SPECIAL REPORT TO THE DISTRICT ATTORNEY OF ORANGE COUNTY: PROSECUTORS ROLE IN THE DEKRAAI INFORMANT CONTROVERSY

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Executive Summary

Preface

On October 12, 2011, Scott Dekraai, a 41-year-old former tugboat operator put on body armor, armed himself with several guns and walked into a Seal Beach hair salon and executed his ex-wife and seven others in what would become Orange County's deadliest mass shooting. A ninth victim survived the attack. Dekraai was arrested 20 minutes after the deadly rampage and was booked into the Orange County Jail.

That first shot fired inside the Salon Meritage would set in motion a series of events that devastated lives, shattered a sleepy beach town's sense of security, and tarnished the Orange County criminal justice system.

From 2011 to 2017, the Orange County District Attorney's Office (OCDA) controversial prosecution of the *People vs. Scott Dekraai* multiple-murder case exposed its illicit use of a jailhouse confidential informant and failure to provide defense counsel with timely discovery regarding the informant's criminal and informant history.

The failings of the Dekraai prosecution team were so remarkable that they became known nationally as the "Jailhouse Informant Scandal." As the courtroom drama played out, it became painfully apparent there were other criminal cases with similar – and equally glaring – deficiencies in the Orange County Superior Court. The fallout from these prosecutorial abuses has called into question the viability of Orange County's criminal justice system and the credibility of its law enforcement agencies. These abuses, combined with the prior OCDA administration's failure to hold its employees responsible for their actions, resulted in intense media scrutiny and an unrelenting demand for accountability.

In April 2019, a Deputy Attorney General announced in an Orange County courtroom that the California Attorney General's (Cal AG) criminal investigation into the Jailhouse Informant Scandal had been closed without any findings, conclusions, or recommendations.

In response, the newly elected Orange County District Attorney directed Special Counsel to conduct an internal administrative investigation into OCDA's culpability in the Informant Scandal. In essence, to find out what happened, who was responsible, and how to prevent these failures from occurring in the future?

The following report is a public presentation of the results of this administrative investigation. An extensive and thorough research and analysis of issues has resulted in multiple findings. A generic summary of these findings includes:

- There were multiple reasons and contributors to the flawed prosecution of the *Dekraai* and other cases in which a confidential informant was utilized.

- The culpability of the *Dekraai* prosecution team goes beyond what the trial and appellate courts identified. The evidence points to intentional negligence committed by the prosecution team. The key question examined in determining the intentionality of the prosecution team's performance deficiencies hinges on **when** prosecutors learned that the jailhouse informant used in the *Dekraai* case (i.e., Fernando Perez) was already a veteran government confidential informant.

    - First, this investigation confirms the conclusion of the trial and appellate courts that, at a minimum, the prosecution team exhibited prosecutorial misconduct in the performance of their duties.

    - Second, there is clear and convincing evidence to a reasonable certainty that indicates prosecutors also committed malpractice due to intentional negligence.

- This investigation also revealed three haunting ironies:

    - In the *Dekraai* case, the use of a confidential informant was unnecessary and actually detrimental to achieving justice.

    - In 1976, Edward Allaway committed the largest mass murder in Orange County history (until the murders committed by Scott Dekraai) with the killing of seven people at the Cal State University Fullerton campus. A jury convicted Allaway of multiple murders but deadlocked and could not reach a verdict on his plea of not guilty by reason of insanity. The decision then became the trial court judges who ruled that Allaway was insane, and remanded him to Patton State Hospital. Over the years, the staff at Patton repeatedly recommended to Orange County judges that Allaway was sane and fit for release to society. The OCDA prosecutor successfully fighting against Allaway's release would eventually become the lead prosecutor in *Dekraai*. During the *Dekraai* prosecution, both District Attorney Tony Rackauckas and the lead prosecutor were outspokenly apprehensive that Dekraai might also plead not guilty by

reason of insanity and avoid the death penalty. This fear largely motivated the flawed use of confidential informant Perez who obtained tainted confessions from Dekraai that were ultimately barred from consideration by the trial court. In the end, Scott Dekraai never entered an insanity plea and his evasion of the death penalty was largely the result of prosecutorial misconduct.

- The prosecutorial team whose responsibility it is to ensure fidelity to the law, ethical conduct in prosecutions, maintenance of defendant rights, and pursuit of justice for victims, were the very ones who violated informant/discovery law, obfuscated and failed to accept responsibility for their lapses, trampled defendant rights, and denied the full imposition of justice for victims and their families.

Contextual Environment

In order to grasp the severity of the failures committed by the *Dekraai* prosecution team, it is imperative to familiarize oneself with the contextual environment in which the *Dekraai* case took place. This context is contained in the "Background Information" section of the main report, and provides highly relevant information in the following areas:

- An explanation of the *Brady* and *Massiah* Rules – which were violated by OCDA prosecutors.
- A history of Orange County local/federal joint gang task forces in which confidential informants were utilized, including *Operation Black Flag* which relied on confidential informant Perez, the central figure in this investigation.
- The ethical duties and responsibilities of prosecutors - which were violated by the *Dekraai* prosecution team.
- The comprehensive depth of experience and training of the *Dekraai* prosecutors.
- The significance of the 1977 *Edward Allaway* case, Orange County's largest mass murder at the time, in which Allaway was found Not Guilty by Reason of Insanity – and the important role it played in OCDA's handling of the *Dekraai* prosecution.
- Chronologies of important circumstances/events in the *Dekraai* prosecution and the OCDA's use of confidential informant Perez. (attachment 1)

Summary of Investigative Findings and Recommendations

This administrative investigation is uniquely complex. First, it deals with events which began nearly nine years ago with the October 2011 arrest of mass murderer Scott Dekraai. Second, the case is multi-faceted, with multiple players (e.g., law enforcement, judiciary, media, and academia) at the federal, state, and local levels. Third, the negative ramifications of the deficiencies in the *Dekraai* case are immense and continue to this day.

Although this investigation is focused on only OCDA employees, the deficiencies in the *Dekraai* case were not isolated to OCDA and will be cursorily addressed in the report.

The following is a summary of the investigative findings and recommendations by category:

Confidential Procedures of Federal/Local Joint Gang Task Force Increased the Possibility of Discovery Violations Related to Confidential Informants

- ❑ The confidential inner workings and procedures of the joint gang task forces formed with federal and Orange County law enforcement created an environment that increased the possibility for the violation of *Massiah* and *Brady* rules related to the use and legal discovery of confidential informants. It is recommended that OCDA no longer participate in joint task forces until the parties revise their Memoranda of Understanding to ensure local prosecutors receive the necessary discovery information regarding federal confidential informants in order to comply with *Brady* and *Massiah* laws.

Lack of Oversight of the *Dekraai* Case by Prior OCDA Executive Management

- ❑ The prior OCDA Executive Management's lack of supervision over high-profile cases including *Dekraai* resulted in prosecutors trying these cases without adequate oversight, including the lack of discussion and resolution of critical decisions such as the use of confidential informants. In 2019, under District Attorney Spitzer, OCDA established new programs and corresponding policies and procedures to ensure all major case prosecutions are reviewed by executive management, and that a jailhouse confidential informant may only be utilized with the approval of the elected District Attorney.

- The prior OCDA administration allowed for the creation of internal documents related to the *Dekraai* prosecution which omitted important information and failed to discuss known instances of prosecutorial misconduct, negligence, or malpractice. It is the affirmative duty of OCDA to ensure all communications are accurate and complete.

Dekraai Prosecution Team Performance Deficiencies

- Severe performance deficiencies by the OCDA prosecution team were identified in its handling of the *Dekraai* case. As confirmation, both the trial and appellate courts concluded that the prosecution team exhibited misconduct and negligence in the performance of their duties. This investigation agrees with this conclusion, but also probes deeper into the underlying issue causing the performance deficiencies: the circumstances and timing of the prosecution team in learning that Perez was an experienced confidential informant. Nearly every performance deficiency in the *Dekraai* case stems from the answer to this question. This answer is also critical as it identifies the culpability of members of the prosecution team and ultimately the level of discipline that should be recommended for their performance failures.

  Unfortunately, the explanation given by the Dekraai prosecutors, when examined against the myriad of available evidence, is highly questionable and unconvincing. As such, it was necessary to identify essentially three scenarios surrounding the circumstances and timing of learning that Perez was an experienced confidential informant. Each will be examined against the evidence in the main body of this report:

  1. The members of the prosecution team were unintentionally negligent in their failure to learn in a timely manner that Perez was an experienced confidential informant, and thus were incompetent.

  2. The members of the prosecution team deliberately chose to ignore the myriad of evidence—right in front of them—which pointed toward Perez being an experienced confidential informant, and thus committed malpractice.

  3. The members of the prosecution team maliciously and intentionally, from day one, deceptively concealed its knowledge that Perez was a federal confidential informant, and thus misled the court in their testimony.

- ❑ Based upon the analysis of these three scenarios, this investigation finds that there is clear and convincing evidence to a reasonable certainty that indicates *Dekraai* prosecutors committed malpractice due to intentional negligence. This finding necessitates the imposition of severe disciplinary action against the prosecutors. However, before the completion of this internal investigation, both *Dekraai* prosecutors resigned their employment with OCDA and are now outside the administrative purview of OCDA. Notwithstanding, this report is available to state compliance and law enforcement agencies for their review.

Confidential Informants Used in Non-*Dekraai* Cases

- ❑ There is insufficient evidence to determine prosecutorial misconduct or malpractice in the five other cases where confidential informants were also utilized.

Improvements Implemented by OCDA

- ❑ OCDA has implemented significant reforms to address the deficiencies involving the use of confidential informants. A summary is provided at the end of the full report.

OCDA Jailhouse Informant
Public Investigative Report

Introduction

On October 12, 2011, Scott Dekraai was arrested after executing eight people and wounding a ninth in Orange County's deadliest mass murder. He was charged with multiple felonies, including eight counts of murder, and booked into the Orange County jail. Three days later, Dekraai was surreptitiously questioned about his crimes by an Orange County jail inmate awaiting sentencing. That inmate, Fernando Perez, was also a veteran federal and local confidential informant since 1999.

Dekraai was represented by an attorney at the time he was questioned by the confidential informant – a violation of Dekraai's constitutional rights.

OCDA's ill-advised and flawed use of Perez as an informant and the lack of timely disclosure of his criminal/informant history quickly derailed the *Dekraai* case, miring it in ongoing controversy with allegations of prosecutorial misconduct and negligence. In subsequent trial court evidentiary hearings regarding these allegations, it became apparent that other gang-related prosecutions involving the use of confidential informants could also be impacted by these same deficiencies.

After multiple evidentiary hearings, the trial court concluded that *Massiah* (informant) and *Brady* (discovery) law violations did in fact occur. In response, the trial court removed OCDA entirely from prosecuting the penalty phase of the *Dekraai* case. The Cal AG appealed OCDA's removal to the California District Court of Appeal (Court of Appeal). The Court of Appeal affirmed the trial court's removal of OCDA, agreeing that the prosecutorial team—OCDA and the Orange County Sheriff's Department (OCSD)—was guilty of prosecutorial misconduct and negligence.

These shared conclusions of the trial and appellate courts resulted in severe and ongoing negative impacts to OCDA and to the Orange County criminal justice system. One impact was the initiation of a criminal probe by the Cal AG, and later an ongoing civil investigation by the U.S. Department of Justice (DOJ) into whether there was/is a pattern of practice of OCDA and/or OCSD denying defendants their statutory and constitutional rights.

Despite the courts' conclusions, the prior OCDA administration failed to hold any of its employees accountable. As a result, local and national media have unrelentingly

pursued these prosecutorial deficiencies and insisted on accountability and a change in future prosecutorial behavior.

Purpose and Scope of Investigation

The OCDA's stated purpose of this investigation was threefold:

1. Pursue administrative accountability for prosecutorial misconduct, malpractice, or negligence identified in the *Dekraai* or other gang related cases in which confidential jailhouse informants were utilized.

2. Provide public transparency on any deficiencies which occurred in the *Dekraai* and other impacted cases in which a confidential jailhouse informant was improperly utilized.

3. Identify any areas where improvements can be made in OCDA's participation with joint gang task forces to ensure that due process is administered, the constitutional rights of all parties are maintained, and that justice is ultimately served in all cases which the DOJ passed on to OCDA to prosecute.

The scope of work for this investigation included:

1. Conducted a Human Resources (HR) investigation into whether OCDA staff followed the law and OCDA policies and procedures in their prosecution of the *Dekraai* and other gang-related cases where a confidential jailhouse informant was utilized.

2. The scope is limited only to OCDA employees. The OCSD has stated that it is conducting its own investigation into the culpability of its employees related to these issues.

3. Produced two reports: (a) a confidential HR investigative report, and (b) an investigative report which will be released to the general public detailing the investigation's findings.

This report is the public investigative report.

Investigation Limitations

There were some limitations that had an impact on this investigation; however, none were substantial enough to prevent a qualitative review of the issues. The voluminous documentary and testimonial evidence available provided a sound and revealing basis to make investigatory findings and recommendations. The limitations encountered included:

- The HR portion of this review is confidential per California employment law and is therefore not included in this public report. HR confidentiality rules prohibit public agencies from naming any employees who were disciplined or what the level of the discipline that was imposed.

- In obtaining information from the Cal AG and DOJ, the investigative team was limited to what these agencies would provide. That being said, the Cal AG did provide the investigative team with transcripts of their interviews with OCDA employees, and the DOJ accommodated OCDA's request that a member of its investigative team (Special Counsel to the District Attorney) be present during its civil probe interviews with OCDA employees and provided their subsequent testimony transcripts.

- District Attorney Spitzer ordered all OCDA employees to cooperate fully with this administrative investigation; however, the investigative team was unable to compel former OCDA employees to cooperate. Notwithstanding, most former OCDA employees involved in the *Dekraai* and other cases agreed to talk with the investigative team on a voluntary basis. HR administrative investigators do not have subpoena power or the authority to either place non-employees under oath or compel their testimony by administrative sanction.

- The two attorneys that prosecuted the *Dekraai* case resigned from OCDA in December 2019, just prior to the scheduling of investigatory interviews with them. Notwithstanding, the investigatory team has the transcripts of these employee's extensive testimonies in trial court evidentiary hearings and subsequent interviews with the Cal AG and DOJ.

Methodology for Investigation

The following methodology was utilized by the investigative team:

- Notifications and advisory consultations with impacted groups:

  The Board of Supervisors was notified that an HR investigation was being conducted; County Counsel was consulted in October, 2019 and provided legal advice on HR investigation logistics; and impacted OCDA employees were notified that an investigation was underway.

- Documentary research included, but was not limited, to the following items:
  - Orange County Superior Court Judge Goethals's trial court evidentiary hearing transcripts in the *Dekraai* case
  - Trial court and Appellate court rulings on the *Dekraai* case
  - Review of pertinent OCDA emails on *Dekraai* and other cases involving the use of a confidential informant
  - Documents created and used by *Dekraai* prosecution team
  - Seal Beach Police Department *Dekraai* case files
  - Public *Dekraai* defense court filings.
  - Review of Perez's confidential informant (Orange County Informant Index, or OCII) file
  - Cal AG interview transcripts with OCDA employees assigned to the *Dekraai* and other cases in which a confidential informant was utilized
  - DOJ interview transcripts with OCDA employees working on the *Dekraai* and other cases where a confidential informant was utilized
  - Correspondence from public advocacy groups (e.g., ACLU, local attorneys) calling for state and federal investigations of the OC informant scandal
  - OCDA prosecutor ethical standards and responsibilities; OCDA Vision and Mission statements; and expectations for County Executive Managers
  - Experience and training records for pertinent OCDA employees
  - Media reports on the Jail Informant controversy

- Interviews
  - The DOJ held interviews with OCDA staff as part of its civil investigation from May 2019 to September 2019. The DOJ requested that OCDA hold off on its HR investigative interviews until the DOJ finished its initial round of interviews with OCDA staff. An agreement was reached where a member of OCDA investigative team for this report (i.e., Special Counsel to the DA) would be present during DOJ interviews with OCDA staff.

- As previously identified, formal HR investigatory interviews were in the process of being scheduled for OCDA employees by the investigative team, however, right before notification, the OCDA attorneys assigned to the *Dekraai* prosecution submitted their resignations.
- Interviews were conducted with two current and two former OCDA employees with knowledge of the *Dekraai* and gang related cases in which confidential jailhouse informants were utilized.
- An interview was conducted with an Anaheim Police Department investigator regarding Anaheim's use of Perez as a confidential informant.

Background Information

The background information required to properly analyze Orange County jailhouse informant practices related to the *Dekraai* and other cases is voluminous but critical to understanding what occurred and why. A summary of the more important contextual information that should be considered includes:

Brady and *Massiah* Rules

OCDA prosecutors who used a confidential informant were alleged to have violated two federal rules—*Brady* and *Massiah*.

Brady Rule:

The US Supreme Court ruling in *Brady vs. Maryland*, 373 U.S. 83 (1963), requires that prosecutors disclose materially exculpatory evidence in the government's possession to the defense. "Brady material" includes any evidence favorable to the accused—evidence that goes towards negating a defendant's guilt, that would reduce a defendant's potential sentence, or evidence going to the credibility of a witness. A prosecutor's obligation under *Brady* is to provide the defense with materially exculpatory evidence within the government's possession, including evidence that could have been used to impeach a confidential informant's credibility.

Massiah Rule:

The *Massiah* Rule is the principle that an attempt to elicit statements from a suspect who has counsel violates the Sixth Amendment to the United States Constitution. The US Supreme Court in *Massiah v. United States, 377 U.S. 201 (U.S. 1964)* said that any interrogation of the defendant without the protection afforded by the presence of

counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crimes.

History of Orange County Joint Gang Task Forces

Over the past 25 years local law enforcement agencies have partnered with state and federal law enforcement to address large criminal enterprise operations within Orange County. Pertinent to this investigation, the first joint gang task force was comprised of the Santa Ana Police Department (SAPD) and the Federal Bureau of Investigation (FBI), called *Operation Roundup*, designed to address entrenched gang crime in the city of Santa Ana. The operation resulted in the arrest of 117 defendants in 1994.

In 2000, a second SAPD/FBI joint gang task force was established to conduct *Operation Orion*. This operation resulted in 139 arrests, with OCDA obtaining 125 local Grand Jury indictments. A confidential informant who was originally arrested in *Operation Roundup* was used to build cases in *Operation Orion*.

In 2003, a formal Memorandum of Understanding (MOU) was signed between SAPD and the FBI to establish a governance structure and delineate corresponding responsibilities between the parties. In summary terms, the Joint Task Force and its operations were governed solely under the authority of the FBI. SAPD officers assigned to the Joint Task Force were cross-deputized as federal officers, signed non-disclosure agreements, and took administrative direction from the FBI rather than their own departments regarding task force activities.

In late 2008, a joint task force was formed to dismantle the Mexican Mafia enterprise within Orange County, particularly within the Orange County jails. The task force's first operation was called *Operation Black Flag*. The task force consisted of the DOJ (US Attorney and FBI), SAPD, OCDA, OCSD, Alcohol/Tobacco/Firearms (ATF), California Department of Corrections, and the Costa Mesa Police Department. In July 2011, the task force made arrests. This operation utilized confidential jailhouse informants Oscar Moriel and Fernando Perez. Some of the defendants were prosecuted by the US Attorney and some were prosecuted locally by OCDA. (Attachment 2)

In September 2013, the joint gang task force again targeted and obtained indictments against the Mexican Mafia enterprise within Orange County as part of *Operation Smokin' Aces*. The operation resulted in 129 defendant indictments; 86 by a federal grand jury and 43 by the Orange County Grand Jury. (Attachment 3)

Operation Black Flag Confidential Informant Initiates Contact with Defendant Scott Dekraai

On October 12, 2011, Scott Dekraai was booked into the Orange County Jail. On October 14, 2011, he was arraigned in court and represented by legal counsel. This provided him with constitutional protections from being questioned by law enforcement or an agent of law enforcement without his lawyer present. On October 15, 2011, Orange County jail inmate and federal confidential informant Fernando Perez initiated a conversation with Dekraai and asked him why he was incarcerated.

On October 18, 2011, an OCSD jail deputy sheriff assigned to the Special Handling (SH) unit called the OCDA Investigator assigned to the *Dekraai* case to inform him that there was an inmate "who has provided good intel in the past" that had spoken with Dekraai about his murders.

On October 19, 2011, the *Dekraai* prosecution team went to the OC jail to interview Perez. OCDA prosecutors initially claimed they failed to research Perez's criminal history prior to the interview, and subsequently claimed to not have known Perez was a federal confidential informant until several months into 2012. During the interview, Perez admitted to OCDA prosecutors to asking Dekraai questions about his criminal charges. At the end of the meeting, OCDA requested that OCSD place a bug inside Dekraai's jell cell to covertly record any subsequent conversations between Dekraai and Perez. Per *Massiah* rules, Perez was admonished by both the OCDA and OCSD staff not to ask Dekraai questions about his crimes, but rather to act as a non-soliciting "listening post" for anything Dekraai wanted to volunteer about his murders.

A few days later, the bug captured Dekraai admitting to the murders and providing significant and useful information about his motivations for and the manner in which he committed his murders.

Prosecutor Ethical Duties and Responsibilities

It is important to identify the standards of performance and conduct expected of a prosecutor in evaluating OCDA employee culpability in this investigation:

American Bar Association:

- Standard 3-1.2: The primary duty of a prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public

safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

The State Board of California Rules of Professional Conduct for an attorney, state in pertinent part:

- Rule 1.1 Competence: A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

- Rule 3.8 Special Responsibilities of a Prosecutor: The prosecutor in a criminal case shall:
  - Make timely disclosure to the defense of all evidence of information known to the prosecutor that the prosecutor knows or reasonably should know tends to engage the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relived of this responsibility by a protective order of the tribunal.

- Rule 8.4 Misconduct: It is professional misconduct for a lawyer to:
  - Engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.
  - Engage in conduct that is prejudicial to the administration of justice.

OCDA's "Deputy District Attorney Office Procedures & Guidelines Manual," in effect at the time, states in pertinent part:

- "...A Deputy District Attorney is expected to be a vigorous, competent advocate for the People in the pursuit of justice. He/she is expected to act with honor and dignity at all times, recognizing that prosecutors have a duty to promote confidence in the law and in the administration of criminal justice."

- The *Brady* Obligation: "As prosecutors, we have a constitutional mandate, separate and apart from our discovery obligation under Penal Code section 1054, to disclose exculpatory material evidence in the possession of the "prosecution team" to defendants in criminal cases...The suppression by the prosecution of evidence favorable to an accused...violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution...It is the responsibility of each Deputy District Attorney

to comply with whatever discovery requirements Brady imposes when the Deputy District Attorney is responsible for providing discovery in a particular case."

- OCII (Orange County Informant Index) – Informants: "It is essential that a Deputy District Attorney seek the advice of his/her immediate supervisor without hesitation should a question arise. It is expected that every Deputy District Attorney utilizing cooperating individuals be familiar with the contents of the OCII manual, and that the principles contained therein be followed and applied."

- Required Knowledge: "In addition to the contents of this manual, Deputy District Attorneys are expected to understand and comply with the following: 1. The policies, procedures, and directives of the units to which they are assigned; 2. The California State Bar Rules of Professional Conduct; 3. The California District Attorneys Association (CDAA) Uniform Crime Charging Standards; 4. The CDDA Professionalism Sourcebook; the CDAA Ethics and Responsibility for the California Prosecutor Manual…"

OCDA Prosecutorial Experience and Training

The investigative team reviewed the experience and training of those OCDA prosecutors involved in *Dekraai* and other gang related cases in which a confidential informant was utilized. In all cases, the prosecutors had the necessary experience and training that would provide a reasonable basis for them to competently prosecute these cases per law and OCDA policy. For example, all prosecutors worked in various OCDA units, including stints in the Gang/TARGET and/or the Homicide units. Many of them had been assigned supervisory/management assignments overseeing other attorneys. In addition, training records show that these prosecutors received training in various pertinent areas such as: Professionalism and Ethics, Rules of Professional Conduct, Ethical Decision Making, Prosecutorial Misconduct, Ethics in Gang Prosecutions, Understanding *Brady* Law, Avoiding Discovery Errors, Discovery *Brady* Issues, OCII (the confidential informant log and associated ethics with using confidential informants), and Confidential Informants.

People vs. Edward Charles Allaway Case

In 1976, Edward Charles Allaway murdered seven people on the Cal State University, Fullerton campus. At the time, it was the largest mass murder in Orange County history. Allaway pleaded not guilty by reason of insanity. In 1977, the jury deadlocked

on the insanity phase of the trial; the judge then ruled that Allaway was insane when he committed the crimes and Allaway was thus remanded to the secure forensic psychiatric Patton State Hospital.

Allaway began requesting his release from Patton in 1986, stating he was fit to leave the psychiatric hospital. He petitioned for release on five separate occasions, nearly each time with a recommendation of release from the psychiatric staff of Patton State Hospital. In four of those instances, (he withdrew his 1998 petition before trial), OCDA successfully fought his release. Each petition for release resulted in a "five-alarm" legal fire in Orange County, causing imminent safety concerns for citizens, severe emotional distress to the victim's families, and the dedication of significant legal sources to ensure that Allaway was not the first mass murderer in American history to be released from confinement. OCDA was extremely active in its efforts to prevent Allaway's release, with the District Attorney himself meeting with and writing letters to the psychiatric staff at Patton (attachment 4) and writing a letter to the California State Governor. (attachment 5)

The lead *Dekraai* prosecutor was intimately involved in OCDA's substantial efforts to prevent the release of Allaway from 2001 to 2016. In 2001, he was the deputy district attorney who successfully opposed Allaway's release in court. In 2009, Patton again recommended Allaway for release. Both the District Attorney and the lead *Dekraai* prosecutor met with Patton's administration to argue against Allaway's release. Had the case gone to trial, the lead *Dekraai* prosecutor would have again been the prosecutor. In 2016, Allaway was transferred to the state mental hospital in Napa Valley. The lead *Dekraai* prosecutor provided the Napa Valley mental hospital administrator with Dekraai's criminal history to ensure they were familiar with Allaway's history. (attachment 6)

Similarly, OCDA executive management was concerned that Dekraai might also plead Not Guilty by Reason of Insanity, with all its inherent tribulations. This concern was expressed by the then-District Attorney when he briefed individual Board of Supervisors members that he was concerned that Dekraai would plead Not Guilty by Reason of Insanity. It was also expressed by the lead *Dekraai* prosecutor during his 2014 trial court testimony in the *Dekraai* evidentiary hearings, in which he admitted that his previous experience working on the *Allaway* case came into play and was a concern for him when Dekraai indicated that he might plead Not Guilty by Reason of Insanity.

Chronological Summary of OCDA's Prosecution of the *Dekraai* Case

The prosecution of the *People vs. Dekraai* case began in October 2011 and lasted until August 2017.

Due to prosecutorial team misconduct and malpractice, and the resulting addressment of grievances filed by the *Dekraai* defense team, it unconscionably took six years to adjudicate this case. In the end, a trial never occurred as Dekraai eventually plead guilty to all charges (negating the guilt phase of the trial). Then, due to ongoing discovery violations and trial court sanctions against the prosecution team, the trial court judge removed the possibility of the death penalty being imposed against Dekraai, sentencing him instead to life without the possibility of parole.

Over those six years, there were a great many circumstances and events which contributed to the *Dekraai* prosecutorial debacle. Below is a high-level summary of the most relevant events so that the reader may gain a working perspective of the case:

- Orange County jail inmate Fernando Perez had a long history of serving as a jailhouse confidential informant for both local and federal law enforcement agencies. OCDA OCII records from 1999 indicate that Perez was used as a confidential informant for the Anaheim Police Department. The OCII record also indicates that in August of 1999, Perez was terminated as a confidential informant because, according to the Anaheim detective handling Perez, he failed to follow directions and was unreliable. The detective provided a written warning in the OCII file advising that Perez should no longer be used as a confidential informant.

- Despite this warning, the OCII files indicate that OCDA again utilized Perez as a confidential informant in 2001. Then, in September 2010, the OCDA Gang/TARGET unit attorney prosecuting Perez for his third-strike crime re-registered Perez as a CI. In January 2011, Perez was then introduced to the FBI and Santa Ana Gang Task Force by OCSD.

- In February 2011, Perez testified in federal court as a confidential witness. In March 2011, representatives from the FBI, OCSD, Santa Ana PD, and OCDA (Gang/TARGET unit) went into closed session with the judge presiding over Perez's criminal case to detail his value as a confidential informant. Due to his third-strike conviction, Perez was facing a 40-years to life sentence. In consideration for his confidential informant work, Perez was sentenced to 21 years in prison.

- On October 12, 2011, Dekraai was arrested and booked into Orange County Jail. Perez initiated contact with Dekraai on October 15, 2011 and told OCSD deputies that he had obtained useful information against Dekraai. On October 18, 2011, an OCSD Special Handling Unit deputy called the OCDA Investigator assigned to the *Dekraai* case to inform him that an inmate who has "provided good intel in the past" would like to provide information to the *Dekraai* prosecution team.

- On October 19, 2011, the prosecution team met with Perez at the jail. After that meeting, OCDA prosecutors requested that OCSD bug Dekraai's cell for five days. On October 21, 2011, the bug captured Dekraai explicitly bragging about his murders.

- On November 1, 2011, the *Dekraai* prosecution team investigator obtained Perez's handwritten notes of his October 15, 2011 conversation with Dekraai from OCSD deputies.

- During the first six months of the *Dekraai* case (October 2011 to April 2012), the prosecution team repeatedly ignored clear and compelling evidence that Perez was a veteran federal confidential informant. This investigation identified more than ten occasions where events should have caused the prosecution team to suspect that Perez might be a confidential informant and therefore check his criminal/informant history.

- In November 2011, the OCDA Homicide unit investigator assigned to the *Dekraai* case sent a memo to the OCDA Gang/TARGET unit attorney prosecuting Perez's criminal case to inform him that the *Dekraai* prosecution team had received incriminating information against Dekraai from Perez. (attachment 7) Despite the *Dekraai* case being the largest mass murder case in OC history, there was no documentary or trial court testimonial evidence found that indicated that the *Perez* prosecutor ever informed his colleagues, the *Dekraai* prosecutors, that Perez had previously been utilized as a long term local and federal confidential informant. (Note: this is not to conclude that this disclosure did not occur, only that there is no written evidence that proves it did).

- The *Dekraai* prosecution team initially (October 2011 to February 2013) provided limited discovery information to the defense team regarding Perez. The prosecution team stated during trial court evidentiary hearings and in subsequent interviews with the Cal AG and DOJ that they withheld some of

Perez's information because they were not going to call him as a witness and therefore (wrongly) believed they did not have to provide it.

- On April 13, 2012, the lead *Dekraai* prosecutor approved the discovery of the written report of the Seal Beach detective working the *Dekraai* case.

- On June 1, 2012, the lead *Dekraai* prosecutor emailed his investigator requesting that the investigator remind him what case(s) Perez was working (as an informant). (attachment 8)

- On January 11, 2013, the *Dekraai* defense team filed a motion in the trial court to compel the discovery of information related to the use of Perez as a confidential informant and his criminal and informant background. The motion accused OCDA of intentionally placing a known informant near Dekraai and intentionally withholding discovery evidence. Shortly thereafter, the lead *Dekraai* prosecutor filed an opposition brief to prevent the discovery. On January 25, 2013, the trial court ordered that discovery related to confidential informant Perez be provided to the defense, including Perez's criminal and informant history.

- On January 29, 2013, the *Dekraai* prosecution team sent a letter to the DOJ requesting federal confidential informant information on Perez ("Inmate F") (attachment 9). On February 7, 2013, the FBI's Chief Division Counsel responded in writing, stating, in part, "The FBI continues to evaluate what documents it possesses, whether they are relevant to your request, and whether they may be produced in accordance with applicable federal law and regulations. Additionally, we are addressing legal and security issues related to your request. To that end, we may supplement this response with additional documents at a later date. However, it is unclear why all discovery in federal cases in which 'Inmate F' may have provided information (much of which does not relate to 'Inmate F') or the substantive information provided by 'Inmate F' in the federal investigations is relevant to the *Massiah* issue under consideration by the Court. Please find enclosed the documents which we are, at this time, legally authorized to provide you." With this letter, the FBI essentially ignored the Superior Court judge's ruling as to what discovery must be turned over to the *Dekraai* defense team. (attachment 10 and 22)

- In mid to late February 2013, OCDA turned over discovery material on Perez to the *Dekraai* defense counsel. From this information, the *Dekraai* defense team learned that OCDA had provided a substantially less amount of discovery

material in other non-*Dekraai* cases in which Perez was also used as a confidential informant. This resulted in new trial court motions by defense counsels in the non-*Dekraai* cases, and ultimately in significant sentencing reductions and the dismissal of cases for *Massiah* and *Brady* violations in these non-*Dekraai* cases. In addition, due to the volume of discovery information provided to the *Dekraai* defense team, they requested, and the trial court granted a lengthy continuance to digest the materials.

- On January 31, 2014, the *Dekraai* defense filed three lengthy court motions requesting various forms of relief: Motion 1 claimed a violation of *Massiah* law related to use of Perez as a confidential informant; Motion 2 claimed outrageous government misconduct and requested dismissal of the death penalty as a sentencing option; and Motion 3 requested that OCDA be removed from prosecuting the case.

- In February 2014, to respond to the allegations made in the defense motions, OCDA directed an internal case review of the *Dekraai* and other gang cases in which jailhouse confidential informants were utilized. The case review was inappropriately headed by the lead prosecutor of the *Dekraai* case, as he was one of the prosecutors accused of outrageous government conduct.

- From March to July 2014, the *Dekraai* trial court held evidentiary hearings to gather the necessary information to rule on the three defense motions. The hearings heard testimony from more than 40 witnesses and produced more than 5,000 pages of transcripts.

- On April 22, 2014, OCDA conceded the *Dekraai* defense's *Massiah* motion, essentially not challenging that Perez was a government agent and improperly solicited information from represented defendant Dekraai without his attorney being present. As a result, OCDA agreed not to use the Dekraai confessions obtained by Perez.

- On May 2, 2014, Dekraai entered guilty pleas to all felony charges against him: eight counts of first-degree murder and one count of attempted murder. As a result, Dekraai's trial would only be the penalty phase to determine if he would be sentenced to either the death penalty or life without the possibility of parole.

- On July 30, 2014, the Santa Ana PD Sergeant who was the supervisor in charge of the Santa Ana Gang Task Force, testified in the *Dekraai* trial court evidentiary hearings. The supervisor provided the following pertinent information:

- The DOJ (US Attorney and FBI) has governance authority over the Joint Gang Task Force; all Santa Ana PD officers and OCSD deputies on the task force are cross-deputized as federal officers and take administrative direction from DOJ personnel.
- The Sergeant was unaware that federal informant Perez was being utilized in the local *Dekraai* case until early 2014.
- All local cross-deputized police officers claim that the Assistant US Attorney in charge of the Joint Task Force would not allow some of the task force confidential informant information to be shared with OCDA.

- On August 4, 2014, the *Dekraai* trial court issued its ruling on the three defense motions. The judge granted the *Massiah* motion (which OCDA did not contest); denied the motion alleging outrageous government conduct, but ruled that OCDA exhibited significant prosecutorial misconduct, and deemed the misconduct to be negligent rather than malicious; and denied the motion to recuse OCDA from prosecuting the penalty phase of the *Dekraai* case. (attachment 11)

- In September 2014, per trial court order, OCSD produced previously undisclosed documents from its TRED jail information system detailing inmate movements and the reasons for those movements. Upon learning of the existence of these documents, the *Dekraai* defense requested a resumption of evidentiary hearings claiming new evidence of discovery and informant violations by the prosecution team. OCDA agreed to the request and additional hearings resumed in in the trial court in February 2015.

- On March 12, 2015, the trial court judge issued a Supplemental Ruling based on his findings in the February 2015 evidentiary hearings (attachment 12). In its ruling, the trial court sanctioned OCDA by removing the entire office from prosecuting the penalty phase of the *Dekraai* case. In its ruling, the trial court stated that:

  "It is arguable whether or not the evidence currently before this court related to alleged prosecutorial misconduct reaches the standard of 'outrageous government conduct…'"

  "The District Attorney has a conflict of interest in this case which has actually deprived this defendant of due process in the past. And given this ongoing conflict, the District Attorney's continued participation in this prosecution

will likely prevent this defendant from receiving a fair trial in the future. After a period of what can at best be described as benign neglect concerning the action of his law enforcement partners, the District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial."

As a result, the penalty phase of the *Dekraai* case was assigned to the Cal AG. The Cal AG subsequently filed an appeal with the California Court of Appeal requesting that it overturn the trial court judge's dismissal of OCDA from prosecuting the penalty phase of *Dekraai*.

- On March 18, 2015, then District Attorney Rackauckas sent a letter to the Cal AG requesting that it investigate whether some OCSD deputies and the Deputy District Attorney prosecuting the *Perez* case lied on the stand during the *Dekraai* evidentiary hearings. (attachment 13) The Cal AG accepted the request and opened a criminal investigation.

- On November 17, 2015, a group of prominent local attorneys lead by Erwin Chemerinsky, Dean of the UCI Law School, and former California Attorney General John Van de Kamp, sent a letter the Attorney General of the United States requesting that the US Department of Justice initiate an investigation into the use of jailhouse informants by the Orange County Sheriff's Department and the Orange County District Attorney's Office. The letter was co-signed by 25 prominent lawyers and law professors from across the country. The letter cited a September 30, 2015, *New York Times* editorial, which called for the US DOJ to conduct a thorough investigation. In their letter, the authors also stated, "As of the writing of this letter, it is fair to say that the criminal justice system in Orange County is in a state of crisis." (attachment 14)

- On January 4, 2016, then District Attorney Rackauckas, citing the Informant Policies & Practices Evaluation Committee (IPPEC) report solicited by Mr. Rackauckas, requested that the US DOJ conduct a review of the OCDA. In his letter, Mr. Rackauckas promised the DOJ "unfettered access to documents and personnel of the OCDA." (attachment 15)

- On January 11, 2016, an OCDA/Investigation Bureau Commander met with the FBI to discuss OCDA concerns regarding the policy differences between OCDA and the FBI in the use of confidential informants, and in facilitating the proactive sharing of information so that local prosecutions could meet their discovery

requirements. (attachment 16) On January 27, 2016, the FBI responded in writing, generically stating that the FBI retains total discretion in determining what information it will or will not provide to local law enforcement regarding the use of confidential informants in federal cases. Specifically, the FBI's letter stated, in part, "An FBI task force operates under the FBI's authority to enforce federal laws only. While local law enforcement officials may be invited to serve on an FBI task force pursuant to a memorandum of understanding between participating agencies…the task force is and remains an FBI task force. It does not become transformed into an entity operated under the state or local government jurisdiction. As such, from a commonsense approach, as well as from an investigative standpoint, providing sensitive FBI Confidential Human Source information to your office would negatively impact the integrity of the FBI's Confidential Human Source program and FBI investigations." (attachment 17)

- On May 3, 2016, in the Orange County *People vs. Wozniak* prosecution, the trial judge released 81 redacted pages of a newly discovered OCSD Special Handling (SH) jail log to the *Wozniak* defense counsel (who was also the defense counsel for *Dekraai*). The SH log detailed the movements, reasons behind those movements, and discussions with OCSD deputies and confidential informants within the OC Jail. Both the *Wozniak/Dekraai* defense counsel and the OCDA *Dekraai* prosecution team claimed that this was the first time they learned of the existence of an OCSD SH log (different from the TRED information).

- On May 10, 2016, OCDA and OCSD executive staff met to discuss the existence and implications of the SH log. OCSD shortly thereafter provided 1,157 pages of unredacted SH log records to OCDA. OCDA dedicated significant office resources to reviewing the log records to determine which records required discovery to defense attorneys in multiple cases.

- In a June 9, 2016 press release, the OCDA publicly announced "OCDA's Action Plan to Remedy Legal Issues" by continuing "to analyze the entirety of the SH Log material to determine what other cases, if any, were affected, what Brady issues and Massiah v. United States…violations, if any, need to be reported to defendants, the court" and the Cal AG. This effort was later inappropriately abandoned by the former OCDA administration after the Court of Appeal failed to reinstate OCDA as the prosecution of record in the *Dekraai* case. After learning that the task was not completed, in October 2019, District Attorney Spitzer restarted this effort to inform defendants of past *Brady* and *Massiah*

violations. The assigned task force efforts are ongoing and expected to be completed within the next six to eight months.

- On November 22, 2016, the Court of Appeal (*People vs. Dekraai*, 5 Cal.App.5th 1110) denied the Cal AG's appeal to have OCDA reinstated as the prosecutor of the penalty phase of the *Dekraai* case. (attachment 18) In its ruling, the Court of Appeal stated, in pertinent part:

  "The record before us demonstrates that from the outset, the OCDA failed in its duty as the primary County prosecutor to supervise its prosecution team, specifically the OCSD, and ensure its prosecutors and its law enforcement team complied with its constitutional, statutory, and discovery obligations."

  "The evidence supports the conclusion that during this time period, prosecutors failed their professional responsibility to properly investigate Perez's confidential informant work and produce information to *Dekraai.*"

  "Contrary to the [Cal] Attorney General's attempts to lay all the blame on the OCSD, the OCDA was complicit in the wrongdoing."

  "Not only did the OCDA intentionally or negligently ignore the OCSD's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the Confidential Informant program."

- On December 15, 2016, the DOJ informed the Orange County Board of Supervisors and OCDA that its Civil Rights Division was commencing a civil investigation into whether there was a pattern and practice by OCSD and/or OCDA in violating *Massiah* and *Brady* laws in the use and subsequent discovery of the use of confidential jailhouse informants. (attachment 19) Accordingly, the DOJ began documentary evidence collection and ultimately held interviews with relevant OCDA staff in mid-2019. OCDA is fully cooperating with this investigation.

- In June 2017, the Orange County Grand Jury released a controversial report entitled "Myth of Orange County Jailhouse Informant Program" that, among other things, inaccurately concluded that OCSD was not operating a formal jailhouse informant program. (attachment 20)

- On August 18, 2017, after additional trial court evidentiary hearings due to the revelation of the OCSD SH log information and the resulting further allegations of discovery abuse by the *Dekraai* prosecution team, and in what appears to be in part a response to the June 2017 Grand Jury report, the *Dekraai* trial court judge issued his last ruling. (attachment 21) In his ruling, the judge, in pertinent part, stated:

  "The evidence produced during the three evidentiary hearings demonstrates the existence of serious misconduct committed by key members of the prosecution team."

  "To accept chronic non-compliance with such orders in any case, much less a case of this magnitude, would dangerously undermine the integrity of, and ultimately the community's respect for, the justice system."

  "The court has lost confidence that [the prosecution team] can ever secure full compliance with its lawful discovery orders."

  "There is evidence that the prosecution team explicitly or implicitly promised confidential informants consideration in exchange for information and confidential informants Perez and Moriel expected a benefit."

  "During this entire period, prosecutors failed their professional responsibility to properly investigate Perez's confidential informant work and produce information to *Dekraai*."

  "The truth is competent evidence has established beyond any reasonable doubt that OCSD, in its secondary capacity as county jailer, created and maintained a Confidential Informant program whereby it continued to investigate criminal activity in contravention of targeted defendants' constitutional rights."

  As a result of these findings, the trial court sanctioned OCDA by removing the death penalty as a potential punishment for Dekraai's eight confessed murders. Dekraai was sentenced to life without the possibility of parole.

- In April 2019, a deputy attorney general from Cal AG, informed Orange County Superior Court Judge Jim Rogan, during a non-*Dekraai* related trial proceeding, that the Cal AG had closed the OC informant criminal investigation without comment or action. In response, the District Attorney shortly thereafter directed this HR

investigation into OCDA's culpability regarding the OC Jailhouse informant scandal.

Investigative Findings and Recommendations

This administrative investigation is uniquely complex. First, it deals with events which began nearly nine years ago with the October 2011 arrest of mass murderer Scott Dekraai. Second, the case is multi-faceted, with multiple players (e.g., law enforcement, judiciary, media, and academia) at the federal, state, and local levels. Third, the negative ramifications of the deficiencies in the *Dekraai* case are immense and continue to this day.

Although this investigation is focused on only OCDA employees, the deficiencies in the *Dekraai* case were not isolated to only OCDA and will be cursorily addressed below.

The following investigative findings and recommendations are based on an extensive and thorough review of voluminous documentary and testimonial evidence:

Federal/Local Joint Gang Task Force

An analysis of OCDA issues related to its participation in joint gang task force operations resulted in one finding:

Finding 1: The establishment of joint gang task forces between federal and Orange County law enforcement has been instrumental in successfully prosecuting gang activities, but its confidential inner workings and procedures have at times created an environment that has increased the possibility for the violation of *Massiah* and *Brady* rules related to the use and legal discovery of confidential informants in state prosecutions.

The current governance of federal/local gang task forces in Orange County is controlled by DOJ agencies (i.e., US Attorney, FBI). There are no known issues regarding the use of federal confidential informants when cases are prosecuted by the US Attorney. However, when federal confidential informants are used in cases tried by local prosecutors (i.e., OCDA), the potential for *Massiah* and *Brady* rule violations increase for several reasons.

Joint task force operations are confidential and not shared with local law enforcement personnel who are not part of the task force, except for a compelling reason approved

by the DOJ. This can be problematic in the local prosecution of defendants arrested as a result of task force operations. It is typical for task force operations to result in the arrest of a substantial number of defendants. As such, the US Attorney often hands off many of these cases for prosecution to the local district attorney. When these cases are handed off, it is imperative that the task force forward all relevant information to OCDA for an effective and ethical prosecution. If full disclosure is not provided, it increases the chances of incomplete discovery to the defense and other violations of defendant statutory and constitutional rights.

Second, the use of confidential informants in the prosecution of cases is complex due to logistical and security concerns. It is often the case that local prosecutions take far less time to adjudicate than federal prosecutions; this is exacerbated by state criminal law that establishes time deadlines for prosecution. As such, it is possible that the early "outing" of a federal confidential informant in a local case may negatively impact the future prosecution of a later-tried federal case. Depending upon the status of the confidential informant, it could also expose the confidential informant to physical danger and may effectively end the use of the confidential informant for future cases.

Third, when federal confidential informants are housed in local jails, it increases the possibility that these informants will seek to collect information from other jailed defendants who are not part of the joint gang task force operation. Such was the circumstance in *Dekraai*.

Dekraai was not a gang member, but a high-profile target due to his status as the most prolific mass murderer in Orange County history. Enter Fernando Perez who was an experienced federal confidential informant with a high-profile target (Dekraai) in his sights, who was awaiting sentencing in his own criminal case, and was receiving judicial consideration for a sentence reduction due to his cooperation with law enforcement.

In these instances, it is possible that a federal confidential informant on his/her own initiative may attempt to gather information to further reduce his/her sentence, without initially disclosing to the local prosecution team that he/she is a federal confidential informant.

All the above situations played out in the *Dekraai* case. Prior to this administrative investigation, every OCDA employee involved in the *Dekraai* case claimed not to have been informed of Perez's previous informant history until at least six months after the case was opened. Also, in 2013, when a *Dekraai* prosecutor requested that the FBI provide discovery information on Perez's use as a federal confidential informant, the

FBI responded by stating that providing Perez discovery was hampered by legal and security issues, and even questioned the need for OCDA to comply with the trial court's discovery orders. (Attachment 22) As such, the FBI subsequently provided the *Dekraai* prosecution team with many but not all the requested documents.

Recommendation: OCDA should not participate in future joint gang task forces until Memoranda of Understandings (MOU) between the parties are revised to mandate that local prosecutors receive the necessary information regarding federal confidential informants that are utilized in state prosecutions to ensure compliance with *Massiah* and *Brady* law.

This is an issue with potential nationwide implications. It is obvious that current MOUs do not adequately account for resolving the coordination issues related to the use of the same confidential informant in both federal and state prosecuted cases. If not resolved, these issues will negatively impact the ability to solve crimes, future federal/state prosecutions, and strain relations between law enforcement agencies.

Oversight of the *Dekraai* Case by OCDA Executive Management

For reference purposes, the chain of command for the lead *Dekraai* prosecutor (i.e., the supervisor of the Homicide unit) was the Senior Assistant District Attorney and then the District Attorney. An analysis of the prior OCDA Executive Management's supervision and monitoring of the *Dekraai* case resulted in two findings:

Finding 2: The lack of supervision by OCDA executives over high-profile cases including *Dekraai* during the prior administration resulted in OCDA prosecutors trying these cases without adequate oversight, including the lack of discussion and resolution of critical decisions such as the use of confidential informants.

There were at least two obvious and critical factors that should have motivated OCDA executives to more closely monitor the *Dekraai* and gang prosecutions which used a confidential informant: (1) the *Dekraai* case was the largest mass murder case in Orange County history, and (2) the use of confidential informants in prosecutions is inherently problematic and should be discouraged.

Despite these critical factors, in the course of this investigation, there was virtually no written records or verbal acknowledgement from OCDA prosecutors demonstrating that prior OCDA executive management provided even routine supervision over cases

utilizing a confidential informant. For example, the former Senior Assistant District Attorney who supervised the lead *Dekraai* prosecutor, inexplicably stated to OCDA consultants hired to reform its informant policies and procedures that he did not even know that a jailhouse informant was used in the *Dekraai* case until he read it in the newspaper. Additionally, there was virtually no mention of proactive executive oversight of the *Dekraai* case in any trial court testimony or in transcripts from OCDA employee interviews with the Cal AG or DOJ.

In an additional example of the lack of oversight by OCDA executive management, in February 2013, when *Dekraai* prosecutors turned over a substantial amount of discovery material on informant Perez to defense counsel, it became apparent that other cases in which Perez was utilized as a confidential informant had received far less discovery information. This resulted in new trial court motions by defense counsels in non-*Dekraai* cases, and ultimately in significant sentencing reductions and the dismissal of cases for *Massiah* and *Brady* violations. All these deficiencies came as a surprise to OCDA executive management.

Recommendation: Ensure that OCDA attorney/investigator staff are trained and adhere to the newly established policies and procedures regarding major prosecution cases and the use of confidential informants: the Major Case Review Committee, and the Confidential Informant Review Committee (CIRC) with its protocol prohibiting the use of a jailhouse informant without express authorization from the elected District Attorney.

Finding 3: The prior OCDA administration allowed for the creation of internal documents related to the *Dekraai* prosecution which omitted important information and failed to discuss known instances of prosecutorial misconduct, negligence, or malpractice.

In response to the bombardment of OCDA by the courts, media, and interest groups due to discovery and informant violations in the *Dekraai* and other cases, the prior OCDA management created some internal documents, the purpose of which appears to be an attempt to lessen its culpability for prosecutorial misconduct and negligence allegations. While these documents do contain a large amount of factual information, they also omit important case-critical pieces of information and are therefore misleading. For example:

- An April 2015, 31-page document entitled "Memorandum to (DOJ) Jim Dutton Concerning Informant and Discovery Issues," written by a *Dekraai* prosecutor, omits several crucial facts: (1) that confidential informant Perez questioned Dekraai about his crimes in the OC Jail in their initial encounter, in violation of *Massiah*, (2) that Perez's confidential informant file warned against using Perez as a confidential informant, and (3) that the *Perez* prosecutor failed to inform the *Dekraai* prosecution team that he had accused Perez of committing perjury during Perez's 2009 court testimony.

- A November 2015 internal OCDA memo, entitled "Memo Disproving False Reports in Media Regarding OCDA," authored by the lead *Dekraai* prosecutor, attempted to identify and debunk the media's "demonstrably false reports of alleged wrongdoing by OCDA" in their prosecution of the *Dekraai* and other cases where a confidential informant was utilized. While the memo does address valid instances of inaccurate reporting, it does not correspondingly acknowledge or address OCDA's known acts of prosecutorial misconduct/negligence/malpractice.

- Despite the trial and appellate courts' conclusion that the *Dekraai* prosecution team committed prosecutorial misconduct and negligence, the former OCDA administration implausibly presented the lead *Dekraai* prosecutor with a highly laudatory commendation letter, effusively praising him for his work on the case. The Senior Assistant District Attorney wrote in the September 16, 2016 commendation letter, "I salute you as the embodiment of the type of excellent prosecutor and person we should all strive to be," and described him as a prosecutor with "impeccable integrity."

Recommendation: The District Attorney should hold his/her executive management team accountable for meeting their affirmative duty to ensure that all OCDA correspondence contain accurate and forthcoming information.

<u>*Dekraai* Prosecution Team</u>

An analysis of the performance issues involving the *Dekraai* prosecution team identified several critical findings central to this administrative investigation:

Finding 4: OCDA attorney staff assigned to prosecute the *Dekraai* (and other cases where a confidential information was utilized), had sufficient experience and training which would allow OCDA executive management to

reasonably expect them to perform their work in a competent and ethical manner and within the parameters of informant/discovery law.

The attorneys assigned to prosecute the *Dekraai* case were the head of the Homicide unit and a senior level attorney in the Homicide unit. Both had substantial work experience in a variety of prosecutorial units. In addition, the training records for all attorneys examined had an extensive list of training in areas including ethics, the use of informants, *Brady* rule requirements, rules of professional conduct, prosecutorial misconduct, avoiding discovery errors, and the use of the OCII (confidential informant log) maintained by OCDA.

Recommendation: OCDA management should continue to ensure that its prosecutorial staff who are in assignments that may utilize confidential informants are conversant with OCDA's Informant Manual, Informant Authorization Protocols, and the Confidential Informant Review Committee (CIRC).

Finding 5: Severe performance deficiencies by the OCDA prosecution team were identified in their handling of the *Dekraai* case.

Both the trial and appellate courts concluded that the *Dekraai* prosecution team exhibited misconduct and negligence in the performance of their duties. This investigation agrees with this conclusion, but also probes deeper into the underlying issue causing the performance deficiencies: **the circumstances and timing of the prosecution team in learning that Perez was an experienced confidential informant.** Nearly every performance deficiency in the *Dekraai* case stems from the answer to this question. This answer is also critical as it identifies the culpability of the prosecution team and ultimately the level of discipline that should be recommended for their performance failures.

Unfortunately, the explanation given by the *Dekraai* prosecutors, when examined against the myriad of available evidence, is highly questionable and unconvincing. As such, this report's investigators were required to examine the potential scenarios for when the *Dekraai* prosecution learned that Perez was a veteran confidential informant. There are essentially three scenarios surrounding the circumstances and timing of learning that Perez was an experienced confidential informant. Each will be examined against the evidence:

1. The members of the prosecution team were unintentionally negligent in their failure to learn in a timely manner that Perez was an experienced confidential informant, and thus were incompetent. (Incompetence)

2. The members of the prosecution team deliberately chose to ignore the myriad of evidence—right in front of them—which pointed toward Perez being an experienced confidential informant, and thus committed malpractice. (Malpractice)

3. The members of the prosecution team maliciously and intentionally, from day one, deceptively concealed its knowledge that Perez was a federal confidential informant, and thus misled the court in their testimony. (Deception)

Scenario One—Incompetence:

Under this scenario, the prosecution team simply failed to competently perform their duties. This is essentially the claim of the prosecution team and the predominate premise used by the trial court in leveling its sanctions against the prosecution team: first, disallowing the use of Dekraai's confessions to Perez (2014); second, the recusal of OCDA from prosecuting the *Dekraai* case (2015); and third, the removal of the death penalty as a possible punishment for Dekraai (2017).

Accepting this scenario along with its fact assertions would result in the *Dekraai* prosecution team being guilty of the following performance deficiencies:

a. <u>Prosecutorial Misconduct and Negligence</u>

Information that validates this conclusion includes:

1) Despite multiple obvious clues indicating that Perez could be a confidential informant, for 14 months, *Dekraai* prosecutors failed to check OCDA's confidential informant files to determine whether Perez was a confidential informant. In his March 4, 2014 People's Opposition Brief to Defense Motion to Recuse OCDA, the lead *Dekraai* prosecutor admitted that, "Neither I nor [the other Dekraai prosecutor] had previously inquired about, accessed, or learned about the contents of the Inmate F's [Fernando Perez] OCDA informant file." As a result, the prosecutors deprived themselves of vital information demonstrating that Perez was previously used as both a local and federal confidential informant and that there were notations in the OCII file warning against continuing to use him as an informant.

2) The *Dekraai* prosecutors failed to ask their colleague, the OCDA attorney prosecuting the *Perez* case, in a timely manner whether Perez was a government confidential informant.

3) The significance of the *Dekraai* case required the utmost due diligence and skill by the prosecution team.

4) Both the trial court judge and California Court of Appeal opinion concluded that OCDA prosecutors committed prosecutorial misconduct and negligence in the *Dekraai* case.

5) *Dekraai* prosecutors negligently ignored repeated compelling evidence indicating that Perez was a veteran confidential informant.

b. Professional incompetence of *Dekraai* prosecutor(s) exhibited by their stated lack of an adequate working knowledge of *Massiah* law

A defendant's Sixth Amendment Constitutional protection under *Massiah* is a fundamental legal concept. This is knowledge that every law school student learns. Yet, in trial court, Cal AG, and DOJ interview testimony, the lead *Dekraai* prosecutor repeatedly used his purported lack of an adequate knowledge of either *Brady/Massiah* as a defense against his flawed legal judgments related to discovery obligations, that subsequently crippled OCDA's ability to effectively and efficiently prosecute the case. This is verified by the Court of Appeal in its ruling on *Dekraai*, which stated in pertinent part, "The magnitude of the systematic problems cannot be overlooked. [The lead *Dekraai* prosecutor], a 20-year veteran of the OCDA and supervisor of the homicide unit, admitted his legal reasoning on a prosecutor's fundamental ethical obligations under *Massiah* was flawed. [The other *Dekraai* prosecutor], a 24-year veteran of the office, explained his understanding of his ethical obligation was 'evolving.' This record does not support a finding there was a reasonable basis for the trial court to have confidence the OCDA will prevent future misconduct from occurring in this case."

This purported flawed understanding of *Massiah* played out in prosecution team's October 19, 2011 interview of confidential informant Perez. The following is testimony from the lead *Dekraai* prosecutor in his March 2014 trial court testimony:

Defense Q: "So he [Perez] indicated to you before he gave the [October 19, 2011] statement that he was the person who actually had questioned Scott Dekraai and that it wasn't a spontaneous statement. He said that he asked him?"
A: "I think he says that in the middle of the interview."
.....
Q: "So it was clear to you at that point in the interview at least that there had been a question that led to an incriminating response, right?"
A: "That is certainly what it appears, yes."
Q: "So when you heard that, did you think that at that point I probably should terminate this interview or at least terminate it until I have a greater understanding of who Fernando Perez is?"
A: "No, I did not."
.....
Q: "So after the interview ends, at that moment you have no concern whatsoever that you may have just gotten statements in violation of Massiah, fair to say?"
A: "Fair."
Q: "You are not worried in the least of what you have obtained and the legality of it?"
A: "That is true."

c. <u>Performance deficiencies by the OCDA prosecutors in the *Dekraai* case resulted in severe negative consequences to OCDA and Orange County's criminal justice system</u>

Examples of the severe nature of these consequences include:

1) Sanctions against the prosecution in the *Dekraai* case:
   - Loss of admission of the Perez/Dekraai covert tape-recording showing premeditation, depravity, and mental clarity of Dekraai during the commission of his murders
   - Recusal of the entire OCDA office from prosecuting the *Dekraai* case
   - Removal of the death penalty as punishment against Dekraai

2) Subjection of the family and friends of Dekraai's victims to several years of unnecessary emotional distress, and a denial of justice in the removal of the death penalty as punishment, due to misconduct/negligence in prosecuting the case.

3) Severe tarnishing of the reputation of OCDA, and the subsequent diminishment of public faith in the Orange County criminal justice system, due to scores of continuous and ongoing negative national and local media exposure (which continue to this day) because of the prosecutorial misconduct/negligence committed in the *Dekraai* case, as well as in other cases that came to light from the deficiencies in the *Dekraai* case. The other OCDA prosecutions that were materially damaged and resulted in a degradation of justice include:

- *People vs. Henry Rodriguez:* The trial court judge vacated Rodriguez's life sentence for a double murder conviction due to the illegal use of a jailhouse informant after the defendant filed a habeas corpus motion based on information obtained from the *Dekraai* case.

- *People vs. Eric Ortiz:* the trial court ordered a new murder trial after OCSD deputies refused to testify regarding the use of a jailhouse informant.

- *People vs. Bryant Islas:* facing a life sentence, Islas instead received a reduced plea agreement after the trial court learned that a jailhouse informant obtained an illegal confession.

- *People vs. Isaac Palacios:* Palacios was allowed to plead guilty to a lesser charge after his murder conviction was set aside due to jailhouse informant violations.

- *People vs. Leonel Vega:* Vega, who was sentenced to life without the possibility of parole, received a sentence reduction to 15 years in prison after testimony in *Dekraai* showed that informant notes were withheld from the defendant.

4) As a direct result of the *Dekraai* debacle, the California Legislature added section 1424.5 to the Penal Code. This section requires the court to inform the State Bar of California when the court determines that a prosecutor deliberately and intentionally withheld relevant evidence from a defendant. Pursuant to this section, the court may remove a prosecutor from a case who acted in bad faith in failing to provide relevant discovery. The court may also disqualify the prosecutor's office from the case if the court finds that employees of the office engaged in a pattern of practice of knowingly and intentionally withholding relevant evidence from a defendant.

5) The enormous waste of public resources: prosecutorial deficiencies in the *Dekraai* case resulted in adding *years* of unnecessary courtroom testimony and litigation; in OCDA staff, past and present, being consumed by the collection of data and in prepping for interviews with the Cal AG and DOJ; and in the opportunity cost of taking OCDA staff away from their duties of case prosecution and victim care.

6) In early 2019, when the OCDA's senior executive responsible for coordinating the office's response to state/federal investigative agency reviews of the *Dekraai* case was asked if he could quantify the amount of OCDA staff time consumed by these tasks, he stated that the number of unnecessary additional hours was essentially immeasurable.

d. <u>OCDA prosecutors consistently refused to accept responsibility for their misconduct and negligence in the *Dekraai* case</u>

Examples include:

1) In the trial court's August 2017 ruling, the judge stated, "This court has for some time maintained hope that the Orange County District Attorney and the Orange County Sheriff, in the face of objectively verifiable evidence, would accept the reality that for many years illegal activities occurred in the Orange County Jail involving represented defendants and working informants."

2) In a *Dekraai* prosecutor's analysis paper critiquing the trial court and Court of Appeal's rulings, the prosecutor wrote, "The DCA's [Court of Appeal's] opinion exhibits numerous instances of hindsight bias which lead to confusion in the factual timeline, especially concerning what [the *Dekraai* prosecutors] knew and when they knew it and unwarranted legal conclusions."

3) In his DOJ civil investigation interview in 2019, a *Dekraai* prosecutor was asked: "...So you viewed any—so you viewed any violations that may have occurred between them [Dekraai and Perez]—in terms of—you viewed any potential Massiah violations of Mr. Dekraai's Sixth Amendment rights of that category, e.g., 'not flagrant' or 'relatively mild'"? *Dekraai* prosecutor answer: "Yes." Q: "And what's the basis of that?" A: "That's just my legal analysis."

Scenario 2—Malpractice:

Under this scenario, the prosecution team deliberately chose to ignore the multitude of evidence indicating that Perez was likely a veteran confidential informant. In doing so, the prosecution team hoped to use Dekraai's jailhouse confessions to Perez as evidence to demonstrate premeditation and rationality in the commission of his murders, and thereby refute any claim by Dekraai that he was insane.

Provided below is extensive evidence which supports the consideration of intentional negligence and thus malpractice by the prosecution team:

- Trial and Appellate Court Statements

  Every judicial or investigative body examining the *Dekraai* case has wondered out loud whether the prosecutorial misconduct/malpractice related to discovery and defendant constitutional rights violations in the use of a confidential informant was intentional rather than negligent. For instance:

  - The trial court stated in its March 12, 2015 ruling:

    "The District Attorney cannot or will not in this case comply with the discovery orders of this court…"

    "It is arguable whether or not the evidence currently before this court related to alleged prosecutorial misconduct reaches the standard of outrageous government conduct…"

  - The Court of Appeal stated in its November 22, 2016 ruling, "Not only did the OCDA intentionally or negligently ignore the OCSD violations of targeted defendant's constitutional rights…"

- Insanity Plea Concerns

  Listed below are the relevant events and testimony related to the prosecution team's critical concern, based on the lead prosecutor's experience with the Allaway case, that Dekraai may assert a plea of not guilty by reason of insanity:

- At the time of his arrest, Dekraai informed a Seal Beach police detective that he was under psychiatric care and taking medication.
- The Seal Beach Police detective went to Dekraai's psychiatrist to obtain Dekraai's psychological records. The doctor would not release the information without a proper medical release from Dekraai. The detective met with Dekraai inside the jail and attempted to get Dekraai to sign a waiver without his attorney being present. Dekraai declined to sign the waiver.
- Dekraai admitted to Perez that he was going to plead "insanity". "I want to do my time in a mental hospital".
- In the November 17, 2011 memo from the Dekraai prosecution team investigator to the OCDA Perez prosecutor, it stated, "Those facts and intelligence (about Dekraai's murder confession to Perez) will likely greatly enhance the prosecution of Dekraai, especially in the event there is an insanity plea entered by Dekraai".
- Then District Attorney Rackauckas briefed individual Orange County Board of Supervisor members that he was concerned that Dekraai would plead Not Guilty by Reason of Insanity just as Allaway had previously done.
- In his 2014 testimony in the *Dekraai* evidentiary hearings, the lead *Dekraai* prosecutor admitted that his previous experience working on the post-*Allaway* case came into play, and he was concerned when Dekraai indicated that he might plead Not Guilty by Reason of Insanity.

It is important to acknowledge just how deep the insanity plea concern was to OCDA. This concern can be ascertained by reading OCDA letters regarding their opposition to the release of Allaway as recommended by Patton State Hospital psychiatric staff on four different occasions. Excerpts from these letters include:

December 7, 2009 Letter from OC District Attorney to Patton State Hospital Executive Director:

- "Thank you for allowing me the opportunity to meet with you on Monday, November 30 [2009] at your facility and to discuss this matter of utmost importance. As the District Attorney of Orange County, it is my duty and responsibility to oppose the release of Edward Allaway into our community…"
- "To put it bluntly, and based on the history of the Allaway litigation and the numerous assessments from Patton, I have grave doubts and concerns about Patton's ability to accurately diagnose Edward Allaway."

April 15, 2010 Letter from OC District Attorney to Governor Arnold Schwarzenegger:

- "I am writing to bring to your attention that the California Department of Mental Health has plans to recommend the release of Orange County's worst mass murderer Edward Allaway into the community. This is a high priority, urgent

matter which merits your immediate attention to prevent irrevocable harm to public safety."

- "Unfortunately, the meeting with [Patton executives] left me with grave concerns that Patton's staff is ignorant of mass murderer Allaway's history of violence, has misdiagnosed his illness, and has little appreciation of the substantial danger he poses to society."
- "...Allaway's past meritless petitions [for release] have caused tremendous trauma to the victims' families. Unfortunately, Allaway has received a recommendation for release every time a new treatment team or hospital administration takes a "fresh look" at Allaway without considering all of his history and the facts and circumstances of his case."

- State of Mind of *Dekraai* Prosecutors

In order to consider whether acts of misconduct were done intentionally or deliberately, it is also critical to know what the person was thinking. This state of mind information was provided by the lead *Dekraai* prosecutor in his March 26, 2014 trial court testimony:

> Defense Q: "You did though—you would agree that you had the obligation at that point to share with the court that this individual [Perez] had been an informant in the jails for a comfortable period of time and that that may have bearing on whether the statement by him was truthful."
> A: "I don't know if all those—that I was up on all those facts."
> Q: "Well, you knew you had gotten an e-mail even before this litigation had started that he was involved in as many as nine cases as an informant potentially, correct?"
> A: "The day before I received that e-mail?"
> Q: "Yes."
> A: "I guess so."
> Q: "But you—"
> A: "I can't put myself back in that point and say that was on my mind."
> Q: "Yeah, but you had the ability to inform yourself of that well before the 24th [January 2013]. You had made a decision tactically not to make a discovery about his background, right?"
> A: "Not true."
> Q: "Right?"
> A: "Not true."
> Q: "Why after this period of time, knowing basically what was in [the prosecution team's investigator] report, after having the interview, finding out

whether Perez was really telling the truth, whether this was really all an act of nobility, why not find out whether there was information that spoke to the contrary?"
A: "I'm not certain."
Q: "But you knew you had an obligation, would you agree, not to mislead the court."
A: "Absolutely."
Q: "That was misleading, was it not, to indicate that he was doing this basically out of his sense of society's well-being when you had evidence that he had been an informant for a year and a half?"
A: "I didn't say that he was doing this out of a sense of well-being. I said he said he was doing this out of a sense of—"
Q: "Okay, let's say a witness says something and you have evidence that would, in fact, impeach that witness." Is it your obligation as a prosecutor to turn that over?"
A: "If I have evidence, yes."
Q: "Is it—is it acceptable from your perspective to basically put blinders on and not see that evidence that is right within your reach?"
(Objection and Rephrase)
Q: "Mr. [lead *Dekraai* prosecutor], you could have easily obtained evidence that was consistent with your skepticism about whether Mr. Perez was telling the truth fully about his motivations. Right? That was information you could have obtained very easily?"
A: "I was able to obtain it after the court's discovery order so I suppose you could say it was obtainable, yes."
Q: "And you made the decision—you're the one who typed the declaration. You typed it knowing that Mr. Perez had an informant history; you just hadn't gotten more of the details. You knew that. Right?"
A: "No, I don't know the extent—what extent I knew that he had an informant history. I believe I knew he had been an informant."

Q: "Well, it was one e-mail in January of 2013, so it was one phone call or one e-mail away for the preceding 18 months. Right? At any point if you wanted to call as the head of the Homicide Unit to [the *Perez* prosecutor] and say, [*Perez* prosecutor], 'what other cases, has he been involved with,' you could have found out the answer very easily. Correct?"
A: "Probably."
Q: "You didn't want to?"
A: "No, I didn't make that consideration."

Q: "So in sum, you never thought it was something that was important to do before writing this [January 25, 2013] Declaration to find out more about what Mr. Perez's informant background was?"
A: "True."

This testimony clearly indicates that *Dekraai* prosecutors made a deliberate decision not to find out more about Perez's informant background.

- Facts/Events/Actions of *Dekraai* Prosecution

In determining intentionality, it also helpful to examine the facts/events/actions of the *Dekraai* prosecution team. The first category of facts/events/actions examined is that related to the context or environment of the *Dekraai* prosecution. In that regard, consider the:

- Prosecution team: OCDA's prosecution team was comprised of veteran, highly experienced prosecutors, investigators and Sheriff Deputies. The lead of the prosecution team was the head of the most prestigious unit in OCDA – the Homicide unit.

- Case: the *Dekraai* case was the most prolific murder case in Orange County history. The prosecution had at its disposal whatever resources it deemed necessary.

- Orange County Jail Informant Program: OCSD leadership conceded in court, and OCSD Special Handling Logs and TRED records show, that OCSD had a decades long practice of moving jailhouse confidential informants next to defendants to obtain criminal act confessions.

The second category of facts/events/actions related to intentionality is provided in the pertinent chronology of the *Dekraai* case information specifically related to confidential informant Perez. It is important to note that all these facts/events/actions are uncontested:

- In August or September 2011, the Senior Assistant District Attorney, who was the supervisor of the *Dekraai* lead prosecutor, received a PowerPoint presentation by the *Perez* criminal case prosecutor briefing him on the federal/local joint gang task force operation named *Operation Black Flag*. As part

of that presentation, Fernando Perez was identified as being utilized as jailhouse confidential informant.

- Dekraai was arrested on October 12, 2011. On October 14, 2011, he was arraigned in court and was represented by counsel. On October 15, 2011, jailhouse inmate and federal confidential informant Perez questioned and resultantly obtained Dekraai's confession inside the Orange County jail. On October 18, 2011, an OCSD Special Handling Unit deputy contacted the *Dekraai* prosecution team to inform them they had an inmate "who has provided good intel in the past" that had spoken to Dekraai and wanted to share that information with law enforcement. On October 19, the *Dekraai* prosecution team met with Perez in the jail. Following that meeting, the prosecution team requested that OCSD place a covert listening device in Dekraai's cell. The prosecution team instructed Perez not to question Dekraai but just to act as a legally permissible "listening post" to see if Dekraai would, unsolicited, confess to and describe his murders. On October 21, the bug captured Dekraai explicitly bragging about his murders.

- In his personal work log for October 18, 2011, the investigator for the *Dekraai* prosecution team made the following two entries (attachment 23):

  - The first entry: "...Rec'd a telephone call from OCSD Special Handling Deputy [name] ref a jail informant who spoke with Dekraai in great detail about the shooting; informant is cooperative and not looking for a deal. No local charges pending; he has been sentenced on federal charges and is awaiting pick-up by US Marshals for trans to federal prison. His 85-year sentence was reduced to 20 for the work that he has already done. Advised *[names of Dekraai* prosecutors]."

  - The last entry: "Today, I also received a telephone call from IRC Special Handling/Classification Deputy [name] regarding an inmate who was given information by Dekraai. *[Names of Dekraai* prosecutors] advised."

  These two entries refer to the same phone call but provide different levels of information. The first entry strongly implies that Perez was a veteran government confidential informant before he met Dekraai, and states that the investigator had informed the *Dekraai* prosecutors of this; the second entry leaves this information out. This discrepancy eventually becomes an issue in February 2014 when the investigator for the *Dekraai* prosecution team is

subpoenaed to testify in the *Dekraai* evidentiary hearings and the lead *Dekraai* prosecutor first learns of his investigator's October 18, 2011 log entries.

- In his personal log for October 26, 2011, the investigator for the *Dekraai* prosecution team made the following entry: "Debrief meeting held at OCSD crime lab [with prosecution team]. After the meeting, [Seal Beach detective] informed us that the covert jail recordings have been terminated; some good stuff obtained…"

- On November 1, 2011, the investigator for the *Dekraai* prosecution team obtained from OCSD Special Handling deputies the notes Perez had written to document his October 15, 2011 conversation with Dekraai in which Dekraai initially confessed to his murders. This investigator later stated in his March 2014 trial court testimony:

  > Defense Q: "When do you think you first realized he [Perez] was an informant, that he was somebody who had done a comfortable amount of work in the jailhouse setting?"
  > Investigator A: "Probably after we conducted our [October 19, 2011] interview and I went to pick up some notes from [OCSD deputy] that had been made by Fernando [Perez]."
  > …..
  > Q: "…You said that once you got the notes, in your mind you kind of viewed him as an informant in the jails. Is that right?"
  > A: "No. I was impressed with how organized he was in his note-taking and the kinds of things he had written down. I still had no idea what this person had been involved in."
  > Q: "When did you first become alerted to the fact that he was, you know, more involved in informant work?"
  > A: "I don't know for sure. I really don't. I wish I could answer that for you."

  Similarly, when the second chair *Dekraai* prosecutor was asked during his March 2014 trial court testimony when he first had the feeling that Perez was a confidential informant beyond the *Dekraai* case, the prosecutor stated, "Probably when I saw the notes [in November 2011]."

- On November 17, 2011, the investigator for the *Dekraai* prosecution team wrote a memo to the OCDA prosecutor trying Perez's own criminal case informing him that the *Dekraai* prosecution team was utilizing Perez as a confidential informant

in the *Dekraai* case. The investigator was given permission to write this letter by the lead *Dekraai* prosecutor.

- In February 2012, the *Dekraai* defense team sent an informal discovery request for the criminal and informant history of Perez. Subsequently, in his March 2014 trial court testimony, a *Dekraai* prosecutor was asked, "...at that point [after receiving the informal discovery request] at least you might have—you must have wondered, look is there something to what he's asking about? Is there something that is there in terms of his informant background beyond the Dekraai case?" The *Dekraai* prosecutor responded, "Yeah, I started thinking about that." Later, that same prosecutor in his August 2019 DOJ interview stated regarding his first (October 19, 2011) meeting with Perez: "I could tell by looking at him he was somebody. He wasn't your average, you know, guy in there for a DUI. I mean, I could tell he was—had been around the block...and he looked like a gang guy. And I know having been in the Gang Unit for several years."

- On April 11, 2012, the lead *Dekraai* prosecutor requested a rap sheet for Perez's criminal history.

- On April 13, 2012, OCDA discovered to the *Dekraai* defense team the February 23, 2012 report written by the Seal Beach detective working the *Dekraai* case that included Dekraai's confessional statements to Perez gained from the covert listening device placed in Dekraai's cell in October 2011. In reference to the detective's February 23, 2012 report, the *Dekraai* prosecutor stated in his March 4, 2014 opposition brief to the defense's motion to recuse OCDA from the *Dekraai* case, "Therefore, in my opinion, when viewing this [2/23/12] report and the attached notes of Inmate F [Perez], it doesn't take much detective work to figure out that Inmate F was working as an informant."

- On June 1, 2012, the lead *Dekraai* prosecutor emailed the second chair *Dekraai* prosecutor and investigator, stating, "...Can you remind me what case(s) Fernando P is working? Before deciding if/when/how to disclose Fernando's identity to the Dekraai defense lawyers, we are going to need to talk to the prosecutor(s) on Fernando's other cases and analyze several things such as: security risks to Fernando, prejudice to those cases if Fernando testifies for us and/or doesn't testify for them. But unless we decide not to use Fernando (and I am disinclined to give up on that prospect), we are going to need to disclose his identify to the Dekraai defense team so they can perform a conflict check."

- On July 26, 2012, the lead *Dekraai* prosecutor sent the defense team the covert tape recording of the Perez/Dekraai jail cell conversation.

- On January 11, 2013, the *Dekraai* defense filed a motion in the trial court to compel the discovery of information related to Perez's criminal and informant background.

- On January 29, 2013, the lead *Dekraai* prosecutor sent an email to the DOJ requesting discovery information on Perez. In his email, the prosecutor admitted that Perez "...engaged Dekraai in conversation about the mass murder, and Dekraai bragged to the Source [Perez] about the shootings." The prosecutor also admitted in the email that it can be proven that Perez was a prior government informant evidenced by a long-standing relationship with them: "In order to meet their burden for suppression of the evidence, the defense must prove: (1) that the Source was acting as a government agent (*which can be proved by demonstrating an 'implied understanding' between the informant and law enforcement, evidenced by a long-standing relationship, whereby law enforcement creates a situation enabling the informant to gather information from a suspect and then expects the informant to gather that information*)..."

- On February 1, 2013, the lead *Dekraai* prosecutor, for the first time, requested Perez's informant file from OCDA's own Orange County Information Index (OCII).

- On January 31, 2014, the *Dekraai* defense filed three motions requesting various forms of relief due to its allegations of prosecutorial discovery violations. Motion 1 claimed a violation of the *Massiah* rule in the utilization of Perez as a confidential informant; Motion 2 claimed "Outrageous Government Misconduct," seeking the removal of the possibility of the death penalty; and Motion 3, asked for OCDA to be recused from prosecuting the *Dekraai* case.

- On February 26, 2014, the investigator for the *Dekraai* prosecution team was subpoenaed by the defense to testify in trial court evidentiary hearings regarding the defense's January 31, 2014 motions. The investigator informed the lead *Dekraai* prosecutor of his subpoena on February 26, 2014, and also for the first time, the prosecutor reviewed the investigator's personal log information for October 18, 2011, which included the two similar but disparate entries. As previously mentioned, the first entry strongly suggested that Perez was a federal confidential informant before he met Dekraai, and that the investigator had informed the *Dekraai* prosecutors of this on October 18, 2011. When the lead

Dekraai prosecutor learned of the two entries, in an effort to dispel the impression that he knew of Perez's past informant history in October 2011, he immediately called the investigator and requested that the investigator write a memo to the *Dekraai* case file explaining the reason for and the timing of the two entries (attachment 24). In addition, the prosecutor also wrote his own memo to the *Dekraai* case file (attachment 25).

- On March 24, 2014, during trial court evidentiary hearings on the defense's three motions, the lead *Dekraai* prosecutor was asked by the defense counsel, "You said after you left the meeting with Perez that your impression was that he was a jailhouse informant and possibly a gang member?" The lead *Dekraai* prosecutor responded, "Yes."

- On April 22, 2014, the *Dekraai* prosecution conceded the defense's *Massiah* motion and agreed not to use any information obtained by Perez in his conversations with Dekraai. This effectively ended the prosecution team's strategy and subsequent tactics to use these confessions to mitigate a potential Not Guilty by Reason of Insanity plea by Dekraai.

- On November 7, 2014, following the discovery of the TRED OC jail inmate records, the *Dekraai* defense requested a new evidentiary hearing based on additional alleged discovery and informant abuses by the prosecution team. Both the defense and prosecution agreed to a new hearing which resumed in February 2015. On March 12, 2015, the trial court ruled in favor of the defense, and as a sanction, recused the entire OCDA office from prosecuting the penalty phase of the *Dekraai* case.

- In May 2016, the Cal AG began its interviews of OCDA staff in its criminal investigation of alleged OCDA/OCSD violations in the *Dekraai* case. Pertinent interview testimony by the *Dekraai* lead prosecutor includes:

  - "It looked like [the OCSD Special Handling Deputy] and Perez knew each other."
  - "I wouldn't be naïve enough to think that he's [Perez] not doing whatever he's doing out of self-interest."
  - "I didn't know his [Perez] history with law enforcement. So I didn't know, you know, but—but even not knowing that, this guy comes to us in the posture of a jailhouse snitch."

- On August 18, 2017, the trial court issued its final ruling on the *Dekraai* case, removing the death penalty as a sentencing option due to ongoing informant and discovery violations by the prosecution team. In its ruling the trial court stated:

  "Members of the prosecution team chose to either deny, or ignore, these glaring irregularities. One of the apparent byproducts of this response has been the prosecution team's chronic failure to comply with this court's discovery orders."

  "In this case, the evidence demonstrates that 'discoverable records and evidence' have repeatedly been withheld."

  "The truth is that the OCDA has been complicit in the OCSD's misconduct."

  "The truth is thereafter OCDA failed to significantly follow up on its promises to address these 'systematic problems.'"

- In January and February of 2020, separate telephonic interviews were conducted with two former OCDA employees: the prosecutor of the *Perez* criminal case, and the investigator for the *Dekraai* prosecution. The following information was provided during the interviews:

  Dekraai prosecution team investigator statements:

  - We didn't know Perez's background until a week or two later [after the October 19, 2011 interview].
  - I requested permission from the lead *Dekraai* prosecutor to send my November 17, 2011 memo informing the *Perez* case prosecutor that we were utilizing Perez in the *Dekraai* case. I then emailed the memo to both *Dekraai* prosecutors.

  It should be noted that both *Dekraai* prosecutors denied being sent the November 17, 2011 memo at the time it was written; this report's investigative team was also unable to find any written evidence showing that the *Dekraai* investigator sent the November 17 memo to prosecutors.

  Perez prosecutor statements:

  - I met with the lead *Dekraai* prosecutor within one month after I received the *Dekraai* investigator's November 17, 2011 memo informing me that Perez was

serving as an informant in the *Dekraai* case. This meeting occurred in the lead *Dekraai* prosecutor's office. When I met in his office, it "felt to me like he knew Perez was a CI."

- Both *Dekraai* prosecutors were trying to negate any potential insanity plea by Dekraai so they wanted to admit into the court record the jail conversations between Dekraai and Perez.

- I told the lead *Dekraai* prosecutor that "Fernando Perez had his fingers in everything, that he had testified in his own trial and committed perjury… I told [him] that Perez was a confidential informant... I told him that I prosecuted the [Operation] Black Flag cases… I told him who Fernando Perez was, and that he may be used in state prosecutions."

- I told the lead *Dekraai* prosecutor that I knew the Sheriff Special Handling deputies who handled jailhouse informants and "there is no possible way that the deputies would have walked [the *Dekraai* prosecutors] in the jail to see Perez without telling them that Perez was a CI."

After this interview, this report's investigators reviewed the *Perez* prosecutor's trial court testimony in the *Dekraai* case and noted apparent contradictions. In particular, in his trial court testimony, he was asked:

> Question: "So there was no discussion about the fact between you and any member of the Dekraai prosecution team that—that Fernando Perez was an informant, he was in the federal system, he had been used by various individuals and taken a whole bunch of notes in the jail?"
> Answer: "No."

As a result, this report's investigators conducted a second telephonic interview with the *Perez* prosecutor. During the second interview, the *Perez* prosecutor:

- Stated that he understood how his trial court testimony might appear to be contradictory, but it is not. The testimony he gave in the trial court was to the best of his recollection.

- Insisted that he met with the lead *Dekraai* prosecutor with a month of receiving the November 17, 2011 memo.

- Stated that there was "no way the Dekraai prosecutors did not know Fernando Perez was a CI."

- Reiterated that there was no way that the Sheriff Special Handling Unit deputies would let the *Dekraai* prosecutors walk into the Perez interview blind.

- Was asked to explain why he didn't make it clear in this trial court testimony that he told the *Dekraai* prosecutors Perez as a confidential informant. He explained, "In hindsight, I wish I would have said when I gave [the lead *Dekraai* prosecutor] the list [of all the cases Perez was working as a CI]."

It should be noted that there was no written evidence found which confirmed that the *Perez* prosecutor met with the lead *Dekraai* prosecutor one month after he received the November 17, 2011 memo.

- Inconsistent or Contradictory Prosecution Team Testimony

In the process of determining whether the *Dekraai* prosecutors acts of misconduct/malpractice were done intentionally, it is also helpful to examine whether there are inconsistencies or contradictions in their testimony. In the *Dekraai* case, inconsistent and contradictory testimony was given by the *Dekraai* prosecutors in the following areas:

  - Did the *Dekraai* prosecutors know that Perez had been a confidential informant prior to meeting Dekraai?

    One of the troubling aspects of this investigation is the number of contradictory statements made by the *Dekraai* prosecution team in various venues (trial court testimony, DOJ and Cal AG interviews, and written documents) regarding when they knew Perez was a government confidential informant before he met Dekraai in October 2011. OCDA prosecutors should have had an easily verifiable answer to such a fundamental question. Disturbingly, they do not.

    When the *Dekraai* prosecution team members were asked in various judicial and investigative venues when they first knew of Perez's previous confidential informant work, they consistently stated they didn't know of his prior confidential informant work until sometime between June 2012 and January 2013:

Lead Dekraai prosecutor:

- In Item 53 in his March 4, 2014 Declaration and Opposition brief to recusing OCDA from prosecuting the Dekraai case: "So my best guess is that sometime during the summer of 2012 I talked with [the *Perez* prosecutor] about Inmate F's informant history." Item 54: "I believe that by January 2013, [the *Perez* prosecutor] had told me the following about Inmate F: …That he had informed on some associates of a notorious prison gang, and thus that he was at a higher level of risk than the average informant."

Second Chair Dekraai prosecutor:

- In his March 2014 trial court testimony:
  Defense Q: "So when did you first think this person could be an agent [government CI]?"
  A: "I didn't even think about that until much later in the game."
  Q: "When's much later in the game?"
  A: "When all this basically came to light. I don't believe I found out about [Perez's] background until late 2012, maybe early 2013."

However, the *Dekraai* prosecutors then contradicted their own testimony on several occasions:

Lead Dekraai prosecutor:

- In his March 4, 2014 Declaration and People's Brief in Opposition to Defense's Motion to Recuse OCDA from prosecuting the *Dekraai* case, Item 47: "One of the notes written by Inmate F. contained in [Seal Beach Detective's] 2-23-12 report is addressed to [OCSD deputy]… Therefore, in my opinion when viewing this [2-23-12] report and the attached notes of Inmate F., it doesn't take much detective work to figure out that Inmate F was working as an informant."

- In his June 1, 2012 email to his *Dekraai* prosecution team colleagues, he writes, "can you remind me of what case(s) Fernando P is working?"

Second Chair Dekraai prosecutor:

- March 2014 trial court testimony:
  Defense Q: "When did you think this person [Perez] was likely an informant beyond the Dekraai case?"
  A: "Probably when I saw the notes."

Q: "You're talking weeks later [after the Perez October 19, 2011 jail interview]?"
A: "Right."
.....
Q: "So in February 2012 we [the *Dekraai* defense team] filed a discovery request...So when you got the request for discovery and that was something that was discussed with you and the [lead *Dekraai* prosecutor], at that point at least you might have—you must have wondered, look is there something to what he's [Perez] talking about? Is there something that is there in terms of his informant background beyond the Dekraai case?"
A: "Yeah, I started thinking about that."

- August 2019 DOJ testimony:
  DOJ Q: "[Lead *Dekraai* prosecutor] emails [*Dekraai* prosecution team investigator] on June 1, 2012 asking to be reminded 'what cases Fernando P. is working.' Correct?"
  A: "Correct."
  Q: "How did you interpret that line, 'cases Fernando P. is working?"
  A: "Well, at some point [the lead *Dekraai* prosecutor] found out that Fernando Perez was involved as an informant in the Operation Black Flag investigation."
  Q: "So you're saying that at some point before June 1, 2012, [the lead *Dekraai* prosecutor] knew that Mr. Perez was involved in providing information on other cases?"
  A: "I'm assuming he had to have information based on that question, yes."

- Omissions and inaccurate information provided in prosecution's court filing

In his January 25, 2013 opposition brief to the defense motion to order discovery on Perez, the lead *Dekraai* prosecutor omitted the following consequential information:

- That the prosecution team had been informed by OCDS staff before the October 19, 2011 jail meeting with Perez that he "had provided good intel in the past."

- That Perez had initiated his October 15, 2011 conversation with Dekraai asking him questions about why he was incarcerated, in violation of *Massiah* law.

- The list of nine cases that he was provided the day before (1/24/13) showing the cases that Perez was utilized as an informant.

Despite these omissions, the prosecutor then made the following grossly inaccurate statement in his opposition brief and sworn declaration: "To date, the prosecution has provided exhaustive discovery to the defense."

At the conclusion of the January 25, 2013 court hearing on the discovery motion, the trial court judge ordered full discovery on the criminal and informant history of Perez.

Scenario 3—Deception:

After examining the foregoing information, it is apparent that there is an even graver possibility to consider: whether *Dekraai* prosecutors knew from the beginning (October 2011 or before) that Perez was a veteran confidential informant? If so, their subsequent court and interview testimony was untruthful.

Following a complete and through review of all the available evidence, the investigators of this report determined that this scenario cannot be sufficiently proven.

After a review and analysis of the above three scenarios (i.e., Incompetence, Deception, Malpractice), this investigation makes the following finding:

Finding 6: There is clear and convincing evidence to a reasonable certainty that indicates *Dekraai* prosecutors committed malpractice due to intentional negligence.

A summary analysis of the above three scenarios (i.e., Incompetence, Deception, Malpractice) yields the following conclusions:

- In order to reasonably consider that the *Dekraai* prosecution team was unintentionally negligent because they performed their duties in an incompetent manner, one has to accept the premise that experienced and well trained prosecutors, with pristine performance records, suddenly became inept during their prosecution of the worst murder case in Orange County history. Many of the mistakes made in the *Dekraai* prosecution would not have been made by junior level attorneys. It strains credulity to chalk the *Dekraai* debacle up as a six-year long requiem of unintentional blunders.

- There is, however, ample direct and circumstantial evidence that supports a conclusion that the Dekraai prosecution team committed malpractice due to intentional and deliberate negligence in the performance of their duties.

  The state of mind analysis based on the lead *Dekraai* team prosecutor's own testimony clearly indicates that the prosecution team make a deliberate choice not to find out the criminal and informant history of confidential informant Perez in a timely manner. In addition, the multitude of uncontested facts/events/actions in this case demonstrate that the prosecution team was repeatedly presented with obvious clues that caused them to wonder whether Perez was a confidential informant. And finally, the prosecution team provided inconsistent and contradictory testimony on critical case issues (when they first confirmed that Perez was a veteran confidential informant, and omissions of some of those issues in court filings).

  These apparent acts of deliberate negligence have had devastating consequences to the victim's families, the Orange County criminal justice system and its law enforcement agencies, and to the taxpayer as public funds are wasted in flawed prosecutions and law enforcement resources are diverted away from their current duties to deal with past *Dekraai* case failures.

Recommendation: **A finding of intentional negligence resulting in malpractice necessitates the imposition of severe disciplinary action against the *Dekraai* prosecution team and its executive chain of command. However, the executives involved left the office with the outgoing DA administration, and as previously noted, the *Dekraai* prosecutors resigned their positions with OCDA in December 2019 during the course of this investigation.**

Unfortunately, this recommendation is no longer implementable given that those who could be considered for disciplinary action no longer work for OCDA. Notwithstanding, the thrust of this recommendation is on accountability, which is always a prerequisite for the proper administration of justice and the upholding of performance standards. Going forward, OCDA must hold its employees accountable for performance deficiencies through accurate performance evaluations and in the imposition of employee discipline when warranted.

Confidential Informants Used in Non-Dekraai Cases

The investigative team performed a cursory review of the other non-Dekraai cases in which confidential informants were utilized.

Finding 7: There is insufficient evidence to validate prosecutorial misconduct or malpractice in the five cases reviewed in which confidential informants were also utilized.

There were five other cases where the use of confidential informants was negatively impacted by the Dekraai case. While there were deficiencies in these cases, this review failed to identify demonstrable errors made by OCDA prosecutors in their handling of the cases, as well as circumstances outside their control in attempting to obtain all discoverable information from federal gang task force members.

Recommendation: Refer to the Finding 1 recommendation to revise OCDA's MOU with the federal/local joint gang task force to ensure that federal task force members share discovery information with OCDA prosecutors related to the use of confidential informants.

Improvements Implemented by OCDA

Finding 8: OCDA has implemented significant efforts to constructively address the deficiencies involving the use of confidential informants.

Some of the key reforms include:

- Establishment of regular executive staff meetings
- Update of the OCDA Legal Policy Manual
- Establishment of Major Case Review Committee to ensure that all major cases are periodically reviewed and discussed with executive management
- Development of a new prosecutor annual performance evaluation focused on developing the "whole prosecutor" rather than only on "winning cases" at any cost.
- Development of a new policy regarding *Brady* and discovery obligations for prosecutors and law enforcement personnel
- Establishment of a Conviction Integrity Unit that investigates claims of factual innocence presented by defendants who were convicted of serious or violent felonies

- Establishment of a Chief Ethics Officer position that functions in an advisory role to OCDA staff on ethics related to questions on individual cases as well as those that pertain to global ethical issues.
- The administration of discipline by the current OCDA administration for prosecutorial misconduct.
- Development of Informant Policy Manual that reforms OCDA policies and procedures regarding the use of informants
- Establishment of a standalone Professional Responsibility Training Unit that provides a comprehensive program of continuing legal education and training
- Creation of a revised policy for the granting of Immunity

No recommendation necessary

Attachments:

1. Chronology of Pertinent *Dekraai* events
2. July 13, 2011, FBI Press Release, Ninety-Nine Members and Associates of Mexican Mafia-Affiliated Gangs Charged in Operation Black Flag
3. September 24, 2013, FBI Press Release, Operation Smokin' Aces Targets Mexican Mafia Operations in Orange County
4. December 7, 2009, letter from District Attorney Tony Rackauckas to Carlos Luna, Executive Director and Dr. George Christison, Acting Medical Director, Patton State Hospital, re: Edward Allaway
5. April 15, 2010, letter from District Attorney Tony Rackauckas to Governor Arnold Schwarzenegger, re: Pending Release of Orange County Mass Murderer Edward Allaway by Patton Hospital Staff
6. September 8, 2016, letter from lead *Dekraai* prosecutor to Mike McQueen, Hospital Administrator, Napa State Hospital, re: Edward Allaway, Orange County Superior Court Case No. C-36354
7. November 17, 2011, memo from *Dekraai* prosecution team investigator to the OCDA deputy district attorney assigned to prosecute *People v. Fernando Perez*
8. June 1, 2012, email from lead *Dekraai* prosecutor to second chair *Dekraai* prosecutor and investigator, subject: "Fernando P", June 4, 2012, email response from *Dekraai* lead investigator to lead *Dekraai* prosecutor
9. January 29, 2013, email from lead *Dekraai* prosecutor to U.S. Department of Justice/FBI, subject: discovery order regarding source
10. February 7, 2013 letter from lead *Dekraai* prosecutor to Christina Gaspar, U.S. Department of Justice/FBI, Los Angeles, Office of Chief Division Counsel, Re: Discovery Order re: Inmate F, Orange County Superior Court Case 12ZF0128 (*People v. Dekraai,* Death Penalty Case)
11. August 4, 2014, Ruling, *People of the State of California v. Scott Dekraai,* No.12ZF0128, Judge Thomas M. Goethals
12. March 12, 2015, Supplemental Ruling, *People of the State of California v. Scott Dekraai,* No.12ZF0128, Judge Thomas M. Goethals
13. June 6, 2016, letter from Orange County District Attorney Tony Rackauckas to Julie Garland, Senior Assistant California Attorney General, Re: Supplemental referral to Attorney General for review of conduct and testimony by OCSD personnel in *People v. Dekraai.*
14. November 15, 2015, Joint Letter to the United States Department of Justice, Request for Federal Investigation in Orange County, California, from law school deans, professors and leading criminal law attorneys

15. January 4, 2016, letter from Orange County District Attorney Tony Rackauckas to Loretta E. Lynch, Attorney General of the United States, Re: Request for Federal Investigation of the Orange County District Attorney's Office Informant Policies and Practices
16. January 5, 2016, email from Ron Seman, Commander, Bureau of Investigation, OCDA, to George Boykins & Eric A. Mayo, U.S. Department of Justice/FBI, Los Angeles, Re: Santa Ana Gang Task Force
17. January 27, 2016, letter from Paul E. Raimondi, Chief Division Counsel, U.S. Department of Justice/FBI, to Ron Seman, Commander, Bureau of Investigation, OCDA, Re Disclosure of FBI Confidential Human Sources
18. November 22, 2016, Decision, California Court of Appeal, *People v. Scott Dekraai*, 5 Cal.App. 5th 1110
19. December 15, 2016, Press Release, United States Department of Justice, Justice Department Opens Investigations of Orange County, California, District Attorney's Officer and Sheriff's Department
20. Report of the 2016-2017 Orange County Grand Jury, "The Myth of the Orange County Jailhouse Informant Program"
21. August 18, 2017, Ruling (Motion for Sanctions Related to Ongoing Discovery Abuse), *People of the State of California v. Scott Dekraai*, No.12ZF0128, Judge Thomas M. Goethals
22. February 7, 2013 letter from Paul F. Raimondi, Chief Division Counsel, U.S. Department of Justice/FBI, Los Angeles, to lead *Dekraai* prosecutor, subject: re People v. Scott Evans Dekraai, Case No.12ZF0128
23. *Dekraai* prosecution team investigator's personal work log for October 18, 2011
24. March 1, 2014, email from *Dekraai* prosecution team investigator to lead *Dekraai* prosecutor, subject: *Dekraai* Investigator Case Notes (2).doc
25. March 3, 2014, Memo Office of District Attorney, to Dekraai File, 12ZF0128, from lead *Dekraai* prosecutor, subject: *Dekraai* Inv. [name] case notes

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ATTACHMENT 1

Chronology of *Dekraai* Prosecution

The prosecution of the *People vs. Scott Dekraai* case began in October 2011 and was not completed until August 2017. Listed below is a chronology of important events related to the case:

- In 1976, Edward Allaway murdered seven people on the Cal State University Fullerton campus. Allaway pleaded Not Guilty by Reason of Insanity. The jury convicted Allaway of murder but deadlocked on the issue of his sanity. The trail judge then found Allaway not guilty by reason of insanity and remanded him to Patton State Hospital. Beginning in 1986, Allaway began to regularly petition the court for his release stating he was fit to be released into society with the recommendation of psychiatric staff from Patton. The Orange County District Attorney's Office (OCDA) successfully fought Allaway's release on five separate occasions. The then-District Attorney and the lead *Dekraai* prosecutor led these efforts from 2001 to 2016. Each of Allaway's petitions for release resulted in a "five-alarm" legal fire in Orange County, causing imminent safety concerns for citizens, severe emotional distress to the victim's families, and the dedication of significant legal resources to ensure that Allaway was not the first mass murder in American history to be released from confinement. The *Allaway* facts are important because these same The Orange County District Attorney's Office decision makers (i.e., District Attorney, lead *Dekraai* prosecutor) were admittedly extremely concerned that Dekraai would also assert a plea of Not Guilty by Reason of Insanity with all its inherent tribulations, and these fears impacted the decisions made by the prosecution team in their use of a confidential informant in the *Dekraai* case.

- Orange County jail inmate Fernando Perez had a long history of serving as a jailhouse confidential informant for both local and federal law enforcement agencies. The Orange County District Attorney's Office Informant Index (OCII) records from 1999 indicated that Perez was used as a confidential informant for the Anaheim Police Department. The OCII record also indicated that in August of 1999, Perez was terminated as a confidential informant because, according to the Anaheim detective handling Perez, he failed to follow directions and was unreliable. In August of 1999, the detective documented Perez's OCII file with a written warning that Perez should no longer be used as a confidential informant.

- Despite this warning, the OCII files indicated that OCDA again utilized Perez as a confidential informant in 2001. Then, in September 2010, the OCDA Gang/TARGET unit attorney prosecuting Perez for his third-strike crime re-registered Perez as a CI. In January 2011, Perez was then introduced to the FBI and Santa Ana Gang Task Force by the Orange County Sheriff's Department (OCSD). In February 2011, Perez testified in federal court as a confidential witness. In March 2011, representatives from the FBI, OCSD, Santa Ana PD, and OCDA (Gang/TARGET unit) went into closed session with the judge presiding over Perez's criminal case to detail his value as a confidential informant. Due to his third-strike conviction, Perez was facing a 40-years to life sentence. Ultimately, in consideration for his confidential informant work, Perez was sentenced to 21 years in prison.

- In August or September 2011, the Senior Assistant District Attorney, who was the supervision of the lead *Dekraai* prosecutor, received a PowerPoint presentation by the *Perez*

criminal case prosecutor briefing him on the federal/local joint gang task force operation named *Operation Black Flag*. As part of that presentation, Perez was identified as being utilized as a jailhouse confidential informant. The presentation included Perez's photograph.

- On October 12, 2011, Dekraai was arrested and booked into Orange County jail. Informant Perez initiated contact with Dekraai on October 15, 2011 and told OCSD deputies that he had obtained useful information against Dekraai. On October 18, 2011, an OCSD Special Handling Unit deputy called the OCDA investigator assigned to the *Dekraai* case to inform him that an inmate who has "provided good intel in the past" would like to provide information to the *Dekraai* prosecution team.

- On October 19, 2011, the prosecution team met with Perez at the jail to hear him out. After that meeting, OCDA prosecutors requested that OCSD bug Dekraai's cell for five days. On October 21, 2011, the bug captured Dekraai explicitly bragging about his murders.

- On November 1, 2011, the *Dekraai* prosecution team investigator obtained Perez's handwritten notes of his October 15, 2011 conversation with Dekraai from OCSD deputies.

- During the first six months of the *Dekraai* case (October 2011 to April 2012), the prosecution team repeatedly ignored clear and compelling evidence that Perez was a veteran federal confidential informant. This investigation identified numerous occasions where events should have caused the prosecution team to suspect that Perez might be a confidential informant and therefore check his criminal/informant history.

- In his personal work log for October 18, 2011, the investigator for the *Dekraai* prosecution team made the following two entries:

  - The first entry: "...Rec'd a telephone call from OCSD Special Handling Deputy [name] ref a jail informant who spoke with Dekraai in great detail about the shooting; informant is cooperative and not looking for a deal. No local charges pending; he has been sentenced on federal charges and is awaiting pick-up by US Marshals for trans to federal prison. His 85-year sentence was reduced to 20 for the work that he has already done. Advised [names of *Dekraai* prosecutors]."

  - The last entry: "Today, I also received a telephone call from IRC Special Handling/Classification Deputy [name] regarding an inmate who was given information by Dekraai. [Names of *Dekraai* prosecutors] advised."

  These two entries refer to the same phone call but provide different levels of information. The first entry provided information that indicated Perez was a veteran government confidential informant before he met Dekraai and stated that the investigator had informed the *Dekraai* prosecutors of this; the second entry leaves this information out. This discrepancy eventually becomes an issue in February 2014 when the investigator for the *Dekraai* prosecution team is subpoenaed to testify in the *Dekraai* evidentiary hearings and the lead *Dekraai* prosecutor first learns of his investigator's October 18, 2011 log entries. This concern is described in more detail in the February 26, 2014 entry below.

- In his personal log for October 26, 2011, the investigator for the *Dekraai* prosecution team made the following entry: "Debrief meeting held at OCSD crime lab [with prosecution team]. After the meeting, [Seal Beach detective] informed us that the covert jail recordings have been terminated; some good stuff obtained…"

- On November 1, 2011, the investigator for the *Dekraai* prosecution team obtained from OCSD Special Handling deputies the notes Perez had written to document his October 15, 2011 conversation with Dekraai in which Dekraai initially confessed to his murders. Subsequently, in their March 2014 trial court testimonies regarding these notes, both the second chair *Dekraai* prosecutor and the investigator responded that the first time they had the impression that Perez might be a veteran confidential informant was when they read the notes in November 2011.

- On November 17, 2011, the investigator for the *Dekraai* prosecution team sent a memo to the OCDA Gang/TARGET unit attorney prosecuting Perez's criminal case to inform him that the *Dekraai* prosecution team had received incriminating information against Dekraai from Perez. Despite the *Dekraai* case being the largest mass murder case in OC history, there was no documentary or trial court testimonial evidence found that indicated that the *Perez* prosecutor ever informed his colleagues, the *Dekraai* prosecutors, that Perez had previously been utilized as a long term local and federal confidential informant. (Note: this is not to conclude that this disclosure did not occur, only that there is no written evidence that proves it did).

- From December 2011 to February 2013, the *Dekraai* prosecution team provided limited discovery information to the defense team regarding Perez. The prosecution team stated during trial court evidentiary hearings and in subsequent interviews with the Cal AG and DOJ that they withheld some of Perez's information because they were not going to call him as a witness and therefore (wrongly) believed they did not have to provide it.

- In February 2012, the *Dekraai* defense team sent an informal discovery request for the criminal and informant history of Perez. Subsequently, in his March 2014 trial court testimony, a *Dekraai* prosecutor was asked, "…at that point [after receiving the informal discovery request] at least you might have—you must have wondered, look is there something to what he's asking about? Is there something that is there in terms of his informant background beyond the Dekraai case?" The *Dekraai* prosecutor responded, "Yeah, I started thinking about that." Later, that same prosecutor in his August 2019 DOJ interview stated regarding his first (October 19, 2011) meeting with Perez: "I could tell by looking at him he was somebody. He wasn't your average, you know, guy in there for a DUI. I mean, I could tell he was—had been around the block…and he looked like a gang guy. And I know having been in the Gang Unit for several years."

- On April 11, 2012, the lead *Dekraai* prosecutor requested a rap sheet for Perez's criminal history.

- On April 13, 2012, the lead *Dekraai* prosecutor approved the discovery of the February 23, 2012 written report of the Seal Beach detective working the *Dekraai* case that included Dekraai's confessional statements to Perez obtained from the covert jail listening device placed in Dekraai's jail cell. Later, in the lead *Dekraai* prosecutor's March 4, 2014 opposition brief to the defense's motion to recuse OCDA from the *Dekraai* case, he would state, "Therefore, in my opinion, when viewing the [February 23, 2012] report and the attached notes of Inmate F [Perez], it doesn't take much detective work to figure out that Inmate F was working as an informant."

- On June 1, 2012, the lead *Dekraai* prosecutor emailed his second chair prosecutor and his investigator, stating, "...Can you remind me what case(s) Fernando P is working? Before deciding if/when/how to disclose Fernando's identity to the Dekraai defense lawyers, we are going to need to talk to the prosecutor(s) on Fernando's other cases and analyze several things such as: security risks to Fernando, prejudice to those cases if Fernando testifies for us and/or doesn't testify for them. But unless we decide not to use Fernando (and I am disinclined to give up on that prospect), we are going to need to disclose his identity to the Dekraai defense team so they can perform a conflict check."

- On July 26, 2012, the lead *Dekraai* prosecutor sent the defense team the covert tape recording of the Perez/Dekraai jail cell conversation.

- On January 11, 2013, the *Dekraai* defense team filed a motion in the trial court to compel the discovery of all information related to the use of Perez as a confidential informant and his criminal and informant background. The motion accused OCDA of intentionally placing a known informant near Dekraai and intentionally withholding discovery evidence. Shortly thereafter, the lead *Dekraai* prosecutor filed an opposition brief to prevent the discovery. On January 25, 2013, the trial court ordered that discovery related to confidential informant Perez be provided to the defense, including Perez's criminal and informant history.

- On January 29, 2013, the *Dekraai* prosecution team sent an email to the DOJ requesting federal confidential informant information on Perez ("Inmate F"). In his email, the prosecutor admitted that Perez "...engaged Dekraai in conversation about the mass murder, and Dekraai bragged to the Source [Perez] about the shootings." The prosecutor also admitted in this email that it can be proven that Perez was a prior government informant evidenced by a long-standing relationship with them. On February 7, 2013, the FBI's Chief Division Counsel responded in writing, stating, in part, "The FBI continues to evaluate what documents it possesses, whether they are relevant to your request, and whether they may be produced in accordance with applicable federal law and regulations. Additionally, we are addressing legal and security issues related to your request. To that end, we may supplement this response with additional documents at a later date. However, it is unclear why all discovery in federal cases in which 'Inmate F' may have provided information (much of which does not relate to 'Inmate F') or the substantive information provided by 'Inmate F' in the federal investigations is relevant to the *Massiah* issue under consideration by the Court.

Please find enclosed the documents which we are, at this time, legally authorized to provide you." With this letter, the FBI essentially ignored the Superior Court judge's ruling as to what discovery must be turned over to the *Dekraai* defense team.

- On February 1, 2013, the lead *Dekraai* prosecutor, for the first time, requested Perez's informant file from OCDA's own Orange County Information Index (OCII).

- In mid to late February 2013, OCDA turned over a substantial amount of discovery material on Perez to the *Dekraai* defense counsel. From this information, the *Dekraai* defense team learned that OCDA had provided a substantially less amount of discovery material in other non-*Dekraai* cases in which Perez was also used as a confidential informant. This resulted in new trial court motions by defense counsels in the non-*Dekraai* cases, and ultimately in significant sentencing reductions and the dismissal of cases for *Massiah* and *Brady* violations in these non-*Dekraai* cases. In addition, due to the volume of discovery information provided to the *Dekraai* defense team, they requested, and the trial court granted a lengthy continuance to digest the materials.

- On January 31, 2014, the *Dekraai* defense filed three lengthy court motions requesting various forms of relief: Motion 1 claimed a violation of *Massiah* law related to use of Perez as a confidential informant; Motion 2 claimed outrageous government misconduct and requested dismissal of the death penalty as a sentencing option; and Motion 3 requested that OCDA be removed from prosecuting the case.

- In February 2014, to respond to the allegations made in the defense motions, OCDA directed an internal case review of the *Dekraai* and other gang cases in which jailhouse confidential informants were utilized. The case review was inappropriately headed by the lead prosecutor of the *Dekraai* case, as he was one of the prosecutors accused of outrageous government conduct.

- On February 26, 2014, the investigator for the *Dekraai* prosecution team was subpoenaed by the defense to testify in trial court evidentiary hearings regarding the defense's January 31, 2014 motions. The investigator informed the lead *Dekraai* prosecutor of his subpoena and his personal work log for October 18, 2011, which included the two similar but disparate entries. As previously mentioned, the first entry provided information that indicated Perez was a federal confidential informant before he met Dekraai, and that the investigator had informed the *Dekraai* prosecutors of this on October 18, 2011. When the lead *Dekraai* prosecutor learned of the two entries, he immediately called the investigator and requested that the investigator write a memo to the *Dekraai* case file explaining the reason for and the timing of the two entries. In addition, the prosecutor also wrote his own memo to the *Dekraai* case file.

- From March to July 2014, the *Dekraai* trial court held evidentiary hearings to gather the necessary information to rule on the three defense motions. The hearings heard testimony from more than 40 witnesses and produced more than 5,000 pages of transcripts. On March 24, 2014, during trial court evidentiary hearings, the lead *Dekraai* prosecutor was asked by the defense counsel, "You said after you left the meeting with Perez that your impression was

that he was a jailhouse informant and possibly a gang member?" The lead *Dekraai* prosecutor responded, "Yes."

- On April 22, 2014, OCDA conceded the *Dekraai* defense's *Massiah* motion, essentially not challenging that Perez was a government agent and improperly solicited information from represented defendant Dekraai without his attorney being present. As a result, OCDA agreed not to use the Dekraai confessions obtained by Perez.

- On May 2, 2014, Dekraai entered guilty pleas to all felony charges against him: eight counts of first-degree murder and one count of attempted murder. As a result, Dekraai's trial would only be the penalty phase to determine if he would be sentenced to either the death penalty or life without the possibility of parole.

- On July 30, 2014, the Santa Ana PD Sergeant who was the supervisor in charge of the Santa Ana Gang Task Force, testified in the *Dekraai* trial court evidentiary hearings. The supervisor provided the following pertinent information:

  - The DOJ (US Attorney and FBI) has governance authority over the Joint Gang Task Force; all Santa Ana PD officers and OCSD deputies on the task force are cross-deputized as federal officers and take administrative direction from DOJ personnel.
  - The Sergeant was unaware that federal informant Perez was being utilized in the local *Dekraai* case until early 2014.
  - All local cross-deputized police officers claim that the Assistant US Attorney in charge of the Joint Task Force would not allow some of the task force confidential informant information to be shared with OCDA.

- On August 4, 2014, the *Dekraai* trial court issued its ruling on the three defense motions. The judge granted the *Massiah* motion (which OCDA did not contest); denied the motion alleging outrageous government conduct, but ruled that OCDA exhibited significant prosecutorial misconduct, and deemed the misconduct to be negligent rather than malicious; and denied the motion to recuse OCDA from prosecuting the penalty phase of the *Dekraai* case.

- In September 2014, per trial court order, OCSD produced previously undisclosed documents from its TRED jail information system detailing inmate movements and the reasons for those movements. Upon learning of the existence of these documents, the *Dekraai* defense requested a resumption of evidentiary hearings claiming new evidence of discovery and informant violations by the prosecution team. OCDA agreed to the request and additional hearings resumed in in the trial court in February 2015.

- On March 12, 2015, the trial court judge issued a Supplemental Ruling based on his findings in the February 2015 evidentiary hearings. In its ruling, the trial court sanctioned OCDA by removing the entire office from prosecuting the penalty phase of the *Dekraai* case. In its ruling, the trial court stated that:

"It is arguable whether or not the evidence currently before this court related to alleged prosecutorial misconduct reaches the standard of 'outrageous government conduct...'"

"The District Attorney has a conflict of interest in this case which has actually deprived this defendant of due process in the past. And given this ongoing conflict, the District Attorney's continued participation in this prosecution will likely prevent this defendant from receiving a fair trial in the future. After a period of what can at best be described as benign neglect concerning the action of his law enforcement partners, the District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial."

As a result, the penalty phase of the *Dekraai* case was assigned to the Cal AG. The Cal AG subsequently filed an appeal with the California Court of Appeal requesting that it overturn the trial court judge's dismissal of OCDA from prosecuting the penalty phase of *Dekraai*.

- On March 18, 2015, then District Attorney Rackauckas sent a letter to the Cal AG requesting that it investigate whether some OCSD deputies and the Deputy District Attorney prosecuting the *Perez* case testified untruthfully during the *Dekraai* evidentiary hearings. The Cal AG accepted the request and opened a criminal investigation.

- On November 17, 2015, a group of prominent local attorneys lead by Erwin Chemerinsky, Dean of the UCI Law School, and former California Attorney General John Van de Kamp, sent a letter the Attorney General of the United States requesting that the US Department of Justice initiate an investigation into the use of jailhouse informants by the Orange County Sheriff's Department and the Orange County District Attorney's Office. The letter was co-signed by 25 prominent lawyers and law professors from across the country. The letter cited a September 30, 2015, *New York Times* editorial, which called for the US DOJ to conduct a thorough investigation. In their letter, the authors also stated, "As of the writing of this letter, it is fair to say that the criminal justice system in Orange County is in a state of crisis."

- On January 4, 2016, then District Attorney Rackauckas, citing the Informant Policies & Practices Evaluation Committee (IPPEC) report solicited by Mr. Rackauckas, requested that the US DOJ conduct a review of the OCDA.

- On January 11, 2016, an OCDA/Investigation Bureau Commander met with the FBI to discuss OCDA concerns regarding the policy differences between OCDA and the FBI in the use of confidential informants, and in facilitating the proactive sharing of information so that local prosecutions could meet their discovery requirements. On January 27, 2016, the FBI responded in writing, generically stating that the FBI retains total discretion in determining what information it will or will not provide to local law enforcement regarding the use of confidential informants in federal cases. Specifically, the FBI's letter stated, in part, "An FBI task force operates under the FBI's authority to enforce federal laws only. While local law enforcement officials may be invited to serve on an FBI task force pursuant to a memorandum of understanding between participating agencies...the task force is and remains an FBI task force. It does not become transformed into an entity operated under the

state or local government jurisdiction. As such, from a commonsense approach, as well as from an investigative standpoint, providing sensitive FBI Confidential Human Source information to your office would negatively impact the integrity of the FBI's Confidential Human Source program and FBI investigations."

- On May 3, 2016, in the Orange County *People vs. Wozniak* prosecution, the trial judge released 81 redacted pages of a newly discovered OCSD Special Handling (SH) jail log to the *Wozniak* defense counsel (who was also the defense counsel for *Dekraai*). The SH log detailed the movements, reasons behind those movements, and discussions with OCSD deputies and confidential informants within the OC Jail. Both the *Wozniak/Dekraai* defense counsel and the OCDA *Dekraai* prosecution team claimed that this was the first time they learned of the existence of an OCSD SH log (different from the TRED information).

- On May 10, 2016, OCDA and OCSD executive staff met to discuss the existence and implications of the SH log. OCSD shortly thereafter provided 1,157 pages of unredacted SH log records to OCDA. OCDA dedicated significant office resources to reviewing the log records to determine which records required discovery to defense attorneys in multiple cases.

- In May 2016, the Cal AG began its interviews of OCDA staff in its criminal investigation of alleged OCDA/OCSD violations in the *Dekraai* case.

- In a June 9, 2016 press release, the OCDA publicly announced "OCDA's Action Plan to Remedy Legal Issues" by continuing "to analyze the entirety of the SH Log material to determine what other cases, if any, were affected, what Brady issues and Massiah v. United States...violations, if any, need to be reported to defendants, the court" and the Cal AG. This effort was later negligently abandoned by the former OCDA administration after the Court of Appeal failed to reinstate OCDA as the prosecution of record in the *Dekraai* case.

- In October, 2019, after learning that the task to "analyze the entirety of the SH Log ... "Was not completed, the current OCDA administration restarted this effort to inform defendants of past *Brady* and *Massiah* violations. The assigned task force efforts are ongoing and complex, involving the review of thousands of SH Log documents and cross-referencing them with inmate records. The task force is expected to complete its work within six months.

- On November 22, 2016, the Court of Appeal (*People vs. Dekraai*, 5 Cal.App.5th 1110) denied the Cal AG's appeal to have OCDA reinstated as the prosecutor of the penalty phase of the *Dekraai* case. In its ruling, the Court of Appeal stated, in pertinent part:

  "The record before us demonstrates that from the outset, the OCDA failed in its duty as the primary County prosecutor to supervise its prosecution team, specifically the OCSD, and ensure its prosecutors and its law enforcement team complied with its constitutional, statutory, and discovery obligations."

  "The evidence supports the conclusion that during this time period, prosecutors failed their professional responsibility to properly investigate Perez's confidential informant work and produce information to *Dekraai*."

"Contrary to the [Cal] Attorney General's attempts to lay all the blame on the OCSD, the OCDA was complicit in the wrongdoing."

"Not only did the OCDA intentionally or negligently ignore the OCSD's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the Confidential Informant program."

- On December 15, 2016, the DOJ informed the Orange County Board of Supervisors and OCDA that its Civil Rights Division was commencing a civil investigation into whether there was a pattern and practice by OCSD and/or OCDA in violating *Massiah* and *Brady* laws in the use and subsequent discovery of the use of confidential jailhouse informants. Accordingly, the DOJ began documentary evidence collection and ultimately held interviews with relevant OCDA staff in mid-2019. Their investigation is ongoing.

- In June 2017, the Orange County Grand Jury released a controversial report entitled "Myth of Orange County Jailhouse Informant Program". That report inaccurately concluded that OCSD was not operating a formal jailhouse informant program.

- On August 18, 2017, after additional trial court evidentiary hearings due to the revelation of the OCSD SH log information and the resulting further allegations of discovery abuse by the *Dekraai* prosecution team, and in what appears to be in part a response to the June 2017 Grand Jury report, the *Dekraai* trial court judge issued his last ruling. In his ruling, the judge, in pertinent part, stated:

  The evidence produced during the three evidentiary hearings demonstrates the existence of serious misconduct committed by key members of the prosecution team.

  To accept chronic non-compliance with such orders in any case, much less a case of this magnitude, would dangerously undermine the integrity of, and ultimately the community's respect for, the justice system.

  The court has lost confidence that [the prosecution team] can ever secure full compliance with its lawful discovery orders.

  There is evidence that the prosecution team explicitly or implicitly promised confidential informants consideration in exchange for information and confidential informants Perez and Moriel expected a benefit.

  During this entire period, prosecutors failed their professional responsibility to properly investigate Perez's confidential informant work and produce information to *Dekraai*.

  The truth is competent evidence has established beyond any reasonable doubt that OCSD, in its secondary capacity as county jailer, created and maintained a Confidential

Informant program whereby it continued to investigate criminal activity in contravention of targeted defendants' constitutional rights.

As a result of these findings, the trial court sanctioned OCDA by removing the death penalty as a potential punishment for Dekraai's eight confessed murders. Dekraai was sentenced to life without the possibility of parole.

- In April 2019, a deputy state attorney general from Cal AG informed Orange County Superior Court Judge Jim Rogan, during a non-*Dekraai* related trial proceeding, that the Cal AG had closed the OC informant criminal investigation without comment or action.

- Following the Cal AG's revelation, District Attorney Spitzer sent a letter to the California Attorney General to inquire whether it was accurate that the Cal AG had dropped its criminal investigation into the OC Jailhouse Informant scandal. The Attorney General did not respond to repeated inquiries from OCDA. In response, the District Attorney shortly thereafter directed his Special Counsel to conduct a formal investigation into OCDA's culpability regarding the use of jailhouse informants.

- In January and February of 2020, separate telephonic interviews were conducted with two former OCDA employees: the prosecutor of the *Perez* criminal case, and the investigator for the *Dekraai* prosecution. During those interviews, the *Perez* prosecutor stated that he informed the lead *Dekraai* prosecutor within a month of his November 17, 2011 notification that Perez was being utilized in the *Dekraai* case, that Perez was a confidential informant before he met Dekraai. It should be noted that there is no written evidence to confirm this claim.

ATTACHMENT 2

Ninety-Nine Members and Associates of Mexican Mafia-Affiliated Gangs Charged in Operation Black Flag

Federal Indictments Allege Racketeering by Criminal Enterprises Operating in Orange County; Linked Gang-Related Felonies Charged at Federal and State Levels

FBI Los Angeles
July 13, 2011

Public Affairs Specialist Laura Eimiller
(310) 996-3343

More than 500 law enforcement officers and agents executed arrest and search warrants this morning, marking the culmination of a multi-year investigation by the Santa Ana Gang Task Force that resulted in five federal indictments and various state felony charges for gang-related crime. Members and associates of violent Mexican Mafia-controlled gangs who claim the streets of Orange County as their territory were taken into custody for their roles in crimes and criminal enterprises alleged to be responsible for carrying out offenses including racketeering, extortion, narcotics and firearms violations, assault, and murder.

The results of today's operation were announced today by representatives of the Santa Ana Gang Task Force member agencies, including: the United States Attorney for the Central District of California, André Birotte, Jr.; FBI Assistant Director in Charge Steven Martinez; Santa Ana Police Chief Paul Walters; Orange County District Attorney Tony Rackauckas; ATF Special Agent in Charge John Torres; Senior Special Agent Daniel Evanilla with the California Department of Corrections and Rehabilitation; Captain Les Gogerty with the Costa Mesa Police Department; and Orange County Sheriff Sandra Hutchens.

Twenty-six of the 57 federal defendants were arrested during today's early morning operation, while 25 were already incarcerated on unrelated charges. Six are considered fugitives and are being sought be members of the task force. In addition, eight of the state defendants were arrested today and three are considered fugitives. The remainder were already in custody.

A federal grand jury in the Central District of California returned five federal indictments, the last of which was returned on Wednesday, June 29, 2011. The federal indictments collectively charge 57 members or associates of the Mexican Mafia and the Forming Kaos street gang that claims its territory in the city of Costa Mesa. The five indictments allege a pattern of serious criminal activity ranging from drug trafficking to conspiracy to murder. Two of the five federal indictments charge violations of the federal racketeering statute, commonly known as RICO.

One RICO indictment charges a total of 28 defendants associated with an Orange County branch of the Mexican Mafia, an organization led by Mexican Mafia member Peter Ojeda. Ojeda was previously indicted in 2005 in the Central District of California and is currently incarcerated in federal prison serving time for his conviction in that case. The second indictment charges an additional 17 defendants (11 with RICO) associated with the Forming Kaos street gang in Costa Mesa, California, and details the gang's extensive ties to the Mexican Mafia.

The three remaining federal indictments charge an additional 13 defendants with a variety of narcotics trafficking violations, including the distribution of heroine, methamphetamine, and cocaine, as well as a series of firearms offenses.

In addition to the federal indictments, the Orange County District Attorney's Office has filed various charges in connection with the alleged murder and assault conspiracies, to include gang enhancements.

The two federal RICO indictments are further described below.

The Orange County Mexican Mafia (OC Mexican Mafia); Peter Ojeda Criminal Enterprise

The indictment charging members and associates of the Orange County faction of the Mexican Mafia, headed by defendant Peter Ojeda, alleges the defendants engaged in conspiracies to commit murder, extortion, conspiracies to commit extortion, and narcotics trafficking for monetary gain. The defendants, according to the indictment, functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

The Mexican Mafia

The Mexican Mafia is a powerful and violent prison gang that controls drug distribution and other

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The Mexican Mafia is a powerful and violent prison gang that controls drug distribution and other illegal activities within the California penal system and on the streets of Southern California by organizing Hispanic street gang members for the purpose of establishing a larger network for the Mexican Mafia's illegal activities. If a gang does not accede to the Mexican Mafia, the Mexican Mafia will assault or kill the gang's members who are not in custody, as well as those members who are incarcerated within the California penal system. In addition to intimidation through direct assaults, the Mexican Mafia is also able to assert control and influence over gang members outside the penal system because gangs do not want their members in the penal system to be assaulted or killed, and because the gang members know that, if they are incarcerated, they will need the protection of the Mexican Mafia while they serve their sentences.

As a member of the Mexican Mafia, or "carnal," defendant Ojeda maintained the primary leadership role among Hispanic street gang members in Orange County and his influence over gangs extended from the streets to the jail system. High ranking and intermediate level members of the F-Troop criminal street gang, as well as high ranking members of other Hispanic criminal street gangs, such as Delhi, Highland Street, Orange Varrio Cypress, East Side Santa Ana, Little Hood Santa Ana, McClay, Townsend, and Forming Kaos, made up the Orange County Mexican Mafia and assisted defendant Ojeda in exerting his influence over Hispanic street gangs and their members in Orange County, according to the indictment.

Ojeda ordered Hispanic criminal street gangs in Orange County to pay money as a "tax" or "tribute" which consisted of a portion of the proceeds the gangs earned from various criminal activities. In return, gang members were permitted to exert influence over their neighborhoods and territories and seek protection or assistance from the OC Mexican Mafia.

The indictment alleges Ojeda disciplined Orange County criminal street gangs and their members who engaged in unsanctioned violence or did not pay taxes as required. The OC Mexican Mafia also disciplined any gang member who committed some act of disrespect to the organization, its members, or those protected by it. The discipline included "green lights" placed on the offender, meaning the gang or gang member would be physically disciplined or required to pay a "penalty." The OC Mexican Mafia also disciplined members and associates of its enterprise and other gang members by putting them on a "Hard Candy" list, meaning the individual would be targeted for death by any member or associate of the OC Mexican Mafia.

Ojeda, who served as the unchallenged leader of the OC Mexican Mafia for decades, was transferred out of Orange County in 2007 to serve the federal sentence imposed as a result of his 2006 conviction in the federal Bureau of Prisons. At this time, another member of the Mexican Mafia, defendant Armando Moreno, attempted to take over defendant Ojeda's leadership position in the OC Mexican Mafia and ordered Ojeda's supporters to be placed on the "Hard Candy" list. Despite being incarcerated outside of California, defendant Ojeda maintained his leadership position in the organization and ordered those members and associates loyal to defendant Moreno to be placed on the "Hard Candy" list.

The girlfriends and wives of incarcerated members and associates are alleged to have been directly involved in the affairs of the OC Mexican Mafia and knowingly passed messages between members and associates of the OC Mexican Mafia. The indictment alleges these messages included "green light" and "Hard Candy" lists that resulted in individuals being targeted for assaults and murder.

The Forming Kaos (FK) Criminal Enterprise

The second RICO indictment charges members and associates of a criminal organization engaged in conspiracies to commit murder, assaults with dangerous and deadly weapons, extortion, conspiracies to commit extortion, and narcotics and firearms trafficking for monetary gain. This organization operated in Orange County and is known as the "Forming Kaos" criminal enterprise. The gang constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

FK members operated and claimed territory in Costa Mesa, California, primarily on the westside of the city and guard their territory against any encroachment from members or associates of any other criminal street gang. The indictment alleges FK members have and are willing to engage in acts of violence, including murders and assaults, to defend their territory, which they mark or "plaque" or "tag" with graffiti. FK members are expected to retaliate through the use of violence, including murders and assaults, against anyone who assaults or kills another FK member, or disrespects FK or its members. Those invited to join FK are typically "jumped in," whereby they are assaulted by two or more gang members for a limited period of time by other FK members in order to prove their toughness and worthiness to join the enterprise. Some members can be "walked in," whereby they can bypass being jumped in if they grew up in FK territory or have family members who already belong to FK, or they can be "crimed in," whereby they commit a certain amount of criminal acts on behalf of the gang to show their loyalty to the gang.

In an effort to protect FK territory from rival gang members and to carry out retaliation against anyone who assaults or kills or otherwise disrespects its members, FK members share firearms and sell firearms to fellow members. They also engage in the sale of firearms for monetary gain to maintain FK's status.

FK exercises control over narcotics dealers within FK territory by requiring dealers to pay a "tax" to the enterprise on a regular basis. In return for paying the tax, the narcotics dealers are allowed to distribute narcotics in FK territory without interference from FK members, and they receive protection from rival gang members seeking to assault them. FK members themselves also engage in narcotics trafficking and rely on narcotics suppliers in order to make money for use by the enterprise. Additionally, FK aligns itself with the Mexican Mafia and collects taxes from individuals seeking protection. Many FK members have tattoos depicting their allegiance to the Mexican Mafia, such as the number "13" and/or two bars and three dots, which represent the Mayan symbol for the number 13.

According to United States Attorney Andre Birotte Jr.: "Today's charges demonstrate that the

Department of Justice is committed to dismantling the Mexican Mafia and the street gangs associated with the Mexican Mafia. No member of the Mexican Mafia, and no gang member affiliated with the Mexican Mafia, is beyond the reach of the law. Working with our partners at the state and local level, we will bring gangsters to justice, whether they commit their crimes on our streets or in our prisons."

FBI Assistant Director in Charge, Steven Martinez, said, "The Santa Ana Gang Task Force put years of effort into this complex investigation to find those responsible for the gang violence plaguing Orange County communities, including two major criminal enterprises calling shots on the streets and from inside prison walls. The serious charges the defendants now face, including RICO, are a positive step in ensuring the defendants face the consequences for the abundance of crimes alleged."

"A dangerous criminal street gang has suffered a critical blow to its organization and to its ability to intimidate and extort residents in the Orange County area. The criminals targeted by this operation aligned themselves with the Mexican Mafia in order to ensure their stronghold on their territory," said John Torres, Special Agent in Charge of ATF's Los Angeles Field Division. "Today's operation has removed an insidious threat to the stability of our communities and has sent a clear message to those individuals involved in gang activity that they will be pursued, prosecuted, and removed from the very streets they seek to terrorize."

Senior Special Agent Daniel Evanilla with the CDCR said, "The California Department of Corrections and Rehabilitation-Special Service Unit is happy to have partnered with all of these agencies to again disrupt the criminal activities of the Mexican Mafia prison gang."

Chief of Police Paul Walters stated, "This operation is a prime example of what multi-agency task forces can accomplish to keep our communities safe. The collaboration in this case included local, state, and federal resources and will bring some dangerous individuals who were operating at a sophisticated level to justice."

"Defendants who commit crimes to glorify their gangs and continue to commit serious crimes behind bars are some of the most dangerous individuals in our society. The only place they belong is in prison and the Orange County District Attorney's Office is committed to keeping them there for the rest of their lives," stated District Attorney Tony Rackauckas.

Lieutenant Mark Manley with the Costa Mesa Police Department said, "We're extremely proud of our participation and the fact that this large-scale investigation will undoubtedly result in a blow to one of our more historically active local gangs, as well as the larger criminal enterprise throughout Orange County."

Many of the federal defendants face mandatory-minimum prison terms ranging from five to 10 years, depending on the quantities of narcotics alleged and individual criminal histories, and maximum penalties of 20 years to life imprisonment. Federal defendants arrested today will make an initial appearance in U.S. District Court in Santa Ana this afternoon.

This case was investigated by the Federal Bureau of Investigation; the Santa Ana Police Department; the Orange County Sheriff's Department; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the California Department of Corrections and Rehabilitation-Special Service Unit; the Costa Mesa Police Department-Gang Enforcement Unit; and the Federal Bureau of Prisons.

Multiple agencies assisted during today's operation, including Garden Grove Police Department; Tustin Police Department, Los Alamitos Police Department; Seal Beach Police Department; Irvine Police Department; La Habra Police Department: Orange County Regional Narcotics Supression Program; California Department of Justice-Bureau of Narcotics Enforcement; Newport Beach Police Department and Orange Police Department.

The federal defendants will be prosecuted by the United States Attorney's Office. The District Attorney in Orange County will prosecute defendants charged by the state.

The Santa Ana Gang Task Force is one of many FBI Safe Streets Task Forces throughout the United States, funded for the purpose of assisting local police in identifying and addressing violent crime in America.

An indictment contains allegations that a defendant has committed a crime. Every defendant is presumed to be innocent until proven guilty in court.

Media Contact:

- FBI Media Relations: 310-996-3343
- Orange County Sheriff's Department: 714-904-7042
- U.S. Attorney's Office: Bruce Riordan: 213-894-0480
- Orange County District Attorney's Office: 714-347-8405
- Santa Ana Police Department: Anthony Bertagna: 714-709-2043
- ATF: Special Agent Chris Hoffman: 213-216-3622

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ATTACHMENT 3

Operation Smokin' Aces Targets Mexican Mafia Operations in Orange County

Federal and State Grand Juries Indict 129 Defendants who Allegedly Assisted the Prison Gang or Were Involved in the Business of Numerous O.C. Street Gangs

FBI Los Angeles
September 24, 2013

Public Affairs Specialist Laura Eimiller
(310) 996-3343

SANTA ANA, CA—Hundreds of law enforcement officials this morning fanned out across Southern California to conclude Operation Smokin' Aces, an investigation conducted by the Santa Ana Gang Task Force that targeted the Orange County wing of the Mexican Mafia, which allegedly exercises control over Latino street gangs and is a powerful force in the local jail system.

A total of 129 defendants have been named in indictments issued by county and federal grand juries. Each of the defendants is linked to an Orange County street gang that claims allegiance to the Mexican Mafia, which is also called the Eme. Some of the federal defendants also are associates of the prison gang who allegedly worked directly with one of the two Mexican Mafia members who oversee the Orange County wing of the criminal enterprise.

During the course of the investigation, task force members made undercover purchases of 67 weapons (38 handguns and 29 rifles). They also seized 22 pounds of methamphetamine, 1.5 pounds of heroin, and three pounds of cocaine.

Over the past three months, a federal grand jury in Orange County has returned 26 indictments that charge a total of 86 defendants. The indictments allege a wide range of criminal conduct, including murder and assault, extortion and "tax" collection, and the street-level distribution of narcotics.

As part of Smokin' Aces, the Orange County District Attorney has also obtained indictments that charge a total of 43 defendants.

At the center of Smokin' Aces is a federal racketeering indictment that focuses on the operations of the Mexican Mafia in Orange County, a criminal organization that for many years has been headed by Peter Ojeda, who allegedly ordered murders and assaults on behalf of the Mexican Mafia. (Ojeda is not formally charged in the indictment unsealed today, but he is currently pending trial in another racketeering case that was filed in 2011 in relation to Operation Black Flag.)

The racketeering indictment alleges a conspiracy to violate RICO, the federal Racketeer Influenced and Corrupt Organizations Act. The RICO indictment unsealed today charges 26 defendants associated with the Orange County branch of the Mexican Mafia, including those who implemented orders given by Eme leaders, gang members who collected and delivered "tax payments," and women associated with the organization who serve the "crucial" function of moving messages from incarcerated Mexican Mafia operatives to their minions on the streets.

The Mexican Mafia is a powerful and violent prison gang that controls drug distribution and other illegal activities within the California penal system and on the streets of Southern California by organizing Latino street gang members for the purpose of establishing a larger network for the Mexican Mafia's illegal activities. If a street gang does not comply with the demands of the Mexican Mafia, the prison gang will order the assault or murder the offending gang's members, whether they are in custody or on the streets.

The majority of the federal indictments target gang members who allegedly trafficked in significant quantities of narcotics and firearms. Two of the indictments outline large drug trafficking conspiracies, one of which focuses on the Santa Ana-based Delhi gang. The gang members and their associates were paying "taxes" or "rent" to the Mexican Mafia, and this revenue stream fortified the control the Mexican Mafia has over members of gangs, whether they are on the street or in custody.

The first large drug distribution indictment charges 15 people and outlines the activities of an organization allegedly run by George "Monk" Martinez and John Terrones, who are alleged leaders of the Santa Ana-based Delhi gang and who are also named in the RICO indictment. The narcotics indictment alleges a conspiracy to distribute methamphetamine and heroin.

The second narcotics trafficking indictment charges a dozen individuals with participating in a methamphetamine distribution organization headed by Mario Franco, a member of a Santa Ana-based gang who also is named in the RICO indictment.

Operation Smoking Aces is the latest action by the Santa Ana Gang Task Force to target the Mexican

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Operation [illegible] Flag Aces is the latest action by the Santa Ana Gang Task Force to target the Mexican Mafia and its control over Latino street gangs in Orange County. In July 2011, authorities announced Operation Black Flag, which led to charges against 99 defendants, including Peter Ojeda (see: http://www.fbi.gov/losangeles/press-releases/2011/ninety-nine-members-and-associates-of-mexican-mafia-affiliated-gangs-charged-in-operation-black-flag).

Smokin' Aces was an investigation conducted by the Santa Ana Gang Task Force, which consists of agents and officers with the Federal Bureau of Investigation; the Santa Ana Police Department; the Orange County Sheriff's Department; the Bureau of Alcohol, Tobacco and Firearms and Explosives; and the California Department of Corrections and Rehabilitation-Special Service Unit. Special agents with IRS-Criminal Investigation also participated in Operation Smoking Aces.

Multiple agencies assisted during today's operation, including personnel with the United States Marshals Service; the Anaheim Police Department; the Newport Beach Police Department; the Fountain Valley Police Department; the Huntington Beach Police Department; the Brea Police Department; the Irvine Police Department; the Buena Park Police Department; and the Garden Grove Police Department.

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ATTACHMENT 4

TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

December 7, 2009

Carlos Luna, Executive Director
Dr. George Christison, Acting Medical Director
Patton State Hospital
3102 Highland Avenue
Patton, CA 92369

Re: Edward Allaway

Mr. Luna and Dr. Christison:

Thank you for allowing me the opportunity to meet with you on Monday, November 30, at your facility and to discuss this matter of utmost importance. As the District Attorney of Orange County, it is my duty and responsibility to oppose the release of Edward Allaway into our community through CONREP. He remains a very dangerous individual with a severe mental disorder, an unstable and violent history, and attitude issues that should raise concerns about his current or future readiness for community living.

The facts of the most notorious mass murder in Orange County history are well known. Edward Allaway calculated and executed a bloodbath at Cal State Fullerton on July 15, 1976, shooting nine people with seven dying of gunshot wounds. This was not a random shooting. He targeted certain people. While more than 33 years have elapsed, the killings still haunt and reverberate in the hearts and minds of not only victims' families, but to the many who recall the horrors of that tragic day. Our community would be aghast at the prospect of Edward Allaway back in our neighborhoods.

During our meeting, I made the above points to you. It seems that your response was that Edward Allaway has been viewed as symptom-free for decades (we strongly disagree) and therefore if the evaluators determine that he is not a danger, Patton will recommend his release to CONREP. I want to remind you that this same argument has previously been made by hospital staff supporting each of Edward Allaway's five previous petitions for release-but at each and every 1026.2 trial, the independent judges have rejected the hospital's recommendation to release Edward Allaway, citing his continued and present threat and danger. In my opinion, nothing has changed.

Moreover, what is clear to me is that the past and current evaluations of Edward Allaway are fraught with inaccurate and inadequate analyses that do not account for the

many troubling signs he has exhibited throughout much of his life. As new assessment teams come and go, the precision and thoroughness seems lost in the transition. The most recent case in point is the December 2008 report from Patton (signed by several people including Dr. Christison) wherein the assessment team on page 3 states, "Mr. Allaway has no history of violent behavior or aggressive acts prior to the instant offense." This is categorically false. Edward Allaway's history is well-chronicled in reports and files retained at Patton that reflect his prior violence at Chrysler, fights with co-workers at Knott's Berry Farm, threatening his wife with a knife and on another occasion raping her, and squaring off with a co-worker at Cal State Fullerton. This December 2008 report was written to the Superior Court and should not contain such obvious omissions.

To put it bluntly, and based on the history of the Allaway litigation and the numerous assessments from Patton, I have grave doubts and concerns about Patton's ability to accurately diagnose Edward Allaway. At our meeting, you spoke to me about Patton's role as patient advocate for Edward Allaway. I speak to you as a public advocate. You also spoke to me about Patton's consideration of Edward Allaway's individual right to be released. I speak to you about my duty to protect the rights of our community to live free from the dangers presented by Edward Allaway. If this means another trial, then our office will use every effort to prevail and secure the safety and welfare of our citizens.

Respectfully,

Tony Rackauckas
Orange County District Attorney

TR:ru

ATTACHMENT 5

TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

April 15, 2010

Governor Arnold Schwarzenegger
State Capitol Building
Sacramento, CA 95814

Re: Pending Release of Orange County Mass Murderer Edward Allaway by Patton State Hospital staff

Dear Governor Schwarzenegger:

I am writing to bring to your attention that the California Department of Mental Health has plans to recommend the release of Orange County's worst mass murderer Edward Allaway into the community. This is a high priority, urgent matter which merits your immediate attention to prevent irrevocable harm to public safety.

This past November, my two top prosecutors in charge of the Homicide Unit and I met with the Executive Director and Acting Medical Director of Patton State Hospital. Unfortunately, the meeting left me with grave concerns that Pattan's staff is ignorant of mass murderer Allaway's history of violence, has misdiagnosed his illness, and has little appreciation of the substantial danger he poses to society.

I am respectfully requesting that you review the facts of this case so you can direct the state employees to consider all of the facts and circumstances of this case. I am confident that no competent professional could come to such a decision to release Allaway if they engage in a diligent review of all materials available on him.

In 1976, Allaway murdered seven co-workers in a rampage shooting at California State University, Fullerton. He was subsequently found not guilty by reason of insanity by a Superior Court Judge at trial and was institutionalized in the state hospital system in 1977.

Since then, Allaway has petitioned for release five times. In four of those instances (he withdrew his 1998 petition before trial), the Orange County District Attorney's Office has successfully fought his release. Unfortunately, his petitions have resulted in costly, protracted, and unnecessary litigation at the expense of taxpayers. Expert fees alone have cost taxpayers more than $100,000, not to mention the costs incurred by the court, prosecution and defense.

More importantly than money, Allaway's past meritless petitions have caused tremendous trauma to the victims' families.

Unfortunately, Allaway has received a recommendation for release every time a new treatment team or hospital administration takes a "fresh look" at Allaway without considering all of his history and the facts and circumstances of his case.

I have included a complete briefing packet with attachments detailing the crime, Allaway's history of mental illness and violent tendencies, the historical ignorance of the state hospital's treatment teams recommending the killer's release, and the court rulings contrary to the hospital's opinions and recommendations.

I appreciate your prompt attention in this matter. Please do not hesitate to call me if you have further questions on this important case affecting public safety.

Sincerely,

Tony Rackauckas
Orange County District Attorney

Attachment: Alloway – Mass Murdered Briefing Package

TR:ss/ru

ATTACHMENT 6

OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA
TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

JOSEPH D'AGOSTINO
SENIOR ASSISTANT D.A.
GENERAL FELONIES/
ECONOMIC CRIMES

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

JAIME COULTER
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

CRAIG HUNTER
CHIEF
BUREAU OF INVESTIGATION

JENNY QIAN
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

September 8, 2016

Mike McQueeny, Hospital Administrator
Napa State Hospital
2100 Napa Vallejo Highway
Napa, CA 94558

RE: Edward Allaway, OC Superior Court case no. C-36354

Dear Mr. McQueeny,

As Tony Rackauckas wrote to you on August 19, 2016, the Orange County District Attorney's Office believes that employees of the State Hospital System who have evaluated Mr. Allaway over the years have, as a rule, possessed an insufficient knowledge of his history.

In the interest of providing Napa State Hospital with information concerning Mr. Allaway's history, I am today giving you some important records from our office's file: Pages 1-234, 289-821, 4755-4915, and 5332-5556. These records include interviews of witnesses who knew Mr. Allaway and observed him at or around the time he committed the 7 murders in July, 1976. Additionally, we are providing you reports from some of the mental health professionals that have treated and/or evaluated Mr. Allaway down through the years.

Finally, we assume that you already have access to the State Hospital records concerning Mr. Allaway for the approximately 38 years that he has been committed to the Department of State Hospitals, but if you'd like us to supply you with those records, as well, feel free to contact me at 714-347-8462.

Sincerely,

Dan Wagner
Assistant District Attorney

ATTACHMENT 7

TONY RACKAUCKAS
DISTRICT ATTORNEY

MEMO

OFFICE OF THE DISTRICT ATTORNEY

November 17, 2011

TO: Erik Petersen, Deputy DA, Target Unit

FROM: Robert Erickson, Investigator, Homicide Unit

SUBJECT: Informant Assistance on Scott Dekraai Murder Case

I am the District Attorney Investigator assigned to the murder case of defendant Scott Dekraai, DA Case #11F14820. He is in custody and charged with the murder of eight shooting victims and the attempted murder of another person in the city of Seal Beach on October 12, 2011.

On October 18, 2011, OCSD Deputy Ben Garcia contacted me and advised me that an inmate (Fernando Perez BN: 2364768) housed near Defendant Dekraai had information directly from Dekraai regarding the murders in Seal Beach. Perez requested that he be able to speak with the investigators assigned to the case.

On October 19, 2011, Deputy District Attorneys Scott Simmons and Dan Wagner, Seal Beach Detective Gary Kropman, and I went to the OCSD IRC and conducted an audio recorded interview with inmate Perez. Before beginning the interview, I explained to Perez that he was being promised absolutely nothing in return for his information. He did not hesitate to go forward with the interview.

In summary, Perez provided facts and intelligence about the events of the day of October 12, 2011, that only Dekraai could have known. Those facts and intelligence will likely greatly enhance the prosecution of Dekraai, especially in the event there is an insanity plea entered by Dekraai. Following Perez's interview, a covert investigation conducted within the jail facility further established the validity of the information provided by Perez. Perez may eventually be called as a witness in the case against Scott Dekraai.

As the prosecutor handling Perez's case, this memorandum is being directed to you for your consideration and information only. I respectfully request that you keep Perez's name in information, as it relates to the Dekraai case, confidential. Nothing about Perez or his statements regarding the Dekraai case have been discovered to the defense.

ATTACHMENT 8

[redacted]

Wagner, Dan

From: Erickson, Robert
Sent: Monday, June 04, 2012 8:16 AM
To: Wagner, Dan
Cc: Simmons, Scott
Subject: RE: Fernando P
Attachments: Memo re Fernando Perez.doc

Dan,

DDA Erick Peterson (Target – Santa Ana) is the person who would know exactly which cases Fernando worked on/testified in. He is the DDA that I wrote a memo to when we originally met with Fernando. I have attached a copy of the memo for your reference. I think (but I am not sure) that Fernando is done testifying on whatever else he might have been working. He was released from OCJ on 12/14/11. As far as I know, he is now housed in a federal prison somewhere serving his sentence...I don't know how much time he ultimately received.

Bob

From: Wagner, Dan
Sent: Friday, June 01, 2012 2:12 PM
To: Erickson, Robert
Cc: Simmons, Scott
Subject: Fernando P

[redacted]

Scott and Bob,

Can you remind me what case(s) Fernando P is working?
Before deciding if/when/how to disclose Fernando's identity to the DeKraai defense lawyers, we are going to need to talk to the prosecutor(s) on Fernando's other case(s) and analyze several things such as:

- security risks to Fernando
- prejudice to those cases if Fernando testifies for us and/or doesn't testify for them

But, unless we decide not to use Fernando (and I am disinclined to give up on that prospect), we are going to need to disclose his identity to the DeKraai defense so that they can perform a conflict check. They're going to need to do that sooner or later, and I'd rather not wait much longer if they will be deciding to conflict off.

Thanks,
Dan

ATTACHMENT 9

Wagner, Dan

From: Wagner, Dan
Sent: Tuesday, January 29, 2013 2:28 PM
To: 'david.s[redacted]
Subject: discovery order regarding source
Attachments: court order re Inmate F discovery.pdf

Dave,

Thanks for helping me on this matter. On my end, I am prosecuting Scott Dekraai for the mass murder he committed in a Seal Beach hair salon in October, 2011.

Attached is a certified minute order (no further written order was issued) which grants in whole the defense's discovery request regarding the Source. In order to give context to the court's order, a copy of the defense's discovery motion is also attached. The requested – and ordered – discovery are itemized at pages 16-19 of the discovery motion (and numbered 1-10, respectively). The court's order directs me to make discovery of all responsive material, but I would specially highlight items 1-4, 6, and 9 for you.

In a nutshell, here's how we've gotten to this court-ordered discovery concerning the Source:

- Mass murder defendant Dekraai was housed in the OC Jail cell nextdoor to the Source.
- The Source engaged Dekraai in conversation about the mass murder, and Dekraai bragged to the Source about the shootings.
- The Source contacted an OCSD Deputy, who contacted my investigator. We spoke to the Source and decided he had good information. We requested that the Source not engage Dekraai in conversation concerning the mass murder, but that if Dekraai volunteers such information, to listen and document what Dekraai said.
- We asked, and OCSD agreed, to place a listening device in Dekraai's jail cell. That device captured Dekraai, in subsequent conversations with the Source, bragging about the shootings.
- I want to introduce at trial the tapes of Dekraai bragging about the shooting.
- The defense wants to suppress the tapes, arguing a *Massiah* violation of defendant's sixth amendment rights.
- In order to meet their burden for suppression of the evidence, the defense must prove: (1) that the Source was acting as a government agent (which can be proved by demonstrating an "implied understanding" between the informant and law enforcement, evidenced by a long-standing relationship, whereby law enforcement creates a situation enabling the informant to gather information from a suspect and then expects the informant to gather that information); and (2) that the informant deliberately elicited information about the charges case from the suspect.
- In an effort to gather evidence to support their future *Massiah* motion to suppress the tapes – especially as to the first prong of the *Massiah* test-- the defense has moved for discovery about any other informing work the Source has done, and the Court has overruled my objections and ordered me to provide the listed discovery concerning the Source.

Hopefully that lays out what you need to know. I would be glad to provide further information if necessary.

I know that information regarding Sources is a sensitive area, and we plan to be duly careful with this information. The Court has indicated it will entertain a motion for a protective order should I believe such to be appropriate. My intention is to petition the court for such a protective order, which would restrict the defense along the following lines:

- The reports discovered may not be distributed to any person other than a lawyer, investigator, paralegal or their professional assistants. No copies of the reports may be given – in any form – to any other persons without express permission from the court.

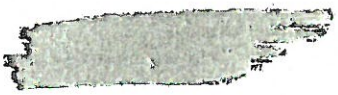
INMATE F005805

Additionally, I do not anticipate that the information you will provide me will include an identification of the Source's current location. However, I will need to make the Source available for the defense to interview the Source. The Source, like any other witness, will be free to choose whether and/or how much to speak to the defense. But I will need to arrange for the defense to meet with the Source in a private (albeit secure) environment in order for them to have the opportunity to interview the Source. Further, I will need to have the Source available to testify at hearing of the future *Massiah* motion.

Dave, this case is one of my office's highest priorities, and I really appreciate your help in this matter. But I want to be sensitive to the needs of your cases as well, so please feel free to contact me with any concerns, or if you need further information, etc.

Thanks.

Dan Wagner, Head of Homicide Unit
Assistant District Attorney
Orange County DA's Office



ATTACHMENT 10

OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA
TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
SENIOR ASSISTANT D.A
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

MARY ANNE MCCAULEY
SENIOR ASSISTANT D.A
BRANCH COURT OPERATIONS

JOSEPH D'AGOSTINO
SENIOR ASSISTANT D.A
GENERAL FELONIES/
ECONOMIC CRIMES

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A
SPECIAL PROJECTS

JEFF MCLAUGHLIN
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

February 7, 2013

Christina Gaspar
FBI
Office of the Chief Division Counsel
11000 Wilshire Boulevard, Suite 1700
Los Angeles, CA 90024

Re: Discovery Order re: Inmate F
Orange County Superior Court Case 12ZF0128 (People v. Dekraai, Death Penalty Case)

Dear Ms. Gaspar:

I am writing to formalize my previous request of your agency regarding a source whom I will refer to as "Inmate F." This inmate engaged in conversation with mass murder defendant Scott Dekraai when they were both incarcerated in Orange County Jail. Dekraai's attorneys are seeking to suppress Dekraai's statements to Inmate F on the grounds of an alleged *Massiah* violation. These statements are powerful inculpatory evidence concerning the mass murder committed by Dekraai in a Seal Beach hair salon in October, 2011. In the course of preparing for their *Massiah* motion, the Dekraai defense team moved the court for a discovery order concerning Inmate F. Over my objection, on January 25 the Superior Court granted the defense motion for discovery. The court issued an order (a copy of which I have previously provided to you) in which I have been directed to make the following discovery concerning Inmate F:

Item 1 – The names and case numbers of any and all cases in which [Inmate F] has offered to provide and/or has provided information pertaining to a suspect and/or defendant in a criminal matter (including state and federal investigations).

Item 2 - Any and all discovery, including but not limited to reports, notes, writings, oral communications, and recordings, pertaining to any and all cases in which [Inmate F] has offered to provide and/or provided information relating to a suspect and/or defendant in a criminal case (both state and federal).

Item 3 - Any and all reports, notes, writings, oral communications, and recordings memorializing communications between representatives of law enforcement (including but not limited to [OCDA], [OCSD], and Seal Beach Police Dept.), and either [Inmate F] or his representative(s), relating to (a) the instant matter [i.e., People v. Dekraai], and/or (b) any and all other cases in which [Inmate F] has provided information related to a suspect or defendant in a criminal matter.

INMATE F 005803

Item 4 - Any and all reports, notes, writings, oral communications and/or recordings memorializing communications between representatives of law enforcement (including but not limited to the Orange County District Attorney's Office and/or the Orange County Sheriff's Department and either [Inmate F] and/or counsel for [Inmate F]) relating to the sentencing of [Inmate F] on any and all of the following matters: 06WF**** and 07WF****.

Item 5 - Any and all discovery in the following cases in which [Inmate F] has been charged as a defendant: 06WF***, 06WF***, 07WF****, 02***, 01WF***, 99NF***, 00WF***.

Item 6 - Any and all reports, notes, writings, oral communications and/or recordings memorializing communications between representatives of law enforcement (including the [OCDA] and/or the [OCSD] and [Inmate F] (and/or his counsel) memorializing any and all requested, proposed and/or agreed upon benefits in any form, since [Inmate F's] incarceration in January 2007. The requested, proposed and/or agreed upon benefits may include but not be limited to consideration of a lesser sentence on any criminal matter, as well as modified a) housing conditions; b) protective status within the jail; c) day room conditions, and/or d) commissary privileges and/or phone call privileges.

Item 7 - Any and all reports, notes, writings, oral communications and/or recordings related to [Inmate F] that are material to impeachment of [Inmate F] and/or his character for dishonesty.

Item 8 - Any and all reports, notes, writings, oral communications and/or recordings memorializing allegations of moral turpitude committed by [Inmate F], regardless of whether said allegations culminated in a conviction.

Item 9 – The names of any and all cases and case numbers (both state and federal) in which [Inmate F] has testified as a witness for the prosecution.

Item 10 - Any and all reports, notes, writings and/or recordings discoverable to the defense pursuant to *Maryland v. Brady*.

I am asking that your agency provide to me any materials you possess which are responsive to this court order so that I may meet my discovery obligations. I realize that information regarding informants raises safety concerns, and therefore I will take the following precautions:

1) I will petition the court for a protective order, pursuant to Cal. Penal Code section 1054.7, allowing me to redact from all materials any information concerning Inmate F's current location, or his family's address, or any other similar information which could cause a danger to persons' safety.
2) I will also ask the court to issue a protective order decreeing that no reports discovered to the defense may be distributed to any person other than a lawyer, investigator, paralegal or professional assistant on the defense team. In other words, that no copies of the reports may be given – in any form – to any other persons without express permission from the court.

I appreciate your assistance in this matter. If you have any questions or concerns, you can reach me at (714)[redacted]

Sincerely yours,

Dan Wagner
Assistant District Attorney

INMATE F005804

ATTACHMENT 11

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
AUG - 4 2014
ALAN CARLSON, Clerk of the Court
BY: BRENDA RAAB, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

V. 12ZF0128

SCOTT DEKRAAI, RULING

Defendant.

INTRODUCTION

This court has heard extensive testimony, and examined an abundance of exhibits which run into the thousands of pages, to resolve allegations of misconduct lodged by the defendant against members of the Orange County District Attorney's staff and their law enforcement agents in this case. In a series of independent motions considered concurrently by the court, the defendant seeks 1) an order barring the People from pursuing the death penalty against him; 2) recusal of the entire Office of the Orange County District Attorney from further involvement in this prosecution; and 3) an order barring use of statements allegedly made by the defendant after his arrest while he was incarcerated in the Orange County Jail.

The legal basis for the defendant's motions can be found in cases such as United States v. Russell (1973) 411 U.S. 423, in which the United States Supreme Court "recognized that due process may bar a conviction where the government involvement in a criminal enterprise has become sufficiently outrageous and shocking to the universal sense of justice." This principle has been applied by California's courts in numerous cases including Morrow v. Superior Court (1994) 30 Cal. App. 4th and People v. Smith (2003) 31 Cal 4th 1207. In People v. McIntyre (1979) 23 Cal. 3d 742, our Supreme Court observed that "(s)ufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of law". 23 Cal. 3d at 748, Footnote 1.

That having been said, this court is mindful of its current responsibility which is to rule on the motions pending in this case, People v. Scott Dekraai. The broad scope of the recent evidentiary hearing related to these motions in no way alters that responsibility. This court has heard and considered evidence that may at times have seemed factually unrelated to this case. The court has engaged in this

process to provide itself with the perspective necessary to determine whether or not the alleged activities which are at issue in this case were part of an ongoing course of misconduct by law enforcement that rises to the level of "outrageous government conduct" as alleged by the defendant; and also to determine whether or not there is a legal basis for the requested recusal of the entire Office of the District Attorney.

It is not the appropriate function of this court at this time to attempt to fashion a global remedy related to all of the prosecutorial misconduct issues raised by the evidence it has heard. Rather, this court has ultimately focused on these questions:

1) Did law enforcement engage in misconduct in its investigation and preparation of the case against this defendant?
2) If so, what is the nature of that misconduct?
3) If there was identifiable misconduct, is the imposition of any sanction appropriate?
4) If so, what sanction?

With these questions in mind this court now undertakes its analysis of the evidence presented and the applicable law as to each pending motion.

1) MOTION FOR SANCTIONS RELATED TO ALLEGED "OUTRAGEOUS GOVERNMENT CONDUCT"

The defendant's "outrageous government conduct" allegations, and the evidence presented during the course of this hearing relevant to that issue, relate largely, although not exclusively, to alleged discovery abuse, much of it dealing with material that may fall within the purview of Brady v. Maryland (1963) 373 U.S. 83; and post arrest law enforcement activities that allegedly violated standards set forth in Massiah v. United States (1964) 377 U.S. 201. Members of the District Attorney's staff, in their testimony before this court and during final arguments, have acknowledged that Brady violations, or "errors," may have occurred in a number of recent prosecutions, including this one, but point to several factors to mitigate their failures: 1) a lack of understanding of relevant legal guidelines concerning criminal case discovery; 2) heavy caseloads; 3) the "deliberate withholding" (to paraphrase the testimony of one prosecutor) of relevant material by an Assistant United States Attorney; and 4) an inability to foresee the specific issues raised in the pending defense motions.

This court is convinced that caseloads are heavy for all government lawyers, no matter which end of the counsel table they occupy. The court also acknowledges that discovery issues can become complicated, especially when lawyers are busy and cases involve large quantities of discoverable material, although the basic legal rules applicable to this motion are well established and relatively straightforward. Finally, the court believes that certain federal authorities may at times relevant to these proceedings have been arrogant and even dismissive in their dealings with local prosecutors despite the fact that federal law enforcement traditionally relies on state courts and local prosecutors to do most of the heavy lifting with respect to the daily operation of America's criminal justice system.

These observations notwithstanding, this court has been unable to locate any authority, and counsel has cited none, which forgives or excuses a prosecutor's failure to comply with constitutional mandates

due to a lack of government resources. Nor has the court found any precedent, and again counsel has cited none, which suggests that ignorance or misunderstanding of the law would justify or excuse a lack of compliance. Finally, this court believes and finds that any failure by federal authorities to act in a manner consistent with the laws of this state provides no excuse for any local prosecutor's violation of the Massiah rules or failure to provide to the defense so-called Brady material on a timely basis.

Brady v. Maryland, supra, and Massiah v. United States, supra, are landmark decisions of the United States Supreme Court. They serve as the bases for fundamental procedural principles which apply to all criminal cases. They do not embody judicial suggestions. These cases have created self-executing rules of Constitutional law that must be recognized and followed in every instance by all prosecutors on both the national and local levels. The Brady rule can be simply summarized. Prosecutors must, even in the absence of any request by the defendant, turn over to the defense all materials which either hurt their case or help the defendant's cause.

California's Supreme Court has long been sensitive to the importance of the discovery process in criminal cases. Over twenty years ago, in In re Littlefield (1993) 5 Cal. 4th 122, the Court offered these observations:

> "...timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts'. (Citation omitted)" 5 Cal. 4th at 131

Five years later, in In re Brown (1998) 17 Cal. 4th 873, the Supreme Court provided the philosophical basis for its application of the Brady discovery rules to all criminal prosecutions conducted within this state:

> "Despite any seeming unfairness to the prosecution, no other result would satisfy due process in this context. 'The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.' (Citation omitted)...As one court has expressed it: 'We suspect the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that inaccurate convictions based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure. (Citation omitted)...This obligation serves 'to justify trust in the prosecutor as 'the representative...of a sovereignty...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (Citation omitted)." 17 Cal.4th at 882-83.

Although it hardly seemed necessary, seven years later in People v. Salazar (2005) 35 Cal. 4th 1031, the Supreme Court further explained to California prosecutors their Brady obligations:

> "In Brady, the United States Supreme court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' (Citation omitted). The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused (citation omitted), that the duty encompasses

impeachment evidence as well as exculpatory evidence (citation omitted), and that the duty extends even to evidence known only to police investigators and not to the prosecutor (citation omitted)...In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.' "35 Cal. 4th at page 1042.

As suggested above, these rules are not complicated. The prosecutors called to testify in this matter are among the most experienced lawyers in the Orange County District Attorney's office. They acknowledged at least a general familiarity with the Brady and Massiah rules. Indeed, the Orange County District Attorney's own training materials, portions of which have been produced as exhibits during the current hearing, reinforce the critical importance of Brady compliance in these unambiguous terms:

"Brady material must be disclosed to the defense whether it is requested or not...The prosecutor is required to disclose Brady material that is possessed by the prosecution team. The prosecution includes 'both investigative and prosecutorial personnel'...Moreover, 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police'... Court decisions have sternly imposed this obligation holding the prosecutor responsible for information in the possession of the 'prosecution team,' whether or not he was actually aware of it. The fact that a witness WAS an informant in the past has been held to constitute Brady material." (Emphasis in original) (Citations omitted) Hearing Exhibit A-77, Orange County District Attorney Informant Policy, January 2012, Rules and Guidelines.

"Brady material must be disclosed whether it is requested or not. The prosecutor is chargeable with the knowledge of all Brady material in possession of the prosecution team, whether or not he actually knows of its existence. The prosecution team includes all law enforcement personnel and agencies assisting the prosecution of the case. The prosecutor thus has the duty of seeking out and disclosing all material in the possession of the prosecution team. This duty of the prosecutor cannot be delegated to another." (Emphasis in original) Hearing Exhibit A-83, " Written policies of OCDA regarding Brady obligations."

This court believes that the discovery rules arising out of Brady are clear and unequivocal. With that in mind this court finds that substantial evidence supports a number of the defendant's allegations concerning potential Brady violations. For example, one experienced prosecutor whose allegedly chronic lack of Brady compliance was a major point of contention during this hearing, acknowledged during his lengthy testimony that he had provided differing amounts of informant related Brady discovery material to different lawyers on different cases (though not this case), all of which involved the same informant. In explaining his consistently inconsistent discovery performance this veteran prosecutor described his typical practice. Shortly before trial he would request any outstanding Brady material from law enforcement. He would then pass along to his paralegal assistant any material he received in response to this request without reviewing it. His paralegal would then provide it to defense counsel. As a result of this "hands off" process, this senior DDA testified that he never noticed that on one case he had provided four pages of Brady discovery while on another, involving the very same informant, he

provided one hundred ninety six pages. Such a cavalier attitude toward the constitutionally required Brady procedure is patently inappropriate and legally inadequate.

This court notes that certain issues raised by the defendant's motions require a cross over legal analysis. Specifically, in certain instances alleged misconduct implicated both Brady and Massiah standards. With that in mind, this court finds that working informants and targeted inmates were at times intentionally moved inside the Orange County Jail by jail staff, often at the request of outside law enforcement agencies, in the hope that inmates would make incriminating statements to those informants. Such intentional movements were seldom, if ever, documented by any member of law enforcement. Therefore little or no information concerning these intentional movements was ever created or turned over to defense counsel as part of the discovery process. This court also finds that false documentation was requested by, and likely provided to, jail informants to enable them to increase their credibility with target inmates. All of these activities should, in light of In re Neely (1993) 6 Cal. 4th 901, have been disclosed to defense counsel pursuant to Brady in order to facilitate a defendant's investigation of possible Massiah violations.

This court also finds that, despite their testimony to the contrary, express or implied promises were made to both of the informants whose conduct is here at issue and from whom this court heard extensive testimony. It is clear that both Fernando Perez and Oscar Moriel sought and expected consideration for their in custody informant work and they were each directly or impliedly promised by law enforcement that such consideration would be forthcoming. As the District Attorney's own training materials excerpted above suggest, this is Brady material.

This court further finds that, without legal justification or excuse, in different cases involving the same informant significantly different quantities of informant related discovery material were turned over by Orange County prosecutors to defense counsel. These cases were not directly related to the Dekraai prosecution. The missing material included dozens, sometimes hundreds, of pages of handwritten informant notes which summarized incriminating statements allegedly made by targeted inmates. After considering all of the evidence presented on this subject, this court is not convinced that these chronic discovery failures were the result of any improper intervention by federal authorities. The missing discovery constituted Brady material.

On the other hand, the court finds that a key misconduct allegation related directly to this defendant has not been sustained by the evidence. As unlikely as it may seem in light of the foregoing findings and the healthy skepticism developed by this court over the years related to coincidence and criminal prosecutions, the court finds it more likely than not that this defendant and informant Fernando Perez were not housed in neighboring cells in L Mod within the Orange County Jail shortly after the defendant's arrest as a result of a specific plan by law enforcement. Rather, it appears to the court that their adjacent cell placements in October of 2011 were the result of a confluence of independent events. Specifically, the court finds, based on its evaluation of the testimony as well as its review of the relevant documents admitted, including Exhibits A-57 and A-58, that this defendant was ordered housed in Mod L soon after he was booked into the jail by a triage nurse employed by the county's Health Care Agency rather than by any member of law enforcement. Likewise, the court finds

that informant Perez, while apparently awaiting transport to a federal detention facility, had occupied a cell in Mod L for some weeks before the terrible events of October 12, 2011 unfolded in Seal Beach.

These findings, however, do not end the court's inquiry in this area. Irrespective of how it came to pass that this defendant and informant Perez found themselves in adjacent cells within Mod L, it must still be determined whether or not the defendant's subsequent statements to Perez were the product of a course of misconduct by members of law enforcement, including the Orange County District Attorney, which constituted "outrageous government conduct." In fact, the interactions between this defendant and informant Perez, and later between Perez and law enforcement, in October of 2011 raise a number of serious questions beyond how the two inmates ended up in adjacent cells.

When prosecutors learned from a Special Handling deputy sheriff soon after the defendant arrived in Mod L that the defendant was allegedly speaking to Perez about his crimes, and they quickly thereafter arranged a meeting with both the Special Handling deputy and the informant, they admit that they had been informed that this inmate "had provided reliable information on prior occasions." So why did prosecutors not immediately seek more specific information concerning the background of this mystery inmate? Why did the Special Handling deputy who had known and worked with Perez as an active informant for many months before the meeting fail to volunteer information to these prosecutors about the working history of this inmate when, for whatever reason, they failed to ask? Were these failures a manifestation of a conspiratorial "don't ask, don't tell" policy, or were they simply the product of negligence? Ultimately, did the Dekraai prosecution team adequately discharge its constitutional obligation, as framed in Salazar, supra, "to learn of any favorable evidence known to others acting on the government's behalf, including the police?" Did they, as discussed in In re Brown, supra, fail "to turn over an easily turned rock?"

In answering these questions, the work history of Fernando Perez as an effective informant cannot be ignored. As a result of his prior instruction and experience, Perez was clearly capable of working aggressively as an effective custodial informant with very little encouragement or direction. Law enforcement was well aware of his abilities as he had demonstrated them time and again over the preceding months. And his motivation to do so was clear as Perez had repeatedly told law enforcement long before October of 2011 essentially the same thing he related to this court during his recent testimony--that he would "do anything" to alter his circumstances in order to avoid an impending life sentence. So when the opportunity fell into his lap to work his informant magic on this defendant who was suddenly housed in the cell next door, Perez did not hesitate. Within a short time, although he denied it in his testimony, the evidence indicates that Perez was doing for law enforcement what he had done so often before—intentionally ingratiating himself with a target suspect and thereafter obtaining incriminating statements from that suspect.

The People have argued, apparently relying on Neely, supra, that they are not responsible for Perez's conduct since he was allegedly instructed not to question this charged and represented defendant about his case, only to listen and report. However, given the factual circumstances demonstrated by this evidence, this argument is not persuasive. The owner of a starving dog cannot evade liability for the dog's destructive behavior inside a butcher shop by instructing that dog not to eat

just before releasing him into the shop knowing at the time that it is teaming with fresh cuts of prime beef. When released that dog is going to eat. Contrary instruction under such circumstances is disingenuous and meaningless.

The Neely case does stand for the proposition that the Massiah rules do not apply to an informant who goes to work "on his or her own initiative, with no official promises, encouragement, or guidance. (Citation omitted)" However, in Neely the Supreme Court explained how the facts of a particular case may affect that analysis. "In order for there to be a pre-existing arrangement ... it need not be explicit or formal, but may be inferred from evidence that the parties behaved as though there was an agreement between them, following a particular course of conduct over a period of time. (Citation omitted)." 6 Cal. 4th at 915. So it is here. In this case, there was an historical "course of conduct" between Perez and his law enforcement handlers which establishes that this informant was in fact once again working on their behalf when he made inappropriate contact with this defendant. When Perez was "released" near this defendant's cell inside Mod L, he ate as any starving dog would.

As noted above, prosecutors in their recent testimony have acknowledged that, in hindsight, they may have violated discovery rules in this case as well as other recent serious cases. The relevant questions then become, in light of the allegations made in the defendant's motions, what is the nature of the misconduct that occurred here? And more specifically, did the misconduct in this case result from prosecutorial negligence, or was it the product of an ongoing course of "outrageous government conduct"?

This court has considered the totality of the evidence presented in formulating its answer to these questions. Documents filed by the defendant in support of the motion initially created a specter of intentional prosecutorial misconduct. For example, in his initial pleading the defendant highlighted the fact that early in 2013 the lead prosecutor in this case filed a sworn declaration opposing discovery of what would prove to be highly probative material concerning Fernando Perez. In his declaration that prosecutor made this representation:

> "OCDA has not given Inmate F (Perez) any leniency or consideration for his efforts on this case, and—as stated to Inmate F on October 19—does not intend to give Inmate F any leniency or consideration in exchange for his efforts on this case."

This sworn statement now appears to have been, if not inaccurate, at least seriously misleading. Was it intentionally so? This court has carefully reviewed all of the evidence offered on this issue which the court views as critical to the resolution of the pending motions in that it focuses squarely on the fundamental integrity of the criminal justice system. If a prosecutor lies to any court on any case the entire system becomes a potential house of cards.

During his testimony, this senior prosecutor explained his thinking in drafting this declaration, and denied that any aspect of it was intentionally false. This court now finds the testimony of this witness credible on this subject. The court believes that when he drafted his declaration, this prosecutor was unaware of who Francisco Perez was and what prior services he had performed for law enforcement.

However, what he should have known, and what else he should have done before executing such an unequivocal declaration, are very different questions.

When Francisco Perez engaged this represented defendant in conversation in October of 2011, Perez had been, in essence, a professional informant working at the direction of law enforcement inside the Orange County Jail for over one year. He had executed formal informant agreements. He was without question working in return for anticipated benefits, either express or implied. The exact nature of those benefits had just not yet been determined (which may still be the case). Any reasonable exercise of the type of due diligence required of local prosecutors by cases like In re Brown, supra, and Salazar, supra, in October of 2011 would have revealed these significant facts to them. Had such a timely due diligence inquiry been conducted, the current hearing might not have been necessary.

It is worth reemphasizing at this point that when a local prosecutor undertakes a state prosecution that is based on an investigation involving federal authorities, that local prosecutor assumes full responsibility for the manner in which that prosecution will be conducted, including compliance with all statutory and constitutional requirements. This responsibility, to quote the Orange County District Attorney's own training materials, "cannot be delegated to another." It is professional and it is personal. A constitutional responsibility such as that created by Brady cannot be voided by any local policy or any statute, whether state or federal.

The history of the Office of the Orange County District Attorney is proud and accomplished. The events associated with the current hearing do not constitute the District Attorney's finest hour. Nonetheless, after an exhaustive evaluation of the totality of this record, the court finds that the District Attorney's well-documented failures in this case, although disappointing, even disheartening, to any interested member of this community, were negligent rather than malicious. This court also finds that these prosecutorial "errors," as they were characterized by counsel during argument, constitute significant negligence and that they therefore rise to the level of misconduct. The court further finds that the misconduct was the product of woefully inadequate legal training along with a lack of professional energy and strategic imagination.

Time and again this court heard prosecutors explain, in so many words, that their failures in this and other cases were the result of a misunderstanding of the law; or heavy caseloads; or complex investigations; or orders they received from federal authorities. Many testified, in essence, that they were "too busy" to give discovery issues the attention they required. None of these explanations constitutes a legitimate excuse for the failures demonstrated.

As noted above, this court considered evidence concerning alleged misconduct in a number of factually unrelated cases in an effort to determine whether the misconduct in this case was related to or the product of a broader course of "outrageous government conduct". This court concludes that it was not. That is not to suggest that this court finds that there was no misconduct in other cases. However, since this court finds that the apparent misconduct in other cases is not related to the misconduct committed in this case, the court believes that the unrelated misconduct becomes irrelevant to the resolution of the pending motions.

In reaching this conclusion, the court is mindful of our local District Court of Appeal's recent opinion in People v. Guillen (2014) 2014 DJDAP 8933, which involved multiple appellate claims of "outrageous government conduct." After thoroughly reviewing the current state of the law in this area, the well-respected Presiding Justice of that court reached these legal conclusions which are binding on this court.

> "A court's power to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution. (Citation omitted)... Ninth Circuit Court of Appeals' cases have described what a high bar defendants who assert outrageous government conduct must overcome. The remedy is a 'narrow one.'(Citation omitted)... The rights of the respective parties here are extremely important ones, namely, defendant's right to a fair trial and the People's right to prosecute persons believed to be responsible for the commission of serious crimes. (Citation omitted)... Those cases where courts have concluded the government's conduct barred prosecution because it was outrageous have involved situations where the government interfered with a defendant's right to effective assistance of counsel or created, encouraged, and condoned lengthy unlawful activity...we conclude the cases we discuss above establish appellants have not established that the OCSD or the OCDA engaged in outrageous government conduct that impacted a protected right and prevented them from receiving a fair trial."

It might be argued that the prosecutorial misconduct at issue here, including the allegations made concerning the impropriety associated with documented efforts by a Seal Beach police detective to secure a waiver from the defendant concerning his mental health records after he was represented by counsel, encroached on his "protected" Sixth Amendment rights. Although this court finds that this contact was improper, once again based upon its evaluation of all of the evidence the court finds that this violation was negligent rather than malicious. In addition, since the mental health records sought remain under court seal and have therefore never been seen by the People, this court cannot conclude that this impropriety will prevent this defendant from receiving a fair trial. This court therefore finds that neither this nor any of the other prosecutorial improprieties committed in this case constitute "outrageous government conduct" as such conduct is defined in Guillen, supra. This court therefore declines to impose the relief sought by the defendant in his motion, specifically either the dismissal of the special circumstance allegation he has already admitted, or the prohibition of the penalty trial sought by the People.

The court nonetheless believes that a significant sanction is appropriate as a result of the misconduct involved here. In People v. Jenkins (2000) 22 Cal. 4th 900, the Supreme Court confirmed that trial courts retain "broad discretion in determining the appropriate sanction for discovery abuse, and recognize that sanctions ranging from dismissal to the giving of special jury instructions may be required in order to ensure that the defendant receives a fair trial, particularly when potentially favorable evidence has been suppressed." 22 Cal. 4th at page 951 With that discretion in mind, this court will be guided by the old maxim that "the punishment should fit the crime," and hold that the appropriate sanction for the People's failures in this case is the exclusion of all evidence related to their misconduct; in other words, the exclusion of the defendant's custodial statements for all purposes during a penalty trial. The court at this time respectfully declines to impose any additional sanctions.

2) MOTION TO RECUSE THE OFFICE OF THE ORANGE COUNTY DISTRICT ATTORNEY

The court incorporates all of its findings made in section one above as if they were again fully set forth here. Penal Code section 1424 specifies the standards to be applied when a defendant moves to recuse the District Attorney from a case. The statutory protocol has been followed in this case. People v. Spaccia (2012) 209 Cal. App. 4th 93 discusses the legal rules that apply to a recusal motion:

> "Penal Code section 1424 has been interpreted as providing a two-part test for disqualification. First, the court must determine whether there is a conflict of interest. Second, the court must determine whether the conflict is so severe as to disqualify the district attorney from acting. (Citation omitted)" 209 Cal. App. 4th at 106.

Despite the emotionally charged venting that has occasionally occurred with respect to all of the defendant's pending motions and the People's response to them, this court finds that the evidence produced has been insufficient to support a finding in favor of the defendant on either required prong. It is troubling that throughout this pending litigation additional materials that appear to have been subject to this court's January, 2013 discovery order have continued to emerge from various sources. On the other hand, the court is aware that roughly 17,000 pages of discovery have been produced by the People in response to that order. On balance, this court has not lost confidence that the duly elected District Attorney of this county has the ability to competently and ethically complete the prosecution of this serious matter. The motion to recuse the Office of the Orange County District Attorney is therefore respectfully denied.

3) MOTION TO EXCLUDE THE DEFENDANT'S CUSTODIAL STATEMENTS

Abundant evidence supports the People' decision to concede the so-called Massiah motion and the court now formally accepts that capitulation. The defense motion to preclude any use, direct or derivative, during the People's case in chief of the statements allegedly made by this defendant in the Orange County Jail in October of 2011 is granted. Of course, in light of this court's ruling above on the defendant's "outrageous government conduct" motion, the Massiah motion is effectively rendered moot.

The evidence presented to support the defendant's Massiah motion demonstrated to this court, as discussed above, that informant Fernando Perez was not intentionally placed in L Mod in the cell adjacent to this defendant on October 13, 2011, in an attempt to elicit incriminating statements from him. Nevertheless, the court finds that the People failed in their due diligence obligation to determine who Fernando Perez was when they soon thereafter met and entered into an agreement with him. The evidence establishes that the People failed to make any significant inquiry at that time into Perez's criminal history and his pre-existing relationship with law enforcement. Had they undertaken such a reasonable inquiry on a timely basis, they would have quickly learned, as discussed in Neely, supra, that Perez had a longstanding relationship with law enforcement as an informant; that he had been working effectively as an informant inside the Orange County Jail for many months; and that he had every reason to expect that he would be rewarded for any additional informant work he might do when he was ultimately sentenced on his potential life imprisonment case.

Given his recent work history with law enforcement and his motivation to "do anything" to improve his legal circumstances, it could hardly be expected by any reasonable person that Fernando Perez would do anything other than exactly what he did in this case. Seizing an apparently fortuitous opportunity to add to his informant resume, he almost immediately engaged this defendant in conversations about his case, asking questions when he felt it was necessary. Perez was not merely "a listening post." The conduct of this informant violated this defendant's rights under the Sixth Amendment to the United States Constitution. The defendant's custodial statements to this informant must therefore be excluded.

CONCLUSION

Critical cases often generate complicated, convoluted issues. So it is here. The defendant, who has entered guilty pleas to eight counts of first degree murder and one count of attempted murder, and admitted the related multiple murder special circumstance, has alleged various acts of misconduct by the Orange County District Attorney and sworn members of law enforcement and has requested the imposition of specific sanctions.

This court has analyzed all of the evidence presented that relates to any alleged prosecutorial misconduct, while at the same time maintaining its focus on what happened to this defendant in this case. The court has ultimately concentrated much of its energy on determining whether or not the events in this case were the product of a broader spectrum of misconduct that rose to the level of "outrageous governmental conduct."

Many of the witnesses who testified during the course of this hearing were credibility challenged. These witnesses include current and former prosecutors, as well as current and former sworn peace officers. Some perhaps suffered from a failure of recollection. Others undoubtedly lied. In reaching its conclusions and formulating its findings, this court has resolved all credibility issues in a manner consistent with its rulings.

Based upon the foregoing findings, this court now answers its own initial questions regarding the defendant's "outrageous government conduct" motion as follows:

1) Law enforcement did engage in misconduct in the investigation and preparation of the current prosecution;
2) The misconduct directly related to this case was negligent and therefore does not rise to the level of "outrageous government conduct";
3) The misconduct was nonetheless serious and therefore merits a significant sanction;
4) The appropriate sanction is the exclusion at trial for all purposes, direct or derivative, of all custodial statements made by this defendant.

With respect to the recusal motion, pursuant to the standards set forth in Penal Code section 1424, that motion is respectfully denied. This court is not convinced that the entire Office of the Orange

County District Attorney has a conflict of interest with respect to further prosecuting this case; nor is the court convinced that that the evidence demonstrates "a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner" in this case in the future. People v. Connor (1983) 34 Cal.3d 141 at 148.

Finally, the Massiah motion is granted in effect by stipulation, and as a result the defendant's custodial statements are excluded.

The court complements all counsel for their preparation and performance during the presentation of this extraordinary hearing.

Dated: 8/4/14

THOMAS M. GOETHALS

Judge of the Superior Court

ATTACHMENT 12

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MAR 12 2015
ALAN CARLSON, Clerk of the Court
BY: _____ DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA

V. 12ZF0128

SCOTT DEKRAAI SUPPLEMENTAL RULING

INTRODUCTION

In January of 2014 this defendant filed a series of motions which alleged misconduct on the part of members of the Orange County District Attorney's office and their law enforcement partners. In these motions, the defendant sought several forms of relief. After conducting a lengthy evidentiary hearing related to these allegations, this court issued a written ruling in August of 2014. Later that year, the defendant requested reconsideration of that ruling along with a supplemental evidentiary hearing on the issues involved based upon his belief that he had discovered relevant new evidence. The People ultimately joined in the request for a supplemental hearing and so, despite its initial reluctance to do so, this court commenced that hearing on February 5, 2015. The hearing, which put back into play the defendant's motions 1) to bar the People from seeking a death judgment against him; and 2) to recuse the entire Office of the Orange County District Attorney from further participation in this prosecution, concluded its evidentiary phase on February 19, 2015.

In this Supplemental Ruling, the court confirms its original findings and rulings in all respects except for those that are specifically addressed herein. In addition to the issues on which this court originally ruled, the court will now address these additional questions:

1) Has the supplemental evidence, when considered along with all of the other evidence produced during this entire hearing, demonstrated that this defendant has suffered a personal due process violation in the form of outrageous government conduct and/or serious discovery violations which warrant the imposition of any additional trial sanction?
2) Does the supplemental evidence, when considered along with all of the evidence produced during this hearing, require the recusal of the entire Orange County District Attorney's office?

MOTION FOR SANCTIONS RELATED TO "OUTRAGEOUS GOVERNMENT MISCONDUCT"

The defense allegation that triggered the supplemental evidentiary hearing was primarily the contention that the defense had developed new evidence suggesting that one or more of the law enforcement witnesses who testified during the initial phase of the hearing lied during that testimony. This

contention focused largely on the testimony of Orange County Sherriff's deputies Seth Tunstall and Ben Garcia.

A brief background statement is necessary to place the current issues into context. The defendant's original prosecutorial misconduct allegations focused on events that occurred in October of 2011, shortly after the defendant's arrest, when he was placed into a particular cell inside the Orange County Jail. In the directly adjacent cell was an active inmate informant. The defendant alleged that he was purposefully placed in that particular cell by law enforcement in the hope that the informant could obtain incriminating statements from him. The People's position was that no improper activity had occurred.

During the first phase of the evidentiary hearing on these motions, the court heard many weeks of testimony which established that law enforcement had engaged in illegal activity in other cases not related to this defendant's case. During the initial testimony of deputies Tunstall and Garcia, they were asked about their experience within the jail as "special handling" deputies, and whether they had been involved in or had any knowledge of any of the alleged misconduct. Both denied any such involvement, and, when examined more specifically, essentially indicated that they had limited recollections of many of these events and no means of refreshing their vague recollections of the relevant events related to this defendant's housing in the jail.

The court is not privy to the exact means whereby the People and the defendant became aware, after the conclusion of the first phase of this hearing, that the Orange County Sheriff has for many years maintained within its jail records system a database known as TRED. Nonetheless, the court has now heard testimony that the TRED system has existed for at least a decade, that classification and special handling deputies access it on a daily basis, and that the TRED records contain significant information about inmate cell movements and the reason for such transfers. During their initial testimony, despite fielding inquiries that should logically have triggered responses about the existence and content of TRED records, neither Tunstall nor Garcia ever mentioned their knowledge and regular use of TRED during the years they worked in the jail.

Deputy Tunstall, during his recent appearance before this court, testified that, despite his belief that TRED records would be the best place to look for information concerning inmate transfers, and his understanding before his original testimony that the reason for this defendant's cell placement was critical to the resolution of the pending motions about which he was testifying, it "never crossed his mind" to look at the TRED records or to reveal their existence to counsel or this court. In response to questions posed by this court, Tunstall testified that TRED access was limited to "classification, special handling, and upper administration." He also told the court that he was never specifically instructed not to mention the existence of TRED records in court, and that he would have discussed them if anyone had specifically asked him about them despite his training that all TRED records were "confidential."

During his supplemental testimony deputy Garcia informed the court that he had reviewed TRED records in preparation for his original testimony because he understood the issues raised by the defendant's motion and the most reliable way to determine "who moved who and why" inside the

Orange County Jail would be to review the inmate's TRED records. Nonetheless, he agreed that, despite this belief and the direct nature of the questions he was asked, he never mentioned the existence of the TRED records during his initial testimony. After offering several possible reasons for this, Deputy Garcia ultimately explained his prior silence by stating "that's the way we were trained."

After listening to their recent testimony, and comparing it to the prior testimony of both deputies, this court concludes that deputies Tunstall and Garcia have either intentionally lied or willfully withheld material evidence from this court during the course of their various testimonies. For this court's current purposes, one is as bad as the other and it is therefore not necessary to engage in the semantical analysis required to determine which of these possibilities has occurred. This court will leave that evaluation to prosecutors employed by the executive branch of government.

What is crystal clear is this. Deputies Tunstall and Garcia were two of the Orange County Sheriff's most experienced classification and special handling deputies. Both worked in the Orange County Jail in those capacities for many years. During those years both became thoroughly familiar with the existence and function of the TRED records system. Each personally made thousands of entries in the TRED system. They understood that inmate moves were documented and often explained on the TRED system. Both testified that a review of an inmate's TRED records would likely be the best way to determine when and why that inmate's housing was changed. Tunstall and Garcia at least generally understood when they were first called to testify on the current motion what the issues to be discussed would be, and that these issues involved inmate movements within the jail. Neither mentioned the existence or content of the TRED records at any time during their initial testimony on the current motions.

To perhaps clarify the record, this is not the first time during this protracted hearing that deputy Tunstall's testimony lacked credibility. This court did not believe the earlier testimony of either Tunstall or deputy district attorney Eric Peterson when they unsuccessfully tried to shift responsibility for a serious discovery breach in another case to the shoulders of a former federal prosecutor.

In making its credibility findings, the court gives substantial weight to the testimony of deputy Jonathon Larson, another Special Handling deputy. Deputy Larson knew and worked with both Tunstall and Garcia. His duties approximated theirs. This court found Larson's acknowledgement of his informant responsibilities straightforward and credible:

> Question: "Was one of your jobs to kind of develop informants in the jail, identify them and manage them if they were of assistance?"
>
> Answer: "I would say yes." (Reporter's Transcript, page 6740)

This testimony directly contradicts that of both Tunstall and Garcia on this subject.

The court also found one aspect of deputy William Grover's testimony remarkably candid. Grover was another long time classification and special handling deputy inside the Orange County Jail. Grover knew and worked with both Tunstall and Garcia for many years. Deputy Grover testified that he was trained from "day one...in classification and special handling" (R.T. 6700) that he was never to mention the

existence of the TRED records since they were part of "an internal sheriff's department secured data system and we don't discuss it" (R.T. 6701). Grover's testimony is often inconsistent with the recollections of both Tunstall and Garcia on key issues.

As a result of such testimony, and this court's evaluation of the demeanor of these witnesses as they testified and the inconsistency of their various sworn statements, the court finds, as stated above, that both Tunstall and Garcia lacked credibility. The court further believes that these sheriff's deputies, due to their training and experience, intentionally failed to tell anyone outside of a limited number of sheriff's personnel, at any time, about the existence of the TRED record system, even when such information was called for by questions asked of them under oath in court.

In People v. Guillen (2014) 227 Cal. App. 4th 934, which was discussed by this court in its original ruling, the well-respected presiding justice of Orange County's local Court of Appeal wrote that a trial court may appropriately dismiss a criminal prosecution based upon a finding of "outrageous government conduct" when such conduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." Guillen, supra, 227 Cal. App. 4th at p. 1004. That rule may not strictly apply to the current motion, however, since this defendant does not seek the dismissal of any charge. In fact he has entered guilty pleas to all of the serious charges filed against him and does not ask to withdraw his guilty pleas. Rather he asks that this court bar a penalty trial.

It is arguable whether or not the evidence currently before this court related to alleged prosecutorial misconduct reaches the standard of "outrageous government conduct" discussed in Guillen and other cases. What cannot be debated is the fact that serious, ongoing discovery violations continue to occur in this case. This court therefore now elects to impose additional sanctions for these discovery violations, rather than for any broader course of ongoing prosecutorial misconduct. This is consistent with the discretion conferred upon the court by People v. Jenkins (2000) 22 Cal. 4th 900, which was also discussed in the court's original ruling. Pursuant to Jenkins, this court has "broad discretion" to sanction the People "for discovery abuse" by the prosecution team.

There is no direct evidence before the court to support the suggestion that the District Attorney or any of his deputies was actually aware of the existence of the TRED record system until after the completion of the first phase of this hearing and the court's initial ruling. But that does not resolve the issue since, for discovery purposes, "(t)he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." In re Brown (1998 17 Cal. 4th 873, f879, citing United States v. Payne (1995) 63 F. 2d 1200, 1208.

Given the issues raised by the defense motions, the People's failure to provide the defense with any information whatsoever for nearly two years concerning the existence of the computerized TRED housing records maintained within the Orange County Jail, despite repeated orders from this court to produce just such records, constitutes a serious discovery violation. The defendant argues that his motion to bar the People from seeking the death penalty is the only viable remedy for the ongoing discovery violations that have been demonstrated by the evidence produced during both phases of this hearing since permitting a penalty trial under these circumstances would necessarily invite an "arbitrary

and capricious" verdict. This court respectfully disagrees. This court believes that an appropriate alternative trial sanction can be crafted to prevent just such an unacceptable result. With that in mind the court now imposes the following additional trial sanctions for the serious, continuing discovery violations that have occurred in this case.

Evidence during the People's penalty trial presentation shall be limited to 1) evidence directly related to the acts committed by this defendant on October 12, 2011; 2) statements made by the defendant before his booking at the Orange County Jail; and 3) victim impact evidence. Any additional aggravating evidence is excluded from the People's penalty case in chief presentation. Should any counsel feel that this court should reconsider any aspect of this order as a result of developments at trial, before any other aggravating evidence is mentioned in the presence of the jury counsel is ordered to broach the subject with the court outside the jury's presence. This court believes that such evidence is not likely to produce an "arbitrary and capricious" verdict since it involves only evidence that directly relates to events that the defendant himself has admitted through his own pleas of guilty.

RECUSAL MOTION

As for the defendant's motion to recuse the District Attorney's office, the legal rules concerning recusal remain the same as previously discussed. To justify a recusal order, it is the defendant's burden to demonstrate that 1) the District Attorney has a conflict of interest; and 2) the conflict is "so grave as to make a 'fair trial' unlikely." Haraguchi v. Superior Court (2008) 43 Cal. 4th 706, 713. This court previously ruled that the defendant had failed to meet this burden.

But the evidentiary ground has now shifted. In its original ruling, this court wrote that it had "not lost confidence that the duly elected District Attorney of this county has the ability to competently and ethically complete the prosecution of this serious matter" and therefore denied the recusal request. This ruling was largely based on the court's conclusion that any prosecutorial misconduct the court found in other cases was not related to the misconduct in this case. Therefore, the prior ruling concluded that "the unrelated misconduct becomes irrelevant to the resolution of the pending motions." In light of the recent evidence, the court no longer harbors this belief.

In its original ruling, this court expressed concern over the fact that "throughout this pending litigation additional materials that appear to have been subject to this court's January, 2013 discovery order have continued to emerge." It is now apparent that the discovery situation in this case is far worse than the court previously realized. In fact, a wealth of potentially relevant discovery material--an entire computerized data base built and maintained by the Orange County Sheriff over the course of many years which is a repository for information related directly to the very issues that this court was examining as a result of the defendant's motion--remained secret, despite numerous specific discovery orders issued by this court, until long after the initial evidentiary hearing in this case was concluded and rulings were made.

As stated above, there is no direct evidence to suggest that the District Attorney actively participated in the concealment of this information from the defense and the court. Which really just aggravates the entire situation because someone has to be in charge of criminal investigations and prosecutions in

Orange County. At times this may create a conflict of interest between prosecutors bound by their legal and ethical constraints and peace officers who may try to cut legal corners for the sake of expediency or some other purpose. The evidence indicates that such a conflict of interest exists in this case. Under such circumstances it is the District Attorney's responsibility to resolve any such conflict by respecting and protecting the rule of law rather than by ignoring any attempt to compromise a suspect's statutory or constitutional rights. The evidence indicates that such resolution has not occurred in this case.

As the chief law enforcement officer in this county the District Attorney is responsible for the actions of his agents. In this case the evidence demonstrates that some of those agents have habitually ignored the law over an extended period of time to the detriment of this defendant. As a result, after reconsidering the evidence it heard during the initial phase of this hearing along with the recent supplemental evidence, this court has reached the following conclusion.

The District Attorney has a conflict of interest in this case which has actually deprived this defendant of due process in the past. And given this ongoing conflict, the District Attorney's continued participation in this prosecution will likely prevent this defendant from receiving a fair trial in the future. After a period of what can at best be described as benign neglect concerning the actions of his law enforcement partners, the District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial. Therefore, the defendant's motion to recuse the office of the Orange County district Attorney must be and is granted.

This court does not order the District Attorney's recusal as a punitive measure. As the Supreme Court said in People v. Bryan (2014) 60 Cal. 4th 335, 374, recusal "is not a mechanism to punish past prosecutorial misconduct." Recusal is instead a remedial measure designed to insure that any future trial is fair. That is exactly this court's aim in issuing this extraordinary recusal order.

CONCLUSION

Certain aspects of the District Attorney's performance in this case might be described as a comedy of errors but for the fact that it has been so sadly deficient. There is nothing funny about that. In fact what makes the situation here especially disconcerting is that this performance has deprived this defendant, the people of Orange County, and especially the community of Seal Beach, of the timely resolution of this case which all parties deserved. And which should have, could have, and likely would have been achieved but for this performance. Justice delayed has resulted in the denial of justice to all concerned here.

With that thought in mind, this court now answers its own questions:

1) The additional evidence presented convinces this court that the defendant has suffered a personal due process deprivation as a result of significant discovery violations which the court was unaware of when it made its initial findings and orders.

As discussed in People v.Guillen, supra, at pages 1003-04, "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the (g)overnment activity in question violates some protected right of the defendant."(Citing Hampton v. United States (1976) 425 U.S. 484, at 490.) Here the court finds that when the People presented false and/or intentionally misleading testimony during this defendant's own motions the defendant's due process rights were violated to his personal detriment. This is so whether or not the prosecution was actually aware that the testimony of any witness was either false or intentionally misleading since the District Attorney is legally responsible for the acts of his agents.

Notwithstanding this finding, in the exercise of its discretion the court elects to impose additional trial sanctions related to the defendant's first motion (the motion to preclude a penalty trial in this matter) on the basis of its finding that serious additional discovery violations have occurred since the court issued its initial ruling. As a result of those discovery violations, the court now orders that, during the People's case in chief presentation during the defendant's penalty trial, evidence will be limited to that which 1) directly relates to the defendant's conduct on October 12, 2011 in Seal Beach; 2) statements the defendant made before he was booked into the Orange County Jail; and 3) victim impact evidence. The defendant's specific motion to preclude a penalty trial is denied.

The People contend that People v. Uribe (2011) 199 Cal. App. 4th negates the court's ability to impose additional sanctions. This court respectfully disagrees. The cases are distinguishable, and the Uribe court itself observed that "...when prosecutorial misconduct impairs a defendant's constitutional right to a fair trial, it may constitute outrageous government conduct warranting a dismissal." Uribe, supra, at 841. But today's order dismisses nothing, neither any charge nor any other allegation or enhancement. Nor are the additional sanctions imposed based upon a finding of outrageous government conduct. Rather, these penalty trial sanctions are imposed pursuant to the discretion conferred on this court by the Supreme Court in Jenkins, supra for serious discovery violations.

2) The additional evidence forces this court to reconsider its original ruling on the recusal motion. As a result of that reconsideration, this court finds it necessary to recuse the entire office of the Orange County District Attorney.

Even at this late date, after more than two years of concerted effort by a team of OCDA's most experienced prosecutors, the court finds that the District Attorney lacks the apparent ability to achieve compliance with his constitutional and statutory discovery obligations in this case. This chronic failure stems from a conflict of interest on the part of the District Attorney as discussed herein. This conflict of interest has to date deprived the defendant of his right to due process and a fair trial. Unless the situation is corrected immediately, it will continue to do so. The court makes this finding despite the parties' stipulation that, since this court made its pivotal discovery order in late January of 2013, the People have produced over thirty thousand pages of informant related discovery.

In this case, the District Attorney's conflict of interest is not imaginary. It apparently stems from his loyalty to his law enforcement partners at the expense of his other constitutional and statutory obligations. In the face of this conflict of interest the evidence demonstrates that, in this case, the

District Attorney cannot or will not insure compliance by other team members with the orders of this court. The defendant has as a result of this conflict of interest suffered a personal due process violation that has deprived him of a trial for well over two years and will likely continue to do so in the future. As a result, the District Attorney and all of his deputies must be recused.

Despite the foregoing rulings, this court remains fully aware of its obligations to both this defendant and this community. As the court observed in Guillen, critical rights are implicated on both sides.

> "The rights of the respective parties here are extremely important ones, namely, defendant's right to a fair trial and the People's right to prosecute persons believed to be responsible for the commission of serious crimes." Guillen, supra, at pages 1006-07, citing Uribe, supra at 857-58.

These potentially competing rights must be fairly and appropriately reconciled in every case, based on the facts of each individual case, if California's criminal justice system is to remain respected and viable. It is this court's responsibility to conscientiously engage in that reconciliation process on a case by case basis. With that responsibility in mind, this court finds that the evidence at hand in this case demonstrates that additional trial sanctions must be imposed here. The evidence also requires that the District Attorney and his deputies be relieved of their responsibilities in this matter. Those responsibilities shall immediately be assumed by California's Attorney General. This case must then proceed deliberately to its just conclusion through a penalty trial during which qualified representatives of the Orange County community will determine the appropriate punishment for the crimes this defendant has admitted committing over three years ago.

The court once again commends litigation counsel for their preparation and presentations during the hearings on this motion.

Dated: 3/12/15

Judge

ATTACHMENT 13

TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

June 6, 2016

HAND DELIVERED

JULIE GARLAND, Senior Assistant Attorney General
Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101-3702

RE: Supplemental referral to Attorney General for review of conduct and testimony by OCSD personnel in *People v. Dekraai*

Dear Ms. Garland:

On March 18, 2015, I made a written referral to your Office stemming from the ruling of the Orange County Superior Court (OCSC) dated March 12, 2015, which recused the Office of the Orange County District Attorney (OCDA) from the case of *People v. Dekraai*, OCSC Case No. 12ZF0128. As I stated in my March 18 letter (a copy of which is attached hereto), in the *Dekraai* court's written recusal order, the court made findings that it believed that two Orange County Sheriff's Department (OCSD) deputies assigned to the jail (Tunstall and Garcia) and one OCDA deputy district attorney (Petersen) may have testified untruthfully during the hearings on the defendant's motions to dismiss and recuse. In light of the unique posture of the *Dekraai* case after the court's recusal order, I determined that there might be a perception of conflict if the OCDA were to review for potential prosecution the conduct and testimony of the witnesses who had testified at the hearings. Consequently, I referred the matter to your Office, and pledged that OCDA would fully cooperate with your Office's review.

I am now writing to supplement the OCDA's initial referral to your Office in light of recent developments on the *Dekraai* case. On May 3rd, 2016, the OCDA learned of the existence of another set of previously-undisclosed OCSD jail records which contain material responsive to the *Dekraai* court's discovery orders. These new records, known as Special Handling Logs (hereinafter, "the Logs"), came to light during litigation of the *People v. Wozniak*, OCSC case no. 12ZF0137. The OCDA promptly made your Office aware of the existence of the Logs. On May 10, OCDA received a complete set of the Logs from OCSD. On May 26, after completing our initial review of the Logs, we provided a complete copy of the Logs to your Office (consisting of 1157 pages).

Having made an initial review of the Logs, it is the belief of the OCDA that the content of these Logs and the non-production of the Logs during the previous hearings of the *Dekraai* case may constitute evidence of the commission of criminal wrongdoing. Additionally, it is the belief of the OCDA that the content of the Logs significantly impeaches the testimony of several OCSD witnesses who testified at the previous *Dekraai* hearings, particularly OCSD Special Handling deputies Garcia and Grover.

Because the Logs relate to your Office's current review, and because, as before, I believe that there might be a perception of conflict if the OCDA were to be responsible for reviewing, for potential prosecution, the conduct of OCSD personnel with regard to the *Dekraai* case, I am accordingly now referring to your Office for additional review the conduct and testimony of any OCSD personnel related to the Special Handling Logs and/or the *Dekraai* case.

It should be noted that at this time, significant questions about the Logs remain to be answered, such as: Why were the Logs created in the first place? Why were the Logs no longer written after January, 2013? Who knew of the existence of the Logs, and when? Why were the Logs not mentioned, nor produced, during the prior *Dekraai* hearings? Why are entries from May – September, 2011 missing from the Logs?

As the OCDA continues to analyze the unfolding, complex legal and factual scenarios we are facing, we anticipate that we will need to seek answers to these types of questions in order to faithfully discharge our prosecutorial duties (not least of which include due diligence in searching for potential *Brady* material). It is possible that answers to questions like these might provide evidence of criminal wrongdoing. Be assured that if we make such inquiries, that although we would be acting solely within our roles as prosecutors of defendant Dekraai, we would nevertheless be mindful of the role your Office will be taking as the reviewer of the conduct and testimony of the OCSD personnel concerning the Logs and the *Dekraai* case, and thus the OCDA will continue to fully cooperate with your Office by, among other things, providing you with evidence which is relevant to your review.

Sincerely,

Tony Rackauckas

Tony Rackauckas
District Attorney

TR:vlb
Attachments

ATTACHMENT 14

JOINT LETTER TO THE UNITED STATES DEPARTMENT OF JUSTICE

Request for Federal Investigation in Orange County, California

VOLUME I

November 17, 2015

The Honorable Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: REQUEST FOR FEDERAL INVESTIGATION IN ORANGE COUNTY, CALIFORNIA

Dear Attorney General Lynch:

We the undersigned share a firm belief in our criminal justice system and its overall ability to produce fair and reliable results. Compelling evidence of pervasive police and prosecutorial misconduct in Orange County, however, has caused us grave concern. We write to urge the Department of Justice to initiate an investigation into the actions of the Orange County Sheriff's Department ("OCSD") and the Orange County District Attorney's Office ("OCDA") in connection with the use of jailhouse informants and the concealment of informant-related evidence.

EVIDENCE OF MISCONDUCT IN ORANGE COUNTY: AN OVERVIEW

On September 30, 2015, *The New York Times* published an editorial addressing the situation in Orange County, which stated, in part:

> In a scheme that may go back as far as 30 years, prosecutors and the county sheriff's department have elicited illegal jailhouse confessions, failed to turn over evidence that is favorable to defendants and lied repeatedly in court about what they did . . . . Among other things, the defense argued, deputies intentionally placed informants in cells next to defendants facing trial . . . and hid that fact.
>
> The informants, some of whom faced life sentences for their own crimes, were promised reduced sentences or cash payouts in exchange for drawing out confessions or other incriminating evidence from the defendants. This practice is prohibited once someone has been charged with a crime. Even when using an informant is allowed, defendants and judges must be told of the arrangement. That did not happen in Orange County. As [one] defense lawyer discovered, the sheriff's department kept secret a computer file showing where jailhouse informants were placed that went back decades. The prosecutor's office kept separate files of data on informants and their deals.

Referring to the misconduct at issue as both "blatant" and "systemic," *The New York Times* concluded that "[t]he Justice Department should conduct a thorough investigation."[1]

As of the writing of this letter, it is fair to say that the criminal justice system in Orange County is in a state of crisis: charges in extremely serious cases have been reduced or dismissed; violent crimes—including murders—have gone entirely uninvestigated; to date, four law enforcement officers have refused to testify in pending criminal matters, citing their Fifth Amendment privilege against self-incrimination;[2] and at least one prosecutor has been found by a court to have given "incredible" testimony under oath.[3] More troubling still, this all appears to be the tip of the iceberg.

Given this state of affairs, as well as the scope of the misconduct at issue, the Department of Justice is the only entity with the capacity to conduct the investigation required.

Initial Hearings Before Judge Goethals & August 4, 2014 Ruling

Beginning in March of 2014, the Honorable Thomas Goethals held extraordinary evidentiary hearings in the capital murder case of *People v. Scott Dekraai*. Witnesses were questioned about the use of an informant in Mr. Dekraai's case, and about allegations of wide-scale informant-related misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Massiah v. United States*, 377 U.S. 201 (1964).[4] Over the course of a year, twenty-eight prosecutors and law enforcement officers testified under oath.

The defense alleged that members of the OCSD had a longstanding practice of secretly coordinating the movements of informants, in order to position them to obtain incriminating statements from targeted defendants. Informants would then actively elicit statements from charged defendants, going well beyond the constitutionally permissible role of "listening posts."[5]

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1 *Dishonest Prosecutors, Lots of Them*, http://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html?_r=0.

2 *With Deputies Refusing To Testify Under Oath In Snitch Scandal, It's Time For A Federal Probe*, http://blogs.ocweekly.com/navelgazing/2015/10/orange_county_snitch_scandal_informant.php; and *Deputies Take the Fifth, Complicating Yet Another Jail Snitch Case*, http://www.ocregister.com/articles/attorney-688078-case-deputies.html.

3 *People v. Dekraai* Supplemental Ruling, http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf.

4 Dekraai Motion to Dismiss the Death Penalty, http://bit.ly/1MCpnNe; and *How Tony Rackauckas Took a Slam Dunk Death Penalty Case and Turned It into His Worst Crisis*, http://blogs.ocweekly.com/navelgazing/2015/03/scott_dekraai_seal_beach_salon_murder_tony_rackauckas_district_attorney.php.

5 *U.S. v. Henry*, 447 U.S. 264, 271 (1980), finding that a jailhouse informant who was "not a passive listener" but engaged in "some conversations" with an in-custody defendant violated his Sixth Amendment right to counsel

In numerous cases, informants were said to have coerced confessions from targeted defendants with threats of physical violence and death.

Prosecutors, the defense maintained, consistently concealed information about these practices, despite a clear duty of disclosure. Instead, prosecutors repeatedly presented informants—to defense attorneys, judges, and even juries—in an identical fashion: as lucky listeners who happened to end up in the presence of talkative defendants. The defense further alleged that in some instances, in order to conceal the misconduct, prosecutors went so far as to suborn perjury. Prosecutors were said to have routinely concealed evidence damaging to the credibility of their informants, even when such evidence suggested that the informants were extraordinarily unreliable.

Over the course of the hearings before Judge Goethals, OCSD Special Handling Unit deputies testified under oath about the placement of informants.[6] The OCSD deputies denied that the placement of informants next to Mr. Dekraai and other high-value inmates was intentional, repeatedly testifying that, to the contrary, the housing arrangements were entirely coincidental. Over the course of their testimony, OCSD deputies went still further, denying the very existence of a jailhouse informant program in Orange County. The OCDA endorsed the testimony of OCSD witnesses, who denied any wrongdoing. In his ruling issued on August 4, 2014,[7] Judge Goethals concluded, *inter alia*:

- "This court believes that the discovery rules arising out of *Brady* are clear and unequivocal. With that in mind this court finds that substantial evidence supports a number of the defendant's allegations concerning potential *Brady* violations."

- "[T]his court finds that working informants and targeted inmates were at times intentionally moved inside the Orange County jail by jail staff, often at the request of outside law enforcement agencies, in the hope that inmates would make incriminating statements to those informants. Such intentional movements were seldom, if ever, documented by any member of law enforcement. Therefore little or no information concerning those intentional movements was ever created or turned over to defense counsel as part of the discovery process. This court also

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under *Massiah*. *See also* Cal. Pen. Code § 4001.1(b), a law passed in 1990 in response to the Los Angeles informant scandal discussed below, prohibiting any act "beyond merely listening" by in-custody informants.

[6] The Special Handling Unit is staffed by a small group of deputies working in the jail, whose assignments, as described in a search warrant written by Deputy Seth Tunstall in the case of *People v. Zorich*, include "[g]athering gang intelligence on shot caller/representatives, gang rivalries in and out of custody, narcotic trafficking within the system, [and] *developing confidential informants*" (emphasis added). The search warrant that includes this description of Special Handling's role in "developing confidential informants" was not uncovered by the *Dekraai* defense team until after the close of the initial hearings in the case.

[7] *People v. Dekraai* Ruling, http://big.assets.huffingtonpost.com/RulingbyGoethals.pdf.

finds that false documentation was requested by, and likely provided to, jail informants to enable them to increase their credibility with target inmates. All of these activities should . . . have been disclosed to defense counsel pursuant to *Brady* in order to facilitate a defendant's investigation of possible *Massiah* violations."

- "This court also finds that, despite their testimony to the contrary, express or implied promises were made to both of the informants whose conduct is here at issue and from whom this court heard extensive testimony . . . . As the District Attorney's own training materials . . . suggest, this is *Brady* material."

- "This court further finds that, without legal justification or excuse, in different cases involving the same informant significantly different quantities of informant related discovery material were turned over by Orange County prosecutors to defense counsel . . . . The missing material includes dozens, sometimes hundreds, of pages of handwritten informant notes which summarized incriminating statements allegedly made by targeted inmates. After considering all of the evidence presented on this subject, this court is not convinced that these chronic discovery failures were the result of any improper intervention by federal authorities. The missing discovery constituted *Brady* material."

- "Many of the witnesses who testified during the course of this hearing were credibility challenged. These witnesses include current and former prosecutors, as well as current and former sworn peace officers. Some perhaps suffered from failure of recollection. Others undoubtedly lied."

Judge Goethals concluded that Mr. Dekraai's statements to informant Fernando Perez had been obtained in violation of *Massiah*, a point ultimately conceded by the State at the hearings.[8] On the other hand, "the court [found] that a key misconduct allegation related directly to this defendant [had] not been sustained." Noting that "[a]s unlikely as it may seem in light of the foregoing findings and the healthy skepticism developed by this court over the years related to coincidence and criminal prosecutions," Judge Goethals reluctantly credited the representation of the OCDA and the OCSD that Mr. Dekraai and the informant Fernando Perez were not housed in neighboring cells "as a result of a specific plan by law enforcement," but instead as a result of "a confluence of independent events."

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[8] On the day that former Deputy DA Erik Petersen was scheduled to testify, *Dekraai* prosecutors announced that they would concede the *Massiah* violation involving Perez, and asked that Judge Goethals limit any further testimony in the case and prohibit the defense from calling Mr. Petersen. Judge Goethals rejected that request. *D.A. Won't Use Jailhouse Recordings in Seal Beach Mass-Murder Case*, http://www.latimes.com/local/lanow/la-me-ln-jailhouse-recordings-seal-beach-shooter-20140422-story.html.

Though Judge Goethals did sanction the prosecution,[9] he declined to recuse the District Attorney. Calling it "troubling" that "throughout this pending litigation additional materials that appear to have been subject to this court's January, 2013 discovery order have continued to emerge from various sources," Judge Goethals nevertheless concluded that, "[o]n balance, this court has not lost confidence that the duly elected District Attorney of this county has the ability to competently and ethically complete the prosecution of this serious matter."

Reopened Hearings Before Judge Goethals & March 12, 2015 Supplemental Ruling

Following the conclusion of the initial portion of the hearings, the defense uncovered significant new evidence, including the existence of a secret computer database maintained by the OCSD since 1990, called "TRED."[10] A TRED file contains entries that Judge Goethals later described as documenting "significant information about cell movements and the reason for such transfers." Judge Goethals concluded that this newly discovered evidence was significant enough to merit reopening the hearings and revisiting his prior ruling. As he explained in his supplemental ruling, "[t]he defense had developed new evidence suggesting that one or more of the witnesses who testified during the initial phase of the hearing lied during their testimony."

The very existence of a database with information about inmate movements and other critical information, considered alongside the contents of several key TRED files, directly contradicted substantial portions of OCSD testimony presented at the initial hearings. Over the course of the reopened hearings it became clear that, contrary to the State witnesses' prior sworn testimony, a secret jailhouse informant program has long existed in Orange County's jails.[11] The revelation of the TRED files also exposed one of Judge Goethals' key findings—made in reliance on the State's representations in testimony and argument—as incorrect. This key finding was the determination that "intentional movements were seldom, if ever, documented by any member of law enforcement. Therefore, little or no information concerning those intentional movements was ever created . . . ." With the discovery of the TRED files, law enforcement's documentation of inmate movements was uncovered. The TRED files also contradicted sworn testimony from OCSD deputies regarding the reasons why Mr. Dekraai was housed with an informant.

The decision to conceal TRED files, along with the *Brady* material contained within them, suggests that law enforcement officials in Orange County have been willing to go to great lengths

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9 Determining that "a significant sanction is appropriate as a result of the misconduct involved here," Judge Goethals excluded "all evidence related to their misconduct, in other words, the exclusion of the defendant's custodial statements for all purposes during a penalty trial."

10 *Sheriff's Department Use of Jailhouse Tracking System Under Scrutiny*, http://voiceofoc.org/2015/02/sheriffs-department-use-of-jailhouse-tracking-system-under-scrutiny/.

11 *People v. Dekraai* Ruling, http://big.assets.huffingtonpost.com/RulingbyGoethals.pdf.

not only to circumvent the constitutional protections afforded criminal defendants,[12] but also to ensure that their efforts remain secret. Judge Goethals underscored this concern, emphasizing the consistent refusal of OCSD deputies in earlier testimony to so much as mention the TRED files, even when "such information was called for by questions asked of them under oath in court."[13]

On March 12, 2015, after considering the new evidence before him, Judge Goethals ordered the recusal of the entire OCDA and imposed significant additional sanctions on the prosecution.[14] Judge Goethals specifically found that:

> [D]eputies Tunstall and Garcia have either intentionally lied or willfully withheld material evidence from this court during the course of their various testimonies. For this court's current purposes, one is as bad as the other and it is therefore not necessary to engage in the semantical analysis required to determine which of these possibilities has occurred. This court will leave that evaluation to prosecutors employed by the executive branch of government.

Judge Goethals also made clear that he "did not believe" the testimony of Deputy District Attorney Erik Petersen with respect to the claim that a former federal prosecutor was responsible for one

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12 OCSD deputies appear to have employed the following tactics, among others, to achieve this end: (1) the maintenance of informant tanks, in which jailhouse informants and high-value inmates are intentionally placed in the same housing areas; (2) the orchestrated movement of informants to housing locations near targets, including the fraudulent manipulation of the housing and security levels of informants, designed to induce the trust of targets; and (3) the active encouragement of informants to secure statements from represented targets. Tr., *Dekraai Hearing*, February 9, 2015, at 6355-6360; Tr., *Dekraai Hearing*, February 17, 2015, at 6637-6348, 6748.

13 In his opinion, Judge Goethals stated that Deputy Tunstall and Deputy Garcia "have either intentionally lied or willfully withheld material evidence from this court during the course of their various testimonies . . . even when such information was called for by questions asked of them under oath in court." *People v. Dekraai* Supplemental Ruling, http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf. Judge Goethals wrote that "[t]his court did not believe the earlier testimony of either Tunstall" or Deputy DA Erik Petersen "when they unsuccessfully tried to shift responsibility for a serious discovery breach in another case to the shoulders of a former federal prosecutor."

14 As a sanction for the significant concealment of evidence, Judge Goethals excluded all penalty phase evidence other than "1) evidence directly related to the acts committed by this defendant on October 12, 2011; 2) statements made by the defendant before his booking at the Orange County Jail; and 3) victim impact evidence." *See You're All Out*, http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html; *When District Attorneys Attack*, http://www.nationalreview.com/article/419110/criminal-justice-mess-orange-county-kevin-d-williamson; *Judge Disqualifies All 250 Prosecutors in Orange County, CA Because of Widespread Corruption*, http://www.dailykos.com/story/2015/05/29/1388819/-Judge-disqualifies-all-250-prosecutors-in-Orange-County-CA-because-of-widespread-corruption; *Critics: Orange County DA Needs "Cleansing with Bleach and Firehoses,"* http://www.huffingtonpost.com/2015/04/03/orange-county-da_n_6993390.html; *OC District Attorney's Team Barred from Seal Beach Shooting Case*, http://voiceofoc.org/2015/03/oc-district-attorney-barred-from-dekraai-death-penalty-hearing/; and *Caught Backing Lying Sheriff's Deputies, Orange County Prosecutors Get Booted In Murder Case*, http://blogs.ocweekly.com/navelgazing/2015/03/seal_beach_salon_massacre.php.

of the serious discovery breaches. In making the decision to reverse course and recuse the District Attorney, Judge Goethals reasoned as follows:

> [T]he District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial. Therefore, the defendant's motion to recuse the office of the Orange County [D]istrict Attorney must be and is granted.[15]

The evidence adduced at the hearings, along with Judge Goethals' findings, raises the specter of a decades-long, wide-scale constitutional crisis. Given that evidence from the TRED database was apparently concealed for some twenty-five years, there is certainly reason to believe that countless TRED files created during the past quarter century might include *Brady* material that was never disclosed to defendants. This in turn raises additional questions: how often were TRED notations suppressed when they ought to have been disclosed? Are there cases where the hidden TRED files could have made the difference between acquittal and conviction, freedom and incarceration, or perhaps even life and death?

Evidence Pointing to Prosecutors' Central Role

The evidence suggests that law enforcement does not bear exclusive responsibility, or even primary responsibility, for the suppression of critical impeachment and exculpatory information in Orange County. Rather, the documented evidence indicates that prosecutors have played a central role—for decades.

The OCDA's Potential Knowledge of the TRED System

In a recent interview, OCSD Sheriff Hutchens stated that, "There's no secret about [the TRED System]. Certainly, the District Attorney's office has known about it for years."[16] Mr. Rackauckas responded by flatly denying that the OCDA had been aware of the system's existence, stating that TRED files had only been disclosed by the OCSD in one of its cases. These conflicting representations merit additional inquiry.

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[15] *People v. Dekraai* Supplemental Ruling, http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf.

[16] *Jailhouse Informant Scandal Rocking Criminal Justice System in Orange County*, http://abc7.com/news/jailhouse-informant-scandal-rocking-oc-criminal-justice-system/1046811/.

The Suppression of Brady *Evidence from the Orange County Informant Index*

Significant evidence emerged in a second capital case, *People v. Daniel Wozniak*,[17] which suggests that the OCDA has routinely suppressed *Brady* evidence contained in the Orange County Informant Index ("O.C.I.I."). The O.C.I.I. is managed by the OCDA, and is intended to serve as the countywide database of informant files for law enforcement and the OCDA. The index documents assistance from "cooperators," as well as concerns regarding cooperator conduct and reliability. The O.C.I.I. system appears to have been in existence for at least thirty-five years.

The OCDA should have known about its failures to disclose *Brady* evidence within the O.C.I.I. no later than 1990, during post-trial habeas litigation in the death penalty case of *People v. Thomas Thompson.*[18] Mr. Thompson was executed in 1998, but the case has been haunted by compelling allegations about both the concealment of evidence and misconduct by the prosecution.[19] At Mr. Thompson's trial, the prosecution never disclosed that an O.C.I.I. file existed

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[17] On August 26, 2015, Mr. Wozniak, who is awaiting trial in a death penalty case, filed a Motion to Dismiss the Death Penalty, alleging and analyzing thirty years of purported informant-related misconduct in Orange County. *People v. Wozniak* Motion to Dismiss, Super. Ct. Orange County, No. 12ZF0137, filed Aug. 26, 2015, http://voiceofoc.org/files/2015/08/Wozniak-Defense-Motion-to-Dismiss-as-filed-08-26-2015.pdf.

[18] In 1990, appellate counsel finally obtained from the OCDA a key informant's O.C.I.I. file, which included information that would have substantially undermined his credibility. Declaration of William J. Arzbaecher, III, Oct. 25, 1990.

[19] At the preliminary hearing of Mr. Thompson and his co-defendant David Leitch, the prosecutor called three informants who claimed Mr. Thompson confessed that he was directed by Mr. Leitch to kill the female victim, because Mr. Leitch feared the victim would interfere with his efforts to reconcile with his wife. When former assistant DA Michael Jacobs took over the case, he decided to try the two defendants separately. At the *Thompson* trial, Mr. Jacobs called two new informants as witnesses, both of whom testified that Mr. Thompson admitted his sole responsibility for the rape/murder. Mr. Thompson was convicted and sentenced to death. At the Leitch trial, Mr. Jacobs returned to the theory from the preliminary hearing, arguing that the defendant directed Mr. Thompson to kill the victim. Mr. Jacobs did not pursue the death penalty against Mr. Leitch, who was convicted of second degree murder. As Judge Stephen Reinhardt made clear in one of his discussions of *Thompson* over the years:

> The incompatibility of the two presentations could not have been more evident. As Judge Betty Fletcher of our court later wrote, "little about the trials remained consistent other than the prosecutor's desire to win at any cost."
>
> The prosecutor's contradictory presentations were so blatantly unethical that, in a wholly unprecedented action, seven former California prosecutors with extensive death penalty experience subsequently filed an amicus brief on Thompson's behalf in the United States Supreme Court, arguing that "this is a case where it appears that our adversarial system has not produced a fair and reliable result." This group of top prosecutors included the individual entrusted with the decision whether to seek the death penalty in all capital-eligible cases in Los Angeles County during 1979-1991, his counterpart in Sacramento entrusted with the same decisions in that county during 1989-1995, and the drafter of the California death penalty statute under which Thompson was convicted and sentenced. These highly respected prosecutors severely criticized the egregious conduct of Thompson's prosecutor and observed that "the use of three informants to support one

for informant Edward Fink, even though he was described within that file as an "unreliable operator." The file also included an entry stating that Mr. Fink escaped custody while acting as an informant with the Long Beach Police Department.[20]

In the past year, the concealment of informant Fink's O.C.I.I. file in *Thompson* sparked a broader investigation by the *Wozniak* defense. This probe appears to have only scratched the surface of the scope of non-disclosure stemming from prosecutors' handling of this critical database of informant information. Mr. Thompson's prosecutor, Michael Jacobs, admitted in a 1999 deposition for another condemned defendant, William Charles Payton, that he did not turn over the O.C.I.I. file for a key informant in that case, Daniel Escalera. Jacobs further testified that he was unaware of even the *existence* of the O.C.I.I. system during the first two decades of his career. At the time of his deposition, the veteran murder prosecutor was the chief of the OCDA's homicide unit.[21]

A document discussed for the first time in a *Wozniak* pleading signals that the non-disclosure of evidence from the O.C.I.I. files does not appear to be a problem unique to Mr. Jacobs, but rather the result of long-term, and long-concealed, OCDA practices. A 1999 letter sent from a high-ranking official within the California Attorney General's Office ("AG") to current Orange County District Attorney Tony Rackauckas[22] describes efforts by multiple prosecutors designed to prevent defendant Payton from obtaining O.C.I.I. entries relating to informant Escalera.[23] According to the AG's letter, the OCDA only agreed to turn over critical entries after being advised that "if [the OCDA] did not disclose this material in the informant index, the Attorney General's office had an independent ethical obligation to disclose it to the defense under *Brady*."

Perhaps the most remarkable aspect of this discovery is the following: *not even this communication* appears to have been enough to spur Mr. Rackauckas to investigate whether there were systemic discovery violations underway in connection with the use and potential abuse of the O.C.I.I. Thus, it is not surprising that other cases have also been located, predating and

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> prosecution theory and then two new informants to support another demonstrates how easy it is to manipulate facts when the prosecutor's goal is to win at all costs."

Judge Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. Process*, http://www.law.nyu.edu/sites/default/files/ECM_PRO_059248.pdf.

20 *People v. Wozniak*, Motion to Dismiss, at 240-241.

21 *People v. Wozniak*, Motion to Dismiss, at 38.

22 Letter dated June 16, 1999, from Chief Assistant AG David Druliner to Orange County District Attorney Tony Rackauckas, http://bit.ly/1Xf14gf.

23 According to his O.C.I.I. file, Escalera was "a member of EME [*i.e.*, the Mexican Mafia] and has put out a [contract] on an informant's life."

postdating the AG's letter, in which it appears that *Brady* evidence from the O.C.I.I. was not turned over and, instead, substantial efforts were made to prevent its disclosure.[24]

Additional Concerns About the OCDA's Conduct and Response to Revelations

The motions to dismiss the death penalty filed in *Dekraai* and *Wozniak* identify numerous defendants as having had significant informant-related evidence suppressed by the OCDA. We are deeply troubled that much of the evidence allegedly suppressed extends well beyond the O.C.I.I.

For instance, there is evidence that in multiple cases, informants extracted confessions from targeted defendants with threats of physical violence and death.[25] Such actions squarely violate a United States Supreme Court case on that very point, *Arizona v. Fulminante*, 499 U.S. 279 (1991). However, neither prosecutors nor members of local law enforcement needed to be familiar with that particular holding to realize that confessions should not be coerced with threats of violence and death. It is concerning that such an operation could occur on a single occasion, let alone repeatedly. The fact that in some instances, the prosecutor elected to hide any and all evidence of the confessions, despite an unambiguous duty of disclosure,[26] strongly indicates an appreciation of the illegality of such conduct.

Profound Impact on the Administration of Justice and the Response of Local Authorities

The behavior of the OCDA since the *Dekraai* Motion to Dismiss was filed in January of 2014 has done nothing to dispel our concerns. Rather than conducting a full and fair investigation of these serious allegations,[27] and analyzing the scope of cases potentially tainted by past

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[24] For example, Mark Cleveland, a prolific informant whose jailhouse cooperation spanned nearly 30 years, was described on the first page of his O.C.I.I. file as a "problem informant." *People v. Wozniak*, Motion to Dismiss, at 205. Additionally, the first entry describing Mr. Cleveland's informant efforts states: "Subject cannot be trusted." *Id.* at 205. Mr. Cleveland allegedly broke into a home and stole money while operating as an informant with a local police department. *Id.* The O.C.I.I. file for Fernando Perez—the informant who obtained statements from both Mr. Wozniak and Mr. Dekraai—includes the following entry, based upon information provided by a local detective in 1999: "Perez was terminated as a C.I. – Do not use as a C.I." The prosecutors in *Dekraai* claimed not to have examined Mr. Perez's O.C.I.I. file until January of 2013, fifteen months after Mr. Perez elicited a confession from the defendant. *Id.* at 67, 162.

[25] *People v. Wozniak*, Motion to Dismiss, at 527-532, 613-615, 660-671.

[26] This duty emanates both from *Brady* and California statutory discovery provisions. *See* Cal. Pen. Code § 1054.1(b), the scope of which exceeds *Brady* when it comes to statements by defendants and witnesses. ("The prosecuting attorney shall disclose to the defendant . . . [the] (b) [s]tatements of all defendants . . . [and] (f) [r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . .") That is, any statement made by the defendant or a trial witness, whether it is exculpatory or not, must be disclosed.

[27] The OCDA conducted what it described as an "internal investigation" before the *Dekraai* hearings began, in which numerous witnesses named in the Motion to Dismiss were interviewed. But investigators did not record a single interview or create a single report. Tr., *Dekraai* Hearing, March 24, 2014, at 997-998. Not only was the chief of

misconduct, the OCDA apparently turned its energies to preventing Judge Goethals from hearing more of its cases.[28]

The recent decision by another court to deny the *Wozniak* Motion to Dismiss the Death Penalty, a 754-page filing with more than 20,000 pages of supporting exhibits, without allowing any witness testimony, is further evidence of the need for federal intervention.[29] Individual trial courts are neither inclined nor equipped to conduct wide-scale investigations into systemic misconduct. Judge Goethals' decision to go as far as he did was nothing short of anomalous, and even he limited his inquiry to the facts as they related to the individual criminal case before him.

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the homicide unit and the lead prosecutor on *Dekraai*, Assistant DA Dan Wagner, never interviewed, but he actually helped lead the investigation, despite being a focus of the defense allegations of wrongdoing. During his testimony in *Dekraai*, when he was asked why investigators did not create any reports related to the witness interviews, Assistant DA Wagner stated, "I guess I could answer from my own standpoint. There was nothing—there was no new information. There was nothing that was contrary. There was nothing that was *Brady* material." *Id.* at 998.

[28] "Since February 2014, the district attorney's office has asked to disqualify Goethals—a former homicide prosecutor and defense attorney—in *57* cases, according to court records. In 2011, records show, prosecutors made disqualification requests against Goethals just *three* times. In 2012, *zero* times. In 2013, only *twice*." *O.C. Prosecutors Steering Cases Away from Judge Thomas Goethals*, http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150314-story.html.

[29] Judge John Conley, whom the defense twice sought to recuse based upon issues surrounding his own use of a jailhouse informant when he was a homicide prosecutor at the OCDA, declined to hold hearings in the *Wozniak* case, reasoning as follows:

> [Wozniak] cannot use what he claims happened in more than 40 other cases at other times to show outrageous government misconduct in his own case, and he has not shown that any alleged misconduct in those other cases would affect his right to a fair trial.
>
> That leaves the defendant's assertion that he has established "a thirty year history of law enforcement surreptitiously violating defendant's constitutional rights and of the District Attorney's Office failing to turn over constitutionally and statutorily mandated discovery." This is the real thrust of his argument.
>
> The court is not persuaded by this argument. Based on this record it can neither criticize nor approve the conduct of the District Attorney and law enforcement in each of the other 40 cases defendant cites. This record is not clear enough either to condemn or to exonerate—with the exception of those cases handled by former Deputy District Attorney Eri[k] Petersen, where the District Attorney concedes that errors were made. To resolve this issue would take months and months of testimony—in a case which was first filed 5 ½ years ago and is set for trial on 10/30/15, today.

People v. Wozniak, Decision on Motion to Dismiss the Death Penalty, http://bit.ly/20xTolv. The defense and prosecution pleadings are available at: Motion to Dismiss the Death Penalty, 8/26/2015, http://bit.ly/20xSyeT; D.A. Preliminary Response to Motion to Dismiss, 8/27/2015, http://bit.ly/1RZ6xUl; D.A. Opposition to Motion to Dismiss, 9/16/2015, http://bit.ly/1St4jhm; and Defense Reply to Prosecution Response to Motion to Dismiss, 10/15/2015, http://bit.ly/1RZ7bl4. The second disqualification motion is available at: http://bit.ly/1kx2wfv.

Moreover, efforts by the OCDA to publicly minimize the seriousness of the situation have remained consistent, as has the apparent refusal to so much as consider the potential consequences to countless accused who may have been deprived of critical evidence.[30]

The staunch refusal of the OCDA and the OCSD to acknowledge the possibility that members of their respective agencies may have intentionally deprived defendants of evidence, or that scores of as yet unidentified defendants have been denied due process, would appear to be driven more by concerns about self-preservation than impartial analysis. Indeed, the interest in avoiding further scrutiny appears to have repeatedly influenced or precipitated the resolution of serious cases implicated in the scandal. One defendant now faces less than four years in prison after first being sentenced to life without the possibility of parole for murder;[31] another defendant, who allegedly admitted to two separate murders, recently received a sentence that allowed him to be released on probation;[32] and a number of other defendants received reduced sentences after an OCSD deputy found to have provided misleading testimony in *Dekraai* refused to testify for the prosecution in their cases.[33]

The repeated efforts to minimize or even evade these questions entirely, leaving investigations and cases to fall by the wayside,[34] have had other implications for the

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30 The OCDA, instead of proposing its own investigation into the 40-some cases brought to its attention by the *Wozniak* defense—faced with a decision by the court finding that the "record is not clear enough to condemn or exonerate [the OCDA and law enforcement]"—elected instead to issue a press release stating that "The Honorable John D. Conley found today that the accusations of outrageous governmental conduct by the Orange County District Attorney's Office (OCDA) were untrue." This response is consistent with other recent public statements. *O.C. District Attorney Official Calls Claims of Intentional Misconduct in Use of Jailhouse Informants "Baloney,"* http://www.ocregister.com/articles/attorney-685527-office-district.html.

31 *DA's Misconduct Leads to Reduced Sentence for Convicted Murderer*, http://voiceofoc.org/2015/02/das-misconduct-leads-to-reduced-sentence-for-convicted-murderer/.

32 *Calif. Prosecutors Opt for Freeing Accused Murderers Instead of Transparency*, http://www.washingtonpost.com/news/the-watch/wp/2014/10/15/calif-prosecutors-opt-for-freeing-accused-murderers-instead-of-transparency/; and *Here Is Why an Admitted Killer Walked Free*, http://www.ocregister.com/articles/palacios-639481-moriel-informant.html. In explaining the resolution of the case, a supervising prosecutor stated that his office's considerations for the resolution included that "[w]e didn't want to go through another one of those [*Dekraai*] hearings."

33 *Thin Blue Lies: Orange County Pays Price for Law Enforcement Perjury*, http://blogs.ocweekly.com/navelgazing/2015/06/tony_rackauckas_prosecutors_oc_snitch_scandal_ocda.php; *Informant Fallout: O.C. Sheriff's Deputy Refuses to Testify in Mexican Mafia Cases*, http://www.ocregister.com/articles/tunstall-664879-deputy-cases.html; and *OC Deputies' Snitch Scam Playbook Revealed*, http://blogs.ocweekly.com/navelgazing/2015/06/oc_deputies_snitch_scam_playbook_revealed.php.

34 *Murders Forgotten: How Far Did Prosecutors Go to Hide Informants Network?*, http://voiceofoc.org/2015/03/murders-forgotten-how-far-did-prosecutors-go-to-hide-informants-network; *Misconduct In Jailhouse Snitch Program Letting Murder Suspects Walk Free*, http://www.huffingtonpost.com/2014/10/21/california-jailhouse-informants_n_5999674.html; and *Gang Member's*

administration of justice in Orange County. For instance, the OCDA and local law enforcement failed to investigate as many as six murders admitted to by one key informant.[35] A signed agreement with that same informant, as well as recorded police interviews with him, remained hidden with a local police agency for five years—and were never turned over to defendants in three potential "life" cases in which he testified.[36] In one of several interviews that were not disclosed, the informant told police investigators, as he tried to negotiate a resolution of his own attempted murder case, that "I might be able to help you out if my memory can fall back in place, it might not be able to fall back in place because it's a long time ago. People forget. If I can grab spots of my memory and make it seem like it was yesterday . . . ." In another case involving what appears to be a wrongfully incarcerated 14-year-old, the prosecution withheld exculpatory evidence in the form of separate statements made by two accomplices to the jailhouse informant. (The OCDA has said that it cannot confirm what materials came into its possession, because the case file disappeared.[37]) That same informant, who is still expected to testify for the government in a federal case, allegedly told a Los Angeles-based news program in recent weeks that he believed "[p]eople's constitutional rights have been violated."[38]

L.A. County Informant Scandal

The situation in Orange County is especially troubling, considering that in the late 1980s, Los Angeles County, its neighbor to the north, endured what was previously the most serious jailhouse informant scandal in the nation's history.[39] The highly publicized revelations of

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Reduced Sentence is Sixth Case Altered by Jailhouse Informants, http://www.ocregister.com/articles/islas-679349-informant-attorney.html.

35 Oscar Moriel testified in one case that "it might be up to five, maybe six" murders that he has committed. *People v. Dekraai*, Motion to Dismiss, at 387. Mr. Moriel, who has still not resolved his own attempted murder case or proceeded to trial since he was charged and incarcerated ten years ago, admitted that no one has questioned him about his murders. Tr., *Dekraai* Hearing, April 7, 2014, at 1641.

36 *Jailhouse Snitch Tapes Reveal How Cops Recruited Serial Murderer to Be Their Informant,* http://www.huffingtonpost.com/2015/06/12/orange-county-jailhouse-informants_n_7566928.html; and *Recordings Reveal How Informant Ring Operated in Orange County Jails,* http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/28/orange-county-snitch-scandal-audiotapes.html.

37 *How OC Law Enforcement Locked Up an Innocent 14-Year-Old Boy for Two Years,* http://blogs.ocweekly.com/navelgazing/2014/12/luis_vega_santa_ana_shooting_gang_andy_alvarez.php.

38 *Did Orange County Law Enforcement Break Law by Using Jailhouse Informants?,* http://abc7.com/news/did-oc-law-enforcement-break-law-by-using-jailhouse-informants/1047095/.

39 It is worth noting that the current Sheriff and Undersheriff of Orange County, Sandra Hutchens and John Scott respectively, are both transplants from the Los Angeles County Sheriff's Department ("LASD"). Sheriff Hutchens worked at various levels in the LASD for 30 years before joining the OCSD in 2008. http://www.sheriffhutchens.com/about-sheriff-hutchens. Likewise, Undersheriff Scott worked in the LASD from 1969-2005, and in 2008 joined Sheriff Hutchens' administration as Undersheriff.

misconduct in the Los Angeles jails prompted a special grand jury investigation that culminated in recommendations for reforms intended to guard against future abuses. [40] Those recommendations appear to have gone unheeded in Orange County. In fact, OCSD officials introduced the computerized TRED system the *very same year* that the Los Angeles County Grand Jury issued its report—while simultaneously initiating a practice of concealing TREDs and the favorable evidence contained within them.

The Need for a Federal Investigation

The language found in a 1990 *Los Angeles Times* editorial calling for a federal investigation—published after the Los Angeles County Grand Jury issued its report—resonates as strongly, if not more so, in Orange County, 2015:

> Unfortunately, it now appears that only the intervention of federal authorities can restore public confidence in a criminal justice system in which officers of the law and the court have tolerated and, in some instances, possibly encouraged perjury.
>
> What is at stake are fundamental questions of constitutional rights and the basic integrity of a court system to which the voters of California have assigned the power of life and death.
>
> Failure to resolve these issues will open the administration of justice in this county to doubts so corrosive that their consequences are difficult to calculate.[41]

The response to the Los Angeles County scandal, which did not include federal intervention, failed to address perhaps the most important issue: how to bring justice to defendants whose convictions and sentences were wrongfully secured through the use of dishonest informants and unlawful informant-related practices.[42]

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http://shq.lasdnews.net/pages/pagedetail.aspx?id=2222. Both were LASD employees when the Los Angeles informant scandal erupted.

[40] Report of the 1989-90 Los Angeles Grand Jury, http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf.

[41] *Make It a Federal Case: Grand Jury Report on Informant Scandal Doesn't Go Far Enough*, http://articles.latimes.com/1990-07-11/local/me-4_1_grand-jury.

[42] *Informant-Aided Convictions Going Unchallenged: Justice: Few Defense Lawyers Are Accepting an Invitation to Appeal Murder Convictions Obtained with the Help of Jailhouse Snitches*, http://articles.latimes.com/1989-10-20/local/me-399_1_defense-lawyers.

Orange County requires a thorough investigation by an independent entity, one with the authority to investigate long-concealed evidence in the custody of the OCSD and OCDA. The unwillingness of the OCSD and OCDA to acknowledge the due process implications of the alleged misconduct has become only more entrenched as attention to the situation has grown. Nearly two years have passed since many of these issues were first brought to the attention of the OCDA and OCSD, allowing them ample time to demonstrate their ability to bring themselves into conformity with core constitutional principles.[43] It is our firm belief that the Department of Justice is the only entity equipped to conduct this investigation[44] and restore public confidence in the criminal justice system in Orange County.[45]

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[43] *Sheriff Clicks Her Heels but OC Snitch Scandal Won't Go Away*, http://blogs.ocweekly.com/navelgazing/2015/07/sheriff_sandra_hutchens_thinks_her_department_is_innocent_in_ocs_snitch_scandal.php.

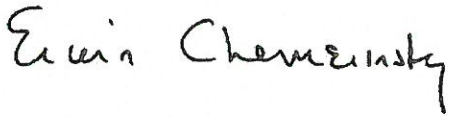
[44] In addressing the OCDA's recently empanelled investigative committee, legal professionals and experts have expressed serious concerns about the decision to create a panel comprised of members selected by the District Attorney. With regard to the California AG's investigation—announced on the same day that the agency also declared it would appeal Judge Goethals' ruling in *Dekraai*—the Sheriff and the Chairman of Orange County's Board of Supervisors have joined in raising concerns about the AG's ability to impartially analyze the role that different agencies have played in the wrongdoing. The AG's recently filed legal brief, which takes the position that the OCDA bears no responsibility for the misconduct and concealment found in Judge Goethals' ruling, has corroborated the belief of many that the agency's investigatory findings will necessarily be consistent with the analysis and conclusions set forth in its brief. *See, e.g., Experts: No Hope for Justice in Orange County Prosecutor Scandal with Current Investigations,* http://www.huffingtonpost.com/entry/orange-county-district-attorney_55a6fc50e4b0c5f0322c5b8e; *OCDA's Office Thinks Review Committee Will Save It from Snitch Scandal*, http://blogs.ocweekly.com/navelgazing/2015/07/tony_rackauckas_snitch_scandal_washington_post_2015.php; and *Watchdog: Is Panel Reviewing Use of O.C. Jailhouse Informants Really Independent?*, http://www.ocregister.com/articles/office-671724-county-attorney.html.

[45] News reports have suggested that the Department of Justice extended a job offer to one of the prosecutors central to the situation in Orange County, Erik Petersen, a prosecutor identified by Judge Goethals as having provided testimony under oath which he deemed "incredible." *People v. Dekraai Supplemental Ruling*, http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf; and *California Prosecutor, Embroiled in Controversy Over Use of Informants, Won't Be Coming to Omaha*, http://www.omaha.com/news/metro/california-prosecutor-embroiled-in-controversy-over-use-of-informants-won/article_6f6130be-f890-5bb3-bd03-7fcbeb7c43a3.html. Moreover, attorneys from the United States Attorney's Office in Orange County recently indicated that they may call Deputy Tunstall as an expert witness at a forthcoming Mexican Mafia trial, and will seek to block questioning regarding his testimony at the *Dekraai* hearings—despite evidence of dishonesty during those hearings and Judge Goethals' findings. *Suspected Mexican Mafia Leader Backs Out of Plea Deal, Headed to Federal Trial*, http://www.ocregister.com/articles/ojeda-686395-mexican-mafia.html. To avoid the appearance of any conflict, the Department of Justice may wish to consider an investigation by the Inspector General. Irrespective of what the Department concludes in that regard, there can be no doubt that the Department of Justice has jurisdiction to consider these questions.

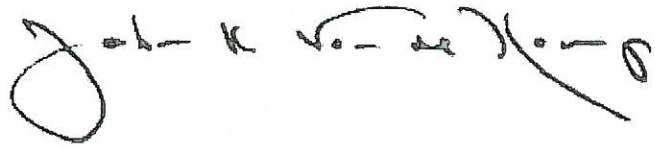
Conclusion

Accordingly, the undersigned respectfully request that the United States Department of Justice commence an investigation of the Orange County District Attorney's Office and the Orange County Sheriff's Department.

Signed:



Erwin Chemerinsky: Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. In January 2014, National Jurist magazine named Dean Chemerinsky the most influential person in legal education in the United States.



John Van de Kamp: John Van de Kamp is counsel at the Los Angeles office of the law firm Mayer Brown, where he is a member of the Government practice. In a governmental career spanning some 30 years, he has served as U.S. Attorney for California's Central District, the first Federal Public Defender for the Central District, Los Angeles County District Attorney (1975-1983), and California Attorney General (1983-1991).

Co-signed by the below listed individuals and organizations:

Robert Bloom: Robert M. Bloom, Professor of Law at Boston College, is an expert on criminal informants and the author of the book *Ratting: The Use and Abuse of Informants in the American Criminal Justice System*. Professor Bloom has had legal experience as a criminal attorney—both as a prosecutor and a defense lawyer—as well as in legal services and civil rights law.

Paul Butler: Paul Butler is a Professor of Law at Georgetown University Law Center, where he researches and teaches in the areas of criminal law, race relations law, and critical theory. Professor Butler's work has been profiled on 60 Minutes, Nightline, and the ABC, CBS, and NBC Evening News, among other places. Prior to joining the academy, Professor Butler served as a federal prosecutor with the U.S. Department of Justice, where his specialty was public corruption. His prosecutions included a United States Senator, three FBI agents, and several other law enforcement officials. While at the Department of Justice, Professor Butler also worked as a Special Assistant U.S. Attorney, prosecuting drug and gun cases.

Tucker Carrington: Tucker Carrington is the founding director of the Mississippi Innocence Project and Assistant Professor of Law at the University of Mississippi School of Law. Before that, Professor Carrington was an E. Barrett Prettyman Fellow at Georgetown University Law Center, a trial and supervising attorney at the Public Defender Service for the District of Columbia, and a visiting clinical professor at Georgetown.

Jack Chin: Gabriel "Jack" Chin is the Martin Luther King, Jr. Professor of Law at the University of California, Davis School of Law, where he teaches criminal law and procedure. He has extensive experience prosecuting and defending criminal cases in state and federal courts. His scholarship has appeared in the University of Pennsylvania, UCLA, and Cornell law reviews, the *Harvard Civil Rights-Civil Liberties Law Review*, and the Yale, Duke, and Georgetown law journals, among others. His work has been cited in four U.S. Supreme Court opinions, and by many other courts.

Angela Davis: Angela J. Davis is a Professor of Law at the American University Washington College of Law, where she teaches criminal law, procedure, and defense. She has served on the adjunct faculty at George Washington, Georgetown, and Harvard Law Schools. Professor Davis researches and writes on prosecutorial discretion and racism in the criminal justice system. Her book won the Association of American Publishers 2007 Professional and Scholarly Publishing Division Award for Excellence in the Law and Legal Studies Division. Professor Davis has also served as the Executive Director of the National Rainbow Coalition and the Director of the Public Defender Service for the District of Columbia, where she previously worked as a staff attorney.

Richard Drooyan: Richard Drooyan served as the Chief Assistant United States Attorney under United States Attorney Nora Manella from January 1997 to January 1999. In addition to general oversight responsibility for over 235 Assistant United States Attorneys, he had direct supervisory responsibility for certain priority criminal investigations and cases. In 1991, Mr. Drooyan served as a Deputy General Counsel for the Independent Commission on the Los Angeles Police Department (the "Christopher Commission"). In 2000, he served as General Counsel of the Rampart Independent Review Panel. Mr. Drooyan was a member of the Los Angeles Police Commission from 2010 to 2013, and served as President from 2011 to 2012.

Ingrid Eagly: Ingrid Eagly is a Professor of Law at UCLA. Her primary research and teaching interests include immigration law, criminal adjudication, evidence, and public interest lawyering. Immediately prior to joining the faculty at UCLA, Eagly served as a trial attorney for the Office of the Federal Public Defender in Los Angeles. At UCLA, Professor Eagly teaches the Criminal Defense Clinic and serves as faculty advisor to the Criminal Justice Society.

Laura Fernandez: Laura Fernandez is a Research Scholar and Senior Liman Fellow in Residence at Yale Law School, where she focuses on questions of prosecutorial misconduct and accountability. Prior to that, she was an attorney with the Public and Charitable Service Department of Holland and Knight.

Mary Ellen Gale: Mary Ellen Gale, a Professor of Law at Whittier Law School, was an elected member of the ACLU National Board of Directors from 1987 to 2015, and served on its Executive Committee for sixteen years. A member of the ACLU of Southern California Board of Directors since 1977, she co-chaired its Legal Executive Committee for twenty years. Professor Gale has authored ACLU appellate briefs for the Supreme Courts of the United States and California, congressional testimony on criminal justice, and articles on the death penalty and police misconduct. She researches and writes on constitutional law, civil liberties, and civil rights.

Gil Garcetti: Gil Garcetti served 32 years in the Los Angeles District Attorney's office, including two terms as the District Attorney for Los Angeles County, from 1992-2000. Prior to his election, he served as a trial prosecutor in the office and was also appointed chief deputy district attorney.

Brandon Garrett: Brandon Garrett is the Thurgood Marshall Distinguished Professor of Law at the University of Virginia. Professor Garrett's research and teaching interests include, among others, criminal procedure, wrongful convictions, habeas corpus, scientific evidence, civil rights, and constitutional law. Professor Garrett is the author of the book *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, published by Harvard University Press, and *Too Big To Jail: How Prosecutors Compromise with Corporations*, also published by Harvard University Press.

Bennett Gershman: Bennett Gershman is one of the original faculty members at Pace Law School and has taught as a visiting professor at Cornell Law School and Syracuse Law School. A former prosecutor with the Manhattan District Attorney's office for six years, he is the author of numerous articles as well as two books on prosecutorial and judicial ethics. He served for four years with the Special State Prosecutor investigating corruption in the judicial system. He is one of the nation's leading experts on prosecutorial misconduct. He is active on several bar association committees, and is a frequent *pro bono* litigator.

Bruce Green: Bruce Green is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He teaches primarily in the areas of legal ethics and criminal law. He has written extensively in these fields, including the chapter on prosecutors' ethics in *Professional Responsibility: A Contemporary Approach* (2d ed. 2014). Professor Green is a past chair of the ABA Criminal Justice Section. He also served as a member of the ethics committees of the ABA and the bar associations of New York State, City and County. Before joining the Fordham faculty, Professor Green was a federal prosecutor in the Southern District of New York, where he served as Chief Appellate Attorney. While at Fordham, he served part-time as Associate Counsel in the office of the Iran/Contra prosecutor.

Samuel Gross: Samuel R. Gross is the Thomas and Mabel Long Professor of Law at Michigan Law, where he teaches evidence, criminal procedure, and courses on wrongful criminal convictions. His published work includes articles and books on evidence law, the death penalty, false convictions, racial profiling, eyewitness identification, and the relationship between pretrial bargaining and trial verdicts. Professor Gross is the editor of the *National Registry of Exonerations*, which was launched in May 2012 and maintains a detailed online database of all known exonerations in the United States since 1989.

Kaaryn Gustafson: Kaaryn Gustafson is Professor of Law at the University of California, Irvine School of Law and is Co-Director of the Center on Law, Equality and Race. Her research and scholarship is interdisciplinary and explores the role of law in both remedying and reinforcing inequality. Her publications have appeared in numerous journals, including the *Journal of Criminal Law & Criminology*. Her 2011 book, *Cheating Welfare: Public Assistance and the Criminalization of Poverty*, was awarded the Herbert Jacob Book Prize.

Paul Heaton: Paul Heaton is a Senior Fellow at the University of Pennsylvania Law School and Academic Director of the Quattrone Center for the Fair Administration of Justice. Much of his research aims to apply methodological insights from economics to inform issues in legal and criminal justice policy. An expert on legal and regulatory program and policy evaluation, Dr. Heaton's research has been published in leading scholarly journals such as the *Yale Law Journal*,

New England Journal of Medicine, Journal of Law and Economics, Journal of Labor Economics, and *American Journal of Public Health.*

Donald Heller: Prior to forming his own law firm in 1977, Donald H. Heller was an Assistant District Attorney in Manhattan. Mr. Heller later served as an Assistant United States Attorney in the United States Attorney's Office in Sacramento, California, and was the author of the ballot initiative that reinstated the death penalty in California in 1978. Mr. Heller was one of several former prosecutors who signed an amicus brief in *People v. Thomas Thompson*.

Peter Joy: Peter A. Joy is a professor at Washington University Law. Professor Joy is well known for his work on legal ethics, criminal justice, and clinical legal education. He has written extensively and presented nationally and internationally on legal ethics and lawyer and judicial professionalism. His recent articles include *Constructing Systemic Safeguards Against Informant Perjury* and *Prosecutors' Disclosure Obligations in the U.S.* (with Professor Bruce Green).

Miriam Krinsky: Miriam Aroni Krinsky spent 15 years as an Assistant U.S. Attorney, where she served as LA's Chief of the General Crimes Sections, Chief of the Criminal Appellate Section (overseeing over 1,000 criminal appeals), chaired the national Solicitor General's Advisory Group on Appellate Issues, and served on the Attorney General's Advisory Committee on Sentencing. She has taught at the UCLA School of Public Policy and Loyola and Southwestern Law Schools, served as the Executive Director of Los Angeles County's Citizens' Commission on Jail Violence (investigating allegations of excessive force in County jails), and served on the Los Angeles Ethics Commission (serving as Commission President for three years). She also served on the California Judicial Council and was appointed by the California Supreme Court to the State Bar Board of Trustees, the regulatory body that oversees all California lawyers.

Daniel Medwed: Professor Daniel Medwed teaches Criminal Law, Evidence, and Advanced Criminal Procedure: Wrongful Convictions and Post-Conviction Remedies at Northeastern University School of Law. His book, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent* (New York University Press, 2012), explores how even well-meaning prosecutors may contribute to wrongful convictions because of cognitive biases and an overly deferential regime of legal and ethical rules.

Alexandra Natapoff: Alexandra Natapoff is the Associate Dean for Research and Professor of Law at Loyola Law School, Los Angeles. Professor Natapoff is a nationally recognized expert on the subject of criminal informants. She has testified before Congress, contributed to federal and state reform legislation, and her book about informants, *Snitching: Criminal Informants and the Erosion of American Justice* (New York University Press, 2009), won the 2010 ABA Silver Gavel Award Honorable Mention for Books.

Charles Ogletree: Charles Ogletree, the Harvard Law School Jesse Climenko Professor of Law and the Founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law.

Lauren Ouziel: Lauren Ouziel is an Assistant Professor at Temple University Beasley School of Law. Prior to entering academia, she was a federal prosecutor for eight years, serving in the United States Attorney's Office for the Southern District of New York and later the Eastern District of Pennsylvania. Professor Ouziel's research and teaching interests include criminal procedure, evidence, criminal federalism, and perceptions of legitimacy in criminal enforcement and adjudication. Among other work, she has studied how federal intervention in local criminal enforcement, both through oversight of and partnership with state and local authorities, influences perceptions of legitimacy.

L. Song Richardson: L. Song Richardson is a Professor of Law at the University of California, Irvine School of Law. Prior to that she was a state and federal public defender, and an assistant counsel at the NAACP Legal Defense and Educational Fund, Inc. Professor Richardson's interdisciplinary research uses lessons from cognitive and social psychology to study criminal procedure, criminal law, and policing. Professor Richardson's scholarship has been published by law journals at Yale, Cornell, Northwestern, the University of Southern California, and the University of Minnesota, among others.

Cookie Ridolfi: Kathleen "Cookie" Ridolfi is a Professor of Law at Santa Clara University School of Law and the cofounder and former Director of the Northern California Innocence Project. In 2004, she co-founded the Innocence Network, an affiliation of organizations dedicated to pursuing exonerations on behalf of wrongfully convicted prisoners and working to redress the causes of wrongful conviction. She was lead researcher and co-author of "Preventable Error, A Report on Prosecutorial Misconduct in California 1997-2009." From 2004-2008, she served on the California Commission on the Fair Administration of Justice, which was tasked with the study and review of the administration of criminal justice in California.

Elisabeth A. Semel: Elisabeth Semel is a Clinical Professor of Law at the University of California, Berkeley, School of Law and the founding Director of its Death Penalty Clinic, which represents individuals facing capital punishment at all stages of the proceedings. In her early legal career, Professor Semel worked as a deputy public defender in Solano County and a staff attorney at Defenders, Inc., a non-profit community defender office in San Diego. She later formed the San Diego firm of Semel & Feldman, which represented clients accused of crimes of violence, including capital offenses, at the trial level. Professor Semel has also served as the Director of the ABA Death

Penalty Representation Project. Her research focuses on race discrimination in the administration of capital punishment, particularly as it concerns jury selection.

Jonathan Simon: Jonathan Simon is the Adrian A. Kragen Professor of Law and Director of the Center for the Study of Law and Society at Berkeley Law. His scholarship concerns the role of crime and criminal justice in governing contemporary societies. His past work includes two award-winning monographs, *Poor Discipline: Parole and the Social Control of the Underclass* and *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. His most recent books are *The Sage Handbook of Punishment and Society* and *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America*.

Alex Whiting: Alex Whiting is a Professor of Practice at Harvard Law School where he teaches, writes, and consults on domestic and international criminal prosecution issues. From 2010 until 2013, he was in the Office of the Prosecutor at the International Criminal Court (ICC) in The Hague where he served first as the Investigations Coordinator, overseeing all of the investigations in the office, and then as Prosecutions Coordinator, overseeing all of the office's ongoing prosecutions. Before going to the ICC, Whiting taught for more than three years as an Assistant Clinical Professor of Law at Harvard Law School, again with a focus on prosecution subjects. From 2002-2007, he was a Trial Attorney and then a Senior Trial Attorney with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. He was lead prosecution counsel in *Prosecutor v. Fatmir Limaj, Isak Musliu, and Haradin Bala; Prosecutor v. Milan Martic*; and *Prosecutor v. Dragomir Miloševic*. Before going to the ICTY, he was a U.S. federal prosecutor for ten years, first with the Criminal Section of the Civil Rights Division in Washington, D.C., and then with the U.S. Attorney's Office in Boston.

Ellen Yaroshefsky: Ellen Yaroshefsky is a clinical professor of law at Cardozo Law and the Executive Director of the Jacob Burns Ethics Center. She is an expert in legal ethics, co-chair of the A.B.A.'s Ethics, Gideon and Professionalism Committee of the Criminal Justice Section, and chair of the Ethics Committee of the National Association of Criminal Defense Lawyers. She also serves on ethics committees of state and local bar associations, and was a Commissioner on the State Joint Commission on Public Ethics.

The National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

The Constitution Project

The Constitution Project is a nonpartisan advocacy and government watchdog organization that brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. The organization undertakes original research, develops policy positions, publishes reports and statements, files amicus briefs, testifies before Congress, and holds regular briefings with legislative staff and other policymakers. TCP's work has been cited by numerous government agencies, as well as leading law and policy organizations.

The National Association of Public Defense

The National Association of Public Defense is a membership organization comprised of almost 11,000 practitioner-members within 76 organizations (including 14 statewide systems) and another 600 individual members through many more jurisdictions in all 50 states. NADP promotes strong criminal justice systems, policies and practices to ensure effective public defense; pursues system reform that increases fairness for indigent clients; and delivers education and support of

public defenders/advocates and public defender leaders. NAPD is member-led and its agenda is member-set. NAPD is committed to building a community that is inclusive of members of the many diverse professions that are essential to public defense delivery, and to be able to contribute information and solution as the voice of practitioners themselves.



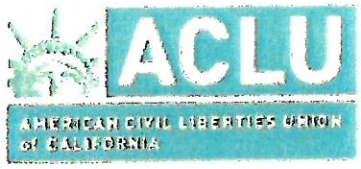
California Attorneys for Criminal Justice

California Attorneys for Criminal Justice (CACJ) was formed in 1973. Today, it has grown to over 2,000 members. CACJ is the country's largest statewide organization of criminal defense lawyers. The CACJ works to defend the rights of the accused, provides quality continuing legal education courses, preserves due process, and protects the independence of the criminal defense lawyer.



California Public Defender Association

The California Public Defenders Association (CPDA) is the largest organization of criminal defense attorneys in the State of California. Our membership includes over 3,000 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 30 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. We regularly provide continuing legal education in all areas of criminal practice, including legal ethics. CPDA also contributes to the development of law in both the legislative arena, through advocacy before the California Legislature, and in the judicial arena, through its amicus work before the California Supreme Court, the United States Supreme Court, and the lower state and federal appellate courts.



The ACLU of California, with support from ACLU National and Washington Legislative Offices

The three California affiliates—ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties—have a long, successful history of working together to protect and promote civil liberties. Though each affiliate is autonomous and has the exclusive right to guide the work in its jurisdiction, we come together to maximize our statewide impact on issues for the benefit of civil liberties. When our work is done on behalf of all three affiliates, particularly in high-impact statewide litigation and collaborative legislative efforts, it is more powerful and effective in conveying the strength of the statewide ACLU presence. While this letter originates in the ACLU of California affiliates, the ACLU National and the Washington Legislative Offices, are also in support.

ATTACHMENT 15

TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

January 4, 2016

The Honorable Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Request for Federal Investigation of the Orange County District Attorney's Office Informant Policies and Practices

Dear Attorney General Lynch:

In 2015, I assembled a group of lawyers and a retired Orange County Judge independent of my office to examine the Orange County District Attorney's Office (OCDA) policies and practices regarding the use of jailhouse informants. The committee was named the Informant Policies & Practices Evaluation Committee (IPPEC). The IPPEC proceeded to conduct a six-month evaluation to conduct a thorough review and assessment of the OCDA policies and practices regarding the use of jailhouse informants. At the conclusion of the review, they prepared a report containing recommendations regarding the OCDA use of jailhouse informants in order to assist me in ensuring that the OCDA policies and practices and its interactions with its law enforcement partners are lawful.

Today, the IPPEC presented me with the written report of their findings. Please see the enclosed report entitled ORANGE COUNTY DISTRICT ATTORNEY INFORMANT POLICES & PRACTIES EVALUATION COMMITTEE REPORT for your review and reference. In the report, the IPPEC makes 10 specific recommendations which I am in the process of reviewing and implementing. In addition to these 10 specific recommendations, on page 3 of the report, the IPPEC recommends the following:

> *...that the jailhouse informant controversy in Orange County be investigated by an entity with document subpoena power and the ability to compel witnesses to be questioned under oath. The Orange County Grand Jury, the California Attorney General, or the United States Department of Justice are possible entities with such power. This recommendation is not meant to suggest that the IPPEC has reached any conclusion regarding any allegations of criminal wrongdoing. It is worth noting that almost every member of the OCDA's Office who was interviewed said that he or she would welcome an investigation and was confident the investigation*

> *would find, with perhaps one or two outliers, no intentional misconduct by a member of the OCDA's Office. The IPPEC respectfully suggests that at a minimum, the OCDA request that an Investigative Grand Jury conduct such an inquiry to demonstrate transparency and foster confidence in the Orange County criminal justice system.*

I am respectfully requesting and welcoming your office to conduct any review you deem appropriate in regard to the OCDA Informant Policies and Practices. In order to facilitate this, I am offering The United States Department of Justice unfettered access to any documents and/or personnel of the OCDA. Both myself and my staff welcome the opportunity to discuss this matter with your department. I can be reached at the following phone number (714) 834-3600.

Sincerely,

Tony Rackauckas
District Attorney

TR:vlb
Cc: The Hon. Kamala Harris
Attorney General, State of California

Attachment: Report of Informant Policies & Practices Evaluation Committee

ATTACHMENT 16

RE: Santa Ana Gang Task Force

Flag for follow up.

You replied on Thu 1/7/2016 9:01 AM

MA Mayo, Eric A. (LA) (FBI) <Eric.Mayo@ic.fbi.gov>
Tue 1/5/2016 7:26 PM
Seman, Ron; Boykins, George (LA) (FBI)

Available. Thanks.

-Eric

SSA Eric A. Mayo
FBI Orange County Resident Agency, Squad 1 (OCRA-1)
FBI Los Angeles Violent Gangs Program Coordinator
(714) 939-3298 office
(310) 261-9833 cell
eric.mayo@ic.fbi.gov

-------- Original message --------
From: "Seman, Ron" <Ron.Seman@da.ocgov.com>
Date: 01/05/2016 4:38 PM (GMT-08:00)
To: jviramontes@santa-ana.org, rgatto@santa-ana.org, "Boykins, George (LA) (FBI)" <George.Boykins@ic.fbi.gov>, "Mayo, Eric A. (LA) (FBI)" <Eric.Mayo@ic.fbi.gov>, "Burnett, Ted" <Ted.Burnett@da.ocgov.com>, "Masangkay, Ben" <Ben.Masangkay@da.ocgov.com>, "Gomez, Ernie" <Ernie.Gomez@da.ocgov.com>
Subject: Santa Ana Gang Task Force

As some of you may be aware of our office has recently revised our policies regarding "Confidential Informants" and it has been brought to my attention a potential conflict between our offices informant policy and the FBI's policy. In an effort to resolve the potential conflict and ensure both policies are being complied by the task force, I feel it is imperative that the task force members meet and discuss this important issue. I would like to host the meeting on Monday, January 11, 2016 at 1:00 PM at our office located at 401 Civic Center Drive West, Santa Ana, Ca. I would appreciate a response indicating your availability. Thank you and I look forward to meeting each of you.

Thanks again,

Ron Seman
Commander
Orange County District Attorney's Office.

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

ATTACHMENT 17

U.S. Department of Justice

Federal Bureau of Investigation

Orange County Resident Agency
(714) 939-8699

4000 West Metropolitan Drive, Suite 200
Orange, California 92868

January 27, 2016

VIA HAND DELIVERY ONLY
Mr. Ron Seman
Orange County District Attorney's Office
401 West Civic Center Drive
Santa Ana, California 92701

Re: Disclosure of FBI Confidential Human Sources

This correspondence is in response to your office's request for the legal and policy prohibitions for the sharing of FBI confidential human source (CHS) information with the Orange County District Attorney's Office on all cases wherein the CHS is operated by a federal task force officer assigned to an FBI task force.

An FBI task force operates under the FBI's authority to enforce federal laws only. While local law enforcement officials may be invited to serve on an FBI task force pursuant to a memorandum of understanding between the participating agencies, through the deputation of the participating local law enforcement officials, or on an informal basis, the task force is and remains an FBI task force. It does not become transformed into an entity operated under state or local government jurisdiction. When FBI task forces are established, local law enforcement officials are frequently provided access to sensitive FBI information, which they are restricted from disseminating pursuant to federal guidelines and policy. The FBI, as an agency of the United States Department of Justice (DOJ), retains appropriate controls over the use and dissemination of such sensitive information by non-FBI employees who acquire the information through service on FBI task forces under the DOJ's Touhy regulations, Subpart B of part 16, chapter I, Title 28, CFR, i.e., 28 CFR 16.21-16.29. These regulations take their name from United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), which held that the Attorney General could validly prescribe regulations regarding the release of government documents and witnesses. Under the Touhy regulations, boilerplate and blanket statements as to the need to disclose information do not meet the standard as specific and particularized statements of fact on a case-by-case basis are generally necessary.

In addition to the Touhy regulations, the *Attorney General's Guidelines for the Use of FBI Confidential Human Sources* prohibit the blanket sharing of CHS files with state and local law enforcement agencies. The guidelines are issued under the authority of the Attorney General as provided in Title 28, United States Code, Sections 509, 510, and 533. These guidelines are mandatory for DOJ personnel that operate FBI CHSs in any of the FBI's investigative programs. According to Section I(D)(1) of the guidelines, FBI personnel, as employees of the DOJ have an obligation "to maintain as confidential the identity of any Confidential Human Source." Consistent with that obligation, FBI personnel "shall not disclose the identity of a Confidential Human Source or information that Source has

provided that would have a tendency to identify the Source unless disclosure is appropriate under one of the exceptions[.]"

An exception for disclosure to other law enforcement officials exists to those who need to know the identity to perform their official duties, subject to the prior approval of the FBI Special Agent in Charge or his or her designee. This determination is done on a case-by-case basis where the due process needs of a state or local matter outweigh the benefits of protecting the CHS identity. For instance, with regard to exculpatory information, the determination of CHS disclosure is ultimately made by the federal prosecuting office. Whenever an FBI agent knows or reasonably believes that a current or former CHS has information that is exculpatory as to a target of or a defendant (including a convicted defendant) in a federal, state, or local investigation or case, the FBI agent must disclose the exculpatory information to either the relevant United States Attorney's Office (USAO) or to the DOJ. The USAO or the DOJ is responsible for disclosing in accordance with DOJ policy the exculpatory information to all affected federal, state, and local authorities.

Furthermore, and as an example, the FBI's top priorities remain protecting national security and investigating public corruption. Providing CHS information relating to national security cases, such as from the Joint Terrorism Task Force, to your office to be retained in a local database would, in addition to the restrictions discussed above, create numerous classification issues and potential compromises to national security. The investigation of public corruption cases would also encounter potential compromises where CHSs are used to target local law enforcement and political officials. As such, from a common sense approach, as well as from an investigative standpoint, providing sensitive FBI CHS information to your office would negatively impact the integrity of the FBI's CHS program and FBI investigations.

If you have any further questions, then please feel free to contact me to discuss.

Sincerely,

PAUL F. RAIMONDI
CHIEF DIVISION COUNSEL

By: R. Stephen Kramer
Associate Division Counsel

ATTACHMENT 18

5 Cal.App.5th 1110
Court of Appeal,
Fourth District, Division 3, California.

The PEOPLE, Plaintiff and Appellant,
v.
Scott Evans DEKRAAI, Defendant and Respondent.

G051696
|
Filed 11/22/2016
|
As Modified 12/14/2016

Synopsis

Background: Following guilty plea to eight counts of murder, defendant filed motion to recuse entire county district attorney's office from prosecuting his penalty phase. Following evidentiary hearing, the Superior Court, Orange County, No. 12ZF0128, Thomas M. Goethals, J., denied motion, and defendant filed motion for reconsideration based on newly discovered evidence. The Superior Court, Goethals, J., 2015 WL 4384450, granted motion for reconsideration and, following evidentiary hearing, granted motion to recuse and ordered additional evidentiary sanctions. Attorney General appealed.

Holdings: The Court of Appeal, O'Leary, P.J., held that:

as a matter of first impression, evidence supported determination that office's loyalty to sheriff's department constituted conflict of interest;

evidence supported determination that conflict was so grave that it was unlikely that defendant would receive a fair penalty hearing; and

office's loyalty to department and its desire to protect department at the expense of defendant's rights violated due process.

Affirmed.

**527 Appeal from an order of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed. Super. Ct. No. 12ZF0128

Attorneys and Law Firms

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Appellant.

Frank Ospino and Sharon Petrosino, Public Defenders, David Dworakowski and Scott Sanders, Assistant Public Defenders, Scott Van Camp, Deputy Public Defender, for Defendant and Respondent.

OPINION

O'LEARY, P.J.

*1114 I. Introduction

The trial court recused the entire Orange County District Attorney's (OCDA) office [1] from prosecuting Scott Evans Dekraai's penalty phase after he pled guilty to eight counts of murder. The court did so after two evidentiary hearings in which it heard from 39 witnesses over six months. The court's reasoning is detailed in an eight-page single spaced order in which it concluded the OCDA had a conflict of interest with the Orange County Sheriff's Department (sheriff) that prevented the OCDA from fairly prosecuting the penalty phase. The Attorney General appeals from that ruling, arguing the Sheriff was to blame for the misconduct and the OCDA did not have a conflict of interest.

The sole issue is whether the trial court erred by recusing the entire OCDA's office from prosecuting Dekraai's penalty phase. We have read the extensive record and considered the relevant authorities. As we explain below, we conclude it was well within the court's discretion to recuse the entire OCDA's office from prosecuting the penalty phase because the OCDA had a disqualifying conflict of interest.

**528 On the last page of the Attorney General's reply brief it states, "The trial court's order recusing the OCDA from prosecuting Dekraai's penalty phase trial was a remedy in search of a conflict." *Nonsense.* The court recused the OCDA only after lengthy evidentiary hearings in which it heard a steady stream of evidence regarding improper conduct by the prosecution team. To suggest the trial judge prejudged the

case is reckless and grossly unfair. *These proceedings were a search for the truth.* The order is affirmed. [2]

II. Summary

Penal Code section 1424 [3] grants a trial court the authority to recuse a district attorney if the evidence establishes the district attorney has a conflict of interest that is so severe it is unlikely a defendant would receive a fair trial. We review the trial court's ruling for an abuse of discretion. *1115 (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, 76 Cal.Rptr.3d 250, 182 P.3d 579 (*Haraguchi*).)

At the first evidentiary hearing, the trial court had before it Dekraai's motions to dismiss, recuse the OCDA Office, and exclude his custodial statements. The basis for these motions was alleged misconduct on the part of the OCDA. Confidential informants (CIs), OCDA prosecutors and investigators, OCSD deputy sheriffs, and local law enforcement testified concerning a custodial CI program (CI program) where OCSD deputy sheriffs placed CIs near represented defendants, including Dekraai, to obtain statements, and prosecutors were aware of the CI program and either explicitly or implicitly promised CIs they would receive a benefit. There was also evidence that after district attorneys met with a CI and learned the CI had questioned Dekraai, they obtained permission from OCSD to place a recording device in Dekraai's cell to obtain additional statements. OCDA prosecutors and investigators also testified their discovery practices concerning the CI program were deficient in this case and others. During the course of the hearing, the OCDA agreed it would not use Dekraai's custodial statements to a CI during the penalty phase, and Dekraai subsequently pled guilty to all charges.

**529 At the conclusion of the first evidentiary hearing, the trial court denied the motions to dismiss the death penalty and recuse the OCDA Office, and ordered that the OCDA not use Dekraai's custodial statements during the penalty phase. The court reasoned that although the prosecution team committed significant, negligent misconduct in this case as evidenced by the OCDA's constitutional discovery violations and interference with Dekraai's constitutional right to counsel, evidence concerning prosecutorial misconduct in other cases was not relevant in this case. The court concluded the OCDA did not suffer from a conflict of interest and the court had not lost confidence the OCDA could fairly prosecute the penalty phase.

After Dekraai filed a motion for reconsideration based on newly discovered evidence, the Sheriff's TRED [4] records, the trial court conducted a second evidentiary hearing. Orange County deputy sheriffs testified regarding the TRED records, which were three-line computer data entries regarding, inter alia, the reasons for classification decisions and housing movements. Two deputy sheriffs who testified at the first evidentiary hearing admitted they did not disclose the TRED records and gave conflicting reasons for the failure.

At the conclusion of the second evidentiary hearing, the trial court explained that for a decade the Sheriff maintained the TRED database in which it documented inmate housing movements and deputy sheriffs accessed the *1116 database on a daily basis. The court opined the two deputy sheriffs were not credible and concluded evidence concerning prosecutorial misconduct in other cases was now relevant in this case. The court reasoned that although there was no evidence the OCDA knew of or concealed the TRED records, their recent disclosure demonstrated the OCDA's "benign neglect" resulted in a violation of Dekraai's constitutional and statutory rights. The court concluded that based on the TRED records and the other evidence it heard during the first and second evidentiary hearings, the OCDA had a conflict of interest with the Sheriff and it had lost confidence the OCDA could fairly prosecute Dekraai's penalty phase. The court granted the motion to recuse the entire OCDA's office from prosecuting the penalty phase and ordered additional evidentiary sanctions.

As we explain below, we conclude the trial court did not abuse its discretion when it recused the entire OCDA's office from prosecuting the penalty phase. There was substantial evidence to support the court's conclusion the OCDA's institutional relationship with the Sheriff constituted a conflict of interest that prevented the OCDA's Office from fairly prosecuting the penalty phase. The court's conclusion the OCDA's institutional relationship with the Sheriff prevented it from supervising its law enforcement team was a conflict of interest well established in law. Further, the court's exercise of its discretion, that based on the entire factual record before it, the OCDA's conflict of interest was so grave that it was unlikely Dekraai would receive a fair penalty phase, was within the permissible range of options provided by section 1424.

"[W]e must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties

fairly and justly—to afford every defendant, whether suspected of crimes high or petty, equal treatment under the law." (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 734, 76 Cal.Rptr.3d 264, 182 P.3d 590 (*Hollywood*).) "The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, *but in the integrity of the prosecutor*." (Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 537, italics added.)

III. Facts

Offenses and Custodial Events

Dekraai entered a hair salon in Seal Beach armed with three handguns. He shot eight people, seven of whom died, including his ex-wife. After he left the salon, Dekraai fatally shot a man who was sitting in his vehicle in the *1117 parking lot. Minutes later law enforcement officers stopped Dekraai in his truck and arrested him. Seal Beach detective Gary Krogman interviewed Dekraai the same day.

Orange County deputy sheriffs placed Dekraai in the Orange County Jail, module L, sector 19, cell 13. Deputy sheriffs moved Fernando Perez, a CI who had been in module L, sector 17 since the previous month, from cell 3 to cell 1. Around the same time, deputy sheriffs moved Dekraai, who was represented by retained counsel at the time, to sector 17, cell 3, next to Perez. Perez befriended Dekraai, and Dekraai made incriminating statements to him. Perez wrote down Dekraai's statements and gave them to a deputy sheriff in **530 the county's special handling unit (SHU).[5] That deputy sheriff called an OCDA investigator who notified prosecutors Dekraai spoke to Perez. Assistant District Attorney Dan Wagner (Wagner) and Senior Deputy District Attorney Scott Simmons (Simmons), OCDA investigator Robert Erickson, and Krogman met with Perez in the jail. After speaking with Perez, the prosecutors obtained the Sheriff's approval to place a recording device in Dekraai's cell. Dekraai made additional statements to Perez for about a week until Dekraai was moved to another facility. Just before he was moved, the Orange County Public Defender was appointed to represent Dekraai.

Perez and another inmate, Oscar Moriel, worked as CIs in "Operation Black Flag" (Black Flag), a federal/state task force led by the Santa Ana Police Department to combat criminal gang activity in Orange County. Assistant United States Attorney Terri Flynn-Peister was to prosecute the federal cases, and Deputy District Attorney Erik Petersen (Petersen) was to prosecute the state cases. The primary case agents were FBI agent Anthony Garcia, Orange County Deputy Sheriff Seth Tunstall, and Santa Ana Detective Gonzalo Gallardo. Black Flag was scheduled to culminate in July 2011 with the filing of indictments.

Procedural History

A complaint, filed in October 2011, and an indictment, filed in January 2012, charged Dekraai with eight counts of murder (§ 187, subd. (a)), and attempted murder (§§ 664, subd. (a), 187, subd. (a)), and alleged the multiple murder special circumstance (§ 190.2, subd. (a)(3)), and a firearm enhancement (§ 12022.53, subd. (d)). In October 2012, the DA declined to produce information concerning Perez because it did not intend to call him as a witness; it had already produced the jail recordings. In January 2013, the trial court granted Dekraai's motion to compel discovery regarding Perez. Over the following months, the OCDA provided voluminous discovery.

*1118 In early 2014, Dekraai filed the following motions: (1) a nonstatutory motion to dismiss the death penalty based on outrageous governmental conduct; (2) a motion to recuse the OCDA pursuant to section 1424 and the due process clause; and (3) a motion to exclude his custodial statements pursuant to *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (*Massiah*) [prosecution may not use evidence obtained in violation of Sixth Amendment right to counsel]. The motions were supported by a declaration from Assistant Public Defender Scott Sanders (Sanders), Dekraai's trial counsel. The prosecution opposed the motions, supported by a declaration from Wagner, the head of the OCDA's homicide unit. The Attorney General opposed recusing the OCDA.

First Evidentiary Hearing—March to July 2014

At the outset of the hearing, the trial court indicated it had read the motions, declarations, and exhibits and it concluded Dekraai had made a prima facie showing requiring an evidentiary hearing and it would consider the motions jointly. The court heard testimony from 36 witnesses, only some of which we discuss here.

Perez, a CI with two active cases being prosecuted by DA Petersen, testified about his life in custody. As relevant here, Perez emerged as a shot caller in the Mexican Mafia

after a power struggle for control of the OC jails. When Perez's faction lost **531 power and he became vulnerable, he had an "awakening" and contacted Benjamin Garcia, a deputy sheriff who worked in the SHU. In summer 2010, Perez "debriefed" with Garcia and deputy sheriff William Grover, who also worked in the SHU, and began providing them information on the Mexican Mafia. In January 2011, after meeting with Tunstall, who also worked in the SHU, detective Gallardo, and FBI agent Anthony Garcia, Perez signed a CI agreement. During 2011, Perez was a CI providing information on the Mexican Mafia to Garcia, his primary personal handler. When Perez received information, he would notify one of his handlers and write down the information, and a deputy sheriff would pick up his notes. Perez testified that from the outset he was told he could not question inmates but if an inmate told him something, he could write it down.

Perez testified he became a CI because it was the right thing to do, but he hoped his work would be taken into consideration in his prosecution. He added no one promised him anything. Perez claimed he did not question anyone or ingratiate himself with inmates to get them to discuss their cases, although he acknowledged he had an incentive to be a CI because he faced two life sentences. Perez stated inmates confided in him because he was a Mexican Mafia shot caller who could be trusted. When Perez was asked about his notes indicating he questioned inmates or arranged to have inmates *1119 Leonel Vega and Abel Perez housed near him, he could not remember. Perez admitted he asked Garcia for a fake validation packet, a notice indicating a person is a Mexican Mafia member, which would enhance his credibility.

Perez also provided information on numerous inmates, including the following: Daniel Wozniak, who PD Sanders also represented, confessed to Perez he killed and mutilated two people; Vega, a Delhi gang member who was charged with special circumstance murder and was represented by counsel, was a Mexican Mafia member who provided information to Perez; Isaac Palacios, a Delhi gang member who was charged with two counts of special circumstance murder and was represented by counsel, confessed his crimes to Perez; and Fabian Sanchez, a Delhi gang member who was charged with attempted murder and was represented by counsel, confessed to Perez and implicated himself in another homicide.

Perez testified he had befriended Dekraai, and Dekraai confessed to him. As he had done with other inmates who he was informing on, Perez regularly checked on Dekraai and helped him adjust to life in custody, showing him how to bathe in his cell and heat food, and giving him various items. When his recollection was refreshed with a transcript of the jail recordings, Perez agreed he asked Dekraai whether he used drugs; this was after Perez met with the prosecution team. Perez wrote down what Dekraai told him and gave it to Garcia. At the October 19, 2011, meeting, Perez initially told Wagner and Simmons, OCDA investigator Erickson, and detective Krogman he did not ask Dekraai questions but later admitted to them that he told Dekraai to explain what happened. They told Perez to listen to Dekraai and write down what he said but that he could not ask Dekraai any questions.

Wagner testified he had been a prosecutor for 20 years and was one of the district attorneys prosecuting Dekraai.[6] Wagner described his employment history with the OCDA's Office and how he came to head the homicide unit. Wagner agreed he had trained attorneys but he could not recall if any programs **532 involved *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (*Brady*) [prosecution duty to disclose to defendant material exculpatory evidence], and none of the trainings involved *Massiah* or CIs.

Wagner testified regarding the prosecution's efforts to obtain Dekraai's psychological records. While watching Krogman's interview with Dekraai, Wagner learned Krogman had obtained a medical waiver from Dekraai prior to him being represented by counsel. On October 17, Wagner, Simmons, and Erickson drove to Dekraai's psychiatrist's office. When they entered the office, staff gave them the name and telephone number of the doctor's *1120 attorney, Joel Douglas. Erickson called Douglas, who told him that he would produce the records when he received the waiver. They sent the waiver to Douglas, and Erickson called him. Douglas stated the waiver was invalid because it did not specify psychological and substance abuse records and Erickson had to obtain a new waiver. Later that day, Krogman learned the waiver was invalid and went to the jail and tried to get Dekraai, who was now represented by counsel, to sign a new waiver, but he refused. Wagner denied anyone from the OCDA's office told Krogman to try to obtain a new waiver. When Wagner was asked whether he was frustrated with Krogman's conduct, he said Krogman was "bound by different ethics than I am." Later, pursuant to a lawfully obtained search warrant, but contrary to a subsequent court order prohibiting seizing the records until resolution of Dekraai's motion to quash the search warrant, Krogman seized the records; no one for the prosecution team inspected the records, and they remain under seal.

Wagner testified about the prosecution team's meeting with Perez on October 19, 2011. Wagner admitted his knowledge of *Massiah* was limited. Wagner did not know Perez and did not research his background before meeting him but thought he was a "jailhouse informant." Deputy sheriff Garcia met the prosecution team, showed them Perez's notes, and took them to a room where Perez and another deputy sheriff were seated. Erickson told Perez that they would appreciate him sharing any information he heard about the Seal Beach shootings but not to expect anything in return. After Perez said he understood, Erickson activated his recording device. During the interview, Perez repeated he understood they were not promising him anything in return for his information. Erickson asked Perez how his conversation with Dekraai began. Perez stated he asked Dekraai what happened and when Dekraai asked him if he really wanted to know, Perez told him to explain what happened. The recorded interview was brief.

Wagner left the meeting thinking Perez was a gang member and jailhouse informant. Because Wagner did not intend to call Perez as a witness, he and DA Simmons "discussed whether and how it might work to capture Dekraai on tape if he continued to speak about the crime." After an OCSD captain approved their request to place a recording device in Dekraai's cell, they asked Garcia to remind Perez to not initiate any conversation with Dekraai about the shootings. After the interview, Wagner did not investigate Perez or his background as an informant.

In late 2011, Erickson asked and Wagner approved of Erickson notifying Perez's prosecutor, whose identity Wagner did not know, that Perez provided information on the Dekraai case. When Wagner read Erickson's November 2011 memorandum to DA Petersen, which he claimed was two years later, he cringed when he read the following: "As the prosecutor handling Perez's *1121 case, this memorandum is being **533 directed to you for your consideration and information only." Wagner believed "consideration" referred to continued benefits while in custody and not a reduced sentence, and he did not approve conferring any benefit to Perez for his information.

Wagner testified that in February 2012, after he read Erickson's report regarding the October 2011 meeting with Perez and Krogman's report concerning Dekraai's recorded statements, he approved disclosing the information to Dekraai while concealing Perez's name to protect him. This information, and Perez's notes concerning Dekraai, were produced to Dekraai in April 2012; it was the first discovery regarding Perez. The reports do not include any information about Perez's prior work as a CI.

In April 2012, Wagner asked Erickson to run Perez's "rap sheet" to determine if the Orange County Public Defender's Office had previously represented Perez. Wagner learned Perez faced a life sentence, the name of his defense counsel, and likely that Petersen was prosecuting his cases. Wagner did not intend to call Perez as a trial witness, but he knew it was likely Perez would have to testify at a *Massiah* hearing.

In June 2012, Wagner e-mailed Erickson to ask him about which cases Perez was working on as a CI, and Erickson directed him to Petersen. Wagner admitted he had information Perez was working on "some other case[,]" but he did not "recall having [the] thought process[ ]" that Perez's work as a CI needed to be shared with defendants other than Dekraai. Wagner believed he first spoke to Petersen about Perez between June 2012 and January 2013.

In October 2012, PD Sanders sent Wagner an informal discovery request concerning Perez and his CI work. Wagner replied the OCDA had already produced recordings in July 2012, and he declined the request because he did not intend to call Perez as a trial witness.

In January 2013, Sanders filed a formal discovery motion concerning Perez's CI work. Wagner opposed the motion. In his opposition, Wagner stated he had disclosed all *Brady* material, and included a declaration in which he stated Perez was not going to receive any benefit for providing information in the Dekraai case. The following week, Wagner sent DA Petersen and deputy sheriff Tunstall an e-mail asking how much CI information there was and how long it would take to collect it. A couple days later, Petersen replied there were eight "State Black Flag" cases and one homicide case. The next day, the trial court granted Dekraai's motion to compel discovery.

Wagner admitted that after the trial court's ruling, he realized his understanding of *Massiah* and *1122 *In re Neely* (1993) 6 Cal.4th 901, 26 Cal.Rptr.2d 203, 864 P.2d 474 (*Neely*) (6th Amend. violation where informant acted on police behalf based on preexisting agreement with expectation of benefit and deliberately elicited statements from defendant), were flawed. However, he stated his " 'withholding' of '*Brady* material,' " as alleged in Dekraai's informal discovery

request, was not intentional but rather was because of his "failure to predict" the defense's "creative applications" of *Massiah* and failure to evaluate "the subtleties of the *Massiah* motion which had not yet been filed." The OCDA produced 5,490 pages of documents and 45 computer discs, including Perez's CI file and information regarding nine gang cases. Additional materials were produced in the following months, including Erickson's November 2011 memorandum to Petersen mentioning "consideration." Wagner read some of the material and skimmed the information on the nine gang cases.

**534 Around the same time, Wagner e-mailed Ben Masangkay, the OCDA CI index coordinator, requesting Perez's CI file. Wagner stated Perez's CI file did not contain any notes indicating Perez worked as a CI on inmates Dekraai, Wozniak, or Sanchez, which he explained meant no request for consideration had been made. [7]

Wagner testified about his review of Dekraai's motions and his subsequent investigation of the contentions made therein vis-à -vis this case and to a lesser extent the nine gang cases. Wagner stated he had investigated the claims that members of the SHU and/or Santa Ana police placed CIs next to represented defendants to obtain statements. Wagner, Simmons, Erickson, and Krogman interviewed DA Petersen, detective Gallardo, and deputy sheriffs Garcia and Tunstall in March 2013. [8] He could not remember many of the details of these interviews, including whether he asked the interviewees if they were aware of moving CIs. Wagner remembered Tunstall stating Perez obtained information from an inmate not associated with the Mexican Mafia, Palacios, but he did not remember following up. He also remembered Garcia stating the Sheriff's housing records indicated a jail nurse moved Dekraai to module L, sector 17, cell 3.

In May 2013, Wagner, Simmons, and Erickson interviewed Gallardo. Again, Wagner could not remember many details of the interview. At the meeting Wagner asked Gallardo whether he ever directed Perez to obtain statements from defendants who were charged with murder but not connected with the Mexican Mafia. Gallardo replied the following: " 'There were, there *1123 were—there was times we did. We did use informants and we—basically under the direction of a district attorney we would use inmates.' " When confronted with the interview transcript, Wagner gave inconsistent answers about this exchange.

Within weeks of receiving Dekraai's motions in early 2014, Wagner spoke first with his supervisor, Senior Assistant District Attorney Jim Tanizaki, and then with District Attorney Rackauckas about the motions. Wagner admitted that before he had read the entire motion to dismiss he made public comments the motion included "scurrilous allegations" and "untruths." Wagner also stated the Sanders' allegations were " 'commonplace' " and " 'part of their normal litigation strategy.' " Wagner said that after he read the entire motion he had a "begrudging respect" for Sanders' work on the gang cases, but he failed to acknowledge any wrongdoing in the Dekraai case. Wagner admitted there was "a lot of anger inside [him]" regarding Sanders' allegations and the anger was pervasive in the OCDA's Office, including "many" in the 15-person homicide unit.

Simmons, an OCDA senior deputy district attorney, testified he had been a prosecutor for 24 years and was the other attorney prosecuting Dekraai. Simmons knew there were jail informants, but he was unaware SHU deputy sheriffs worked with them. As to the October 19, 2011, meeting, Simmons stated no one tried to learn anything about Perez. Simmons did not remember hearing Perez had previously provided reliable information. Simmons was skeptical Perez was providing information for purely altruistic reasons, but he did not suspect Perez was a CI in other cases until he saw Perez's notes weeks later. Simmons had a basic **535 understanding of *Massiah* and although he knew Perez asked Dekraai questions, he did not think they should stop the meeting because he did not think Perez was a government agent. Immediately after the meeting, they decided to not use Perez as a trial witness and instead placed a recording device in Dekraai's cell. Simmons learned the extent of Perez's CI work in late 2012 or early 2013.

Simmons stated the first time he saw Erickson's November 2011 memorandum to Petersen, which he did not instruct Erickson to write, was shortly before it was produced to the defense in September 2013. Simmons said he has a better understanding of *Massiah* and *Neely* and now believes the memorandum and information about Perez's CI work should have been produced in response to Dekraai's informal request for discovery. He attended a training on CIs many years ago, one training regarding *Brady* within the last 10 years, and no training on *Massiah*. Simmons did not consider making an entry in Perez's CI file for his work on Dekraai because he shared Wagner's understanding concerning when to make a notation in a CI file.

*1124 Erickson testified he was previously an OCDA investigator who worked with Simmons on the Dekraai case. Erickson knew SHU deputy sheriffs worked with CIs and he "may have" previously spoken with deputy sheriff Garcia about CIs. He also knew Perez had previously provided reliable information before the prosecution team met with him at the jail. Both before and after recording, Erickson told Perez that they were not making him any promises in return for his information, and Perez stated he was not seeking anything. After the interview, and after Garcia gave him Perez's notes regarding Dekraai on November 1, 2011, Erickson believed Perez had done a "comfortable amount of work" as a jail informant. Erickson gave Perez's notes to detective Krogman.

Erickson testified concerning his November 2011 memorandum to Petersen. Someone told him to write the memorandum but he could not remember who it was. He was "quite certain" is was not Wagner or Simmons, but he would have sought their approval. When Erickson was asked what he meant when he wrote a "covert investigation" in the jail demonstrated Perez's information was reliable, he stated he was referring to the meeting with Perez and Perez's notes. Erickson explained that when he said "consideration" he meant "careful thought and contemplation" rather than "actual consideration." He added the purpose of the memorandum was "basically" to make Petersen aware Perez provided information.

Erickson stated he wrote a report regarding the October 19, 2011, meeting with Perez a couple months after the meeting. Erickson did not include information that Perez had previously provided reliable information, and he did not recall any prosecutor telling him to include that information after they reviewed the report.

Krogman, a 27-year veteran of the Seal Beach Police Department, testified he was the lead detective in the Dekraai case. Krogman interviewed Dekraai the day of the shootings and obtained a medical waiver. After he learned attorney Douglas would not accept the waiver because it did not specify psychological records, Krogman prepared a new waiver and went to the jail to have Dekraai sign it. Krogman knew Dekraai was represented by counsel, and he was "vaguely" familiar with *Massiah*, but he was not concerned because he did not plan to interrogate Dekraai and he had already signed a waiver. Krogman stated no one from the OCDA's office instructed him to have Dekraai sign another **536 waiver. Krogman learned Perez previously provided reliable information the day the prosecution team met with him. One week later, Krogman obtained a compact disc of the recordings from Dekraai's cell. Several weeks later he listened to the recordings and prepared a report detailing some of the recordings. He obtained Perez's notes regarding his conversations with Dekraai on November 9, 2011.

*1125 Moriel, a CI housed in a federal facility serving time on another case, testified he was facing two life sentences in a 2005 gang related attempted murder case prosecuted by Petersen. Moriel, a high-ranking member of the Delhi gang, explained that in 2009, while he was in Orange County Jail, he decided to turn his life around and he spoke with deputy sheriffs Garcia and Grover about becoming a CI. In February 2009, he met with Garcia and detective Gallardo and told them about two murders and that he knew who committed them. [9] Moriel withheld information first because he wanted immunity and then because he wanted a deal. Like Perez, Moriel wrote down information and gave it to SHU deputy sheriffs. He said SHU deputy sheriffs never told him there were inmates that he could not talk to or to stop talking to inmates. Moriel provided information on a couple dozen cases where he did not write any notes and he provided written notes on at least two cases that were not recorded in his CI file.

Moriel testified about Vega, a Delhi gang member and Mexican Mafia associate, who was charged with special circumstance murder. He and Vega were housed near each other both in disciplinary isolation and in module L. Moriel admitted he asked for, and Gallardo provided, a validation packet to convince Vega that he was not a CI. He initially claimed Vega told him about his pending case without asking him any questions. He said that during a subsequent conversation, Vega confessed to him. Moriel admitted that during this conversation he did question Vega. The same day, Moriel wrote Garcia a note about a previous conversation with a detective and Grover regarding moving Palacios. Despite his initial denials, Moriel eventually admitted his note indicates the plan was to obtain a confession from Palacios like he did Vega.

Finally, Moriel testified regarding Amaury Luqueno and Sergio Elizarraraz. Moriel told Gallardo that Luqueno told him an off-duty police officer shot at him and Elizarraraz. Days later, Elizarraraz was moved into Moriel's unit. Not long after, Moriel obtained confessions from Elizarraraz about various crimes.

Susan Kang Schroeder, OCDA chief of staff, testified OCDA Rackauckas is her direct supervisor. Schroeder is authorized to make public comments about high profile cases, and when she does, it is the OCDA's official position. Schroeder's review of the motions to dismiss and recuse consisted of the two paragraphs that concerned her. Schroeder told one local news outlet the OCDA's Office understood the frustration of the victims' family members, and " 'we're frustrated the defense keeps up with delay tactics.' " She told another local news outlet the motions were "on the checklist of things to do[,]" and " 'they'll *1126 lose and we'll do the trial[.]' " Schroeder stated the motions had no merit because Wagner, who she described as one of the best prosecutors in the OCDA's office, said the motions were meritless.

After Schroeder testified, the OCDA conceded the *Massiah* motion and stated it would not use Dekraai's statements to Perez **537 in its penalty phase case-in-chief.[10] The OCDA argued that evidence concerning other cases, which the trial court previously characterized as Evidence Code section 1101 evidence, was not relevant to the other two motions and further testimony from DA Petersen and others should be limited. Dekraai accepted the concession, but contended the evidence was relevant to the dismissal and recusal motions. The trial court accepted the DA's concession on the *Massiah* motion and explained that although it may at some point narrow the scope of the testimony concerning other cases, the court opined the "[Evidence Code section] 1101-type evidence" was admissible subject to Evidence Code section 352. Testimony continued.

Petersen, an experienced deputy district attorney, testified he was assigned to the TARGET unit, the tri-agency gang enforcement team, and was housed in the SAPD from 2009 to 2013. Petersen had a heavy caseload with voluminous discovery. Petersen's investigator and paralegal, whom he shared with other prosecutors, assisted him with discovery. Petersen agreed that because of his heavy caseload, he did not review all cases for discovery material before it was produced, got "up to speed" when defense counsel announced ready, and hoped all the discovery had been produced.

Petersen learned of Black Flag in 2010. Deputy sheriff Tunstall asked Petersen if he was interested in prosecuting some of the defendants after they learned the defendants could receive more prison time in state court than in federal court. Petersen was assigned the Vega case and the Moriel case in October 2010. When he retrieved the discovery from the previous prosecutor, he said there was no outstanding discovery.

Petersen knew Moriel was a federal informant, but he did not investigate the extent of his CI work even after he heard Moriel testify about his extensive CI history. Petersen produced Moriel's notes regarding Vega's confession, which were dated August 1, 2009, and consisted of four pages, to Vega's defense counsel. Petersen admitted he did not produce other relevant discovery to Vega, and to another defendant who Vega's defense counsel also represented. At the time of Vega's trial, Petersen was only aware Moriel *1127 provided information regarding Vega, Palacios, and Elizarraraz. Petersen never asked Moriel or Tunstall how Moriel came to be housed next to Vega. Petersen testified he had never seen OCSD's log detailing Moriel's CI work and he did not know the Santa Ana Police Department conducted three recorded interviews with him in 2009.

When Petersen read the motion to dismiss, it was the first time he learned of "coincidental contact" between CIs and targeted defendants and that he had not produced to defense counsel a significant amount of Moriel's notes. Petersen also learned he produced different quantities of notes in Black Flag cases—four pages to Vega and 196 pages to another defendant. Petersen admitted there was "discovery that was not" produced, but he stated it was not intentional. He believed Assistant United States Attorney Flynn-Peister decided what information could be released. He conceded his understanding of *Brady* was "evolving" as he read more cases.

While prosecuting the Perez case, Petersen did not know Perez obtained information from Dekraai until either Wagner or **538 Erickson told him. When he received Erickson's November 2011 memorandum, he did not consider how it affected Perez's case but he intended to give it to Perez's defense counsel. Petersen did not recall whether Wagner told him Perez was not to receive any consideration for providing information in the Dekraai case. However, Wagner said he would tell the sentencing judge what Perez did and he would recommend less than a life sentence in one of Perez's cases.

Gallardo, a former Santa Ana detective, testified that in 2003 he was assigned to the career criminal unit, a federal task force designed to dismantle criminal street gangs. Gallardo admitted that a few days before his testimony he met with OCDAs about his May 2013 interview with district attorneys. Gallardo testified he misspoke at that interview when he told Wagner that the district attorneys directed him to obtain

statements from murder suspects. Gallardo said it was under Flynn-Peister's direction. Gallardo realized his mistake during his meeting with district attorneys a few days earlier "[w]hen it was brought to [his] attention." Gallardo claimed it was a simple mistake he attributed to the fact he was working with the OCDA and the interview was in the OCDA's office. Gallardo stated he had to get approval from Flynn-Peister or a FBI agent before disseminating information. He added, however, that after July 2011, all CI notes were released to detectives.

Gallardo testified that during the May 2013 interview he was telling the truth when he said SHU deputy sheriffs would put Perez or Moriel next to a murder suspect to obtain statements. SHU deputy sheriffs were responsible for moving CIs near targeted defendants but he did not know how it was documented. Gallardo thought he heard discussions between Garcia and ***1128** Santa Ana police officers about moving CIs near targeted defendants. He learned there was a plan to put Moriel and Vega together in disciplinary isolation. Gallardo initially said he believed Garcia gave Moriel fake paperwork but later said he did not know whether that happened.

After Gallardo testified, Dekraai pleaded guilty to all counts and admitted the special circumstance and firearm enhancement allegations.

Tunstall, a 15-year deputy sheriff, testified he was assigned to the SHU from 2002 to 2010, when he was assigned to the federal task force. As a member of the task force, his office was at the Santa Ana Police Department, but he had weekly contact with SHU deputy sheriffs. In the last couple years Tunstall had received training from the OCDA regarding CIs but not from the Sheriff. He had not been trained on *Massiah* but knew CIs cannot question represented defendants about charged crimes. Tunstall instructed CIs to write down information they received from inmates but not to question inmates about charged crimes. If he learned a CI was eliciting information, he would instruct the CI to stop; however, he was not aware of that happening. He met with both Perez and Moriel while they were working as CIs.

Prior to testifying, Tunstall read the motion to dismiss and reviewed Perez's and Moriel's CI notes. He testified he had no information deputy sheriffs moved CIs near charged defendants to elicit statements. But Tunstall admitted he once tried to have an inmate moved to obtain statements but it did not happen. He acknowledged that when he worked in the SHU at Theo Lacey jail, Gallardo told him Vega was moved from Theo Lacey Jail to Orange County Jail so Moriel could obtain statements from Vega about the Mexican Mafia. Tunstall stated that had he known Moriel questioned Vega, he would have told Petersen, but he did not believe that happened.

****539** Tunstall reviewed Moriel's August 1, 2009, four-pages of notes detailing Vega's confession before he testified at Vega's trial. When confronted with the notes, Tunstall admitted the first time Vega confessed to Moriel was after Moriel told Vega to tell him what happened. Although Tunstall initially stated he did not have an obligation to produce Moriel's notes, he later said he would have notified someone had he known but he only "briefly" reviewed Vega's notes before trial. Like Petersen, Tunstall blamed the United States Attorney's office and the FBI for the discovery lapses. Tunstall added that although he had a complete copy of Perez's and Moriel's CI notes, he was not allowed to give Petersen the notes until after the Black Flag operation in July 2011. He gave contradictory testimony about whether he ever gave Petersen all the CI files.

Tunstall was interviewed by DAs Wagner and Simmons in March 2013. When confronted with the interview transcript, Tunstall claimed he misspoke ***1129** when he said he was involved in moving Perez near Mexican Mafia "targets" to obtain statements. He said there was only one target, Ronald Melendez.

Tunstall was questioned about the Sheriff's housing records concerning inmates Perez, Moriel, Dekraai, and Palacios. He repeatedly stated he did not know why they were moved. When Tunstall was asked whether inmate movements were documented in any Sheriff's reports, he answered the following: "No, they wouldn't be. It would just be in the housing records." When Tunstall was asked how defense counsel would know an inmate was moved near a CI, Tunstall replied, "I do not know that answer."

Garcia, a 12-year OCSD deputy sheriff, testified he worked in the SHU for about 11 years before being transferred to the task force in July 2013. Garcia explained SHU deputy sheriffs work with CIs from the federal task force but do not have their own CIs. Garcia said CIs were inmates who signed CI agreements and not those that simply provided information. Ever since being at the police academy Garcia knew CIs cannot question a defendant about charged crimes.

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Garcia read portions of the motion to dismiss regarding him intentionally moving CIs and inmates to obtain statements. He admitted that pursuant to orders from the federal task force, CIs were moved to try to obtain statements from Vega and Palacios regarding the Mexican Mafia. He gathered notes from CIs, summarized them, and gave them to the task force. Garcia repeatedly said he did not believe he ever wrote a report or documented movements of CIs and inmates near each other to obtain statements.

PD Sanders played an audio recording of a July 2009 meeting between CI Moriel, deputy sheriff Garcia, another SHU deputy sheriff, and a Santa Ana detective. Garcia agreed that during the recording the detective stated Moriel would get " 'maximum consideration' " for providing information and Moriel had to sign a document the detective assured him would remain confidential. Garcia did not remember what was said during the meeting because he was working on the computer.

Garcia first met Perez in June 2010. Perez had written his life story, and either he or deputy sheriff Grover asked Perez to write down the names of all the gang members he knew. Garcia told Perez to write down any information he received, and Garcia would collect the notes, which Garcia later summarized. Garcia initially stated Perez provided information because he thought it was the right thing to do, but later acknowledged Perez asked whether he would receive a benefit. After reading Perez's notes about Wozniak, Garcia admitted **540 he was concerned Perez asked him about the charged crime but he could not remember whether he spoke with Perez. Garcia could not recall speaking with Perez about questioning inmates.

*1130 Garcia was asked how Dekraai and Perez were housed next to each other in module L, a module reserved primarily for inmates with special needs. Garcia explained Perez was housed in sector 17, cell 3 for protective custody awaiting transfer to a federal facility; this cell had the best visibility from the guard and nursing stations. The medical unit initially placed Dekraai in sector 19 for acute observation; the medical unit can place an inmate with medical issues without the SHU's approval. Two days later, nurse James Trimmer, with the Orange County Health Care Agency, completed paperwork to move Dekraai to sector 17, cell 3, Perez's cell. [11] Garcia stated a module L deputy sheriff who was not part of Black Flag and who would not have known Perez was a CI moved Perez into the sector 17, cell 1, the adjoining cell.

Garcia testified that when Perez told him that he spoke with Dekraai, he notified Erickson and Krogman. Garcia could not recall whether he told anyone from the OCDA or Krogman about Perez's work as a CI, but there was no reason he would have withheld that information. Garcia was asked a number of questions regarding the Sheriff's housing records and the housing of specific inmates, including Perez and Moriel. Garcia claimed not to know why an inmate was moved in the jail.

Flynn-Peister testified she was an AUSA until the end of 2012 when she was appointed to the Orange County Superior Court. After discussing the details of Black Flag, Flynn-Peister stated she knew Perez and Moriel were CIs for the operation and she gave case agents legal advice on how to properly use them. She was not involved in the operational details of the investigation, did not direct case agents to move CIs and inmates near each other, and denied she provided questions for the CIs to ask inmates. She knew Perez and Moriel were obtaining information and writing notes, but she did not review the notes until 2011.

Flynn-Peister stated that when she learned case agents planned to use Moriel as a CI, she was concerned about the potential Sixth Amendment issues. She wrote a memorandum on how to properly use him and to notify her if Moriel obtained information from an inmate about a charged crime. During 2010 and 2011, she could remember only one inquiry.

Flynn-Peister spoke with case agents about protecting the integrity of Black Flag, but she never told case agents to withhold information from defendants, the OCDA, or local law enforcement and she was not asked if Moriel's and Perez's notes could be disclosed. Flynn-Peister testified she and *1131 DA Petersen had equal access to the operation's investigation materials with the exception of federal materials.

Later, the trial court questioned Flynn-Peister. The court read the portion of Petersen's testimony in which he stated Flynn-Peister deliberately withheld discovery from him. The court asked Flynn-Peister whether she remembered telling any case agent to give the local prosecutor only four pages and nothing more. She said, "No." When the court asked whether it was possible she was not remembering, she said, "No."

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**541 Deputy sheriff Tunstall was recalled. Tunstall testified Flynn-Peister authorized him to give Petersen only four pages of Moriel's notes. [12]

Trial Court's First Ruling

After counsel presented argument, the trial court took the matter under submission. At a hearing the following week, the trial court issued its 12-page written ruling, portions of which it read into the record. The court explained the broad scope of the evidentiary hearing was necessary to allow it to determine whether "in this case" law enforcement engaged in outrageous government conduct and whether the Office should be recused from prosecuting the penalty phase, and not to fashion a global remedy based on evidence about other cases.

The trial court first addressed the outrageous government conduct motion. The court stated Dekraai's motion was in large part based on discovery violations pursuant to *Brady, supra,* 373 U.S. 83, 83 S.Ct. 1194, and interference with his right to counsel pursuant to *Massiah, supra,* 377 U.S. 201, 84 S.Ct. 1199. The court said that prosecutors during their testimony and final argument admitted that for various reasons there were "*Brady* violations, or 'errors' " in this case and others. The court found unpersuasive the OCDA's justifications, i.e., misunderstanding of the law, heavy caseloads, uncooperativeness of federal authorities, and failure to anticipate defense strategy.

After discussing at length *Brady* and *Massiah* and their progeny, the trial court stated the district attorneys' testimony and training materials suggest they were *familiar* with constitutional discovery rules. The court opined substantial *1132 evidence supported the conclusion there were a number of *Brady* violations, including that one district attorney took a " 'hands off' " approach to the discovery process and law enforcement made express or implied promises to CIs.

The trial court stated some issues required a hybrid analysis implicating both *Brady* and *Massiah.* The court explained OCSD deputy sheriffs, frequently at outside law enforcement agencies' request, intentionally moved CIs and targeted inmates to obtain statements. The court said law enforcement "seldom, if ever," documented the movements and thus, "little or no information" was produced to defense counsel. The court opined substantial evidence supported the finding CIs requested and received false documentation from OCSD deputy sheriffs to increase their credibility with targeted inmates. The court concluded *Brady* required district attorneys to produce this information to defense counsel to investigate possible *Massiah* violations.

However, the trial court explained the evidence before it demonstrated that "it [was] more likely than not" law enforcement did not intentionally house Dekraai and Perez in adjoining cells and "independent events" brought them both to module L. The court opined that nevertheless the question remained whether the OCDA and law enforcement engaged in subsequent misconduct.

The trial court focused on the prosecution team's meeting with Perez. The court **542 asked why the prosecution team, after learning Perez " 'provided reliable information on prior occasions,' " did not seek more information regarding Perez's background and why did Garcia not provide this information when the prosecution team failed to inquire. The court wondered whether these failures were intentional or negligent and whether the OCDA discharged its constitutional obligations. The court reasoned "[l]aw enforcement was well aware" Perez was an effective, independent CI and he would do anything to avoid having to serve a life sentence. The court said that despite Perez's denials, the evidence demonstrated Perez did for law enforcement what he had done before—ingratiated himself with Dekraai to obtain incriminating statements. The court rejected the OCDA's assertion it was not responsible for Perez's action because law enforcement repeatedly told him not to question Dekraai but only to listen and report. The court opined the "historical 'course of conduct' " established Perez was working on law enforcement's behalf when he spoke with Dekraai.

In addressing whether the DAs' misconduct was negligent or rose to outrageous government conduct, the trial court cited to Wagner's January 2013 declaration wherein he stated the prosecution team made Perez no promises of leniency. The court stated it initially believed this document, and other documents, demonstrated "intentional prosecutorial misconduct" but based on a totality of the evidence, the court concluded Wagner's statement *1133 was "if not inaccurate, at least seriously misleading." The court added that after hearing Wagner's testimony on this subject, it found him to be credible, i.e., that before the meeting he did not know of Perez's background, but that what he knew and what he should have known and should have done were very different things. The court stated "timely due diligence" would have revealed Perez had executed a formal CI agreement and had been

working as a professional CI in the Orange County jail for over one year in exchange for express or implied anticipated benefits.

After again rejecting the OCDA's excuses for failing to satisfy its discovery obligations, the court opined that based on the entire record, the OCDA's "failures in this case" were significant negligence, not malicious, and constituted prosecutorial misconduct. The court added that it also considered whether the apparent misconduct in other cases was relevant to the misconduct in this case and amounted to outrageous government conduct but ultimately concluded it was not.

Citing in part to Krogman's attempt to obtain a new waiver from Dekraai, the trial court stated it could be argued the prosecutorial misconduct violated Dekraai's Sixth Amendment rights. The court opined the conduct was improper and concluded, based on the entire record, the misconduct was negligent and not malicious, noting there was no prejudice as the records remained under seal. The court concluded that when considered in its totality, the prosecutorial misconduct did not constitute outrageous government conduct requiring dismissal of the special circumstance Dekraai already admitted or the death penalty. Despite the court's finding the prosecution team did not engage in outrageous government conduct, it concluded a significant sanction was appropriate and prohibited prosecutors from using Dekraai's custodial statements during the penalty trial.

The trial court then turned to the motion to recuse the OCDA's Office, incorporating the above findings. After discussing section 1424's two-part test, the court concluded there was insufficient evidence the OCDA had a conflict of interest or that **543 any conflict was so severe it disqualified the OCDA from prosecuting the penalty phase. The court added the following: "It is troubling that throughout this pending litigation additional materials that appear to have been subject to this court's January[ ] 2013 discovery order have continued to emerge from various sources. On the other hand, the court is aware that roughly 17,000 pages of discovery have been produced by the [OCDA] in response to that order. On balance, this court has not lost confidence that the duly elected [district attorney] of this county has the ability to competently and ethically complete the prosecution of this serious matter." The court denied Dekraai's motion to recuse the OCDA.

*1134 Finally, the trial court addressed Dekraai's *Massiah* motion. The court concluded there was significant evidence supporting the OCDA's concession, and the court accepted it. The court granted the *Massiah* motion and precluded prosecutors from using any of Dekraai's custodial statements during its penalty phase case-in-chief.

In conclusion, the trial court stated the evidence "in this case" established the prosecution team engaged in negligent prosecutorial misconduct requiring a significant sanction. The court opined many of the witnesses, including current and former prosecutors and sworn peace officers, "were credibility challenged." The court said some simply could not remember, but "[o]thers undoubtedly lied."

Motion for Reconsideration

Three months later, Dekraai filed a motion for reconsideration based on newly discovered evidence that Sanders obtained as a result of subpoenas in the Wozniak case.[13] The newly discovered evidence consisted of TRED records, the Sheriff's "dated computer entries that include the purported reasons for both jail housing movements and classification decisions." The OCDA initially opposed the motion to reconsider as did the Attorney General. Dekraai filed a reply, supported by Sanders' declaration. At a hearing, after the OCDA agreed, the trial court reopened the hearing.

Second Evidentiary Hearing--February to March 2015

Zachary Bieker testified he was an Orange County deputy sheriff assigned to the SHU from 2011 to 2013 and worked with Garcia and Grover. He explained housing decisions could be based in part on whether an inmate was a CI but there was no document or computer record that indicated whether an inmate was a CI. When Bieker was asked whether it would help if he had more time to think about it, he said, "No[.]"

When Bieker was asked what TRED records were, Bieker stated they are three-line computer entries regarding classification, interviews, separation orders, and housing movements. Bieker did not know what the acronym TRED meant, believed TRED records existed since the time the Orange County Jail got computers, and first learned about TRED records when he worked in the classification unit. He stated supervisors, deputy sheriffs in the classification unit and the SHU, and some deputy sheriffs in housing have access to TRED records. Bieker made TRED entries on a daily basis and estimated he made thousands of entries. TRED records

were the first place Bieker would look to determine why an inmate was moved.

*1135 Bieker had not received training on whether he could discuss TRED records in court. He added no supervisor ever told **544 him that he could not discuss TRED records and he was not of the opinion they could only be discussed among SHU deputy sheriffs. He believed he could share TRED records with the OCDA or an investigating agency. Based on Dekraai's TRED records, Bieker "assum[ed]" nurse Trimmer moved Dekraai to sector 17, cell 3 without the SHU's approval because Dekraai's TRED records did not include any notation the SHU approved the move.

On cross-examination, Bieker testified the "common practice" was "TREDs weren't allowed in court[,]" but he did not know why. Bieker stated now that he knows TRED records were produced to Dekraai, he no longer thinks TRED records are confidential. When the trial court questioned Bieker, he answered, "My understanding of the TRED was that they weren't allowed in court for whatever reason." He stated it was probably another deputy sheriff who told him that.

Tunstall testified that when he was part of the task force from January 2010 to October 2014 he was also a deputy sheriff in the SHU. Tunstall knew prior to his March 2013 meeting with the OCDA's Office he was going to be asked about Dekraai's and Perez's housing and whether the Sheriff intentionally housed them near each other so Perez could obtain statements from Dekraai despite having previously disavowed any knowledge of the Sheriff's documentation of inmate movements. Tunstall now explained that if he wanted to know why an inmate was moved, he would consult "the back portion" of the classification system, which was the TRED system, the best source of the information. Tunstall made "tens of thousands" of TRED entries.

Tunstall testified that when he was first assigned to the SHU in 2001 he was informally trained on the use of TRED records. Tunstall was taught TRED records, unlike housing records, are confidential because they contain sensitive information that could pose a threat to inmates. He was advised that if he was asked a question about TRED records while testifying he should invoke the privileges of Evidence Code sections 1040 and 1042 and request to speak with the judge in chambers with county counsel present. Tunstall claimed it did not occur to him to review TRED records before he testified even though he knew the reason why Dekraai and Perez were housed near each other was the critical issue. Tunstall agreed he was asked several questions about the reasons for the movement of several inmates and he often answered he did not know. Those questions did not cause Tunstall to think about checking TRED records.

Garcia testified he began working in the classification unit in 2005 and the SHU in 2008. Garcia first learned of and had access to the TRED system (he *1136 did not know what TRED stood for) when he began working in the classification unit. Garcia also made thousands of entries in the TRED system. Before his interview with the OCDA in March 2013, he reviewed Dekraai's and Perez's housing and TRED records to determine why they were moved, who moved them, and when they were moved. Garcia agreed that at his October 2014 meeting with the DA he said his superiors instructed him to keep TRED records confidential. But he understood that if he was asked about TRED records while testifying to invoke the privileges of Evidence Code section 1040 and 1042.

Garcia reviewed the transcript of his previous testimony before testifying. He believed that during his first testimony he provided all the information required by the questions that were asked. Garcia admitted he was asked several questions about the reasons why inmates were moved and he often answered he did not know. Garcia provided different reasons **545 why he never mentioned TRED records during his previous testimony, including he did not think PD Sanders asked him a question that required a reference to TRED, it did not occur to him TRED could have had the answer, and TRED records were confidential. When Garcia was asked whether prior to his initial testimony it occurred to him to tell the DA that TRED may contain helpful information, he said he did not know. Finally, in response to the trial court's questions, Garcia stated that when he first learned of and was given access to TRED, someone, a sergeant, told him they were confidential and not to discuss them.

Grover testified he previously worked in the classification unit and the SHU. Grover stated that from "day one in training" in 2002 he was told not to discuss TRED because it was an internal Sheriff's "secured data system" that had extremely sensitive information regarding inmates.

Jonathan Larson, a deputy sheriff, was assigned to the SHU from 2010 to 2012 and worked with Garcia and Grover. Larson said that when a CI provided him information, he documented the information in TRED. He learned about TRED during his first day of training in the classification unit

like all deputy sheriffs in that unit because an inmate could not be classified without looking at TRED records. Larson would look at housing records to learn *when* an inmate was moved and TRED records to determine *why* he was moved. He was never told he could not discuss TRED records outside the SHU. However, he was told that if he was questioned about TRED while testifying to invoke the privileges in Evidence Code section 1040 and 1042.

Trial Court's Ruling on Motion for Reconsideration

After the close of evidence, the trial court stated the parties could file written briefs. After the parties filed their briefs, there was a hearing where *1137 counsel offered final argument. The trial court issued its eight-page written ruling, portions of which it read into the record.

The trial court provided the procedural history of the case and "confirm[ed] its original findings and rulings" except as addressed in this supplemental ruling. The court stated the issue presented was whether supplemental evidence—evidence Tunstall and Garcia lied during the initial hearing—when considered with all the other evidence, established the prosecution team engaged in outrageous government conduct requiring additional sanctions and whether that evidence required the OCDA's recusal.

The trial court explained the initial hearing focused in part on whether deputy sheriffs placed Dekraai, who was represented by counsel, in a cell adjoining Perez, a CI, to obtain statements. The court explained that at the initial hearing, Tunstall and Garcia, SHU deputy sheriffs, both testified they were not involved in placing Dekraai next to Perez and feigned little knowledge of these events.

The trial court explained the evidence demonstrated that for at least 10 years, the Sheriff maintained a database in its jail records system known as TRED, which contained significant information about inmate housing movements. The court added the evidence established SHU deputy sheriffs accessed TRED on a daily basis. The court stated neither Tunstall nor Garcia ever mentioned TRED despite being asked questions "that should have logically triggered responses about" TRED. After detailing the inconsistencies in their testimony, the court concluded, "Tunstall and Garcia have either intentionally lied or willfully withheld material evidence from **546 [the] court." The court said the evidence established both Tunstall and Garcia were "thoroughly familiar" with TRED and made voluminous entries in TRED. The court added it did not believe Tunstall's, or Petersen's, testimony, blaming Assistant United States Attorney Flynn-Peister for discovery violations.

The trial court found deputy sheriffs Larson and Grover credible. The court opined their testimony conflicted with Tunstall's and Garcia's testimony and supported the conclusion SHU deputy sheriffs' duties included managing CIs and they were to never mention TRED. The court concluded both Tunstall and Garcia lacked credibility and intentionally withheld information about TRED at the initial hearing.

The trial court explained it was debatable whether the supplemental evidence demonstrated the prosecution team engaged in outrageous government conduct. The court said what was clear was that there were "serious, ongoing discovery violations" that required imposition of additional sanctions. Before imposing additional sanctions however, the court stated there *1138 was no evidence the OCDA knew of the TRED system until after the first hearing but that was not dispositive because for *Brady* purposes the OCDA had constructive knowledge of all information possessed by the prosecution team. The court opined the OCDA's failure to provide Dekraai with information concerning TRED for over two years in violation of the court's discovery orders was a significant discovery violation. As a sanction, the court ruled the prosecution's evidence during the penalty phase would be limited to the following: the circumstances of the offenses; Dekraai's precustodial statements; and victim impact statements.

Second, with respect to the recusal motion, the trial court stated "the evidentiary ground has now shifted." The court opined that based on the supplemental TRED evidence, evidence of prosecutorial misconduct in other cases was related to the prosecutorial misconduct in this case and the court had lost confidence the duly elected OCDA could fairly prosecute the penalty phase. The court added its concern regarding the discovery situation that it expressed in its first ruling was far worse because the TRED database maintained by the Sheriff for many years and containing information relevant to this case remained secret.

The trial court stated there was no evidence the OCDA "actively participated in the concealment of" TRED. The court found this to be particularly aggravating because "someone has to be in charge of criminal investigations and prosecutions in Orange County." The court reasoned as follows: "At times this may create a conflict of interest

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between prosecutors bound by their legal and ethical constraints and peace officers who may try to cut legal corners for the sake of expediency or some other purpose. The evidence indicates that such a conflict of interest exists in this case."

The court said the OCDA failed its responsibility to resolve the conflict of interest by protecting the rule of law and instead ignored OCSD's attempt to compromise Dekraai's constitutional and statutory rights. The court stated the OCDA was responsible for its agents' action and its agents ignored the law prejudicing Dekraai. The court characterized the OCDA's conduct during this period as "benign neglect" preventing it from complying with the court's discovery orders. The court concluded, "The [OCDA] has a conflict of interest in this case which has actually deprived [Dekraai] of due process in the past. And given this ongoing conflict, the [OCDA's] continued participation in this prosecution will likely prevent [Dekraai] **547 from receiving a fair trial in the future." The court granted Dekraai's recusal motion, not as a "punitive measure[ ]" to punish past prosecutorial misconduct but instead as a "remedial measure designed to insure that any future trial is fair."

In conclusion, the trial court stated the supplemental evidence established that when the OCDA presented false or intentionally misleading testimony, *1139 regardless of whether it was aware, it violated Dekraai's due process rights requiring additional sanctions detailed above. The court also stated the supplemental evidence established the OCDA in this case is unable to comply with its constitutional and statutory discovery obligations because of a conflict of interest and the conflict demonstrates the OCDA will not ensure the prosecution team will comply with its discovery orders; the court noted that since its January 2013 discovery order, the OCDA had produced over 30,000 pages of discovery. The court concluded the conflict of interest required recusal of the entire OCDA's Office and the Attorney General must prosecute the penalty phase.

IV. Discussion

A. Section 1424

Section 1424, subdivision (a)(1), provides, in relevant part, that a motion to recuse a prosecutor "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." Section 1424, subdivision (a)(1), "provides a two-part test: (1) whether there is a conflict of interest, and (2) whether the conflict is so severe as to disqualify the district attorney from acting. [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 373, 178 Cal.Rptr.3d 185, 334 P.3d 573 (*Bryant*).) "Section 1424's standards are 'prophylactic' [citation] and are designed 'to prevent potential constitutional violations from occurring' [citation]." (*People v. Trinh* (2014) 59 Cal.4th 216, 231, 173 Cal.Rptr.3d 1, 326 P.3d 939 (*Trinh*); *Haraguchi, supra,* 43 Cal.4th at p. 712, 76 Cal.Rptr.3d 250, 182 P.3d 579 [pretrial recusals prevent conflicts of interest that could lead to reversals].)

"Recusal of a prosecutor under section 1424 constitutes a statutorily authorized judicial interference with the executive branch's constitutional role to enforce the law. Accordingly, the decision whether to recuse must be carefully considered. '[R]ecusal of an entire prosecutorial office is a serious step, imposing a substantial burden on the People, and the Legislature and courts may reasonably insist upon a showing that such a step is necessary to assure a fair trial.' [Citation.]" (*Bryant, supra,* 60 Cal.4th at p. 374, 178 Cal.Rptr.3d 185, 334 P.3d 573.) "If a defendant seeks to recuse an entire office, the record must demonstrate 'that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the personal interest of the district attorney or an employee.' [Citation.]" (*Id.* at p. 373, 178 Cal.Rptr.3d 185, 334 P.3d 573.) Recusal of an entire prosecutorial office is a "disfavored," "drastic" remedy and "there must be 'no other alternative available.' " (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1482, 98 Cal.Rptr.3d 596.)

*1140 "We uniformly have held that a motion to recuse is directed to the sound discretion of the trial court, and its decision to grant or deny the motion is reviewed only for an abuse of discretion. [Citations.] The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. **548 The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi, supra,* 43 Cal.4th at pp. 711–712, 76 Cal.Rptr.3d 250, 182 P.3d 579, fns. omitted.) This standard is the same in capital cases. (*Hollywood, supra,* 43 Cal.4th at p. 728, 76 Cal.Rptr.3d 264, 182 P.3d 590.)

1. Conflict of Interest

The first part of the test asks whether there is a reasonable possibility less than impartial treatment exists. "[A] court must determine whether a conflict exists, that is, whether 'the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' [Citations.]" (*Haraguchi, supra,* 43 Cal.4th at p. 713, 76 Cal.Rptr.3d 250, 182 P.3d 579.) A defendant's burden of establishing a genuine conflict "is especially heavy where, as here, the defendant seeks to recuse not a single prosecutor but the entire office. [Citations.]" (*Trinh, supra,* 59 Cal.4th at p. 229, 173 Cal.Rptr.3d 1, 326 P.3d 939.)

"Even if specific prosecutors had engaged in misconduct, this behavior standing alone would not necessarily evince a likelihood that other prosecutors would exceed the bounds of proper advocacy. 'Our cases upholding recusal have generally identified a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge.' [Citation.]" (*Bryant, supra,* 60 Cal.4th at p. 375, 178 Cal.Rptr.3d 185, 334 P.3d 573.) Thus, we must determine whether there is a divided loyalty or structural incentive at odds with the OCDA's duty to prosecute Dekraai's penalty phase fairly. (See *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754, 76 Cal.Rptr.3d 276, 182 P.3d 600.)

Here, the trial court explained that after hearing evidence the Sheriff secretly maintained the TRED database for over a decade and deputy sheriffs lied about it at the first evidentiary hearing, it concluded the misconduct *in other cases* was relevant to the misconduct in this case and "the discovery situation in this case is far worse than the court previously realized." The court stated that although there was "no direct evidence" the OCDA knew of TRED or "actively participated" in concealing TRED evidence, the OCDA was responsible for the actions of the prosecution team for *Brady* purposes. Based on the entire record, we conclude substantial evidence supported the trial court's ***1141** conclusion OCDA had an actual conflict because its loyalty to the Sheriff prevented the OCDA from performing its constitutional and statutory obligations in this case.

Although we agree the evidence tends to establish it was coincidence Dekraai and Perez were housed next to each other, it is clear OCSD SHU deputy sheriffs operated a well-established program whereby they placed CIs, Perez and Moriel, next to targeted defendants who they knew were represented by counsel to obtain statements. Garcia's, Tunstall's, and Gallardo's testimony supports this conclusion. Although at the hearing Gallardo blamed Flynn-Peister for withholding discovery and claimed she approved moving inmates, at his earlier May 2013 interview he told Wagner that the OCDA's Office, not Flynn-Peister, approved moving inmates. There was evidence Perez and Moriel requested and received from SHU deputy sheriffs fake documentation to enhance their credibility with targeted defendants. There was also evidence the prosecution team explicitly or implicitly promised consideration in ****549** exchange for information and Perez and Moriel expected a benefit.

Additionally, at the first hearing, Garcia and Tunstall both had the opportunity to discuss TRED records but failed to do so and during their subsequent testimony both admitted they withheld information. For example, at the first hearing when Tunstall was asked whether there were any Sheriff's reports that documented inmate movements, he replied, "No, they wouldn't be. It would just be in the housing records." When Tunstall was asked how anyone would know an inmate was moved next to a CI, he answered, "I do not know that answer." However, at the second hearing, he testified TRED records were the best place to look to learn why an inmate was moved, he had made thousands of TRED entries, and he was trained TRED records were confidential.

At the first hearing, Garcia claimed he did not know why inmates were moved and stated he did not believe he ever wrote a report or documented he had moved CIs near inmates to obtain statements. At the second hearing, he admitted to making thousands of TRED entries. Garcia also admitted that before his March 2013 interview with the OCDA, he reviewed Dekraai's and Perez's housing and TRED records to determine why they were moved, who moved them, and when they were moved because he knew what he would be asked. Garcia provided a number of reasons why he never mentioned TRED during his initial testimony, including TRED records were confidential, the questions did not call for a reference to TRED records, and it did not occur to him TRED records could have had the answer. Needless to say, there was overwhelming evidence supporting the trial court's conclusion Garcia and Tunstall intentionally lied or willfully withheld information at the first hearing and they lacked credibility.

***1142** Throughout her briefs the Attorney General claims all the fault lies with the Sheriff, and the OCDA is not to blame for the custodial CI program the Sheriff operated in the Orange County Jail. In fact, the Attorney General

asserts the Sheriff "deceiv[ed]" the OCDA. But at oral argument, the Attorney General conceded the record includes no evidence that before the March 2014 evidentiary hearing the OCDA asked the Sheriff questions that would have elicited information about the TRED database or TRED records. There is no legitimate reason for the Sheriff to create and maintain such a sophisticated, synchronized, and well-documented CI program other than to obtain statements that will benefit prosecutions. Given the benefit the OCDA received from the Sheriff's CI program over the years, it would not be unreasonable to conclude the OCDA was aware of the CI program and at the very least should have inquired about CIs housing and movements.

The evidence demonstrated DAs Wagner and Simmons received information from their investigator, Erickson, that Garcia reported Dekraai was confessing to Perez. Wagner and Simmons went to the jail and met with an informant who was interacting with a defendant who they knew was represented by counsel. Wagner, Simmons, and Erickson each admitted they knew there was jailhouse informant activity but before meeting Perez they did nothing to learn about his background. Garcia stated he could not remember whether he provided Wagner or Simmons with any information about Perez's background as a CI. Erickson stated he "may have" previously spoken with Garcia about CIs and admitted that before the meeting he learned Perez had previously provided reliable information. Wagner admitted Perez said he questioned Dekraai. Similarly, Simmons stated that during the meeting he learned Perez asked Dekraai questions, but Simmons was not concerned because **550 he did not believe Perez was acting on the government's behalf. Although both Wagner and Simmons knew Perez previously questioned Dekraai, they obtained and received approval from the Sheriff's command staff to place a recording device in Dekraai's cell to obtain additional statements. Why would the Sheriff have any concerns about moving CIs to obtain statements from defendants represented by counsel when the district attorneys accepted the information without question and asked the Sheriff for permission to obtain additional information?

Both Wagner and Simmons admitted they were aware Perez had initiated conversations with a represented defendant. This should have been a red flag for them. Rather than directly admonish Perez and educate the Sheriff on *Massiah* principles, they simply asked deputy sheriff Garcia to remind Perez to not initiate any conversation with Dekraai. And about the same time as the Perez interview, another member of the prosecution team, detective Krogman, violated *Massiah* when he went to the jail and attempted to have Dekraai sign another waiver. Wagner was not concerned with Krogman's conduct because *1143 he believed they are bound by "different ethics," but this is further evidence the OCDA failed to adequately direct the prosecution team to avoid constitutional violations.

After the meeting, Simmons did nothing to learn of Perez's background, and at least one year passed before he learned the extent of Perez's work as a CI. After the meeting, Wagner similarly failed to learn anything about Perez's criminal history or his work as a CI despite many opportunities to do so. In late 2011, Wagner approved Erickson's request to notify Perez's prosecutor that Perez provided information on Dekraai's case, but Wagner did not read the memorandum for almost two years. In the memorandum, Erickson wrote a " 'covert investigation within the jail' " established Perez was providing reliable information. This of course was an indication Perez was acting on the government's behalf. Around the same time, Erickson wrote a report regarding the meeting with Perez but did not mention he was a CI. Wagner read this report a few months later but the fact there was no information about Perez's criminal history or his previous work as an informant did not raise any red flags. In April 2012, Wagner obtained Perez's rap sheet to determine if the Orange County Public Defender's Office had a conflict and learned Perez was facing a life sentence, but he did not contact Petersen. In June 2012, when Wagner asked Erickson which cases Perez was working as an informant and Erickson directed him to Petersen, Wagner did not follow up until January 2013, after Dekraai filed a formal request for discovery. Wagner finally obtained Perez's CI file in February 2013. After the March and May 2013 meetings where Wagner learned Perez obtained information from inmates unconnected to the Mexican Mafia investigation, Wagner did nothing to follow up. This evidence supports the conclusion that during this entire time period, prosecutors failed their professional responsibility to properly investigate Perez's CI work and produce the information to Dekraai.

Indeed, during their testimony, Wagner and Simmons conceded there was *Brady* material that should have been produced to Dekraai, but the most Wagner could admit to was "flawed" legal reasoning. In its first ruling, the trial court stated the prosecution had produced about 17,000 pages of material since its January 2013 order and in its second ruling stated the prosecution had produced more than 30,000 **551 pages of material. [14] The Attorney General asserts

the fact prosecutors produced the TRED records refutes the assertion it has a loyalty to protect the Sheriff. But county counsel only produced these documents in response to Dekraai's subpoena, after PD Sanders learned of the records when he subpoenaed records in the Wozniak case. The OCDA had a duty to learn of the TRED database and disclose its records to Dekraai. ***1144** (*People v. Williams* (2013) 58 Cal.4th 197, 256, 165 Cal.Rptr.3d 717, 315 P.3d 1 [prosecution's *Brady* duty includes obligation "to ascertain" and disclose favorable evidence known to investigative agencies].)

There was a similar pattern of neglect on Petersen's part vis-à -vis his interaction with Moriel. Petersen knew Moriel was a federal CI, but he did not know the extent of his work and did not inquire further. Petersen stated that at the time of the Vega trial, he was only aware Moriel provided information regarding inmates Vega, Palacios, and Elizarraraz, and he did not investigate further. Petersen admitted he never asked Moriel or deputy sheriff Tunstall how Moriel came to be housed next to Vega. After Moriel testified he provided law enforcement with information regarding about 20 inmates, Petersen never inquired further. As with Wagner, Petersen admitted he failed to produce discovery to various defendants about Moriel's CI work and when he did provide discovery it was vastly different in different cases without any justification. Although this evidence did not concern Dekraai, the trial court did not err by concluding it was relevant Evidence Code section 1101-type evidence that provided further support SHU deputy sheriffs operated a CI program to obtain statements from represented defendants and the OCDA's office was either explicitly or implicitly aware of it.

There are no published section 1424 cases addressing the type of conflict of interest the trial court identified here —a divided loyalty. Cases in which conflicts of interest resulting in recusal of the entire district attorney's office generally fall into the following categories: institutional conflicts (*Bryant, supra,* 60 Cal.4th at p. 372, 178 Cal.Rptr.3d 185, 334 P.3d 573 [infiltration of district attorney's office and delayed discovery]; *People v. Gamache* (2010) 48 Cal.4th 347, 364, 106 Cal.Rptr.3d 771, 227 P.3d 342 [district attorney employee a victim] (*Gamache*); *People v. Vasquez* (2006) 39 Cal.4th 47, 55, 45 Cal.Rptr.3d 372, 137 P.3d 199 [family relationship]; *People v. Snow* (2003) 30 Cal.4th 43, 85, 132 Cal.Rptr.2d 271, 65 P.3d 749 [district attorneys testified at trial]; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 830–832, 118 Cal.Rptr.2d 725, 44 P.3d 102 [professional services relationship]; *People v. Zapien* (1993) 4 Cal.4th 929, 969, 17 Cal.Rptr.2d 122, 846 P.2d 704 [district attorney's misconduct] (*Zapien*); *People v. Conner* (1983) 34 Cal.3d 141, 148, 193 Cal.Rptr. 148, 666 P.2d 5 [district attorney witness and possible victim] (*Conner*); *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 270, 137 Cal.Rptr. 476, 561 P.2d 1164 [family relationship] (*Greer*)[15]; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277, 1283–1284, 62 Cal.Rptr.2d 331 [district attorney's office victim and potentially implicated in wrongdoing] (*Lewis*); ***1145 **552** *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1579, 24 Cal.Rptr.2d 177 [district attorney investigator misconduct] (*Merritt*), personal conflicts (*Trinh, supra,* 59 Cal.4th 216, 229–230, 173 Cal.Rptr.3d 1, 326 P.3d 939 [district attorney's father recent patient at site of hospital shooting]), prior representation conflicts (*People v. Griffin* (2004) 33 Cal.4th 536, 568, 15 Cal.Rptr.3d 743, 93 P.3d 344 [district attorney investigator previously defense investigator], overruled on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32, 144 Cal.Rptr.3d 84, 281 P.3d 1 (*Riccardi*)); and financial conflicts (*Eubanks, supra,* 14 Cal.4th at pp. 585–587, 59 Cal.Rptr.2d 200, 927 P.2d 310 [crime victim provided district attorney financial resources to investigate crime])).

A district attorney's impartiality may be impaired by institutional interests. (*Eubanks, supra,* 14 Cal.4th at p. 595, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Institutional interests and structural incentives like the one present here, a loyalty to protect, can be analogized to those cases where there was a familial relationship between the victim and the district attorney's office. In these cases, courts have concluded the district attorney could not exercise its discretion impartially. (*Gamache, supra,* 48 Cal.4th at pp. 362–363, 106 Cal.Rptr.3d 771, 227 P.3d 342 [district attorney employee a victim]; *Conner, supra,* 34 Cal.3d at pp. 144–145, 193 Cal.Rptr. 148, 666 P.2d 5 [deputy district attorney material witness and possible victim where deputy sheriff stabbed and shot]; *Greer, supra,* 19 Cal.3d at p. 259, 137 Cal.Rptr. 476, 561 P.2d 1164 [victim's mother discovery clerk in district attorney's office].)

Here, institutional interests and structural incentives between the OCDA and the Sheriff constituted a genuine conflict of interest. In Orange County, the Sheriff is charged with investigating crimes, and the OCDA is charged with prosecuting those crimes.[16] In this case though, the evidence demonstrates the Sheriff, in its secondary capacity as county jailer, created and maintained a CI program whereby it continued to investigate criminal activity in contravention of targeted defendants' constitutional rights. As we explain

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above, the only identifiable use for the evidence the Sheriff obtained from its CI program was for use by the OCDA. The OCDA's loyalty to protect its primary law enforcement partner and its work interfered with its professional and ethical responsibilities. Here, the OCDA's loyalty to the Sheriff interfered with its ability to discharge its constitutional and statutory obligations. Not only did the OCDA intentionally or negligently ignore the Sheriff's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the CI program.

Lewis, supra, 53 Cal.App.4th 1277, 62 Cal.Rptr.2d 331, a decision from this court, is instructive. In *Lewis,* petitioner was Orange County's auditor-controller. Following Orange County's *1146 bankruptcy, a proceeding was brought to remove him from office for willful misconduct. (*Id.* at p. 1280, 62 Cal.Rptr.2d 331.) The *Lewis* court issued a writ of mandate directing the trial court to vacate its order denying petitioner's motion to recuse the district attorney and enter a new order granting the motion. (*Id.* at pp. 1286–1287, 62 Cal.Rptr.2d 331.) The court cited to a number of factors proving there was a genuine conflict, including petitioner continued to act as auditor of county departments, the district attorney was a victim, and as relevant here, **553 the district attorney was implicated in the alleged conduct that caused Orange County's financial ruin. (*Id.* at pp. 1283–1285, 62 Cal.Rptr.2d 331.)

As in *Lewis,* the OCDA was implicated in the misconduct. As we explain above, there was sufficient evidence the OCDA was not only aware the Sheriff maintained a CI program in which it moved CIs near targeted represented defendants to obtain statements but that it also failed on many occasions to produce information, or provided incomplete information, to defendants about the CIs who were obtaining the information. Contrary to the Attorney General's attempts to lay all the blame on the Sheriff, the OCDA was complicit in the wrongdoing—DAs Wagner and Simmons knew Perez questioned Dekraai, who was represented by counsel, and then obtained OCSD approval to place a recording device in Dekraai's cell for Perez to obtain additional statements. And Wagner reported to Rackauckas and Tanizaki that district attorneys had been accused of wrongdoing within weeks of PD Sanders filing the defense motions. The OCDA's public response was to simply dismiss the serious allegations in the motions as "part of their litigation strategy" and "delay tactics." Thus, we conclude substantial evidence supports the trial court's conclusion there was a genuine conflict of interest —the OCDA's loyalty to the Sheriff conflicted with its duty to the rule of law and its duty to fairly prosecute the case against Dekraai.

2. Gravity of Any Conflict

The second part of the test asks whether the conflict is so great it is more likely than not the district attorney will treat the defendant unfairly during some portion of the criminal proceedings. Thus, "[i]f ... a conflict exists, the court must further determine whether the conflict is ' " 'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.' " ' [Citation.]" (*Haraguchi, supra,* 43 Cal.4th at p. 713, 76 Cal.Rptr.3d 250, 182 P.3d 579.) The potential for unfair treatment must be " 'real, not merely apparent,' " and likely result in unfairness. (*Bryant, supra,* 60 Cal.4th at p. 373, 178 Cal.Rptr.3d 185, 334 P.3d 573.)

"Section 1424 'does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.' [Citations.] Only an *1147 *actual likelihood of unfair treatment*, not a subjective perception of impropriety, can warrant a court's taking the significant step of recusing an individual prosecutor or prosecutor's office." (*Haraguchi, supra,* 43 Cal.4th at p. 719, 76 Cal.Rptr.3d 250, 182 P.3d 579.)

"The protection of prosecutorial impartiality is, of course, a major purpose of the court's recusal power. [Citation.] *Even under section 1424, it may be appropriate to recuse an entire district attorney's office when there is substantial evidence that a deputy's animosity toward the accused may affect his colleagues.* [Citation.] Recusal may be denied, however, when the evidence of personal animus or bias is slight and does not amount to a reasonable possibility of unfairness. [Citations.]" (*Hamilton, supra,* 46 Cal.3d at p. 140, 249 Cal.Rptr. 320, 756 P.2d 1348, italics added, overruled on other grounds in *Eubanks, supra,* 14 Cal.4th 580, 59 Cal.Rptr.2d 200, 927 P.2d 310; *People v. Alcocer* (1991) 230 Cal.App.3d 406, 414, 282 Cal.Rptr. 5 [same].)

"Recusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that *future* proceedings will be fair. '[S]ection **554 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions.' [Citation.]" (*Bryant, supra,* 60 Cal.4th at p. 375, 178 Cal.Rptr.3d 185, 334 P.3d 573.)

Here, there was substantial evidence the OCDA's conflict of interest was so grave it was unlikely Dekraai would receive a fair penalty hearing. In reaching this conclusion, the trial court relied in part on the fact that despite its January 2013 discovery order, the OCDA failed to ensure the Sheriff complied with that order as evidenced by the continuous production of documents. In its first ruling, the court stated that from January 2013 to August 2014, the OCDA produced approximately 17,000 pages of discovery. The court's second ruling demonstrates that in the eight months since its first ruling, the OCDA had produced an additional 13,000 pages of discovery. As we note above, a few months ago, the Attorney General notified this court the Sheriff found an additional 1,157 pages of what it referred to as the " 'Special Handling Log.' " This evidence supports the court's conclusion the OCDA continues to fail to ensure the Sheriff, its chief law enforcement partner, will comply with its constitutional and statutory obligations. Discovery is not complete, additional discovery decisions must be made, and the OCDA's past substantial discovery failures are evidence it cannot be relied upon to comply with its discovery obligations in this case moving forward.

Additionally, we conclude there is other uncontradicted evidence from OCDA employees that supports the court's conclusion the OCDA's conflict of interest was so grave it was unlikely Dekraai will receive a fair penalty hearing. (*Lewis, supra,* 53 Cal.App.4th at pp. 1282–1283, 62 Cal.Rptr.2d 331 [remand to determine whether conflict of interest unnecessary because uncontradicted evidence demonstrates conflict exists].) Wagner admitted Tanizaki, his direct *1148 supervisor, and Rackauckas were aware of Dekraai's motions and some of the allegations. Wagner also admitted he made public comments the motion included "scurrilous allegations" and "untruths" before he had read the entire motion, which demonstrates he had prejudged its merits. He conceded that after he read the entire motion, he agreed there was some merit to Sanders' allegations concerning the gang cases, but he would not make the same acknowledgement on the Dekraai case, despite the fact he previously testified he failed to produce all *Brady* material and the OCDA effectively conceded the *Massiah* motion. After conceding the *Massiah* motion, the OCDA stressed the concession was not an admission of wrongdoing because it was "arguable" *Massiah* was not violated. How could the trial court expect the OCDA to properly supervise OCSD and fairly prosecute the penalty phase when one of the district attorney's prosecuting Dekraai failed to acknowledge any wrongdoing on the prosecution team's part in the Dekraai case?

Additionally, Wagner agreed many people in the OCDA's office, including "many" in the 15-person homicide unit, were angry at Sanders because of his allegations. Wagner's admissions of animosity towards Sanders was sufficient evidence the animosity extended to the entire defense team. Schroeder, Rackauckas' chief of staff, publicly stated the motions were essentially meritless because Wagner, one of the best prosecutors in the office, said so. Based on this evidence, it is certainly reasonable to conclude the animosity towards the defense existed at the highest levels in the OCDA's office and permeated the entire office.

Contrary to the Attorney General's claim otherwise, this recusable conflict of **555 interest is not based simply on prosecutorial misconduct, which courts have ruled is impermissible. (*Young v. United States ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 807, fn. 18, 107 S.Ct. 2124, 95 L.Ed.2d 740; see *Zapien, supra,* 4 Cal.4th at pp. 969–971, 17 Cal.Rptr.2d 122, 846 P.2d 704.) No, the recusable conflict of interest, a divided loyalty, is based on the OCDA's intentional or negligent participation in a covert CI program to obtain statements from represented defendants in violation of their constitutional rights, and to withhold that information from those defendants in violation of their constitutional and statutory rights. The conflict here is "real," it is "grave," and goes well beyond simply "distasteful, or improper" prosecutorial actions. The trial court's recusal of the entire OCDA's office was a necessary step to ensure Dekraai's personal right to a fair penalty trial. (See *Hamilton, supra,* 46 Cal.3d at p. 140, 249 Cal.Rptr. 320, 756 P.2d 1348 [deputy DAs' animosity may affect colleagues].)

In *Lewis, supra,* 53 Cal.App.4th at pages 1285–1286, 62 Cal.Rptr.2d 331, after finding the district attorney's office had a conflict of interest because it was both victim and possible malfeasant, the court concluded the conflict of interest was so grave that it was unlikely the auditor-controller would get a fair trial. Here, *1149 like in *Lewis*, the OCDA's office was implicated in the wrongdoing and there was sufficient evidence the animosity towards PD Sanders permeated the entire OCDA's office.

The Attorney General raises a number of contentions as to why the trial court erred by concluding the OCDA's conflict of interest was so severe it could not fairly prosecute Dekraai's penalty phase. First, the Attorney General argues

the court's evidentiary sanctions eliminated any potential prejudice to Dekraai during the penalty phase. Although we agree the court's evidentiary sanctions cure the OCDA's and the Sheriff's *past* misconduct, the court's evidentiary sanctions do not ensure *moving forward* Dekraai will receive a fair penalty phase. In its first ruling, the court ordered the prosecution could not use Dekraai's custodial statements during its case-in-chief. In its second ruling, the court ordered the only evidence the prosecution could use during the penalty phase was Dekraai's conduct on October 11, 2011, his precustodial statements, and victim impact testimony. Based on the extensive misconduct in the record, we disagree with the Attorney General it is "sheer speculation that law enforcement officials will continue to conceal information" when the OCDA has failed to and continues to fail to properly supervise the Sheriff. The court's evidentiary sanctions do not ensure that in the future the systemic failures of the OCDA and the Sheriff will not interfere with the defense's ability to present mitigating evidence. (§ 190.3 [detailing types of evidence admissible during penalty phase]; see *People v. Crew* (2003) 31 Cal.4th 822, 854, 3 Cal.Rptr.3d 733, 74 P.3d 820 [evidence of conduct in jail admissible during penalty phase].) Additionally, although the trial court's current order would preclude evidence of Dekraai's bad conduct in jail, the court indicated that it would reconsider its ruling in light of future evidence. Dekraai will remain in the Sheriff's custody and under its control throughout the penalty phase. That being the case, it remains unlikely that Dekraai will receive a fair penalty phase if the OCDA remains in control of the litigation.

The magnitude of the systemic problems cannot be overlooked. Wagner, a 20-year veteran of the OCDA and supervisor of the homicide unit, admitted his legal reasoning on a prosecutor's fundamental ethical obligations under *Massiah* was flawed. Simmons, a 24-year veteran of the office, explained his understanding of his ethical **556 obligation was "evolving." This record does not support a finding there was a reasonable basis for the trial court to have confidence the OCDA will prevent future misconduct from occurring in this case.

Second, the Attorney General contends recusing the entire OCDA's office and requiring the Attorney General to prosecute the penalty phase "will not rectify the alleged problems in this case." The Attorney General adds that *1150 "[a]ny misconduct in this case, even if imputable to the OCDA, undeniably had its origins in the OCS[D]." The Attorney General asserts that because the OCDA is familiar with the Sheriff and the issues in this case, the OCDA is "arguably better suited" to prosecute the penalty phase. We disagree. The record before us demonstrates that from the outset, the OCDA failed in its duty as the primary county prosecutor to supervise its prosecution team, specifically the Sheriff, and ensure its prosecutors and its law enforcement team complied with its constitutional and statutory obligations. Moreover, isn't the Attorney General's claim true in every section 1424 case? In all counties the district attorney is more familiar with its law enforcement partners, and were we to accept that reasoning as a basis to reverse the trial court's order, we would essentially eviscerate section 1424's protections. Here it is arguable this familiarity and cozy relationship between the OCDA and the Sheriff contributed to the problem.

The Attorney General also relies on *Bryant, supra,* 60 Cal.4th 335, 178 Cal.Rptr.3d 185, 334 P.3d 573, and *Merritt, supra,* 19 Cal.App.4th 1573, 24 Cal.Rptr.2d 177, to argue the evidence was insufficient to support the trial court's conclusion the OCDA could not fairly prosecute Dekraai's penalty phase.

In *Bryant, supra,* 60 Cal.4th at pages 371–372, 178 Cal.Rptr.3d 185, 334 P.3d 573, defense counsel filed a pretrial motion to recuse the entire Los Angeles County District Attorney's Office (LADA) based on a failure to provide discovery regarding whether the defendant's family's employees had infiltrated the LADA and the delayed disclosure of a deputy district attorney's unredacted interview notes. The LADA provided redacted copies of these notes, but the fact the notes had been redacted was not apparent from the copies. (*Id.* at p. 372, 178 Cal.Rptr.3d 185, 334 P.3d 573.) After the trial court heard testimony from numerous LADA supervisors and deputies, it granted the recusal motion because supervisors had been involved in the intentional and deliberate withholding of evidence. (*Ibid.*) The court based its reasoning in part on the fact that during its review of the infiltration issue, the court questioned the prosecutors whether there was additional information it should be aware of but "[n]o one had mentioned the notes or the internal conflict." (*Ibid.*) The Attorney General appealed, the Court of Appeal reversed, and the California Supreme Court denied defendants' petitions for review. (*Id.* at pp. 373–374, 178 Cal.Rptr.3d 185, 334 P.3d 573.) The LADA removed from the case the prosecutor who committed the alleged misconduct. (*Ibid.*) A jury convicted defendants of first degree murder, and the trial court sentenced them to death. (*Id.* at p. 352, 178 Cal.Rptr.3d 185, 334 P.3d 573.)

On automatic appeal to the California Supreme Court, defendants argued, *inter alia*, a violation of section 1424 and their due process rights. (*Bryant, supra,* 60 Cal.4th at p. 372, 178 Cal.Rptr.3d 185, 334 P.3d 573.) In rejecting defendants' argument the prosecutor's past actions required recusal, the court explained the purpose of recusal is to ensure future proceedings are fair and not to punish past prosecutorial *1151 misconduct. (**557 *Id.* at pp. 374–375, 178 Cal.Rptr.3d 185, 334 P.3d 573.) The court opined there was no evidence of a conflict of interest because the prosecutors in question were replaced and the evidence was produced to defendants. (*Id.* at p. 375, 178 Cal.Rptr.3d 185, 334 P.3d 573.) The court also rejected defendants' contention that because several supervisors were involved in the recusal issue, those same prosecutors would have supervisory power over any prosecutor who tried the case. (*Id.* at pp. 375–376, 178 Cal.Rptr.3d 185, 334 P.3d 573.) The court opined, "Recusal is justified only when the prosecutor has 'an interest in the case extraneous to [his or her] official function.' [Citation.]" The *Bryant* court concluded defendants failed to establish the existence of an extraneous interest. (*Id.* at p. 376, 178 Cal.Rptr.3d 185, 334 P.3d 573.)

Bryant is inapposite, and contrary to the Attorney General's assertion, it is not "a closer case than this one." We disagree the trial court's recusal order was punishment for *past* prosecutorial misconduct. The court said as much in its written ruling. The court recused the OCDA because of systemic problems within its office and the Sheriff's office that demonstrated the OCDA had a divided loyalty between its duty to fairly prosecute cases and protecting the Sheriff. Although we agree the trial court found that based on the state of the evidence the OCDA was not aware of TRED and did nothing to conceal its existence, the Attorney General admits the OCDA had constructive knowledge of TRED for *Brady* purposes. The fact the defense team now has Dekraai's and Perez's TRED records does not cure the systemic problem.

The Attorney General construes the trial court's supplemental ruling too narrowly to mean the court recused the OCDA only because of the TRED records and because the OCDA was unaware of the TRED records this case is similar to *Bryant*. The basis for the court's ruling was broader than TRED. The court stated after learning of the TRED records, "the evidentiary ground has now shifted[ ]" and the misconduct in the other cases was relevant to this case. The record established both Wagner and Simmons were aware Perez questioned Dekraai, and sanctioned this operation by obtaining the Sheriff's permission to place a recording device in Dekraai's cell. Unlike in *Bryant*, the OCDA did not remove the offending prosecutors. And here the evidence of other cases established the misconduct was significantly more pervasive than in *Bryant*.

In *Merritt, supra,* 19 Cal.App.4th at pages 1576–1577, 24 Cal.Rptr.2d 177, defendant moved to recuse the entire LADA because an investigator committed misconduct. The trial court granted the motion, explaining that although the prosecutors were blameless and the investigator " 'sandbagged' " the prosecutors, the LADA would try to protect its office. (*Id.* at pp. 1577–1578, 24 Cal.Rptr.2d 177.) The *Merritt* court reversed because all material originally withheld by the investigator had ultimately been provided, and because "effective alternative remedies existed with which to deal with the alleged misconduct other than the ultimate, drastic remedy of recusing the entire [LADA]." (*Id.* at p. 1581, 24 Cal.Rptr.2d 177.)

*1152 *Merritt* is inapposite. As we explain above, the trial court's evidentiary sanctions cured the past misconduct but the trial court, when considering the systemic problems within both the OCDA's and OCSD's office, concluded recusal was necessary to ensure Dekraai would receive a fair penalty phase. Unlike in *Merritt*, the OCDA was not "sandbagged" as evidenced by their either explicit or implicit participation in the OCSD's CI program that **558 continued to produce highly valuable information for use in prosecutions. Based on the entire record, we conclude the court's ruling there was a genuine conflict of interest that posed a grave danger the OCDA could not fairly prosecute the penalty phase was supported by substantial evidence. Thus, the court did not abuse is discretion in granting Dekraai's motion to recuse the entire OCDA's office because recusal of the entire office "[fell] within the permissible range of options set by" section 1424. (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089, 151 Cal.Rptr.3d 526 ["scope of discretion ... resides in particular law being applied"].)

B. Due Process

"As a constitutional matter, ... '[n]either [the California Supreme Court] nor the United States Supreme Court has delineated the limitations due process places on prosecutorial conflicts of interest.' [Citation.] Indeed, '[a]s ... prosecutors [cannot] completely avoid personal influences on their decisions, to constitutionalize the myriad distinctions and judgments involved in identifying those personal connections that require a ... prosecutor's recusal might be unwise, if not impossible. The high court's approach to *judicial*

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conflicts generally leaves that line-drawing process to state disqualification and disciplinary law, with only "the most extreme of cases" being recognized as constitutional violations. [Citation.] [¶] To show a due process violation arising from a *prosecutor's* conflicting interest should be more difficult than from a judge's, for the "rigid requirements" of adjudicative neutrality ... do not apply to prosecutors.' [Citation.]" (*Bryant, supra,* 60 Cal.4th at pp. 373–374, 178 Cal.Rptr.3d 185, 334 P.3d 573.) In other words, "Recusal is justified only when the prosecutor has 'an interest in the case extraneous to [his or her] official function.' [Citation.]" (*Id.* at p. 376, 178 Cal.Rptr.3d 185, 334 P.3d 573)

The OCDA's primary function is to prosecute crimes in Orange County. In that capacity, it must exercise its vast discretion justly and fairly to ensure every defendant is treated fairly, regardless of the severity of the charged offenses. Here, the evidence demonstrated the OCDA had an interest extraneous to its official duties—its loyalty to the Sheriff and its desire to protect the Sheriff at the expense of Dekraai's constitutional and statutory rights. This abdication of the OCDA's fiduciary duty violated Dekraai's due process rights.

*1153 V. Disposition

The order is affirmed.

Fybel, J., and Ikola, J., concurred.

All Citations

5 Cal.App.5th 1110, 210 Cal.Rptr.3d 523, 16 Cal. Daily Op. Serv. 12,362, 2016 Daily Journal D.A.R. 11,620

Footnotes

1 We refer to the elected Orange County District Attorney, Tony Rackauckas, by name. We refer to lawyers in the OCDA's office by name where appropriate or as DA, district attorney, prosecutor, or prosecution team as the context requires.

2 In a request to modify the opinion, the Attorney General states she did not intend to suggest the trial judge prejudged the case.

3 All further statutory references are to the Penal Code, unless otherwise indicated.

4 The record includes no explanation about what the acronym TRED means.

5 At the Orange County jail there was an intake and release center where about 28 deputy sheriffs worked in the classification unit and within that unit about four deputy sheriffs worked in the SHU.

6 The parties stipulated the trial court could consider Wagner's declaration.

7 Masangkay, who had trained SHU deputy sheriffs on the CI index, later testified a literal reading of the OCDA's policy only required an entry in the CI's file if the CI received a benefit.

8 During Wagner's testimony, the trial court ordered the discovery of all notes from each of the interviews. The DA later produced about 130 pages of material.

9 In one of the interviews, Moriel stated he wanted a deal in exchange for information and that his memory about the crimes would depend on whether or not he received a deal.

10 Weeks later, a prosecutor qualified that concession, stating whether there was an actual *Massiah* violation was arguable. And later in supplemental briefing, the same prosecutor said he conceded the *Massiah* motion "for practical reasons" and it was "*not* an admission of wrongdoing."

11 Trimmer testified the decision to move Dekraai to sector 17, cell 1 could have been his, medical staff's, or classification's, but he could not remember. He stated the move was in Dekraai's best medical interest. Trimmer stated he could not move an inmate who was in module L for a non-medical reason without permission from someone in the classification unit.

12 PD Sanders offered the testimony of a number of witnesses from the DA's office and local law enforcement. Much of this testimony concerned cases where Moriel provided information, and some of it concerned the DA's training policies regarding CIs, investigation of Sanders' allegations, and preparation of its responsive papers. Sanders also recalled several witnesses, some a couple times, to clarify testimony or revisit issues raised by other witnesses' testimony. We need not recount all that testimony here.

13 County counsel produced the records in response to Sanders' subpoenas.

14 And it appears OCSD found additional materials since the trial court's second ruling. On June 10, 2016, the Attorney General filed a letter brief stating the OCSD found an additional 1,157 pages of what it referred to as the "Special Handling Log.' "

15 The California Legislature enacted section 1424 in response to *Greer*. (*People v. Eubanks* (1996) 14 Cal.4th 580, 591, 59 Cal.Rptr.2d 200, 927 P.2d 310 (*Eubanks*).)

16 Rackauckas, the Orange County District Attorney, and Sandra Hutchens, the Orange County Sheriff, are the only countywide elected officials in the Orange County criminal justice community.

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ATTACHMENT 19

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FOR IMMEDIATE RELEASE

Thursday, December 15, 2016

Justice Department Opens Investigations of Orange County, California, District Attorney's Office and Sheriff's Department

The Justice Department today opened a civil pattern-or-practice investigation into the Orange County District Attorney's Office and the Orange County Sheriff's Department, pursuant to the Violent Crime Control and Law Enforcement Act of 1994.

The investigation will focus on allegations that the district attorney's office and the sheriff's department systematically used jailhouse informants to elicit incriminating statements from specific inmates who had been charged and were represented by counsel, in violation of the Sixth Amendment. Additionally, the investigation will seek to determine whether the district attorney's office committed systematic violations of defendants' 14th Amendment due process rights under *Brady v. Maryland*, a 1963 Supreme Court case, by failing to disclose promises of leniency that would have substantially undermined the credibility of the informants' trial testimony.

Orange County District Attorney Tony Rackauckas requested that the Justice Department review his office's informant policies and practices and offered unfettered access to documents and personnel.

"A systematic failure to protect the right to counsel and to a fair trial makes criminal proceedings fundamentally unfair and diminishes the public's faith in the integrity of the justice system," said Principal Deputy Assistant Attorney General Vanita Gupta, head of the Civil Rights Division. "Our investigation will examine the facts and evidence to determine whether the district attorney's office and sheriff's department engaged in a pattern or practice of violating these rights. We are grateful to District Attorney Rackauckas for the unrestricted access he has offered to provide."

"We appreciate the District Attorney's invitation to review his office's policies and practices, along with his assurance of unfettered access to documents and personnel in his office," said U.S. Attorney Eileen Decker of the Central District of California. "We are confident that this investigation, and the cooperation being offered by the Orange County District Attorney's Office, will help restore public confidence in the integrity of the Orange County criminal justice system."

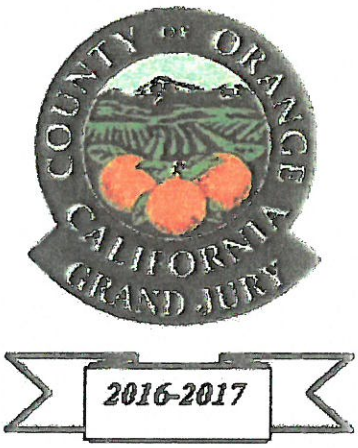
Attorneys from the Civil Rights Division's Special Litigation Section and the U.S. Attorney's Office of the Central District of California are jointly conducting this investigation. For more information on the Civil Rights Division, please visit www.justice.gov/crt. For more information about the U.S. Attorney's Office of the Central District of California, please visit https://www.justice.gov/usao/district/cdca.

Topic(s):
Civil Rights

Component(s):
Civil Rights Division
Civil Rights - Special Litigation Section
USAO - California, Central

ATTACHMENT 20

THE MYTH OF THE ORANGE COUNTY JAILHOUSE INFORMANT PROGRAM



"The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor. Some readers may view this concept with skepticism. Yet this notion lies at the heart of our criminal justice system and is the foundation from which any prosecutor's authority flows"

-Carol Corrigan, Hastings Law Review

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SUMMARY

Significant media coverage, finger pointing, and speculative rhetoric have been published about the alleged jailhouse informant program that is said to exist in the Orange County jails. Due to this persistent media attention, the negative impact on previous convictions, and the continued erosion of confidence, the 2016-2017 Orange County Grand Jury elected to undertake an investigation into the allegations.

A three-pronged approach was employed: a review of the structure and use of jailhouse informants; an investigation into the Orange County District Attorney's operations surrounding the use of in-custody informants; and an investigation into the Orange County Sheriff's Department operations surrounding the use of in-custody informants. In all, the 2016-2017 Orange County Grand Jury spent more than 3,500 man hours, read more than 40,000 pages of documents, listened to dozens of hours of tapes and interviewed more than 150 people in its investigation of the criminal justice system in Orange County.

The Grand Jury found that there have indeed been discovery violations in a small number of cases. Both the Orange County District Attorney and the Orange County Sheriff's Department allowed employees to drift from the core organizational mission of their agencies and this lax supervision has unfortunately resulted in the erosion of trust in the criminal justice system. Both agencies are aware of these shortcomings and have implemented organizational changes to repair the damage.

The Grand Jury found no definitive evidence of a structured jailhouse informant program operating in the Orange County jails. Allegations of intentional motivation by a corrupt district attorney's office and a conspiracy with a corrupt sheriff's department to violate citizen's constitutional rights are unfounded. Disparate facts have been woven together and a combination of conjecture and random events have been juxtaposed to create a tenuous narrative insinuating nefarious intent. That narrative does not stand up to factual validation.

Although the use of in-custody informants does occur, it is generally organic in nature, case specific and does not represent a conspiracy between the Orange County Sheriff's Department and Orange County District Attorney's office.

While the Grand Jury has now finished its investigation, the California Attorney General and the United States Department of Justice have ongoing investigations. Any further explorations of potential widespread, systemic institutional wrongdoing surrounding discovery violations or informant issues in Orange County would be better suited to these investigations; not in the trial court for the largest confessed mass murderer in Orange County history.

REASON FOR THE STUDY

The 2015-2016 Orange County Grand Jury determined that an investigation was warranted to restore confidence in the Orange County justice system, following accusations by the Orange County Public Defender's office that the Orange County District Attorney (OCDA) was engaging in prosecutorial misconduct by withholding discovery material in collusion with the Orange County Sheriff's Department (OCSD). Following in the footsteps of the 1989-1990 Los Angeles Grand Jury, the 2015-2016 Orange County Grand Jury began an investigation into the use of jailhouse informants. Per Penal Code section 936 they requested the California Attorney General provide legal counsel to assist in the investigation. The Attorney General's involvement in issues tangential to the controversy necessitated the hiring of an outside special counsel. This created a delay that prevented the 2015-2016 Grand Jury from completing the investigation.

Due to the persistent media attention, the negative impact on previous convictions, and the continued erosion of confidence, the 2016-2017 Orange County Grand Jury (OCGJ) elected to take up the investigation. The Attorney General retained outside legal counsel for the OCGJ while it performed an exhaustive investigation into the jailhouse informant controversy. A three-pronged approach was employed: (1) a review of the structure and use of jailhouse informants; (2) an investigation into the OCDA's operations surrounding the use of in-custody informants; and (3) an investigation into the OCSD operations surrounding the use of in-custody informants.

To date, there has been significant media coverage, finger pointing, and much speculative rhetoric published, but the actual *facts* surrounding the use of in-custody informants remain unreported. The OCDA commissioned an outside review of informant policies and practices. In June 2016, the OCDA reported to the Orange County Board of Supervisors (Board of Supervisors) that the OCDA had implemented seven of the ten recommendations put forth in the review and that proposals for two other recommendations were forthcoming. However, no outside entity has followed-up to ensure implementation has actually occurred. There has also been no outside review of the Orange County Sheriff's Department operations surrounding the use of jailhouse informants.

It is important to note that the OCGJ is charged with investigating *civil* issues within Orange County government and as such an investigation of *specific* criminal activities and *specific* civil rights violations are outside its charge. However, it is within the jurisdiction of the Civil Grand Jury to investigate the operations of county and city government, including the OCDA's office and OCSD, and other local law enforcement agencies. As allegations have been made that these entities have standard practices wherein they routinely violate defendants' rights in their "quest to win," it falls to the OCGJ to investigate these allegations.

METHOD OF STUDY

The OCGJ began its investigation by reviewing more than 2,000 pages of initial court documents related to the *People v. Dekraai* and *People v. Wozniak* cases where allegations of the existence and use of jailhouse informants in Orange County were first brought to light. In addition, the OCGJ reviewed articles in The *Orange County Register*, *Voice of OC*, *The New York Times*, *OC Weekly* and *The Intercept*; read more than 60 press releases from the OCSD and OCDA; reviewed the 1990 Los Angeles County Grand Jury report; and watched videos of town hall meetings and interviews with the OCDA and the Sheriff. Additionally, the OCGJ studied the 2016 Informant Policies and Practices Evaluation Committee Report (IPPEC report), the 2002-2003 Orange County Grand Jury investigative report of the OCDA's office, the 2006 California Commission on the Fair Administration of Justice report and the 2007 and 2015 Internal Audits of the OCDA's office. This initial document review formed the basis for an interview list and further document requests.

The OCGJ subpoenaed more than 8,000 pages of documents from the OCDA and obtained more than 3,000 pages of documents from the OCSD. These documents contained policy manuals, training materials, performance evaluations, meeting minutes and agendas, contracts with outside evaluators and auditors, organizational charts, and discovery documents in informant cases, as well as hundreds of hours of tape-recorded informant conversations and the OCSD special handling log. The OCGJ interviewed more than 150 individuals including active and retired deputy district attorneys, senior deputy district attorneys, assistant district attorneys, investigators, and executive staff. Interviews were conducted with dozens of OCSD personnel including special handling deputies, classification deputies, training deputies, retired deputies, members of the new Custody Intelligence Unit, and current and retired command staff.

The OCGJ also interviewed nationally recognized legal scholars, public defenders, private criminal defense lawyers, local law enforcement detectives and commanders, judges, members of the Board of Supervisors, as well as authors of various reports and audits to gain additional insight on previous recommendations, the current and legal use of jailhouse informants, and application of relevant case law.

The OCGJ was given access to the Orange County Informant Index (OCII) in the OCDA's office as well as the inmate classification records (aka TRED) used by deputies in the Orange County jails to ascertain what information is stored and available in the databases of these two offices regarding jailhouse informants. The OCGJ toured the Intake Release Center (IRC) multiple times to better understand operations and housing moves of inmates as well as a geographical understanding of Module L and Module J referred to in press accounts as the "snitch tank."

The OCGJ attended hearings in both the *Dekraai* and *Wozniak* cases, and attended multiple training sessions for prosecutors, investigators, and OCSD deputies. Inquiries were made of neighboring district attorney and sheriff's departments about the policies used regarding jailhouse informants to better understand alternative methods of classifying inmates and tracking jailhouse informant activity. Legal Counsel dug into previous Orange County cases where illegal informant use had been alleged, in an attempt to verify the allegations of systemic prosecutorial misconduct. Members of the OCGJ read extensive law review articles to better

understand the constitutional and legal issues under discussion. In all, the OCGJ spent more than 3,500 man hours, read more than 40,000 pages of documents, listened to dozens of hours of tapes, and interviewed more than 150 people in its investigation of the criminal justice system in Orange County.

All the facts contained in this report had a minimum of three corroborating pieces of evidence and the OCGJ believes this investigation has been thorough and comprehensive in its attempts to speak with all sides of the criminal justice system. This investigation was conducted independently from all other OCGJ investigations into the OCDA and OCSD.

It is also important to note that both the OCDA's office and the OCSD command staff were cooperative and transparent with the OCGJ team throughout the investigation.

BACKGROUND AND FACTS

In October 2011, Scott Dekraai walked into a Seal Beach beauty salon and committed the largest mass murder in Orange County history. There was never any doubt about his guilt; multiple witnesses, overwhelming physical evidence and a valid confession clearly implicated Dekraai. This was believed to be a slam-dunk case and the OCDA announced he would seek the death penalty. Hearing and trial dates were set and Dekraai was appointed an assistant public defender. However, in January 2014, after nearly three years of defense delay, his public defender cried prosecutorial misconduct and claimed that Dekraai's civil rights had been violated.

In the defense motions and subsequent court proceedings, it was alleged that the OCDA, OCSD, and many local law enforcement agencies were complicit in not only the use of an illegal informant program, but had actively attempted to hide and deny the existence of the program for more than 30 years. In March 2015, the court, in an unprecedented move, recused the entire OCDA's office from continuing to adjudicate the case and ordered it assigned to the State Attorney General's office. This sent shock waves through Orange County and started a national debate on the integrity of the Orange County justice system. This came at a time when national distrust of the criminal justice system was running high. Multiple incidents of misconduct on the part of law enforcement continue to be reported in the news nightly, and the systems that our society relies on to instill order are, in some cases, proving deeply flawed.

Media accounts of the Orange County informant "scandal," editorials, and exposés abounded including a New York Times op-ed in September 2015, calling for a federal investigation into the "blatant and systemic misconduct" of the OCDA. More than 30 renowned and respected legal scholars concerned about civil rights violations wrote a joint letter in November 2015, urging the United States Department of Justice to investigate the use of the informant program. In December 2015, the Orange County Register ran a series of articles titled "Inside the Snitch Tank" and hosted a public forum in March 2016 that sought to inform the public of the events. The CBS news magazine, *60 Minutes,* broadcast the story to a national audience in May 2017.

From the beginning, the OCDA and the OCSD have maintained that there is no jailhouse informant program, informants are incidental to any investigation, that their use was never hidden, and that the use of informants has been greatly distorted, exaggerated, and misconstrued in the press. In response to the media outcry, the OCSD announced the implementation of remedial improvements to ensure training and prisoner safeguards are in place and the OCDA's office convened a team of outside legal investigators to review prosecutors' use of informants. This outside evaluation team, the Informant Policies & Practices Evaluation Committee (IPPEC), produced a report in January 2016, in which they outlined ten detailed steps the OCDA should take to improve operations that they claimed were factors that contributed to the office culture that has led to the informant scandal.

As the IPPEC team had to rely solely on public documents and voluntary witnesses, they further recommended that "*an entity with document subpoena power and the ability to compel witnesses to be questioned under oath*" conduct an actual investigation into the truth of informant use. They suggested the OCGJ, the California Attorney General, or the United States Department of Justice as potential investigatory entities. The Attorney General's office has opened an investigation into allegations of misconduct of law enforcement individuals in the *Dekraai* case and originally indicated there was no plan to open a wider civil rights investigation. The Civil Rights Division of the Department of Justice eventually announced an investigation into possible inmate civil rights violations in November 2016.

Jailhouse Informant Controversy

Dekraai & Wozniak: The Use of Informants in Orange County

In spite of the fact that Dekraai had confessed, the prosecution was concerned that he would attempt an insanity defense similar to that in the 1977 *Allaway* case. In that case, the previously largest mass murder in Orange County history, Edward Allaway was convicted by a jury but avoided the death penalty and was committed to a mental institution. The OCDA held a press conference hours after the Dekraai shooting stating he would seek the death penalty against Dekraai. The office was concerned that Dekraai would successfully plead insanity and another Orange County mass murderer would escape justice. So, when notified by an OCSD deputy that there was an inmate who reportedly had an in-custody conversation with Dekraai, the prosecution team interviewed the inmate to determine if the conversation would provide evidence to counter an insanity defense. This interview formed the basis for the defense allegations of civil rights' violation in *Dekraai.*

The prosecution, who has steadfastly held that they were unaware of the informant's background during this initial interview, immediately decided they would not use his testimony and setup a secondary legal method for capturing Dekraai's in-custody conversations by recording his conversations with the informant. Conversely, the defense has argued that the OCSD intentionally placed an informant near Dekraai, that prosecutors should have been aware of the informant's background, and any conversations the informant had with Dekraai were at the request of the prosecution team, thus violating his Sixth Amendment right to counsel. The defense further argued that by not turning over all the background on the informant as part of discovery, the prosecution team further violated Dekraai's Fifth Amendment right to due

process. While it's true that the prosecution did not readily provide the requested informant background information to the defense, they argued the defense was not entitled to it because they had no expectation of using the informant's testimony at trial.

Once under court- order to produce the background documents to satisfy discovery rules, the prosecutors provided all the requested documentation in their possession. Unfortunately, many of these records were held by federal law enforcement officials and it took substantially longer than expected for them to be produced. The OCGJ subpoenaed documents from the federal government relevant to this investigation and also experienced a substantial delay in receiving them. The OCDA's complaints of slow actions on the part of the federal government that delayed the production of discovery materials in *Dekraai* appear to be credible.

The *Wozniak* case is different. Daniel Wozniak murdered his neighbor, and then murdered a friend to cover up the original murder. He did not immediately confess to the murder and entered a plea of not guilty, thus requiring the prosecution to prove his guilt in court. Convicting Wozniak was a priority for the OCDA's office and, seeing an opportunity to advance a personal agenda, a prolific informant took the initiative to solicit information from Wozniak while in custody. Given the prior use of incentives provided to this informant, it isn't a stretch of the imagination to believe that he saw in Wozniak another opportunity to ingratiate himself with law enforcement. So he reached out to a special handling deputy who notified the prosecution team that a known informant had information about their case. The prosecution met with the informant and after a single meeting determined that they would not use the informant or any information produced by him. Unlike in *Dekraai*, this prosecution team did not set up any recordings to capture future conversations and informed the defense early in the process that there was an informant who would not be used.

Emboldened by the rulings in *Dekraai*, the defense sought in *Wozniak* to again argue against the death penalty by claiming OCDA misconduct, and filed an extensive brief again alleging a secret informant program that undermined Wozniak's rights. The defense was notified early that there had been an informant, but when information on the informant was requested a year later, the request was denied. Again, the prosecution team argued that because the informant would not directly testify in court and no information presented in court came from the informant, they were not bound by *Brady* or *Rules of Evidence* to release any informant information to the defense. Ultimately, the court, in this case, did not find the defense's argument compelling and Wozniak was found guilty and sentenced to death in September 2016. The OCGJ did not find any persuasive or material evidence that the informant was intentionally placed near Wozniak and the OCDA and OCSD version of events seems credible. The court did not find any violation of Wozniak's rights and no informant was used in his prosecution.

The Legal Use of Jailhouse Informants

The use of jailhouse informants in the criminal justice system is not new and Orange County's use of informants mirrors that of jurisdictions across the nation. The Supreme Court has ruled that the use of informants is a valuable tool in "society's defensive arsenal" (*McCray v. Illinois (1967) 386 U.S. 300, 307).* In *United States v. Dennis (183 F.2d 201, 224 2d Cir. 1950)*, the judge stated, "*Courts have countenanced the use of informers from time immemorial; in cases of*

conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly." Still, the use of jailhouse informants has a record of abuses and in many cases has resulted in wrongful prosecutions. However, the incentives for using jailhouse informant testimony are many – and this is as true for the prosecutor building his case as it is for the informant seeking favorable consideration. Several exposés have been written by local media citing excessive compensation for informants' testimony and the 1989-90 Los Angeles Grand Jury provided an extensive and comprehensive report on the abuses that existed in their county's use of jailhouse informants.

Until 2014, the use of jailhouse informants in Orange County was likely unknown to the general public. Then, the motion presented by the defense in *Dekraai* alleging outrageous government conduct, including an unlawful systemic use of jailhouse informants, led to the unprecedented decision by the court to remove the entire OCDA office from continuing to prosecute the case, and assigned the case to the Attorney General's office, who appealed the decision.[1] This recusal decision created shock waves through the local criminal justice community and ignited a national firestorm of criticism of the OCDA. Articles, exposés, and op-eds appeared, and continue to appear, at regular intervals in the media.

Defining "Jailhouse Informants"

The word informant has been used extensively in court motions and press articles but has different meanings. In the general vernacular an informant is someone who informs; however, within the context of jail communities the term has fundamentally different meanings. It is important to define this term to ensure consistency in use.

Co-defendants and Percipient Witnesses

It is important to clarify that a co-defendant in a case is not an informant. Neither is a percipient witness (an eyewitness) to a crime. Many of the allegations in the *Dekraai* and *Wozniak* briefs refer to co-defendants and percipient witnesses as "informants." This confuses the issue to the benefit of the defense's claims.

Sources of Information (SOI)

Within the jail community there are also varying types of "informing" and it is important to make this distinction clear. The recent informant "scandal" has necessitated, for the better, the OCSD to codify these differences in order to establish stricter control and procedures surrounding jailhouse informants.

It is imperative for jailers to have inside information of jail politics in order to adequately ensure the safety of inmates and the security of the jail. These informants are often merely sources of information (SOI's), who, for their own safety, tip off jailers to potential fights or violations of jail protocols. SOI's have no expectation of compensation for the information provided. So, while they may be "informing" jailers of potential problems within the jail that pose safety or security risks, they are not what a deputy would consider an in-custody informant. There is no formal agreement kept

[1] The Court of Appeals upheld the recusal on November 23, 2016.

between the jailers and an SOI to provide information. Allegations that this is a new category of informant are not accurate as there have always been SOIs within a jail community.

Jailhouse Informants

In jail, information is currency. There are inmates who have information about crimes, both inside and outside of jail, and want to "sell or trade" their information for some form of compensation. This compensation could be as minimal as an extra phone call or a housing change, or it could be more substantial such as a sentence reduction. It is important to recognize that this type of informant will typically approach jailers *unsolicited* in an attempt to make a deal and is not recruited by deputies. In fact, this happens daily in a jail population of several thousand inmates and is encouraged to maintain jail safety. This is not a civil rights violation or an illegal practice. In a community where the prisoners outnumber the guards by nearly 20:1, it is a necessity. This type of informant often does not start with any kind of a formal agreement with jailers, is not initially an agent of or directed by jailers, and elicits information from fellow inmates of their own accord then seeks out deputies to "sell or trade" the information.

If the information provided to jailers by this type of informant involves an in-custody crime or violation, it is acted on at the custodial level by deputies who have been assigned to investigate in-custody crimes. Due to the recent controversy, and the OCSD's desire to use best practices, deputies will now create a formal agreement that is signed with the OCSD documenting the informant and the agreement of compensation within the jail. The cooperation of the OCDA's office is needed if any reduction in sentencing is offered.

If the information provided involves a crime that has occurred or will occur outside the jail, the information is passed to the appropriate local law enforcement (LLE) agency to act upon. The custodial deputies within the jail act as facilitators of communication between the informant and the police agency that is handling the informant and are ultimately not responsible for any part of the criminal investigation subsequent to the informant's disclosures. It is the responsibility of LLE to vet the information for accuracy and usefulness. If the information proves useful, LLE could choose to enter into an agreement with the informant. It is important to note that a prosecutor may not know of the informant's existence until local law enforcement decides to use information provided by the informant to build their case, enters into an agreement, and then notifies the OCDA.

Mercenary Informants

Mercenary informants, commonly referred to as "snitches," are a specific type of informant that has been widely reported to exist *en masse* in the Orange County jails. This type of informant signs an agreement with law enforcement to act as an agent to gather information from a suspected criminal and is promised payment either in cash, or reduced sentencing. Mercenary informants can be solicited by law enforcement or can approach law enforcement of their own accord with an offer to cooperate. This type of informant has a specific target or case that they work with law enforcement to solve and

have a signed agreement spelling out their duties as an agent of law enforcement. The OCGJ was unable to identify any of this type of informant currently housed in any Orange County jail.

While the trial court in *Dekraai* has stated that the question of the existence of a "jailhouse informant program has left the station," the OCGJ disagrees. The mere existence of informants in the jail is not conclusively indicative of a program. The OCGJ found no direct, material evidence of an organized, recognized 'program' of jailhouse informants. A program requires certain elements to be in place. The OCGJ did not find a strategic plan or schedule for jailhouse informants. The OCGJ found no formal training, no dedicated budget, no codified job descriptions, no calendaring of events, no advance scheduling of activities nor any approved recruitment material of OCSD personnel for a jailhouse informant program. There are no formal discussions with inmates during or after booking to place inmates into an organized, structured jailhouse informant program, such as those that exist for mental health, language classes, or legal assistance. No outside agency supplies dedicated personnel or resources supporting jailhouse informants, running jailhouse informants, supervising jailhouse informants or supplying jailhouse informants as seen in other program offerings within the jail communities. In short, the OCSD does not have a stable of informants that they routinely disperse throughout the jail to gather evidence on crimes either legally or illegally.

This is not to say that the OCSD is not using or has not used jailhouse informants. However, this use is almost always organic in nature, narrowly focused, and primarily to ensure the safety and security of the jails, and not to investigate crimes. A handful of special handling deputies drifted from their custodial duties, over a period of years, into investigating crimes. The lack of proper supervision and appropriate policies allowed this to continue longer than it should have. This drift does not constitute an OCSD jailhouse informant program, but rather the work of a few rogue deputies who got carried away with efforts to be crime-fighters. The negative effect was enhanced by inadequate supervision of these activities, as well as the deputies' unawareness of consequences of their actions and a lack of knowledge for the scope and breadth of their discovery obligations as part of the prosecutorial team.

Abuses of the Law: Massiah and Brady

The motion to dismiss filed in *Dekraai* alleged that an informant was used by the prosecution to obtain evidence against Dekraai in violation of his Sixth Amendment rights and that information on this informant was not disclosed to the defense team as required by law. On the heels of the *Dekraai* motion, the defense filed a similar motion in *Wozniak*. This motion also outlined the use of jailhouse informants in several Orange County capital cases extending back to the 1980's. This fueled more speculation and confusion and has resulted in some pending cases being dropped or charges being reduced.[2]

The United States criminal justice system is predicated on the basic principle that an individual is innocent until proven guilty. The state must make its case to a jury of citizens who must then believe beyond a reasonable doubt that the defendant has committed the crime of which they are accused. The state has overwhelming resources at its disposal for prosecuting and the

[2] *People v. Ortiz, People v. Palacios, People v. Vega, People v. Rodriguez*

constitution has built protections for the individual into the very fabric of the nation. These are enshrined in the Bill of Rights which includes the Fifth and Sixth Amendments, detailed through case law such as *Brady v. Maryland* and *Massiah v. United States.*

The Fifth Amendment protects the individual from self-incrimination and guarantees due process. In *Brady,* the Supreme Court established the prosecution has an affirmative duty to ensure due process and to disclose any evidence that could exonerate or mitigate the case against an individual. The Sixth Amendment confers the right of an individual to legal counsel and to confront witnesses. A violation of either of these legal principles would constitute a violation of an individual's civil rights. *Massiah* clearly outlined when an accused's Sixth Amendment right is triggered. This occurs at the moment an individual is charged with a crime. At that point the state must work to prove its case BUT may not elicit statements from the accused about themselves or the crime of which they are accused without the presence of legal counsel. The law in California is very clear: The State may not attempt to elicit evidence from an accused once they are charged with a crime without the presence of legal counsel. This includes the use of agents of the State, i.e., informants. The State may NOT place an informant with an accused individual *after* they have been arraigned, with the intention of *eliciting* information about the crime for which they have been charged. However, they may place an informant with an incarcerated defendant to elicit information about a *different, non-charged* crime. And, to ensure due process, any information that is obtained from an informant about this other crime, along with information about the informant who helped to obtain it, should be disclosed to the defense if new charges are brought.

The OCGJ heard several prosecutors claim this is an evolving area of the law. Most legal scholars and judges believe there is a "bright line" when it comes to what qualifies as *Brady* material that should be handed over to the defense. Case law has repeatedly sought to clarify the spirit enshrined in the Fifth and Sixth Amendments, not change it. However, it does appear that what qualifies as *Brady* material is an increasingly expanding list of potential evidence that requires continual training to ensure all prosecutors are educated on current expectations. The new California law AB1909, in part inspired by *Dekraai*, has upped the ante on withholding discovery and violating *Brady* obligations. This law now makes violations a felony, sending a strong message that justice is more important than a conviction.

Perkins Operations

In *Illinois v. Perkins (496 US 292,1990)*, the U.S. Supreme Court ruled in keeping with *Massiah* that law enforcement officers and their agents could legally question a suspect in jail without notifying them of any constitutional rights as long as they were not interrogating the suspect about the crime with which they were charged. An undercover operation performed in a jail environment under these conditions is now referred to as a *Perkins* operation. If a person of interest in a cold case is arrested on an unrelated charge, a mercenary informant, as an agent of law enforcement, may be used to elicit incriminating statements from the suspect. Local police agencies have run *Perkins* operations to specifically work cold cases (cases which have not been solved and are generally several years old). In the majority of jailhouse informant cases the OCGJ inquired into, OCSD personnel merely facilitated placement and movement for *Perkins* operations but were not actively involved in investigating the crimes in question.

Federal Perkins Operations: Black Flag and Smokin' Aces

The heightened influence of prison gangs in California is increasingly dangerous and Orange County is no exception. In the early 2000's, one of the most prolific prison gangs with national reach, the Mexican Mafia, had a presence in Orange County that extended beyond the cells of the County jail and into the streets. A local "leader" ran gang activities including narcotics sales, on behalf of a national gang leader both inside and outside of jail. Profits from local narcotics sales were taxed and sent to the national leader. A fight for leadership in 2009 led to several assaults and attempted murders of incarcerated gang members and created serious safety issues in the Orange County jails.

A Federal task force, with assistance from the OCSD, Santa Ana Police Department and the OCDA, was formed to investigate and break-up gang influence in Orange County. As many members of the Mexican Mafia were locally incarcerated, the investigation extended into Orange County jails. This investigation had a national focus with the code name of Operation Black Flag where the Department of Justice filed cases, as well as a local focus that went by the code name Operation Smokin' Aces where the OCDA filed cases.

In order to infiltrate the prison gang, informants were necessary. In 2009, two prominent Mexican Mafia members were incarcerated in the Orange County jails and agreed to work as informants participating in *Perkins* operations for the federal task force in exchange for lighter sentences. The OCGJ wants to particularly note that these federal informant operations were not under the control and direction of the OCDA or LLE. The informants signed written contracts with the federal government and provided copious notes to their handlers on gang activity both within and outside the jails. These notes later provided the fodder for the *Dekraai* and *Wozniak* defense motions.

Operations Black Flag and Smokin' Aces concluded in July 2011 with indictments for more than 100 known gang members. One of the informants was housed in the Intake/Release Center (IRC) for his safety, awaiting relocation as part of his deal when, in October 2011, Dekraai committed his crime and was placed in the IRC on suicide watch, awaiting arraignment. There has been testimony surrounding the placement of Dekraai next to a prolific informant, but both the court and the OCGJ have found no direct evidence that this placement was more than coincidental. There are only a small number of cells for high profile or special custody inmates, and both the informant and Dekraai would have needed to be placed in protective custody. The placement of Dekraai was reasonable within this context. There is no direct evidence of a conspiracy to place an informant near Dekraai prior to his first conversation with an informant. Months of testimony and review of jail records have been unable to substantiate the claim of intentional placement and the OCGJ did not uncover any additional information that would definitively demonstrate otherwise. In fact, all the evidence and testimony the OCGJ reviewed points squarely to a coincidental placement of Dekraai next to a prolific informant who personally saw an opportunity to expand his portfolio with law enforcement and provide evidence on a high profile inmate.

Office of the Orange County District Attorney

As of 2015, there had been many press reports about alleged errors and possible misconduct by members of the OCDA's office related to in-custody informants. In response to the continuing questions and requests to revisit several cases, the OCDA contracted for an operational audit. The audit resulted in several recommendations surrounding operational structure and personnel training. It did not, nor was it intended to, address the specific use of jailhouse informants. Not satisfied with an internal audit, the OCDA hired an independent, external committee to thoroughly investigate and examine the policies and practices surrounding the use of jailhouse informants. The OCDA has maintained from the beginning that the use of in-custody informants is few and far between and no systemic attempt to hide their use was ever made. In fact, many inside the OCDA's office repeatedly stated to the OCGJ that there is no informant "program" and they are more than reluctant to use jailhouse informants in prosecuting cases.

The Informant Policies & Practices Evaluation Committee (IPPEC)

After a six-month evaluation, the Informant Policies & Practices Evaluation Committee (IPPEC) issued its report in December 2015. The report outlined several deficiencies in the OCDA's office which the authors believed led to an office culture that allowed for a careless use of informants. The committee reported that they interviewed over 75 individuals and reviewed over 2,000 pages of legal briefs and internal OCDA training materials. They proposed ten in-depth recommendations for policy, training, and personnel changes to be implemented to ensure the proper and legal use of jailhouse informants by the OCDA's office. However, little of the report dealt directly with the procedures and protocols surrounding the use of informants. Instead the report focused on issues of culture and concluded rather tenuously that this led, albeit indirectly, to discovery abuses and recommended an outside monitor to ensure implementation.

The OCGJ found that the interviews conducted by the IPPEC were primarily limited to lower level staff and, in fact, only one of the executive staff was interviewed. Many of the recommendations of the IPPEC were already being implemented prior to their investigation and including them as unique recommendations does a disservice to the work the OCDA had already implemented, particularly in the training unit. In June 2016, the OCDA reported that seven of the ten recommendations had been implemented, two were forthcoming, and one was declined. In August 2016, the OCDA requested, per the IPPEC recommendation, that the Board of Supervisors approve a $300,000 two-year contract for outside legal assistance to the OCDA to consult and advise on the implementation of the IPPEC recommendations.

The IPPEC report found that less than 1% of cases involved the use of jailhouse informants, a number they determined after surveying the entire prosecutorial staff. This appears to be an accurate number. The OCGJ interviewed dozens of prosecutors, but only one prosecutor stated being comfortable using jailhouse informants, and then only to solve cold cases. The OCGJ uncovered no systemic or wide-spread use of jailhouse informants by the OCDA, nor any intentional attempts to violate defendant's rights through the use of jailhouse informants.

The OCGJ did find instances where there were discovery failures in a few cases where informants were used. The IPPEC characterized these types of failures as a result of a "win-at-

all-costs" mentality. However, the OCGJ spoke with many credible witnesses who disputed the existence of such a mentality. Instead, the OCGJ found these discovery errors to generally be the result of high caseloads, communication breakdowns with outside LLE agencies, and an inexcusable inattention to discovery issues by a few individuals. This handful of individuals showed a lack of understanding of the critical importance of strict adherence to constitutional, statutory, and ethical standards even in the face of strong evidence of guilt in the most serious crimes. These errors do not indicate a system of abuse, but rather a lack of supervision and laziness in the practice of law.

Lack of Leadership

The IPPEC report cited a clear lack of leadership, oversight, supervision, and training in the OCDA's office. This should have come as no surprise as a 2002 Orange County Grand Jury report also found a lack of leadership in the OCDA's office. The 2002 recommendations were disregarded and 14 years later, the IPPEC Report concluded that the culture had not changed. After nearly 100 interviews with OCDA personnel, it became clear to the OCGJ that lack of leadership persists. The structure of the OCDA's office, its vertical reporting chains that create silos operating independently within the organization and its recent lack of meaningful training and oversight, combine to create an office where abuses are seldom caught and prosecutors have almost unlimited autonomy to prosecute cases as they deem fit. In fact, during interviews for this investigation the OCGJ heard statements that indicated some prosecutors felt they did not need anyone second guessing their case or that they would quit if someone tried to tell them how to run a case.

Individuals can become emotionally invested in a case and lose sight of the greater job of upholding the system of fairness required for our justice system to function properly. Without management oversight, this human tendency cannot be countered. In the case of the recent informant controversy, it is clear to the OCGJ that had individuals charged with supervising prosecutors been more aware of how those prosecutors were conducting business, their high caseload, and shoddy record-keeping habits, this entire episode could have been avoided.

The OCGJ also found there is no standardized process for supervisory promotions. The OCGJ is not impugning the promotion of any of the personnel currently in these roles. Rather the OCGJ wishes to make the point that a lack of documented standards and promotional vetting exposes the OCDA to criticism of promoting primarily for successful interpersonal relations rather than job competence. The requisite management and supervisory skills necessary to supervise a team of individuals are not related or equivalent to one's legal skills or acumen. Currently, managers are not required to have training in management or supervisorial skills. Promoting an individual because they are a good lawyer is not adequate criteria for an administrative role and can lead to sloppy management and autonomy that runs amok.

Training

"The court...finds these prosecutorial 'errors,' as they were characterized by counsel during argument, constitute significant negligence and that they therefore rise to the level of misconduct....The court further finds that the misconduct was the product of woefully inadequate legal training along with a lack of professional energy and strategic imagination." (People v. Dekraai, Ruling, August 4, 2014, p.8*)*

The OCGJ was provided nearly 7,000 pages of training documentation including content and attendance lists. A review of this material confirmed the serious deficiencies in past training that had been called out in previous operational audits of the OCDA. The OCGJ heard from many witnesses that from 2009 to 2015 training was not a priority, was regularly dismissed as merely credit for mandatory continuing legal education, and the lawyers assigned to teach too often had other full-time responsibilities.

In early 2013, a newly appointed training coordinator developed significant and comprehensive recommendations for office-wide training in multiple venues, but it was not until two years later that the OCDA began to implement the internal and external recommendations for increased training and created an internal training unit. Staffed by two full-time lawyers devoted to training, the unit is augmented by the twelve appellate lawyers who add insights to the trial performance of the OCDA based upon their evaluation of transcripts and perform training duties as needed.

The training unit has made a good beginning and has provided more than 460 training sessions since its inception. This includes more than 40 one-to-two hour training sessions on *Brady, Massiah, Perkins* and the use of jailhouse informants presented by senior lawyers in the OCDA's office to personnel in the many LLE agencies. They have also presented more extensive programs at the OCSD Sheriff's Regional Training Academy to all new recruits.

While the implementation of this training is to be applauded, there does not appear to be a clear metric that establishes the effectiveness of the current training program in ensuring content is retained and implemented. So far, all the training offered is provided through a passive, one-way delivery of information. The question of whether the newly implemented training program can shift the culture remains a concern. The OCGJ heard from some of the more senior prosecutors that they thought the training had the law "wrong." There did not appear to be any intention on the part of these prosecutors to change the way they interpreted *Brady, Massiah,* or *Perkins*.

Additionally, training on legal content should be standard in any law office. Its absence for a number of years is troubling and speaks to a lack of priorities for keeping abreast of legal changes. Organizations need to keep current in their respective field and every agency should share the same priority for trained leadership.

The OCDA revised the procedures for using informants and produced a new Informant Policy Manual that was approved and released in August 2016. Unfortunately, when asked about it in OCGJ interviews as late as November 2016, many prosecutors told the OCGJ they had not read or even been aware the new manual was available. The revised manual explains the OCDA's

amended informant record-keeping system and emphasizes the need to report timely and accurate information, as well as the consequences for failing to report the necessary information. The lack of awareness about changes in informant policy is an example of the poor communication, leadership deficiencies, and current training gaps in the OCDA's office.

Accountability

The IPPEC recommended the OCDA form a Confidential Informant Review Committee (CIRC) to review any use of jailhouse informants in the prosecution of cases. Prior to the IPPEC evaluation and recommendation, the OCDA had already formed this committee and the OCGJ subpoenaed all the policy, agenda, and supporting documents related to the CIRC. It appears that very few requests are being made to use jailhouse informants and this seems to validate other information that indicates the current use is very low.

The IPPEC also recommended the formation of a Conviction Integrity Unit (CIU) in the OCDA's office to review post-conviction claims of innocence where an informant may have been used. The OCDA responded that they already operate several conviction integrity reviews in the office and would be establishing another for post-conviction claims of innocence not covered by the established review units. After the allegations in *Dekraai* and the disclosure of the Special Handling Deputy Log (Log), new concerns arose about the integrity of cases where an informant may have been used but not disclosed to the defense.

Following disclosure of the Log, the OCDA assigned four full time lawyers to review the 1100 plus pages of notes for potential discovery issues specifically surrounding informants. The group identified more than 3,000 individuals named in the Log, categorized them based on frequency and associations, and determined that approximately 10% should be reviewed for issues surrounding the possible use of an informant. The OCGJ reviewed several of these identified cases in depth and in a large majority of cases, initiation of inmate contact for the purposes of gathering information was made by outside police agencies and not the OCDA or the OCSD. In very few instances is there any reference to OCDA contact. The OCGJ is satisfied that the OCDA is comprehensively reviewing all Log entries for potential discovery issues and informing defense counsel of any additional discovery that may result. To date, the OCDA has found very few that require a full conviction integrity review.

Orange County Informant Index (OCII)

Voluntary records on confidential informants have been maintained by the OCDA since the 1970s, first on index cards and later converted to a computer database which is now called the Orange County Informant Index (OCII). This informant database includes the name of the informant, the name of the case, case number, the date and synopsis of any testimony, and any consideration given. The OCII system was created to establish a record of the history of use, credibility, and reliability issues surrounding the use of potential confidential informants in narcotics cases and has grown to incorporate informants in general. Due to the possible incentives to inform, the motivation of an informant is always suspect and each informant must be vetted and their credibility challenged. If an informant is found to be unreliable, this should be noted in the OCII, however there is no current way to enforce this.

An informant's entry in the OCII is predicated on LLE notifying the OCDA that they relied on an informant when building their case. This notification is voluntary and LLE is often reluctant to disclose information on a confidential informant. However, courts have established that any prior history of informing qualifies as *Brady* material, thus records need to be kept. In a case where the prosecution intends to use informant testimony, the defense must be notified if a history of informing exists. Depending upon the sensitivity of the inmate's identity, some information cannot be shared in open court and must be handled either in a closed court evidentiary hearing or *in camera* (a hearing held before the judge in private chambers). The final decision to disclose informant information to the defense rests with the court. Unfortunately, there have been incidents where individual prosecutors themselves made the call, often using flawed legal reasoning. Due to the sensitive information contained in the OCII, the file is kept secure and access is restricted to only three individuals in the OCDA's office. Currently all witnesses listed in the OCDA case management system (CMS) are screened through the OCII.

The value of the OCII database is evident when considering the extent of discovery requirements and the affirmative effort required to disclose the full history on an informant linked to a case. However, the voluntary nature of providing information to the OCDA for entry into the OCII is a weakness in the effectiveness of the OCII as a complete repository of informant information. In one of the cases reviewed by the OCGJ it was noted that an informant, who worked on a case in 2009, had not been included in the OCII. It is not known how many other times this has occurred. There has been a concerted effort by the OCDA to train prosecutors on the use and value of the OCII post *Dekraai*. OCDA staff has conducted 30 training sessions on the importance and use of the OCII for new prosecutors, LLE, and OCSD personnel since 2014.

Technology

The OCGJ received overwhelming input that the current case management system (CMS) used by the OCDA is inadequate; it is only moderately useful and does not enable any reliable search of the database. However, fixing this problem has not been a top priority for budget allocations. The exponential increase of digital data from body cams, cell phone videos, and other sources makes the need for an updated system more urgent. It is the responsibility of the OCDA to meet all discovery obligations. Without proper accounting and tracking of discovery material, prosecutors cannot be certain they have fulfilled their lawful discovery obligations. Failures to meet these obligations are likely to continue to occur without new and upgraded data search and retention capabilities. In the absence of a modern capable system many prosecutors have felt the necessity to create their own system of discovery notification and records retention. This invariably results in differing discovery outcomes that are a potential liability to the county.

Office of the Sheriff-Coroner

The OCSD has also been accused of colluding on a jailhouse informant "program." However, like the OCDA, the OCSD has steadfastly denied the existence of an informant program. Much has been made in court filings about training materials within the OCSD that reference "developing" informants and how to use the information. This is portrayed as proof of an informant program. The OCGJ is confident there is no program of jailhouse informant use for

criminal investigation in the Orange County jails. The OCGJ has found that there is a policy and practice of in-custody informant use for facility, staff, and inmate safety and that the referenced training materials related to this subject matter. There were a limited number of incidents in the recent past where OCSD personnel sought to use mercenary informants to assist LLE and these attempts were not handled properly. The OCSD has now implemented new policy to ensure these errors do not re-occur.

Lack of Supervision

As within the OCDA's office, the OCSD suffered from weak supervision of key personnel that created an environment where individuals were allowed to drift from their core mission. Without proper training or legal knowledge, these custodial deputies engaged in activities that had the potential to jeopardize cases. The OCSD requires all new deputies to be assigned to the jails for a period of time before they go to a patrol unit. Promotion to sergeant requires another assignment in the jails as a supervisor. Many sergeants merely bide their time until they can be reassigned to the field. Individuals who wish to remain assigned to the jails often have more institutional knowledge of jail protocol and politics than their newly appointed supervisors. This promotion assignment process allowed special handling deputies to operate with more knowledge than their immediate supervisors and some of them lost sight of their primary function. Without proper supervision, these custodial deputies crossed into the realm of investigations on behalf of LLE and a federal task force, although the OCGJ found no evidence that their intent was to violate or deny inmates of their rights.

TRED

An inmate classification system is a critical element of smooth and safe jail operations. The safety of jail staff and inmates is of paramount concern, and the proper classification and housing of inmates is a vital aspect of maintaining order. Every jail facility has a classification system. The inmate classification methodology within the Orange County jail gained the nickname TRED many years ago. TRED is a record of inmate movement and serves as a classification database. It is a methodology for classifying and housing an inmate in accordance with various criteria, a partial listing of which includes gang affiliation, race, the nature of the offense, prior incarceration history, political and religious beliefs, and sexual orientation.

Typically an inmate is interviewed by a classification deputy upon arrival at the county jail. Based on the information gathered at this interview, the inmate is assigned appropriate housing within the jail. Informally this is characterized as housing "like with like." A classification record is thus created for each inmate as he is processed. For a returning inmate, the previously established record is updated during this intake processing. An inmate's classification record or "TRED" is updated throughout his incarceration. Changes in housing status, disciplinary incidents, and sometimes informant activity will trigger an entry onto an inmate's TRED.

This inmate classification database is a repository of highly sensitive information, yet of limited value to any prosecution as the data contained occurs after the crime for which an inmate is arrested. Access to TRED records is generally provided only under subpoena in most counties and few would question the lengths to which this data is protected or the strictly limited access

that is imposed. The OCSD asserts privilege to protect inmates and jail staff and the judicial system alone retains the authority to determine what and when information can be disclosed. In the *Dekraai* motions, the Public Defender's Office has alleged that TRED records are an organized system of informant documentation modified regularly by OCSD personnel. It is further alleged that these records were regularly kept from the Public Defender's Office in spite of defendant's discovery rights, as a further attempt by the OCSD to collude with the OCDA in a conspiracy to violate defendant rights.

After extensive documentation review and interviews, the OCGJ has concluded that the TRED system is not only similar to systems used throughout all jails in California, but is a necessary system to record the movement and classification of all inmates for the protection of the inmates, the facility, and OCSD personnel. TRED was never designed to be, and is not, a repository of information about an inmate's informant activity.

Special Handling Deputies and the Log

Prior to 2016, special handling deputies were used to coordinate informants and informant information. Much has been made of the role of special handling deputies and their Logs. Special handling deputies were a subset of classification deputies whose original role was to keep jail personnel informed about jail politics and gang interactions as well as facilitating safe movement of inmates within the jail.

The OCSD special handling deputies assigned to Operation Black Flag were managed and directed by federal agents during the operation with respect to the federally contracted informants. Some of these deputies, who received special schedule and uniform considerations, appear to have developed a perception that they had a role as investigators in addition to their responsibilities as custodial deputies within the Orange County jails. It appears to the OCGJ that this shift in perceived duties was reinforced by LLE agencies who would frequently call to inquire about various inmates and request assistance from special handling deputies to help with their active cases, cold-case development, and/or *Perkins* Operations.

The OCSD provided the OCGJ with an unredacted copy of the Log. After review, the OCGJ concluded that the Log was primarily a shift record initiated by special handling deputies to document daily events and occurrences in order to facilitate the exchange of information during shift changes. There is no doubt that comments in the Log were often juvenile, ethnically insensitive, and embarrassing to the OCSD. The Log, however, was not created as a repository of information on informants and their testimony or the purposed movement of informants within the facility.

The OCGJ was able to verify that in many incidences where notations in the Log represented movement, pertinent information had also been noted in TRED. The OCGJ did not find any occasions where the Log reflected notes on the suppression of discovery material or any notation to reflect conspiratorial coordination with the OCDA. Following disclosure in court that the Log existed, the OCSD then directed a review take place to learn of any other unauthorized records within the OCSD.

This off-the-books journal kept by the special handling deputies, unknown to both OCSD command staff and the OCDA's office, further confused the discovery issues in *Dekraai* and angered the court. The value-add from the discovery of this Log to the defense case for misconduct has been greatly exaggerated. The contents of this Log shed little light on Dekraai's movements while in-custody. It would seem that it was the failure to disclose the Log, rather than the actual contents, that created much of the angst.

Proactive OCSD Response to Controversy

The IPPEC only evaluated the OCDA office but in response to the IPPEC report the OCSD also implemented training and structural changes. These included tighter controls on the reporting and movement of all types of informants in the jails; increased training on *Brady* and *Massiah* requirements to ensure that deputies are aware of the constitutional issues surrounding the use of informants; and the hiring of a constitutional policing advisor whose role is to ensure policy and operations meet all legal requirements. The OCSD also conducted an initial internal review of the department resulting in limited disciplinary actions and some reassignments.

In response to the internal review of these issues, the OCSD has implemented policy changes to define and strengthen the procedures to be followed whenever LLE agencies request the services of OCSD jail personnel in an investigation. In particular, strict reporting procedures and approvals are now in place for any use of a mercenary informant or when directing a *Perkins* operation. This policy now requires a written request from the command staff of the LLE agency. Additionally, the request will be reviewed by OCSD command staff to verify the appropriate use of informants, including that they are properly registered, their signed informant contracts are in order, and detailed record keeping of all activities and conversations surrounding any informant are properly maintained. Direct involvement of the OCDA's office is also now required when any information is pertinent to an existing case or could rise to the possibility of additional charges against an inmate. The OCGJ was advised that since this policy was implemented in 2016 there have been no further requests for this support.

Following an internal review, the OCSD has discontinued the special handling deputies class and created the Custody Intelligence Unit. These personnel are now investigators rather than deputies and the unit reports directly to command staff within the OCSD. They retain the responsibility to manage SOI and jailhouse informant information for the safety of inmates and OCSD personnel and to ensure all discovery material is properly recorded and maintained.

The OCGJ notes that a complete internal investigation of OCSD performance or policy violation issues raised during this controversy is on hold until outside investigations of possible criminal charges and civil rights violations are completed. Investigations by the OCSD's Internal Affairs Bureau have been initiated, but cannot be completed pending the outcome of these outside investigations. Numerous personnel have been reassigned and mandatory training for all current and incoming personnel has been implemented in areas of *Brady* and evidence discovery. This is in accordance with Internal Affairs Bureau policy as well as the Police Officers Bill of Rights.

Local Law Enforcement: *Perkins* Operations & the Anaheim Police Department

The OCGJ found that the architects of most *Perkins* operations run in Orange County jails were NOT OCSD personnel but other LLE Agencies. Orange County has 25 local policing agencies, including two University Departments. Several of the departments have their own jail or detention center, operating independently of the OCSD. As the primary investigative agency for a criminal case in Orange County, the particular LLE has initial responsibility for collecting and cataloging evidence. Prosecutors urge LLE detectives to consult with them in the early stages of a criminal investigation, to ensure all discoverable evidence is accounted for and communicated appropriately.

Starting in 2011, the Anaheim Police Department (APD) conducted, or was involved in, dozens of *Perkins* operations, resulting in more than 30 gang-related cases referred to the OCDA for criminal prosecution. All of these cases were developed using two confidential informants who had conducted more than 100 *Perkins* operations in Los Angeles County. Much has been made of these cases in the press as proof of an OCDA informant program. Regrettably, prosecutors assigned to some of these cases learned for the first time at a preliminary hearing that APD did not share all the information about these informants or that the informants had financial contracts with APD. This left the county vulnerable to accusations of civil rights violations and collusion in the prosecution of these cases. A search of the OCII indicated that information about these informants had not been provided to the OCDA, so the failure to turn over pertinent information about the informants was not intentional on the part of the prosecutor.

This highlights a weakness in the prosecutorial team that can set a challenging obligation for the OCDA, who bears the affirmative burden for ensuring justice is done. In order for discovery to be properly gathered and provided to the defense in the statutorily required manner, it is essential that LLE agencies understand their obligations to share information about informants and informant operations with the OCDA. Effective training and communication are central to this coordination. The OCDA has made an excellent beginning providing more than 40 training sessions on *Brady*, and the proper use of *Perkins* operations and jailhouse informants, to sworn personnel in nearly all of the LLE agencies in Orange County. The OCDA further intends to provide follow-up training to each department at least once a year.

The issues uncovered in the APD cases serve as an urgent warning about the lack of uniformity in gathering, cataloging, maintaining, and turning over discovery throughout the Orange County judicial system. For the past two years the OCDA has dedicated a full-time prosecutor to uncovering and sharing all pertinent discovery material in these cases and the OCGJ has been advised that efforts are underway to implement a standardized record keeping system for discovery.

CONCLUSION

There have been discovery violations in a small number of cases, over a period of years, due to a number of factors that are indicative of what happens to all organizations that are not diligent in maintaining awareness of their core mission. Both the OCDA and the OCSD allowed

individuals to drift from the core organizational mission and that laxness in supervision has had the unfortunate result of an erosion of trust in the criminal justice system. Both agencies are now aware of this shortcoming and have implemented organizational changes to repair the damage.

Allegations of a corrupt OCDA's office conspiring with the OCSD's office to violate citizen's constitutional rights are unfounded. Disparate facts have been woven together and a combination of conjecture and random events have been juxtaposed to create a tenuous narrative insinuating nefarious intent. That narrative does not stand up to factual validation.

The OCGJ found no concerted effort by personnel in either the OCDA or the OCSD offices to circumvent the law in order to ensure successful prosecutions. The vast majority of prosecutors we spoke with are ethical, hard-working individuals who have not, and will not, file a case if they do not believe in the guilt of the accused. In an office where more than 15,000 felony cases are filed annually and nearly 97% are settled before they get to trial, allegations of wide-spread jailhouse informant use are not factually supported.

The current search to get to the bottom of potential discovery violations in the *Dekraai* case has devolved into a witch-hunt for agency corruption; a search that after 5 years and more than 40,000 pages of court documents remains fruitless. Previous convictions have been questioned and new trials sought for individuals who claim they may have benefitted from the right to know about the use of an informant in their case. This unfortunate episode has eroded trust in the Orange County criminal justice system, not only within the Orange County legal community, but among the public at large. However, the OCGJ found no evidence to support claims of a systemic, widespread informant program, and reports of such have been exaggerated in the press.

The violations uncovered in *Dekraai* have remedies under existing law. The remedy for evidence obtained illegally in violation of *Massiah*, such as the taped conversation between Dekraai and a jailhouse informant, is the rejection of that evidence into the trial. This has been done: The tape has been thrown out and the jury will never hear it. The remedy for prosecutorial misconduct, such as that due to egregious discovery violations, is the recusal of the prosecutor. This has also been done; the OCDA has been recused and is no longer prosecuting the penalty phase of the case. While the OCGJ has now finished its investigation, the California Attorney General and the United States Department of Justice have ongoing investigations. Any further investigation of potential widespread, systemic institutional wrongdoing surrounding discovery or informant issues in Orange County would be far more appropriately addressed by these agencies and not by the trial court for the largest confessed mass murderer in Orange County history.

FINDINGS

In accordance with California Penal Code Sections 933 and 933.05, the 2016-2017 Grand Jury requires (or, as noted, requests) responses from each agency affected by the findings presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled, "*The Myth of the Orange County Jailhouse Informant Program,*" in Orange County, the Orange County Grand Jury has arrived at thirteen principal findings, as follows:

F.1. The myriad definitions and nuances of what constitutes an "informant" have caused confusion and may have contributed to the current controversy and unnecessary erosion of trust.

F.2. There is no structured jailhouse informant program operating in the Orange County Jails. The existence of informants in the Orange County jails does not constitute a program. The use of an in-custody informant is generally organic in nature, and narrowly focused.

F.3. Violations in discovery and/or *Brady* disclosure in the *Dekraai* case are limited to the actions of a few members of the OCDA and a few OCSD personnel. This does not represent a conspiracy between the OCSD and OCDA.

F.4. The OCII is an incomplete repository of informant information and history due to the voluntary discretion of LLE Agencies to contribute to it.

F.5. LLE Agencies are, and continue to be, a weak link on the prosecution team. While OCDA has no authority over these agencies, they can certainly use the bully pulpit to raise awareness of the problem and encourage participation and commitment to proper legal standards.

F.6. The elevation of personnel in the OCDA to supervisory positions is not the result of standardized, objective hiring standards and does not include any required training in management or supervisorial skills training.

F.7. The OCDA needs to continue and expand the existing training programs to include objective standards in place to evaluate the actual effectiveness of OCDA training. Doubts continue as to whether training, in its current format, will make any substantial difference without metrics to measure impact.

F.8. Interoffice communication within the OCDA is often lacking and contributes to the absence of a unifying vision or sense of leadership. This allows for individual prosecutors to drift and create individualized record-keeping systems that could pose a liability for the County. It is an untenable position to argue that poor communication within the OCDA is the culprit to explain away constitutional discovery and *Brady* obligations.

F.9. Hiring an independent monitor to oversee work recommended by IPPEC and already completed by the OCDA is a waste of County money.

F.10. Mistakes were made by personnel in the OCSD and the OCDA. In response to internal investigations, the OCSD has taken disciplinary action to the extent it is able to do so at this time. There appears to have been minimal consequences for personnel in the OCDA.

F.11. Both the OCSD and the OCDA need updated technology and record keeping systems.

F.12. In spite of no official completed investigations, the OCSD has proactively made structural and organizational changes to address the issues that arose as a result of the informant controversy.

F.13. The current promotion process in the OCSD that requires patrol officers to be reassigned to the jail contributes to a culture of inadequate supervision of long-term jail personnel.

Penal Code §933 and §933.05 require governing bodies and elected officials to which a report is directed to respond to findings and recommendations. Responses are requested, from departments of local agencies and their non-elected department heads.

RECOMMENDATIONS

In accordance with California Penal Code Sections 933 and 933.05, the 2016-2017 Grand Jury requires (or, as noted, requests) responses from each agency affected by the recommendations presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled, "*The Myth of the Orange County Jailhouse Informant Program*" in Orange County, the Orange County Grand Jury makes the following ten recommendations:

R.1.The OCDA should prioritize updating the current case management system to better track all constitutional and statutory requirements and better interface with LLE agencies and the OCII.

R.2. The OCDA should continue working to improve and prioritize its training program by designing and implementing follow-up measurements to determine the effectiveness and impact of current training content and methods.

R.3. The OCDA should implement standardized management hiring and training practices for all supervisory personnel and review employee disciplinary practices to ensure they are sufficient responses to employee actions.

R.4. The OCDA needs to send a clear message to local law enforcement agencies that successful case prosecution relies on the sharing of information, and agencies should be encouraged to share all informant information with the OCDA for input into the OCII.

R.5. Prosecutors within the OCDA need to recognize that the OCII is a tool of limited utility and should not rely solely on the OCII to vet potential witnesses. They should continue to do their due diligence in background checks of all witnesses in their prosecutions.

R.6. The OCDA should standardize its discovery record-keeping system for recording and tracking discovery materials and ensure all prosecutors are aware of and use the new uniform system.

R.7. The OCDA should review their management and communication to improve inter-office communications and break-down the negative effect of silo-ed operations

R.8. The Board of Supervisors should review and consider canceling, within the next 90 days, the OCDA independent monitor contract implemented on recommendations from the IPPEC and approved by the Board in August 2016.

R.9. The OCSD should standardize and consolidate jail activity records that have potential discovery repercussions, and minimize multiple filing systems for recording potentially discoverable material within the jail management system.

R.10. The OCSD should improve supervisor training for newly promoted sergeants that includes demonstrated supervisory skills before rotation back to the field.

REQUIRED RESPONSES

The *California Penal Code* §933 requires the governing body of any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the governing body. Such comment shall be made no later than 90 days after the Grand Jury publishes its report (filed with the Clerk of the Court). Additionally, in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such elected County official shall comment on the findings and recommendations pertaining to the matters under that elected official's control within 60 days to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05 (a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each Grand Jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefore.

(b) As to each Grand Jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the Grand Jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefore.

(c) If a finding or recommendation of the Grand Jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the Grand Jury, but the response of the Board of Supervisors shall address only those budgetary /or

personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with Penal Code §933.05 are required as follows:

Responses are required from the following elected officers within 60 days of the date of the publication of this report:

The Orange County District Attorney (F.1-11; R.1-7)

The Orange County Sheriff-Coroner (F.1-3, 10-13; R.9,10)

Responses are required from the following governing bodies within 90 days of the date of the publication of this report:

The Orange County Board of Supervisors (F.9, R.8)

ATTACHMENT 21

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
AUG 18 2017
DAVID H. YAMASAKI, Clerk of the Court
BY: B. RAAB ,DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA

V.

SCOTT DEKRAAI

RULING (MOTION FOR SANCTIONS RELATED TO ONGOING DISCOVERY ABUSE)

INTRODUCTION

This defendant was arrested on October 12, 2011 and charged with the worst mass killing in the history of Orange County.

On January 17, 2012 the defendant was indicted by the Orange County Grand Jury. The Indictment alleged eight counts of first degree murder, along with the relevant multiple murder special circumstance; one count of attempted murder; and personally using a firearm in the commission of these crimes. The defendant entered pleas of not guilty to all charges; he also denied the special allegations. The case was thereafter assigned to this court for motions and trial. The parties made their first appearances before this court on January 27, 2012.

Early on, the People, represented at that time by the Orange County District Attorney, provided discovery materials to defense counsel which suggested that, while incarcerated in the Orange County Jail soon after his arrest, the defendant made incriminating statements to another inmate about the murders. The People also asserted that the inmate who heard the defendant's statements did not solicit them; that he asked the defendant no questions; that he never acted as an agent of law enforcement; and that he was not seeking, nor had he been offered, any consideration for his involvement in the investigation of this case.

In response to its receipt of this discovery the defense, pursuant to In re Neely (1993) 6 Cal. 4th 901, requested additional information related to the relevant inmate regarding his background and criminal history. The People resisted this request, arguing that since they did not intend to call that inmate as a witness such discovery was legally unnecessary and irrelevant. The People argued further that, since they planned only to offer audio recordings of the defendant's custodial statements, no discovery regarding the other involved inmate was required or appropriate. To support their position the People

again asserted that this inmate had asked for nothing, and the People had offered him nothing as consideration for services rendered.

On January 25, 2013, after considering arguments from both sides on the issue, this court ordered that discovery related to the relevant inmate, including his criminal record and informant history, be provided to the defense. Within a matter of weeks, the People began to comply with the court's order by providing hundreds of pages of discovery material. Hundreds soon turned into thousands. Thereafter the defendant requested, and the court eventually granted, a lengthy continuance of the case in order to afford the defense team adequate time to digest the material it was receiving.

On January 31, 2014 the defendant filed lengthy motions, supported by thousands of pages of attached exhibits. The motions requested various forms of relief. These pleadings required the court to conduct an initial evidentiary hearing that commenced on March 18, 2014.

On April 22, 2014, after the first month of that first hearing, the People conceded the defendant's so-called Massiah motion (the motion based on the United States Supreme Court's decision in Massiah v. United States (1964) 377 U.S. 201), effectively agreeing that any statements made by the defendant to another inmate in the Orange County Jail after he had been arrested, charged with these crimes, and provided by the court with appointed counsel could not be offered against him at trial.

Thereafter, the motion hearing continued. On May 2, 2014, the defendant entered guilty pleas to all of the felony charges pending against him: eight counts of first degree murder and one count of attempted murder. He also admitted the multiple murder special circumstance and the gun use allegation. In accepting his open ended guilty pleas, this court informed the defendant that its only sentencing options would be consecutive sentences of life in prison without the possibility of parole, or death. The defendant acknowledged this, and confirmed his intent to enter his guilty pleas and admissions which this court then accepted. As a result, any subsequent trial in this case would only involve penalty issues.

The evidentiary hearing on the defendant's remaining motions then continued. On August 5, 2014, this court issued its initial ruling on those motions. In that ruling, the court granted certain relief requested by the defendant, but denied his motion to recuse the Orange County District Attorney from the case, and also the defendant's request that the court prohibit the pending penalty trial.

During the fall of 2014, the parties returned to court with what ultimately turned out to be a joint request to resume the evidentiary hearing related to the defense motions. The court accepted the request and the hearing resumed on February 5, 2015.

On March 15, 2015, the court issued a supplemental ruling in which it recused the entire staff of the Orange County District Attorney from further involvement in this prosecution. That recusal order was unanimously affirmed by the District Court of Appeal on November 22, 2016. California's Attorney General thereafter became the prosecutor of record in this matter.

During the pendency of this case, the court has issued a series of discovery orders which remain in full force and effect as of this writing. None of these orders has been appealed. Many have required

production of materials related to informant operations conducted by the Orange County Sheriff's Department within the Orange County Jail. The record in this case reflects the number of hearings that this court has conducted concerning compliance, or the lack thereof, with its lawful discovery orders.

The court has recently completed a third evidentiary hearing that focused largely on that same issue. During the course of the three evidentiary hearing this court has heard sworn testimony from more than fifty witnesses and reviewed thousands of pages of documentary evidence. In the current motion the defendant once again seeks an order barring a penalty trial in this case.

The court has considered the evidence presented and the arguments made by counsel during all three evidentiary hearings as it formulates its current ruling which must stand or fall based on the merits of the entire record in this case alone. The court also incorporates by reference into this ruling, unless otherwise indidcated, all findings included in its prior rulings.

DISCUSSION

As it considers the pending motion, this court has in mind the testimony of all the witnesses it has heard from over the course of the three evidentiary hearings. The majority of those witnesses were either current or former sworn peace officers. A good number were current or former prosecutors.

As discussed in prior rulings, the evidence produced during these hearings demonstrates the existence of serious misconduct committed by key elements of the prosecution team. This misconduct has required the court to impose increasingly severe sanctions in its prior rulings. Now, in the face of what this court can best describe as chronic obstructionism by the prosecution team with respect to discovery compliance, this court is required to consider imposing an even more serious sanction. In order to impose such a sanction, this court must find that the prosecution team's chronic discovery abuse has created a constitutional deprivation which compromises this defendant's right to due process and a fair penalty trial (United States v. Agurs (1976) 427 U.S. 97). This effectively requires the court to attempt to predict the future by examining the past.

This court does not take this issue lightly as it is well aware that this defendant has admitted perpetrating the largest mass killing in the history of Orange County. After entering his guilty pleas, this defendant deserved swift and sure punishment for the terrible crimes he committed. This court has been unable to impose such punishment as it has been legally required to resolve the many serious issues raised by defense motions. Any trial court has the right to expect, and to insist upon, compliance with its lawfully issued orders. To accept chronic non-compliance with such orders in any case, much less a case of this magnitude, would dangerously undermine the integrity of, and ultimately the community's respect for, the justice system. This court believes that maintaining the integrity and viability of Orange County's criminal justice system remains of paramount importance.

This court has been patient, perhaps to a fault, as it has awaited compliance by the prosecution team with its lawful orders. It has for months provided transparent warnings to the People as to what the consequences of ongoing non-compliance with its lawful discovery orders could be. The court has given the prosecution team every opportunity to respond completely to its orders. And yet compliance has not been achieved. Time and again relevant documents have been tardily produced along with sworn declarations claiming that exhaustive searches have been conducted and no additional responsive documents exist. And then, months later, additional relevant documents have appeared along with new sworn assurances.

This court for some time maintained hope that the Orange County District Attorney and the Orange County Sheriff, in the face of objectively verifiable evidence, would accept the reality that for many years illegal activities occurred inside the Orange County Jail involving represented defendants and working informants. Unfortunately, rather than accepting this court's earlier findings and working to correct "the systemic problems" discussed at length by the District Court of Appeal in its unanimous affirmation of this court's decision to recuse the District Attorney (People v. Dekraai (2016) 5 Cal. App. 5th 1110), members of the prosecution team chose to either deny, or ignore, these glaring illegalities. One of the apparent byproducts of this response has been the prosecution team's chronic failure to comply with this court's discovery orders.

In the face of such relentless non-compliance, this court is vested with "broad discretion" to impose appropriate sanctions. As the Supreme Court said in People v. Zamora (1980) 28 Cal. 3d 88:

> We first observe that the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence. 28 Cal. 3d at 99.

In this case, the evidence demonstrates that "discoverable records and evidence" have repeatedly been withheld. Recent evidence also strongly suggests, as discussed below, that some of those "discoverable records and evidence" have likely now been destroyed.

The Supreme Court, citing Zamora, spoke again on this subject in People v. Jenkins (2000) 22 Cal. 4th 900:

> The cases cited by defendant recognize that courts have broad discretion in determining the appropriate sanction for discovery abuse, and recognize that sanctions ranging from dismissal to the giving of special jury instructions may be required in order to insure that the defendant receives a fair trial, particularly when potentially favorable evidence has been suppressed. 22 Cal. 4th at 951.

Long after this court issued the first of its lawful discovery orders in this case, Sheriff's sworn personnel gave false and/or intentionally misleading testimony regarding the existence of relevant jail records. The evidence proves the existence at relevant times of voluminous discoverable data bases created and maintained by OCSD sworn personnel. These include at a minimum an extensive classification data base known as TRED, and a Special Handling log. Both of these contain hundreds, perhaps thousands, of pages of information relevant to the defendant's claims concerning prosecution team misconduct. The

Sheriff's failure to produce this material on a timely basis in the face of this court's repeated orders to do so constitutes the type of "discovery abuse" contemplated by the Supreme Court in both Zamora and Jenkins.

The court does not intend to summarize here all of the compelling evidence it has heard concerning this long term discovery abuse. It has already discussed much of that testimony in its prior rulings. A representative sampling of recent evidence nonetheless seems appropriate. A good deal of that evidence dealt with OCSD's lack of timely compliance with this court's discovery orders as well as the possible destruction of jail records by Sheriff's personnel.

The first witness to appear during the recent hearing, OCSD Lieutenant Andrew Stephens, who oversees the Sheriff's newly-formed Custody Intelligence Unite (the successor in interest to the problematic Special Handling Unit), testified that on the day of his appearance (May 23, 2017), well over four years after this court made its initial discovery order requiring the production of specific informant-related information in the Sheriff's custody, CIU was in possession of sixty eight bankers' boxes full of Special Handling Unit records which had not yet been fully reviewed to determine whether any of them contained materials subject to the court's orders. Sixty eight boxes containing, by the lieutenant's estimate, one hundred files each.

The next witness, Carol Morris, a high ranking OCSD civilian employee responsible for the retention and maintenance of sensitive OCSD records, testified that in 2012 she became "alarmed" when she learned that deputies were handling documents pursuant to the directives of a "Jail Operations Manual" which permitted the destruction of jail records. Any such destruction, according to this knowledgeable witness, was in violation of both the controlling resolution from the Orange County Board of Supervisors and a 2009 "legal hold" placed on all such records as a result of a pending federal investigation of alleged OCSD misconduct. The witness testified that upon learning of this situation she immediately instructed deputies to cease and desist. Despite that instruction, evidence demonstrates that Special Handling Unit deputies were "shredding" jail documents at times relevant to this hearing and long after the "legal hold" on all such documents had taken affect.

Exhibits 17-14, 17-15, 17-16 and 17-17, for example, describe such shredding.

Exhibit 17-15 is an excerpt from the Special Handling log written on February 5, 2009 by Deputy Grover. In it Grover wrote that one action he took on that date was to "(s)ort through numerous boxes of 'Old Special Handling documents'..then Shred (sic) same at HQ Warehouse."

Exhibit 17-16 is an anonymous excerpt from the Special Handling log that was apparently written on or about October 8, 2009. The writer indicates that during his shift he "cleared out my Special Handling inbox...shredded a lot of stuff."

Exhibit 17-17 is another excerpt from the Special Handling Log written by Deputy Garcia dated November 289, 2009. In it Garcia indicates that on that date he "Worked on desk drawer and shredded old files."

Exhibit 17-14 is a "Work Station Log" date December 15, 2014, related to "CLX Special Handling." Hearing testimony established that "CJX" refers to the Men's Central Jail Complex in Santa Ana. The log entry indicates that on that date, long after the current litigation had begun and directives had been issued by OCSD to stop destroying jail documents, "Deputy Grover sorted and shredded the pile of 'stuff' left in his office."

No records were kept to memorialize exactly what was shredded on any of these occasions.

OCSD Lt. Michael McHenry also testified concerning the possible destruction of relevant records, including a specific portion of the Special Handling log. McHenry was apparently asked to join the Sheriff's "working group" created to investigate the various discovery issues raised in this case due to his computer engineering background. One of his first tasks was to determine whether an alleged gap in the Special Handling log actually existed. He concluded that it did.

> The Court: ... And we have got an unexplained gap between April 12th and October 2nd of 2011. Those are the facts as we know them, right?
>
> The Witness: Yes, sir.
>
> The Court: Can you think, with your computer background experience, and your investigative training and experience, what's the rational explanation for the gap?
>
> The Witness: I can think of two rational explanations.
>
> The Court: Okay. Tell me.
>
> The Witness: One is journaling like that log was—takes a lot of effort. And if you are busy and nobody is paying attention, it doesn't get done. It is not something that anybody was checking. It is not a safety check log that a sergeant signs off every day.
>
> The Court: So that's the random explanation? Just wasn't done?
>
> The Witness: Just didn't happen is the random explanation.
>
> The Court: What's the other explanation?
>
> The Witness: It got deleted.
>
> (Reporter's Transcript, page 10189).

Deputy Jonathan Larson's testimony followed that of Lt. McHenry. Deputy Larson worked in Special Handling during most of 2011, the time period when the Special Handling log gap occurred. He testified that although he only made occasional entries in the log personally, during the gap period he was aware that other Special Handling deputies were making regular entries as he and his sergeants were reading them almost daily. Deputy Larson's testimony, which was credible, seems to negate the viability of the "random explanation" for the Special Handling log gap in 2011 which leaves only the "other explanation" offered by Lt. McHenry: "It got deleted."

Other recent evidence related, as was the case during prior hearings, to the nature and extent of OCSD's use of informants inside the Orange County Jail system. Commander Jon Briggs, a member of the Sheriff's executive command staff and the current supervisor of all OCSD custodial facilities, testified about that.

> The Court: When did you reach the conclusion that you shared with us yesterday and that you confirmed this morning that Special Handling deputies, in fact, have cultivated, utilized, developed and supervised informant activity in the jail?
>
> ...
>
> The Witness: As soon as I read the logs. So I would say March 2016.
>
> ...
>
> The Court: This morning you also, if I heard you correctly in response to a question by Mr. Sanders... And he said do you believe that L-20 was being employed by Special Handling deputies as a snitch tank, and you said yes. Did I misunderstand that?
>
> The Witness: I believe, in looking at where they were moving folks into L and looking at the Special Handling log, that you are right...and they were certainly putting the informants they had cultivated and that they were utilizing into L-20...Totally inappropriate.
>
> ...
>
> The Court: And so I understand the challenges of supervision. But the log suggests to the reasonable reader, perhaps, that that kind of improper misconduct was going on not for days or weeks or months, but probably years. Do you agree with that?
>
> The Witness: Yes, your honor.
>
> ...
>
> The Court: So in hindsight, these deputies who were getting all the accolades and awards should have been facing disciplinary action?
>
> The Witness: Absolutely, your honor.
>
> (Excerpted from Reporter's Transcript at pages 8616-8622.)

OCSD Commander William Baker, another member of the Sheriff's executive command staff, testified on the same subject.

> The Court: ...Based on your review of all the information that is currently available to anybody in the Sheriff's Department, is it your current conclusion, Commander Baker, that over a course of years, rather than over a course of days or weeks or months, Sheriff's deputies operating inside

the Orange County Jail system intentionally moved working confidential informants into close proximity with targeted defendants? Did that happen?

The Witness: Yes, sir.

The Court: And do you believe that the goal in arranging such movements was to elicit incriminating statements from the targeted defendants? Do you believe that happened?

The Witness: Yes sir.

The Court: And again we're not talking once or twice over the course of days or weeks. That happened for a long time, years, didn't it?

The Witness: Yes, sir.

(Reporter's Transcript, page 9821)

OCSD Lt. Martin Ramirez, provided testimony on this same subject. Lt. Ramirez was the Intake and Release Center (IRC) classification sergeant who, along with one other sergeant, supervised Special Handling Unit operations during the first half of 2013. He has since been promoted and has worked as a jail watch commander. Lt. Ramirez's testimony included the following:

Question: Were there modules that were kept in the—in the jail that were at times used to have informants and potential targets placed together?

Ramirez: I know that there is...I have heard that some of these informants or targets were placed in—I think it was Mod L or something like that.

Question: So when you heard that in the news, that was the first time that ever hit you? Like, you had never heard that before?

Ramirez: No, I had heard that before.

Question: You heard that when you were working there, right?

Ramirez: Yeah...So I don't know if I learned that before I was classification sergeant or when I was a sergeant, you know. But I know that. I mean, it is common knowledge that—for me anyways, from what I heard, is that, you know, informants do work the jails.

...

Question: But, you know, it sounds like you were also aware when you were in the jail that Mod L was being used for informants. You knew that; right?

Ramirez: Yes.

...

Question: All right. So while you were a Special Handling sergeant—I call it Special Handling sergeant, but it is really a classification sergeant?

Ramirez: Yes.

Question: When you were a classification sergeant, you knew about the use of Mod L?

Ramirez: Yes.

Question: Okay. And tell me what you knew about it.

Ramirez: I just knew that it had been used in the past to put informants in there and put targets in there.

...

Question: Okay. And so once you learn that, you realize people are working informants in the jail, and that kind of traditional sense of working, they are moving informants around. And targets. They are putting them in a particular sector. You know that is going on, right?

Ramirez: I knew that was happening.

(Excerpted from Reporter's Transcript at pages 9499-9503)

The Court: Based on your current experience, lieutenant, in the Orange County jail system, based on everything you've heard and everything you've read, as you sit here today under oath, do you believe that confidential informants were placed in specific mods, like Mod L, in the Orange County Jail, perhaps before you got there, for the purpose of seeing if they could hear incriminating statements from target defendants?

The Witness: Based on everything I heard, yes, I do.

(Reporter's Transcript, page 9623)

Assistant Sheriff Adam Powell, another member of the Sheriff's executive command staff, testified concerning many of these same subjects. Powell informed the court that he was ODSD's "point man" in its investigation of the ongoing discovery issues. He concluded that these problems resulted from "a failed system," "terrible policies" and "worse protocols." His testimony also included the following:

The Court: Based on your review of all of that information, so all the information that is currently available to the Orange County Sheriff's Department, is it your current conclusion that over the course of many years Sheriff's deputies operating inside the jail, the Orange County jail system, intentionally moved working informants into close proximity with targeted defendants who had already been charged with criminal offenses and were represented by counsel? Do you think that happened?

The Witness: Yes. ...

The Court: And that happened for years, not days, weeks, or months, didn't it?

The Witness: I think it happened in years, yes.

(Reporter's Transcript, page 10701).

The Court: Have you read any of the Fernando Perez handwritten notes? ... Have you read any of those?

The Witness: I am not talking about Fernando Perez and his workings because—

The Court: He's an active working, hard-working informant; right?

The Witness: Absolutely.

The Court: And some of your Special Handling deputies managed and cultivated him, didn't they?

The Witness: Yes.

(Reporter's Transcript, page 10703).

A number of recently admitted exhibits also related to the nature of the Special Handling unit's long term relationship with informants in the jail system.

Exhibit 17-20 is an OCSD memo from Lt. B. Guidice to Sgt. D. Johnson, dated October 23, 2009, regarding "Special Handling Deputies Duties." Among the duties listed is "Handle and maintain 'confidential informants'."

Exhibit 17-21 is an OCSD memo, dated December 16, 2009, regarding "Special Handling class ideas." The memo includes this somewhat cryptic notation: "THIS ALL IN THE MEMO TO SGT LAGARET DATED 8-31 HANGING ON THE S/H WALL." (Grammatical errors and caps in original.) "Idea" number three in the memo is "Cultivate/manage Confidential Informants."

Exhibit 17-24 is an undated OCSD memo labeled "L-20 Thoughts/Requests." The memo notes that "Inmates are handpicked to be in L-20 for both OCSD & other agencies." Also, "There are several current investigations being conducted, so PLEASE don't get into anything (exchanging any information with inmates). PLEASE contact S/H." And finally, "Module Deputies are not the inmate's handlers...Special Handling are the handlers."

Exhibit 17-37 is an OCSD memo, dated March 29, 2007, from Sergeant B. Irish to Captain B. Wilkerson, labeled "Theo Lacy Facility Classification/Special Handling Team Summary." Among the "overall duties" listed for team members is "Intelligence Gathering: the Theo Lacy Special Handling/Classification team possesses an excellent expertise in the cultivation and management of informants. This expertise is recognized by the Orange County District Attorney's Office, as well as, numerous law enforcement agencies throughout Southern California." (Emphasis in original.)

Exhibit 17-54 is an OCSD memo dated August 31, 2009, apparently written by a member of the "IRC Special Handling detail" to Sergeant Lagaret. The memo sets forth "a sampling of the duties and responsibilities of an Intake and Release (IRC) Special Handling Deputy." Among those listed is "Handle and maintain 'Confidential Informants.' "

Exhibit17-65 is an OCSD memo, dated October 30, 2012, from Deputy Grover to Sergeant Cope. Several witnesses described it as a "brag sheet" which would typically be written by a deputy in anticipation of an upcoming annual performance review. In this memo Deputy Grover "brags" that he "developed a confidential informant" related to criminal activity occurring in south Orange County. He also claims that he and Deputy Garcia engaged in an informant operation inside the Orange County Jail on behalf of the Anaheim Police Department that resulted in a "full confession from one of the suspects."

Finally, Orange County Sheriff Sandra Hutchens testified on a number of topics including her current understanding of past informant operations conducted within the Orange County Jail system.

> The Court: ...Sheriff, based on your review of all the information that is currently available to anybody in the Sheriff's Department, is it your current conclusion that over a course of years, rather than over a course of days or weeks or even months, Sheriff's deputies operating inside the Orange County Jail system intentionally moved working confidential informants into close proximity with targeted defendants?...
>
> The Witness: I would say yes. ...
>
> The Court: ...And do you believe that the goal in arranging such movements was to elicit incriminating statements from targeted defendants?'
>
> The Witness: Yes.
>
> The Court: And we're not talking once or twice over the course of days or weeks, this happened for a long time, years, didn't it?
>
> The Witness: Yes.
>
> (Reporter's Transcript, page 10491).

During her testimony the Sheriff also acknowledged at least some of her Department's discovery failures in this case and apologized to the court for them (Reporter's Transcript, page 10489).

Nonetheless, the Sheriff's testimony included her belief that the jail informant issue has been "blown out of proportion," perhaps due to "sensational" media coverage. This testimony was consistent with prior statements made by the Sheriff, including those contained in a "LETTER FROM THE SHERIFF" released by OCSD several weeks before her testimony. During her recent testimony the Sheriff acknowledged that she wrote this in that latter:

> For well over a year, a handful of local media outlets have relentlessly reported on court proceedings concerning the use of informants in our jail system. In my view, the media coverage

has painted an inaccurate picture of OCSD and has unfairly maligned the good work done by the men and women of this department. Comments made by a handful of public officials have been equally troubling and ill-informed.

Despite this misinformation, the real facts are beginning to emerge. ...

(Exhibit 17-82).

The court is struck by the content of this recent letter. If the Sheriff continues to deny the existence of the "systemic problems" related to her Department's use of informants inside the county jail system which was discussed in such detail by the District Court of Appeal, how can this court generate any reasonable optimism that OCSD will effectively address those problems? More importantly, in the face of such ongoing denials, and given OCSD's compliance record to date, how can this court generate any confidence that the Sheriff's Department will produce all relevant documentation in its possession concerning a problem which the Sheriff herself apparently continues to believe is non-existent?

During the course of the recent evidentiary hearing, the court also saw seven members of the Sheriff's sworn staff invoke their rights to remain silent pursuant to the Fifth Amendment of the United States Constitution. Seven current members of law enforcement, sworn peace officers potentially still authorized to wear badges and carry firearms, several of whom appeared to testify wearing their OCSD uniforms, refused to answer questions under oath for fear that their responses might incriminate them and subject them to criminal prosecution. The fact that the People agreed to grant four of these witnesses use immunity (which required them to testify) does not change the fact that in this court's forty years of experience in the criminal justice system such events are unprecedented.

The court is mindful of the statutory limits on its authority. Penal Code section1054.4(c), for example, directs that a "...court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States." Likewise, Penal code section 1385.1, prohibits a trial judge from striking or dismissing any special circumstance "which is admitted by a plea or guilty or nolo contendere or is found by a jury or a court..." But this court entertains no thought of dismissing or striking any charge or enhancement in this case. In fact there is no such motion pending. Rather, this court will impose an additional sanction only if it determines that the prosecution team's misconduct, when considered in its overall context, has resulted in a constitutional deprivation to the defendant that has effectively compromised his rights to due process and a fair penalty trial.

In that regard, the court is also mindful of a relevant discovery discussion in In re Steele (2004) 32 Cal. 4th 682. Although Steele deals primarily with statutory (Penal code section 1054.9) rather than constitutional (Brady) discovery obligations in the context of a post-conviction habeas petition, in its opinion the Supreme Court discussed both. After citing Strickler v. Greene (1999) 527 U.S. 263, the court quoted directly from United States v. Bagley (1985) 473 U.S. 66.

The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of

independent investigation, defenses, or trial strategies that it might otherwise have pursued." Bagley, supra, at 682-83.

This language to some degree mirrors a defense argument in this case that suggests the defendant has suffered a due process deprivation here related to his ability to fully prepare for his pending penalty trial due to the fact that the prosecution has so consistently failed to comply with this court's lawful discovery orders. Although Steele unambiguously indicates that the People's self-executing Brady obligation "does not extend to evidence that relates solely to the defendant personally and whose exculpatory nature would therefore not otherwise be apparent to the prosecution..." (Steele, supra, at 701), the Supreme Court also confirmed that Brady does require such disclosure in the face of "a specific request" by the defense. Once such a specific request has been made by the defense, the People are obliged to provide evidence that is "both favorable to the defendant and material on either guilt or punishment." In re Sassounian (1995) 9 Cal. 4th 535. Here, the defense has made such "a specific request."

In determining its future course this court has looked for guidance to other statutory discovery schemes within California's criminal justice system such as that implemented in Penal Code sections 1040-42. Those sections also deal with informant related discovery issues, although in a somewhat different context than that now before the court.

In a case involving Penal Code section 1040-42 issues, a defendant moves the court to order the prosecutor to identity a particular witness involved in the case against him. In the face of this request, law enforcement may designate that witness a confidential informant and assert the privilege created by Penal Code sections 1040-42. In the face of such an assertion, a qualified judge conducts an in camera hearing with a sworn peace officer who reasserts the privilege while explaining its legal basis in that particular case. The court then rules on the propriety of the privilege claim.

If the court sustains the claim, the prosecution proceeds with the defendant remaining unaware of the informant's identity. If the court overrules the claim, the prosecution is ordered to identify the witness, which leaves the prosecution team with a choice: either name the informant, and provide all relevant information about his or her background; or elect not to identify the informant in which case the prosecution may end with a dismissal of the affected charges. The decision rests with the prosecutor. The situation here is analogous. This court has issued lawful discovery orders. If the prosecution team elects not to comply with those orders, it must anticipate, just as in the case involving Penal Code section 1040-42, the possibility of a terminal sanction.

Lest there be any uncertainty about how this analogy applies here, this court has for many months warned the People in no uncertain terms what the consequence of a continued lack of discovery compliance might be. It has attempted to educate and also cajole the prosecution team into compliance. Yet such compliance remains an elusive goal. As a result, this court has finally lost confidence that it can ever secure full compliance with its lawful discovery orders. The great irony is that the primary basis for this conclusion is the court's evaluation of the testimony of sworn peace officers and prosecutors, and its review of thousands of pages of law enforcement generated documents.

CONCLUSION

The legal principles that will determine the outcome of the pending motion are largely axiomatic. The parties agree that American courts must expect, and if necessary demand, compliance with their lawful orders. Constitutional due process requires prosecutors to disclose exculpatory evidence in their possession to charged criminal defendants. (Brady v. Maryland (1963) 373 U.S. 83). This discovery obligation exists even in the absence of any request from the defense. (United States v. Agurs, supra). For Brady purposes, exculpatory evidence includes impeachment evidence. (Strickler v. Greene (1999) 527 U.S. 263). The prosecution's discovery obligation extends not only to material in the prosecutor's immediate possession; it also applies to evidence in the possession of other members of the prosecution team, including law enforcement. (Kyles v. Whitley (1995) 514 U.S. 419). A Brady violation therefore can occur when the government fails to turn over to the defense exculpatory evidence known only by police investigators and not by case prosecutors. (Youngblood v. West Virginia (2006) 547 U.S, 867).

As this court formulates its ruling, it recalls again a statement made by the District Court of Appeal in People v. Guillen, (2014) 227 Cal App. 4th 934:

> The rights of the respective parties here are extremely important ones, namely defendant's right to a fair trial and the People's right to prosecute persons believed to be responsible for the commission of serious crimes. Guillen, supra, at 1006-07.

These competing interests weigh heavily on this court's mind as it considers its options. This defendant has committed crimes of such horrible magnitude than they can hardly be compared to any others in the history of Orange County. Without naming names, other defendants whose crimes bear any resemblance to these have in recent years almost invariably been tried, convicted and sentenced to death. If this case had been prosecuted from the outset by the Orange County District Attorney within the most fundamental parameters of prosecutorial propriety, this defendant would likely today be living alongside other convicted killers on California's Death Row in the state prison at San Quentin. Instead, this case hardly seems closer to resolution this morning than it did on that day more than five years ago when it arrived in this courtroom as prosecution team compliance with this court's outstanding discovery orders remains an elusive goal.

Recent events plainly demonstrates the serious compliance issues. For example, the first witness called during the most recent evidentiary hearing, a Sheriff's lieutenant, informed the court that he was aware as he testified of sixty-eight banker's boxes, containing hundreds of individual files, stored within the Orange County Jail that had not yet been fully reviewed and which potentially contained material subject to this court's outstanding discovery orders.

During her testimony the Sheriff herself offered no explanation as to how this situation could exist so many years after this court issued its first discovery order.

Even more recently the current prosecutor informed the court that not long ago as many as thirteen thousand e-mails and eight thousand other documents were delivered to the Attorney General's Office by OCSD; he opined that some of these could also contain material subject to the court's outstanding discovery orders. The record of that exchange between counsel and the court speaks for itself but, after sharing that information, the deputy Attorney General wondered aloud, perhaps somewhat rhetorically, "When does it end?" That question reflects this court's sentiments exactly.

In its prior rulings, this court expressed concern over the prosecution team's history of discovery abuse in this case. In its original ruling over three years ago this court observed that "throughout this pending litigation additional materials that appear to have been subject to this court's January, 2013 discovery order have continued to emerge." Months later, in its second ruling, the court concluded that "the discovery situation in this case is far worse than the court realized." Those rulings resulted in the court's imposition of increasingly serious sanctions upon the People. Since that second ruling it has become apparent that the prosecution team's discovery record is even worse than was previously suspected. Another highly relevant data base, the Special Handling Log, has turned up along with a host of other relevant documents. Despite declarations and promises to the contrary, hundreds of potentially relevant files were until very recently ignored for no apparent reason. Potential issues concerning thousands of additional e-mails and other documents remain unresolved.

This court believes that the truth is the truth. Truth is not the product of political debate. It does not present itself in alternative versions. Our justice system finds the truth primarily through the presentation of evidence, testimonial and physical, which is then subjected to the crucible of cross examination. That is the exact process that has been employed throughout the lengthy proceedings conducted in this courtroom. A list of witnesses who have testified, complete transcripts of their testimony, and all admitted exhibits are matters of public record available to interested members of this community to scrutinize and evaluate for themselves. As a result of this "due process," the facts, and the truth, have become obvious.

The truth is, to quote Sheriff Sandra Hutchens herself during her recent testimony, "over a course of years, rather than over a course of days or weeks or even months, Sheriff's deputies operating inside the Orange County jail system intentionally moved working confidential informants ...to elicit incriminating statements from targeted defendants." To use the descriptive phrase coined by the District Court of Appeal to describe OCSD's informant operation, this "well established program" (Dekraai, supra, at 1141) is not a myth. Nor is it any sort of fantasy, fairy tale or fable. Although apparently created and operated largely by word of mouth, this program has been very real for many years. As the DCA concluded in its unanimous decision on this very subject, "(t)he magnitude of the systemic problems cannot be overlooked." (Dekraai, supra, at 1149). Indeed, the truth is in June of 2016 the District Attorney's office acknowledged many of these "systemic problems" in a "Press Release" (quoted below) which is a part of the record in this case (Exhibit 17-85).

The truth is competent evidence has established beyond any reasonable doubt that "...the OCSD, in its secondary capacity as county jailer, created and maintained a CI program whereby it continued to

investigate criminal activity in contravention of targeted defendants' constitutional rights." (Dekraai, supra, at 1145).

The truth is "...OCSD SHU deputy sheriffs operated a well-established program whereby they placed CIs, Perez and Moriel, next to targeted defendants who they knew were represented by counsel to obtain statements...There was also evidence the prosecution team explicitly or implicitly promised consideration in exchange for information and Perez and Moriel expected a benefit." (Dekraai, supra, at 1141).

The truth is Fernando Perez, at the time of his placement next to this defendant, was an experienced and highly motivated informant who vigorously worked on multiple investigations within the Orange County Jail at the behest of his OCSD handlers in the hope that his pending life sentence would be reduced. After completing what Perez himself described as his "mission" on this and many other cases, it was.

The truth is more than one member of the Orange County Sheriff's Department has either lied or willfully withheld evidence from this court during testimony given concerning the various defense motions. "Needless to say, there was overwhelming evidence...Garcia and Tunstall intentionally lied or willfully withheld information at the first hearing and they lacked credibility." (Dekraai, supra, at 1141).

The truth is the Orange County District Attorney has been complicit in the Orange County Sheriff's misconduct. In point of fact, there was "no legitimate reason for OCSD to create and maintain such a sophisticated, synchronized, and well-documented CI program other than to obtain statements that will benefit prosecutions." (Dekraai, supra at 1142). "(D)uring this entire period, prosecutors failed their professional responsibility to properly investigate Perez's CI work and produce information to Dekraai." (Dekraai, supra, at 1143).

The truth is it was neither an accident nor a coincidence that the Orange County District Attorney resisted the defendant's initial request for discovery concerning the criminal background and informant history of Fernando Perez. "Not only did the OCDA intentionally or negligently ignore the OCSD's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the CI program." (Dekraai, supra, at 1145).

The truth is it was neither an accident nor a coincidence that on January 23, 2013, two days before this court was scheduled to make its initial discovery order in this matter, the OCSD's "Special Handling Log" was terminated.

The truth is that the Orange County District Attorney, in its June 9, 2016 "Press Release," conceded that the Orange County Sheriff's Department engaged in significant misconduct involving the use of informants within its jail operations. Quoting directly from that OCDA Press Release:

> "The SH Log was kept from 2008 to 2013 and includes informal descriptions of activities which the deputies variously termed "plans," "capers", and "operations," which often included use of covert recordings devices...There are informer names on almost every page as well as numerous

mentions of high-profile inmates and frequent confidential informer (CI) interaction with numerous inmates, including high-profile inmates. The SH Log also mentions outside agencies interacting with special handling deputies about inmates and their numerous inquiries about running "operations..."

"The jail special handling deputies cultivated and utilized a group of informers. The informers were often kept in a particular sector, and they would often know each other. In exchange for their information, some informers were given favors such as phone calls and visits. The SH Log contains references to extensive recordings in multiple sectors of the jail."

(Exhibit 17-85)

The Press Release concluded with "OCDA's Action Plan to Remedy Legal Issues."

The truth is thereafter OCDA failed to significantly follow up on its promise to address these "systemic problems."

And the truth is, for whatever reason, the Orange County Sheriff's Department has consistently responded to this court's lawful orders with such indolence and obfuscation that this court has lost confidence that it can ever secure compliance from the prosecution team with those orders.

It might be fairly asked at this point why any of these truths matter in a case in which this defendant committed his historically horrendous crimes in front of countless eyewitnesses and later reportedly confessed to all of them on videotape? That is a fair question. In this court's view these truths matter because what has always made America a beacon of justice, stability and hope both at home and abroad is the fact that this great country operates under the rule of law. To insure the ongoing integrity of America's system of justice--which implements that rule of law--courts must demand that everyone follow the same set of rules. No individual or agency is above the law. If this court permits any individual or agency to disregard its orders, to in effect ignore the law, then it has failed to fulfill its sworn obligation to fairly and consistently enforce that law. In so acting this court would betray its oath to uphold and defend the Constitution, and also its daily duty to provide faithful service to its constituents.

This court cannot here provide a global remedy for all of the problems it has heard described. This court is legally empowered only to resolve specific cases and controversies. This ruling must therefore rise or fall only on the merits of the evidence presented in this case. Nonetheless, this court hopes that these hearings may have some prophylactic impact on future prosecution team conduct.

As a result of these truths the court finds itself at an analytical fork in the road. Taking one fork would require this court to ignore the facts, to impose no additional sanctions for the continuous course of misconduct engaged in by the prosecution team. To take that road would, in this court's estimation, be unconscionable, perhaps even cowardly. And so this court must consider traveling the other road which would require it to impose a sanction that not long ago would have been unthinkable.

In determining its course, the court cannot help but observe that perhaps the only two prosecutorial/law enforcement agencies in the great state of California still enveloped in denial as to

what has happened here over the years are the Orange County District Attorney and the Orange County Sheriff. For example, the court is aware that the California District Attorneys Association's quarterly publication, Prosecutor's Brief, not long ago included an article about this very case, written by a senior deputy DA in a neighboring county. In that article, captioned "People v. Dekraai: The 'Gift' That Keeps on Giving," CDAA's representative wrote this concerning some of the issues presented to this court:

> "...the informant program was wrong—the deputies were improperly secretive about inmate tracking and the district attorney was careless regarding what the sheriff was doing...
>
> The Dekraai decision is ... a recusal decision based on an "institutional conflict of interest" because the District Attorney's loyalty to the sheriff conflicted with his higher duty to the rule of law...
>
> The Orange County Sheriff's Department set up a network of informants to stand next to choice criminal defendants listening for details of their crimes. But the sheriff failed woefully in monitoring the informants' behavior. Many informants exhorted suspects for such details... (Emphasis in original)
>
> Simultaneously, the sheriff's department taught deputies not to mention the inmate tracking system, in public, in private, or in court to such a degree that when deputies were questioned under oath, they "forgot" about the tracking system..."
>
> Prosecutor's Brief, Volume 39, Number 3, Spring 2017, at pages 280, 281 and 286.

Again this is from California District Attorneys Association's official publication, read and relied upon by prosecutors statewide.

In formulating its ruling, the court also hears the words of the victim's families ringing in its ears. I want to take a moment to speak to you fine people directly. I meant it when I thanked many of you for coming to court to share with me your thoughts about this case which has so terribly impacted each of your lives. I meant it when I promised to remember what you said to me.

You are not unanimous in your opinions as to how this court should proceed. Nor would any reasonable person expect you to be. You live daily with the almost unbearable pain that this defendant has thrust upon you and your families. As innocent victims of these horrendous crimes you are angry. Your hearts ache as a result of your unspeakable losses. You miss those who were so suddenly and senselessly taken from you by this defendant's cruel brutality. But, as good people often do in the face of such tragedy, while protecting and treasuring the memories of your loved ones, you are at the same time moving forward with your lives as best you can through your grief. You are all impressive both individually and as a group and I thank you for your patience and your perseverance.

This is not a situation in which the majority must necessarily rule, nor can this court abdicate its responsibility to fairly apply the law to comply with their wishes, but many of the survivors have asked this court to do what little it can to mitigate their suffering by imposing the eight consecutive sentences

of life without possibility of parole that will end this case now and insure that this defendant dies a forgotten man in some obscure maximum security prison.

And so, after considering and attempting to balance all of the relevant considerations, the question must be asked and answered. What does an allegiance to the rule of law now require of this court? Ultimately the court's analysis must return to the questions raised concerning law enforcement's chronic failure to comply with this court's lawful discovery orders, and the impact this chronic failure has on the defendant's right to due process and a fair penalty trial.

This court has issued its ongoing discovery orders to provide this defendant the constitutionally mandated due process to which he is legally entitled. The court finds that the prosecution team is unable and/or unwilling to comply fully with these lawful orders that remain in full force and effect. As a result, this court now exercises its discretion to strike the death penalty as a potential punishment for this defendant, despite the horrendous nature of his crimes. This is not a punitive sanction designed to punish the prosecution team for past misconduct. Rather, it is a remedial sanction necessitated by the ongoing prosecutorial misconduct related to discovery proceedings which has effectively compromised this defendant's right to procedural and substantive due process and prospectively to a fair penalty trial.

The death penalty having been stricken from further consideration, this court intends to sentence the defendant to the maximum remaining possible sentence at its first legal opportunity to do so.

The court once again compliments all counsel for their diligence and professionalism in preparing and presenting their positions.

IT IS SO ORDERED.

Dated: 8/18/17

THOMAS M. GOETHALS

JUDGE OF THE SUPERIOR COURT

ATTACHMENT 22

U.S. Department of Justice

Federal Bureau of Investigation
Los Angeles Division

Office of the Chief Division Counsel
(310) 996-3386

11000 Wilshire Boulevard, Suite 1700
Los Angeles, California 90024

February 7, 2013

VIA EMAIL AND FEDEX

ADA Dan Wagner
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Re: *People of California v. Scott Evans Dekraai*
Case No. 12ZF0128

Dear Mr. Wagner:

This letter is in reference to your letter of February 7, 2013, and your email of January 29, 2013, requesting records relevant to your prosecution in the above-referenced court proceeding. The Federal Bureau of Investigation (the "FBI") has considered the request pursuant to Title 28, Code of Federal Regulations, Section 16.21 et seq. (the "Touhy Regulations"). Per your correspondence, we understand that the relevant issue is whether "Inmate F" was working as a confidential informant when he was incarcerated at the Santa Ana Jail, which can be proved by demonstrating an "implied understanding" between the informant and law enforcement, per Massiah v. United States, 377 U.S. 201 (1964). In other words, the relevant issues are whether and to what extent "Inmate F" may have believed he was working as a confidential human source ("CHS") for law enforcement, including the FBI, based on any relationship between him and law enforcement and what benefits he received in exchange for information he provided during that relationship, if any.

As discussed in the enclosed documents, "Inmate F" provided information in relation to two federal investigations and made recorded telephone calls on the specified dates. "Inmate F" received a total of $1,200 in three payments on March 11, 2011; May 17, 2011; and August 26, 2011. At this time, one case has been indicted. To the best of our knowledge, "Inmate F" was not a defendant in any federal criminal case and, therefore, has not received a sentencing reduction in any federal criminal case in exchange for information provided to the FBI.

The FBI continues to evaluate what documents it possesses, whether they are relevant to your request, and whether they may be provided in accordance with applicable federal law and regulations. Additionally, we are addressing legal and security issues related to your request. To that end, we may supplement this response with additional documents at a later date. However, it is unclear why all discovery in federal cases in which "Inmate F" may have provided information (much of which does not relate to "Inmate F") or the substantive information provided by "Inmate F" in the federal investigations is relevant to the Massiah issue under consideration by the Court.

INMATE F005807

Please find enclosed the documents which we are, at this time, legally authorized to provide to you. These documents have been redacted in compliance with the Privacy Act, the Touhy Regulations, and other federal laws and regulations.

For any questions concerning this matter, please feel free to contact PLS Christina Gaspar at [redacted]

Sincerely,

BILL L. LEWIS
Assistant Director in Charge

By: PAUL F. RAIMONDI
Chief Division Counsel

INMATE F005808

ATTACHMENT 23

CASE NAME:
DEKRAAI, SCOTT EVAN
PC 187

CASE#s: 11F14820 / 11CF
DDA: Scott Simmons/Dan Wagner
INVESTIGATOR: Bob Erickson
AGENCY: Seal Beach PD
LEAD: Det. Gary Krogman Cell # (949) 292-4358 Office 562- 799-4100

AGENCY CASE#s: SBPD DR 11-2379
FR#: 11-53779
VICTIM: 8 deceased, 1 survivor
DATE OF INCIDENT: 10/12/11; 1320 hrs., (Wednesday afternoon)

LOCATION: Salon Meritage 500 PCH Seal Beach
EXPERT:
ATTORNEY: PD – Scott Sanders

10/18/11	Appt set for today to interview Dekraai's first wife, Kristen Westrope, at her res in Oceanside; Rec'd a telephone call from OCSD Special Handling Deputy Garcia ref a jail informant who spoke with Dekraai in great detail about the shooting; informant is cooperative and not looking for a deal. No local charges pending; he has been sentenced on federal charges and is awaiting pick-up by US Marshals for trans to federal prison. His 85 year sentence was reduced to 20 for the work that he has already done. Advised Simmons and Wagner. Met w/ Steve Huff (562) 331-5596, Chelsea Huff , Joe Burk, and Gerri Burk at the the DA's Office after they had met with Vic Wit Advocate Patricia Orozco Boyce. They had questions ref custody of Dominic. We had Nasario Solis come and talk and his wife (a family law attorney) answered some of the their immediate questions; also called the OC Social Worker Kristen Etner for info; Social Services will probably not get involved in the custody issues of this case; no petition was filed by SS; family will likely have to do that on their own; CAST interview arranged for 10/19/11 at 11:00 Kristen Westrope 4475b Estada Dr., Oceanside, 760-994-5868, interviewed at her res by me, Simmons, Wagner; also present was her friend (for support) Laurie Dimbat; Dimbat is also friends with Dekraai and will be available for an interview at a later date if needed; Westrope provided names of several other potential wits; Dimbat had contact info for some of them – Darren Denos one of D's bst friends, lives in SB 562-408-6769, Laurie Dimbat 562-234-6864, and her husband John Dimbat 562-235-6864 both friends of D and Vic Michelle Fournier, Christina and Dave Simon 562-795-7749, Darrin Depratter close frnd of D, lives in Las Vegas, 562-252-2011, Jeff Ashmead, "Sandy" who ended up with half of the property that

	D thought he was going to inherit from his grandparents estate, Richard Dubash, Lee (D's step dad), the Landlords at the res where Westrope was pushed down the stairs in 1997 – address 126 1/2 5th Street, SB Today, I also received a telephone call from IRC Special Handling/Classificaton Deputy Ben Garcia regarding an inmate who was given information by Dekraai. Simmons and Wagner advised.

ATTACHMENT 24

[redacted]

From:	Erickson, Robert <RErickson@sbcda.org>
Sent:	Saturday, March 1, 2014 11:50 AM
To:	Wagner, Dan
Cc:	Simmons, Scott
Subject:	FW: attachment
Attachments:	Dekraai Investigator Case notes (2).doc

Dan,

I received a Public Defender sub on my very first day at the new job...at approximately 8AM, on call for March 7. I called the Defense Investigator yesterday to let her know that I got the sub. I started thinking about what material I have that might help me give a better timeline of the sequence of events for this case. My case log is what I use to keep track of things that I have done and/or need to do on cases, and when those tasks were completed. It is kind of like a running log for me to reference if needed. I also keep contact info in the log. I reviewed the information for how I was contacted by Ben Garcia on 10/18/11. In my log, I made what looks like two separate entries on the same date regarding his call to me. The second entry at the end of 10/18/11 is what I recall as what was said to me on that date. I don't always make entries in the log immediately, and I don't include each and everything that happens with a case, especially when I get really busy. There are times when I have to play catch up with my log.

I have attached my entire case notes/log for the Dekraai case.

To this date, I still firmly believe that all Ben told me on the 10/18/11 was that he had an inmate telling him that Dekraai was talking in great detail about his crime, and that the inmate was (not sure what word he used) credible/reliable. That was all that I was told and that was all that I "advised" you and Scott on that date. We had so much going on that I wasn't sure that you guys would even be interested.

If you read my case note entries for 10/18/11, you will see that at the bottom, I write," Today I ....got a call from Ben Garcia etc....." To the best of my recollection, that was the total extent of our conversation that day and I probably made that entry in my case notes on that same date – 10/18/11, as the last entry for that day. (That was all that any of us knew when we went to IRC the next day).

But at some later date, possibly after we knew what was said on the recording, I must have come back and added the entry for 10/18/11 in which I talk about the inmate having been sentenced and waiting for his trip to Fed. Prison...the 85 yr sentence...etc. I really don't know when I found out any of those details about Perez, or even who told me those details...Ben or maybe even Erik Petersen. Why I went back and added that info in my case notes under that date, I am not sure, but probably just so I wouldn't forget. But based on the entry at the bottom for that same date, "Today, I received a call from Ben Garcia....." I definitely made that entry first, some time before the entry about the inmate's sentence and federal prison info. It might have been Ben that told me that, and perhaps it was when I picked up Perez's notes from Ben on 11/1/11. That info definitely came later, and it wasn't even correct as it turns out. I can only guess, but when I was given that info, I was probably also told that Petersen was handling Perez's cases...because upon hearing that information, that would have been my next question, and I got that answer from somewhere at some point prior to writing the memo to Peterson re what Perez had done.

I just know that Ben called me on 10/18/11 and told me he had a guy who said Dekraai was talking, and that guy was reliable. I then told you and Scott about Ben's call, and I don't think we even committed to talking with the inmate on that day. I didn't set anything up until the next day.

Please remember that I consider my case notes/log workproduct. I don't put everything in them, and I don't really use them for anything other than keeping track of things on my cases.

****You will also see in my notes that I wrote about our attempt to get Dekraai's psych records from the psych's office in Long Beach.

Hope all is well,
Don't hesitate to call or e-mail,
Bob Erickson

CONFIDENTIALITY NOTICE: This communication contains legally privileged and confidential information sent solely for the use of the intended recipient. If you are not the intended recipient of this communication you are not authorized to use it in any manner, except to immediately destroy it and notify the sender.

ATTACHMENT 25

TONY RACKAUCKAS
DISTRICT ATTORNEY

MEMO

OFFICE OF THE DISTRICT ATTORNEY

March 3, 2014

TO: Dekraai File, 12ZF0128

FROM: ADA Dan Wagner

SUBJECT: Inv. Bob Erickson's case notes

On approximately Feb. 26, 2014, I learned that Inv. Bob Erickson, who had retired from OCDA the previous week, had been served with a defense subpoena to appear at the hearing of the Dekraai Defense Motion to Dismiss. I was told that Erickson had begun preparing for his testimony, and had come across something in his case notes which contained material of which he wanted DDA Simmons and I to be aware. I learned that Erickson's case notes were a running log that Inv. Erickson kept of his activities on the case regarding investigative requests which had been made of him; Inv. Erickson considered these case notes to be "work product" and thus had not provided them to DDA Simmons or I to be discovered.

Upon reviewing Inv. Erickson's notes, I realized that I had not read them before, nor had they been provided to the defense in discovery. For the most part, I believe that Inv. Erickson's case notes are work product. However, there are portions of his case notes that are not covered by the work product doctrine. For instance, I read in his case notes an entry dated 10-18-11, in which Inv. Erickson had written : "Rec'd a telephone call from OCSD Special Handling Deputy Garcia ref a jail informant who spoke with Dekraai in great detail about the shooting; informant is cooperative and not looking for a deal. No local charges pending; he has been sentenced on federal charges and is awaiting pick-up by US Marshals for trans to federal prison. His 85 year sentence was reduced to 20 for the work that he has already done. Advised Simmons and

Wagner." And in a subsequent paragraph in his case notes, also dated 10-18-11, Inv. Erickson had written: "Today, I also received a telephone call from IRC Special Handling/Classificaton Deputy Ben Garcia regarding an inmate who was given information by Dekraai. Simmons and Wagner advised."

I realized that I needed to give to the defense this material from within Inv. Erickson's case notes, so I called Inv. Erickson on March 1, 2014, and told him that we would have to turn over to the defense at least a part of his case notes. Inv. Erickson then prepared the notes for discovery by removing any personal cell phone #s of people that he did not want to release and by writing, at my request, a memo describing what his case notes are, how and why he made case notes, and what his recollection was concerning the two conflicting entries dated 10-18-11 regarding Inmate F.

Inv. Erickson then provided me with his redacted case notes and memo later on March 1, 2014. I will be producing portions of these case notes in discovery to the defense later today (on March 3, 2014). Before producing the case notes, I will be redacting portions that are clearly work product and that do not contain any otherwise discoverable material (e.g., reports of witnesses, impeachment of witness, *Brady* material).

PATRICK DIXON BIOGRAPHY

Mr. Dixon is currently Special Counsel to Orange County District Attorney Todd Spitzer. He is co-author of the 2015 OCDA Informant Polices & Practices Evaluation Committee Report (IPPEC). During his 37 year career in the Los Angeles District Attorney's Office, Mr. Dixon served as the Head Deputy of the Major Crimes Division for ten years, and finished his career as the Assistant District Attorney for Special Operations, where he assisted the District Attorney in the day-to-day operations of the office, overseeing 16 trial divisions with more than 370 prosecutors. As a homicide deputy he prosecuted many high-profile capital cases. Mr. Dixon has been recognized for his work by multiple organizations, including the National District Attorney's Association and the Los Angeles County Bar Association. Mr. Dixon has been active in the legal profession, having served the State Bar of California as a Vice-President of the Board of Governors, Chair of the Committee of Bar Examiners and a member of the Judicial Nominees Evaluation Committee (JNE). He also served as a member of the Board of Trustees of the National Conference of Bar examiners.

STEVE DANLEY BIOGRAPHY

Mr. Danley is President & CEO of SD Consulting, Inc., which specializes in assisting clients with significant organizational assessment/rehabilitation and human resource management issues. He worked for the County of Orange government for 33 years holding numerous positions including Chief Human Resources Officer, and Performance Audit Director working directly for the Board of Supervisors. While the county's Performance Audit Director, his office received Harvard University's Kennedy School/Ash Center Democratic Government 2012 "Bright Ideas" recognition. He is co-author of the book *Management Diseases and Disorders: How to Identify and Treat Dysfunctional Managerial Behavior*. He has also served as a Lecturer at the University of California at Irvine (UCI) business school. Mr. Danley holds a Master's degree in Business & Public Administration and a Bachelor's degree in Political Science from UCI.