

1 BIRGIT FLADAGER
2 Stanislaus County District Attorney
3 832 12th Street, Suite 300
4 Modesto, CA 95354
5 Telephone: (209) 525-5550

6 Attorney for the Plaintiff

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CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

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Ana Valencia

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF STANISLAUS**

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11 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO.: 1490969

12 Plaintiff,)

13 vs.)

14 FRANK CLIFFORD CARSON,
15 BALJIT ATWAL,
16 DALJIT ATWAL,
17 WALTER WESTLEY WELLS,
18 GEORGIA DEFILIPPO,
19 CHRISTINA DEFILIPPO,
20 EDUARDO QUINTARA, and
21 SCOTT MCFARLANE,

22 Defendants.)

23 **PEOPLE'S OPPOSITION TO**
24 **DEFENDANT B. ATWAL'S**
25 **MOTION TO DISMISS BECAUSE**
26 **OF OUTRAGEOUS**
27 **GOVERNMENT MISCONDUCT**
28 **AND REQUEST FOR ORDER IN**
29 **RE CONTEMPT**

30 Date: October 1, 2015
31 Time: 10:00 a.m.
32 Dept: 26

The Honorable Barbara Zúñiga

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34 **I.**
35 **Introduction**

36 The People submit defendant's motion is replete with inaccuracies and misstatements
37 regarding the People's careful approach in the handling of the investigation into the death of
38 Korey Kauffman. At all costs, the People made every effort to ensure that due process was
39 provided to all defendants as the People recognized their specific duty not only to prosecute
40 murderers but to ensure that justice is done.

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II.

POINTS AND AUTHORITIES

A. The Standard of Review

The determination of whether the government engaged in outrageous conduct in violation of the defendant's due process rights is a mixed question. The first step involves the consideration and weighing of the evidence and assessing the credibility of the witnesses to determine factually whether, and to what extent, governmental misconduct occurred. This factual determination is clearly one that is subject to a deferential standard of review. But the second step—whether the governmental conduct constitutes outrageous conduct in the constitutional sense of violating the defendant's due process rights—involves the application of law to the established facts and is primarily a legal question. . . . We hold therefore that the trial court's finding that the governmental conduct was outrageous in violation of defendant's due process rights thereby warranting dismissal is subject to independent review.

(*People v. Uribe*, *supra*, 199 Cal.App.4th at pp. 857-858.)

B. Dismissal is Unwarranted Because the Prosecutor's Conduct did not Violate Respondent's Substantive Due Process Rights and was not Conscience-Shocking in a Constitutional Sense

Due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. (*United States v. Salerno* (1987) 481 U.S. 739, 746.) “[T]he substantive component of the Due Process Clause is violated by executive action only when it ‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’” (*Collins v. City of Harker Heights* (1992) 503 U.S. 115, 128.) “While the measure of what is conscience shocking is no calibrated yard stick, it does” “‘point the way.’” (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 847.)

“Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property,” and only the most egregious conduct rises to the level of an abuse of power that shocks the conscience. (*Daniels v. Williams* (1986) 474 U.S. 327, 331, italics in original.) For example, in *Rochin v. California* (1952) 342 U.S. 165, sheriffs' deputies had information that petitioner was selling drugs so they went to the home petitioner shared with his mother and others. (*Id.* at p. 166.) Deputies noted that the outside door was open, so they entered the home and forced open the door to petitioner's room on the

1 second floor. (*Ibid.*) Petitioner was sitting on the side of the bed and deputies observed two
2 capsules on a nightstand. (*Ibid.*) When they asked petitioner who the capsules belonged to,
3 petitioner swallowed them. (*Ibid.*) Deputies jumped on petitioner and tried to extract the
4 capsules. (*Ibid.*) They were unsuccessful and took petitioner to a hospital. (*Ibid.*) One of the
5 deputies directed a doctor to force a tube into petitioner's stomach. The "stomach pumping"
6 caused petitioner to vomit, and deputies found the two capsules of morphine in the vomit. (*Ibid.*)
7 Petitioner was convicted of possessing morphine, and the appellate court affirmed. (*Ibid.*)

8 The United States Supreme Court reversed the conviction finding a violation of petitioner's
9 substantive due process rights. The Supreme Court felt compelled to conclude that,

10 [T]he proceedings by which th[e] conviction was obtained do more than
11 offend some fastidious squeamishness or private sentimentalism about combatting
12 crime too energetically. This is conduct that shocks the conscience. Illegally
13 breaking into the privacy of the petitioner, the struggle to open his mouth and remove
14 what was there, the forcible extraction of his stomach's contents—this course of
15 proceeding by agents of government to obtain evidence is bound to offend even
16 hardened sensibilities. They are methods too close to the rack and the screw to permit
17 of constitutional differentiation.

18 (*Rochin v. California, supra*, 342 U.S. at p. 172.)

19 Since deciding *Rochin*, the Supreme Court has determined that "liability for negligently
20 inflicted harm is categorically beneath the threshold of constitutional due process." (*County of*
21 *Sacramento v. Lewis, supra*, 523 U.S. at pp. 848-849.) Instead, "conduct intended to injure in
22 some way unjustifiable by any government interest is the sort of official action most likely to rise
23 to the conscience-shocking level." (*Id.* at p. 849.)

24 Applying these principles, in *People v. Alexander* (2010) 49 Cal.4th 846, the California
25 Supreme Court rejected defendant's substantive due process claim because there was "no
26 evidence of an unjustifiable intent to harm defendant by invading his attorney-client privilege."
27 (*Id.* at p. 893.) In that case, before jury selection began, the prosecution obtained a warrant
28 authorizing law enforcement to monitor and record conversations from several telephones,
including the one at defendant's parents' home. (*Id.* at p. 884.) During jury selection, the
prosecution provided defense counsel with a transcript of the intercepted calls, which included a
conversation between defendant, his mother, and a defense investigator. (*Ibid.*) During the call,

1 they discussed potential defense witnesses and how the defense might respond to the
2 prosecution's evidence. (*Ibid.*) Defense counsel filed a motion to dismiss and, after an
3 evidentiary hearing, the trial court found defendant had made a prima facie showing that the call
4 was a privileged communication. (*Id.* at p. 886.) But, the trial court "concluded interception of
5 the call was 'at best,' a 'technical violation of the attorney/client relationship, not exploited, not
6 undertaken in bad faith, ... and [it] could not have had any bearing on the outcome of this trial.'" (*Id.*
7 at p. 887.) Since "the interception of the call did not prejudice defendant or benefit the
8 prosecution," the trial court denied defendant's motion. (*Id.* at p. 886.)

9 On direct appeal, the California Supreme Court found inter alia that the governmental
10 conduct was "not so egregious as to shock the conscience such that the conduct was arbitrary in
11 the constitutional sense." (*People v. Alexander, supra*, 49 Cal.4th at p. 892.) Our Supreme Court
12 reasoned,

13 The record demonstrates that the interception of the call at issue, if improper
14 at all in a constitutional sense, was the result of negligence in interpreting the privilege
15 statute in the heat of the moment. As the high court has stated, however, "liability for
16 negligently inflicted harm is categorically beneath the threshold of constitutional due
17 process." (*Lewis, supra*, 523 U.S. at p. 849, 118 S.Ct. 1708.) It is only "behavior at
18 the other end of the culpability spectrum that would most probably support a
19 substantive due process claim; conduct intended to injure in some way unjustifiable
20 by any government interest is the sort of official action most likely to rise to the
21 conscience-shocking level." (*Ibid.*) Because there is no evidence of an unjustifiable
22 intent to harm defendant by invading his attorney-client privilege, we conclude his
23 substantive due process rights were not violated.

24 (*Id.* at p. 893.)

25 More recently, in *People v. Uribe, supra*, 199 Cal.App.4th 836, a case involving
26 prosecutorial misconduct, the Sixth District Court of Appeal declined to find a substantive due
27 process violation. There, defendant had been convicted of committing various sex acts on his
28 granddaughter. (*Id.* at p. 840.) On appeal, the court reversed the convictions because the Sexual
Assault Response Team had failed to disclose a video of the victim's medical examination in
violation of *Brady v. Maryland* (1963) 373 U.S. 83. (*Ibid.*) On remand, defense counsel filed a
motion to dismiss on the grounds of double jeopardy and outrageous prosecutorial misconduct in
violation of defendant's due process rights. (*Id.* at p. 841.) After extended evidentiary hearings,

1 the trial court concluded that the deputy district attorney who prosecuted the first trial had testified
2 untruthfully during the evidentiary hearing. (*Ibid.*) The trial court granted the motion to dismiss,
3 finding the existence of “egregious prosecutorial misconduct committed *following reversal for a*
4 *Brady* violation [that was] ... so grossly shocking and outrageous that it offends the universal
5 sense of justice to allow prosecution in this matter to proceed.” (*Id.* at p. 841, italics in original.)

6 The People appealed the trial court’s dismissal order. (*People v. Uribe, supra*, 199
7 Cal.App.4th at p. 841.) The Sixth District rejected defendant’s substantive due process claim
8 because:

9 In the absence of a fundamental liberty interest having been abridged by the
10 prosecutorial misconduct here—and, further, because the more-specific-provision
11 rule [citation] applies—defendant’s substantive due process claim fails. [The
12 prosecutor’s] misconduct was certainly conscience-shocking in the sense that it
13 involved false testimony by a prosecutor in a formal criminal proceeding. [Citation.]
14 But it did not involve “brutal and . . .offensive” conduct employed to obtain a
15 conviction. [Citation.] Defendant was not entitled to dismissal for outrageous
16 governmental conduct shocking the conscience in violation of substantive due process
17 under *Rochin* and its progeny.

18 (*Id.* at p. 865.)

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**2. Dismissal on Procedural Due Process Grounds is Unwarranted Because the
People Demonstrated that Defendant did not Suffer Prejudice with Regard to
his Ability to Receive a Fair Trial**

“Due process guarantees that a criminal defendant will be treated with ‘that fundamental
fairness essential to the very concept of justice. In order to declare a denial of it [the court] must
find that the absence of that fairness fatally infected the trial; the acts complained of must be of
such quality as necessarily prevents a fair trial.’” (*United States v. Valenzuela-Bernal* (1982) 458
U.S. 858, 872, quoting *Lisenba v. California* (1941) 314 U.S. 219, 236 [considering the use of a
coerced confession as a due process violation].) “[T]he touchstone of due process analysis in
cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the
prosecutor.” (*Smith v. Phillips* (1982) 455 U.S. 209, 219.) “[T]he aim of due process ‘is not
punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the
accused.’” (*Ibid.*, quoting *Brady v. Maryland* (1963) 373 U.S. 83, 87.) “Where it appears that
the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance

1 of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the
2 misconduct.” (*People v. Zapien* (1993) 4 Cal.4th 929, 967.) “[T]he People also have the burden
3 to show that there was no substantial threat of demonstrable prejudice.” (*People v. Uribe, supra*,
4 30 Cal.App.4th at p. 1259.)

5 In *People v. Zapien, supra*, 4 Cal.4th 929, the California Supreme Court found that the
6 sanction of dismissal for prosecutorial misconduct is warranted only where the defendant suffers
7 actual prejudice to his ability to receive a fair trial, or a substantial likelihood of such prejudice.
8 (*Id.* at p. 967.) There, a deputy district attorney prosecuting a death penalty case, found an
9 audiotape inside a sealed envelope bearing defense counsel’s name. (*Id.* at p. 961.) The deputy
10 district attorney instructed his detective to listen to the tape and report to him what was on the
11 tape. (*Ibid.*) Instead, the detective threw the sealed envelope into a dumpster. (*Ibid.*) The tape
12 contained defense counsel’s dictation of the strengths and weaknesses of the case. (*Id.* at p. 962.)
13 The tape was never found, but defense counsel had a transcript of the contents. (*Ibid.*) The trial
14 court denied counsel’s motion for dismissal or other sanctions and his motion to recuse the District
15 Attorney’s Office. (*Ibid.*)

16 On appeal, the California Supreme Court concluded that dismissal was not warranted under
17 the circumstances, noting that “even though [the detective’s] destruction of the tape recording
18 clearly was improper, the imposition of sanctions is warranted only if defendant suffered prejudice
19 as a result.” (*People v. Zapien, supra*, 4 Cal.4th 929, 967.) Our Supreme Court reasoned:

20 As the United States Supreme Court explained in a related context: “[T]he interest of
21 society in deterring unlawful police conduct and the public interest in having juries
22 receive all probative evidence of a crime are properly balanced by putting the police
23 in the same, not a *worse*, position that they would have been in if no police error or
24 misconduct had occurred. [Fn. and citations omitted.]” (*Nix v. Williams* (1984) 467
25 U.S. 431, 443.)

26 As noted above, the destruction of the contents of the tape recording did not
27 prejudice defendant, because the contents of the tape recording had been preserved
28 by transcription. It would have been inappropriate, therefore, for the trial court to
impose sanctions for the destruction of the contents of the tape recording, particularly
the severe sanction of dismissal. “[A]bsent demonstrable prejudice, or substantial
threat thereof, dismissal of the indictment is plainly inappropriate, even though the
violation [of the defendant’s right to counsel] may have been deliberate. [Fn.]”
(*United States v. Morrison* (1981) 449 U.S. 361, 365.)

1 (Id. at p. 967.)

2 Applying these principles, in *People v. Uribe*, *supra*, 199 Cal.App.4th 836, the Sixth District
3 Court of Appeal reiterated that “a showing of prejudice to defendant’s right to a fair trial was
4 required and that the absence of such a showing precluded dismissal as a sanction for prosecutorial
5 misconduct.” (Id. at p. 861.) As discussed above, the trial court found that the prosecutor falsely
6 testified during an evidentiary hearing. (Id. at p. 865.) The trial court granted defendant’s motion
7 to dismiss, finding the existence of “egregious prosecutorial misconduct committed *following*
8 *reversal for a Brady violation* [that was] ... so grossly shocking and outrageous that it offends the
9 universal sense of justice to allow prosecution in this matter to proceed.” (Id. at p. 841, italics in
10 original.) The People appealed. (*Ibid.*) After addressing defendant’s claims, the appellate court
11 concluded that there was no showing that the prosecutor’s misconduct had impacted defendant’s
12 constitutional right to receive a fair trial or otherwise prejudiced his rights. (Id. at p. 874.) The
13 court also concluded that “the [trial] court was not empowered to dismiss the information based
14 upon the prosecutorial misconduct it found to have occurred, absent a showing (and finding by
15 the court) of its significant impact on defendant, namely, that the misconduct prevented him from
16 receiving a fair retrial.” (Id. at p. 875.)

17 Similarly, here, the record does not reveal any prejudice or a substantial threat thereof to
18 defendant’s *ability to receive a fair trial* as a result of the prosecutor’s conduct during pre-filing
19 proceedings. Defendant is not deprived of his ability to receive a fair trial.

20 Courts consistently have held that a trial court has no discretion to dismiss an information
21 as a sanction for misconduct where no prejudice to the defendant’s ability to receive a fair trial
22 results. For example, in *United States v. Morrison* (1981) 449 U.S. 361, the United States
23 Supreme Court assumed that law enforcement officers had violated defendant’s Sixth
24 Amendment right to counsel when they met with defendant without her counsel present and
25 sought her cooperation in a related investigation. The Court nonetheless held that defendant was
26 not entitled to dismissal of the indictment because she had “demonstrated no prejudice of any
27 kind, either transitory or permanent, to the ability of her counsel to provide adequate
28 representation in these criminal proceedings.” (Id. at p. 366.) The Court emphasized that the

1 relief sought must be tailored to the circumstances to ensure that defendant receives the effective
2 assistance of counsel and a fair trial. (*Id.* at p. 365.) It continued:

3 The premise of our prior cases is that the constitutional infringement identified
4 has had or threatens some adverse effect upon the effectiveness of counsel's
5 representation or has produced some other prejudice to the defense. *Absent such*
6 *impact on the criminal proceeding, however, there is no basis for imposing a remedy*
7 *in that proceeding, which can go forward with full recognition of the defendant's right*
8 *to counsel and to a fair trial.* [¶] More particularly, absent demonstrable prejudice,
9 or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even
10 though the violation may have been deliberate."

11 (*Id.* at p. 365, italics added, footnote omitted.) Thus, the sanction of dismissal is appropriate only
12 where there is discernible prejudice that cannot otherwise be remedied by less drastic treatment.
13 (*Ibid.*, fn. 2.)

14 Likewise, in *In re Martin* (1987) 44 Cal.3d 1 the California Supreme Court overturned a
15 defendant's conviction based on the prosecutor's interference with defendant's right to present
16 material witnesses. (*Id.* at p. 52.) Although the Court agreed that defendant was entitled to a new
17 trial, it rejected defendant's argument that he was entitled to a dismissal of the charges and a bar
18 to prosecution. (*Ibid.*) Our Supreme Court acknowledged that such a sanction may be warranted
19 where "the prosecutorial action in question prejudiced the defense by undermining the defendant's
20 ability to mount a defense," but it observed that "no such prejudice appears or is even alleged" in
21 the case before it. (*Id.* at p. 54; see *People v. Memro* (1995) 11 Cal.4th 786, 836 ["[T]he [trial]
22 court decided that even if there was intentional interference with th[e] right [to counsel], defendant
23 had been able to show no prejudice. [¶] The ruling was sound. ... [N]othing in the record suggests
24 that attorney-client communications were revealed, and the prosecutor stated in his offer of proof
25 that no information from the materials was known to, received by, or used to benefit the
26 prosecution or the police."]; see also *People v. Lowery* (1988) 200 Cal.App.3d 1207, 1228 [in
27 holding dismissal unwarranted, the court observed that defendant had "made no attempt to
28 demonstrate how he suffered any prejudice from the taping of his conversation. ... Instead, he
29 merely argues that such prejudice ought to be presumed. In the light of *Morrison* we cannot agree.
30 Absent demonstrable prejudice, or substantial threat thereof, dismissal of the information is

1 plainly inappropriate.”). As this authority makes clear, a trial court errs if it dismisses a case
2 based on prosecutorial misconduct that does not impair a defendant’s ability to receive a fair trial.

3 4 **3. The California Outrageous Governmental Conduct Cases do not Support the Sanction of Dismissal**

5 An older line of California authority recognizes the trial court’s power to dismiss a
6 prosecution for outrageous law enforcement conduct that interferes with the accused’s right to
7 due process of law. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742; *Morrow v. Superior Court*
8 (1994) 30 Cal.App.4th 1252; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422.) “When
9 conduct on the part of authorities is so outrageous as to interfere with an accused’s right of due
10 process of law, proceedings against the accused are thereby rendered improper. [Citations.]”
11 (*People v. Boulas, supra*, 188 Cal.App.3d at p. 429.) “The constitutional bar of outrageous law
12 enforcement conduct . . . may be invoked against police or prosecutorial conduct that does not
13 involve inducement to crime and therefore cannot serve as the basis for an entrapment defense.”
14 (*People v. Smith* (2003) 31 Cal.4th 1207, 1228-1229 (conc. opn. of Werdeger, J.), citing *People*
15 *v. Holloway* (1996) 47 Cal.App.4th 1757, 1767.)

16 In *Barber v. Municipal Court, supra*, 24 Cal.3d 742, the California Supreme Court held that
17 conduct by government agents that infringed on confidential attorney-client communications
18 warranted a dismissal of the information. (*Id.* at pp. 751-752, 756.) There, two local police
19 agencies learned that a demonstration was planned at one of Pacific Gas and Electric Company’s
20 nuclear power plants. The agencies sent undercover officers to meetings for the demonstration.
21 After the demonstrators had been arrested and retained counsel, an undercover officer attended
22 meetings, participated in defense strategy sessions, and passed along information to his superiors.
23 (*Id.* at pp. 747-748.) Our Supreme Court determined that such conduct violated the protestors’
24 rights to private consultation with their attorneys. (*Id.* at p. 756.) The Supreme Court further held
25 that the appropriate remedy was dismissal of the charges. (*Id.* at pp. 759-760.) The court found
26 that the defendants’ right to a fair trial had been compromised because the police conduct had
27 caused such distrust on the part of the defendants that they were no longer willing to participate
28 in the preparation of a defense.

1 Whether or not the prosecution has directly gained any confidential information
2 which may be subject to suppression, the prosecution in this case has been aided by
3 its agent's conduct. Petitioners have been prejudiced in their ability to prepare their
4 defense. They no longer feel they can freely, candidly, and with complete confidence
5 discuss their case with their attorney. Petitioners' attorney testified that the discovery
6 of the undercover agent's true identity resulted in a refusal by his clients to offer
7 suggestions or criticize any aspect of the conduct of the cases. Distrustful of each
8 other and fearing that any one of them might also be an undercover police officer, the
petitioners have even questioned the true identity of defense counsel's law student
assistant. This lack of cooperation, which resulted solely from the intrusion by law
enforcement officers in the attorney-client relationship, has resulted in counsel's
inability to prepare adequately for trial. To allow these cases to proceed to trial under
these circumstances would be contrary to basic notions of fair play and simple justice.

9 (*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 756.)

10 In *Morrow v. Superior Court, supra*, 30 Cal.App.4th 1252, the prosecutor requested that
11 defense counsel discuss with his client the possibility of a plea bargain or a continuance to
12 accommodate a vacation. (*Id.* at p. 1255.) When defense counsel conferred with the defendant,
13 the prosecutor sent her investigator to eavesdrop on the conversation and to report back on what
14 he had heard. (*Ibid.*) In subsequent investigations, the prosecutor offered inconsistent
15 explanations of her conduct. (*Id.* at p. 1256.) At the hearing on defendant's motion to dismiss,
16 the prosecutor and the investigator refused to testify, asserting their Fifth Amendment right
17 against self-incrimination. (*Id.* at pp. 1255-1256.) The court denied the defendant's motion to
18 dismiss because he had not been prejudiced. (*Id.* at p. 1258.)

19 On appeal, the court found that the defendant's Fifth Amendment right against self-
20 incrimination, Sixth Amendment right to the assistance of counsel, right to a fair trial, and similar
21 provisions under the California Constitution had been violated. (*Morrow, supra*, 30 Cal.App.4th
22 at p. 1259.) The court further held that the prosecutor had committed outrageous misconduct that
23 shocked the conscience and violated the defendant's right to due process of law. (*Id.* at pp. 1259-
24 1261.) In that regard, the court found that the defendant had suffered prejudice sufficient to
25 warrant a dismissal. Because confidential matters were discussed and overheard, the appellate
26 court determined that "the harm is apparent and the substantial threat of demonstrable prejudice
27 is inherent." (*Id.* at p. 1263.)

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1 In *Boulas v. Superior Court*, *supra*, 188 Cal.App.3d 422, the appellate court ordered the
2 case dismissed because it found the government's actions to be "outrageous in the extreme, and
3 shocking to the conscience." (*Id.* at p. 434.) The defendant retained an attorney to represent him
4 in a drug case. (*Id.* at p. 425.) He also hired an acquaintance to act as a private investigator and
5 to assist him in brokering a deal with the sheriff's office. (*Id.* at pp. 425-426.) The defendant and
6 his acquaintance met with a sheriff's deputy and the defendant offered to provide information
7 about drug dealers in exchange for a reduced sentence. (*Id.* at p. 426.) Over the course of several
8 communications, the defendant was led to believe that an agreement was possible, but only if he
9 was willing to fire his current attorney and hire one that was acceptable to the sheriff's office and
10 the district attorney. (*Ibid.*) The defendant fired his attorney, but he could not find one who would
11 meet the requirements of the sheriff's office and was willing to accept the case. (*Id.* at p. 427.)
12 He eventually provided information to the sheriff's office while he was unrepresented, though an
13 agreement was never reached. (*Id.* at p. 428.) The defendant later filed a motion to dismiss on
14 the ground that the conduct by the District Attorney's Office and the Sheriff's Department
15 interfered with his rights to counsel and to a fair trial. (*Ibid.*)

16 On appeal, the court found that there was "no question" that the government had
17 committed misconduct when it contacted the defendant outside the presence of his attorney and
18 actively interfered with his choice of counsel. (*Boulas, supra*, 188 Cal.App.3d at p. 429.) After
19 discussing the importance of the attorney-client relationship, and the defendant's right to counsel
20 of his own choice, the court concluded that dismissal was the only appropriate remedy because:

21 No relief, such as suppression or reversal of conviction, would remedy the
22 violation. Furthermore, considering the extent and seriousness of the conduct of those
23 in positions of authority and public trust, we find the grave sanction of dismissal to
24 be the sole appropriate remedy for intentional and calculated violation of [the
25 defendant's] rights. We find the government conduct in the present matter to be
outrageous in the extreme, and shocking to the conscience; we are, thereby, compelled
to order the dismissal of the present case.

26 It is true that petitioner, an individual who may be guilty of those crimes with
27 which he is charged, will, in the words of Justice Cardozo, "go free because the
constable has blundered." (*People v. Defore* (1926) 242 N.Y. 13, 21 [150 N.E. 585,
587].) However, this is not a case in which the constable appears to have merely
28 blundered; indeed, the government went forth with the express intent of interference

1 with an accused's constitutional right.

2 It is our finding that such actions, because performed by those invested with
3 authority and discretion, far exceed a mere blunder. "Disinterested zeal for the public
4 good does not assure either wisdom or right in the methods it pursues."

5 (*Boulas, supra*, 188 Cal.App.3d at p. 434; see also *United States v. Gonzalez-Lopez* (2006) 548
6 U.S. 140, 148-151 [improper government interference with the defendant's right to counsel of
7 choice is structural error and is therefore reversible per se].)

8 Apply these controlling state law standards, dismissal of defendant's case is unwarranted.
9 Because the People's conduct in pre-filing proceedings is unrelated to guilt or innocence, it cannot
10 establish gross or outrageous governmental misconduct warranting dismissal.

11 No actual prejudice resulted and defendant's ability to receive a fair trial is unaffected.
12 Therefore, dismissal of the case is unwarranted. Nor, as explained in detail above, did the
13 People's conduct prejudice defendant in contrast to the situation in all of the cases discussed
14 above, where prejudice to the defendant's right to a fair trial, or a substantial likelihood thereof,
15 was a necessary predicate to the finding of a due process violation.

16 **C. The Alleged Judicial Misconduct Does Not Support a Dismissal for**
17 **Violation of Due Process**

18 First, the People do not assert there is a cause of judicial misconduct as alleged by
19 defendant. The People's understanding is that Judge Cordova did contact other judges. In defense
20 exhibit B to his motion to dismiss, defendant includes the Opinion No. 62 published by the
21 Judicial Ethics Committee in May of 2009. Within the Opinion, at defense page numbered 16
22 (partially illegible due to type on top of the page number, also referenced as the 3rd page of the
23 opinion), at lines 5 through 7, the Judicial Ethics Committee states, "However, if the presiding
24 judge wishes to declare that all the judges on the bench are disqualified, he/she may only do so
25 by polling the individual members of the bench for their individual determinations." Unlike the
26 situation being resolved in the opinion, the Court, here, was dealing with the investigation of a
27 defense attorney who had appeared before each judge.

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1 **1. This is not the “Flip Side” of *Caperton* and There is no Violation of Due Process**

2 Defendant asserts the case of *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868
3 supports a dismissal for a due process violation. However, there are no “extreme” facts present
4 here as there were in *Caperton*. A more thorough review of *Caperton*’s facts is thus necessary.
5 In 2002, A.T. Massey Coal Co., Inc. (“Massey”), was found “liable for fraudulent
6 misrepresentation, concealment and tortious interference with existing contractual relations” and
7 ordered to pay “the sum of \$50 million in compensatory and punitive damages” to *Caperton*. (*Id*
8 at p. 872.) Massey’s chairman, chief executive officer and president, Don Blankenship
9 (“Blankenship”) knew that his appeal would come before the Supreme Court of Appeals in West
10 Virginia and decided to support the opponent of the incumbent, Justice McGraw. (*Id.* at p. 873.)
11 In his support of Justice McGraw, Blankenship donated “\$3 million in contributions” which “were
12 more than the total amount spent by all other Benjamin supporters and three times the amount
13 spent by Benjamin’s own committee.” *Id.* Prior to the appeal, *Caperton* moved to have Justice
14 Benjamin recused based on the conflict, but Justice Benjamin denied the motion. *Id.* After the
15 petition for appeal was submitted, in November 2007, the West Virginia Court of Appeals,
16 reversed the verdict against Massey/Blankenship. The opinion was written by the Chief Justice
17 Davis and joined by Justices Benjamin and Maynard. *Id.*

18 In *Caperton*’s request for rehearing, *Caperton* requested disqualification of
19 disqualification of the three justices, Justice Benjamin, Justice Davis and Justice Maynard. Justice
20 Maynard recused himself following photographs which surfaced where he was enjoying the
21 benefits of the French Riviera with Blankenship. Justice Starcher, who actually dissented to the
22 reversal, also recused himself “based on his public criticism of Blankenship’s role in the ...
23 elections.” *Id.* Justice Starcher also recommended within his recusal that Justice Benjamin also
24 recuse himself, but Justice Benjamin declined and denied *Caperton*’s recusal motion.

25 Here, there are no such “extreme” facts. Cognizant of the relationships that existed
26 between the bench and a tenured defense attorney, the People addressed the Presiding Judge of
27 the Stanislaus County Superior Court, the Honorable Ricardo Córdova. The People’s
28 understanding is that Judge Córdova contacted other judges and made the decision to recuse the

1 bench of the Stanislaus County Superior Court.

2 There is also not a flip side which affects defendant's due process. Following *Caperton*,
3 the California Supreme Court decided *People v. Freeman* (2010) 47 Cal.4th 993, wherein a judge
4 disqualified himself based on the fact that he had worked with a dependency judge who was
5 potentially a victim of defendant's crimes and that he had known the dependency judge for 23
6 years. (*Id.* at p. 997.) The matter was reassigned, but later it was found the computer that may
7 have reflected defendant was "stalking" the judge did not include such evidence. *Id.* at p. 998.
8 The court then reassigned the case back to the previously disqualified judge. *Id.* When the
9 disqualified judge received the case, he returned it to the assigning judge's court for a record
10 regarding defendant's withdrawal of her challenge. *Id.* Defendant, through counsel, withdrew her
11 challenge and her matter was reassigned to the previously disqualified judge. *Id.* Later, defendant
12 again not only challenged the judge but made a Marsden motion stating her attorney bullied her.
13 *Id.* at p. 999. After hearing defendant's claims, the previously disqualified judge informed her the
14 matter had been previously decided. *Id.*

15 Upon review of the *Freeman* matter, the California Supreme Court noted that "an explicit
16 ground for judicial disqualification in California's statutory scheme is a public perception of
17 partiality, that is, the appearance of bias." (*Id.* at p. 1001.) The Court also recognized, "By contrast,
18 the United States Supreme Court's due process case law focuses on actual bias." *Ibid.* The
19 *Freeman* Court further noticed that, "The [Caperton] Court was careful to distinguish the extreme
20 facts of the cases before it from those interests that would not rise to a constitutional level.
21 [Citations] As the court also observed, the states have moved to adopt judicial conduct codes to
22 eliminate "even the appearance of partiality" [Citations] and these codes comprise "standards
23 more rigorous than due process requires.'" (*Id.* at p. 1004-1005.) The Court further cited to
24 *Caperton* stating, "Because the codes of judicial conduct provide more protection than due process
25 requires, most disputes over disqualification will be resolved without resort to the Constitution.
26 Application of the constitutional standard in this case will thus be confined to rare instances." *Id.*
27 The Court further remarked, "[T]he [Caperton] court has also made it abundantly clear that the
28 due process clause should not be routinely invoked as a ground for judicial disqualification.

1 Rather, it is the exceptional case presenting extreme facts where a due process violation will be
2 found. Less extreme cases – including those that involve the mere appearance, but not the
3 probability, of bias – should be resolved under more expansive disqualification statutes and codes
4 of judicial conduct.” *Id.* Thus defendant’s assertion that anything other than actual bias supports
5 a violation of due process is inaccurate.

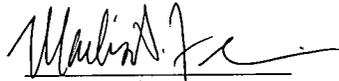
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7 **II. CONCLUSION**

8 As stated, the People have ensured justice was accorded to the defendants. The Honorable
9 Ricardo Córdova also reviewed the matter and made the necessary decision to recuse the bench.
10 Precautions were taken not to invite error or a violation of any of the defendants’ due process
11 rights. Therefore, the People respectfully request the Court deny defendant’s motion to dismiss.
12

13 Dated: September 29th , 2015

14 Respectfully submitted,

15 BIRGIT FLADAGER
16 District Attorney

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18 MARLISA A. FERRBIRA
19 Chief Deputy District Attorney
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PROOF OF SERVICE BY MAIL AND PERSONAL SERVICE

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and that I am employed by the Stanislaus County District Attorney's Office, 832 12th Street, Suite 300, Modesto, California and that I served a copy of the **People's Opposition to Defendant B. Atwal's Moiton to Dismiss Because of Outrageous Government Misconduct and Request for Order in re Contempt** on September 29, 2015 by placing in an envelope addressed to:

Timothy B. Rien	Tim Allen Pori
Law Office of Timothy B. Rien	Law Office of Tim A. Pori
39 S. Livermore Ave., #209	521 Georgia St
Livermore, CA 94550-3119	Vallejo, CA 94590
<i>Attorney for Defendant Wells</i>	<i>Attorney for Defendant G. DeFilippo</i>

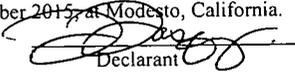
The envelope was then sealed and placed for collection and mailing on September 28, 2015, following ordinary office business practices. That I am readily familiar with the office business practice for collection and processing of correspondence for mailing with the United States Postal Service, that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day,

That I personally served the **People's Opposition to Defendant B. Atwal's Moiton to Dismiss Because of Outrageous Government Misconduct and Request for Order in re Contempt** on September 29, 2015 to the offices of:

Martha Carlton-Magana 1012 11 th St. #103 Modesto, CA 95354 <i>Attorney for Defendant B. Atwal</i>	Alonzo Gradford 1202 H Street Modesto, CA 95354 <i>Attorney for E. Quintanar</i>
Preciliano Martinez 1120 14 th Street, Suite 5 Modesto, CA 95354 <i>Attorney for Defendant Carson</i>	Hans Hjertonsson Grisez, Orenstein & Hertle 724 10 th Street Modesto, CA 95354 <i>Attorney for Defendant D. Atwal</i>
Lawrence Niermeyer Moorad, Clark & Stewart 1020 15 th Street, Suite 10 Modesto, CA 95354 <i>Attorney for S. McFarlane</i>	Ryan Roth 1120 14 th Street, Suite 5 Modesto, CA 95354 <i>Attorney for Defendant C. DeFilippo</i>

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of September 2015, at Modesto, California.


Declarant

PROOF OF SERVICE BY ELECTRONIC MAIL

1
2 STATE OF CALIFORNIA)
3 COUNTY OF STANISLAUS)

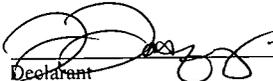
4 I, the undersigned, declare as follows:

5 That I am over the age of 18 years and am not a party to this action and I am employed by
6 the Stanislaus County District Attorney's Office, 832 12th Street, Suite 300, Modesto, California.

7 That I served a copy of the People's **People's Opposition to Defendant B. Atwal's**
8 **Moiton to Dismiss Because of Outrageous Government Misconduct and Request for Order**
9 **in re Contempt** on September 29, 2015 pursuant to California Code of Civil Procedure section
10 1010.6(a)(6) by electronically sending a copy thereof to the offices of Timothy Rien at
11 rienlaw@sbcglobal.net, Tim Allen Pori at tim@defense-attorney-pori.com, Martha Carlton-
Magana at carltnm@hotmail.com, Preciliano Martinez at attvmartinezp@yahoo.com, Hans
Hjertonsson at Hans.hjertonsson@gmail.com, Alonzo Gradford at gradfordlaw@gmail.com,
Lawrence Niermeyer at lniermeyer@aol.com, Ryan Roth at roth@Roth-LEgal.com, Bruce Perry
at brucerperry@msn.com and Stephanie Mitchell at stephanie.mitchell@stanct.org.

12 I declare under penalty of perjury that the foregoing is true and correct.

13 Executed this 29th day of September 2015, at Modesto, California.

14 
15 Declarant

16 Case No. 1490969
17 People v. Carson et al.
18 Hearing: 10/1/2015
19 Dept. 26
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