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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

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14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 vs.

17 RYAN CARROLL,

18 Defendant.

Case No. CR-13-0566 EMC

**NOTICE OF MOTION AND SECOND
MOTION TO DISMISS FOR
VIOLATION OF SPEEDY TRIAL
RIGHTS AND PREINDICTMENT
DELAY; DECLARATION OF
COUNSEL; MEMORANDUM OF
POINTS AND AUTHORITIES**

DATE: July 1, 2015

TIME: 1:30 p.m.

COURT: 17th Floor, Courtroom 5

The Honorable Edward M. Chen

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25 **MOTION TO DISMISS**

26 Defendant Ryan Carroll hereby moves the Court, through counsel, to dismiss the
27 Indictment on the grounds that he has been denied a speedy trial guaranteed by the Sixth
28 Amendment, post-indictment delay, and for Fifth Amendment preindictment delay.

1 This Motion is based on this Notice, the attached Memorandum of Points and
2 Authorities, declarations and exhibits submitted in support, the records and files of this case, and
3 such further evidence, exhibits, and argument as defendant may submit at the hearing in this
4 matter.

5 DATED: June 4, 2015

Respectfully Submitted,

6 /s/ Severa Keith
7 SEVERA KEITH
8 Attorney for Defendant
9 RYAN CARROLL

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DECLARATION OF COUNSEL

I, Severa Keith, make the following declaration under penalty of perjury:

1. I am an attorney at law duly admitted to practice in the State of California and admitted to the bar of this Court. I represent defendant Ryan Carroll in the above-captioned matter, and I have reviewed the discovery in this matter. Unless otherwise noted, I make this declaration based on my own personal knowledge. With respect to those matters not personally known to me I make this declaration upon information and belief.

2. On November 16, 2011, the Humboldt County District Attorney (“D.A.”) Paul Gallegos and the United States Attorney Melinda Haag, “mutually agreed to transfer the prosecution of Carroll to the United States Northern District of California.” Attached hereto as Exhibit 1 is an FBI memo re: case opening, Bates 5237-5239.

3. Assistant United States Attorney began investigating this matter in December, 2011, according to his declaration, signed March 18, 2015, and filed under seal with this court.

4. On January 30, 2012, Ryan Carroll’s attorney, Kathleen Bryson, filed a motion to compel discovery that was granted on February 8, 2012.

5. On February 27, 2012, discovery remained outstanding, despite the Court’s order. The Court noted that the items requested, such as recorded witness interviews and incident reports, were items of discovery that should have been provided without a Court order. Attached hereto as Exhibit 2 are transcripts of proceedings in the Humboldt County Superior Court, *People v. Ryan Carroll*, CR0906012, dated February 27, 2012.

6. On March 26, 2012, Discovery still remained outstanding, and the trial date was continued. The outstanding discovery included all witness interviews. Attached hereto as Exhibit 3 are transcripts of proceedings in the Humboldt County Superior Court, *People v. Ryan Carroll*, CR0906012, dated March 26, 2012. Many witness interviews were thereafter disclosed to the defense.

7. During 2012, the federal government, Federal Bureau of Investigation (“FBI”) was investigating this case with the Humboldt County Sheriff’s detectives. The bulk of the investigation occurred between May, 2012 and January, 2013. The only witness interviews conducted after that point were of individuals whom had already been interviewed by the FBI.

1 The interviews included a joint interview of Cody Brown by Humboldt County and the FBI, and
2 the Humboldt County deputy Sheriffs were closely working with the FBI to apprehend the
3 individual who would become the government's informant.

4 8. On January 8, 2013, I made an informal discovery request to the Humboldt
5 County District Attorney which requested all witness statements, including statements of
6 percipient witnesses the government did not intend to call as witnesses, citing, *inter alia*,
7 California Penal Code 1054.1 and *Brady v. Maryland*, 373 U.S. 83. *See*, Exhibit 4, attached
8 hereto, Motion to Compel Discovery filed June 28, 2013, Ex. A, ¶¶ 19, 25.

9 9. Witness J.C. contacted law enforcement after hearing reports about the raid on
10 Ryan Floyd's property that occurred on or about February 12, 2013.

11 10. On February 14, 2013 Detective Cheryl Franco interviewed a witness, J.C., who
12 had seen news reports regarding the raid. He voluntarily approached the Humboldt County
13 Sheriff's Department to provide them with information about the Floyd property and about the
14 murder charged in this case. Detective Cheryl Franco interviewed J.C. on February 14, 2013. In
15 the interview, J.C. told Detective Franco that he overheard Floyd telling Brown, "don't say
16 nothin' to [J.C.] about us cappin' that guy."¹ These statements were clearly pegged to the time
17 period immediately following the discovery of the victim's body. Furthermore, J.C. told Franco
18 that soon after hearing that statement, he saw Floyd handing Brown a rifle and telling him to hide
19 it. He described a rifle that is consistent with the type of rifle that could have fired the deadly
20 shots.² J.C. also reported that Brown made admissions regarding the murder, such as, "that guy
21 shouldn't have been where he was at." He also reported that he had a laborer who knew more
22 about the murder, because he lived in the same camp as Brown, but J.C. did not want to provide
23 the laborer's identity to Detective Franco, out of fear for his own and the laborer's safety.

24 11. FBI Special Agent Collar interviewed J.C. a couple of weeks later, on March 4,
25 2013.

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27 ¹ *See*, Interview of J.C., filed under seal as Exhibit S to Defendant's Post-Hearing Brief in Support of Defendant's
28 Motion to Dismiss or Exclude Evidence Due to Violation of Defendant's Sixth and Fifth Amendment Rights, which
is hereby incorporated by reference.

² The murder weapon was a .303 with rare rifling, such that the murder weapon has been limited by government
experts to a handful of possible weapons, most of which are older, distinctive-looking rifles.

1 12. On February 26, 2013, I sent two letters to D.A. Gallegos regarding discovery and
2 preservation of evidence regarding the February 12, 2013 raid of Ryan Floyd's property in which
3 over one hundred guns were recovered. *See*, Exhibit 4, at Ex. B. I received no response.

4 13. In mid-March, 2013, I left voice mail messages with D.A. Gallegos and sent a
5 meet and confer letter on March 18, 2013. Attached hereto as Exhibit 5 is the meet and confer
6 letter.

7 14. On June 10, 2013, I sent an email to follow up regarding the requested Floyd raid
8 discovery and on disclosure of federal investigation reports. Attached hereto as Exhibit 6 is an
9 email sent to D.A. Gallegos on June 10, 2013.

10 15. On June 14, 2013, I sent another meet and confer letter. Exhibit 4 at Ex. C.

11 16. On June 28, 2013, I filed a motion to compel discovery that was granted in part at
12 the hearing on July 8, 2013. The motion specifically indicated the need to obtain reports
13 containing *Brady/Giglio* material. *Id.* At the time, I was unaware of any outstanding *Brady*
14 material, except for information related to the Floyd raid, or that other additional witnesses had
15 been interviewed by Humboldt County Sheriffs; however, I knew that the federal government
16 was working on the case, and I suspected that they had interviewed additional witnesses, and this
17 discovery was specifically requested. *Id.* at p. 8:3-12, 24-47.

18 17. On July 8, 2013, the Court ordered that within ten days the Humboldt County
19 D.A.'s office was to produce a law enforcement inventory from Floyd's property and Cheryl
20 Franco's reports and notes from the Wyoming investigation of Brown, among other things.
21 Attached hereto as Exhibit 7 is a true and correct copy of the July 8, 2013 Order of the Humboldt
22 County Superior Court.

23 18. D.A. Gallegos did not obey the Court's orders. On July 9, 2013, via email, he
24 claimed he would do so, but never produced anything in response to the Court's orders. His
25 motivation for violating the Court's order was made clear in a July 15, 2013 email, in which he
26 stated that the federal government was "still engaged in an investigation and they don't want
27 information leaked during their investigation." *See*, Exhibit 8, p. 2, which is a true and correct
28 copy of email correspondence between myself and Paul Gallegos.

1 19. July 24, 2013, the Court ordered the District Attorney to attempt to get federal
2 investigation reports from the federal government. None of these were ever received. Attached
3 hereto as Exhibit 9 is a true and correct copy of that order.

4 20. Over the course of my representation of Mr. Carroll in Humboldt County, the
5 only additional discovery I received pertained to Robert Lee's girlfriend, a previously
6 undisclosed Sheriff's report and missing pages from other reports, and a document containing
7 302s regarding interviews with Travis Callin, Cody Brown, and Cassie Johnson.

8 21. On September 3, 2013 Ryan Carroll was indicted in federal court, approximately
9 one week before the statute of limitations would have run on the non-homicide charges.

10 22. On September 18, 2013, the government produced the initial discovery, which
11 contained just over 835 pages of FBI reports and investigation-related documents. On October
12 21, 2013 approximately 2666 pages of documents were produced, which were heavily redacted
13 reports and documents gathered during the Humboldt County Sheriffs investigation of the case.
14 On October 23 and 31, 2013, approximately twenty witness interviews were produced. The only
15 recorded interview withheld was that of J.C. A report of an interview with Ryan Floyd, in
16 which he mentions J.C., was also withheld.

17 23. Among the documents in the September 18, 2013 discovery production was a 302
18 report, dated March 4, 2013, that described a phone call by Agent Collar in which a redacted
19 witness reported that he saw Floyd tell Brown to hide a rifle, and that the witness thought that it
20 had to do with a murder. The basis for this witness' knowledge of his association between this
21 act and the murder is absent, as is the time period of the witness' observation. The witness'
22 name is redacted. There is no mention of any statements made by Floyd and Brown that indicate
23 their participation in the murder. Attached hereto as Exhibit 10 is Bates 686, produced by the
24 government on September 18, 2013.

25 24. In July, 2014, witness J.C. was in a near-fatal motorcycle accident, was in a coma
26 for sometime, and was hospitalized for months. He suffered a traumatic brain injury and has
27 trouble talking and performing basic daily functions. He no longer works. He also has an eye
28 injury and other physical disabilities. He does remember the incidents that he reported to
Detective Franco on February 14, 2013.

1 25. Not until early April, 2015, did the government produce discovery that contained
2 the February 14, 2013 video-recorded interview of J.C. Corresponding Humboldt County
3 Supplemental Report 22, which memorializes the interview, was also produced at that time.
4 Supplemental Report 22, authored by Cheryl Franco, describes the close working relationship
5 between Humboldt County law enforcement and the federal government. Attached hereto as
6 Exhibit 11 is Supplemental Report 22, redacted to protect the identity of J.C. and the government
7 informant.

8 26. Most notable about these late disclosures is that they contain clear *Brady* material,
9 and their concealment for over two years by Humboldt County and the federal government
10 prevented the defense from investigating these facts and witnesses and from preparing for trial.
11 This concealment was either tactical or negligent on the part of the government.

12 27. The fact that a government agent accessed Supplemental Report 22 on October 3,
13 2013 (the print date at the bottom of the document), strongly suggests that the government
14 knowingly and intentionally withheld this exculpatory information from the defense, as it was
15 not produced on October 21, 2013, along with all the other Humboldt County investigation files.
16 *See*, Exhibit 11.

17 28. Similarly, all recorded witness interviews conducted by Humboldt County
18 Sheriff's detectives, except for the J.C. interview, were provided by the federal government on
19 October 23 and 31, 2013. J.C. provided information that was clearly exculpatory to Mr. Carroll.
20 It was the only interview that was concealed until April, 2015.

21 29. With respect to the time during which the state court case was pending, this
22 exculpatory J.C. interview and Supplemental Report 22 were never disclosed. Both *Brady* and
23 California Penal Code 1054.1 are self-executing,³ yet this discoverable, exculpatory material was
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25 ³ The prosecuting attorney *shall disclose* to the defendant or his or her attorney all of the following materials and
26 information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the
possession of the investigating agencies:

27 (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

28 (b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

1 withheld, precisely because it is exculpatory.⁴ This has caused unreasonable, prejudicial delay
2 and irreconcilable harm to Mr. Carroll's case.

3 30. Additionally, the 302 report by Agent Collar, regarding the interview of J.C. on
4 March 4, 2013, lacked significant information. The report excluded the name of J.C. (it was
5 redacted), the fact that he heard Floyd confess to participation in the murder to Brown, Brown's
6 assent to these statements and his own admissions, and the fact that J.C. saw them behaving
7 erratically the day the body was found. Excluding the fact that J.C. heard two uncharged
8 suspects in this crime confess to being perpetrators is not a minor oversight.⁵ See, Exhibit 10.

9 31. Humboldt County Supplemental 22 is similarly (and oddly) misleading, as
10 Detective Franco indicates that she assisted Deputy Gomes with the J.C. interview, whereas the
11 video clearly shows that she conducted the entire interview, while Deputy Gomes stood by,
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13
14 (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the
outcome of the trial.

15 (e) Any exculpatory evidence.

16 (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the
17 prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the
case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which
18 the prosecutor intends to offer in evidence at the trial.

Cal. Penal Code § 1054.1 (emphasis added).

19 ⁴ D.A. Gallegos stated to the press that his office and the United States Attorney were working hand-in-hand to
20 support the federal prosecution:

21 Gallegos said he's worked closely with the office of Melinda Haag, U.S. Attorney for the
Northern District of California, since the case's inception, all the while with the idea the federal
22 government would take on the prosecution. The case worked its way through the state courts for a
couple of years, Gallegos said, ***as federal and local investigators worked to get federal
prosecutors exactly what they would need to support their case ...***

23
24 "Melinda Haag has been an outstanding resource for us," he said. "She's been a great partner and
colleague, and has reached out to assist whenever she could. She has a region and I have a county,
25 yet she's reached out with her office to assist us time and time again with resources and
prosecutions."

26 See, Suspect Pleads Not Guilty to SoHum Murder in Federal Court; Defendants Make Initial Appearances in 2008
27 Case, Eureka Times-Standard, September 16, 2013 (available at: [http://www.times-standard.com/general-
news/20130906/suspect-pleads-not-guilty-to-sohum-murder-in-federal-court-defendants-make-initial-appearances-
in-2008-case/1](http://www.times-standard.com/general-news/20130906/suspect-pleads-not-guilty-to-sohum-murder-in-federal-court-defendants-make-initial-appearances-in-2008-case/1).) (emphasis added).
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⁵ Even if Agent Collar's 302 report is accurate, the fact that J.C.'s name was redacted along with the concealment of
all other discovery related to J.C. makes it clear that *Brady* information was intentionally suppressed.

1 making an occasionally comment. Deputy Gomes is even out of the room during significant
2 portions of the interview.⁶

3 32. This declaration hereby incorporates by reference Ryan Carroll's Motion to
4 Dismiss for Violation of Sixth and Fifth Amendment Rights, and all supporting briefs and
5 exhibits, inasmuch as they demonstrate the close working relationship and joint investigation
6 between the FBI and the Humboldt County Sheriff's Department during this investigation, and
7 because they establish that the Humboldt County Sheriff's Department was and is an agent of the
8 federal government for *Brady* purposes.

9 33. The effect of what appears to be mutual, coordinated decisions by state and
10 federal law enforcement to deny Mr. Carroll the discovery to which he was entitled offends
11 fundamental conceptions of justice, especially because Mr. Carroll sat in jail, unable to
12 investigate pertinent witnesses and events, while the District Attorney of Humboldt County
13 sandbagged the state court case, giving the federal government additional time and a tactical
14 advantage in their case preparation. The federal government continued to conceal this discovery
15 post-indictment, during the September and October, 2013 disclosures, which hampered Mr.
16 Carroll's ability to prepare his defense once his case was before the Northern District of
17 California.

18 34. Mr. Carroll has diligently investigated this case. The defense performed
19 investigation in Northern California prior to J.C.'s motorcycle accident, and there is not doubt
20 that he would have been interviewed prior to suffering memory loss had the discovery regarding
21 him not been concealed.

22 35. The prejudice that Mr. Carroll has suffered is manifold. First, a witness who
23 heard two uncharged suspects confess to the crime has suffered memory loss. There could
24 hardly be more exculpatory evidence than this. Furthermore, J.C. knew the whereabouts of his
25 laborer, who lived in Brown's camp, and who also has information about this case. J.C. no
26 longer knows that person's whereabouts. This actual and non-speculative prejudice was caused
27 because the government to have a tactical advantage over Mr. Carroll, by preventing him from
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⁶ Interview of J.C. is filed under seal as Exhibit S to Defendant's Post-Hearing Brief in Support of Defendant's

1 investigating an exculpatory witness. Mr. Carroll’s defense has been severely damaged by this
2 witness’ loss of memory of these events. Second, Mr. Carroll has been subjected to lengthy
3 pretrial incarceration, both pre- and post-indictment, due to the government’s withholding of
4 material and exculpatory information. This has caused Mr. Carroll to suffer an unduly long
5 incarceration, has created great anxiety, and has caused him to unjustly suffer mentally and
6 physically.

7 36. This reasons for the delay violates a sense of fair play and fundamental
8 conceptions of justice.

9 37. If the defense and Mr. Carroll had known of this witness in a timely manner, we
10 would have been able to prepare for trial and would not have agreed to continuances or
11 exclusions of time to the extent that has happened if not for the government’s actions, whether
12 intentional or negligent, in failing to provide this discovery.

13 I declare, under penalty of perjury under the laws of the United States, that the foregoing
14 is true and correct. Executed this 4th day of June, 2015, in San Francisco, California.

15 /s/ Severa Keith

16 SEVERA KEITH
17 Attorney for Defendant
18 RYAN CARROLL
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21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. INTRODUCTION**

23 Defendant Ryan Carroll respectfully requests that the Court dismiss the Indictment,
24 pursuant to the Sixth Amendment for post-indictment delay and pursuant to the Fifth
25 Amendment for preindictment delay that he has suffered, as the incidents charged occurred on or
26 about September 10, 2008. Mr. Carroll has been in custody since January, 2010. The delay in
27 this matter has resulted in actual prejudice to Mr. Carroll because a concealed, exculpatory
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Motion to Dismiss or Exclude Evidence Due to Violation of Defendant’s Sixth and Fifth Amendment Rights.

1 witness has suffered memory loss and because at least one unidentified exculpatory witness can
2 no longer be located. The delay has also caused undue stress and anxiety on Mr. Carroll, who
3 has been incarcerated for over five years. The result is actual and incurable prejudice to the
4 defense, and the only remedy is dismissal of the Indictment.

5 6 II. STATEMENT OF FACTS

7 The federal government and Humboldt County detectives began working together in
8 November, 2011. Assistant United States Attorney Benjamin Tolhoff began working on this
9 case in December, 2011. The investigation by the FBI began in about May, 2012, the
10 government's primary informant was arrested and began cooperating in October and November,
11 2012, and the investigation was substantially completed by January, 2013.

12 Once the federal government became involved in this case, the prosecution in Humboldt
13 County was a sham. For the years of 2012 and 2013, counsel for Mr. Carroll were requesting
14 discovery from the prosecution and discovery orders were ignored. Specifically, undersigned
15 counsel repeatedly requested information pertaining to a February, 2013 raid on Ryan Floyd's
16 ("Floyd") property, which was adjacent to the property where the murder occurred. It was also
17 where co-defendant Lee and Cody Brown ("Brown") resided. Many weapons were discovered
18 during that raid. Additionally, undersigned counsel had requested the production of all witness
19 statements and all exculpatory information.

20 Immediately after the raid on Ryan Floyd's property, a witness, J.C., who had seen news
21 reports regarding the raid, voluntarily approached the Humboldt County Sheriff's Department to
22 provide them with information about the Floyd property and about the murder charged in this
23 case. Detective Cheryl Franco interviewed J.C. on February 14, 2013. In the interview, J.C. told
24 Detective Franco facts exculpatory to Mr. Carroll and stated that he knew at least one other
25 witness.

26 Despite the Humboldt County Superior Court's Order that the District Attorney provide
27 information related to the raid on Floyd's property, and the fact that it is *Brady* material, J.C.'s
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1 existence was never disclosed by Humboldt County.⁷ Even after the federal case was filed, his
2 identity and his statement were withheld.⁸

3 It was not until about April 3, 2015 that counsel for Mr. Carroll received discovery from
4 the government which contained J.C.'s video recorded interview, as well as previously-
5 undisclosed FBI reports of Floyd which contained J.C.'s name. This was the first time that the
6 defense became aware of J.C.'s identity. J.C. had a motorcycle accident in July, 2014, and he
7 suffered a traumatic brain injury as well as many physical injuries. He no longer remembers the
8 events that he reported to Detective Franco on February 14, 2013 or to Agent Collar on March 4,
9 2013. Furthermore, since the motorcycle accident, he has lost contact with his former laborer,
10 and has no way to get in contact with him.

11 The state and federal governments were working closely together to investigate this case
12 during 2012 and 2013. The district attorney of Humboldt County was aware of and part of this
13 joint investigation. The J.C. interview was known to both the state and federal government in
14 February and March, 2013. This *Brady* material, known to both the state and federal government
15 in February and March, 2013, respectively, was not disclosed during the state prosecution so as
16 not to harm the federal investigation. Its continued concealment during the federal prosecution
17 hindered and delayed defense investigation and preparation. Because Brady information was
18 held from the defendant for almost two years, his trial has been unreasonably delayed, both pre-
19 and post-indictment, and he has suffered irreconcilable prejudice to his case.

20 21 III. ARGUMENT

22 A. Preindictment Delay

23 The Ninth Circuit recognizes a Fifth Amendment due process violation for preindictment
24 delay where the defendant proves that "he suffered actual, non-speculative prejudice from the
25 delay," and, when the length of the delay is weighed against the reason for the delay, "the delay
26 offends those fundamental conceptions of justice which lie at the base of our civil and political
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⁷ This case was pending in Humboldt County for seven months after the interview of J.C.

⁸ See Declaration of Counsel.

1 institutions.” *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (internal quotations
2 and citations omitted); *see also*, *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

3 If preindictment delay causes “substantial prejudice to [defendant’s] rights to a fair trial
4 and that [] delay was an intentional device to gain tactical advantage over the accused,” due
5 process is violated. *United States v. Marion*, 404 U.S. 307, 324 (1971). Improper delay has been
6 found where the government’s investigation does not merit the time spent to complete it. *United*
7 *States v. Gross*, 165 F.Supp. 2d 372, 384 (EDNY 2001). Tactical decisions based on attempts to
8 increase the odds of conviction are also questionable. *United States v. Ross*, 123 F.3d 1181,
9 1186 (9th Cir. 1997).

10 1. Prejudice

11 Here, Mr. Carroll has met his “heavy burden to prove that preindictment delay cause
12 actual prejudice: the proof [is] definite and not speculative, and [Mr. Carroll can] demonstrate
13 how the loss of the witness . . . is prejudicial to his case.” *United States v. Moran*, 759 F.2d 777,
14 782 (9th Cir. 1985). The government’s delay preindictment has directly caused actual, non-
15 speculative prejudice to Mr. Carroll. There has been no other witness to come forward in this
16 case who has provided evidence that other individuals were the perpetrators of the alleged
17 murder. J.C. in his interview with Detective Franco was credible and provided details regarding
18 the incident that indicate truthfulness, such as the identification of certain structures and
19 relationships between individuals. Furthermore, the two individuals that he identifies as
20 perpetrators are two uncharged suspects, both of whom had the opportunity and motive to
21 commit the murder, and to put the blame on Mr. Carroll. Brown and Floyd are both anticipated
22 government witnesses, and not only was J.C.’s statement exculpatory to Mr. Carroll, but would
23 also impeach Brown and Floyd.

24 This lost testimony is not of speculative value. It is testimony that bears directly on Mr.
25 Carroll’s innocence, and Mr. Carroll has made the necessary showing regarding what J.C. would
26 have said⁹ and how its loss is irreparably harms his defense. The value of evidence that other
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⁹ *See also*, video interview of J.C., as described in footnote 1.

1 people confessed to the charged crime is enormous. Its loss is of similar scale and weighs
2 heavily in favor of dismissal of the indictment, because its loss is due to unreasonable delay.

3 2. Length of delay and reason for delay

4 The length of delay in this matter is unusually long. The matter was indicted just one
5 week short of five years, and presumably the timing of the indictment was to prevent the non-
6 murder charges from being time-barred. The length of delay was not merited. The
7 government's agreement with Humboldt County was signed in November, 2011, yet the FBI did
8 not begin to investigate witnesses until May, 2012. The investigation was complete, with respect
9 to any information relevant to the indictment in January, 2013. There was some activity between
10 January and April, but it was follow up work with already-interviewed witnesses. The informant
11 was not subpoenaed to testify before the grand jury until late August, 2013.

12 The government took advantage of the fact that Mr. Carroll was incarcerated in the
13 Humboldt County jail. Given the record set forth in this matter, it is clear that Humboldt County
14 was instructed to conceal discovery related to J.C. and to the guns found on Floyd's property.
15 This prevented defense preparation. Also, the investigation took six months to get underway,
16 and the government dragged its feet about four before indicting. This kept Mr. Carroll
17 incarcerated an additional 10. *See, United States v. Gross*, 165 F.Supp. 2d 372, 384. The fact
18 that Humboldt County prosecution was delayed while the government took its time investigating
19 offends fundamental conceptions of justice, appears to have been used to gain a tactical
20 advantage over Mr. Carroll to increase chances of conviction. *See, United States v. Ross*, 123
21 F.3d 1181, 1186.

22 The act that most illuminates the government's intent is the concealment of the J.C.
23 discovery. It can simply not be coincidental that this discovery was withheld by both Humboldt
24 County and by the federal government. This manifests a coordinated effort by both jurisdictions
25 to keep Mr. Carroll incarcerated until the federal government decided to indict. The subsequent
26 decision to keep Mr. Carroll in the dark about this witness is the direct cause of the prejudice in
27 this case. J.C.'s memory was affected by an event that occurred only about eight months before
28 the defense received discovery pertinent to his relevance in the case. The loss of this essential
testimony is a direct result of the government's intentional concealment of *Brady* material in

1 what can only be seen as gamesmanship on the part of the prosecution. While a prosecutor is not
2 required to indict when he or she has evidence support probable cause, the decision not to indict
3 cannot be undertaken to gain a tactical advantage. *United States v. Lovasco*, 431 U.S. 783, 794-
4 796 (1977). This factor also weighs in favor of dismissal.

5 3. Statute of Limitations

6 Generally, “protection from lost testimony generally falls solely within the ambit of the
7 statute of limitations.” *Moran*, 759 F.2d at 782. However, when the defendant can demonstrate
8 that the loss of this testimony has “meaningfully impaired his ability to defend himself,”
9 prejudice, even if the indictment is timely, can be proved. *Huntley*, 976 F.2d at 1290-1291.

10 In this matter, where there is clear prejudice, and where the delay was intentionally
11 caused by the government and directly resulted in the prejudice, the statute of limitations should
12 have no bearing on the Court’s decisions. There are certainly sound reasons why capital crimes
13 have no statute of limitations; however, where the government’s actions directly prejudice the
14 defendant’s ability to defend himself, due process demand that the indictment be dismissed.

15 B. Post-Indictment Delay

16 The Sixth Amendment guarantees that in a criminal prosecution, the accused shall enjoy
17 the right to a speedy and public trial. *Doggett v. United States*, 505 U.S. 647 (1992). The Sixth
18 Amendment right to a speedy trial protects against possible prejudice to the defense,
19 unreasonable interference with liberty, and the anxiety of facing criminal charges. *United States*
20 *v. Marion* 404 U.S. 307 (1971)

21 While the defendant has “some responsibility to assert a speedy trial claim,” the Supreme
22 Court has placed “the primary burden on the courts and the prosecutors to assure that cases are
23 brought to trial.” *Barker v. Wingo*, 407 U.S. 514, 529 (1972). Whether a defendant has been
24 denied his right to a speedy trial is determined by a balancing test, comprised of four factors:
25 “Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to
26 the defendant.” *Id.* at 530.

27 The length of delay in this case was affected significantly by the failure of the
28 government to provide discovery of an exculpatory and material witness. This case has been
pending in federal court approximately twenty months, and no amount of delay caused by a

1 failure to provide discovery for tactical or negligent reasons is acceptable.¹⁰ The name and other
2 discovery regarding the witness J.C. was not disclosed until just two months ago. As the
3 Declaration of Counsel indicates, there was no fault on Mr. Carroll's part for this failure to
4 disclose. Since the time this case was pending in Humboldt County, Mr. Carroll has sought to
5 obtain discovery, much of the time with no adequate response, if any.

6 There has been no reason offered by the government for this omission in discovery,
7 except to say that it was not in possession of the J.C. interview and related report until
8 immediately before it was disclosed to the defense. Because the witness statements fall under
9 *Brady*, the withholding of such materials by any agent of the federal government, such as the
10 Humboldt County Sheriff's Department, is properly imputed to the prosecution. *Kyles v.*
11 *Whitley*, 514 U.S. 419 (1995). This delay, therefore, even if unknown to the prosecutor is
12 attributable to the government. "Although negligence is obviously to be weighted more lightly
13 than deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide
14 between acceptable and unacceptable reasons for delaying a criminal prosecution once it has
15 begun." *Doggett v. United States*, 505 U.S. 647, 657 (1992).

16 Mr. Carroll was effectively prevented from asserting his right to a speedy trial right under
17 the *Sixth Amendment* because he was not able to fully develop his defense with the assistance of
18 an exculpatory witness. If he had been informed of the witness J.C. at the initiation of this
19 prosecution, or better, while the case was pending in Humboldt County, he would have not have
20 agreed to exclusions of time for this long of a period. It would be unfair for the Court to penalize
21 Mr. Carroll for not asserting his right to a speedy trial when he has been prevented from building
22 his defense through a lack of exculpatory discovery.

23 Finally, the prejudice to Mr. Carroll must be considered in light of: 1) the actual loss of
24 exculpatory testimony, as discusses above; and 2) the fact the prior prosecution that was pending
25 in Humboldt County since January, 2010. Mr. Carroll has been incarcerated for approximately
26 five and a half years awaiting trial. During this time, he has experienced great anxiety and health
27

28 ¹⁰ In addition to the J.C. discovery, there were additional witness statements disclosed to the defense in early April,
2015 that have exculpatory value, but the statements are by previously-known witnesses and not as significant.

1 problems. This alone is prejudice warranting a dismissal where there is no sound reason for the
2 delay. Quite to the contrary, there is a nefarious reason for the delay.

3 The fact that the federal government did not begin to investigate this crime until three
4 years after it occurred does not affect the analysis. Mr. Carroll has still faced lengthy and
5 oppressive pretrial incarceration. Furthermore, loss of witness memory and witnesses further
6 compounds this prejudice. In this case, the post-indictment delay in this matter was caused by
7 the government’s failure to provide discovery on an exculpatory witness has directly caused
8 prejudice to Mr. Carroll, and the indictment must be dismissed. There is no other remedy.

9
10 **CONCLUSION**

11 For the reasons set forth above, Mr. Carroll respectfully requests that the Indictment be
12 dismissed with prejudice.

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14 Dated: June 4, 2015.

Respectfully submitted,

15
16 /s/ Severa Keith

17 SEVERA KEITH
18 Attorney for Defendant
19 RYAN CARROLL
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