



November 4, 2021

Summer Stephan  
San Diego County District Attorney  
330 W. Broadway  
San Diego, CA 92101

**Re: Criminal activities of Border Patrol agents to obstruct an SDPD homicide investigation and recommendations for charges.**

Dear Ms. Stephan,

We write on behalf of Maria Puga, the widow of Anastasio Hernández Rojas and mother of his five children. She respectfully requests the San Diego County District Attorney's Office pursue charges against Border Patrol agents who obstructed justice in the homicide investigation of Anastasio conducted by the San Diego Police Department (SDPD). The agents involved in the obstruction were part of and oversaw a Critical Incident Investigative Team (CIIT).

In the last year and especially in the last several months, new evidence has come to light that points to significant interference by CIIT in the SDPD investigation of Anastasio's death. Last week these teams were exposed for operating without any investigative authority and impeding the SDPD homicide investigation.<sup>1</sup> Your office has a critical role to play in protecting the integrity of local law enforcement investigations. This includes protecting investigations from unlawful interference by Border Patrol CIIT agents and the chiefs who direct them. Because they are acting without any authority to investigate agents involved in use-of-force incidents and they impeded SDPD's investigation, they are subject to state criminal charges.

Public safety depends on public trust in law enforcement. There can be no trust if there is no accountability. The new revelations warrant your consideration of criminal charges against the CIIT agents and those who directed them for preparing false evidence (PC 134), offering false evidence (PC 132), destroying and/or concealing evidence (PC 135), tampering with witnesses (PC 136.1), and engaging in a conspiracy to obstruct justice (PC 182(a)(5)).

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<sup>1</sup> See SBCC Letter to Congress, October 27, 2021, [https://d3n8a8pro7vnm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC\\_letter\\_to\\_Congress\\_Final\\_10.27.21.pdf?1635367319](https://d3n8a8pro7vnm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC_letter_to_Congress_Final_10.27.21.pdf?1635367319).

## I. Incident background and new revelations in 2020-21.

On May 28, 2010, Anastasio, a longtime resident of San Diego and father of five U.S. citizen children, was brutalized by border agents after asking for medical attention for his ankle that agents had injured while processing him for removal. Although he had lived in San Diego for most of his life, Anastasio had no documents to remain in the United States and no pathway to obtain them. Agents denied him medical attention and then drove him to the San Ysidro Port of Entry to remove him. It is there that they brutalized him in front of eyewitnesses. They “hogtied him, dragged him, beat him with batons, punches and kicks, stood and kneeled on his body against the ground, and tasered him repeatedly for extended lapses of time, even after he had become unresponsive, thus causing his death.”<sup>2</sup> SDPD investigated the incident as a homicide.<sup>3</sup>

SDPD concluded its investigation in July 2010 and the case was forwarded to the U.S. Attorney’s Office for review.<sup>4</sup> The case was under review for seven years, during which time new eyewitness video was revealed that upended the account of the incident that had been described by border agents.<sup>5</sup> Border agents had initially described Anastasio as aggressive, standing and kicking an agent, but the video revealed he was actually handcuffed and lying face down on the ground surrounded by a dozen agents who ended his life.

The video of Anastasio’s death sparked public outcry and congressional action calling for an audit of CBP’s use-of-force policies.<sup>6</sup> The Office of Inspector General commissioned an audit by the Police Executive Research Forum (PERF), which published their findings in 2014.<sup>7</sup> In their report, PERF noted that the 2010 CBP Use of Force Policy Handbook, which was not publicly available, made reference to a “Critical Incident Team (CIT) that may initiate a *parallel* investigation into an incident.”<sup>8</sup> The PERF report stated, “There is no other definition or description of a CIT,” and recommended, “[s]uch information should be added to the Handbook.”<sup>9</sup> Although the Handbook was updated as a result of the audit and subsequently made public, the reference to CITs disappeared.

It was not known then that a Border Patrol Critical Incident Team, such as the one referred to in the 2014 PERF report, had run a parallel investigation in the case of Anastasio Hernández Rojas. The family sought criminal charges from the Department of Justice without this knowledge. Seven years after the incident, the Department of Justice decided not to prosecute and issued a statement detailing the evidence they reviewed in coming to that decision.<sup>10</sup> The evidence listed did not include the CIIT report that has recently come to light.

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<sup>2</sup> See IACHR, Report No. 198/20. Petition P-524-16. Admissibility. Anastasio Hernández Rojas and family. United States of America. July 23, 2020. <https://www.oas.org/en/iachr/decisions/2020/usad524-16en.pdf>.

<sup>3</sup> See SDPD Investigation, <https://www.dropbox.com/sh/4r5dzamxq8fjzon/AA8mConSjaFosUR6BRgh88UJa?dl=0&preview=Exhibit+B+-+San+Diego+Police+Department+Police+Investigation.pdf>.

<sup>4</sup> *Id.* at 15-19.

<sup>5</sup> See, e.g., [https://www.democracynow.org/2012/4/24/death\\_on\\_the\\_border\\_shocking\\_video](https://www.democracynow.org/2012/4/24/death_on_the_border_shocking_video).

<sup>6</sup> See for example, <https://www.typeinvestigations.org/blog/2012/10/19/story-sparks-oig-investigation/>.

<sup>7</sup> See PERF audit recommendations, <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

<sup>8</sup> *Id.* at 14.

<sup>9</sup> *Ibid.*

<sup>10</sup> See <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-herandez-rojas>.

Despite eyewitness video, the Department of Justice declined to prosecute the agents based on the available evidence.<sup>11</sup> When no criminal charges were brought, the family petitioned the Inter-American Commission on Human Rights (IACHR), which accepted review of the case on July 23, 2020.<sup>12</sup> The case is currently pending and is the first-ever probe of an extrajudicial killing by law enforcement in the United States.

In preparation for arguments in the case, Alliance San Diego and the UC Berkeley International Human Rights Clinic, who represent Anastasio's family before the IACHR, gathered declarations of high-level officials including the former Customs and Border Protection Assistant Commissioner for Internal Affairs, James Tomsheck, and the Deputy Assistant Commissioner, James Wong.<sup>13</sup> In these declarations, Tomsheck and Wong described the activities by Border Patrol to unlawfully interfere with the local police investigation of Anastasio's death. This led counsel to review the SDPD investigative record and other records gathered.

In reviewing the SDPD investigative record over the last year, counsel learned that members of the Border Patrol's CIIT were present throughout the SDPD investigation. Upon inspection of the record, it appears that the CIIT interfered with the SDPD investigation to withhold and destroy evidence. In the last month, we were able to view the CIIT report prepared in parallel to the SDPD report, which does not appear to ever have been given to SDPD. In comparing the two reports, we found that the CIIT altered government documents, actively interfered with the investigation, and withheld critical information from SDPD. Their actions constitute obstruction of justice that should be prosecuted under state law.

## **II. Record of Border Patrol CIIT obstruction in SDPD investigation.**

The Border Patrol CIIT engaged in at least seven consequential acts to obstruct justice in the SDPD homicide investigation of Anastasio's killing. Each of these acts compromised the integrity of the investigation and undermined the attempts of SDPD to gather the facts:

1. The Border Patrol CIIT was the first to be notified of the incident at the San Ysidro Port of Entry,<sup>14</sup> but they *never* notified SDPD, the agency with jurisdiction to conduct the criminal investigation as their own policy and the law mandated. Instead, they contacted the FBI and asked them to charge Anastasio with assault while he lay brain dead in the hospital.<sup>15</sup> The FBI declined. SDPD only became aware of the incident through a media inquiry and located the scene of the incident on their own a

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<sup>11</sup> *Ibid.*

<sup>12</sup> See IACHR, Report No. 198/20. Petition P-524-16. Admissibility. Anastasio Hernández Rojas and family. United States of America. July 23, 2020. <https://www.oas.org/en/iachr/decisions/2020/usad524-16en.pdf>.

<sup>13</sup> Additional Observations on Merits submitted to the Inter-American Commission on Human Rights in the case of Anastasio Hernandez Rojas, Case No. 14.0-42, January 27, 2021, Exhibits D and E, [https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/3138/attachments/original/1612382773/Additional\\_Observations\\_on\\_Merits\\_Case\\_14042\\_Exhibits.pdf?1612382773](https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/3138/attachments/original/1612382773/Additional_Observations_on_Merits_Case_14042_Exhibits.pdf?1612382773).

<sup>14</sup> See SDPD Investigation, at 489, <https://www.dropbox.com/sh/4r5dzamxq8fizon/AABmConSjaFosUR6BRqh88Ula?dl=0&preview=Exhibit+B+-+San+Diego+Police+Department+Police+Investigation.pdf>.

<sup>15</sup> *Id.* at 10.

day later, without help from the CIIT or other border agents.<sup>16</sup> CIIT had control over the scene for nearly 15 hours prior to SDPD's arrival.<sup>17</sup> By CIIT not immediately informing SDPD of the incident, police investigators were unable to immediately interview witnesses and agents and investigate the scene of the crime.

2. Despite having no authority to investigate, the CIIT was identified in a situation report prepared by Border Patrol as "coordinating the investigation" with SDPD and other components of DHS.<sup>18</sup> The CIIT participated in incident briefings, controlled the witness lists of border agents for police investigators, and were present at police interviews of witnesses, including agents.<sup>19</sup> The CIIT members even asked questions of witnesses like Anastasio's brother.<sup>20</sup> Members of the CIIT were also present at the hospital where Anastasio was brought and at the autopsy, where CIIT members took pictures for their own purposes.<sup>21</sup> Their presence at each of these critical phases prohibited witnesses and agents from speaking openly about what happened. It also gave CIIT an opportunity to handle and mishandle evidence and spin the narrative as they saw fit to decrease the liability of Border Patrol.

3. The CIIT tampered with evidence. Specifically, they altered the I-213 Border Patrol apprehension report, removing the narrative of the border agent who first came into contact with Anastasio, before giving the report to SDPD.<sup>22</sup> The narrative indicated that Anastasio was compliant, and it did not indicate any agent concerns. If the narrative was included in the I-213 given to police, it would have contradicted subsequent statements agents made to police investigators painting a picture of an erratic and problematic Anastasio.<sup>23</sup> The latter fed into a narrative that he was aggressive, non compliant, and on drugs. This narrative contradicted other initial testimony given by processing agents and Anastasio's brother emphatically stating he was not on drugs. The narrative they created was with the specific intent to exculpate Border Patrol agents. As such, no adverse actions were taken against the agents who killed Anastasio.

4. Soon after Anastasio arrived at the hospital and before SDPD became aware of the case, the CIIT agent talked to the attending doctor and asked him to take a blood

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<sup>16</sup> *Id.* at 335.

<sup>17</sup> *Id.* at 489.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 169-176, 191-204, 217-222, 227-229, 232-234, 248-250, 261-267, 269-273, 309-311, 315-316, 476.

<sup>20</sup> *Id.* at 249.

<sup>21</sup> *Id.* at 315; County of San Diego Autopsy Report,

<https://www.dropbox.com/sh/4r5dzamxq8fjzon/AABmConSjaFosUR6BRgh88UJa?dl=0&preview=Exhibit+C+-+County+of+San+Diego+Autopsy+Report.pdf>.

<sup>22</sup> The original version of the I-213 contains a narrative from Border Patrol agent Nicholas Austin that recounts his encounter with Anastasio Hernández Rojas, and states that he responded to his questions. The narrative does not express any concerns or problems. The I-213 with the narrative appears in the CIIT report for Case# 100528F1 CHU, which was acquired by journalist John Carlos Frey. It is under a protective order. It cannot be shared as an exhibit, but it could be subpoenaed. The version of the I-213 without the narrative is included in the SDPD Investigation, at 487.

<sup>23</sup> See SDPD interview with BP agent Nicholas Austin, SDPD Investigation, at 169. Note that CIIT member Victor Garcia was also present at the interview.

sample to test for drugs.<sup>24</sup> CIIT has no legal authority to direct or request anything from hospital staff. Hospital records show that the hospital did take a blood sample, but the records do not show any results.<sup>25</sup> The one blood test for which the hospital records do show results state there were “no drugs detected.”<sup>26</sup> The Medical Examiner relied on a different blood sample, one that does not correspond to any blood drawn in the hospital records and has no chain of custody, to determine that Anastasio had meth in his body.<sup>27</sup> It was this determination that led the Justice Department to decline to prosecute for murder.<sup>28</sup> As such, nobody was held responsible for Anastasio’s death. This raises serious questions about CIIT interference.

5. In a blatant effort to obstruct justice, the CIIT also “served an administrative immigration subpoena” on the hospital for Anastasio’s medical records and then “refused to provide SDPD investigators with a copy of the records.”<sup>29</sup> Use of an administrative immigration subpoena for a criminal homicide investigation is inappropriate at best, and doing so to delay an authorized investigative agency from obtaining it may constitute grounds for prosecution.<sup>30</sup> The subpoena was prepared at the direction of the U.S. Border Patrol Chief Michael Fisher<sup>31</sup> and would have been overseen, if not signed, by the acting chief of the San Diego sector at the time, Rodney Scott.<sup>32</sup> These actions directly interfered with SDPD’s acquisition of evidence in this case.

6. Additionally, the CIIT failed to preserve video evidence. Over several weeks, in an act of deliberate omission that led to the destruction of evidence, CIIT members repeatedly withheld video surveillance footage requested from SDPD and instead gave SDPD footage that did not pertain to the incident, while allowing the requested footage to be erased and taped over.<sup>33</sup> According to the record, the footage was sent to Sector Command soon after the incident and then given to the CIIT.<sup>34</sup> When SDPD

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<sup>24</sup> Statement of Joe Vaiasuso included in the CIIT report for Case# 100528F1.CHU, acquired by journalist John Carlos Frey, which is not included as an exhibit because it is under a protective order, but it could be subpoenaed. See also SDPD Investigation, at 26, discussing Vaiasuso’s presence at the hospital and his collection of evidence, including the taser probes removed from Anastasio’s body. The probes were given to SDPD in an unsealed bag the next day without an established chain of custody. *Id.* at 116.

<sup>25</sup> The hospital ordered blood drawn for a drug screen on May 28, 2010, at 23:46. See SDPD Investigation, at 647. The blood was drawn at 23:50. *Id.* at 584.

<sup>26</sup> *Id.* at 589.

<sup>27</sup> The toxicology test that the Medical Examiner used to determine that Anastasio had meth in his system is based on two blood draws at 22:19 and 23:19 on May 28, 2010. See Autopsy Report at 18. The hospital does not show a draw at 22:19, but it shows a draw at 22:20, which it determined to be an unacceptable specimen. See SDPD Investigation, at 588. The hospital shows no record of a draw at 23:19; the next draw was at 23:50. *Id.* at 574.

<sup>28</sup> See <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-herandez-rojas>.

<sup>29</sup> “Citing HIPAA regulations and their department policy, Border Patrol refused to provide investigators with a copy of the records.” SDPD Investigation, at 19.

<sup>30</sup> See Additional Observations, IACHR Case No. 14.0-42, Exhibits D, at paragraph 32, and E, at paragraph 84. It could also constitute a violation of the 4th Amendment. Under the Fourth Amendment’s reasonable requirement standard for administrative subpoenas; an immigration subpoena may not be overbroad in scope, irrelevant and improper in purpose. See *v. City of Seattle*, 387 U.S. 541, 544 (1967).

<sup>31</sup> See Additional Observations, IACHR Case No. 14.0-42, Exhibit E, at 20.

<sup>32</sup> Although reference to the subpoena is made in the SDPD investigators report, the subpoena itself on form I-138 is not in the record. It could be subpoenaed to confirm who authorized it.

<sup>33</sup> See SDPD Investigation, at 459-462, 466-470.

<sup>34</sup> *Id.* at 468.

requested it, the CIIT gave them the wrong hour of footage, then denied having any additional footage, ultimately indicating it had been recycled.<sup>35</sup> SDPD investigators sought the video because it “could potentially identify additional witnesses.”<sup>36</sup>

7. Finally, the CIIT appears to have withheld the parallel report it created, which included witness statements, CIIT member reports, photos and other evidence. Specifically, the CIIT prepared a 160-page incident report.<sup>37</sup> Though never shared with SDPD, it was shared with the attorneys who defended border agents. It does not appear to have been part of the record that prosecutors reviewed. As a result of CIIT withholding information from SDPD, decisions were made about how to move forward with the case based on incomplete information. This happened despite Border Patrol’s stance that they were coordinating the investigation for SDPD. They were not, they were running a parallel investigation for their own purposes — to protect agents and the agency from civil liability.

These are the revelations evident in the available documents. There may be additional revelations of problematic CIIT activity in their internal records and/or in their communication with the Border Patrol chiefs who directed their activity. It is not evident that SDPD scrutinized any obstruction of justice. But the harm was done — a family was left without justice, a community was left without answers, and the public continues to be at risk of abuse covered up by the CIIT.

Instead of the CIIT being scrutinized for their unauthorized, problematic, and potentially criminal involvement in the homicide investigation, members of the San Diego CIIT and the acting chief who oversaw them were rewarded and promoted into positions of power. The most notable among them is Rodney Scott who went on to become the U.S. Border Patrol Chief with oversight of the CIIT throughout the country.

The role that the CIIT played in the Anastasio case was not isolated. Rather, it was part of a system of impunity that has rarely, if ever, been questioned. The case examining Anastasio’s death that is pending before the Inter-American Commission on Human Rights is expected to go to a hearing in 2022. Border Patrol’s coverup teams have drawn the attention of the international community and their actions compel examination inside the United States. Congress is being asked to investigate their dangerous record of overreach and obstruction.

Your office also has a responsibility to hold accountable those involved in the cover up of Anastasio’s killing. This includes the CIIT agents whose actions interfered with the SDPD investigation and it should also include the supervisors and chiefs that directed them.

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<sup>35</sup> *Id.* at 466-468.

<sup>36</sup> *Id.* at 467.

<sup>37</sup> See Declaration of Richard Tolles in Support of Motion for Stay at 2. The missing report is Case# 100528F1.CHU, <https://www.dropbox.com/sh/4r5dzamxq8fjzon/AABmConSjaFosUR6BRqh88Ula?dl=0&preview=Exhibit+D+-+Declaration+of+Richard+Tolles+in+Support+of+Motion+for+Stay.pdf>.

### III. Border Patrol can be charged under state law by your office

States can prosecute federal agents for state crimes. Agents are not sheltered from state prosecution unless their actions were within the lawful scope of their duties and it was necessary and proper for them to carry out those actions.<sup>38</sup> If the facts are in dispute, the state has the responsibility and the authority to fully investigate and prosecute if warranted.<sup>39</sup> Border Patrol CIIT investigative activities in the investigation of Anastasio's death go beyond the scope of their authority, and their obstruction of justice was neither necessary or proper.

a. **Border Patrol agents had no authority to interfere with the San Diego Police Department's investigation into the killing of Anastasio.**

Federal agents are only shielded from state prosecution if they are acting within their official duties and those duties are lawful.<sup>40</sup> If agents act recklessly they are not considered to be acting within the scope of their authority.<sup>41</sup> Here, the CIIT agents worked intentionally and/or recklessly beyond the scope of authority given to Border Patrol agents.

Federal law explicitly lays out which federal agencies have authority to conduct criminal investigations. Congress grants authority to conduct investigations of misconduct, including excessive use of force by border agents, to specific government agencies — the Federal Bureau of Investigations (FBI),<sup>42</sup> the Department of Homeland Security Office of Inspector General (OIG),<sup>43</sup> and in limited circumstances the CBP Office of Professional Responsibility (OPR).<sup>44</sup> Nowhere in federal law does Congress grant that authority to Border Patrol or any component thereof, including Border Patrol's CIIT. Border Patrol's authority is limited by statute to the interdiction of people and goods entering illegally between the ports of entry.<sup>45</sup>

While the Border Patrol CIIT has stated at times that it has authority delegated from one of the above agencies, such as OPR, it has not shown any evidence of formal delegation or deputization. OPR investigators are classified separately in the federal government with different job duties, different training, and different supervision. Informal collaboration is not enough to confer investigative authority, especially the authority to investigate an agency's own agents, which is counter to policing best practices. Keep in mind that CIIT is not an Internal Affairs unit, nor is it an authorized investigative unit. It simply has no authority to be involved.

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<sup>38</sup> See *In re Reagle* 135 U.S. 1, 75 (1890)

<sup>39</sup> *Drury v. Lewis* 200 US 1, 8 (1906) (Did not grant the habeas petition to the defendant because the state had authority to try the disputed facts about whether the victim surrendered prior to being shot).

<sup>40</sup> *Idaho v. Horiuchi*, 253 F.3d 359, 381 (9th Cir.) (en banc) (Hawkins, dissenting), vacated as moot, 266 F.3d 979 (9th Cir.2001). See also *Clifton v. Cox*, 549 F.2d 722, 726 (9th Cir.1977) - Court held that while he may have exceeded his express authority to shoot in that circumstance, he did have authority to shoot a gun and thus was granted immunity

<sup>41</sup> *Id.* at 727 n.9 (9th Cir.1977) (quoting *In re Fair*, 100 F. 149, 155 (D. Neb. 1900).

<sup>42</sup> See 28 U.S.C. § 535(a).

<sup>43</sup> See 5a U.S.C. §§ 4(a), 6(f), 8l(c).

<sup>44</sup> See 6 U.S.C. § 211(j). See also 2004 DHS Management Directive 0810.1, stating that OIG has the right of first refusal and that OPR should not investigate until OIG declines / passes.

<https://www.oig.dhs.gov/sites/default/files/0810.1%20The%20Office%20of%20Inspector%20General.pdf>.

<sup>45</sup> 6 U.S.C. § 211(e)(3),

In the case of Anastasio, Border Patrol's authority was limited to the apprehension of Anastasio, but no component of Border Patrol had the authority to investigate its own agents for their excessive use of force in this case, which included hog-tying, beating and tasing him to death. What ensued after is particularly concerning. Rather than reporting the incident to SDPD, which has territorial jurisdiction to investigate what happened, the CIIT withheld the information. It is unknown what happened during the 15 hours that CIIT had exclusive control over the scene.

From the start of this case, CIIT interfered every step of the way with SDPD's legitimate investigation. Given that CIIT has no legal authority to investigate, anything they did in conjunction with an investigation is outside the scope of their authority. Even if Border Patrol agents had authority to conduct an investigation, which they did not, their actions were beyond what was necessary or proper.

**b. CIIT's destruction and withholding of evidence, doctoring reports, mishandling of evidence and witness tampering is beyond what is necessary or proper for any investigation.**

Where a federal agent is operating with lawful authority, their actions still have to be both subjectively and objectively necessary and proper to be shielded from state criminal prosecution.<sup>46</sup> The federal agent must have had an honest belief that the actions were authorized, and that belief must have been objectively reasonable under the circumstances.<sup>47</sup>

SDPD was the local agency authorized to investigate the death of Anastasio. However, from the outset, Border Patrol CIIT interfered with the investigation. Not only did they fail to contact SDPD about Anastasio's death, they continued a parallel investigation that undermined SDPD's homicide investigation.

The CIIT participation in incident briefings, interviews of witnesses and their presence at the hospital and during the autopsy was entirely inappropriate since it was their coworkers who were under investigation. Additionally, there is no reasonable explanation for the destruction of video footage and altering documents including the I-213 Border Patrol apprehension report prior to turning it over to SDPD.

These actions cannot be considered as necessary and proper for carrying out their duties to interdict people and goods from entering illegally between the ports of entry.

#### **IV. Possible Charges**

In light of the role of the Border Patrol CIIT in depriving the family of Anastasio Hernández Rojas a legitimate investigation, the family requests that you consider charging these agents and

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<sup>46</sup> of *Kentucky v. Long*, 837 F.2d 727 at 745 (7th Cir. 1988).

<sup>47</sup> *Id.*

those they took direction from for their obstruction of justice. Newly discovered information gives your office authority to pursue prosecution now.<sup>48</sup>

Your investigation should begin with the Border Patrol CIIT agents identified in the SDPD Investigation report. They include Supervisory Border Patrol Agent Armando Gonzalez, Senior Patrol Agent Victor Garcia, Senior Patrol Agent Joe Vaiasuso, Border Patrol Agent Wendi Lee, and Border Patrol Agent Mike Mannen. These agents worked under the direction of then Acting San Diego Chief Rodney Scott, US Border Patrol Chief Mike Fisher, and CBP Deputy Commissioner David Aguilar, who should also be considered for possible charges.

**a. Preparing False Evidence (PC 134)**

CIIT agents and those who directed them could potentially be charged with the preparation of false documentation with the intent to produce it or allow it to be produced as truthful with the purpose to defraud or deceive. There is at least one instance where this charge may be applicable.

The evidence indicates that CIIT altered the I-213 Border Patrol apprehension report before it was turned over to SDPD. Specifically, the narrative by the apprehending border agent who first came into contact with Anastasio was completely missing.<sup>49</sup> The deleted narrative indicated Anastasio was compliant and the agent didn't have any concerns.<sup>50</sup> The deletion of this portion of the document might have been done with the intent of omitting any evidence that contradicted the narrative that Anastasio was combative and on drugs.

While it is unclear which agents were responsible for deleting the narrative, the District Attorney should fully investigate and consider charging those involved. The tampering with a government document, especially one used for a homicide investigation should not be considered lightly.

**b. Offering False Evidence (PC 132)**

CIIT agents and those who directed them could also potentially be charged with offering false evidence if during the investigation they provided documents or records they knew to be altered or false.<sup>51</sup> Agents offered an altered I-213 and false video footage.

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<sup>48</sup> See PC 803(c) a limitation on time prescribed...does not commence until discovery of [the] offense...where misconduct was done by a public officer

<sup>49</sup> The original version of the I-213 contains a narrative from Border Patrol agent Nicholas Austin that recounts his encounter with Anastasio and states that he responded to his questions. The narrative does not express any concerns or problems. The original narrative appears in the CIIT report for Case# 100528F1 CHU, which was acquired by journalist John Carlos Frey and is under protective order. It cannot be shared as an exhibit, but it could be subpoenaed by Congress. The version of the I-213 without the narrative is included in the <https://www.dropbox.com/sh/4r5dzamxq8fjzon/AAmConSjaFosUR6BRgh88UJa?dl=0&preview=Exhibit+B+-+San+Diego+Police+Department+Police+Investigation.pdf> on page 487.

<sup>50</sup> *Id.*

<sup>51</sup> See *People v. Pereira*, 207 Cal. App. 3d 1057, 1065 (Ct. App. 1989) Court found the individual guilty of offering false evidence when he submitted fraudulent documents to an investigative body.

As discussed above, the CIIT provided SDPD with an I-213 Border Patrol apprehension report without the narrative of the border agent who first came into contact with Anastasio.<sup>52</sup> The CIIT agent, supervisor, or chief who prepared, authorized and/or delivered the I-213 to SDPD either knew or should have known the narrative portion of the report was missing or removed.

In addition, Senior Patrol Agent Victor Garcia provided video footage to SDPD from the surveillance cameras.<sup>53</sup> However, SDPD Detective Collins observed that the lighting in the surveillance did not correspond with the time stamp on the film.<sup>54</sup> Despite Detective Collins immediately drawing Agent Garcia's attention to the error, Garcia was unable to provide the correct video footage.<sup>55</sup> Garcia later stated that if there was an error CBP would know about it, not Border Patrol.<sup>56</sup> But it was the CIIT that oversaw the movement of the video.

Prior to SDPD receiving a copy of the video it changed hands at least 3 times according to police records.<sup>57</sup> Border Patrol Agent Mark Weidman pulled the surveillance video, sent it to Sector command who then sent it to CIIT Senior Patrol Agent Victor Garcia.<sup>58</sup> The CIIT agents, supervisors and chiefs involved in providing the video footage to SDPD either knew or should have known that the timestamp on the video was incorrect as there was no footage of the incidents that ensued.

Both of these actions might have been done with the intent to undermine SDPD's lawful investigation and exculpate Border Patrol agents in the murder of Anastasio. Your office should consider bringing charges against CIIT agents involved and those who may have directed or worked in concert with them.

**c. Destroying and/or Concealing Evidence (PC Section 135)**

CIIT agents and those who direct them could also potentially be charged with destroying, erasing or concealing evidence with the intent of preventing it from being produced in an investigation or legal matter. Specifically, agents may have worked to destroy or conceal evidence when they failed to notify SDPD of the use of force incident, subpoenaed Anastasio's medical records, allowed video footage to be filmed over, and withheld their CIIT report from SDPD. The grounds for this charge is further detailed below.

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<sup>52</sup> The original version of the I-213 contains a narrative from Border Patrol agent Nicholas Austin that recounts his encounter with Anastasio and states that he responded to his questions. The narrative does not express any concerns or problems. The original narrative appears in the CIIT report for Case# 100528F1 CHU, which was acquired by journalist John Carlos Frey and is under protective order. It cannot be shared as an exhibit, but it could be subpoenaed. The version of the I-213 without the narrative is included in the SDPD investigation report on page 487.

<sup>53</sup> See SDPD Investigator report addendum for Collins 466-469.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 467.

<sup>56</sup> *Id.* at 466-469

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

### 1. *Failure to Notify SDPD of Use of Force Incident*

Border Patrol policy states that the appropriate local law enforcement must be notified to undertake all criminal investigations.<sup>59</sup> Nevertheless, CIIT was on-site and failed to contact SDPD.<sup>60</sup> SDPD only became aware of the incident through a media inquiry and located the scene of the incident on their own a day later, without help from the CIIT or other border agents.<sup>61</sup> CIIT controlled the scene for approximately 15 hours prior to the arrival of SDPD.

During the 15 hours that passed after the incident, witnesses were dispersed and disappeared. Since SDPD was not immediately notified, police investigators were unable to identify and talk to witnesses that evening. SDPD did not have the opportunity to interview any agents until the day after the incident.<sup>62</sup> This gave agents an opportunity to go home, shower and rinse off and wash any evidence that could have been on their person.

### 2. *Obtained and Concealed Anastasio's Medical Record Improperly Through an Immigration Subpoena*

According to SDPD, CIIT "served an administrative immigration subpoena" on Sharp Chula Vista for Anastasio's medical records and then "refused to provide SDPD investigators with a copy of the records."<sup>63</sup> Use of an administrative immigration subpoena for a criminal homicide investigation is inappropriate at best, and doing so to delay an authorized investigative agency from obtaining it may constitute grounds for prosecution.<sup>64</sup> The subpoena was prepared at the direction of the U.S. Border Patrol Chief Michael Fisher<sup>65</sup> and would have been overseen, if not signed, by the acting chief of the San Diego sector at the time, Rodney Scott.<sup>66</sup> These actions directly interfered with SDPD's acquisition of evidence in this case.

### 3. *Not preserving video footage of the incident*

As discussed above, CIIT agent Victor Garcia provided SDPD with video footage for a time that did not correspond with Anastasio's death.<sup>67</sup> Detective Collins from SDPD immediately tried to obtain the correct video footage of the scene and several more times when it was evident that the video provided was not the accurate time.<sup>68</sup> The CIIT and specifically Agent Garcia

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<sup>59</sup> UOF Handbook, at 19 <https://info.publicintelligence.net/CBP-ForcePolicyHandbook.pdf>

<sup>60</sup> See SDPD Investigation, at 489.

<sup>61</sup> See SDPD investigation at 335.

<sup>62</sup> *Id.* at 261.

<sup>63</sup> "Citing HIPAA regulations and their department policy, Border Patrol refused to provide investigators with a copy of the records." SDPD Investigation, at 19.

<sup>64</sup> See Additional Observations, IACHR Case No. 14.0-42, Exhibits D, at paragraph 32, and E, at paragraph 84. It could also constitute a violation of the 4th Amendment. Under the Fourth Amendment's reasonable requirement standard for administrative subpoenas; an immigration subpoena may not be overbroad in scope, irrelevant and improper in purpose. See *v. City of Seattle*, 387 U.S. 541, 544 (1967).

<sup>65</sup> See Additional Observations, IACHR Case No. 14.0-42, Exhibit E, at 20.

<sup>66</sup> Although reference to the subpoena is made in the SDPD investigators report, the subpoena itself on form I-138 is not in the record. It could be subpoenaed to confirm who authorized it.

<sup>67</sup> See *Id.* at 466-469.

<sup>68</sup> *Id.*

repeatedly withheld video surveillance footage requested from SDPD and allowed the requested footage to be erased and taped over.<sup>69</sup>

#### 4. *Withheld the CIIT report*

CIIT appears to have created and withheld a 160-page parallel report from SDPD.<sup>70</sup> This report included witness statements, CIIT member reports, photos and other evidence.<sup>71</sup> As a result of CIIT withholding information from SDPD, decisions were made about how to move forward with the case based on potentially incomplete information. This happened despite Border Patrol's stance that they were coordinating the investigation for SDPD.<sup>72</sup>

Allowing for the dispersal of witnesses, obtaining Anastasio's medical record and not sharing it with SDPD, not preserving the video footage of the incident, and not sharing the CIIT report could be considered the destruction or concealment of evidence. These actions may warrant the prosecution of CIIT agents and those who direct or work in concert with them.

#### **d. Tampering with Witnesses (PC 136.1)**

CIIT agents and those who direct them could potentially be charged if they knowingly and maliciously prevented or dissuaded any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. CIIT agents were able to control witnesses by not contacting SDPD when the homicide took place, participating in interviews, and withholding video footage.

##### 1. *CIIT's Failure to Contact SDPD Immediately Prevented the Capture of Witness Statements*

CIIT's failure to contact SDPD in violation of their own policies prohibited SDPD from interviewing eyewitnesses at the scene.<sup>73</sup> Those who viewed the incident from the pedestrian bridge had long since left or had been dispersed prior to SDPD's arrival 15 hours later.

##### 2. *CIIT agents attended interviews*

Senior Patrol Agent Victor Garcia, Senior Patrol Agent Joe Vaiasuso, Border Patrol Agent Wendi Lee, and Border Patrol Agent Mike Mannen each attended at least one critical interview with witnesses and Border Patrol agents.<sup>74</sup> Senior Patrol Agent Victor Garcia attended nearly all of the interviews.<sup>75</sup> Having a Senior Patrol agent at an interview investigating use of force by other border patrol agents may have prevented them from speaking freely about what they saw.

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<sup>69</sup> See SDPD Investigation, 466-470.

<sup>70</sup> See Declaration of Richard Tolles in Support of Motion for Stay at 2. The missing report is Case# 100528F1.CHU, <https://www.dropbox.com/sh/4r5dzamxq8fjzon/AA8mConSjaFosUR6BRgh88Ula?dl=0&preview=Exhibit+D+-+Declaration+of+Richard+Tolles+in+Support+of+Motion+for+Stay.pdf>.

<sup>71</sup> *Id.* See missing CIIT report for Case# 100528F1.CHU.

<sup>72</sup> SDPD Investigative report at 10

<sup>73</sup> UOF Handbook page 19 <https://info.publicintelligence.net/CBP-ForcePolicyHandbook.pdf>

<sup>74</sup> See *Id.* at 196-315

<sup>75</sup> See *Id.*

Additionally, Anastasio's brother Pedro Hernandez Rojas' interview took place at the Chula Vista Border Patrol office in the presence of Wendi Lee and Special Agent Victor Garcia.<sup>76</sup> Not only was CIIT Agent Garcia in the room, he personally asked Pedro questions.<sup>77</sup> Questions for Pedro appear to be directed at impugning Anastasio's character.<sup>78</sup> The presence of Agent Garcia may have had a chilling effect on Pedro. It was also deeply problematic to question a key witness given the uncertain motives of CIIT in this investigation.

### *3. CIIT agents destroyed video footage preventing SDPD from locating witnesses*

As discussed above, the video footage from the incident was taped over. SDPD investigators sought the video because it "could potentially identify additional witnesses."<sup>79</sup> The unavailability of the video impeded on their ability to locate additional witnesses and reconstruct what had happened to Anastasio.

These three distinct actions may rise to the level of witness tampering that warrant the District Attorney's consideration of charges against the CIIT agents involved along with those who directed them.

#### **e. Conspiracy To Obstruct Justice PC 182(a)(5)**

Conspiracy can be found when two or more people work together to pervert or obstruct justice. Obstruction of justice includes preparing and offering false evidence, the destruction or concealment of evidence and witness tampering. If two or more CIIT agents and/or those who direct them are shown to have worked together in any of the aforementioned ways, the District Attorney could potentially prosecute them collectively.

The existing record indicates there was collaboration between CIIT agents and/or upper management with respect to the subpoena and the mismanagement of video footage.

For example, CIIT "served an administrative immigration subpoena" on the hospital for Anastasio's medical records and then "refused to provide SDPD investigators with a copy of the records."<sup>80</sup> As was discovered through statements by former CBP officials James Wong and James Tomsheck, U.S. Border Patrol Chief Michael Fisher ordered San Diego agents to use the subpoena to get the autopsy.<sup>81</sup>

As another example, the CIIT failed to preserve video evidence. CIIT members repeatedly withheld video surveillance footage requested from SDPD and instead gave SDPD footage that did not pertain to the incident, while allowing the requested footage to be erased and taped

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<sup>76</sup> See *Id.* at 248-250.

<sup>77</sup> *Id.* at 249-250

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* at 467.

<sup>80</sup> "Citing HIPAA regulations and their department policy, Border Patrol refused to provide investigators with a copy of the records." SDPD Investigation, at 19.

<sup>81</sup> See Additional Observations, IACHR Case No. 14.0-42, Exhibit E, at 20.

over.<sup>82</sup> According to the record, the footage was sent to Sector Command soon after the incident and then given to the CIIT prior to it being given to SDPD.<sup>83</sup>

Due to the communication and involvement of multiple CIIT agents and higher officials within Border Patrol in these instances, your office should consider charges for conspiracy to obstruct justice.

## V. Conclusion

Public safety depends on public trust in law enforcement. There can be no trust if there is no accountability. Prosecution of Border Patrol's CIIT agents and those who direct or work in concert with them, is necessary to ensure accountability and bolster trust between our community and law enforcement. You are presented with an opportunity to exercise accountability for the interference in the investigation of Anastio's death. This is imperative not only for the family, but for the integrity of any local police investigation in which the Border Patrol CIIT seeks to interfere.

Your consideration of charges would send a clear message, that interference with legitimate police investigations could result in prosecution. It would also set a precedent for prosecutors in other border counties to consider holding unauthorized Border Patrol investigative units accountable for their actions.

Respectfully,



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<sup>82</sup> See SDPD Investigation, at 459-462, 466-470.

<sup>83</sup> *Id.* at 468.