UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, v. GEORGE TORRES-RAMOS, Defendant.	)	CR 06-0656 SVW-1 ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT; (2) DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE; (3) GRANTING-IN-PART AND DENYING-IN-PART DEFENDANT'S MOTION FOR ACQUITTAL; (4) GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL

I. INTRODUCTION

Currently before the Court are several post-trial motions brought by Defendant George Torres-Ramos ("Defendant" or "George Torres"). Defendant seeks the following relief: (1) to dismiss the entire indictment due to alleged Brady violations and outrageous government misconduct, (2) to suppress wiretap evidence in light of newly discovered evidence, (3) judgment of acquittal with respect to the honest services counts, and (4) a new trial due to prejudicial spillover from the dismissed RICO counts. Defendant's motion to

dismiss the indictment is denied because the government's admitted Brady violations and the alleged governmental misconduct did not materially affect the remaining alien harboring, honest services, and tax counts. Defendant's motion to suppress the wiretap evidence is also denied because the newly discovered information is not material to the probable cause or necessity for the wiretap. Defendant's motion for acquittal on the honest services counts is denied with respect to Counts Seven and Eight, but granted with respect to Counts Five, Nine, and Ten, because no rational juror could have found that the use of the mail and wires in Counts Five, Nine, and Ten was in furtherance of the scheme to defraud.[1] Finally, Defendant's motion for a new trial is granted because Defendant was prejudiced by the spillover from the evidence on the highly inflammatory RICO counts that the government voluntarily dismissed after trial.

II. FACTS

A. The Indictment

The grand jury returned the First Superseding Indictment (the "Indictment" or "FSI") on February 13, 2007. The Indictment contained fifty-nine counts and one RICO forfeiture count. Defendant George Torres was the principal defendant and was named as a defendant in all but two of the counts. Other defendants included George Torres's brother, Manuel Torres, George Torres's son, Steven Torres, and other

[1] Throughout this Order, the Court refers to the specific counts as they were listed in the Indictment, even though the counts were renumbered on the special verdict form that was given to the jury.

associates Mario Solano, Carlos Monterosso, Gloria Mejia, Steve Carmona, and George Luk.

Count One of the Indictment charged George Torres and Manuel Torres with participating in the affairs of an associated-in-fact enterprise through a pattern of racketeering activity. The alleged enterprise was referred to as the "Torres Enterprise" and allegedly included George Torres, Manuel Torres, Mario Solano, Carlos Monterosso, Gloria Mejia, Ned Tsunekawa, Ignacio Meza, Steve Carmona, George Luk, Raul del Real, Derrick Smith, Juan Mendoza, Fernando Villalpondo, and six corporations: United Grocers, Inc., VCG Enterprises, Inc., Numero Uno Market, Inc., Numero Uno Management, Inc., La Estrella Market, Inc., and TOVICEP, Inc. (collectively referred to as "the Numero Uno supermarket corporations").

Count One alleged nine racketeering acts, some of which contained multiple subparts. Racketeering Act One alleged that Manuel Torres knowingly received or purchased stolen meat products moving in interstate commerce in June 1986. Racketeering Act Two alleged that George Torres solicited and conspired to murder Edward Carpel, who was killed in a drive-by shooting in May 1993. Racketeering Act Three alleged that George Torres solicited and conspired to murder Jose Maldonado, who was killed in a drive-by shooting in February 1994. Racketeering Act Four alleged that George Torres solicited and conspired to murder Ignacio Meza, who disappeared in October 1998. Racketeering Act Five alleged that George Torres used a telephone to facilitate Raul del Real's possession of controlled substances with the intent to distribute in March 2004. Racketeering Act Six alleged that George Torres conspired to conceal, and concealed, illegal aliens in

connection with the operations of the Numero Uno supermarkets. Racketeering Act Seven alleged that George Torres conspired to extort money from shoplifters at the Numero Uno supermarkets. Racketeering Act Eight alleged that George Torres bribed Los Angeles Central Area Planning Commissioner Steve Carmona. Racketeering Act Nine alleged that George Torres intimidated a witness, Lilia Gonzalez, in an attempt to prevent her from testifying before the grand jury.

Count Two alleged that George Torres, and others, conspired to participate in the affairs of the Torres Enterprise through a pattern of racketeering activity. The enterprise and predicate acts alleged in this RICO conspiracy count were the same as those alleged in the substantive RICO offense charged in Count One.

Counts Three and Four charged additional RICO violations under 18 U.S.C. § 1959, which prohibits the commission of violent crimes in aid of RICO ("VICAR"). Count Three charged George Torres and his son, Steven Torres, with conspiring to assault an individual who had stolen Steven Torres's car at gunpoint. Count Four charged Steven Torres with assaulting an employee of the Numero Uno supermarkets.

Counts Five through Ten charged George Torres, Steve Carmona, and George Luk with honest services mail and wire fraud. The Indictment alleged that George Torres gave Steve Carmona items of value to influence Carmona in his official capacity as a member of the Central Area Planning Commission (the "Commission"). The Indictment alleged that George Torres gave bribes to Carmona in order to have Carmona approve a liquor license for the Numero Uno supermarket on Alvarado Street. The six separate counts were linked to specific uses of the mails and wires. Count Twelve also charged Carmona with making a false

statement on a loan application, where Carmona allegedly stated that he was paying $1000 per month to rent a condominium owned by George Torres.

Count Eleven charged George Torres, Manuel Torres, and Gloria Mejia with conspiracy to harbor illegal aliens at the Numero Uno supermarkets.

Count Thirteen charged George Torres and Gloria Mejia with conspiracy to impede, impair, and obstruct the lawful government functions of the IRS by failing to account for, and pay over, payroll taxes at the Numero Uno markets. Counts Fourteen through Fifty-Nine charged George Torres with substantive violations for each quarter from March 2001 to September 2006 for failing to account for and pay over payroll taxes for employees at the Numero Uno supermarkets.

B. Pretrial Rulings

As a result of several pretrial rulings, the scope of the case that went to trial was limited significantly from that originally alleged in the Indictment. First, the Court granted Defendant's motion to suppress evidence related to Racketeering Act Seven, which alleged that George Torres conspired to extort money from shoplifters at the Numero Uno supermarkets. Much of the probable cause for the search warrant of the stores was based on conversations overheard on the wiretap of George Torres's phone. The Court found, however, that critical conversations were inaccurately quoted in such a way as to enhance probable cause that was otherwise not present. After holding a Franks hearing, the Court found that the affiant, Detective Kading, had

acted, at the least, with reckless disregard for the truth by misquoting the conversations from the wiretap and by omitting other material information from the affidavit for the search warrant. As a result of this ruling, and the fact that much of the evidence relating to the extortion predicate was based on this unlawful search, the government did not present any evidence at trial with respect to the extortion predicate.

Second, the Court severed most defendants and two counts for the purposes of trial. The Court granted the severance motions brought by all defendants except Manuel Torres (George Torres did not file a severance motion). The Court found that the overwhelming majority of the evidence to be presented at trial pertained to George Torres, and to a lesser extent Manuel Torres, who was the only other named defendant in the substantive RICO count. Only George Torres and Manuel Torres were alleged to have participated in the murder predicate acts, which were by far the most serious allegations in the Indictment. The Court severed the other defendants due to the risk of unfair prejudice, given the otherwise limited role of the other defendants in the case.

The Court also severed the VICAR counts in order to prevent a risk of confusion to the jury. The VICAR counts by their very nature were premised on the existence of a RICO enterprise. In order to be found guilty of a VICAR violation, the jury must find that the violent crime alleged in the Indictment was done for the purpose of maintaining the defendant's position in, or gaining access to, the charged enterprise. See 18 U.S.C. § 1959(a). The Court had serious doubts as to whether the associated-in-fact enterprise alleged in the Indictment could even

be proven in the first place. As a result, the Court severed the VICAR counts.

The Court denied, however, George Torres's motion to sever the tax counts. The Court found that much of the evidence related to the tax counts, specifically that employees were paid in cash, would also be admissible to the alien harboring violations, which were charged as underlying predicate acts for the RICO counts as well as in one free-standing count. Thus, since the same evidence would be admissible on the tax counts and the RICO counts, the Court tried the tax counts in conjunction with the RICO counts.

Third, the Court granted the motion to strike Racketeering Act One, which charged Manuel Torres with receiving stolen goods moving in interstate commerce. After receiving the Government's complete proffer, it became indisputably clear that the stolen hot dogs that Manuel Torres was charged with having received, did not have the required interstate character. The undisputed facts showed that although the unprocessed meat had traveled from Arizona to California, once the meat arrived in California, it was processed at a California plant where the meat was ground and packaged into hot dogs. It was only after the meat was made into hot dogs and shipped to the ABC Market that the hot dogs were stolen. Based on these undisputed facts, the Court found that the requisite interstate nexus was not present as a matter of law.

Fourth, the Court granted the motion to strike Racketeering Act Five, which charged George Torres with using a telephone to facilitate Raul del Real's drug offenses. Again, after receiving a complete proffer from the government, the Court found that there could be no

violation of 21 U.S.C. § 841(a)(1) as a matter of law. Based on the government's proffer, George Torres had a conversation with Raul del Real soon after law enforcement had raided one of Raul del Real's stash houses. George Torres told Raul del Real that he had tried to call Raul del Real the night before to alert him to the possibility of a raid, but that Raul del Real had not answered his phone. George Torres further advised Raul del Real to lay low for the time being, and to stay away from Juan Mendoza, who had been arrested in the raid. On these undisputed facts, the Court found no § 841(a)(1) violation as a matter of law.

Fifth, the Court granted a motion to strike Racketeering Act Nine, which charged George Torres with intimidating a witness named Lilia Gonzalez. The government's proffer indicated that an unidentified man had appeared at Ms. Gonzalez's home and told her that he was speaking "on behalf of the Torres family." The unidentified man told Ms. Gonzalez that she should not get involved in the case. As an in limine matter, the Court found that there was insufficient evidence of an agency relationship between this unidentified man and George Torres such that the statement could be used for the truth of the matter asserted – that the unidentified man was speaking on behalf of George Torres or the Torres family. Because there was no evidence of who this man was, or who sent him to Ms. Gonzalez's home, the Court found that no rational jury could have found George Torres guilty of witness intimidation. Thus, the Court struck the witness intimidation predicate act and prevented any evidence of this incident from being presented to the jury.

Finally, the Court denied Defendants' motion to suppress the wiretap evidence. As discussed more thoroughly below, the Court found that there was probable cause for the wiretap based in large part on the conversations between George Torres and Raul del Real that were captured on Raul del Real's wiretap. A wiretap had been approved for Raul del Real's phone based on evidence that law enforcement authorities in Baltimore, Maryland, had made a large narcotics seizure and had learned from the individuals arrested that Raul del Real was the source of the drugs. Soon after obtaining the wiretap on Raul del Real's phone, law enforcement heard Raul del Real speaking with George Torres with regularity. In some of the wiretap conversations, George Torres was heard ordering Raul del Real, who was not an employee of the Numero Uno markets, to perform certain tasks and to meet George Torres at certain locations. George Torres used coded language and said that he did not want to speak about certain topics on the phone. On one occasion, George Torres yelled at Raul del Real for not disclosing certain information to George Torres, and angrily demanded that Raul del Real tell him where a certain unidentified person was located. Furthermore, when George Torres's son was car-jacked, George Torres called Raul del Real and told him to meet him at a specified location and to bring a gun. Based in part on these calls, and other information discussed at greater length below, the Court found that there was probable cause to believe that George Torres was involved in Raul del Real's large-scale drug trafficking operation. The Court also found that necessity for the wiretap was satisfied because there was no other practical way to determine how George Torres was involved in, or assisting, Raul del Real's drug operation.

Having made these rulings, the trial proceeded with only two defendants, George and Manuel Torres. The RICO counts were substantially pared down with only the three murders, bribery, and harboring predicates remaining. The harboring and bribery predicates also formed the basis of separate substantive counts, with the bribery alleged in the form of honest services mail and wire fraud. The tax case also proceeded to trial.

C. Evidence at Trial

The trial began on March 24, 2009, and the jury returned a verdict on April 20, 2009. The evidence introduced in support of the Carpel murder, Racketeering Act Two, came primarily from two witnesses: Aldo Servin and Fernando Villalpondo. Servin testified that he was a security guard at one of George Torres's markets, the La Estrella market, in 1993. In April 1993, Servin was working when another security guard, Salvador Puga, was shot and killed by Manuel Velasco, a member of the Primera Flats gang, who regularly visited a house across the street from the La Estrella Market. Servin testified that after the police responded to the scene of the crime, George Torres arrived accompanied by Ignacio Meza. Servin spoke with George Torres and Ignacio Meza in the parking lot of the La Estrella market where Puga, the security guard, had just been killed. Servin testified that George Torres made a comment to the effect that maybe the gang members across the street shot Puga.

Fernando Villalpondo also testified with regard to the Carpel murder. Villalpondo testified that a short time after the murder of

Puga, Ignacio Meza picked Villalpondo up in his car. Villalpondo testified that he drove the car while Ignacio Meza sat in the passenger seat. They drove to the house across the street from the La Estrella market where the members of the Primera Flats gang regularly congregated. Ignacio Meza then opened fire with a .45 caliber automatic weapon shooting into the house. Edward Carpel was killed in the shooting.

The main witness offered in support of Racketeering Act Three, the murder of Jose Maldonado, was Derrick Smith. Smith testified that in late December 1993, he was present when George Torres spoke to Smith and Ignacio Meza regarding Maldonado. Smith testified that George Torres said that Maldonado was giving George Torres problems and that Meza should take care of him. Smith testified that again, about one month later, in early 1994, Smith was again present when George Torres spoke to Meza regarding Maldonado. George Torres told them that Maldonado had come to one of the Numero Uno markets and had threatened George Torres. Smith reported that George Torres said that Maldonado was trying to "tax" George Torres, and that Maldonado flashed a gun. Smith stated that George Torres was upset and angry this time, and again told Meza that Maldonado needed to be taken care of. After leaving the meeting with George Torres, Smith recalled that Meza discussed how he was going to kill Maldonado. Meza said that he would shoot him one day when Maldonado was leaving the barber shop just down the street from Meza's hydraulic shop. Smith also testified that after the murder, he recovered the murder weapon from Ignacio Meza and stored it at his house.

Jesus Meza, the younger brother of Ignacio Meza, testified that on February 9, 1994, he drove the car from which Ignacio Meza shot and killed Maldonado. Jesus Meza testified that he was with Ignacio Meza in the hydraulic shop when Ignacio Meza discovered that Maldonado had left the barber shop down the street. Jesus testified that he and Ignacio Meza got into the car and they drove up alongside Maldonado and his girlfriend Ana Vasquez while they were walking on the sidewalk. Ignacio Meza fired several shots from a .45 caliber automatic weapon, killing Maldonado and wounding Ana Vasquez.

The government also offered the testimony of Raul del Real, who testified that he received a call from Ignacio Meza in early 1994 before the murder. Raul del Real said that Ignacio Meza asked Raul del Real to check with his sources to determine whether Maldonado had legitimate connections with the Mexican Mafia. Raul del Real testified that he checked with his sources and reported back to Ignacio Meza that Maldonado was a "nobody," meaning that Ignacio Meza could kill Maldonado without fear of reprisal from the Mexican Mafia.

Racketeering Act Four charged George Torres with both solicitation and conspiracy to murder Ignacio Meza. Manuel Torres was also charged with conspiracy to murder Ignacio Meza. Under the government's theory, the alleged solicitation and conspiracy to murder Ignacio Meza began soon after Ignacio Meza broke into the Numero Uno warehouse on Jefferson Street in late March 1998, and stole over half a million dollars cash from the company safe. The government's theory was that in response to this break-in and theft, George Torres became extremely upset and solicited Raul del Real to murder Meza. When Raul del Real declined the offer twice, George Torres then allegedly had Ignacio Meza

murdered by some unknown means in October 1998. Ignacio Meza's body has never been found.

The main witness offered in support of the solicitation and conspiracy to murder Ignacio Meza was Raul del Real. Raul del Real testified that George Torres summoned Raul del Real to the Numero Uno warehouse on the day of the break-in in late March 1998. Raul del Real testified that he, George Torres, Manuel Torres, and Alfredo Garcia drove together from the Numero Uno warehouse to George Torres's ranch in Santa Inez, California. There, Raul del Real recounted some discussions that took place with regard to whether Ignacio Meza was the person who broke into the warehouse and stole the money. There was no testimony, however, that a plot to kill Ignacio Meza was actually hatched at the Santa Inez ranch.

Raul del Real testified that two weeks after they returned from Santa Inez, George Torres summoned Raul del Real to the Numero Uno market on Figueroa Street. Raul del Real said that George Torres presented Raul del Real a gun and asked Raul del Real to kill Ignacio Meza. Raul del Real testified that he refused the offer. Another two weeks passed, and Raul del Real testified that George Torres again summoned Raul del Real to the Numero Uno warehouse on Jefferson Street. Raul del Real testified that George Torres spoke to Raul del Real in the meat freezer and again implored Raul del Real to kill Ignacio Meza. Raul Del Real testified that he again refused.

Jesus Meza testified that Ignacio Meza returned to work at the Numero Uno Jefferson Street market on October 13, 1998. Several witnesses reported seeing Ignacio Meza on that day. Numerous

witnesses, including Ignacio Meza's family, testified that they had never heard from Ignacio Meza since that day.

Several witnesses testified that George Torres was involved in the harboring of illegal aliens at the Numero Uno markets. Former employees testified that they were not lawfully in the United States while they were working at the Numero Uno markets. Employees recounted instances where George Torres was informed that an employee did not have proper documentation, and, in response, George Torres told the employees to obtain documentation and return to work. In one recorded wiretap conversation, Defendant was overheard instructing an employee to have the employees without papers hide upstairs if law enforcement came to the store.

Documentary evidence presented at trial revealed that George Torres provided Steve Carmona with a number of different benefits while Carmona was a member of the Commission. The benefits included use of a cellphone, a white GMC pick-up truck, eight Lakers basketball tickets, and money orders in the amount of $6,247.35 sent to Globe Tires and Motorsports. At the same time, a number of permits for the Alvarado Numero Uno market were pending before the Commission. Calls captured on the wiretap of George Torres's and Steve Carmona's phones were introduced in support of the bribery/honest services counts. In one call, George Torres was heard instructing Carmona to "pass my thing." When the application for the permits for the Alvarado Store failed, Defendant was overheard summoning Carmona and his associate George Luk to the Numero Uno warehouse on Jefferson Street. There was additional evidence offered in support of the bribery/honest services counts, including the fact that Carmona contacted other members of the

Commission in an apparent attempt to persuade them to support the permits application. As discussed at greater length below, there was also evidence that Carmona did not vote on the permits application, which weighed against conviction.

Count Ten charged Defendant with conspiracy to defraud the IRS by impairing and impeding the IRS in the collection of payroll taxes. Counts Eleven through Fifty-Six charged Defendant with failing to account for and pay over payroll taxes from 2001 to 2006. The government presented several former employees of the Numero Uno markets in support of the tax counts. Former store employees testified that they were paid in cash on a regular basis. Former managers and accountants testified that they had conversations with George Torres about whether to place employees on the payroll or to continue paying them in cash. Furthermore, certain high level managers testified that they received their salaries exclusively in cash while in the employ of the Numero Uno markets.

D. Rulings at the Close of Evidence

At the close of the evidence, before the case was given to the jury for decision, the Court made several additional rulings. In light of the evidence presented on the Carpel murder, the Court found that there was insufficient evidence from which rational jurors could find that George Torres solicited or conspired to murder Edward Carpel. The evidence showed that George Torres had responded to the scene of the Puga murder in April 1993, and that weeks later, Ignacio Meza performed the drive-by shooting that killed Carpel. There was a crucial missing

link in the Government's case, however: there was no evidence that George Torres had actually instructed Ignacio Meza to perform the shooting. Although George Torres may have acted somewhat suspiciously by telling Mr. Servin not to talk to the police, the Court found that this evidence was simply insufficient to show that George Torres ordered Ignacio Meza to perform the shooting.

The Court also found that there was insufficient evidence with regard to the charges against Manuel Torres. The Court found that there was insufficient evidence from which rational jurors could have found that Manuel Torres conspired to murder Ignacio Meza. The evidence presented showed that Manuel Torres traveled with George Torres, Raul del Real, and Alfredo Garcia to George Torres's ranch in Santa Inez after Ignacio Meza broke into the Numero Uno warehouse. There was no evidence, however, that any agreement to kill Ignacio Meza was entered into while in Santa Inez. Manuel Torres was not present on the subsequent two occasions when Raul del Real testified that George Torres told him to kill Ignacio Meza. Although Manuel Torres was seen with Ignacio Meza on the day of Ignacio Meza's disappearance, there was no evidence that Manuel Torres was in any way complicit in Meza's disappearance. Thus, the Court granted Manuel Torres's motion for acquittal on the RICO counts.

Furthermore, the Court found that there was insufficient evidence that Manuel Torres had entered into a preexisting conspiracy with respect to the harboring of illegal aliens. Although there was one wiretap call where George Torres told Manuel Torres to have some of the illegal employees hide upstairs, the Court found that the evidence was insufficient to allow the jury to find that Manuel Torres knew or had

reason to know that other conspirators were involved in the conspiracy. The government presented insufficient evidence that Manuel Torres knew of the preexisting conspiracy. The only evidence that the Government presented was that Manuel Torres worked at the Numero Uno supermarket and received one wiretap call, which did not show that Manuel Torres knowingly joined the existing conspiracy charged in the Indictment.

E. Jury Verdict

The Court having made these additional rulings, the case was presented to the jury for decision. The jury returned a verdict finding George Torres guilty of the RICO charges in Counts One and Two. The jury found that George Torres had committed Racketeering Act Three (solicitation and conspiracy to murder Maldonado), Racketeering Act Six (harboring and conspiracy to harbor illegal aliens), and Racketeering Act Eight (bribery of Steve Carmona through the five benefits alleged). The jury found George Torres not guilty, however, as to Racketeering Act Two – the alleged solicitation and conspiracy to murder Ignacio Meza.

With regard to the enterprise, the jury found that the Torres Enterprise existed, and that the following persons or entities were members of the Torres Enterprise: George Torres, Manuel Torres, Gloria Mejia, Ned Tsunekawa, Ignacio Meza, Steve Carmona, George Luk, Raul del Real, Derrick Smith, and the Numero Uno supermarket corporations. The jury did not find that Juan Mendoza was a member of the Torres Enterprise; in fact, the government did not present any evidence with regard to Juan Mendoza.

With regard to the honest services counts, the jury returned a verdict of not guilty on Count Six, which consisted of a call between Steve Carmona and George Luk. The jury found George Torres guilty, however, on Count Five and Counts Seven through Ten. The jury also found George Torres guilty of conspiracy to harbor illegal aliens in Count Eleven. Finally, the jury found George Torres guilty on every tax count including the conspiracy charge in Count Thirteen, and each quarterly violation specified in Counts Fourteen through Fifty-Nine.

F. Post-Trial Developments

After the jury returned its verdict, George Torres filed several post-trial motions. Of particular importance was George Torres's motion to dismiss for outrageous government misconduct or, in the alternative, for a new trial. Throughout the course of the trial, information came to light regarding previously undisclosed impeachment material that was relevant to the government's two key witnesses on the murder charges: Derrick Smith and Raul del Real. Most of this impeachment material was discovered through recorded prison phone calls that the defense subpoenaed from the prisons where Derrick Smith and Raul del Real were housed. The majority of the calls were between Detective Kading and either Derrick Smith or Raul del Real. Some of the calls, however, were between these witnesses and third parties. The calls indicated that certain benefits had been conferred upon these witnesses that were not disclosed to the defense before trial. Because these calls were discovered through the independent diligence of the defense, many of them were used to impeach Derrick Smith and Raul del

Real at trial. This impeachment was effective to some extent because the jury acquitted George Torres on the murder of Ignacio Meza, the charge for which Raul del Real was the primary witness.

Certain other calls produced by the defense during and after trial, however, raised more questions than they answered. In light of these developments, the Court ordered an evidentiary hearing in order to determine whether any additional benefits had been conferred upon Derrick Smith in connection with his testimony. Derrick Smith was the key witness to the only remaining murder charge in the case; indeed, Smith was the only witness who testified that he actually heard George Torres order Ignacio Meza to kill Maldonado. In preparation for the evidentiary hearing, on June 1, 2009, the Court ordered the government to disclose certain additional information including the unredacted daily logs of the agents who handled Smith and Raul del Real. The Court also ordered the government to produce the person most knowledgeable in the Bureau of Prisons ("BOP") who could help determine whether it was possible to uncover additional recorded prison phone calls between Detective Kading and Derrick Smith.

On the day of the hearing where the person most knowledgeable from the BOP was scheduled to appear, the government moved to voluntarily dismiss the RICO counts against George Torres. The Court granted the government's motion and released George Torres from custody on the terms of a stipulated bond.

In light of the Government's decision to dismiss the RICO counts the scheduled evidentiary hearing was not held. Neither Derrick Smith nor Raul del Real, the two witnesses with regard to whom the potential Brady violations had previously pertained, testified at trial with

respect to the remaining honest services, alien harboring, and tax counts. Thus, the Court ordered further briefing on whether an evidentiary hearing was required. The Court also gave the defense leave to address how any newly-discovered evidence could affect the Court's earlier ruling on the wiretap suppression motion. Defendant was also given leave to renew his motion for a new trial in light of the potential for prejudicial spillover from the dismissed counts.

III. ANALYSIS

A. Dismissal of the Indictment

The defense argues that the Court should dismiss the entire Indictment or order a new trial in light of the undisclosed Brady material and what the defense considers general outrageous government conduct. The Court will address each of these arguments in turn.

1. Brady Violations

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. "There are three components of a Brady violation: [1] 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the

State, either willfully or inadvertently; and [3] prejudice must have ensued.'" United States v. Price, 566 F.3d 900, 907 (9th Cir. 2009) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)).

As to the first prong, "Brady encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused." Id. (citing Giglio v. United States, 405 U.S. 150, 154 (1972)); see also United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) ("Brady/Giglio information includes material . . . that bears on the credibility of a significant witness in the case.") (quotations omitted); Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) ("Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses."); United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986) ("[E]vidence affecting the credibility of a government witness has been held to be material under the Brady doctrine.").

On the second prong, the evidence that is favorable to the accused "must have been suppressed by the state." Strickler, 527 U.S. at 281. "The term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within Brady's scope." Price, 566 F.3d at 907. The suppression inquiry does not turn on the good or bad faith of the prosecution in failing to disclose favorable evidence; "an 'innocent' failure to disclose favorable evidence constitutes a Brady violation nonetheless." Id.

The obligation to disclose evidence favorable to the accused extends to the government as a whole, and not merely to the prosecutor. Blanco, 392 F.3d at 394. "[E]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it,

where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided that the prosecutor ought to have it." Id. at 388. Consequently, "[i]n order to comply with Brady, . . . 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" Strickler, 527 U.S. at 281 (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)).

The third prong of the test provides that in order for a Brady violation to have occurred, the suppressed evidence must be material or prejudicial.[2] See Price, 566 F.3d at 911. "'The touchstone of the prejudice analysis is whether admission of the suppressed evidence would have created a reasonable probability of a different result.'" Id. (quoting United States v. Jernigan, 492 F.3d 1050, 1053 (9th Cir. 2007). The defendant need not "demonstrate that the evidence if disclosed probably would have resulted in acquittal." Bagley, 473 U.S. at 680. Rather, the Supreme Court has "defined a 'reasonable probability' as 'a probability sufficient to undermine confidence in the outcome'" of the trial. Id. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). "For the purposes of determining prejudice, the withheld evidence must be analyzed in the context of the entire record." Benn, 283 F.3d at 1053 (quotations omitted).

The materiality or prejudice requirement defines an actual Brady violation and so-called Brady material. An actual Brady violation

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[2] "The terms 'material' and 'prejudicial' are used interchangeably in Brady cases. Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.' Thus, for Brady purposes, the two terms have come to have the same meaning." Benn, 283 F.3d at 1053 n.9.

occurs only when all three elements discussed above are present: the evidence is favorable to the accused, it was suppressed, and it was material to the outcome of the case. See Price, 566 F.3d at 908 n.7 (noting that the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence, or "Brady material," even though "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was prejudicial"). The scope of the government's obligation to make pretrial disclosure under Brady, however, has greater breadth. The Ninth Circuit has stated that "it is the state's obligation to turn over all information bearing on a government witness's credibility. This must include the witness's criminal record, including prison records, and any information therein which bears on credibility." Price, 566 F.3d at 913 n.14 (quotations omitted). As a guide for prosecutors when determining what evidence to disclose to the defense, the Ninth Circuit recently stated:

> The "materiality" standard usually associated with Brady should not be applied to pretrial discovery of exculpatory materials. Just because a prosecutor's failure to disclose evidence does not violate a defendant's due process rights does not mean that the failure to disclose is proper. The absence of prejudice to the defendant does not condone the prosecutor's suppression of evidence ex ante. Rather, the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses. If doubt exists, it should be resolved in favor of the defendant and full disclosure made. The government should

> therefore disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence.

Id. (quotations and alterations omitted). Thus, in the pretrial setting, the government should disclose all favorable material to the defense, even though a failure to disclose the evidence may not be prejudicial in the post-trial context, and therefore, no Brady violation may have actually occurred.

The appropriate remedy for a Brady violation typically is a new trial. United States v. Chapman, 524 F.3d 1073, 1086 (9th Cir. 2008). Dismissal may be appropriate, however, "when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct." Id.

a. Procedural History

With this framework in mind, the Court now turns to the developments in this case. Leading up to trial, the defense made several motions to compel discovery from the government. The defense was able to obtain from the prisons where Derrick Smith and Raul del Real were housed, recorded phone calls, which revealed conversations that these two key government witnesses were having with family, friends, and law enforcement. Particularly important in these recorded phone calls were conversations between the witnesses and one of the chief investigators on the case, Detective Kading. Some of these calls gave the impression that Detective Kading was making promises to the witnesses and, on occasion, making threats to other witnesses. The

government had not independently disclosed to the defense the benefits and threats contained in these recorded phone calls. The defense also alerted the Court to the fact that Detective Kading, along with other law enforcement agents on the case, maintained daily logs, which the defense suspected could shed light on these conversations with the key witnesses that had been revealed through the recorded prison phone calls. As a result, on March 24, 2009, the first day of trial, the Court ordered the government to review the daily logs of the case agents and to disclose any Brady material to the defense.

At trial, during the cross-examination of Derrick Smith and Raul del Real, the defense used the recorded prison phone calls and other information disclosed by the government to effectively impeach these witnesses. With regard to Raul del Real, for example, the defense played a recorded conversation between Raul del Real and Detective Kading, which revealed that Detective Kading was using his influence with a local law enforcement agency to have domestic violence charges dropped against Raul del Real's brother. The recorded calls also revealed that Raul del Real expected to be released from prison in connection with his drug trafficking sentence soon after testifying in the case against George Torres. There was also evidence that Detective Kading and the prosecutors had promised to help Raul del Real retain ownership of his house, even though a forfeiture action had been filed against the house in connection with Raul del Real's drug conviction. None of this evidence had been disclosed to the defense by the government before trial. Instead, the defense obtained this information through its own diligence. The impeachment was effective because the jury ultimately acquitted George Torres of the murder of

Ignacio Meza, the predicate act for which Raul del Real was the primary witness.

The defense also vigorously cross-examined Derrick Smith with the impeachment evidence revealed on the recorded prison phone calls, and the other evidence provided by the government. For example, the government disclosed that Smith had received immunity from prosecution in connection with the murder of a man named Roderick Chapman. At trial, Smith admitted that he had lured Chapman to a house where Ignacio Meza was waiting, and once Chapman entered the house, Meza killed him. The government disclosed before trial that Smith was receiving immunity for his role in this murder. Among the evidence that was revealed in the recorded prison phone calls between Smith and Detective Kading was evidence that, much like Raul del Real, Smith expected to be released from prison soon after he testified against George Torres. The government disclosed that Smith hoped that the government would file a motion for reduction of Smith's sentence, but did not disclose any promises with regard to the extent by which Smith's twenty-four-year sentence for trafficking drugs to Alabama would be reduced. Also revealed on the recorded prison phone calls used during Smith's cross-examination was evidence that Smith had been promised payment for his testimony. Detective Kading was heard on one call telling Smith that "[w]e've already talked about big money." Yet, the government had not disclosed any promise of monetary payment with respect to Smith. When confronted with this information on cross-examination, Smith denied that such a promise had been made. Unlike with Raul del Real, the jury ultimately accepted the testimony of Smith

as evidenced by the fact that the jury found George Torres guilty on the Maldonado murder, for which Smith was the key witness.

The defense filed a post-trial motion that focused primarily on the potential Brady violations in connection with the testimony of Derrick Smith. The defense identified several pieces of evidence, which suggested that additional promises had been made to Smith in exchange for his testimony, and that those promises had not been disclosed to the defense either before or after trial. Chief among this evidence was the recorded prison call that was actually played at trial where Detective Kading mentioned that he and Smith had already talked about "big money." There was also evidence that there was a written proffer agreement between Smith's lawyer and the prosecution that had not previously been disclosed. The government's response to the motion failed to adequately address whether any such additional promises or benefits had been conferred upon Smith. Indeed, the government did not even submit a declaration from Detective Kading admitting or denying that additional promises were ever made.

Because Smith was the key witness in the government's case in connection with the Maldonado murder (indeed, he was the only witness who said that he heard George Torres order the murder) the Court found it likely that any additional impeachment material would likely have been material. See Benn, 283 F.3d at 1058 (finding that "the number and nature of the undisclosed benefits was such that they would have impeached Patrick more effectively than the evidence" presented at trial, and finding the additional benefits to be material because they "would have 'cast a shadow' on Patrick's credibility"). As a result, the Court scheduled an evidentiary hearing in order to determine

conclusively whether such additional promises were made. See United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) ("We believe that the better course is to flush out the truth from behind the government's veil and then determine what to do with it in the light of its implications."). The Court planned to call the case agents involved in the handling of Smith, especially Detective Kading, who by all indications was Smith's primary handler. In preparation for the hearing, the Court ordered the government to disclose additional information. See Bernal-Obeso, 989 F.2d at 333 ("[T]he government should be required under these circumstances, for prophylactic reasons at least, to demonstrate whether it discharged its obligation under Brady."); Blanco, 392 F.3d at 394 (remanding to the district court for fact-finding because it was unclear "whether the information that has so far come to light about Rivera is only the 'tip of the iceberg'"). The Court also ordered the government to produce the person most knowledgeable at the BOP in order to determine whether it would be possible to recover other recorded prison phone conversations between Smith and the detectives in the case.

On June 9, 2009, the date that the person most knowledgeable from the BOP was scheduled to appear for a hearing, the government informed the Court that they had found additional Brady material with respect to Smith. The government admitted that there had been relevant information within its control that bore on the credibility of Smith and Raul del Real, and that several Brady violations had occurred. As a result, the government moved to voluntarily dismiss the RICO counts, which contained the murder charges. The Court granted the motion, and released George Torres on bond.

In light of the dismissal of the RICO charges, it was no longer clear whether an evidentiary hearing was required in order to determine the full range and extent of the benefits conferred upon Smith for his testimony. At the time that the government moved to dismiss the RICO counts, the government did not fully explain what benefits were conferred upon Smith and Raul del Real. The defense argued that an evidentiary hearing was still needed in order to determine the full extent of the governmental misconduct in the case, and to determine whether there was undisclosed Brady material that was relevant to the remaining bribery, harboring, and tax counts. In opposition, the government argued that a further evidentiary hearing was not required because the only possible Brady violations were with respect to the RICO counts that had already been dismissed.

The government's opposition, however, raised further issues, which the Court found warranted an evidentiary hearing. First, the government revealed the basis for their earlier decision to dismiss the RICO counts. After reviewing the daily logs of Agent Black in accordance with the Court's June 1 Order, the government discovered that those logs contained additional Brady material. The Brady material in Agent Black's logs included the following information:

(1) A statement by Derrick Smith that Ignacio Meza had given the firearm used in the Maldonado murder to an individual named "Chava," which contradicted Smith's testimony that Ignacio Meza had given the murder weapon to Smith.

(2) A statement by Felipe "Boxer" Rodriguez who said that he did not know Raul del Real, which contradicted Raul del Real's testimony that Raul del Real spoke with Rodriguez, a purported member of the Mexican Mafia, in order to determine whether Maldonado was protected by the Mexican Mafia, and thus, whether Ignacio Meza could murder him without fear of reprisal from the Mexican Mafia.

(3) An interview of a used car salesman by Detective Kading which suggested that Detective Kading influenced the used car salesman to give Derrick Smith's lawyer a free navigational system.

(4) A recorded conversation between Detective Kading and the wife and brother of Fernando Villalpondo, who testified that he was the driver of the car from which Ignacio Meza fired the shots that killed Carpel.

(5) An interview with Jesus Meza in prison where Agent Black advised Jesus Meza of the possibility of state murder charges if he did not testify against George Torres in connection with the Maldonado murder.

(6) Log entries that suggested that Detective Kading and AUSA Searight were aware that Derrick Smith had been investigated for smuggling drugs into prison in 2004, and that no action was taken against Smith.

As a result of these disclosures, the government admitted that there had been actual Brady violations with respect to the RICO counts because Derrick Smith was the key witness on the Maldonado murder, the only one out of the original three murder predicates that the jury found to have been proven beyond a reasonable doubt.

Second, the government's opposition admitted for the first time that there was additional Brady material with respect to one government witness on the remaining non-RICO counts. The government disclosed that there was additional impeachment evidence with respect to Roberto Garcia that was not disclosed to the defense before or during trial. Because Garcia had been deported, the government obtained an entry visa allowing him to return to the United States in order to testify at trial. Furthermore, Garcia had at least one felony conviction that was not disclosed to the defense. Garcia testified that he worked at the Numero Uno markets, that he was illegal at the time, and he was paid in cash. Despite the fact that Garcia testified on only one day, he was allowed to stay in the United States, where he had family, for two months before being sent back to Mexico.

In an attempt to demonstrate that there was no additional undisclosed Brady material with respect to the remaining bribery, harboring, and tax counts, the government submitted a declaration of Agent Moriarty. Agent Moriarty stated in his declaration that he contacted several witnesses who had testified in the bribery, harboring, and tax cases. He reported that nearly all of them denied that Detective Kading had offered them any benefits or had threatened them in order to influence their testimony.

The Court found several flaws with the government's approach, however. First, the Court found that by contacting the witnesses instead of the law enforcement agents, the government was essentially going about fulfilling its Brady obligations in a backward manner. One of the fundamental principles of Brady is that the prosecutor has a duty to learn what the law enforcement agents on the case know about the witnesses so that any impeachment information can be disclosed to the defense. See Price, 566 F.3d at 909 ("[T]he prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf."). The government, here was essentially doing the reverse – contacting the witnesses in order to determine whether the law enforcement agents had improperly influenced them. Thus, the Court found that it could not rely on the Moriarty declaration as the sole basis for determining whether there was any undisclosed Brady material on the remaining counts.[3] Second, Agent Moriarty did not contact all of the witnesses that testified on the bribery, harboring, and tax counts. Finally, Agent Moriarty did not ask the witnesses whether they had been improperly influenced by any law enforcement agents in the case other than Detective Kading, even though there was evidence that Detective Thurman was the primary handler of the witnesses on these non-RICO counts.

The Court decided to hold another evidentiary hearing in order to make findings as to whether there was additional undisclosed Brady material that was relevant to the remaining bribery, harboring, and tax counts. In light of the government's previous failures to fully

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[3] As discussed below, however, the Court used the Moriarty declaration to the extent that it corroborated or contradicted the testimony of the officers at the evidentiary hearing.

disclose Brady material, the Court could not be confident that all Brady material had been revealed. The Court was concerned that, in light of the new evidence with respect to Roberto Garcia, the Court may have been dealing with a "tip of the iceberg" situation, where there was more impeachment material to be discovered. See Blanco, 392 F.3d at 394. As a result, on July 28, 2009, the Court held an evidentiary hearing. At the hearing, Detective Kading, Detective Thurman, and Agent Black testified. Having observed these witnesses at the evidentiary hearing the Court now makes the following findings.

b. Evidentiary Hearing Findings

The purpose of the July 28, 2009 evidentiary hearing was to determine whether any additional Brady material existed with respect to the witnesses who testified on the bribery, harboring, and tax counts. The Court first called Detective Kading to the stand, and inquired as to his contacts with the witnesses on the non-RICO counts. Detective Kading testified that he had significantly less contact with the witnesses on the non-RICO counts due to the fact that he was primarily responsible for the witnesses involved in the violent crime predicates, such as Derrick Smith and Raul del Real. Nonetheless, Detective Kading testified that he was present for interviews with Lilia Gonzalez, Ned Tsunekawa, and Daniel Mercado. Detective Kading testified that he never made any threats or promises to the non-RICO witnesses that could have affected their testimony at trial. Detective Kading said that he and Don Freeman had developed some kind of social relationship during the course of the investigation when Freeman visited Los Angeles for

meetings with investigators. Detective Kading testified that, on one occasion, he paid for Freeman's breakfast before Freeman testified at trial.

Agent Moriarty's declaration indicated that one witness on the harboring and tax counts, Victor Topete, reported that perhaps Detective Kading had threatened him. Agent Moriarty's declaration suggested that Detective Kading told Topete that if he did not testify, then Detective Kading would know that Topete was hiding information. Topete asked Detective Kading what would happen if he did not cooperate, and Detective Kading told him that he would go to jail. When asked about this reported exchange with Topete, Detective Kading testified that he was not the person that had made these comments, but that Topete had confused him with Detective Thurman. The Court finds that this is a plausible explanation in light of the fact that both detectives have the same first name "Greg." Indeed, Detective Thurman testified that he was the one who communicated regularly with Topete. Detective Thurman testified that he told Topete that if Topete did not comply with a trial subpoena, that he could go to jail, but Detective Thurman testified that he never threatened Topete in any way in order to influence his testimony. Indeed, after further questioning from AUSA Davis, Topete told Agent Moriarty that the only comment about going to jail had been with respect to a trial subpoena. Furthermore, Topete categorically denied that Detective Kading had ever attempted to influence his testimony. Furthermore, Detective Thurman testified that Topete does not understand English well. Detective Thurman testified that he had communication problems with Topete before. Topete's wife, Ana Alvarez, did not report any improper threats in connection with her

testimony. Thus, the Court finds that neither Detective Kading nor Detective Thurman made improper promises or threats with respect to Topete. The Court generally finds Detective Thurman credible, and his version of events corroborates Detective Kading's version, to the effect that no improper threats or promises were made to Topete.

With respect to the remaining non-RICO witnesses, the Court also finds that Detective Kading did not make any additional improper threats or promises to these witnesses. The fact that Detective Kading took Freeman out to breakfast before trial is not the type of Brady information that must be disclosed to the defense before trial. It is hard to imagine that such a de minimus benefit could ever be material.

The Court views Detective Kading's testimony at the evidentiary hearing with skepticism in light of the Court's earlier finding at the Franks hearing (see Docket No. 497) and the improper manner with which Detective Kading handled Derrick Smith and Raul del Real in this case. Nonetheless, the Court generally accepts Detective Kading's testimony with respect to his testimony that he did not make any threats or promises to the non-RICO witnesses. The Court notes that in its earlier ruling after the Franks hearing, although the Court found that Detective Kading had misquoted certain portions of the wiretap calls, the Court never found that Detective Kading was intentionally lying. The Court found that Detective Kading acted with reckless disregard for the truth because he had available to him the recorded calls, yet he misquoted them in significant ways. Under those circumstances, the Court found that his actions constituted reckless disregard for the truth. It does not necessarily follow from that ruling, however, that Detective Kading's testimony cannot be believed under any

circumstances. Furthermore, although many of the recorded prison calls between Detective Kading and Smith or Raul del Real suggest that Detective Kading made certain improper inducements, the Court is not convinced that the same relationship existed between Detective Kading and the non-RICO witnesses. Detective Kading was not in charge of the non-RICO witnesses, as he was with the witnesses on the violent crime aspect of the case. Furthermore, the non-RICO witnesses were cut from entirely different cloth than the murder witnesses such as Derrick Smith and Raul del Real. None of the non-RICO witnesses were in custody, and, as a result, it makes sense that they were handled differently. Furthermore, unlike with Derrick Smith and Raul del Real, Detective Kading rarely met with or spoke to any of the non-RICO witnesses without another law enforcement agent present. Finally, Detective Kading's testimony is corroborated by Detective Thurman, who the Court generally finds credible. Thus, although the Court views Detective Kading's testimony with some skepticism, the Court finds that Detective Kading did not make any additional threats or confer any benefits upon the non-RICO witnesses.

Detective Thurman testified that he was largely in charge of the witnesses related to the non-RICO counts. Detective Thurman testified that he generally did not make any additional threats to or confer benefits upon the non-RICO witnesses. Detective Thurman did mention, however, that he gave Carlos Moran some assistance with an administrative problem Moran was having with another local police agency. A bench warrant had been issued under Moran's name due to confusion with Moran's identity. In order to assist Moran to clear the warrant, Detective Thurman called the police agency involved and

obtained the proper paperwork for Moran to complete. Moran completed the paperwork and turned it into the police agency, which resolved the confusion. The only other additional benefit that Detective Thurman testified to was that he may have on one occasion paid for Don Freeman's lunch. As with Detective Kading, however, merely purchasing a witness lunch is unlikely to ever constitute material impeachment evidence. As discussed earlier, Detective Thurman testified that he was the one who communicated with Topete, not Detective Kading. Detective Thurman testified that he generally told witnesses, including Topete that they had to testify truthfully before the grand jury, and that if they did not want to cooperate, they could be subpoenaed. The Court finds Detective Thurman credible on this point, and finds nothing improper with these comments.

There was also evidence presented at the evidentiary hearing that one witness, Yolanda Amaro, did not want Detective Thurman to contact her again. The parties disagreed as to what Amaro said, but the general idea was that she felt intimidated by Detective Thurman. Amaro did not testify in the government's case at trial, however, and the defense chose not to call her.

The final witness, Agent Black, had very little, if any, contact with the witnesses on the non-RICO counts. The Court finds Agent Black's testimony to be credible and finds that he did not make any additional threats or promises to any of the non-RICO witnesses.

At the end of the evidentiary hearing, the defense informed the Court that the government had not yet disclosed to the defense the unredacted version of Detective Kading's logs for the period of June 2003 to December 2005. The Court ordered the government to make the

unredacted versions of these logs available to the defense, and to report back to the Court as to any new information that a review of these logs revealed. On July 30, 2009, the government made these logs available to the defense, and the parties have submitted supplemental reports from this review. The defense identifies five entries from Detective Kading's unredacted logs that the defense argues were relevant to this case, and that would have been helpful to the defense case at trial. Each of the entries identified by the defense, however, is again relevant only to the murder predicates in the dismissed RICO counts. For example, the defense notes that several of the redactions in Detective Kading's logs related to the impoundment of a car used by Derrick Smith to dispose of the body of Roderick Chapman, the murder for which Smith received immunity in exchange for his testimony. The government already disclosed that Smith was receiving immunity for the Chapman murder. The Court is not convinced that this additional information changes the analysis in any way. The remaining entries identified by the defense similarly pertain to the now-dismissed RICO counts. The defense has not identified any additional material from the review of Detective Kading's unredacted logs that would have been material to the non-RICO counts.

Having now conducted this evidentiary hearing, the record is complete with respect to what benefits and threats were made to the witnesses who testified with respect to the non-RICO counts.

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c. Analysis

The government admits that it committed multiple Brady violations with respect to the murder predicates included in the RICO counts. Indeed, in light of the evidence that was revealed at trial, and the evidence that has subsequently been uncovered in additional recorded prison calls and Agent Black's logs, it would be impossible to find otherwise. Derrick Smith and Raul del Real were the essential lynchpins to the government's case on the alleged Maldonado and Meza murders. Smith was the only witness who testified that he heard George Torres instruct Ignacio Meza to kill Maldonado. Likewise, Raul del Real was the only witness who testified that he heard George Torres order the murder of Ignacio Meza. Raul del Real was so thoroughly impeached that the jury apparently rejected his testimony and acquitted George Torres on the Meza murder. Despite the overwhelming amount of impeachment evidence pertaining to Smith, the jury nevertheless accepted Smith's testimony and found that George Torres had ordered the Maldonado murder.

The additional impeachment material relevant to Derrick Smith's testimony almost certainly would have been material and would have called for, at the very least, a new trial. The government recognized as much, and as a result the government moved to dismiss the RICO counts in their entirety.

With regard to the remaining bribery, harboring, and tax counts, however, the government contends that the admitted Brady violations did not pertain to testimony that was relevant to the remaining counts.

Indeed, Derrick Smith and Raul del Real's testimony was relevant exclusively to the murder predicate acts and now-dismissed RICO counts.

When performing a Brady analysis, it is proper to analyze the evidence separately with respect to the different counts. Courts have held that any remedy, either new trial or dismissal, is only appropriate as to those counts that have been materially affected by the Brady violations. See United States v. Wayne, 903 F.2d 1188, 1193 (8th Cir. 1990) (affirming denial of new trial because "[a] review of the evidence on Count III leads us to conclude that the suppressed evidence was not material to this count"). Indeed, in the main case cited by the defense in support of its argument that the Court should dismiss the remaining counts, the court found that the Brady violations were material to the other counts. See United States v. Lyons, 352 F. Supp. 2d 1231 (M.D. Fla. 2004) (dismissing additional counts because the "tainted testimony explicitly touched more than the drug-conspiracy count"). Because the RICO counts have already been dismissed, the Brady violations with respect to Smith and Raul del Real are essentially moot. See id. at 1244-45 ("Dismissal of the drug-conspiracy count has rendered moot the issue of whether there were Brady and Giglio violations as to that count."). Indeed, George Torres has already received the remedy he seeks as to those counts: dismissal with prejudice.

When performing the materiality analysis with respect to the other counts, however, the Court considers the effect of the undisclosed Brady material as it pertains to the counts separately. The government admits that the information with regard to Roberto Garcia was favorable to the defense, and that it was suppressed. The Court, however, finds

that the suppressed Brady material with respect to Garcia was not material to either the harboring or the tax counts because it was of relatively minor importance in light of the other evidence presented on those counts. Garcia testified that he received cash when he worked at the Numero Uno market and that he was not legally in the United States. Garcia testified that he had a conversation with George Torres, who told him to get a "good Social Security number" so that he could continue working at the Numero Uno market. The implication of the testimony was that George Torres knew that Garcia was illegal and that he was instructing Garcia to obtain false identification.

However, there is not a reasonable probability that the jury would have reached a different result if the additional impeachment material with respect to Garcia had been disclosed to the defense before trial. The harboring and tax counts to which the testimony of Mr. Garcia's testimony was relevant were otherwise sufficiently strong without Garcia's testimony. See Benn, 283 F.3d at 1053 ("For the purposes of determining prejudice, the withheld evidence must be analyzed in the context of the entire record."). Similarly, the meals given to Don Freeman were not material to the tax counts to which Freeman's testimony was relevant. Nor does the fact that Detective Thurman helped Carlos Moran obtain certain paperwork from another police department bear any reasonable probability that it would have affected the outcome of the case.

Thus, the Court finds that the additional evidence that was suppressed and that was favorable to the accused, was not material to George Torres's convictions on the harboring or tax counts – the counts to which these witnesses' testimony was relevant. Thus, there is no

Brady violation with respect to these counts; accordingly, there is no need to consider whether a new trial or dismissal of these counts is an appropriate remedy.

2. Outrageous Government Conduct

Despite the fact that there is no Brady violation with respect to the remaining bribery, harboring, or tax counts, the defense advances an argument based generally on what the defense perceives to be outrageous government conduct. "An indictment may be dismissed with prejudice under either of two theories: First, a district court may dismiss an indictment on the grounds of outrageous government conduct if the conduct amounts to a due process violation. Second, if the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers." Chapman, 524 F.3d at 1084. Because there was no Brady violation with respect to the remaining counts, there is no due process violation on this basis. Furthermore, the Court finds no authority to support an argument that the conduct of the government in this case otherwise violated George Torres's due process rights.

Accordingly, the defense proceeds on a theory that the Court should dismiss the entire indictment, including the non-RICO counts, under the Court's supervisory powers. "A court may exercise its supervisory powers to dismiss an indictment in response to outrageous government conduct that falls short of a due process violation." United States v. Ross, 372 F.3d 1097, 1109 (9th Cir. 2004). A district court may exercise its supervisory power "to implement a remedy for the

violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991).

"To justify exercise of the court's supervisory powers, prosecutorial misconduct must (1) be flagrant and (2) cause 'substantial prejudice' to the defendant." Ross, 372 F.3d at 1110. "Because dismissing an indictment with prejudice encroaches on the prosecutor's charging authority, this sanction may be permitted only in cases of flagrant prosecutorial misconduct." Chapman, 524 F.3d at 1085. As to the second prong, "[a] district court may not use its supervisory authority to dismiss an indictment for prosecutorial misconduct 'not prejudicial to the defendant.'" Ross, 372 F.3d at 1110 (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988)). The prejudice requirement is necessary because "'[e]ven a sensible use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions,' including the harmless error rule prescribed by Federal Rule of Criminal Procedure 52(a)." Id. (quoting Nova Scotia, 487 U.S. at 254). Furthermore, the court should consider whether less drastic remedies are available to sanction the prosecutor's conduct. See id. at 1111.

The Court declines to exercise its supervisory powers to dismiss the remaining counts under these circumstances because, although the conduct of the prosecutors and investigators in this case was deficient, George Torres did not suffer substantial prejudice on the non-RICO counts. "[T]he proper prejudice inquiry is whether the

government conduct 'had at least some impact on the verdict and thus redounded to the defendant's prejudice.'" Id. at 1110. Besides the fact that the evidence on the RICO counts spilled over to the non-RICO counts (which is discussed later in connection with the new trial motion[4]) George Torres did not suffer any prejudice as a result of the government's misconduct in this case. The bribery, harboring, and tax counts were all based on evidence that was independent from the improper handling of the witnesses in the murder predicates. Thus, George Torres did not suffer sufficient prejudice to justify dismissing the non-RICO counts.

Furthermore, to the extent that the conduct of the government was deficient in this case, less drastic remedies are available to remedy and deter the such conduct in the future. "Prosecutors may . . . be sanctioned even if their misconduct does not prejudice the defendant." Id. at 1111. "Sanctions may be necessary to punish prosecutors who fail to fulfill their duty to 'win fairly, staying well within the rules.'" Id. (quoting United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993)). To the extent that the Court finds that the prosecutors acted inappropriately in this case by failing to comply with Court orders or otherwise neglecting their duties, the Court will consider the possibility of sanctions.

The Court is disturbed by the government's conduct in this case, especially with regard to how the agents handled the key witnesses on the murder predicates. The government's case on the three murder predicates relied on witnesses who were inherently problematic because of their criminal history and the number of incentives that had been

[4] See infra Part III.D.6.

conferred upon them for their testimony. As the Ninth Circuit has cautioned:

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. As Justice Jackson said forty years ago, 'The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility.' On Lee v. United States, 343 U.S. 747, 757 (1952). A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. See United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) (convictions reversed because government should have known witness was committing perjury). Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against its perfidy. By its actions, the government can either contribute or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by Giglio to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility. Shaffer, 789 F.2d at 689.

United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993).

In this case, the government did not adequately appreciate the amount of care that was required when dealing with criminal informants such as Derrick Smith and Raul del Real. Before trial, the Court and the defense persistently prodded the government to live up to its obligations under Brady. Yet, as the proceedings unfolded, it became clear that the government had not heeded the Court's warnings and that important information had not been fully disclosed. To the government's credit, however, when the additional information came to light, the government acknowledged its error and took what it considered the appropriate step and dismissed the RICO counts with prejudice. See United States v. Kojayan, 8 F.3d 1315, 1322-23 (9th Cir. 1993) (noting as an important factor for the exercise of supervisory powers whether the government acknowledged the misconduct and accepted responsibility). Thus, although the government clearly failed to live up to its obligations pretrial, in light of the government's acceptance of responsibility and decision to dismiss the RICO counts, the Court finds that dismissal of the remaining uninfected counts is not called for under the circumstances.

B. Wiretap

The defense argues that the undisclosed benefits to Derrick Smith call into doubt the Court's earlier ruling on the wiretap suppression motion. Derrick Smith was identified as "CS-1" in the wiretap application for George Torres's phone. The defense argues that if the extensive benefits given to Derrick Smith had been revealed to the issuing judge, that the issuing judge would have found the information

provided by Smith to be unreliable, and that without this information, there was no probable cause or necessity for the wiretap. The defense also argues that the information provided by Detective Kading generally cannot be trusted, and that it too should have been excised from the wiretap application. The defense seeks to have the information on the wiretap suppressed, or, as an initial step, the defense seeks a Franks hearing.

The defense correctly points out that the principles of Brady apply to pretrial suppression hearings. See United States v. Gamez-Orduno, 235 F.3d 453, 461 (9th Cir. 2000) ("The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."); United States v. Barton, 995 F.2d 931, 935 (9th Cir. 1993) ("[W]e hold that the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."). Thus, the government has an obligation to disclose impeachment evidence that bears on the credibility of an informant, such as Derrick Smith, who is the source of information in an affidavit.

Here, the numerous undisclosed benefits given to Derrick Smith could have been used to impeach the statement in the Affidavit that "Detective Kading has been able to verify the information provided by [Smith] in several different matters by independent means and believes [Smith] to be reliable." (Aff. ¶ 33.) Thus, the information regarding

the many benefits conferred upon Smith in exchange for his cooperation, should have been disclosed to the defense under Brady.

Even though Brady applies in the context of suppression hearings, and requires certain information to be disclosed to the defense in advance of such hearings, in order for suppression to be an appropriate remedy, the framework in Franks v. Delaware, 438 U.S. 154 (1978), applies. In order to obtain a hearing under Franks, the defendant must make a "substantial preliminary showing" that (1) "a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and (2) "the allegedly false statement is necessary to the finding of probable cause." Franks, 438 U.S. at 155-56; United States v. Senchenko, 133 F.3d 1153, 1158 (9th Cir. 1998). Thus, the defense must show that the allegedly false information was necessary to the finding of probable cause.

The same standard applies when evaluating necessity in the context of a wiretap application. In United States v. Ippolito, 774 F.2d 1482 (9th Cir. 1985), the Ninth Circuit held that the Franks analysis should apply to the necessity for a wiretap. Id. at 1485. The court noted that, under Franks, "the reviewing court should set the affidavit's false assertions to one side and then determine whether the affidavit's remaining content is still sufficient to establish probable cause. If the affidavit is not sufficient, the warrant must be voided and the fruits of the warrant suppressed." Id. The court noted that, under this framework, "the false statements must be material to a finding of probable cause." Id. The court found that this same analysis applies in the necessity context as well. Id.

The Court notes that there have been some Ninth Circuit cases that appear to have applied a less stringent materiality standard in the context of necessity for a wiretap. Instead of the standard set forth in Franks, where the Court said that the allegedly false statement must be "necessary to the finding of probable cause," see 438 U.S. at 156, some Ninth Circuit cases have applied what appears to be a more lenient standard, and have held that a false statement is material if it "could have" affected the issuing judge's finding of necessity. See United States v. Blackmon, 273 F.3d 1204, 1208 (9th Cir. 2001) ("[T]he court must determine . . . whether a reasonable issuing judge *could have* denied the application because necessity for the wiretap had not been shown." (emphasis added)); United States v. Carniero, 861 F.2d 1171, 1176 (9th Cir. 1988) ("If an application is inaccurate, the reviewing court must determine the true facts and rely on the credible evidence at the suppression hearing to determine whether a reasonable district court judge *could have* denied the application because necessity for the wiretap had not been shown." (emphasis added)).

The Court declines to apply a "could have" standard in the context of the necessity for the wiretap. First, the "could have" language used in the cases above comes from a passage in Ippolito near the end of the opinion. See Blackmon, 273 F.3d at 1208 (quoting Ippolito); Carniero, 861 F.2d at 1176 (same). In Ippolito, however, the Ninth Circuit expressly adopted the Franks framework from the probable cause context and imported it into the necessity context. Thus, although the Ippolito court used the "could have" language, the court's holding was to adopt the standard from Franks, where the false statement has to be necessary for the finding of necessity. Second, in other Ninth Circuit

cases, the court has applied a more faithful Franks materiality standard when evaluating the necessity for a wiretap. See United States v. Shryock, 342 F.3d 948, 977 (9th Cir. 2003); United States v. Bennett, 219 F.3d 1117, 1125 (9th Cir. 2000). In Shryock, the Ninth Circuit affirmed the district court's denial of a Franks hearing because, even assuming that the affidavit included misleading statements and omissions, "those statements and omissions were not necessary to the district court's finding of necessity." 342 F.3d at 977. Similarly, in Bennett, the Ninth Circuit affirmed the district court's denial of a Franks hearing because "the wiretap application contains information supporting probable cause and necessity independent of the information impeaching Chambers's credibility." 219 F.3d at 1125. Thus, the Court will apply the standard from Franks, Shryock, and Bennett, and ask whether, assuming the information was intentionally or recklessly false, there is nevertheless sufficient information in the application to support the issuing judge's finding of necessity.[5]

In light of the vast amount of impeachment evidence pertaining to Derrick Smith that was not disclosed in advance of the wiretap suppression hearing, the Court finds it likely that the issuing judge would have at the very least viewed the information provided by Smith with great skepticism, and perhaps would have disregarded the information provided by Smith in its entirety. Furthermore, in light of Detective Kading's conduct handling the witnesses in this case, the

[5] The Fifth Circuit has questioned "whether the Ninth Circuit in Ippolito intended to erode the Franks standard." United States v. Guerra-Marez, 928 F.2d 665, 670 n.4 (5th Cir. 1991). In that case, the Fifth Circuit ultimately declined to adopt a "diluted Franks standard." Id.

issuing judge probably would have viewed any information from him with skepticism. Even if the information provided by Smith and Detective Kading is excised from the Affidavit, however, the Court finds that there is sufficient evidence in the Affidavit to support the issuing judge's finding of probable cause and necessity. In order to explain the Court's finding in this regard, it is important to explain the Court's earlier ruling on the wiretap suppression motion.

1. The Court's Earlier Ruling

George Torres filed his Motion to Suppress Wiretap Evidence on December 23, 2008. (Docket No. 514.) Torres moved to suppress the wiretap evidence on the basis that there was no probable cause and no necessity for the original application that was approved by United States District Court Judge Percy Anderson on February 3, 2004.

Judge Anderson found that the Affidavit of Paul Weinrich (the "affiant" or "Officer Weinrich"), a police officer with the Bell Gardens Police Department and member of the combined DEA Southern California Drug Task Force ("Task Force"), provided probable cause to believe that evidence would be recovered relating to George Torres's participation in the following criminal activities: (1) conspiracy to engage in racketeering activity, 18 U.S.C. § 1962(a) & (d); (2) violent crimes in aid of racketeering activity ("VICAR"), Id. § 1959; (3) conspiracy to possess or use a firearm during and in relation to a violent or drug trafficking crime, 18 U.S.C. §§ 924(o), 924(c)(1)(A); (4) conspiracy to distribute, and possess with intent to distribute, controlled substances, 21 U.S.C. §§ 846, 841(a)(1); (5) aiding and

abetting the distribution of controlled substances, 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1); and (6) use of a communication facility to facilitate such controlled substance offenses, 21 U.S.C. § 843(b). At a hearing on February 2, 2009, the Court found that Judge Anderson's finding of probable cause and necessity was supported by sufficient information in the Affidavit, and denied the motion to suppress evidence from the wiretap.

a. The Affidavit

The following is a summary of the information included in the Affidavit of Officer Weinrich.[6] After detailing George Torres's past suspected criminal activity, Officer Weinrich discussed recent developments in the relationship between George Torres and Raul del Real, and recent phone conversations overheard on a wiretap of Raul del Real's phone. Officer Weinrich stated that Raul del Real is a "large volume cocaine and marijuana trafficker with direct contacts to the Mexican Mafia." (Weinrich Aff., Ex. A to Motion to Suppress Wiretap Evidence [Docket No. 514], ¶¶ 46, 47.) Officer Weinrich also stated that Raul del Real is "extremely violent and dangerous." (Id. ¶ 46.) On August 27, 2002, Raul del Real was stopped as he was leaving his girlfriend's house, and officers found $240,000 cash and a loaded handgun inside the car. The police searched the girlfriend's house and found 40 pounds of marijuana in the garage. During the arrest, Raul del Real asked the officers: "How did you get on to me? I dump my phones all the time. I'm always watching." (Id. ¶ 48.)

[6] Notably, Detective Kading was not the affiant for the wiretap application.

On December 26, 2002, Raul del Real visited the Los Angeles County Jail and the police retrieved a conversation in which Raul del Real was talking to Armando Ochoa, a known "shot caller" in the Mexican Mafia.[7] (Id. ¶ 48.) The conversation revealed Raul del Real asking Ochoa to intervene in a dispute between local gangs. Ochoa was overheard saying, "My homeboys killed Lefty and now you guys got one of my homies, so let's just call it that, right there." (Id.) Officer Weinrich stated that he had overheard other conversations in which Raul del Real asked Ochoa's girlfriend to talk to Ochoa on other matters on Raul del Real's behalf. (Id.)

In April 2003, Raul del Real opened the "Real Deal Car Wash," which officers soon learned was a staging ground for narcotics trafficking. (Id. ¶ 49.) On July 16, 2003, the police observed Victor Steward and Billy Haynes driving into the car wash. (Id.) When Billy Haynes drove out, the police stopped the car and found a kilogram of cocaine inside the car door panel. (Id.) Officer Weinrich stated that based on calling patterns indicated trap and trace devices, and the fact that the drugs were picked up at the car wash, Officer Weinrich believed that Raul del Real was the source of the cocaine. (Id.)

On August 28, 2003, Officer Weinrich was contacted by Immigration and Customs Enforcement ("ICE") officials in Baltimore, Maryland regarding a large drug bust that they had recently carried out. (Id. ¶ 50.) In the bust, ICE officials had arrested two individuals in Baltimore who were in possession of 26 kilograms of cocaine, 15 pounds of marijuana, and $850,000 in cash. (Id.) The suspects agreed to

[7] LAPD Detective Mark Espinoza, a member of a multi-agency task force investigating the Mexican Mafia, informed the Affiant that a "shot caller" is a person who is able to make decisions on behalf of the Mexican Mafia regarding violent reprisals. (Aff. ¶ 48.)

cooperate, and informed ICE that they had been receiving multi-kilogram shipments of cocaine and marijuana from Los Angeles over the past year. (Id.) The suspects identified their source of supply as Raul del Real by his nickname "Ra-Ra." (Id.) The suspects further identified Raul del Real as their source by identifying his photograph. (Id.)

On August 31, 2003, the police recorded a call from the Baltimore bust suspects to Raul del Real in which Raul del Real stated: "It's a done deal. We can take him out right now. Not even you can help him. We have people worldwide, everywhere." (Id.) Officer Weinrich stated that Raul del Real was referring to one of the Baltimore customers' Los Angeles contacts. (Id.) Officer Weinrich stated that this activity show that Raul del Real was a large-volume narcotics distributor, who uses violence to further his activities. (Id.) In another recorded conversation, Raul del Real had told his sister: "I don't know why I'm so violent," and recounted an earlier occasion where he "broke a guy." (Id. ¶ 50 n.6.)

As a result of this evidence, Officer Weinrich was able to obtain a wiretap for Raul del Real's phone. (Id. ¶ 51.) Officer Weinrich began intercepting phone calls on Raul del Real's phone on October 9, 2003, and "nearly immediately," calls between Raul del Real and George Torres were intercepted. (Id.) Officer Weinrich stated that they spoke to each other on a "regular basis." (Id.)

The LAPD also had a wiretap the phone of Vernon Steward, one of the targets of the proposed wiretap. (Id. ¶ 52.) From Vernon Steward's wiretap, the police heard conversations referencing George Torres and Del Real. (Id.) For example, on October 5, 2003, Victor Steward went to a hearing for Billy Haynes's criminal prosecution for

drugs, after which Victor called his brother Vernon Steward. (Id.) Referring to the kilogram of cocaine that was found in the door panel of the car, Victor said that "my fingerprints wasn't on there." Vernon responded, "It was on there?" Victor said, "No, it wasn't." Vernon then asked, "Oh, it wasn't? What about George's?" Victor responded, "I don't know. Ra knew all that." Vernon concluded, "He don't know nothing then?" Victor said that he did not. (Id.) Officer Weinrich stated that a detective in the case informed Officer Weinrich that Vernon Steward refers only to George Torres as "George." (Id.) Officer Weinrich also opined that he believed that Vernon Steward and Raul del Real did not tell George Torres about Billy Haynes's arrest. (Id.)

As things developed on Raul del Real's wiretap, Officer Weinrich stated that in mid-October 2003, he noticed Raul del Real avoiding George Torres. (Id. ¶ 53.) On multiple calls, Raul del Real made excuses not to meet with George Torres. (Id.) For example, on October 19, 2003, Raul del Real told George Torres it was too foggy to meet with him. However, George Torres called back and told Raul del Real to meet him at Alfredo Garcia's (aka "Chigas") house. (Id.)

Raul del Real eventually met with George Torres on October 20, 2003, during a meeting in which George Torres became extremely angry with Raul del Real. (Id.) In a recorded conversation, George Torres was overheard saying to Raul del Real: "I'm going to tell you something. Never talk about what I'm going to ask you. Never. Never, you motherfucker. You better tell me where he is at. You better tell me, motherfucker." (Id.) George Torres went on stating: "Yeah. You know what? You play me like that again, motherfucker. . . . You know

where he is at, punk. You know where he's at. Don't be playing me like that, you motherfucker. Don't ever play me like that , thinking I'm stupid. You know what's up. You tell me what's up, motherfucker, cause I wanna know!" (Id.) Raul del Real responded by stating "10-4." (Id.) George Torres continued: "You know where he's at, punk motherfucker. Don't be playing me like that, motherfucker." (Id.) Officer Weinrich said that Raul del Real "seemed cowed." (Id.) Then, a few minutes later, George Torres called back and said, "Another thing that I thought, too. Oh, man. Just throw, just throw to the W. I don't want to say it on the radio. Two seconds. Hurry up." (Id.)

Officer Weinrich interpreted this conversation as George Torres being upset with Raul del Real for not informing him of the law enforcement problems that Raul del Real had been experiencing recently in his drug trafficking operation. (Id.) Officer Weinrich stated that he suspected George Torres had learned about the Billy Haynes bust or the Baltimore investigation, and was angry because Raul del Real had not informed Torres about either. (Id.) The reference "throw to the W," was a command for Raul del Real to go to the Numero Uno warehouse, so that George Torres could speak with Raul del Real in person and avoid police detection. (Id.)

The Affidavit also related several conversations that the police intercepted relating to Vernon Steward. (Id. ¶ 54.) Vernon Steward was arrested in 1992 for possession of 271 grams of crack cocaine and multiple firearms offenses. (Id.) Vernon Steward was a close friend of George Torres and was observed meeting with narcotics customers several times leading up to his 1992 arrest in a Ford Explorer owned by George Torres. (Id.) On November 10, 2003, the LAPD intercepted a

conversation in which Vernon Steward was talking to his girlfriend about a meeting he had with George Torres that day. (Id. ¶ 55.) Vernon was overheard recounting his conversation with George Torres: "I told him like it was, we started out, you had one little spot, motherfucker. I was your only nigger . . . you come see me every day of the week. You get a little money. I go to prison because I can't do nothing negative. Hey, you wanna act negative. Fuck you!" (Id.) Officer Weinrich interpreted this call as Vernon Steward expressing his frustration that he did time in prison, and did not inform on George Torres, and, as a result, Vernon thought Torres owed him a favor. (Id.)

A couple weeks later, on November 21, 2003, George Torres was overheard talking to Raul del Real about Vernon Steward's visit. (Id. ¶ 56.) George Torres said, "Vernon, that fucking nigger, pulled in. Chigas let him in. He said, 'What's up G? How come you don't call me?'" George Torres responded: "Get the fuck out of here you fucking nigger." George Torres said, "I told that motherfucking nigger to get out. I don't want no motherfucking fleas and canaries around me." (Id.) Officer Weinrich interpreted this conversation as George Torres not wanting Vernon Steward around him because he is a "canary" – meaning he might inform the authorities about Torres's illegal activities. (Id.)

On November 25, 2003, the police intercepted a call from Alfredo Garcia, in which he said to Raul del Real: "Call the boss. Call the boss. Call George." (Id. ¶ 57.) Later that same day, Raudel Sandoval called Raul del Real and said: "Call George, please, on the phone."

(Id.) Officer Weinrich stated that George Torres is the only person to whom Raul del Real speaks with "great deference." (Id. ¶ 13.)

On November 24, 2003, George's son, Steven Torres, was car-jacked at the El Monte Numero Uno market. (Id. ¶ 58.) George Torres called Raul del Real immediately to inform him that Steven had been car-jacked at gunpoint. (Id. ¶ 59.) George Torres instructed del Real to call "Trivilin" to find out where they strip the cars "so I can see if I can catch this mother fucker." (Id.) The next day, George Torres found out that they had identified the car-jacking suspect on the store's security camera. (Id. ¶ 62.) George Torres called del Real and said, "I told you we were going to get the motherfuckers. I told you." (Id. ¶ 63.) George Torres instructed Raul del Real: "You know what's up. I'll call you later. Be ready." (Id.) Officer Weinrich opined that Torres was instructing Raul del Real to be ready to go find the perpetrator. (Id.) Previously, George Torres had asked Raul del Real "Do you got one on you?," which the affiant interpreted as an instruction to bring a gun. (Id. ¶ 61.)

On December 3, 2003, Raul del Real detected law enforcement surveillance of him. (Id. ¶ 57.) Raul del Real made a number of calls to people alerting them to the surveillance. (Id.) Raul del Real's brother, Alberto del Real, called Raul and said that he had talked to Chigas, which Officer Weinrich interpreted as alerting George Torres to the surveillance. (Id.) Officer Weinrich also stated that Torres was guarded in his conversation on the phone, and he communicated Raul del Real using the "walky-talkie" feature of their Nextel phones, which is harder for law enforcement to intercept. (Id.)

On December 21, 2003, Raul del Real called Cynthia Barnes, the girlfriend of the incarcerated Mexican Mafia associate Armando Ochoa, to talk to her about Steven Torres's car-jacking. (Id. ¶ 65.) Raul del Real said that the car had been taken from "one of my boys," and that "[m]y people have their business right at El Numero Uno market." (Id.)

On December 26, 2003, Raul del Real called his brother Alberto del Real, who had been reported to the police for exhibiting unusual behavior. (Id. ¶ 67.) Raul del Real said: "LAPD was going to take you to jail. That's all I got to tell you. LAPD did not fuck with you because Peter Torres told them not to." (Id.) "They were going to pull you over. They did not do it because of me. You owe me one." (Id.) Peter Torres reportedly is George Torres's nephew, and worked for the LAPD at the time. (Id.)

On January 14, 2004, George Torres called Raul del Real and told him that he had a deal for him. George Torres said, "I got a good deal for you, motherfucker. But you gotta, you know what's up. You got to get something going. I've got a good deal. I've got a close out so you can come buy all kinds of shit I've got." (Id. ¶ 69.) George Torres told Raul del Real to meet at the warehouse to "see what kind of businessman you are." (Id.) Officer Weinrich interpreted this call to have possibly been about drugs. (Id.) More likely, however, Officer Weinrich stated that George Torres was selling some kind of grocery item on "very favorable terms." (Id.) Officer Weinrich stated that such transfers of valuable assets "are common between George Torres and Raul del Real and are, I believe, a way that Torres makes Raul del Real beholden to him." (Id.)

The Affidavit also recounted a number of older past crimes in which George Torres was suspected of being involved in the last 20 years. For example, Officer Weinrich mentioned an incident in 1986, in which George Torres was suspected of running over with his car and killing a man named Rigoberta Guerra, who caused some kind of disturbance at one of the Numero Uno markets. (Id. ¶ 22.) The Affidavit also recounted an incident in 1989 where George Torres assaulted Jose Luis Ferrusco for his involvement in a labor dispute at one of the stores. (Id. ¶ 27.) The Affidavit also discussed the circumstances surrounding murders of Edward Carpel and Jose Maldonado, and the disappearance of Ignacio Meza. (Id. ¶¶ 30-36.)

The Affidavit also recounted another past incident that occurred in 1989, when Albert del Real, Raul del Real's brother, was arrested for possession of marijuana. (Id. ¶ 28.) During the arrest, the police found a briefcase in the backseat of the car. (Id.) Albert del Real said that he was employed by the Numero Uno markets and that the briefcase belonged to his "boss," although Alberto del Real could not remember his boss's name. (Id.) The police opened the briefcase and found $13,000 in cash, plus multiple airline and hotel receipts in the name of George Torres. (Id.) The receipts indicated that George Torres had taken numerous trips to Mexico in the recent past. (Id.) United States Customs investigated the incident but no further action was taken. (Id.)

Another past incident recounted in the Affidavit was a traffic stop involving both George Torres and Raul del Real in 1996. (Id. ¶ 38.) On September 22, 1996, the Long Beach police department observed two vehicles driving in tandem at a high rate of speed. (Id.) When

the officers tried to pull the cars over, they saw a passenger in the Range Rover throw a paper bag out of the car window. (Id.) George Torres was driving the Range Rover in front and Raul del Real was driving the car in the back. (Id.) Sitting in the back seat of the Range Rover driven by George Torres was Vincent McDade, who was found with a loaded handgun in the seat pocket in front of him. (Id.) Officer Weinrich opined that the actions of George Torres, Del Real, and McDade were consistent with the commission of a drive-by shooting because "McDade was positioned in the back seat of the car . . . from which he could shoot as Torres drove by," and "Raul del Real was in a position to act as a blocking vehicle if they were followed." (Id.) George Torres pled guilty to reckless driving in connection with the incident. (Id.)

b. Probable Cause

As an initial matter, the Court found that the Affidavit, on its face, established probable cause to support the issuance of the wiretap. In order to issue a wiretap order, the district court must find probable cause to believe "(1) that an individual is committing, has committed, or is about to commit specified offenses, . . . (2) that communications relevant to the offense will be intercepted through the wiretap, and (3) that the individual who is the focus of the wiretap investigation will use the tapped phone." United States v. Fernandez, 388 F.3d 1199, 1235 (9th Cir. 2004). "Looking only to the four corners of the wiretap application, we will uphold the wiretap if there is a 'substantial basis' for these findings of probable cause." United

States v. Meling, 47 F.3d 1546, 1552 (9th Cir. 1995) (quoting United States v. Stanert, 762 F.2d 775, 778-79 (9th Cir.), amended, 769 F.2d 1410 (9th Cir. 1985)). Courts must apply "practical common sense and examin[e] the totality of the circumstances," to determine whether probable cause for a wiretap existed. United States v. Tham, 960 F.2d 1391, 1395 (9th Cir. 1991).

Based on the information included in the Affidavit, the Court found that there was a sufficient basis for the issuing judge's determination that George Torres was committing drug crimes. Among the crimes listed in the Affidavit were (1) conspiracy to distribute controlled substances, 21 U.S.C. §§ 846, 841(a)(1); (2) aiding and abetting the distribution of controlled substances, 18 U.S.C. § 2; and (3) use of a communication facility to facilitate controlled substances offenses, 21 U.S.C. § 843(b). The Court also found that there was probable cause to believe that George Torres was involved in a RICO conspiracy pursuant to 18 U.S.C. § 1962(d), based on underlying drug crimes.

In Salinas v. United States, 522 U.S. 52 (1997), the Supreme Court defined the breadth of the RICO conspiracy statute. The defendant was charged with both a substantive RICO violation, pursuant to § 1962(c), and RICO conspiracy, for the defendant's role in assisting the sheriff to allow prisoners to have "contact visits" in exchange for money. Id. at 55. The defendant was acquitted on the substantive RICO count, but convicted on the RICO conspiracy charge. Id. The Court rejected the defendant's argument that the conspiracy charge required a showing that the defendant himself committed, or agreed to commit, two predicate acts as required for a substantive RICO violation. Id. at 61. The

Court examined the plain language of the statute and noted "no requirement of some overt act or specific act . . . , unlike the general conspiracy provision applicable to federal crimes." Id. The Court stated that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." Id. at 65. The Court held that the evidence was sufficient to convict the defendant of RICO conspiracy because the sheriff "committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme." Id. at 66. Thus, the Supreme Court affirmed the defendant's conviction for conspiracy to commit RICO.

In United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008), the Ninth Circuit applied the definition of a RICO conspiracy as laid out in Salinas. The court found that the indictment was sufficient because it need only show that the defendant "'knew about and agreed to facilitate the scheme.'" Id. at 1041 (quoting Salinas, 522 U.S. at 66). The court noted Salinas's "broad interpretation of the RICO conspiracy statute," and found that under that standard, the allegations in the indictment were sufficient. Id. The indictment alleged that the defendant knew about the objective of the enterprise, which was to traffic contraband cigarettes, and that the defendant had agreed to facilitate it by receiving the cigarettes, concealing them in his car, and delivering them. Id. at 1042.

Turning to the Affidavit here, there was probable cause to believe that George Torres was engaged in a RICO conspiracy involving

underlying predicate drug offenses. First, the conversations overheard on the wiretap created probable cause to believe that there was an enterprise. An associated-in-fact enterprise is "'a group of persons associated together for a common purpose of engaging in a course of conduct.'" Odom v. Microsoft Corp., 486 F.3d 541, 552 (9th Cir. 2007) (quoting Turkette, 452 U.S. at 583). "To establish the existence of such an enterprise, a plaintiff must provide both 'evidence of an ongoing organization, formal or informal,' and 'evidence that the various associates function as a continuing unit.'" Id. Furthermore, the enterprise must have a "structure," which means "the way in which parts are arranged or put together to form a whole and the interrelation or arrangement of parts in a complex entity." United States v. Boyle, __ U.S. __, 129 S.Ct. 2237, 2244 (2009) (quotations and alterations omitted).

Here, the evidence in the Affidavit demonstrated probable cause that there was an associated-in-fact enterprise that consisted of George Torres, Raul del Real, Alfredo Garcia, and Raudel Sandoval. The calls intercepted on Raul del Real's wiretap reveal a power structure where George Torres had significant control over Raul del Real, who was a large-volume drug trafficker. George Torres was overheard directing and instructing Raul del Real to perform certain tasks, and on several occasions, George Torres told Raul del Real to come to the warehouse or to meet him at Garcia's house. Raul del Real responded with "10-4," and complied with Torres's orders. George Torres reprimanded Raul del Real on one occasion in particular, when George Torres told him "Don't be playing me like that, you motherfucker. Don't ever play me like that, thinking I'm stupid. You know what's up. You tell me what's up,

motherfucker, cause I wanna know!" There was a hierarchical structure to the organization, where George Torres was the boss, Raul del Real an associate, and Alfredo Garcia and Raudel Sandoval were assistants at a lower level. Raul del Real personally referred to George Torres as "boss," even though Raul del Real was not employed at the Numero Uno markets. On one occasion in particular, Garcia told Raul del Real: "Call the boss. Call the boss. Call George." (Id. ¶ 57.)

Furthermore, the Affidavit revealed that George Torres and Raul del Real had been functioning together as a continuing unit over a significant period of time. George Torres was arrested in a traffic stop bearing the hallmarks of a drive-by shooting with Raul del Real in 1996. Raul del Real was overheard referring to George Torres and his associates at the Numero Uno markets as "my people." Moreover, Raul del Real assisted George Torres to find where Steven Torres's car was being stripped after Steven had been car-jacked. These facts demonstrate a continuing unit of core associates.

The Affidavit also established probable cause to believe that there was a pattern of predicate RICO act acts consisting of Raul del Real's large-volume drug trafficking business. The minimum requirement for a pattern of racketeering is "at least two acts of racketeering activity" within ten years of each other. 18 U.S.C. § 1961(5). "[T]he term 'pattern' itself requires a showing of a relationship between the predicates and of the threat of continuing activity." H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989). The concept of relatedness "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are

not isolated events." Id. at 240. Continuity requires proof of either "a series of related predicates extending over a substantial period of time," or "past conduct that by its nature projects into the future with a threat of repetition." Id.

Raul del Real's drug dealings alone created such a pattern. In the summer of 2002, Del Real was arrested at his girlfriend's house in possession of 40 pounds of marijuana and $250,000.00 cash. On July 16, 2003, Billy Haynes was arrested leaving Raul del Real's car wash with a kilogram of cocaine in the side panel of the car. In August 2003, Raul del Real was implicated as the main source in the Baltimore bust, where ICE seized 26 kilograms of cocaine, 15 pounds of marijuana, and $850,000 in cash. The Baltimore suspects identified Raul del Real as their source by recognizing his picture and his nickname "Ra-Ra." These predicates were all related in the sense that they shared similar methods, participants, and purposes. Moreover, there was probable cause to believe that, based on his history, Raul del Real's drug trafficking scheme would be ongoing.

There was also probable cause to believe that George Torres was involved in the RICO conspiracy. Under Salinas, all that is required is (1) knowledge of, and (2) an agreement to facilitate the substantive RICO violation. 522 U.S. at 478. In other words, the defendant need only "adopt the goal of furthering or facilitating the criminal endeavor," or be "aware of the essential nature of the scope of the enterprise and intend to participate in it." Id. The Ninth Circuit has also held that the defendant must have "'knowingly agreed to facilitate a scheme which includes the operation or management of a

RICO enterprise.'" Fernandez, 388 F.3d at 1230 (quoting Smith v. Berg, 247 F.3d 532, 538 (3rd Cir. 2001)).

Here, the information in the Affidavit created probable cause to believe that George Torres knew of, and agreed to facilitate, Raul del Real's illegal narcotics distribution scheme. The facts in the Affidavit reveal that Raul del Real was a high volume drug dealer who had been implicated in multiple large drug busts. The conversations overheard on the wiretap show that George Torres and Raul del Real have a secretive relationship, where they arranged to meet in person at the Numero Uno warehouse instead of talking over the phone. On one occasion in particular, George Torres specifically told Raul del Real to meet at the warehouse because George Torres did not "want to say it on the radio." Moreover, the Affidavit reveals that George Torres exercised authority over Raul del Real on a regular basis, telling del Real where to meet him and what to do. George Torres told Raul del Real to go to the warehouse in "two seconds," and ordered him to "hurry up." When Steven Torres was car-jacked, George Torres called del Real immediately and told him to "[b]e ready." All of this notwithstanding the fact that George Torres and Raul del Real was not an employee of the Numero Uno markets. Thus, the circumstantial evidence shows probable cause to believe that George Torres knew of Raul del Real's narcotics trafficking business and agreed to facilitate it.

The conversation overheard on a wiretap of Vernon Steward's phone further supports probable cause to believe that George Torres was involved in Raul del Real's drug business. On July 16, 2003, Victor Steward and Billy Haynes drove separate cars into Raul del Real's car wash. When they entered, the gate was closed behind them. A few

minutes later, the gate was opened and the two vehicles drove away in opposite directions. The car driven by Billy Haynes was pulled over and the police found a kilogram of cocaine hidden inside the car door panel. The police also found Victor Steward's drivers license in the car driven by Billy Haynes. The affiant stated that Raul del Real was the source of the cocaine based on the fact that Raul del Real owned the car wash and the calling pattern the officers observed leading up to the bust.

On October 5, 2003, Billy Haynes had a court appearance for the charges brought against him after the July 16, 2003 bust. Victor Steward attended the court appearance, and afterward called his older brother Vernon Steward, on whose phone there was a wiretap. Victor Steward was heard saying: "Well, it sure looks like they are trying to put it on me. I'm listening to them talk, cause they found the license." Vernon said, referring to Haynes, "He was just a mule. Didn't know it was in there so it was your truck." Victor responded saying he could make the same claim of no knowledge "'cause my fingerprints wasn't on there." Vernon asked, "It was on there?" Victor clarified, "No. It wasn't." Vernon then asked, "Oh, it wasn't? What about George's?" Victor answered, " I don't know. Ra knew all that." Vernon asked, "He don't know nothing then?" Victor replied and said he did not. Officer Weinrich then stated that he had talked to Detective Torres, who said that Vernon Steward does not refer to anyone as "George" other than George Torres. The reference to "Ra" on the call, was to Raul del Real.

A reasonable interpretation of this call is that Victor and Vernon Steward were discussing whether George Torres's fingerprints were on

the kilogram of cocaine that Billy Haynes obtained from Raul del Real. Also, Vernon Steward's statement that "He don't know nothing then?" could plausibly be interpreted as a reference to whether George Torres knew about the bust of Billy Haynes. The comment "He don't know nothing then?" could also be interpreted to mean that George Torres could make a claim of no knowledge if he was arrested, similar to the claim of no knowledge that Billy Haynes made at his arraignment. Thus, this conversation supports the inference that George Torres was involved in Raul del Real's drug dealing business.

The finding of probable cause that George Torres was involved in Raul del Real's drug business is also supported by the October 20, 2003 phone call between George Torres and Raul del Real. In that call, George Torres became extremely angry with Raul del Real and began yelling at him. George Torres told Raul del Real: "Never talk about what I'm going to ask you. Never. Never, you motherfucker." Torres continued: "Yeah. You know what? You play me like that again motherfucker . . . You know where he is at, punk. You know where he's at. Don't be playing me like that, you motherfucker. Don't ever play be like that, thinking I'm stupid. You know what's up. You tell me what's up, motherfucker, cause I wanna know!" Raul del Real responded saying, "10-4." Torres said, "What's that shit?" Torres continued: "You know where he's at, punk motherfucker. Don't be playing me like that, motherfucker." A few minutes later, George Torres called back and said: "Another thing that I thought, too. Oh, man. . . . Just throw, just throw to the W. I don't want to say it on the radio. Two seconds. Hurry up."

It is reasonable to infer that the subject matter George Torres was speaking about in this conversation was illegal. George Torres was clearly trying to locate someone, and was angry with Raul del Real for not telling him where the person was. Officer Weinrich does not say who George Torres was looking for, but earlier in the Affidavit, Raul del Real was overheard saying that he would kill the Los Angeles contact of the Baltimore customers. Raul del Real said: "It's a done deal. We can take him out right now. Not even you can help him. We have people worldwide, everywhere." The issuing judge could have inferred that George Torres was also concerned about where this person was.

The fact that George Torres clearly did not want Raul del Real to ever tell anyone about the conversation further supports the inference that the subject of the conversation was illegal. George Torres told Raul del Real to never talk about what George Torres was asking him. Furthermore, when it came to the end of the conversation, George Torres clearly sought to avoid speaking about the issue further on the phone. Instead, George Torres ordered Raul del Real to come to the warehouse so that they could speak in person. On other occasions, with respect to Vernon Steward in particular, George Torres had mentioned that he did not want any "canaries" around him – "canary" is a slang term for people who might disclose illegal activity to law enforcement. From this evasive conduct, there was probable cause to believe that George Torres and Raul del Real were discussing illegal activity and that George Torres was involved in Raul del Real's drug business.

In sum, looking at the Affidavit as a whole, there was probable cause to believe that George Torres and Raul del Real were engaged in a

conspiracy to commit drug crimes. The Affidavit revealed that Raul del Real was a large-volume drug trafficker who had recently been busted (without his knowledge) in Baltimore. ICE had recently seized 26 kilograms of cocaine, 15 pounds of marijuana, and $850,000 in cash from Raul del Real's customers. When the authorities obtained a wiretap on Raul del Real's phone, they heard George Torres giving Raul del Real orders. George Torres was heard ordering Raul del Real to come to the warehouse because George Torres did not want to "say it on the radio." On one occasion in particular, George Torres became extremely angry with Raul del Real and demanded that Raul del Real tell him where an unknown person was located. There was also evidence that Raul del Real's fellow drug dealers thought that George Torres's fingerprints could have been on the drugs. From these facts, there was a substantial basis for the issuing judge to believe that George Torres was involved in Raul del Real's drug crimes.[8]

c. Franks Hearing – Probable Cause

The defense identified several allegedly false statements or omissions in the Affidavit, and requested a hearing under Franks v. Delaware, 438 U.S. 154 (1978). "A district court must suppress evidence seized pursuant to a wiretap if the defendant can show the wiretap application contained intentionally or recklessly false information that was material to the finding of probable cause."

[8] Because the Court found probable cause, the Court did not address the good faith exception. The Court notes, however, that several courts have found that the good faith exception to the exclusionary rule applies in the context of wiretap applications under Title III. See, e.g., United States v. Gotti, 42 F. Supp. 2d 252, 267 (S.D.N.Y. 1999); United States v. Bellomo, 954 F. Supp. 630, 638 (S.D.N.Y. 1997).

Meling, 47 F.3d at 1553. The defendant must make a "substantial preliminary showing that 'the affidavit contain[ed] intentionally or recklessly false statements, and . . . [that] the affidavit purged of its falsities would not be sufficient to support a finding of probable cause." Id. (quoting United States v. Lefkowitz, 618 F.2d 1313, 1317 (9th Cir. 1980)). Franks applies to material omissions as well as false statements. Id.

The Court found, however, that the defense had not made a substantial preliminary showing that the Affidavit contained false statements or omissions or that the statements identified were not material to the finding of probable cause. For example, the defense argued that the Affidavit failed to fully disclose that on certain recorded calls from Raul del Real's wiretap (1) George Torres referred to Raul del Real as "boss" or "big dog," (2) Raul del Real referred to others as "boss" or "big dog," and (3) on one call, Raul del Real called George Torres a derogatory name. The defense argued that these omissions were important because, if included, they would have undermined the idea that George Torres was in charge, and that Raul del Real was taking orders from him.

The Franks analysis applies to omissions as well as outright false statements: "By reporting less than the total story, an affiant can manipulate the inferences that a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all meaning." United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985). Initially, the defendant bears the burden of making "a substantial showing that the affiant intentionally or

recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." Id.

After reviewed transcripts of the relevant calls, the Court found that although Officer Weinrich's failure to include these facts in the Affidavit could have been misleading, ultimately the failure to include these facts was not material to the finding of probable cause. Officer Weinrich stated that he noticed that Raul del Real spoke to George Torres with "great deference." As evidence of this deference, Officer Weinrich pointed to the fact that Raul Del Real referred to George Torres as "big dog." On several calls identified by the defense, however, George Torres also referred to Raul del Real as "big dog." (See Grable Decl., Exs. 1, 4.) Indeed, this appears to be a common nickname that they used for each other. Raul del Real also referred to others as "big dog." By leaving this information out of the Affidavit, Officer Weinrich arguably gave the misleading impression that only Raul del Real called George Torres "big dog," when in fact it was a nickname that they both used for each other.

The Court found the defense's argument that Officer Weinrich made misleading omissions with regard to the use of the word "boss" to be less convincing, however. The defense identified only one occasion where George Torres used the word "boss" when talking to Raul Del Real. (Grable Decl., Ex. 9.) In that conversation, George Torres offered to help Del Real out, saying "Anything you need boss. If you need food . . . just tell me what you need. I'll sell you everything. You don't have to go to the post market, I'll sell you everything. My cost, big dog." (Id.) Thus, even when George Torres used the word "boss" he was

still in a position of power over Raul del Real; indeed, George Torres was offering to help Del Real by selling him goods at a discount.

Moreover, the Court find it important to note what the Affidavit said with respect to the use of the term "boss." The Affidavit did not say that Raul del Real referred to George Torres as "boss" like he did with the term "big dog." Rather, the Affidavit stated that "*others*, [when] referring to George Torres, tell Raul Del Real to call 'the boss,' despite the fact that Raul Del Real is not legitimately employed by Torres." (Aff., at 13 (emphasis added).) The specific reference was to a call from Alfredo Garcia to Raul Del Real, on November 25, 2003, in which Garcia said, "Call the boss. Call the boss. Call George." (Id. at 40.) Viewed in this light, the fact that George Torres called Del Real "boss" in passing on one isolated occasion took on less importance. The important fact that Officer Weinrich accurately portrayed in the Affidavit was that third parties, specifically Alfredo Garcia, referred to George Torres as "the boss" when talking to Del Real. Thus, the Court found that the defense did not made a substantial preliminary showing that the omission of the one reference where Torres called Del Real "boss" was misleading.

The defense also argued that Officer Weinrich failed to mention that, on one occasion, Raul del Real referred to George Torres as a "puta" – a derogatory Spanish term for a female prostitute. Defendants argue that, had this reference been included in the Affidavit, it would have undermined the idea that Del Real was deferential toward George Torres. Reviewing the call as a whole, however, it was clear that George Torres was still in control. Indeed, in the call identified by the defense, George Torres said, "Over here you fucking bone head.

Right, right, well you ain't learned nuttin' yet bitch." In response, Raul del Real called George Torres a "puta." Immediately thereafter, George Torres said, "Haven't you learned nuttin' yet motherfucker," and "I'm right behind you dick head. Over here." Thus, on the one occasion in which the identified Raul del Real calling George Torres a derogatory name, it was clear that George Torres was still in control.

Even assuming that all of these identified omissions were misleading, the Court found that the defense was not entitled to a Franks hearing because the omissions were not material to the finding of probable cause. "A defendant challenging an affidavit must also show that the affidavit . . . supplemented by the omissions would not be sufficient to support a finding of probable cause." Stanert, 762 F.2d at 782. If the content of the calls identified by the defense had been added to the Affidavit, the Affidavit would have still demonstrated that there was a power dynamic between George Torres and Raul Del Real, and George Torres was in charge. On multiple occasions, George Torres ordered Raul del Real to meet him at the warehouse. On one occasion, George Torres told Raul del Real to meet him at the warehouse in "two seconds," and ordered Del Real to "hurry up." When Steven Torres was car jacked, George Torres called Del Real and told him to find the shop where the car was going to be stripped. When George Torres discovered the tape recording of the incident, he called Del Real immediately and told him: "I'll call you later. Be ready." Perhaps most revealing was the conversation in which George Torres chastised Del Real on the phone by saying, "Never talk about what I'm going to ask you. Never. Never, you motherfucker. You better tell me where he is at. You better tell me, motherfucker. . . . Don't ever

play be like that, thinking I'm stupid. You know what's up. You tell me what's up, motherfucker, cause I wanna know!" Thus, even if the omitted information was included, there was ample evidence in the Affidavit to support the government's theory that George Torres was in charge, and that Raul del Real took orders from George Torres.

Indeed, the very calls offered by the defense revealed that George Torres was giving Raul del Real advice and ordering him to do go places and perform tasks. In several of the calls, George Torres ordered Del Real to meet him at a specified location such as the warehouse or Garcia's house. (See, e.g., Grable Decl., Ex. A, at 2, 6, 10, 14, 17, 19, 20.) On one call, George Torres told Del Real to "hurry up . . . because I've got things to do." (Id. at 15.) As mentioned before, in the call where Del Real called George Torres a derogatory name, George Torres called Del Real a "fucking bone head," a "bitch," and a "motherfucker." (Id. at 6.) Thus, even if this information had been provided to the issuing judge in the Affidavit, it would not have altered the power structure between George Torres and Raul del Real in which George Torres was clearly in charge.

The defense also argued that Officer Weinrich failed to mention a call on October 14, 2003, in which Raul del Real agreed to meet with George Torres. The defense argued that this call contradicted Officer Weinrich's assertion that in mid-October, Raul del Real began avoiding Torres. The defense argued that this fact undermined the whole theory that George Torres's scolding of Del Real on October 20, 2003, was in response to George Torres's discovery that Raul del Real was having problems with law enforcement. The Court, however, found that the undisclosed phone call was not material to probable cause because there

was probable cause to believe that George Torres was involved in Raul del Real's drug business even without Officer Weinrich's interpretation of the October 20, 2003 call.

In the October 20 call, George Torres harshly scolded Del Real telling him, "You know where he's at. Don't play me like that, you motherfucker. Don't ever play me like that, thinking I'm stupid. You know what's up. You tell me what's up, motherfucker, cause I wanna know!" Whether Officer Weinrich's interpretation of this conversation (that George Torres was upset about not being informed regarding the law enforcement incursions into Del Real's trafficking organization) was correct was immaterial. Even without Officer Weinrich's interpretation, there was probable cause to believe that George Torres knew about and agreed to facilitate Del Real's drug trafficking, as discussed above, based on the circumstantial evidence of the behavior between George Torres and Raul del Real and the conversation between Victor and Vernon Steward. Thus, the omission of this call was not material to the finding of probable cause.

The defense also argued that Officer Weinrich failed to inform the issuing judge that the police had a previous wiretap on the phone of Derrick Smith in 1998, whose goal was to obtain information about the "Torres Organization." In 1998, the government filed a wiretap application with United States District Court Judge Ronald S. Lew. The application sought a wiretap on the phone of Derrick Smith, which the affiant stated was being used by both Smith and Ignacio Meza to facilitate their drug distribution activities. The affidavit discussed the "Torres Organization," which the affidavit stated included George Torres, Derrick Smith, Ignacio Meza, Jose Mendoza, Raul del Real, and

others. The affidavit noted that Derrick Smith and Ignacio Meza were recently indicted in Alabama in connection with a scheme to traffic drugs using a private jet company run out of Los Angeles called Jets West. The purpose of the wiretap was to investigate the scope of the Torres Organization and the target subjects' involvement with drug trafficking.

The defense noted that this wiretap was only placed on the phone of Derrick Smith for one month, and that no renewal application was ever filed. The defense inferred that because there was no renewal of the wiretap, the investigation must not have revealed any evidence. The defense argued that if this information had been disclosed to Judge Anderson, then it would have undermined the probable cause for the 2004 wiretap.

As an initial matter, in the application for the 2004 wiretap, the investigating officers did disclose the existence of the 1998 wiretap on Derrick Smith's phone. Although the 2004 Affidavit did not discuss the content of what was intercepted on that wiretap, Officer Weinrich noted that "[o]n August 21, 1998, the Honorable Ronald S. W. Lew, United States District Judge, signed an order . . . authorizing the initial interception of wire and electronic communications to and from [a phone] used by Derrick Smith." (Aff. ¶ 12.) The 2004 Affidavit also disclosed that Vernon Steward and Raul del Real were intercepted on the 1998 wiretap of Derrick Smith's phone. (Id.) The 2004 Affidavit did not disclose, however, that George Torres and the "Torres Organization" were the targets of the 1998 wiretap.

The fact that the 2004 Affidavit did not disclose that George Torres was the target of the 1998 wiretap would not have affected the

issuing judge's finding of probable cause. The probable cause for the wiretap in 2004 was based on the recent seizure of narcotics from Raul del Real's customers in Baltimore, and George Torres's recent communications with Raul del Real on Raul del Real's wiretap. Even if the 1998 wiretap of Derrick Smith had not revealed any incriminating evidence, that fact would not have been material to Judge Anderson's finding of probable cause for the wiretap in 2004. There was new evidence in 2004, and even though the 1998 wiretap may have failed, based on the new conversations between George Torres and Raul del Real there was reason to believe that information could now be obtained. Thus, the Court found that the failure to disclose the details of the 1998 wiretap to the issuing judge was not material to probable cause.

The defense argued that recently obtained recorded conversations from Raul del Real's wiretap did not support Officer Weinrich's statement in the Affidavit that Raul del Real detected law enforcement surveillance on December 3, 2003. In the Affidavit, Officer Weinrich stated that "On October 3, 2003, Raul del Real detected law enforcement surveillance of him. A series of calls were intercepted on Raul del Real's phone in which he alerted Jose Mendoza and others of the surveillance. Alberto del Real called Raul del Real and told him of the arrangements he had made in response to surveillance and said, 'I talked to Chigas' – indicating that Torres had been alerted to surveillance through Target Subject Garcia." (Aff. ¶ 57.)

Defendants argued that the conversations that occurred on December 3, 2003 did not support these assertions in the Affidavit. The defense argued that there was no "series of calls . . . in which he alerted Jose Mendoza and others of the surveillance." The defense provided to

the Court all of the calls that were intercepted on December 3, 2003. The quality of the calls was relatively poor, and they were quite difficult to understand. There is one call in which Albert del Real said, "I talked to Chigas," which is consistent with the Affidavit. In that same call, Raul del Real said he could not talk about what he is doing on the phone, which suggests that he was engaged in illegal activity and that he was wary of surveillance. Indeed, this comment could have been a clue to others that he was under surveillance. Thus, the defense did not meet its initial burden of demonstrating that this portion of the Affidavit was false or misleading.

Even if this portion of the Affidavit was removed, however, it would not have affected the finding of probable cause. There was sufficient other information in the recorded calls between George Torres and Raul del Real that indicated that both of them were extremely conscious of law enforcement surveillance. On one occasion, George Torres told Raul del Real to come to the warehouse to talk because George Torres did not want to talk on the phone. When Raul del Real was busted with marijuana in his girlfriend's house, he commented that "I dump my phones all the time. I'm always watching." Thus, even if the paragraph about Raul del Real alerting others to surveillance was removed, it would not have affected the issuing judge's finding of probable cause.

Finally, the defense identified a number of other allegedly false statements and omissions that related to George Torres's past criminal activity and that the Court found were not material to probable cause. The defense pointed to allegedly false statements regarding Meza's disappearance, who was responsible for killing Maldonado, the drive-by

shooting of Carpel, and the incident where George Torres allegedly ran over a man in an alleyway behind a Numero Uno market. None of these statements, however, were material to whether there was probable cause to believe that George Torres was involved in Raul del Real's drug business. The evidence that law enforcement sought to obtain through the wiretap was with regard to how George Torres was currently financially supporting Raul del Real in his drug trafficking scheme. At no point did Officer Weinrich state that he believed the wiretap would reveal evidence regarding these past crimes. Thus, even assuming such misstatements or omissions were made intentionally or recklessly, they were not material to whether George Torres knew of and agreed to facilitate Raul del Real's drug trafficking.

In denying George Torres's motion to suppress the wiretap evidence, the Court found that the defense had not satisfied its burden of making a substantial preliminary showing of false statements or omissions that were material to the finding of probable cause. Thus, the Court denied the request for a Franks hearing.

d. Violent Crime

In the Court's earlier ruling from the bench on February 2, 2009, the Court said that it found probable cause based on George Torres's involvement in Raul del Real's drug business. On the record, the Court said that "[t]here is no probable cause other than drugs." (RT 2/2/09, at 29.) Although this statement is clear from the transcript, the Court writes now in order to clarify this earlier ruling.

In finding probable cause for the wiretap, as discussed above, the Court relied primarily on its finding that there was probable cause based on drugs. The Court had serious doubts as to whether the violent crimes listed in the historical section of the Affidavit could create probable cause for the wiretap. (See Aff. ¶¶ 22-45.) The historical violent crimes in the Affidavit reached back to February 1986, with the murder of Luis Rigoberta, and went up through the present. These events included the assault on Jose Luis Ferrusco in December 1989, the Carpel murder in Spring 1993, the Maldonado murder in February 1994, and the disappearance of Ignacio Meza in 1998. One of the theories in the Affidavit appeared to be that these historical violent crimes created a pattern of racketeering, and that these crimes supported probable cause for the wiretap. (See id. at 16 n.2.) When the Court said at the February 2, 2009 hearing that it did not find probable cause for violent crimes, the Court was referring to these historical events. In the Court's view, there was no probable cause to believe that these seemingly disparate crimes could have constituted a pattern of racketeering. Furthermore, the Court found it highly unlikely that evidence of these crimes would have been revealed through the wiretap. Thus, the Court's comment that there was no probable cause with respect to violent crime referred to the historical violent crime.

At the time of its ruling, however, the Court inadequately distinguished between those historical crimes, for which there was no probable cause to believe that evidence would have been revealed, and the more recent violent crimes uncovered on Raul del Real's wiretap. If the Court had been more careful in articulating its ruling at the February 2, 2009 hearing, the Court would have made it clear that there

was probable cause to believe that George Torres turned to Raul del Real to commit violent acts on George Torres's behalf. The probable cause for this violent crime was apparent from the recorded phone calls between George Torres and Raul del Real. Indeed, when Steven Torres was car-jacked, George Torres called Raul del Real nearly immediately and told Raul del Real to "find out where they strip [stolen cars] at so I can see if I can catch this mother fucker." Later, George Torres called Raul del Real and asked Raul del Real, "Do you got one on you?" This comment referred to a gun. Then, George Torres discovered that he had captured the car jacking on the security tape at the Numero Uno store. George Torres called Raul del Real and told him, "I got these motherfuckers on tape. I got the mother fuckers robbing Stevie and everything." Later that day, George Torres called Raul del Real and said, "You know what's up. I'll call you later. Be ready." From these comments, there was a substantial basis for the issuing judge to find that there was probable cause to believe that George Torres used Raul del Real to commit violent crimes on George Torres's behalf.

Although the Court did not make this finding clear in its earlier ruling on February 2, 2009, the Court finds nonetheless that there was probable cause to believe that George Torres and Raul del Real were involved in committing violent crime. These violent crimes could have supported probable cause for the conspiracy to possess a firearm during a crime of violence in violation of 18 U.S.C. § 924, as listed in the probable cause section of the Affidavit.

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e. Necessity

In the Court's earlier ruling, the Court found that there was necessity for the wiretap on George Torres's phone. Federal wiretaps are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518, et seq., which permits electronic surveillance of criminal suspects only if certain privacy safeguards are met. Thus, "[t]o obtain a wiretap, the government must overcome the statutory presumption against this intrusive investigative method by proving necessity." United States v. Gonzalez, Inc., 412 F.3d 1102, 1112 (9th Cir. 2005). The defense argued that (1) the Affidavit did not include a "full and complete" statement regarding traditional investigative tactics, (2) there was no necessity for the wiretap on George Torres's cellphone, and (3) the Affidavit contained material false statements and omissions. The Ninth Circuit reviews whether the Affidavit contained a full and complete statement de novo; whether there was necessity for the wiretap is reviewed for abuse of discretion. Id.

f. Full Statement

The statute requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). Mere "generalized statements" that would be true of any similar investigation are not sufficient to satisfy the requirements of the statute. Blackmon, 273 F.3d at 1204.

"Bald conclusory statements without factual support are not enough. Likewise, simple allegations that the crime being investigated is inherently difficult to solve will not, by themselves suffice." United States v. Martinez, 588 F.2d 1227, 1231 (9th Cir. 1978). Rather, the affidavit must include "specific allegations indicating why normal investigative procedures failed or would fail *in the particular case*." Id. at 1208 (emphasis added).

The purpose of the wiretap on George Torres's phone was to obtain evidence of how George Torres was assisting in Raul del Real's drug trafficking business. The affiant suspected that the support was financial in nature but did not know exactly how it took place. Thus, Officer Weinrich stated that a wiretap was necessary to identify precisely what support George Torres was providing to Raul del Real. To this end, the Affidavit included an exhaustive list of specific investigative strategies that law enforcement had used, or had contemplated using, at the time of the application. Those strategies included wiretaps on the phones of others suspects, confidential informants, physical surveillance of Torres, electronic tracking, physical surveillance of Raul del Real, search warrants, trash searches, interviews, toll data, and a financial investigation.

Officer Weinrich explained that there had been a wiretap on Raul del Real's phone since October 2003, but noted that its usefulness was limited because George Torres knew Raul del Real was a high-volume drug trafficker and, therefore, George Torres was more guarded in his conversations with Raul del Real. Officer Weinrich noted that George Torres often refused to talk on the phone and, instead, arranged for face-to-face meetings with Raul del Real. By contrast, if a wiretap

was placed on the George Torres's phone line, Officer Weinrich was optimistic that law enforcement could intercept conversations that George Torres had with others leading up to and after the in-person meetings between George Torres and Raul del Real. Officer Weinrich stated that since George Torres was not in charge of the day-to-day operations of the Numero Uno markets, he would have to call others, such as his wife Roberta Torres or Alfredo Garcia, to have money or other assets transferred to Raul del Real. Officer Weinrich stated that such payments would likely stand out because they would have to be initiated by George Torres.

With regard to confidential informants, Officer Weinrich stated that he was not aware of anyone who was able to engage George Torres to obtain information about his illegal activities with Raul del Real. Officer Weinrich noted that Derrick Smith knew George Torres back in the mid-1990's, and he was currently serving a 24-year prison sentence. Officer Weinrich stated that he did not believe Smith would be able to make contact with George Torres if released, because Torres would have been extremely suspicious of Smith. Officer Weinrich also said that he had a case against Raul Del Real and Jose Mendoza, presumably stemming from the Baltimore bust, and Officer Weinrich had considered approaching them to cooperate against George Torres. Officer Weinrich had decided against approaching Mendoza because Officer Weinrich did not believe Mendoza would be able to make contact with George Torres. Officer Weinrich stated that Mendoza and George Torres had only a casual relationship in the past, and Officer Weinrich believed that George Torres would be suspicious if Mendoza suddenly approached him on an individual basis. George Torres also knew that Mendoza had a drug

and alcohol problem and, as a result, would not trust Mendoza with sensitive information. With regard to Raul del Real, Officer Weinrich stated that Raul del Real would likely not cooperate against George Torres because Raul del Real was afraid of George Torres and knew that George Torres was capable of violence. Thus, Officer Weinrich stated that Raul del Real would likely not cooperate against George Torres for fear of retaliation.

Officer Weinrich discussed physical surveillance, but noted that it had not been helpful in the past. Officer Weinrich stated that George Torres rarely, if ever, handled cocaine personally and, therefore, physical surveillance had limited value. The goal of the investigation was to determine how George Torres was providing financial support to Raul del Real. Officer Weinrich suspected that such support was facilitated by telling Alfredo Garcia and Roberta Torres, among others, to transfer cash and/or assets to Raul del Real. As a result, physical surveillance would not reveal precisely how this occurred. Officer Weinrich noted that law enforcement had been conducting physical surveillance of George Torres for several months without obtaining any significant information. Officer Weinrich also said that a tracking device on George Torres's car would not have been helpful because it would not show how he was providing assistance to Raul del Real's drug trafficking enterprise.

Officer Weinrich also explained that he had been conducting surveillance of Raul del Real, but that it had been of little use because Raul del Real was extremely alert to potential surveillance. Moreover, Officer Weinrich stated that surveillance had been conducted of Raul del Real for three months and law enforcement still did not

know from where or how Raul del Real obtained his narcotics. Officer Weinrich stated that he would continue to surveil Raul del Real and George Torres, but added that he needed to know the content of the calls from George Torres's cell phone to determine how George Torres was providing criminal planning and direction.

Officer Weinrich discussed the possibility of search warrants, but concluded that they would not be useful because George Torres was not currently maintaining drugs at his home or stores. Officer Weinrich explained that he believed Torres was providing financial assistance to Raul del Real and other traffickers, and that probable cause did not exist to search any of George Torres's locations. Moreover, Officer Weinrich thought it was unlikely that George Torres was in possession of firearms due to his past convictions, and that during the incident when Steven Torres was car jacked, George Torres told Raul del Real to bring a gun. Officer Weinrich thought it was likely that George Torres was maintaining large quantities of cash at his stores, but that it would be virtually impossible to determine whether the source of the cash was legitimate or illegitimate. Even if he was to discover records indicating that assets had been transferred to Raul del Real, since George Torres and Raul del Real had been friends, and Raul del Real operated a car wash and small grocery store, it would have been impossible to determine why the transfer had been made. Thus, Officer Weinrich stated that the wiretap was necessary to disprove an assertion that a transfer of funds was for a legitimate purpose.

Officer Weinrich stated that trash searches were unlikely to yield helpful evidence because the trash bins at the Numero Uno markets were hard to access and protected by security guards, who would likely

detect anyone coming onto the property. Moreover, the businesses generated large volumes of trash on a daily basis, which made a trash search impractical. Even if financial documents were recovered, Officer Weinrich stated that it would be difficult to segregate lawful from unlawful transactions.

With regard to interviews and grand jury proceedings, Officer Weinrich stated that George Torres was well-known in his neighborhoods as "Mexican George," and, whether accurate or not, he was reputed to have an explosive temper and to resort to extreme violence when necessary. As a result, Officer Weinrich stated that it was extremely difficult to get anyone to talk about his illegal activities. Officer Weinrich gave an example of an individual in prison who had worked directly with George Torres in the past, but now claimed that he had no memory of such incidents. Moreover, Officer Weinrich stated that Vernon Steward, who had been overheard talking about George Torres on a wiretap, had recently claimed to have no knowledge of George Torres. Officer Weinrich opined that this same reluctance to talk would have been found in George Torres's other business associates. Furthermore, if they were approached, they would have likely alerted George Torres to the investigation.

Officer Weinrich discussed the use of a pen register and a trap and trace device, noting that it had been of substantial value to the investigation, but that its usefulness had been exhausted. Officer Weinrich stated that George Torres used his phone like a radio dispatch system, telling his associates where to go and what to do. George Torres frequently used the Nextel walky-talky feature to contact his close associates dozens of times per day. The toll data had revealed

some helpful patterns, which showed how George Torres communicated with others through his lower-rung associates. Its usefulness had been exhausted, however, because it was necessary to understand not only the patterns, but also the contents of the conversations.

Finally, Officer Weinrich discussed an ongoing financial investigation performed by the IRS and California Department of Justice inquiring into the activities of George Torres and his Numero Uno markets. The financial investigation had been helpful, but Officer Weinrich explained that it had significant limitations. For example, Officer Weinrich stated that it was difficult to determine which cash and assets had been obtained from narcotics sales as opposed to legitimate sources. The El Monte market generated $6.8 million in sales in 2002, mostly in cash. Moreover, the markets contained "Continental Express Money Order" stores, which allowed George Torres to convert cash to negotiable money orders. With these resources, George Torres could easily commingle narcotics proceeds with other store proceeds, and also make payments to traffickers such as Raul del Real. The financial investigation had also revealed that George Torres regularly refinanced his properties and shifted loans between properties, which made it difficult to track the proceeds. George Torres used a Puerto Rican bank, Banco Popular, which had a reputation for not cooperating fully with law enforcement investigations and potentially revealing such investigations to their clients. A financial investigation of Raul del Real and Vernon Steward has also been unproductive because neither of them maintained bank accounts. Thus, Officer Weinrich repeated his explanation that the wiretap was necessary in connection with the financial investigation to determine

how George Torres was directing the transfer of funds and other assets to drug traffickers.

Having reviewed this nineteen-page exposition of traditional investigatory tactics, the Court found that Officer Weinrich gave a full and complete statement as to whether or not other investigative procedures have been tried and failed, and if not, why they appeared to be too dangerous or unlikely to succeed if tried. Officer Weinrich did not provide mere generalized conclusions or boilerplate explanations for why traditional means of investigation would not proceed. Rather, he specifically explained why certain techniques had been exhausted and why others would not help reveal how George Torres was providing financial assistance to drug traffickers like Raul Del Real. Thus, the Court found that the Affidavit was in compliance with the "full and complete statement" requirement of 18 U.S.C. § 2518.

g. Necessity Finding

"[T]he government may establish necessity for a wiretap by any of three alternative methods. The government may show that traditional investigative procedures (1) have been tried and failed; (2) reasonably appear unlikely to succeed if tried; or (3) are too dangerous to try." Gonzalez, 412 F.3d at 1112. "When reviewing necessity we employ a 'common sense approach' to evaluate the reasonableness of the government's good faith efforts to use traditional investigative tactics or its decision to forego such tactics based on the unlikelihood of success or the probable risk of danger involved with their use." Id. (quoting Blackmon, 273 F.3d at 1207). "Though 'the

wiretap should not ordinarily be the initial step in the investigation, . . . law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap.'" United States v. Canales Gomez, 358 F.3d 1221, 1225-26 (9th Cir. 2004) (quoting McGuire, 307 F.3d at 1196-97).

The issuing court's finding of necessity is reviewed for abuse of discretion. Gonzalez, 412 F.3d at 1115; McGuire, 307 F.3d at 1197. "The issuing court has considerable discretion in finding necessity, particularly when the case involves the investigation of a conspiracy." United States v. Reed, __ F.3d __, 2009 WL 2366556, at *6 (9th Cir. 2009). The Ninth Circuit has "'consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of . . . other satellite conspirators.'" Id. (quoting McGuire, 307 F.3d at 1196-97).

The Court found that there was a sufficient basis for Judge Anderson's finding of necessity for the wiretap. The main purpose of the investigation was to intercept conversations in which Torres is heard instructing others to transfer cash or assets to Raul del Real in order to assist his drug trafficking business. Officer Weinrich noted that the IRS and California DOJ had been performing an exhaustive financial investigation of George Torres's businesses, but that it was nearly impossible to determine where money was coming from and going to due to the fact that the Numero Uno markets were largely cash businesses. The investigation could not distinguish between legitimate and illegitimate transactions. Officer Weinrich stated that law enforcement needed to perform the financial investigation in connection

with the wiretap so that they could hear George Torres giving the instruction to transfer money, and they could then follow the transfer and see if it was a legitimate or illegitimate transaction.

In light of these circumstances, the wiretap was necessary to discover precisely how George Torres was supporting Raul del Real's drug trafficking business. The only way to determine exactly how Torres was supporting Raul del Real in the commission of the drug crimes was to listen to the conversations between George Torres and Raul del Real, in combination with George Torres's conversations to others instructing them to transfer assets to Raul del Real. Thus, necessity existed for the wiretap.

h. Franks Hearing – Necessity

The defense argued that the Affidavit made false statements and omitted certain information, which the defense argued would have been material to the issuing judge's finding of necessity. "A defendant is entitled to a Franks hearing if he makes a substantial preliminary showing that a false statement was deliberately or recklessly included in an affidavit submitted in support of a wiretap order, and the false statement was material to the district court's finding of necessity." United States v. Staves, 383 F.3d 977, 982 (9th Cir. 2004). "'As a general rule, proof that law enforcement officials either lied or made reckless misstatements in affidavits to secure a warrant or order does not in and of itself invalidate that warrant or order, or compel suppression of evidence obtained upon its execution. But false statements that are material to causing the warrant to issue will

invalidate it.'" United States v. Rivera, 527 F.3d 891, 898 (9th Cir. 2008) (quoting United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985)). As discussed earlier, a misstatement or omission is material if the information included or omitted was necessary for the finding of necessity. Shryock, 342 F.3d at 977.

The defense argued that Officer Weinrich did not accurately represent the availability of individuals that law enforcement could have interviewed regarding George Torres's illegal activity. The defense argued that beginning months after the wiretap was issued, the task force conducted "a campaign of interviews that would lead to 84 interviews in 16 months." (Reply, at 27.) The defense contended that this fact made Officer Weinrich's representations false, and that if this information had been included in the wiretap, it would have affected Judge Anderson's decision regarding whether interviews were feasible.

As an initial matter, the defense did not made a substantial preliminary showing that Officer Weinrich made any false statements in the Affidavit on the issue of interviews. Officer Weinrich stated: "At this time, however, I know of no persons with current information about Torres['s] illegal activities who are willing to speak to me." (Aff. ¶ 93.) In this statement, Officer Weinrich made clear that he was looking for information regarding Torres's *current* illegal activity. Indeed, that was the purpose of the wiretap: to identify precisely how George Torres was currently supporting Raul del Real in the drug trafficking business.

In fact, the defense's own offer of proof in this regard confirmed that Officer Weinrich did not know of anyone who had information about

George Torres's current operation with Raul Del Real. The wiretap application was approved on February 3, 2004, and the first interview that Defendants identify took place more than a month later on March 10, 2004. (Mot., Ex. KK.) According to the defense, this first interview was with Isabel Maldonado regarding the murder of Jose Maldonado. (Id.) The Maldonado murder occurred on February 9, 1994, more than ten years earlier. There is no indication that the interview of Isabel Maldonado had anything to do with George Torres's current drug activities, which were the primary subject of the probable cause in the Affidavit.

Similarly, Defendants identified other interviews in the months that followed, all of which related to events that had occurred in the mid-1990's. Thus, the fact that law enforcement interviewed other individuals with information about past events did not show that Officer Weinrich made false statements regarding the availability of interviews. In fact, these interviews were entirely consistent with Officer Weinrich's statement in the Affidavit that "[w]hen I am able to locate persons with information about the current activities of Torres and when it does not appear that they will reveal the investigation to him, interviews will be conducted and, if appropriate, grand jury testimony will be generated." (Id. ¶ 93.)

The defense argued that the series of interviews conducted months after the wiretap was obtained were omissions that were material to the finding of necessity. As an initial matter, it must be remembered that necessity is judged as of the time of the wiretap application. Thus, to the extent that law enforcement interviewed others after the wiretap application was approved, an omission would be reckless only if it

could be shown that Officer Weinrich knew, or should have known, of the existence of the interview subjects as of the time of the application. See Franks, 438 U.S. at 155 (holding that a false statement must be made "knowingly and intentionally, or with reckless disregard for the truth" in order to invalidate a search). The defense made no showing in this regard. Moreover, the fact that the investigating officers had "some success with normal investigative techniques after the wiretap order was issued does not establish that the issuing court erred in concluding, at the time the wiretap application was made, that these techniques were unlikely to succeed." United States v. Smith, 31 F.3d 1294, 1301 n.4 (4th Cir. 1994).

Even assuming that Officer Weinrich knew of the interview subjects at the time of the application, had the information been disclosed to the issuing judge, there would have been no effect on the finding of necessity for the wiretap. As mentioned earlier, the purpose of the wiretap was to figure out how George Torres was assisting Raul del Real in his illegal drug trafficking operation. According to Defendants' own offer of proof, the interviews conducted in the subsequent months were regarding murders that occurred in the mid-1990's. Thus, if these prospective interviews had been disclosed to the issuing judge, they would not have affected the finding of necessity for the wiretap to determine how George Torres was assisting Raul Del Real in 2004.

Thus, the Court found that Defendants had not made a substantial preliminary showing that Officer Weinrich intentionally or recklessly omitted reference to interviews that the task force conducted months after the wiretap application was approved, and even if the defense

had, the omitted information was not material to the finding of necessity.

The defense also argued that Officer Weinrich misrepresented the availability of witnesses that could make contact with George Torres and engage him in an illegal drug transaction. Specifically, the defense argued that in 1999, Derrick Smith had informed law enforcement that "he could arrange a drug transaction with Torres 'in such a manner that would allow law enforcement to monitor the transaction and build a case against Suspect Torres.'" (Reply, at 28 (quoting Mot., Ex. EE).)

In the investigative report from 1999 to which the defense referred, however, Derrick Smith never said that he personally could talk to George Torres about George Torres's illegal activities, or that he could personally buy drugs from George Torres. Rather, Derrick Smith stated that he knew an unnamed third person who was a "long-time acquaintance" of George Torres, and who "currently purchases kilogram quantities of cocaine from suspect George Torres." At the hearing on the motion to suppress, the Government said that this third person was most likely Ignacio Meza, who had disappeared by 2004, or another third person named Angulo, who had fled to Mexico by 2004. Thus, this unnamed third person would not have been available to make contact with George Torres in 2004. Even assuming Officer Weinrich knew of this reference in the 1999 report of Smith's interview, the defense did not come forward with any evidence that this third person was ever identified by law enforcement, or that he or she was available in 2004 to help with the investigation. Thus, the defense did not make a substantial preliminary showing that Officer Weinrich misrepresented or

omitted reference to the availability of people who could make contact with George Torres.

The defense also argued that Officer Weinrich omitted reference to a search of George Torres's residences and businesses that was performed in 1999. In that search, the police found a hand gun and a taser in the home of Delores Torres, and several rifles in the security room of the Jefferson Street store, but did not locate any evidence linking Torres with drug trafficking. The theory in the Affidavit, however, was not that George Torres was suspected of having drugs in his possession, but that he was providing financial assistance to Raul del Real. As a result, the fact that the 1999 search did not reveal drugs was not relevant to the theory behind the Affidavit.

The defense identified numerous alleged omissions from the necessity section of the Affidavit, all of which the Court rejected. For example, the defense noted that the government attempted to place a security guard in the Numero Uno markets, but the individual was never actually approved for the position. The government had identified a "runner" for the George Torres who said he could negotiate the sale of 300 kilos of cocaine, but the government proffered that he fled to Mexico and was never heard from again. The government also had identified an individual who had met with George Torres and had observed Torres receive $700,000 in cash. This source indicated his willingness to cooperate but only if his cooperation was not revealed to George Torres. The unnamed source said that George Torres would "wipe his/her whole family out if he found out that he/she was involved with giving information to the police." The source also said that "his/her family would be killed if Torres found out." Thus, these

other arguments regarding necessity showed that Officer Weinrich did not leave out information from the Affidavit that was material to the necessity for the wiretap.

i. Evidence of Other Crimes

At one of the suppression hearings, the Court raised the issue of whether the government had complied with the requirements of 18 U.S.C. § 2517(5), which establishes a procedure for gaining authorization to use evidence of other crimes for which authorization was not originally sought in the original wiretap application. It is not uncommon for officers conducting surveillance pursuant to a court-ordered wiretap to overhear conversations relating to offenses other than those specified in the original authorization order. This evidence is sometimes characterized as "windfall" evidence. See United States v. Denisio, 360 F. Supp. 715, 719 (D. Md. 1973). When such windfall evidence is captured on the wiretap, 18 U.S.C. § 2517(5) provides the appropriate procedure to gain authorization for its use:

> When an investigative or law enforcement officer, while engaged in interception wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized by a judge of competent jurisdiction

> where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Id.

The government obtained evidence regarding bribery and harboring on the wiretap even though these were not the original crimes that were authorized by the wiretap order. The government conceded that it never made an application in accordance with 18 U.S.C. § 2417(5) to obtain express authorization from Judge Anderson to use the evidence of these other crimes.

Despite the fact that the government may not have received express authorization pursuant to § 2417(5), the Court found that the government could use evidence of other offenses because the issuing judge had given "implicit authorization" for their use. See United States v. Homick, 964 F.2d 899, 904 (9th Cir. 1992). In Homick, the defendant argued that evidence relating to crimes other than those originally specified in the wiretap authorization order could not be used at trial. Id. The Ninth Circuit noted that "in its application for extension of the wiretap authorization, the government included information relating to the" other crimes, including wire fraud and conspiracy to commit wire fraud. Id. Thus, the Ninth Circuit found that "[b]ecause the government kept the court apprised of that information, it was not error for the court to allow the government to charge [the defendant] with wire fraud and conspiracy to commit wire fraud." Id.

This implicit authorization rule has been applied by several other Circuits as well. See, e.g., United States v. Van Horn, 789 F.2d 1492, 1503 (11th Cir. 1986) (finding that "the continuing approval of the authorizing district court, after it had been apprised of the conversations intercepted, meets the judicial approval requirement"); United States v. Masciarelli, 558 F.2d 1064, 1068 (2d Cir. 1977) (finding that "nothing in the statute requires that the supplemental court authorization be express rather than implied").

Similarly, here, the Court found that the government had fully disclosed the evidence relating to the other crimes, including bribery and harboring, in the government's applications for extensions. The Court performed a complete examination of each of the extension applications, and found that Judge Anderson had been fully informed that evidence of other crimes had been obtained. Indeed, in subsequent wiretap orders, Judge Anderson actually gave express authorization for the government to seize evidence relating to these other crimes. Under these circumstances, the Court found that the government obtained implicit authorization to use the evidence from the other crimes.

In light of the implicit authorization given to use the evidence of other crimes the Court found no § 2417(5) violation. Even if there had been no such implicit authorization, however, the Court would have found that dismissal of the counts was not an appropriate remedy. Some courts have dismissed counts of an indictment where the evidence presented to the grand jury was disclosed in violation of § 2517(5). See, e.g., United States v. Brodson, 528 F.2d 214 (7th Cir. 1976); United States v. Marion, 535 F.2d 697 (2d Cir. 1976); United States v. Orozco, 630 F. Supp. 1418 (S.D. Cal. 1986). In the Court's view,

however, dismissal of the counts was not an appropriate remedy. The Supreme Court has held that evidence seized in violation of the Fourth Amendment can be presented to the grand jury. See United States v. Calandra, 414 U.S. 338, 349 (1974). Consistent with this precedent, several courts have held that dismissal of the indictment is not appropriate when evidence of other crimes is seized pursuant to an otherwise valid wiretap. See, e.g., United States v. Williams, 124 F.3d 411, 426 (3d Cir. 1997) (Alito, J.); United States v. Resha, 767 F.2d 285 (6th Cir. 1985); United States v. Cardall, 773 F.2d 1128, 1134 (10th Cir. 1985); United States v. Barnes, 47 F.3d 963 (8th Cir. 1995). Thus, the Court denied the defense's motion to dismiss the bribery and harboring counts on the basis that the evidence of other crimes was presented to the grand jury.

The defense never moved to suppress the evidence of bribery and harboring seized on the wiretap at trial on the basis that they were obtained in violation of § 2417(5) – the defense exclusively sought to have the underlying counts dismissed. (See Docket No. 596, at 24 n.10, 25.) As the defense correctly pointed out, "suppression is only an appropriate remedy for illegally intercepted calls." (Id. at 24 n.10.) The defense noted that, "based on the Court's . . . finding of probable cause for drug related activity, that the Government could have legally intercepted these unrelated calls." (Id.)

Furthermore, the defense never challenged the minimization procedures that had been used on the wiretap of George Torres's phone. In the Court's view, so long as the law enforcement officers monitoring the wiretap were appropriately minimizing their interception of the calls on the target telephone, if evidence of other crimes was

discovered, and subsequently disclosed to the issuing judge, the government could use that evidence. The government is not required to ignore evidence of other crimes if it is lawfully listening for certain types of crimes.

Indeed, the purpose of § 2417(5) was to make the government demonstrate "'that the original order was lawfully obtained, that it was sought in good faith, and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.'" United States v. Aloi, 449 F. Supp. 698, 722 (E.D.N.Y. 1977) (quoting S. Rep. No. 1097, at 12). The requirement that evidence of other crimes must have been "incidentally intercepted" does not require that the "interception be 'inadvertent' or 'unanticipated.'" United States v. McKinnon, 721 F.2d 19, 22 (1st Cir. 1983). Rather, "[e]vidence of crimes other than those authorized in a wiretap are intercepted 'incidentally' when they are the by-product of a bona fide investigation of crimes specified in a valid warrant." Id. at 23. Indeed, "Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his law enforcement activities merely because law enforcement agents are aware of his diversified criminal portfolio." Id. The Court found that the government's investigation into George Torres's association with Raul del Real was a bona fide investigation.[9]

[9] The defense also did not challenge the probable cause or necessity for any of the subsequent extension orders or applications for different phones, each of which had to independently satisfy these requirements. See United States v. Carniero, 861 F.2d 1171, 1176 (9th Cir. 1988) ("*Each* wiretap application, standing alone, must satisfy the necessity requirement." (emphasis in original)).

Thus, because the government had fully disclosed the evidence of other crimes to the issuing judge in subsequent extension applications, the Court found that there was no violation of § 2417(5) under the doctrine of implicit authorization. The Court also found that the remedy the defense sought, dismissal of the counts, would not have been appropriate even if there had been a violation of § 2417(5). Furthermore, in light of the fact that the defense did not seek to suppress the evidence at trial and did not challenge the minimization procedures employed, the Court found that further remedies were not appropriate.

2. New Evidence

Having explained the Court's earlier rulings with respect to the wiretap, the Court can now evaluate whether the new evidence put forth by the defense changes the Court's analysis. The defense argues generally that because of the numerous undisclosed benefits that had been made to Derrick Smith in exchange for his cooperation in the case, any information underlying probable cause or necessity in the wiretap application that came from him, should be excised from the Affidavit. The defense also argues that since Detective Kading did not disclose the additional benefits given to Smith, and the fact that Detective Kading is generally unreliable, that the information from Detective Kading in the Affidavit should also be viewed with great skepticism.

Even if the information in the Affidavit from Derrick Smith and Detective Kading are excised from the Affidavit, however, the Court finds that there still would have been probable cause and necessity for

the wiretap on George Torres's phone. Information from Derrick Smith (referred to as "CS-1" in the Affidavit) was only included in four locations in the Affidavit. Smith provided historical information about the Carpel and Maldonado murders. (See Aff. ¶¶ 32-36.) The Affidavit mentioned that Smith was an associate of Ignacio Meza, and that the two of them were indicted for trafficking cocaine to Alabama. (Id. ¶ 41.) The Affidavit also mentioned the 1998 wiretap on Smith's phone. (Id. ¶ 12(a).) In the necessity section, there was only one mention of Smith where the Affidavit said that if Smith were released from prison, that he would be unable to make contact with George Torres because George Torres would be extremely suspicious of his early release. (Id. ¶ 79.)

The information that Smith and Meza were associates in the drug business is not in dispute. Similarly, the Court has no reason to doubt the statement that if Smith had been released from prison, Smith would not have been able to engage George Torres in his illegal activities. Indeed, George Torres would have been highly suspicious of Smith if he had suddenly been released from his 24-year sentence.

If the remaining information was excised from the Affidavit, there was still probable cause and necessity for the wiretap. The information with respect to the Carpel and Maldonado murders was historical in nature, and did not affect the probable cause for the wiretap, which was based primarily on the recent phone calls between George Torres and Raul del Real. Thus, even if this information was removed from the Affidavit, there would have been probable cause and necessity for the wiretap.

The references to Detective Kading in the wiretap Affidavit were similarly immaterial to the probable cause and necessity for the wiretap. Detective Kading was mentioned in connection with the disappearance of Ignacio Meza. (Id. ¶ 45.) The Affidavit related that Detective Kading interviewed Meza's family members with respect to Meza's disappearance, and that the family suspected that George Torres was responsible for the disappearance. (Id.) Detective Kading was mentioned on one other occasion in the necessity section, where the Affidavit stated that Detective Kading was the source of some of the information that "[w]hether accurate or not, Torres has a reputation among residents in the Newton area of Los Angeles for extreme violence." (Id. ¶ 90.)

Neither of these references to Detective Kading, however, was material to the finding of probable cause or necessity. As with the Carpel and Maldonado murders, Meza's disappearance was historical in nature and was not material to the Court's finding of probable cause, which was based on the recent conversations between George Torres and Raul del Real. As to the second piece of information, that George Torres had a reputation for extreme violence, even if the information provided by Detective Kading was to be excised, there would be sufficient evidence that George Torres had a reputation for violence. This is because in addition to the information from Detective Kading, Officer Weinrich stated that he had "also had numerous discussions with patrol officers who work in the Newton division," who stated that "Torres is known in the Newton area as 'Mexican George,'" and that "[h]e is said to have an explosive temper and to resort to violence when his interests are threatened." (Id. ¶ 90.) Officer Weinrich also

pointed out that these characteristics were reflected in some of the wiretap calls between George Torres and Raul del Real. (See id.)

Finally, the defense argues that new information from the logs of Agent Black reveals that law enforcement had conducted a trash search at the home of Delores Torres, which was not disclosed in the Affidavit. In the necessity section of the Affidavit, Officer Weinrich stated that "conducting trash searches at Torres's businesses or residences is unlikely to yield evidence that would greatly further the investigation." (Id. ¶ 89.) Officer Weinrich stated that the businesses generated a large amount of trash, the trash bins at the stores were guarded by security guards, and even if financial documents were found, it would have been extremely difficult to separate lawful asset transfers from unlawful transfers. (Id.) The defense points out that Agent Black conducted a trash search of Delores Torres's home and that this was not disclosed in the Affidavit. Even if included, however, this piece of information would not have changed the issuing judge's finding of necessity. The focus of the Affidavit was on the trash at the Numero Uno markets. Furthermore, even if financial records had been found in the trash, Officer Weinrich stated that law enforcement would not have been able to separate legitimate from illegitimate transactions.

Thus, the Court finds that the information from Derrick Smith and Detective Kading that was included in the Affidavit was not material to the probable cause or necessity for the wiretap. Thus, George Torres's motion for suppression and a new trial on this basis is denied.

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C. Honest Services Counts

George Torres seeks a judgment of acquittal pursuant to Rule 29 with respect to the jury's findings on the honest services wire and mail fraud counts. The jury found that George Torres had knowingly participated in a scheme to defraud the citizens of the City of Los Angeles of their right to Steve Carmona's honest services, and that George Torres had used, or caused someone to use, the mails or wires in furtherance of the scheme.

When considering a Rule 29 motion, "all reasonable inferences are drawn in favor of the government, and any conflicts in the evidence are to be resolved in favor of the jury's verdict." United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1201 (9th Cir. 2000). "There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Magallon-Jimenez, 219 F.3d 1109, 1112 (9th Cir. 2000).

As the Court instructed the jury, in order to be found guilty of honest services mail or wire fraud, the government must prove each of the following elements: (1) that the defendant knowingly made up or participated in a scheme or plan to deprive citizens of their right to a public official's honest services, (2) that the defendant acted with the intent to deprive the citizens of their right to the public official's honest services, and (3) that the defendant used, or caused someone to use, the mails or wires to carry out or to attempt to carry

out the scheme or plan. See Ninth Circuit Model Jury Instruction 8.102 (2003 ed.).

The Ninth Circuit has identified "two principal theories of honest services fraud in cases involving public officials: [1] fraud based on a public official's acceptance of a bribe and [2] fraud based on a public official's failure to disclose a material conflict of interest." United States v. Kincaid-Chauncey, 556 F.3d 923, 942 (9th Cir. 2009). The bribery theory is at issue in this case. The government's case was based on the theory that George Torres gave items of value to Steve Carmona in order to influence Steve Carmona in his capacity as a member of the Los Angeles Central Area Planning Commission (the "Commission").

When the government's theory is that items of value were given to a public official in exchange for influence, "at least an implicit quid pro quo is required." Id. at 943. "This requirement is necessary to ensure that the defendant had the requisite intent to defraud and to avoid convicting people for having the 'mere intent to curry favor.'" Id. (quoting United States v. Kemp, 500 F.3d 257, 281 (3rd Cir. 2007). "Without a link between the item of value received and an understanding that the public official receiving it is to perform official acts on behalf of the payor when called upon, there is no discernible way to distinguish between an elected official responding to legitimate lobbying and a corrupt politician selling his votes to the highest bidder." Id.

On the other hand, however, "the quid pro quo necessary for a bribery honest services fraud conviction need not be explicit." Id. "Nor need the implicit quid pro quo concern a specific official act." Id. "It is sufficient, for example, if the evidence establishes that

the government official has been put on 'retainer' – that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked." Id. at 944 n.15. However, "[o]nly individuals who can be shown to have had the specific intent to trade official actions for items of value are subject to criminal punishment on this theory of honest services fraud." Id.[10]

The evidence presented at trial was sufficient to allow the jury to find that George Torres devised or participated in a scheme to defraud the citizens of the City of Los Angeles of their right to Steve Carmona's honest services through the payment of bribes. Steve Carmona became a member of the Commission in April 2002, and continued on the Commission until approximately September 27, 2005. Throughout that time, the evidence showed that George Torres gave Steve Carmona several items of value. Beginning in April 2002, George Torres allowed Steve Carmona to list a condominium owned by George Torres on Steve Carmona's residency verification form. Residency in the geographical area of the Commission was a prerequisite to serving as a commissioner, and Steve Carmona maintained a different residence outside of the geographical area in Pico Rivera. The evidence also showed that George Torres paid

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[10] In cases involving campaign contributions, the government is required to prove an explicit quid pro quo. See Kincaid-Chauncey, 556 F.3d at 936; United States v. Inzunza, __ F.3d __, 2009 WL 2750488, at *4 (9th Cir. 2009). The benefits at issue in this case were not campaign contributions. Nevertheless, the defense argues that an explicit quid pro quo should be required in light of the fact that Carmona never voted on the permits application. This argument is foreclosed, however, by the Ninth Circuit's holding in Kincaid-Chauncey where the court explicitly stated that "the quid pro quo necessary for a bribery honest services fraud conviction need not be explicit." 556 F.3d at 943. The fact that Carmona never actually voted on the permits application does not change the analysis in this regard because, as discussed below, in Kincaid-Chauncey, the Ninth Circuit also adopted the "stream of benefits" theory, which endorses the notion that the public official need not actually take an official action in exchange for the gift of value; it is sufficient for the public official to have been put on retainer. See id. at 944 n.15.

Steve Carmona's cell phone bills from October 2002, until after Steve Carmona left the Commission in September 2005. While Steve Carmona was on the Commission, George Torres paid in excess of $12,000 for Steve Carmona's monthly cell phone service. In March 2005, George Torres gave Steve Carmona a 2005 GMC pick-up truck, which was worth approximately $16,000. On December 28, 2004, George Torres gave Carmona eight Los Angeles Lakers basketball tickets worth over $1,000.

During the same time that Steve Carmona was on the Commission and George Torres was providing Steve Carmona with items of value, George Torres began pursuing an application with the Commission in order to obtain a liquor license, a permit for an indoor swap meet, and a parking permit at the Alvarado Numero Uno market. There was sufficient evidence from which the jury could have inferred that the benefits given to Steve Carmona were intended to influence Steve Carmona in his capacity as a member of the Commission. In a recorded conversation on November 9, 2004, George Torres was heard saying to Steve Carmona: "Make sure you pass my thing; it was on the paper today." On December 17, 2004, Steve Carmona was heard in conversation with his associate George Luk. George Luk told Steve Carmona that Luk had gone to "George's place" and picked up a check for $15,000 for "Alvarado." On December 28, 2004, Steve Carmona was heard talking to George Torres about the Lakers tickets, and Carmona said that he "could invite some people from the city."

On April 12, 2005, the Commission denied the application for the permits. That evening, one of the managers of the Numero Uno markets involved in obtaining the permits, Joe Ramos, left a voice message for George Torres. Ramos said, "We just got back from the meeting. I

don't think it went very good. I don't know what these guys were supposed to do to set us up, boss, but I'll talk to you in person." From this evidence, the jury could have inferred that George Torres was giving Steve Carmona the items of value with the specific intent to influence Carmona in his capacity as a member of the Commission.

The defense argues that there was insufficient evidence of a quid pro quo because Steve Carmona never actually voted and the application for the permits ultimately failed. The government notes, however, that although Steve Carmona never actually voted on the permits application, Carmona exercised his influence behind the scenes. Courts have held that honest services bribery can be proven by showing that an item of value was given to a public official with the intent to have that official influence other officials on the matter. See, e.g., United States v. Potter, 463 F.3d 9, 19 (1st Cir. 2006); United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) ("It is no less a violation of sections 1341 and 1346, however, for that commissioner, in addition to selling her vote, to take steps to ensure that a majority of commissioners vote with her."). In Potter, the defendants were charged with bribing a public official in order to influence certain items on the state's legislative agenda. Id. The First Circuit noted that "[i]t is common knowledge that powerful legislative leaders are not dependent on their own votes to make things happen. The honest services that a legislator owes to citizens fairly include his informal and behind-the-scenes influence on legislation." Id. at 18.

Here, the evidence showed that Steve Carmona influenced other members of the Commission in an attempt to have the Alvarado permits application approved. Carmona was heard telling George Luk about a

conversation that Carmona had with fellow commissioner Young Kim, where Carmona told Kim, "Remember when you wanted me to come through for your, ah, your buddy. . . . And now I need to you sit back, ah, just in case, ah, Alvarado goes. You know what I mean?" On the days before the April 12, 2005 vote on the permits application, Carmona told Luk that Kim would "carry the water." Carmona spoke with fellow commissioner Beverly Ziegler in an attempt to get her to vote in favor of the permits application. Carmona told Zeigler "on this one, you know, I think you wanted me to be there on that last one. On this one, I uh, I hope, uh, things work out." From these recorded conversations, the jury could have found that Carmona was influencing his fellow commissioners to approve the permits application.

Furthermore, a defendant can violate the honest services statute even if the goal of the scheme does not ultimately succeed. See Potter, 463 F.3d at 17. Indeed, in Potter, the First Circuit noted that the public official in question may have been unwilling or unable to execute the goal of the bribe. Id. at 17. However, the fact that "the scheme never achieved its intended end, would not preclude conviction for" honest services mail or wire fraud. Id.

This is consistent with the law under the federal bribery statutes. In Evans v. United States, the Supreme Court held that under the Hobbs Act, the bribery offense "is completed at the time when the public official receives a payment in return for his agreement to perform specific official act; fulfillment of the quid pro quo is not an element of the offense." 504 U.S. 255, 268 (1992).

That a bribe need not achieve its intended goal, was recognized by the Ninth Circuit in Kincaid-Chauncey, where the court adopted the

stream of benefits theory. See 556 F.3d at 944 n.15. Under the stream of benefits theory, the Ninth Circuit said that "[i]t is sufficient . . . if the evidence establishes that the government official has been put on 'retainer' – that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked." Id. Thus, the crime is committed when the official is given items of value with the understanding that the official will do whatever is asked; the official does not necessarily have to act on the briber's behalf.

The evidence here was sufficient to support such a stream of benefits theory. The evidence showed that George Torres had Steve Carmona on retainer and that Carmona was ready to assist in matters before the Commission. Even though Carmona had officially recused himself from the April 12, 2005 vote, the evidence showed that just days before the vote Carmona was considering the possibility of showing up to vote. Carmona told Luk that if there was not a quorum, then he was going to show up for the vote on the permits. Furthermore, even after the permits were denied at the April 12, 2005 vote, Carmona organized the motion for reconsideration. The motion for reconsideration was denied on April 26, 2005. Yet, in the days after that vote, the evidence showed that Carmona was organizing another effort to refile the application for the permits. In light of these actions, the jury could have found that George Torres had Steve Carmona on retainer and that Carmona was stood ready to act favorably whenever George Torres came calling. The jury could have found that Carmona remained on retainer as long as Carmona was on the Commission, in light

of his efforts to refile the application even after it was denied on multiple occasions.

The final prong of a conviction for honest services mail or wire fraud is that the specific uses of the wires must have been in furtherance of the scheme to defraud. See United States v. Shipsey, 363 F.3d 962, 971 (9th Cir. 2004). "To support a wire fraud charge, the wire must be 'incident to the execution of the scheme' and not 'part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the defendant's fraudulent scheme.'" United States v. Lazarenko, 564 F.3d 1026, 1036 (9th Cir. 2009) (quoting United States v. Lo, 231 F.3d 471, 478 (9th Cir. 2000)). "The importance of the temporal aspect of the wire transfer to the underlying scheme is best illustrated in our case law: 'The pertinent question is not whether or not the defendant had obtained all the money she expected to get before the wire occurred. Rather, the wire can occur after the defendant has obtained her fee, if the wire is part of the execution of the scheme as conceived by the perpetrator at the time.'" Id. (quoting Lo, 231 F.3d at 478 (quotations omitted)).

The issue here is whether the jury could have found that the specific uses of the mails and wires alleged in connection with the specific counts were in furtherance of the underlying scheme to defraud. Three out of the five counts on which the jury returned a verdict of guilty took place after Steve Carmona left the Commission. Count Five was based on the mailing of thirteen money orders to Globe Tires and Motorsports to pay for the tires and rims for Steve Carmona's Cadillac on February 15, 2006. Counts Nine and Ten were based on the use of wires to pay Steve Carmona's cell phone bill on November 14,

2005, and December 23, 2005 respectively. Counts Seven and Eight, however, were based on wire transmissions that occurred when Carmona was still a member of the Commission. Count Seven and Eight were based on the payment of Steve Carmona's cell phone bill on July 14, 2005, and September 1, 2005 respectively.

The jury's finding that the use of the wires in Counts Seven and Eight were in furtherance of the scheme to defraud was supported by sufficient evidence because Steve Carmona was still on the Commission at the time those wires took place. As discussed above, there was sufficient evidence for the jury to find that George Torres gave items of value to Steve Carmona to keep Carmona on retainer until Carmona left the Commission. Based on the evidence presented at trial, the jury could have found that one such gratuity was the payment of Carmona's cell phone services. Accordingly, the jury could have found that the payment of the cell phone bill while Carmona was on the Commission was in furtherance of the underlying scheme to defraud.

However, once Steve Carmona left the Commission on approximately September 27, 2005, any subsequent uses of the mails or wires could not have been in furtherance of the underlying scheme to defraud. Because the government's theory was that the payments were made to keep Carmona on retainer in the event that issues came before the Commission, once Carmona left the Commission, there was no public official to retain. Thus, no rational jury could have found that the use of the wires and mails in Counts Five, Nine, and Ten were in furtherance of the scheme to defraud.

The government notes that in federal bribery cases, the payment of the bribe can occur after the official performs the official act.

Indeed, courts have found that bribery can where an official takes an official act with the understanding that he will receive some benefit after he leaves office. See Potter, 463 F.3d at 19; United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998). In Potter, the court noted that "a payment that had been promised in advance but paid afterwards could be unlawful." 463 F.3d at 19. Similarly, in Jennings, the court said in the context of the federal bribery statute, that "[b]ribes are often paid before the fact, but 'it is only logical that in certain situations the bribe will not actually be conveyed until the act is done.'" 160 F.3d at 1014 (quoting United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982)).

There was insufficient evidence, however, from which the jury could have found that these payments to Carmona after he left the Commission were made due to the actions that Carmona took while he was on the Commission. There was a lack of evidence in this regard because Carmona was never actually successful in his efforts to benefit George Torres and Numero Uno by virtue of Carmona's position on the Commission. Indeed, the application for the permits was never approved.

As a result, no rational jury could have found that either of the situations identified by the government in Potter or Jennings were present here. In Jennings, the court noted that in certain situations, the bribe may not actually be conveyed until the act is done. 169 F.3d at 1014. Here, however, the act in question was never accomplished because the permits application was never approved. The government would argue that favorable action was taken because Carmona lobbied other commissioners in connection with the permits application. George

Torres, however, was not paying Carmona simply to exert influence on other commissioners; he was paying Carmona to get the permits application approved. It would make little sense for George Torres to pay Carmona after the fact even though Carmona never achieved the object of the bribe.

There also was insufficient evidence for the jury to find that the situation identified in Potter was present here. In Potter, the court noted that a payment that was promised in advance but paid afterwards could be unlawful. 463 F.3d at 19. Much like the situation described in Jennings, however, no rational jury could have found that there was an agreement whereby George Torres promised to pay Carmona's cellphone bill once Carmona left the Commission even if Carmona was unable to get the permits application approved. Thus, in light of the fact that Carmona failed to get the applications approved, no rational juror could have found that the payments made after Carmona left the Commission were a reward for Carmona's failure.

As discussed above, the government was able to avoid the problems presented by the fact that Carmona never voted, and the permits application was never approved, by relying on the "stream of benefits" theory from Kincaid-Chauncey. By arguing that Carmona was on retainer for George Torres, the government was relieved of the obligation of proving that any official act was ever taken and of tying individual payments to specific official acts. Because the government relied on this theory, however, the government cannot now argue that the uses of the mail and wires that occurred after Carmona left the Commission were in furtherance of that same scheme to defraud. When Carmona left the Commission, the scheme ended because Carmona was no longer a public

official that could be placed on retainer. As a result, no rational jury could find that the uses of wires and mails that occurred after Carmona left the Commission were in furtherance of the scheme to defraud. Accordingly, the motion for acquittal is granted with respect to Counts Five, Nine, and Ten, but denied with respect to Counts Seven and Eight.[11]

D. Spillover Prejudice

The defense seeks a new trial on the grounds that the evidence from the dismissed RICO counts was extremely inflammatory and that it improperly influenced the jury's decision to convict on the remaining honest services, alien harboring, and tax counts. Rule 33 allows a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Generally, "[a] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." United States v. Alston, 974 F.2d 1206, 1211 (9th Cir. 1992); see also United States v. Inzunza, __ F.3d __, 2009 WL 2750488, at *18 (9th Cir. 2009) (noting that the reviewing court's "role is limited to determining whether the district court clearly and manifestly abused its discretion"). "'The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.'"

[11] The defense also argues that the honest services statute is unconstitutionally vague. This argument, however, is foreclosed by the Ninth Circuit's decision in United States v. Weyhrauch, 548 F.3d 1237, 1247 (9th Cir. 2008). Although the Supreme Court granted certiorari in Weyhrauch to address the issue of vagueness, see United States v. Weyhrauch, __ U.S. __, 129 S.Ct. 2863 (2009), in the interim, the Ninth Circuit decision remains controlling.

Id. (quoting United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980)). "'If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.'" Id. (quoting Lincoln, 630 F.2d at 1319).

One recognized basis for a new trial is the doctrine of prejudicial spillover or retroactive misjoinder. See United States v. Lazarenko, 564 F.3d 1026, 1042 (9th Cir. 2009). These concepts are "closely related" and the terms "prejudicial spillover" and "retroactive misjoinder" are often used interchangeably. Id. at 1042 n.10. As the Ninth Circuit recently explained, "'[r]etroactive misjoinder arises where joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper.'" Id. at 1043 (quoting United States v. Vebeliunas, 76 F.3d 1283, 1293-94 (2d Cir. 1996) (internal quotations omitted)). The court noted that in the Second Circuit, to invoke retroactive misjoinder, the defendant "must show compelling prejudice," and that "[p]rejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice." Id.[12] The

[12] In Lazarenko, the Ninth Circuit noted that the First Circuit has a somewhat more demanding standard, which requires the defendant to "'prove prejudice so pervasive that a miscarriage of justice looms.'" 564 F.3d at 1043 (quoting United States v. Trainor, 477 F.3d 24, 36 (1st Cir. 2007)). At no point in Lazarenko, however, did the Ninth Circuit adopt the First Circuit standard. Instead, the Ninth Circuit endorsed the test from the Second Circuit. See id. at 1044. Even under this more demanding standard, however, the Court would find that Defendant suffered sufficient prejudice to warrant a new trial on the non-RICO counts.

Ninth Circuit also noted that the primary question is whether "'the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants [or counts], in view of its volume and the limited admissibility of some of the evidence.'" Lazarenko, 564 F.3d at 1043 (quoting United States v. Cuozzo, 962 F.2d 945, 950 (9th Cir. 1992)). The concern is that a defendant should be given a fair trial on each and every count, and the jury should not be allowed to find a defendant guilty on some counts simply because the evidence presented on dismissed counts was particularly inflammatory. See United States v. Hamilton, 334 F.3d 170, 182 (2d Cir. 2003) (noting that an analysis of spillover prejudice "requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant"); cf. United States v. DeRosa, 670 F.2d 889, 898 (9th Cir. 1982) (noting that the court "must be wary of situations where a jury might impute the guilt of some defendants to other defendants").

In Lazarenko, the Ninth Circuit articulated a five-factor test for determining whether a new trial is warranted on the basis of spillover prejudice. See 564 F.3d at 1044. The court adopted the Second Circuit test under which the court considers: "(1) whether the evidence was so inflammatory that it would tend to cause the jury to convict on the remaining counts; (2) the degree of overlap and similarity between the dismissed and remaining counts; and (3) a general assessment of the strength of the government's case on the remaining counts." Id. (citing Vebeliunas, 76 F.3d at 1294). The court also adopted two factors from an earlier Ninth Circuit case: "[4] whether the trial

court diligently instructed the jury and [5] whether there is evidence, such as the jury's rendering of selective verdicts, to indicate that the jury compartmentalized the evidence." Id. (citing Cuozzo, 962 F.2d at 950).

Here, a balanced analysis of these five factors with respect to each of the remaining categories of counts (honest services, harboring, and tax), leads the Court to conclude that the George Torres was prejudiced by the spillover from the highly inflammatory evidence presented in connection with the RICO counts. The Court will address each factor in turn.

1. Inflammatory Nature of the Evidence

This first factor considers "whether the evidence on the vacated counts was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant[] on the remaining counts." United States v. Morales, 185 F.3d 74, 83 (2d Cir. 1999); see also Lazarenko, 564 F.3d at 1043 (noting that the question is "whether the evidence was so inflammatory that it would tend to cause the jury to convict on the remaining counts"). This factor "is not met where 'the evidence that the government presented on the reversed counts was, as a general matter, no more inflammatory than the evidence that it presented on the remaining counts.'" United States v. Hamilton, 334 F.3d 170, 182 (2d Cir. 2003) (quoting Morales, 185 F.3d at 83).

Here, there is no doubt that the evidence presented on the vacated RICO counts was of such an inflammatory nature that it would have

tended to incite the jury to convict George Torres on the remaining counts. The evidence presented on the three murders portrayed George Torres as a calculating killer who ordered three people murdered simply because they crossed his path and interfered with his supermarket business. It is hard to imagine any more inflammatory evidence.

The inflammatory nature of the murder evidence was further enhanced by the witnesses who testified in support of the murders. Both Derrick Smith and Raul del Real testified that they were long-time associates and friends of George Torres. Derrick Smith was an admitted murderer, with an extensive criminal history, who was serving a twenty-four year sentence for trafficking cocaine to Alabama. Likewise, Raul del Real admitted to shooting people and he was serving a fourteen year sentence for trafficking cocaine to Baltimore. The jury was undoubtedly given the impression that George Torres was an unsavory character in light of his long-time friendship and association with these despicable human beings.

Furthermore, the Court finds it likely that the jury could have been improperly influenced by the subtext of the entire case, which was that George Torres was somehow involved in drug trafficking. The jury could have easily understood that because George Torres was in control of Smith and Raul del Real, both of whom admitted (and even boasted at times) to their extensive drug dealings, George Torres was involved in their drug trafficking activities. Although the government never expressly enunciated such a theory, the jury likely understood the subtext of the government's case.

In addition to the evidence presented on the substantive murder predicates, there was also significant evidence presented to support

the government's theory that George Torres was in charge of a larger criminal RICO enterprise. Courts have recognized that when a conviction is not sustained on a RICO count, that there is a greater risk of spillover prejudice due to the fact that the RICO statute allows the government to introduce evidence to establish the enterprise element of the crime. See, e.g., United States v. DeRosa, 670 F.2d 889, 897 n.11 (9th Cir. 1982); United States v. Tellier, 83 F.3d 578, 581-82 (2d Cir. 1996) (noting that "[i]f the RICO counts fail, prejudice on the other counts is likely," because "[a] RICO charge allows the government to introduce evidence of criminal activities in which the defendant did not participate to prove the enterprise element"). In DeRosa, the Ninth Circuit noted that "[t]he hazards of joinder may be magnified when a RICO count was used to establish joinder because . . . in attempting to prove a RICO violation, the government will try to show how the various defendants associated as part of the racketeering enterprise." 670 F.2d at 897 n.11.

Courts have also noted that simply being charged with "racketeering" can be inherently prejudicial. See, e.g., DeRosa, 670 F.2d at 897 n.11 (noting the "risk that 'the prejudicial effect of tarring a defendant with the label of "racketeer" [can] taint[] the conviction on an otherwise valid count.'" (quoting United States v. Guiliano, 644 F.2d 85, 89 (2d Cir. 1981)); United States v. Stefan, 784 F.2d 1093, 1101 (11th Cir. 1986); Guiliano, 644 F.2d at 89; Morales, 185 F.3d at 83 ("[T]he fact that a RICO count has been reversed often suggests prejudice."); United States v. Sam Goody, 518 F. Supp. 1223, 1226 (E.D.N.Y. 1981). Indeed, the Second Circuit has noted that "[o]ne of the hazards of a RICO is that when the Government is unable to

sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of 'racketeer' tainted the conviction of an otherwise valid count." Guiliano, 644 F.2d at 89. The mere fact, however, that a RICO count "was subsequently dismissed does not alone suffice to establish prejudice." Vebeliunas, 76 F.3d at 1294; see also Morales, 185 F.3d at 83. Nonetheless, the fact that the RICO counts were subsequently dismissed does call for greater sensitivity as to whether the jury was improperly influenced by the inclusion of the RICO counts. See DeRosa, 670 F.2d at 897 n.11 (noting that the "hazards of joinder may be magnified" when a RICO count is included); Sam Goody, 518 F. Supp. at 1226.

Here, the Court finds that the jury was improperly influenced by the inclusion of the RICO counts that were subsequently dismissed. The RICO counts allowed the government to present substantial evidence to prove the existence of the so-called "Torres Enterprise." The government's entire theory was that George Torres was the mastermind of the enterprise which bore his name. Furthermore, the government argued that the entire purpose of the Torres Enterprise was to keep victims in fear of the Torres Enterprise and to enrich its members by expanding the profits and power of the Torres Enterprise. This overarching theory prejudiced the George Torres on the remaining counts because the government portrayed George Torres as a crime boss who used crime as part of his regular method of doing business.

The Court also finds that the jury was improperly influenced by the fact that George Torres was labeled as a "racketeer." This fact alone is not sufficient to show prejudice. See Morales, 185 F.3d at

83; Vebeliunas, 76 F.3d at 1294. In several cases, however, where no prejudice was found when RICO counts were dismissed the court gave limiting instructions on the use of the term "racketeer." See Morales, 185 F.3d at 83; Vebeliunas, 76 F.3d at 1294. In Morales, the district court "carefully instructed the jurors that they should not be influenced by the use of the word 'racketeering' in determining whether the government has proved the defendants' guilt." 185 F.3d at 83. Similarly, in Vebeliunas, "the district court instructed the jury that the term 'racketeering' was 'only . . . used by Congress to define the offense,' and should not influence their 'determination of whether the guilt of the defendant has been proven.'" 76 F.3d at 1294.

Here, however, the parties never proposed, and the Court never gave, such a limiting instruction with regard to the use of these inflammatory terms. Thus, the Court did not have the opportunity to ameliorate the inherently prejudicial effect of tarring the defendant with the label of "racketeer" through the use of a limiting instruction.

In sum, this first factor weighs especially heavily in favor of George Torres's motion for a new trial. The evidence presented on the dismissed RICO counts was incredibly inflammatory because George Torres was charged with ordering the murder of three individuals. Furthermore, the inclusion of the RICO counts allowed the government to present evidence of a criminal enterprise and to portray George Torres as the boss of the enterprise who would commit any number of crimes in order to keep victims in fear and to enhance the profits of the Torres Enterprise. Furthermore, the Court did not have the opportunity to instruct the jury not to use the label of "racketeer" for an improper

purpose. Under these circumstances, the Court finds that the jury was influenced by the evidence on the dismissed counts and was incited or aroused to convict George Torres on the remaining honest services, harboring, and tax counts.

2. Degree of Similarity Between Dismissed and Remaining Counts

This second factor asks whether the dismissed and the remaining counts were similar or dissimilar. See Lazarenko, 564 F.3d at 1044. Courts have recognized two different scenarios where prejudice is unlikely. First, "where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover." United States v. Wapnick, 60 F.3d 948, 953-54 (2d Cir. 1995); see also United States v. Naiman, 211 F.3d 40, 50 (2d Cir. 2000). Second, "[t]he absence of prejudicial spillover can also be found where the evidence on the reversed and remaining counts are completely dissimilar, thus permitting the inference that the jurors were able to keep the evidence separate in their minds." United States v. Rooney, 37 F.3d 847, 856 (2d Cir. 1994); see also Morales, 185 F.3d at 82. The Second Circuit has reconciled these two theories as follows:

> While these two lines of cases appear at first blush to be contradictory, they are in fact consistent. When the reversed and remaining counts arise from an identical fact pattern and all evidence introduced on the reversed count would have been

> admissible anyway, a defendant will have a difficult time establishing prejudice. Likewise, when the reversed and remaining counts arise from completely distinct fact patterns and the evidence can easily be compartmentalized, we normally will have undiminished faith that a jury has followed the court's instructions and has evaluated each count on the specific evidence attributed to it. It is only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, and this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur.

Rooney, 37 F.3d at 856 (emphasis in original).

Here, there is no dispute that the evidence introduced with regard to the three murder predicates would not have been admissible if George Torres had been on trial for only honest services fraud, harboring, and tax. Furthermore, there is no dispute that the evidence relating to the alleged RICO enterprise would not have been admissible at such a trial. Thus, all of the highly inflammatory evidence would not have been admissible on a trial for the remaining counts.

The government argues that despite this fact, the evidence presented on the RICO counts was so distinctly different from the evidence on the remaining counts that it could have been easily compartmentalized. The Court disagrees. The government presented its case in such a manner that the jury was invited to use the evidence from the dismissed RICO counts in order to convict on the remaining counts. First, it is important to note that the evidence introduced in

support of the stand-alone honest services and alien harboring counts was virtually identical to the evidence used to support the bribery and harboring predicate acts in the RICO counts. In other words, the government used the same evidence to prove the bribery and harboring predicate acts as it did to prove the separate honest services and harboring counts. As a result, when considering the evidence of bribery and harboring in the context of the RICO counts, the jury was expressly required under the RICO statute to determine whether the bribery and harboring predicates formed a pattern of racketeering activity along with the murder counts. In order to make this determination, the jury had to consider whether these predicate offenses were related to one another by sharing "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1989). Thus, the jury was required to compare these predicate acts to each other and decide whether they were sufficiently related to form a pattern of racketeering activity. Indeed, the jury found that these seemingly disparate crimes did have such a relationship and formed a pattern of racketeering activity because the jury convicted George Torres on both RICO counts. To argue that the jury was then able to consider this same evidence separately and independently from the RICO counts and murder predicates when considering the stand-alone honest services and harboring counts strains credibility.

With regard to the tax counts, the government similarly encouraged the jury to consider the tax evidence as it related to the RICO counts,

and visa versa, even though the alleged tax violations were not predicate RICO offenses. The evidence of the tax violations should have been presented as entirely separate from the RICO counts, yet the government sought to impermissibly use the tax evidence to bolster the RICO counts. In closing arguments, the government explicitly told that jury that they should consider the tax violations when determining whether there was a pattern of racketeering activity, even though the tax violations were not predicate racketeering acts. The government said:

> Witnesses, documents and recordings together I submit, . . . proved beyond a reasonable doubt that George Torres . . . engaged in ongoing persuasive [sic] and systematic pattern of criminal activity, including harboring aliens, failure to pay payroll taxes, bribing a public official, and soliciting conspiracy to commit murder.

This was clearly an improper argument that was designed to invite the jury to consider the evidence of the tax crimes in the context of the RICO counts.

The government did the reverse as well, and invited the jury to use the RICO evidence to bolster the tax counts. One of the defense's main arguments at trial was that certain high-level managers of the Numero Uno markets set up the system to pay payroll in cash of which George Torres was unaware. The government countered this argument by relying on the RICO evidence:

> [W]hat employees knowing what we know about George Torres, would set up a cash payroll system behind this man's back? Leaving

aside that they would have not motive to do it. Why would they cross George Torres?

The government was clearly using the evidence of George Torres's violent character from the RICO counts to argue that no employee would do anything without George Torres's knowledge.

In Rooney, the Second Circuit faced a similar situation where the government improperly used evidence from an unrelated dismissed counts in order to bolster one of the remaining counts. 37 F.3d at 857. The court noted that the evidence on Count III was entirely distinct from the evidence on Counts I and II, and as a result, "the jury would normally be expected to compartmentalize it." Id. at 856. The court noted, however, that "the prosecution encouraged the jury to consider the evidence on Count III as bearing on Rooney's culpability on Counts I and II." Id. The court noted that during closing arguments, the government used a recorded conversation bearing on Count III to bolster the government's case on Counts I and II. Id. Much like our case, the issue was whether the defendant had the requisite knowledge to support Counts I and II, and the government used a phone conversation relating to Count III to support the government's position. Id. at 856-57. The court found that "[t]his explicit invocation of evidence pertaining only to Count III and otherwise inadmissible on Counts I and II to bolster the government's case on these counts undermines our confidence that the jury adequately separated the two occurrences." Id. at 857.

Similarly, here, the government used the evidence from the tax counts to bolster the RICO counts, and visa versa. The argument that the tax crimes formed the basis for the requisite pattern of racketeering was clearly improper. Furthermore, the government used

the evidence of George Torres's violent nature in order to bolster their argument that George Torres knew about the cash payments because no employee would dare do anything without George Torres's knowledge. The government's strategy in this regard undermines the argument that the RICO counts and the tax counts were entirely separate and that the jury likely compartmentalized the evidence.

The government also argues that the Court already found that the jury would be able to compartmentalize the evidence with respect to the tax counts, because the Court denied Defendant's pretrial motion to sever the tax counts. The government argues that nothing has changed since the pretrial ruling, and that the Court should adhere to the earlier ruling. The government's argument does not adequately recognize the important difference between the pretrial context and the current posture of the case. In the pretrial context, the RICO counts were still intact, and they included as predicate acts the alien harboring counts. In denying the severance motion, the Court relied on the government's proffer that the evidence that the employees were paid in cash was relevant to both the tax counts and the harboring charges, which were included as predicate acts under the RICO counts. Thus, pretrial, there was an overlap of the evidence on the tax counts and the RICO counts. Now, however, because the RICO counts have been dismissed, the harboring charge remains in the case only as one stand-alone conspiracy count. As a result, the important factor of whether the evidence would have been admissible on both counts is no longer relevant. The question now is whether the highly inflammatory evidence from the murders and the RICO enterprise, which could not have been

severed pretrial because it was all included in one count, spilled over to the remaining counts.

In sum, the evidence of the murders and the RICO enterprise would have not been admissible if George Torres had been charged only with honest services fraud, harboring, and tax. Furthermore, the government presented its case in such a way that the jury was encouraged to consider, and with respect to the bribery and harboring allegations actually required to consider, the evidence of the murders as they related to the other counts. Indeed, the tax case was substantially enhanced by the government's argument that George Torres was a violent person. Thus, under these circumstances, the Court finds that this second factor weighs in favor of prejudicial spillover.

3. Strength of the Evidence on Remaining Counts

On the third prong, the court must make "a general assessment of the strength of the government's case on the remaining counts." Lazarenko, 564 F.3d at 1044. A district court may still order a new trial if the evidence was otherwise sufficient to allow the jury to find the defendant guilty on the remaining counts. See, e.g., Rooney, 37 F.3d at 857; Guiliano, 644 F.2d at 88-89. In Guiliano, the Second Circuit found the "evidence sufficient to support the appellant's conviction" on the remaining count. 644 F.2d at 88-89. Nevertheless, the court ordered "a retrial of this charge because of the distinct risk that the jury was influenced in its disposition of this count by improper evidence and by the allegations of the RICO count." Id. Similarly, in Rooney, the court found that the evidence was sufficient

to allow the jury to find the defendant guilty of the charge on the remaining counts. 37 F.3d at 857. The court also noted, however, that "a jury could also have reasonable doubt" that the defendant had the requisite mental state for the crime. Id. Therefore, because the government's case on the remaining counts was "not overwhelming," and the court was unable to conclude that the conviction on the remaining counts "did not result from a spillover from the case against him in Count III," the court ordered a new trial. Id.

By comparison, courts have denied a new trial when the evidence on the remaining counts was "airtight" or "very substantial." See Lazarenko, 564 F.3d at 1045; Vebeliunas, 76 F.3d at 1294. For example, in Morales, the Second Circuit denied a new trial on the basis of spillover prejudice in part because the government presented a "strong case" on the remaining counts. 185 F.3d at 83. The court noted that several eyewitnesses testified that the defendants committed the armed robberies. Id. The court also noted that there was "overwhelming evidence" on certain counts because the defendants had actually confessed to the crimes. Id.

Here, the Court finds that although the evidence on certain aspects of the remaining honest services, harboring, and tax counts was somewhat strong, and sufficient for a jury to find George Torres guilty, if given a new trial, there is a significant possibility that the jury would acquit George Torres on the remaining counts. See Rooney, 37 F.3d at 857 (granting a new trial because the "jury could . . . have a reasonable doubt" about the mental state required for the crime). Perhaps the weakest group of counts were the honest services counts. As discussed in more detail above, although the evidence was

sufficient to allow the jury to find George Torres guilty on a bribery theory on Counts Seven and Eight, the evidence was not overwhelming. Steve Carmona did not vote on the Alvarado permits application, and the application was never approved while Carmona was on the Commission. Furthermore, George Torres and Steve Carmona had a business relationship that began before Carmona became a member of the Commission and continued after Carmona left the Commission. Some of the evidence suggested that Carmona in fact disclosed that he was retained by George Torres for services unrelated to his work as a commissioner. From these facts, the defense argued quite persuasively that Carmona was not acting in his official capacity when he lobbied other members of the Commission.

Further supporting the defense's argument is the fact that the Court granted judgment of acquittal with respect to three out of the five honest services counts that the jury found had been proven beyond a reasonable doubt. As discussed above, the Court found that no reasonable juror could have found that the uses of the mail and wires in Counts Five, Nine, and Ten, were in furtherance of the scheme to defraud because they occurred after Carmona left the Commission. The fact that the jury found George Torres guilty on these legally unsustainable counts suggests that the jury did not carefully consider the evidence with respect to each count individually, and may have been affected by the inflammatory nature of the RICO counts.

In Lazarenko, the Ninth Circuit confronted a similar situation where the jury found the defendant guilty on twenty-nine counts, the district court granted judgment of acquittal with respect to fifteen counts, and the Ninth Circuit reversed an additional six counts on

appeal. 564 F.3d at 1045. The court then considered whether a new trial was warranted on the basis of spillover prejudice from the dismissed counts. Id. The court noted that whether the evidence on the remaining counts was "sufficiently strong" was "a closer question." Id. Nevertheless, the court noted that "'[i]t is not necessary that the court agree with jury verdicts on all counts to determine that the jury carefully weighed the evidence.'" Id. (quoting Stefan, 784 F.2d at 1101). The court said that the "overall evidence of fraud was strong, although it was incumbent on the government to weave that evidence through the technical threads of multiple counts." Id. In fact, much like this case, the Ninth Circuit in Lazarenko dismissed certain wire fraud counts because the specific uses of the wires were not in furtherance of the scheme to defraud. Id. at 1037. Nevertheless, the court found that a new trial was not necessary because the dismissal of certain counts did "not undermine the evidence that was airtight." Id. at 1045.

Here, unlike Lazarenko, the evidence on Counts Seven and Eight was far from "airtight." Indeed, the defense had a very plausible argument that no bribery ever occurred because the alleged bribee never actually voted on the Alvarado permits application and the permits were never actually approved. Thus, the Court finds that on retrial, the jury very well could have a reasonable doubt as to whether the gifts given to Carmona were for the impermissible purpose of influencing Carmona in his official capacity as a member of the Commission.

The government's case on both the alien harboring and tax counts similarly suffered from important weaknesses, which persuade the Court that if given a new trial, the jury could find George Torres not guilty

of the harboring and tax counts. See Rooney, 37 F.3d at 857. It is important to note that the Indictment charged George Torres with conspiracy to harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) & (v)(I). The conspiracy was alleged to have begun on a date unknown, but no later than June 11, 2004, and included George Torres, Manuel Torres, Gloria Mejia, and other known and unknown individuals. While there was a fair amount of evidence with regard to George Torres's intent to conceal illegal aliens from detection, there was less evidence presented with respect to an agreement with others to conceal illegal aliens. Much of the government's case was based on the wiretap conversations, and in particular, the call on June 12, 2004, where George Torres instructed Manuel Torres that if the authorities arrived at the store, to have the employees without papers to hide upstairs. As the government made clear in connection with Manuel Torres's motion for judgment of acquittal, however, the allegation in the Indictment was that the conspiracy began before this call was made; indeed, the Indictment alleged that the conspiracy began no later than June 11, 2004. All of the evidence of a preexisting conspiracy, however, was circumstantial. There was evidence that Numero Uno employed numerous undocumented employees, but there was little direct evidence of an ongoing conspiracy as alleged in the Indictment. Furthermore, there was evidence that the Immigration and Customs Enforcement Agency sent the Numero Uno markets a letter certifying that the markets were in compliance with their immigration duties. While the circumstantial evidence was sufficient to allow the jury to find the charged conspiracy, if given a new trial, the jury could find have a reasonable doubt as to whether the conspiracy existed.

The tax counts similarly suffered from certain weaknesses. Count Thirteen charged George Torres with conspiring to impede and impair the ability of the IRS to collect payroll taxes from the Numero Uno markets. Much of the evidence on this tax conspiracy count came from upper level managers who testified that they had conversations with George Torres about the payment of cash wages to employees. However, some of these witnesses had serious credibility issues in light of the fact that the IRS was not pursuing them for the amounts that they owed in unpaid personal income taxes. Furthermore, although the conspiracy was alleged to have continued until June 2, 2006, some of the key witnesses such as Ned Tsunekawa and Vanessa Bradford left employment at the Numero Uno markets in the late 1990's. There was also evidence that near that same time, George Torres had ordered all employees to be on the payroll system. This evidence was consistent with George Torres's version of events that one he discovered that there were errors in the company's bookkeeping, he ordered them corrected. If given a new trial, the jury could believe George Torres's version of events and find that the conspiracy ended in the late 1990's.

The individual quarterly payroll tax counts also had certain weaknesses. Counts Fourteen through Fifty-Nine charged George Torres with failing to account for and pay over to the IRS payroll taxes for each quarter from March 31, 2001, to September 30, 2006. The evidence presented to support most of these individual counts were so-called "timecard correction sheets." These were paper documents that were seized by the authorities in a search of the Numero Uno markets. Although the contents of the timecard correction sheets were not uniform, they indicated that certain employees had been paid a certain

amount for their work. The government's theory was that the amounts that were recorded on these timecard correction sheets were paid in cash, and no payroll taxes were withheld from these amounts. Indeed, some of the timecard correction sheets expressly stated that the employee had been paid in cash and were signed by George Torres. Other timecard correction sheets, however, did not say that the employee was paid in cash. Furthermore, the government's theory was that the amount of money recorded on the timecard correction sheets were not reported to Numero Uno's payroll service called ADP. Because ADP was responsible for withholding the payroll taxes, the government argued that no withholding was made on the amounts reflected on the timecard correction sheets. There was evidence, however, that the information that was ultimately submitted by Numero Uno to ADP could be, and in fact was on occasion, altered before it was electronically transmitted to ADP. The government, however, never entered into evidence the records from ADP that would have shown how much payroll was reported to ADP such that a comparison could have been made between the information that was recorded on the timecard correction sheets and the information that was submitted to ADP.

The government's case was based on circumstantial evidence that the information on the timecard correction sheets had not been reported to ADP, and therefore, no payroll tax had been withheld. Indeed, there was sufficient evidence from which the jury could have found that this was the case. However, in light of the government's failure to submit the actual ADP records from which a comparison could have been made, the jury could have found that the government did not prove its case beyond a reasonable doubt.

In sum, although the evidence on the two remaining honest services counts, the harboring conspiracy count, and the tax counts was sufficient to allow the jury to find George Torres guilty beyond a reasonable doubt, there is a significant possibility that if given another trial where the highly prejudicial RICO evidence is not admissible, the jury could find George Torres not guilty on these counts. See Rooney, 37 F.3d at 857. Thus, while the evidence on these counts was otherwise sufficient, it was not so overwhelming that a subsequent trial would necessarily reach the same result.

4. Jury Instructions

On the fourth factor, an assessment must be made with regard to whether the court diligently instructed the jury. Lazarenko, 564 F.3d at 1044. In the context of a motion to sever, the Ninth Circuit has said that a "critical factor" in determining whether the jury can reasonably be expected to compartmentalize the evidence as it relates on to certain defendants or counts, is "the judge's diligence – or lack thereof – in instructing the jury on the purposes to which various strands of evidence may be put." Cuozzo, 962 F.2d at 945.

The government argues that the Court instructed the jury with sufficient diligence because the Court gave an instruction that the jury should consider each count separately and not allow a decision on one count to control the verdict on any other count. See Ninth Circuit Model Criminal Jury Instructions, 3.12 (2009). The Court is not convinced, however, that this general instruction was sufficient to have prevented the jury from considering the evidence from the RICO

counts with respect to the remaining counts. In fact, at the close of the evidence and before the case was given to the jury for decision, the Court granted judgment of acquittal with respect to the Carpel murder and the charges against Manuel Torres. As a result, the Court gave a much more specific instruction to the jury warning the jury not to speculate about why those counts were no longer before them, and that they should not consider that evidence as it pertained to the remaining counts. This limiting instruction was much more detailed and it specifically instructed the jury not to be influenced by the dismissed charges. If the RICO counts had been dismissed before the case had been given to the jury, the Court would certainly have given a similarly specific limiting instruction. Because the government did not dismiss the RICO counts until months after the jury returned their verdict, however, the Court did not have the opportunity to do so.

As noted earlier, courts have held that the prejudicial effect of a dismissed RICO count can be ameliorated by a limiting instruction telling the jurors that they should not be influenced by the fact that the defendant is charged with "racketeering." See Morales, 185 F.3d at 83; Vebeliunas, 76 F.3d at 1294. Here, however, the parties never proposed that such an instruction be given, and therefore, the Court never cautioned the jury with regard to the prejudicial racketeering charges that have now been dismissed.

In sum, while the Court did give a general instruction to consider each count separately, if the charges had been dismissed before the case was given to the jury for decision, the Court would have certainly given a more specific and detailed limiting instruction. Under these circumstances, the Court is not convinced that the general instruction

was adequate to guard against any spillover prejudice from the RICO counts.

5. Evidence that the Jury Actually Compartmentalized the Evidence

On this final factor, the Court must determine "whether there is evidence, such as the jury's rendering of selective verdicts, to indicate that the jury compartmentalized the evidence." Lazarenko, 564 F.3d at 1044. The Ninth Circuit has said that "[t]he fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence." Cuozzo, 962 F.2d at 950. The Second Circuit has similarly noted that "[p]artial acquittal of a defendant strongly indicates that there was no prejudicial spillover." Morales, 185 F.3d at 83; see also Hamilton, 334 F.3d at 183 ("The absence of . . . spillover is most readily inferrable where the jury has convicted a defendant on some counts but not on others.").

The government argues that there is evidence that the jury actually compartmentalized the evidence because the jury acquitted George Torres of the Meza murder and the honest services wire fraud violation charged in Count Six. The government also points to the fact that on the special verdict form, the jury found that Juan Mendoza was not a member of the Torres Enterprise.

The relevance of the acquittal on the Meza murder and the finding that Mendoza was not part of the Torres Enterprise is limited, because these aspects of the case were part of the now-dismissed RICO counts. In most cases where courts have performed the spillover prejudice

analysis, courts have considered whether the jury rendered selective verdicts on the remaining counts, not whether the jury rendered selective verdicts within the dismissed counts. See Morales, 185 F.3d at 83. Furthermore, even if the selective verdicts within the dismissed counts are to be considered, they are of relatively little importance. First, the jury's decision to acquit on the Meza murder can easily be explained by the fact that Raul del Real was the sole witness, and his credibility was so incredibly impeached that it would have been difficult for any rational juror to have believed his testimony.[13] The jury's decision that Juan Mendoza was not a member of the Torres Enterprise is easily explained as well because the government did not mention his name once during the course of the trial.

With respect to the remaining counts, the jury acquitted on only one out of the remaining fifty-four counts. The one count on which the jury acquitted George Torres was one of the honest services charges in Count Six. This honest services count was based on an alleged call from George Luk in Washington, D.C., to Steve Carmona in Los Angeles. This count was mispled, however, because Steve Carmona actually placed

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[13] The fact that Raul del Real was effectively impeached does not affect the inflammatory nature of the evidence on the dismissed RICO counts as discussed supra Part III.D.1. First, there was evidence of two other murders included in the RICO counts, and although the jury found George Torres not guilty of the Meza murder, the jury clearly believed the testimony of Smith that George Torres had ordered the murder of Maldonado. The jury never had the opportunity to render a verdict on the Carpel murder because the Court granted the Rule 29 motion before the case was sent to the jury for consideration. Second, even though the jury did not believe Raul del Real's testimony that George Torres ordered him to kill Meza, Raul del Real's testimony was prejudicial because Raul del Real admitted to trafficking literally tons of drugs and testified about his long association with George Torres. Finally, the fact that the jury did not believe Raul del Real's testimony with regard to the solicitation does not affect the overall prejudicial nature of the racketeering charge and the other evidence that George Torres was at the head of a criminal enterprise that would take whatever steps necessary to protect the profits of the Numero Uno markets.

the call to George Luk. Furthermore, the call did not involve George Torres at all, and there was no evidence that George Torres caused Carmona to place the call. Thus, the fact that the jury found George Torres not guilty on this count is not especially persuasive of whether the jury compartmentalized the evidence.

The Court also has doubts with regard to whether the jury compartmentalized the evidence based on the fact that the jury convicted George Torres of the honest services counts that were connected to uses of the mail and wires that occurred after Steve Carmona left the Commission. As explained earlier, because Steve Carmona had left the Commission at the time of the mail and wire transmissions, no rational juror could have found that these uses of the wires were in furtherance of the scheme to defraud the citizens of Carmona's honest services. The fact that the jury found George Torres guilty on these counts indicates that the jury was improperly influenced by the inflammatory evidence in the RICO counts and did not evaluate each count individually.

Thus, the Court does not find especially significant the fact that the jury acquitted on one of fifty-four counts in an indictment as complex as this. In light of the other factors including the inflammatory nature of the evidence, the fact that the government encouraged the jury to consider the RICO and non-RICO evidence in combination, the weaknesses in the government's case, and the lack of specific limiting instructions, the Court finds that George Torres suffered spillover prejudice from the dismissed RICO counts. Thus, a new trial is warranted.

6. Governmental Misconduct

The Court finds relevant in the context of the prejudicial spillover the governmental misconduct that occurred in this case. As detailed earlier, due to the undisclosed Brady material with respect to Raul del Real and Derrick Smith, the two key witnesses on the murder predicates in the RICO counts, the government moved to voluntarily dismiss the RICO counts in their entirety after the trial had already been completed. At the time, the government admitted that it had in its possession certain exculpatory and impeachment evidence that should have been turned over to the defense before trial. The government further admitted that the evidence was material to the RICO counts such that, at the very least, a new trial would have been an appropriate remedy. The government stated, however, that if a new trial was ordered on the RICO counts, the government would choose not to pursue the RICO counts. Thus, the government moved to dismiss the RICO counts in their entirety.

It is not entirely clear to the Court why the government chose not to retry George Torres on the RICO counts. Presumably, however, the government decided that, in light of the evidence that was revealed during trial and during the post-trial discovery, the evidence on the RICO counts was not sufficient to allow the government to pursue the RICO counts in good faith. One can only surmise that if the government had been aware of the Brady material before trial, the government would not have pursued the RICO counts, and specifically the murder predicates, against George Torres. If the government had made this decision before trial, George Torres would have enjoyed a trial that

was free from the spillover prejudice of the RICO counts. Because of the government's own failures, however, this information was not revealed until after the trial began. Under these circumstances – where, by its own admission, the government failed to fulfill its constitutional duties before trial, which resulted in the government choosing not to pursue the counts against the defendant in a retrial – the government should not enjoy the slightest benefit of any spillover from the dismissed counts to the remaining counts. Thus, as an additional basis for its decision, the Court exercises its supervisory power and orders a new trial in order to deter the government misconduct that occurred in this case. See Simpson, 927 F.2d at 1090 (noting that a district court may exercise its supervisory power "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct").

IV. CONCLUSION

In conclusion, George Torres's motion to dismiss the remaining honest services, alien harboring, and tax counts based on alleged Brady violations and outrageous government misconduct is DENIED. Furthermore, the motion to suppress evidence from the wiretap and for a new trial is DENIED. The motion for judgment of acquittal is GRANTED with respect to the honest services charges in Counts Five, Nine, and Ten, but DENIED with respect to Counts Seven and Eight. The motion for

a new trial on the remaining counts due to the prejudicial spillover from the now-dismissed RICO counts is GRANTED.

IT IS SO ORDERED.

DATED: September 18, 2009

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE