. And finally, "[i]n the very near future, the OCDA will be determining and inquiring why the SH Log and these other materials mentioned in the SH Log, were not previously provided to the OCDA in response to the OCDA's prior requests and the court's prior discovery orders." (Exh. X2.) In sum, as of June 9, 2016, the OCDA had lost the last vestige of any reasonable claim that it was unaware of the discovery responsibilities that arose out of OCSD officers unlawfully using informants and covering up that effort.

## XVI. Baytieh's Response to Smith Entries from the SH Log Corroborates Pre-Trial Knowledge that Platt and Martin were Informants

### A. Baytieh's Letter to Smith's Counsel Summarizing the Relevant SH Log Entries Inadvertently Confirms His Long-Standing Knowledge of the Informant Operation and His Role in the Cover-Up

Two weeks after the OCDA issued its press release and Wagner filed the Motion to Regulate Discovery in *Dekraai*, Baytieh decided he needed to act. On June 24, 2016, he wrote a letter to Smith's trial and appellate counsel. (Exh. N1.) The plan, in hindsight, was obvious. Baytieh, who at that moment was serving as the head of the *Brady* Notification System and had been responsible for training many on what were supposedly best informant and discovery practices, wanted it to appear that he was fully above board. As a result, he became among the first prosecutors to notify defense counsel about content from the SH Log pertaining to their case.

In his letter he stated that "[a]fter reviewing the Special Handling Log, the OCDA is providing you with information listed below from the Special Handling Log regarding in-custody informant witness Arthur Palacios who testified during the trial in the above referenced case." (Exh. N1.) The letter was carefully crafted such as to ensure maximum protection of the conviction, Baytieh, and his prosecution team. As discussed previously, the log includes a description of a multi-informant OCSD-led operation involving Palacios, Platt, and Martin, intended to illegally obtain statements form Smith. Assuming arguendo that Baytieh was not the leader of the massive concealment and cover-up in this case, the log would have revealed to him for the first time that a) the informant effort in the case was actually operational months before Palacios began working with Beeman on the solicitation charges, b) he had been deceived about who Platt and Martin really were and how they ended up in Smith's dayroom, and c) additional reports related to interviews with the informants were certain to exist, and had been inexplicably concealed from him.

While Baytieh's letter projected that he was previously unaware of the SH Log and the entries related to *Smith*, it did not convey the slightest surprise about what he had read,

or a sense that he had any other responsibilities other than to send his summary. Staying in character had created a new set of problems. If what Baytieh had read truly revealed to him the truth about Platt and Martin, and he was an ethical and sincere prosecutor, his anger would have been boundless. In this scenario he would have been betrayed by those whom he thought were loyal investigators, who misled him, caused him to conceal evidence, and to introduce false evidence—all of which risked coming to light after he had spent the prior year attempting to persuade the criminal justice community and the public that the scandal was overblown and unfairly critical of prosecutors for their role in concealing informant evidence. Again, though, Baytieh seemed entirely unconcerned by what he was describing. Instead, his focus was fully on convincing the readers that nothing described in the log would have affected the original proceedings. He wrote:

> …As you know from reading the January 29, 2010 Grand Jury transcript of the testimony of Arthur Palacios, as well as from all the discovery previously provided to Smith's attorney prior to trial, **the People always took the position that Arthur Palacios was a police informant long before he came into contact with defendant Paul Smith while they were both housed in the Orange County Jail**. **The following information is being provided to you to make sure the OCDA is in total compliance with all discovery obligations**:

(Exh. N1.)

Baytieh's suggestion was that, first, the log evidence simply added more proof to an already settled issue—that Palacios was an informant "long before he came into contact with Paul Smith"—and that, as a result, what he was about to describe from the SH Log was essentially irrelevant. Second, despite the fact that this supposedly would have no impact on the state of the case, Baytieh nobly wanted out of an abundance of caution to make sure his agency was "in total compliance with all discovery obligations."

Setting aside the audacity of Baytieh pronouncing his commitment to *Brady* in this case, his framing of the state of the evidence at the time of the trial was beyond

disingenuous. Indeed, Palacios had been an informant in the past, and even while he was in custody at a time prior to his contact with Smith, though Baytieh intentionally hid important details of this by not disclosing Palacios' OCII file. The prosecution, however, **never actually conceded that Palacios was working as a police informant <u>at the time he came into contact</u> with Defendant, despite what he had suggested in his letter.** Indeed, had Baytieh agreed in 2010 that Palacios was working as an OCSD informant when he first obtained statements from Smith, it would have amounted to a concession that Palacios questioned Smith about the crime in violation of the Sixth Amendment, and Palacios would not have been able to testify at the Grand Jury proceedings or the trials about Smith's statements related to the murder.

Hoping his sleight of hand had worked, Baytieh then proceeded to his summary. It is noteworthy that Baytieh had been perfectly comfortable in 2010 during the Grand Jury proceedings having Palacios describe Platt's role as an aspiring co-conspirator. Additionally, during the closing argument, he had the nerve to assail the defense for failing to bring Martin to testify, when he and his team had been hiding that both Martin and Platt were informants. However, in 2016, he elected not to share the names of the two informants who the SH Log revealed were part of the prosecution team effort to obtain statements in 2009. It was incredibly convenient for Baytieh to decide that, after misleading the defendant and his counsel for years, the protection of the informants' identities was somehow justified.

Baytieh wrote in his first paragraph describing a section of the log the following:

> The Special Handling Log contains a June 24, 2009 entry referencing two inmates other than Arthur Palacios indicating that they want to give information to an OCSD deputy relating to Paul Smith, and asking to have dayroom with defendant Paul Smith in order to get information from defendant Paul Smith about his crime. This entry indicates the Special Handling deputy arranged for these 2 inmates, in addition to Arthur Palacios and defendant Paul Smith to have dayroom together;

(Exh. N1.)

Baytieh should have simply written what he actually read in the log entry by now-Sergeant Padilla:

> **Martin, Platt, Palacios, Smith to get day room from just after morning chow until around 11:00.** This is at the request of Martin and Platt. **They feel if they get this time with Smith, they can get details on his crime. I told them I didn't have a problem with this and would pass it on. I am leaving an e-mail with Guevara.** Schneider said he would let Mitchell know in the morning. Thanks. Martin asked if he could get out for a non-collect call as well. I told him I would do my best to accommodate him.

(Exh. E1, pp. 116-117, bolding added.)

This excerpt from the SH Log represented perhaps the most clear language of any found within the entire version of the log that was later ordered by Judge Goethals to be disclosed, in terms of detailing a government-orchestrated plan to violate a defendant's Sixth Amendment rights.[42] Padilla openly stated that he "didn't have a problem" with helping informants "get details on [Smith's] crime," and so he gladly put three informants in Smith's dayroom after Platt and Martin said they believed they could get statements from the defendant. Yet, Baytieh had the nerve to communicate to counsel there was nothing of real importance to learn in the log. Moreover, assuming arguendo that Baytieh was a hapless victim of OCSD personnel having gone complete rogue, again, his letter gave not the slightest hint that the revelation was disturbing or concerning.

Baytieh also wrote:

> "The Special Handling Log contains a June 25, 2009 entry referencing one of the two above listed inmates in section (3) [neither one of them is Palacios] as spear-heading the effort to get information from defendant Paul Smith;"

(Exh. N1.)

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[42] The mystery of what was done to convince Judge Goethals that all excerpts related to Smith should be excluded remains an issue requiring careful study and consideration.

Baytieh chose the above language, instead of writing the following, which Sergeant Michael Carrillo specifically wrote:

> Sat in on interview between Platt, Jeffrey XXX and DPI/ATF. It looks like **Paul Martin will be spear-heading the case** on Smith, Paul #XXXXX who is also housed in L-20.

(Exh. E1**,** p. 118; Exh. F1, bolding added.)

Per this entry, Paul Martin was going to lead a multi-informant effort that included the testifying informant (Palacios) attempting to illegally obtain statements from the defendant. Nonetheless, Baytieh had decided to assert that nothing had meaningfully changed in terms of whether statements had been obtained unlawfully:

> The Special Handling Log contains a June 29, 2009 entry referencing one of the two above listed inmates in section (3) [neither of them is Palacios] as indicating that he is going to be released from jail and that any operation in place to get information from defendant Paul Smith will be maneuvered to the second inmate listed in section (3) above and Arthur Palacios. Please note that as you know from the discovery provided to you prior to trial, around this time defendant Paul Smith was asking Arthur Palacios as well as other inmates to help him hire a hit man to kill a police officer, and defendant Paul Smith ended up pleading guilty to such criminal solicitations after the conclusion of his trial for the 1988 murder related charges;

(Exh. N1.)

Baytieh purported to summarize the following entry written by Sergeant Carrillo:

> Interview in DPI room now with Platt and Guevara. It appears Platt may be out tomorrow. Platt advises any operations currently in the works have been properly maneuvered for Paul Martin and Art Palacios to take over should he leave.

(Exh. E1, p. 120.)

Of course, Baytieh should have been shaken to his core by what he was reading and summarizing. In 2010, Platt had been presented, through Palacios' interview with Wert and Voght, as an aspiring conspirator who had tried to collect $8,000 from Smith as part of an

authentic effort to attack Wert. (Baytieh even had a letter from Platt regarding the offer, which he never disclosed to the defense.) Baytieh then presented this intentionally deceptive version of Platt to the Grand Jury via Palacios' testimony.

However, in the summary of this entry, Baytieh presented neither a semblance of shock about the contents, nor a hint of feeling betrayed by Palacios, Wert, and Voght for misleading him about who Platt and Martin really were. Instead, Baytieh sought to diminish the importance of this SH Log entry. The decision not to feign outrage was wise on some level, as its expression would have risked reeking of such insincerity as to spur questions from defense counsel about the existence of additional evidence. Still, shock and fury were the required emotions if Baytieh's narrative in this case is to be believed.

The even greater mistake was what he had written after summarizing that there was a plan to maneuver the operation into the hands of Palacios and Martin once Platt left. Baytieh decided to add to this section of his summary a reminder that defense counsel "note that as you know from the discovery provided to you prior to trial, that Paul Smith was asking Arthur Palacios as well as other inmates to help him hire a hit man to kill a police officer, and defendant Paul Smith ended up pleading guilty to such criminal solicitation after the conclusion of his trial for the 1988 murder related charges." (Exh. N1.)

Why is the inclusion of this sentence so revealing of Baytieh's dishonesty? When Baytieh wrote this part of the summary he did not stay in character. Everything Baytieh was supposed to know about Platt's informant role was what he could see on the pages of the SH Log. However, the SH Log spoke about an operation designed to get statements about the crime. Neither the actual entries that he relied upon for section of the letter, nor any entries from the SH Log, made reference to the "hir[ing] of a hit man." Platt's role in developing evidence regarding the hiring of a hit man was still three years away from being revealed. It would not become known until 2019—according to Baytieh—when the DOJ uncovered the report and confronted Baytieh with it. Again, the SH Log did not include any discussion of this. **In other words, Baytieh accidentally slipped into his summary**

**that Platt was part of the attempt to obtain evidence regarding the solicitation to assault Wert—when in his narrative he does not learn this until 2019.**

Baytieh's thoughts were on the misconduct he had covered up, including the recordings and reports describing how Platt continued to work to build the solicitation charges after he was released. His other instinct was to try to somehow minimize the importance of Platt and Martin being revealed as informants through the log. Harkening back to the original discovery, he emphasized that counsel already knew that Smith was talking to "inmates" other than Palacios about a "hit." It was a miserable effort of intellectual dishonesty—implying that the prosecution had met its discovery obligations before trial by having falsely made it appear that Smith was speaking with run-of-the-mill inmates, when the prosecution knew those inmates were actually informants working with members of the OCSD to obtain evidence against the defendant. Nonetheless, Baytieh hoped that, with the added reminder that Defendant had pled guilty, counsel would believe there was nothing in the SH Log that could possibly change the legal equation.

It was a sickening effort, but there was more to come.

### B. Baytieh Lies to the OCDA Press Spokesperson—Proven by His Response to Supposed Awakening to Hidden Informant Operation and Rogue Police Force

While there is no need to apply a comparative grade to the outrageousness of each phase of the cover-up, certainly what Baytieh did next not only adds to the complete implausibility of his innocence, but powerfully illustrates the true prosecutorial credo by which he has lived for more than a decade: win and self-protect at all costs. In 2017, in *People v. Dekraai*, allegations about the cover-up related to the informant operation in *Smith* were detailed for the first time in briefs filed in that case. (Redacted Offer of Proof, *People v. Dekraai*, Orange County Superior Court Case Number 12ZF0128, dated May 12, 2017, attached herein as Exhibit Z2; Supplement #1, *People v. Dekraai*, Orange County

Superior Court Case Number 12ZF0128, dated May 16, 2017, attached herein as Exhibit A3.)

Those motions would lead to a news story, and for the first time Baytieh found himself in a situation where he needed to answer the question of when he initially realized Platt was an informant. The answer he gave was to the OCDA's press spokesperson:

> When HuffPost asked when Baytieh first became aware that other inmates mentioned in the letter were informants, Van Der Linden said Baytieh told her he "became aware of it when our office received/reviewed the log, which was May 10, 2016."

(Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017.)

There was no turning back at that point for a prosecutor whose first commitment has always been to protect his career and the perceptions of others that he had spent years cultivating. His answer to Michelle Van Der Linden locked in a claim that it was his reading of the SH Log the prior year that first revealed to him a) Platt and Martin's role in his own prosecution team's investigation (along with Palacios'), and b) the OCSD's plan near the time of Smith's incarceration in Orange County, in terms of violating Smith's rights.

### C. Baytieh's Completely Explainable Failure to Learn More After Reading the SH Log

Baytieh cemented what his claim would be moving forward after providing his version to the OCDA spokesperson: He was unaware that Platt and Martin were informants before reading the SH Log.

In the days and years that followed, however, **Baytieh never reached out to his investigators or the deputies referenced in the SH Log a) to find out why all of what was described within the log was hidden from him, b) to locate the records and reports that he would have believed were created based upon the interviews**

**referenced in the log, or c) to determine whether there was still more undisclosed evidence in the case.** This is confirmed because Baytieh never produced a single item of evidence—including the recorded interview and the related police reports about his informant work—between the time that he sent the letter to counsel in 2016 and when he sat down with the DOJ staff in 2019. If he had received answers to questions about interviews with Platt and Martin that included claims that none of this occurred, he would also have been required under *Brady* to disclose that deception in 2019, once the DOJ confronted him with the interview of Platt.

DOJ staff questioned Baytieh about whether he had ever reached out to deputies referenced in the SH Log. Baytieh was going to need a lot of language to obfuscate:

> Q: …Did you reach out or anyone from your office reach out to the deputies involved in the entries referenced in your letter to Smith's counsel to gain an understanding of what they meant?
> A: So I just want to make sure I'm clear when you say "deputies," you mean deputy sheriffs?
> Q: Yes.
> A: So I did not reach out to anybody, me personally. I did not reach out to anybody specific about the deputies. I felt that I have an obligation to discover this to the defense attorney. I know our office had different processes that they were going through, and I wasn't involved in that process. I know that there was a process, and there was potentially – potentially interviewing certain deputies. I supervised the unit that handles *Brady* disclosure in our office. So that's why I'm familiar with the fact that on certain deputies we tried to interview -- "we" being the DA's office. We tried to interview them, and certain deputies refused to give us a statement. I know that in a general context because I supervised the unit that did the *Brady* analysis and -- about these deputies. **So I didn't. I didn't reach out to anybody**.

(Exh. E1, pp. 126-27; bolding added.)

The question was clear and called merely for a "No." However, Baytieh wished to shroud his effort to stop anything more being uncovered about the log entries other than the absolute minimum by surrounding his answer with a discussion of his role in the *Brady* Notification System. That role had nothing to do with his responsibility as the trial

prosecutor to find out what was owed to Paul Smith in terms of concealed evidence related to what was described in the SH Log. The *Brady* Notification System plays no part in ensuring that convicted defendants received concealed evidence from cases in which they had been convicted—and Baytieh knew that.

There is only one rational explanation for Baytieh's failure to contact his investigators or the named deputies about the contents of the SH Log, or to direct that they be contacted by a District Attorney investigator: a conspirator in an evidence concealment scam would not call his co-conspirators and ask why the evidence was concealed and where it can be found. How will Baytieh explain his failure to act? Perhaps he will insist it slipped his mind for years. Perhaps he will swear the phone lines and email connections to members of his investigative team went on the glitch for years, preventing him the search for answers he so desperately wanted to undertake. All of these explanations may seem improbable, but for Baytieh nothing is off the table, except the truth.

## XVII. Baytieh Realizes Discovery of the SH Log Requires a New Phase in the Massive and Expanding Cover-up

### A. Baytieh Prevents OCSD Personnel Implicated in *Smith* from Being Added to the *Brady* Notification System

Unfortunately for Smith and the criminal justice system, by 2016 Baytieh had already spent years withholding evidence from Defendant to ensure the wrongdoing in *Smith* was never uncovered. Those affected cases are identified and summarized beginning at page 223.

However, the uncovering of the SH Log created an even greater threat to his impunity. While Baytieh clearly hoped that his letter to Smith's counsel would be adequate to convince the defense that there was no need to either pursue acquiring the relevant entries from the actual SH Log or pursue post-conviction relief, potentially even greater risk would be its disclosure to other defendants who were entitled to the evidence. In

response, Baytieh ramped up his evidence concealment actions to another stunning level. Just months after the agency announced in a press release its "concrete action plan" to ensure defendants received discovery from the log, the then-supervisor of the OCDA's *Brady* Notification System took a leadership post in a second conspiracy—this time consisting exclusively of prosecutors who shared the most malevolent of objectives.

His position was ideal for his plan. As head of the *Brady* Notification System, Baytieh was perfectly situated to block the additions of prosecution team members, who were required to be added to the system because of their role in violating the constitutional rights of Smith and in participating in acts of concealment that unquestionably amounted to "moral turpitude:"

1) Sergeant Michael Padilla: Then a Special Handling deputy, Padilla acknowledged in writing that he was facilitating a Sixth Amendment violation, noting that "**Mike please follow up on this**. Platt and Martin have info on Smith they want to give to Guevara. Guevara is coming in the morning at approximately 18:00 hours to talk to Platt." Padilla had already put the plan in place. Padilla wrote that "**[Platt and Martin] feel if they get this time with Smith, they can get details on his crime**." Padilla continued, **"I told them I didn't have a problem with this and would pass it on."** Padilla had arranged for "Martin, Platt, Palacios, Smith to get day room from just after morning chow until around 11:00."

   (Exh. E1, pp. 115-116; Exh. F1.)

2) Sergeant Michael Carrillo: Then a Special Handling deputy, Carrillo was implicated through Padilla's note as having aided and abetted in the Sixth Amendment violation, or, at a minimum, realizing that one was underway, and failing to take action to stop it. Padilla wrote specifically to Carrillo, "Mike please follow upon on this." The following day, Carrillo confirmed he was all in, writing: "Sat in on interview between Platt, Jeffrey XXX and DPI/ATF. It looks

like Paul Martin will be spear-heading the case on Smith, Paul #XXXXX who is also housed in L-20."
(Exh. E1, pp. 116-118; Exh. F1.)

3) Sergeant Anton Pereyra: Pereyra wrote the following on June 29, 2009: "Interview in DPI room now with Platt and Guevara. It appears Platt may be out tomorrow. Platt advises any operations currently in the works have been properly maneuvered for Paul Martin and Art Palacios to take over should he leave."
(Exh. E1, p. 120; Exh. F1.)

4) Former Lieutenant Roger Guevara: Then an investigator, Guevara was fully implicated by the above SH Log notes in terms of having worked with informants Platt, Martin, and Palacios to obtain evidence about Smith's charged crimes.

In fact, Guevara should have already been added to the *Brady* Notification System prior to the uncovering of the SH Log. During the *Dekraai* litigation, the defense obtained a letter written by Guevara within days of initiating the informant operation in this case. In that letter, Guevara asked for permission to place a recording device in cells to capture conversations between informant Oscar Moriel and a defendant facing murder charges at the time, Leonel Vega. Guevara wrote that a Santa Ana Police Department detective was requesting help in "getting Moriel, an CI for SAPD, and Vega together, and record any conversation they may have." (Letter from Sergeant Roger Guevara to OCSD Assistant Sheriff Mike James, dated June 25, 2016, attached herein as Exhibit B3.) He continued:

IRC Special Handling Deputies have come up with a plan to house both Vega and Moriel in adjoining cells in IRC Dis Iso.

Vega is in custody for CPC 187 Murder and Det. Flynn believes they may gain valuable evidence reference the murder from recorded conversations between the two.

(Exh. B3.)

Of course, long before he read the SH Log, Baytieh realized that Wert, Voght, and Beeman needed to be added to the *Brady* Notification System. However, if somehow Baytieh woke up to the misconduct in his own case for the first time in 2016 when he read the SH Log, he would have quickly learned that his three primary investigators—Wert, Voght and Beeman—were aware of and concealed all of the misconduct described in the log. Thus, all of them needed to be added to the *Brady* Notification System. At the same time, there was not a chance Baytieh would pursue a path leading to their addition to the system, as the then-required disclosures of their misconduct that would inevitably circle back to him.

### B. Baytieh Helps Drive Conspiracy to Hide the SH Log—Leading Effort Related to the *Brady* Notification System

As previously discussed, in 2019, Baytieh told the DOJ he never actually studied the evidence supporting the *Dekraai* allegations. Two years later, in 2021, while running for judge, he made this claim publicly for the first time, while adding a twist. (Saavedra, *Orange County DA Official Mired in Controversy As Head Of Special Prosecutions Now Wants To Be A Judge*, OC Register, April 8, 2021.) Baytieh said that the November 2016 ruling in *Dekraai* affirming the recusal of the OCDA "…put more light on the problem, and I accepted it and I agree with it 100 percent." Baytieh said, "I truly believe that the Court of Appeal's analysis and findings set the foundation for some very positive changes in the

criminal justice system. Changes that I am very proud to have championed by way of the training I have been providing for the past six years." He added that, "This is not a game for me, this is about the truth. I had an assignment. I did my absolute best at it, with a single focus, to do the right thing. I never said anything that I didn't believe was the truth, based on what I knew at the time." (Saavedra, *Orange County DA Official Mired In Controversy As Head Of Special Prosecutions Now Wants To Be A Judge*, OC Register, April 8, 2021.)

Of course, the Court of Appeal did "set the foundation" for critically important changes in the criminal justice system. However, the Court of Appeal had no idea that Baytieh was in possession of a silent jackhammer that he quickly and continually put to use to destroy that foundation. The ruling had neither opened Baytieh's eyes nor impacted his behavior in the slightest. Rather, his statement was just another in a series of calculated comments—this one designed to project himself as able to admit his errors, while showing respect for members of a judiciary who might someday review his rulings as a member of the Orange County bench. The Court of Appeal Opinion was not an enlightening experience for Baytieh, even if it should have been. Indeed, it was embarrassing that Baytieh would imply that on the day he read the appellate opinion, he began a conversation with himself that resembled the following: "I made terrible and repeated errors. I incorrectly accused those who believed the allegations were meritorious as being 'intellectually dishonest.' I should have never claimed the defense lacked a 'shred of evidence' supporting their allegations, having never studied even a shred of that evidence myself—and having led a massive cover-up in *Smith*. They were right and I was wrong." None of these thoughts went through Baytieh's mind, nor anything like them. He had not been moved to insight by Judge Goethals' two opinions that came before the Court of Appeal opinion. He had not forgotten that, for more than a decade, he concealed evidence from *Smith.* It was just more dishonesty, as Baytieh sought to achieve his goals regardless of the cost.

If what Baytieh spoke was remotely related to the truth, it would have been reflected in opportunities available to him after the Court of Appeal opinion. Indeed, in December 2016, it might have seemed that Baytieh had experienced an awakening. That month, the agency's new *Brady* Policy for Law Enforcement went into effect. The initials at the bottom indicate it was written by Baytieh, and that was logical considering that it purported to guide how *Brady* Notification System decisions would be made moving forward. (OCDA's *Brady* Policy for Law Enforcement, attached herein as Exhibit C3.) It described Baytieh's Special Prosecutions Unit as being tasked with investigating misconduct once it came to the attention of the Unit and then submitting the officers and their alleged misconduct to the "four Senior Assistant District Attorneys [who] will decide, under the supervision of the District Attorney as needed, if the information triggers a *Brady* obligation by the OCDA." (Exh. C3.) Baytieh headed the Unit between the time the SH Log came to light in 2016 and 2018. In 2018, he became a Senior Assistant District Attorney with oversight over the Special Prosecutions Unit and the *Brady* Notification System.[43] **Based upon the policy he authored, it appears that he was the only current employee of the OCDA who would have participated in each decision regarding whether a member of law enforcement would be added to the *Brady* Notification System between 2014 and 2022, when he was terminated.**

Again, if Baytieh was who he said he became after setting his eyes upon the Court of Appeal opinion in 2016, that year should have marked the beginning of the OCDA's rebirth in terms of meeting its *Brady* disclosure obligations related to law enforcement. Sadly, it would instead mark the beginning of a due process disaster that was only fully understood by a small group of prosecutors that included Baytieh. In theory, the new policy should have ensured that those members of law enforcement who engaged in misconduct proven in

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[43] Baytieh was promoted to Senior Assistant District Attorney by Rackauckas in April 2018. (Assistant District Attorney Ebrahim Baytieh Promoted to Senior Assistant District Attorney; https://orangecountyda.org/press/assistant-district-attorney-ebrahim-baytieh-promoted-to-senior-assistant-district-attorney/)

whole or part by the SH Log would have evidence of their misconduct available to defendants when the officers became witnesses in other cases. The problem was that this appropriate objective clashed with the goals of Baytieh and the prosecutors responsible for *Brady* disclosures to those defendants whose cases were directly discussed in the log.

The terrible irony was that Baytieh knew perhaps better than anyone in his entire office that the SH Log was an important new source of *Brady* material, placing obvious responsibilities on the Unit he managed. His response should have been to direct his staff to conduct an immediate and energized search for *Brady*-qualifying misconduct that would be the basis of adding named officers to the *Brady* Notification System. Again, this was not just what was obviously required legally, but what was required because of what the agency promised on June 9, 2016. (Exh. X2.) At the top of the press release from that day, it states that "OCDA sets out concrete action plans to remedy OCSD's previous nonproduction of documents." (Exh. X2.)

Once again, SH Log entries needed to be disclosed in cases where the integrity of conviction was implicated, as well as other cases where defendant had the right to cross-examine officers based upon misconduct described in the log. The clearest example of the latter was discussed earlier, and pertains to Lieutenant Guevara, Sergeant Pereyra, Sergeant Padilla, and Sergeant Carrillo. Their facilitation of a Sixth Amendment violation in *Smith* should have led to their addition to the *Brady* Notification System, and the disclosure of relevant SH Log entries to all other defendants where these officers subsequently became witnesses.

For Baytieh, logic strongly indicates that the determinative factor in deciding to block all additions to the *Brady* Notification System based upon conduct found in the log, was his fear surrounding what would then need to be disclosed in terms of *Smith*-related log entries. As discussed earlier, Baytieh's aspiration in sending his misleading 2016 letter directed to Smith's defense counsel regarding the SH Log entries was to convince the attorneys who read it that what was identified in the log should not prompt a habeas corpus challenge based upon the improper admission of Palacios' trial testimony. Baytieh did not

attach the log entries to the letter, and certainly his hope was that copies of relevant entries from the log would not be requested. (He would later claim that an agreement with the OCSD prevented him from turning over the logs. If the prosecutor's office actually reached what would be a highly concerning agreement with the OCSD not to provide excerpts of the long-concealed law enforcement log to defendants, that agreement could not override their *Brady* obligations.)

For Baytieh, however, preventing the *Smith* defense team from seeing the actual entries would not have allayed his concerns regarding the risks associated with dissemination of the *Smith* SH Log entries. Those worries extended to other counsel; that is, the fear that attorneys who received the *Smith* SH Log entries through the *Brady* Notification System might dig more deeply into what occurred in *Smith* and eventually develop a more profound understanding of the misconduct, including that committed by Baytieh.

Baytieh unquestionably knew what he needed to do if he wanted to honor his legal obligations and his leadership position—particularly in light of the awakening he claimed to have experienced after the Court of Appeal ruling. He also knew what he needed to do if he wanted to protect himself (and to a lesser extent his co-conspirators who risked turning on him if they came to believe Baytieh would place them in peril.) **Logically, it was all or nothing when it came to making disclosures from the SH Log**. If only the *Smith* entries were excluded from consideration when prosecutors analyzed the log to determine which law enforcement personnel should be added to the *Brady* Notification System, it could raise suspicions among well-intentioned colleagues who might notice that the *Smith* entries were not even being reviewed—and ultimately no *Smith* prosecution team members were being added. Additionally, if the SH Log entries were reviewed and *Brady* Notification System disclosures were made when officers were added, the exclusion of *Smith* law enforcement personnel from the System could also raise red flags among prosecutors. The simplest and most horrific choice for the legal justice system, if Baytieh wished to protect those responsible for the misconduct in *Smith*—including himself—was to make sure that the

Special Prosecutions Unit, the executive managers, or Rackauckas never relied upon a single page of the SH Log in determining whether a member of law enforcement should be added to the *Brady* Notification System. That is exactly what Baytieh accomplished.

### C. Baytieh Is Unmoved to Activate *Brady* Notification System as the OCSD Faces Questions and Criticism for its Concealment of the SH Log

In 2017, the third evidentiary hearing in *Dekraai* focused on the OCSD's cover-up of the SH Log. Members of the OCDA, including Baytieh, were no doubt anxious to learn whether Judge Goethals would grant the remedy requested by the defense—an order excluding the death penalty as punishment—in a case that was referred to the CAG because the "abdication of the OCDA's fiduciary duty violated Dekraai's due process rights." (*Dekraai*, 5 Cal. App. 5th 1110, 1152.) Baytieh would have been highly interested in the litigation, even if one were to assume for argument's sake that he had no role in the *Smith* concealment, nor in the systemic concealment of the SH Log from defendants. After all, Baytieh had been the public face of the OCDA's effort to delegitimize allegations that had been legitimized by Judge Goethals and the Court of Appeal. With a hearing set to determine whether the motion to dismiss the death penalty would be granted, Baytieh and his fellow members of the OCDA were facing the worst and most embarrassing scenario: A new and long-lasting stain upon the OCDA following the one already left by the office's recusal on the very same case.

Moreover, Baytieh did not need to attend the proceedings nor speak to colleagues to receive reminders of the importance of the SH Log concealment to the final round of hearings. The litigation received significant media coverage over a period of months, with a consistent area of focus being the testimony about why the SH Log was not disclosed earlier.[44] Included in that media coverage were stories about the testimony of Sergeant

[44] Saavedra, *Court approves release of OC jail deputies' notes*, OC Register, Nov. 18, 2016; Dalton, *Appellate Court Upholds Ruling That Barred DA's Office from Dekraai*

Raymond Wert—the former lead investigator and named victim in *Smith*—who not-so-coincidentally gave the directive with a fellow Special Handling sergeant to terminate use of the SH Log of notes in 2013, just two days before Judge Goethals ordered comprehensive discovery in *Dekraai*. (Saavedra, *Dekraai Victim's Husband Wants Orange County Sheriff Officials Held 'Accountable' in Jailhouse Snitch Scandal*, OC Register, June 5, 2017; Moxley, *Orange County Sheriff Sandra Hutchens Crumbles in Snitch Scandal Testimony*, OC Weekly, July 12, 2017.)

Baytieh certainly did not miss the following headline, which highlighted Wert's testimony that he, himself, never even looked at the SH Log prior to directing officers to stop using it:

**Sheriff's Sergeant Says He Ended Jailhouse Notes on Informants Without Reading Them**

(Vo, *Sheriff's Sergeant Says He Ended Jailhouse Notes on Informants Without Reading Them*, Voice of OC, June 6, 2021.)

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*Case*, Voice of OC, Nov. 23, 2016; Moxley, *California Justices Hand DA Rackauckas His Latest Embarrassment*, OC Weekly, Nov. 23, 2016; Moxley, *Newly Released Court Evidence Reveals Unconstitutional Orange County Jail Scams*, OC Weekly, Dec. 5, 2016; Smith, *New Evidence Deputies Committed Perjury in orange County Snitch Scandal,* The Intercept, Dec. 8, 2016; Moxley, *Snitch Scandal Judge Ponders $10,000 Contempt Fine for Orange County Sheriff*, OC Weekly, Jan. 20, 2017; Saavedra*, Lawyer says OC Sheriff spokesman helped run snitch program*, OC Register, Apr. 1, 2017; Moxley, *Sheriff Sandra Hutchens and Cronies Breathe Sigh of Relief While Deputies Take the Fifth*, OC Weekly, May 26, 2017; Vo, *Sheriff's Deputies Take the Fifth During Jailhouse Snitch Hearing,* Voice of OC, May 26, 2017; Saavedra, *3 sheriff's deputies take the 5th when asked about jailhouse informants*, OC Register, May 31, 2017; Moxley, *All You Need to Know About OC Sheriff Sandra Hutchens*, OC Weekly, Jun. 2, 2017; Moxley, *Sheriff Sandra Hutches, Attorney General Pin Scandal on Lower Ranks*, OC Weekly, Jan 13, 2017; Saavedra, *Grand jury: No systemic cheating from Orange County Sheriff in using jailhouse informants*, OC Register, Jun. 13, 2017; Moxley, *Snitch Myth? Only to Orange County's Reality- Denying Grand Jury*, OC Weekly, Jun. 21, 2017; Vo, *No Death Penalty for Seal Beach Mass Murderer Scott Dekraai, Judge Rules*, Voice of OC, Aug. 18, 2017; Moxley, *Attorney General Protected Lying Sheriff in Death Penalty,* OC Weekly, Aug. 23, 2017.

Considering both the focus on the SH Log, and the OCDA's promise regarding discovery obligations, if Baytieh and those responsible for disclosure were well-intentioned, their response would have been to redouble their efforts to get the mandated discovery to defendants. Instead, Baytieh and his co-conspirators continued to aggravate their misconduct. Even when Judge Goethals issued his ruling the following month, prohibiting the imposition of the death penalty, the same Baytieh was unwilling to change course. He refused to direct his staff to begin reviewing the SH Log to ensure disclosure responsibilities through the *Brady* Notification System would finally be honored.

### D. Baytieh and Fellow Prosecution Conspirators Ignore Repeated Reminders from *U.S. v. Govey* to Honor *Brady* Obligations Related to the SH Log

Quite clearly, Baytieh's plan related to the SH Log was not to prevent its consideration in *Brady* Notification System decisions for two or three years—but to hide this evidence forever. Therefore, it is hardly surprising that even after the 2017 *Dekraai* ruling prohibiting the death penalty as a punishment, a drumbeat of new reminders about informant-related discovery obligations and the consequences for failing to honor them had no impact. On February 5, 2018, just months after the final ruling by Judge Goethals in *Dekraai*, a news story flagged serious issues regarding failed and late disclosures of informant evidence that could be used to impeach former Special Handling deputies who were scheduled to testify in Joseph Govey's federal drug distribution case:

> Federal prosecutors have said they are still going through more than 25,000 records they have received from the Department of Justice, which is conducting a review of the local use of jailhouse informants. [Counsel] has asked the judge to dismiss the charges against Govey, alleging the government has failed to turn over material connected to the case.

(Emery, *Defendant in Federal Drug Case, Now Tied to O.C. Jailhouse-Snitch Scandal, Contends Deputies Targeted Him for Revenge*, OC Register, Feb. 5, 2018.)

As discussed throughout this brief, Govey was no stranger to Orange County informant scandal issues. The testifying informant witness in *Smith*, Arthur Palacios, was also one of several witnesses who testified in Govey's Grand Jury proceedings. (Exh. Z1; Partial Grand Jury Transcript, *People v. Govey*, Orange County Superior Court Case Number 12ZF0134, dated April 5, 6, 2012, attached herein as Exhibit D3.) **Of course, neither Govey's Grand Jury nor Govey had any idea that Palacios had both violated the constitutional rights of Smith, and worked together with the prosecution team in *Smith* to mislead the Grand Jury and trial jury about the true role of informant Platt. Nor did the *Govey* Grand Jury know that one of the key witnesses presented, Investigator Bill Beeman, had engaged in enormous misconduct in *Smith***.

Additionally, as previously discussed, the version of Palacios' OCII provided to Smith in 2022 and to Govey in 2014 were not the same. Significant issues with the use of informant witnesses and the non-disclosure of informant evidence existed in Govey's 2014 felony case, which are discussed at length in the DOJ Report. (DOJ Investigation Report, dated October 13, 2022, attached herein as Exhibit D1, pp. 22, 31-34.) The report summarizes the final outcome in *Govey* and what preceded the prosecution's dismissal decision: "… October 2014, a prosecutor dropped all charges against Joseph Govey in a felony solicitation of murder case after the court ordered the prosecutor to produce records about informants in the case." (Exh. D1, p. 22, fn. 22.) The Honorable Thomas Goethals was also the presiding judge in that matter.

On February 23, 2018, Judge Cormac Carney heard oral argument regarding discovery issues in Govey's federal case. During that argument, it was publicly revealed that as of that date, the defense had received 75,000 documents from the federal government. The United States Attorney provided Judge Carney with 20,000 additional documents for potential release to the defense,[45] prior to the Court's ruling on whether it

[45] It appears that what was being discussed in terms of the quantity of discovery, was nearly 100,000 documents, rather than 100,000 pages.

would dismiss the case based upon allegations of repeated non-disclosure. Judge Carney would have likely been stunned to learn that even after all that transpired in Orange County, the performance of federal prosecutors' in *Govey*—although inadequate and flawed—would have appeared as extraordinary if compared to the discovery practices of the Baytieh-supervised *Brady* Notification System. That is, whereas federal prosecutors in *Govey* had turned over tens of thousands of pages of informant-related discovery relevant to the impeachment of OCSD officers implicated in the informant scandal, Baytieh and his colleagues were actively working to block with all of their deceptive might the most important source of evidence to emerge from the scandal. **Significantly, in the present moment, only a small group of presumably former OCDA prosecutors, federal prosecutors and their staff in Govey's case, Govey's defense counsel, and Judge Carney know whether the OCDA—fearful of Judge Carney's deserved wrath—turned over to federal prosecutors the SH Log entries related to the key OCSD witnesses in *Govey* (even as they continued to hide them systematically from local defendants.)**

After listening to the arguments, Judge Carney detailed from the bench his reasons for dismissing the case. Judge Carney's ruling emphasized the importance of prosecutors timely disclosing to defendants all impeachment evidence related OCSD personnel implicated in the misuse of informants, who subsequently leave their jail assignment to become officers in the field:

> Any case that they're involved in as a result of that decision [to place them "on the streets"], every case they're involved in, this issue of their credibility is now on the table. And **every case that the federal government decides to do through the joint task force, you want to prosecute a defendant -- you want to prosecute a defendant where these officers are percipient witnesses, you're going to have to do a *Brady* disclosure**.

(Reporter's Transcript, *U.S. v. Joseph Govey*, February 23, 2018 (8:17-cr-00103-CJC-1), attached herein as Exhibit E3, p. 30, bolding added.)

There is no scenario in which Baytieh can claim he overlooked the ruling or failed to appreciate its significance. Separate of the monumental fact that a federal judge had dismissed a case based upon prosecutorial failures to disclose informant-related evidence generated by the OCSD, the ruling was the subject of considerable media coverage.[46] (Emery, *Judge Dismisses Federal Drug Case Tied to O.C. Jailhouse-Snitch Scandal*, OC Register, Feb. 24, 2018; Moxley, *Massive Orange County Snitch Scandal Document Dump Wrecks Federal Case,* OC Weekly, Feb. 28, 2018.)

On March 1, 2018, a story on Judge Carney's decision took up nearly the entire front page of the Daily Journal and a significant portion of a second page—offering the many readers from the OCDA paragraphs upon paragraphs of reminders about their legal and ethical obligations, and the need to right the ship immediately. (Cuniff, *First US Judge Weighs in on OC Jail Informant Scandal,* Daily Journal, Mar. 1, 2018, attached herein as Exhibit F3.)

Later that same day, Judge Carney's written opinion was published. It might have almost seemed from the language of his opinion that somehow Judge Carney had a sixth sense that Baytieh and his colleagues required another reminder of their solemn obligations. The pointed language should have re-awakened all who needed it to correct their course. (*U.S. v. Govey* (2016) 284 F.Supp.3d 1054.)

The introduction to the opinion, after the court ruling, began with the following:

> Sadly, the Government in this case failed to disclose the material evidence to Defendant in a timely manner. Inexplicably, the Government waited just days before trial to disclose almost 100,000 material documents that Defendant needed to expose the trial witnesses' motive and bias against him and to attack their character for truthfulness.

*(Id.* at p. 1056.)

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[46] Defendant does not cite media stories as evidence of alleged conduct, but rather to establish the high likelihood that members of the OCDA were regularly reminded of their concealment of evidence.

The above paragraph alone should have been all that was needed to convince the head of the *Brady* Notification System and the lead conspirator in *Smith*, to begin honoring his discovery obligations. However, as Baytieh read on, the reminders of his own misconduct kept flying off the page:

> Unfortunately, the Government demonstrated a deliberate indifference and reckless disregard for its constitutional discovery obligations in this case. One of the principal, sworn duties of a prosecutor is to disclose to a defendant all material, favorable evidence, including impeachment evidence, in the Government's possession. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The evidence must be disclosed even if there has been no request by the defendant. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

(*Id*. at p. 1061.)

Regrettably, the repeated admonitions from Judge Carney, delivered alongside a dismissal, had no effect on Baytieh.

As Baytieh read the opinion, however, he knew that he had not just been violating his discovery obligations to an ever-growing group of defendants in local Orange County cases. **From the moment he realized that one of the two key OCSD witnesses against Govey was OCSD Investigator Beeman, Baytieh knew that he was in possession of discovery related to Beeman that needed to be disclosed**. Per Judge Carney's opinion, Govey asserted that "the same OCSD deputies who were involved in the investigation of his 2012 attempted murder case were involved in the June 2017 search that gave rise to the instant charges—Deputy Bryan Larson and Deputy Bill Beeman." (*Id*. at p. 1058.) The opinion continues:

> Defendant claims that these deputies feel aggrieved by the 2012 dismissal and since then have been trying to obtain a conviction against him. So, according to Defendant when the deputies found him with narcotics during the search, they had a motive and bias to overstate the charges and maliciously prosecute him for distributing methamphetamine.

(*Ibid*.)

Baytieh fully appreciated that he was in possession of information and evidence that could change the outcome in Govey's case. Beeman was one of the principal co-conspirators in *Smith,* and his role in that case, which included concealing informant evidence and writing false and misleading reports, was precisely the type of evidence that would not only impeach Beeman, but show that he was more than capable of engaging in precisely the type of conduct that Govey alleged. **In fact, Govey had the right to call Baytieh as a witness regarding Beeman's misconduct. Of course, Baytieh was no more likely to disclose evidence of the misconduct committed by Beeman in this case as he was in the dozens of other cases in which his *Smith* co-conspirators had become witnesses.**

When this Court weighs the likelihood that Baytieh would provide previously concealed favorable evidence in this case, it will be appropriate to consider his reaction and responses to questions about the *Govey* litigation, Judge Carney's ruling, and the repeated and ever-available reminders of that ruling.

Judge Carney's ruling should have marked a turning point, just as Judge Goethals' rulings should have, and just as the California Court of Appeal's ruling should have. However, for individuals like Baytieh, rulings like these are, at best mere future talking points molded to whatever advantage is needed at a particular moment in time. Baytieh's desire for impunity always will rule Baytieh, and Judge Carney's historic ruling almost certainly had the opposite effect of what it would have on fundamentally ethical counsel: He became even further re-entrenched in his commitment to conceal. Unfortunately, Judge Carney will soon join the rest of this county's criminal justice community in discovering the most extreme manifestation of "deliberate indifference and reckless disregard" for the rights of defendants.

In a sad turn of events, Govey never found out that an OCDA prosecutor-turned-judge's disregard for his constitutional rights far exceeded that of the federal prosecutors held responsible for the dismissal of his federal case. Ten months later, after the ruling, Govey was murdered. (Minsky, *Santa Maria Man Identified as Homicide Victim found in Nipomo Golf Course Lake*, Santa Maria Times, Sep. 25, 2020.)

### E. A Defendant (Correctly) Alleges for the First Time in Orange County that Prosecution Is Hiding SH Log Entries

As has been discussed, between approximately December 2017 and at least the summer of 2019, the SH Log was being systematically withheld in cases, as acknowledged in the OCDA's 2020 report on the informant scandal and the 2022 report by the DOJ. This consensus on the systematic non-disclosure of the SH Log is particularly significant because it a) deprives Baytieh and his colleagues of any claim that they actually corrected disclosure practices after the rulings in *Dekraai* and Govey's federal case; b) corroborates that wide-scale non-disclosures could not have been the product of negligence; and c) makes the non-disclosure that continued despite repeated reminders of the concealment that much more egregious.

Forceful, persistent reminders to Baytieh and his colleagues about the wrongfulness of their continuing concealment of the SH Log repeatedly arrived. Just three weeks after the ruling in *Govey,* the defendant in an Orange County case, *People v. Jordan Prinzi*,[47] filed a series of motions seeking to a) obtain informant-related evidence to impeach former Special Handling Deputy Cyril Foster; b) question Foster about evidence of his prior misconduct; and c) ultimately to dismiss the case for the failure to turn over the requested evidence. Foster, like Larson from the federal *Govey* case, had moved to the "streets," and was the investigating officer in *Prinzi*. In a section of Prinzi's motion seeking to cross-examine Foster, Baytieh, and the OCDA were confronted once again with Judge Carney's ruling and its significance to the agency's analysis of its discovery responsibilities:

> In a ruling handed down just two weeks ago, United States District Judge Cormac Carney dismissed federal charges of possession of methamphetamine for distribution in which a key witness was also a former Special Handling deputy. (*United States v. Joseph Govey*, case no. SACR 17-00103-CJ.) In his opinion, Judge Carney reiterated that the OCSD and prosecutors create constitutional-based discovery obligations whenever they elect to rely on the

[47] Assistant Public Defender Scott Sanders represented Prinzi.

credibility of former deputies from the Special Handling Unit:

> "Any case that they're involved in as a result of that decision [to place them "on the streets"], every case they're involved in, this issue of their credibility is now on the table. And every case that the federal government decides to do through the joint task force, you want to prosecute a defendant -- you want to prosecute a defendant where these officers are percipient witnesses, you're going to have to do a *Brady* disclosure. (Reporter's Transcript of Ruling, *United States v. Joseph Govey*, February 28, 2018.)"
>
> It hardly seems feasible that high ranking members of the OCDA are oblivious to that litigation.

(Motion and Offer of Proof Supporting Cross-Examination of Orange County Sheriff's Department Deputy Cyril Foster Regarding Violations of Constitutional and Statutory Laws and Efforts to Conceal Misconduct (without exhibits), *People v. Jordan Prinzi*, Orange County Superior Court Case Number 17WF2634, dated March 7, 2018, attached herein as Exhibit G3.)

Unquestionably, "high ranking members of the OCDA," including Baytieh, were "not oblivious" to the *Govey* litigation or the expanding *Prinzi* litigation. Veteran Writs and Appeal prosecutor, former Senior Deputy District Attorney Brian Fitzpatrick, arrived on scene at the possession for sale of narcotics case both to argue in writing and orally against each of the defendant's request. Joining him at counsel table was a member of the Special Prosecutions Unit that oversees the *Brady* Notification System, then Senior District Attorney (and currently Assistant District Attorney) Bugman. Thus, it would be unreasonable to believe that Baytieh was unaware for one moment what was alleged in *Prinzi*, and how his office was responding.

In a Motion to Dismiss, Prinzi zeroed in on what was becoming logically clear, which was that the OCDA was improperly and systematically blocking the SH Log from defendants:

> As would become apparent with a minimum of questions directed at the prosecution, **the OCDA has been rejecting its self-executing responsibility to turn over favorable evidence that would undermine the credibility of those former Special Handling deputies (including but not limited to Foster), who have since become officers on the streets, investigators, and**

> **testifying witnesses.** Thus, the OCDA faces a new crisis: If the agency turns over *Brady* evidence bearing on Foster's credibility in this case, more questions will appropriately follow about why this type of evidence has been withheld in other cases in which Foster, and other former Special Handling deputies, investigated or testified. Thus, faced with a crystal clear appellate opinion, along with admissions by the highest ranking leadership of the OCSD about constitutional violations over the course of years, it is now the OCDA—not the OCSD—that has become the most forceful denier of reality.
>
> Once again, the OCDA is propelling the justice system backwards as the agency's commitment to its own self-interest leads to a trampling of the rights of this defendant, and certainly many others. **The veil of supposed ignorance that the OCDA claimed had shielded it from the knowledge about the Special Handling Log ("SH Log"), and what its pages described, was lifted twenty-one months ago.[48] Unfortunately, the OCDA has placed its sincere-sounding public pronouncements in the recycle bin and skipped quickly past its promise that all who were entitled to discovery from that vital source would receive the evidence.**

(Motion to Dismiss (without exhibits), *People v. Jordan Prinzi*, Orange County Superior Court Case Number 17WF2634, filed March 19, 2018, attached herein as Exhibit H3, bolding added.)

Baytieh and members of his cabal knew Prinzi had nailed it. The OCSD was systematically hiding the SH Log. If Baytieh had misled Fitzpatrick and Bugman about what was transpiring, he was placing them in a position to mislead court and counsel. Fitzpatrick's

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[48] On June 9, 2016, the OCDA issued a press release. (Exh. X2.) In the release, OCDA a) described its shock and horror to learn the truth about what the Special Handling Unit was doing with "informers;" b) expressed anger that OCSD did not disclose the log, noting that "the OCDA made repeated requests to the OCSD telephonically, in writing, and at meetings" that should have led to the disclosure; c) declared the "OCDA will continue to analyze the entirety of the SH Log material to determine what other cases, if any, were affected, what *Brady* issues and *Massiah v. United States* (1964) 377 U.S. 201 violations, if any, need to be reported to defendants, the court, and the CAG [California Attorney General];" and d) insisted "OCDA will be determining and inquiring why the SH Log and these other materials mentioned in the SH Log were not previously provided to the OCDA in response to OCDA's prior requests and the court's prior discovery orders." As we learn that resulting *Brady* obligations have been ignored, it is probably safe to assume the probe for answers about the withholding of the SH Log ended simultaneously with the press secretary pushing "send" on the e-mail distributing the press release.

response was forceful. He began his written motion opposing the cross-examination with the following statement:

> **Defendant seeks a fishing expedition**. He wants to broadly expand his cross-examination of Deputy Foster beyond the scope of the direct examination and, by his own admission, go "into a different subject matter altogether."

(People's Response to Defendant's Motion to Expand Cross-Examination of Deputy Foster (without exhibits), *People v. Jordan Prinzi*, Orange County Superior Court Case Number 17WF2634, dated March 16, 2018, attached herein as Exhibit I3, bolding added.)

The OCDA's opposition concludes by arguing that "[t]his preliminary hearing is not defendant's forum to fish for impeachment evidence by asking Deputy Foster speculative questions about his unrelated service in the jail back in 2010 and 2011." (Exh. I3, p. 6.)

It was the same in oral argument:

> This isn't the *Dekraai* case, and none of that evidence is before this court. And we start with what we have, and with what defendant presented. And it's not even close. It's a pure fishing expedition. That's what it is. Pure and simple.

(Partial Reporter's Transcript, *People v. Prinzi*, Orange County Superior Court 17WF2634, March 20, 2018, attached herein as Exhibit J3, p. 28.)

The attempt by the OCDA to place the responsibility for turning over *Brady* evidence on defendants by claiming that they must first identify the evidence is wholly inconsistent with the promised "concrete action plan" for disclosure of SH Log records, the *Dekraai* appellate opinion, and the federal *Govey* ruling. The fact that this argument was being made when the OCDA was systematically blocking the disclosure of the evidence that the defendant was supposedly "fishing" for, made the argument that much more appalling. Significantly, though, logic says that these contentions on behalf of the prosecution were directed by Baytieh and his group of co-conspirations working to block the SH Log records from being released.

A few weeks later, the OC Weekly published a story about the case, "Orange County DA Tony Rackauckas Mocks Court of Appeal's Snitch Ruling." (Moxley, *Orange County DA Tony Rackauckas Mocks Court of Appeal's Snitch Ruling*, OC Weekly, Apr. 11, 2018.)

The story continued:

> Acknowledging his office hasn't given the defense Special Handling records tied to Foster, senior deputy DA Brian Fitzpatrick boldly argued that Sanders possesses "no evidence to impeach" the deputy and therefore should be blocked from asking him questions "far afield of the facts of this case."
>
> As that prosecution advances, OCDA stonewalling continues, with the 75-year-old Rackauckas parading around the county to win a sixth, four-year term in June. He's telling voters he always acts honorably. The DA says Sanders is a liar and reporters documenting the scandal are lemmings. Goethals, a former homicide prosecutor and onetime Rackauckas campaign contributor, was "biased" for recusing him from *Dekraai* after the cheating emerged.

(Moxley, *Orange County DA Tony Rackauckas Mocks Court of Appeal's Snitch Ruling*, OC Weekly, Apr. 11, 2018.)

Perhaps Baytieh will claim that he had nothing to do with any of what occurred in *Prinzi*, and no idea why a member of his Unit was present in a case where the discovery issues intersected with the SH Log cover-up. None of that would be truthful.

The sad reality was that *Prinzi* represented another wake-up call—an opportunity for the OCDA to change course. Baytieh was the most important member of his office in determining whether that would happen. If, indeed, he believed the Court of Appeal was "100 percent" right in their 2017 ruling, and that was important to him, the direction could have been changed at any time. It would have meant admissions of wrongdoing by him and his colleagues. It would have been painful. And it almost certainly never crossed their minds.

### F. A Defendant Alleges Systematic Withholding of the SH Log for the First Time

On July 13, 2018, in *People v. Oscar Garcia*, the defendant filed a Motion to Recuse.[49] The motion included a two-year study of cases involving former members of the Special Handling and Classification Units who testified in hearings or trials. The defense

[49] Assistant Public Defender Scott Sanders represented Oscar Garcia.

presented its finding: Among the 146 identified cases, the OCDA had not disclosed a single entry from the SH Log or other evidence of the informant-related misconduct. (Motion to Recuse (without exhibits), *People v. Oscar Garcia*, Orange County Superior Court Case Number 17WF2552, dated July 13, 2018, attached herein as Exhibit K3.) Members of the OCDA, such as Baytieh, cannot claim that there was a failure to understand what Garcia alleged in the motion to dismiss or subsequent motions that addressed the same issues. Once again, there was a number of news stories that synthesized the allegations about the cover-up of the SH Log, including the following: Saavedra, *Defense Attorney Behind Orange County 'Snitch Scandal' Launches New Misconduct Charges*, OC Register, Jul. 13, 2018; Ferner, *New Evidence In California Jail Snitch Scandal Raises Questions About State, Federal Probes*, HuffPost, Jul. 18, 2018; Bartley, ABC7 investigation: *Unlikely Alliance Born In Search For Answers Over OC Snitch Scandal*; ABC7, Oct. 29, 2018.

With the court filings (and the related news stories), Baytieh and his colleagues were put on notice that the concealment of the SH Log had been found out—supported by an extensive study of cases involving the OCSD personnel most likely to have had SH Log entries warranting their addition to the *Brady* Notification System.

Yet, during the next two years, as the defendant continually argued in motions that OCDA was improperly and systematically blocking the release of *Brady*-implicated portions of the SH Log and other favorable evidence, Baytieh and his co-conspirators kept the truth to themselves. The trial court denied the motion for an evidentiary hearing on April 23, 2019. (Redacted Court Vision, *People v. Oscar Garcia*, Orange County Superior Court Case Number 17WF2552, attached herein as Exhibit L3.) On August 22, 2019, Defendant filed a Motion to Compel Discovery #2, filed on August 22, 2019. The motion cited the assigned prosecutor's previous discussions with the court during a motion to compel discovery related to former Classification and Special Handling deputies:

> The Court: As I recall, that was one of Mr. Sanders's questions as to these other 146 cases, whether there has actually been an individual *Brady* analysis as to each or whether this was essentially just being ignored, and your representation is that the office -- your office has indeed done an individual *Brady* review of each case?
>
> Mr. Bugman: Your honor, I -- **that's my understanding,** and I can certainly confirm, of all the deputies that are listed, that there would be a review for those deputies. I **know that we have a *Brady* process and that notice goes out on those cases when they're listed as witnesses.** So -- but **my understanding is that that has been done**. My concern, though, is that the **entire motion is based on the presumption that there's this conspiracy to withhold *Brady* evidence, which we don't agree with. We do think that that is speculative.**

(Partial Reporter's Transcript, *People v. Oscar Garcia,* Orange County Superior Court Case Number 17WF2552, dated February 22, 2019, attached herein as Exhibit M3, p. 16, bolding added.)

The arguments that Sanders was making, of course, were not "speculative" and were instead based correctly on a fact-based analysis. The prosecutor argued that it was "speculative" that "there's this conspiracy to withhold *Brady* evidence." The defense had laid out in detail, supported by extensive exhibits, why the claim was the antithesis of speculative. Since that time, the OCDA and the DOJ have confirmed the allegations were well-founded, as well. Baytieh, on the other hand, knew the claims by the prosecutor from the Special Prosecutions Unit he supervised were inaccurate, and allowed them to go uncorrected once again, despite his legal and ethical obligations. Of course, the truth was that these claims were the ones he wanted presented and which he encouraged the prosecutor to make—and very likely misled the prosecutor into presenting.

### ii. Baytieh's Special Prosecutions Unit Employs Use of Phony "Single Email Test" of Former Special Handling and Classification Deputies, as Alternative to *Brady* Review of SH Log

On July 11, 2019, District Attorney Spitzer released a letter from former Orange

County District Attorney Tony Rackauckas to former OCSD Sheriff Sandra Hutchens and current Sheriff Don Barnes.[50] ("*Brady* Letter" from former OCDA District Attorney Tony Rackauckas to OCSD Sheriff Sandra Hutchens to Sheriff Don Barnes, dated December 20, 2018, attached herein as Exhibit N3.) The *Brady* Letter inadvertently confirmed that the defense allegations in *Prinzi* and *Garcia* were completely accurate. In the aftermath of the discovery of the SH Log and the *Dekraai* ruling, Baytieh's Special Prosecutions Unit failed to conduct *Brady* Notification Reviews of Special Handling and Classification deputies implicated in the SH Log. However, after the filing of the *Garcia* motion in 2018, Baytieh and his conspirators devised a plan. In order to a) create a cover for the failure to properly consider the SH Log entries; b) avoid embarrassment for massive discovery violations related to the OCSD on the heels of litigation in *Dekraai, U.S. v. Govey*, *Prinzi,* and *Garcia*; and c) avoid admissions that evidence should have been turned over in hundreds of cases, **the agency created a patently fraudulent test for disclosure that is an affront to the holding in *Brady***.

In the *Brady* Letter, Rackauckas announced that after considering whether to place ten former Special Handling deputies on the *Brady* Notifications System, he decided instead to add none. The *Brady* Letter also revealed for the first time the unauthentic test employed for analyzing *Brady*-qualifying misconduct by Special Handling deputies—one in which Rackauckas, Baytieh, and three other Senior Assistant District Attorneys limited their consideration of wrongdoing to whether deputies "exhibited dishonesty and/or purposeful concealment of the Special Handling log [SH log] in their replies [or non-replies] to the OCSD management requests for records related to Jail Classification and Special Handling."

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[50] Gerda, *Rackauckas Secretly Cleared Deputies Accused of Lying About Informants*, Voice of OC, June 11, 2019; Saavedra, *Former Orange County DA Rackauckas secretly cleared deputies of lying right before leaving office*, OC Register, June 11, 2019.

> The Orange County District Attorney's Office has completed an analysis on whether the following Orange County Sheriff's Department (OCSD) personnel: Z[redacted] M[redacted] C[redacted] J[redacted] M[redacted] A[redacted] M[redacted] R[redacted] L[redacted] and R[redacted] – exhibited dishonesty and/or purposeful concealment of the Special Handling blog (SH blog) in their replies (or non-replies) to the OCSD management requests for records related to Jail Classification and Special Handling. These requests were made in February and March of 2016 and directed to all current and former Classification and SH deputies. They were to provide any personal notes or records in their possession to OCSD management.

(Exh. N3.)

**In other words, *Brady* determinations were made not based upon the contents of the SH Log, but rather on the supposed veracity of their responses to a "single e-mail" from 2016 inquiring whether deputies still possessed materials.** Of course, it made no sense to base the *Brady* determination solely upon whether a deputy stated he or she was in possession of prior logs or notes, particularly to the exclusion of a careful study of notes about the use of informers, which the OCDA admitted in 2016 implicated its *Brady* responsibilities. **On the other hand, Baytieh and his co-conspirators were certainly not going to analyze evidence for *Brady* purposes that they were simultaneously committed to concealing from defendants**.

The letter also confirmed that the practice for making *Brady* Notification System decisions, established by the Baytieh-authored *Brady* Policy for Law Enforcement, had been used in making these fraudulent determinations. Therefore, Senior Assistant District Attorneys and the District Attorney of the OCDA had been responsible for analyzing whether the ten Special Handling deputies named in the *Brady* Letter would be added to the *Brady* Notification System, and using the "single e-mail test" to make those decisions. As indicated earlier, Baytieh had been promoted to one of the senior positions—a position in which he continued to have oversight over the Special Prosecutions Unit and the *Brady* Notification System.

The truth is that even when Baytieh and his co-conspirators finally sprang into action in 2018, the "single e-mail test" was an outrageous attempt to separate themselves entirely from their legal and ethical requirements, while appearing to adhere to them. The test was designed to have courtroom prosecutors believe—based upon representation of the Special Prosecutions Unit—that the OCDA had met its *Brady* obligations related to particular Special Handling deputies who had become witnesses. Line prosecutors would then represent that all *Brady* obligations had been met, and battle any effort to obtain information about what precisely was the basis of such representations. Baytieh was placing OCDA prosecutors in harm's way by having them unknowingly do his dirty work—and quite clearly, even this was not a sufficient incentive for him to do what was right. In the minds of most prosecutors, if it had been determined by the esteemed Baytieh, the Special Prosecutions Unit, and executive managers that no disclosures were required, the defense should not be permitted to "speculate" their way into a probe about the decision-making process. The idea was to shut the door on questions about a) when these *Brady* evaluations started, b) how the conduct was examined, and c) what conduct was actually considered in determining which deputies should be added to the *Brady* Notification System. Baytieh and his co-conspirators had taken their cover-up of the SH Log to the next level, and they did not flinch in the slightest.

### G. Additional and Revealing Efforts by Baytieh to Deceive the DOJ

#### i. Baytieh Demonstrates His Consciousness of Guilt in Response to Questions about Platt and Martin and When Confronted with Platt Report

Baytieh's cover-up of Platt and Martin's role and the related evidence had haunted him from the moment the informant scandal blew up in 2014. Before the filings in *Dekraai*, the concealment of jailhouse informant evidence had merely become standard operating procedure for the win-at-all-costs prosecutor.

However, six years later, Baytieh found himself and this case at the center of the informant storm. Even if one were to extend every possible benefit of the doubt to Baytieh about his role and knowledge of evidence concealment, at the moment he began his DOJ interview in 2019, that should not allow eliminating all common sense from the analysis. For instance, there is no doubt that the names "Jeffrey Platt" and "Paul Martin," and their roles in *Smith*, were at the forefront of his mind. In fact, all logic says that nothing worried him more than the extent to which the DOJ had locked in on the two informants' and his significance to *Smith*.

The background is important. After leading a public effort to delegitimize allegations that prosecutors withheld informant-related evidence, Baytieh suddenly, in 2016, found entries in the SH Log describing an informant operation in his own case. This is confirmed by the letter he sent to counsel in 2016. Unarguably, Baytieh read the entries from Special Handling deputies describing how they facilitated Platt and Martin being placed in Smith's dayroom with testifying informant Palacios so that they could question Smith about his crime. The entries also referenced several interviews with the informants. In unambiguous language, deputies described an operation undertaken in clear violation of the Sixth Amendment, and there was every reason to believe that the statements attributed to Smith that Palacios testified about were implicated in the illegal operation.

Then, in 2017, two motions in *Dekraai* alleged that Baytieh and his team had hidden evidence in *Smith* regarding the use of two informants whose names Baytieh had redacted in his letter to counsel. Baytieh knew the names. A national publication, as well as local news outlets, published stories focused on whether Baytieh was responsible for the concealment of evidence in this case. (Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017; Moxley, *In Orange County's Courthouse Scandals, Prosecutors and Sheriff Unite in Cover-Ups*, OC Weekly, May 17, 2017.) Baytieh cannot claim to have been unaware of the press coverage, as it included comments from the OCDA spokesperson regarding what Baytieh told her about when he learned that Platt and Martin were informants in the case:

> When HuffPost asked when Baytieh first became aware that other inmates mentioned in the letter were informants, Van Der Linden said Baytieh told her he "became aware of it when our office received/reviewed the log, which was May 10, 2016."

(Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017, bolding added.)

Later the same year, Smith's counsel on direct appeal filed a motion seeking habeas corpus relief based upon these precise issues. The Public Defender's Office was appointed in 2018, and Assistant Public Defender Sara Ross then initiated litigation to obtain copies of the actual SH Log entries, which had never been provided to the defense. That litigation was active in the months leading up to Baytieh's interview. Moreover, Baytieh had been told in advance of the meeting with the DOJ that there would be four cases specifically addressed:

> Q. And what did you review?
> A. I reviewed -- there were four cases that you had told our office, so I kind of reviewed certain notes. I brought certain notes just to refresh my recollection.

(Exh. E1, p. 12.)

The questioning (and level of detail in the responses) makes it abundantly clear that *Smith* was identified in advance as one of the four cases that the DOJ informed Baytieh in advance would be the subject of questioning.

The result of this for Baytieh was that he knew he would be walking a tightrope once the interview began. He knew that even after reading the SH Log, he had made no efforts to obtain any discovery referenced in the SH Log nor any responses from prosecution team members about what he read. How can this be represented with certainty? None of the discovery described in this motion was provided between 2016 and when the DOJ interview took place in 2019. If Baytieh had gone to investigative members of the prosecution team for responses to and explanations about the concealment, he would have been required to make disclosures. He made none. In addition, Baytieh admitted to the

DOJ that he took no steps to get to the truth (he already knew): "I didn't reach out to anybody." (Exh. E1, pp. 127-128.)

Baytieh's awkward approach to the DOJ interview as it pertained to Platt, Martin, and the related disclosure issues was on display early in the interview. His pre-planned decision was to pretend that Platt and Martin remained of such minimal significance—even after all that occurred since 2016—that he barely remembered who they were:

> Q. No. That's fine. What I'm asking you, so are you familiar with an individual by the name of Jeffrey Platt?
> A. **The name sounds familiar, yes**.
> Q. Okay. It sounds familiar.
> Why does it sound familiar?
> A. Because **I think he was one of the people --he's in one of the memos that I wrote. He's one of the people that was part of that group that Palacios was trying to -- not Palacios -- Smith was trying to solicit and talking about his activities with**.

(Exh. E1, p. 73.)

Of course, the problem was that this made no sense considering all that is described above. Platt's name did not just "sound familiar." Even in the best-case scenario for Baytieh, he knew exactly who Platt was beginning in 2016. He also knew that Platt was far more than "one of the people that was part of that group that Palacios was trying to -- not Palacios -- Smith was trying to solicit and talking about his activities with."

Baytieh did not forget that the SH Log described law-violating "arrangements w/Deputy Schneider for the group in L-20. Martin, Platt, Palacios, **Smith to get day room from just after morning chow until around 11:00. This is at the request of Martin and Platt. They feel if they get this time with Smith, they can get details on his crime**." (Exh. E1, pp. 116-117, bolding added.)

Additionally, Baytieh did not "think" he had written about Platt in his 2016 memo to counsel. He knew he had written to counsel and that he had made the decision to not reference Platt or Martin by name. When his questioners turned to the subject of Paul Martin, Baytieh tried out a similar trick:

> Q. Are you familiar with an individual by the name of Paul Martin?
> A. **I think he's one of the people that were in that same group**. So I'm not familiar with him. I've never -- I don't believe I've ever met him, but **I believe he's one of the same group of the inmates that were in the same day room group with Paul Smith and Mr. Palacios**…

(Exh. E1, p. 97, bolding added.)

Baytieh had a dual objective in these efforts. He hoped to have it appear that he had only a passing knowledge of Platt and Martin, such that the DOJ personnel would find it highly unlikely that he could have been involved in any concealment of evidence. Additionally, he wanted to avoid blaming his co-conspirators for the concealment—recognizing the risk that this could raise more questions, be disbelieved, or lead to fellow wrongdoers turning on him if questioned about how all of this occurred. However, Baytieh simply went too far in pretending that he was not clued in to who Platt and Martin were and what they had done with the prosecution team's guidance. In sum, Baytieh's error was that it **was simply illogical that the two informants in *Smith* were still barely registering on his radar—particularly considering a) he had become the focal point of media coverage based upon his alleged concealment of the informants, and b) these allegations followed Baytieh's public attempts to undermine the credibility of arguments made in *Dekraai* that OCDA prosecutors hid informant-related evidence.**

Baytieh's play-acting was about to get a still greater challenge. As discussed in the introduction, Baytieh almost certainly believed that the DOJ was reviewing available case materials rather than attempting to locate undisclosed items of evidence. Soon, though, Baytieh was in for a surprise—except that he proved unable to generate a surprised response. The question was a simple one, which was whether he had seen a report that listed Platt as a confidential informant and that described Platt as obtaining a statement from Smith:

> Q. But my question was more specific. Did you see a police report indicating that Jeffrey Platt was a confidential informant, and he took a -- and he had a statement from Paul Smith?

> A. Yeah. I can't -- **I really can't answer your question off the top of my head just because, you know, I don't remember**. It's been six years, I think, since I dealt with this case…

(Bolding added.)

The Introduction analyzes why this response was completely irreconcilable with published statements that the OCDA press spokesperson attributed to him in 2017 and which appeared in a published story. In 2017, he informed his agency's spokesperson that he "became aware of [Platt and Martin being informants on the case] when our office received/reviewed the log, which was May 10, 2016." (Ferner, *OC Prosecutor Who Defended DA's Office Over Snitch Scandal Is Accused of Covering Up Jail Informant Use*, HuffPost, May 16, 2017.) Without having time for reflection about what best served or damaged his interests, he claimed that he could not remember whether he saw such a report. The problem is that his answer to his press spokesperson in 2017 was the equivalent of "I never saw any evidence of Platt being an informant or obtaining a statement from him until I saw the Special Handling Log six years after Smith was convicted."

It was the type of moment that Baytieh would have made the centerpiece of an argument about a defendant's consciousness of guilt. In this case, however, there is so much evidence of Baytieh's consciousness of guilt that his revealing inability to immediately answer the questions must share center stage with a plethora of other compelling evidence of the prosecutor's knowledge and criminality.

### ii. Baytieh Reveals Consciousness of Guilt in Astounding Argument that *Smith* Prosecution Team Did Not Violate *Brady*

Baytieh had clearly left the first day of DOJ questioning feeling that it was a mission unaccomplished. He likely had read the room correctly. The probing by DOJ staff suggested concerns about how Baytieh approached his *Brady* responsibilities generally and specifically in *Smith*. Additionally, as discussed, Baytieh appeared non-reactive when confronted with Sergeant Voght's report describing an undisclosed 2009 interview with

Platt in which he described how the informants questioned Smith in violation of his constitutional rights.

On day two of the interview, Baytieh jumped at the opportunity to add on to and improve his responses from the day before:

> Q. Good morning.
> A. Good morning.
> Q. Thank you. I wanted to start with – we obviously started yesterday. We have the benefit of overnight. And I wanted to give you an opportunity if there's anything you wanted -- additional that you wanted to say in yesterday's questions or if there's anything else you want to show us, I thought that's a good place to start.
> A. Fine. Yeah. If you don't mind, give me a few minutes. I want to just share with you….

(Exh. E1, p. 347.)

Baytieh should have stopped there, but there was no chance. One point that should be clear from this motion is that Baytieh's confidence in his ability to persuade is boundless. And, because he does not let the truth interfere with his efforts, he has all-too-often been successful. He stated:

> Yesterday when we were talking about Martin and Platt in connection with the Smith case and **I had told you initially that to the best of my recollection, Martin and Platt were not witnesses in my case, I never called them, I went back and confirmed they were not witnesses in the case**. I never called either one of them.

(Exh. E1, p. 347.)

Right off the bat, he started with subtle deception. In actuality, Baytieh had not the slightest doubt of recollection at any point as to whether he called Martin and Platt as witnesses such that he "went back and confirmed they were not witnesses in the case." Baytieh had hid all of the evidence of their informant work in the case and knew he never called them. He had written a letter to counsel describing why the new evidence from the SH Log was essentially unimportant, in part because Palacios was the testifying informant. (Exh. N1.) Of course, if the SH Log materials were about testifying informant witnesses,

when the log had emerged in 2016 there would have been immediate, additional issues related to the non-disclosure. As discussed previously, after the Grand Jury proceedings, Baytieh made sure he never spoke Platt's name. As to Martin, he emphasized in his deplorable rebuttal argument that Martin had not been called as a witness, asking jurors: "**Where is Martin?** Remember, Martin is involved in all this stuff. We know he's in jail. The Defendant told you he's looking at 20 years. **If Palacios is making up all these things, bring him bring in. He always says he didn't do it.**" (Exh. I2, p. 294, bolding added.) In 2019, after all that occurred and knowing what would be front and center with the DOJ, Baytieh never had a scintilla of doubt about whether he may have actually called Platt and Martin. These were, instead, little lies meant to make bigger ones more effective.

He was continuing what he had started the previous day. He walked into the interview room with the DOJ knowing the case inside and out, fully recognizing that the biggest issue was why evidence related to the two informants had not been disclosed. In sum, it was more poor acting.

After spending several minutes trying to mislead DOJ representatives into believing that the "Jeffrey Platt" in *Smith* and *Shawkey* were different people, he returned to making his new and improved presentation about what Platt and Martin meant to *Smith*. (Exh E, pp. 347-350.) He knew that blaming his investigators for the concealment of the Platt report in *Smith* was far too risky. As discussed earlier, doing so could lead DOJ staff to contact investigators who might tell the truth about how they never hid Platt and Martin from Baytieh—and even about how they booked the report and recorded interview into property in 2009, well before trial. On the other hand, taking his new and improved response in the direction that he did—without even a suggestion that evidence had been kept from him—powerfully corroborates that evidence was, in fact, never kept from him.

Baytieh decided the previous evening—or perhaps that morning—that the best chance to reverse or minimize the damage caused by the Platt report finally being out was to reframe the failure to disclose evidence about Platt and Martin as unimportant and

inconsequential. Where he would go with this contention was likely something others in the room could never have foreseen:

> Platt knew Paul Smith, I think, from high school. So that was part of the -- they had a connection completely independent of them being in custody together. That was provided to the defense attorney. I'm happy to give you the page number just to make it easier for you. So that's 1401, a mention of Platt, 1403. **And actually, they even say his full name and his booking number so that the record is very clear to the defense attorneys way before the trial about who else was present during the discussions between Mr. Smith and Mr. Palacios.** It's mentioned again on 1420. And this is where it talks about Jeffrey Platt was in the group, and Jeffrey Platt goes -- I'm going to quote right now -- "I know this guy. That's the guy in the group," and it just happened they were old high school buddies. So that's the connection between Platt. **The defense knew that from the beginning. There was nothing that I had in my possession about the fact that Platt and Martin were privy to these discussions in the jail that I would not discover to the defense attorneys. We gave it to them from the beginning.**

(Exh. E1, pp. 351-352, bolding added.)

His "argument" was that the defense had timely received all that it was entitled to learn about Platt and Martin. How could this be possible? According to Baytieh, this was true because the defense knew, from the prosecution-provided discovery, that Platt and Martin were in the dayroom when the statements were made by Smith. It was typical Baytieh, as he incorporated small touches to enhance his perceived sincerity: "I'm happy to give you the page number just to make it easier for you." (Exh. E1.) The willingness to identify the particular page numbers suggested a prosecutor who was transparent and professional. He was neither. The DOJ did not need page numbers. Its staff needed to be told in the moment what Baytieh knew about the key content of the pages he was referencing. The pages he was citing were given to the defense specifically because, while they included names and booking numbers, they misled—hiding the fact that Platt and Martin were informants who participated in an unlawful operation that violated Smith's constitutional rights. Again, even if every benefit of the doubt were extended to Baytieh, he had to have known this as he cited the page numbers. The day before, he supposedly learned for the first time about a report that had not been disclosed to the defense that

revealed Platt was an informant who had described his work and how the informants had violated the Sixth Amendment under *Massiah*. Baytieh knew that none of the pages he was citing to the DOJ revealed this or even hinted that Platt and Martin were informants. Yet, he had the temerity to tell the DOJ that Smith had all he needed in terms of disclosures because defense counsel received the names of inmates whose true identity was being hidden.

Baytieh did not stop there—further aggravating the deception by the moment:

> Again, 1429, and this one references specifically a note that was turned over to law enforcement, and it's a note that came to Paul Smith from Jeffrey Platt. And it's regarding -- here is the information on it, and this is from page 1430. "This is a copy of a letter I have in my hand" -- this is Palacios saying that. "This is a copy of a letter I have in my hand of a letter that came in to Paul Smith from Jeff Platt out on the street." Jeff Platt by then was out. He wasn't in custody. "It's regarding basically some information on Ray Wert." He was the potential victim that Palacios was trying to put a hit out on. Investigator Wert, it's dealing with. "He wants your home address. He wants your California driver's license, information, and picture of you, vehicles you drive. He's willing to pay a price for that. Also, he was wanting the price for" -- "to have somebody basically jump you, have you taken care of out there on the street. He said the price that he got quoted was $8,000." All that information was provided to the defense attorney. **Platt was not a witness, but the idea that -- because some of the questions you're asking me about yesterday was about "Well, how about this information about Platt?" They had all that information**.

(Exh. E1, pp. 352-353, bolding added.)

There was clearly no limit on what Baytieh was capable of arguing, actually telling the DOJ staff that he had met his disclosure obligations when he shared Palacios' statements about Platt's communications pertaining to the "hit" on Wert. He actually said the words, "[t]hey had all that information." The information was fraudulent. Baytieh knew it in 2009, which is why he never took any action against Platt back then, and he unquestionably knew it in 2019. Baytieh was pretending that the prosecution had done what was required of it by making disclosures, regardless of the fact that the defense was entirely misled by those same disclosures. Throughout his presentation, Baytieh

conveniently bypassed any discussions about the Platt report that he supposedly saw for the first time one day earlier. Pretending he could still not hear that bombshell explode made his day two performance that much more absurd.

The far-fetched explanations continued unabated from there, as he told the DOJ: "I made a decision that Platt is not going to be a witness in my case. I'm not going to call him. The defense had all the information that they needed that was in my possession regarding his involvement in the case." (Exh. E1, p. 353.)

> So our office, we made the prosecutorial decision about who we're going to use as a witness in the case. We provided the required discovery that the Constitution mandates, and we notified the defense attorneys about the other people that we present in those discussions. They had that information.

(Exh. E1, pp. 353, 354.)

With that statement, it seemed that a part of Baytieh realized he needed to admit that he knew Platt and Martin were informants and that he had made the "prosecutorial decision" not to call them. Baked in to what Baytieh had just said was that the OCDA decided not to call Platt and Martin, and, as a result, he believed he was not constitutionally required to disclose evidence demonstrating that they were informants on the case. In the end, he could not deliver a morsel of truth. He resisted finally admitting he always knew who Platt and Martin were, cognizant of the slippery slope that he was on as he spoke.

One of the problems with Baytieh's assertion that he made a "prosecutorial decision" not to have Platt testify is that Baytieh would have never made such a determination without first studying the facts. Everything that we currently know indicates that the "prosecutorial decision" about whether to have Platt testify was one of the easiest of his win-at-all-costs career. Platt would have been a devastatingly bad witness for the prosecution, as his testimony would have ended any hopes of introducing Smith's statements and exposed a then-hidden jailhouse informant program. This makes considerably more sense than the notion that a) Baytieh had no idea Platt was an informant (because his investigators hid evidence from him in the property room of the Sheriff's Department, and he never checked what was booked in his own cases); b) Baytieh, for

some reason, had no interest in interviewing Platt about what Smith told him; and c) Baytieh had no desire to protect Wert and the community from the violence Platt was purportedly attempting to facilitate.

Instead of turning the corner and finally telling the truth during day two of his interview, Baytieh tried to convince the DOJ that he was an exemplary prosecutor who responsibly brought out that Platt and Martin were in the dayroom when Palacios spoke with Smith:

> Now, I also did it in front of the grand jury, right, so in front of the grand jury. And if you look at page 50 of the transcript of the Grand Jury, I specifically put it on the record. "During the" – the question by me. "During the time that you were there, did you become aware or did you hear him" -- "him" being Mr. Smith, the defendant -- "have conversation with Jeffrey Platt where he wanted -- he wanted Platt to help him get in contact with somebody that would help Paul Smith get rid of some witnesses on the outside?" Answer: "Yes, sir." That information was put in the Grand Jury aside from the taped interview that was provided to the defense attorneys months and months and months before the trial.

(Exh. E1, p. 354.)

What Baytieh was attempting to accomplish through the above assertion was astounding. He knew that his questioning of Palacios before the Grand Jury in 2009 was intended to obtain misleading answers that suggested Platt was authentically attempting to place a "hit" on Wert. Again, he realized that Platt was never attempting to help harm Wert, or otherwise Baytieh would have had him prosecuted and re-incarcerated. Baytieh knew Platt was working with Wert, Beeman, Voght, and others to develop solicitation and conspiracy charges against Smith. He knew this when he asked the questions in 2009, and he unquestionably knew that Smith and his counsel had been misled when he elicited Palacios' misleading testimony. Yet, Baytieh had the remarkable gall to plead with the DOJ to see the then-prosecutor as honorable for having pointed out that Platt was in contact with Smith—even though this purportedly helpful detail was being brought out in the context of an effort to hide that Platt was actually an enormously valuable informant for the defense. In other words, what Baytieh needed to elicit from Palacios was the truth about

who Platt was. Baytieh then needed to bring before the Grand Jury members of his prosecution team to explain that Palacios was on the witness stand because he had "played ball" with a corrupt prosecutor and his corrupt investigators. Playing ball meant hiding the truth about the contact with Smith that Platt had described—particularly with the tape rolling and when Baytieh was questioning him. Palacios knew before the recording device was turned on that telling the truth was not going to lead to Smith's conviction—a conviction that was valued far more than truth-telling. In sum, Baytieh does not get a gold star for having elicited Platt's name while misleading the Grand Jury and the defendant about who Platt was and what he really did in this case.

**iii. Baytieh Insists He Never Studied Evidence in *Dekraai,* Despite Prior Public Attacks on the Allegations and on Dean Chemerinsky's Support of Claims—While Excoriating *Dekraai* Prosecutors for their Failure to Study Defense Evidence**

In an interview replete with deception, it is certainly not feasible to parse out and analyze each instance. However, another subject matter that warrants discussion is what Baytieh said about his role, and those of his colleagues, in responding to allegations of jailhouse informant-related misconduct detailed in *Dekraai* beginning in January 2014.

It certainly appears Baytieh believed at the outset of his interview that DOJ attorneys were unlikely to have carefully studied his public statements made while presenting the OCDA's response to the informant scandal. He also likely viewed it as improbable that those questioning him had tracked down a recording or transcript of the events at which he appeared.

Baytieh's confidence about the DOJ's understandable lack of information about his public comments—combined with his complete unscrupulousness—led to the creation of still more proof that Baytieh lacked even basic fidelity to the truth. It was Baytieh who had told law students at the University of California, Irvine School of Law, that their dean did not "know the facts" and "that's not fair[,]" and it was Baytieh who said there was not a

"shred of evidence" that an Orange County prosecutor had withheld informant-related evidence.

Setting aside the fact that Baytieh's concealment of evidence in this case should have stopped him from making the above statements, implicit in his public claims was a claim that he knew the evidence connected to the allegations in *Dekraai* inside and out. Yet, just three years after these very public attacks on Dean Chemerinsky and upon the allegations themselves, he told the DOJ, "**I've never read a single police report about Dekraai**…" (Exh. W2, pp. 1-7; Exh. E1, p. 42, bolding added.) Was it really possible that Baytieh was admitting (or claiming) that he had never studied the evidence supporting the informant-related motions in *Dekraai*?

During his DOJ interview, it became clear that this was precisely what Baytieh meant to communicate. However, he had far more to say on this subject matter that warrants review and analysis:

> …. **I've never read a single police report about Dekraai**, but I was in certain meetings where Dekraai was discussed because I was the assistant head of court of the Homicide Unit.
>
> So you asked me about when that concern came about. And by that time, I was probably one of the more experienced capital litigators in the office. I think I had done four or five capital cases. I was probably the most experienced Homicide prosecutor in the office.
>
> So, I mean, I was sitting in those meetings just to give advice and kind of share input. And there was a motion filed by the defense attorney for Mr. Dekraai, hundreds of pages, and I was in a meeting.
>
> And at that time, Mr. Wagner was designated to be on a case by virtue of a title, and that was where kind of my concern starts. I'll tell you what I mean by that.
>
> …They didn't realize that we needed to put the best, most experienced homicide prosecutor on that case. That was the first mistake.
>
> The second mistake is after the motion was filed. And I was in a meeting when the motion was filed, a few hundred pages. And the reaction to it is "This is unfounded. This is a lot of speculative argument, a lot of far-fetched argument. So therefore, let's go litigate the motion."
>
> And my argument was "Well, wait a second. They just filed a 500-page" -- whatever number. I don't know what the number is. "They're not just talking about the Dekraai case. They're talking about dozens of other cases.

"Do you know these cases?

"No, but we don't need to know them because this has nothing to do with the case."

So the argument was all these other gang cases that the defense for Mr. Dekraai is raising really are irrelevant to the Dekraai case, right? So that was -- that was the mistake.

And I still remember -- because I remember leaving that meeting, going, "**You have to go and ask Judge Goethals for a six-month continuance so you can be prepared for this motion, at least a six-month continuance**."

By that time, Mr. Dekraai's counsel had spent a lot of time being prepared. **Our client is harmed when a prosecutor walks in the courtroom and he or she does not know the case better than anybody else in that courtroom. I truly believe that**.

**I think part of my job as a prosecutor is when I walk in that courtroom, I have to know the case better than anybody else.** I have to be prepared to answer the judge's questions, to respond to whatever claim, right, wrong, good, bad, and ugly, that opposing counsel is going to make.

But at that time, there was a push to get the case to trial, and the argument that prevailed is "Nope. We're ready to proceed. This motion lacks merit. We're going to be able to litigate it."

So that was -- that's when I started realizing on the Dekraai case, the benefit of having Mr. Wagner on it is diminishing. I'm telling you this background because then shortly thereafter, I left Homicide. So I'm not really that involved in Homicide. I'm running a very, very busy unit. I had 14 prosecutors and seven paralegals that I was supervising.

**So then really my knowledge of what was happening with Dekraai was from, you know, reading -- I read the ruling that Judge Goethals issued…**

(Exh. E1, pp. 45-47.)

It certainly made sense that Baytieh wished to distance himself from his agency's earlier fight to discredit the informant scandal and prosecutors' roles. It was a battle that could no longer be credibly fought, especially following the 2016 discovery of the SH Log and the ruling affirming the recusal of the OCDA just months later. Thus, members of the OCDA not directly connected with the OCDA's response to *Dekraai* and the jailhouse informant allegations would have understandably preferred to distance themselves from the agency's years-long attack on the allegations. Of course, the problem for Baytieh was that

this was not an option available to him. Baytieh was not just directly connected to the OCDA's response; he was the face and voice of that response.

Moreover, it was not *Dekraai* prosecutors Wagner or Simmons who had described the defense allegations of prosecutors committing misconduct as "baloney" and lacking a "shred of evidence." It was Baytieh. Not only was he admitting (or at least claiming) in 2019 that he had never studied the evidence supporting the allegations, but he was acknowledging that when he leveled his criticisms, he operated without any reasonable belief that the *Dekraai* prosecutors had studied the allegations and shared their findings with him such that he could claim he was operating in good faith when making his own public statements. That is, Baytieh was not relying on another so-called expert on the allegations. The "knowledge" he claimed about what was occurring in *Dekraai* was limited to what he gathered from "ruling[s]." However, there was nothing in the rulings of Judge Goethals that supported his disparagement of the allegations as he had done publicly. Even in the first ruling in 2014, in which recusal and dismissal were denied, Judge Goethals' finding included that "[m]any of the witnesses who testified during the course of this hearing were credibility challenged. These witnesses include current and former prosecutors, as well as current and former sworn peace officers. Some perhaps suffered from a failure of recollection." (Trial Court Ruling, *People v. Scott Dekraai*, Orange County Superior Court Case Number 10ZF0128, dated August 4, 2014, attached herein as Exhibit S8.)

The following year, in 2015, Judge Goethals ruled that the entire OCDA must be recused in an opinion that pointedly criticized the OCDA and the OCSD. (Exh. A2.) In sum, nothing in Baytieh's purportedly limited knowledge about the accuracy of the allegations—based upon Judge's Goethals rulings—supported the public statements that he had made. The reality was that Baytieh knew from his experience in *Smith*, *Guillen*, and other cases that the allegations were spot-on, and that his obligation had been to disclose the evidence and what he knew from those cases. Moreover, there is every reason to believe that he thoroughly read the allegations, studied the evidence, and then lied about his

conclusions, like he lied about whatever he needed to in order to serve his perceived best interests. **Regardless of whether he studied the evidence from *Dekraai* or not, Baytieh has admitted that he made false and misleading public statements on the subject matter.**

Obviously, what he told the DOJ was never intended to be a long-overdue admission that he had intentionally misled the Orange County community in his repeated assertions that the allegations leveled in *Dekraai* were baseless. It was also not meant to be an acknowledgement that his attacks on Dean Chemerinsky were hypocritical and without the slightest foundation in truth. **Nonetheless, when Baytieh's public statements in 2016 are compared with his 2019 statements to the DOJ, they reveal someone who lies and falsely attacks others indiscriminately.**

The actual intention of Baytieh's statement was to separate himself from the prosecutors assigned to *Dekraai*, whom he would paint as being derelict in their duties by failing to appropriately study the allegations. At the same, Baytieh implied that he or another more experienced prosecutor—not Wagner—should have been chosen as one of the prosecutors in *Dekraai* because that person would have demanded the necessary time to carefully analyze the defense's evidence that purportedly supported the allegations. That prosecutor—someone more like him—could have been counted on to study the allegations with a fine-tooth comb. Baytieh made it clear that he believed the assigned prosecution team never took this essential action. Quite obviously, Baytieh never explained during his lecture on proper prosecutorial practices why he never came forward at any point during the three years of protracted litigation to share this knowledge that the defense claims were being attacked without proper study by his agency. He also certainly never took a moment to explain why, if he failed himself to study the allegations and he had information that the *Dekraai* team did not, he had attacked their veracity and those who determined there was substantial evidence to support the claims.

While the failure of the *Dekraai* prosecution team to carefully analyze the allegations was reprehensible, Baytieh was the one lawyer in the county who could not

appropriately invoke their failure in order to favorably contrast his own commitment to fairness and proper legal practices. Not only had he pretended publicly that he had conducted a study of the facts that supported his assailing of the defense allegations in *Dekraai*, but he did so knowing the truth about what is revealed in this motion: Five years before the *Dekraai* motions were filed, he had initiated in *Smith* the most egregious informant-related misconduct in this county's history, which he then advanced as he misled the DOJ and continued to conceal the truth about what occurred.

Moreover, his responsibility to study the evidence in *Dekraai* at the time was not rooted solely in the impropriety of failing to study allegations he was claiming were false. As head of the Special Prosecutions Unit and the *Brady* Notification System, he had an independent responsibility to study the numerous incidents of alleged police and prosecutorial misconduct that potentially warranted adding multiple individuals to the System. However, Baytieh has never shown an inkling of insight into or ability to appreciate his hypocrisy. The greater good is self-protection, and that always overpowers all other more legitimate interests.

As indicated above, by the time of his 2019 DOJ interview, the winds had shifted. This was due to a series of appellate and trial court rulings in *Dekraai* and other cases, as well as the fact that the DOJ was three years into its investigation. Thus, after placing his finger in that wind, Baytieh made his selection. Honesty was not a consideration. He took his shot at persuading DOJ personnel why prosecutors Wagner and Simmons were solely responsible for the failure to closely examine allegations leveled in *Dekraai*, and that his responsibilities as head of the Special Prosecutions Unit left him inadequate time to study the evidence—again, apparently, hoping that the DOJ team a) had not located and studied his prior public statements before his interview; b) did not recognize that his Special Prosecutions Unit should have been required, if Baytieh was actually committed to constitutionally mandated discovery, to study the allegations for purposes of determining whether officers discussed in this motion engaged in conduct that warranted their addition

to the *Brady* Notification System; and c) did not discover his role in the historic misconduct described herein.

Baytieh's undertakings and words are important because they show, again, the little importance he places on the truth. He does not just try to revise history in whatever manner he thinks will best suit him. He seeks to erase it.

## XVIII. Both the OCDA and the DOJ Determine that Prosecutors Blocked Disclosures from the SH Log Near the Time of the *Dekraai* Court of Appeal Ruling in Late 2016—Corroborating Baytieh's Role and His Attempt to Mislead in 2021 Public Statements

In July 2020, the OCDA released its Special Report on the *Dekraai* Jailhouse Informant Controversy ("Special Report"). The Special Report stated the following:

> In a June 9, 2016 press release, the OCDA publicly announced "OCDA's Action Plan to Remedy Legal Issues" by continuing "to analyze the entirety of the SH Log material to determine what other cases, if any, were affected, what *Brady* issues and *Massiah v. United States* ... violations, if any, need to be reported to defendants, the court" and the Cal AG. **This effort was later inappropriately abandoned by the former OCDA administration after the Court of Appeal failed to reinstate OCDA as the prosecution of record in the *Dekraai* case.**

(Exh. G2, p. 23, bolding added.)

The DOJ provided a similar analysis in the section of its 2022 report describing the failure of the Rackauckas-led OCDA to make disclosures from the SH Log:

> In 2016, prosecutors admitted that the Log contained information that defendants Scott Dekraai and Daniel Wozniak were entitled to under *Brady v. Maryland*. But at the time, OCDA also pledged that it would "analyze the entirety of the SH Log material to determine what other cases, if any, were affected," and what "violations, if any . . . need to be reported to defendants, the court, and the CAG [California Attorney General]." OCDA did not live up to this pledge.

(Exh. D1, p. 50.)

Baytieh did not simply fail to live up to his office's pledge. As has been discussed, he did his very best to make sure that it was decimated—making sure that his office's Special Prosecutions Unit never even examined the SH Log when considering who should be added to the *Brady* Notification System. This was a premeditated and deliberated decision to re-bury the log. The goal was to stop SH Log entries from being seen by defendants, with the greater objective for Baytieh being that no defendant or defense counsel saw the entries related to Paul Smith's case.

Engaging in this misconduct was certainly not going to stop Baytieh from lying to the public about his mindset and actions. Baytieh stated in 2021 that the Court of Appeal's opinion "…put more light on the problem, and I accepted it and I agree with it 100 percent." (Saavedra, *Orange County DA Official Mired in Controversy As Head Of Special Prosecutions Now Wants To Be A Judge*, OC Register, April 8, 2021.) That was a bald-faced lie. It is also a statement that will stand the test of time as an outrageous and compelling example of a man who deceives with stunning ease—audaciously claiming that the ruling had spurred an awakening in his thinking about jailhouse informant issues when, in fact, he and his prosecutorial co-conspirators actually responded in the most disrespectful manner possible to the Court of Appeal's analysis and findings.

## XIX. Affected Cases

In this section, Smith will identify and briefly describe cases in which Baytieh caused discovery violations by failing to disclose impeaching misconduct committed by members of the prosecution team in *People v. Smith*.

### A. Cases Prosecuted by Baytieh in which Wert, Voght, or Beeman Testified

***People v. Michael Stewart Garten*** **(No. 06CF3677)**

Defendant Michael Stewart Garten was charged on November 11, 2006 with murder, a felony violation of PC 187(a), and voluntary manslaughter, a felony violation of PC 192(a). (Redacted Court Vision, *People v. Michael Stewart Garten*, Orange County Superior Court Case Number 06CF3677, attached herein as Exhibit O3.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. O3.)

Investigator Donald Voght testified during the preliminary hearing on September 14, 2007. (Exh. O3.)

On January 11, 2011, Garten pled guilty to voluntary manslaughter, and was sentenced to 11 years in state prison. (Exh. O3.) That same day, the prosecution filed a motion to dismiss the murder charge, which the court granted. (Exh. O3.)

***People v. Manuel Roland Ortiz* (No. 06WF3649)**

Defendant Manuel Roland Ortiz was charged on December 12, 2006 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Manuel Roland Ortiz*, Orange County Superior Court Case Number 06WF3649, attached herein as Exhibit P3.) He was also charged with attempted murder, a felony violation of PC 664(a)-187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Exh. P3.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. P3.)

Investigator Donald Voght testified on the afternoon of October 8, 2008, the morning of October 14, 2008, and the morning of April 20, 2009. (Exh. P3.)

On April 22, 2009, the court declared a mistrial regarding the murder charge. (Exh. P3.) That same day, the jury found Ortiz not guilty of attempted murder. (Exh. P3.) On June 15, 2009, the OCDA filed a First Amended Information adding a charge of assault with a deadly weapon other than a firearm in violation of PC 245(a)(1), and an enhancement for inflicting great bodily injury in violation of PC 12022.7(a). (Exh. P3.)

On September 17, 2009, the prosecution team added a charge of voluntary manslaughter, a felony under PC 192(a), and an enhancement for personal use of a deadly weapon, a violation of PC 12022(b)(1), to the First Amended Information. (Exh. P3.) That same day, Ortiz pled guilty to the voluntary manslaughter charge, the enhancement was dismissed, and the court dismissed the murder and assault charges. (Exh. P3.) Also on that same day, Ortiz was sentenced to a total term of 3 years in state prison. (Exh. P3.)

***People v. Clarence Eugene Butterfield*** **(No. 09ZF0077)**

Defendant Clarence Eugene Butterfield was charged on December 8, 2009 with murder, a felony violation of PC 187(a), and assault with a firearm, a felony violation of PC 245(a)(2). (Redacted Court Vision, *People v. Clarence Eugene Butterfield*, Orange County Superior Court Case Number 09ZF0077, attached herein as Exhibit Q3.) Additionally, he was charged with the special circumstance of torture in violation of PC 190.2(a)(18), and the special circumstance of mayhem in violation of PC 190.2(a)(17). (Exh. Q3.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. Q3.)

Detective Donald Voght testified on the morning of August 11, 2010. (Exh. Q3.)

On August 19, 2010, Butterfield was convicted of all counts, and both the special circumstances and the enhancement were found true. (Exh. Q3.) On October 6, 2010, Butterfield was sentenced to an indeterminate life sentence without the possibility of parole in addition to a consecutive sentence of 3 years in state prison. (Exh. Q3.)

***People v. Edgar Calvillo*** **(No. 08CF0919)**

***People v. Alfredo Cruz*** **(No. 08CF0919)**

Defendants Edgar Calvillo and Alfredo Cruz were charged on March 24, 2008 with murder, a felony violation of felony PC 187(a). (Redacted Court Vision, *People v. Edgar Calvillo*, Orange County Superior Court Case Number 08CF0919, attached herein as Exhibit T3; Redacted Court Vision, *People v. Alfredo Cruz*, Orange County Superior Court Case Number 08CF0919, attached herein as Exhibit U3.) Calvillo was additionally charged

with the special circumstance of discharging a firearm from a vehicle during a murder in violation of PC 190.2(a)(21), and with the use of a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Exh. T3.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. T3; Exh. U3.)

In *Calvillo*, Investigator Raymond Wert testified at the trial in the afternoon on November 17, 2009, in the morning on November 19, 2009, in the morning and afternoon on November 23, 2009, and in the morning on November 24, 2009. (Exh. T3.)

In *Cruz*, Wert testified on December 13, 2010. (Exh. U3.)

Calvillo was convicted of all three felony charges, including first-degree murder in violation of PC 187(a), and the jury found true the charged special circumstance and enhancement. (*People v. Calvillo* (Cal. Ct. App., Mar. 25, 2011, No. G043333) 2011 Cal. App. Unpub. WL 1102864.) On February 6, 2010, Calvillo was sentenced to a total of 40 years to life in state prison. (Exh. T3.) The Court of Appeal reduced the conviction to second-degree murder on the prosecution's recommendation and set aside the 190.2(a)(21) enhancement. (*Calvillo* (2011) WL 1102864 at p. 1.)

On December 16, 2010, Cruz was convicted of second-degree murder. (Exh. U3.) On March 25, 2011, Cruz was sentenced to 15 years to life in state prison. (Exh. U3.)

Defendant Calvillo appealed the conviction. Defendant argued that the trial court improperly denied his motion to exclude the March 2008 confession, which he claimed was involuntary and obtained by OCSD Investigators in violation of *Miranda v. Arizona* (A1966) 384 U.S. 436. (*Ibid.*)

On March 21, 2008, OCSD Investigators Spencer and Voght arrested Calvillo and transported him to the OCSD for an interview. (*Calvillo* (2011) WL 1102864 at p. 1.) Spencer told Calvillo that if he were honest and truthful, "everything's going to be alright" but if he were to play "games[,]" it would not "look good[.]" (*Ibid*.) Investigator Spencer then left the defendant to be interviewed by Investigators Todd and Wert. (*Ibid*.) Defendant was not handcuffed. (*Ibid*.) Defendant was then read his *Miranda* rights by Wert. (*Ibid*.) Calvillo indicated that he understood each of the following: he had the right to remain

silent, anything he said could be used against him in court, he had a right to an attorney before and during questioning, and if he could not afford an attorney, one would be appointed for him before the questioning. (*Ibid*.) After reading defendant his *Miranda* rights, Wert and Todd did not ask him whether he waived his rights. (*Ibid*.)

Wert indicated to the defendant that they wanted Calvillo to tell them what had happened the previous night, the day of the murder. (*Ibid*.) Calvillo then recounted his actions before and after the murder. (*Ibid*.) He stated the following: Calvillo's friend, Julian, was at Defendant's house in Santa Ana on the day of the murder. (*Ibid*.) Julian's friend Freddie was also there, although Calvillo was not close with Freddie. (*Ibid.*) Freddie had come to the defendant's house to tell both Defendant and Julian that three brothers were looking for Calvillo, Julian, and Freddie, and that the three brothers had threatened to hurt their parents. (*Ibid*.) Freddie had said that approximately three weeks earlier, the three brothers had jumped Freddie at the brothers' house. (*Ibid.*) Calvillo and Julian then asked Freddie to drive them to the brothers' house. (*Id.* at p. 2.) Calvillo brought his gun to scare the brothers. (*Ibid*.) Calvillo told Freddie he had no intention of shooting anybody. (*Ibid*.) After arriving at the brothers' house, Julian approached one of the brothers and a fight between the two of them soon broke out. (*Ibid*.) Although Calvillo at first stood nearby, Calvillo retrieved his gun from the car and pointed it at the brother Julian was fighting with. (*Ibid.*) While Julian, Calvillo, and Freddie drove away, Calvillo shot at the brother four times, though intended not to hit him. (*Ibid.*)

Later, Wert asked Calvillo if he knew the victim had died. (*Ibid*.) Calvillo denied this and stated, "[h]e's not dead[,]" even after it was repeated multiple times. (*Ibid*.) Calvillo then began to weep. (*Id.* at p. 3.)

On appeal, Calvillo contended that he never waived his *Miranda* rights, pointing to his youth at the time and alleging that he was promised leniency. (*Id.* at p. 4.) Calvillo argued that Investigators Wert and Todd did not ask him if he was willing to waive his *Miranda* rights, nor did they advise him in a timely enough manner that the victim had

died, such that Calvillo could make an informed decision about submitting to the interview. (*Ibid*.) The Court of Appeal denied Calvillo's claim. (*Id.* at p. 5.)

Calvillo contended that Investigator Spencer had both threatened him and made a promise of leniency when he told him if he was honest, everything would be okay—but that if he were to play games, things would not look good. (*Id.* at p. 4.) The appellate court concluded that Calvillo's statement was voluntary and that the trial court did not err by admitting Calvillo's statement into evidence. (*Id.* at p. 5.) On March 25, 2011, the appellate court affirmed the judgment. (*Id.* at p. 6.)

On March 18, 2020, the Court of Appeal issued an opinion reversing Cruz's petition for resentencing under PC 1170.95 and remanded the matter for further proceedings on the merits. (Exh. U3.)

***People v. Gary A. Shawkey*** **(No. 09ZF0078)**

Defendant Gary A. Shawkey was charged on December 10, 2009 with murder, a felony violation of PC 187(a), and a special circumstance for murder for financial gain in violation of PC 190.2(a)(1). (Exh. M2.) Shawkey was also charged with grand theft, a felony violation of PC 487(a), and an enhancement for theft exceeding $150,000, a violation of PC 12022.6(a)(2). (Exh. M2.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. M2.)

Investigator Donald Voght testified on the morning of June 2, 2011. (Exh. M2.) Investigator Raymond Wert testified on the afternoon of June 2, 2011, and again on the morning of June 8, 2011. (Exh. M2.)

On June 21, 2011, Shawkey was convicted of all counts. (Exh. M2.) On July 22, 2011, Shawkey was sentenced to a total term of life in prison without the possibility of parole, in addition to a concurrent term of 5 years in state prison. (Exh. M2.)

***People v. Richard Gustav Forsberg*** **(No. 10CF2387)**

Defendant Richard Gustav Forsberg was charged on August 31, 2010 with murder, a felony violation of PC 187(a), and an enhancement for special circumstance of lying in wait, a felony violation of PC 190.2(a)(15). (Redacted Court Vision, *People v. Richard Gustav Forsberg*, Orange County Superior Court Case Number 10CF2387, attached herein as Exhibit V3.) On June 10, 2011, the prosecution requested dismissal of the special circumstance enhancement. (Exh. V3.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. V3.)

Investigator Donald Voght testified on the morning of June 10, 2011. (Exh. V3.)

On December 10, 2012, Forsberg was convicted of second-degree murder. (Exh. V3.) On February 1, 2013, Forsberg was sentenced to 15 years to life in state prison. (Exh. V3.)

***People v. Miguel Angel Guillen*** **(No. 06CF3677)**
***People v. Garret Eugene Aguilar*** **(No. 06CF3677)**
***People v. Jared Louis Petrovich*** **(No. 06CF3677)**
***People v. Stephen Paul Carlstrom*** **(No. 06CF3677)**
***People v. Raul Villafana (*****No. 06CF3677)**

Defendant Miguel Angel Guillen was charged on January 11, 2011 with murder, a felony violation of PC 187(a), and voluntary manslaughter, a felony violation of PC 192(a). (Redacted Court Vision, *People v. Miguel Angel Guillen*, Orange County Superior Court Case Number 06CF3677, attached herein as Exhibit W3.) On August 4, 2011, the prosecution team made a motion to dismiss the voluntary manslaughter charge, which the court subsequently granted. (Exh. W3.)

Co-defendants Garret Eugene Aguilar, Jared Louis Petrovich, Stephen Paul Carlstrom, and Raul Villafana were charged with murder, a felony violation of PC 187(a). (Redacted Court Vision, *People v. Garret Eugene Aguilar*, Orange County Superior Court Case Number 06CF3677, attached herein as Exhibit X3; Redacted Court Vision, *People v. Jared Louis Petrovich*, Orange County Superior Court Case Number 06CF3677, attached

herein as Exhibit Y3; Redacted Court Vision, *People v. Stephen Paul Carlstrom*, Orange County Superior Court Case Number 06CF3677, attached herein as Exhibit Z3; Redacted Court Vision, *People v. Raul Villafana*, Orange County Superior Court Case Number 06CF3677, attached herein as Exhibit A4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. W3; Exh. X3; Exh. Y3; Exh. Z3; Exh. A4.)

Investigator Donald Voght testified on the morning of August 23, 2011. (Exh. W3; Exh. X3; Exh. Y3; Exh. Z3; Exh. A4.)

On October 25, 2011, all defendants were convicted of second-degree murder. (Exh. W3; Exh. X3; Exh. Y3; Exh. Z3; Exh. A4.) On December 2, 2011, Guillen was sentenced to an indeterminate life sentence with the possibility of parole in addition to a consecutive term of 5 years in state prison. (Exh. W3.) On January 27, 2012, Aguilar and Petrovich were sentenced to 15 years to life in state prison. (Exh. X3; Exh. Y3.) On March 21, 2012, Carlstrom was sentenced to 15 years to life in state prison. (Exh. Z3.) On April 13, 2012, Villafana was sentenced to 15 years to life in state prison. (Exh. A4.)

***People v. Christian William Carney*** **(No. 08ZF0022)**

Defendant Christian William Carney was charged on July 10, 2008 with murder in violation of felony PC 187(a), and an enhancement for discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Redacted Court Vision, *People v. Christian William Carney*, Orange County Superior Court Case Number 08ZF0022, attached herein as Exhibit B4.) Carney was also charged with felony violations of PC 422, criminal threats, and PC 136.1(a)(2), attempts to prevent or dissuade any witness or victim from attending or giving testimony. (Exh. B4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. B4.)

Investigator Donald Voght was designated as the prosecution's Investigating Officer on November 29, 2011. (Exh. B4.) Voght also testified on December 6, 2011, and on the morning of December 7, 2011. (Exh. B4.)

Investigator Raymond Wert testified on the morning of December 5, 2011. (Exh. B4.)

On December 20, 2011, Carney was convicted of all counts. The enhancement alleged pursuant to PC 12022.53(d) was found not true. (Exh. B4.) On March 2, 2012, Carney was sentenced to a total term of 28 years and 8 months to life in state prison. (Exh. B4.)

***People v. Annamaria Magno Gana*** **(No. 11CF1199)**

Defendant Annamaria Magno Gana was charged on May 9, 2011 with murder, a felony violation of PC 187(a), with an enhancement for discharging a firearm causing great bodily injury or death, a felony violation of PC 12022.53(d); attempted murder, a felony violation of PC 664(A)-PC187(a), with an enhancement for discharging a firearm in violation of PC 12022.53(d); and attempted premeditated murder, a felony violation of PC 664(a). (Redacted Court Vision, *People v. Annamaria Magno Gana*, Orange County Superior Court Case Number 11CF1199, attached herein as Exhibit C4.) On July 5, 2011, the OCDA filed a First Amended Complaint adding a second count of attempted murder with an enhancement for the special circumstance of lying in wait in violation of PC 190.2(a)(15). (Exh. C4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. C4.)

Sergeant Raymond Wert testified on March 12, 2013. (Exh. C4.)

On April 3, 2013, Gana was convicted of all counts. (Exh. C4.) On June 20, 2013, Gana was sentenced to a total term of 40 years to life in state prison. (Exh. C4.)

***People v. Anthony Darnell Wade*** **(No. 10ZF0088)**

Defendant Anthony Darnell Wade was charged on April 22, 2010 with murder, a felony violation of PC 187(a); the special circumstances of robbery, murder while committing rape, burglary, and torture in violation of PC 190.2(a); and an enhancement for personally using a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision,

*People v. Anthony Darnell Wade*, Orange County Superior Court Case Number 10ZF0088, attached herein as Exhibit D4.) Wade was also charged with inflicting injury on an elder adult, a felony violation of PC 368(b)(1), with enhancements for personally using a deadly weapon in violation of PC 12022(b)(1), and for causing great bodily injury on an elder in violation of PC 12022.7(c); robbery, a felony violation of PC 211/212.5(a), with an enhancement for personally using a deadly weapon in violation of PC 12022(b)(1); burglary, a felony violation of PC 459-460(a), with an enhancement for personally using a deadly weapon in violation of PC 12022(b)(1); torture, a felony violation of PC 206, with an enhancement for personally using a deadly weapon in violation of PC 12022(b)(1); rape/duress/menace, a felony violation of PC 261(a)(2); and unlawful taking of a vehicle, a felony violation of VC 10851(a). (Exh. D4.)

Baytieh was the assigned prosecutor. (Exh. D4.)

Investigator Beeman testified on the afternoon of September 3, 2013. (Exh. D4.)

On September 6, 2013, Wade was convicted of all counts (Exh. D4.) On November 12, 2013, Wade was sentenced to death. (Exh. D4.)

***People v. Hilbert Thomas*** **(No. 10ZF0087)**

Defendant Hilbert Thomas was charged on April 22, 2010 with two counts of murder, a felony violation of PC 187(a). It was also alleged that in the commission of the murder there existed the special circumstances of robbery, burglary, and multiple murder convictions in violation of PC 190.2(a). There was also an additional alleged enhancement for discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Redacted Court Vision, *People v. Hilbert Thomas*, Orange County Superior Court Case Number 10ZF0087, attached herein as Exhibit E4.) He was additionally charged with robbery, a felony violation of PC 211/212.5(c); burglary, a felony violation of PC 459-460(b); and unlawful taking of a vehicle, a felony violation of VC 10851(a). (Exh. E4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. E4.)

Detective Donald Voght testified on the afternoon of February 10, 2014. (Exh. E4.) Both Wert and jailhouse informant Anthony Boozer appeared on People's Revised Witness List #2, attached herein as Exhibit F4. Neither ultimately testified. (Exh. E4.)

On February 10, 2014, the prosecution moved to dismiss the multiple murder enhancements attached to the first count of murder, which the court granted. (Exh. E4.) On February 11, 2014, Thomas was convicted of all other counts. (Exh. E4.) On June 16, 2014, Thomas was sentenced to death. (Exh. E4.)

***People v. Leobardo Valladares*** **(No. 13WF0932)**

Defendant Leobardo Valladares was charged on September 20, 2013 with murder, a felony violation of PC 187(a), and an enhancement for discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Redacted Court Vision, *People v. Leobardo Valladares*, Orange County Superior Court Case Number 13WF0932, attached herein as Exhibit G4.) On August 3, 2015, the Original Information was amended to include a second enhancement for personal use of a firearm in violation of PC 12022.5(a). (Exh. G4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. G4.)

Investigator Donald Voght testified on the afternoon of July 27, 2015. (Exh. G4.)

On August 4, 2015, Valladares was convicted of murder and both enhancements were found to be true. (Exh. G4.) On September 25, 2015, the court struck the enhancement for personal use of a firearm in violation of PC 12022.5(a), and sentenced Valladares to a total term of 50 years to life in state prison. (Exh. G4.)

***People v. Charles Patrick Drew*** **(No. 13ZF0161)**

Defendant Charles Patrick Drew was charged on May 9, 2013 with murder, a felony violation of PC 187(a), with four enhancements for PC 190.2(a)(17)(C), (D), (F), and (K); rape of an unconscious person, a felony violation of PC 261(a)(4); sodomy, a felony violation of PC 286(f); oral copulation of an unconscious person, a felony violation of PC

288a(f); sexual penetration of an unconscious person, a felony violation of PC 289(d); and assault with a deadly weapon other than a firearm, a felony violation of PC 245(a)(1). (Redacted Court Vision, *People v. Charles Patrick Drew*, Orange County Superior Court Case Number 13ZF0161, attached herein as Exhibit H4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. H4.)

Sergeant Raymond Wert testified on August 20, 2015. (Exh. H4.)

On September 15, 2015, Drew was convicted of all counts. (Exh. H4.) On October 23, 2015, Drew was sentenced to life without the possibility of parole in state prison. (Exh. H4.)

***People v. Jean Pierre Castellanos*** **(No. 07HF0954)**

Defendant Jean Pierre Castellanos was charged on September May 10, 2007 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Jean Pierre Castellanos*, Orange County Superior Court Case Number 07HF0954, attached herein as Exhibit I4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. I4.)

Investigator Donald Voght testified on the morning and afternoon of August 20, 2007, and on the afternoon of July 30, 2008. (Exh. I4.) Voght was designated as the prosecution's Investigating Officer on July 22, 2008, and was present at counsel table on July 24, July 29, July 30, and July 31, 2008. (Exh. I4.) Wert testified on the morning of July 24, 2008. (Exh. I4.)

On August 4, 2008, Castellanos was convicted of the lesser offense of PC 192(a), voluntary manslaughter. The enhancement for the use of a deadly weapon was found true. (Exh. I4.) On September 26, 2008, Castellanos was sentenced to a total term of 11 years in state prison. (Exh. I4.)

On July 6, 2012, the Honorable Craig Robison denied defendant's request for production of transcripts and case related material of prior judicial proceedings. (Exh. I4.)

***People v. Salvador Chavo Marquez*** **(No. 06ZF0142)**

Defendant Salvador Chavo Marquez was charged on December 13, 2006 with murder, a felony violation of PC 187(a). (Redacted Court Vision, *People v. Salvador Chavo Marquez*, Orange County Superior Court Case Number 06ZF0142, attached herein as Exhibit J4.) The defendant was additionally charged with the special circumstances of burglary in violation of 190.2(a)(17)(G), and the special circumstance of torture in violation of PC 190.2(a)(18). (Exh. J4.) The murder charge was accompanied with the enhancement of personal use of a deadly weapon in violation of PC 12022(b)(1). (Exh. J4.) He was also charged with cruelty to animals in violation of PC 597(a), and unlawful taking of a vehicle in violation of 10851(a). (Exh. J4.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. J4.)

Investigator Donald Voght testified on the afternoon of February 19, 2009. (Exh. J4.)

On March 2, 2009, Marquez was convicted of all counts. (Exh. J4.) On April 24, 2009, Marquez was sentenced to an indeterminate life sentence without the possibility of parole in addition to a sentence of 1 year in state prison. (Exh. J4.)

On May 20, 2010, the conviction was affirmed by the California Court of Appeal. (Exh. J4.)

### B. Cases Where Baytieh Was Not the Prosecutor, but in Which Wert, Voght, or Beeman Testified

***People v. Alejandro Hurtado*** **(No. 08SF0509)**

Defendant Alejandro Hurtado was charged on June 11, 2008 with murder, a felony violation of PC 187(a), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1), and participation in criminal street gang activity, a felony violation of PC 186.22(a). (Redacted Court Vision, *People v. Alejandro Hurtado*, Orange County Superior Court Case Number 08SF0509, attached herein as Exhibit K4.)

Investigator Donald Voght testified on the morning and afternoon of October 16, 2008. (Exh. K4.)

On December 10, 2009, the jury found Hurtado not guilty of murder, and the court declared a mistrial as to the criminal street gang activity charge and to the lesser included charges related to the murder count. (Exh. K4.) On January 29, 2010, the prosecution team amended the Original Information to charge Hurtado with voluntary manslaughter, a felony violation of PC 192(a), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1). (Exh. K4.) That same day, Hurtado pled guilty to the voluntary manslaughter charge and the gang enhancement. (Exh. K4.) On January 14, 2011, Hurtado was sentenced to a total term of 3 years in state prison; credit for time served exceeded Hurtado's sentence, so he was released and ordered to begin parole. (Exh. K4.) That same day, the court approved the prosecution team's motion to dismiss all other outstanding counts and enhancements. (Exh. K4.)

***People v. Stephen Jeffrey Clevenger*** **(No. 09ZF0062)**
***People v. Mitchell Wade Highley*** **(No. 09ZF0062)**
***People v. Lance Eric Wulff*** **(No. 09ZF0062)**
***People v. Brian Merle Sawin*** **(No. 09ZF0062)**
***People v. Roarke Ryan Ocampo*** **(No. 09ZF0062)**

Defendant Stephen Jeffrey Clevenger was charged on May 29, 2009 with two counts of robbery in felony violation of PC 211-212.5(a)-213(a)(1); burglary, a felony violation of PC 459-460(a), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(C); assault with a deadly weapon other than a firearm, a felony violation of PC 245(a)(1), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(B); and participation in criminal street gang activity, a felony violation of PC 186.22(a). (Redacted Court Vision, *People v. Stephen Jeffrey Clevenger*, Orange County Superior Court Case Number 09ZF0062, attached herein as Exhibit L4.) On June 11, 2009, the OCDA filed a First Amended Indictment that added an enhancement of personally

using a deadly weapon to the first robbery charge, a felony violation of PC 12022(b)(1). (Exh. L4.)

The prosecution successfully sought indictments of five defendants: Clevenger, Mitchell Highley, Roarke Ocampo, Brian Sawin, and Lance Wulff. The case involved an alleged home invasion robbery perpetrated by members of the Orange County Skins ("OCS"), a criminal street gang. (Partial Grand Jury Transcript, *People v. Stephen Jeffrey Clevenger*, Orange County Superior Court Case Number 09ZF0062, dated May 28, 2009, attached herein as Exhibit M4, p. 1.) Four of the five people indicted were alleged members of the OCS; Ocampo was the only one who was not. (Exh. M4, p. 1.)

Ocampo had previously shared an apartment in San Clemente with a friend, Kristy Reed. (Exh. M4, p. 2.) Reed's brother lived in the apartment as well. (Exh. M4, p. 2.) At the time of the offense, Ocampo had moved out because of an argument between him and Reed. (Exh. M4, p. 3.) The argument started when Reed discovered that some of the money she had been saving was missing, and she became suspicious of Ocampo after hearing rumors that he was spending the money. (Exh. M4, p. 3.) The prosecution alleged that Ocampo wanted to get back at Reed due to the argument, so he paid Wulff—the leader of OCS and an alleged acquittance of Ocampo—$500 to put a "hit" on Reed and Adam Goldberg, Reed's boyfriend and roommate at the time of the incident. (Exh. M4, p. 4.)

On January 16, 2009, at approximately 10:00 am, Clevenger, Highley, and Sawin allegedly broke into the San Clemente apartment occupied by Reed and Goldberg. (Exh. M4, p. 5.) Both Reed and Goldberg were assaulted, and a Dell computer and PlayStation 3 belonging to Reed's brother were stolen. (Exh. M4, p. 6.)

At the time of the incident, Clevenger was dating Jessica Glanz. (Exh. M4, p. 3.) Glanz had spent the weekend of the incident with Clevenger and his friends from OCS and became aware that they were planning a home invasion but was not present when the crime was committed. (Exh. M4, pp. 4, 24.) Glanz ended up reporting the crime 11 days after the incident took place and became a key witness in the Grand Jury proceedings. She

identified Clevenger, Highley, Sawin, and Wulff as members of the gang and described the events surrounding the crime. (Exh. M4, pp. 8, 15, 23, 24, 25, 26.)

The prosecution alleged that even though this was not a crime directed at the member of another gang, it benefitted the status of OCS, and their "ability to go out and conduct criminal enterprise." (Partial Grand Jury Transcript, *People v. Stephen Jeffrey Clevenger*, Orange County Superior Court Case Number 09ZF0062, dated May 29, 2009, attached herein as Exhibit N4, p. 183.) The prosecution's case relied on the following evidence: (1) identification of the suspects by Reed and Glanz; (2) jail phone calls between the defendants tying them to the crimes, which were listened to by OCSD Investigator Beeman; (3) a Dell laptop that was stolen from Reed's apartment and subsequently located from Defendant Highley's former residence; and (4) DNA evidence. (Exh. N4, p. 183.)

Beeman testified at the Grand Jury proceeding on May 28, 2009. (Exh. M4, p. 130.) Beeman stated that he was then assigned to the Special Operations Intelligence Unit, had been a law enforcement officer for 20 years, and spent the previous eight years working as an investigator. (Exh. M4, p. 131.) According to Beeman's testimony, he was part of the investigation in this case, and initially became aware that Clevenger and Highley were possible suspects after reading a Santa Cruz Police Department incident report. (Exh. M4, pp. 131-132.) Based on this report, Beeman conducted a follow-up investigation, which included monitoring jail calls by Clevenger and Highley while they were in custody. (Exh. M4, p. 132.) Beeman testified that "…the entire Orange County jail uses a company called Global Tell Link, GTL. They're the phone company that is responsible for the phone system. Any time an inmate makes a phone call, a collect phone call, it is recorded and stored in the GTL database for up to three years…" (Exh. M4, p. 132.) Per Beeman, it was these phone calls that linked the defendants to the crime. (Exh. M4, pp. 133, 138.)

Beeman testified that during one of the calls, Highley was asked about his involvement in the crime. According to Beeman, Highley responded, "I didn't touch anyone. I was the one that didn't. I was the one ransacking. And, Nicole, do you know why we were there? There was a hundred pounds of pot. That's worth a million dollars."

(Exh. M4, pp. 133-134.) Beeman later corrected himself and stated that Highley actually said the amount was 50 pounds. (Exh. M4, p. 134.) Moreover, Beeman testified that during one of the phone calls, Highley was trying to find a way to get Sawin to plead guilty, so that "they will stop hunting for us." (Exh. M4, p. 136.) Beeman testified that there were also calls regarding a Dell computer; Highley was on another phone call with his girlfriend, who told Highley that she had "picked up a laptop computer from his former residence [.]" (Exh. M4, p. 134.) According to Beeman, Highley wanted to know if the computer was the same that was taken from the home invasion in San Clemente. (Exh. M4, p. 134.) After describing the computer first to his girlfriend, she confirmed that the one she was in possession of was a silver Dell computer that was missing two keys (identical to what Highley had just described to her.) (Exh. M4, p. 135.) Beeman testified that Highley continued to say "Okay, great. That was the only way they were linking me." (Exh. M4, p. 135.) Per Beeman, Highley then proceeded to tell his girlfriend to "tear off the serial number and put it away until he got home." (Exh. M4, p. 135.) Beeman said that he followed up his investigation by meeting with Highley's girlfriend, who eventually gave him the laptop in question. (Exh. M4, pp. 136-137.) Beeman stated that he investigated the laptop, and that it was a silver Dell computer with two missing keys. (Exh. M4, p. 137.) Following this, Beeman made an entry "on an official record" of the serial number and testified that it matched the number of the computer stolen from Reed's apartment. (Exh. M4, p. 137.)

Beeman opined that Clevenger was getting directions from Wulff. (Exh. M4, p. 139.) Beeman testified that he had listened to a call between Clevenger and Wulff, during which Clevenger told Wulff that "they had collected DNA from him and Mitch Highley and that they both refused to talk to the cops about the investigation when questioned." (Exh. M4, p. 139.) Clevenger, according to Beeman, also told Highley that he had spoken to Wulff, and that Highley could be "in the gang." (Exh. M4, p. 140.) Beeman further testified that during one of the phone calls he listened to, he heard the following: "Clevenger told Highley that the cops were fishing by collecting their DNA and that Sawin

wasn't talking like they both had thought. Because if Sawin was talking, the cops would have already arrested both of them and charged them with the home invasion robbery. And in regards to the DNA, he said, ['']If we had left our DNA, they - - it would have come back the following day,['] and they would have already been charged." (Exh. M4, pp. 140-141.)

Beeman went on to testify that he had subsequently talked to Glanz, Ocampo, and Wulff. (Exh. M4, p. 141.) During one of his discussions with Ocampo, Beeman stated that Ocampo admitted to making a false police report related to the case. (Exh. M4, p. 145.) Additionally, Beeman testified that Wulff had admitted to him that there was an "acquaintanceship" between Wulff and Ocampo, based on the fact that Ocampo had worked at a Pizza Port in San Clemente at the same time with Robert Fossem, who was friends with Wulff. (Exh. M4, p. 146.) However, Ocampo denied ever knowing Wulff, and was unable to pick him from a lineup. (Exh. M4, pp. 142, 143, 146.) Beeman additionally stated that Wulff did not admit to setting up the home invasion but admitted to knowing "more than he was saying." (Exh. M4, pp. 146-147.)

On August 30, 2010, the prosecution announced Defendant Clevenger had died, and the case against him was subsequently dismissed. (Exh. L4.)

On September 28, 2010, Defendant Ocampo pled guilty to two counts of robbery, a felony violation of PC 211-212.5(a)-213(a)(1) (counts one and two); one count of assault with a deadly weapon, a felony violation of PC 245(a)(1) (count four); and one count of false report of criminal offense, a misdemeanor in violation of PC 148.5(a) (count seven). (Redacted Court Vision, *People v. Roarke Ryan Ocampo*, Orange County Superior Court Case Number 09ZF0062, attached herein as Exhibit O4.) Other charges and enhancements against Ocampo were dismissed. (Exh. O4.) Ocampo was sentenced to nine years in state prison as to count one, two years in state prison for count two, one year in state prison for count four, and six months in jail for count seven. (Exh. O4.)

On February 25, 2011, Wulff pled guilty to street terrorism, a felony in violation of PC 186.22(a), and solicitation to commit a crime, a felony in violation of PC 653f(a); he was sentenced to 32 months in state prison and 6 months in jail. (Redacted Court Vision,

*People v. Lance Eric Wulff*, Orange County Superior Court Case Number 09ZF0062, attached herein as Exhibit P4.) Other charges against him were dismissed. (Exh. P4.)

On June 22, 2011, Highley pled guilty to two counts of robbery, felony violations of PC 211-212.5(a)-213(a)(1); one count of burglary, a felony violation of PC 459-460(a); one count of assault with a deadly weapon other than firearm, a felony violation of PC 245(a)(1); and street terrorism, a felony violation of PC 186.22(a). (Redacted Court Vision, *People v. Mitchell Wade Highley*, Orange County Superior Court Case Number 09ZF0062, attached herein as Exhibit Q4.) In addition, enhancements as to felony violations of PC 186.22(b)(1)(C) and 186.22(b)(1)(B) were found to be true, although stricken for purposes of sentencing. (Exh. Q4.) Highley was sentenced to state prison for a term of 15 years to life as to counts one and two (PC 211-212.5(a)-213(a)(1)). (Exh. Q4.)

Similarly, on June 22, 2011, Sawin pled guilty to two counts of robbery, felony violations of PC 211-212.5(a)-213(a)(1); one count of burglary, a felony violation of PC 459-460(a); assault with a deadly weapon other than firearm, a felony in violation of PC 245(a)(1) PC; and street terrorism, a felony violation of PC 186.22(a). (Redacted Court Vision, *People v. Brian Merle Sawin*, Orange County Superior Court Case Number 09ZF0062, attached herein as Exhibit R4.) Enhancements as to PC 186.22(b)(1)(C) and 186.22(b)(1)(B) were found to be true, while enhancement pursuant to PC 12022(b)(1) was dismissed. (Exh. R4.) Sawin was sentenced to state prison for a term of 15 years to life as to counts one and two, and the prison sentence was stayed pursuant to PC 654 as to the rest of the charges. (Exh. R4.)

***People v. Mauricio Molina (No. 07SF0626)***

***People v. Julian Santiago Sermano (No. 07SF0626)***

Defendants Mauricio Molina and Julian Santiago Sermano were charged on June 11, 2007 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Mauricio Molina*, Orange County Superior Court Case Number 07SF0626, attached herein

as Exhibit S4; Redacted Court Vision, *People v. Julian Santiago Sermano*, Orange County Superior Court Case Number 07SF0626, attached herein as Exhibit T4.) Defendant Sermano was additionally charged with an assault with a deadly weapon other than a firearm, a felony violation of 245(a)(1), and the enhancements of both inflicting great bodily injury, a violation of PC 12022.7(a), and personal use of a deadly weapon, a violation under 12022(b)(1). (Exh. T4.)

Investigator Raymond Wert was designated as the prosecution's Investigating Officer on February 5, 2008. (Exh. S4; Exh. T4.) Wert also testified that afternoon. (Exh. S4; Exh. T4.) In addition, in *Sermano*, Wert testified again on June 8, 2010, returned to the stand on June 14, 2010, and was recalled on June 21, 2010. (Exh. T4.)

In *Molina*, on September 4, 2009, the OCDA amended the Original Information to add a charge of voluntary manslaughter, a felony violation of PC 192(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Exh. S4.) That same day, Molina pled guilty to the manslaughter charge. (Exh. S4.) On May 21, 2010, the court dismissed the murder charge and sentenced Molina to a total term of 11 years in state prison. (Exh. S4.)

Sermano was found guilty of both charges and the enhancement of personal use of a deadly weapon to the murder charge. (Exh. T4.) The enhancements for the other charge were dismissed. (Exh. T4.)

In *Sermano*, the defense later, on August 27, 2010, moved to "strike Investigator Ray Wert's comments on page 9, lines 4 through 13, of the Probation & Sentencing Report, which are his opinion about the defendant and the comments are inappropriate." The court struck two statements provided by Wert. (Exh. T4.)

***People v. Ruben Nicholas Roa (No. 07CF0217)***

Defendant Ruben Nicholas Roa was charged on June 28, 2007 with murder, a felony violation of PC 187(a), and an enhancement for criminal street gang activity in violation of PC 186.22(b)(1). (Redacted Court Vision, *People v. Ruben Nicholas Roa*, Orange County

Superior Court Case Number 07CF0217, attached herein as Exhibit U4.) He was also charged with receiving stolen property, a felony in violation of PC 496(a), and an enhancement for criminal street gang activity in violation of PC 186.22(b)(1). (Exh. U4.) Finally, Roa was charged with participation in criminal street gang activity in violation of PC 186.22h(a). (Exh. U4.)

Investigator Donald Voght testified on the morning of October 21, 2010. (Exh. U4.)

On October 28, 2010, Roa was convicted of all counts. (Exh. U4.) On November 5, 2010, Roa was sentenced to a total term of 15 years to life in state prison. (Exh. U4.)

***People v. Joseph Govey*** **(No. 12ZF0134 and No. 11CF2247)**

Defendant Joseph Govey was charged on April 3, 2012 with possession of a firearm by a felon, a felony violation of PC 12021(a)(1), and an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(A); evading a police officer/reckless driving, a felony violation of VC 2800.2, with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(A); possession or receipt of items as forgery, a felony violation of PC 475(a), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(A); two counts of participation in criminal street gang activity, a felony violation of PC 186.22(a); solicitation of murder, a felony in violation of PC 653f(b), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1)(A); and attempted murder, a felony violation of PC 664(a)-187(a), with an enhancement for criminal street gang activity in in violation of PC 186.22(b)(1)(C). (Exh. Z1.)

Investigator Beeman testified on April 5, 2012. (Exh. D3, p. 208.)

On September 22, 2014, the Court granted the prosecution's motion to dismiss the charges regarding solicitation of murder, attempted murder, and one of the counts of participation in criminal street gang activity (along with the relevant enhancements). (Exh. Z1.) On October 2, 2014, the court granted the prosecution's motion to dismiss the case and all remaining charges, and Govey was released. (Exh. Z1.)

In August of 2011, Govey was sought by the police as a parolee at large. (Exh. D3, p. 134.) On approximately August 16, 2011, Marcel Irizarry ("Irizarry" or "Solo") notified the Huntington Beach Police Department as to the location of Joseph Govey and Shirley Williams. (Exh. D3, pp. 12, 134.) On that date, Govey led the police on a high-speed chase, before both he and Williams were arrested on parole warrants. (Exh. D3, pp. 29-41, 49-51.) A gun was found in the passenger side of the vehicle where Williams had been sitting, and ammunition was found under Williams' seat and in her purse. (Exh. D3, pp. 56, 87-88.) A shell casing was also located in her bra. (Exh. D3, pp. 87-88.)

On August 18, 2011, Govey was charged with one count of PC 12021(a)(1) [felon with a firearm]; one count of PC 12025(a)(1)/(b)(1) [having concealed firearm in vehicle with prior conviction]; one count of VC 2800.2 [evading a peace officer reckless driving]; one count of PC 476 [check fraud]; one count of PC 186.22(a) [street terrorism]; one count of Business and Professions Code 4140 [unauthorized possession of hypodermic needle or syringe]; and one count of PC 148(a)(1) [resisting and obstructing officer]. (Redacted Court Vision, *People v. Joseph Govey*, Orange County Superior Court Case Number 11CF2247, attached herein as Exhibit V4.)

Govey was alleged to be an active participant in the criminal street gang Public Enemy Number 1 ("PEN1"). The firearm offenses, evasion, and check fraud were allegedly committed for the benefit of PEN1, and enhanced accordingly pursuant to PC 186.22(b)(1). The complaint further alleged nine prison priors pursuant to PC 667.5(b). (Exh. V4; Felony Complaint, *People v. Joseph Govey*, Orange County Superior Court Case Number 11CF2247, filed Aug. 18, 2011, attached herein as Exhibit W4.)

The prosecution subsequently alleged that, once in jail, Govey solicited other inmates and members of PEN1 to kill Irizarry. On January 27, 2012, an amended complaint against Govey adding new charges was filed. The amended complaint added one count of PC 182(a) [criminal conspiracy]; one count of PC 653f(b) [solicitation of murder]; and an additional prison prior pursuant to PC 667.5(b). (Amended Felony Complaint, *People v. Joseph Govey*, Orange County Superior Court Case Number 11CF2247, filed Jan.

27, 2012, attached herein as Exhibit X4.)

Former Investigator Beeman testified that he monitored Govey's calls, and overheard him attempting to make a three-way call that did not go through. (Exh. D3, p. 216.) Govey then made a three-way call to another person, Casey Conger, during which Govey allegedly made incriminating statements. (Exh. D3, pp. 216-217.)

***People v. Jason Ara Erpinar (No. 09NF2881)***

Defendant Jason Ara Erpinar was charged on October 7, 2009 with two counts of rape by use of drugs, a felony violation of PC 261(a)(3), and one count of rape by duress or menace, a felony violation of PC 261(a)(3), with enhancements for each count pursuant to PC 667.61(b)/(e)(5). (Redacted Court Vision, *People v. Jason Ara Erpinar*, Orange County Superior Court Case Number 09NF2881, attached herein as Exhibit Y4.)

Sergeant Raymond Wert testified on the morning of August 17, 2012. (Exh. Y4.) Wert testified again on the morning and afternoon of September 6, 2013. (Exh. Y4.)

On August 30, 2012, Erpinar was convicted of three counts of rape. (Exh. Y4.) On October 11, 2013, Erpinar was sentenced to a total of 24 years in state prison. (Exh. Y4.)

According to the Court of Appeal opinion, Erpinar and Victim "A." had a 14-month relationship when they were both 17-year-old high school students. (*People v. Erpinar* (Cal. Ct. App., June 15, 2015, No. G049153) 2015 WL 3659945, at pp. 4-5.) A. was allegedly raped by force by Defendant in June or July 2007. (*Id*. at p. 5.) The second alleged rape was of an intoxicated person. It occurred on March 26, 2008, and the victim was identified as "D." (*Id*. at pp. 2-3.) The third alleged rape, which was allegedly by force, took place on March 7, 2009, and the victim was identified as "C." (*Id*. at p. 4.)

Erpinar was arrested in October 2009, and questioned in a recorded interview at the La Habra Police station. (*Ibid*.) Regarding C., Erpinar initially told detectives he did not remember her before recounting the events of March 7, 2009, saying he and C. had consensual sex. (*Id*. at p. 6.) Regarding D., Erpinar said she drank to excess at the park, fell and chipped her tooth on the car mirror or the ground, and vomited inside her car. (*Ibid*.)

He also said he told D.'s mother that he "did not force himself on her" or put anything in D.'s drink. (*Ibid*.) Regarding A., Erpinar said his relationship was "never healthy" with her. (*Ibid*.) Erpinar said his routine when meeting women was to meet, get food or coffee, get alcohol, hang out at a bar or park, then have sex, and that none of these relationships were "serious" or "very violent." (*Id*. at p. 7.)

A three-count complaint was filed against Erpinar in October 2009. (*Ibid*.) Deputy Public Defender Linda Hewitt represented him until December 11, 2009, when he substituted Randall T. Longwith as his attorney of record. (*Ibid*.) Longwith represented Erpinar at the preliminary hearing on November 30 and December 1, 2010, where Erpinar was charged with two counts of rape of an intoxicated person and one count of forcible rape. (*Ibid*.) On March 25, 2011, Erpinar substituted R. Dennis Rentzer as his attorney of record, but on August 22, 2011, (the first day of his trial) Erpinar withdrew his not guilty plea, pleaded guilty to all three counts, and accepted a sentence of 15 years in prison. (*Ibid*.) In September 2011, Erpinar wrote to the trial court asking to withdraw his guilty plea "on the ground he was mentally incapacitated when he changed his plea" and was allowed to do so at a hearing on October 17, 2011, because "the law did not permit his proposed sentence." (*Ibid*.) Erpinar elected to proceed pro-per as his own attorney. (*Ibid*.)

On August 17, 2012, Erpinar requested a continuance on grounds that jail personnel had taken numerous folders and notes from his cell, causing him to be left unprepared to adequately defend himself at trial. (Reporter's Transcript, *People v. Jason Ara Erpinar*, Orange County Superior Court Case Number 09NF2881, dated August 17, 2012, attached herein as Exhibit Z4, pp. 6-9.)

At an evidentiary hearing, the key witness from the OCSD was Sergeant Wert. Wert's testimony contradicted the representations of Erpinar that his items had been taken while being transferred:

> When he was moved I personally, on two different dates, was present during the move to make sure all of his materials, again, a very large amount of

> materials that exceeded what he, as a pro per inmate should have had; however, he was allowed to have that. Just not to interrupt the process with his proceedings…

(Exh. Z4, p. 20.)

The court ruled the following: "The Court finds that **Sergeant Wert's testimony was credible**. The court finds that Mr. Erpinar has not been denied his pro per privileges." (Exh. Z4, p. 37.) The Court's belief in Wert's testimony was key to its finding that Erpinar was engaged in "dilatory tactics" to delay the jury trial. (*Erpinar* (2015) WL 3659945 at p. 13.) Erpinar's motion to continue was denied and a jury panel was set for August 20, 2012. (*Ibid*.) On August 20, the Court denied a motion to continue, then denied Erpinar's subsequent motion for appointment of counsel. (*Id*. at pp. 9-10.) The Court reconsidered Erpinar's final request for a continuance to allow him to meet with his DNA expert, but after the prosecution said they would not rely on DNA evidence, the Court confirmed its denial of the motion. (*Id*. at p. 10.)

At trial, the jury found Erpinar guilty on all three counts. (*Ibid*.) Erpinar then retained counsel and brought a motion for a new trial, which the Court denied. (*Ibid*.) Erpinar was sentenced to eight years on each count for a total of 24 years in prison. (*Ibid*.)

On appeal, Erpinar raised several issues. They included those directly related to Wert's testimony and that implicit finding that Erpinar falsely stated that he had legal materials that had been taken. Erpinar argued that the trial court violated his constitutional right to counsel by denying his motion to withdraw his waiver of counsel and appoint new counsel. (*Ibid*.) The Court of Appeal held that, based on Erpinar's "dilatory" behavior and requests for lengthy continuances, the trial court did not abuse its discretion in denying his requests. (*Id*. at pp. 9-12.) This was the same language the trial court used after finding Wert credible. (Exh. Z4, p. 37.) Relatedly, Erpinar argued that the trial court abused its discretion by denying his August 20, 2012 request for a trial continuance. (*Erpinar* (2015) WL 3659945 at p. 12.) The Court of Appeal held that Erpinar "had been given virtually every accommodation necessary to adequately prepare" for trial and that the trial court

properly exercised its discretion in failing to find good cause for further continuances. (*Id*. at pp. 12-13.)

The Court of Appeal rejected the remainder of Erpinar's contentions and affirmed the conviction. (*Id*. at p. 20.)

***People v. David Anthony Luna*** **(No. 10WF3109)**

***People v. Alexander Soto*** **(No. 10WF3109)**

Defendant David Anthony Luna was charged on December 16, 2010 with felony second degree murder in violation of PC 187(a). An enhancement was added charging the defendant with being a gang member vicariously discharging of a firearm causing great bodily injury under 12022.53(d)/(e)(1). He was also charged for the special circumstance of criminal street gang activity in violation of PC 190.2(a)(22); criminal street gang activity in violation of PC 186.22(b)(1); and criminal street gang activity in violation of PC 186.22(a). (Redacted Court Vision, *People v. David Anthony Luna,* Orange County Superior Court Case Number 10WF3109, attached herein as Exhibit A5.) On May 18, 2012, the OCDA filed a First Amended Information that additionally charged Luna with discharging a firearm at an inhabited dwelling, housecar or camper, or at an occupied building, vehicle, or aircraft in violation of PC 246, and an enhancement for criminal gang activity in violation of PC 186.22(b)(4)(B). (Exh. A5.)

Defendant Alexander Soto was charged on December 16, 2010 with murder, a felony violation of PC 187(a), and enhancements for gang member vicarious discharge of a firearm causing great bodily harm in violation of PC 12022.53(d)/(e)(1), and criminal street gang activity in violation of PC 186.22(b)(1), as well as a special circumstance of criminal street gang activity in violation of PC 190.2(a)(22). Soto was also charged with participation in criminal street gang activity, a felony violation PC 186.22(a). (Redacted Court Vision, *People v. Alexander Soto*, Orange County Superior Court Case Number 10WF3109, attached herein as Exhibit B5.) On May 18, 2012, the OCDA filed a First Amended Information additionally charging Soto with discharging a firearm at an inhabited

dwelling, housecar or camper, or at an occupied building, vehicle, or aircraft, a felony violation of PC 246. (Exh. B5.)

Investigator Donald Voght testified in the afternoon on September 26, 2011. (Exh. A5; Exh. B5.)

Sergeant Raymond Wert testified in the afternoon on May 28, 2013, and in the morning on May 29, 2013. (Exh. A5; Exh. B5.)

On June 13, 2013, Luna and Soto were convicted of all counts. (Exh. A5; Exh. B5.) On March 28, 2014, Luna was sentenced to a total term of 40 years in state prison. (Exh. A5.) On January 31, 2014, Soto was sentenced to a total of 40 years to life in state prison. (Exh. B5.)

***People v. Daniel Luker*** **(No. 12CF1048)**

Defendant Daniel Luker was charged on April 10, 2012 with felony assault, in violation of PC 245(a)(4), with an enhancement for criminal street gang activity in violation of PC 186.22(b)(1). He was also charged with a felony for conspiring to commit a crime, violating PC 182(a)(1), and with a felony for participating in criminal street gang activity, violating PC 186.22(a). (Redacted Court Vision, *People v. Daniel Luker,* Orange County Superior Court Case Number 12CF1048, attached herein as Exhibit C5.)

Investigator Beeman testified on two occasions, in the morning and afternoon on August 28, 2012, and in the morning and afternoon on March 12, 2014. (Exh. C5.)

On March 19, 2014, Luker was convicted of the lesser included offense of misdemeanor assault, PC 240, with the gang enhancement. (Exh. C5.) He was also convicted of the conspiracy and street gang counts. (Exh. C5.) On July 11, 2014, Luker was sentenced to a total of 11 years in state prison. (Exh. C5.)

***People v. Daniel Luker*** **(No. 13CF3953)**

Defendant Daniel Luker was charged on December 13, 2007 with conspiracy to commit a crime, a felony under PC 182(a)(1), with an enhancement for criminal street gang

activity under PC 186.22(b)(1). He was also charged with a felony for participating in criminal street gang activity under PC 186.22(a). (Redacted Court Vision, *People v. Daniel Luker,* Orange County Superior Court Case Number 13CF3953, attached herein as Exhibit D5.) On January 31, 2014, OCDA filed a First Amended Complaint additionally charging Luker with attempted murder, a felony under PC 664(a)-PC187(a); and solicitation of murder, violating PC 653f(b). An enhancement for criminal street gang activity, violating PC 186.22(b)(1), was also added (Exh. D5.).

Investigator Beeman testified in the morning and afternoon on July 9, 2014. (Exh. D5.) Additionally, on July 7, 2014, the prosecution presented a transcript of a witness interview Beeman conducted. (Exh. D5.)

On July 10, 2014, Luker was convicted of all counts. (Exh. D5.) On July 11, 2014, Luker was sentenced to a total of 80 years to life in state prison. (Exh. D5.)

In Investigator Beeman's testimony from the morning and afternoon of July 9, 2014, he stated the following: Beeman had been with the OCSD for 24 years. (Partial Trial Transcript, *People v. Daniel Luker*, Orange County Superior Court Case Number 13CF3953, dated July 9, 2014, attached herein as Exhibit E5.) Beeman explained that he is assigned to the Special Operations Intelligence Detail, which entails several duties, including threat assessments, specialized investigations, and intelligence gathering. (Exh. E5, p. 509.) Regarding intelligence gathering on "white racist gangs", Beeman clarified that he collects information pertaining to white racist gangs, their associates, and, occasionally, will debrief gang members in exchange for leniency. (Exh. E5, p. 510.) Beeman had attended a debriefing interview with Daniel Garretto, a gang member, in order to ascertain whether the information Garretto could offer Beeman about his gang was worth offering him leniency. (Exh. E5, p. 511.) Garretto had previously attempted to contact the police to inform them of the threat to Breanna Chacon's life. (Exh. E5, pp. 574-575.) Breanna Chacon had testified against Defendant in November 2012. (Exh. E5, p. 572.) Subsequently, a "green light" was put on her, indicating that someone had ordered her

death or "bodily injury." (Exh. E5, pp. 142, 487.) On September 26, 2013, Luker had called Garretto to task him with the job of locating Chacon. (Exh. E5, p. 538.)

On October 22, 2013, Beeman had met Shantell Apodoca undercover as Joe Miller, cellmate of defendant Daniel Luker at the Orange County Jail, who had recently been released. (Exh. E5, pp. 512-513.) Beeman had set up this meeting by conducting two ruse calls to Apodoca pretending to be Miller as he knew that Apodoca was expecting a call from Miller to deliver messages and paperwork. (Exh. E5, p. 513.) Beeman knew that Apodoca was expecting such a delivery from Miller, as he had monitored a call from Luker to Apodoca in which Luker informed her that his cellmate, Miller, was going to be released and deliver paperwork to her. (Exh. E5, p. 513.) That evening of October 22, 2013, Beeman and Detective Wilson met Apodoca at her residence and interviewed her about this case. (Exh. E5, p. 516.) At the meeting, Apodoca agreed to assist law enforcement and act as if she had genuinely received the paperwork from Miller. (Exh. E5, p. 536.) Apodoca then called Luker the following day on October 23, 2013 at 7:01 PM; however, to Beeman's knowledge, no one was in her presence to instruct her on what to say to Luker. (Exh. E5, p. 536.)

Given the content of the aforementioned call between Luker and Apodoca, Beeman had a deputy at the jail search Miller upon release for potential documents against Chacon. (Exh. E5, p. 514.) On October 23, 2013, Beeman went to the Theo Lacy facility to see what the deputies had obtained from Miller. Miller had in his possession a transcript of Beeman interviewing Chacon in a previous case against Defendant. (Exh. E5, p. 514.)

During the course of his career, Beeman said he has "probably" listened to over 10,000 inmate phone calls. (Exh. E5, p. 516.) According to Beeman, experienced inmates are more cautious when it comes to openly talking about committing crimes on the telephone, as they are aware their calls are being monitored—in contrast to inexperienced inmates who are not aware of the extent of monitoring. (Exh. E5, p. 517.) In Beeman's opinion, Luker is amongst the experienced inmates and is more cautious when speaking on the phone. (Exh. E5, p. 517.) Beeman had reviewed many phone calls that had been made

to Luker, and determined that fifteen of the calls made to Luker were relevant to the investigation. (Exh. E5, p. 516.)

Beeman retained copies of the fifteen calls he deemed relevant. In addition, he turned them over to the OCDA's office and booked a copy into Sheriff's evidence. (Exh. E5, p. 518.) Given the varying lengths and content of these calls, Beeman selectively pared down the calls to only include the "relevant" portions of the call into the copies. (Exh. E5, p. 519.) The "relevant" portions of the calls included portions in which there was discussion of the case. (Exh. E5, p. 524.)

During a phone call made on September 17, 2013 at 10:30 PM, Beeman heard Luker ask Zareczny if a person nicknamed "Bam-Bam" was present, to which Zareczny did not respond. (Exh. E5, pp. 533-534.) Beeman did not know who "Bam-Bam" was until September 27, 2013. (Exh. E5, p. 540.) While monitoring a call made to Laurie Irwin, Beeman discovered that "Bam-Bam" was Anthony "Tony" Hummer, who was staying at the Lakewood House. (Exh. E5, pp. 539-540.) Other than Anthony Hummer, Beeman knew "Big Bam-Bam" was Randy Thompson and "Little Bam" was Robert Nelson – both from the Orange County Skins. (Exh. E5, p. 541.)

***People v. Ruben Martinez*** **(No. 14NF4890)**

Defendant Ruben Martinez was charged on November 18, 2014 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Ruben Martinez*, Orange County Superior Court Case Number 14NF4890, attached herein as Exhibit F5.)

Donald Voght testified on the morning of December 15, 2015. (Exh. F5.)

On March 3, 2017, Martinez was convicted of murder. (Exh. F5.) On May 12, 2017, Martinez was sentenced to 52 years to life in state prison. (Exh. F5.)

***People v. William John Wallace*** **(No. 13CF3980)**

Defendant William John Wallace was charged on December 23, 2013 with attempted murder, a felony violation of PC 664(a)-187(a), and an enhancement for attempted premeditated murder in violation of PC 664(a). Wallace was also charged with two counts of solicitation of murder in felony violation of PC 653f(b). (Redacted Court Vision, *People v. William John Wallace,* Orange County Superior Court Case Number 13CF3980, attached herein as Exhibit G5.)

Investigator Beeman was designated as the prosecution's Investigating Officer. (Exh. G5.) Beeman testified during the morning session on April 16, 2014, and during the morning and afternoon sessions on March 28, 2017. (Exh. G5.)

On March 30, 2017, Wallace pled guilty to all counts. (Exh. G5.) That same day, Wallace was sentenced to a total of 9 years in state prison. (Exh. G5.)

Investigator Beeman first testified in the morning of April 16, 2014. (Partial Preliminary Hearing Transcript, *People v. William John Wallace*, Orange County Superior Court Case Number 13CF3980, dated April 16, 2014, attached herein as Exhibit H5.) He stated the following: Beeman had been with the OCSD for 24 years. (Exh. H5, p. 201.) On October 31, 2013, Beeman met with Investigator Launi from the Santa Ana Police Department about a murder-for-hire investigation. (Exh. H5, pp. 201-202.) Investigator Launi discussed with Beeman about assistance on the case and whether the OCSD could "take over." (Exh. H5, p. 202.)

During the meeting with Investigator Launi and other law enforcement members, it was agreed that the Sheriff's Department would take over the investigation from Investigator Launi. (Exh. H5, p. 203.) Immediately after the meeting, Beeman and his partner, Investigator Catalano, informed the victim, Jodie Honarvar, that there was a potential threat on her life. (Exh. H5, p. 204.)

Beeman met with Sean Hyepock, a private investigator, for the first time on November 1, 2013. (Exh. H5, p. 209.) Following their meeting, Beeman arranged for Hyepock to act as a middle-man to set up meetings between Defendant Wallace and the

alleged hitman who would have killed Honarvar. (Exh. H5, p. 210.) Hyepock had then given the assassin the nickname "The Captain". (Exh. H5, p. 123.) Hyepock was instructed to record conversations and keep text messages between he and Wallace and turn them over to Beeman. (Exh. H5, pp. 210-211.) Beeman also instructed Hyepock to initiate contact with Wallace and further their conversation about hiring a hit man. (Exh. H5, p. 227.) Hyepock was directed by Beeman to bring up the killing of Honarvar such that Beeman would be able to see the credibility of Hyepock's allegations, in addition to assessing if Wallace would change his mind. (Exh. H5, pp. 227, 241.) Beeman was made aware of a text exchange between Wallace and Hyepock, which occurred on or around November 7, 2013. During the text exchange, Wallace requested to delay the hit for a couple of weeks. (Exh. H5, pp. 228-229.)

Beeman was then given a phone number from Hyepock that would allow Beeman to contact Wallace. (Exh. H5, p. 213.) On December 16, 2013, Beeman had two telephone conversations with Defendant Wallace. (Exh. H5, pp. 213-215.) After these phone conversations, Beeman sent several text messages to Wallace to set up a meeting, though he never received a response from Wallace. (Exh. H5, pp. 215, 237.) Beeman had Hyepock text Wallace the same information that he was texting Wallace. (Exh. H5, pp. 237-238.)

Beeman instructed Hyepock to text Wallace in order to arrange a meeting for December 20, 2013, at a Carl's Jr. parking lot in the South End of San Clemente. (Exh. H5, p. 215.) Wallace did not show up to the Carl's Jr. meeting. (Exh. H5, pp. 216, 236.) Beeman had Hyepock arrange a second attempt at a meeting for later that same day. (Exh. H5, pp. 215-217.) This second attempt to meet was also unsuccessful. (Exh. H5, p. 217.) Beeman asked that Hyepock arrange a meeting for the following day, and the meeting was set for 6:00 am of December 21, 2013 in Irvine. (Exh. H5, pp. 217-218.) Wallace met with Beeman at the arranged time and place on December 21 to talk about killing Honarvar. (Exh. H5, pp. 217-220.) During this third meeting, Beeman asked Wallace if he was certain about carrying out a hit against his ex-wife, to which Wallace nodded and gave a thumbs up. (Exh. H5, p. 220.)

Between November 1, 2013 and the third meeting on December 21, 2013, Wallace never paid Beeman to kill Honarvar. (Exh. H5, p. 232.) Beeman was aware of a meeting that took place in Hyepock's car, during which Hyepock said that The Captain needed a down payment of $2500. (Exh. H5, p. 231.) Wallace never gave the money to Hyepock and did not agree to give money to The Captain in that meeting. (Exh. H5, p. 232.) Although 40 $100 bills were found in Wallace's vehicle on scene at the location of Wallace's arrest, Wallace never told Beeman what the purpose of the money in his possession was. (Exh. H5, pp. 246-248.)

In a motion filed on May 13, 2016, Defendant Wallace challenged the attempted murder count and the premeditation and deliberation enhancement. (Motion to Dismiss, *People v. William John Wallace*, Orange County Superior Court Case Number 13CF3980, dated May 13, 2016, attached herein as Exhibit I5.) The defense argued that the prosecution failed to establish sufficient evidence at the preliminary hearing to support the violation of PC 664(a)-187(a) and PC 664(a). In the motion, the defense additionally asserted that the prosecution failed to establish for purposes of the preliminary hearing that Wallace a) wanted to kill Honarvar, and b) actually took any direct but ineffectual act toward the hit beyond mere preparation. (Exh. I5, p. 8.)

The defense argued that the prosecution failed to show specific intent, and that the commission of another dangerous crime cannot alone imply specific intent. (Exh. I5, p. 9.) That is, evidence supporting a charge of solicitation to commit murder was alone insufficient to support a charge of attempted murder. (Exh. I5, p. 10.) Next, the defense contended that the prosecution failed to establish that Wallace took any direct but ineffectual act towards the hit beyond preparation. (Exh. I5, p. 10.) The defense cited *People v. Decker* (2007), which held that whereas preparation for an attempt involves planning and arranging the means necessary for the commission of an offense, an attempt requires an overt step towards the commission after the preparations have been made. (Exh. I5, p. 13.) The defense argued that Wallace never intended to follow through with the plan and did not make said overt step to put the plan into motion, as evidenced by the fact that

there was no direct meeting between Wallace and "The Captain", nor was a contract or finalized agreement between them ever made. In addition, Wallace did not move to finalize the details of the crime, he attempted to avoid the meeting with "The Captain" twice, and no payment to Investigator Beeman was ever made or agreed upon. (Exh. I5, pp. 12-14.) Finally, the defense argued that because Wallace never actually paid or finalized a contract or agreement, he had never crossed the line from preparation into attempt. (Exh. I5, p. 15.) That is, there was no final step toward the commission of a murder, and, thus, insufficient evidence that Wallace's conduct moved beyond preparation. (Exh. I5, p. 15.)

On May 13, 2016, the Court denied the motion. (Exh. G5.)

***People v. Lonnie Loren Kocontes*** **(No. 13ZF0163)**

Defendant Lonnie Loren Kocontes was charged on June 14, 2013 with murder, a felony violation of PC 187(a), and the special circumstance of murder for financial gain in violation of PC 190.2(a)(1). (Redacted Court Vision, *People v. Lonnie Loren Kocontes*, Orange County Superior Court Case Number 13ZF0163, attached herein as Exhibit J5.)

Investigator Donald Voght appeared for an in camera hearing on March 6, 2015. (Exh. J5.) Voght testified on the afternoon of July 31, 2017, and on the morning and afternoon of August 1, 2017. (Exh. J5.) On January 29, 2020, the court granted the prosecution's request for Voght to sit at counsel's table for the remainder of the trial; he was present in court that same day and the next. (Exh. J5.) Investigator Beeman testified on the afternoon of August 1, 2017, and on the morning and afternoon of August 2, 2017. (Exh. J5.)

In June 2020, Kocontes was convicted of first-degree murder, and the special circumstance of having committed the murder for financial gain. (*People v. Kocontes* (2022) 86 Cal.App.5th 787, 817.) He was sentenced to life in prison without the possibility of parole. (*Ibid*.)

Voght testified at the evidentiary hearing that he was contacted by the OCDA's office and told that an inmate, King, had information about the victim, Kanesaki's, alleged

murder. (*Id*. at p. 831). The two met on April 22, 2014. (*Ibid.*). King told Voght that Kocontes had solicited him and another inmate, Semanu, to bribe or murder Nguyen, Kocontes' ex-wife, who would be testifying in Kanesaki's case. (*Ibid*.) Voght conducted a total of 8 recorded interviews with King and his attorney and later helped place King into Kocontes' jail cell where a recording device was placed. (*Id*. at p. 815.) King had entered into a written agreement with the OCDA. In exchange for his cooperation and any arrests, King would be released from jail immediately. *(Id*. at p. 831.) King was released from jail in late 2014. *(Ibid*.)

Voght testified that in the jail cell recordings he listened to, Kocontes never admitted to killing Kanesaki and King never asked Kocontes about her death. (*Id.* at p. 832.) Voght emphasized that the solicitation investigation had nothing to do with the pending murder charge and testified that in every interview King was admonished not to ask Kocontes about Kanesaki's murder. (*Ibid*.)

The OCDA arranged for Beeman to play the role of "Greg" to communicate with Kocontes. Voght gave investigator Beeman's number to King to give Kocontes. *(Id*. at pp. 815, 833.*)* "Greg" was introduced to Kocontes as a real estate broker and King's friend/partner. (*Id*. at p. 830.) Voght also testified that, to his knowledge, and contrary to what Kocontes claimed, Beeman never told Kocontes he was a private investigator. (*Id*. at p. 832.)

Beeman knew Kocontes was moved into King's cell and spoke to both using the same undercover phone number. (*Id*. at p. 833.) Beeman testified that there were 7 recorded telephone conversations with Kocontes, and they had spoken 10 times total. (*Id*. at p. 815.) Beeman testified that Kocontes inferred that he wanted Beeman to help convince Nguyen to write a declaration saying her Grand Jury testimony was false. (*Id*. at p. 833.) Beeman further testified that although Kocontes never mentioned "wanting to have … Nguyen killed," he used coded language to indicate that he wanted Beeman to harm her. *(Ibid.)* Beeman also testified that King gave Voght some of Kocontes' documents and Voght gave them to him. (*Ibid*.)

Kocontes appealed his conviction. (*Id.* at p. 787.) In its decision, the Court of Appeal emphasized that government agents, including "law enforcement officers and private persons enlisted by the government," are prohibited from deliberately eliciting incriminating statements from a Defendant about a crime that they have been charged with outside the presence of counsel. (*Id*. at p. 835 (citing *Massiah, supra*).) To prevail in a motion to suppress informant testimony, [the defendant] must show "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." (*Id.* at p. 836 (citing *People v. Johnsen* (2021) 10 Cal.5th 1116, 1152).) However, "there is no *Massiah* violation 'where an informant-cellmate is simply a "listening post" and does not ask questions or solicit information.'" (*Ibid*. (citing *In re Wilson* (1992) 3 Cal.4th 945, 950).)

Kocontes claimed that his Sixth Amendment right to counsel pursuant to *Massiah* was violated when, from June 2014 to October 2014, the OCDA housed a government informant in his cell and caused a law enforcement officer to communicate with him. (*Id.* at p. 830.) Kocontes alleged that King arranged for him to speak with Beeman, an investigator from the OCSD, who posed to him as a private investigator. (*Ibid*.) Kocontes asserted that he then provided Beeman with "critical material and strategy in this case and that had nothing to do with the solicitation case" and "even if the questioning concerned the solicitation case, the solicitation case was 'so closely connected with the murder case it implicated his right to counsel.'" (*Ibid*.)

The Court concluded that *Massiah*'s first prong was met because there was no dispute that Beeman—acting as "Greg"—and King, were both government agents. (*Id*. at p. 836.) However, the Court concluded that the second prong was not met because the record did not include any evidence that government agents deliberately elicited incriminating statements about the charged offense. (*Id*. at p. 837.) The Court also concluded that Voght and Beeman's testimony established they were investigating a new, uncharged crime, namely Kocontes soliciting King and Beeman to bribe or murder Nguyen, and that they

were, therefore, investigating criminal conduct that had not yet been charged. Thus, *Massiah* was not implicated. (*Ibid*.)

Additionally, Kocontes argued that the cumulative effect of the several errors created prejudice, requiring reversal. (*Id*. at p. 891.) Kocontes alleged the following errors: "(1) The court erred by admitting evidence the 1999 incident involved 'inappropriate relationship with a female'; (2) The court erred by denying his mistrial motion when Prince insinuated the 1999 incident involved a minor and Kocontes knew bad actors from when he was incarcerated; (3) The court erred by admitting evidence Kanesaki's blood and urine testified[sic] negative for alcohol; (4) The court erred by admitting Kanesaki's March 2, 2005 e-mail(s) to White; (5) The court erred by admitting the solicitation evidence; and (6) The court erred by denying his mistrial motion because the COVID-19 health protocols infringed on his due process right to a fair trial." (*Ibid*.)

The appellate court noted that a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*Ibid.* (citing *People v. Hill* (1998) 17 Cal.4th 800, 844.) Nonetheless, while the court agreed with Kocontes' first, third, and fourth claims, they stated that those errors were harmless. (*Id.* at p. 892). The court did not find that the solicitation evidence, pursuant to Kocontes' fifth claim, was improperly introduced. (*Ibid.*)

The Court of Appeal therefore upheld Kocontes' conviction and sentence. (*Id.* at p. 892.)

***People v. Adam Anthony Ingala-Whiting*** **(No. 14HF1464)**

Defendant Adam Anthony Ingala-Whiting was charged on May 14, 2014 with murder, a felony violation of PC 187(a), with an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Adam Anthony Ingala-Whiting*, Orange County Superior Court Case Number 14HF1464, attached herein as Exhibit K5.)

Detective Donald Voght testified on the morning of October 20, 2014 and on the morning of March 7, 2018. (Exh. K5.)

On March 21, 2018, Ingala-Whiting was convicted of second-degree murder. (Exh. K5.) On June 15, 2018, Ingala-Whiting was sentenced to an indeterminate term of 15 years to life plus a consecutive sentence of 1 year in state prison. (Exh. K5.)

***People v. Mark Allan Grisham*** **(No. 18WF2502)**

Defendant Mark Allan Grisham was charged on November 15, 2018 with possession of a controlled substance with intent to sell, a felony violation of HS 11351; possession of a controlled substance with intent to sell, a felony violation of HS 1137; possession of a controlled substance while armed with a firearm, a felony violation of HS 11370.1(a); conspiracy to commit a crime, a felony violation of PC182(a)(1); possession of a firearm by a felon, a felony violation of PC 29800(a)(1); prohibited person owning ammunition, a felony violation of PC 30305(a)(1); and felon in possession of body armor, a felony violation of PC 31360(a). (Redacted Court Vision, *People v. Mark Allan Grisham*, Orange County Superior Court Case Number 18WF2502, attached herein as Exhibit L5.)

Officer Beeman testified on the morning and afternoon of January 14, 2019. (Exh. L5.)

As part of the Special Operations Bureau, Beeman investigated issues that came up both in and out of the jails. (Preliminary Hearing Transcript, *People v. Grisham*, Orange County Superior Court Case Number 18WF2502, dated January 14, 2019, attached herein as Exhibit M5, p. 22.) During these investigations, Beeman would sometimes engage in ruses where he pretended to be someone else. (Exh. M5, p. 23.) After asking Beeman general questions on this subject matter, defense counsel Scott Sanders sought to question Beeman about his role in the case of *People v. Paul Smith*. (Exh. M5, p. 4.) As an offer of proof about why he should have been permitted to question Beeman regarding his work on the *Smith* case, counsel explained that: (1) the *Smith* case involved Beeman engaging in a ruse in which he played a character named "Blade" who was attempting to solicit a murder,

(2) the *Smith* case involved the use of at least one other prisoner ("inmate p") as an informant, (3) the informant was part of a program of informants being used by the special handling unit in the jail, and (4) this informant program was illegally hidden from defense counsel in multiple prosecutions, including, most famously, the case of *People v. Dekraai*. (Exh. M5, pp. 23-28.) Counsel argued that Beeman's involvement in this program could have involved multiple acts of moral turpitude and went to the credibility of his testimony in defendant's case. (Exh. M5, p. 27-28.)

The court allowed defense counsel to begin questioning Beeman about his involvement in the case of *People v. Paul Smith*. (Exh. M5, p. 29.) Defense counsel asked Beeman if he was aware of "inmate p." and Beeman said no. (Exh. M5, p. 30.) Beeman said that he had not followed the litigation in the *Smith* case. (Exh. M5, p. 30.) When defense counsel attempted to ask more about the investigation in *Smith*, Beeman said that he was uncomfortable answering questions about it because it had happened ten years earlier. (Exh. M5, p. 30.) Defense counsel revealed that the name of "inmate p." was Platt, and Beeman said that he remembered that Platt was involved in some way in the investigation in the *Smith* case, but that he could not remember any specifics. (Exh. M5, p. 32.) Defense counsel offered to refresh Beeman's recollection with a document, the prosecution objected, and the court sustained the objection. (Exh. M5, p. 32.) Defense counsel asked Beeman if he knew about the use of other informants in the *Smith* case, the prosecution objected, and the court sustained the objection. (Exh. M5, p. 32.)

At this point, defense counsel and the court engaged in a colloquy regarding what questions the defense would be allowed to ask. (Exh. M5, pp. 33-35.) The court said that Beeman had said that he did not remember any specifics about Platt's involvement, so defense counsel had to move on in his questioning. (Exh. M5, p. 33.) Defense counsel argued that given the seriousness of the *Smith* case, Beeman simply saying that he did not remember what happened raised more questions. (Exh. M5, p. 33.)

The court allowed defense counsel to attempt to refresh Beeman's recollection of the *Smith* case with a grand jury transcript. (Exh. M5, pp. 35-36.) Beeman read a portion of the

transcript and said that it did not refresh his recollection as to the specifics of the *Smith* investigation. (Exh. M5, p. 37.) Beeman said that he would like to read his case file in order to refresh his recollection, and defense counsel offered that he had Beeman's case file. (Exh. M5, p. 38.) The court said that Beeman reading his case file was too far removed from the preliminary hearing at hand and told defense counsel to move on. (Exh. M5, p. 38.) Defense counsel attempted to clarify that Beeman had no independent recollection of Platt's involvement in the *Smith* case. (Exh. M5, p. 38.) The prosecution objected, and the court sustained the objection. (Exh. M5, pp. 38-39.) Defense counsel attempted to verify that the only thing that would refresh Beeman's recollection would be reading his case file. (Exh. M5, p. 39.) The prosecution objected and the court sustained the objection. (Exh. M5, p. 39.)

Defense counsel asked if Beeman had talked to anybody about the *Smith* case in recent years given that there was an ongoing habeas proceeding. (Exh. M5, p. 39.) The prosecution objected and the court sustained the objection. (Exh. M5, pp. 39-40.) Defense counsel argued that he should be allowed to test Beeman's claim that he did not remember anything about the *Smith* case given that there was ongoing litigation and press coverage of the case. (Exh. M5, p. 40.) The court sustained objections on a series of questions regarding whether Beeman had spoken to fellow officers, members of Beeman's department, or the prosecution about the *Smith* case in the last two years. (Exh. M5, p. 43.) The court sustained objections on a series of questions regarding Beeman's knowledge of the informant program and his awareness of discovery violations related to the program. (Exh. M5, pp. 44-45.)

On April 26, 2019, the Court granted Grisham’s motion to withdraw his plea of not guilty and instead plead guilty to all counts. (Exh. L5.) That same day, Grisham was sentenced to a total of 4 years in state prison. (Exh. L5.)

***People v. David Steven Ortega*** **(No. 16NF1172)**

***People v. Edgar Ramirez*** **(No. 16NF1172)**

Defendant David Steven Ortega was charged on April 19, 2016 with murder, a felony violation of PC 187(a), with the special circumstance of criminal street gang activity in violation of PC 190.2(a)(22). The following enhancements were also added: discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d); personal use of a firearm in violation of PC 12022.53(b); vicarious discharge of a firearm by a member of a gang causing great bodily injury in violation of PC 12022.53(d)/(e)(1); attempted premeditated murder in violation under PC 644(a); and criminal street gang activity, a violation under PC 186.22(b)(1). Ortega was also charged with attempted murder, a felony violation under PC 664(a)-PC187(a) with the following enhancements: discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d); personal use of a firearm in violation of PC 12022.53(b); vicarious discharge of a firearm by a member of a gang causing great bodily injury in violation of PC 12022.53(d)/(e)(1); attempted premeditated murder, a felony violation of PC 644(a); and criminal street gang activity, a violation of PC 186.22(b)(1). (Redacted Court Vision, *People v. David Steven Ortega*, Orange County Superior Court Case Number 16NF1172, attached herein as Exhibit N5.)

Defendant Edgar Ramirez was charged on April 19, 2016 with murder, a felony violation of PC 187(a). The following enhancements were added: vicarious discharge of a firearm by a member of a gang causing great bodily injury in violation of PC 12022.53(d)/(e)(1); and criminal street gang activity in violation of PC 186.22(b)(1). Ramirez was also charged with attempted murder, felony violation of PC 664(a)-PC187(a), with two enhancements: vicarious discharge of a firearm by a member of a gang causing great bodily injury in violation of PC 12022.53(d)/(e)(1); and criminal street gang activity in violation of PC 186.22(b)(1). (Redacted Court Vision, *People v. Edgar Ramirez*, Orange County Superior Court Case Number 16NF1172, attached herein as Exhibit O5.)

Sergeant Donald Voght testified on the morning and afternoon of April 4, 2017, the afternoon of April 29, 2019, the morning of April 30, 2019, and the morning of May 7, 2019. (Exh. N5; Exh. O5.)

On March 20, 2019, the court dismissed Ortega's firearms enhancements. (Exh. N5.) On May 16, 2019, Ortega was convicted of all other counts. (Exh. N5.) On June 14, 2019, Ortega was sentenced to a total term of life in state prison without the possibility of parole in addition to an additional term of 57 years to life. (Exh. N5.)

On May 16, 2019, the court declared a mistrial as to all counts for Ramirez. (Exh. O5.) On September 5, 2019, the OCDA amended the Original Information, adding a charge of voluntary manslaughter, a felony in violation of PC 192(a), to which Ramirez pled guilty. (Exh. O5.) That same day, the court dismissed the murder and attempted murder counts, and sentenced Ramirez to a total term of 11 years in state prison. (Exh. O5.)

Operation Stormfront

Baytieh's role in the conspiracy to conceal evidence in *Smith* visited *Brady* violations on numerous cases, including a series of prosecutions that targeted white supremacist gangs. Sergeant Beeman led the Operation Stormfront investigation and was the key witness in each of the related felony prosecutions tainted by Baytieh's non-disclosure.

***People v. Ruthie Christine Marshall*** **(No. 10ZF0092)**
***People v. Alexander Manfred Lind*** **(No. 10ZF0092)**
***People v. Jeffrey Peek*** **(No. 10ZF0092)**
***People v. Jose Gonzalez*** **(No. 10ZF0092)**
***People v. Jesse Raffensberger*** **(No. 10ZF0092)**

Defendant Ruthie Christine Marshall was charged by an indictment filed on October 18, 2010, with two counts of assault with a deadly weapon, one count of assault with a

semiautomatic firearm, and two counts of kidnapping, with enhancements for criminal street gang activity on all counts. Defendant Alexander Manfred Lind was charged with one count each of assault with a deadly weapon, assault with a semiautomatic firearm, and kidnapping, with an enhancement for criminal street gang activity on each count, and a count of participation in a criminal street gang. Defendant Jeffrey Peek was charged with one count each of assault with a deadly weapon and kidnapping, with an enhancement for criminal street gang activity on both counts. Defendant Jose Gonzalez was charged with one count each of assault with a deadly weapon and kidnapping. Defendant Jesse Raffensberger was charged with one count each of assault with a deadly weapon, assault with a semiautomatic firearm, and kidnapping, with an enhancement for criminal street gang activity on each count, and a count of participation in a criminal street gang.

Investigator Beeman testified in the morning and afternoon on July 27, 2011. (Redacted Court Vision, *People v. Ruthie Christine Marshall, Alexander Manfred Lind, Jeffrey Peek, Jose Gonzalez, and Jesse Raffensberger*, Orange County Superior Court Case Number 10ZF0092, attached herein as Exhibit N8.)

***People v. Wayne Jason Marshall*** **(No. 10ZF0097)**
***People v. Ruthie Christine Marshall*** **(No. 10ZF0097)**
***People v. Richard Michael Briggs*** **(No. 10ZF0097)**
***People v. Andrew Michael Casper*** **(No. 10ZF0097)**
***People v. Edward Anthony Ferraro*** **(No. 10ZF0097)**
***People v. Richard Allen Rainey*** **(No. 10ZF0097)**
***People v. Thomas James Symington*** **(No. 10ZF0097)**

Defendant Ruthie Christine Marshall was charged by an indictment filed on November 30, 2010, with extortion of property and an enhancement for acting to benefit the Aryan Brotherhood white supremacist gang. (Redacted Court Vision, *People v. Ruthie*

*Christine Marshall*, Orange County Superior Court Case Number 10ZF0097, attached herein as Exhibit R3; Partial Grand Jury Transcript, *People v. Ruthie Christine Marshall*, Orange County Superior Court Case Number 10ZF0097, dated November 30, 2010, attached herein as Exhibit S3, p. 21.) According to grand jury testimony, defendants Wayne Jason Marshall[51], Richard Michael Briggs, Edward Anthony Ferraro, Richard Allen Rainey, and Thomas James Symington were also charged by the same indictment with extortion and an enhancement for acting to benefit the Aryan Brotherhood white supremacist gang. Andrew Michael Casper was charged by the same indictment with extortion and an enhancement for acting to benefit the Aryan Brotherhood and PEN1 gangs. Defendants Casper, Rainey, and Wayne Marshall were also charged with participation in a criminal street gang or street terrorism, and defendant Wayne Marshall was also charged with attempted aggravated assault. (Exh. S3, pp. 1, 20-21.)

Investigator Beeman testified in this matter on November 30, 2010, after previously testifying in a related matter on October 14, 2009. (Exh. S3, pp. 22-24.) This particular hearing largely centered on Wayne Marshall's alleged attempts to extort Charles Hull for the benefit of white supremacist gangs Aryan Brotherhood and PEN1. Beeman's investigative work was critical to the case. According to OCDA Senior Deputy District Attorney Jim Mendelson, once Beeman began monitoring phone calls between Wayne Marshall and others, he decided to "become proactively involved" in the case. He ultimately listened to "592 hours of [jail phone] calls that had been recorded over an 18-month period" for evidence that Wayne Marshall was planning to "exact revenge" on fellow Aryan Brotherhood members. (Exh. S3, pp. 10-12.) Beeman then even warned Charles Hull, a PEN1 gang member, about Wayne Marshall's intent towards him on two different occasions.

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[51] On December 12, 2012, cases 10ZF0097, 10ZF0098, 11ZF0099, and 11ZF0103 were consolidated into case 03SF0831 with respect to defendant Wayne Jason Marshall only. (Redacted Court Vision, *People v. Wayne Jason Marshall*, Orange County Superior Court Case Number 03SF0831, attached herein as Exhibit O8.)

Beeman also testified as to the use of jailhouse informants in this case. He listened to calls between Wayne Marshall and Briggs, who served as Wayne Marshall's "mouthpiece." Wayne Marshall was apparently concerned that Briggs was working as an informant while in custody. Wayne Marshall's concern was well-founded: In January 2010, Wayne Marshall found out that paperwork existed suggesting that Briggs was, indeed, an informant. (Exh. S3, p. 55.)

Beeman also listened to recordings of a jailhouse visit between Ruthie Marshall and Wayne Marshall. (Exh. S3, pp. 83-84.) In those recordings, according to Beeman's retelling, Wayne Marshall (also known as Bullet) blamed Ferraro for supposedly providing information to law enforcement, which consequently caused the arrest of several associates (excluding Ferraro):

> Q. By Mr. Mendelson: Were you able to attribute any significance to the, "except for Eddie"?
> A. Yes, several of Wayne Marshall's army, the people we have spoken about, had been arrested. And he was blaming all of that on information provided by Ferraro to law enforcement. Which actually never happened.

(Exh. S3, p. 94.)

Beeman also testified that he "knew" Lance Wulff, the former head of Orange County Skins, who testified for the prosecution later that day while Beeman was still present in the courtroom. Moreover, Beeman had "personal involvement" in Wulff's case and knew that Wulff had made statements to the police. Beeman explained that Wulff was moved to a different housing module around the time he became an informant:

> Q. By Mr. Mendelson: you testified earlier you knew this individual Lance Wulff. Do you know, do you have knowledge about inmate Wulff being moved?
> A. Yes.
> Q. Can you explain that to us.
> A. There was a kite found in one of the cells of inmate Jonathan Trottier, which was referred to in the call as Rhino, he is another PEN1 gang member. In the kite it talked about Wulff being on bad terms, and that he was possibly

going to be assaulted. So at that point with the pending assault, when jail deputies found out about the pending assault, they went to Wulff and asked him to come out of his cell to change his housing location.

A. And do you have personal involvement in another case where Wulff, inmate Wulff was actually a defendant?

A. Yes.

Q. And based on that, was there some paperwork about inmate Wulff making some statements to the police?

A. Yes.

Q. And based on your training and experience and knowledge, would that be reason for an individual to be basically subject to a hit?

A. Yes, definitely.

(Exh. S3, pp. 50-51.)

However, Beeman failed to mention that the housing module Wulff was moved to after jail staff supposedly found a kite referencing Wulff's name was the infamous module L-20, which later became infamous as the "snitch tank" uncovered by litigation in *People v. Dekraai*. Had the concealed *Smith* evidence been made available to these defendants, they could have further investigated Wulff's informant status. However, they were unable to do so and instead were left with false reassurances that Beeman had left no stone unturned in his testimony:

Q. The last question I have got for you is going to have two parts.

First of all with respect to Wayne Marshall's attempt to have a hit, by putting Charles Hull in the hat, green lighting him and the like, in the course of all your investigation, everything you know from listening to phone calls, monitoring visits, and from talking to other individuals, do you have any information that would be exculpatory, that would tend to establish Wayne Marshall was not guilty of that offense?

A. No, I don't.

Q. Secondly, same question, except for with respect to the extortion, do you have any exculpatory information based on the totality of everything you know on this investigation, that would tend to distance Wayne Marshall from his participation in that extortion?

A. No, I don't.

(Exh. S3, pp. 89-90.)

***People v. Wayne Jason Marshall*** **(No. 10ZF0098)**
***People v. Ruthie Christine Marshall*** **(No. 10ZF0098)**
***People v. Douglas Kenneth Adams*** **(No. 10ZF0098)**
***People v. Andrew Michael Casper*** **(No. 10ZF0098)**
***People v. Jason Odelle Fanelli*** **(No. 10ZF0098)**
***People v. Ryan Dennis Sloan*** **(No. 10ZF0098)**

According to grand jury testimony, defendants Wayne Jason Marshall, Ruthie Christine Marshall, Douglas Kenneth Adams, Andrew Michael Casper, Jason Odelle Fanelli, and Ryan Dennis Sloan were charged by an indictment filed on December 14, 2010, with one count of conspiracy to commit murder or, in the alternative, conspiracy to commit aggravated assault. On both conspiracy counts, Casper and Fanelli were charged with an enhancement for acting to benefit multiple gangs (PEN1 and Aryan Brotherhood); the other defendants were charged with an enhancement for acting to benefit only the Aryan Brotherhood. Defendants Casper, Fanelli, and Wayne Jason Marshall were also charged with active participation in a criminal street gang. Lastly, Defendant Wayne Jason Marshall was also charged with solicitation of murder plus an enhancement on the solicitation count for acting to benefit a criminal street gang. (Partial Grand Jury Transcript, *People v. Wayne Jason Marshall, Ruthie Christine Marshall, Douglas Kenneth Adams, Andrew Michael Casper, Jason Odelle Fanelli, and Ryan Dennis Sloan*, Orange County Superior Court Case Number 10ZF0098, dated December 14, 2010, attached herein as Exhibit P8, pp. 1, 16-17.)

Investigator Beeman testified on December 14, 2010. (Exh. P8, p. 19.) As foreshadowed by the previous case, this grand jury testimony largely centered on Edward Anthony Ferraro's "suspected cooperation with law enforcement" to provide information against the Aryan Brotherhood after serving as Wayne Marshall's "spokesperson." (Exh. P8, pp. 7-9.) The Sheriffs were "proactive in sitting there and warning people" about Wayne Marshall's plan to execute "hits" when "all of a sudden" Ferraro decided to become

an informant. (Exh. P8, p. 10.) Like the other cases in which Wayne Marshall or Ruthie Marshall were charged, Investigator Beeman was instrumental in providing the evidence to charge Wayne Marshall with solicitation. Beeman also "warned Mr. Ferraro, and then he had occasion to interview three individuals here, Sloan, Fanelli and Adams." (Exh. P8, p. 13.)

Beeman testified that Ferraro was not an informant:

> Q. And let me ask you a question, in the course of your investigation of all these activities pertaining to Wayne Marshall and his control of criminal enterprise, are you the sole -- are you an individual from the orange county sheriff's department that has been involved with every single facet of it?
> A. Yes.
> Q. Are there any other district attorneys other than myself that have been involved in the case?
> A. No.
> Q. And have you been there with me at every step of the way with my participation in this case?
> A. Yes.
> Q. And in this time frame back around March and April of this year, did we receive any information whatsoever from Mr. Ferraro?
> A. No.
> Q. Did Mr. Ferraro cooperate with us in any way whatsoever?
> A. No.

(Exh. P8, pp. 29-30.)

Lastly, the grand jury in this case incorporates the testimony of informant Lance Wulff. (Exh. P8, p. 13.) Thus, like above, had Beeman's unconstitutional actions in *Smith* been divulged, defense counsel could have investigated or further impeached informant Wulff's testimony.

***People v. Wayne Jason Marshall (*No. 11ZF0099*)***

***People v. Ruthie Christine Marshall (*No. 11ZF0099*)***

***People v. Edward Anthony Ferraro (*No. 11ZF0099*)***

***People v. Kelsey Alane Kirkland (*No. 11ZF0099*)***

According to grand jury testimony, defendants Wayne Jason Marshall, Ruthie Christine Marshall, Edward Anthony Ferraro, and Kelsey Alane Kirkland were charged by an indictment filed on January 5, 2011, with one count each of conspiracy to commit murder plus an enhancement for entering into the conspiracy for the benefit of a criminal street gang. All defendants were also charged in the alternative with conspiracy to commit aggravated assault. Defendant Wayne Jason Marshall was also charged with active participation in a gang and solicitation to commit murder, plus an enhancement for acting to benefit a gang on the solicitation count. (Partial Grand Jury Transcript, *People v. Wayne Jason Marshall, Ruthie Christine Marshall, Edward Anthony Ferraro, and Kelsey Alane Kirkland*, Orange County Superior Court Case Number 11ZF0099, dated January 5, 2011, attached herein as Exhibit Q8, pp. 1, 20-21.)

Investigator Beeman testified on January 5, 2011. (Exh. Q8, p. 22.) When introducing Beeman's testimony, the prosecutor reminded the grand jury, who were also delivering indictments on the previously discussed Ruthie and Wayne Marshall cases, that Investigator Beeman was present throughout the development of evidence, even telling the jury that, as they "probably guesse[d]," Beeman was "obviously privy" to developments in the case including warning a potential target of violence by Marshall. (Exh. Q8, pp. 14-15.)

Beeman was the first witness called in this proceeding. (Exh. Q8, p. 16.) As previewed by the prosecutor in his opening remarks, he would go on to describe nearly everything the jurors needed to know: Wayne Marshall's conspiracy to execute an attack on Briggs, the fourteen acts that comprised that conspiracy, Beeman's warning to Briggs about the planned attack, his interview of Kirkland, Ferraro's statements evidencing the conspiracy, and the presence of Special Handing deputies outside the Kirkland interview. To learn of this information, Beeman, again, described listening to hours of phone calls between the co-defendants, particularly Wayne Marshall.

He described an undercover visit he made to the Theo Lacy Facility after listening to phone calls where Kirkland and Ferraro were planning to visit Wayne Marshall in custody. (Exh. Q8, pp. 51-56.) Wayne Marshall had supposedly asked for someone with a level ten

security level–in other words, "somebody who he could trust and that wouldn't divulge any information"–and Kirkland fit the description. (Exh. Q8, p. 54.)

Kirkland then visited Wayne Marshall, where Beeman suspected she would show him a written note. Beeman also had two other unnamed partners in the stakeout and contacted another Special Handling deputy to instruct him to apprehend Kirkland if she left the visiting area after showing Wayne Marshall the note. Beeman also said he contacted Briggs after Kirkland's visit once he became aware of the potential threat to Briggs' life. (Exh. Q8, pp. 56-58, 74.)

Beeman then staked out a T.G.I. Fridays near the Theo Lacy Facility, where the Marshalls were having a party for their wedding anniversary. Beeman and the OCSD arrested Ferraro on a preexisting warrant, and Beeman then took Kirkland to the station for a 45-minute interview, which, according to Beeman, was conducted voluntarily since Beeman told her she was free to leave. However, Kirkland supposedly said she "felt comfortable talking to [Beeman], and she was happy to talk[.]" (Exh. Q8, p. 64.) After continued questioning, she admitted to flushing the note she gave Marshall to read during the visit down the toilet at Theo Lacy Facility:

> Q. So as you continued to question her, did she admit it was possible she had actually flushed it?
> A. Yes.
> Q. Did you question her about her knowledge of what was on this note?
> A. Yes.
> Q. Did you have to press her quite a bit to get her to be straightforward?
> A. Yes, initially she just told me she saw some writing that made reference to an old guy going on vacation. She didn't really understand portions of the letter. But later on in the conversation, probably 25 minutes into the interview, she finally admitted to me that the note was about Lil Rick, Richard Briggs.

(Exh. Q8, p. 68.)

Beeman admitted to continuing to press Kirkland:

Q. Just to be clear, after you continued to press her, she eventually admitted that she had actually looked at some of the contents of this note?
A. Yes.

(Exh. Q8, p. 69.)

However, Beeman ultimately convinced Kirkland to cooperate with police:

Q. Did she make any statements about what she had been expected to do with respect to her integrity?
A. Yes, he told her, Ferraro told her if questioned by the cops, maintain your integrity and don't lose your integrity for anyone.
Q. And as you continued to question her about that, did her meaning appear to stay consistent about what that meant?
A. No.
Q. Can you explain what you meant by that?
A. Initially when she said maintain her integrity, I took it as though she should not cooperate with law enforcement and compromise her integrity by giving one of her friends up to law enforcement, causing them to face criminal charges. Later when I pressed her further about what she had mentioned about integrity, she said that Ferraro told her not to -- to maintain her integrity and be truthful to the police.

(Exh. Q8, pp. 70-71.)

Beeman was later explicitly questioned about the supposedly voluntary questioning he conducted of Kirkland:

Q. By Mr. Mendelson: that interview with Kelsey Kirkland, at any time was she detained?
A. After the visit she was -- I wasn't present, but she was talked to by the jail staff. And I am not sure of the exact details of how she was contacted.
Q. During your interview you said you didn't Mirandize her; safe to conclude that you never Mirandized her?
A. No, I did not.
Q. And can you give us the scenario as far as how she was situated, and what if anything you did to let her know that she was free to leave?
A. I initially, right off the bat at the beginning of the interview, I told her she was not going to be arrested, I just wanted her to be truthful. And I asked her if she had any problems talking with me. And she said she would be comfortable talking to me. And also during my contact with her she wanted to know if she could call her friend to pick her up, and I let her use her cell

> phone to call whoever she needed to call to drive her back to T.G.I. Friday's, to have them pick her up at T.G.I. Friday's. So at no time did I tell her that she wasn't free to go, and she never asked whether or not she could go.

(Exh. Q8, pp. 74-75.)

However, because Beeman's conduct in *Smith* was not disclosed, defense counsel was unaware that his conduct towards Kirkland was part of a larger pattern of misconduct.

***People v. Wayne Jason Marshall (*No. 11ZF0103*)***

***People v. Ruthie Christine Marshall (*No. 11ZF0103*)***

***People v. Ryan Dennis Sloan* (No. 11ZF0103)**

***People v. Kirk John Tillman* (No. 11ZF0103)**

According to grand jury testimony, Defendants Wayne Jason Marshall, Ruthie Christine Marshall, Ryan Dennis Sloan, and Kirk John Tillman were charged by an indictment filed on February 9, 2011, with one count of conspiracy to commit murder, or, in the alternative, conspiracy to commit aggravated assault. The OCDA later added an enhancement for acting to benefit a gang to the conspiracy counts. Defendant Wayne Jason Marshall was also charged with a third count of participation in a criminal street gang. Investigator Beeman testified on February 9, 2011. (Partial Grand Jury Transcript, *People v. Wayne Jason Marshall, Ruthie Christine Marshall, Ryan Dennis Sloan, and Kirk John Tillman*, Orange County Superior Court Case Number 11ZF0103, dated February 9, 2011, attached herein as Exhibit R8, pp. 12-13.)

The prosecutor, in his opening statement, again centered Beeman's importance to the case, and ascribed a motive of genuine concern for victims' well-being to his actions: "he first started listening to these calls, and I think he will tell you every time he listened to a call[,] he is really concerned about what really had happened to Jimmy Jones." Beeman, again, notified someone that Wayne Marshall was making a credible threat against him – this time, Jimmy Jones, after he allegedly assaulted Ruthie Marshall. (Exh. R8, p. 11.)

Beeman also testified that Ryan Sloan was housed in the same block at Theo Lacy Facility as Wayne Marshall:

> Q. Do you know where Ryan Sloan, you told us his moniker was Doc, where was he back on New Year's in 2009?
> A. He was in custody at the Theo Lacy branch jail, housed in the same mod as Wayne Marshall.

(Exh. R8, p. 27.)

But unlike Wayne Marshall, Sloan had access to "the dayroom and the phones," which he used to make phone calls to Ruthie Marshall that Beeman listened in on. (Exh. R8, pp. 28-29.) Given Beeman's unconstitutional use of dayroom privileges as evidenced by *Smith*, had such evidence been disclosed to defense counsel it is not unreasonable to think that unusual dayroom and module movements would have been more thoroughly questioned by counsel.

### C. Cases in which Officers Padilla, Guerrero, Pereyra, or Sandoval Were Involved

***People v. Anh Tuan Dinh Doan*** **(No. 15WF1296)**

On June 16, 2015, the OCDA filed a felony complaint against Defendant Anh Tuan Dinh Doan alleging violations of twenty-one counts, including sixteen counts of grand theft (PC 487(a)) and four counts of petty theft (PC 487(a)-488). (Redacted Court Vision, *People v. Anh Tuan Dinh Doan*, Orange County Superior Court Case Number 15WF1296, attached herein as Exhibit P5.) On June 29, 2015, the case proceeded to preliminary hearing before the Honorable Michael Beecher. At the preliminary hearing, OCDA Deputy District Attorney Mark Geller called former Special Handling Deputy Michael Carrillo as a witness. The defendant was held to answer on each count. (Exh. P5.)

A felony information was filed on September 17, 2015, adding an allegation that defendants had suffered a prior serious felony in violation of PC 667(d)/(e)(1) and PC 1170.12(b)/(c)(1). On the same date, the court set the case for jury trial to begin on January 14, 2016. This original trial date would later be vacated and reset, first to September 8,

2016, then to October 17, 2016, before being vacated on the latter date. On October 25, 2017, before the Honorable Sheila Hanson, the defendant entered a plea of guilty as to each charge of the indictment and admitted to enhancement in violation of PC 12022.1(b) as to count 1. The judge sentenced the defendant to a total of fourteen years in state prison. (Exh. P5.)

***People v. Kelly Michele Wolfe*** **(No. 14HF2315)**

Defendant Kelly Michele Wolfe was charged with second degree murder, a felony violation of PC 187(a); driving under the influence of alcohol or drugs with injury, a felony violation of VC 23153(a); DUI with BAC of 0.08% or more causing injury, a felony violation of VC 23153(b); driving without a valid driver license, a misdemeanor violation of VC 12500(a); and failure to yield to a visually handicapped pedestrian, a misdemeanor violation under VC 21963. (Redacted Court Vision, *People v. Kelly Michele Wolfe*, Orange County Superior Court Case Number 14HF2315, attached herein as Exhibit Q5.)

Pereyra testified at trial on the morning of September 22, 2015. (Exh. Q5.) Pereyra stated that he arrived at Wolfe's apartment shortly after the collision had taken place. (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 679.) Pereyra also testified as to observations he made about the damage he saw to Wolfe's vehicle while it was parked outside of her apartment. (*Id.* at pp. 679-680.) Pereyra briefly questioned Wolfe's husband while he was sitting outside (*Id.* at p. 680.)

Wolfe was found guilty of the first four charges listed above, but the fifth, regarding the charge of failing to yield to a visually handicapped pedestrian, was dismissed. (*Ibid*.) In Wolf's appeal, she raised three claims: The evidence was insufficient to sustain the murder conviction, the failure to allow a manslaughter instruction as a lesser included offense violates the equal protection clause, and the failure to allow voluntary intoxication as a defense violates due process (*Id.* at p. 677.) The Court of Appeal affirmed the trial court's ruling. (*Ibid*.)

The court imposed an aggregate sentence of 18 years to life. (*Id.* at p. 680)

***People v. Justin Johnson*** **(No. 16HF1040)**

On August 2, 2016, the OCDA filed a felony complaint against Justin Janecek Johnson alleging violations of three counts, including attempted murder (PC 664(a)-187(a)) and two counts of assault with a deadly weapon other than a firearm (PC 245(a)(1).) Included in this filing were felony enhancements for inflicting great bodily injury (PC 12022.7(a)) and personally using a deadly weapon (PC 12022(b)(1).) (Redacted Court Vision, *People v. Justin Johnson*, Orange County Superior Court Case Number 16HF1040, attached herein as Exhibit R5.) On September 26, 2016, the case proceeded to preliminary hearing before the Honorable Matthew S. Anderson. At the preliminary hearing, OCDA Deputy District Attorney Danielle Cota called former Special Handling Deputy Anton Pereyra as a witness. The defendant was held to answer to counts 1 and 2.

A review of the preliminary hearing transcript indicates that Deputy Pereyra did not mention his prior experience as a Special Handling deputy in the Orange County Jails, and neither the prosecutor nor defense counsel asked any questions regarding his assignments to the unit. (Reporter's Transcript (Preliminary Hearing), *People v. Justin Johnson*, Orange County Superior Court Case Number 16HF1040, dated Sep. 26, 2016, attached herein as Exhibit S5.) It appears highly likely that the prosecution failed to provide any evidence regarding the role of former Special Handling Deputy Pereyra in violating the constitutional rights of inmates, in concealing evidence related to said violations, or in hiding evidence that would have demonstrated that OCSD witnesses in *Dekraai* provided false or misleading testimony.

On October 11, 2016, the Honorable Sheila Hanson set the case for jury trial to begin on December 1, 2016. This jury trial would be later trailed to December 12, 2016. On December 12, 2016, the prosecution motioned to dismiss the case against the defendant. The Honorable Sheila Hanson granted this motion. (Exh. R5.)

***People v. Gary Cummings*** **(No. 16HF1305)**

On September 22, 2016, the OCDA filed a felony complaint against Defendant Gary Cummings alleging burglary in the second degree (PC 459-460(b).) (Redacted Court Vision, *People v. Gary Cummings*, Orange County Superior Court Case Number 16HF1305, attached herein as Exhibit T5.) On November 2, 2016, the case proceeded to preliminary hearing before the Honorable Joy W. Markman. At the preliminary hearing, OCDA Deputy District Attorney Danielle Cota called former Special Handling Deputy Anton Pereyra as a witness. The defendant was held to answer on the complaint. On December 20, 2016, before the Honorable Kazuharu Makino, the defendant entered a plea of guilty on the sole count charged and the court sentenced him to a total of six months in the Orange County Jail. (Exh. T5.)

***People v. Brian Bellino*** **(No. 16HF1639)**

On November 18, 2016, the OCDA filed a felony complaint against Defendant Brian Bellino alleging one count of assault with a deadly weapon other than a firearm (PC 245(a)(1)) and one count of possession of a controlled substance paraphernalia (HS 11364(a).) (Redacted Court Vision, *People v. Brian Bellino*, Orange County Superior Court Case Number 16HF1639, attached herein as Exhibit U5.) On December 2, 2016, the case proceeded to preliminary hearing before the Honorable Thomas A. Delaney. At the preliminary hearing, OCDA Deputy District Attorney Karen Wulc called former Special Handling Deputy Anton Pereyra as a witness. The defendant was held to answer on the complaint.

On December 28, 2016, the defendant entered a change of plea on the felony information and the court sentenced him to a total of 86 days in the Orange County Jail and three years of probation. (Exh. U5.)

***People v. Fernando Mena* (No. 16HF0498)**

On March 16, 2016, the OCDA filed a felony complaint against Defendant Fernando Mena alleging violations of six counts, including assault with force likely to produce great bodily injury (PC 245(a)(4)) and battery with serious bodily injury (PC 243(d).) (Redacted Court Vision, *People v. Fernando Mena*, Orange County Superior Court Case Number 16HF0498, attached herein as Exhibit V5.) On January 30, 2017, the case proceeded to preliminary hearing before the Honorable Gregory W. Jones. At the preliminary hearing, the prosecution called former Special Handling Deputy Anton Pereyra as a witness. The defendant was held to answer to counts 1 and 2 of the information. On April 10, 2017, the defendant entered into a plea of guilty, before the court, on counts 1 and 2. The Honorable Robert R. Fitzgerald sentenced the defendant to a total of 180 days in the Orange County Jail. (Exh. V5.)

***In re A.S.* (No. DL050715–001)**

The minor was charged with making a false representation to a peace officer, a misdemeanor in violation of PC 148.9(a); and violating curfew, a misdemeanor in violation of MC 9.201. (*In re A.S.* (Cal. Ct. App., May. 10, 2017, No. G052457) 2017 WL 1908319 at p. 1.)

Pereyra was the officer with whom the minor had the key interaction. (*Ibid*.) Pereyra, driving an unmarked patrol car, pulled over to stop and question the minor, who appeared to be approximately 15 years old. The minor was walking with an individual, who appeared to be in his 20s. (*Ibid.*) Pereyra testified that he did not recall turning on his emergency lights, but that he believed he activated his rear amber flashing lights before stopping the minor. (*Ibid*). Pereyra testified that he thought the minor was engaged in some kind of romantic relationship with the male, as the male purportedly had his arm around the minor. (*Ibid.*) When Pereyra asked the minor her name and where she was going, she gave a false name and age that did not match with the birth year she gave. (*Ibid.*) After further questioning and inconsistencies in the minor's answers, Pereyra and another officer drove

the minor to her home. (*Id*. at p. 2.) Pereyra knocked on the door to the home and spoke with her parents. The minor then gave her true name and age. (*Ibid.*)

The trial court found insufficient evidence to support the second charge of violating curfew, but found the minor guilty of making a false representation to a peace officer. (*Ibid.*) The trial court found that because it is common for family members to place their arms around one another, the officer did not have reasonable suspicion of the level required to make a stop. (*Ibid*.) The trial court, nonetheless, found the minor guilty or providing false information, because it found that the stop and subsequent questioning were consensual and therefore not a violation of the minor's Fourth Amendment rights. (*Ibid*.) The minor appealed, alleging the officer detained her without reasonable suspicion and, therefore, the evidence derived from the stop should have been be excluded and the reverse the trial court's finding on the first charge should be reversed. (*Ibid.*) The appeals court disagreed and affirmed the trial court's judgement. (*Ibid.*) The Court stated that although it disagreed with the trial court's reasoning that the stop was consensual, there thus was reasonable suspicion for Pereyra to stop the minor. As a result, the trial court's error was harmless. (*Ibid.*)

***People v. Moises Ruiz*** **(No. 16HF1723)**

On November 12, 2016, the OCDA filed a felony complaint against Defendant Moises Ruiz alleging violations of eighteen counts, including assault with a deadly weapon other than a firearm, a felony violation of PC 245(a)(1); and criminal threats, a felony violation of PC 422(a). The complaint alleged ten enhancements along with the charges filed, including personally using a deadly weapon in violation of PC 12022(b)(1) and criminal street gang activity in violation of PC 186.22(d). (Redacted Court Vision, *People v. Moises Ruiz*, Orange County Superior Court Case Number 16HF1723, attached herein as Exhibit W5.) On August 24, 2017, the case proceeded to preliminary hearing before the Honorable Robert Gannon. At the preliminary hearing, OCDA Deputy District Attorney

Cliff Bodley called former Special Handling Deputy Anton Pereyra, and Gilbert Dorado as witnesses. The defendant was held to answer on all counts and enhancements alleged.

On September 19, 2017, the court set the case for jury trial on October 24, 2017. The October 24 date was later vacated and reset for October 31, 2017. At trial, Deputy District Attorney Cliff Codley called Deputies Anton Pereyra, Jack Mullvain, Jonathan Larson, Gilbert Dorado and Sergeant Harrison Manhart as witnesses.

A review of the jury trial transcript indicates that the prosecution questioned Deputy Pereyra about his experience in law enforcement. Deputy Pereyra stated, "[I] started out working custody jail complex. After that, while in custody, I worked six years in the Classification Unit." (Reporter's Transcript (Jury Trial), *People v. Moises Ruiz*, Orange County Superior Court Case Number 16HF1723, dated Nov. 8, 2016, attached herein as Exhibit X5.) During Ruiz's trial, Pereyra was called to testify on November 6, 2017. Pereyra was first asked about his prior experience with gangs and his professional background as a member of law enforcement. (Exh. X5, p. 4.) Pereyra stated that a conservative estimate of the number of gang-related cases that he had previously investigated was "several hundred." (Exh. X5, p. 4.) Pereyra also stated that many of these cases—roughly 80 percent—took place in the region of San Juan Capistrano. (Exh. X5, p. 7.)

Pereyra was then asked questions about his interaction with Ruiz during December 5, 2016. (Exh. X5, p. 6.) He stated that he received a dispatch to the location of the incident, 26524 Calle San Francisco. (Exh. X5, p. 4.) He testified that he was alone when he responded and was the first officer on the scene, although other officers would arrive later. (Exh. X5, p. 5.) Pereyra stated that, once he responded, he saw an individual attempting to scale a wall in the alley. (Exh. X5, p. 8.) He identified the individual as Ruiz, someone he had interacted with numerous times before. (Exh. X5, p. 8.) After recounting the route he took to the scene, Pereyra also stated that there were other individuals in the alley pointing towards Ruiz, urging Pereyra to pursue Ruiz. (Exh. X5, p. 12.) Pereyra then testified that Ruiz, after seeing Pereyra, tried to flee. (Exh. X5, p. 23.) After a foot chase,

the path of which Pereyra recounted, Pereyra stated that he eventually caught up to Ruiz. (Exh. X5, p. 33.) According to Pereyra, Ruiz briefly ran towards Pereyra, who drew his weapon and ordered Ruiz to get down on the ground. (Exh. X5, p. 33.) Ruiz complied. (Exh. X5, p. 33.) Pereyra stated that other officers, who recently arrived on the scene, handcuffed Ruiz. (Exh. X5, p. 36.) Pereyra also stated that he could smell alcohol on Ruiz's breath and that Ruiz was yelling incoherently with slurred speech. (Exh. X5, p. 36.) Pereyra also stated that once Ruiz was in custody, a woman approached Pereyra yelling "that's him" in Spanish, referring to Ruiz. (Exh. X5, p. 35)

Pereyra was also questioned about the investigation he undertook after Ruiz was in custody. He testified that he searched the area and found a black sweatshirt, one that matched the sweatshirt Pereyra claimed to have seen Ruiz attempting to scale the alley wall with (Exh. X5, p. 38.) Pereyra then testified that he searched the surrounding area for a knife, but could not find one. (Exh. X5, p. 42.) On cross examination, Pereyra stated that while there was a lot of trash around the area, he was confident that the sweatshirt he found was the one he claimed to see Ruiz using in the alley. (Exh. X5, p. 54.)

Finally, Pereyra was also asked about a separate interaction he had with Ruiz, one that took place on February 22, 2014. (Exh. X5, p. 45.) He was questioned about that incident because the prosecution wanted to put forth before the jury more on the "background evidence of Ruiz' gang affiliation." (Exh. X5, p. 44.) He outlined questioning Ruiz about the theft of a skateboard. (Exh. X5, p. 46.) Pereyra also stated that Ruiz ran from police when they first attempted to contact him regarding the theft. (Exh. X5, p. 45.) Pereyra also stated that Ruiz changed his story several times and also made statements such as "I know what I did," "I fucked up," and apologized. (Exh. X5, p. 48.) Pereyra also stated that during this questioning regarding the separate incident, Ruiz stated that he had been drinking the day of that incident.

Following deliberation, the jury found the defendant guilty on counts 1, 2, 3, 5, and 6 with all enhancements accompanying those charges to be true. The jury found the

defendant not guilty of count 4. At sentencing, the Honorable Gary S. Paer sentenced the defendant to a total of fifteen years and four months in state prison. (Exh. W5.)

***People v. Alejandro Limon (*No. 15HF0917)**

On August 20, 2015, the OCDA filed a felony complaint against Defendant Alejandro Limon alleging violations of five counts, including violations of assault with a deadly weapon other than a firearm, a felony violation of PC 245(a)(1); and attempted voluntary manslaughter in felony violation of PC 664(a)-192(a). (Redacted Court Vision, *People v. Limon*, Orange County Superior Court Case Number 15HF0917, attached herein as Exhibit Y5.) On March 13, 2016, the case proceeded to preliminary hearing before the Honorable Carlton P. Biggs. Limon was held to answer on the complaint.

On March 7, 2018, the case was assigned to the Honorable Steven D. Bromberg for trial. On March 13, 2018, at the jury trial, OCDA Deputy District Attorney Tara Meath called former Special Handling Deputy Anton Pereyra as a witness.

A review of the jury trial transcript indicates that the prosecution questioned Deputy Pereyra about his experience in law enforcement. The witness did not mention his experience as Special Handling or Classification deputies in the Orange County Jails, and neither the prosecutor nor defense counsel asked any questions regarding the witness' respective assignments to these units. (Reporter's Transcript (Jury Trial), *People v. Alejandro Limon*, Orange County Superior Court Case Number 15HF0917, dated March 13, 2018, attached herein as Exhibit Z5.) It appears highly likely that the prosecution failed to provide any evidence regarding the role of Pereyra in violating the constitutional rights of inmates, in concealing evidence related to said violations, or in hiding evidence that would have demonstrated that OCSD witnesses in *Dekraai* provided false or misleading testimony.

On March 19, 2018, the jury returned a verdict. The defendant was found not guilty of premeditated attempted murder. The defendant was, however, found guilty of the lesser offense of violating PC 664(a)-192(a). The jury found the enhancement, inflicting great

bodily injury (PC 12022.7(a)), to be true. On May 11, 2018, the Court sentenced the defendant to a total of six years in state prison. (Exh. Y5.)

***People v. Robert Fee*** **(No. 16HF0577)**

On April 29, 2016, the OCDA filed a felony complaint against Defendant Robert Fee alleging violations of two counts of attempted murder upon a peace officer (PC 664(e)-187(a)) each of which carried the enhancement of discharge of a firearm (PC 12022.53(c).) (Redacted Court Vision, *People v. Robert Fee*, Orange County Superior Court Case Number 16HF0577, attached herein as Exhibit A6.) On January 18, 2017, the case proceeded to preliminary hearing before the Honorable Gregory W. Jones. At the preliminary hearing, OCDA Deputy District Attorney called former Special Handling Deputy Anton Pereyra as the sole witness. The defendant was held to answer on the complaint.

A review of preliminary hearing transcript indicates that Deputy Anton Pereyra did not mention his prior assignment to the Special Handling Unit, and neither the prosecutor nor defense counsel asked any questions regarding his assignment to the unit. (Reporter's Transcript (Preliminary Hearing), *People v. Robert Fee*, Orange County Superior Court Case Number 16HF0577, dated January 18, 2017, attached herein as Exhibit B6.)

At trial, investigator Pereyra testified on January 18, 2017. (Exh. A6.) He also testified on April 6, 2022, and presented a series of photos relating to the incident.

Fee eventually pled guilty to the two counts of attempted murder upon a peace officer, along with their enhancements. (Exh. A6.) He was sentenced to a total of 17 years in state prison. (Exh. A6.)

***People v. Mark Jarosik*** **(No. 09HF0875)**

On May 17, 2009, Mark Jarosik was arrested on suspicion of sexually assaulting his girlfriend, Sarah C. (*People v. Jarosik*, (June 27, 2014, G047949) [nonpub. opn.] (2014 Cal. App. Unpub. LEXIS 4658).) The prosecutor charged Jarosik with rape and attempted

sodomy by force, and the trial court issued a protective order barring Jarosik from contact with Sarah. While Jarosik was in a holding cell on June 5, 2009, he purportedly had a conversation with inmate Timothy Ryan in which he allegedly solicited Ryan's help for the murder of Sarah.[52] (*Id*. at p. 20.) Jarosik was released on bail the next day. **This conversation took place less than three weeks before Special Handling Deputies began working with three informants in *Smith* to obtain statements from Defendant Smith in violation of the Sixth Amendment. At the center of the concealed evidence in both *Jarosik* and *Smith* was former OCSD Investigator Joseph Sandoval.**

On June 8, Sarah dropped her children off at school and drove around the corner to get mail from her mailbox. (*Id.* at p. 8.) Jarosik ran over to her parked car, met her at her open door, and struck her face and body. Sarah fell to the gutter, and Jarosik grabbed her hair and slammed her head repeatedly against the curb. Neighbors intervened and restrained Jarosik until police arrived. (*Id.* at pp. 8-9.)

Later, Ryan saw on the news that Jarosik had been bailed out of jail and rearrested for attempted murder. (*Id.* at p. 21.) Ryan contacted law enforcement about his previous conversation with Jarosik and arranged to "continue the conversation" about having Sarah murdered when Jarosik was in custody again. (*Id*. at p. 22.) At that point, Jarosik had been charged with rape, attempted sodomy, and attempted murder. (*Id*. at p. 19.)

On July 1, 2009, a recorder was secretly placed in a van transporting the two men. Jarosik asked Ryan if he had read anything about him in the papers. (*Id*. at p. 22.) Ryan said he had not because the jail was on lockdown. Ryan asked Jarosik why he had never sent him the letter, and Jarosik explained it was because his mother had bailed him out. Jarosik gave Sarah's address to Ryan and described what vehicle she drove. Ryan

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[52] Jarosik allegedly told Ryan that an altercation with a "stupid bitch" had landed him in jail, disclosed that he had a "problem," complained he needed to make the problem go away, and wished aloud he could "get rid of" his girlfriend. (*Id*. at p. 20.) Jarosik asked Ryan, "Well, since you're into drugs, do you know anybody that could kill anybody." Ryan answered, "Let me see what I can do." (*Id*. at p. 20.) Jarosik said he would send Ryan a letter with Sarah's name and address, but he did not and was bailed out the next day.

explained that if Sarah died, Jarosik's case would go away because "there's no victim, there's no witnesses there's no crime…" (*Id*. at p. 22-23.) Initially, Jarosik responded that he changed his mind about having Sarah killed and just wanted someone to "set her up," not "take her out." (*Id*. at p. 23.) Jarosik then made several comments pertaining to the attack against Sarah that took place after Jarosik was bailed out of jail.[53] (*Id*. at pp. 23-24.) Finally, Jarosik expressed that he did not want to be in prison until he was 70 years old and agreed that Sarah needed to be killed before his trial. (*Id*. at p. 25.) The prosecution then added additional charges against Jarosik, including solicitation to commit murder. (*Id*. at p. 19.)

At trial, the jury heard Ryan's testimony and the recorded conversation. (*Id*. at p. 26.) The jury convicted Jarosik of two counts of forcible rape, attempted forcible sodomy, four counts of disobeying a restraining order, attempted murder, and solicitation to commit murder. (*Id*. at p. 1.) The jury found the allegation that Jarosik acted with premeditation and deliberation in committing the attempted murder to be true, and also found he inflicted great bodily injury on the victim under circumstances involving domestic violence. (*Id*. at p. 1.) The trial court sentenced Jarosik to 31 years to life in prison. On appeal, Jarosik challenged the sufficiency of the evidence to support the premeditation and deliberation finding and argued that jail officials violated *Massiah* when they placed him, Ryan, and a recording device in the van after Ryan disclosed to law enforcement that Jarosik had solicited his ex-girlfriend's murder. The appellate court ruled that there was sufficient evidence to support the premeditation and deliberation finding and that there was no *Massiah* violation since Jarosik had not yet been charged with solicitation at the time of the recorded conversation. (*Id*. at pp. 16, 31.)

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[53] "[I]t was consensual for me . . . it was consensual sex and she said she was beaten . . ." (*Id*. at p. 23.) "I lost it man when I . . . went there . . . she was right in front of me and I, I went to grab her and she just . . . freaked on me . . . she fell to the ground and hit her head and there was blood . . . and then I'm like I'm down on the ground all of a sudden I get picked up and I'm like what the fuck." (*Id*. at pp. 23-24.)

In making its ruling, the court emphasized the following:

> [OCSD Investigator] Starnes only participated in an initial interview with Ryan, where jail officials attempted to determine the contours of Ryan's alleged information and whether he was credible or simply wanted to be paid in some fashion. **Starnes did not participate in preparing Ryan for his conversation with Jarosik, and the officer who did, Joe Sandoval, did not direct Ryan to elicit any information on the charged offenses, but only to continue his solicitation conversation with Jarosik.**

(*Id*. at p. 10.)

Sandoval claimed in his testimony that he did not direct the informant to ask about his charged offenses. However, because Baytieh failed to make disclosures about Sandoval to Jarosik, the defendant was unaware of critical evidence related to Sandoval's credibility and his practice of engaging in actions related to informants designed to conceal their actions and their relationship with law enforcement. First, in *Smith*, Sandoval demonstrated he is a law enforcement officer who, during the very same time period, was willing to orchestrate secret agreements with informants, allowing them to obtain consideration. As discussed previously, in *People v. Smith*, a note within Palacios' OCII file showed that he offered informant Palacios the chance to earn money prior to his testimony in *Smith*. (Exh. R1, pp. 2-6.) As also discussed above, it appears that discussions regarding the monetary compensation occurred after Palacios failed to appear for his court hearing and was being given special treatment by being allowed by him and the *Smith* prosecution team to avoid being taken into custody on that warrant and instead walk himself into custody at a time of the informant's choosing.

Second, if Baytieh turned over Palacios' OCII file in *Jarosik*, or made the necessary disclosures related to what it included, this would have revealed to Jarosik that Sandoval attempted to add informant Palacios as an OCII-approved informant just days after he completed his testimony in *Smith*. (Exh. R1, p. 2; Exh. S1, p. 2.) As discussed, the timing of this effort appears to have been designed to minimize disclosures in *Smith*. Implicit in this effort is that Palacios was engaged in undisclosed informant efforts in advance of

Smith's trial and very likely was in discussions with Sandoval and other members of law enforcement that were not revealed to the defense. This was highly relevant to an ongoing relationship with the prosecution team that likely motivated Palacios to provide particularly favorable testimony.

If Defendant Jarosik was appropriately in possession of this information, he not only would have sought additional evidence related to undisclosed, relevant information related to informant Ryan but would have been able to challenge the credibility of Sandoval and his representation about his communications with Ryan. This would have been relevant to a challenge under *Massiah* and the Sixth Amendment to statements about the charged crimes, as well as to attacking the credibility of both Sandoval and Ryan. Regardless of whether damning evidence related to Sandoval and Ryan was then turned over to the defense, what occurred in *Smith* would have been important as the court and jury in *Jarosik* considered whether there existed undisclosed communications between Sandoval and Ryan that bore on the credibility of their version of events.

### D. Cases in Which Baytieh Was the Prosecutor, but No Officer from *Smith* Was Involved[54]

***People v. Cuong Viet Nguyen* (No. 08CF1842)**

Defendant Cuong Viet Nguyen was charged on June 19, 2008 with murder, a felony violation of PC 187(a), and an enhancement for discharging a firearm causing great bodily harm or death in violation of PC 12022.53(d). Nguyen was also charged with attempted murder, a felony violation of PC 664(a)-187(a), and an enhancement for discharging a

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[54] Smith contends that Baytieh was required under *Brady* to disclose to defendants whom he prosecuted both his misconduct in *Smith* and the acts to conceal that misconduct, which detailed herein. However, for purposes of calculating the number of affected cases, Defendant has chosen not to included the cases he prosecuted unless a jailhouse informant was involved or one of the officers from the *Smith* prosecution team was called as a witness.

firearm causing great bodily injury or death in violation of PC 12022.53(d). (Redacted Court Vision, *People v. Cuong Viet Nguyen*, Orange County Superior Court Case Number 08CF1842, attached herein as Exhibit C6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. C6.)

On March 24, 2010, Nguyen was convicted of murder plus the firearms enhancement, but the jury found him not guilty of attempted murder. (Exh. C6.) On May 7, 2010, Nguyen was sentenced to a total term of 55 years to life in state prison. (Exh. C6.)

***People v. Ethan Emanuel Rosenfeld*** **(No. 06CF3373)**

Defendant Ethan Emanuel Rosenfeld was charged on October 26, 2006 with murder, a felony violation of PC 187(a). (Redacted Court Vision, *People v. Ethan Emanuel Rosenfeld*, Orange County Superior Case Number 06CF3373, attached herein as Exhibit D6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. D6.)

On May 5, 2010, Rosenfeld was convicted of first-degree murder. (Exh. D6.) On June 11, 2010, Rosenfeld was sentenced to 25 years to life in prison. (Exh. D6.) After the Court of Appeal filed an opinion affirming a modified judgment of Rosenfeld on November 30, 2011, his conviction was reduced from first to second degree murder on February 15, 2012, and his sentence was reduced from 25 years to life to 15 years to life in state prison. (Exh. D6.)

***People v. William Leo McDougal*** **(No. 10ZF0094)**

Defendant William Leo McDougal was charged on November 15, 2010 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. William Leo McDougal*, Orange County Superior Court Case Number 10ZF0094, attached herein as Exhibit E6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. E6.)

On August 17, 2012, McDougal pled guilty to murder. (Exh. E6.) On October 26, 2012, McDougal was sentenced to a total term of 16 years to life in state prison. (Exh. E6.)

***People v. Robert Eugene Vasquez*** **(No. 12ZF0131)**

Defendant Robert Eugene Vasquez was charged on March 12, 2012 with murder, a felony violation of PC 187(a); the special circumstance of lying in wait in violation of PC 190.2(a)(15); and an enhancement of personal use of a deadly weapon in violation of PC 12022(b)(1). Vasquez was also charged with assault with a deadly weapon other than a firearm, a felony violation of PC 245(a)(1), and an enhancement for inflicting great bodily injury in violation of PC 12022.7(a). (Redacted Court Vision, *People v. Robert Eugene Vasquez*, Orange County Superior Court Case Number 12ZF0131, attached herein as Exhibit F6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. F6.)

On June 27, 2013, Vasquez was convicted on all counts. (Exh. F6.) On August 23, 2013, Vasquez was sentenced to an indeterminate life sentence without the possibility of parole in addition to a consecutive term of 8 years in state prison. (Exh. F6.)

***People v. Derek Henry Pinski*** **(No. 12CF2594)**

Defendant Derek Henry Pinski was charged on September 4, 2012 with murder, a felony violation of PC 187(a), and an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1). (Redacted Court Vision, *People v. Derek Henry Pinski*, Orange County Superior Court Case Number 12CF2594, attached herein as Exhibit G6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. G6.)

On May 7, 2014, the court granted Pinski's motion to withdraw his plea of not guilty and instead plead guilty by reason of insanity to a second-degree murder charge (plus the enhancement). (Exh. G6.) On May 29, 2014, the court ordered that Pinski be confined to a state hospital for no less than 15 years from September 1, 2012. (Exh. G6.) Pinski also received a total sentence of 16 years to life. (Exh. G6.)

***People v. Paul Marshal Curry*** **(No. 10CF3053)**

Defendant Paul Marshal Curry was charged on November 9, 2010, with first degree murder, a felony violation of PC 187(a) with the special circumstance of giving poison; and with making false or fraudulent claims, a felony violation of PC 550(a)(1), with the special circumstance of murder for financial gain, a felony violation of 190.2(a)(1). (Redacted Court Vision, *People v. Paul Marshal Curry*, Orange County Superior Court Case Number 10CF3053, attached herein as Exhibit H6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. H6.)

On September 30, 2014, Curry was found guilty of both charges and their enhancements. (Exh. H6.) He was sentenced to life in state prison without the possibility of parole on November 14, 2014. (Exh. H6.)

***People v. Juana Perez Valencia*** **(No. 09CF3144)**

Defendant Juana Perez Valencia was charged on December 28, 2009 with murder, a felony violation of PC 187(a); child assault causing death, a felony violation of PC 237ab; and voluntary manslaughter, a felony violation of PC 192(a). (Redacted Court Vision, *People v. Juana Perez Valencia*, Orange County Superior Court Case Number 09CF3144, attached herein as Exhibit I6.) On May 24, 2010, the OCDA filed an Original Information charging Valencia with child assault causing death, a felony violation of PC 237ab. (Exh. I6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. I6.)

On January 30, 2012, the Court declared a mistrial as to the murder and child assault charges. (Exh. I6.) On re-trial, Valencia was convicted on September 28, 2012 of both charges. (Exh. I6.) On November 9, 2012, the court set aside the conviction on the child assault charge and sentenced Valencia to 15 years to life in state prison. (Exh. I6.) On September 30, 2014, the Court of Appeal filed a decision reversing Valencia's conviction(s). Both the charges against Valencia and his sentence were vacated on October 27, 2014. (Exh. I6.) On February 14, 2017, the OCDA dismissed the original two counts

and amended its Original Information to charge Valencia with voluntary manslaughter, a felony violation of PC 192(a). (Exh. I6.) That same day, Valencia pled guilty to the charge of manslaughter and was sentenced to a total term of 11 years in state prison. (Exh. I6.)

***People v. Lorne Paul Kelley*** **(No. 07ZF0004)**

***People v. Ricky Lee Nelson*** **(No. 07ZF0004)**

Defendant Lorne Paul Kelley was charged on March 5, 2007 with murder, a felony violation of PC 187(a), with an enhancement for personal use of a deadly weapon in violation of PC 12022(b)(1); as well as attempted murder, a felony in violation of PC 664(a)-187(a). (Redacted Court Vision, *People v. Lorne Paul Kelley*, Orange County Superior Court Case Number 07ZF0004, attached herein as Exhibit J6.) On November 5, 2008, the OCDA filed a First Amended Indictment that added a personal use of a deadly weapon enhancement, a felony in violation to PC 12022(b)(1), to the attempted murder charge. (Exh. J6.)

Defendant Ricky Lee Nelson was charged on the same date with murder, a felony violation of PC 187(a), and attempted murder, a felony violation of PC 664(a)-187(a). (Redacted Court Vision, *People v. Ricky Lee Nelson*, Orange County Superior Court Case Number 07ZF0004, attached herein as Exhibit K6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. J6; Exh. K6.)

On December 17, 2008, Kelley was convicted of all counts. (Exh. J6.) On February 20, 2009, Kelley was sentenced to concurrent terms of 51 years and a life sentence plus 6 years in state prison, with parole eligibility after 14 years. (Exh. J6.)

On December 18, 2008, Nelson was convicted of both counts. (Exh. K6.) On February 20, 2009, Nelson was sentenced to a total term of 25 years to life. (Exh. K6.) After the Court of Appeal filed a reversal of judgment against Nelson on December 13, 2010, the court vacated his sentence for both counts and dismissed his case on February 4, 2011. (Exh. K6.)

***People v. Stephen Joseph Bennett*** **(No. 06Z2F0138)**

Defendant Stephen Joseph Bennett was charged on September 15, 2006 with first degree murder, a felony violation of PC 187(a), with a special circumstance of armed robbery, a felony violation of PC 190.2(a)(17)(A). (Redacted Court Vision, *People v. Stephen Joseph Bennett*, Orange County Superior Court Case Number 06Z2F0138, attached herein as Exhibit L6.) He was also charged with second degree robbery, a felony violation of PC 211-212.5(c); possession of a firearm by a felon, a felony violation of PC 12024(a)(1); and sale or transport of a controlled substance, a felony violation of HS 11352(a). (Exh. L6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. L6.)

On October 2, 2008, Bennett was found guilty of murder, second degree robbery, and of sale or transport of a controlled substance. (Exh. L6.) He was found not guilty of possessing a firearm by a felony. (Exh. L6.) However, on January 4, 2019, defendant filed a petition to vacate the murder pursuant to PC 1170.95(a). (Exh. L6.) On March 11, 2020, the murder conviction and its enhancement were vacated. (Exh. L6.) On July 17, 2020, the court exercised its discretion to strike the defendant's prior convictions and sentenced him to a total state prison commitment of ten years. The Court then suspended the prior sentence and sentenced defendant to three years of formal probation. (Exh. L6.)

***People v. Brandon Michael Turner*** **(No. 06ZF0138)**

***People v. Bernard Smith*** **(No. 06ZF0138)**

Defendants Brandon Michael Turner and Bernard Smith were charged on September 15, 2006 with first degree murder, a felony violation of PC 187(a), with a special circumstance of robbery in violation of PC 190.2(a)(17)(A), and an enhancement for discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Redacted Court Vision, *People v. Brandon Michael Turner*, Orange County Superior Court Case Number 06Z2F0138, attached herein as Exhibit M6; Redacted Court Vision, *People v. Bernard Smith*, Orange County Superior Court Case Number 06Z2F0138,

attached herein as Exhibit N6.) In addition, Defendants were charged with second degree robbery, a felony violation of PC 211-212.5(c), and an enhancement for discharging a firearm causing great bodily injury or death in violation of PC 12022.53(d). (Exh. M6; Exh. N6.) Turner and Smith were also charged with sale or transport of a controlled substance, a felony violation of HS 11352(a). (Exh. M6; Exh. N6.) Finally, Smith was charged with possession of a firearm by a felon, a felony violation of PC 12021(a)(1). (Exh. N6.)

Ebrahim Baytieh was the assigned prosecutor. (Exh. M6; Exh. N6.)

On September 19, 2008, a jury found Turner guilty of all charges and found true all of the enhancements. (Exh. M6.) Turner was sentenced to life without the possibility of parole, plus a consecutive term of 25 years to life in state prison. (Exh. M6.)

Defendant Smith was also found guilty of all charges, the special circumstance of robbery, and both enhancements. (Exh. N6.) On January 16, 2009, Smith was sentenced to indeterminate term of life without the possibility of parole, plus a consecutive term of 28 years to life in state prison. (Exh. N6.)

On March 18, 2013, the Court denied Defendant Turner's request for reduction of fines. (Exh. M6.) Similarly, on April 9, 2015, the Court denied Turner's request to eliminate or modify fines, fees, or restitution amounts ordered at sentencing. (Exh. M6.)

On February 25, 2019, Turner filed a motion to vacate murder conviction and for resentencing, pursuant to PC 1170.95. (Exh. M6.) On March 19, 2019, Court read and considered the petition for purposes of assignment and to address the appointment of counsel. (Exh. M6.) Court appointed Public Defender to represent Turner. (Exh. M6.)

On April 10, 2023, Turner's case was assigned to Judge Larry Yellin for all purposes. (Exh. M6.) On July 10, 2023, the case was added to calendar for August 2, 2023 at 9:00 am in department C42 for hearing at the request of defense counsel. (Exh. M6.)

In contrast, Court of Appeal reversed Defendant Smith's conviction as to counts one and two on August 30, 2011 and vacated the state prison sentence. (Exh. N6.)

On June 20, 2012, Smith's case was assigned for re-trial and further proceedings to Department C37 for Judge Gary S. Paer, and jury trial was set to start on June 21, 2012. (Exh. N6.) Jury trial was trailed twice, and eventually started on June 25, 2012. (Exh. N6.)

In the re-trial, Smith was again found guilty of all charges, and the jury found true the special circumstance of robbery. (Exh. N6.) However, the other two enhancements were found not true. (Exh. N6.) On October 26, 2012, Smith was sentenced to indeterminate term of life without the possibility of parole, plus a consecutive determinate term of 3 years in state prison. (Exh. N6.)

On July 2, 2014, Court of Appeal affirmed the opinion in *Smith*. (Exh. N6.)

On April 16, 2016, the trial court denied Smith's motion to vacate restitution. (Exh. N6.)

On April 8, 2019, Smith filed a petition to vacate murder conviction and for resentencing, pursuant to PC 1170.95. (Exh. N6.) On April 18, 2019, the Honorable Kimberly Menninger read and considered the petition for purposes of assignment and to address the appointment of counsel. (Exh. N6.) The Court appointed a Public Defender to represent Smith. (Exh. N6.) The case was assigned to the Honorable Maria Hernandez in Department C27 for purposes of the petition filed per PC 1170.95. (Exh. N6.)

On June 5, 2019, Smith's case was re-assigned from Judge Maria Hernandez to Judge Matthew S. Anderson for all purposes. (Exh. N6.)

On August 30, 2022, Smith's case was assigned to the Honorable Judge Gary S. Paer for the purpose of the 1172.6 petition. (Exh. N6.) The order to show cause on petition for resentencing pursuant to PC 1172.6 was signed and filed the same day. (Exh. N6.) Next hearing for the petition is set for August 11, 2023. (Exh. N6.)

## XX. Baytieh's Other Jailhouse Informants: What They Taught Him and How He Tried to Hide What He Had Learned

In this section Defendant will discuss other cases prosecuted by Baytieh in which jailhouse informants provided statements attributed to the defendants in those cases. The fact that Baytieh appears to have had a significant number of cases in which jailhouse informants were involved, of course, further lessens the probability that he was the victim of an elaborate and successful plot by his own investigators to hide informant evidence from him. More importantly, what Baytieh saw and hid while prosecuting these other cases makes it even more unreasonable to think he was ever victimized in the slightest when it came to jailhouse informants and jailhouse informant evidence.

The first case discussed in this section, *People v. Guillen*, is unquestionably one of Baytieh's most high-profile cases of his career. In *Guillen*, the prosecution was aided immensely by the contributions of two jailhouse informants who claimed that a total of three defendants admitted their responsibility for the crime. The first informant, Sean Pough, described during an interview how suspects in that case came to his housing location shortly after the killing of John Derek Chamberlain, and how one suspect then followed him when he moved into another jail. Pough also explained that jail personnel asked about facilitating an opportunity to collect a statement from another suspect in the killing.

Understanding what occurred with the second *Guillen* informant, Lance Lawrence, is also important to gain a greater understanding of Baytieh's knowledge of the jailhouse informant program and his desire to protect informants' ability to be effective through the manipulation of evidence disclosures. A study of Lawrence's role in *Guillen* has also led to the discovery of troubling issues emerging in *People v. Ruben Oliveros*—another case in which Lawrence appeared as an informant. While Lawrence testified in *Oliveros*, but not *Guillen*, it appears that Baytieh may was gravely concerned about the implications for himself if the highly unusual consideration given to Lawrence between 2008 and 2011 was

ever carefully examined. It should also be emphasized that if there was material contained in the OCII files of Pough and Lawrence, there is every indication it was not disclosed—particularly considering Baytieh's claim in his DOJ interview that he never reviewed the OCII files of informants in his cases.

Defendant will also explore Baytieh-led prosecutions stemming from the murder of Scott Miller. Baytieh prosecuted two defendants in one trial and another defendant in a second trial. All three were convicted and two were sentenced to death. These cases included three jailhouse/custodial informants and once again, there is cause for concern about the concealment favorable and material information related to the informants. In the last of those prosecutions, *People v. Johnson*, the decision to call an informant would cause a direct collision with *People v. Smith*, as Baytieh decided to hide that his testifying informant in *Johnson* had been the fourth informant placed in Smith's dayroom that was at the center of an undisclosed operation.

Next, Defendant Smith will discuss an informant that appeared on Baytieh's witness list right up to the commencement of trial in his ultimately-successful capital murder prosecution of Hilbert Thomas. In *Thomas*, Special Handling deputies manipulated the housing locations of Thomas and informant Anthony Boozer, and the latter went to work. Once again, it appears that Baytieh was concerned about undisclosed discoverable evidence related to Boozer that he believed needed to be disclosed or which he blocked himself from seeing in an attempt to shield himself from his responsibilities.

### A. Baytieh Is Unable to Feign Ignorance of the Jailhouse Informant Program After Prosecuting *People v. Miguel Guillen, Garret Aguilar, Michael Garten, Jeremy Culmann, et al.* (No. 06CF3677)

*People v. Guillen* is discussed in section XIX, Affected Cases, because of Baytieh's failure to provide the defense with evidence from *Smith* that could have impeached one of the testifying witnesses, former OCSD Sergeant Donald Voght. However, this is not where disclosures from *People v. Smith* would have had their biggest impact. Informant-related

evidence, concealed in *Smith*, would have been of case-breaking importance to Miguel Guillen's co-defendants, Garret Aguilar and Michael Garten. Baytieh introduced testimony by jailhouse informant Pough in the 2011 trial where Aguilar was a co-defendant that helped secure the ill-gotten convictions of both Aguilar and Garten. Disclosures from *Smith* would have made it obvious to these defendants that Pough's work was in furtherance of an illegally operated jailhouse informant operation. However, Garten pled to a manslaughter charge and was sentenced to 11 years, seemingly having never realized that challenges to Pough's credibility were available. Likewise, disclosures would have certainly prompted Aguilar to challenge the admissibility of Pough's statements, led to a renewed consideration of Pough's credibility by both Aguilar and Garten, and, most significantly, prompted additional efforts to uncover any undisclosed evidence of Pough's informant background.

The concealed evidence from *Smith* would have also been immensely important to a third defendant, Jeremy Culmann, who also pled guilty to manslaughter charges and received 11 years (with four years of credits waived)—in part because Informant Lawrence claimed that he obtained statements from Culmann in 2009. Because of Baytieh's refusal to turn over evidence, Culmann, too, never realized that a Sixth Amendment challenge under *Massiah* was available to him. While Baytieh revealed to Culmann that Lawrence had reached a cooperation agreement in another case, *People v. Oliveros*, there was more that met the eye in that case as well. Culmann never had the slightest idea about other key issues surrounding Lawrence's role in *Oliveros*, and how Baytieh and a second prosecutor worked together to conceal the shocking story about how consideration appears to have flowed from Lawrence's informant work in the cases of both Culmann and Oliveros. In order to present a fuller picture of what occurred in Baytieh's cases, *Oliveros* will be discussed in this section, even though he was not the assigned prosecutor.

Baytieh's understanding of the significance of Pough and Lawrence in proving his long-existing knowledge of the jailhouse informant program is also demonstrated powerfully by a number of other actions, including his Unit's response to a 2016 Public

Records Act ("PRA") Request by Attorney Sanders. In response to a request for all cases in which jailhouse informants testified, Baytieh's Special Prosecutions Unit provided heavily redacted summaries of responsive cases—but did not include *Guillen* or *Oliveros*, despite both having included testimony from informants. Hiding these summaries from Sanders, who was litigating two capital murder cases (*Dekraai* and *Wozniak*) at the time, in which jailhouse informant issues were front and center, was an aggravated act of concealment. However, it appears that this non-disclosure originated in an effort to conceal the informant use in those cases from an entity or entities that were conducting their own investigations into these issues.

### B. Informant Pough's Revealing Informant Role Comes to Life in 2007 Interview with OCSD Investigators

The investigation of the in-custody killing of John Derek Chamberlain pre-dated the *Smith* informant operations in 2009 and 2010, even though the trial of Guillen and his charged co-defendants did not begin until 2011. This meant that Baytieh was required to turn over to Aguilar, Garten and Culmann the concealed evidence in *Smith* related to the use of informants Baytieh called informant Pough at trial, where he testified about statements made by Aguilar and Garten. Interestingly, Garten had already resolved his case before trial, but the prosecutor nonetheless introduced Garten's statements at the trial.

Additionally, Baytieh knew well before the 2011 trial—as a result of Pough's statements during his interview in 2007—that the informant had shared compelling evidence of a coordinated effort to question targets about their role in the Chamberlain killing. Pough claimed to investigators that he had never come forward previously as an informant. Yet, like so many other informants, he found himself in the perfect place at the perfect time for an enthusiastic effort to ingratiate himself with the suspects in Chamberlain's killing, who quickly arrived. Pough told investigators, "Actually **there was three -- there was four of them in the – in -- put in our sector all at once**, but they took

three of them out of there." (Interview of Sean Pough, *People v. Miguel Angel Guillen*, Orange County Superior Court Case Number 06CF3677, dated June 12, 2007, attached herein as Exhibit R6, p. 7.) In fact, at least two *Chamberlain* suspects—whom Pough claimed had made admissions to him—had their classification status changed almost immediately after the crime and were then moved into Pough's module at the Theo Lacy Facility to allow for "clsr supervsn[sic.]" (Redacted TREDs of Michael Garten and Garret Aguilar, attached herein as Exhibit S6.)

Pough struggled during his interview, as he seemed to vacillate between presenting himself as being protective of the four suspects placed into his module and telling the truth about his goal of ingratiating himself so that they would be convinced to speak about the killing of Chamberlain. Referring to his contact with Aguilar, Pough said the following:

> You know, at first, when he came into the sector, he was upstairs and there was -- like I said, there was four of them altogether. And they were -- you could tell they were all in shock. Who wouldn't be in shock, you know? **But our main concern is inmate against inmate was just, you know, keep your mouth shut**.

(Exh. R6, p. 14, bolding added.)

Just a few minutes later, Pough seemed to forget what he had just said: [Aguilar] -– he used to come out to the day room and just sit there. And after about three days, I finally -- you know, **we all tried to get their attention, "Hey, do you want to talk? Do you want to talk?"** (Exh. R6, p. 23.) Pough said to the investigators that, at one point, he began keeping some notes from Garten, but also pretended to have difficulty understanding why he chose to keep them. (Exh. R6, pp. 14-16.)

Throughout the interview, Pough struggled in his effort to appear as something other than a working informant. In the following excerpt, he was questioned about whether another defendant, Stephen Carlstrom, spoke about the crime:

> SEAN POUGH: None. No. He knew just, you know, keep mouth shut. He's obviously done some time somewhere, whether it be county jail or state. But

> he knew to, you know, keep his mouth shut. When I was in C-13, I was celled next to him and then Red was celled on the other side of Steve. And he didn't really -- he's a stress case. But he didn't really -- you know, he didn't say a word to me.

(Exhibit R6, p. 28.)

Module C-13 is located in the Orange County Main Jail, and Pough had just stumbled into offering an illustration of the not-so-coincidental movements that were at the heart of the jailhouse informant program.

Indeed, quite clearly, Aguilar ("Red") was not just moved with three other Chamberlain suspects by happenstance into Pough's module in the Theo Lacy Facility. Nor was he moved by chance into Pough's next location in another jail. Per the OCSD report regarding the interview of Pough, Aguilar was also moved to Module I, cell number 13 in the Main Jail on February 21, 2007:

| SEAN POUGH<br>BK# 2328402 | MICHAEL GARTEN<br>BK#2323130 | GARRET AGUILAR<br>BK#2319345 |
|---|---|---|
| Theo Lacy Facility<br>Oct-06 – 2-07<br>Location (P-44-07-01) | Theo Lacy Facility<br>10/5/06<br>Location (F-W-L-5) | Theo Lacy Facility<br>10/5/06<br>Location (F-W-G-3) |
| Theo Lacy Facility<br>3/14/07<br>Location (O-41-10-01) | Theo Lacy Facility<br>10/6/06 – 11/14/06<br>Location (P-44-2-1) | Theo Lacy Facility<br>10/06/06<br>Location (P-44-04-1) |
| Men's Main Jail<br>3/22/07<br>Location (C-13-14-1) | Theo Lacy Facility<br>11/14/06<br>Location (P-44-13-1) | Theo Lacy Facility<br>10/17/06<br>Location: (N-Dis/Iso 1-1) |
| Theo Lacy Facility<br>4/4/07<br>Location (P-46-05-1) | Theo Lacy Facility<br>5/3/07<br>Location (Q-52-8-1) | Men's Main Jail<br>11/08/06<br>Location (C-13-3-1) |
| Theo Lacy Facility<br>4/5/07 - current<br>Location (P-44-11-1) | Theo Lacy Facility<br>5-5-07<br>Location (K-Dis/Iso-7-1) | Men's Main Jail<br>2-21-07<br>Location (C-13-12-1) |
| *Purposely Left Blank* | Theo Lacy Facility<br>5/5/07 - current<br>Location Q-52-6-1 | *Purposely Left Blank* |

(Report by OCSD Investigator Ken Hoffman, dated June 12, 2007, attached herein as Exhibit T6.)

One month later, on March 22, 2007, Pough was moved into the same module at the Main Jail, in cell number 12. (Exh. T6.) As Pough noted during his interview, co-defendant Stephen Carlstrom was housed in the module as well.

Another subject of importance in the informant effort was the use of the dayroom, and the added dayroom opportunities created for Pough specifically. During his interview,

Pough told former OCSD Investigator Ken Hoffman he did not know why he received two hours of dayroom, unlike everyone else:

> Sean Pough: No. It's all fed in-house. We're all total seps. Basically an ad seg situation --g
> Investigator Hoffman: Okay.
> Sean Pough: -- which is administrative segregation. We get fed -- everything is -– is done right there in the cell. We don't leave our cells.
> Investigator Hoffman: **Yeah. One hour a day or something for showering and day room?**
> **Sean Pough: They --**
> **Investigator Hoffman: But separate from everyone else?**
> **Sean Pough: Yeah. Everybody gets an hour but me. I get two for some reason. I don't know why**.

(Exh. R6, p. 13, bolding added.)

Of course, Baytieh's investigators understood why informant Pough was receiving more dayroom time than anyone else in his module. At the very least, Baytieh understood perfectly once he received and hid the recorded 2009 interview of Platt from *Smith* in which Platt described how three informants were placed in Smith's dayroom.

> In the event Baytieh needed still more evidence of an informant operation in action, Pough shared in his interview that a deputy inquired if he wanted to have yet another defendant who would be charged in Chamberlain's death, Jared Petrovich, moved next to him: The one kid, Jared, I met on a bus ride. That's how I know him. I know he's in Sector 47 only because some of **the cops think that I want to move him over to my sector. I don't have that juice, for one. They keep telling me, "You want him moved over? You want him moved over?"**

(Exh. R6, p. 38.)

Again, Baytieh and his investigators recognized why OCSD deputies were suggesting that Petrovich be moved over into his section. Pough had been producing when it came to the Chamberlain defendants, and he looked like the perfect informant candidate to produce still more. Because Investigator Hoffman understood the significance of what Pough was saying and the danger in what was being revealed, he immediately switched topics, asking Pough whether he was a member of one of the county's white supremacist

groups—rather than seeking even more word about Pough's discussions with deputies about Petrovich. (Exh. R6, p. 38.)

For Baytieh, if his antenna was conveniently lowered while he studied Pough's interview such that he failed to recognized the significance of what the informant was describing, that excuse was no longer available by the time Pough testified in the 2011 *Guillen* trial. Between the time of Pough's interview and Guillen's trial, Baytieh and his *Smith* prosecution team had engaged in rampant pre-trial misconduct involving informants and the concealment of related evidence. Thus, by the time Guillen's trial started, Baytieh did not possess even a slight doubt about whether Pough's work was a product of the jailhouse informant program—just as had been the situation with the three informants in *Smith*.

Seventeen days after speaking with Hoffman, Pough received his deal. Although he was being prosecuted under the Three Strikes Law, Pough's sentence was reduced to four years in exchange for his cooperation. (Redacted Court Vision, *People v. Sean Pough*, Orange County Superior Court Case Number 06HF1221, attached herein as Exhibit U6.) At Pough's sentencing hearing in 2007, Senior Deputy District Attorney Yvette Patko stated that she was "specially appearing for Brahim Baytieh and Nikki Buracchio for the People." (Reporter's Transcript of Sentencing, *People v. Sean Pough*, Orange County Superior Court Case Number 06HF1221, dated June 29, 2007, attached herein as Exhibit V6, p. 2.) The Court stated that the "three-year sentence [was] part of this agreement that [Pough] reached with Mr. Baytieh." (Exh. V6, p. 3.)

At trial, Baytieh asked one of the key figures from the informant scandal, former Special Handling Deputy Seth Tunstall, about the fact that Pough and Aguilar were housed together for approximately eight days:

> Q: Fair for me to say that from October 6th, 2006, until October 17th, 2006, Mr. Aguilar and Mr. Pough were both housed in P44?
> A: That is correct.

(Reporter's Transcript, *People v. Miguel Angel Guillen*, Orange County Superior Court Case Number 06CF3677, dated August 18, 2011, attached herein as Exhibit W6, p. 82.)

Baytieh continued:

> By Mr. Baytieh: If I'm an inmate housed in P44 back in 2006 and I am in one of the cells on the first floor and one of the inmates was housed on the second floor is having his day room and he's outside in the day room in front of the area where my cell is, do I have the ability to communicate with him?
> A: Yes, you do.
> Q: Can you tell the jury how is that happening?
> A: Commonly how that will happen is you can talk through the cracks in the door, which you can communicate verbally. If you want to try to disguise it, you can also use sign language, which some inmates do, or you can pass paperwork underneath the door.
> Q: Have you in your expertise in that area become aware of the fact that that communication takes place all the time between inmates inside of their cell and inmates on the outside in [] having their day room?
> Mr. Currier: Objection. Vague as to all the time.
> Mr. Baytieh: I'll rephrase it, your honor. Thank you.
> The court: Okay. Go ahead.
> By Mr. Baytieh: Have you talked to inmates that told you that that communication takes place?
> A: Yes.

(Exh. W6, p. 94.)

Pough was the next witness called by Baytieh, and the prosecutor quickly turned to the conversations Pough had with "Red," Defendant Garret Aguilar, while Pough was in dayroom:

> Q: When you were inside P44, in your cell, would there be occasions where inmates who are housed in other cells within P44 would have their day room?
> A: Yes.
> Q: And if they are having their day room, are you able to communicate with them?
> A: Yes.
> Q: How do you – how did you go about communicating with them?

A: There's a little gap underneath the door, and we can, you know, hear each other through that – through the door, through the gap.

(Exh. W6, pp. 106-107.)

According to Pough's testimony, Aguilar said on multiple occasions during their communications that he was "concerned about the pencil he put in [Chamberlain's] butt." (Exh. W6, p. 117.) In addition, Baytieh elicited that Pough had conversations with Defendant Garten, who was also housed in the module, and received kites that included discussions about the crime. (Exh. W6, pp. 121-122.) Garten had already pled guilty seven months earlier to a reduced charge of manslaughter, so it is unclear why these statements were introduced at the trial of the co-defendants.

Nonetheless, the following questioning was directed by Baytieh:

Q: Okay. How many times do you think that you think you sent kites over to Garten?
A: I ain't got enough fingers or toes.
Q: Okay. And during the time that there was an exchange of kites, Mr. Garten also sent along additional kites to you. Would that be correct?
A: Correct.
Q: Would it be a like number, quite a few of them?
A: Quite a few.
Q: All right. And this exchange of kites centered, did it not, largely on the reason that Garten was in custody?
A: Correct.
Q: That had to do with the John Chamberlain case. Right?
A: Correct.
Q: Garten explained to you the facts of the case, didn't he?
A: Yes, he did.
Q: Things that he saw. True?
A: Correct.
Q: Things that he knew. True?
A: Correct.

(Exh. W6, p. 122.)

Baytieh's examination was highly efficient and cautious. He carefully avoided everything discussed above, from his interview four years earlier, which demonstrated the

OCSD was coordinating Pough's movements and encouraging his questioning of targeted suspects. While Pough shared details about how he was able to get statements when either he or the target was in dayroom, he certainly never mentioned that more time was available to him than the other inmates in his module.

Fortunately for Baytieh, Aguilar's defense counsel appeared to miss these issues entirely. He did not probe at trial (or before, in a pre-trial motion to exclude) based upon the contents of Pough's interview. On the other hand, defense counsel would have never missed these issues if Baytieh had willingly met his *Brady* obligations by turning over evidence from *Smith* that demonstrated the law-breaking nature of the jailhouse informant program.

### C. A Second Jailhouse Informant in Chamberlain Murder Case Appears Three Years After the Crime

On May 19, 2009, Lawrence was interviewed at the Orange County Jail by OCDA Investigators Patrick Goodman and Curtis McLean. (Report of OCDA Investigator McLean, dated May 21, 2009, attached herein as Exhibit X6.) The report does not detail their conversation, but Lawrence provided the investigators with notes, attached herein as Exhibit Y6, that painted a clear picture of a repeat informant in action once again. Four months prior to the interview, Lawrence was charged with three counts of first-degree burglary and one count each of second-degree burglary, receiving stolen property, and petty theft. (Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Number 09HF0120, attached herein as Exhibit Z6.) Lawrence was housed in Central Men's Jail Module D with Culmann. (Exh. X6, p. 1.)

According to Lawrence, on February 2, 2009, he and Culmann were chatting for "about an hour about various things" when the conversation turned to their cases. (Exh. Y6, p. 1.) In this conversation, Lawrence lied to Cullman and told him he was confident Culmann would be "ok" because his father is an attorney. Lawrence wrote, "I tell people

he is a lawyer to gain inmates [sic] confidence." (Exh. Y6, p. 1.) He stated: "Inmates tend to put their confidence in me about there [sic] cases because they're under the impression I know what I'm talking about because they think my father is a lawyer." (Exh. Y6, p. 1.) According to Lawrence, Culmann quickly admitted to planning and carrying out the killing, saying that he was only "fighting murder" because "the piece of shit had to go and die on us." (Exh. Y6, p. 1.) Culmann also allegedly shared that the killing occurred just ten feet from his bunk, and that his one worry was that someone would inform on him. (Exh. Y6, p. 2.)

Lawrence said he spoke with Culmann "cell to cell" just ten days later, on February 12, 2009. This time, Culmann allegedly volunteered that he learned to fight from the La Habra Boxing Club. Six days later, Lawrence spoke again with Culmann while in the dayroom. This time, Lawrence lied to Culmann again and repeatedly reminded him that his father is an attorney. The deception paid off, and Culmann gave Lawrence his booking and case number in an attempt to see if Lawrence could help him with his case. (Exh. Y6, pp. 3-4.)

On March 15, Lawrence and Culmann had another cell to cell conversation. Around 12 am, Lawrence asked Culmann: "How come you have been so down lately?" Culmann responded, "I'm sick of this place"—but Lawrence continued to prod Culmann to divulge specific information about his culpability and asked him, "[w]hat are you so worried about? [Y]ou said they don't know you were involved with the planning and they don't have you on camera." (Exh. Y6, p. 5.) Culmann eventually shared that the OCSD and OCDA have DNA evidence. Lawrence, however, continued questioning Culmann. His questions became more pointed: "What are you talking about? You mean you cut yourself when you were hitting him?" (Exh. Y6, p. 5.) This continued until Culmann allegedly admitted that he spit on Chamberlain. On March 18, Lawrence questioned Culmann during another 2 am chat, during which Culmann purportedly confirmed the location of the attack. (Exh. Y6, p. 5.)

Lawrence said he and Culmann spoke one more time, at 3 am on March 21. (Exh. Y6, p. 6.) Culmann, still under the impression that Lawrence and his attorney father may have been able to help him, asked Lawrence what he should do about his trial. Lawrence took this opportunity to dig for inculpatory evidence and asked Culmann: "What exactly do you think is bad that you know of?" (Exh. Y6, p. 6.) Culmann explained how he used the bunk as leverage to stomp on Chamberlain and only stopped after four to six minutes. That same day, March 21 2009, Lawrence met with the investigators regarding Culmann and provided three double-sided pages of handwritten notes detailing Culmann's alleged confession. (Exh. X6, pp. 1-2.)

No written agreement appears to exist spelling out any agreement for consideration that was reached between Lawrence and the prosecution.

### D. Lawrence's Prior Documented Informant Services in *People v. Oliveros*

Included within the sequential discovery to the Chamberlain murder defendants is an agreement between Lawrence and former Senior District Attorney Cameron Talley in the prior case of *People v. Oliveros*. The agreement was dated May 19, 2007, and is attached herein as Exhibit A7. The focal point of the consideration was Lawrence's then-pending case in which he faced charges of first-degree residential burglary plus an additional five-year prison term due to his prior conviction for a serious felony. (Exh. A7, p. 1.; Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Number 06HF2173, attached herein as Exhibit B7.) Because of the "strike" and five-year prior, Lawrence was facing a minimum sentence of nine years. However, the agreement with Talley would change his outlook significantly.

In exchange for Lawrence providing information regarding Oliveros' involvement in the murder of Raffi Yessayan, Talley agreed that, in the open residential burglary case, Lawrence would plead guilty, receive "CTS," credit for time served, and be released "OR,"

on his own recognizance. In Lawrence's two probation cases, the probation would be terminated with credit for time served. He would also be released on his own recognizance pending his testimony and eventual sentencing. (Exh. A7, p. 1.) In return for a lenient sentence, Lawrence was required to a) obtain prior written consent of the OCDA before leaving the County; b) maintain contact with his probation officer; c) maintain contact and updated contact information with the OCDA investigator; d) refrain from contacting any witness in his open residential burglary case (to which he had pleaded guilty in exchange for credit for time served); and e) not violate any laws or terms of probation. (Exh. A7, p. 3.) Under the terms of this deal, Lawrence's cooperation and compliance with the delineated terms would allow him to avoid a lengthy prison sentence.

**i. *Oliveros*' Connection to *Guillen*, the Attempt to Conceal Evidence Regarding Lawrence and the "Hush Consideration" He Received, and Baytieh's Attempts to Hide His Knowledge of Illegally Operated Jailhouse Informant Program**

While Oliveros was not prosecuted by Baytieh, it would intersect with *Guillen* and the informant scandal in a manner that grows more disturbing the closer the case is examined. In order to present a cogent understanding of the critical concerns, Defendant must detour momentarily to lay out what occurred in *Oliveros*; namely, the astounding, undisclosed consideration for Lawrence's testimony that appears to be connected to Lawrence's work in *Guillen*. Baytieh's concerns about Lawrence, and what occurred in *Oliveros* and *Guillen*, also appear to have contributed mightily to his decision to hide Lawrence's testimony in *Oliveros* from the informant investigations and/or PRA Response to Sanders.

**ii. A Brief Summary of *People v. Oliveros***

Ruben Oliveros was charged with first-degree murder and participation in criminal street gang activity. He was also charged with enhancements for special-circumstance

murder that occurred during a robbery, special-circumstance murder committed by and to further a criminal street gang, felonies committed for the benefit of a gang, use of a firearm, and discharge of a firearm causing great bodily injury or death. (Redacted Court Vision, *People v. Ruben Oliveros*, Orange County Superior Court Number 06CF2031, attached herein as Exhibit C7.)

Raffi Yessayan's body was discovered by a jogger on a dirt trail in the City of Orange on June 7, 2006. (*People v. Saldivar* 2012 WL 1499033, 1, 1.) Yessayan was a member of the Family Mob gang who relied on Social Security disability income because he was albino and legally blind. (*Id.*, at p. 2.) Due to his vision impairment, he often allowed people to drive his car, including Saldivar, a member of an associated gang. (*Ibid*.) On the night of June 6, Yessayan was last seen sitting in his car outside of Saldivar's home with Saldivar, Marcos Antonio Charcas-Fernandez, and another woman. (*Id*., at p. 3.) Between 9:15 and 9:30 p.m., a security guard heard two gunshots ring out from the area where Yessayan's body was found, and cell phone records placed Yessayan's car near the murder scene at 9:15 p.m. (*Ibid*.)

On the evening of June 7, shortly after Yessayan's body was found, Saldivar and Ruben Oliveros appeared at Jose Muniz's chop shop with Yessayan's car and dropped the car off for the night. (*Ibid*.) The next day, Saldivar and Oliveros returned to the shop, where Oliveros participated in chopping up the car, paid Muniz $200, and took several component parts. (*Ibid*.) Saldivar was arrested on June 12, 2006, and Oliveros was charged with first-degree murder on June 29, 2006. (Exh. C7.)

### iii. Lawrence Violates Terms of Cooperation Agreement and Yet Appears to Receive Benefits from the Prosecution Prior to His Testimony in *Oliveros*

On May 19, 2007, Lawrence offered information to OCDA regarding the *Oliveros* case. (Exh. A7, p. 2.) He had an open residential burglary charge and was on probation for residential burglary, second-degree burglary, and forgery. (Exh. B7; Partial Reporter's

Transcript, *People v. Ruben Oliveros*, Orange County Superior Court Case Number 06CF2031, dated November 18, 2008, attached herein as Exhibit D7, pp. 115-116; Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Case Number 05HF1850, attached herein as Exhibit E7; Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Case Number 04SF0304, attached herein as Exhibit F7.) He faced 17 years in prison if he violated probation again. Thus, to say he was motivated would be putting it lightly.

Even with the incentive of a sweetheart deal, Lawrence broke terms of his agreement repeatedly. In fact, he violated the terms his probation nearly continuously throughout 2008, as detailed below. On June 2, 2008, Lawrence was ordered to be held without bail after repeatedly failing the conditions of his probation by failing to notify his probation officer upon a move, failing to report to the Probation Department as directed, associating with three people on probation, and illegally possessing marijuana:

> According to records of the Orange County Sheriffs Department (DR #: 08-097552, report attached), on May 28, 2008, Orange County Sheriffs Department officers found .5grams of Hash Oil in a small glass container in the probationer's bedroom. The probationer later admitted it was his and that he purchased it from a marijuana shop for $25.00 dollars. This is a violation of Section 11357(a) H&S. The probationer was arrested and booked in Orange County Jail.

(Petition for Arraignment on Probation Violation, *People v. Lance Lawrence*, Orange County Superior Court Case Number 05HF1850, dated May 30, 2008, attached herein as Exhibit G7, p. 2.)

On August 15, 2008, Lawrence received a jail sentence with credit for time served for this probation violation, despite the Probation Department recommending a prison sentence. (Exh. E7; Exh. G7, p. 2.) Furthermore, on August 18, 2008, Lawrence admitted to his probation violation related to prior charges of second-degree burglary and forgery, and received a sixteen-month prison sentence with credit for time served. He was placed on parole. (Exh. F7.) However, he never reported to his parole officer and his time out of

custody was short-lived. When he met with his probation officer just two days later, on August 20, 2008, he admitted to the following:

> On August 20, 2008, the probationer was found to have 1.7 grams of marijuana in the glove box of the vehicle, which is a violation of Section 11357(b) H&S…On August 20, 2008, the probationer was in possession of a 6-inch folding knife with a 2Y2-inch blade, which is a violation of his probation.

(Petition for Arraignment on Probation Violation, *People v. Lance Lawrence*, Orange County Superior Court Case Number 05HF1850, dated August 25, 2008, attached herein as Exhibit H7, p. 1.)

In its petition, the Probation Department brought Lawrence's history of probation violations to the court's attention, writing that Lawrence was "just released from the Orange County Jail on August 18, 2008." (Exh. H7, p. 2.) Because of this history, the Probation Department advised the court that Lawrence had "no intention of complying with Probation" and again recommended, due to Lawrence clearly being unsuitable for probation, that the court impose a prison sentence. (Exh. H7, p. 2.)

On August 25, 2008, he made an appearance for the August 20th violation while in custody. However, on August 29, 2008, the OCDA mysteriously stepped in and the "Probation Violation petition [was] ordered withdrawn on motion of People." (Exh. E7.) On November 7, 2008, Lawrence was again held in custody without bail, and a probation violation was filed on November 10, 2008. (Exh. E7.) This time, the violation was due to Lawrence's complete failure to report: "The probationer failed to report as directed to the Probation Department as directed by the Probation Officer on September 19, October 3, 17, and 31, 2008. The probationer last reported on September 5, 2008." (Petition for Arraignment on Probation Violation, *People v. Lance Lawrence*, Orange County Superior Court Case Number 05HF1850, dated November 10, 2008, attached herein as Exhibit I7, p. 2.) Despite numerous violations, Talley terminated the probation on November 24, 2008. (Exh. E7.)

### iv. Lawrence's Testimony in *Oliveros*

Lawrence testified that between December 9, 2006, and March 4, 2007, Lawrence and Oliveros were cellmates in an eight-person cell in the Orange County Main Jail. Lawrence testified that he routinely lied to his cellmates, claiming that his father was a lawyer and that he could serve as their "jailhouse lawyer" to ingratiate himself to the people against whom he would later provide information or testify. (Exh. D7, p. 10.)

According to Lawrence, Oliveros approached him first in the dayroom to ask for advice on his case, and was concerned about keeping their communications private from the outset. Because of Oliveros' well-founded concern about privacy, Lawrence did not glean all the information he would ultimately turn over to the prosecution immediately–instead, he cajoled Oliveros into providing inculpatory information over a two-week period. (Exh. D7, p. 17.)

While questioning Lawrence on the stand, Talley repeatedly stressed that Lawrence did not have access to Oliveros' information about the case, including photos. (Exh. D7, p. 18.) However, Lawrence also admitted that he had seen evidence during the "ten to 15 times that [he and Oliveros] talked about [the case]." (Exh. D7, p. 57.) In particular, Lawrence was already familiar with the forensic pathologist's autopsy report. (Exh. D7, pp. 61-62.) Although Lawrence denied viewing the police reports, he later admitted that he viewed "everything" Oliveros showed him. (Exh. D7, p. 37.) Given that Oliveros relied on Lawrence's purported expertise, it is highly likely that Lawrence knew what was contained in the police report, and thus was able to craft his presentation of his Oliveros' statements to corroborate the report or fill in any gaps. For instance, Lawrence testified that Oliveros confessed to planning, alongside Saldivar, to rob the victim of his money, his car, and his methamphetamine, and that Oliveros told him he committed the killing by shooting the victim. (Exh. D7, p. 43.) What portions of that rendition were based upon what Lawrence read will never be known.

Lawrence also equivocated regarding his motivation to become an informant. While he claimed he wanted to provide information out of pure altruism because he thought it was

"the right thing to do," and because how Oliveros spoke about his alleged crime "really grossed [him] out," he also clearly wanted to get a deal for himself—especially because he fully understood the potential prison sentence and probation terms hanging over his head unless he could give the OCSD and OCDA what they wanted. (Exh. D7, p. 21.)

Lawrence attempted to explain his repeated willingness to cooperate with the prosecution by acting as an informant in *Oliveros* and other cases. In fact, Lawrence acknowledged that his career as an informant began before he met Oliveros, when he provided information to the OCSD and OCDA on at least one prior occasion about a "friend selling large quantities of marijuana" and participated in a controlled buy of marijuana from the friend. (Exh. D7, pp. 107-108.) Because of his prior experience, he approached OCSD knowing that they would "give [him] leniency on [his] deals" in exchange for testimony in *Oliveros*. (Exh. D7, pp. 107-108.)

He added that at the time he talked to the OCSD and OCDA in 2007 about providing information about Oliveros, he knew that he faced nearly two decades in prison due to repeated probation violations, unless he complied with the terms of the agreement he and Talley reached:

> Q: But, you are looking -- when you were talking to the District Attorney and the police in April of 2007, you were looking at least 17 years in prison, correct?
> A: Yes.

(Partial Reporter's Transcript, *People v. Ruben Oliveros*, Orange County Superior Court Case Number 06CF2031, dated November 19, 2008, attached herein as Exhibit J7, p. 5.)

However, despite the looming threat of prison time, Lawrence was forced to admit he broke the terms of the agreement between he and Talley when he failed to contact his probation officer:

> Q. And another term and condition was that you had to maintain contact with the -- your probation officer, correct?

A. Correct.
Q. All right. Now, I notice that you are in custody today and you were yesterday, correct?
A. Yes.
Q. So something happened between May of 2007 and about ten days ago that caused you to be arrested, correct?
A. Correct.
(Exh. J7, pp. 6-7; Exh. E7.)

Lawrence was unable to explain why the OCDA was still willing to honor the terms of the agreement despite the repeated violations:

Q. So even though you violated a term and condition of your contract, the District Attorney's office is still willing to work with you; is that your understanding?
A. Yes, sir.
Q. As long as you testify truthfully, correct?
A. Yes.
(Exh. J7, p. 21.)

Lawrence admitted that he talked to the police about his conversations with Oliveros not only out of feigned moral outrage, but also to secure a reduced sentence in exchange for supplying information about Oliveros. (Exh. J7, p. 56.) He acknowledged that from the very start of their conversations, Lawrence plotted how he would exploit Oliveros' trust to provide information to the OCSD and OCDA. (Exh. J7, p. 65.) Lastly, he admitted that his duty was to provide consistent inculpatory information, with truthfulness only a secondary concern:

Q. So **even if it is not truthful**, even if Mr. Oliveros never talked to you, **you have to be consistent with what you told Mr. Talley** because he has already told you that's what the truth is, correct?
A. **Correct**.
Q. Therefore, you have to testify consistent with what you told the District Attorney on April 11th, correct?
A. Correct.
Q. Otherwise, you don't get the deal, right?

A. Correct.
(Exh. J7, p. 67; bolding added)

### v. Lawrence Receives a Mysteriously Improved Resolution from Prosecutor Talley

Lawrence finished testifying in *Oliveros* on November 19, 2008. Exactly one month later, on December 19, 2008, Talley dramatically deviated from his original promised disposition and dismissed Oliveros' open residential burglary case. Talley also agreed to terminate probation on the prior cases in which he was subject to outstanding felony probations—despite the new violations. [55] (Exh. E7.) Thus, even though, per the agreement, Lawrence was required to plead guilty to residential burglary—meaning that he would have a serious felony on his record that would make him a potential "third striker" in the future—his case was dismissed. He would face no lasting consequences for his conduct. He would have no supervision as a result of the dismissal and the probations being terminated.

**This resolution raises the question of what exactly Talley received in return for this resolution that was well above and beyond the agreement**—particularly in light of Lawrence's conduct between the time of the resolution and the time of the sentencing.

## E. Motion for New Trial in *Oliveros* Granted

In January of 2010, defense counsel for Oliveros submitted a motion for a new trial, which was heard on January 22, 2010. (Motion for New Trial, *People v. Ruben Oliveros*, Orange County Superior Court Case Number, 06CF2031, filed January 14, 2010, attached herein as Exhibit K7, p. 1; Exh. D7, pp. 33-34.) There was no written opposition filed. In

[55] The third case referenced in the agreement, was previously disposed of on August 15, 2008. (Exh. F7.)

the motion, Defendant provided new exonerating testimony from co-defendant Marco Charcas-Fernandez, who was legally unavailable during Oliveros' original trial because he was unwilling to testify until a resolution was reached in his case. Defense counsel also argued that there was prosecutorial error and misconduct such that Oliveros' due process rights were violated. Defendant argued that he wanted to call Oliveros' brother as a witness, but that the prosecution successfully argued that they were barred from doing so by the prosecution, because the brother was facing felony charges. (Exh. K7, p. 17.) However, per the defense, there was no evidence suggesting Oliveros' brother was even arrested, let alone charged with a felony. (Exh. K7, p. 17.) On February 8, 2010, the court ruled as follows per the Court Vision minutes:

> Motion granted in part as follows: Motion for new trial is granted based upon due process grounds, and new undiscovered witness Charcas-Fernandez. Motion denied in part as follows: motion for sanctions based upon prosecutorial misconduct. Motion by defendant for new trial is granted.

(Exh. D7.)

### F. Lawrence Commits New Wave of Felonies in 2009 and 2010

As mentioned previously, just two months after Talley's inexplicable resolution from *Oliveros* put Lawrence on the street with no probation, he was charged on January 21, 2009, with three new residential burglaries. (Exh. Z6.) On September 2, 2009, after providing information to the OCDA regarding Culmann, Lawrence posted a $100,000 bond and was released from custody. (Exh. Z6.) Again, this was only possible because Lawrence was alleged to have committed one, and not two, prior serious felonies—something only possible because Talley had inexplicably exceeded the terms of their earlier resolution and dismissed the charged residential burglary in 2008.

Less than two months later, on October 26, 2009, Lawrence was charged with one count of first-degree burglary and two counts of second-degree burglary. An enhancement was subsequently added to the first-degree burglary count because the offense was committed while released from custody. (Redacted Court Vision, *People v. Lance*

*Lawrence*, Orange County Superior Court Case Number 09SF0985, attached herein as Exhibit L7.) He pleaded guilty on November 4, 2009, but delayed sentencing until September 23, 2011–a date that proved highly significant.[56] (Exh. L7.) On January 12, 2010, Lawrence was charged with one count of second-degree burglary, one count of making or possessing fictitious instruments, and one count of receiving stolen property, with released-from-custody enhancements on each count. (Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Case Number 10HF0048, attached herein as Exhibit M7.) Lastly, on February 26, 2010, Lawrence was charged with four counts each of second-degree burglary and theft with a prior conviction. (Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Case Number 10HF0291, attached herein as Exhibit N7.)

### G. A September to Remember: Putting the Pieces Together as to Why Lance Lawrence Received the Deal of a Lifetime in September 2011 in the Midst of Developments on the Two Known Cases Where He Worked as Informants

In this section, Defendant will analyze developments in *Guillen* and *Oliveros*, and the astounding resolution that Cameron Talley delivered to Lawrence the very same month for conduct that appears to be wholly disconnected to his services on *Oliveros*.

#### i. Talley Mysteriously Dismisses Murder Charges Against Oliveros

On September 9, 2011, when Oliveros was on the verge of a new trial, Talley inexplicably motioned to dismiss all charges against Oliveros without prejudice. (Exh. C7.) This would be considered a shocking development in any case, but unquestionably so in a

[56] The first-degree burglary and enhancement charges are also dismissed on November 4, 2009. (Exh. L7.)

murder case. In fact, this may be the only murder case in the past three decades where the prosecution obtained a murder conviction and dismissed the charges entirely.

It would be extremely difficult to view that dismissal as something other than a reflection of Talley's lack of belief in Lawrence's veracity. That is, if Talley believed that Oliveros had admitted to Lawrence that he committed the murder, it is difficult to imagine what would have prevented Talley from seeking a conviction a second time—particularly having obtained one in the first trial based upon the strength of Lawrence's testimony.

However, in light of this development, and Lawrence already having received an enormous benefit for his informant services in *Oliveros*, there is an even larger question: Why, two weeks later, would Talley interject himself into Lawrence's pending cases?

### ii. Both Sides Rest in *Guillen*

On June 17, 2011, all sides appeared for pre-trial motions in *People v. Guillen*. As noted previously, the case against Culmann, the defendant from whom Lawrence allegedly obtained statements in 2009, resolved in January 2011. However, the case for which Lawrence as incarcerated when he spoke with Culmann had remained open along with the additional cases that had been added in 2009 and 2010.

On August 31, 2011, the prosecution rested its case. (Exh. W3.) On September 19, 2011, the defense rested its case. (Exh. W3.) Four days later, Lawrence appeared to obtain a resolution on his case that secretly took into account his work on *Guillen* and other questionable considerations related to *Oliveros*.

### iii. Talley First Appears on Lawrence's Case on 35th Date and Offers Extraordinary Resolution in Timing that Suggests Connection to Culmann and *Guillen*

On September 23, 2011, Lawrence was sentenced on all four of his then-pending cases—once again, the case on which he was in custody when he developed evidence on Culmann and the three cases he picked after posting bond. (Exh. Z6; Exh. L7; Exh. M7; Exh. N7.) **OCDA prosecutors had appeared at 35 hearings from the time Lawrence was incarcerated until his final appearance 32 months later. And on the final appearance, it was prosecutor Talley appearing for the very first time.** [57]

The disposition that would follow was quite clearly not rooted in the amount of evidence available to the prosecutor or the traditional methods used by the OCDA for determining the appropriate offer based upon the seriousness of the conduct and the defendant's prior history. **Facing a maximum sentence of 22 years and eight months in prison, Lawrence pled guilty to the charges. However, Talley dismissed or struck all sentencing enhancements, including the prior "strike," the five-year prior and his crime-bail-crime allegations. Lawrence understandably agreed to Talley's extraordinary offer to be sentenced to three years and eight months, with all sentences running concurrently.** (Reporter's Transcript, *People v. Lance Lawrence*, Orange County Superior Court Case Number 10HF0048, dated September 23, 2011, attached herein as Exhibit O7, p. 6.) Moreover, because Lawrence had 1,431 days of custody credit—more than three years and eight months—he was released and never even stepped foot in a California prison. (Exh. O7, p. 11.)

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[57] Non-Talley OCDA appearances are as follows: a) 35 appearances in Case Number 09HF0120; b) 25 appearances in Case Number 09SF0985; c) 22 appearances in Case Number 10HF0048; and d) 15 appearances in Case Number 10HF0291. (Exh. Z6; Exh. L7; Exh. M7; Exh. N7.)

In sum, thanks to Talley's first appearance on a case to which he was not assigned, Lawrence served zero days in prison for all four cases involving numerous residential burglaries with a prior conviction for residential burglary.

Talley alluded to what prompted this extraordinary resolution during Lawrence's sentencing, stating that the agreement was "the disposition me and [Lawrence's counsel] reached and [that was] the reason that **Mr. Lawrence [was] being shown some leniency in addition to other reasons for other cases**." (Exh. O7, pp. 13-14.)

The "other cases" are logically *Guillen*/Culmann and *Oliveros*. However, Talley had already gone above and beyond in the consideration given to Lawrence in *Oliveros*. Moreover, Lawrence was certainly not a testifying informant for Talley on any other case after *Oliveros*, and certainly not an informant for him since he was re-incarcerated in 2009.

Ultimately, it appears that Talley was, in part, doing Baytieh's dirty work. A number of factors point to this: a) the massive benefit provided; b) the fact that Lawrence assisted in Baytieh's case (leading to a guilty plea) at a time when he was incarcerated on a case that was part of this resolution; c) Baytieh's history of informant-related concealment, and, as discussed below; d) Baytieh's efforts to conceal Lawrence from Attorney Sanders and likely those investigating the jailhouse informant scandal.

### iv. Talley Represents Lawrence as His Defense Counsel, Even Though Three Serious Felony Enhancements Were Part of Troubling 2011 Resolution

On May 18, 2015, Lawrence was charged with fifteen felony counts, four prior serious felonies, and other enhancements. Four of the felonies were first degree residential burglaries. (Redacted Court Vision, *People v. Lance Lawrence*, Orange County Superior Court Case Number 15HF0497, attached herein as Exhibit P7.) For seven months, Lawrence was represented by private conflict counsel. Lawrence then served as pro per counsel for several months. Attorney Marion Wheeler appeared as retained attorney on July 28, 2016, and July 29, 2016. (Exh. P7.) On the latter date, the court appointed conflict

counsel, David Medina. (Exh. P7.) Over the next year, Medina and two other appointed counsel would declare conflicts.

Then on May 25, 2017, Cameron Talley, "retained attorney," substituted in as counsel of record. (Exh P7.) He would conduct the preliminary hearing and remain on the case for two years. It was another in a series of troubling developments in the history of the OCDA and its informants. Talley mysteriously appeared in 2011 on Lawrence's cases, and resolved his case in the least transparent way possible. Six years later—his first as private counsel—he was purportedly retained in a case enhanced to a "third strike" prosecution as a result of his prior resolution.

### H. Baytieh's Apparent Concealment of Pough and Lawrence from Jailhouse Informant Investigations and from Response to Sanders' PRA

Five years after Baytieh celebrated the convictions in *Guillen*—in the midst of the still-expanding jailhouse informant controversy—the prosecutor had little interest in sharing what he knew about the roles of Pough or Lawrence and their intersection with the jailhouse informant program, or even with anyone outside his agency or the OCSD. In April 2016, the OCDA was awaiting the decision as to whether the California Court of Appeal would affirm or overrule the trial court's ruling in *Dekraai* recusing the entire office. After having battled Dekraai's (and Smith's) attorney Sanders publicly about allegations that had been raised, Baytieh found himself overseeing a response to a Public Records Act request focused on the office's use of informants. The response was produced by the Special Prosecutions Unit he supervised.

The key section of the request and response are the following:

**Request No. 2:** The names of the individuals "'who testified regarding statements that he or she claimed were made by a defendant while said defendant (or uncharged inmate) was incarcerated at a jail or prison facility,'" as described in the above referenced paragraph number one;"

**Specific Response and Objection to Request No. 2:** Our "Specific Response and Objections to Request No. 1" are incorporated herein by reference. Your request, "The names of the individuals "'who testified regarding statements that he or she claimed were made by a defendant while said defendant (or uncharged inmate) was incarcerated at a jail or prison facility,'" as described in the above referenced paragraph number one;" is overbroad and unduly burdensome and we object to your request.

Our Case Management System that we use to track our files does not maintain records in the format requested so we are unable to conduct a search for the records. The Public Records Act applies to existing records and does not require a public agency to create a record that does not exist. (Gov. Code § 6252 (e) and (f); *Sander v. State Bar of California* (2013) 58 Cal.4th 300.)

To the extent there are records responsive to your requests, they will not be produced because they are exempt from disclosure pursuant to Government code section 6254, subdivision (k), specifically Evidence Code sections 1040 - 1042, the Official Information Privilege. Official Information may be withheld where, "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice." (Evid. Code § 1040(b) (2)) The public interest in protecting the integrity of investigations and the lives of cooperating individuals greatly outweighs a request to access confidential law enforcement information. The public interest in non-disclosure clearly outweighs the public interest served by disclosure. (Gov. Code §6255(a))

We have identified the following non-exempt responsive records to your request:

Records with case names, numbers and/or names of witnesses – 14 pages

(Partial OCDA Response to Public Record Request from Attorney Scott Sanders, dated April 15, 2016, attached herein as Exhibit Q7, p. 2.)

The responsive letter was prepared by Senior District Attorney Denise Hernandez, who signed it—though there was little chance she knew about Pough. However, Baytieh certainly had both never forgotten Pough. He also approved the letter, including the response that did not include any reference to Pough. (Exh. Q7.) This is confirmed because his signature appears above the following: "**Read and Approved by Ebrahim Baytieh, Assistant District Attorney, Supervising Head of Court — Special Prosecutions Unit**." (Exh. Q7, p. 8, bolding added.) Baytieh's assistance in formulating the response and deciding what to include can be separately confirmed because summaries of several of his cases involving informants were provided. The cases summarized in the 14 pages were clearly created in response to request for a summary of cases where a jailhouse informant testified. The first case for which there is a redacted summary is *People v. Shawkey*—Baytieh's case—and informant Ronald Henderson's name is left unredacted, as he testified at Grand Jury proceedings. (Exh. Q7, p. 9.) The third case for which there is a redacted summary is *People v. Lamb*—also Baytieh's case—and informant Darryl Mason's name is left unredacted, as he testified at the trial. (Exh. Q7, p. 11.) The fourth case for which there is a redacted summary is the instant case, *People v. Smith*, and Arthur Palacios' name is left

unredacted, as he testified at the trial. (Exh. Q7, p. 12.) Another case for which there is a redacted summary is *People v. Joseph Govey*, which is discussed throughout this motion. The names of the three informants who testified at Grand Jury proceeding are unredacted: Palacios, Alexander Frosio, and Carl Johnson. (Exh. Q7, p. 19.) There is also a summary from another case that Talley prosecuted, *People v. Rodriguez*. The name of the testifying informant, "Garrity," is left unredacted. (Exh. Q7, p. 21.)

Baytieh unquestionably did not forget the trial in the murder of John Derek Chamberlain, or that he called informant Pough to testify about statements made by one defendant facing murder charges (Aguilar) and another who had already pled guilty to manslaughter charges (Garten). Yet, a summary of Pough's role in *Guillen* is not included.

Additionally, neither Baytieh (nor Talley, if he was consulted) included a summary of *Oliveros* and Lawrence's testimony in that case, even though it is incredibly unlikely that Lawrence failed to cross Baytieh's mind at the time of the response to the PRA. Of course, corroboration for Baytieh's thought-out effort to hide Lawrence and *Oliveros* from those outside his circle of trust also flows from Lawrence's astounding 2011 resolution after both sides rested in *Guillen*.

Significantly, the concealment of summaries related to *Guillen* and *Oliveros* did not cross Baytieh's mind for the first time when he saw Sanders' PRA and helped fashion the response. As the OCDA's response to the PRA emphasizes, the OCDA does not create writings or documents in response to public records requests. The specific response includes a reminder that "[t]he Public Records Act applies to existing records and does not require a public agency to create a record that does not exist. (Coy. Code § 6252 (e) and (f); *Sander v. State Bar of California* (2013) 58 Cal.4th 300.)." (Exh. Q7, p. 2.)

In other words, the summaries provided were not "create[d]" in response to Sanders' PRA, but instead were almost unquestionably produced pursuant to an investigator or investigations by the California Attorney General, the Orange County Grand Jury, and/or the OCDA Attorney Informant Policies and Practices Evaluation Committee. ("IPPEC"). Thus, the decision to exclude *Guillen*/Pough and *Oliveros*/Lawrence from Sanders' PRA

response was either because those summaries in those cases were intentionally never created, despite their creation being responsive to a request by an investigative effort related to jailhouse informant issues, or they were provided to one or more investigative entities and then intentionally and improperly withheld in the response to Sanders' PRA because of Baytieh's concerns (and very likely Talley's, as it related to *Oliveros*).

## I. The Jailhouse Informant-Supported Prosecutions in the Murder of Scott Miller

### i. Brief Summary of the Murder of Scott Miller

The Court of Appeal described the events leading up to the murder:

> The police investigation into Miller's death revealed that he was an original founding member of the Southern California White Supremacist criminal street gang known as PEN1 or PEN1 PDS. The gang, which is active in the California state prison system, started in the late 1980's and is a subordinate gang to the White Supremacists gang called the Aryan Brotherhood. In 2002, the gang had at least 200 members, including [Michael] Lamb and [Jacob] Rump.
>
> According to the prosecution's gang expert, despite Miller's original gangster status in PEN1, by 2000 he was becoming increasingly disliked by other PEN1 gang members and was viewed by some as being out of control. Although Miller continued to be a member in good standing notwithstanding the internal dissention, all that changed when Miller decided to participate in a local Fox 11 television news segment about PEN1 and its criminal activities. The show was broadcast on February 20, 2001, a few days before another founding member of the gang, Donald "Popeye" Mazza, was to stand trial for PEN1–related criminal charges. Despite Fox's attempt to conceal Miller's identity, it was obvious to anyone who knew him that it was Miller featured in the program. Apparently, Fox was unable to conceal all of his visible tattoos, and they allowed him to be interviewed with his beloved pet pit bull dog."

(*People v. Rump* (2009) WL 3389902, p. 2.)

### ii. The Prosecution of Lamb and Rump

Rump was charged with "conspiracy to commit murder […] for the benefit of the Public Enemy Number 1 ("PEN1") or PEN1 Death Squad ("PEN1 PDS") criminal street gang, premeditated attempted murder of a peace officer, being a felon in possession of a firearm, two counts of carrying a firearm while being an active gang member, and two counts of street terrorism." (Redacted Court Vision, *People v. Jacob Anthony Rump*, Orange County Superior Court Case Number 03CF0441, attached herein as Exhibit P6; *People v. Rump, supra,* WL 3389902 at p. 1.) Lamb's charges were similar, except he was charged as the shooter in the murder and was charged with personal use of a firearm associated with the killing of Miller and the attempted murder upon a police officer. (*Ibid*.; Redacted Court Vision, *People v. Michael Lamb*, Orange County Superior Court Case Number 03CF0441, attached herein as Exhibit R7; Redacted Court Vision, *People v. Jacob Rump*, Orange County Superior Court Case Number 03CF0441, attached herein as Exhibit S7.) The prosecution sought the death penalty as to Lamb only. (Exh. R7.)

### iii. Prosecution Strengthened through Jailhouse Informant Testimony of Darryl Mason

The evidence against the defendants included testimony from a former member of PEN1, Darryl Mason.[58] Mason testified that "Miller's participation in the television segment 'put him in the hat,' or cancelled his good standing in the gang." (*Rump, supra,* WL 3389902 at p. 2.) Mason explained that other members of the gang responded by putting a "'green light' on Miller, which meant that he was targeted for an act of violence." (*Ibid*.) Mason also testified about statements allegedly made by Lamb while both were housed at the Orange County Jail:

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[58] Baytieh told the DOJ in 2019 that he has never turned over OCII materials in a case to a defendant—an admission that he effectively means he would not have turned over the file created for Mason (if one were created). (Exh. E1, p. 148.)

> He told police officers that Lamb had stood outside his cell door and quietly told him "how he whacked Scottish and that he had stripes coming for that." When Mason asked Lamb how he had done the crime, Lamb said he shot Miller in the back of the head. Mason said that Lamb seemed serious and looked to be asking "for a little bit like a pat on the back or something."

(*Id*. at p. 6.)

### iv. Baytieh Elects Not to Introduce Informant Testimony, but Utilizes Witness to Impeach Defense Witness Johnson

The DOJ's 2022 Report did not name the prosecutor who prosecuted six cases involving twelve informants, and who, as a result of those cases, was one of the prosecutors who "saw obvious indications that OCSD's informants were operating outside constitutional bounds across a number of cases, [but] failed to act to stop the pattern." (Exh. D1, p. 41.) However, not only did Baytieh appear to have had a matching number of cases and informants, but the DOJ wrote that, in one of the cases, "the prosecutor limited the testimony of a custodial informant to prevent him from testifying about the defendant's in-custody statements, which meant that there was no evidence about any potential *Massiah* issues." (Exh. D1, p. 23.) That is precisely what Baytieh did with regard to informant McLachlan—limiting his testimony such that it did not include statements purportedly made by Lamb to McLachlan. Baytieh said the following, on April 30, 2007, in open court:

> I intend to file and follow my obligation under 1127a of the Penal Code, which requires me to file at the time of the testimony of jail informants, the law requires me to file a certain pleading to say what we promised them, if we promised them anything, and I will do that. What I wanted to tell the court -- I mentioned to counsel -- McLaughlin is somebody the people intend to testify. McLachlan. I'm sorry, I said, "McMaughlin." McLachlan. Mr. McLachlan gives a statement to the police about a conversation he had with Mr. Lamb while they were in custody whereby Mr. Lamb admitted to him that he committed -- that he did know these were cops that he shot at and that he was tweaking. I told the defense I don't intend to seek to introduce those statements under 1220. I want to put that on the record. Mr. Stapleton understood me to

do that. Therefore, those statements are inadmissible. Those are 1220 statements.

(Reporter's Transcript, *People v. Lamb and Rump*, Orange County Superior Court Case Number 03CF0441, dated April 30, 2007, attached herein as Exhibit T7, pp. 57-58.)

Baytieh's history says that the decision not to call McLachlan was unlikely to be rooted in good-faith analysis. In the above statement, Baytieh wanted to emphasize that he no longer had disclosure responsibilities related to McLachlan as an informant. **The most logical explanation for the decision to walk away from the defendant's purported confession was that Baytieh knew that he had already committed discovery violations with regard to McLachlan, who was a listed witness**. Just like he would with informant Palacios two years later in *Smith*, Baytieh had not disclosed any evidence about McLachlan's informant background. It was a background that existed, and which Baytieh no doubt recognized. As discussed below, when Baytieh called McLachlan during the capital murder trial of Billy Joe Johnson, he admitted on cross-examination that he had been an informant on other cases. As in Smith's case, though, it appeared that defense counsel had none of the details, which would have been the result of a Baytieh decision.

In addition, in 2017, the California Attorney General produced discovery in *Dekraai* that was subsequently introduced by the defense as Exhibit 17x45. It included a version of the Special Handling Deputies' Special Handling Log that pre-dated the 2013 to 2018 edition that would become the focus of that litigation. The earlier version, which will be referred to as SHLog1, shows that that McLachlan did not just work for police agencies in the more traditional sense. A note in the log confirms that in late 2006, McLachlan was also working as an informant in the jail for then-Special Handling Deputy Jack Ackerman:

**12/05/06**

Inmate McLachlan, Donald #2336155 (IM L-20) requested a non-collect so he could call McKinley (CMPD). I arranged it. CI for Ackerman.

(*Dekraai*, Exhibit 17x45, p. 174; *not attached*.)

Considering Baytieh's history, the most reasonable explanation for his decision to not introduce Lamb's statements through McLachlan is that Baytieh was aware of evidence damaging to the informant's credibility, and feared that his non-disclosure of such evidence would come to light. Moreover, Baytieh clearly believed that he had a next-best option. Although he would not introduce Lamb's statements to McLachlan, he would question Johnson about statements he supposedly made to McLachlan near the time of the crime when both were out of custody.

Minutes from the *Lamb* case confirm that Baytieh sought to question defense witness Johnson: "Counsel for defendant Rump advises the Court that the People intend to question Billy Joe Johnson during cross-examination regarding his testimony as to a statement he made to Donald McLachlan. Defendant objects to the questioning on due process grounds." (Exh. S7.)

During the joint trial, Lamb called Johnson, who gave a detailed description of the events leading up to the murder. Most significantly, he testified that he—not Lamb—had shot and killed the victim, Scott Miller, and that he had committed the crime alone. (*Rump, supra,* 2009 WL 3389902 at pp. 10-11.)

Johnson testified that he and Miller had been "good friends for 20 to 25 years[,]" but that he did not like the fact that Miller had appeared on the television show. (*Id*. at p. 10.) Johnson stated that he was angry when he realized Miller was at the same party with him on the night of the incident. (*Ibid*.) However, Johnson later left the party to go get heroin with Miller. (*Id*. at p. 11.) On their way to get the drugs, they stopped, and Miller used a pay phone to make a call. (*Ibid*.) They proceeded to drive to an alleyway, when Johnson stated that he became "very annoyed" and "just reached in [his] waistband and grabbed [his] gun and blasted [Miller]." (*Ibid*.) Johnson testified that he drove away after the shooting and returned to pick people up from the party. (*Ibid*.) While at another location later that night, Johnson was asked if he had heard that "Scottish got blasted." (*Ibid*.) Johnson responded by telling the person to "watch his fuckin' mouth." (*Ibid*.)

Johnson testified that he later gave the murder weapon to Lamb, because Lamb told Johnson that he was in need of a gun to defend himself against Hispanic gang members. (*Ibid*.) According to Johnson, when he bought the gun about six months earlier from a "mutual friend," it was loaded, but he was unable to give a description as to the bullets or the location of the safety in the gun. (*Ibid*.)

Additionally, Johnson stated that when Rump was his cellmate at the Orange County Jail in 2004, the two "got along well[.]" (*Ibid*.) Johnson alleged that it was him who first suggested they contact Rump's investigator, Gail Greco, to inform her of Rump's innocence. (*Ibid*.) Johnson testified that he had never told anyone else about the murder, but told Greco that he "blasted [Miller's] ass" and explained how it had been "a clean kill" (*Ibid*.) Johnson reasoned to Greco that "I want to see right being done, that's why I'm telling you that I'm the one that killed Scott Miller." (*Ibid*.) Johnson denied having affiliations with "N.L." or receiving any orders for the murder. (*Ibid*.) Moreover, he denied ever saying he was upset that "Lamb shot Miller in the back of the head rather than the face." (*Ibid*.)

On July 2, 2007, both defendants were convicted of all charges, and the enhancements were found to be true. (Exh. R7; Exh. S7.) However, the jury deadlocked as to whether to impose the death penalty for Lamb, and Lamb was retried on the issue of whether he would be sentenced to death or life imprisonment. (Exh. R7.) Lamb was retried on the determination of whether he should be sentenced to death or life imprisonment. During the retrial, when Baytieh cross-examined Johnson, who was again called by the defense, he confronted him with alleged statements to McLachlan in which Johnson purportedly said that Lamb was the shooter in the case. Baytieh attempted to impeach Johnson with statement that McLachlan attributed to Johnson in which Johnson said that Lamb was the shooter—not himself. (Partial Transcript, *People v. Michael Lamb*, Orange County Superior Court Case Number 03CF0441, dated May 19, 2008, attached herein as Exhibit U7, pp. 74-79.) On July 2, 2007, Rump was convicted of one count of street terrorism and one count of possession of a firearm by a felon, and on July 10, 2007, Rump

was convicted of all remaining counts. (Exh. P6.) On October 5, 2007, Rump was sentenced to a total of three indeterminate life sentences without the possibility of parole, in addition to an indeterminate sentence of 83 years to life in state prison. (Exh. P6.)

A newly empaneled jury returned a verdict of death on June 11, 2008, and Lamb was sentenced to death on August 22, 2008. (Exh. R7.)

### J. The trial of Billy Joe Johnson and the Discovery Violation Involving a Key Prosecution Witness

Johnson's path to death row is unlike any other in this county's history. In its opinion affirming Johnson's conviction and death verdict on direct appeal, the California Supreme Court described the timing of Johnson being charged on August 23, 2007, with aiding and abetting Miller's murder:

> After testifying at the guilt phase of Lamb and Rump's trial in 2007, but before taking the witness stand at Lamb's penalty phase trial in 2008, [Johnson] was charged with Miller's murder, for which the prosecution was seeking the death penalty. Despite the court's repeated admonitions regarding his right against self-incrimination, defendant continued to maintain that he shot Miller.

(*People v. Johnson* (2016) 62 Cal.4th 600, 611; Redacted Court Vision, *People v. Billy Joe Johnson*, Orange County Superior Court Case Number 07CF2849, attached herein as Exhibit V7.)

On October 7, 2009, opening statements were presented in Johnson's murder trial (Exh. V7.) Consistent with his theory in the prior trials of Lamb and Rump, at Johnson's trial Baytieh contended "that defendant was not the actual shooter but rather… aided and abetted the murder by luring Miller out of Costa Mesa on the pretext of buying heroin and driving him to the location where Lamb and Rump were waiting to execute him in a surprise attack." (*Johnson, supra,* 62 Cal.4th 600 at p. 630.) On October 8, 2009, Baytieh called McLachlan to testify about alleged statements made to him by Johnson the day after

the murder—essentially the same statements that he attempted to impeach Johnson with when he testified at Lamb's trials:

> Defendant told McLachlan that he drove with Miller from the party in Costa Mesa to Anaheim, telling Miller they were going to get drugs. Defendant also indicated that he was walking next to Miller in the alley before he was killed. When Miller heard footsteps coming from behind, he asked defendant, "Are those PEN1 guys?" He was then introduced to Lamb and Rump. According to defendant, Miller seemed resigned to the idea that something was going to happen to him. Defendant identified Lamb as the shooter. He also told McLachlan that he was angry and upset about the way the killing was handled and had confronted Lamb about it. Describing Miller as a "dear friend," defendant thought Miller should have been executed by a shot to the face, not to the back of the head. As defendant envisioned the scenario, Miller should have been told to his face, "You had a good run, you ran afoul of the rules, it is time to go." Defendant explained that Miller had to be killed because of the news interview and "his actions ... in the neighborhood."

(*Id*. at p. 610.)

During his testimony on October 8, 2009, McLachlan was questioned about his motive for the testimony:

> Q. Why are you doing it? Why are you testifying? You are not getting anything in return. Why are you doing it?
> A. Well, originally - - originally, the reason why I got involved in this thing was because I asked Lamb's attorney - - or, Lamb's homicide investigator not to subpoena me, to leave me out of the - - the court proceedings. And they didn't do that. They, you know, subpoenaed me. So that's pretty much where the second interview with Blazek came into existence.

(Reporter's Transcript, *People v. Billy Joe Johnson*, Orange County Superior Court Case Number 07CF2849, dated October 8, 2009, attached herein as Exhibit W7, p. 63.)

McLachlan further testified that he did not want anything to do with the case initially. (Exh. W7, pp. 63-64.) Baytieh pressed on: "But then when you got subpoenaed by the investigator for Mr. Lamb, that's when you called the cops and say, [']they are going to subpoena me, let me tell you what I know,['] correct?" McLachlan agreed. (Exh. W7, p.

64.) McLachlan continued to explain that he was willing to testify because he had been subpoenaed and it was "his civic duty[,]" while adding: "what choice do I have?" (Exh. W7, p. 64.)

Defense counsel asked whether McLachlan had offered information on other cases, and he answered in the affirmative:

> Q. Yet, you have offered information on other crimes to the police, too, correct?
> A. Correct.

(Exh. W7, p. 67.)

Whether this question was fortuitous fishing by defense counsel who logically would have suspected that McLachlan's police cooperation was not limited to just the *Lamb/Rump/Johnson* line of questions, or, instead, questioning prompted by discovery provided to the defendant, is unknown. However, Baytieh told the DOJ that he never provided materials from an OCII file to a defendant before:

> Q. For any of the cases that you used informants, did you review the file, relevant file, at the OCII?
> A. Actual OCII file?
> Q. Yeah.
> A. No, sir.

(Exh. E1, p. 148.)

If this was truthful, there is ample reason to believe that a discovery violation occurred in *Johnson* as well, based upon the failure to provide *Brady* material relevant to his credibility. Baytieh's untrustworthiness when it comes to evidence disclosure makes it highly likely that he studied McLachlan's file, found evidence in it that was damaging to the informant or to Baytieh—just like the situation with Palacios in *Smith*—and hid it.

Despite McLachlan's informant background, Baytieh was perfectly comfortable insisting to jurors during closing argument in *Johnson* that McLachlan lacked any reason or motivation to speak anything other than the truth:

> Remember, Donny McLachlan told you. You don't have to like him, but what he told you is supported by the fact. He has every reason in the world not to say what he said, but he said it anyway.
> You are going to go, "yeah, he says he doesn't want to be a racist anymore. I am not buying it." That's fine. That's fine. If you think whatever his motive, he came here. He is not getting anything. Every time he tried to get something, he was told no.

(Partial Reporter's Transcript, *People v. Billy Joe Johnson*, Orange County Superior Court Case Number 07CF2849, dated October 14, 2009, attached herein as Exhibit X7, p. 43.)

The problem, as so often has been the case when Baytieh brings an informant into a case or courtroom, is the defendant in that case has little idea what else the informant might have said that would have weakened his believability and what other relationship, benefit, or secret consideration influenced a presentation that was especially helpful to the prosecution.

### K. Testimony of Custodial Informant Paul Longacre

Baytieh also called another witness, Paul Longacre, from Salinas Valley State Prison. (Reporter's Transcript, *People v. Billy Joe Johnson*, Orange County Superior Court Case Number 07CF2849, dated October 20, 2009, attached herein as Exhibit Y7, pp. 96, 104.) Longacre testified that in 1991, he and Johnson were both incarcerated in Folsom State Prison. (Exh. Y7, pp. 97-98.) However, there was far more to the story of Paul Longacre than Baytieh was willing to share with the defendant or jurors.

Baytieh asked Longacre if he recalled either Johnson "bragging" about his involvement in the murder of a child molester in prison, or sending two letters to the OCDA offering information about Johnson. Longacre testified that he could not recall either the conversation with Johnson or the letters; however, he verified that the letters were written in his handwriting. (Exh. Y7, pp. 98-100.) On cross-examination, Longacre admitted to sending the letters—"I wanted to talk to somebody from that office"—but refused to say whether the statements contained therein were truthful:

Q. No?
A. I am saying that things -- things happened, but I am not completely sure if my recollection is correct. And I can't testify that it is, and I won't.
Q. Somebody, in your letter, confesses to you to killing somebody else and that is blurry to you now as you look back on it?
A. It is not -- well, it is 19 years ago. A lot of things I don't remember. So I can't sit here and tell you that I honestly remember word for word and what happened. I just can't. I am not going to. For you or for him or for anybody.
(Exh. Y7, p. 104.)

Baytieh emphasized that he and Longacre had never met before the date of his testimony, and that, even if Longacre had sent the letter angling for leniency from OCDA, that "nobody from [Baytieh's] office came and talked to [him] about [his] case." (Exh. Y7, pp. 97, 106.) However, Baytieh was not giving the full picture of his connection to Longacre.

Longacre was the informant who replaced Platt in Smith's informant-filled dayroom in July 2009. In fact, one of Baytieh's tells demonstrating his realization that Platt was an informant and not an aspiring "cop-killer" was during his questioning of Palacios at Smith's trial.

Additionally, Baytieh failed to disclose Longacre's role as a testifying informant in *Johnson* to Smith, even though disclosure would have been favorable and material, as it would have alerted Smith to the probability that a multiple-informant operation was at play in Smith's case. Relatedly, Johnson was entitled to know that Longacre was the fourth informant ultimately assigned to Smith's dayroom, as it was relevant to whether his cooperation at any stage was impacted by his relationships with the law enforcement.

### L. *People v. Hilbert Thomas*

Baytieh's capital murder prosecution of Hilbert Thomas is discussed previously in the "Affected Cases" section of this motion. On August 21, 2012, Baytieh filed a "Revised Proposed Witness List," which is attached herein as Exhibit Z7. One of the witnesses who was included on the list was jailhouse informant Anthony Boozer. However, between that

date and the date that "Revised Proposed Witness List #2" was filed over a year later, on December 16, 2013, Baytieh never provided discovery to defense counsel regarding the concealed *Smith* evidence. (Exh. F4.) The jury trial had previously been set for January 6, 2014. (Exh. E4.)

While the defendant does not have the interview with Boozer that prompted Baytieh to list him as a witness, Defendant is in possession of a report written by OCSD Sergeant Gaul. (Report of Joseph Gaul, dated March 13, 2012, attached herein as Exhibit A8.) The report states that on January 13, 2012, Deputy Zachary Bieker informed him that Boozer "wanted to provide some information on the case." (Exh. A8.) Boozer was, at that time, a cooperating defendant in a multi-defendant murder case, *People v. Anthony Boozer* (11CF2479), after having given a proffer on October 4, 2011. On May 21, 2013, he reached an agreement with former Senior District Attorney Scott Simmons in which the murder charge would be dismissed and his sentence significantly reduced in exchange for his cooperation and testimony. Boozer pled to the remaining other six counts with an understanding that he would be sentenced to twelve years in state prison. (*Tahl* form, *People v. Anthony Boozer*, Orange County Superior Court Case Number 11CF2479, attached herein as Exhibit B8.) His plea was entered that day and his sentencing was continued. (Redacted Court Vision, *People v. Anthony Boozer*, Orange County Superior Court Case Number 11CF2479, attached herein as Exhibit C8.)

Baytieh was also fully aware that this was not Boozer's first foray into informing. One month earlier, OCDA Investigator Vivian Tabb stated that she had been given a discovery request regarding Boozer. (Supplemental Report of OCSD Investigator Vivian Tabb, dated April 16, 2013, attached herein as Exhibit D8.) It appears to have been based upon a defense request. Tabb confirmed through the San Bernardino Police Department that "[Anthony] Boozer…was a confidential informant in 2003-2004 and his records were destroyed to him being inactive for 5 years." (Exh. D8.) The author noted that she also wrote the following:

> On April 5, 2013, I spoke to **Sgt. Joseph Gaul from the Professional Standards Unit** of the Orange County Sheriff's Department. Sgt. Gaul advised me his agency does have policies and procedures in place regarding the handling, maintenance, retention and destruction of confidential informant files however without a subpoena or court order they do not wish to turn them over at this time.

(Exh. D8.)

It could not have gone more perfectly for Baytieh. His OCDA investigator had reached out to a member of the OCSD's Professional Standards Unit, who was also the most important investigator on the prosecution team in *Thomas*. In his response to the inquiry, Gaul could wear two hats. He was still lead investigator—and, indeed, would be designated as such when jury selection commenced in Thomas' case on January 13, 2014—but could also use his then-current position to set up roadblocks to more being learned about Boozer as an informant. (Exh. E4). While the author of the report did verify that Boozer was a past confidential informant in San Bernardino, interestingly, there is no similar representation by Gaul. Of course, a conversation took place, as Boozer was an OCDA and OCSD informant on the case, but neither the author nor Gaul wanted their conversation reflected in the report.

At the same time, Baytieh knew what he needed to do when he viewed the report: contact his lead investigator and find out everything he could about Boozer's history of informing. He likely did, and hid what he learned. Moreover, as discussed previously, Baytieh claimed that he never reviewed a single OCII informant file from an informant in one of his cases. And, again, that was almost unquestionably untrue. Nonetheless, Baytieh did not turn over the OCII file on Boozer to the defense prior to trial, unless he lied to the DOJ and had turned over sections of the OCII file in some of his cases.

Regardless, placing Boozer on his witness list more than one year before Thomas' trial triggered Baytieh's responsibility to turn over the concealed evidence from *Smith*, so that the defense would be alerted to the hidden jailhouse informant program and the need to raise a challenge to the admissibility of Boozer's testimony about statements allegedly

made to him by Thomas. For Baytieh, it was just another chance to violate his *Brady* responsibilities for a better chance at winning. Thus, no disclosures were forthcoming.

Ultimately, Boozer was never called to testify. It was likely not a coincidence. On January 29, 2014, the jury was sworn and the prosecution began calling witnesses. (Exh. E4.) **On January 30, 2014, Defendant Scott Dekraai filed a 505-page motion to dismiss his capital murder case, with allegations focused on a jailhouse informant program that was operated in violation of defendants' constitutional rights—and advanced by both the OCDA and the OCSD.** (Exh. O2.) Baytieh had little interest in calling a jailhouse informant once the allegations of an illegally operated jailhouse informant program were raised—allegations that unquestionably he knew were well-founded years before they were raised in *Dekraai*.

Baytieh had almost certainly been hiding for years the truth about how Boozer not-so-coincidentally found his way to Thomas in the Orange County Jail. During his 2011 interview, Boozer was asked whether he felt his safety could be compromised by his cooperation in his ongoing case. The dialogue went as follows:

> Boozer: But I'm okay where I'm housed at…
> Investigator Hatch: Yeah?
> Boozer: Yeah. Deputy Chevalier[59], he takes good care of me
> (Partial Interview Proffer of Anthony Boozer, dated October 5, 2011, attached herein as Exhibit E8, p. 6.)

Soon, Chevalier's relationship with Boozer would yield more dividends. In the fall of 2014, Boozer's co-defendants learned that Boozer, indeed, had worked as a jailhouse informant while awaiting trial, after litigation in *Wozniak* and *Dekraai* led to discovery of the TRED system. Defendants in those cases obtained discovery that was then attached to a motion in support of an evidentiary hearing. One of the results was the acquisition of key

[59] The first TRED entry for Scott Dekraai is dated October 13, 2011, and it authored by Chevalier: "SH JACKET CREATED UNDER DEKRAAI, SCOTT." (Exh. A1.)

TRED and housing records. It should hardly come as a surprise that, three months after Boozer's proffer, the name "Chevalier" appeared in the housing records of Hilbert Thomas. (Housing Records of Hilbert Thomas attached herein as Exhibit F8.) Chevalier certainly was planning to "take care" of Thomas and Boozer when he ordered the move—though in ways that could not be more dissimilar. Indeed, thanks to Chevalier, exactly three months after Boozer's proffer, Thomas arrived in Mod J-6, where Boozer resided. (Redacted TRED Records of Anthony Boozer attached herein as Exhibit G8.)

Similarly, in this instance, **less than 24 hours after Thomas' arrival**, on January 13, 2012, Deputy Zachary Bieker called the OCSD investigator for *People v. Thomas* to tell him that "[Anthony] Boozer (Bkg #265XXXX) is an inmate housed at the Intake Release Center, Mod J, Sector 6 along with Hilbert Thomas and is the person who wanted to provide some information." (Exh. A8.)

It was also Bieker who also wrote the key hidden entry in Dekraai's TRED stating that "^ is not to be moved regardless of medical or mental health request. All movement has/will be approved by IRC SH or SH Sergeants." (Exh. A1). And it was Bieker who would claim in 2015 testimony that this perfectly clear statement—Special Handling had authorized the movement of Dekraai next to Perez and medical professionals could not, in the past or future, move him without their approval—supposedly meant no such thing. (Exh. A1.)

Nineteen days later, Deputy Cyril Foster moved Thomas out of the module. (Exh. F8.) One week after that move, Special Handling Deputy Garcia transferred Boozer out of the module as well. (Exh. G8.) However, on February 14, 2012—a month before Sheriff's investigators wrote their report about the statements Boozer allegedly obtained from Thomas—Chevalier and Deputy Ben Garcia initiated a series of movements bringing Boozer and Thomas back to the very same module (J-6) and to nearby cells. Those movements culminated with Garcia placing Thomas into Mod J, Section 6, cell 4, and **three minutes later** moving Boozer into Mod J, Sector 6, cell 8. (Exh. F8; Exh. G8.)

The story of the purposefully coordinated housing movements of informant Boozer

and the target, capital defendant Thomas, is told for the first time in this motion. However, there is every reason to believe that Baytieh has understood this completely for more than a decade.

### M. *People v. Shawkey*

On pages 29 and 170-173, Defendant Smith discusses the prosecution in *People v. Shawkey* and its connection to *People v. Smith* through the undisclosed informant Jeffrey Platt. Platt also appeared on the prosecution's witness list, as he told authorities that he saw the defendant and victim together shortly before the victim's disappearance. However, separately, it was a case in which multiple jailhouse informants were involved. Ronald Henderson testified before the Grand Jury regarding statements made to him while he was incarcerated with Shawkey in Virginia. (Exh. E1, pp. 211-224, 250.)

Two other jailhouse informants claimed that Shawkey made admissions to them while housed in the jail facilities managed by the OCSD. One is Alex Trujillo. He was on Baytieh's trial witness list but never called. (Exh. E1, pp. 251-252.) The third informant was Mark Georgantas. (Exh E1, pp. 225-230, 241-251.) Georgantas was not called as a witness.

## XXI. Jailhouse Informant Cases In Which Baytieh Withheld Favorable And Material Evidence

In this section, Defendant will give a brief summary of cases in which Baytieh caused discovery violations because of his refusal to turn over evidence from *Smith*. The concealed evidence would have demonstrated how the county's jailhouse informant program operated, such that informants were encouraged to question targets, housing and dayroom assignments were manipulated, and constitutional obligations under the Sixth and Fourteenth Amendments were ignored. In the cases discussed below, the prosecutor was someone other than Baytieh. The prosecutor in these cases provided evidence indicating a

jailhouse informant had obtained statements from the defendant, but the defendant reasonably was unaware of the jailhouse informant program and how it actually operated.

Baytieh was required to turn over the evidence concealed in *Smith* in every Orange County case from 2009 until the present in which the prosecution presented a jailhouse informant witness as having coincidental contact with the defendant when the defendant spoke about a crime, or in which the informant contended that there was no elicitation of statements. Of course, Baytieh never disclosed the concealed evidence from *Smith* in other criminal cases, because he had concealed it in *Smith* and because doing so would have exposed the enormous wrongdoing of him and his prosecution team, which continued to expand each time he rejected his disclosure obligations to other defendants.

The summaries and descriptions in this section are based primarily upon the declaration of Attorney Scott Sanders, which is the source of representations except where citations to exhibits are provided. The section of Sanders' declaration related to the "Affected Informant Cases" is based upon information and belief and is the result of Sanders' study of informant issues that resulted in numerous court filings between 2014 and 2019.

***People v. Scott Dekraai* (12ZF0128)**

There can be little doubt that soon after Baytieh learned about the allegations lodged in the 2014 Motion to Dismiss and the related Motion to Recuse in *Dekraai*, he knew exactly what he was required to do. With the filing of these motions and the publicity surrounding them, Baytieh understood that Dekraai's defense team had figured out how the program actually operated—and how constitutional rights had routinely been violated in the process. Moreover, Baytieh fully appreciated how the OCDA and the *Dekraai* prosecutors planned to respond. Baytieh, who was a member of the homicide unit when the motions were filed in *Dekraai*, described in his DOJ interview how he was a part of the discussions with the *Dekraai* prosecution team in which they decided to fight the allegations without what he claimed was adequate preparation.

Baytieh has self-servingly switched between claims that he studied the evidence thoroughly to insisting that he looked at none of it. His history as a prosecutor and his new assignment just months later suggests the truth is that he studied the evidence and allegations in detail and believed that many of the allegations were spot-on—despite his public claims to the contrary in 2014 and 2015. This inference that he carefully examined the allegations is supported not only by his reputation for being extremely well-prepared but also by the fact that, soon after the filing, he was appointed the supervisor of the *Brady* Notification System. In this position, he would have logically participated in or oversaw a careful search of the evidence to determine whether named officers needed to be added to the system—or, at a minimum, have oversight of that effort. Even if one assumes that Baytieh was intentionally derelict in that duty, he was privy to sufficient internal dialogue and press coverage to understand the allegations that there existed a jailhouse informant program in which the movement of informants was coordinated and informants were directed to elicit information.

In terms of the response specifically in *Dekraai*, Baytieh fully realized that his agency would fight the allegations regardless of their accuracy—and part of the reason he knew this was his own role that he took in attempting to undermine the credibility of the allegations in the minds of the criminal justice community and the public. All of this make particularly aggravated his failure to disclose evidence from *Smith* and *Guillen*, at least in the months following the filing in *Dekraai*. Again, although Baytieh now self-servingly claims he never studied the allegations first raised in 2014 in *Dekraai*, in 2015 and 2016, he presented himself as the most knowledgeable attorney in the county when it came to assessing the reliability of the allegations related to systemic informant-related misconduct. (Exh. D1, p. 42.) He was not forced to diminish the allegations. Rather, it was a position he enthusiastically embraced and advocated for using his entire skillset. He did this even though he knew he was misleading the public with his entire skillset, and even though he knew he was required under *Brady* to turn over the evidence from *Smith* and *Guillen* that would have shown the allegations were spot-on.

A close examination of the actions taken by the prosecution team in *People v. Dekraai* offers a unique window into prosecutorial decision-making and misconduct in Orange County's most serious cases prosecuted from 2009 to 2017.

Before Assistant DA Wagner, Senior Deputy DA Scott Simmons, and two investigators traveled to the Orange County Jail in October of 2011 to conduct an interview with an inmate, they already knew that his name was "Fernando Perez." It would take two years for the prosecution to provide to the defense, over its objection, evidence showing him to be one of Orange County's most prolific jailhouse informants. But the prosecution had all of that information available to them before they spoke to Perez. Fernando Perez had his own OCII file, which showed that Deputy DA Eric Petersen had obtained approval to work with Perez earlier the same year. The OCII file on Perez also included what should have been a concerning entry: "PEREZ WAS TERMINATED AS A C.I. – DO NOT USE AS A C.I." Perez had hidden a weapon in his home after doing an informant operation that led to the seizure of firearms and arrests. The investigating officer recognized that this conduct made Perez untrustworthy and wisely requested the following entry in Perez's OCII in 1989: "Do Not Use as C.I." However, the prosecution team claimed they never even examined Perez's OCII file until Judge Goethals ordered informant-related discovery in 2013.

Like Baytieh in *Smith*, prosecutors who failed to turn over the *Brady* material contained in these OCII files and in the files of scores of other informants insisted their actions were unintentional—which, of course, is not an excuse under *Brady* when the information is accessible because non-disclosure has the same impact of depriving the defendants of due process rights. Additionally, such an explanation is simply not believable, as the prosecutors were well aware that its agency maintained the OCII files for informants.

Moreover, in a declaration responsive to the *Dekraai* dismissal motion, Wagner admitted that he was told before the interview started that Investigator Bob Erickson relayed information from Special Handling Deputy Ben Garcia "that an inmate who had

provided reliable information on prior occasions" had received statements from Dekraai. Wagner also stated that Perez came to the prosecution in the "posture of a jailhouse snitch." However, in the recorded interview that followed, no questions were asked that would have revealed to the listener that Perez was, in fact, a jailhouse informant prior to his contact with Dekraai. In actuality, Perez had worked as a jailhouse informant from July of 2010 until October of 2011.[60]

Baytieh and members of the *Dekraai* prosecution team also clearly recognized, through references throughout the motion, that a central aspect of the allegations was how dayroom access was manipulated—including specifically for informant Perez in *Dekraai*. One section in the Motion to Dismiss stated the following:

> 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.
>
> 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

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[60] Perez's very first informant effort in 2010 culminated with Perez reporting that he had obtained a confession from Daniel Wozniak.

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]...
(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]. (..?)—
(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: "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.

Erickson wrote a report about the interview with Perez that protected his identity, thereby seemingly leaving the author free to at least share that the unidentified inmate was a jailhouse informant. Yet, there was no mention of this seemingly critical fact, even though Wagner reviewed the report before it was discovered. Wagner would later claim that because he only intended to introduce the recorded portion of the discussions between

Dekraai and Perez, and would not call the informant, the defense was not entitled to discovery of his informant background. However, once the dismissal motion was filed and the enormity of Perez's informant background took center stage, he said his decisions to withhold the evidence were simply a matter of a "flawed" legal analysis. Yet none of the later efforts designed to minimize the appearance of being deceptive can explain why the prosecution began hiding Perez's informant background in the initial recorded interview (before they had even obtained recordings between Perez and Dekraai) or why Wagner would have allowed Erickson to write the following, which falsely suggested that Perez's claims were credible:

> I explained to [Perez] that we were not meeting with him in exchange for any promises or leniency on any charges he may have pending against him. [Perez] acknowledged he was not looking for any favors. [Perez] stated 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 [Perez].

However, the conduct of the *Dekraai* prosecution team proved that the willingness to mislead and conceal evidence related to informants was routine. Wagner would later concede under oath that it was "fair" to say he doubted that the jailhouse informant was coming forward out of purely a civic duty.

Moreover, before Erickson even wrote his report on Dekraai, the investigator authored a memorandum to Perez's prosecutor, former Deputy DA Eric Petersen. Petersen had already convicted Perez of a Third Strike offense and, in his trial brief, requested a life sentence be imposed. In the memorandum entitled "Informant Assistance," Erickson praised Perez's contribution to the *Dekraai* investigation, stating that Perez "may eventually be called as a witness in the case against Scott Dekraai. As the prosecutor handling Perez's case, this memorandum is being directed to you for your consideration and information only." Petersen was also instructed to keep the letter secret as Perez's work had not been disclosed to the *Dekraai* defense team. The letter indicated that the

*Dekraai* prosecution team very much wanted Perez rewarded for his tremendous assistance in the case—while also preferring that, if Perez ended up testifying, a court and jury be left in the dark about what the *Dekraai* team wanted for him.

Eventually, it would become clear that Wagner's plan was to keep all informant evidence away from the defense by arguing that it was irrelevant to the admissibility of the recordings between Perez and Dekraai, even though Perez admitted to questioning Dekraai and obtaining a confession before the recording device was introduced into the jail cell—and, therefore, his status as an informant at that time was obviously relevant. If this self-serving and circular reasoning worked, there would be a *Massiah* hearing in which the defense would not know Perez was one of the most prolific jailhouse informants in Orange County history, and the prosecutor would object to any and all questions designed to obtain insights about his informant background during the hearing.

But to accomplish this objective, Wagner had to push past all ethical boundaries—into a territory where he appeared disturbingly comfortable. In e-mails later obtained by the defense, Wagner can be seen, as early as June of 2012, exploring the possibility that Perez would testify in *Dekraai* and that Petersen not use him in his cases where he was a witness. On the stand, Wagner explained his thought process: "The people like Mr. Perez don't make good witnesses; that they get worse with time. The more times they testify, the worse they get."

With the benefit of hindsight, Wagner's sworn declaration in opposition to Dekraai's request for discovery in January of 2013 included two intentionally misleading pronouncements. First, he wrote that "Inmate F. said that he was not looking for any consideration, but that due to the seriousness of the case, be believed the prosecution should hear what defendant had told him." Wagner did not believe this personally, and indeed he knew of an abundance of evidence to the contrary, in the form of longstanding informant work designed to reduce the life sentence Perez was facing. Yet Wagner misled by way of massive material omission. In an e-mail exchange prior to oral argument, Wagner was given the names of ten cases in which Perez was a potential testifying witness, including

*Palacios*, yet strangely was unbothered by not sharing information that would have fully impeached the representations that Perez was not seeking a benefit. In the *Dekraai* hearings, Special Handling deputies claimed that they believed they could not speak of TREDs in open court, and were reminded through the prosecutor's questioning that they could have requested to proceed via Evidence Code Section 1040. Of course, the same option was available to Wagner—but the truth is that he knew he had a far greater chance of getting a favorable ruling if the court never heard a word of Perez's prior informant work.

But Wagner was not done. He wrote that the "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." This representation would have seemed a terrible error in view of the contradictory letter in which Erickson told Petersen to take into consideration his tremendous work on the *Dekraai* case. Yet, counsel for Dekraai never raised the issue. Why? More than a year after it was written, it had not been disclosed, and it would still take another eight months before it was finally discovered. But how could this rationally be explained by Wagner, when it was sent to Petersen fourteen months earlier?

According to the prosecutors, Erickson wrote the letter to Petersen without consulting with either of them. Erickson testified that the letter was the idea of a prosecutor, but definitely not Wagner or Simmons—perhaps, oddly enough, it could have been the brainchild of Petersen. But certainly, the homicide prosecutors must have seen the letter. That did not happen either, they claimed. But what about the fact that the letter was attached to e-mails sent to the prosecutors—including Wagner? The prosecutors asserted under oath that neither opened their attachments and, as a result, never disclosed the letter to the defense.

Wagner's story had a familiar ring to it; one in which a prosecutor somehow never receives a critical document that would have shown that the same prosecutor was covering up critical information. Fortunately, Judge Goethals rejected the arguments by Wagner

and, as a result, thousands of pages of materials from the cases in which Perez testified could be analyzed. This would lead to evidence of a jailhouse informant program, hidden jail movements designed to violate *Massiah*, and revelations of misconduct in numerous cases. Yet despite the powerful allegations of wrongdoing against Wagner, he would be selected by the OCDA to lead an internal investigation of the allegations of misconduct raised in Dekraai's motion to dismiss—though, not so unexpectedly, there was no investigation of the misconduct in *Dekraai*. Therefore, it should come as no surprise that following this investigation, one in which investigators scrupulously kept their recorders off and notepads at their sides, Wagner declared that there was not a single piece of information that he needed to disclose to defense counsel under *Brady*, even though the conviction of Leonel Vega and the prosecution of Isaac Palacios, just to name two, would soon fall apart.

During the hearings themselves, the OCDA defended any and all prosecutors and members of law enforcement against allegations of wrongdoing—with the exception of Judge Flynn-Peister. Even the obviously dishonest testimony of Special Handling deputies and informants was allowed to stand uncorrected. Although Judge Goethals' decision in August of 2014 did not include recusal or significant sanctions, the court found the following:

> Many of the witnesses who testified during the course of this hearing were credibility challenged. These witnesses included current and former prosecutors, as well as current and former sworn peace officers. Some perhaps suffered from failure of recollection. Others undoubtedly lied.

The court made another significant finding, as well:

> [T]his court finds that working informants and targeted inmates were at times intentionally moved inside the Orange County Jail by jail staff, often at the request of outside law enforcement agencies, in the hope that inmates would make incriminating statements to those informants. Such intentional movements were seldom, if ever, documented by any member of law enforcement. Therefore little or no information concerning these intentional movements was ever created or turned over to defense counsel as part of the discovery process.

The response by the OCDA was one fully reflective of an agency incapable of recognizing the significance and depth of the problems associated with the use of informants and the bigger issue of strictly honoring *Brady*. The office soon announced that it would add more paralegals. Later, the office added training—a significant portion provided by Assistant DA Wagner.

When a second round of hearings included obvious perjury and concealment of unhelpful TRED records and orchestrated efforts to develop and manage informants, prosecutors still refused to condemn any of what they saw with their own eyes.

***People v. Joseph Govey*** **(12ZF0134)**

All charges, including solicitation for murder, were dismissed in 2014.

The DOJ Report includes an analysis of *Govey* as an exemplar of the "OCSD and OCDA [having] engaged in a pattern or practice of conduct that deprived criminal defendants of their Fourteenth Amendment rights." (Exh. D1, p. 37.) One of multiple jailhouse informants used in violation of Govey's Sixth Amendment rights was Arthur Palacios, the testifying informant in *Smith*. The discussion found in the DOJ Report does not address the failure of Baytieh and the OCDA to disclose *Brady* evidence from *Smith* showing that Palacios previously questioned that defendant in violation of the Sixth Amendment.

Govey and Shirley Williams were arrested in 2011 and charged with felony evading a peace officer/reckless driving, possession of a firearm by a felon, possession of ammunition, and possession of fictitious instruments. (Exh. D1, p. 31.) In addition, the OCDA charged both with gang enhancements, arguing that Govey had "active participation" in Public Enemy Number 1 ("PEN1") and that the crimes were also committed for the benefit of PEN1. (Exh. D1, p. 31.)

Govey's, as well as Williams', right to counsel attached when they were charged in 2011. (Exh. D1, p. 31.) At this point, as the DOJ Report stated, it became "illegal for law enforcement to elicit statements from either defendant about the charged crimes without

their lawyers present. That included asking questions about Govey's membership in PEN1, because Govey's charges included gang enhancements alleging that he committed his crimes as an ['']active participant['] of the gang." (Exh. D1, p. 31.)

Briefly after Govey was transferred to Orange County Jail and booked in August of 2011, he was placed into a module that housed several custodial informants. (Exh. D1, p. 31.) Significantly, three of these informants quickly came forward and alleged that Govey had "enlisted two of them to send word to members of PEN1 that E.E. [one of the informants] should be killed." (Exh. D1, p. 31.) Another informant, F.F., was under the impression that some members of PEN1 viewed him as a "snitch," and said Govey approached him with a proposition that he could help F.F. "make things right" with PEN1 if F.F. would help Govey with E.E. (Exh. D1, p. 31.) Moreover, Palacios, who is referred to as A.A. in the DOJ report, alleged that Govey made a phone call to a fellow member of PEN1 to pass on the word that Govey wanted E.E. dead. (Exh. D1, p. 31.) Yet another informant, G.G., told OCSD deputies that he had overheard Govey's discussions with F.F. and Palacios. (Exh. D1, p. 31.)

Unbeknownst to Govey, G.G. and Palacios had an extensive history working as jailhouse informants when they met Govey in jail in August of 2011. (Exh. D1, p. 31.) According to the DOJ Report, "A.A. [Palacios] worked with Special Handling deputies one year earlier to obtain key incriminating statements from defendant Paul Smith while they were housed together in a different module at the jail. And before G.G. reported to deputies about overhearing Govey's conversations, G.G. had already been taking notes about Govey ['']to help deputies out.['']" (Exh. D1, pp. 31-32.) In light of the information provided to the OCSD deputies by the informants, additional charges by the OCDA were filed against Govey for "soliciting the murder of E.E., along with more gang enhancements" in early 2012. (Exh. D1, p. 32.)

All charges were dismissed against Govey in October of 2014 "after the court ordered the prosecution to disclose information related to the other informants in Govey's case." (Exh. D1, p. 45.)

However, during the course of the DOJ investigation it was discovered that another jailhouse informant had participated in the investigation of Govey that was undisclosed. At the center of that effort was OCSD Investigator Beeman, who in *Smith* had worked close with testifying informant Palacios and undisclosed informant Platt.

The DOJ Report emphasized that once the latter charges were filed, *Massiah* precluded the OCSD from eliciting any statements from Govey about the solicitation for murder charge without the presence of his counsel. (Exh. D1, p. 32.) However, the Sixth Amendment and *Massiah* were, once again, ignored: "OCSD nevertheless used a fifth informant, H.H., to extract additional information from Govey about the solicitation of murder charge, as well as Govey's ties to PEN1. Investigator Bill Beeman made sure that H.H. had access to Govey while Govey was housed in disciplinary isolation in 2012." (Exh. D1, p. 32.)

H.H. was designated as a Special Handling "management case" and interviewed by a Special Handling deputy in late 2011. (Exh. D1, p. 32.) The same deputy introduced H.H. and Beeman to each other when Beeman was conducting an investigation in *Govey*. (Exh. D1, p. 32.) Per Beeman's memo regarding the *Govey* investigation, H.H. "had access to Govey" and had concurred to "be a sponge," meaning H.H. would provide Beeman with information about Govey. (Exh. D1, p. 32.) H.H. ended up having extensive discussions with Govey over the weeks that followed, and the two "developed a level of trust." (Exh. D1, p. 32.) In addition, some of these conversations were recorded by the Special Handling deputies, as evidenced by entries from the SH Log. (Exh. D1, p. 32.) Beeman also gave directions to H.H. to make multiple phone calls to members of PEN1 on Govey's behalf. (Exh. D1, p. 32.) Although Govey's right to counsel had already attached for the solicitation of murder charge, these conversations nevertheless touched the charge. (Exh. D1, p. 32.) Among the information disclosed to Beeman by H.H. were the identities of people Govey had allegedly tried to reach in order to kill E.E. (Exh. D1, p. 32.)

The violation of Govey's Sixth Amendment rights did not end there. As with the solicitation to commit murder charge, Govey's right to counsel had attached for the gang

enhancement, but this did not stop H.H. from having conversations with Govey about both. (Exh. D1, p. 32.) Referring to the misconduct, the DOJ Report stated:

> In doing so, H.H. was acting as an agent of law enforcement for the purposes of *Massiah*. The Special Handling Unit introduced H.H. to Beeman so that H.H. could assist with the Govey investigation. H.H. began speaking with Govey because Beeman told H.H. to do so—making H.H. a government agent for the duration of the time H.H. spoke with Govey while Govey was in disciplinary isolation. OCSD also ensured that H.H. had access to Govey. When Govey was moved to disciplinary isolation in 2012, a Special Handling deputy noted in his TRED that "Per Spec Ops," Govey would remain there for the rest of his time in custody. OCSD's "Special Operations/Intelligence Detail" was where Investigator Bill Beeman was then assigned. That same day, the same deputy wrote in the Special Handling Log that inmates were moved in disciplinary isolation "in order to accommodate in-coming CI's [confidential informants] as well as to make room" for Govey.

(Exh. D1, pp. 32-33.)

Per the DOJ, the elicitation prong set forth in *Massiah* was also "clear," because although H.H. may have been told to simply "be a sponge," Beeman's memo about the investigation confirmed that H.H.'s level of activity was more extensive. (Exh. D1, p. 33.) The DOJ Report referenced to the following facts: first, H.H. contacted PEN1 members on Beeman's direction, and second, H.H. provided help to OCSD deputies when it came to the identities of the individuals Govey had allegedly tried to contact to help kill E.E. (Exh. D1, p. 33.) Thus, the DOJ concluded, that rather than "merely listening as Govey spoke unprompted," H.H. was actively participating in "ongoing discussions" regarding PEN1 activities and the solicitation of murder charge. (Exh. D1, p. 33.)

Beeman created a summary of H.H.'s assistance in a memo that was provided to the prosecutor in H.H.'s case. (Exh. D1, p. 33.) As a result of the "useful information [provided] to Investigator Bill Beeman" contained in the memo, H.H. received a "midterm instead of the upper term" sentence that was imposed on H.H.'s co-defendant. (Exh. D1, p. 33.)

In a subsequent interview with the H.H. prosecutor, he admitted to DOJ staff that H.H. did indeed assist Beeman in the *Govey* investigation, specifically regarding the solicitation of murder charges. (Exh. D1, p. 33.) Moreover, after being questioned by DOJ staff about Beeman's memo, the H.H. prosecutor stated that it did raise "red flags" concerning "a potential *Massiah* violation." (Exh. D1, p. 33.) The same prosecutor, however, told DOJ personnel that he had disclosed the information to the *Govey* prosecutor who had the duty to inform the defense about the "breach" of Govey's rights. (Exh. D1, p. 33.) Per H.H.'s prosecutor, he had "left a message" to the *Govey* prosecutor and talked to her in person about the role of H.H. in the case. (Exh. D1, p. 33.) H.H.'s prosecutor also told DOJ staff that he believed "he gave the Govey prosecutor Beeman's memo describing H.H.'s cooperation, but ['']can't really remember.['']" (Exh. D1, p. 33.)

Conversely, when DOJ staff contacted Govey's prosecutor, she claimed that she lacked any knowledge of H.H. (Exh. D1, p. 33.) The DOJ Report stated that it failed to find anything referring to H.H. in the prosecutor's case file for *Govey*. (Exh. D1, p. 33.) Moreover, the DOJ Report stated that when they "asked the Govey prosecutor about the leniency that OCDA provided to H.H., she told us that it was relevant to Govey's case, should have been disclosed to the defense, and was not." (Exh. D1, p. 33.) In addition, the DOJ Report continued: "She also told us that Beeman's memo suggested that H.H. was asking Govey about the solicitation of murder charges regarding E.E., which raised *Massiah* issues. The leniency that OCDA granted to H.H. for their work as an informant against Joseph Govey could have been used, in combination with Beeman's memo, to prove a Sixth Amendment violation." (Exh. D1, pp. 33-34.)

Finally, the DOJ Report stated that the prosecutor in *Govey* claimed to have never received a message from H.H.'s prosecutor nor had a discussion with him concerning H.H.—in contrast to the version presented by H.H.'s prosecutor. (Exh. D1, p. 34.) The DOJ Report added that "[t]he *Govey* prosecutor also told us that during the litigation of informant discovery in the Govey case, she sought advice from high-ranking prosecutors at OCDA, including H.H.'s prosecutor and his supervisor, the head of OCDA's homicide unit,

who had signed off on leniency for H.H. in February of that year. The *Govey* prosecutor said that she believed that if other members of OCDA had knowledge about another informant in the Govey case, they should have shared that information with her." (Exh. D1, p. 34.)

***People v. Shirley Williams*** **(11CF2247)**

After being convicted of committing crimes for the benefit of PEN1 in 2013, new evidence led to the dismissal of the gang allegations in 2015.

The DOJ Report includes a section about the misconduct in co-defendant Williams' case as well. (Exh. D1, pp. 43-45.) According to the facts laid out in the DOJ Report, the OCDA alleged that Govey was a member of PEN1 and Williams was associated with the same gang. (Exh. D1, p. 43.) More specifically, the prosecution claimed that Williams' association with PEN1 was "based on her relationship with Govey and her previous contacts with PEN1 members." (Exh. D1, p. 43.) For the OCDA to successfully meet their burden of proof regarding the gang enhancements, they had to show that Govey and Williams acted "in association with" PEN1. (Exh. D1, pp. 43-44.) That, in return, meant that the OCDA had a *Brady* obligation to disclose any evidence to the defense tending to negate Govey's PEN1 membership. (Exh. D1, pp. 43-44.)

The OCDA was in possession of evidence that put Govey's alleged active membership in PEN1 in dispute. (Exh. D1, p. 44.) The OCDA prosecutor handling Govey's and Williams' cases at the time had conducted an interview with an informant and PEN1 member, K.K., in January of 2012 at the Orange County Jail. (Exh. D1, p. 44.) Also present at the interview were an OCSD investigator and Special Handling deputies. (Exh. D1, p. 44.) During the interview, K.K. shared what he knew about PEN1, the Aryan Brotherhood, and related white supremacist prison gang, "the Brand." (Exh. D1, p. 44.) K.K. opined that Govey was "not in good standing with the Aryan Brotherhood," and according to him Govey had been put on a "permanent kill list" by the gang. (Exh. D1, p. 44.) Moreover, K.K. said Govey had gotten assaulted by the gang members multiple times

in the past, and that he had even received orders to kill Govey, which led to an altercation between the two in the jail. (Exh. D1, p. 44.) According to K.K., there had also been a more recent attack on Govey in the jail. (Exh. D1, p. 44.) He explained that Govey "was in the hat with the brand [the Aryan Brotherhood], and what that means is that you're not coming out. You're to be killed." (Exh. D1, p. 44.)

Williams' lawyer had no knowledge of the aforementioned interview. (Exh. D1, p. 44.) The OCDA never provided the defense with K.K.'s statements, although the gang enhancements against Williams were an essential issue when the case went to trial in March of 2013. (Exh. D1, pp. 44-45.) Had Williams' attorney known, he could have disputed the claim that Govey was an "active participant in PEN1," which would have made a much more efficient defense in Williams's case due to the fact that her enhancement charges were based on her relationship with Govey. (Exh. D1, pp. 44-45.)

At trial, an OCSD deputy and gang expert, Asraf Abdelmuti, testified for the prosecution and opined that "Govey was an [']active participant['] of PEN1 and Williams was [']associated['] with the gang when police arrested them in 2011." (Exh. D1, p. 44.) Moreover, Abdelmuti testified that Govey was "in constant communication" with PEN1 and was "frequently send[ing] messages related to gang politics" to members of the gang. (Exh. D1, pp. 43-44.) Williams, per Abdelmuti, had been known to associate with PEN1 members for many years. (Exh. D1, p. 44.) However, the most powerful evidence against Williams, as it related to her allegedly being in association with PEN1, was the relationship between her and Govey, as well as getting arrested at the same time with him. (Exh. D1, p. 44.) In contrast, the DOJ Report stated, "Abdelmuti said nothing about Govey being on the Aryan Brotherhood's kill list and did not explain how Govey's status with the Aryan Brotherhood and PEN1 members like K.K. could be reconciled with Govey's alleged status as an active participant with PEN1." (Exh. D1, p. 44.)

During cross-examination, it was established that Abdelmuti was only able to point out four occasions within a nine-year period where Williams had been contacted by members of PEN1. (Exh. D1, p. 45.) The judge in the case denied the defense motion to

dismiss the enhancements due to lack of evidence, stating that the evidence was sufficient for the case to proceed in front of a jury. (Exh. D1, p. 45.) The jury subsequently found Williams guilty of each count and enhancement. (Exh. D1, p. 45.)

The DOJ Report stated that "in 2015, based on the information that emerged during Govey's case, OCDA and Williams's counsel stipulated to dismiss the gang enhancements against Williams. With time served, Williams was released. An internal OCDA review of the Govey and Williams prosecutions found that ['']statements about Govey's claims of inactivity in PEN1 were just as exculpatory to Williams as they were to Govey.['']" (Exh. D1, p. 45.)

In an interview with DOJ staff, the OCDA prosecutor who tried Williams' case said that she did not know about the K.K. interview before the case proceeded to trial. (Exh. D1, p. 45.) She told DOJ staff that the interview would have been disclosed to the defense, had she known about it. (Exh. D1, p. 45.)

***People v. Leonel Vega*** **(07CF2786)**

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 and other allegations relating to the murder of Giovanni Onofre in March of 2004. The case proceeded to trial in December of 2010. At trial, the prosecution's case against Vega was built primarily on the alleged admissions of three informants who, like Vega, had been members of the Delhi street gang: Oscar Moriel, Johnny Belcher, and Julio Ceballos.

The facts established at trial were as follows: Giovanni Onofre, Andrew Onofre, and Hector Lopez, were at a bus stop in an area claimed both by Delhi and one of its major rivals, Alley Boys. A white Lincoln Town Car pulled up and Vega, located in the passenger seat, made a "D" hand sign. Giovanni approached the car. Vega exited the car and asked where they were from. Giovanni responded he was from Alley Boys. Vega went back in the car and grabbed a firearm. Giovanni, Andrew, and Lopez fled and were separated. The vehicle circled a nearby park a few times. Andrew heard a gunshot.

Shortly thereafter, Giovanni was found dead a short distance away as a result of a gunshot to the head. A few days later, Vega was arrested following a high-speed pursuit. Vega yelled "This is Delhi" as he was arrested and ammunition was found in the vehicle. In 2007, Andrew Onofre identified Vega from a photographic lineup.

At trial, Julio Ceballos testified that Vega showed him a newspaper article about the shooting and bragged that he had been the shooter. Oscar Moriel and Johnny Belcher claimed that, in separate encounters while in custody, Vega admitted his responsibility for the killing. Moriel and Belcher testified that Vega claimed he 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. Vega also purportedly told Moriel that he later made threats against Ceballos to dissuade him from testifying at trial. **There is little question that the timely and required disclosure of the concealed evidence in *Smith* would have quickly revealed to Leonel Vega that he was likely the subject of multiple unlawful informant operations**.

On December 7, 2010, informant Oscar Moriel testified that, while housed at the Orange County Jail in a cell next to Vega, Vega admitted to committing the charged murder. One month earlier, on November 4, 2010, the government had sent Vega's counsel, Robison Harley, a four-page statement written by Moriel memorializing Vega's alleged confession. The statement was dated August 1, 2009. At the top of the letter, Moriel had written "For Flynn," referring to Detective Flynn from the SAPD. Moriel wrote that Vega did not believe that Belcher would testify against him. He wrote that he asked Vega "what exactly happened," because Vega had only told Moriel what Belcher said, and not what had actually occurred. At that point, Vega purportedly confessed to his role in the homicide.

This four-page note was the only discovery related to Moriel and Vega's conversations that was provided to Vega—despite a discovery motion filed by Vega on November 29, 2010, requesting all evidence favorable to the defense, impeachment evidence about the informant in the possession of other agencies, and any reports

containing evidence that undermined the credibility or probative value of prosecution witnesses.

Again, the operation in *Smith* originated no later than June 25, 2009—the exact same day that OCSD Sergeant Guevara sought authorization to begin the Moriel informant operation targeting Smith. Guevara wrote:

> I request permission to wire adjoining cells at the OCSD Intake Release Center (IRC) to audio record two inmates. We would like to record any conversations between Vega, Leonel (XX-XX-XX) Bkg# 2436967 and Moriel, Oscar Daniel (XX-XX-XX) Bkg #2327313. Vega and Moriel are documented Delhi Criminal Street Gang members. Santa Ana P.D. Det. Chuck Flynn has requested help in getting Moriel, a CI for SAPD, and Vega together and record any conversations they may have.
>
> **IRC Special Handling Deputies have come up with a plan to house both Vega and Moriel in adjoining cells in IRC Dis Iso**.
>
> Vega is in custody for CPC 187 Murder and Det. Flynn believes they may **gain valuable evidence reference the murder** from recorded conversations between the two.
>
> …

(Exh. B3, bolding added.)

James wrote "OK" on the letter, initialed it and dated it "6-25-09." The letter was also copied to Assistant Sheriff J.B. Davis, and Captain T. Board. (Exh. B3.)

That operation was in full force soon thereafter, and Moriel emerged with his confession on August 1, 2009.

Moriel testified about how he ended up in extensive discussions with Vega when either he or Vega were in the dayroom—and how their contact culminated in a confession.

On December 16, 2010, Vega was found guilty of murder with the special circumstance of committing the crime for the benefit of the gang, use of a firearm, and street terrorism. On July 2, 2011, Vega was sentenced to life without the possibility of parole and a consecutive sentence of 25 years to life.

The Motion to Dismiss for Outrageous Governmental Conduct filed in *Dekraai* described evidence showing how the contact between Moriel and Vega had been coordinated and that evidence relevant to these movements, the encouragement of questioning, and the concealment of informant-related evidence. Santa Ana Police Department ("SAPD") and OCSD Special Handling deputies had orchestrated an intentional violation of *Massiah*, utilizing what was referred to in *Dekraai* as the "dis-iso scam"—placing the informant (Moriel) and the charged defendant (Vega) in disciplinary isolation to dispel suspicions that the police agent was actually an informant. During 2014 testimony, Moriel and Special Handling deputies denied any such plan to coordinate the movements of Moriel and Vega to allow questioning about the murder. The deputies continued to deny the claim even after a recording, hidden for five years in the SAPD, was introduced. The recorded discussions capture Deputy Garcia, former SAPD Detective Charles Flynn, and Moriel discussing how to bring Moriel and his targets (Vega and Isaac Palacios) together. Among the other evidence hidden from Vega were jailhouse recordings in which Moriel attempted to elicit a confession and Vega responded by proclaiming his innocence.

Additionally, among the nearly 200-plus pages of Moriel's notes that were not disclosed were several additional pages from the exact same date that the alleged confession was documented. On those concealed pages, Moriel wrote about doing the "dis-iso" thing again. If those notes, the hidden recordings, or the hidden letter had been disclosed, counsel would have unquestionably brought a successful *Massiah* violation excluding Moriel's testimony.

At the *Dekraai* hearings, Special Handling Deputy Seth Tunstall and prosecutor former Deputy District Attorney Eric Petersen suggested that it was former federal prosecutor Judge Terri Flynn-Peister who was responsible for limiting the materials that Petersen received and could share with the defense. During her testimony, Judge Flynn-Peister adamantly denied restricting the documents available to Petersen. A careful study of the *Vega* litigation supports Judge Flynn-Peister's testimony, and reveals a prosecutor

committed to keeping the defense in the dark about Moriel. Nonetheless, the OCDA fully adopted the rendition that Judge Flynn-Peister was to blame. According to Assistant DA Wagner, Petersen stated during a 2014 OCDA "investigation" responding to the *Dekraai* allegations that he did not realize until after the conviction that there were additional notes of Moriel that were undiscovered; Wagner testified he could not recall what Petersen said he did after realizing that the defense did not receive complete discovery. The investigators present in the investigation did not record interviews, take notes, or write reports about the questioning of key witnesses over a number of days. Wagner testified that he did not believe anything that was learned during the investigation required discovery under *Brady*.

Notably, Petersen testified in the *Dekraai* hearings that he had an "evolving" understanding of *Brady*.

Vega was convicted of special circumstances murder on December 16, 2010. However, in 2014, the conviction was vacated and Vega agreed to a reduced charge of involuntary manslaughter.

***People v. Joe Nunez Rodriguez, Juan Lopez, & Sergio Elizarraraz*** **(10CF0433)**

On February 8, 2010, informant Moriel wrote to "Garcia and Gonzo"—former OCSD Special Handling Deputy Ben Garcia and SAPD Investigator Gonzalo Gallardo—about a shooting involving an off-duty officer for which Sergio Elizarraraz and Amaury Luqueno had been arrested. Moriel believed that both had been released and wanted to let Garcia and Gonzalo Gallardo know he could get confessions from both over the phone: "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???" With Elizarraraz still in custody on a separate case, a call was unnecessary. Moriel could do his work in person. On February 10, 2010, just two days after he suggested he could get a confession, Sergio Elizarraraz was moved into Moriel's unit—Unit 20 in Mod L. In February of 2010, two days after Moriel told a Special Handling deputy he could get a

confession on another case, Sergio Elizarraraz was "coincidentally" moved into the same module as Moriel. Moriel detailed his conversations with Elizarraraz in 26 pages of notes. Petersen neither disclosed those pages or 200 others written by Moriel. Among the pages not disclosed to the defendants were those reflecting Moriel's enthusiastic desire to assist the prosecution—stating he was "pretty positive that [he could] get [a] confession" out of Elizarraraz on the other case.

In addition, Petersen withheld a note written about Moriel's efforts to get a confession from co-defendant Juan Lopez: "I've been talking to Combo (Lopez) 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." This letter was written after another "coincidental" movement. Elizarraraz was moved out of the unit where he and Moriel had been living. The next day Elizarraraz's co-defendant, Lopez, arrived.

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. According to SAPD detectives, they learned of the confession and interviewed Moriel on February 23, 2010. On 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 a gas station video that was a key piece of evidence in the crime.

On February 25, 2010, a felony complaint was filed. However, the only named defendant was Lopez. He 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. Interestingly, on June 30, 2010, an amended felony complaint was filed, adding Rodriguez as a defendant. On September 30, 2010, Rodriguez appeared for the first time on the case and was appointed counsel. On October 12, 2010, Sergio Elizarraraz was also charged in the case. He appeared for the first time on the charges the same day and Robison Harley was appointed as his counsel—the same attorney who represented Leonel Vega.

The prosecutor in this case was Petersen, as well. Most of Moriel's notes were concealed, including those documenting statements by Elizarraraz to Moriel and notes that would have shown that Elizarraraz and Moriel were placed together if they had been revealed to the defense. Neither Petersen, law enforcement, nor the *Dekraai* prosecution team were able to blame Judge Flynn-Peister for the discovery concealment, as the matter proceeded to trial well after the Operation Black Flag "takedown" in the case in 2011. Who was responsible, other than, of course, the prosecutor who is charged with ensuring that mandated discovery is disclosed to the defense? Petersen claimed during the *Dekraai* hearings that he never read Moriel's notes and relied instead upon his detectives. At the hearings, Detectives Rondou and McLeod denied reading Moriel's notes—including those introduced at the trial, which documented the conversations between Moriel and Defendant Sergio Elizarraraz.[61] **Once again, if at any moment prior to Moriel's testimony, Baytieh had come forward with the concealed evidence in *Smith,* Elizarraraz's counsel would have had insights into the jailhouse informant program, recognized it was in play in his case, and initiated a motion to exclude Moriel's testimony.**

On June 30, 2011, Rondou testified at the preliminary hearing:

> A. HE DIDN'T GIVE AN EXACT NUMBER. HE JUST INDICATED THAT THEY MET FACE TO FACE SEVERAL TIMES, AND THEY, HE TERMED IT, CHOPPED IT UP IN THE DAYROOM SEVERAL TIMES, THAT THEY WOULD ALWAYS TALK.

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[61] At the *Dekraai* hearings, detectives Rondou and McLeod extended their purported ignorance of Moriel's notes even further. Both claimed that they never studied Moriel's notes—even through the date of their testimony at the hearings and even after "learning" via the Motion to Dismiss in *Dekraai* that Moriel had written significant quantities of notes about conversations with inmates regarding unsolved Santa Ana gang crimes. During the time period when Moriel was working in the jail, he had numerous meetings with Rondou, who was a "cold-case" investigator.

At the severed trial of Lopez and Rodriguez, the deception continued. As detailed in the *Dekraai* Motion to Dismiss, Petersen conspired with SAPD investigators to present a fabricated and convoluted explanation as to why neither of Moriel's interviews with the detectives were recorded, providing a new version created after the preliminary hearing. According to testimony in *Dekraai*, there had been a mysteriously "short window" to speak with Moriel and both coincidentally forgot to bring their recording device, believing the other had brought theirs. Although a) Moriel had been housed at the jail for the prior five years and was seemingly available at any time; b) the SAPD was only a block away; c) the Orange County Jail was a law enforcement facility seemingly filled with recorders; and d) there was little possibility that a short delay would affect Moriel's ability to identify suspects in a video taken three years earlier, the investigators conducted an unrecorded interview.

While the trial could not have gone more poorly for the prosecution, Petersen's successful severance of Elizarraraz still paid enormous dividends. It kept attorney 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*.

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 appeared far stronger because Moriel claimed that Elizarraraz confessed to the crime. However, Petersen likely 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. Fabian Sanchez*** **(11CF0920)**

On April 11, 2011, Fabian Sanchez was charged in a felony complaint with two counts of attempted murder with gang and firearm use enhancements, and one count of street terrorism.

During SAPD Homicide Detective Roland Andrade's testimony in the *Dekraai* hearings, yet another in an endless series of unexpected revelations occurred. Detective Andrade admitted having worked with the Special Handling Unit to have Palacios and Sanchez—both members of the Delhi gang—placed in side-by-side cells with a "strategically placed recorder captur[ing] conversations between the inmates for several days." The goal was purportedly to obtain incriminating statements from Sanchez, but Andrade (and Rondou) had been deeply involved in the investigation of Isaac Palacios' involvement in two murders, as discussed below. This effort was never disclosed to Sanchez and was not revealed to Palacios until almost three years after the devices were installed. In fact, Andrade did not even create a report about what occurred until January 2, 2014.

On April 21, 2011, after the recordings failed to yield helpful information, Sanchez was moved into an "informant tank" (L-20) where Perez was waiting for him. On the very same day, Perez wrote a note directed to "Garcia" that included incriminating statements about Sanchez's charged attempted homicide. His writings that followed were even more fascinating—though perhaps only matched by his testimony on the subject matters. Perez concluded his note, dated April 23, 2010, with the following:

> It took me so long to find out who he was with and finally after some **hardworking conversation** he spilt who he was with that he got away and is still out there. He fled with that (9) millimeter! He told me his family hates Porros and that his family even knows who he was with that night. I think a [*sic*] arrest should be made.

According to Perez's testimony during the *Dekraai* hearings, the phrase "hardworking conversation" has a very different meaning than the words suggest:

Q: And that was, again, he was just talking to you spontaneously. When I say "spontaneously," I mean there were no questions? He just on his own at some point in the unit started telling you details about what happened in the shooting?
A. Yeah.
Q: And, again, you didn't ask him any questions, right?
A. I didn't ask him any questions.

This would be followed by a purported failure of recollection once shown the note:

Q: Let me read to you what this says and see if this sounds right. "It took me so long to find out who he was with, and finally after some hard working conversation he spilt who he was with, and he got away and is still out there." You wrote that, right?
A: It is my writing, yes, but I don't recall that part. I am sorry.

Once he regained his balance, he then simply returned to a familiar mantra:

Q: You don't do hard working conversation in order to get information, is not something you do?
A: No. They confess.

A study of the government's work relating to Perez's contact with Palacios and Fabian Sanchez is invaluable in demonstrating the brazenness of the efforts to obtain evidence unlawfully—and the belief that those efforts were undetectable.

As emphasized in the *Dekraai* Motion to Dismiss, the use of the dayroom was also essential to the effort:

> 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.) 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. 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.

(Bolding added.)

On May 3, 2011, Andrade headed over to the jail after someone from classification supposedly informed him that Perez had received statements from Sanchez. Rondou testified that he accompanied Andrade simply because the junior detective asked him if he would be interested in accompanying him. Despite his testimony suggesting that this was unexpected news, Andrade knew that SAPD detectives had been working with Special Handling deputies, which significantly increased their chances of receiving what they wanted. They were about to experience a windfall. Just hours before Rondou walked to the jail, Grover had "coincidentally" ordered another movement involving Palacios and an informant—one that placed him in close proximity of prized informant Fernando Perez.[62] Sanchez was sent to disciplinary isolation and Grover placed Palacios into Sanchez's former cell. Rondou—the same detective who finally admitted during the *Dekraai* hearings to requesting in May of 2010 for Palacios and Moriel to be placed in side-by-side cells, and personally listened to Moriel try to trade better benefits for better memories about Palacios' murder in an interview hidden from defendants for five years—must have been "shocked" by what he was about to learn. On a day when he just happened to join Andrade on a stroll to the jail to speak about statements by Fabian Sanchez, Perez delivered a bonus confession: Perez had already documented, and was prepared to discuss, a new and improved confession from Palacios within hours of the target replacing Fabian Sanchez in the very same cell.

The efforts to obtain statements in violation of *Massiah* in this case are intertwined with the efforts related to Isaac Palacios' case, which is discussed in the next section.

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[62] Rondou admitted during the *Dekraai* hearings to requesting that Palacios be moved next to Moriel back in May of 2010. Grover made the movement at that time. As if still more was needed to show the improbability of the Sanchez/Palacios switch on the very same day of the "two for one confessions" (May 3, 2011), Deputy Tunstall testified as to the OCJ population in *People v. Armando Macias*. He estimated the jail population at approximately 6000 inmates. His testimony gives some sense of the enormous odds against the Sanchez/Palacios shift being coincidental.

Perez's notes also present an important picture of a jailhouse informant and the Special Handling Unit working together to defeat a mental health issue. Perez indicated that he believed he could develop evidence to show that Sanchez was not incompetent. After writing a set of notes that indicated all too clearly his relationship with Special Handing—"I've heard so much from you all saying that [Sanchez] is a lost cause. Well he's not"—Special Handling made arrangements for a second contact. This time, Perez's notes were purely descriptive of an inmate who seemingly appeared competent. Deputy Garcia thereafter attached only the latter notes to a report that he then forwarded to the SAPD. The report did not reveal Perez's identity, give any clue that there had been discussions with Special Handling and apparently the SAPD prior to the informant's observations, or refer to any prior informant work by Perez.

As with the next case discussed, disclosures from *Smith* would have alerted the defendants and their counsel that what might have appeared to be coincidences were nothing of the sort.

***People v. Isaac Palacios*** **(11CF0720)**

On March 18, 2011, Palacios was accused in the killing of Alberto Gutierrez that occurred on January 19, 2005. The charges were murder, street terrorism, gang and firearm use enhancements, and the gang special circumstance allegation.

On March 25, 2011, Palacios was charged with the killing of Randy Adame, which 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.

Informants Oscar Moriel and Fernando Perez were purported witnesses to Palacios' confessions on the two charged murders. However, Moriel's undisclosed notes contained statements from other Delhi gang members that Palacios was *not* the shooter in the Adame murder.

Before Moriel obtained Palacios' supposed confession to the Adame murder, Moriel spoke with another Delhi gang member about the crime, who was one of the co-defendants

in *People v. Rodriguez*, discussed previously. 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":

> 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 he 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).

Petersen eventually turned over to Palacios 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.[63] Additionally,

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[63] 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 at the preliminary hearing. During that questioning, Rondou finally admitted that Moriel had documented his

Petersen had secreted six of those pages from the defendants in *People v. Rodriguez*.

But the evidence from Elizarraraz was far from the most compelling third-party culpability evidence that should have been made available to Palacios. Until the court-ordered discovery in *Dekraai*, 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 SAPD officer in April of 2009. In notes dated February 1, 2010, Moriel wrote that Alvaro Sanchez and Trujillo[64] (known as "Vicious") told him that Galarza admitted to the Adame murder.

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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.

At some point subsequent to the preliminary hearing in *People v. Palacios,* 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. Petersen also turned over five additional pages of Moriel's notes that document conversations with other inmates, such as Vega. The one page of Elizarraraz's notes that Petersen concealed was Elizarraraz's second confession in *People v. Rodriguez*, which he also withheld in that case.

Petersen likely made a risk assessment after the preliminary hearing in Palacios' 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 Palacios or his counsel about Termite's purported culpability. In conducting his analysis, Petersen may have felt there was minimal risk that the evidence of Termite's culpability would ever be introduced at Palacios' trial, even with the note given to the defense. To accomplish the introduction, Palacios 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 receive "credit [for] time served," even though he was supposedly the admitted shooter in a case that carried the possible sentence of life without possibility of parole. The prosecution in *Palacios* 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.

[64] Detectives with the SAPD would have had little trouble identifying Trujillo, as Moriel provided his exact cell location.

Moreover, Palacios never learned during the first three years of his incarceration Moriel had told SAPD Detectives Rondou and Fynn in a hidden recording that was obtained via a subpoena in *Dekraai* that he could "grab spots of my memory [of Palacios' out of custody confession to him] and make it seem like it was yesterday" if he received enough consideration on his own 2006 attempted murder.

Turning to Perez, the government's story of how Palacios confessed to the informant without the intervention of law enforcement should have been far too embarrassing to present. It was not. Special Handling Deputies, at the request of a SAPD detective, placed a recording device between the cells of Palacios and Fabian Sanchez the previous month. When this failed to yield confessions, Sanchez was moved into Perez's unit. As discussed above, on May 3, 2011, SAPD detectives received news that Perez had obtained a confession from Sanchez and walked over for the interview. On the very same day, Sanchez was moved out of the unit and Palacios took his place in the exact same cell. At Perez's interview, he claimed that just before the detectives arrived, Palacios had also confessed to him. Perez began his note about Palacios' confession with "I believe my mission is done . . . ." Obviously, the mission was to obtain the incriminating statements from the informant and then report them.

In the *Dekraai* Motion to Dismiss, the defense detailed the significance of the dayroom to informant operation—a point of focus, of course, in *Smith*:

> 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. . . .

Although Palacios was charged with two special circumstances murders, after evidence of significant discovery concealment, he resolved his case in September of 2014 with a plea to one count of second-degree murder and received a sentence matching his credits—allowing him to be freed on the date of his plea.

***People v. Charles Craig Clements, et al.*** **(No. 09NF1537)**

**Just two weeks before Defendant Paul Smith was transported to the Orange County Jail to face murder charges, the OCDA filed several serious charges against Defendant Charles Craig Clements.** The timing of the filing would prove to be the least important reason that Clements was entitled to disclosure from Smith.

Defendant Charles Craig Clements was charged on June 1, 2009, with two counts of kidnapping to commit robbery, rape, oral copulation, or sodomy, a felony violation of PC 209(b)(1), with enhancements for being armed with a firearm in the commission of a felony in violation of PC 12022(a)(1) and for damaging property over $65,000 in violation of PC 12022.6(a)(1) as to count one and two, as well as an enhancement for personal use of a firearm in violation of PC 12022.53(b) as to count one only. (Redacted Court Vision, *People v. Charles Craig Clements*, Orange County Superior Court Case Number 09NF1537, attached herein as Exhibit I8.) Clements was additionally charged with three counts of second-degree robbery, a felony violation of PC 211/212.5(c), with the same enhancements as in count one (violations of PC 12022(a)(1), 12022.53(b), and 12022.6(a)(1) as to count three, and violations of PC 12022(a)(1) and 12022.6(a)(1) as to counts four and five). (Exh. I8.) Lastly, Clements was charged with solicitation of murder, a felony violation of PC 653f(b). (Exh. I8.)

At trial, Donald Boeker, a fellow inmate of Clements, testified that Clements had attempted to solicit the murder of one of alleged kidnapping victims, Lopez. (*People v. Clements* (Cal. Ct. App., Mar. 27, 2013, No. G046314) 2013 WL 1233245 at p. 5.) Boeker testified that he had been assaulted twice while in jail by people who referenced his upcoming testimony in Clements' case. (*Ibid*.) The trial court excluded testimony and evidence relating to the second of the assaults on Boeker. (*Ibid.*)

**Boeker testified that, while in a dayroom group with Clements, he developed a relationship with the defendant**. (*Ibid*.) **Of course, in *Smith*, three informants were placed in the same dayroom group with Smith in order to accomplish the mission to obtain statements about his charged crime. There is little question that this information from *Smith* needed to be disclosed to Clements, along with the evidence of the jailhouse informant program and the efforts to conceal that program demonstrated by the hidden evidence in *Smith*.**

Boeker testified that Clements wanted to have Lopez killed and asked Boeker to do it, offering him $10,000. (*Ibid*.) After Boeker asked how he was supposed to get in the house, Clements gave him a hand-drawn map of Lopez's house. (*Id.* at p. 7.) Clements also gave Boeker another piece of paper containing the names of Lopez, her husband, and describing their cars. (*Ibid*.) Boeker gave the map to a deputy sheriff the next day. (*Ibid*.)

Clements was found guilty of both kidnapping charges with their enhancements, as well as the robbery charges and their enhancements. (*Id.* at p. 1.) On the solicitation of murder charge, the jury deadlocked six to six. (*Ibid.*) The trial court dismissed that charge. (*Ibid*.)

On appeal, Clements' challenges included the trial court's refusal to grant his motion to sever regarding the charge of solicitation. (*Ibid*.) Clements contended that the solicitation charges and testimony had a spillover effect such that the guilty findings on the other charges were tainted by that testimony. (*Id.* at p. 8.)

The Court of Appeal found that the motion to sever was effectively and properly denied, therefore upholding the trial court's ruling. (*Ibid.*) It stated that no spillover effect

on the other convictions took place. (*Ibid.*) The Court of Appeal affirmed the trial court's ruling on this issue and all others that were the subject of the appeal. (*Id.* at p. 9.)

The trial court sentenced Clements to an aggregate sentence of two consecutive life terms plus a determinate term of 18 years. (*Id.* at p. 3.)

Clements recently filed a writ of habeas corpus to the Ninth Circuit Court of Appeal challenging a district court's earlier denial. (Appellant's Opening Brief, *People v. Charles Craig Clements*, Orange County Superior Court Case Number 09NF1537, dated December 21, 2022, attached herein as Exhibit J8.)

In the Appellant's Opening Brief, Clements described how, after the Orange County jailhouse informant scandal began to unfold in 2015 and 2016, he realized that he was one of the program's targets. (Exh. J8. p. 16.) He emphasized how, prior to trial, he received neither TRED records nor excerpts of the SH Log relating to Boeker's involvement in the program, the directions he was given, or the consideration he received. (Exh. J8, p. 16.) Even after making the request for those records in habeas proceedings, Clements initially faced resistance from the OCSD, the CAG, and the U.S. Attorney's Office. (Exh. J8, p. 17.) Finally, after the appointment of counsel, Clements received some of the requested records. (Exh. J8, p. 17.) Still, he has received only heavily redacted versions of those records. (Exh. J8, p. 17.)

Clements made four arguments for why he is entitled to a new trial based on the information uncovered from the scandal. (Exh. J8, p. 24.)

In his opening habeas brief, Clements argued that the prosecution presented false evidence in his case. Boeker testified that he received no consideration on his parole case for his actions involving Clements. (Exh. J8, p. 5.) Clements argued that this was false. (Exh. J8, p. 5.) The lead detective called and wrote to Boeker's parole agent requesting leniency. (Exh. J8, p. 5.) Boeker received it, and his original 12-month sentence was lowered to an 8-month sentence, concurrent to his new charges. (Exh. J8, p. 5.) The prosecutor also argued to the jury that Boeker had altruistic motives for his actions, excluding the fact of the consideration Boeker received. (Exh. J8, p. 5.) Clements alleged

that false testimony affected the reliability of the aggravated kidnapping counts. (Exh. J8, p. 25.)

Second, Clements contended that the concealment of the relevant TRED records and SH Log entries relating to Boeker violated *Brady.* (Exh. J8, p. 25.) The evidence was no doubt favorable to Clements since it would have allowed him to impeach the testimony of Boeker, if not exclude it altogether, due to the *Massiah* violations that took place. (Exh. J8, p. 26.) Clements also argued that the still-withheld portions of Boeker's records further violate *Brady*. (Exh. J8, p. 26)

Third, Clements asserted that his rights under *Massiah* were violated since Boeker acted as a state agent when he deliberately obtained statements from Clements after the right to counsel had already attached. (Exh. J8, p. 26.) This had a substantial and injurious effect or influence in determining the jury's verdict. (Exh. J8, p. 27.)

Fourth, Clements alleged that acts of prosecutorial misconduct so infected the trial with unfairness that they made the resulting conviction a denial of due process. (Exh. J8, p. 27.)

Clements alleged that each argument on its own, if upheld, would require habeas relief. (Exh. J8, p. 24.) At minimum, Clements requested that the court remand for discovery of the still-withheld records and an evidentiary hearing. (Exh. J8, p. 27.) Proceedings are ongoing.

***People v. Jose Camarillo, Mark Garcia, Fernando Gallegos, and Bernardo Guardado* (11CF2418)**

On August 26, 2011, Jose Camarillo, Mark Garcia, Fernando Gallegos, and Bernardo Guardado were charged with conspiracy (PC Section 182(a)(1)) and aggravated assault (PC Section 245(a)(1)), with gang enhancements (PC Section 186.22(b)(1)). (Redacted Court Vision, *People v. Jose Camarillo, Mark Garcia, Fernando Gallegos, and Bernardo Guardado*, Orange County Superior Court Case Number 11CF2418, attached herein as Exhibit K8.) 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. **The alleged law violation occurred on June 25, 2009, which was approximately the same date that the unlawful operation involving informants Platt, Martin, and Palacios was initiated against Paul Smith.**

The case against Camarillo was apparently the only OCDA-prosecuted Operation Black Flag case that proceeded to trial. The operation was the product of a joint federal and local investigation into Mexican Mafia activities, with Judge Flynn-Peister being at one time the assigned prosecutor on the federal side. Deputy DA Petersen did not reveal that he was going to call informant Moriel until the first day of the trial and only provided the defense with seven pages of his informant notes. Petersen only discovered a single Special Handling summary and seven pages of handwritten notes. Yet, Tunstall had testified in another proceeding that Moriel had written approximately 500 pages of daily notes. To where did these other 493 pages of notes disappear? Assuming arguendo that the number of notes was closer to the 196 pages found in *People v. Eric Lopez*, Tunstall knew the defendants in *Camarillo* did not have 189 of the 196 pages, including critical notes that would have proven Moriel committed perjury in *Camarillo*, and that Petersen suborned it.

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. This allowed Moriel to tell an unchallenged and wholly misleading story about his relationship with Leonel Vega, who was facing murder charges and was a key local Mexican Mafia leader. 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.

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. Through the 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. 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.

However, 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 far beyond the legal and ethical rules that they would introduce testimony completely divorced from the truth.

Petersen said in the *Dekraai* hearings, referring to *Camarillo, et al.*, "I didn't make any discovery determinations in that case," indicating that Tunstall and the Task Force were responsible for the discovery decisions (and violations) in *Camarillo*. This self-serving explanation does not explain why a prosecutor examining Moriel with merely seven pages

of notes, when he knew from other cases that there were far more, did not rectify the situation—or why he sat silently while Moriel testified inconsistently with what he had said in other cases prosecuted by Petersen.

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. Camarillo accepted a sentence of eight years in prison—likely feeling great relief that he would not be sentenced to life in prison under California's Three Strikes Law. Gallegos and Guardado accepted sentences of seven years in state prison. Petersen likely felt a measure of relief himself that there would not be an appellate process, reducing the chances that his team's misconduct would be uncovered.

***People v. Derek Adams* (11ZF0112)**

Convicted of murder in 2012.

Informants Lance Eric Wulff and Jeremy Bowles worked in tandem to extract a confession from Derek Adams. Wulff led Adams to believe he was a heavy hitter in the white supremacist world, stating he "was pretty much the one running the show out there for everyone"—though he actually, at that time, was an informant and a witness for the government against his former gang members. Using a technique violative of the United States Constitution and prohibited by the Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246], Wulff suggested to Adams that "we need to know the story now" if the target wanted to protect himself from future harm by the gangs. Adams then described the crime and his role.

Wulff testified before the Grand Jury—presenting himself as being interested purely in finding out more about the crime—and the prosecution did not disclose that Wulff had agreed to testify on two other cases for the government and that he was a jailhouse informant. If Baytieh had disclosed the hidden evidence in *Smith*, Adams reasonably would have challenged the indictment by arguing the prosecution's concealment of Orange County's jailhouse informant program violated the holding in *Johnson v. Superior Court,*

*15 Cal.3d 248*, at 251. In *Johnson*, the California Supreme Court held that "[w]hen a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence." (*Ibid*.)

***People v. Timothy Hurtado, Noel Hurtado, and Ilene Hurtado*** **(08SF0509)**

Timothy Hurtado pled guilty to child abuse and endangerment in 2014.

Deputy DA Howard Gundy—who led the courtroom litigation on behalf of the OCDA in *Dekraai*—called Mark Cleveland at the grand jury proceeding to testify about an alleged jailhouse confession by Timothy Hurtado but did not disclose any of the damaging information contained in Cleveland's OCII file. Gundy also failed to correct Cleveland's testimony that he had only provided information on two other cases. Gundy offered the defendants reduced sentences and dismissal of murder charges without ever sharing the concealment of evidence at the grand jury proceedings. Again, the defense would have been able to attack the indictment based upon Baytieh's failure to disclose the concealed evidence in *Smith* as a violation of the California Supreme Court's holding in *Johnson*. (*Ibid*.)

***People v. Wozniak*** **(12ZF0137)**

On March 18, 2014, Perez testified in the *Dekraai* evidentiary hearings about his contact with capital defendant Daniel Wozniak that resulted in what he claimed were admissions to the double murder. The following year, Wozniak filed a Motion to Dismiss based upon an argument that the OCDA's extensive history of hiding informant-related evidence undermined a reasonable faith that the agency would turn over all favorable evidence.

Certainly, Baytieh knew that Perez—an informant in both *Dekraai* and *Wozniak*—was testifying about his purported coincidental contact with both capital defendants. Had Baytieh turned over the concealed evidence, Defendant Wozniak would have been able to

significantly fortify his arguments about the commitment to concealment that was long-standing and recently on display when Perez took the stand. Perez's testimony was a near-repeat performance of informant Sean Pough's law enforcement interview in *Guillen*, which also should have been disclosed to the defendant, while also merging with the dayroom malfeasance orchestrated in *Smith*.

According to Perez, he essentially obtained the trust of high-value targets by accident:

> A. I can't remember.
> Q. Just think about it.
> A. I don't remember if I went to his cell first, but I would check on everybody. That's just something inmates do. We check on each cell that's in the sector to see if anybody needs hot water or anybody needs things like that.
> Q. Really? So you had just become an informant and now what you were doing in that cell -- in that cell unit as you were checking on people out of the goodness of your heart?
> Q. I know you felt it was the right thing to do. I got that. The question I'm asking you is why were you spending time with Daniel Wozniak when your focus was on the Mexican mafia?
> A. What do you mean? I wasn't spending time with Daniel.
> Q. You weren't?
> A. He was in my sector. I mean it's a small little sector. We get an hour out. I believe we get an hour out of dayroom a day, you know, and I check -- I check on every -- all inmates.
> Q. Why? Why do you check on inmates?
> A. Because we -- if you're -- we ask them if they're all right; if they need hot water, because the hot water -- You know, the hot water -- they got -- it's -- the way it is in the sector, you got to pop the door, go get some --go get a few bags of hot water and bring it to some of the -- you know, whoever asks for hot water, you got to pour the hot water into, you know, the door so they can drink coffee, things like that. I would make my rounds every morning to see if everybody was okay, if they need anything.
> Q. You're an informant at that point. You've become a government informant. Right?
> A. I believe at that time I was.
> Q. So you're still kind of just doing the rounds to just kind of be kind to everybody in the unit. Right?
> A. I was -- that's exactly what I was.

Q. Some of those people you're about to really damage. Right?
A. My intentions weren't to damage anybody.

Perez's career had a similar trajectory to that of informant Palacios in *Smith*. Like Palacios, Perez worked as an informant within the jails after being previously rejected for service, according to their OCII files. Moreover, Perez had committed perjury in his own Third Strike case prosecuted by Senior Deputy District Attorney Erik Petersen—a point Petersen made in closing argument. Perez also planned to present false testimony to obtain a new trial—a fact he admitted during his testimony at the *Dekraai* hearings. Moreover, Perez's interest in informing in 2011 only materialized once his Mexican Mafia leadership group lost power, and his opponent placed him on a "Hard Candy" list, making him a target for death.

Soon after providing a biography of his life of crime to Special Handling Deputy Bill Grover, Perez delivered a confession from Daniel Wozniak in early July of 2010. When detectives from the Costa Mesa Police Department ("CMPD") interviewed Perez about those conversations on July 8, 2010, he described how he was able to build a rapport with Wozniak. Perez suggested that he could attempt to obtain more information about subjects who appeared to be of interest to the detectives. As a result, Perez returned to the housing unit the same day and obtained additional statements from Wozniak on precisely the subject matters of interest identified by the detectives. Notes documenting those statements were forwarded to the detectives. Five months later, CMPD Detective Jose Morales wrote a report regarding what was learned from Perez. There was no mention of Perez's informant background. Six more months would pass before Perez was "signed up" as an informant by the Santa Ana Gang Task Force.

Former Senior District Attorney Matt Murphy repeatedly tried to convince the trial court in *Wozniak* that the *Dekraai* hearings were entirely unhelpful to the defense arguments about the contact between Wozniak and Perez, calling it at one point "the biggest dud as far as Daniel Wozniak goes. Every single witness [Attorney Sanders] has

called has proven he is absolutely out of his mind wrong regarding the case against Daniel Wozniak." Murphy had conveniently overlooked the fact that the same witnesses who purportedly "proved" that defense counsel was "out of his mind wrong" with regard to Wozniak denied with the same adamancy that they had any role in any movements designed to obtain statements from any charged defendants. Moreover, if Murphy's current client[65] had simply met his discovery obligations by providing to Wozniak's counsel the concealed evidence from *Smith*, it is hardly feasible that Murphy would have felt comfortable making such arguments.

During the evidentiary hearings in *Dekraai*, former Special Handling Deputy Ben Garcia stated that Perez was not an informant when he had contact with Wozniak and indicated that his unit had done nothing to suggest to Perez that they wanted him to collect statements. An entry in Perez's TREDs contradicted that assertion and his testimony. On June 9, 2010, Deputy Padilla made a TRED entry in Perez's file, noting that he was a Total Separation Protective Custody inmate and a "potential victim."

Two and one-half hours later, Padilla made a new entry:

> S/H: CHANGE IN PLAN. ^ WILL NOT BE P/C'D AT THIS MOMENT. ^ NOW A SPECIAL MANAGEMENT CASE FOR S/H. NOTIFY IRC S/H IF PROBLEMS W/^. D FLEXED TO TTL SEP L3.

As Garcia admitted back in an interview in 2013 with prosecutors, inmates will not talk with other inmates who are in protective custody ("P.C.") because they are perceived to be informants. The giveaway for inmates is the blue wristband that protective custody inmates are given. Therefore, in order to make informants more approachable, Special Handling changed informants' classifications to Total Separation Level 3 and gave informants an orange wristband. That is precisely what happened with Perez. Garcia knew this when he testified and lied by stating that Perez was not an informant at the time. From there, Garcia's testimony and credibility became a house of cards.

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[65] Murphy currently represents Baytieh in regards to *People v. Smith*, per a letter Murphy sent to Attorney Sanders.

Garcia denied having informants in the jail—an assertion that will be shown to be blatantly false. Perez was not "signed up" by the Task Force for another seven months after his wristband adjustment was made. So, what explains why Special Handling authorized Perez to begin doing informant work on June 6, 2010? Of course, the answer is self-evident. Garcia had lied. Perez joined the ranks of many jailhouse informants on that date. And his first stop would be one of Orange County Jail's informant tanks, later identified as Module J.

In Judge Goethals' analysis of Perez's action with regard to *Dekraai*, he could have just as easily been speaking about the informants in *Smith*:

> The *Neely* case does stand for the proposition that the *Massiah* rules do not apply to an informant who goes to work "on his or her own initiative, with no official promises, encouragement, or guidance. (Citation omitted)" However, in *Neely* the Supreme Court explained how the facts of a particular case may affect that analysis. "In order for there to be a pre-existing arrangement . . . it need not be explicit or formal, but may be inferred from evidence that the parties behaved as though there was an agreement between them, following a particular course of conduct over a period of time. (Citation omitted)." 6 Cal.4th at 915. So it is here. In this case, there was an historical "course of conduct" between Perez and his law enforcement handlers which establishes that this informant was in fact once again working on their behalf when he made inappropriate contact with this defendant. When Perez was "released" near this defendant's cell inside Mod L, he ate as any starving dog would.

Housing records reveal that on June 16, 2010, Deputy Garcia moved Perez out of disciplinary isolation and into Mod J. According to Garcia's interview, Daniel Wozniak arrived in Mod J on June 17, 2010**—only one day after Perez had been relocated to that unit.**

In an interview with Wagner and other members of the *Dekraai* prosecution team in 2013, Garcia said the following about Perez's contact with Wozniak:

> 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."

In hindsight, these were more half-truths not fully appreciated until the release of the TRED records. When Garcia made these statements, he knew that Perez was an informant when he made contact with Wozniak, and he knew about the building of a rapport, not because he figured it out through intuition or by looking at records, but because Perez was working for them as an informant the entire time. This would have become obvious far sooner if Baytieh had simply met his disclosure obligations.

***People v. Eric Ortiz*** **(11CF0862)**

On January 28, 2014, Ortiz was convicted of first-degree murder and attempted murder. The conviction occurred just three days before the Motion to Dismiss was filed in *Dekraai*. The revelations of a jailhouse informant came too late for Ortiz, but they should not have. All that was needed was for Baytieh to have met his *Brady* obligations and turn over the concealed evidence from *Smith*—evidence that at that time had been hidden for five years.

After a three-week trial, the jury found the following allegations true: that "both crimes were committed for the benefit of a criminal street gang; that the defendant personally discharged a firearm causing death or great bodily injury; and that the murder was intentional and committed by a gang member to further the gang (a special circumstance)." Ortiz's sentencing was continued to allow his defense counsel, Mr. Loewenstein, to "obtain transcripts and other documents from evidentiary hearings being conducted in *People v. Scott Dekraai*…" These hearings revealed a "secret informant network" that had previously been "…unknown to defense attorneys and the courts." A key witness in Ortiz's trial was an inmate informant named Donald Geary, "who testified that Ortiz had confessed to the offenses while the two shared the same day room for several months at the Orange County Jail."

Following a Defense motion for new trial, filed on March 16, 2015, and the prosecution's opposition motion, filed on April 1, 2015, the court heard arguments (also on April 1, 2015) and made a finding that the "defense had established a *prima facie* showing of a possible *Massiah* violation." The court based this conclusion "on the finding that had the defense known the facts underlying the alleged *Massiah* violation before trial, it would have been entitled to a hearing on the admissibility of defendant's statements to Geary."

The court also took judicial notice of the "2014 ruling by Judge Thomas Goethals pertaining to alleged *Massiah* and *Brady* violations by law enforcement in the *Dekraai* case." The court further granted an "evidentiary hearing under section 402, after which it stated it would rule on the motion for new trial."

Thereafter, the defense submitted a list of potential witnesses to call during the evidentiary hearing that included the prosecutor in Ortiz's case, Erik Petersen; Detectives Rondou, Andrade, and Rodriguez; Donald Geary; and Orange County Sheriff's Department (OCSD) deputies Tunstall, Garcia, Grover, and Larson. Detectives Rondou, Andrade, and Rodriguez, as well as Erik Petersen, were all mentioned by Geary in his March 19, 2012 letter to his attorney, *prior to* his April 3, 2012 "taped interview with law enforcement…in which he detailed defendant's confession while both were in the same module at the Orange County Jail." The OCSD deputies were "identified at the *Dekraai* hearings as members of the Special Handling Unit at the Orange County Jail." One of the main purposes for calling the OCSD deputies was to establish that Santa Ana Police Department (SAPD) investigators had worked with "deputies from the Special Handling Unit…on a number of cases (near the time period of the contact between Defendant Ortiz and Geary) to obtain statements from suspects, via jailhouse informants, and then concealed the true account about how informants and targets came together."

The evidentiary hearing spanned the course of "six court days," and several witnesses testified. The SAPD detectives all stated that their first contact with Geary was on April 3, 2012, the same day as his taped interview (mentioned above), and, conveniently, Geary also stated that he only contacted law enforcement after "obtaining

defendant's confession…" The SADP detectives also testified about their contacts with the Special Handling deputies, which led the court to find that "the relationships among these Orange County Sheriff's deputies and other law enforcement individuals, especially Detective Rondou and Deputy District Attorney Petersen, were much more than occasional." The court continued, "[t]hey were on gang task forces together; they had offices in the same buildings; and in at least one case, they committed a *Massiah* violation which remained undetected until the jail's informant program was exposed during similar hearings in the *Dekraai* case."

Another defense attorney, Gary Poulson, testified that Detective Rondou and Petersen were both involved in his homicide case, which also contained *Massiah* violation issues; after Poulson threatened a *Massiah* motion, the "double murder gang homicide settled for credit time served." Ortiz's previous attorney, Deputy Public Defender Melani Bartholomew, testified that Ortiz's trial had to be continued at the last minute because Petersen produced Geary's taped interview on the very day of the originally anticipated trial date.

Lastly, the Special Handling deputies, Tunstall, Garcia, Grover, and Larson, all invoked their privilege against self-incrimination when called to testify about their employment. The prosecution then "call[ed] a custodian of TRED records to explain away [TRED] entries…" Sergeant Patrick Rich testified, "Deputy Ben Garcia made an entry on October 28, 2012, clarifying an entry made by another deputy on March 9, 2012…Deputy Bryan Larson made an entry on April 5, 2015, about Geary being placed in protective custody due to being a witness in a murder case." The testimonies of Tunstall, Garcia, and Grover from the *Dekraai* hearings were also read into the record.

Thereafter, the court requested a briefing on three issues: (1) the significance of the four deputies' invocation of their privilege against self-incrimination; (2) evidence supporting the position that Geary was placed near Ortiz by law enforcement to obtain incriminating statements; and (3) whether a *Brady* violation existed. After both sides presented their arguments, the court held that "defendant did not receive a fair *Massiah*

hearing due to the four deputies' invocation of their Fifth Amendment rights." The court reasoned that while the prosecutor, Seton Hunt, argued in his brief that "defendant *had* received a full and complete hearing and that the testimony of the four deputies would not have provided material information," the court had already implicitly found that such testimony was material when it "…authorized defense to call the Special Handling deputies." The court further explained: "If any deputies moved Geary close to the defendant for the purpose of obtaining incriminating statements, it is these deputies who would have done so." Because Garcia and Larson were both "mentioned in the TRED records of both Geary and the defendant," it was patently unfair to then "…preclude the defense from asking the deputies who moved the inmates their reasons for doing so…" Lastly, the court referred to defense counsel's argument that law enforcement may not be permitted to violate a defendant's rights under *Massiah* and then invoke the Fifth Amendment to prevent the defense from proving that violation.

The court held that the proper remedy for law enforcement's non-disclosure of material information is an adverse ruling against the prosecution. The court found that it was the prosecution's "exclusive authority to disclose the requested information in the possession of the four law enforcement officers" because the prosecution could have compelled testimony by "…requesting that the court grant them use of immunity pursuant to Penal Code section 1324." The court thus made an adverse ruling, finding that "defendant's statements to the informant, Geary, were obtained in violation of defendant's Sixth Amendment right to counsel and would have been excluded at trial, had the underlying facts been known to the defense." Consequently, the court also granted the defense motion for new trial, finding that new evidence was discovered, the "secret nature" of which censored its discovery even with "…reasonable diligence" from the defense. The court concluded that the newly discovered evidence was also not cumulative and that, "should such evidence be excluded in a retrial, a different result is probable."

On March 3, 2016, a hearing was held for the jury trial re-trial. On that same day, the court granted a motion to exclude Defendant's statements made to Geary. After

proceeding to trial, Geary did not testify. As of March 24, 2016, the jury declared themselves hopelessly deadlocked. After filing the final jury instructions, counsel for the defense moved for a mistrial, which the court ultimately granted. Ortiz was subsequently convicted.

***People v. Henry Rodriguez* (98NF2206)**

Convicted of special circumstances murder in 2006 after an earlier conviction from 2000 was reversed. A new trial was ordered in 2016 and, in 2020, Defendant pled guilty to two counts of voluntary manslaughter and received credit for time served.

In 2014, Rodriguez filed a petition for a writ of habeas corpus, challenging his special circumstances murder conviction. According to Garrity, Rodriguez's preliminary hearing was occurring around the time he and Garrity were housed together. Their cells were at a nearly 90-degree angle, so they could face each other and speak. According to Garrity, he and **Rodriguez introduced themselves in the dayroom** and hit it off. Shortly thereafter, Rodriguez began telling Garrity about "a girl that got killed."

Rodriguez was retried in 2005 after the Court of Appeal reversed the original conviction, finding that the defendant's statements made to the police were improperly admitted. At the re-trial, former Senior District Attorney Cameron Talley called informant Michael Garrity, who had provided alleged statements from Rodriguez in 1999 but had not been called as a witness at the earlier re-trial.

The motion for new trial was assigned to Judge Goethals for evidentiary hearings. He ordered an evidentiary hearing in which a number of witnesses were called. The litigation focused on the failure of the prosecution to provide Rodriguez with evidence from the TREDs and the OCII related to informant Garrity prior to the 2005 trial.

In preparation for the examination of Garrity in 2005, the defendant's counsel served five separate subpoenas upon the OCSD. In conducting the habeas review, Judge Goethals found that counsel for the OCSD ("county counsel") made misleading representations about the responsive records. In his ruling, Judge Goethals stated that "[d]espite the fact

that Judge Fasel and defense counsel accepted and relied upon the inaccurate representations by the Sheriff's lawyer, the judge nonetheless determined that he should conduct a limited in camera examination…" The Court continued, stating that "[s]ome of these materials (despite the representations made moments earlier by Sheriff's counsel i.e. '…there are no records') were described by Deputy Fouste as 'classification TREAD which are the notes reference him and all of his movement for every in-custody he has ever had since 1992…"

At the in camera hearing that followed, the TRED records were reviewed. A subsequently unsealed transcript of the proceedings appears to indicate the judge ordered the disclosure of the TREDs despite arguments by county counsel and Special Handling supervisor Fouste. Yet, the records were never disclosed. Judge Goethals stated that "[d]espite the judge's pointed comments, these records were never provided to defense counsel until March of 2015, as part of the discovery produced by the People in connection with the current Writ litigation."

In addition, it was not until February of 2016 that the prosecution finally turned over the OCII card for informant Garrity. The most significant entry is one from 2005, in which prosecutor Elisabeth Hatcher discusses former Deputy DA Bob Jones' determination that Garrity did actually receive a benefit for his informant work but that Jones wanted the then-assigned trial attorney, Deputy DA Dennis Conway, to withhold court documents that could prove Garrity received consideration:

> …Bob Jones provided me with **court docs from our county which indicated ci did receive consideration on cases here in our county**. BJ provided copy of Docs to DDA Conway. Copy of Docs in CI OCII file also. **BJ instructed Conway to refrain from providing copies to defense unless ordered by court per E. Hatcher**. (bolding added)

This is the portion of Exhibit 4 that is referred to in the ruling of Judge Goethals and the Court of Appeal. The OCDA did ultimately turn over the documents referred to in the entry but did not disclose their determination that consideration had been given to their

informant. Talley, who replaced Conway before the commencement of the re-trial, testified at the 2016 hearing that he never learned of the OCII entry.

He also argued in 2006 pre-trial admissibility hearings and at trial that Garrity was working without any interest in obtaining a benefit and had not sought one:

> [T]here is no suggestion that ... Garrity, based on the record, has tried to get anything back in exchange for what he has done on any of these cases. And then, when the defense says he is seeking moral relief in exchange for information, we are pretty far afield of that point. We don't have somebody who ever was, as far as the records indicates, used as a plant in any of these cases. We have somebody who has heard some bad stuff in jail and decided to relate it.

In his ruling, Judge Goethals wrote the following:

> After listening to the prosecutor's argument, Judge Fasel denied Petitioner's motion to exclude at trial the statement allegedly heard by Mr. Garrity. As a result, the same prosecutor [Talley] was able to later argue to the jury that Mr. Garrity came forward only because he "...thought it was a sick case," and that he "...didn't ask for anything...or want anything..."

Judge Goethals summarized a portion of Talley's testimony at the 2016 hearing:

> When defense counsel asked Talley if he investigated to see whether Garrity was in the OCII, he said he would not "swear [he] talked to Bob Jones[,]" but he "probably" did. He admitted the OCII was not in his discovery boxes and Judge Fasel did not have exhibit No. 4. Talley could not access OCII because you had to ask the "gatekeeper[,]" senior DDA Jones. He admitted "[He] did not go and access the [OCII]." And he did not contact OCSD or see its records, which included any TRED records. He had not heard of TRED records until recently. Talley stated Garrity did not receive any consideration other than the drug program, which defense counsel mentioned at the section 402 hearing. Talley did not believe Garrity was a CI because he did not provide information expecting a benefit.

(*In re Henry Rodriguez*, 2017 WL 2705349, at p. 15.)

Talley's statements are reminiscent of those made by Baytieh during his 2019 DOJ interview. Both veteran homicide prosecutors somehow managed to not get their hands on OCII files related to their testifying informants—files that just so happened to include favorable evidence about the informant.

When the court asked Talley what he had done to determine whether Garrity was a confidential informant, Talley stated:

> [H]e spoke to Fares, Conway, and possibly senior DDA Jones but he did not speak with DDA Schwarm or anyone with OCSD. He also reviewed the entire file and all the discovery, including the transcripts of Garrity's interviews with law enforcement. Talley admitted nothing prevented him from contacting OCSD to obtain records. He added, "But I can't—in other words, if there is no reason to inquire into something, there would be no reason for me to do it." In response to the court's hypothetical question, Talley agreed he would have produced Garrity's TRED records had he had them before litigating Rodriguez's motion to exclude Garrity's testimony.

On February 25, 2016, the Honorable Thomas Goethals granted a new trial in *People v. Rodriguez*, stating that:

> "This court agrees ... discovery of the documents reviewed by Judge Fasel in camera, ... was mandatory in 2005[ ]" (underscore omitted) pursuant to *Brady* because "these documents constituted potentially exculpatory material" to the *Massiah* issue. The court characterized the prosecution's failure to provide Garrity's TRED records to the defense as "an error of constitutional dimension."

The Court of Appeal affirmed the decision of the Orange County Superior Court in an unpublished opinion, which Defendant does not cite for any legal holding contained within it. (*In re Henry Rodriguez*, 2017 WL 2705349.) Rather, it is cited to emphasize what was still not known at the time of the trial court and appellate court's ruling that potentially would have had bearing on the subsequently filed Motion to Dismiss for Outrageous Governmental Conduct, which was denied:

> The defense was aware Garrity had received sentences that appeared lenient. Before Judge Fasel, defense counsel argued Garrity had provided evidence to the prosecution in exchange for being "released early" or being "sent to Chapman House for his drug addiction problem." DDA Talley countered by arguing to the court, "[T]here is no suggestion that ... Garrity, based on the record, has tried to get anything back in exchange for what he has done on any of these cases." Talley, of course, was relying on a record that did not include exhibit No. 4. Had the OCDA produced exhibit No. 4 information as it concedes it should have, Talley would not have been able to make the same argument relative to Garrity. Talley, like DDA Conway before him, knew this court had previously concluded detectives violated Rodriguez's *Miranda* rights, and thus he had to call Garrity as a witness. Portraying Garrity as a morally upright inmate with a conscience who was just trying to do the right thing was of paramount importance to the prosecution. Thus, exhibit No. 4 was material. Based on the entire record, we conclude the trial court did not err by granting Rodriguez's petition for writ of habeas corpus and ordering a new trial, and if necessary allowing him to relitigate the *Massiah* motion.

(*Id*. at 48.)

As indicated above, a legitimate question that exists is whether the subsequent motion to dismiss would have been denied, or four more years would have passed before a resolution was reached in *Rodriguez*, if the trial (and appellate) courts had been aware that Baytieh was hiding the jailhouse informant program during habeas corpus proceedings. Moreover, these courts' analysis may have moved still further if it had known about a) Talley's enormously concerning actions related to informant Lance Lawrence, which included consideration beyond the agreement reached in *Oliveros*; and b) the subsequent "sweetheart deal" given to Lawrence in subsequent cases that may have been secretly linked to Baytieh's *Guillen* prosecution.

On March 6, 2020, the Defendant pled guilty to two counts of voluntary manslaughter and received credit for time served.

***People v. Edgar Bengoa*** **(10NF1581)**

Edgar Bengoa was charged with robbery, assault with a firearm, and for engaging in the crime to benefit a criminal street gang. (*People v. Bengoa* (Cal. Ct. App., June 24, 2014,

No. G048244) 2014 WL 2855066, at p. 1.) The felony complaint was filed on June 23, 2010, almost one year to the day after the illegal three-informant dayroom operation in *Smith* was initiated. (Redacted Court Vision, *People v. Edgar Bengoa*, Orange County Superior Court Case Number 10NF1581, attached herein as Exhibit L8.) Once again, had the informant operation and the concealment of evidence by OCDA and OCSD personnel in *Smith* been made available to the defendant in this case, Bengoa would have almost unquestionably sought additional evidence related to the information operation undertaken and the informants, as well as challenged the admissibility of the informant evidence that was introduced.

On December 24, 2012, a jury convicted Bengoa of two counts of robbery and participation in criminal street gang activity but acquitted him of the assault with a firearm charge. (*People v. Bengoa* (Cal. Ct. App., June 24, 2014, No. G048244) 2014 WL 2855066, at p. 2.) Bengoa was sentenced to a total term of 28 years to life. (*People v. Bengoa* (*Id*., at p. 1.) On June 24, 2014, Fourth District Court of Appeal affirmed the trial court's judgment. (*Id*., at p. 6.)

On May 7, 2010, Robert and Laura Alvarado were about to park their car at their residence in Anaheim when two Hispanic men walked up demanding their money. The man on the driver's side displayed a gun. (*Id*., at p. 1.) In the midst of the robbery, Mr. Alvarado was shot in the arm; his injuries were not life-threatening. Both robbers fled the scene with money and items belonging to the Alvarados. (*Ibid*.)

Three days later, a Bell Gardens Police Department officer attempted to interview Defendant, 16-year-old Bengoa, and another male, Salome Orellana-Pineda, as the officer believed the suspect descriptions matched Bengoa and Orellana-Pineda. (People's Trial Brief, *People v. Bengoa*, Orange County Superior Court Case Number 05NF1581, filed December 12, 2012, attached herein as Exhibit M8 p. 2.) Orellana-Pineda was apprehended first. A search of his person resulted in the recovery of items stolen from the Alvarados. Police arrested Edgar Bengoa at his residence later that same evening. (Exh. M8, p. 2.)

When questioned by a detective from the Anaheim Police Department and an officer from the Bell Gardens Police Department, Bengoa insisted that although he was present during the crime, he did not participate in the robbery or the shooting. (Exh. M8, p. 2.) In addition, neither of the Alvarados was able to pick Bengoa as the shooter from a six-pack photographic line-up. (Exh. M8, p. 3.)

Although not addressed specifically in the appellate opinion, during the trial, the prosecution called jailhouse informant Travis Lambright as a witness. (Exh. M8, p. 3; Exh. L8.)

**DOJ Analysis of *People v. Bengoa***

As with *People v. Paul Smith*, the case of *People v. Bengoa* was presented as an exemplar by the DOJ of the "OCSD and OCDA [having] engaged in a pattern or practice of conduct that deprived criminal defendants of their Sixth Amendment rights." (Exh. D1, pp. 34-37.)

In the DOJ Report, informant Lambright is referred to as "I.I." According to Lambright, Bengoa admitted to the robbery and the shooting to him while in the same module in Theo Lacy. (Exh. D1, p. 34; Exh. M8, p. 3.) Lambright testified that "Bengoa was aiming for the victim's chest or head but missed and struck the victim's arm." (Exh. D1, p. 34; Exh. M8, p. 3.) Based on Lambright's testimony, the prosecutor argued that Bengoa was the shooter while also describing Bengoa's alleged confession to Lambright as "spontaneous and unprompted." (Exh. D1, p. 35; Exh. M8, p. 3.) At trial, the prosecutor said to Lambright, "so it's not like someone from the Orange County D.A.'s Office sent you in and said ask questions of Mr. Bengoa about this robbery." (Exh. D1, p. 35; Exh. M8, p. 3.) Lambright answered in the negative. (Exh. D1, p. 35; Exh. M8, p. 3.)

The DOJ Report states:

> Unbeknownst to the jury that convicted Bengoa or the attorney who represented him, [Lambright] had a significant history as an informant for

> OCSD. And [Lambright] was not the only informant to speak to Bengoa. OCSD also used an informant, J.J., to elicit statements from Bengoa, and the Special Handling Unit took careful and deliberate steps to ensure that Bengoa would talk to both informants. At least some of Bengoa's conversations with the informants, and perhaps all of them, violated Bengoa's right to counsel under *Massiah.*

(Exh. D1, p. 35.)

On May 22, 2013, Bengoa's co-defendant pled guilty to personal use of a firearm and robbery and was sentenced to 15 years. (Exh. D1, p. 35.)

**Bengoa was the Subject of a Separate Undisclosed Informant Operation involving Lambright and a Second Informant**

According to the DOJ Report, the OCSD learned of an unsolved murder in Los Angeles in which Bengoa was a suspect while he was in custody awaiting trial for the robbery and shooting, and the OCSD began helping the Los Angeles Sheriff's Department (LASD) in the murder investigation. (Exh. D1, p. 35.) An operational plan was put in place by the OCSD in August 2012. (Exh. D1, p. 35.) Both agencies agreed on a plan to use Lambright and Eric McLoughlin to "elicit and record inculpatory statements made by Bengoa about the uncharged Los Angeles murder." McLoughlin is referred to as Informant J.J. in the DOJ Report. (Exh. D1, p. 35; Exh. M8, p. 7.) The plan further stated that McLoughlin was to be placed in Bengoa's cell and was to wear a recording device while in the dayroom with Bengoa. (Exh. D1, p. 35.) In addition, the plan included placing Bengoa and Lambright in cells next to each other with a recording device positioned inside the vent between the cells to capture conversations of the two. (Exh. D1, p. 35.) The DOJ indicated it was unable to locate any recordings related to *Bengoa* in the documentation provided to the DOJ by the OCSD and OCDA. (Exh. D1, p. 35.)

Because the Los Angeles murder was still uncharged at the time of the August 2012 informant operation, questioning of Bengoa that was limited to the Los Angeles investigation would not have implicated *Massiah*. However, shortly after the operation was initiated, McLoughlin alleged that Bengoa had confessed not only to the Los Angeles

murder but also to the Orange County robbery and shooting. (Exh. D1, p. 35.) As the DOJ stated: "The operational plan that resulted in these alleged confessions, as well as the circumstances surrounding the execution of the plan, establish both the agency and elicitation prongs of *Massiah*." (Exh. D1, p. 35.)

While the prosecution did not use the evidence obtained by OCSD during the August 2012 informant operation at Bengoa's trial, it utilized Bengoa's alleged confession to Lambright that was obtained earlier in June 2012. (D1, p. 36; Exh. A.) The prosecutor that called Lambright at trial said the following:

> [A]pproximately a month after Bengoa's arrival in his module at Theo Lacy—Bengoa admitted to I.I. that he robbed and shot the victim. I.I. inferred that Bengoa was aiming for the victim's chest or head but missed and struck the victim's arm.

(Exh. D1, p. 34.)

Based upon Bengoa's testimony, the prosecutor argued Bengoa was the shooter. (Exh. D1, p. 34.) Per the DOJ Report, the prosecutor said the statements were spontaneous, noting that during his questioning, the prosecutor said, "so it's not like someone from the Orange County D.A.'s Office sent you and said ask questions of Mr. Bengoa about the robbery?" (Exh. D1, p. 35) In December 2012, the jury convicted Bengoa of several charges, leading to a sentence of 28 years to life. He was acquitted of the assault with a firearm charge despite Lambright's claim that he admitted to the firearm.

The DOJ refrained from offering its opinion as to whether the June 2012 confession actually was the fruit of a *Massiah* violation. (Exh. D1, p. 36.) However, the DOJ opined: "In any event, Bengoa's attorney would likely have explored this issue had he been aware of the evidence suggesting a *Massiah* violation. This evidence included the fact that both informants had served as informants for OCSD in the past and the fact that OCSD followed up on the June 2012 confession with a full-blown informant operation in August 2012." (Exh. D1, p. 36.)

When interviewed by the DOJ in 2019, the prosecutor who handled Bengoa's case stated that he was not aware of the August 2012 informant operation plan or Lambright's informant history. (Exh. D1, p. 36.) He added that he would have discovered the evidence to Bengoa's attorney if he had been aware of it. (Exh. D1, p. 36.) Per the DOJ Report, the operation plan created by the OCSD was never alluded to in any reports created about the case. (Exh. D1, p. 36.) Rather, all reports related to the *Bengoa* investigation were written "as to leave the reader with the impression that any informant contacts were by serendipity rather than by design"—indicating that this explained the prosecutor's lack of knowledge. (Exh. D, p. 36.) There is, however, a missing element that remains in terms of why the operation was undertaken and who pressed for it. Earlier in the DOJ Report, it states that "[l]acking a solid identification of Bengoa from the victims, though, OCSD decided to use informants to elicit statements from Bengoa in the hopes of shoring up the evidence against him." (Exh. D1, p. 34.) However, it must be emphasized that the OCSD was not the investigating agency on the case, and thus, members of the agency would not have known what needed "shoring up." The guiding hand for any OCSD-effectuated operation came at the request of the OCDA, the Anaheim Police Department, or both. Additionally, the DOJ Report does not discuss why Lambright's significant history was unknown to the Defendant or, purportedly, the prosecutor. Presumably, that history was documented in an OCII file for Lambright, and if not, it raises important questions as to why that did not occur.

As indicated above, if the wide-ranging hidden discovery from *Smith* had been provided to Bengoa, there is little doubt that all of the issues identified by the DOJ would have been seen by defense counsel in advance of trial. This would have led to discovery requests and both Sixth Amendment challenges and challenges to Lambright's credibility, and quite possibly the ultimate exclusion of the tainted informant evidence.

## CONCLUSION

This motion has detailed the repeated and shocking acts of misconduct that Ebrahim Baytieh and his prosecution team committed in order to obtain Paul Smith's special circumstances murder conviction, and ensure that the defendant never discovered the wrongdoing in his case.

The egregious misconduct spanned more than a decade and caused the unjustified and unfair delay of the defendant's re-trial.

The dismissal of Defendant's case is the only just outcome.

DATED: September 6, 2023

Respectfully submitted,

MARTIN SCHWARZ
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Orange County

SCOTT SANDERS
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