Nos. 03-10067, 03-10071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JOSE RAMON GARCIA;
EDWARD MICHAEL POWERS

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE
(Volume 1 of 2)

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JURISDICTION

Defendants' jurisdictional statement is correct, with one exception. The judgments were not entered until February 14, 2003. (ASER 205 (Docs. 485 & 486)).[1]

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[1] This brief uses the following abbreviations: "ASER" for the Appellee United States' Supplemental Excerpts of Record; "ER" for the Appellants' Excerpts of Record; "SER" for Powers' Supplemental Excerpts of Record;

(continued...)

BAIL STATUS

On January 8, 2004, the district court granted defendants' motion for release pending appeal.

ISSUES PRESENTED

1. Whether the introduction of excerpts of defendant Garcia's October 2, 1995, interview violated his rights under the Self-Incrimination Clause of the Fifth Amendment.

2. Whether the district court committed plain error, resulting in a violation of Garcia's rights under the Self-Incrimination Clause, when it admitted excerpts of defendant Powers' state court testimony.

3. Whether the admission of excerpts of Garcia's October 2, 1995, interview was plain error that violated Powers' rights under the Confrontation Clause of the Sixth Amendment.

4. Whether, in a conspiracy prosecution under 18 U.S.C. 241, the United States must prove that an overt act listed in the indictment occurred within the limitations period.

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[1](...continued)
"Doc. ___" for the document number on the district court docket sheet; and "RT" for the Reporter's Transcript of the jury trial. See Docs. 441-467. Transcripts of other proceedings are designated by their docket entry number.

5. Whether the district court clearly erred in finding that Thomas Hampton's out-of-court statements were made in furtherance of a conspiracy involving both Hampton and Powers, thus qualifying those statements as non-hearsay admissible under Fed. R. Evid. 801(d)(2)(E).

6. Whether the district court abused its discretion in disqualifying Powers' attorneys or by holding an *ex parte* hearing and receiving a sealed proffer from the government prior to ruling on the disqualification motion.

STATEMENT OF THE CASE

On February 22, 2000, a grand jury returned an indictment charging Edward Michael Powers and Jose Ramon Garcia with conspiring, in violation of 18 U.S.C. 241, to violate the Eighth Amendment rights of prisoners to be free from cruel and unusual punishment. (ER 1-4). Four superseding indictments were filed over the next 18 months. (ER 5-23). On September 17, 2001, the district court granted in part and denied in part defendants' motion to dismiss the third superseding indictment. (ASER 106-127). See pp. 24-26, *infra*. The United States then filed a fourth superseding indictment, which charged Powers and Garcia with conspiracy under Section 241 and with violations of 18 U.S.C. 242, and extended the period of the alleged conspiracy to August 1996. (ER 19-23). The district court denied defendants' motion to dismiss that indictment. (ASER 134-139).

Trial started on April 1, 2002. (ASER 148-152). On May 10, 2002, the court dismissed the Section 242 charge against Powers pursuant to Fed. R. Crim. P. 29. (ASER 162-164). On May 15, 2002, the jury found Powers and Garcia guilty on the Section 241 conspiracy count but acquitted Garcia on the Section 242 charge. (RT 4422-4423). Garcia and Powers were sentenced to terms of imprisonment of 76 and 84 months, respectively. (ER 334, 343).

STATEMENT OF FACTS

A. The Offense Conduct

As detailed below, the United States presented evidence showing that defendants were part of a conspiracy among certain correctional officers to have disfavored inmates attacked by other prisoners, often with deadly weapons. They particularly targeted for attack those inmates who had been convicted of child molestation or other sexual offenses.

1. Background

During the early and mid-1990s, defendant Powers was a correctional sergeant at Pelican Bay State Prison in Crescent City, California. Defendant Garcia was a correctional officer whom Powers supervised during much of this time. (RT 2879). Powers and Garcia were very close friends. (RT 632, 888, 1005, 1580, 1848, 1875-1876, 3842-3843). Powers was the leader of a powerful

clique of correctional officers, who were close-knit and very loyal to each other and generally shunned other prison employees. (RT 42-44, 70-71, 246, 512-514, 602-603, 635-637, 4103). Garcia was a member of Powers' clique. (RT 43-44, 177).

The prisoners at Pelican Bay generally despised inmates who had been convicted either of killing or molesting a child or of other sex offenses. If prisoners discovered that an inmate had committed such an offense, that inmate usually would be stabbed or otherwise assaulted. (RT 302-303, 310-312, 599-600, 978-979, 1012-1014, 1195-1196, 1295-1296, 1323, 1369, 1385-1386, 2050-2051, 2168-2169). These attacks were typically authorized by inmates known as "shot callers," who held leadership positions within their gangs. (RT 290, 309, 978, 1295, 1385-1386, 2859).

As detailed below, Powers and Garcia developed close relationships with some of these shot callers, cultivated them as informants, and used them to arrange attacks on other inmates. One of these shot callers was Thomas Branscum, who became one of Powers' and Garcia's most important informants. (RT 2852, 2855, 2876; RT 109, 1281-1285, 1288-1291, 1294-1295). Garcia developed a close friendship with Branscum. He did special favors for Branscum and gave him gifts,

including alcohol, medication, underwear, and cologne. (RT 109-110, 980-987, 1288, 1314-1315, 2855).

Garcia gave similar gifts to inmate Christopher Patin, another shot caller with whom Garcia developed a close relationship. (RT 1077, 1576-1579, 1633-1634). Garcia also gave Patin special privileges. For example, Garcia promised Patin that he would prevent any guards, other than Powers and Garcia, from searching Patin's cell. (RT 1627-1628).

Similarly, Powers developed a close friendship with inmate Christopher Caldwell. (RT 596-598). Powers was protective of Caldwell and gave him special privileges. (RT 592-593, 600-601, 783-785). Powers would periodically warn Caldwell to stay away from the prison yard because some violent incident was about to occur there. (RT 600). In addition, Powers disclosed to Caldwell that certain prisoners had been convicted of child molestation, and Caldwell then relayed that information to other inmates. (RT 598-599, 614-615).

2. Specific Incidents

a. Stabbing Of Lenard Chester (1992)

Lenard Chester, who was serving a sentence for rape, was stabbed in the neck by another inmate, Johnny Phillips. (RT 367-371, 426, 436). Chester survived but his injury was very serious. (RT 487-488).

On July 25, 1992 – the day before the stabbing – Correctional Officer William Schembri was working in a control booth overlooking the prison yard. (RT 44-47, 53-55). Schembri testified at trial that he was visited in the control booth by Officer William Jones, a member of Powers' clique, who told Schembri that he had come to talk to him on Powers' behalf. Jones advised Schembri that Chester was going to be attacked in the prison yard, and that Schembri should "look in the other direction." (RT 148; RT 61-67, 73, 182, 234-236). Jones explained that Chester was being targeted because he was planning to rape a female corrections officer. (RT 64-65). No attack occurred that day, but Chester was stabbed in the yard the next day while Schembri was on duty. (RT 68, 76-80).

Prior to the stabbing, inmate Cydrick Davis had approached another prisoner, Gary Johns, and asked him to arrange an attack on Chester. Davis told Johns that he had been informed by the "administration" that Chester was a child molester. Davis gave Johns a knife and told him that the stabbing should occur during the second watch because Sergeant Powers would be on duty. (RT 291-295, 335). Johns ultimately declined to follow through. (RT 296-297). Davis then arranged for inmate Phillips to carry out the stabbing. (RT 365-369).

A day or two before he was stabbed, Chester had been stopped and strip-searched by Officers Mark Payne and Paul Sanders, who were part of Powers'

clique. (RT 43-44, 427-430, 513-514, 3220). Sanders warned Chester to "stop harassing the officers." (RT 428-430). Chester denied harassing anyone and asked to be taken to the lieutenant's office to discuss the matter. (RT 429). Sanders replied: "We don't handle our business in the lieutenant's office, we handle our business on the yard, and you will see in a day or so; you'll meet your accuser." (RT 430).

On July 26, 1992, Chester approached Officer James Mather in the prison yard and asked for permission to go to his cell because he feared for his safety. (RT 434-435, 1650). Mather testified that earlier that same day, he had been told by a supervisor that Chester might be attacked, and was instructed to notify a supervisor if Chester requested permission to leave the yard. (RT 1648-1649). When approached by Chester, Mather called the sergeant's office but was told that Chester could not return to his cell. (RT 1650-1651). Chester was stabbed minutes later. (RT 435-436, 1651).

Powers was the sergeant on duty and was on the scene shortly after the stabbing. (RT 3836). Chester identified his assailant to Powers and pointed out the location of the knife used in the stabbing, but Powers just laughed. (RT 438-439).

Judy Glover was an officer with the prison's Security and Investigations Unit. When she reported to the scene of the stabbing, Powers told her he had no witnesses and no suspects. (RT 494-495). Glover went to the infirmary to interview Chester, who told her he had already identified his attacker to Powers. (RT 441, 477, 508-509). When Glover asked Powers again if he had a suspect, he seemed agitated and emphatically told her no. (RT 510-511). Glover testified that Powers did not follow normal investigative procedures that would have been critical in identifying Chester's attacker. (RT 499-508).

b. Incident During Judge Henderson's Visit (1993)

In September 1993, inmate Paul Longacre approached defendant Garcia and told him that a group of prisoners (of which Longacre was a member) had decided to attack African-American inmates in the prison yard. (RT 889-891). Longacre explained to Garcia that he did not want to participate in the attack, but felt he had no choice because he feared punishment from his fellow inmates if he refused to take part. (RT 890, 894, 924). Longacre informed Garcia that he and his cellmate had knives in their cell and would use them to stab other inmates if the attack actually took place. (RT 891). Longacre asked Garcia to have him transferred to another housing unit so that he would not be forced to take part. (RT 890). Garcia discussed this information by telephone with Powers, and then instructed

Longacre to go back to his cell and not to worry. (RT 892-893, 958; see RT 4324; ASER 175).

Meanwhile, federal district judge Thelton Henderson and his staff were scheduled to tour Pelican Bay on September 14, 1993, in connection with a civil lawsuit. (RT 965, 1786-1790). Powers knew about the judge's visit in advance. He discussed it with inmate Christopher Caldwell, and warned Caldwell to "stay off the yard" during Judge Henderson's visit because "the yard was going down." (RT 605-606).

On the day of Judge Henderson's visit, Longacre and his cellmate took their knives to the prison yard in anticipation of the planned attack. Powers and Garcia never tried to stop them. (RT 893-896, 958). While Judge Henderson was being taken to an observation tower overlooking the prison yard, guards fired warning shots and ordered everyone in the yard onto the ground. Some of Judge Henderson's staff were in the yard at the time and had to lie on the ground with the prisoners. Shortly thereafter, the judge and his staff were ushered into a conference room and shown a pile of knives that had just been confiscated in the yard. (RT 518-519, 897-898, 944, 1785-1791, 3252-3253, 3289-3290, 3346-3347).

Powers later told inmate Caldwell that he was upset that guards "put the yard down" during Judge Henderson's visit because "he wanted the yard to go off." (RT 608).

c. Attack On Arthur Meeks (1994)

On December 18, 1994, inmate Gary McCoy attacked Arthur Meeks, who was serving a sentence for sexually molesting a child. (RT 1022, 1374, 2721, 4027). Prior to the attack, Garcia had told inmate Christopher Patin that Meeks was a child molester and had shown him paperwork confirming Meeks' offense. (RT 1581-1584). Garcia told Patin that someone was going to attack Meeks and that Meeks should be killed by stabbing him in the left armpit. (RT 1585-1587). Garcia emphasized to Patin that all child molesters should be killed and that he was tired of seeing them run around free. (RT 1579, 1585).

Garcia approached inmate Thomas Branscum and told him to arrange an assault on Meeks. Garcia showed Branscum Meeks' file, which confirmed his conviction for a sexual offense. (RT 1008-1016, 1228-1231). Branscum arranged for inmate Gary McCoy to carry out the attack. Branscum then went back to Garcia and told him when the assault would occur. (RT 1021-1022).

Shortly before the attack, Garcia called Sergeant Powers, who then came to the dining hall where Garcia was located. (RT 1588-1589). Powers was there

with Garcia when Meeks was attacked. The assault occurred in the yard in front of the dining hall. Right before the attack, Garcia looked out the window, saw Meeks walking in the yard, and said: "There it goes, there it goes, there it goes. It's going to happen, it's going to happen." (RT 1587-1590; RT 1022).

After McCoy attacked Meeks, Branscum received permission from Garcia to go see McCoy, who had been placed in a holding cage in the prison yard. In order to visit McCoy, Branscum had to pass through a guarded gate. Powers, who was at the gate when Branscum arrived, waved him through. Branscum testified that he found this unusual because the inmates were in lock-down because of the attack on Meeks and were not supposed to be walking around the prison yard. (RT 1024-1027, 1336-1337).

d. Attack On Len Willeford (1995)

Inmate Len Willeford had been convicted of killing a child. (RT 1986-1987, 2052). This information was contained in Willeford's prison file, which defendant Garcia showed to inmates Branscum and Patin. Garcia then instructed Branscum to have Willeford stabbed. (RT 1011-1012, 1031-1032, 1040-1043, 1077-1078, 1198, 1226-1227).

Branscum asked inmate John Ashby to attack Willeford. Ashby ultimately agreed to carry out the assault after Garcia showed him Willeford's file. The attack took place on January 12, 1995. (RT 1534-1544, 1991-1992, 2742).

Defendant Garcia later told the FBI that, prior to the attack, he had received information from an informant that Willeford was "in trouble" because of rumors that he was a child molester. Garcia acknowledged that he checked Willeford's file and determined that Willeford had been convicted for killing a child. (RT 2856).

Sergeant Powers later testified in state court that Garcia had told him in advance that Willeford was going to be attacked. (RT 2880, 2890). In an interview with the FBI, Powers said that he had received information from an informant that Willeford was going to be attacked because he was rumored to be a child molester. Powers said he reviewed Willeford's prison file to determine whether Willeford had been convicted for child molestation. (RT 2851-2852).

e. Assault Of Michael Birman (1995)

Shortly after Willeford was assaulted, inmate Thomas Branscum was taken to the gym to meet with Powers and Garcia. When Branscum arrived, Powers told him that Garcia would explain everything. (RT 1048-1049). Garcia then said that someone had called Branscum's mother and told her that her son had been stabbed

and was dying. Garcia claimed that inmate Michael Birman was the one who had called Branscum's mother, and Garcia urged Branscum to retaliate by attacking Birman. (RT 1050-1051). Garcia insisted that Branscum do the attack personally, rather than arranging for another inmate to carry it out. (RT 1056). When Branscum asked Garcia for permission to call his mother to reassure her that he had not been stabbed, Powers answered instead and denied the request. (RT 1051-1052, 1255, 1323).

Branscum was suspicious of Garcia's story and feared he was "being set up." (RT 1054-1057). Branscum checked the phone call records and determined that Birman had not called Branscum's mother. (RT 1054-1055). Shortly thereafter, Powers came to Branscum and said: "I see you did your homework." (RT 1061). Despite his misgivings, Branscum arranged for his cell mate, Robert Wilson, to attack Birman. (RT 1056-1057). Wilson carried out the assault on January 16, 1995. (RT 2742-2743).

Prior to the assault, Powers had told inmate Caldwell that he did not like Birman and wanted him "off the yard." (RT 616-617, 858). After the assault, Powers told Caldwell he was angry because Birman had not been seriously injured in the attack. (RT 617-619).

f. Attack On Theodore Smith (1995)

On February 12, 1995, inmate Synrico Rogers attacked Theodore "Smitty" Smith, who was serving time for sexual offenses against minors. (RT 2735, 4027-4028). Powers was present during the assault. (RT 622).

Prior to the attack, Powers instructed inmate Terrence Prince to arrange an assault on Smith and to make sure it occurred on Powers' shift. Powers told Prince that Smith was a "piece of shit" and had "to go." (RT 1837-1838, 1909-1910, 1922). Also prior to the attack, Prince overheard Garcia arguing with Smith and telling him "You're a rat, you're no good." (RT 1843-1844, 1877-1880, 1913). Prince then arranged for Rogers to carry out the assault. (RT 1839-1841, 1930-1932).

g. Assault Of Michael Black (1995)

In 1994 or 1995, correctional officers James Coop and Ronald Parker asked Michael Black to attack another inmate, Theodore Smith. (RT 2456-2458, 2503-2504). Black refused. (RT 2457-2458). Powers ultimately arranged for someone else to assault Smith. See p. 15, *supra*.

Later, on February 25, 1995, Black was confronted in the prison yard by Officers Mark Payne and Owen Tuttle, both members of Powers' clique (RT 43-44, 513-514, 2459, 4103). The officers ordered Black to strip naked in the yard.

Black felt they were trying to humiliate him. He refused to remove his underwear. Payne and Tuttle then took Black to the gym, where Powers and Greg Devos (another member of Powers' clique) were located. After the other inmates were ordered to leave the gym, Powers and the officers began striking Black. Powers hit Black in the neck and face, and the officers then pushed him to the ground and kicked him. Black suffered injuries to his face, head, and legs. (RT 629, 1845, 2069-2071, 2459-2470, 2504-2507). Inmate Caldwell testified that, after the assault, Powers ordered him and another prisoner to "clean it up" and told Caldwell that he "didn't see nothing." (RT 630-631).

h. Lt. Scribner's Concerns About Powers (1995)

Lieutenant Larry Scribner, who was Powers' supervisor at the time, testified that he became concerned in April 1995 that Powers was allowing attacks on inmates to occur in the prison yard. Scribner overheard Powers talking on the radio advising his staff that attacks were going to occur, who the aggressors and victims would be, what they were wearing, and which direction they were walking. (RT 2622-2625, 2628-2629, 2659). Scribner raised his concerns with Powers and reminded him that the correctional staff must "be proactive, not reactive" – *i.e.*, if the officers believe an attack is going to occur, they should try to

prevent it. (RT 2628-2630). Scribner testified that Powers "did not like" this instruction. (RT 2630).

i. Attack On Robert Rose (1995)

In 1995, Robert Rose was serving a sentence for child molestation. (RT 2678-2679). Inmates Tim Hickerson and Robert Caudle confronted Rose after learning about his conviction offense. Rose then sent a note to the correctional staff complaining that Hickerson and Caudle were pressuring him. Garcia told Hickerson about Rose's note. Hickerson then told Caudle that they had a green light from Garcia to attack Rose. Caudle agreed to carry out the assault. (RT 2169-2174, 2209).

On September 9, 1995, Hickerson signaled to Garcia that Caudle would be the one doing the attack. A short time later, the door to Caudle's cell was opened electronically. Caudle left his cell, and then glanced up at the gun tower and made eye contact with Garcia. Garcia nodded his head toward Rose, who was sitting at a table in a common area. Caudle proceeded to attack Rose, kicking him in the head. (RT 2174-2178, 2217-2227). Garcia then pointed a .37 millimeter gas gun at Rose, and ultimately fired three rounds of rubber projectiles toward Rose and Caudle, even though the inmates no longer posed a danger to each other. (RT 2177-2180; RT 2075-2082, 2161, 2283, 2286-2288, 2291-2294, 4037-4038).

Afterwards, Garcia praised Caudle and told him "that there were over 500 sex offenders between the two [prison] yards, and that it needed to be cleaned up." (RT 2181-2182).

j. Plan To Attack Daniel Sheets (1996)

Inmate Daniel Sheets was credited with making the initial allegations of misconduct that prompted the internal affairs investigation of Powers and Garcia. (RT 2738-2740, 4282). In July or August 1996, Powers asked inmate Thomas Hampton to have Sheets stabbed. Hampton then went to inmate Gene Ebright, who agreed to do the stabbing. Powers left a knife in Ebright's cell, but Ebright ultimately decided not to carry out the assault. This incident, with supporting record cites, is described in greater detail at pp. 59-61, *infra*.

B. Prison Investigation And Interviews Of Garcia

In January or February 1995, Pelican Bay prison began an investigation into alleged wrongdoing by Powers and Garcia. (RT 2738-2740). On April 13, 1995, investigators from the California Department of Corrections (CDC) conducted a compelled interview of Garcia after advising him of his rights and obligations under *Lybarger v. City of Los Angeles*, 710 P.2d 329 (Cal. 1985), the state law analogue to *Garrity v. New Jersey*, 385 U.S. 493 (1967). (ASER 81; ER 24). Under *Lybarger*, an employee can be compelled to answer questions as long as the

responses and the evidence derived therefrom are not used against the individual in a future criminal prosecution.

On September 29, 1995, investigators conducted another compelled interview of Garcia. (ER 33-128; ASER 64-72). It took place in the prison's Internal Affairs interview room. (ER 46). Lieutenant Mark Roussopoulos was in charge of the interrogation and was assisted by Special Agent George Ortiz, a CDC investigator. (ER 46). Captain Dan Smith also attended. (ER 34). Garcia was advised under *Lybarger* that he must answer investigators' questions but that none of his statements or evidence derived from them could be used against him in any criminal proceeding. (ER 47). After extensive questioning, Garcia was told "this concludes our interview." (ASER 72).

Early the next morning, Garcia contacted Captain Smith and requested to speak with Agent Ortiz. (ASER 84). Smith relayed the message to Ortiz, explaining that Garcia had said "he won't talk to anybody else but you." (*Ibid.*). In a brief telephone conversation, Garcia told Ortiz:

> I was less than truthful to you, sir, and I want to tell you the truth. I want to talk to you. The reason that I did not talk to you was because you had a criminal in the room with me yesterday, and I want to come forward. I don't want nobody there except you. I don't want the union there. I want to tell you the truth.

(ASER 84-85). Ortiz made arrangements to meet Garcia at the Bay View Inn in Crescent City, California. (*Id.* at 85).

On October 2, 1995, Garcia and Ortiz met at the motel, as agreed. (ER 131). Ortiz was the only interviewer present. (*Ibid.*). At the outset, Ortiz offered Garcia the opportunity to have two union officials represent him at the interview, but he declined: "I refuse to have the union representatives with me because this is not a matter of politics. It is a matter of telling the truth." (*Ibid.*). Ortiz then administered a *Miranda* warning to Garcia:

> [Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him or her present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questions are asked of you if you wish. Do you understand each of these rights that I have explained to you?

(*Ibid.*). Garcia said he understood his *Miranda* rights and nonetheless wanted to talk with Ortiz. (ER 131-132). In contrast to the September 29 interview, Ortiz did *not* tell Garcia that he was required to answer questions or that his statements would be inadmissible against him.

During the October 2 meeting with Ortiz, Garcia explained that he had been reluctant to tell the truth in the previous interview because of the presence of Captain Smith and Lt. Roussopoulos. (ER 144). Garcia suggested that he had

requested the October 2 interview, in part, to expose alleged wrongdoing by Smith. (ER 132-133, 144-145, 160-169, 177, 182-184). During the interview, Garcia claimed to have smuggled a weapon out of the prison in his shoe as part of an attempt to cover up evidence of another officer's stabbing of an inmate. (ER 169-170, 173). Garcia emphasized that he wanted to reveal the alleged wrongdoing at Pelican Bay even if it meant that he himself would be sent to prison: "I know I could go to prison for hiding that evidence." (ER 184). Garcia explained that he also came forward to talk to Ortiz because he was concerned that working conditions at the prison had become dangerous for correctional officers, due to the widespread consumption of alcohol by inmates and low morale among the staff: "[O]fficers are going to start to get killed. And that is my concern. And that is why I am speaking like this. And that is what I got to say today." (ER 182).

C. FBI Interviews Of Powers And Garcia

On November 20, 1995, FBI Special Agent Stanley Walker interviewed both Garcia and Powers at their residences. (RT 2851-2854, 2871-2873, 2857). Garcia had contacted Walker a few days earlier and requested an interview with the FBI. (RT 2871-2873). Garcia voluntarily answered Walker's questions, despite being advised that the FBI was investigating Garcia's alleged misconduct. (RT 2872-2874).

During their interviews with the FBI, Powers and Garcia discussed their close relationship with inmate Thomas Branscum, as well as the attack on inmate Len Willeford. Both Powers and Garcia characterized Branscum as "one of their best informants." (RT 2852-2853, 2855, 2876). Garcia also described Branscum as a close friend and acknowledged that he had given Branscum perfume, cologne, and underwear (RT 2855). In addition, Powers and Garcia both acknowledged that they had received information, in advance, that inmate Len Willeford might be targeted for attack by other prisoners and that they had checked Willeford's central prison file to determine whether he was, in fact, a child molester. (RT 2851-2852, 2856, 2858-2859, 2875-2876).

Garcia also told Agent Walker that he knew inmates were brewing alcohol in violation of prison rules. (RT 2855).

D. State Prosecution Of Garcia

Garcia was charged in state court with various offenses arising out of misconduct at Pelican Bay prison. Powers testified at Garcia's trial and preliminary hearing. (Doc. 75, Attachments 1 & 2). In January 1998, Garcia was found guilty of assault, conspiracy to commit assault, and two counts of possessing alcohol in prison. See *People v. Garcia*, 100 Cal. Rptr. 2d 789, 793 (Cal. App. 1 Dist. 2000). His conviction was upheld on direct appeal. *Ibid.*

In February 2002, Garcia filed a petition for a writ of habeas corpus in state court seeking to overturn his state conviction on the ground that his trial attorney had provided ineffective assistance of counsel by failing to object to the prosecutor's use of Garcia's April 13 and September 29, 1995, compelled statements during the state proceedings. (ER 328). On July 10, 2002, the state court granted the habeas petition and vacated Garcia's state court conviction. (ER 328-331).

E. Kastigar *Proceedings In This Case*

Between December 2000 and February 2002, the district court held numerous pretrial hearings, pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), to determine whether the government's evidence against Garcia was derived from sources independent of the compelled statements he gave to internal affairs investigators on April 13, 1995, and September 29, 1995. (See Docs. 92, 254, 308, 309, 350, 353, 430, 508, 511, 513; ER 188-222, 224-226; ASER 57-61, 73-94, 95-133).

Several hearings focused on whether the United States would be allowed to introduce at trial the statements Garcia made during his interview with Agent Ortiz on October 2, 1995. (See, *e.g.*, ER 24). Defendants argued that Garcia's October 2 interview was the fruit of his earlier compelled statements and thus must be

excluded in its entirety under *Kastigar*. The district court disagreed, concluding that the October 2 interview was not itself compelled and, on the whole, was not impermissibly tainted by Garcia's earlier compelled statements. (ASER 60, 74, 126). The court nonetheless concluded that some of Garcia's answers during that interview would be inadmissible under *Kastigar* if they were given in response to questions that Ortiz would not have known to ask but for Garcia's earlier compelled statements. (ASER 74-75, 77).

After receiving submissions from the government documenting the sources for Ortiz's questions,[2] the court held that the United States had demonstrated that 15 categories of testimony given by Garcia during the October 2 interview were derived "from legitimate sources wholly independent of the compelled testimony of either the April 13 or September 29 interviews." (ER 24-26). But the court held that *Kastigar* would bar admission of other portions of the October 2 interview. (ER 206-207).

In July 2001, defendants moved to dismiss the third superseding indictment, arguing that the United States had failed to show under *Kastigar* that the evidence it presented to the grand jury was derived from sources independent of Garcia's

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[2] See Government's Reply re: *Lybarger/Kastigar* Issues, dated July 11, 2001 (filed under seal).

compelled statements. (Doc. 224). In response, the government filed voluminous documents explaining the independent sources for the testimony of its witnesses.[3] The government also presented testimony from state and federal investigators at a *Kastigar* hearing to explain the sources of its evidence. (Doc. 508 at 23-64; ASER 78-94).

On September 17, 2001, the district court granted in part and denied in part the motion to dismiss. (ASER 106-127). The partial dismissal focused on the "Rose/Caudle incident" (described at pp. 17-18, *supra*) in which Garcia fired a gas gun toward inmates Robert Rose and Ronald Caudle. That incident formed the basis of the count against Garcia under 18 U.S.C. 242 (ER 18) and was one of the overt acts listed in the conspiracy count against both defendants. (ER 17 ¶ 29). The court struck from the indictment the Section 242 count against Garcia and the reference to the Rose/Caudle incident in the conspiracy count. (ASER 114, 135). The court concluded that the evidence of the Rose/Caudle incident presented to the grand jury was indirectly tainted by compelled statements that Garcia had given to internal affairs investigators. (See ASER 135). The court reasoned that Garcia's state conviction was "tainted" because the state prosecutor had used his

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[3] See, *e.g.*, Amended Declaration of Special Agent Jose G. Reynoso in Support of Government's *Kastigar* Showing re: Grand Jury and Trial Witnesses, dated September 5, 2001 (filed under seal).

compelled statements to cross-examine him, in violation of *New Jersey v. Portash*, 440 U.S. 450 (1979). (ASER 135). The state court conviction was based, in part, on the Rose/Caudle incident, and the federal grand jury had been advised of that conviction. (See ASER 135). For those reasons, the district court concluded that the portions of the third superseding indictment that relied on the Rose/Caudle incident were impermissibly tainted. (See ASER 106-107, 114, 135).

However, the court denied defendants' motion for dismissal as to all other incidents in the indictment "after having conducted an exhaustive review of the record and after having found that the Government had identified, by a preponderance of the evidence, a clean and independent source" for each of the other incidents and for the testimony of its each of its witnesses. (ASER 135-136; ASER 110-126).

On October 2, 2001, a fourth superseding indictment was returned by a different grand jury which had not been told of Garcia's state conviction. (ER 19-23; Doc. 341 at 2 n.2). That indictment included a Section 242 count against Garcia based on the Rose/Caudle incident (ER 23) and listed that incident as one of the overt acts supporting the conspiracy count against both defendants. (ER 22 ¶ 29).

Defendants moved to dismiss the fourth superseding indictment under *Kastigar*. (Doc. 336). They did not "challenge the evidence proffered by the Government to the Grand Jury," but instead argued the United States had failed to prove that Garcia's state conviction had no influence on the decision to prosecute. (ASER 136). The court denied the motion, finding that "the conviction did not influence the Government's decision to initiate prosecution." (*Id.* at 138).

SUMMARY OF ARGUMENT

This Court should affirm both defendants' convictions.

1. The admission into evidence of excerpts of Garcia's October 2, 1995, interview did not violate his rights under the Self-Incrimination Clause of the Fifth Amendment. The compulsion that produced Garcia's earlier statements on April 13 and September 29, 1995, did not carry over to and impermissibly taint the October 2 interview. Garcia actively sought out the October 2 interview and he agreed to answer questions after receiving a *Miranda* warning that anything he said could be used against him in court. His insistence on participating in the October 2 interview was an intervening act of free will that purged the taint of the earlier compulsion. Thus, by voluntarily answering questions on October 2, Garcia himself became a legitimate, independent source of evidence for purposes of *Kastigar v. United States*, 406 U.S. 441 (1972).

2. The admission of excerpts of Powers' state court testimony was not plain error as to Garcia. A state judge vacated Garcia's state court conviction on the ground that his trial attorney had provided ineffective assistance of counsel by failing to object to the prosecutor's use of Garcia's compelled statements during the state proceedings. Garcia now argues that if his state trial counsel had filed a pre-trial *Kastigar* motion, there never would have been a state prosecution and thus Powers never would have testified in state court. Garcia's assertion that no state prosecution would have occurred is highly speculative and implausible, but at any rate, his argument is premised on a "but for" rationale that this and other courts have rejected. The connection between Powers' state court testimony and the alleged violation of Garcia's *Kastigar* rights during the state proceedings is too attenuated to require excluding the testimony from evidence.

3. The admission of excerpts of Garcia's October 2 interview was not plain error violating Powers' rights under *Bruton v. United States*, 391 U.S. 123 (1968). When read in context, Garcia's statements during that interview are not incriminating as to Powers and thus raise no concerns under *Bruton*. Instead, Garcia's statements appear to be an attempt to absolve Powers of responsibility for Garcia's admittedly improper conduct.

4. The United States was not required to prove that any of the overt acts listed in the indictment occurred within the limitations period. Defendants were convicted of conspiracy under 18 U.S.C. 241, which does not require proof of any overt act.

5. The statements that Thomas Hampton made to Gene Ebright about Powers fell within the co-conspirator exception of Fed. R. Evid. 801(d)(2)(E), and thus their admission did not violate the Confrontation Clause. The district court did not clearly err in finding that Hampton and Powers were co-conspirators. Hampton said that Powers would provide Ebright a weapon so that he could stab another inmate. A few days later, Powers left a knife in Ebright's cell. The fact that events occurred as Hampton had predicted is powerful evidence corroborating Hampton's statements. This, along with other evidence, amply supports the district court's finding that Hampton and Powers were co-conspirators.

6. The district court did not abuse its discretion in disqualifying Powers' original attorneys. Their continued representation of Powers presented a serious potential for conflict of interest. Those attorneys had represented seven correctional officers who testified before the grand jury that indicted Powers. At the time of the disqualification motion, the United States anticipated calling some of the officers as government witnesses at trial. In fact, one of those officers

ultimately testified as a government witness at trial and was cross-examined by Powers' counsel. Thus, if Powers' original attorneys had not been disqualified, they would have been placed in the untenable position of cross-examining their former client.

Nor did the district court abuse its discretion in holding an *ex parte* hearing and receiving a sealed proffer from the United States. The court held an open hearing prior to disqualifying Powers' attorneys, and Powers had multiple opportunities before the ruling to present his objections. At any rate, the district court made clear that, even without the information presented in the *ex parte* hearing and sealed proffer, the evidence in the record justified disqualification.

ARGUMENT

I

THE INTRODUCTION OF EXCERPTS FROM THE OCTOBER 2, 1995, INTERVIEW DID NOT VIOLATE GARCIA'S FIFTH AMENDMENT RIGHTS

The district court admitted into evidence limited excerpts from Garcia's October 2, 1995, interview. Garcia argues (Joint Br. 37, 40, 54-57) that the entire interview was the "fruit" of his earlier compelled statements and thus the admission of any portion of it violated *Kastigar v. United States*, 406 U.S. 441 (1972). Garcia's argument is meritless.[4] He was not compelled to give the October 2, 1995, interview. Quite to the contrary. He insisted on being interviewed on October 2, he selected his interviewer, and he expressly agreed to answer questions even though he received a *Miranda* warning that anything he said could be used against him in court. These and other facts demonstrate that the compulsion that produced the earlier statements on April 13 and September 29, 1995, had no lingering effect on Garcia's October 2 statements. Garcia's voluntary choice to answer questions on October 2 was an intervening act of free

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[4] This Court reviews *de novo* whether a Fifth Amendment violation has occurred. *In re Grand Jury Subpoena*, 75 F.3d 446, 447 (9th Cir. 1996). Clear error is the standard of review for the district court's finding that the government's evidence was derived from legitimate sources independent of the compelled statements. *United States v. Anderson*, 79 F.3d 1522, 1525 n.4 (9th Cir. 1996).

will that made Garcia himself a legitimate, independent source of evidence for purposes of *Kastigar*.

A. The Excerpts Of The October 2 Interview That Were Introduced Into Evidence Were Not Tainted By Garcia's Earlier Compelled Statements

When a governmental entity compels a person to answer questions, the Fifth Amendment precludes use or derivative use of the compelled responses against that individual in a criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Kastigar*, 406 U.S. at 460-461. Garcia's compelled statements on April 13 and September 29, 1995, were thus protected by *Garrity* and *Kastigar*. However, the *Garrity/Kastigar* protection does not automatically extend to responses that Garcia gave in later interviews that covered the same subject matter as his earlier compelled statements. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263 (1983) ("a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony"). If a defendant gives a compelled answer and then later makes an otherwise voluntary statement on the same topic, there is no *Garrity/Kastigar* protection for the latter statement unless the compulsion that produced the first statement has "carried over" and tainted the second. See *Oregon v. Elstad*, 470 U.S. 298, 310 (1985) ("When a prior statement is actually

coerced," the relevant inquiry is "whether that coercion has carried over into the second confession."); accord *United States v. Orso*, 266 F.3d 1030, 1035 (9th Cir. 2001) (*en banc*), cert. denied, 537 U.S. 828 (2002).[5]

In deciding whether the earlier compulsion had sufficiently dissipated by the time of the later statement, this Court applies the "taint" analysis of *Brown v. Illinois*, 422 U.S. 590 (1975). See *Orso*, 266 F.3d at 1035, quoting *United States v. Wauneka*, 770 F.2d 1434, 1439-1440 (9th Cir. 1985). Thus, the ultimate question is whether the individual's decision to answer questions in the subsequent interview is "sufficiently an act of free will to purge the primary taint" of the earlier compulsion. *Brown*, 422 U.S. at 602. Although no single fact is dispositive, a defendant's receipt of *Miranda* warnings prior to making the subsequent statement weighs in favor of finding that statement an act of free will. See *id.* at 603. Other relevant factors include (1) the passage of time between the two statements, *Elstad*, 470 U.S. at 310; (2) any change in the interviewers or location of the questioning, *ibid.*; (3) "the presence of intervening circumstances,"

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[5] These cases are relevant even though they involve confessions during custodial police interrogations. The protection against use of coerced confessions during such interrogations is "coextensive with the use and derivative use immunity mandated by *Kastigar* when the government compels testimony from a reluctant witness." *Chavez v. Martinez*, 123 S. Ct. 1994, 2002 (2003) (plurality).

Brown, 422 U.S. at 603; and (4) whether the original statement was triggered by official misconduct and, if so, how flagrant it was. See *id.* at 604.

These factors demonstrate that the compulsion that produced the April 13 and September 29, 1995, statements did not carry over to Garcia's October 2 interview. Most importantly, it was Garcia who actively sought out the October 2 interview, and he effectively selected his own interviewer by demanding to speak with Ortiz and no one else. Indeed, as Garcia's own attorney emphasized to the jury:

> [Garcia] sought out the interview from which you will hear statements in this case. He sought out the interview with the agent so that he could answer the agent's questions about what he had done as a correctional officer. * * * You will hear that for yourselves during a tape recorded interview of Officer Garcia that, as I said, he volunteered to give.

(ASER 151-152) (opening statement). In his closing argument, Garcia's attorney reiterated that

> in that tape recorded interview you heard, [Garcia] fully and readily admitted what he had done. He wasn't hiding in those interviews. In fact, he asked for the interviews. He requested the interview with Agent Ortiz.

(ASER 172).

Moreover, at the outset of the October 2 interview, Garcia received a *Miranda* warning specifically advising him that "you have the right to remain

silent" and that "[a]nything you say can and will be used against you in a court of law." (ER 131). Garcia said he understood those rights and nonetheless wanted to talk to Ortiz. (ER 131-132). The October 2 interview thus stands in sharp contrast to the September 29 interview, in which Garcia was told that he was required to answer questions but that his statements could not be used against him in a criminal proceeding.

There is no reason to doubt that Garcia fully understood the significance of waiving his *Miranda* rights on October 2. He had a college degree in criminal justice and had previously worked in the criminal investigations units of the United States Army. (ER 49-50, 187).[6] Moreover, at one point in the interview, Garcia said he knew he could go to prison for some of the misconduct he had revealed earlier in that interview. (ER 184; see also ER 169-170, 173).

Other factors confirm that the earlier compulsion did not spill over into the October 2 interview. Three days elapsed between the September 29 and October 2 interviews. The Supreme Court has found the absence of taint when the temporal gap between the two statements was much less than three days. See *Lyons v. Oklahoma*, 322 U.S. 596, 604-605 (1944) (second confession was not tainted by a

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[6] Although defendants assert (Joint Br. 5) that English is Garcia's second language, his own attorney admitted that Garcia is "fluent in four languages: English, Spanish, French and Japanese." (ASER 191).

coerced statement given 12 hours earlier). In addition, the October 2 interview took place at a motel – a far more neutral location than the prison's Internal Affairs interview room where Garcia made his compelled statements on September 29. Finally, there is no suggestion that Agent Ortiz engaged in any misconduct during either the September 29 or October 2 interview that would cause Garcia to feel intimidated by him. To the contrary, by insisting on speaking only with Ortiz and by declining the offer to have union representatives present during the October 2 interview (ER 131), Garcia signaled that he felt comfortable with Ortiz.

Because Garcia's decision to answer questions on October 2 was an intervening act of free will, the entire interview should have been admissible at the federal trial. By freely answering questions on October 2, Garcia himself became "an independent, legitimate source of evidence" for purposes of *Kastigar*. See *United States v. Contreras*, 755 F.2d 733, 735, 737 (9th Cir.) (even though defendants had previously given immunized statements to state officials, their voluntary decision to talk to federal agents about the same subject matter after receiving *Miranda* warnings meant that "the defendants themselves became an independent, legitimate source of evidence for the federal authorities"), cert. denied, 474 U.S. 832 (1985).

The district court, however, went beyond the requirements of *Kastigar* by excluding from evidence some portions of the October 2 interview. The court reviewed the October 2 interview virtually line-by-line to determine whether the *questions* asked by Agent Ortiz were derived from sources independent of Garcia's earlier compelled statements. The court concluded that Garcia's answers on October 2 would be excluded if they were in response to questions that Ortiz would not have known to ask but for the earlier compelled statements. Based on that analysis, the court found that 15 categories of testimony from the October 2 interview were derived from independent sources and thus admissible, but that the rest of the interview should be excluded. See p. 24, *supra*. Garcia does not attempt on appeal to show that the judge's factual findings as to those 15 categories were clearly erroneous.[7]

Garcia nonetheless contends that the October 2 interview was impermissibly tainted because the only reason he requested it was to correct false or misleading

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[7] Contrary to Garcia's suggestion (Joint Br. 44-46, 54), the occasional references to the September 29 interview during the October 2 conversation did not taint the latter interview. See *United States v. Bayer*, 331 U.S. 532, 540-541 (1947) (compelled statement did not impermissibly taint a subsequent confession, even though defendant had "requested the original statement and read it before making the second" and even though the latter confession was labeled a "supplementary" statement and was basically the same as the earlier one).

statements he made on September 29. He asserts that he would not have said anything on October 2 but for his statements on September 29. (Joint Br. 54-57).[8]

The courts have soundly rejected this type of "but for" rationale. As the Supreme Court has explained:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. *In such a sense, a later confession may always be looked upon as fruit of the first.* But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Elstad, 470 U.S. at 311 (emphasis added). Similarly, in *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987), cert. denied, 485 U.S. 922 (1988), this Court held that a second confession was not impermissibly tainted even though it may never have occurred "but for" an earlier confession the defendant made after being tortured. *Ibid.*

Defendants argue, however, that the government has the burden, under *Harrison v. United States*, 392 U.S. 219 (1968), of proving that Garcia would have

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[8] That assertion is factually questionable given Garcia's own explanations for why he requested the October 2 interview. See pp. 20-21, *supra*.

given the interview on October 2 even if he had not been compelled to speak on September 29. (Joint Br. 52-53, 55-57). *Harrison* is inapposite here.

Harrison involved a decision by a criminal defendant to testify at trial after the prosecution had already committed a constitutional violation by introducing his illegally obtained confessions as evidence at the same trial. After the defendant's conviction was overturned because of that violation, the prosecution sought to introduce the defendant's testimony from the first trial as evidence against him on retrial. *Harrison*, 392 U.S. at 220-221. By placing the burden on the prosecution to prove that the defendant would have testified at the first trial even if no constitutional violation had occurred, *Harrison* sought to prevent the government from unjustly benefitting from a violation for which it was responsible. See *id.* at 224-225.

Here, by contrast, no such constitutional violation had occurred by the time of the October 2 interview. Although prison investigators had compelled Garcia's statements on April 13 and September 29, 1995, such compulsion itself does not violate the Fifth Amendment. A violation, if any, would occur only if the compelled statements were used against Garcia in a criminal prosecution. See *Chavez v. Martinez*, 123 S. Ct. 1994, 2000-2004 (2003) (plurality); *id.* at 2006-2008 (Souter, J., concurring in judgment); *United States v. Verdugo-Urquidez*, 494

U.S. 259, 264 (1990). Thus, when he gave the interview on October 2, Garcia was not confronted with the dilemma of having to testify in order to mitigate the harmful effects of a constitutional violation that had already occurred. *Harrison* thus has no relevance here.

Garcia nonetheless asserts (Joint Br. 42, 56) that he felt compelled to request the October 2 interview because he had been erroneously told during the September 29 interrogation that his compelled answers could be used against him for impeachment purposes. He contends that, as a result, he felt he had no choice but to talk to Ortiz on October 2 to correct his earlier answers so they would not come back to haunt him if he were ever cross-examined at a future criminal trial. Garcia's argument is flawed in a number of respects.

It is questionable whether Garcia misunderstood his legal protections by the time he began answering substantive questions during the September 29 interview. Although a prison official initially stated that "anything as you know in this interview may be used for impeachment purposes" (ER 43-44), a different investigator – the one who questioned Garcia most extensively – later gave Garcia a correct explanation of the law just before the substantive portion of the interview: "If you do answer, none of your statements nor any additional evidence

which is gained by reason of such statements can be used against you in any criminal proceedings. Do you understand that?" (ER 47).

At any rate, the record contains no evidence that Garcia requested the October 2 interview because of concern that his earlier compelled statements might someday be used for impeachment purposes. Instead, Garcia suggested during the October 2 interview that he came forward to talk to Ortiz primarily because he wanted to expose wrongdoing by others at the prison and because he was concerned that the use of alcohol by prisoners and low morale among the staff were causing dangerous working conditions that could get a correctional officer killed. (ER 182-184; ER 132-133, 144-145, 160-169, 177).

But even if Garcia had requested the October 2 interview solely because of a mistaken belief that his earlier statements could be used for impeachment, that misapprehension would not undermine the conclusion that the October 2 interview was voluntary and untainted. A statement is not compelled simply because the defendant has an incorrect understanding of the law or the facts – even if the misapprehension is a result of misleading information provided by law enforcement authorities. See *Elstad*, 470 U.S. at 316-317, citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

B. The Admission Of Portions Of The October 2 Interview Was Harmless Beyond A Reasonable Doubt

The portions of the October 2 interview that were played for the jury were, in many respects, exculpatory and consistent with the defense theory of the case. (See, *e.g.*, ER 232-240, 251, 265-268). Perhaps that is why it was Garcia's attorney – not the prosecutors – who highlighted the October 2 interview in arguments to the jury. The prosecutors made only passing and rather vague references to the interview in their opening statement and closing argument. (ASER 149, 168-169). Garcia's attorney, by contrast, repeatedly reminded the jury about the audio recording of the October 2 interview, emphasized that his client had sought out the interview, and argued that it showed that Garcia cooperated with investigators, had nothing to hide, and acted in good faith to try to stop violence at the prison. See ASER 151-152 (opening statement); ASER 170-174 (closing argument). By highlighting the October 2 interview, Garcia's attorney could get his client's explanation of events before the jury without having to put him on the witness stand where he might be subject to damaging cross-examination.

Yet Garcia now contends that the October 2 interview was especially damaging because, he asserts, it provided the key evidence of "his close

relationship with Powers during their years at the prison, statements that all but ensured a jury finding that the two were acting within a conspiratorial framework." (Joint Br. 59). But Garcia's own attorney told the jury during his opening statement that Garcia was "close to Sergeant Powers." (ASER 150). In addition, an FBI agent who interviewed both defendants testified at trial that Garcia lived on Powers' property (RT 2854-2855), and numerous witnesses explained that Powers and Garcia were very close friends. (RT 632, 888, 1005, 1580, 1848, 1875-1876, 3842-3843).

Moreover, in their interviews with the FBI agent, both Powers and Garcia made admissions that linked them to inmate Thomas Branscum (RT 2852-2853, 2855, 2861), a key government witness who was involved in arranging several of the attacks against other inmates and who provided highly damaging testimony about the defendants' role in the conspiracy. During their FBI interviews, Powers and Garcia both characterized Branscum as "one of their best informants." (RT 2852, 2855, 2876). Other trial testimony provides abundant evidence that Powers and Garcia worked in concert during several incidents – including those related to the attacks on inmates Birman, Meeks, and Willeford – and during Judge Henderson's visit when they allowed inmate Longacre and others to take knives to the prison yard. See pp. 9-14, *supra*. Indeed, Garcia's attorney conceded during

his closing argument that Garcia had relayed information to Powers, in advance, about the Longacre incident. (ASER 175).[9]

Finally, Garcia complains that the October 2 interview was particularly damaging because it contained an admission that he allowed inmates to have alcohol. (Joint Br. 58-59). But Garcia admitted in his November 1995 interview with the FBI that he knew inmates were brewing alcohol in violation of prison rules (RT 2855) – an admission that Garcia's attorney reiterated during closing argument. (ASER 172-173). Because the other evidence in the record (including defendants' admissions to the FBI) largely duplicated the substance of the October 2 interview, the admission of excerpts from that interview was, if erroneous at all, harmless beyond a reasonable doubt.

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[9] Contrary to defendants' assertion (Joint Br. 60), the October 2 interview was not the only source that led investigators to the Longacre incident. An agent testified that he recommended that the FBI investigate the Longacre matter based on his recollection of old rumors at the prison of staff involvement in the incident. (ASER 89-90, 92-94). The agent's recollection is thus a legitimate, independent source for purposes of *Kastigar*.

II

THE INTRODUCTION OF EXCERPTS OF POWERS' STATE COURT TESTIMONY WAS NOT PLAIN ERROR AS TO GARCIA

At the federal trial, the United States introduced excerpts of testimony that Powers gave during Garcia's state court prosecution. Garcia argues that this testimony was indirectly derived from Garcia's compelled statements and thus its admission violated *Kastigar*. Because Garcia did not preserve this issue for appeal, it can be reviewed only for plain error. See Fed. R. Crim. P. 52(b).

> Under [the plain error] test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." * * * If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

United States v. Cotton, 535 U.S. 625, 631-632 (2002) (internal quotation marks omitted). An error is "plain" only if it is "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). Moreover, an error usually will not affect the defendant's "substantial rights" unless it is "prejudicial," in the sense that it "affected the outcome of the district court proceedings." *Ibid.* This determination is similar to the "harmless error" inquiry, but with "one important difference: It is the defendant rather than the Government who bears the burden of persuasion with

respect to prejudice." *Ibid.* As explained below, the district court did not err, much less commit plain error, in admitting Powers' testimony.

A. The Standard Of Review Is Plain Error

Prior to the jury verdict, Garcia never argued that admission of Powers' state court testimony would violate Garcia's rights under *Kastigar*. He raised that issue for the first time in his motion for a new trial. (ASER 188). In that motion, Garcia asserted that he had no basis for raising the *Kastigar* objection to Powers' state court testimony until the state judge granted the habeas petition. (ASER 188-189).

That contention is unpersuasive. Even though the state judge vacated Garcia's state court conviction after the federal jury returned its verdict, Garcia was aware of the basis for his *Kastigar* argument well *before* Powers' state court testimony was admitted at the federal trial on April 29, 2002. (RT 2878-2898). Two months earlier, in February 2002, Garcia had filed his habeas petition in state court seeking to overturn his conviction on the ground that his trial counsel had failed to protect his rights under *Kastigar*. (ER 328). In September 2001, Garcia's attorney advised the district judge in this case that he would be filing such a habeas petition, and argued that the judge should make his own determination whether the state court conviction was tainted without waiting for a

state judge to grant habeas relief. (ASER 99-101). Based on this argument, Garcia convinced the district court to dismiss a portion of the third superseding indictment. See pp. 24-26, *supra*. Garcia thus had no justification for waiting until after the federal jury rendered its verdict before arguing that Powers' state court testimony was inadmissible because of alleged taint in the state proceedings.

B. The District Court Did Not Err, Much Less Commit Plain Error, In Admitting Portions Of Powers' State Court Testimony

Garcia contends that the state court's grant of the habeas petition demonstrates that, if Garcia's trial attorney had vigorously asserted his client's rights under *Kastigar*, there never would have been a state prosecution and thus Powers never would have testified in state court. Thus, he contends that Powers' state court testimony is an indirect product of a *Kastigar* violation and thus should have been excluded from the federal trial. (Joint Br. 3, 37-38; Garcia Br. 1-5). That argument is incorrect, both legally and factually.

Garcia's argument is premised on the type of "but for" analysis that this Circuit and other courts have rejected in analogous situations. See, *e.g.*, *Beardslee v. Woodford*, ___ F.3d ___, 2004 WL 136895, at *4-*8, *18-*19 (9th Cir. Jan. 28, 2004); *United States v. Duchi*, 944 F.2d 391, 393, 395-396 (8th Cir. 1991). In

each of those cases, the prosecution introduced into evidence incriminating testimony that the defendant had previously given in his co-defendant's case. The defendant objected to the admission of this testimony, arguing that he never would have testified in his co-defendant's case, had there not been an earlier constitutional violation. Both *Beardslee* and *Duchi* concluded that such a "but for" link did not require exclusion of the testimony, given how attenuated the connection was between the alleged constitutional violation and the voluntary decision of each defendant to testify. See *Beardslee*, 2004 WL 136895 at *18-*19; *Duchi*, 944 F.2d at 395-396. As in *Beardslee* and *Duchi*, the link between Powers' state court testimony and the alleged violation of Garcia's *Kastigar* rights during the state proceedings is simply too attenuated to justify excluding Powers' testimony from the federal trial.

At any rate, Garcia's assertion that no state prosecution would have occurred if his counsel had filed a pre-trial *Kastigar* motion is highly speculative and implausible. Such a motion would not necessarily have resulted in dismissal of the case, as illustrated by the United States' success in opposing defendants' *Kastigar* motions below. And even if Garcia had avoided a state trial by filing a *Kastigar* motion, it is likely that his preliminary hearing would nonetheless have taken place. See *People v. Gwillim*, 223 Cal. App. 3d 1254, 1261-1264, 1273

(Cal. App. 6 Dist. 1990) (pre-trial *Kastigar* proceedings, which led to dismissal of charges, occurred after preliminary hearing). Because Powers' testimony at the preliminary hearing largely duplicated his state trial testimony (compare RT 2878-2885 with RT 2885-2898), pre-trial dismissal of the state charges would not likely have changed the substance of the evidence introduced at the federal trial.

For these reasons, the district court did not err at all in admitting Powers' state court testimony at the federal trial. Certainly, the admission of this testimony did not rise to the level of an "obvious" error. See *Olano*, 507 U.S. at 734.

Nor can Garcia meet the other requirements for reversal under the plain error standard. Garcia has failed to show that the admission of Powers' testimony affected his "substantial rights" by influencing the outcome of the trial. *Ibid.* Much of the substance of Powers' state court testimony was duplicated by other evidence in the case, including statements that Powers and Garcia gave to the FBI in November 1995, which were summarized in the testimony of an FBI agent at the federal trial. (RT 2851-2876). See also pp. 42-44, *supra*. In any event, this is not a case where an alleged error is so egregious that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 631-632.

III

THE ADMISSION OF EXCERPTS FROM GARCIA'S OCTOBER 2 INTERVIEW WAS NOT PLAIN ERROR AS TO POWERS

Powers argues (Joint Br. 60-68) that introduction of a portion of Garcia's October 2 interview violated Powers' rights under the Confrontation Clause, as interpreted in *Bruton v. United States*, 391 U.S. 123 (1968). Powers did not properly preserve this issue for appeal and thus it can be reviewed only for plain error. There was no *Bruton* error here, plain or otherwise.

A. Plain Error Is The Standard Of Review

The defense filed a pretrial motion *in limine* seeking to exclude from evidence some portions of Garcia's October 2, 1995, interview. The motion objected on *Bruton* grounds only to the following question and answer (ASER 142):

> [Q.] Specifically, Sergeant Powers. Was Sergeant Powers ever aware of your dealings with Branscum?
>
> [Garcia:] Yes. He knew.

(ER 268). The United States agreed not to introduce this portion of the interview but did not concede that its admission would violate *Bruton*. (ASER 146).

The government worked with defense counsel to redact portions of the October 2 statement to conform to the parties' agreement. (ER 305-A ¶2). During the redaction process, however, the question and answer regarding the dealings with Branscum were inadvertently not deleted. (*Id.* ¶ 3). The government gave defense counsel the proposed redacted transcript for their review well before it was used at trial, but they never asked during this review process for deletion of the question and answer regarding Powers' knowledge of Garcia's dealings with Branscum. (*Ibid.*).

On April 29, 2002, a compact disc (CD) containing the redacted audio recording of the October 2 interview was played at trial. (ASER 159-160). Defendants raised no *Bruton* objections when the CD was played for the jury and did not request any cautionary instructions. (See *ibid.*).[10]

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[10] The jury replayed this CD during deliberations. (ASER 183). Defendants assert, in passing, that the jury's playing of the CD outside the presence of Powers and his attorney was "itself an independent constitutional violation." (Joint Br. 68). Defendants do not appear to be raising this argument as a separate basis for reversing their convictions. (See Joint Br. 1-2 (questions presented)). At any rate, they did not raise this objection below until their motion for a new trial (see ASER 177-186, 194-195, 200), and thus the issue could be reviewed only for plain error. See *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir.), cert. denied, 479 U.S. 823 (1986). No plain error occurred. This case is unlike *United States v. Brown*, 832 F.2d 128 (9th Cir. 1987), on which defendants rely. (Joint Br. 68). In that case, neither the defendants nor their counsel were notified of the jury's request for a playback of the audiotape, and the tape was

(continued...)

Because Powers did not object to the redacted recording when it was introduced, and did not request any limiting instruction, the *Bruton* issue can be reviewed only for plain error. See *United States v. Arias-Villanueva*, 998 F.2d 1491, 1507 (9th Cir.), cert. denied, 510 U.S. 1001 (1993). If a court grants a motion *in limine* to exclude evidence, but a party nonetheless tries to introduce such evidence at trial in violation of the ruling on the motion, an "objection must be made when the evidence is offered to preserve the claim of error for appeal." Fed. R. Evid. 103, advisory committee notes (2000 amendment). The same logic would apply when the parties reach a pretrial agreement to exclude certain evidence but (through inadvertence) such evidence is nonetheless offered at trial.

B. When Read In Context, Garcia's Statement Raises No Concerns Under The Confrontation Clause

In *Bruton*, the Supreme Court held that a defendant was deprived of his Sixth Amendment rights under the Confrontation Clause when his nontestifying co-defendant's confession naming him as a participant in a crime was introduced at their joint trial. 391 U.S. at 126-137. The Court found a violation even though

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[10](...continued)
replayed by a case agent who had sat at the prosecution's table during trial, thus raising concerns about outside influence on the jury. 832 F.2d at 129-130. Here, the jurors themselves played the audio recording (ASER 183) and defendants and their counsel were present when the court advised the parties that the jury wanted a device to play the CD. (ASER 176-186).

the jury was instructed that the confession could only be considered against the declarant. Later, the Supreme Court clarified that the *Bruton* rule applies only when the co-defendant's confession, on its face, is powerfully incriminating to the defendant. *Richardson v. Marsh*, 481 U.S. 200, 208-211 (1987). Where the confession becomes incriminating only through linkage with other evidence, redaction of the defendant's name and a proper limiting instruction generally will satisfy the Confrontation Clause. *Ibid.*

The statement at issue here raises no Confrontation Clause concerns under either *Bruton* or *Richardson* for the simple reason that, when read in context, it is not incriminating at all as to Powers. See *United States v. Davis*, 418 F.2d 59, 63 (9th Cir. 1969) (refusing to reverse on *Bruton* grounds where "testimony was clearly not a confession inculpating" the defendant, but instead was largely an attempt to exonerate defendant and declarant); *United States v. Kindig*, 854 F.2d 703, 709 (5th Cir. 1988) (testimony did not implicate Confrontation Clause because it was not adverse to defendant and substantially comported with defendant's own testimony).

Garcia's statement that Powers was aware of his "dealings with Branscum" is not incriminating when read in its full context. Earlier in the interview, Garcia had stated that he tried to cultivate certain inmates as informants so that he could

combat violence at the prison by learning in advance about weapons and planned attacks. (ER 232-233). It was in this context that Garcia asserted that "Sergeant Powers was working with me." (ER 233). Garcia further explained that one of his informants was inmate Thomas Branscum. (ER 229, 235, 263). Garcia acknowledged that he allowed inmates to have alcohol as payment for their services as informants. (ER 233-240). But Garcia emphasized that he and his informants kept the alcohol a secret and that no other staff members knew about it – "not even Sergeant Powers." (ER 251). Garcia further stressed: "I know I did make mistakes. And *Sergeant Powers didn't know about it.*" (ER 268) (emphasis added). Finally, when asked whether Powers ever directed him to review files on suspected child molesters, Garcia replied: "Not at all." (*Ibid.*).

Thus, when considered in light of these other comments, the statement at issue is most reasonably read as an assertion that Powers was aware Garcia was using Branscum as an informant as part of his alleged efforts to control violence at the prison, but that Powers did not know of the admittedly inappropriate means that Garcia had used to repay Branscum and other informants. Garcia's statement thus appears to be an attempt to absolve Powers of any blame for Garcia's mistakes. Merely knowing that Garcia was cultivating Branscum as an informant is not incriminatory, especially in light of the defense theme below that use of

inmates as informants was a laudable tactic that correctional officers often employed to prevent violence. (See, *e.g.*, RT 284, 287-288, 3809-3810, 4317; ASER 170).

C. The Admission Of The Statement Without A Redaction Or A Limiting Instruction Did Not Adversely Affect Powers' Substantial Rights

Even if a *Bruton* error occurred, reversal would be unwarranted under the plain error standard because Powers has failed to show that the admission of the statement affected his "substantial rights" – *i.e.*, that it was "prejudicial" in the sense that it influenced the outcome of his trial. *Olano*, 507 U.S. at 734. The United States presented abundant evidence, aside from Garcia's October 2 interview, that Powers was familiar with Garcia's dealings with Branscum. In his November interview with the FBI, Powers acknowledged meeting with Garcia and Branscum in his office and characterized Branscum as "one of their best informants." (RT 2852-2853). Moreover, Powers' state court testimony, which was admitted at the federal trial, clearly established Powers' involvement with Garcia in cultivating Branscum as an informant. (RT 2888-2889, 2892-2893, 2895-2898). Although Garcia challenges the admission of Powers' state court testimony on *Kastigar* grounds, Powers has raised no such challenge to the admission of his own testimony, nor could he. The statement from Garcia's

October 2 interview is not prejudicial because it largely duplicates other admissible evidence, including Powers' own admissions.[11]

IV

BECAUSE 18 U.S.C. 241 DOES NOT REQUIRE PROOF OF AN OVERT ACT, THE UNITED STATES WAS NOT REQUIRED TO PROVE THAT ANY OF THE OVERT ACTS LISTED IN THE INDICTMENT WERE COMMITTED WITHIN THE LIMITATIONS PERIOD

Defendants argue (Joint Br. 69-75) that the district court should have instructed the jury that the government must prove that an overt act listed in the indictment was committed within the limitations period. The court did not err in refusing to give such an instruction.[12] Defendants were charged with conspiracy under 18 U.S.C. 241 – not under 18 U.S.C. 371. That distinction is important here because Section 241, unlike Section 371, does not require proof of an overt act. *United States v. Skillman*, 922 F.2d 1370, 1373 n.2, 1375-1376 (9th Cir. 1990), cert. dismissed, 502 U.S. 922 (1991). Under a conspiracy statute without overt act

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[11] Even if Powers had proved that he was prejudiced, reversal still would be unwarranted under the plain error standard because the admission of Garcia's statement did not "seriously affect[] the fairness, integrity, or public reputation of [the] judicial proceedings." *Cotton*, 535 U.S. at 631-632.

[12] Because defendants argue that the jury instruction misstated the law, the standard of review is *de novo*. See *United States v. Solano*, 10 F.3d 682, 683 (9th Cir. 1993).

requirements, it necessarily follows that the government need not allege or prove that any overt act occurred within the limitations period. *United States v. Salmonese*, 352 F.3d 608, 619-620 (2d Cir. 2003); *United States v. Butler*, 792 F.2d 1528, 1531-1533 (11th Cir.), cert. denied, 479 U.S. 933 (1986).

Consequently, the district court satisfied the requirements of the statute of limitations when it instructed jurors that, in order to convict defendants for conspiracy, they must find beyond a reasonable doubt that there was an unlawful agreement "beginning on or about July 25th, 1992 and ending in or about August 1996." (ASER 166). The court could have stopped there. Nonetheless, the court went on to instruct the jury that it must find beyond a reasonable doubt that an overt act in furtherance of the conspiracy was committed within the limitations period (*i.e.*, on or after February 22, 1995). (ASER 167). This was substantively identical to the jury instruction that this Court prescribed in a Section 371 conspiracy case. See *United States v. Fuchs*, 218 F.3d 957, 961 (9th Cir. 2000) (error in that case "could have been cured simply by instructing the jury that it had to find that an overt act in furtherance of the conspiracy occurred within the statute of limitations"). By giving this additional instruction, the trial court provided defendants more protection than the law requires in a Section 241 prosecution.

Defendants' reliance (Joint Br. 72-73) on *United States v. Davis*, 533 F.2d 921, 929 (5th Cir. 1976), is misplaced.[13] That case involved a conspiracy under Section 371, which requires proof of an overt act. At any rate, *Davis* represents the minority view even as to Section 371. Other circuits have concluded that the government may rely on uncharged overt acts to satisfy the statute of limitations, even under conspiracy statutes like Section 371 that require proof of an overt act. See *United States v. Frank*, 156 F.3d 332, 337-339 (2d Cir. 1998), cert. denied, 526 U.S. 1020 (1999); *United States v. Dolan*, 120 F.3d 856, 866 (8th Cir. 1997) (citing cases).[14]

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[13] Defendants also cite *United States v. Stoner*, 98 F.3d 527 (10th Cir. 1996) (Joint Br. 73-74), but fail to note that the relevant portion of that opinion is no longer precedential authority. See *United States v. Stoner*, 139 F.3d 1343, 1344 (10th Cir.) (*en banc*), cert. denied, 525 U.S. 961 (1998).

[14] This Court has not decided the statute of limitations issue in a published opinion, but has upheld a conspiracy conviction under 18 U.S.C. 371 that "rest[ed] upon the proof of an overt act not charged in the indictment," after concluding that reliance on the uncharged act did not affect defendant's substantial rights. *Brulay v. United States*, 383 F.2d 345, 350-351 (9th Cir.), cert. denied, 389 U.S. 986 (1967).

V

HAMPTON'S REMARKS TO EBRIGHT WERE CO-CONSPIRATOR STATEMENTS UNDER FED. R. EVID. 801 AND THUS THEIR ADMISSION DID NOT VIOLATE THE CONFRONTATION CLAUSE

Defendants argue (Joint Br. 75-80) that statements made by Thomas Hampton to Gene Ebright were inadmissible hearsay and that their introduction violated the Confrontation Clause. In fact, there was no Confrontation Clause violation because Hampton's statements fell within the co-conspirator exception of Fed. R. Evid. 801(d)(2)(E) and thus were not hearsay.

A. Background

Gene Ebright is a former inmate who was incarcerated at Pelican Bay prison in 1996. Consistent with his testimony at a pre-trial hearing, Ebright testified at trial that in July or August 1996, inmate Thomas Hampton asked him to arrange an attack on another prisoner, Daniel Sheets. (RT 2373-2374; ASER 38-39). According to Ebright's testimony, Hampton told him that defendant Powers had asked Hampton to have Sheets stabbed and had promised to provide him drugs as payment for the attack. (RT 2373-2374, 2391-2392; ASER 38). Ebright agreed to carry out the stabbing himself. (RT 2375-2376; ASER 38-40). Hampton told Ebright that Powers would supply a weapon to Ebright to be used in the attack.

(RT 2375; ASER 40). A few days later, Ebright saw Powers coming out of his cell, even though Powers was not assigned to work in Ebright's unit. (RT 2376-2378, 2392-2394, 2399-2400; ASER 40-41). Ebright went immediately into his cell and found a knife under his pillow. (RT 2377, 2402; ASER 41). Ebright ultimately decided not to carry out the attack. (RT 2379-2380; ASER 42-43). He hid the knife in a mechanical control box outside his cell; the knife fell into a slot inside the box and Ebright could not retrieve it. (RT 2379-2383; ASER 43-44). Years later, Ebright told investigators where he had hidden the knife and they found it where he said it would be. (RT 2383-2384, 2445, 2679-2681; ASER 45). Hampton did not testify at trial.

After holding a pretrial evidentiary hearing at which Ebright testified about his conversation with Hampton (ASER 34-56), the district court ruled in May 2001 that the United States could introduce evidence of the Ebright incident at trial. (ER 312-314, 324-326). The court subsequently found that Hampton's comments to Ebright were not hearsay because they were statements of a co-conspirator. (ASER 154-157). Later, in denying defendants' motion for a new trial, the court found that Hampton's statements were "inherently reliable" in light of the corroborating events that occurred after his conversation with Ebright. Specifically, the court emphasized that Hampton said Powers would supply a

weapon to Ebright and then a few days later that prediction came true when Powers came to Ebright's cell and left a knife. (ASER 196-197). Finally, the court concluded that even if admission of Hampton's statements were erroneous, it would be harmless beyond a reasonable doubt. (ASER 197-198).

B. The District Court Did Not Clearly Err In Finding That Hampton And Powers Were Co-Conspirators

If an out-of-court statement qualifies as non-hearsay under Fed. R. Evid. Rule 801(d)(2)(E), its admission will not violate the Confrontation Clause. *Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987). Under Rule 801, a statement is not hearsay if it

> is offered against a party and is * * * a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The *contents of the statement shall be considered but are not alone sufficient* to establish * * * the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered * * *.

Fed. R. Evid. 801(d)(2)(E) (emphasis added). In determining whether a statement satisfies the rule, a court should consider "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement." Fed. R. Evid. 801, advisory committee notes (1997 amendment).

Defendants argue (Joint Br. 78) that the record contains no evidence, aside from the statements themselves, that Hampton participated in a conspiracy with Powers. Whether Hampton was part of a conspiracy involving Powers is a factual question reviewed for clear error. See *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003). The district court did not clearly err in finding that Hampton and Powers were co-conspirators.

Hampton's statements were not the only evidence linking him to a conspiracy with Powers. The events that occurred a few days after Hampton's conversation with Ebright, which corroborated Hampton's statements, provided the additional evidence necessary to satisfy Rule 801(d)(2)(E). Hampton said that Powers would provide Ebright with a weapon so that he could stab Sheets; a few days later, Powers left a knife in Ebright's cell. It is doubtful that Hampton would have known that Powers was going to provide a weapon to Ebright, unless Hampton was conspiring with Powers. See *Bourjaily*, 483 U.S. at 180-181 (the fact that events occurred as predicted by the declarant was independent evidence corroborating the declarant's statement). And Powers' decision to put the knife in *Ebright's* cell – instead of another inmate's cell – suggests that Hampton went to Powers after the conversation and told him that Ebright had agreed to personally carry out the stabbing. In addition, Hampton and Ebright were members of a

skinhead gang which would carry out attacks on behalf of other gangs at the prison. (RT 2372-2373, 2386-2388; ASER 35-38, 51-52). The skinheads' willingness to attack prisoners on behalf of others provides an explanation for why Powers would go to Hampton if he wanted to set up an attack on an inmate. This is yet another piece of evidence corroborating Hampton's statements.

C. Even If Erroneous, The Admission Of Hampton's Statements Was Harmless Beyond A Reasonable Doubt

Even if the court had excluded all of Hampton's statements, Ebright nonetheless could have testified to what he himself observed and said during this incident. Without revealing what Hampton said, Ebright still could have told the jury several key facts about the incident: (1) Hampton visited Ebright, (2) during that visit, Ebright told Hampton that he (Ebright) would personally stab Sheets; (3) a few days after telling this to Hampton, Ebright saw Powers leaving his cell, and (4) moments later, Ebright entered his cell and discovered a knife under his pillow. This sequence of events would allow the jury to reasonably infer that Powers provided the weapon to Ebright for use in stabbing Sheets. At the very least, Ebright's testimony (if believed by the jury) would establish that Powers put a dangerous weapon in an inmate's cell.

Thus, even without Hampton's statements, the Ebright incident is highly incriminating, especially because Powers' placement of the knife in Ebright's cell was consistent with the manner in which Powers and Garcia had previously arranged for attacks on other inmates. The record contains abundant evidence – aside from the Ebright incident – that Powers and Garcia used inmates to commit assaults on other prisoners, allowed inmates to have dangerous weapons, and encouraged stabbing as the method of attack. See pp. 4-18, *supra*. In light of this evidence, the admission of Hampton's statements was, if error at all, harmless beyond a reasonable doubt.

VI

THE DISQUALIFICATION OF POWERS' LAWYERS DID NOT VIOLATE HIS RIGHTS UNDER THE SIXTH AMENDMENT OR THE DUE PROCESS CLAUSE

(This argument is contained in Volume 2 of this brief, which is being filed under seal.)

CONCLUSION

This Court should affirm both defendants' convictions.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is unaware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the 24,000 word limit imposed by the Appellate Commissioner's order of May 6, 2003. Volumes 1 and 2 of the brief contain a combined total of 16,665 words of proportionally spaced text. The brief was prepared using Wordperfect 9.0, and the type face is Times New Roman, 14-point font.

_____
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Date: February 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE (Volumes 1 and 2) were served by first-class mail, postage prepaid, on each of the following counsel of record:

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