

SHARON PETROSINO
Public Defender
Orange County
TRACY R. LESAGE
State Bar No. 182414
Assistant Public Defender
SCOTT SANDERS
Assistant Public Defender
State Bar No. 159406
14 Civic Center Plaza
Santa Ana, California 92701

Telephone: (714) 834-2144
Fax: (714) 834-2729

Attorneys for Defendant Wozniak

DEPT. C-30
HEARING DATE: May 19, 2017

EST. TIME: 1 hour

RECEIVED
MAY 10 2017
DISTRICT ATTORNEY'S OFFICE
SANTA ANA, CALIFORNIA
FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MAY 10 2017
DAVID H. YAMASAKI, Clerk of the Court
BY: L. Hayle, DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

DANIEL PATRICK WOZNIAK,

Defendant.

Case No.: 12ZF0137

**AMENDED NOTICE OF
MOTION AND MOTION TO
PRESERVE EVIDENCE,
EXHIBITS, FILES AND OTHER
ITEMS RELATED TO
AUTOMATIC APPEAL**

**TO: THE HONORABLE JOHN D. CONLEY; SENIOR DEPUTY DISTRICT
ATTORNEY MATTHEW MURPHY; AND DEPUTY DISTRICT ATTORNEY
SETON HUNT:**

PLEASE TAKE NOTICE THAT: on May 19, 2017, or as soon thereafter as the
matter may be heard in Department C-30 of the above-entitled court, Daniel Patrick Wozniak,
the defendant in the above-entitled matter, will move the court to order the preservation of
evidence pending automatic appeal and related post-conviction proceedings.

DATED: May 10, 2017

Respectfully Submitted,

Scott Sanders

Scott Sanders
Assistant Public Defender

1
2 **I. INTRODUCTION**

3 On March 10, 2017, Wozniak filed a motion seeking disclosure of evidence and
4 alternatively to preserve evidence. Wozniak amends his brief in light of the California
5 Supreme Court's ruling in *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, as well
6 as other recent discoveries and developments. This amended version of Wozniak's request to
7 preserve evidence seeks items, presents information, and offers arguments not included
8 within the original filing. Thus, this filing supersedes the originally filed brief.

9 While Wozniak identifies numerous items for preservation herein—some of which
10 were previously sought through discovery and subpoena litigation—the written analysis
11 within this brief focuses upon the preservation of informant-related records and evidence
12 possessed by the Orange County Sheriff's Department ("OCSD") and the Orange County
13 District Attorney's Office ("OCDA"). Wozniak seeks preservation of evidence requested
14 prior to his sentencing, as well as evidence that has come to light post-sentencing. Wozniak
15 incorporates into this motion all written and oral arguments previously submitted articulating
16 the need for disclosure of informant related discovery.

17 Wozniak twice sought and was denied an order preventing imposition of the death
18 penalty. Wozniak argued several bases, including that imposition of the death penalty would
19 violate the ban on cruel and unusual punishment under the Eighth and Fourteenth
20 Amendments to the United States Constitution, as there exists insufficient reliability that
21 Wozniak would be provided with favorable mitigation evidence. After Wozniak's
22 conviction, entries within the OCSD's Special Handling Log ("SH Log"), memorializing
23 daily activity notes of OCSD Special Handling deputies, were turned over for the first time
24 in this case—although their disclosure was required years earlier pursuant to previous court
25 orders. Beginning on April 29, 2016, three witnesses testified in *Wozniak* about the SH Log.
26 After Wozniak was sentenced to death, additional documents and information relevant to this
27 Court's denial of the dismissal motion, and Wozniak's requests for subpoenaed materials and
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1 discovery, came to light in *People v. Scott Dekraai*. Among the discoveries newly revealed
2 to Wozniak were that: (1) the SH Log was terminated and set to be replaced with an
3 “important information sharing” document just days before the Honorable Thomas Goethals
4 issued a comprehensive discovery order in 2013 that would have required disclosure of
5 entries from the SH Log (and the TRED system); (2) there exists a 5 ½ month gap in the SH
6 Log during 2011; (3) In September of 2016, Deputy County Counsel chose not to inform this
7 Court or counsel that her agency was in the midst of a purportedly intensive search for
8 additional logs—with at least one set, from the Theo Lacy Facility, apparently having already
9 been found—and instead suggested that defense should have been able to learn whether
10 additional logs existed through the questioning of Sergeant Kirsten Monteleone, which took
11 place four months earlier; (4) in August of 2014, the OCSD restarted a log for members of
12 the Special Handling Unit, but did not disclose this prior to Wozniak’s sentencing; (5) Special
13 Handling Deputies assigned to Theo Lacy Facility (“TLF”) utilized a Special Handling Log
14 (“SH Log II”) in contrast to testimony by Monteleone, and those logs appear to have been
15 shared with the OCDA in advance of Wozniak’s sentencing; (6) internal OCSD documents
16 confirm a long-standing jailhouse informant program that was used to support criminal
17 investigations and prosecutions, as well as security efforts within the jail; (7) module
18 deputies, and not just Special Handling deputies, have been encouraged and relied upon over
19 the years to develop informant evidence; and 8) in December of 2014 the OCSD obtained
20 authorization to destroy records likely to contain evidence about jailhouse informants.¹

21 The 247 pages of the SH Log provided in *Dekraai* after Wozniak’s conviction also
22 include many entries that were not found among the log material ordered to be disclosed by
23 this Court. That version of the SH Log, for example, contains numerous, previously hidden
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25 ¹ In January of 2015, the Board of Supervisors issued a non-destruction order regarding
26 jailhouse informant records, but it is unclear how long that order will remain in effect and
27 whether the OCSD is in agreement about what categories of records fall within that order—
28 particularly considering their long entrenched recalcitrance to even admit the jailhouse
informant program exists.

1 details of how information was manipulated to keep targets placed in informant tanks from
2 knowing they were surrounded by informants. (Special Handling Log, *People v. Dekraai*,
3 attached herein as Exhibit A.) In a series of entries from a single day, Deputies Anton Pereyra
4 and Benjamin Garcia wrote about “working” inmates” in L-20 and Mod J (where Wozniak
5 and Perez were housed). The deputies wrote about how one of the recently successful
6 informants “will be going back to L20 on the premise he took a bus ride to Lacy and got
7 punted back by medical for his asthma.” (Exh. A, p. 216.) Deputies fabricated a medical need
8 for the informant because L-20 was being presented as a medical unit.

9 Significantly, the defense team has recently learned that Senior Deputy District
10 Attorney Matt Murphy—who throughout this litigation stressed his tremendous aversion to
11 informant evidence—had himself fully embraced the work done by an informant in L20 in
12 his successful argument for the death penalty in another special circumstances double murder
13 case, *People v. Skylar Daniel Deleon*. As will be discussed, in 2008 Murphy argued that a
14 jail informant in that case was a compelling conduit for truth, telling jurors that the informant
15 provided nothing short of “extraordinary” testimony.

16 It now appears Murphy must have been experiencing a sense of déjà vu during the past
17 several years—though this sensation should have been accompanied by disclosures to
18 Wozniak and this Court. As this Court recalls, Perez and Wozniak were originally moved
19 into a “snitch tank”—Mod J was finally acknowledged as containing such tanks during 2015
20 testimony in *Dekraai*. Perez was initially candid about wanting consideration. But after
21 Costa Mesa detectives told Perez they could not promise anything, Perez kept working
22 Wozniak and allegedly obtained more statements. With SH Log revelations in 2016, it was
23 finally discovered that Special Handling Deputy Bill Grover was encouraging Perez behind
24 the scenes, telling him to “marinate the Costa Mesa info.” But having insisted from 2014 until
25 the sentencing date that the defense was completely off track in their arguments that deputies
26 orchestrated the movements of Perez and Wozniak, and encouraged the elicitation of
27 statements—“[Defense Counsel] has gotten his butt kicked regarding Daniel Wozniak and
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1 the witnesses that he has called [in *Dekraai*], and he knows it”—Murphy oddly claimed
2 Grover intended “marinate” to be understood as a request to “chill out” and take no further
3 action. (Reporter’s Transcript (“R.T.”), *People v. Daniel Patrick Wozniak*, Super. Ct.
4 Orange County, No. 12ZF0137, Jun. 13, 2014, p. 196.) Setting aside the tortured
5 definition of “marinate,” it is hardly plausible that a Special Handling deputy who falsely
6 testified in *Dekraai* in order to cover up his own role and that of his unit in developing
7 and managing informants, inexplicably decided he must to stop Perez’s informant efforts
8 in this particular case. Grover’s acts of deception are described in detail in the Post-Trial
9 Motion to Dismiss filed in this case.

10 But even if the obvious facts and logic were unable to restrain Murphy’s arguments
11 that the contact between Perez and Wozniak, and the elicitation of statements were purely
12 coincidental, certainly *Deleon* should have stopped him in his tracks. For years, Murphy
13 offered not the slightest hint that he had any knowledge of the interaction between jailhouse
14 informants and OCSD deputies, or the jail informant effort. Yet, in *Deleon*—in a twist of all
15 twists—it was Murphy, himself, who elicited testimony and then regaled the jury with the
16 enormously valuable effort of a Classification/Special Handling deputy who **convinced** a
17 reluctant informant who “work[ed]” with him, to participate in an operation to obtain
18 recorded statements. Daniel Elias² testified in *Deleon* that after initially coming forward with
19 incriminating statements about Deleon’s efforts to kill witnesses, he sought a deal in his
20 pending felony case, but (like Perez) was allegedly told he could not have one. According to
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22
23

24 ² In a request for restitution reconsideration filed on November 3, 2014, Elias asked to have
25 his restitution reduced to “\$0 IM ADA HAndicAp. And **mentally ILL...**[sic]” (*Motion for*
26 *Restitution Hearing Reconsideration of Ability to Pay and Constitutionality of Excessive*
27 *Fines, People v. Elias*, Orange County Superior Court Number 05HF1751, attached herein as
28 Exhibit KK [emphasis added.]) If indeed Elias is mentally ill, the diagnosis and its onset is
unknown at this time. There appears to be no discussion of Elias suffering from mental illness
during the litigation in *Deleon*.

1 Elias, Classification Deputy Brian Gunsolley³ encouraged him, nonetheless, to do the morally
2 right thing and help collect recorded statements, which Elias did.⁴

3 In his penalty phase closing argument, Murphy stated, “You haven’t seen [Elias’] rap
4 sheet. Sent plenty of chills down my spine.” (R.T., *People v. Deleon*, Case Number
5 05HF0372, Nov. 4, 2008, at p. 2046, herein attached as Exhibit B.) This effort to make Elias
6 appear so dangerous that a homicide prosecutor was shaken to his core merely upon reading
7 the rap sheet was brilliant, though unquestionably improper.⁵ The imagery of Elias as a
8 frighteningly violent offender compellingly conveyed to jurors that Deleon nearly
9 accomplished more killing, and would have but for a remarkable “fit of conscience” by the
10 man who stopped him.

11
12
13 ³ The Special Handling Unit operates under the Classification Unit within the jail and Deputy
14 Brian Gunsolley was likely assigned to the Special Handling Unit.

15 ⁴ In 2016, it was finally learned that a Special Handling deputy who testified in 2014 that he
16 had no information about what took place between Wozniak and Perez, actually told Perez to
17 “marinate the Costa Mesa info,” per the SH Log. (Perhaps Deputy William Grover told Perez
18 that things work out even better for informants when they work from their moral core—or, at
19 least, when they claim as much when on the witness stand. Grover, himself, also believes
20 that telling the truth is not the most important consideration when testifying.) After working
21 diligently as an informant in 2010 and 2011 as part of self-named “Operation Daylight,” Perez
22 found himself living in the cell next to Scott Dekraai in the purported Medical Module L. He
23 obtained statements from Dekraai. But this time, Perez got it right from beginning, claiming
24 he wanted nothing in exchange for his services, even though he was looking at a life sentence.
25 The prosecution played along, confirming they would give him nothing (though a letter
26 praising his tremendous work, entitled “Informant Assistance Memorandum” was sent
27 straight away to the informant’s prosecutor). Perez, like Elias, just wanted to do what was
28 morally right and agreed to have his conversations recorded.

⁵ The register of actions confirms Murphy’s statement: Elias’ rap sheet was not introduced
into evidence in the case. But considering that Murphy was seeking death for two horrendous
special circumstances murders, as well as arguing that Deleon had avoided prosecution for a
third murder, and was planning other murders from the jail, jurors certainly believed that a
rap sheet with only the most egregious of criminal histories could have caused the reaction
that Murphy described.

1 But certainly nothing showed jurors more clearly why Elias was both reliable and a
2 genuinely changed person than testimony elicited by Murphy that (1) Elias had not received
3 in the past, nor would he receive in the future, any consideration on his pending case as a
4 result of testifying; and (2) he was so committed to doing what was right that he stayed in the
5 Orange County Jail so that he could remain to testify, rather than complete his sentence in
6 state prison, which greatly preferred. Murphy questioned him on the subject:

7 Q. In fact, by cooperating, in a weird way you actually -- **you are worse off**
8 **than you would have been, right?**

9 A. **Yeah, way worse.**

10 Q. Okay. Because, **you would rather be in prison** than jail, right?

11 A. Yeah.

12 In another question to Elias, Murphy stated that "...by cooperating and making the
13 decision to **cooperate for nothing**, your life is at risk for the **next eight years or so** that you
14 are going to be in prison, right?"⁶

15 Murphy synthesized to perfection the evidence of Elias's compelling
16 credibility:

17 And that man, ladies and gentlemen, came in here with his waist chains on, **on**
18 **his way to prison**, and he testified anyway. **And, that is extraordinary. He**
19 **got nothing from it.**

20 Unquestionably, based upon the information available to them, jurors had compelling reasons
21 to believe Elias' testimony about perhaps the most aggravating post-crime evidence a capital
22 defendant can face. But they had been defrauded. Jurors never knew the real reason why for
23 more than two years Elias had been continuing his sentence until after he testified against
24 Deleon—with Murphy agreeing every step of the way. Elias never wanted go to prison, let
25 alone get there faster. Had this been his wish, he could have accomplished that by being

26 ⁶ The answer to the question was stricken. Elias pled guilty in 2006 and received an
27 agreement directly to the court or through the assigned prosecutor, allegedly without any
28 input by Murphy, that he would be sentenced to a maximum of eight years and eight months
in prison.

1 sentenced in 2006—and then simply being transported back to court in 2008 or whenever he
2 was needed. Rather, Elias desperately wanted the sentencing court to hear about how he
3 assisted the prosecution without any hope for a reduced sentence. Neither Murphy nor Elias
4 believed the informant was “way worse off” at the time of his testimony. And when Murphy
5 told jurors that Elias “got nothing from it,” he knew the truth was his informant “got nothing,
6 yet.” Just a few months after walking off the witness stand, the informant looked on as
7 Murphy asked that the sentencing judge take into “consideration” his supposedly selfless,
8 truthful, and valuable efforts. Murphy’s argument apparently was so compelling that defense
9 counsel did not even feel the need to be heard. Elias would not be sentenced to the “next
10 eight years or so” in prison, which Murphy said awaited him. In fact, he was not even “on
11 his way to prison.” Elias was on his way home. The court sentenced the informant to **credit**
12 **for time served**.

13 Apparently, Murphy also believed Elias deserved another type of consideration,
14 though this has proven far more difficult for Elias to actually receive. Beginning in 2010,
15 Elias has alleged in a series of motions that Murphy agreed to have returned to him \$2628 in
16 cash seized at the time of his arrest. Murphy apparently made this agreement even though
17 the OCDA had years earlier obtained a forfeiture ruling for the cash, as the money had been
18 found with narcotics, firearms, ammunition, scales and pay/owe sheets. Elias continues to
19 wage what has now been a seven year battle to have the money returned to him, which he
20 swears Murphy promised he would receive—and which a prosecutor appearing for Murphy
21 in 2012 agreed (again) could be returned to him. Elias filed his most recent request just last
22 month.

23 The newly discovered evidence of informant Elias’ work in the jail and at trial, the
24 role of the OCSD in the informant effort, Elias’ housing in a snitch tank, the consideration
25 that Elias ultimately received, the benefit that Elias said was promised to him by Murphy and
26 which he has fought unsuccessfully to obtain for eight years, and Murphy’s knowledge of all
27 of this years before the litigation in this case, are all likely to be argued—and appropriately
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1 so—in support of arguments that more comprehensive discovery is required than was
2 previously ordered in this case.

3 Murphy’s use of Elias as an informant is also highly relevant to another point. The
4 newly discovered evidence proves that Murphy actually agreed with Wozniak’s belief that
5 jailhouse informants—even those who have been extremely dangerous criminals in the past—
6 can provide what Murphy termed as “extraordinary” testimony during a penalty phase.
7 Murphy’s actual analysis, which he elected not to share in this case, would have powerfully
8 supported previous arguments that Wozniak was entitled to materials to assist him in locating
9 jailhouse informants who observed or had direct contact with Wozniak. Said evidence, if
10 found, would have corroborated the descriptions of Wozniak’s good conduct in jail, as
11 described by Daniel Munoz, whom Murphy assailed as lacking in credibility. Moreover,
12 Murphy’s experience and analysis in *Deleon*, if shared prior to this Court’s ruling denying
13 informant discovery, would have offered a powerful counter to the Court’s analysis:

14 The best witness would be someone who was there on very light charges like
15 driving under the influence with priors or a small amount of dope, who had no
16 prior record, who was befriended by Mr. Wozniak, who doesn't have all the
17 baggage that a snitch would have. There's no way that a snitch would be an
excellent witness.

18 (R.T., *People v. Wozniak*, Aug. 17, 2016, at p. 4775.)

19 Murphy’s view that a jailhouse informant’s testimony was “tremendously helpful to
20 the People’s [penalty phase] case,” according to his statement to Elias’ sentencing judge, is
21 particularly compelling. *Deleon*, like *Wozniak*, involved a double murder for financial gain.
22 To support the jury voting for death, Murphy introduced, through informant Elias, Deleon’s
23 efforts within the jail to kill witnesses. On the other hand, Wozniak sought leads to informant
24 evidence corroborating his ameliorative effect on inmates, which contributed to a penal
25 environment where actual and threatened acts of violence are less likely. The fact that the
26 picture of Elias’ motives and expectations were misleadingly presented to the jury does not
27 diminish the potential value of jail informants in this case. Wozniak would have, and will in
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1 the future, present any informants possessing favorable information with all of their warts,
2 while emphasizing a credibility enhancing fact: defendants, unlike prosecutors, can never
3 give a sentencing benefit on an informant's case—before they testify, or after.

4 It must be emphasized through all of the analysis that follows, there exists no
5 legitimate governmental interest in destroying such evidence. However, the developments
6 discussed herein demonstrate the real possibility that they may be destroyed because of
7 policies permitting their destruction and/or motives to destroy evidence damaging to
8 prosecution cases and the credibility of governmental officers.

9
10 **II. THIS COURT HAS JURISDICTION TO ORDER THE PRESERVATION OF**
11 **EVIDENCE IN ANTICIPATION OF POSTCONVICTION DISCOVERY**
12 **REQUESTS BY HABEAS COUNSEL.**

13 In *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 534 (“*Morales*”), the
14 California Supreme Court held that a superior court has jurisdiction to grant a capital
15 defendant's motion to preserve evidence in anticipation of habeas counsel's filing of a
16 postconviction discovery motion under Penal Code section 1054.9.⁷ The Court acknowledged
17 that “section 1054.9 authorizes the postconviction discovery motion procedure and describes
18 the scope of available discovery, but does not speak to the situation in which a condemned
19 prisoner who is otherwise entitled to seek discovery under the statute is temporarily prevented
20 from doing so for lack of the appointment of habeas counsel.” (*Id.* at p. 532.) In holding that
21 a superior court has the jurisdiction to order evidence preserved, *Morales* recognized that the
22 substantial delay in appointing habeas counsel could “operate to deprive condemned inmates
23 of a right otherwise available to them” if the evidence that might be discovered has been
24 destroyed by the time habeas counsel is appointed. (*Id.* at p. 533.)

25 Thus, when a capital case is pending on appeal, and no habeas counsel has yet been
26 appointed to initiate postconviction investigation and discovery per section 1054.9, a

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28 ⁷ All further statutory references are to the Penal Code unless otherwise stated.

1 superior court has jurisdiction “to order preservation of evidence that would potentially
2 be subject to such discovery.” (*Morales, supra*, 2 Cal.5th p. 534.) The materials requested
3 in Wozniak’s motions to preserve evidence fall within the scope of this court’s authority to
4 order preservation, as his request is supported by 1) the Court’s language in *Morales, supra*,
5 2 Cal.5th 523; 2) section 1054.9; and 3) long-standing principles of the defense’s right to
6 discovery at trial. Wozniak’s motions seek simply to preserve the status quo as best as
7 possible, so that when habeas counsel is eventually appointed to conduct investigation and
8 discovery, the potentially discoverable evidence has not been destroyed.

9 **A. *Morales* Supports Wozniak’s Preservation Request.**

10 As *Morales, supra*, 2 Cal.5th 523, made clear, requests and orders to preserve evidence
11 necessarily may be broader than the materials ultimately obtained from the court in
12 postconviction discovery pursuant to section 1054.9. While it is outside the scope of appellate
13 counsel’s appointment to file a motion seeking discovery under section 1054.9, it is appellate
14 counsel’s duty to preserve evidence that comes to her attention “if that evidence *appears*
15 relevant to a potential habeas corpus investigation.” (*Morales, supra*, 2 Cal.5th at pp. 527,
16 532 [italics added], citing Cal. Supreme. Ct., Policies Regarding Cases Arising From
17 Judgments of Death, policy 3, std. 1-1.) However, “[q]uestions as to whether a movant is
18 actually entitled to discovery of the material to be preserved, including compliance with the
19 procedural requirements of [] section 1054.9, will await the eventual filing and determination
20 of the postconviction discovery motion.” (*Morales, supra*, 2 Cal.5th at p. 534.) Thus, as
21 *Morales* concluded, preservation should encompass “evidence *potentially* discoverable under
22 [] section 1054.9” (*id.* at p. 526 [italics added]), allowing the determination of what is actually
23 discoverable under section 1054.9 to be made at a later date.

24 **B. Section 1054.9 Supports Wozniak’s Preservation Request.**

25 As discussed *ante*, the scope of preservation is necessarily broader than what habeas
26 counsel may actually be able to discover, as preservation is appropriate of any material
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1 potentially discoverable under section 1054.9. Nonetheless, it is helpful to look at the scope
2 of section 1054.9 to determine what evidence might potentially be discoverable.

3 In *In re Steele* (2004) 32 Cal.4th 682 (“*Steele*”), the Court “enumerated the
4 prerequisites to postconviction discovery” under section 1054.9. (*Morales, supra*, 2 Cal.5th
5 at pp. 528-29.) *Steele* looked to existing statutory and case law governing discovery to
6 determine the scope of postconviction discovery. Section 1054.9 encompasses two types of
7 postconviction discovery requests: (1) “file reconstruction” requests, seeking materials that
8 the prosecution produced at trial but that the defendant does not possess; and (2) requests for
9 materials “beyond file reconstruction,” *i.e.*, materials discoverable at trial but not disclosed
10 by the prosecution. (*Steele, supra*, 32 Cal.4th at pp. 695-96; see also *Barnett v. Superior Court*
11 (2010) 50 Cal.4th 890, 898-900 (“*Barnett*”).) The latter category includes three subtypes: (a)
12 materials the prosecution should have provided at trial pursuant to a court order, a statutory
13 duty, or the constitutional duty to disclose exculpatory evidence; (b) materials the prosecution
14 should have provided at trial because the defense specifically requested and was entitled to
15 receive them; and (c) materials that the prosecution would have been obligated to provide
16 had the defense specifically requested them. (*Steele, supra*, 32 Cal.4th at p. 697; see also
17 *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

18 *Steele* also confirmed well-established law that an “individual prosecutor is presumed
19 to have knowledge of all information gathered *in connection with the government’s*
20 *investigation.*” (*Steele, supra*, 32 Cal.4th at p. 697 [italics in original].) The Court reaffirmed
21 that “the prosecution is responsible not only for evidence in its own files, but also for
22 information possessed by others acting on the government’s behalf that were gathered in
23 connection with the investigation.” (*Ibid.*)⁸ In *Barnett, supra*, 50 Cal.4th 890, the California
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25 ⁸ In *Steele*, the petitioner sought prison records from the Department of Corrections and
26 Rehabilitation (CDCR) that, *inter alia*, detailed his withdrawal from the Nuestra Familia
27 prison gang; the assistance he provided in providing information to law enforcement; and his
28 help in prosecutions around the state against the Nuestra Familia and its members. The court
determined that the CDCR was not an investigating agency in the defendant’s capital crime

1 Supreme Court elaborated further, stating that the prosecution's obligations under *Brady*
2 extended to exculpatory materials in the possession of others: "[T]he pretrial obligation to
3 provide *Brady* materials extends not only to materials the prosecutor personally possesses,
4 but, to some extent, to materials others possess as well." (*Barnett, supra*, 50 Cal.4th at 904,
5 citing *Strickler v. Greene* (1999) 527 U.S. 263, 275, fn.12 [duty extends to materials
6 possessed by police department of another county in the same state] and *Giglio v. United*
7 *States* (1972) 405 U.S. 150, 154.)

8 **C. General Discovery Policies Support Wozniak's Preservation Request.**

9 In both *Steele, supra*, 32 Cal.4th 682, and *Barnett, supra*, 50 Cal.4th 890, the court
10 looked to the language of section 1054.9 within the context section 1054. As the defense is
11 entitled to have after trial whatever discovery it was entitled to before trial (§ 1054.9, subd.
12 (b)), the scope of discovery available pursuant to section 1054.9 is informed by general
13 discovery law principles. Thus, to determine the scope of this court's jurisdiction as explained
14 in *Morales, supra*, 2 Cal.5th 523, the range of materials that would have been discoverable
15 at the time of trial under constitutional fair trial principles and sections 1054 *et seq.* must be
16 identified.

17 In *In re Littlefield* (1993) 5 Cal.4th 122, 133-35, decided before *Steele, supra*, 32
18 Cal.4th 682, the Court interpreted "in the possession of" as consistent with prior case law,
19 specifically *Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 243 (holding that
20 materials discoverable by the defense included information in the possession of all agencies
21 to which the prosecution has access that are part of the criminal justice system) and *People*
22 *v. Coyer* (1983) 142 Cal.App.3d 839, 843 (describing information subject to disclosure by
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24
25 so the records were not discoverable on that basis. The court concluded, however, that
26 because the prosecution had reviewed those records at the time of trial – although it had not
27 taken and did not have possession of them – it would have had a duty to provide them had
28 defendant asked for them at the time of trial. Consequently, they were discoverable to the
petitioner in pursuing post-conviction relief. (*Steele, supra*, 32 Cal.4th at pp. 697-98, 700-
02.)

1 the prosecution as that “readily available” to the prosecution and not accessible to the
2 defense). (See also *In re Brown* (1998) 17 Cal.4th 873, 879 [noting that courts “have
3 consistently ‘decline[d] to draw a distinction between different agencies under the same
4 government, focusing instead upon the ‘prosecution team’ which includes both investigative
5 and prosecutorial personnel”] [citations omitted].) Additionally, Courts before and after
6 *Steele* have recognized that:

7 [T]he prosecution’s *Brady* duty may require disclosure of exculpatory and
8 impeachment information contained in materials that are *not* directly connected
9 to the case. For example, *particularly upon the request of the defense*, the
10 prosecution has the duty to seek out critical impeachment evidence in records
11 that are “reasonably accessible” to the prosecution but not to the defense.
12 (*J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1335-36 [first italics in original, second
13 italics added], citing *People v. Little* (1979) 59 Cal.App.4th 426, 433-34 [prosecution
14 affirmatively must investigate key prosecution witness’s criminal history and disclose felony
15 convictions]; *People v. Santos* (1994) 30 Cal.App.4th 169, 178-79 [upon defense request,
16 prosecution must disclose prosecution witnesses’ misdemeanor convictions]; *People v. Hayes*
17 (1992) 3 Cal.App.4th 1238, 1243, 1245 [upon defense request, prosecution must disclose
18 prosecution witnesses’ criminal convictions, pending charges, probation status, acts of
19 dishonesty, and prior false reports]; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1078;
20 *In re Pratt* (1999) 69 Cal.App.4th 1294, 1317.)

21 The prosecution has a duty to learn of any favorable evidence known to the others
22 acting on the government’s behalf in the case. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-
23 38.) (See e.g. *Steele, supra*, 32 Cal.4th 682, 700-02 [The prosecution was charged with
24 constructive possession of prison records despite being unaware of their exculpatory value.].)
25 A defendant need not establish that evidence sought is material. (*Barnett, supra*, 50 Cal.4th
26 at p. 901.) Section 1054.1 “requires the prosecution to provide all exculpatory evidence, not
27 just evidence that is material under *Brady* and its progeny.” (*People v. Cordova* (2015) 62
28 Cal.4th 104, 124.)

29 **III. EVIDENCE, EXHIBITS, FILES, AND OTHER ITEMS REQUESTED BY** 30 **WOZNIAK TO BE INCLUDED IN AN ORDER OF PRESERVATION BY** 31 **THIS COURT.**

32 Here, Wozniak seeks an order preserving material to which he was, or would have
33 been entitled to at trial under these principles that delineate the range of information the

1 prosecution must obtain and disclose, and the range of people, entities, and agencies from
2 whom that information must be obtained. As explained in *Morales*, doubts about ultimate
3 discoverability should be resolved in favor of preservation; questions about the movant's
4 actual entitlement to discovery of the materials are not to be addressed until the filing of the
5 postconviction discovery motion. (*Morales, supra*, 2 Cal.5th at p. 526.) The requests set forth
6 below are reasonably specific, supported by citations to the record or other documents
7 indicating the existence of such material, and relate to culpability, death-eligibility, and
8 punishment.

9 Wozniak requests this Court issue an order directing the OCDA, the OCSD, and the
10 OCDA's agents and representatives to preserve evidence, exhibits, files, and other related
11 items listed herein pending resolution of this automatic appeal and related state and federal
12 habeas corpus proceedings. If the Court elects not to grant disclosure of the identified items
13 within the subpoena, it is respectfully requested that the identified items be maintained in the
14 court file.

15 Specifically, Wozniak requests preservation of the following items:

- 16 1. All evidence, exhibits, files, and other items in Orange County Superior Court
17 case number 12ZF0137; and
- 18 2. All evidence, exhibits, files, and other items in the proceedings in Orange County
19 Superior case number 10HF0920.

20 As used in this motion, the terms "evidence, exhibits, files, and other items" shall be
21 deemed to include, but not be limited to, all of the following:

- 22 a. All items admitted into evidence at trial, whether they be physical, demonstrative,
23 illustrative, written, tape recorded, videotaped, photographed, or otherwise;
- 24 b. All items offered but excluded from evidence at trial, whether sought to be
25 introduced by the prosecution or the defense;
- 26 c. All law enforcement reports, notes, tape recordings, or other memorialization of
27 fruits of law enforcement investigation or witness interviews, all scientific and
28

1 forensic reports or notes and underlying documentation (including, but not limited
2 to, laboratory notebooks, bench notes, computer printouts, or other recordings of
3 raw data, in whatever media), all photographs, and all other items of evidence that
4 are in any way related to this capital case and that are in the possession of any of
5 the state or county governmental agencies or officials named above or their agents
6 or employees, including private individuals or institutions retained to render
7 services in connection with this case;

8 d. All custodial records relating to Wozniak from time of arrest until transfer to San
9 Quentin to await execution of sentence, including records of housing, jail visiting
10 logs, records of any medical and/or psychiatric treatment or evaluation occurring
11 during his incarceration;

12 e. Any and all documents, writings and/or recordings, which were responsive to
13 defense subpoenas in this case or not disclosed despite constitutional and/or
14 statutory discovery laws because they were (a) either purposefully withheld or (b)
15 their existence was not known by members of the OCSD at time of hearing;

16 f. All notes taken by each and every court reporter in this case in the Orange County
17 Superior Courts;

18 g. All writings or other records relating to the decision by the OCDA to seek the death
19 penalty in this case, including, but not limited to, all policy manuals, regulations,
20 guidelines, policy statements, internal memoranda and other writings which have
21 been relied upon or promulgated by the OCDA pertaining to the procedure by
22 which a decision is made as to whether to charge special circumstances and/or seek
23 the death penalty, and any and all documents, writings, records, memoranda, or
24 notes relating to the decision to allege special circumstances and to seek the death
25 penalty in this case;

26 h. All criminal files relating to witnesses appearing in this case;
27
28

- i. A complete, unredacted copy of the Special Handling Log/Blog ("SH Log") maintained between September 24, 2008, and January 31, 2013;
- j. Any and all TRED records of inmates housed at one of the Orange County Jails between January 1, 1980 and the present;
- k. Any and all logs/writings and/or other documentation created in the course of employment by Special Handling Deputies located at the Orange County Jail and/or the Theo Lacy Facility between January 1, 2003 and the present;
- l. Any and all logs or notes created by personnel employed within the Orange County Jail documenting contact with informants, sources of information, and/or any other term used to identify inmates who have shared information with deputies related to possible law violations, between May 27, 2010 and September 26, 2016;
- m. Any and all Special Handling files, administrative segregation files, and/or protective custody files created by the OCSD between January 1, 1980 and the present;
- n. Any and all files created by members of the OCSD that contain information documenting informant activities and/or operations within the Orange County Jails between January 1, 1980 and the present;
- o. Any and all communications between members of the OCSD and/or between members of the OCSD and outside agencies regarding jailhouse informants and/or the development of jailhouse informants, and/or the cultivation of jailhouse informants between January 1, 2003, and the present;
- p. Any and all housing floor logs and/or daily activity logs created by module deputies where Wozniak was housed between May 21, 2010 and September 26, 2016;
- q. Any and all housing floor logs and/or daily activity logs created by module deputies where Fernando Perez was housed between June 1, 2010 and the present;

- 1 r. Any and all Sergeant's Activity Logs created by supervisors of the
2 Classification/Special Handling Unit(s) located at the Intake Release Center or the
3 Theo Lacy Facility between January 1, 2003, and the present;
- 4 s. Any and all Briefing Logs created by supervisors of the Classification/Special
5 Handling Unit(s) located at the Intake Release Center or the Theo Lacy Facility
6 between January 1, 2003, and the present;
- 7 t. Any and all Briefing Logs created for and/or by the OCSD Command Staff
8 between January 1, 2003, and the present;
- 9 u. The names and case numbers of any and all criminal and/or civil cases in which
10 members of the Special Handling Unit testified between January 1, 2003 and
11 January 31, 2014;
- 12 v. A copy of any and all subpoenas issued to members of the Special Handling Unit
13 between January 1, 2003 and January 31, 2014;
- 14 w. Any and all e-mail communications, Briefing Logs, intra-agency writings and/or
15 other documents that relate to and/or or corroborate Deputy William Grover's
16 email on June 30, 2014, stating that the OCSD "no longer labels the inmates
17 'informants' we now call them 'Sources of Information' or 'SOI' ...";
- 18 x. Any and all e-mail communications, Briefing Logs, intra-agency writings and/or
19 other documents instructing or encouraging members of the OCSD that the agency
20 no longer "labels the inmates 'informants' we now call them 'Sources of
21 Information' or 'SOI' ...";
- 22 y. A copy of the "Bowles Book," which is referenced at page 56 of the Supplemental
23 Brief in Support of Request to Dismiss the Death Penalty, filed in *People v.*
24 *Dekraai*;
- 25 z. A copy of the "disc (Assistant District Attorney Dan Wagner) received from
26 (Sergeant Kirsten Monteleone) two months ago ..." noted at page 70 of the
27
28

1 *Supplemental Brief in Support of Request to Dismiss the Death Penalty* (filed in
2 *People v. Dekraai*,) which is referenced herein and incorporated;

3 aa. Any and all lists, indexes or other documentation (not previously disclosed) that
4 include the names and/or activities of jail/jailhouse/custodial informants and/or
5 sources of information created and/or maintained between January 1, 1980 and
6 September 26, 2016;

7 bb. Any and all reports, notes, recordings, and written communications (including e-
8 mails) created during the course of any OCSD investigation related to the Special
9 Handling Log and its replacement;

10 cc. Any and all writings and/or communications between January 1, 2014 and the
11 present that reference retention policies pertaining to "source of information" files,
12 "special handling jackets or files," and/or "confidential informant files";

13 dd. Any and all incoming and outgoing communications between Carol Ann Morris
14 (or other members of the Support Services) regarding the retention policies related
15 to "source of information" files and/or "special handling jackets or file(s)";

16 ee. Any and all documents and/or communications created between January 1, 2014
17 and the present that identify individuals who created, contributed to, or authorized
18 amendments or additions to the Custody and Courts Operation Manual ("CCOM")
19 referencing "informant," "in custody informant," "in-custody informant," "jail
20 informant," "jailhouse informant," "special handling," and/or "source(s) of
21 information";

22 ff. Any and all documents, writings, and/or communications created between January
23 1, 2008 and the present, describing, discussing, detailing, and/or mentioning
24 "informant," "in custody informant," "in-custody informant," "jail informant,"
25 "jailhouse informant," "special handling," "sources of information," "source of
26 information," and/or special handling, within the CCOM;

- 1 gg. Any and all documents, writings, and/or communications discussing or referencing
2 the "Informant" section of the OCSD's Policy Manual between January 1, 2008
3 and the present;
- 4 hh. Any and all communications between January 1, 2014 and the present discussing
5 or referencing "in-custody informant," "In-Custody Informant," "in custody
6 informant," "in-custody confidential informant," and/or "in custody confidential
7 informant," within the OCSD's Policy Manual;
- 8 ii. A copy of any and all lists and/or records memorializing and/or detailing (a) the
9 destruction, by members of the Classification Unit or the Special Handling Unit,
10 of any writings, notes, documents, and/or recordings and/or (b) the destruction, by
11 anyone, of writings, notes, documents, and/or recordings that were created,
12 changed, and/or maintained by members of the Classification Unit and/or Special
13 Handling Unit between September 24, 2008 and the present. The provided lists
14 and/or records should include those that identify the documents referenced as being
15 destroyed/shredded on pages 66, 398 and 453 of the *Dekraai* version of the Special
16 Handling Log;
- 17 jj. Any and all recorded conversations between members of the OCSD and inmates
18 who were housed in the same jail unit as Wozniak between May 27, 2010 and
19 September 26, 2016;
- 20 kk. The complete, unedited Orange County Informant Index ("OCII") since the date
21 of its creation through the present;
- 22 ll. A copy of the Orange County Informant Index files ("OCII") for the following
23 individuals: James Alderman (likely DOB 5/15/51), James Dean Cochrum/aka
24 James Hill (likely DOB 8/13/60) and Daniel S. Escalera;
- 25 mm. Any and all discovery receipts or other documents from *People v. William*
26 *Charles Payton* (C-45040), memorializing that the OCII for Daniel Escalera was
27 discovered to Defendant Payton, and the date of said disclosure;
28

1 nn. Any and all discovery receipts or other documents from *People v. Johnny Ray*
2 *Salmon* (C-49688), memorializing that the OCII for James Alderman was
3 discovered to Defendant Salmon, and the date of said disclosure; and
4 oo. Any and all discovery receipts or other documents from *People v. Elliott Beal* (C-
5 54407), *People v. William Lee Evins* (C-57087), and *People v. William*
6 *Gullett/Ronald Ewing* (C-54839), memorializing that the OCII for James Cochrum
7 (aka James Hill) was discovered to each of the defendants in the identified cases
8 and the dates of said disclosures.

9 Wozniak requests that this Court's preservation order remain in effect until either 1)
10 thirty days after execution of sentence, or 2) non-preservation of such items or materials is
11 approved by a court of competent jurisdiction, after at least thirty (30) days written notice of
12 any intention to destroy or allow determination of such evidence has been given to Wozniak,
13 his counsel, the Orange County District Attorney, and the Attorney General of California.
14 Wozniak further requests that this Court order all persons having custody of the materials
15 specified in this motion to permit Wozniak's counsel, or his representatives, to have
16 reasonable access to the items and materials for inspection and, with reasonable notice to and
17 opportunity to file objections by the Attorney General of California.

18 **IV. ARGUMENT IN SUPPORT OF RELEASE OF SUBPOENAED MATERIALS**
19 **PERTAINING TO MOTIONS RELATED TO DISMISSAL OF DEATH**
20 **PENALTY, DISCLOSURE OF INFORMANT-RELATED EVIDENCE, AND**
21 **RECUSAL OF THIS COURT.**

22 Wozniak incorporates all motions and responsive briefs filed before, during, and after
23 his trial. Within said filings, Wozniak sought evidence related to informant Fernando Perez,
24 jailhouse informants that were located in the same housing unit as Wozniak, the jailhouse
25 informant program operated in Orange County, the recusal of this Court, and other
26 information and documents related to its arguments in support of the dismissal of the death
27 penalty—and in support of the discovery of evidence bolstering said arguments. The motions
28

1 seeking release of records and documents after Wozniak's 2016 conviction were denied in
2 part, the recusal was denied, and the dismissal motions were denied.

3 In evaluating the request for disclosure (and alternatively the preservation) of items
4 listed above), Wozniak requests that the allegations and supporting documents described in
5 previous motions and described herein be considered.

6 **A. This Court's Refusal to Dismiss the Death Penalty and to Order Evidence**
7 **That Could Lead to Favorable Informant Evidence Being Disclosed to**
8 **Wozniak.**

8 It is reasonably anticipated that Wozniak will argue in habeas proceedings that
9 evidence was withheld from him, through the time of his sentencing, in order to (1) enhance
10 the prosecution's chances of defeating Wozniak's motion to dismiss the death penalty, (2)
11 discourage the trial court from ordering further disclosures that could lead to favorable
12 informant-related evidence, and 3) prevent delays of the scheduled sentencing date.

13 On April 29, 2016, counsel for Wozniak learned for the first time that Special Handling
14 deputies utilized a SH Log between 2008 and 2013. Disclosure of the SH Log was required
15 in response to earlier subpoenas issued in this case (as subsequently acknowledged by Deputy
16 County Counsel Liz Pejeau). This Court permitted questioning of several witnesses
17 beginning in early May 2016. Classification/Special Handling Sergeant Kirsten Monteleone
18 was arguably the most critical of the testifying witnesses. She both participated in the
19 investigation culminating in the SH Log finally being disclosed, and acted as Custodian of
20 Records. In the latter role, she was the individual responsible for making the determination
21 regarding which pages from the SH Log were responsive to previous subpoenas and
22 ultimately brought to court.

23 Although Wozniak requested the OCSD turn over the entire SH Log, the Court elected
24 instead to permit the OCSD to identify responsive sections based upon searches for particular
25 names, monikers, and other identifying information of individuals identified in subpoenas.
26 This Court, thus, never received nor examined the entire SH Log, which the OCDA also had
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1 it in its possession for more than eight months. The Court later shared its finding regarding
2 Monteleone's credibility:

3 Garcia and Grover's testimony in *Dekraai* – which of course the court has no
4 direct knowledge of – may show that they were bad people, I don't know. I'm
5 not making any determination about that. Obviously Judge Goethals had severe
6 problems with their credibility, but I am comfortable with Sergeant
7 Monteleone. Yes, she wasn't as thorough as she could have been, but I think
8 she is a credible and professional law enforcement officer, and I'm willing to
9 trust her.

10 (*Wozniak*, R.T., May 12, 2016, at pp. 4239-40.)

11 Subsequent to both Monteleone's testimony and Wozniak being sentenced to death,
12 significant issues have emerged regarding her testimony, the existence of additional,
13 undisclosed documents, and other critical evidence.

14 **1. Withholding of Log Entry Related to Termination, Replacement, and**
15 **Cover-Up of the SH Log.**

16 As this Court recalls, Wozniak had repeatedly pointed to the strong circumstantial
17 evidence that the termination of the SH Log was not carried out to advance a legitimate
18 governmental interest as well as the likelihood that a replacement log was created. Through
19 questioning of Monteleone in this case, it was learned that SH Log was terminated the very
20 same month that the Honorable Thomas Goethals ordered comprehensive informant
21 discovery in *Dekraai*. However, Judge Goethals' January 25, 2013 order unquestionably
22 required disclosures from the SH Log—and disclosures were required in this case from the
23 SH Log at the time of Honorable James Stotler's discovery order in September 2014. (R.T.,
24 *People v. Dekraai*, Jan. 25, 2013, at p. 145, attached herein as Exhibit C.)

25 Yet, in June and July of 2016, Pejeau argued against further disclosures to the defense
26 from the SH Log, voicing opposition to orders for additional notes by Deputies Ben Garcia
27 and William Grover. She stated that “[e]ven if his requests were limited to Deputy Grover’s
28 and Garcia’s blog entries because of the late production of the blog, the request is still
overbroad.” (*Wozniak*, May 12, 2016, R.T. at p. 4520.) The term “overbroad” was invoked
repeatedly throughout this litigation. But, these arguments were made as if the attorney

1 articulating the objections was completely disconnected from the near-impossible situation
2 that the defense found itself. If Pejeau was correct in her position, the defense would have
3 been required to successfully play an extraordinary guessing game—one that would have also
4 been derided—in which it framed every conceivable combination of deputy names and
5 keywords until it landed upon a “jointly created entry by Grover and Garcia regarding the
6 termination of the Special Handling Log and the creation of a replacement log.” Yet, as
7 absurd as this suggestion is, a guess with this fortuitous precision would have presented the
8 only chance that the government would have relinquished one of the most important entries
9 in the SH Log.

10 On October 28, 2016, Dekraai received a version of the SH Log that included
11 numerous entries not previously turned over to this Court for its consideration.
12 Unquestionably, though, the single most striking entry pertained to the termination and
13 replacement of the SH Log. Nonetheless, it can be found exactly where one would have
14 guessed, or more precisely where lawyers and investigators with the most diminished of
15 inquiring minds would have looked to get answers about the termination and replacement of
16 the SH Log—at the end of the log. The key entry was on January 23, 2013, under “Deputies
17 Grover & Garcia”:

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

22 (SH Log at p. 1155, disclosed in *Dekraai* on Oct. 28, 2016, a section of the SH Log from
pages 1154-67 is attached herein as Exhibit D.)

23 The quoted language above, including the bolding and the capitalization, is presented
24 exactly how the entry appears; the use of these highlighting tools obviously having been
25 employed by the author(s) so the words would stand out to Special Handling Deputies who
26 needed to know about the sudden change in the SH Log and the procedure moving forward.
27 This formatting also had unintended an unanticipated consequence. When the SH Log was
28 finally available for study more than three years after its termination, the location of the entry

1 and its appearance eviscerated any reasonable argument that a member of the government
2 already looking for the reasons that the log had been terminated would have somehow missed
3 this entry. Thus, it is inconceivable that not a single member of the government agencies
4 who studied the SH Log identified this entry and its significance, or felt obligated to disclose
5 it prior to Wozniak being sentenced to death.

6 All who read the entry certainly understood its significance. If it had been turned over
7 to Wozniak—and the government possessed no arguable privilege or confidentiality concern
8 that supported non-disclosure—defense counsel would have pointed out a communication
9 occurring **one** day before the entry was made. On January 22, 2013, Assistant District
10 Attorney Wagner, the lead prosecutor in *Dekraai*, reached out via e-mail to Special Handling
11 Deputy Seth Tunstall and former Deputy District Attorney Erik Petersen. In that e-mail,
12 Wagner communicated that there was a “50-50” chance that the Court would order the
13 discovery concerning Perez. (People’s Exhibits in Opposition to Motion to Dismiss and
14 Recuse, *People v. Dekraai*, Exhibit 20, attached herein as Exhibit E.) That same e-mail listed
15 the categories of discovery in Wozniak’s *Motion to Compel Discovery*, which included the
16 following request that made it abundantly clear to the reader that disclosure of portions of the
17 SH Log was required:

18 Item 3 - Any and all reports, notes, writings, oral communications, and
19 recordings memorializing communications between representatives of law
20 enforcement (including but not limited to [OCDAJ], [OCSD], and Seal Beach
21 Police Dept.) and either [Inmate F] or his representative(s), relating to ... any
22 and all other cases in which [Inmate F] has provided information related to a
23 suspect or defendant in a criminal matter.

24 (*Ibid.*)

25 The non-disclosure of the termination/replacement entry in the instant matter
26 prevented Wozniak from describing a conspiracy among supervisors and deputies of the
27 OCSD, beginning on, or around, January 22, 2013, (1) to violate any ruling in *Dekraai* that
28 required disclosure to the defense of sections of SH Log; (2) to avoid discovery law

1 obligations in other cases including this one; and (3) to hide the jailhouse informant program.⁹
2 Three days later, on January 25, 2013, Judge Goethals indeed issued an order requiring that
3 the prosecution disclose evidence from the SH Log related to Fernando Perez. For the next
4 **39 months**, members of the OCSD defiantly stood in contempt of the *Dekraai* court order by
5 ignoring the order requiring disclosures from the SH Log as they carried out their plan to
6 obstruct justice and hide evidence about Perez, his contact with Dekraai and others, and the
7 jailhouse informant program.

8 The representations of the OCDA as an agency, and Murphy as an attorney, suggests
9 institutionally and individually that they were aware of the termination and planned
10 replacement of the SH Log well prior to Wozniak being sentenced to death. On May 13, 2016,
11 Murphy emphasized the need to look very closely at the SH Log:

12 So this is an area that obviously I want to make sure that the court is
13 satisfied, as well as the appellate record, that somebody with some
14 knowledge of the case hasn't just done word searches, but that we have
15 meticulously gone through these blog entries. I don't anticipate any of it at
16 the end of the day is going to have any impact on our case at all, but I think that
17 it would probably be wise for myself and perhaps Mr. Wagner to go through
18 this page-by-page rather than just relying on a "Woz" word search. I think
19 that it would – I think I want to do that.

20 (*People v. Wozniak*, May 13, 2016, R.T. at pp. 4287-88 [emphasis added].)

21 ⁹ In the *Declaration of Captain William Baker*, dated December 16, 2016, attached herein as
22 Exhibit F, Baker states that if a replacement log existed he believes it would have been found
23 as a result of the agency's search. His stated certainty is unjustified. As Baker describes in
24 Exhibit F, "[F]ollow-up interviews with Special Handling deputies and/or supervisors have
25 been attempted, but many have declined to be interviewed upon the advice of counsel." (*Id.*
26 at p. 4.) Additionally, after purportedly giving their first explanations about the termination
27 of the SH Log, "Lieutenant Ramirez has recently informed OCSD that this summary of his
28 interview was inaccurate. No corrections have been provided by Lieutenant Ramirez as of
the date of this declaration." (*Id.* at p. 3) In addition, Wert also "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." (*Ibid.*)

1 A press release from the OCDA, several weeks later, included the “OCDA’s Action
2 Plan to Remedy Legal Issues.” It stated “The OCDA will continue to analyze the entirety of
3 the SH Log material to determine what other cases, if any, were affected, what *Brady* issues
4 and *Massiah v. United States* (1964) 377 U.S. 201 violations, if any, need to be reported to
5 defendants, the court, and the CAG.” ([http://orangecountyda.org/civica/press/display.asp?](http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=4834)
6 [layout=2&Entry=4834](http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=4834) [emphasis added].)

7 The “action plan” also included the following:

- 8 1. **Dekraai and Wozniak prosecutors are analyzing the SH Log for the**
9 **purpose of providing the defendants all appropriate discovery.**
- 10 2. An experienced prosecutor will be assigned to review the SH Log for the
11 purpose of identifying all other current and former criminal defendants who
12 are identified in the SH Log. This prosecutor, working with the trial
13 prosecutor assigned to each identified defendant, will then determine
14 whether each identified defendant received the material to which he/she is
entitled.
- 15 3. **This prosecutor will be assisted in his/her review of the SH Log by the**
16 **Dekraai and Wozniak prosecutors, who have already invested**
17 **significant time in reviewing and analyzing the contents of the SH Log.**
(<http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=4834>
18 [emphasis added].)

19 On June 10, 2016, more than three months before Wozniak was sentenced to death,
20 Murphy declared his “meticulous” study of the SH Log complete. Murphy discovered to the
21 defense a small number of entries (additional to those provided earlier by the OCSD)—but
22 he did not disclose that the log was terminated with a plan to replace it. Murphy also stated,
23 “I have read that—this blog. **We’ve put eyes on every page**, and something that may seem
24 innocuous to Mr. Sanders is the type of information that can lead to a murder.” (R.T.,
25 *Wozniak*, June 10, 2016, at p. 4374 [emphasis added].) While counsel respectfully takes issue
26 with the suggestion of an indifference to human life, more importantly, Murphy’s stated
27 concern for the welfare of the inmate and informant population reinforces the important
28 impetus for the OCDA’s incredibly careful study of the entire log. And ultimately, what is

1 terribly troubling about the *Brady* analyses conducted by veteran homicide prosecutors is
2 what they believed they could withhold from defendants and courts.

3 **2. Evidence of a 5 ½ Month Gap in Log and Misleading Testimony on**
4 **the Subject Matter.**

5 On December 16, 2016, counsel for Wozniak learned for the first time via litigation in
6 *People v. Dekraai* that there was actually a five and one half month gap in the version of the
7 SH Log—purported to be the complete version—that was turned over to the Honorable
8 Thomas Goethals on June 9, 2016. In Captain William Baker’s declaration, filed in
9 December, he stated the following:

10 8. I am informed and believe that if the dates (from April 12, 2011
11 through October 2, 2011) not accounted for in the Log was saved on OCSD
12 computer drives, they likely would have been located through the computer
13 search referenced above.
(Exh. F.)¹⁰

14 Importantly, Monteleone introduced during her May 2016 testimony the possibility
15 that some months of the log may have been missing—actually hypothesizing that any missing
16 month could have been caused by Special Handling deputies having taken vacation:

17 Q: So you click in. And how big is the document that you see?

18 A: Well, like I said, it's saved by months and years. So each month and every
year is a separate document.

19 Q: And how many separate documents then were there?

20 A: I don't know.

21 Q: Take the number of years roughly and --

22 A: Some months were -- I believe there was some months that weren't there.

And that could have been just because there was vacation. I don't know.

23 Again, I'm assuming so I don't know.

(Wozniak, May 3, 2016, R.T. at pp. 3692-93.)

26 ¹⁰ Of course, Baker’s statement that the unaccounted log entries would “likely would have
27 been located” presupposes that deputies that had hidden the SH Log for years and the TREDs
28 before that would nonetheless have been unwilling to delete portions of the log.

1 The complete absence of any log entries for a single month because of vacation seemed
2 improbable, unless the entire IRC Special Handling Unit was allowed to vacation at the same
3 time. However, when one considers the actual state of the SH Log turned over—five
4 **consecutive** months missing entirely—Monteleone’s suggestion that vacation schedules
5 could explain the missing notes is even more troubling. Monteleone knew that the entire
6 Special Handling Unit would never have reasonably been absent for months at a time—yet
7 neither she, nor anyone else with knowledge of this gap, chose to disclose to Wozniak the
8 months that were missing, and their obvious significance, prior to Wozniak being sentenced
9 to death.

10 Moreover, the fact that the SH Log was not maintained as a single document on the
11 OCSD’s Special Handling share drive, but instead consists of individuals files created for
12 each month and year, further suggests Monteleone’s testimony was intentionally misleading.
13 **Although Monteleone did not deliver the entire file to this Court, she would have been**
14 **required to open the file for each month in order to perform the required word searches.**
15 Additionally, she had to carry out this process multiple times after additional names were
16 added to identify other responsive entries from the log that this Court deemed discoverable.

17 Monteleone reasonably recognized at some point, and more likely multiple points, that
18 there were either no files or no content for the months of May, June, July, August, and
19 September of 2011. Nonetheless, Monteleone claimed that vacation may have been the
20 explanation for the missing months, instead of coming forward at some point to share (with
21 the defense and this Court) that her analysis was all but impossible. Similarly, considering
22 the asserted careful study by Murphy and other members of the OCDA, it is unreasonable to
23 believe they also did not identify the significant gap in the SH Log. If Monteleone, County
24 Counsel, or a member of the OCDA had disclosed the gap, the Court arguably would have
25 allowed additional testimony to determine the completeness of the file and the completeness
26 of the disclosures.

1 The missing months, Monteleone's testimony, and the failure of any member of the
2 OCSD or the OCDA to disclose the missing logs prior to Wozniak being sentenced further
3 supports Wozniak's request for the preservation of the other informant related evidence
4 identified in this brief.

5 **3. Withholding Information that OCSD Possessed Additional Relevant**
6 **Logs.**

7 As this Court recalls, Wozniak repeatedly pressed during both the Spring 2016 hearing
8 and in subsequent litigation that the government turn over (or disclose the existence of)
9 additional logs created by Special Handling deputies kept at both the IRC and Theo Lacy after
10 the SH Log was terminated on January 31, 2013. At page 28 of the *Post-trial Motion to*
11 *Dismiss*, filed on September 21, 2016, Wozniak reminded all who read the brief of Deputy
12 County Counsel's Pejeau response to such inquiries one month earlier:

13 **Ms. Pejeau:** All I would say is that we had two custodians of records
14 testify as to what additional information they located that was responsive to
15 **Mr. Sanders' subpoenas, and that they undertook a search for additional**
16 **logs and notes and this is what they discovered. And so we had a whole**
17 **hearing, and we took testimony about what existed, and certainly that was**
18 **the time -- and, in fact, I do believe there were additional questions about**
19 **whether there was anything else.** So I don't know what could possibly satisfy
20 Mr. Sanders at this point, frankly.

21 (R.T., *Wozniak*, Aug.17, 2016, at p. 4712 [emphasis added].)

22 Defense counsel responded: "Can I say what would satisfy me? Can we get a
23 declaration from the Sheriff's Department to say there was nothing that replaced the Log?"
24 (*Ibid.*) The response of Pejeau seemed to open back up again the possibility that there was a
25 subsequent log created.

26 **Ms. Pejeau:** Well, certainly, if this court thinks that there is good cause
27 to produce information pertaining to any subsequent records and that it's
28 relevant to this case, then that is something that the Sheriff's Department would
29 have to respond to. But, again, we're here to determine whether there's good
30 cause for all of these requests, including that request.

(*Id.* at p. 4713.)

1 The bolded statement by Pejeau was misleading, and her failure to correct her
2 misrepresentation prior to Wozniak being sentenced to death was improper. In a declaration
3 dated November 10, 2016, Baker stated that “The Sheriff created a team of OCSD personnel
4 (i.e., sergeants, lieutenants, a commander, and an Assistant Sheriff) specifically dedicated to
5 reviewing the contents of the Log and determining the existence of any additional files or
6 records.” (Declaration of Captain William Baker, dated Nov. 10, 2016, attached herein as
7 Exhibit G, p. 2) The placement of that paragraph in the declaration between events described
8 in February of 2016 and May or June of 2016, indicates that this team was created by May of
9 2016. Baker added that “[i]n approximately May and/or June 2016, OCSD reviewed three
10 computer drives utilized by members of the Special Handling unit, totaling over 72,000 files
11 and 7,000 files.” (*Ibid.*) It is certainly not believable that Pejeau, who was the lead Deputy
12 County Counsel at that time in terms of responding to issues about the SH Log and other
13 related materials in both cases, was oblivious to the search initiated for additional documents
14 two to three months earlier. Thus, Pejeau’s suggestion that the defense had a fair and
15 sufficient opportunity to get answers about additional logs through its questioning of
16 Monteleone in May of 2016, and that they “**undertook a search for additional logs and**
17 **notes and this is what they discovered**”—when her own agency apparently believed a far
18 more extensive search was required—was misleading. That search, unbeknownst to
19 Wozniak, involved the study of tens of thousands of pages of files. The failure reveal this is
20 egregious and speaks to the necessity of having the most complete set of potentially relevant
21 materials preserved. Additionally, Pejeau, Monteleone (who attended the sentencing), and
22 members of the OCSD had still another month before Wozniak was sentenced to die to inform
23 this Court that the OCSD was still very much searching for documents potentially responsive
24 to earlier subpoenas in this case and in *Dekraai*. It is also noteworthy that, according to
25 Baker, the month after Wozniak was sentenced to death, the OCSD allegedly further
26 intensified its search to determine whether additional logs existed:

27 ///

1 Beginning in October 2016, the search of every share computer drive in the
2 Custody Division was initiated. Ten sergeants were initially assigned to
3 manually review every document on their share drives. The group was tasked
4 with search for any and all documents resembling the Log, any missing months
5 from the Log, any subsequent or replacement logs, documents mentioning the
6 use of confidential informants, and documents mentioning Defendants and
7 other specified inmates. At the beginning of November 2016, nine additional
8 staff members were assigned to the task.

9 (Exh. G, p. 4.)

10 Again, it is simply not believable that Pejeau was unaware of the search for additional
11 logs that may have existed when she spoke in August of 2016 or at some point prior to
12 Wozniak being sentenced to death.

13 **4. Withholding Evidence that Special Handling Log was Re-Started and** 14 **Hidden in 2014.**

15 The OCSD also unquestionably ignored the order of the Honorable James Stotler in
16 this case, issued on September 12, 2014, by refusing to turn over responsive entries from the
17 SH Log—**resulting in 20 months of contempt of court in *People v. Wozniak***. That order
18 included that the OCSD turn over the following item requested in the subpoena:

19 1) Any and all notes and/or reports, whether handwritten or computer
20 generated, memorializing any and all communications between Fernando Jose
21 Perez (DOB: XXX) and personnel employed by the Orange County Jail,
22 between January 1, 2009 and January 1, 2012. The term “personnel” refers to
23 any and all individuals employed by the Orange County Sheriffs Department
24 (“OCSD”), excluding medical personnel, and including but not limited to
25 members of the Special Handling Unit and/or the Classifications Unit;
26 (*People v. Wozniak*, OCSD Motion to Quash, Exhibit A, filed Aug. 27, 2014.)

27 After Wozniak was sentenced to death, the OCDA and the OCSD finally turned over
28 in *Dekraai* additional information that makes the non-disclosure in *Wozniak* in 2014 even
more aggravated. (In *Dekraai*, Judge Goethals also ordered disclosure of evidence responsive
to item #1, found above, subpoena that included the same language as above, and was issued
the same day.) It has recently been discovered in *Dekraai*, that three days after the subpoenas
were issued in both cases, deputies at the IRC and Theo Lacy re-initiated use of a Special
Handling Log, SH Log II. The timing of the recommencement of log utilized by Special

1 Handling deputies is noteworthy. The SH Log was terminated on the verge of a court
2 order requiring its disclosure by Judge Goethals. The SH Log was re-started just weeks
3 after the Judge Goethals issued its 2014 ruling denying the request for dismissal and
4 recusal of the OCDA; a ruling that suggested the most intense litigation related to
5 jailhouse informants in the county's history was coming to a close.

6 The particular Special Handling supervisor who directed deputies to start using SH
7 Log II was noteworthy. It was none other than Brent Benson.¹¹ Considering it was his
8 directive to start the SH Log II, it is unreasonable to believe that Benson somehow failed to
9 realize at that time that entries existed in the SH Log, and the TREDs needed to be disclosed.
10 This deception further speaks to the need to preserve comprehensive discovery.

11 **5. Failure to Disclose Evidence Impeaching the Testimony about Use of**
12 **Log by Special Handling Deputies at Theo Lacy Facility.**

13 During the 2016 hearing in this case, Monteleone testified that she asked unidentified
14 current Special Handling deputies whether they kept or were aware of a SH Log at the TLF
15 and they said they were not. (R.T. May 3, 2016, *Wozniak*, at pp. 3688-89.) Senior Deputy
16 District Attorney Eric Scarbrough was present for the prosecution during this questioning.
17 Pejeau was also present, as she was throughout the hearings.

18 Monteleone was asked by Scarbrough during his examination, "Was there any contact
19 made with regards to sergeants over at Special Handling at Theo Lacy with regards to, 'Hey,
20 we've found that there are deputies who are using something called a 'Special Handling
21 Blog?' Do your personnel, your staff have anything like that over at Theo Lacy?" She replied,
22 "That question was asked by another command[er], and there wasn't – I personally – I
23 personally didn't have that conversation." Scarbrough then asked, "But you're aware of that
24 questioning was done, or that search was done, and it turned up with negative results? There
25

26
27 ¹¹ The then-Custodian of Records/Special Handling Sergeant Benson swore in a declaration
28 opposing the release of records that "there is no jailhouse informant program." (OCSD
Motion to Quash, Exhibit C, filed Aug. 27, 2014, *People v. Wozniak*.)

1 is no other Special Handling Blog over at Lacy?" She answered, "Correct." (R.T. May 3,
2 2016, *Wozniak*, at p. 3831.)

3 Sergeant Mark Peters was also questioned on this subject. Defense counsel returned
4 to the questioning, with Assistant District Attorney Daniel Wagner present for the
5 prosecution. Peters said that he also spoke with Monteleone about whether there was log or
6 blog at TLF. Peters testified that he learned from Monteleone that there was not a log used
7 by Special Handling at Lacy. He said, "The same drive is available at Theo Lacy. And she
8 looked at that drive and made – and determined there – that it wasn't there." (R.T. *Wozniak*,
9 May 5, 2016, at pp, 3900-01.) Peters stated, "[a]nd also in addition [Monteleone] talked to
10 the supervisors and staff at Theo Lacy on that." (*Ibid.*) He added, "I don't know the specifics.
11 Asked specifically if there's something like this kept at Lacy and that she has access to that
12 drive, and she checked it. She also spoke to the staff there." (*Id.* at p. 3903.)

13 However, Baker's declaration indicates that daily activity logs have been kept at the
14 TLF, including those used prior to January of 2013 that resemble the SH Log. He wrote the
15 following in his December 2016 declaration:

16 10. I am informed and believe that various other "logs" appear to have
17 been sporadically maintained at the Theo Lacy Facility and the Intake Release
18 Center by Classification and Special Handling covering periods of time before,
19 during and after the time period covered by the Log. Most of these logs appear
20 to have been misguided attempts to document Special Handling and
21 Classification deputies' work. Generally speaking, the logs kept after January
22 2013 primarily reflect the deputies' daily tasks and do not contain detailed
23 information like the Log.

(Exh. F, p. 4.)

24 On April 21, 2017, Judge Goethals unsealed Dekraai's *Supplemental Brief in Support*
25 *of Request to Dismiss the Death Penalty*,¹² referenced herein as "*Dekraai Unsealed Brief*,"
26 and attached herein as Exhibit H.

27 ¹² Judge Goethals deferred making a final ruling on the concurrent request to unseal the
28 attached exhibits. As a result, Wozniak is citing portions of the brief that cite, quote or image

1 The brief states the following:

2 On June 16, 2016, exactly one week after Wagner appeared before this Court
3 to first turn over the SH Log, Monteleone wrote an e-mail to Wagner with the
4 heading “**Additional logs found.**” Monteleone stated, “My CSA is delivering
5 the additional logs to you today. They will be in a sealed envelope with your
name on it.”

6 (Exh. H, p. 69.)

7 The *Dekraai Unsealed Brief* then points out that there were no supplemental materials
8 provided for review in that case until December. 6, 2016. (Exh. H, p. 69.)

9 According to the brief, Wagner sent an e-mail to Monteleone two months later, on
10 August 11, 2016, stating that he wished to “clarify the contents of the disc I received from
11 you **two months ago** (referenced below).” (Exh. H, p. 70.) Wagner then allegedly described
12 a folder he was examining based upon a screenshot of the table of contents that bore the title
13 “TL Log.” (*Id.* at p. 71.)

14 That “TL” refers to Theo Lacy is confirmed by a Wagner writing that “‘Housing
15 module logs [that] were somehow copied into the Theo Lacy Classification share drive.’ (*Id.*
16 at Inmate F35117.)” (Exh. H, p. 71.) A series of e-mails in August 2016 indicated that
17 Wagner had reached the conclusion that additional logs needed to be discovered to the
18 defense, and the OCSD needed to be prepared to raise any privilege issues at an in camera
19 hearing scheduled for August 19, 2016, as seen in a series of e-mails found at page 72 of
20 Exhibit H:

21 ///

22 ///

23 ///

24 ///

25 ///

26
27 exhibits, as good faith representations of what said exhibits state. Neither the California
28 Attorney General nor the OCSD has challenged the accuracy of the quoted materials.

McHenry, Michael P

From: Monteleone, Kirsten W
Sent: Wednesday, August 17, 2016 4:12 PM
To: Pejeau, Liz [COCO]
Cc: Feely, Troy M; McHenry, Michael P
Subject: Fwd: Additional logs found

"additional logs"

Sent from my iPhone

upcoming in camera hearing

Begin forwarded message:

From: "Wagner, Dan [DA]" <Dan.Wagner@da.ocgov.com>
Date: August 17, 2016 at 4:07:50 PM PDT
To: "Monteleone, Kirsten W" <KMonteleone@ocsd.org>
Subject: RE: Additional logs found

Please be prepared to make claim(s) of privilege on these logs at the upcoming in camera hearing before Judge Goethals.
I will compile these "additional logs" into a single document and add page #s and then send to you tomorrow.

From: Monteleone, Kirsten W [<mailto:KMonteleone@ocsd.org>]
Sent: Wednesday, August 17, 2016 12:06 PM
To: Wagner, Dan
Cc: Pejeau, Liz [COCO]
Subject: RE: Additional logs found

Hi Dan,
After reviewing everything there is some privileged information on those logs. Let me know how you would like to proceed.
Kirsten

From: Wagner, Dan [<mailto:Dan.Wagner@da.ocgov.com>]
Sent: Wednesday, August 17, 2016 9:22 AM
To: Monteleone, Kirsten W
Subject: RE: Additional logs found

Thank you Kirsten.
I am preparing to provide materials to the defense responsive to their Aug. 4 discovery request, and it appears that material from this disk is responsive. However, before producing it to the defense, I want to double-check with you that there is no material on the disk which you believe is privileged or should otherwise be subject to redaction or withholding.
Please advise ASAP.

Thanks,
Dan

1

INMATE F035116

///

1 However, on August 19, 2016, the referenced logs were not disclosed. (*Id.* at p. 72.)
2 As a result, defense counsel for Dekraai and Wozniak, did not learn until December 2016 that
3 according to Baker's declaration "various other 'Logs' appear to have been sporadically
4 maintained at the Theo Lacy Facility and the Intake Release Center by Classification and
5 Special Handling covering periods of time before, during and after the time period covered
6 by the Log[.]" and that "in August 2014, deputies in Classification and Special Handling were
7 instructed by their Sergeant at the time to keep daily activity logs." (Exh. F, p. 4.) Per Baker,
8 those logs were kept until March of 2015. (*Id.* at p. 5.)

9 At a minimum, the testimony by Monteleone and Peters that there were no logs
10 maintained by Special Handling deputies at the TLF appears to be incorrect. Moreover, it
11 appears likely that Monteleone and Wagner knew the testimony was inaccurate prior to
12 Wozniak's sentencing—but did not share that information. The failure to disclose the
13 existence of additional logs, including those whose existence would have impeached prior
14 testimony, is relevant to whether these agencies can be trusted to ever turn over or even
15 preserve evidence that a reviewing court may deem discoverable.

16 **6. Internal OCSD Documents Confirm a Long-Standing Jailhouse**
17 **Informant Program that Was Used to Support Criminal Investigations**
18 **and Prosecutions, as Well as for Security Efforts Within The Jail.**

19 Wozniak argued in motions to dismiss that there has been a decades long jail informant
20 program, that its existence was relevant to identifying informant witnesses to his good
21 conduct within the jail, and that the concealment of the informant effort is relevant to whether
22 it is reasonably reliable that favorable mitigation evidence would be disclosed to the defense.

23 After Wozniak was sentenced to death, evidence has come to light corroborating
24 defense allegations of a long standing and robust informant program—one that was also long-
25 denied, including through years of this litigation. Internal OCSD documents and other
26 writings describing the effort are described in Exhibit H, and Wozniak asks to incorporate
27 the motion in so much as it summarizes contents and sections of documents or quotes in
28 whole or in part agency documents.

1 For instance, the *Dekraai Unsealed Brief* quotes a memo dated February 28, 2008 to
2 Sergeant Brittain. In the memo, which includes bolding by Dekraai of four words for
3 emphasis, Special Handling deputies emphasized the value of Special Handling deputies, as
4 the agency apparently weighed whether deputies should be replaced with correctional
5 officers:

6 The concept of replacing Deputies with Correctional Officers has serious
7 negative ramifications throughout the entire Corrections system, especially
8 Classification/Special Handling. Every facet of our job, as described above,
9 would be adversely affected. The loss of the experience and knowledge of our
10 Classification/Special Handling Deputies would literally cause complete chaos.
11 This knowledge base takes years to develop, as does the networking with other
12 agencies. It also includes thousands and thousands of interviews with inmates,
13 thousands of hours' worth of training, attendance at hundreds of intelligence
14 gathering meetings, and **cultivation of hundreds of confidential informants**.
15 Without the expertise to properly classify, track, and house inmates, the jail
16 environment becomes ripe for inmate assaults, murders, staff assaults.
17 Ultimately, replacing Deputies with Correctional Officers will surely result in
18 numerous lawsuits and litigation.

19 (Exh. H, p. 17 [emphasis added in *Dekraai Unsealed Brief*].)

20 The *Dekraai Unsealed Brief* also cites several writings that counter the narrative that
21 began to develop in the aftermath of the SH Log, which was that informant efforts were
22 principally about jail security issues. Specifically, the *Dekraai Unsealed Brief* references
23 what appears to be an undated classification interview to determine possible protective
24 custody status, which includes per se recruitment of inmates to become confidential
25 informants within the jails. It includes the following questions:

26 ///

27 ///

28 ///

///

///

///

///

1 Are you willing and able to provide any information to assist law enforcement
2 in any unsolved criminal activity such as homicides, assaults, robberies, etc.?

3 1) We cannot provide any consideration for current or past cases but can assist
4 you in contacting the appropriate representatives to discuss your case.

5 2) If you decide that you are unwilling to provide information to assist law
6 enforcement in any unsolved criminal activity it WILL NOT affect this
7 classification interview and YOU WILL be provided Protective Custody
8 status if it is deemed appropriate.

9 (Exh. H, p. 18.)

10 Some members of the OCSD were certainly under the impression that the OCDA
11 recognized and appreciated the work that agency was doing in terms of working informants.
12 For instance, Exhibit H cites an intra-department memo from Sergeant Irish to Captain
13 Wilkerson, dated March 29, 2007. Irish wrote an "Executive Summary of Theo Lacy's
14 Classification/Special Handling Team." He stated the following:

15 Intelligence Gathering: **The Theo Lacy Special Handling/Classification**
16 **team possesses an excellent expertise in the cultivation and management of**
17 **informants. This expertise is recognized by the Orange County District**
18 **Attorney's Office**, as well as, numerous law enforcement agencies throughout
19 Southern California.

20 (Exh. H, p. 21 [emphasis added in *Dekraai Unsealed Brief*].)

21 Of course, none of this information should have been "newly discovered" to Wozniak
22 or any other defendant for whom these issues were germane. These documents, and likely
23 many others, had always been available if the agency was willing to simply tell the truth.
24 They were not, and that unwillingness supports an expansive discovery order that ensures
25 that any reasonably relevant information is not destroyed.

26 **7. Module Deputies Have Had an Active Role in Cultivating, Developing,** 27 **and Directing Jailhouse Informants.**

28 Beginning at page 47 of the *Dekraai Unsealed Brief*, filed on April 7, 2017, Dekraai
describes the discovery in recent months of evidence that the county's jailhouse informant

1 program has relied heavily upon module deputies to create and maintain a thriving operation.
2 (Exh. H.)

3 For instance, at page 47 of the brief, Dekraai quotes from an undated letter from the
4 Special Handling Unit to Module P deputies praising their work in cultivating informants
5 within the jail, and noting that their efforts have been of great assistance to the OCDA:

6 COMMENDATION FOR MOD P DEPUTIES

7 **Theo Lacy Special Handling** would like to commend **all of the**
8 **deputies currently assigned to Module P.** The amount of information over
9 the past several months obtained by these deputies has been invaluable.

10 They are constantly on the lookout for “kites” being passed and are able
11 to retrieve them on most occasions. **These pieces of information have been**
12 **critical in countless cases brought to the District Attorney and aided in the**
13 **prosecution of several gang members** who disrupt normal operations both
14 within our jail system, and on the streets of Orange County.

15 Their ability to discreetly **cultivate CI’s** and pass the information on to
16 Special Handling is outstanding. **Not only for the prosecution of gang**
17 **members but to prevent assaults on staff and inmates alike.** Several
18 potential assaults/killings have been thwarted by the efforts of these deputies
19 and their work should be recognized.

20 We cannot state enough how much we appreciate their efforts,
21 dedication, and tireless desire to perform their duties, often times without fully
22 knowing the importance of their actions. Once again, we would like to thank
23 every Deputy assigned to Module P for their assistance. Thank you!
24 (Exh. H, pp. 47-48 [emphasis added in *Dekraai Unsealed Brief*].)

25 The previously undisclosed role of module deputies in working with jail informants
26 supports the preservation of any and all housing floor/module logs. Access to these logs,
27 which are among those the OCSD successfully sought permission to destroy after the
28 specified period, is necessary to ensuring that informants in each of Wozniak’s module are
located. This is important because of gaps in the SH Log in 2011, and between January 2013
and Wozniak’s sentencing date. Additionally, relevant evidence contained in said logs that
was never disclosed, which pertains both directly to Wozniak and which demonstrates pattern

1 of non-disclosure of favorable evidence to him and others, supports Wozniak's argument that
2 favorable evidence collected within jail is likely to be hidden forever.

3 **8. Risk of Destruction of Records Based Upon Evidence of Prior Evidence**
4 **Destruction.**

5 While the United States' DOJ investigation, and the other pending governmental
6 inquiries, would hopefully discourage further efforts to conceal, it is very possible that its
7 investigation could have the opposite effect on some members of the OCSO. As has been
8 discussed, it now appears that the shredding of documents described in prior briefs was not
9 only unregulated by supervisory staff, but was not authorized under county policies on the
10 destruction of records.

11 In December of 2008, the DOJ initiated an investigation of the OCSO and its jails in
12 the aftermath of the custodial death of John Derek Chamberlain. It would have logically
13 seemed that deputies would have been hesitant to destroy governmental records, and
14 particularly those that for which destruction was not authorized. Nonetheless, on February
15 5, 2009, Grover wrote: "Sort through numerous boxes of 'Old Special Handling documents'
16 .. then Shred same@ [sic] HQ Warehouse." (SH Log Excerpts, p. 66, attached herein as
17 Exhibit I.) On November 29, 2009, Garcia wrote that he "[w]orked on desk drawer and
18 shredded old files." (Exh. I, p. 453.)

19 Additionally, another disconcerting entry within the SH Log documents a sergeant's
20 direction to a member of the Special Handling Unit that deputies make changes to particular
21 logs, again during the time period when the DOJ was investigating. Deputy Carrillo wrote
22 on **April 8, 2009**, that he "ADJUSTED [sic.] THE DISCIPLINARY [sic.] ISOLATION LOGS
23 FOR THE DOJ TO MATCH THE LOGS FOR AD-SEG AND PC LOGS, PER SGT
24 JOHNSON." (Exh. I, pp. 125, 127.) Special Handling Deputy Garcia had made log entries
25 indicating he was working significantly on the "DOJ project." (Exh. I, pp. 124-25.) Of
26 course, there could exist an innocent explanation for one log being "adjusted" to "match"
27 other logs that apparently the department believed would be submitted or located by the DOJ
28 during its investigation. But the timing of the entries adds further cause for concern. It was

1 reported that there was “a weeklong visit and inspection in **April** of the five facilities by a
2 team from the Justice Department.” (Abdollah, *U.S. Probes Orange County’s Jail System*,
3 Los Angeles Times, Aug. 14, 2009, [http://articles.latimes.com/2009/aug/14/local/me-oc-](http://articles.latimes.com/2009/aug/14/local/me-oc-jails-investigation14)
4 [jails-investigation14](http://articles.latimes.com/2009/aug/14/local/me-oc-jails-investigation14).) Of course, there would be far less concern about an entry like this one
5 if not for the entries describing unauthorized shredding, as well as the history of misconduct
6 that has been revealed throughout the course of this litigation.

7 Per the same reporting, Sheriff Sandra Hutchens, the Commander in charge of jail
8 operations (former Assistant Mike James), and other officials met with federal inspectors on
9 April 17, 2009. (*Ibid.*) The entries bring into focus the credibility of Sheriff Hutchens’
10 assertion published in a June 2009 article, that she took steps to ensure that all jail logs were
11 computerized and would not be able to be modified.¹³ Despite this claim, there are the
12 oddities that in April of 2009 (a) a Special Handling Deputy would have described adjusting
13 different logs; and (b) the description of that alignment effort was found in the in the SH Log,
14 which up until the time of its termination in 2013 was alterable as a Microsoft Word file.

15 There is yet more evidence that the talk and walk of an OCSD under investigation can
16 be entirely irreconcilable. In August of 2009, then Assistant Sheriff Michael James, in charge
17 of the county’s jails, stated that, “Even though it’s been burdensome, we’ve cooperated fully,
18 given them all they asked for and made changes where appropriate.” (*Id.* at p. 7.) One would
19 have logically thought that an agency under investigation for its treatment of incarcerated
20 inmates would have had great trepidation about violating the Constitutional rights of those
21 same inmates—particularly with the DOJ looking on—and did not need to be told that it was
22 time to stop violating rights associated with due process. Nonetheless, on June 25, 2009, just
23 two months after meeting with federal investigators and two months before he told the press
24

25 ¹³ The Orange County Register reported in 2009 that the OCSD, under Sheriff Hutchens,
26 purportedly accomplished “replacing paper jail logs with electronic ones that cannot be
27 altered once an entry is made.” (Edds and Hernandez, *Sheriff Hutchens Says She’s Made*
28 *Progress Revamping the Department*, Orange County Register, June 22, 2009,
<http://www.ocregister.com/articles/hutchens-168337-department-sheriff.html>.)

1 of the agency's progress, James authorized a blatant effort to violate the Sixth Amendment
2 by placing homicide defendant Vega and informant Oscar Moriel in side-by-side recorded
3 cells to "gain valuable evidence reference the murder from recorded conversations between
4 the two." (Letter from OCSD Investigator Roger Guevara to Assistant Sheriff Michael
5 James, dated June 25, 2009, attached herein as Exhibit J.)

6 In sum, this conduct demonstrates the importance of preserving the evidence identified
7 in this motion.

8 **9. Retention Policies that Allow for Destruction of Jailhouse Informant**
9 **Records.**

10 In a brief filed in *Dekraai* on January 18, 2017, Dekraai details the process by which
11 in 2017, he and his counsel learned that the OCSD failed to disclose retention policies
12 permitting for the destruction of informant-related records in 2014, despite a 2017 subpoena
13 that required disclosure of said policies. (Redacted Supplemental Brief Seeking OCSD
14 Pleadings, *People v. Dekraai*, filed Jan., 2017, attached herein as Exhibit K.)

15 The filing, which will be referred to as "*Dekraai Destruction Brief*" indicates that
16 Dekraai subpoenaed the following, on November 3, 2016:

17 4) Any and all lists of retention policies and/or time frames for the
18 destruction of documents, logs and or other materials created, published,
19 followed and/or deemed effective for the Orange County Sheriff's Department
20 between January 1, 2006 and the present. The referenced document has been
21 referred to in the past as the "Document Retention List."
(Exh. K, p. 53.)

22 According to the *Dekraai Destruction Brief*, on November 10, 2016, County Counsel
23 turned over directly to the defense documents that were purportedly responsive to its
24 subpoena. Those 10 pages of documents consisted of (1) a declaration of Pam Walker,
25 Assistant Custodian of Inmate Records, Orange County Jail; (2) four pages under the heading
26 of "Records Control Schedule," and indicating original approval by resolution, dated October
27 9, 1979; (3) an intra-departmental memo to file by Sharon Rowlett regarding "Retention
28 Schedules," dated July 21, 1992; and (4) a "Document Retention List," signed by Assistant

1 Sheriff Hewitt and Assistant Sheriff Krans, dated April 24, 1995. (Exh. K, p. 53.) These
2 records did not appear to have any references to informant-related records.

3 However, according to the same Exhibit K, several weeks after these materials were
4 provided, counsel was contacted by an independent source regarding that individual's belief
5 that the OCSD had not fully complied with the subpoena for retention records. (Exh. K, p.
6 53.) Subsequently, that source provided the defense with a copy of "Orange County Sheriff's
7 Department Records and Disposition Schedules," passed by vote of the Orange County Board
8 of Supervisors on December 16, 2014, and attached herein as Exhibit L.

9 In the section under Criminal Investigation, is the title "Confidential Informant Files"
10 which "[i]ncludes documentation relating to identity of confidential informant, information
11 provided by informant, consideration provided, and case information involving the
12 informant. Informant files are maintained under active and inactive status." (Retention
13 Schedule No. 367, attached herein as Exhibit M.) The disposition for such files states,
14 "**Destroy 3 years after inactive.**" (Exh. L, p. 46 [emphasis added].) In a separate section
15 entitled "Custody and Court Operations," there are two titles of immediate importance. One
16 is entitled "Source of Information," and is described as "File documenting information
17 received from an inmate." (Retention Schedule No. 56C, attached herein as Exhibit N.) The
18 disposition for the file states, "**Destroy after 3 years.**" (Exh. L, p. 31 [emphasis added].) The
19 second is titled "Special Handling Jacket or File," which is described as a "Classification file
20 containing information about Administrative or Protective Custody Inmates." (*Ibid.*) The
21 disposition for such file also states, "**Destroy after 3 years.**" (*Ibid.* [emphasis added].)
22 Neither of those titles—"Source of Information" or "Special Handling Jacket or File"—are
23 listed in the retention schedules turned over pursuant to the November 2016 subpoena.

24 Two of the categories of records named in the retention policies were referenced
25 during the 2016 hearing in this case regarding the Special Handling Log, during the testimony
26 of Sergeant Mark Peters.

27
28

1 In May of 2016, during limited hearings in the aftermath of the Special Handling Log
2 discovery, Sergeant Mark Peters testified about OCSD policy changes regarding informants,
3 the use of the term "source of information," and the significance of special handling
4 jacket/files:

5 Q: When were confidential informant files created?

6 A: We have policy -- we have **recently installed policy as it related to**
7 **confidential informant files by the department and within the jails.**

8 Q: And when was that?

9 A: **I wrote them**, I should probably know this. It's probably two years ago.

10 Q: After this stuff on Dekraai broke?

11 A: Yes.

12 (*Wozniak*, R.T., May 5, 2016, at pp. 3923-24 [emphasis added].)

13 The questioning then turned to how the agency could determine whether a person was
14 an informant within the jails and where records were kept—a subject on which little ground
15 was gained in 2014 and 2015:

16 Q. Is there a -- is there an informant file that you can look at?

17 A. **Is there special handling files? There is special handling files.**

18 Q. **Is that the same thing to you?**

19 A. **To me.**

20 Q. If you look at the special handling files, there is informant information if the
21 person is an informant?

22 A. Correct.

23 Q. **If you want to find out if a particular person is an informant, what do**
24 **you do?**

25 A. **I don't know what you mean.**

26 Q. **How would you find out whether that was the case or not?**

27 A. **We would look in the special handling file.**

28 Q. **What kind of notation would be in there that would indicate that to**
you?

A. **There would be some type of document that the person was an**
informant,

Q. What, is there a particular format form that you can see that reveals that?

A. Yes, there's -- you know, there's the informant file and then there's a thing
called a source of information.

Q. Okay. So what's the informant file?

1 A. It's -- it could be both. It's like if we have informants, currently have any
informants.

2 Q. I mean, so there is -- you can look in a place, you have a file place you can
3 go to, you can leaf through it and see if the person's name is in there; right?

A. Right.

4 Q. So, I mean, like if a person who is out in the open, if you want, you could
5 look through that file and you would see Fernando Perez's name; right?

A. I don't know who that is.

6 Q. Let's say there is an informant that has been working in the jail. You can go
7 to the file drawer and leaf through it and you can check whether that person
is an informant?

8 A. Yes.

9 (*Wozniak*, R.T. May 5, 2016, at p. 3955 [emphasis added].)

10 While this Court denied the defense request for evidence that would assist it in locating
11 informants housed in the same unit as *Wozniak*, that is an issue likely to be challenged on
12 appeal—and that appeal is also likely to include additional information learned subsequent
13 to *Wozniak*'s death sentence. Moreover, while in January of 2016, the OCSD announced a
14 litigation hold after being by directed the Board of Supervisors not to destroy jailhouse
15 informant-related records, that hold will certainly be lifted prior to *Wozniak*'s appeals being
16 exhausted. This Court should thus order the OCSD and the OCDA not to destroy any
17 informant related records prior to the completion of *Wozniak*'s appellate litigation.

18 This request is fair. The OCDA maintains the county-wide database of informant
19 records via the Orange County Informant Index. In a number of cases over the years, as
20 discussed in the originally filed *Motion to Dismiss* (and subsequent filings), deputies chose
21 not to disclose the OCII or contents containing *Brady* material. The OCSD hid TREDs, the
22 Special Handling Log, and untold documents in furtherance of its concealment of the
23 county's jailhouse informant program. As the Court of Appeal recently stated in its ruling
24 on the recusal in *Dekraai*, "The magnitude of the systemic problems cannot be overlooked."
25 (*People v. Dekraai* (2016) 5 Cal.App. 5th 1110, 1149 [as modified].) That the OCSD wanted
26 the authority to rapidly destroy its informant-related records, and sought authorization only
27 months after discovery of the long-hidden TRED database, adds further support to the
28 concerns articulated by the Court of Appeal. Moreover, it appears that in the decades prior

1 to the jailhouse informant litigation, there was no policy that permitted said destruction.
2 Unless the informant effort was exponentially greater than known to exist at this point,
3 retention of those records are not burdensome relative to the massive quantity of records
4 retained by the OCSD and the OCDA. Perhaps most importantly, the waves of revelations
5 over the past several years demonstrate one clear truth: It is simply unknown what additional
6 information relevant to informants and Wozniak's case could become available in the years
7 that follow. The reasonable possibility of additional revelations is further bolstered by the
8 fact that multiple investigations regarding the use of jailhouse informants in this county are
9 currently underway.

10 **10. *People v. Skylar Deleon.***

11 Wozniak describes below Murphy's use of an informant in the capital murder case, as
12 well as its relevance to habeas proceedings and the need to preserve informant related
13 evidence.

14 ***Brief Summary of the Facts***

15 On August 30, 2005, Skylar Deleon was arraigned and appointed counsel in response
16 to the original felony information, which charged him with two special circumstance murders
17 for financial gain of Thomas and Jackie Hawks. (*People v. Deleon*, 05HF0372, Register of
18 Actions, p. 9, attached herein as Exhibit O.) The case proceeded to trial in October of 2008.
19 (*Id.* at p. 19.) Deleon's codefendants included his wife Jennifer Henderson, John Kennedy,
20 Alonso Machain, and Myron Gardner. Machain testified at the trial to much of the facts
21 related to the Hawks murder. (*People v. Henderson* (July 17, 2009, No. G039432)
22 ___ Cal.App.4th ___ [2009 Cal.App. Unpub. LEXIS 5752, p. 25].)

23 As a newlywed couple, Deleon and his wife, Jennifer Henderson, amassed thousands
24 of dollars of debt and continued to make big item purchases despite a joint income of \$21,000
25
26
27
28

1 in 2003. (*Id.* at p. 9.)¹⁴ In October of 2004, Thomas and Jackie Hawks listed their 55-foot
2 yacht, the *Well Deserved*, at \$465,000 in a boating magazine, and planned to move to Arizona
3 near their grandson. (*Id.* at pp. 10-11.) The same month Deleon got in touch with a friend
4 from jail, Machain, whom he asked if he wanted “to make a few million dollars.” (*Ibid.*)
5 Deleon explained that they could kill bad people and keep their money, and then started to
6 plan the crime with Machain. (*Ibid.*) On November 1, 2004, Deleon responded to the ad for
7 the yacht. (*Ibid.*)

8 On November 6, Thomas Hawks gave Deleon and Machain their first tour of the yacht.
9 (*Id.* at p. 12.) After their visit, Deleon told his pregnant wife she ought to bring their young
10 daughter to see the yacht and meet the Hawks to “make [them] feel more at ease.” (*Id.* at p.
11 13.) The morning of November 15, Deleon and Machain recruited John Kennedy for help
12 since Mr. Hawks, a former probation officer, could have outmatched the pair of them alone.
13 (*Id.* at p. 14.) The three of them met Mr. Hawks at Newport Beach, and Kennedy was
14 introduced as Deleon’s accountant. (*Id.* at pp. 14-15.) Once aboard, Mr. and Mrs. Hawks
15 sailed the trio out to sea, but Deleon asked to stop the yacht because he wanted to swim out
16 and inspect the hull. (*Id.* at p. 15.) While the boat was idled, the three defendants subdued the
17 couple with handcuffs Machain previously purchased. (*Id.* at pp. 12, 15.) Then, Deleon forced
18 Mr. and Mrs. Hawks to sign and thumbprint a previously prepared durable power of attorney
19 forms. (*Id.* at p. 16.) Finally, Deleon tied both of them to the yacht’s anchor and lowered them
20 into the water as the boat was roughly miles off the coast. (*Id.* at pp. 16-17.)

21 In the days after the murder, Deleon and Henderson drove to a bank in Kingman,
22 Arizona with a notarized power of attorney for the Hawks and attempted to access the
23 couple’s funds. (*Id.* at p. 19.) Relatives of the Hawks worried for the disappeared couple. (*Id.*
24 at p. 20.) After investigators determined the last people who saw the Hawks were Deleon and
25

26
27 ¹⁴ The California Supreme Court has not issued a ruling on Deleon’s direct appeal. Wozniak
28 includes the Court of Appeal’s summary of facts pertaining solely to the murders found in
the appellate opinion of the separately tried case of co-defendant Jennifer Henderson.

1 Henderson, a search warrant of their home produced the Hawks' personal belongings and
2 items taken from the *Well Deserved*. (*Id.* at p. 23.) Deleon was arrested and charged with
3 two counts of special circumstances murder. He was found guilty on October 20, 2008. (Exh.
4 O, pp. 29-30.) On October 22, 2008, the penalty phase began. (*Id.* at p. 31.) It included two
5 prosecution witnesses, informants Jonathan Alvarado and Daniel Elias, both of whom
6 testified about Deleon's alleged efforts within the jail to have two main witnesses in Deleon's
7 case, a scuba diving instructor and his wife, a notary, as well as Deleon's father and cousin,
8 and Daniel Elias¹⁵ killed.¹⁶ (Exh. P, pp. 1262-64, 1270-72, 1285-91, 1297-1303, 1309-14.)
9 On November 6, 2008, the jury returned a verdict of death. (Exh. O, p. 38.)

10
11 **a. The Role of Jailhouse Informant Daniel Elias in the Penalty Phase**
12 **of People v. Deleon.**

13 During his penalty phase opening statement, Murphy summarized Daniel Elias' role
14 and significance and described the anticipated testimony:

15 June 25th, 2005, Daniel Elias. Some of you will remember that name. Daniel
16 Elias is a drug user. Effectively, he is a criminal. He is in the jail with Skylar.
17 They are both in the medical section of the jail. Skylar approaches him,
18 befriends him.

19 Long series of conversations just like we have seen with all these other people.
20 Skylar offers to pay him millions of dollars if he will either murder or effectuate
21 the murder of his cousin, a scuba instructor and a notary. And he told him that
22 he would take him to Mexico. He had a lot of money in Mexico and he would
23 tender payment in Mexico.

24 (Exh. P, p. 1238.)

25 ¹⁵ Daniel Elias testified that "[Deleon] also put a contract on me[.]" but that testimony was
26 stricken from the record. (R.T., *People v. Deleon*, 05HF0372, Oct. 22, 2008, p. 1309, attached
27 herein as Exhibit P.)

28 ¹⁶ On July 28, 2006, Murphy filed a complaint alleging that Deleon committed three counts
of solicitation for murder. (*People v. Deleon*, 06HF1419, Felony Complaint, attached herein
as Exhibit Q.)

1 Elias was called to the witness stand the same day. He testified to having had a “series
2 of conversations” that were “possibly” in July of 2006. (Exh. P, pp. 1285-86.) Elias agreed
3 with Murphy’s questioning that he and Deleon were in the medical housing unit. However, he
4 clarified that L-20 was medical unit, not exactly being used as a medical unit:

5 Q. All right. You were in the medical housing unit, if I am not mistaken?

6 A. Yeah. Sector 20.

7 THE COURT: Mr. Elias, I am going to have to ask you to speak up.

8 THE WITNESS: Yes. Sector 20.

9 Q. By Mr. Murphy: And what is sector 20? What does that mean?

10 A. It is, like, a drop-out and people who are in trouble sector.
(*Id.* at p. 1283.)

11 As discussed in the introduction and below, Elias and Deleon were housed together in
12 what is only recently recognized to be an informant tank: a housing location populated with
13 targets (such as Deleon) and informants (such as Elias)—similar to Mod J, where Wozniak
14 and Perez were placed two days apart in June of 2016.

15 In discussing these conversations with Deleon, Elias also confirmed that the module
16 was populated with informants:

17 Q. Specifically, did he tell you some things about some witnesses in this case?

18 A. Yes.

19 Q. Tell us what he told you and take us through those conversations.

20 A. He asked me to -- well, it was more or less asking about money. He -- **he**
21 **said he ran a make on the tier, I was the only one without a C.I. file.**

22 Q. If you could just scoot a little closer.

23 A. Oh. I was the only one without a C.I. file.

24 Q. Okay. I am going to slow you down there. You said he ran a make on the
25 tier. What does that mean?

26 A. He said his attorney ran a make on the tier that -- finding out who was who
27 on the tier.

28 Q. Okay. And he said that you do not have a C.I. file. What does that
mean?

A. I never told on anybody.

(Exh. P, p. 1284 [emphasis added].)

Elias claimed that because there was no record of him previously working as an
informant, Deleon believed that Elias was a “good candidate” for “taking out witnesses.”

1 (Exh. P, p. 1285.) Elias later said that Deleon wanted the witnesses "killed." (*Id.* at p. 1286.)
2 According to Elias, Deleon wanted him to kill a "scuba diver that was part of the case," which
3 he later clarified as a scuba "instructor." (*Id.* at p. 1285.) Deleon purportedly also sought to
4 have his own cousin killed because "he was telling on him about a murder they did in
5 Mexico." (*Id.* at p. 1286.)

6 Elias also acknowledged that on a particular day, he was placed in a dayroom group
7 with Deleon and Kelly Henderson. (Exh. P, p. 1288.) During cross-examination, Elias
8 answered "Yes" to defense counsel's question whether Henderson was "one of the well-
9 known snitches in the Orange County Jail, right?" (*Id.* at p. 1301.)

10 According to Elias, he told Deleon at one point that he needed a million dollars in
11 order to apparently obtain bail:

12 Q. Okay. So how would you describe the progression of these conversations?

13 Did he tell you this information up-front? How can you describe that for us?

14 A. For the murders?

15 Q. Yes.

16 A. Oh, just -- well, we were talking about my -- my incidents to get out. I needed
17 money. I needed a million dollars, and he said -- he made me believe that
18 he had money that he can access in Mexico and that I could get out.

19 Q. Did he tell you how he would pay you for this?

20 A. Yeah. He said once he was released, my friend whoever did the job would
21 go down to Mexico with him and he would give them 2,000,000 for the
22 murders and a million to get me out.

23 (*Id.* at pp. 1287-88.)

24 Murphy's questioning, provided his version of what then occurred:

25 Q. Okay. Mr. Elias, at some point you made a decision to come forward with
26 this information; is that right?

27 A. Yes. I -- well, not really. I told the neighbor about our discussions, my other
28 day room partner guy, and he was a C.I. and he told me, "oh, you can get
out on this." I said, "well, I am not -- I don't do that," and he conducted a
letter, sent it out. They came and talked to us, the Newport police, and I was
considering doing this. They said -- when I told them what was going on,
they said, "well, we need to talk to the D.A.," and the D.A. said they
wouldn't work with me when they came back, so that was the end of it.

1 Q. Okay. So you were hoping to get some consideration, then, and the
2 detectives came back and said, basically, no deal for you, right?

3 A. Yeah.

4 (Exh. P, pp. 1288-89.)

5 Elias claimed that he still decided to cooperate even though he purportedly believed
6 he would receive no benefit for his cooperation.

7 Q. Okay. And after that happened, why have you decided to continue to
8 cooperate?

9 A. I have had some problems and I have been talking with classification, a
10 deputy down there, on my own problems. And he asked me if I would help
11 him out with Deleon, that he keeps on trying – this isn't the first time he has
12 tried to hire people to kill his witnesses.

13 Q. This is what the classification deputy told you?

14 A. Yes.

15 Q. Okay.

16 A. And he told me, you know, "you are not going to get anything for it, you
17 know that, but you will do – but, you will be able to do the right thing for
18 once." and I didn't tell him yes, I would do it. I went back to my cell and I
19 thought about it for a while, and now I just made that decision to wash
20 myself up.

21 Q. To do what?

22 A. To not be active in the criminal world.

23 Q. Okay.

24 A. By telling. Or, helping the police.

25 (Exh. P, pp. 1289-90.)

26 The prosecution's presentation of a murderous plot—nearly joined in by an inmate
27 momentarily willing to get in on the crime and with the connections to make it happen—
28 crystallized under Murphy's questioning. Elias agreed with the Murphy's suggestion that he
thought about participating in Deleon's plan and had friends who could carry it out:

23 Q. Okay. All right. So the plan, just so I am clear, was you were going to get
24 some friends on the outside --

25 A. Contract, yeah. My friends.

26 Q. Okay. And, you know, I am not going to ask you any names or anything like
27 that, but do you have friends on the outside who are kind of tough guys?

28 A. Yes.

(Exh. P, pp. 1290-91.)

1 This was Murphy's last question in a compelling direct examination. It would have
2 appeared that Deleon's efforts set in action a chain of events that could have led to more
3 murders and likely would have, but for a moment of astonishing conscience and courage by
4 a man so changed he was willing to forego even the personal benefit he desperately wanted
5 in order to stop the killer. Of course, this was also a story with a familiar ring—told many
6 times over the decades by informants for the prosecution, in which a perfectly timed epiphany
7 changed a violent criminal to well-intentioned citizen, aiding authorities without any
8 reasonable hope for assistance.

9 Former defense counsel Gary Pohlson, who has since been appointed a Judge of the
10 Orange County Superior Court, turned immediately to the issues of that supposed
11 transformation, and the issue of Elias' expectations of consideration:

12 Q. So, if I understand what you are saying here is you were just doing -- you
13 were just testifying because you want to do the right thing?

14 A. Yes, sir.

15 Q. You are not expecting to get any benefit out of this?

16 A. That was not -- it was made clear that that would not happen.

17 Q. Okay. You are not going to get anything at all for coming here and being a
18 snitch?

19 A. No.

20 (Exh. P, p. 1291.)

21 Attorney Pohlson then simply asked of Elias whether had offered his assistance as an
22 informant in any other case, an issue not addressed during direct examination.

23 Q. Have you ever done this in any other cases?

24 A. No, sir.

25 Q. Had you ever offered to do it in any other cases?

26 A. No, sir.

27 Q. Never offered?

28 A. Not that I remember.

(Exh. P, p. 1291.)

Elias's answer suggested an oddly failed memory. After allegedly being told that he
could not receive a deal for work with Deleon, he actually wrote another letter to Murphy in
August of 2016. This time Elias wanted to provide information to Murphy about statements

1 made by murder defendant Quang Quan, even though Quan's case was not being prosecuted
2 by Murphy. (Exh. P, pp. 1292-93.) Deleon's counsel understandably wanted jurors to know
3 that Elias seemed to believe—despite his testimony—that informant work was not free for
4 the prosecution:

5 District Attorneys [sic] Office
6 Central Court Santa Ana

7 To whom it may concern my name is Daniel Elias and I'm housed at the jail
8 next to Quang Quan. He has told me very personal information about himself
9 and regarding his case. I'm here in jail for Drugs and gun charges and facing a
10 max of 8 years 8 months. **I'm willing to testify in exchange for time off my**
11 **sentence.** Please feel free to contact me here at the jail. My case is out of
12 Harbor court. I'm a basically a good guy that has a drug problem. I'm not
13 involved in gangs any more and I stayed out of jail for six years. I'm married
14 and own a business and really just want to get out and back to my life. I deserve
15 a chance and **will help you if you will help me.**

16 Thank you,
17 Daniel Elias # XXXXX

18 (Letter from Elias to Murphy, "copied" by OCDA, Aug. 15, 2006, and attached herein as
19 Exhibit R [bolding added].)

20 With this letter, Murphy certainly would have been alerted to the obvious fact that
21 Elias was unlikely to be cooperating in any case purely because of a sense of civic
22 responsibility. Elias made it clear—after previously writing to Murphy about Deleon—that
23 his assistance came with conditions: "I deserve a chance and will help you if you will help
24 me." (*Ibid.* [emphasis added].) He was blunt: his condition was "time off on my sentence"
25 "in exchange" for testimony.

26 Moreover, based upon Murphy's presentation of Elias as a violent offender, the
27 prosecutor must have found disingenuous Elias' claim that he was a "good guy that has drug
28 problem." (Exh. R.) After all, as noted previously, Murphy's final question had brought out
that Elias had people who could carry out the murder and at one point he purportedly planned
to enlist them.

1 Attorney Pohlson went on to question Elias about the letter he sent to Murphy on July
2 21, 2006, regarding providing the prosecution his testimony in the instant case:

3 Q. By Mr. Pohlson: on July 21st of 2006, you wrote Matt Murphy a letter saying
4 that you would testify against Skylar, right?

5 A. Probably.

6 Q. Okay. Now, this is before you talked to the police, right?

7 A. Talked to the police? What do you mean?

8 Q. About testifying against Skylar.

9 A. I don't think so, no.

10 MR. POHLSON: may I approach, your honor?

11 THE COURT: yes.

12 Q. By Mr. Pohlson: this is a letter supposedly written on July 21st of 2006, to
13 Matt Murphy by you, Okay? Does that refresh your recollection as to
14 whether this -- whether you wrote the letter before you talked to the police
15 or after?

16 A. Tell you the truth, I don't recall.
17 (Exh. P, at p. 1293-94.)

18 The letter states as follows:

19 TO: Matt Murphy
20 District Attorneys [sic] Office

21 Hello my name is Dan Elias and I'm currently housed at the Orange County
22 Jail with Skylar Deleon. Deleon and I have been talking for about 2 months and
23 he has confided in me about his case and has asked me to help him kill 2
24 witnesses in his case in exchange for bailing me out. He wants me to kill
25 Michael Lewis and a scuba diving instructor who is testifying against him. I am
26 no longer a participant in criminal activities or associate with gang members.
27 This has been a very personal and big decision for me to make. I'm taking the
28 right steps to change my life, which is why I'm writing you this letter and have
also met with Newport Police Detectives and also **work with Deputy
Gunsolley here at the Jail.**¹⁷

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¹⁷ Murphy was certainly on notice that Elias was an informant in the jail in 2006. Elias said
the was working with a deputy and wrote two letters about his ability to provide incriminating
statements from two separate murder defendants.

1 The reason I'm writing this letter is because Deleon has been putting a lot of
2 pressure on me to help him kill the two witnesses. He has said that if I can't get
3 the job done then the crips in Long Beach can do it. I also know that he has
4 been in contact with the crips through visiting and letters at the Glass in visiting
so not just to be herd [sic].

5 It is my honest belief that these two peoples [sic] lives are in danger and that at
6 some time there will be an attempt to murder them. I will do whatever you ask
of me to do to help save their lives.

7 Sincerely,
8 Dan Elias

9 P.S. – At this point I just want to do what's right. I'll do this without any
10 consideration if I have to.

11 (Letter from Elias to Murphy, copied July 21, 2006, attached herein as Exhibit S [emphasis
added].)

12 During cross-examination, Elias testified further about his decision to help without
13 any anticipation of consideration:

14 Q. You weren't feeling any pressure to get it done, were you? You just wanted
15 to get a deal from the D.A., that's why you were contacting them, right?

16 A. At the time -- at the -- in the beginning, yes. Yes, sir.

17 Q. But, now you are just doing it out of the goodness of your heart?

18 A. Like I told you, they told me they wouldn't work with me. And when I was
approached by Deputy Gunsolley from Classification, it was kind of a moral
thing.

19 (Exh. P, p. 1303.)

20 Elias then testified to the following on re-direct:

21 Q. Okay. So you, basically, went to your attorney, said, "I got information on
22 Skylar, can I get a deal," and your attorney came back to you. That's the
23 "they" that Mr. Pohlson is referring to is your attorney, right? He came back
to you and said, "D.A. said no deal," right?

24 A. Yeah. It wasn't my attorney. It was Byington.

25 Q. Okay. Detective Byington?

26 A. Yes.

27 Q. So he said no deal?

28 A. No deal.

(Exh. P, p. 1307-08.)

1 On re-direct Murphy went further, suggesting that not only was nothing coming to
2 Elias for his cooperation, but that despite a purported desire to simply be sentenced to state
3 prison and arrive there as quickly as possible, the informant had decided to remain in jail so
4 that he could be available to testify.

5 Q. Okay. And since that point, Mr. Elias, you have decided for reasons to
6 cooperate anyway, right?

7 A. I decided to help the classification officer, Deputy Brian Gunsolley.
8 Basically, we knew it wasn't going to do anything, it was just going to stop
him from trying to hire more people.

9 Q. Okay. And, as you sit there now, what are you getting for your
cooperation?

10 A. Nothing. But, I have been stuck in this jail for a couple years.

11 Q. You were going to go start serving your prison sentence, right?

12 A. Yeah.

13 Q. In fact, by cooperating, in a weird way you actually -- you are worse off
14 than you would have been, right?

15 A. Yeah, way worse.

16 Q. Okay. Because, you would rather be in prison than jail, right?

17 A. Yeah.

18 (Exh. P, p. 1308 [emphasis added].)

19 Elias then testified,

20 Q. And, as you sit there now, you are not getting anything for this other
21 than extra time in the Orange County Jail and a snitch jacket when you
22 get to the joint, right?

23 A. Yeah.

24 (Exh. P, p.1309 [emphasis added].)

25 It was on re-direct examination that Murphy brought out that OCSD deputies placed
26 Elias and Deleon in a cell; a cell which Elias confirmed on cross examination was "wired."
27 (*Id.* at p. 1304, 1310-11.) According to the testimony, Elias emerged from the cell with a
28 map to find the diver. (*Id.* at p. 1311.)

29 In closing argument, Murphy contrasted Elias with the other in-custody witness,
30 Jonathan Alvarado:

31 ///

1 Now, this guy, Daniel Elias, is a very different story. Now we are talking
2 about approximately a year later. Now, instead of wrong hit man to kill wrong
3 witnesses, what Skylar Deleon has done in the jail is he has figured out who the
4 right guys are.

5 You know, Daniel Elias, ladies and gentlemen, is a totally different
6 animal than Danny Alvarado. Again, he doesn't know anybody in the case.
7 Same story. Mexico, drugs. Same garbage that Skylar tells everybody else.

8 He tells them, "Yeah, you get your friend to kill these people and, when
9 I am out, what I will do is I will take him down to Mexico where my money
10 is." And we all know how that story ends.

11 **Daniel Elias, ladies and gentlemen -- and this is -- this is something**
12 **that you won't see as a juror probably ever again. This is extraordinary for**
13 **a couple of different reasons.**

14 But, number one, Skylar approaches him and he solicits him to murder
15 these witnesses. Okay. Again, not his dad, but he is talking about Kathleen
16 Harris, he is talking about Adam Rohrig, he is talking about Mike Lewis.

17 Now, if he murdered his father, folks, it has no impact on our case. If he
18 murders those people, now we are talking about a major impact on the
19 successful prosecution, and a major impact on what you folks would be able to
20 consider in terms the propriety of the death penalty in that.

21 So Skylar solicits him, and he comes home and says, "I want to make
22 these people disappear, I want to take care of them." What does he do? He has
23 -- I think at first it was considering possible advantages, right? He thought "I
24 could get a deal if I come out with this information."

25 Never snitched on anybody before. He is not a paid informant. **He is not**
26 **an informant. He has never done that. He is an actual criminal and he is a**
27 **bad guy.** So, what does he do? He comes forward.

28 And you heard testimony about it, so I am not telling you anything you
don't already know. They come to us and his background gets looked at. And,
basically, he is told no. Not because he is not believable, but because we don't
need him. I don't need him

Folks, I will get to it in a minute. I don't need anything in this case other
than Betty Jarvi for you folks to come back and sentence this guy to death. I
don't need him, but -- that's the extraordinary part. Because, then he gets turned

1 down. No deal. "You are not getting any consideration, you are **too bad a guy,**
2 **your record is too bad and we don't need you,**" and he talks to Deputy
3 Gunsolley.

4 **And Gunsolley lays it out on a moral plane and says, "This guy is**
5 **trying to kill people from the jail, and look at this case and look at what he**
6 **has done. And I want you to man up, and I am going to ask you to man up**
7 **and do the right thing here. You are going to go to prison. You are going**
8 **to get a snitch jacket. But, if you really want to turn your life around, even**
9 **though you may get killed in prison" -- which is what happens to snitches**
10 **and he is a snitch now.**

11 "You got no deal, but you have an opportunity to do the right thing and
12 to have an impact for once in your criminal infested life, have a positive impact
13 for the families of these murders victims."

14 **And that man, ladies and gentlemen, came in here with his waist**
15 **chains on, on his way to prison, and he testified anyway. And, that is**
16 **extraordinary. He got nothing from it.**

17 He knew that Alonso was in Newport Beach Jail. Folks, that's something
18 that wasn't published in the register. Person who knows that is the guy sitting
19 right there in the blue shirt.

20 The descriptions that he gave. The notary, the scuba instructor, the
21 cousin. And that same question was asked to him, remember? "Do you have
22 any friends? You didn't really take him seriously, did you? You don't have any
23 friends on the outside that would do this."

24 **Remember his answer? Folks, you haven't seen his rap sheet. Sent**
25 **plenty of chills down my spine.**¹⁸ He leans into the microphone and says, "Oh,
26 no, sir, I do have friends that would do that."

27 Mr. Pohlson asked him, "Well, you didn't take this seriously, did you?"
28

¹⁸ As his closing indicates, Murphy's statement to the jurors about evidence that was never introduced—Elias's rap sheet—sending "chills down my spine," was wholly improper, albeit certainly effective. Murphy knew that he cannot discuss the details of evidence not introduced. But, Murphy wanted jurors to be left with the impression that Elias' record when taken was enough to leave a veteran murder prosecutor shaken.

1 Again, leans into the microphone with that tick that he had, that we all
2 saw, "Oh, no, sir, I took this very seriously."

3 **That man had a fit of conscience.** And that's why you heard from him.
4 Because in the criminal world, ladies and gentlemen, in this -- and this kind of
5 puts this in context a little bit. **What that guy did in this case is so horrendous.**
6 **And what he was trying to do from the jail while, theoretically, society is**
7 **protected from him.**

8 What he did is so bad that even somebody like Daniel Elias wanted no
9 part of it. **And even he wanted to do his part. And it is going to kind of**
10 **sound corny, but for justice. I submit to you his testimony was**
11 **extraordinary.**

12 (Exh. B, pp. 2043-47 [emphasis added].)

13 b. **Daniel Elias' Long Path to Receiving the Consideration He**
14 **Supposedly Never Expected, and to Never Receiving the Additional**
15 **Benefit He Was Promised at Sentencing.**

16 Murphy's knowledge about the use of jailhouse informants prior to Wozniak's arrest,
17 his use of them, his candidness in presenting facts related to them and the benefits sought and
18 likely to be delivered, and his knowledge of the role of jail deputies in investigating criminal
19 conduct are relevant to issue of preservation of informant-related and other evidence
20 identified herein.

21 As Wozniak repeatedly emphasized, informant testimony can be extraordinary
22 compelling—and even more so when describing the good conduct of a defendant who is
23 unable to offer any sentence consideration. While Murphy appropriately recognized the
24 immense value of informant testimony from a violent criminal at a penalty phase, he
25 understandably chose not to share his *Deleon* experience in *Wozniak*.

26 Ultimately, it is critically important examine what was actually taking place in *Deleon*
27 more closely. Murphy's presentation of Elias during questioning and closing argument of a
28 man suffering a "fit of conscience"—a violent criminal relinquishing any hope for sentence
reduction, and ignoring his desperate desire to simply serve the state prison sentence awaiting
him so the he could remain in a local jail and available for testimony—would certainly have
seemed "extraordinary." But the truth is that neither Deleon nor Murphy believed that Elias'

1 assistance was without value in terms of influencing the sentence he would serve. That story
2 begins with Elias' case.

3 **c. People v. Elias.**

4 On September 30, 2005, Elias was charged in a felony complaint under California's
5 Third Strike Law with five felony counts, two misdemeanors, and enhancements. The
6 charges included possession for sale of methamphetamine and possession of a firearm by a
7 felon. (Complaint, *People v Daniel Patrick Elias*, Orange County Superior Court Case
8 Number 05HF1751, attached herein as Exhibit T.)

9 On January 11, 2006, the OCDA, via Paralegal Sally Gier of the Narcotics
10 Enforcement Team's Asset Forfeiture Division, filed a "*Pending Asset Forfeiture*
11 *Notification*" with the Clerk of the Orange County Superior Court, Harbor Justice Center.
12 (Attached herein as Exhibit U.) The actual notification was authored by Deputy District
13 Attorney Tammy Spurgeon and identified the seized property as \$2,628. (*Ibid.*)

14 On April 14, 2006, a preliminary hearing was held before the Honorable Judge Brett
15 London in Department H2 of the Harbor Justice Center. (*People v. Elias*, Orange County
16 Court Case Number 05HF1751, Register of Actions, p. 6, attached herein as Exhibit V.) That
17 same day, Elias was held to answer to counts 1, 2, 3, 4, 6, and 7. (*Id.* at p. 7.) On April 21,
18 2006, a felony information was filed, with the same allegations and charges found in the
19 complaint. (*Ibid.*; Information, *People v Daniel Patrick Elias*, Orange County Superior Court
20 Case Number 05HF1751, attached herein as Exhibit W.)

21 On May 23, 2006, then Senior District Attorney Christopher Kralick sought and
22 received an order for release of the \$2,628. The order included the following:

23 The property was subject to forfeiture proceedings by the State of California,
24 per Health and Safety Code Section(s) 11470 et. Seq., and has been forfeited
25 pursuant to the above Health and Safety Code sections. Thus, authorization is
26 being requested to release the \$2628.00 in United States currency to the Orange
27 County District Attorney's Office for distribution as set forth in Section 11489
28 of the California Health and Safety Code.
(*Request and Order for Release of Property*, attached herein as Exhibit X.)

1 Per the request, the property was to be “released to Petitioners for the use, dispersal,
2 and/or disposal of said property by the Costa Mesa Police Department.” (Exh. X.) The order
3 was signed by Judge London.

4 On August 4, 2006, before the Honorable Susanne S. Shaw, Elias pled guilty to the
5 five felony counts and misdemeanor possession of narcotics paraphernalia. (Guilty Plea,
6 *People v Daniel Patrick Elias*, Orange County Superior Court Case Number 05HF1751,
7 attached herein as Exhibit Y.) On that day, the prosecution was represented by Deputy
8 District Attorney (“D.A.”) James Hicks. Following Elias’ plea, count 5 was dismissed on the
9 prosecution’s motion. Judge Shaw agreed to set a maximum of 8 years, 8 months, on a case
10 that originally carried 75 years to life. (*Ibid.*; Exh. V, p. 6.) Elias’ sentencing hearing was set
11 over to October 27, 2006 (Exh. V, p. 13)—but it was not until two years later and over twenty
12 additional court dates that Elias was actually sentenced.

13 On October 27, 2006, the Honorable Craig E. Robison permitted a continuance of
14 Elias’ sentencing to December 15, 2006. The People were represented by Deputy D.A. Suzy
15 Snyder. (Exh. V, p. 8.)

16 On December 15, 2006, Judge. Robison permitted a continuance to March 23, 2007.
17 On that day, the prosecution was again represented by Snyder. (Exh. V, p. 8.)

18 On March 23, 2007, Judge Robison again permitted a continuance. On that day,
19 according to court minutes, Snyder made a special appearance for Murphy. **This represents**
20 **first time in which Murphy is identified as the assigned prosecutor of Elias.** The case
21 was continued to June 8, 2007. (Exh. V, pp. 8-9.)

22 On June 8, 2007, Judge Robison permitted a continuance. On that day, per the minutes,
23 Deputy District Attorney Nikki Buracchio made a special appearance for Murphy. Sentencing
24 was continued to July 20, 2007. (Exh. V, p. 9.)

25 On July 20, 2007, Judge Robison again permitted a continuance. On that day, per the
26 minutes, Deputy District Attorney William Sparks III made a special appearance for Murphy.
27 Sentencing was continued to August 10, 2007. (Exh. V, p. 9.)
28

1 On August 10, 2007, Judge Robison again permitted a continuance. On that day, per
2 the minutes, Sparks made a special appearance for Murphy. Sentencing was continued to
3 January 11, 2008. (Exh. V, p. 9.)

4 On January 11, 2008, the Honorable David A. Thompson permitted a continuance. On
5 that day, the prosecution was represented by Deputy D.A. Claudia C. Alvarez. That same
6 day, Judge Thompson disqualified himself from the case, and sentencing was continued to
7 January 14, 2008. (Exh. V, pp. 9-10.)

8 On January 14, 2008, the Honorable Thomas J. Borris permitted a continuance. On
9 that day, the prosecution was represented by Deputy D.A. Mark Birney. Sentencing was
10 continued to January 28, 2008. (Exh. V, p. 10.)

11 On January 28, 2008, Judge Borris again permitted a continuance. On that day, the
12 prosecution was represented by Birney. Sentencing was continued to January 29, 2008. (Exh.
13 V, p. 10.)

14 On January 29, 2008, Judge Borris again permitted a continuance. On that day, per the
15 minutes, Deputy D.A. Renee Gurwitz made a special appearance for Murphy. Sentencing
16 was continued to April 4, 2008. (Exh. V, p. 10.)

17 On April 4, 2008, Judge Borris issued and held a bench warrant for Elias. On that day,
18 per the minutes, Deputy D.A. Steve Schriver made a special appearance Murphy. That same
19 day, sentencing and a warrant hearing was scheduled for April 7, 2008. (Exh. V, p. 10-11.)

20 On April 7, 2008, Judge Borris scheduled a jury trial for April 9, 2008. On that day,
21 the prosecution was again represented by Schriver. (Exh. V, p. 11.)

22 On April 9, 2008, Judge Borris vacated the jury trial, and again permitted a
23 continuance for sentencing. On that day, per the minutes, Schriver made a special appearance
24 for Murphy. Sentencing was set for June 13, 2008. (Exh. V, p. 11.)

25 On June 11, 2008, Elias filed a *Notice of Motion; Motion to Continue/Trial (Penal*
26 *Code Section 1050); Declaration in Support Thereof* with the court, whereby he, through his
27 counsel, requested the court to issue a continuance of his jury trial. (Attached herein as
28

1 Exhibit AA.) In his declaration, counsel provided the following “good cause” in support of
2 his motion:

3 **3.1 This case is awaiting final sentencing upon the conclusion of *People v.***
4 ***Skylar Deleon* (Case #06HF1419).** That case is currently set for Preliminary
5 Hearing today in Department H-2 of the Harbor Justice Center. It is not
6 anticipated that the case will resolve in the immediate future, therefore,
7 Defendant requests his sentencing be continued until August 15, or a date
8 convenient to the Court and the People.
9 (*Ibid.* [emphasis added].)

10 On June 13, 2008, Judge Borris again issued and held a bench warrant for Elias, who
11 had not been transported to court. On that day, per the minutes, Alvarez made a special
12 appearance for Murphy. That same day, sentencing and a warrant hearing was scheduled for
13 June 27, 2008. (Exh. V, p. 11.)

14 On June 27, 2008, Judge Borris withdrew the warrant for Elis and again permitted a
15 continuance for sentencing. On that day, per the minutes, Schriver made a special appearance
16 Murphy. Sentencing was set for August 22, 2008. (Exh. V, pp. 11-12.)

17 On August 22, 2008, Judge. Borris again permitted a continuance. On that day, the
18 prosecution was represented by Schriver. Sentencing was continued to September 5, 2008.
19 (Exh. V, p. 12.)

20 On September 5, 2008, Judge Borris permitted a continuance. **Murphy personally**
21 **appeared for the first time.** Sentencing was continued to November 7, 2008. (Exh. V, p.
22 12.)

23 On November 7, 2008, Judge Borris again permitted a continuance. On that day,
24 Schriver made a special appearance for Murphy. Sentencing was set for November 21, 2008.
25 (Exh. V, p. 12.)

26 On November 21, 2008, Elias was not transported, and the Honorable Thomas
27 Goethals permitted a continuance. On that day, Deputy D.A. Heather Heslep-Morrissey made
28 a special appearance for Murphy. Sentencing was continued to December 4, 2008. (Exh. V,
p. 12.)

1 On December 4, 2008, Judge Borris permitted a continuance. On that day, Schriver
2 made a special appearance for Murphy, per the minutes. Sentencing was set for December
3 10, 2008. (Exh. V, p. 13.)

4 On December 10, 2008, Elias was not brought to court, and the Judge Borris permitted
5 a continuance. Murphy appeared. Sentencing was set for December 18, 2008. (Exh. V, p. 13-
6 14.)

7 On December 18, 2008, a sentencing hearing was finally held before Judge Borris in
8 Department C5 of the Central Justice Center. On that day, the prosecution was represented
9 by Murphy and he addressed the court on the record. (R.T. *People v. Daniel Patrick Elias*,
10 Dec. 18, 2008, Sentencing Hearing, p. 4, attached herein as Exhibit BB.)

11 ***Argument Presented by Deputy District Attorney Matthew Murphy***

12 In his argument, Murphy claimed he was twice approached by Elias' attorneys,
13 regarding whether he could "receiv[e] some sort of consideration for his testimony against
14 the defendant Skylar Deleon." (Exh. BB, pp. 4-5.) Murphy claimed "[he] was not interested
15 in making any sort of deal with Mr. Elias based on his background and previous history of
16 criminality," and "told him no." (*Ibid.*)

17 Murphy asserted Judge Shaw decided to strike Elias' strikes for reasons unrelated to
18 Murphy, and stated that "as far as I was concerned, Mr. Elias was receiving absolutely nothing
19 for any potential cooperation that he was going to give. In fact, he would not even be a
20 witness." (Exh. BB, p. 5.) Murphy then stated:

21 At some point after entering that agreement with the court, I received word
22 through my investigator that Mr. Elias made some statements that, in fact, he
23 may have been willing to cooperate anyway without any consideration from the
24 people if I want to bring him as a witness and he testified against Skylar Deleon.
(*Ibid.*)

25 Murphy stated that thereafter, Elias agreed to testify without consideration and did so
26 without his counsel present. Murphy said he "believe[d] Mr. Elias testified truthfully. I
27 believe he's honest about everything he said." (Exh. BB, p. 5.) Murphy told Elias "[he] wasn't
28

1 going to do anything for him,” and stated “Mr. Elias essentially made himself a snitch with
2 no consideration from the People.” (*Id.* at pp. 5-6.)

3 Following his renewed assertion that Elias provided his testimony without any
4 agreement with the prosecution, Murphy stated:

5 At the time that Mr. Elias testified, he did so without any promises. There was
6 never a wink, never a nod, an understanding between me and the defense that
7 Mr. Elias would receive anything for his cooperation.

8 So based on that I take Mr. Elias – well, he put his money where his mouth is,
9 so to speak. He testified without any of that. I believe he was sincere. He was
10 tremendously helpful to the People’s case, I believe, and I believe that he
essentially put his life at risk by doing that.

11 So based on what he did, at this point I would ask the court to take into
12 consideration in determining appropriate sentence today.
13 (Exh. BB, p. 6.)

14 His counsel, Alternative Defender Marri Derby did not make any argument on the
15 record.

16 *The Court’s Sentence Pronouncement*

17 The court noted Judge Shaw’s 2006 decision to strike some of Elias’ strike priors,
18 leaving only one strike prior for consideration at sentencing. The result, as the court
19 explained, was to reduce Elias’ possible exposure from 75 years to a maximum sentence of
20 8 years, 8 months. (Exh. BB, p. 7.) Judge Borris stated he first heard about Elias’ testimony
21 at the present sentencing hearing, and relied on Elias’s history and Murphy’s argument to
22 reach his decision to honor Judge Shaw’s promise of a maximum sentence of 8 years, 8
23 months. (*Id.* at pp. 7-8.)

24 The court then dismissed all priors alleged under sections 667 and 1170.12 pursuant
25 to section 1385(c) except as to count 1. **Elias received a total sentence of four years to**
26 **prison, with credits exceeding the sentence, making him eligible for release the same**
27 **day.** (Exh. BB, pp. 8-11; Exh. V, pp. 13-14.)

28 ///

1 Murphy then provided the court with the Deleon case number, 05HF1451, and added:

2 For the record, in case this is not clear. What Mr. Elias testified to was the
3 solicitation to kill witnesses, and there is good argument to be made had not
4 Elias cooperated, innocent people would have been murdered by Skylar
Deleon.

5 (Exh. BB, pp. 12-13.)

6
7 **d. Daniel Elias' Post-Sentencing Efforts to Have Property Seized**
8 **Returned to Him, as Allegedly Promised by Prosecutor Murphy.**

9 On September 27, 2010, Elias filed a *Motion to Order Release of Seized Property* with
10 the court in his 05HF1751 case, naming as respondent the Costa Mesa Police Department.
11 Elias requested the court release his remaining property, which he said consisted solely of the
12 \$2,628 seized by Costa Mesa police officers on September 28, 2005. (Exh. CC.) In his
13 motion, Elias, wrote the following:

14 On December 18, 2008, Petitioner was sentenced in this matter, petitioner did
15 enter a plea. As a part of the plea a stipulation was made by Deputy District
16 Attorney Matthew Murphy with Petitioner to have all his property returned to
him.

17 Respondents in this matter has [sic.] has released all of petitioner's property
18 except the currency in the amount of \$2,628.00 which they have refused to
19 release to the petitioner.

20 Petitioner has made a deal with D.A. Murphy in plea to have a property returned
not just a portion.

21 (Exh. CC, p. 2.)

22 On October 5, 2010, the Honorable Judge Thomas Goethals considered Elias' *Motion*
23 *to Order Release of Seized Property* and denied said motion without prejudice on the grounds
24 the motion, as submitted, was not in the proper substantive or procedural form. (Exh. V, p.
25 14.)

26 On December 15, 2010, Elias again filed a *Motion to Release of Seized Property* with
27 the court, naming as respondent the Costa Mesa Police Department, and requested his
28

1 approximately \$2800 be returned to him. (Attached herein as Exhibit DD.) In his motion,
2 Elias stated:

3 City of Costa Mesa Police Department and Detective Garcia - #488 are refusing
4 to release monetary funds to my mother Ellie Mangan in the amount of
5 \$2,628.00 (see property report, DR-Number 16303, attached as Exhibit A) that
6 was taken from me by Detective Garcia -#488 during an arrest in Case No.
05HF1751.

7 City of Costa Mesa Police Department has released the property from the
8 [a]forementioned case but not the monetary funds.

9 District Attorney Matt Murphy agreed in December 2008 to have all my
10 property and monetary funds released to my mother Ellie Mangan in regards to
11 my current court matter Case No. 05HF1751.

(*Ibid.*)

12 On January 10, 2011, Judge Robinson considered Elias' *Motion to Release of Seized*
13 *Property* and denied said motion without prejudice on the grounds that, again, the motion, as
14 submitted was substantially and procedurally deficient. (Exh. DD.) Specifically, the court
15 found the motion had deficient service of process, and that Elias' assertions were unsupported
16 in that the court was unable to determine the true owner of said property, "or whether it is
17 being unlawfully withheld." (Exh. V, p. 14.)

18 On September 28, 2012, Elias submitted to the court a *Petition, Declaration, and*
19 *Order for Return of Property*, and again petitioned the court to order the return of the
20 "\$2800+/- [*sic*] cash that was seized by the Costa Mesa P.D. on Sept. 8th 2005 [*sic*]."
21 (Attached herein as Exhibit EE.) Elias provided the following information for the Court in
22 support of his petition:

23 Court Doc's [*sic*] show that a deal was made by myself and the residing [*sic*]
24 Judge and Matt Murphy, DA, to return my property and money, after my
25 testimony in the DeLeon case.

26 (*Ibid.* [emphasis added].)
27
28

1 On November 2, 2012, Elias appeared before Judge Robison. Murphy was also
2 present and requested a continuance of the motion. Murphy's request was granted and the
3 motion was continued two weeks. (Exh. V, pp. 15-16.)

4 On November 16, 2012, Deputy District Attorney Jennifer Duke appeared on behalf
5 of Murphy and represented that the **prosecution was not opposed to the return of property**.
6 Judge Robison signed and granted Elias' *Petition, Declaration, and Order for Return of*
7 *Property* and authorized the release of the approximately \$2800 the Costa Mesa Police
8 Department seized from Elias on September 8, 2005. (Exh. EE; Exh. V, p. 15.)

9 On July 12, 2016, Elias filed a request with the court for a copy of the sentencing
10 transcript and any written orders associated with case 05HF1751. (Attached herein as Exhibit
11 FF.) In his request, Elias stated:

12 In 2012, the Judge, in [Case Number 05HF1751], issued an order at the
13 sentencing hearing, which commanded the Costa Mesa Police department to
14 return \$2,800 to the defendant Daniel Elias. The \$2,800 was confiscated from
15 the defendant Daniel Elias, on or about 9/28/2005, when the defendant was
16 arrested and taken into custody. As part of a guilty plea agreement in the above-
17 listed case, the Court issued said order. The order is analogous to an order of
(*Ibid.*)

18 On November 3, 2016, Elias filed a *Petition for A Writ of Replevin (Return of*
19 *Property)* with the court on his 05HF1751 case, naming as respondent the Costa Mesa Police
20 Department, and again requesting the return of the approximately \$2800 respondent seized
21 on September 8, 2005. (Attached herein as Exhibit GG.) In his petition, Elias again detailed
22 to the court that on or about November 16, 2012, Judge Robinson issued an order to return to
23 Elias the property seized by respondents on September 8, 2005, but that said property was
24 still being withheld from Elias and his authorized agent. (*Ibid.*)

25 On February 6, 2017, Elias filed a *Petition for A Writ of Mandate* with the court,
26 naming as respondent the County of Orange, and requested the court to order respondent to
27 return the approximately \$2,800 seized from his person on or about September 8, 2005.

28

1 (Attached herein as Exhibit HH.) In his petition, Elias detailed that while respondent may
2 have believed the money was subject to forfeiture, the case history and previous court order,
3 as discussed above, shows the money was not subject to forfeiture, and was to be returned to
4 Elias. (*Ibid.*) Elias thereafter requested that he also receive \$1,118.90 in accrued interest—
5 4% over the period of 11 years, 4 months—on the principal \$2,800, for a total of \$3,918.90.
6 (*Ibid.*) In addition, Elias requested the court award him an additional \$5,000 in punitive
7 damages for “Respondent’s unprofessional behavior,” for a total of \$8,266.00.¹⁹ (*Ibid.*) Elias
8 further outlined that had his cash been properly returned, he would not have suffered a
9 restitution fine, and requested the court order the prison housing Elias to not reduce his award
10 by the 55% deduction applied to inmate income. (*Ibid.*)

11 On March 7, 2017, the Honorable Judge Shelia Hanson considered Elias’ *Petition for*
12 *A Writ of Mandate* and denied the petition without prejudice, stating it had not been properly
13 served; the court stated it would consider a renewed motion on the issue upon proper service.
14 (Exh. V, p. 16.)

15 On April 25, 2017, Elias filed a *Petition for a Writ of Replevin (Return of Property)*,
16 naming as respondent the Costa Mesa Police Department, and requested the court order
17 respondent to return the approximately \$2,800 seized from him on or about September 8,
18 2005. (Attached herein as Exhibit II.) In his petition, Elias again cited to the November 16,
19 2012, order signed by the Honorable Judge Craig E. Robinson, which authorized the return
20 of this property to Elias. (*Ibid.*)

21 **11. Analysis of Relevance of *Deleon* and Murphy’s Actions Related to** 22 **Informant Elias.**

23 Information discovered postconviction about Murphy’s actual knowledge, prior to his
24 filing in *Wozniak*, about the role of OCSD deputies in working with and encouraging jail
25 informants, and his own experience in working with informants, is likely to be an issue raised
26 by *Wozniak*’s appellate counsel and reviewed by appellate courts that re-analyze judicial

27 ¹⁹ It is unclear how Elias obtained this figure, but it is believed this is a typographical error,
28 and should be \$8,918.90 based on the appropriate math.

1 determinations about what discovery and subpoenaed materials should be ordered, as well as
2 whether the death penalty should have been dismissed. What Murphy shared and what he
3 did not share, including about his own experiences in *Deleon*, may ultimately be deemed to
4 support ruling on a number of issues, in addition to those identified above.

5 For instance, Wozniak has argued that the OCSD should presumptively be considered
6 a member of the prosecution team whenever a jailhouse informant emerges with statements
7 from a defendant—and particularly from a high profile defendant. The memoranda and other
8 documents recently obtained in *Dekraai* further support that conclusion; that is, Special
9 Handling and module deputies have long operated a network of informants to obtain
10 information about both issues, and issues that support both criminal investigations and
11 prosecutions by the OCDA. What Murphy knew about this subject, beginning in 2014 when
12 this issue was first raised—as well as his own knowledge about how informants are often
13 provided post-testimony consideration in a manner that makes them most effective to the
14 prosecutor who calls them to the stand—could ultimately support a ruling that wide-ranging
15 informant discovery should be ordered. It is imperative that this evidence be available, if and
16 when such a ruling takes place.

17 **12. Murphy's Knowledge of OCSD Deputies in Working Informants and**
18 **Coordinating Informant Operations Prior to the Coordinated**
19 **Movement of Wozniak and Perez.**

20 Murphy possessed information, based upon his experience in *Deleon*, at a minimum,
21 that jail deputies—and particularly those from the Classification Unit, of which Special
22 Handling is a sub-unit—were working with informants in the jails to assist the prosecution
23 team, regardless of whether an agreement with the informant was in place. Allegedly, it was
24 Classification Deputy Gunsolley who pressed Elias to keep providing assistance even without
25 a promised benefit. Murphy, thus, certainly recognized no later than 2008 that jail deputies
26 helped solve crimes where the identified victim was located outside the jails, and did so
27 through the use of jail informants. Moreover, in Elias' letter to Murphy about *Deleon*, he
28

1 mentions his “work with Deputy Gunsolley here at the Jail.”²⁰ His “work” would have
2 logically been understood to mean informant work pre-dating his effort to obtain recorded
3 statements from Deleon. Even if somehow Elias intended to convey he was only “working”
4 Deleon, it is important that the letter was almost certainly written before Gunsolley
5 supposedly convinced Elias to participate in an operation to record their conversations after
6 being moved into the same cell. **This would strongly suggest Gunsolley was working with**
7 **Elias on the *Deleon* investigation to develop evidence while both Elias and Deleon were**
8 **being housed in an informant tank—and before he was purportedly told there would be**
9 **no deal.**

10 Although Murphy never was compelled to answer the question during the pendency
11 of *Deleon*, the prosecutor’s answer to the question of why he believed a classification deputy
12 was working with Elias to collect evidence on this case is an important one. Murphy
13 reasonably would have believed Gunsolley or Classification/Special Handling was
14 encouraged by the prosecution team to have informant(s) collect information, or instead that
15 jail deputies work with informants to collect statements from high value and high profile
16 targets—and are expected to do so without the direction of the OCDA or the investigating
17 agencies.

18 It is reasonable to ask whether the OCDA would acknowledge that the OCSD was a
19 member of the prosecution team, at least in the context of the solicitation for murder
20 investigation and prosecution of Deleon. There is a hardly an argument otherwise. But with
21 what emerges out of the *Deleon* study and the evidentiary developments since Wozniak’s
22 sentencing, the argument that OCSD was a member of the Wozniak prosecution becomes
23 even more compelling.

24 Murphy knew about Gunsolley’s role years before he would find out that Wozniak
25 was moved into the same unit as Perez, an imbedded long-term informant, who had arrived
26

27 ²⁰ Moreover, Elias’ use of the term “consideration” also would have conveyed to Murphy that
28 he was dealing with a writer well versed in the vernacular of the snitch. (Exh. S.)

1 just one day before Wozniak. Yet, in *Wozniak*, Murphy insisted that it was all a coincidence
2 and that there was no evidence that the movements were intended to enable Perez to collect
3 evidence from any target. Moreover, he argued this despite his eye-opening tutelage via
4 *Deleon*. In *Deleon*, Murphy must have believed the coordinated movement and placement
5 of the recording device by deputies was executed under the guiding hand of either the OCDA
6 or law enforcement members of the prosecution team—unless Classification was building the
7 case entirely on their own. And the active role of a classification deputy in supposedly
8 convincing an informant to do work after he was supposedly told there would be no “deal”
9 certainly instructed Murphy—if he did not know already—that deputies take an active role
10 in working with, and encouraging informants to produce helpful information. During Elias’
11 testimony, it also came to light that two informants (Elias and Kelly Henderson) happened to
12 find themselves assigned to the day room with Deleon for a single day. In addition, Murphy
13 also heard Elias testify that Deleon logically (and we now know, quite correctly) believed L-
14 20 was an informant tank. Indeed, Elias confirmed that L-20 was not being used for medical
15 purposes, telling Murphy during questioning, “It is, like, a drop-out and people who are in
16 trouble sector.” (Exh. P, p. 1283.)

17 Therefore, it is certainly difficult to believe that Murphy was shocked when he read,
18 or that he will be when reads the following, which is an undated memo from the Special
19 Handling Unit about what they wanted module deputies to do to keep L-20 working
20 effectively:

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1
2 **L-20 Thoughts/Requests**

- 3 • Run the Module like any other NORMAL Module.....No Special treatment.
4 • NO NON-COLLECT telephone calls...without PRIOR Special Handling
notification.
5 • Consider L-20 as an **AD-SEG** housing unit.
6 • Total separation means Total separation....NO exceptions!!
7 • Chain and Leg Irons...USE THEM!!!
8 • Inmates are handpicked to be in L-20 for both OCSD & other agencies.
9 • There are several current investigations being conducted, so PLEASE don't get
into anything (exchanging any information with inmates). PLEASE contact
S/H.
10 • Module Deputies are NOT the inmate's handlers.... Special Handling are the
handlers
11 • NOTHING EXTRA-
12 • NO EXTRA Dayroom
13 • NO EXTRA Outdoor Recreation
14 • NO EXTRA Telephone
15 • PLEASE Enforce ALL Jail Rules-just like any other Module.
16 • Write up inmates! For things like unauthorized Communication, possibly even
hand signing.
17 • **GIVE THE INMATES EVERYTHING THEY HAVE COMING**

18 (Exh. H., p. 23 [emphasis added in *Dekraai Unsealed Brief*].)

19 Similarly, Murphy and his colleagues were unlikely to be taken aback by the contents
20 of a 2007 memo discussing the Special Handling Unit located in Lacy and the institution that
21 recognized its informant directed efforts. Sergeant Irish wrote to Captain Wilkerson on
22 March 29, 2007, providing an "Executive Summary of Theo Lacy's Classification/Special
Handling Team," which included the following:

23 Intelligence Gathering: **The Theo Lacy Special Handling/Classification**
24 **team possesses an excellent expertise in the cultivation and management of**
25 **informants. This expertise is recognized by the Orange County District**
26 **Attorney's Office**, as well as, numerous law enforcement agencies throughout
Southern California.

27 (Exh. H, pp. 21-22 [emphasis added in *Dekraai Unsealed Brief*].)
28

1 But even assuming *arguendo* in 2008 that Murphy somehow did not glean the
2 significance of (a) an inmate “work[ing]” for a classification deputy, while the informant was
3 housed in a “medical unit” apparently stocked with informants; (b) the “work”
4 director/classification deputy having been responsible for convincing the informant to keep
5 collecting statements without a deal; and (c) the classification unit having coordinated the
6 movement of informant and target, and installed a recording device, the information that
7 began to come to light in *Dekraai* and *Wozniak* between 2014 and Wozniak’s sentencing
8 eliminated any claim of obliviousness.

9 Murphy knew that what occurred in *Deleon* corroborated Wozniak’s argument about
10 the role of jail deputies in developing and encouraging jail informants to work on
11 investigations separate from organized crime and jail safety issues. His experience in *Deleon*,
12 and what was coming to light in 2016, makes Murphy’s arguments about issues, such as the
13 meaning of Grover’s SH Log entry stating he told Wozniak to “marinate the Costa Mesa info”
14 that much more disturbing. Based upon his self-described careful analysis of the SH Log,
15 Murphy reasonably knew at that time that Grover and Garcia wrote the entry that the SH Log
16 would be terminated on the verge of Judge Goethals’ discovery order. He also reasonably
17 knew there was a five and one half month gap in the log. Moreover, Murphy had known
18 since Deputy Jonathan Larson’s testimony in 2015 that Mod J, where Wozniak and Perez
19 were moved, often housed informants and targeted inmates (just like L-20). Yet, Murphy
20 argued to this Court that the Classification/Special Handling Deputy Grover’s entry should
21 be read as the deputy wanting Perez to “chill out” and not do anything on Wozniak’s case.

22 It is finally known in 2017 that when Murphy made this argument, he did so having in
23 2008 introduced evidence and argued in another double murder special circumstances case
24 that **a classification deputy was the key in persuading an informant to participate in an**
25 **operation despite his purported reluctance.** If Murphy’s “marinate” analysis was genuine,
26 he must, in retrospect, be very thankful that Gunsolley did not use similar language with
27
28

1 Elias. If he had, Elias may have relaxed, done nothing, and the “extraordinary” testimony
2 that helped secure a death penalty verdict would have never been heard.

3 What took place in *Deleon*, Murphy’s knowledge of it, and his failure to share that
4 knowledge during the course of *Wozniak* may reasonably support a different calculus by the
5 reviewing court regarding a number of rulings including whether far more expansive
6 informant related evidence should have been turned over to the defense.

7 **13. Murphy’s Definition of Informant Raises Questions About Prior**
8 **Assertions and Arguments.**

9 In the instant matter, beginning with his declaration attached to *People’s Response to*
10 *Defense Motion to Continue*, filed on February 14, 2014, Murphy stated that,

11 4. At no time have I ever seen, proffered, offered leniency, or
12 communicated with Inmate F. or anyone one representing him. Further, I have
13 never spoken to, or communicated with any member of the Orange County
14 Sheriff’s Department concerning Inmate F. and his conversation with Daniel
15 Wozniak or any other criminal defendant.

16 (*Id.* at p. 4.)

17 On October 29, 2015, Murphy stated the following in in open court, regarding the
18 contact between Wozniak and Perez:

19 As soon as I learned of this, I immediately told the Sergeant at Costa Mesa,
20 “I’ve never used an informant. I’m not using one, especially in this case. We
21 don’t need this guy. We’re not touching him.” That was the end of it.

22 (*Wozniak*, R.T., Oct. 29, 2015, p. 1509.)

23 It is now increasingly clear that Murphy, like the OCSD, at times has defined
24 “informant” in a manner inconsistent with statute and his own agency’s policies. For
25 instance, the March 2014 Orange County Informant Index (“OCII”) Manual, created by the
26 OCDA, defines an informant as:

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28 ///

///

1 [A]ny person who knowingly provides information to law enforcement related
2 to another's criminal activity, whose motivations for doing so are other than
3 that of an uninvolved witness, victim, or private citizen primarily acting
4 through a sense of civic responsibility and who, as a general rule, but not
necessarily, expects some sort of benefit or advantage for himself, herself, or
another person in return.

5 (*Partial Orange County Informant Index Manual*, pp. 6-7, attached herein as Exhibit
JJ.)

6 The manual also states, "An IN CUSTODY INFORMANT is an inmate in custody
7 who provides information or testifies about matters another defendant told him while both
8 were in custody. Penal Code Sections 1127a, 1191.25 and 4001.1 govern their use." (Exh. Z,
9 p. 8 [capitalization in original].) Section 1127(a) states:

10 As used in this section, an "in-custody informant" means a person, other than a
11 codefendant, percipient witness, accomplice, or coconspirator whose testimony
12 is based upon statements made by the defendant while both the defendant and
13 the informant are held within a correctional institution.

(§ 1127, subd. (a).)

14 Elias was clearly an informant under both the state statute and the OCDA policy.
15 While Elias ultimately presented himself at trial as having had a civic-minded awakening, it
16 was also clear that when he originally shared the information he did it to obtain a benefit on
17 his case—and as will be discussed, Murphy knew very well that Elias never actually lost sight
18 of his objective.

19 **14. Murphy's Questioning of Elias and Closing Argument About**
20 **Informant's Motivations Are Relevant to Informant Discovery.**

21 One of the core issues in this instant matter related to informants, and informant
22 discovery, is the reliability of the representations by prosecutor Murphy on this subject
23 matter. In *Wozniak*, Murphy was steadfast in his representations that he did not encourage or
24 authorize any informant related efforts. Yet, as can be seen from *Deleon*, at a minimum
25 Murphy knew from his prior case that OCSD deputies encourage informants to assist criminal
26 investigations and prosecutions.

27 Additionally, during the litigation in *Deleon*, Murphy argued that what made the
28 testimony so compelling was the willingness of Elias, a man with a supposedly spine-chilling

1 rap sheet, to (a) stay in a local facility for a significant length of time even though his
2 supposed wish was to be sent to state prison to serve the sentence awaiting him; (b) turn the
3 corner as a human being and assist the prosecution even though he would be branded a
4 “snitch;” and (c) conduct informant work and testify about it knowing he would receive no
5 benefit from this work. The latter two claims were quite similar to those made by both
6 Murphy’s supervisor in *Dekraai* and informant Perez. In arguing against the release of
7 discovery to the defense in 2013, Assistant District Attorney Dan Wagner declared that Perez
8 had also come forward and participated in the recording of *Dekraai* because of a moral
9 obligation—having done so without any desire for consideration, and even after being told
10 he would receive none. Perez was a convicted defendant awaiting sentencing at the time of
11 his contact with *Dekraai*—just as Elias was when was purportedly told that the prosecution
12 would not give him a deal.²¹

13 As noted earlier, Murphy powerfully argued these points compellingly in *Deleon*:

14 And that man, ladies and gentlemen, came in here with his waist chains on, **on**
15 **his way to prison**, and he testified anyway. **And, that is extraordinary. He**
16 **got nothing from it.**

17 (Exh. B, p. 2046 [emphasis added].)

18 Murphy continued:

19 ///

21 ²¹ As discussed in previous motions, former OCDA investigator Robert Erickson e-mailed a
22 letter to former Senior Deputy District Attorney Erik Petersen, the prosecutor of Perez, asking
23 that he take into “consideration” his critically helpful efforts in *Dekraai*. (Both Wagner and
24 co-prosecutor Senior Deputy District Attorney Scott Simmons claimed they never read the
25 letter because they never opened the attachment. *Dekraai* finally received it nearly two years
26 after it was written.) Moreover, when Perez was finally sentenced by the Honorable Gregory
27 Prickett in 2015, the OCDA appears to have given significant consideration in the form of
28 not sharing damaging admissions by Perez made in the *Dekraai* hearings, in which the
informant admitted authoring his misleading written statements to the court and creating a
plan to obtain a new trial through fraudulent testimony. That would, objectively speaking,
seem to be considerable consideration. Perez avoided a life sentence.

1 Remember his answer? Folks, you haven't seen his rap sheet. Sent plenty of
2 chills down my spine. He leans into the microphone and says, "Oh, no, sir, I
do have friends that would do that."

3 Mr. Pohlson asked him, "Well, you didn't take this seriously, did you?"

4 Again, leans into the microphone with that tick that he had, that we all saw,
5 "Oh, no, sir, I took this very seriously."

6 **That man had a fit of conscience.** And that's why you heard from him.
7 Because in the criminal world, ladies and gentlemen, in this -- and this kind of
8 puts this in context a little bit. What that guy did in this case is so horrendous.
9 And what he was trying to do from the jail while, theoretically, society is
protected from him.

10 What he did is so bad that even somebody like Daniel Elias wanted no part of
11 it. **And even he wanted to do his part. And it is going to kind of sound**
12 **corny, but for justice. I submit to you his testimony was extraordinary.**
(Exh.B, p. 2046-47 [emphasis added].)

13 Again the closing matched Murphy's questioning and Elias' responses:

14 Q. Okay. And, as you sit there now, what are you getting for your cooperation?

15 A. Nothing. But, I have been stuck in this jail for a couple years.

16 Q. You were going to go start serving your prison sentence, right?

17 A. Yeah.

18 Q. **In fact, by cooperating, in a weird way you actually -- you are worse off**
19 **than you would have been, right?**

20 A. **Yeah, way worse.**

21 Q. Okay. Because, **you would rather be in prison than jail, right?**

22 A. Yeah.

23 (Exh. P, p. 1308 [emphasis added].)

24 Q. And, as you sit there now, **you are not getting anything for this other than**
25 **extra time in the Orange County Jail and a snitch jacket when you get**
26 **to the joint, right?**

27 A. Yeah.

28 (Exh. P, p. 1309 [emphasis added].)

What was taking place in the courtroom was truly extraordinary—but not for the
reasons suggested by Murphy or Elias. Murphy and Elias knew what had occurred was not
motivated by a "fit of conscience." Both also knew that while the informant had gotten

1 “nothing for it” at the moment of his testimony, it was just a matter of time until he would
2 have the chance to get precisely what he wanted. Beginning in 2006, when Elias agreed to
3 continue to assist without an up-front deal, Murphy had every reason to believe Elias would
4 testify consistent with what he described about his contact with Deleon. For the next two and
5 one half years, Elias asked to continue his sentencing time after time so that he could be
6 sentenced **after** he testified in at least one of Deleon’s cases. Therefore, Murphy had every
7 reason to believe he would ultimately choose words and phrases like “*fit of conscience*” and
8 “*extraordinary*” to describe the informant’s participation, and that the sentencing court would
9 understandably, and very likely, take a description of what Elias allegedly did into
10 consideration. And, that is exactly what happened.

11 Murphy and Elias also realized, despite what was presented, that there was absolutely
12 no reason for Elias to stay in a local jail if his true wish was to simply begin serving his prison
13 sentence. If Elias wanted to start serving a prison sentence he could have done so from the
14 very moment he pled guilty in 2006. But if he went to prison, of course, it would only occur
15 after having been sentenced—and that was what Elias desperately wanted to avoid. If what
16 was presented to the *Deleon* jury was authentic, the supposedly reformed Elias could have
17 enjoyed the prison environment he allegedly yearned for, and simply have been transported
18 back for a single day of testimony whenever Murphy called him as a witness at either the
19 penalty phase or the pending solicitation for murder case. He could have spent the two and
20 one half years that followed his plea in a state penitentiary, and returned to spend just a few
21 days or less in the county jail. But, again, if Elias were to go to prison, he would have to have
22 been sentenced without the benefit of a sentencing court hearing about his cooperation—a
23 benefit which Elias knew would give him far and away his best chance at getting the sentence
24 he wanted: credit for time served, meaning not a day spent in prison.

25 Similarly, if Murphy did not anticipate Elias receiving a benefit for his cooperation—
26 nor believed he should—there certainly was no reason for Murphy to take over as the
27 prosecutor for the sentencing phase of Elias’ case in 2007. There would have been no
28

1 motivation for Murphy to allow continuance after continuance, until shortly after Elias
2 testified in Deleon—unless he had wanted to make it absolutely clear to Elias that he would
3 be there with him all the way through sentencing. Again, if what Murphy told the *Deleon*
4 jury was the truth—that Elias “got nothing from [his cooperation]”—Murphy should have
5 told Elias’ sentencing court each of the many times Elias requested a continuance that there
6 was no reason to delay sentencing a single day.

7 Murphy could not have been more clear in telling the jury there was no benefit
8 whatsoever for Elias’ testimony, that Elias was actually worse off for his decision to
9 cooperate, and that Elias was telling the truth in agreeing when answering Murphy’s
10 questions on this subject. But Murphy’s argument would have matched much more closely
11 with the truth if he said something like the following: “Elias has not received a benefit, yet.
12 He desperately wants a sentencing reduction, as his second letter on the *Quan* case shows.
13 But he is wisely waiting until after he testifies. That way, it can be presented to the sentencing
14 court that despite the lack of any deal being in place, and despite the personal risk to himself,
15 he provided tremendously valuable testimony. Elias certainly believes he has a real shot at a
16 sentence reduction, and with my help, he certainly does.” Instead, by avoiding words like
17 those above, Murphy was able to talk to the sentencing court about his own sudden “fit of
18 conscience” that compelled him to ask that Elias be rewarded.

19 During habeas review in *Wozniak*, the authenticity of Murphy’s representations
20 regarding his own use of informants supports a re-analysis of whether his representations
21 regarding informants in the instant matter should be deemed trustworthy and whether far
22 more expansive discovery should be allowed.

23 **a. Murphy’s Alleged Agreement to Return Forfeited Cash to Elias.**

24 As detailed above, for the past seven years, and continuing through a filing as recently
25 as last month, Elias has been petitioning courts for the return of \$2628, which he claims,
26 Murphy promised would be returned to him. According to Elias’s first filing in 2010:

27 ///

1 On December 18, 2008, Petitioner was sentenced in this matter, petitioner did
2 enter a plea. As a part of the plea a stipulation was made by Deputy District
3 Attorney Matthew Murphy with Petitioner to have all his property returned to
4 him.
(Exh. CC.)

5 He added, "Petitioner has made a deal with Murphy in plea to have a property returned
6 not just a portion." (Exh. CC.) While Elias wrote that "as part of the plea," the agreement
7 for the return of property was made, it is certainly reasonable that the agreement with Murphy
8 came at the time of sentencing. There is, however, no reference to the return of property in
9 the transcript from the day of sentencing, nor are there any documents filed with the court
10 memorializing this agreement.

11 If, indeed, Murphy agreed to return the cash to Elias it would truly be an extraordinary
12 benefit for two reasons. First, the OCDA charged Elias in this case as an armed drug
13 salesman, believing the cash was intertwined with his unlawful drug sales operation. The list
14 of items seized included heroin, methamphetamine, and cocaine, two digital scales, a
15 notebook containing pay/owe sheets, two pistols, a loaded magazine with bullets, and several
16 different categories of bullets. (*Property Report Sheets*, as contained in Exhibit DD, attached
herein as Exhibit Z.)

17 Second, the OCDA had received an order from Judge Robison in 2006—before Elias
18 even pled guilty—authorizing forfeiture of the cash. And forfeiture occurred. In his 2012
19 filing, Elias connected his testimony in *DeLeon* to Murphy's alleged agreement to return
20 proceeds that the OCDA believed were the proceeds of criminal activity. He wrote that
21 "Court Doc's [*sic*] show that a deal was made by myself and the residing [*sic*] Judge and Matt
22 Murphy, DA, **to return my property and money, after my testimony in the DeLeon case.**"
23 (Exh. EE [emphasis added].) As discussed previously, on November 2, 2012, Murphy
24 appeared personally for the only time in the course of the forfeiture proceedings. (Exh. V,
25 pp. 14-15.) On that date, Murphy requested a continuance. Murphy did not file a responsive
26 document contesting Elias' representations. On November 16, 2012, Deputy District
27 Attorney Jennifer Duke appeared for Murphy and represented that the **prosecution was not**
28

1 **opposed to the return of property.** (*Id.* at p. 16.) Judge Robison granted the request. (*Ibid.*)
2 Five years later, Elias has not received the cash and continues to fight for that money in vain.

3 On its face, the decision not to oppose the return of property—as well as the decision
4 not to contest what Elias said about their “deal”—strongly suggests that Murphy knowingly
5 agreed to return the drug money to Elias in 2008. That decision, even assuming somehow
6 that Murphy never knew about the forfeiture, also warrants use of the term “extraordinary.”
7 Murphy, an experienced prosecutor, certainly did not believe with any reasonable certainty
8 that a man whose rap sheet supposedly sent “plenty of chills” down his spine was assuredly
9 changed simply because he testified for the prosecution (and pretended the motive was to
10 stop future violence). If, on the other hand, Elias misrepresented the “deal,” it hardly makes
11 sense that Murphy agreed to help execute it in 2012 by agreeing to have the money returned.
12 Ultimately, if Elias’ statement that Murphy agreed to give the money back was not true, then
13 the prosecutor has been long aware of newly discovered evidence that his formerly
14 extraordinary witness was also a dishonest one.

15 These types of actions, which take years, if ever, to uncover, are important in
16 supporting a wide ranging search for favorable, yet undisclosed evidence within the materials
17 *Wozniak* seeks to preserve.

18 **b. *Murphy’s Belief that Long-Time Violent Criminals Can Be***
19 ***Extraordinary Informants.***

20 Based upon what actually occurred in *Deleon*, it is understandable that Murphy was
21 none too anxious to introduce his use of Elias into the instant litigation. *The problem is that*
22 *it was necessary.*

23 *Wozniak* emphasized in arguments, before and after trial, that the decision by the
24 county to operate a jailhouse informant program did create exclusive rights over the
25 statements collected and the observations made. Moreover, if prosecutors have relied upon
26 informants to convict defendants and support death penalty verdicts, fairness dictates that at
27 least some of these witnesses are reliable enough to exculpate and support verdicts of life
28 without possibility of parole.

1 This Court expressed its view that jailhouse informants were unlikely to be compelling
2 witnesses, stating on August 17, 2016:

3 And the new idea that the best witness of all would be a jail informant is just
4 not the way it works. Jail informants who have axes to grind who are witnesses,
5 who vacillate between being cooperative and uncooperative, who are usually
6 facing life with the equivalent kind of sentence, for Mr. Perez it was a three
7 strikes case, are no way the best witness. The best witness would be someone
8 who was there on very light charges like driving under the influence with priors
9 or a small amount of dope, who had no prior record, who was befriended by
10 Mr. Wozniak, who doesn't have all the baggage that a snitch would have.
11 There's no way that a snitch would be an excellent witness.
12 (R.T., *People v. Wozniak*, Aug. 17, 2016, at pp. 4773-76.)

13 Unbeknownst to this Court and Wozniak and his counsel, Murphy could not have
14 disagreed more strongly. Elias, like Perez, was originally facing a three strike case. He has
15 a criminal record that supposedly sent “plenty of chills” down the prosecutor’s spine. He did
16 not have “a small amount of dope.” In fact, he had ample illegal narcotics—three kinds—
17 was selling it, and was apparently ready to protect it with a loaded weapon. Yet the testimony
18 of Elias was “extraordinary.” Murphy should have shared his evaluation of Elias’ testimony
19 in *Deleon*, and his belief that informants with his type of background could be
20 “extraordinary,” and “valuable” to whatever party called such a witness, particularly in light
21 of the Court’s comments. Considering that while serving as a prosecutor, this Court, Orange
22 County District Attorney Rackauckas, and many others in the OCDA had called upon
23 jailhouse informants, Murphy’s more recent experience should have bolstered Wozniak’s
24 argument sufficiently to warrant a different ruling—and, of course, a different conclusion
25 may be reached on appeal with this newly discovered evidence now available.

26 Lest there be any lack of clarity, Wozniak believes that many of the representations
27 made by Murphy about Elias were misleading—but they did not have to be. Informants can
28 be authentically presented, with any and all facts available that could compromise their
believability—including motives to lie, hoped for benefits, and troubled criminal
backgrounds—with jurors free to fairly decide if the testimony is yet compelling and credible.

1 Additionally, as has been pointed out previously, a defendant in a criminal case lacks the one
2 power that can consciously or unconsciously work to skew reliability, which is the ability to
3 affect the outcome of an informant's case.

4 **V. CONCLUSION**

5 For the reasons stated, it is respectfully requested that this Court order the requested
6 preservation of records as requested.

7
8 DATED: May 10, 2017

Respectfully submitted,

SHARON PETROSINO
Public Defender
Orange County
Tracy Lesage
Assistant Public Defender

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14 Scott Sanders
Assistant Public Defender