

12/21/2010	Submission vacated by order.	<p>This court has some grave concerns over whether the perjury indictment obtained from the grand jury against petitioner McGill accords with fundamental fairness and the statutes which govern grand jury procedure in California (in particular, Penal Code section 939.7, in addition to Penal Code section 939.71), and wishes to give the parties, in particular the district attorney's office, a chance to better explain, in supplemental briefing, the merits of their positions on issues related to the obtaining of that indictment. Therefore, pursuant to California Rules of Court, rule 8.256(e)(1), submission of the above-entitled matter is hereby vacated in order for the parties to address certain questions which the court has. The case will be resubmitted on February 28, 2011 -- the due date for the last set of supplemental briefs requested by this order. Here are the questions: 1. Assuming arguendo that the district attorney's office was not aware of any specific exculpatory evidence possessed by witness David Smollar (see generally Johnson v. Superior Court (1975) 15 Cal.3d 248; Penal Code section 939.71), was it still, nevertheless, a contravention of Penal Code section 939.7 (which provides that the grand jury "shall order" any "other evidence within its reach" that it has "reason to believe" will "explain away the charge") for one of the prosecutors to tell the grand jury, about Smollar, that "his testimony, his credibility or lack of credibility really is insignificant and not relevant to this case," particularly in light of the fact that the evidence before the grand jury was uncontradicted that Smollar was the individual who knew most about the preparation of the second list? (See reporter's transcript of grand jury proceedings, pages 1324-1325.) 2. The court notes that the perjury charge against petitioner McGill was based on the evidence of Barbara Thacker, given in 2007, many months after McGill had testified in August 2006. Was it therefore, in light of that time delay, a violation of Penal Code section 939.7 (which, as noted above, requires the grand jury to order any "other evidence" that it has reason to believe will "explain away" the charge) not to request Susan McGill to return to the grand jury so as to give her a chance to "explain away" the January 12, 2006 cover sheet and attached lists? (See reporter's transcript of grand jury proceedings, page 195.) 3. Is it a correct statement of law that, had the district attorney's office elected to proceed against McGill by information instead of grand jury indictment, defendant McGill would have had the opportunity, before a neutral magistrate, to (1) call David Smollar and ask him questions about the preparation of the January 12, 2006 cover sheet, (2) offer her own explanation as to her earlier grand jury testimony about that cover sheet and attached lists, and (3) have her credibility evaluated by that neutral magistrate who would have had the power to dismiss the perjury charge based on his or her own evaluation of McGill's explanation, or his or her evaluation of the relative credibility of her and Smollar? 4. Assuming that the statement in paragraph 3 above is a correct statement of law, was it a denial of either or both the equal protection clauses of the state or federal Constitutions, when read consistently with article 1, section 14.1 of the California Constitution [no right to "postindictment preliminary hearing" in cases of felony indictments]. not to have</p>
------------	------------------------------	---

		preliminary hearing" in cases of felony indictments], not to have given McGill the chance, before the grand jury, to have explained away the January 12, 2006 cover sheet, or to have called David Smollar? (See Cummiskey v. Superior Court (1992) 3 Cal.4th 1018, 1026-1027 [grand jury is functional equivalent of magistrate presiding over preliminary hearing].)
12/21/2010	Submission vacated by order.	CONTINUED 5. May the indictment of McGill be set aside on the ground that the prosecutor's telling the grand jury that anything David Smollar "might say or not say is not relevant to the crimes at this point" was misleading instructional error? (See People v. Gnass (2002) 101 Cal.App.4th 1271, 1313 ["an indictment may be set aside under Penal Code section 995, subdivision (a)(1)(B) 'based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney'"]; People v. Thorbourn (2004) 121 Cal.App.4th 1083, 1089 ["a grand jury indictee's due process rights might be violated if the grand jury proceedings are conducted in such a way as to compromise the grand jury's ability to act independently and impartially."]; see also People v. Superior Court (Mouchaourab) (2000) 78 Cal.App.4th 403, 428 [rejecting interpretation of Penal Code sections 938 and 938.1 that would "be inconsistent with a defendant's right to raise claims under sections 995, 939.71 and 939.6, on the basis that the district attorney failed to advise of exculpatory evidence or failed to advise as to the limited admissibility of evidence"].) Each party's supplemental briefing will be due on or before Monday, January 31, 2011. Each party may file a response to the other party's supplemental briefing on or before Monday, February 28, 2011. Neither document, absent leave of court, is to exceed 5,000 words. SILLS, P. J. WE CONCUR: RYLAARSDAM, J. MOORE, J.
01/28/2011	Supplemental brief filed by:	Real Party in Interest: The People Attorney: Office Of The District Attorney
01/31/2011	Supplemental brief filed by:	Petitioner: McGill, Susan Attorney: Kevin E. Gallagher
02/28/2011	Response filed to:	to the spb per order of 12/21/10 by DA.
02/28/2011	Response filed to:	by petitioner to spb per order of 12/21/10.
04/15/2011	Submission vacated by order.	Pursuant to California Rules of Court, rule 8.256(e)(1), submission of the above-entitled matter is hereby vacated in order for the parties to address four yes-or-no questions which the court has (and which do not require extended argument unless either of the parties desires such argument). The case will be resubmitted on Monday, May 2, 2011, the due date for the answers to these questions. Here are the questions (including, in two cases, the background behind the questions): 1. Background: On page 11 of the Return to Petition for Writ of Prohibition/Mandate filed by the district attorney's office on September 9, 2010, the statement is made that: "A month after petitioner testified before the grand jury, the prosecution came into possession of a memo ostensibly written by her to Superintendent Fleming on January 12, 2006." There are no

		<p>Superintendent Fleming on January 12, 2006." There are no record references, however, for this statement. On page 20 of the Petition of Defendant Susan McGill for Writ of Mandate/Prohibition and Appendix of Documents 14-19 received by this court on April 19, 2010 (and later formally filed on June 11, 2010), the statement is made that: "The chain of custody of the memo was unknown, except that it was found among David Smollar's things, evidently shortly after he had left the employ of the District." (Italics added.) The record reference given for this statement (pages 1165-1167 of the Reporter's Transcript, which is the testimony of Thacker) recounts the statement of Thacker that Kathy Gorgen told Thacker that indeed "she [Gorgen] found a list in David Smollar's things." (RT 1167.) Later, on page 13 of the Reply of Defendant-Petitioner Susan McGill to People's Return to Petition for Writ of Prohibition/Mandate, filed September 27, 2010, there is a statement that "Even in August 2006, when the list or lists of names and the spreadsheet or spreadsheets were found in David Smollar's vacated office by Kathy Gorgen . . ." (Italics added.) The record reference given for this statement (pages 1200-1202 of the Reporter's Transcript), however (unless somehow the court has missed or misread something), contains no references to the memo being found in Smollar's "office." The question is: Is there any place in the record in this writ proceeding where the grand jury was informed, either by one of prosecutors directly or by way of the evidence presented, that the January 12, 2006 memo was found in Smollar's office? (The court is aware of Thacker's testimony mentioned above about the memo being found in Smollar's "things" and of other testimony (on page 1210 of the Reporter's Transcript) to the effect that the memo was found in Smollar's "file.") 2. No background needed: Was the district attorney's office ever aware, at any time prior to the May 14, 2007 indictment of McGill, that the January 12, 2006 memo was found in Smollar's office (as distinct from "things" or "files")? 3. No background needed: Assuming arguendo that the district attorney's office was aware of the fact that the January 12, 2006 memo was indeed found in Smollar's office, was the grand jury ever informed of that specific fact? 4. Background: On pages 1312-1313 of the Reporter's Transcript, the prosecutor, addressing the grand jury, makes reference to "the grand jury instructions," which appears to be a reference to a specific written document. However, unless the court has somehow missed it, does not appear to be in the record. The question is: Assuming that this document is not otherwise in the record but nevertheless exists, is there any reason the court should not review it in the context of deciding this writ proceeding? Each party's answer to these four questions is due on or before Monday, May 2, 2011. Parties may include as much (or as little) elaboration on their answers as they would like.</p> <p>Sills/Rylaarsdam/ Moore</p>
04/28/2011	Supplemental brief filed by:	<p>Real Party in Interest: The People Attorney: Office Of The District Attorney Attorney: Office Of The State Attorney General</p>

05/02/2011	Supplemental brief filed by:	Petitioner: McGill, Susan Attorney: Kevin E. Gallagher
05/02/2011	Request for judicial notice filed.	by petitioner: for judicial notice of grand jury instructions
05/02/2011	Request for judicial notice filed.	by petitioner for judicial notice of search warrant etc
05/04/2011	Submission vacated by order.	<p>On May 2, 2011, this court received a request for judicial notice from petitioner Susan McGill that this court take judicial notice of the affidavit, submitted under penalty of perjury, of Lou Gutierrez, employed as a Supervising Investigator for the Orange County District Attorney's Office, Bureau of Investigation, and supervisor of the "Felony Unit Panel at the Central Justice Center." The affidavit was dated August 11, 2006, and was "[r]eviewed" by Michael Lubinski, Assistant District Attorney on that date. The court notes that Mr. Lubinski was one of the deputy prosecutors who conducted the grand jury hearing that resulted in the indictment against McGill. The affidavit was subsequently sealed by Judge Robert R. Fitzgerald by order dated August 11, 2006 and filed August 18, 2006. (According to the request for judicial notice, the affidavit was produced by the Orange County District Attorney's Office "in discovery," though precisely when the affidavit was produced is not specified in the supporting declaration.) In context, the affidavit was the basis on which the offices of the Capistrano Unified School District were searched pursuant to a search warrant. The date of the affidavit was less than six days prior to the day (August 16, 2006) that the Orange County Grand Jury commenced to hear testimony in its investigation of Superintendent James Fleming, which investigation resulted in the indictment of Assistant Superintendent Susan McGill for perjury, the same indictment which is the subject of this petition. On its face, Investigator Gutierrez's affidavit contains a statement which would appear to indicate that at least some persons employed by the Orange County District Attorney's Office possessed evidence from witness David Smollar which was directly exculpatory of the perjury charge currently pending against Susan McGill. In particular, Gutierrez's affidavit states, on pages OCDA004532-33, that, during an interview conducted July 12, 2006, David Smollar stated to Gutierrez the following with regard to the visit McGill and Smollar made to the Registrar's Office: "there was an enormous amount of information, and he [Smollar] was not sure what to collect. Smollar said he and McGill noticed there were consistent names of petition signature gatherers. McGill told Smollar to write those names down and generate a list (see attachment H) to give to Fleming. Smollar provided me the original hand written list. Smollar wrote each name by hand, and he said he brought that list back to his CUSD office. Smollar later transferred the list of names into a computer and generated a final list for Fleming (see attachment I). Smollar provided me with a copy of the clean list copy he gave to Fleming." (Italics added; original bolding deleted.) We note that the attachment H mentioned in the affidavit consists of two pages of hand written</p>

		<p>mentioned in the affidavit consists of two pages of hand written names with, in most cases, initials such as "SJC" and "MV" by them, and all done in what appears to be the same handwriting. We also note that attachment I also mentioned in the affidavit is a typed version of two lists of names both of which appear to have been attached to the January 12, 2006 memo which is central to the perjury case against McGill.</p>
05/04/2011	Order filed.	<p>(Continue) Investigator Gutierrez's recount of his interview with Smollar thus shows that Gutierrez was in possession of evidence that showed: (1) Smollar wrote down the names and brought the list back to his own office; (2) Smollar himself transferred the list to a computer and then generated a final list, which appears to have been part of the attachments to the January 12, 2006 memo ostensibly from McGill to Fleming, the same memo that forms the core of the perjury case against McGill, and (3) Smollar himself provided a copy of a "clean list" that he -- Smollar -- gave to Fleming. This evidence appears to be exculpatory in that it tends to show: (a) McGill may indeed not have prepared the memo that became the basis of the perjury charge against her; and (b) McGill, having told Smollar to generate a list and having also told Smollar to give that list to Fleming, could truthfully say she never gave any "report" to Fleming herself; and further (c) McGill could easily have forgotten any role she played in the preparation of the January 12, 2006 memo because most of the work was done by Smollar. Throughout this appellate proceeding, the briefing from the Orange County District Attorney's Office has consistently maintained that the district attorney's office was not aware that Smollar possessed any exculpatory evidence, hence it has contended there was no necessity under Penal Code sections 939.7 or 939.71 to present his testimony to the grand jury. Specifically: -- On page 31 of the Return to Petition for Writ of Mandate, filed in this Court by the district attorney's office on September 9, 2010, the statement is made: "Finally, there is no indication that Smollar's testimony would have been exculpatory vis a vis petitioner [McGill]. At best, he might have testified that petitioner did not personally write down any signature-gatherer names." -- On page 7 of Real Party in Interest's Supplemental Brief re: Petition for Writ of Prohibition/Mandate filed in this Court by the district attorney's office January 28, 2011, the statement is made: "While the evidence did establish that Smollar was instrumental in writing down the names of the recall petition signature gatherers at the Registrar's Office, there was no evidence that he participated in or was aware of the creation of the typed lists by McGill's secretary, Barbara Thacker, which were the lists attached to McGill's January 12 memo to Fleming." (Italics added.) -- On pages 1-2 of Real Party in Interest's Answer to Petitioner's Supplemental [Brief] filed in this Court by the district attorney's office on February 28, 2011, the statement is made: "Not surprisingly, McGill argues the prosecutor's statement to the grand jury that '[David Smollar's] testimony, his credibility or lack of credibility really is insignificant and not relevant to this case,' contravened Penal Code section 939.7, even though the prosecution had no knowledge that Smollar</p>

		<p>even though the prosecution had no knowledge that Smollar possessed any specific exculpatory evidence." (Italics added.) Assuming that this court were to grant McGill's request for judicial notice of Investigator Gutierrez's affidavit, it would thus appear that members of the Orange County District Attorney's Office have deliberately tried to mislead this court by affirmatively stating that the office was not aware that Smollar possessed any exculpatory evidence when, in point of fact, the office's own investigator was aware of the items of exculpatory evidence mentioned above. (See Bus. & Prof. Code, ? 6068, subd. (d) ["It is the duty of an attorney to do all of the following: . . . [?] (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.")</p>
05/04/2011	Order filed.	<p>(Continue) It would also appear that the statement made to the grand jury that anything which Smollar even "might" say was irrelevant was itself a false statement made to the grand jury. Again, however, we emphasize the tentative nature of what the facts in this case now appear to be. This Court believes that fundamental fairness and due process require that the district attorney's office be given the opportunity to "explain away" what appears, at least on first blush, to be a pretty damning case of hiding exculpatory evidence from the grand jury, then the trial court, and finally this Court. We fully recognize that a statement, apparently incorrect on its face, may be explained away if the maker of the statement is given the chance to explain why he or she made the statement. This court is reluctant to come to the conclusion that prosecutorial misconduct has occurred in this case and hopes that the district attorney's office can give us an explanation which will absolve the relevant members of the district attorney's office of any taint of misconduct. Accordingly, pursuant to California Rules of Court, rule 8.256(e)(1), submission of this matter is hereby postponed to give each party the opportunity to submit supplemental briefing by May 17, 2010, in answer to the following questions: 1. Is there any reason this court should not take judicial notice of Investigator Gutierrez's affidavit, particularly in light of its relevance to the question of whether the district attorney's office was aware that Smollar possessed any evidence that would be exculpatory of McGill? 2. Is there any explanation as to why the Orange County District Attorney's Office has consistently maintained that it was unaware that Smollar possessed any evidence that would be exculpatory of McGill in light of the fact of Investigator Gutierrez's affidavit and the apparent "review" of it by one of the prosecutors who conducted the grand jury investigation? 3. Assuming that there is no satisfactory reason to explain the failure of at least one of the prosecutors who conducted the grand jury investigation in this case to present the evidence in Investigator Gutierrez's affidavit to the grand jurors, or no satisfactory explanation for the representations made by the Orange County District Attorney's Office that the office was not aware that Smollar possessed any exculpatory evidence, is this an appropriate case for the imposition of some sort of</p>

		<p>this an appropriate case for the imposition of some sort of sanctions against the Orange County District Attorney's Office? (See generally Los Angeles County Dept. of Children etc. Services v. Superior Court (1995) 37 Cal.App.4th 439.) Notwithstanding the previous order of this court contemplating resubmission of this case on May 2, 2011, resubmission is hereby delayed until May 17, 2011, the due date for the answers to the Court's questions.</p>
--	--	---