



**ORANGE COUNTY DISTRICT ATTORNEY INFORMANT
POLICIES & PRACTICES EVALUATION COMMITTEE
REPORT**



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I. INTRODUCTION

In 2014, a highly publicized controversy unfolded in the Orange County Superior Court regarding the use of jailhouse informants. The controversy initially focused on a case entitled *People v. Scott Dekraai*, Orange County Superior Court Case No. 12ZF0128. *Dekraai* involved a mass shooting in Seal Beach, California, on October 12, 2011. During the course of the *Dekraai* case, the deputy public defender assigned to the case noticed significant discrepancies in discovery produced by the Orange County District Attorney's Office (OCDA) involving a jailhouse informant in the Orange County jail. A series of motions followed, and Judge Thomas Goethals, who was presiding over the case, issued a ruling on August 4, 2014 (Exhibit No. 1). That ruling provides an overview of the issues and allegations. Subsequently, the Public Defender brought additional information to the attention of the court, and Judge Goethals issued a supplemental ruling on March 12, 2015 (Exhibit No. 2).

The court proceedings led to national press coverage regarding the use of jailhouse informants, and resulted in an examination of numerous other past and pending Orange County prosecutions. The press coverage included allegations of prosecutorial misconduct in other cases by the OCDA and allegations of violations of the constitutional rights of criminal defendants by the Orange County Sheriff's Department (OCSD) and other law enforcement agencies. Specifically, there were allegations that a "conspiracy" regarding jailhouse informants existed between the OCDA's Office and the OCSD for over 30 years, leading to the systemic¹ deprivation of constitutional rights of criminal defendants in Orange County.

In response to the controversy, District Attorney Tony Rackauckas assembled a group of lawyers independent of his office and a retired Judge to examine the OCDA policies and practices regarding the use of jailhouse informants. The committee, the Informant Policies & Practices Evaluation Committee (IPPEC), promptly convened to conduct its evaluation. Its members include retired Orange County Superior Court Judge James Smith, retired Los Angeles Assistant District Attorney Patrick R. Dixon, former Orange County Bar Association President Robert Gerard, and ethics law and professional responsibility attorney Blithe Leece. The IPPEC requested that legal scholar and ethics expert Professor Laurie Levenson of Loyola Law School advise the IPPEC on various ethics issues involved in its evaluation.

The IPPEC conducted a six-month evaluation. At its first meeting, it identified its mission statement:

To conduct a thorough review and assessment of the OCDA policies and practices regarding the use of jailhouse informants. Following such review, prepare a report containing recommendations to the District Attorney regarding the OCDA use of jailhouse informants to assist the District Attorney in ensuring that the OCDA policies and practices, and its interactions with its law enforcement partners, are lawful. The report should include an analysis of current issues regarding adherence to relevant law and should include workable suggestions

¹ At the IPPEC's request, the OCDA surveyed its office and provided felony filing numbers and jailhouse informant numbers as of early December 2015. As of early December, jailhouse informants appear to have been used for Grand Jury, Preliminary Hearing or Trial purposes in 3 of 8625 felony filings by the OCDA (.034%). If one includes all cases in which a law enforcement agency used a jailhouse informant and a criminal case was filed, the number is between 35 and 40 (approximately .463% of felony filings). While these numbers may not be exact given the lack of a formal tracking process, they appear to be accurate based on the internal OCDA survey requested by the IPPEC.

regarding training of OCDA personnel and its law enforcement partners to ensure that applicable law is followed.

Having completed its evaluation, the IPPEC hereby makes the following recommendations to the OCDA:

- No. 1: Revise OCDA policies and procedures regarding the use of jailhouse informants.
- No. 2: Establish a Confidential Informant Review Committee (CIRC) with defined protocols and include an “outside” or independent member on the CIRC.
- No. 3: Overhaul the OCDA training program, with extensive additional training regarding discovery obligations and the use of jailhouse informants.
- No. 4: Coordinate with the OCSD and all law enforcement agencies in Orange County regarding jailhouse informant protocols and procedures, including OCDA’s Jailhouse Informant Policy, and engage in detailed training on the Orange County Informant Index (OCII).
- No. 5: Restructure and combine into one unit the OCDA Gang Unit and Target Unit.
- No. 6: Establish an OCDA Conviction Integrity Unit.
- No. 7: Establish an OCDA Chief Ethics Officer position.
- No. 8: Reinstate the Chief Assistant District Attorney position.
- No. 9: Eliminate “Chief of Staff” position and create a position of “Assistant District Attorney for Media Relations.”
- No. 10: Appoint an independent “monitor” for a three-year period to oversee OCDA compliance with the IPPEC’s recommendation.

Some of these recommendations have already been provided to the OCDA at his request and are being implemented. These recommendations, and the reasoning underlying the recommendations, are set forth in this Report and are respectfully submitted to the OCDA.

II. ROLE OF THE PROSECUTOR

The primary responsibility of state and local government is public safety. The duty of a prosecutor is to do justice. As the United States Supreme Court stated in *Berger v. United States* (1935) 295 U.S. 78, 88: “The [prosecutor] is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, the [prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [A prosecutor] may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

III. SCOPE OF REVIEW

The IPPEC’s scope of review was limited to publicly available documents, including over 2,000 pages of legal briefs in various pending cases involving confidential informants, and voluntary interviews

with over 75 individuals, including prosecutors, criminal defense attorneys, judges, and law enforcement officers, who have knowledge about the OCDA and/or the use of jailhouse informants. The IPPEC also reviewed some internal OCDA training materials.

However, the IPPEC did not have subpoena power to obtain and review documents which were not voluntarily produced, or to compel individuals to speak with the IPPEC, or to question individuals under penalty of perjury. The work of the IPPEC is therefore more accurately characterized as an *evaluation*, rather than an *investigation*. Although the members of the IPPEC come from different legal backgrounds, each has extensive experience in evaluating and investigating various legal matters. Yet, without subpoena power, the IPPEC cannot represent that it has “investigated” and uncovered the truth as to what may or may not have occurred in individual cases involving the use of jailhouse informants.

As will be seen in this Report, the IPPEC evaluation identified numerous deficiencies in both supervision and training at the OCDA which contributed to the jailhouse informant issues. The IPPEC’s recommendations are targeted to eliminate these deficiencies.

Finally, in addition to the recommendations listed above, the IPPEC recommends 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.

IV. OVERVIEW OF APPLICABLE LAW

The following case law and statutes are relevant to the IPPEC’s inquiry:

Evidence Code Section 1040, Privilege for Official Information. Evidence Code section 1040 outlines which public entities may claim a privilege for official information which if disclosed violates a Federal or State statute, or when disclosure is against the interest of the public and the public’s interest outweighs the interest of justice in disclosure of the information.

Evidence Code Section 1041, Privilege for Identity of Informer. Evidence Code section 1041 states which public entities may refuse to disclose a person’s identity when they have provided information of a violation of the law, and to prevent another party from disclosing the informer’s identity. Two conditions must apply in order to prevent disclosure: one, disclosure violates a Federal or State statute; and two, disclosure of the informant’s identity is against the interest of the public, and the public’s interest outweighs the interest of justice in disclosure of the informant’s identity. The statute further clarifies that the privilege only applies if the information is provided to specific government agencies, or by a private citizen with the intent that it be transmitted to those agencies.

Evidence Code Section 1042, Adverse Findings of Fact in Criminal Proceeding; Specific Cases. Evidence Code section 1042 describes the court process, including the *in camera* proceeding if applicable, when a public entity legally authorized to claim a privilege does in fact claim a privilege under Evidence Code section 1040 or 1041.

Penal Code section 1054.1, Disclosure to Defendant. Penal Code section 1054.1 is the statutory authority delineating prosecutors' constitutional discovery obligations.

Penal Code section 1054.7, Time of Disclosure; In Camera Showing of Good Cause for Denial or Regulation of Disclosures. Penal Code section 1054.7 states the time disclosures must be made; defines good cause for late discovery; defines good cause for non-disclosure of evidence; and outlines the *in camera* hearing to be conducted prior to a judicial order of non-disclosure for good cause.

Penal Code section 1111.5, Corroboration of In-Custody Informant. Penal Code section 1111.5 is the statutory embodiment of the *corpus delicti* rule enunciated in California case law prohibiting the State from pursuing the conviction of a person based upon their uncorroborated confession. This statute states that the uncorroborated testimony of an in-custody informant cannot be used to convict, or find a special circumstance true, or used as a fact in aggravation.

Penal Code section 4001.1, In-House Custody Informant. Penal Code section 4001.1 states the statutory limit that an informant can be paid for his/her testimony; and excludes the inclusion of incidental payments from the statutory limit. This Penal Code section also incorporates the holding in *Massiah* that in-house custody informants cannot take deliberate actions designed to elicit an incrimination response from a defendant.

Penal Code section 1191.25, Notification of Victim of Crime Committed by In-Custody Informant Before Testimony. Penal Code section 1191.25 states that the prosecution shall make a good faith effort to contact the victims of the in-house informant's crimes prior to his testimony. The notice to the victim shall include the prosecution's intention to provide a benefit to the in-house informant for his testimony.

Penal Code section 1127a, Instruction on Testimony of In-Custody Informant. Penal Code section 1127a defines an in-custody informant; provides the language for the cautionary jury instruction on how a jury should view the testimony of an in-custody informant; describes the written statement to be filed with the court by the prosecutor when an in-custody informant testifies stating the consideration given or promised; and defines consideration.

Penal Code section 1424.5. Penal Code section 1424.5 goes into effect on January 1, 2016. This Penal Code section permits recusal of a single prosecutor's "bad faith" *Brady* violation and recusal of an entire district attorney's office if "other employees" "participated in" or "sanctioned" the *Brady* violation in "bad faith" as part of a "pattern and practice."

Case Law

The following seminal cases outline the Constitutional principles for the use of statements from jailhouse informants: *Massiah v. United States* (1964) 377 U.S. 201; *United State v. Henry* (1980) 447 U.S. 264; *Maine v. Moulton* (1985) 474 U.S. 159; *Kuhlmann v. Wilson* (1986) 477 U.S. 436; *In re Neely* (1993) 6 Cal.4th 901; *In re Neely* 70 Cal.App.4th 767 (1999); and *People v. Fairbank* (1997) 16 Cal.4th 1223.

Massiah focused on a defendant's Sixth Amendment right to counsel by holding that once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when law enforcement deliberately elicits incriminating statements from him without his lawyer present.

Henry further defined what type of conduct is included in the concept of "deliberately elicits" by stating that when an informant develops a relationship of trust and takes actions that would stimulate conversation leading to incriminating statements, then a *Massiah* violation has occurred.

Moulton held that law enforcement's use of the defendant's accomplice who was wearing a wire transmitter as he discussed the pending charges against both of them violated the defendant's Sixth Amendment right to counsel as the conversation was certain to result in incriminating statements by the defendant.

The holding in *Kuhlmann* demonstrates that an informant who either voluntarily or by agreement reports incriminating statements to the police does not create an automatic *Massiah* violation. In order for a *Massiah* violation to occur, the law enforcement agency and the informant must have taken some action designed to cause the defendant to make incriminating statements beyond simply listening. There is no Sixth Amendment violation when law enforcement fortuitously obtains incriminating statements by the defendant after the defendant's right to counsel has attached.

In re Neely (1993) addresses the scope of an agreement between law enforcement and an informant. *Neely* states that the agreement can be explicit or inferred from facts showing that the parties behaved as though an agreement existed by looking to the past history of conduct between law enforcement and the informant.

In re Neely (1999) discusses the suppression of evidence that is obtained as a direct result of a *Massiah* violation, *i.e.*, the fruit of the poisonous tree analysis.

Fairbank involved an informant who relayed voluntary statements made by the defendant to law enforcement despite the fact that law enforcement told the informant that he would not receive consideration for relaying the defendant's statements. *Fairbank* pointed to the holding in *Kuhlmann*, as well as other relevant California case law, in finding there was no *Massiah* violation.

The issues that surround the admission of evidence obtained through a jailhouse informant also necessarily implicate a prosecutor's obligations under *Brady* and its progeny. *Brady v. Maryland* (1963) 373 U.S. 83, states that withholding evidence favorable to the defendant as to either guilt or punishment violates a defendant's due process rights irrespective of the intentions of prosecutors. There is a "duty on the part of the prosecution, even in the absence of a request therefore, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness." (*People v. Ruthford* (1975) 14 Cal.3d 399, 406.) Prosecutors have a duty to disclose exculpatory evidence possessed by, and known to, the law enforcement agencies participating in the case because law enforcement is viewed as part of the prosecution team. (*Kyles v. Whitley* (1995) 514 U.S. 419.) Prosecutors cannot shield themselves from disclosing exculpatory information by stating that they were unaware the material and exculpatory evidence existed. Prosecutors are under a duty to make reasonable efforts to search within the law enforcement team for exculpatory information. See *In Re Brown* (1998) 17 Cal.4th 873. *Brady* and its progeny are fundamental tenets of the criminal justice system.

Prosecutors wield the power of the sovereign state; and thus are held to the highest ethical standards. The California Rules of Professional Conduct outline the statutory ethical guidelines that prosecutors and all attorneys licensed in the State of California must follow.

Also, the State Bar of California has put on "fast track" the adoption of retitled CPRC 5-110, Special Responsibilities of a Prosecutor which closely tracks ABA Model Rule 3.8: Special Responsibilities of a Prosecutor.²

² The prosecutor in a criminal case shall:

V. EVALUATION PROCESS AND METHODOLOGY

The IPPEC used the following process and methodology in its evaluation:

- Review and analysis of the Report of the 1989-1990 Los Angeles Grand Jury regarding the investigation of the involvement of jailhouse informants in the criminal justice system in Los Angeles County. This 153-page report provided an outstanding starting point for the IPPEC evaluation and underscored the dangers to the justice system that arise whenever a jailhouse informant is used by law enforcement and/or a prosecuting agency.
- Review and analysis of the 2006 California Commission on the Fair Administration of Justice Report and Recommendations regarding informant testimony.
- Review and analysis of the May 2015 Orange County Office of the District Attorney Operational Audit titled "Improving the Long-Term Efficiency, Effectiveness, and Economy of the Office of the District Attorney."
- Review and analysis of various jailhouse informant policies and procedures of both the

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- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
 - (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
 - (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
 - (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
 - (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
 - (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
 - (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
 - (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Los Angeles County and Ventura County District Attorney Offices.

- Review and analysis of the legal filings and Court Rulings in *People v. Scott Dekraai* 12ZF0128, *People v. Daniel Wozniak*, 12ZF0137, and other cases involving two specific informants, Oscar Moriel and Fernando Perez. Some documents and legal briefs were reviewed involving other gang-related cases in which confidential informants were used, including *People v. Leonel Vega*, 07CF2786, *People v. Isaac Palacios* 11CF0720, *People v. Fabian Sanchez*, 11CF0920, *People v. Joseph Govey*, 12ZF0134, and *People v. Brian Isas* 11CF2748.
- Review the OCDA's OCII protocols. The OCII is the OCDA's database of informant information. This database was established to create a system by which prosecutors and law enforcement can learn of credibility and reliability issues surrounding the use of a potential informant. The OCII database facilitates the ability of the prosecution team to carry out its disclosure obligations regarding the informant. Information about the informant, his activities, and any benefits he received is inputted into the database.
- Review of the legal briefs and personal observations of some of the live testimony presented on the motion for a new trial filed in *People v. Eric Ortiz*, 11CF0862 a case that involved many of the same allegations that have been made in other cases involving the use of jailhouse informants.
- Personal interviews of over 75 OCDA prosecutors, OCDA investigators, law enforcement officers, criminal defense attorneys, and judges.
- Personal interviews of District Attorney Tony Rackauckas and Orange County Sheriff Sandra Hutchins.

VI. SUMMARY OF EVALUATION

While the ethical prosecution of criminal charges is of paramount importance to the public, it is of particular and more immediate importance to well-defined groups, including: criminal defendants; crime victims; criminal defense attorneys; prosecutors; judges; juries; families of victims; and the families of the accused. The confidence of these various constituencies in the prosecution of criminal cases in Orange County that involve the use of jailhouse informants has eroded. However, implementation of the recommendations in this Report can serve to restore confidence in the Orange County criminal justice system.

During the IPPEC's evaluation process, dozens of prosecutors and criminal defense attorneys willingly participated in IPPEC interviews. The IPPEC appreciates the time that these lawyers spent with the IPPEC. Many of the criminal defense attorneys interviewed by the IPPEC pointed out the high ethical standards exhibited by many of their opposing counsel from the OCDA's Office.

However, during the evaluation it became clear that over the years, some prosecutors at the OCDA's Office adopted what the IPPEC will refer to as a win at all costs mentality. This mentality is a problem. Stronger leadership, oversight, supervision, and training can remedy this problem. Key to addressing the problem is changing the culture of the office by not rewarding prosecutors with the "must win" mentality with promotions. Prosecutors' performance reviews should focus less on winning trials, and reflect greater emphasis on legal knowledge, analysis of issues, and finding justice.

What also became clear during the evaluation was that, in many ways, the OCDA's Office functions as a ship without a rudder. While the high level of trust that the District Attorney has given to

his senior deputies and supervisors is in many ways admirable and a credit to the experience of those senior deputies and supervisors, there does not appear to be any consistent or clear cultural message emanating from the top down to the bottom of the organization. In short, the office suffers from what is best described as a failure of leadership.

This failure appears to have contributed to the jailhouse informant controversy. The management in the office was unaware of the caseloads, use of jailhouse informants, and discovery challenges of Deputy District Attorneys in the Target, Gang, and Homicide Units. The lack of oversight of these serious cases led to repeated legal errors that should have been identified and rectified by management long before the problems reached the current scale. Additionally, the lack of oversight by management at all levels has resulted in implementation of inconsistent procedures and practices. This is an issue that must be acknowledged, shouldered, and remedied by the entire leadership team at the OCDA's Office, including the District Attorney, Senior Assistant District Attorneys, and the Assistant District Attorneys. In fact, the IPPEC evaluation revealed that the District Attorney himself was unaware of many of the problematic issues that led to the jailhouse informant controversy.

The IPPEC evaluation also revealed that, within the OCDA's Office, there is a palpable hesitation to bring problematic information to the attention of the District Attorney. One readily apparent reason for this hesitation is that senior management at the OCDA is subject to termination without cause. When a Deputy District Attorney 4 accepts a promotion to Assistant District Attorney or Senior Assistant District Attorney they become "at will" employees, and serve at the pleasure of the District Attorney. By accepting these promotions, prosecutors give up all civil service protection. If terminated, these senior prosecutors cannot revert back to their previous civil service protected position of Deputy District Attorney 4. Rather, they must leave the OCDA. Such a policy does not promote the free exchange of ideas on issues facing the OCDA. While the IPPEC recognizes that the District Attorney should have the ability to select his executive staff, we recommend that if these prosecutors are removed from their "at will" positions they should be returned to their previous civil service jobs, not terminated. This lack of job security inhibits the free exchange of ideas among managers. Hopefully a change in the civil service rules will result in more independent (and vocal) thinking by senior management level attorneys.

The IPPEC also learned that over the years a certain ambivalence has developed about making suggestions or expressing concerns because, often times, despite acknowledgement of the concern or an expression of thanks for the suggestion, "nothing ever happens or changes." This ambivalence underscored the need for more robust communication and leadership at the OCDA.

VII. RECOMMENDATIONS

RECOMMENDATION NO. 1: REVISE OCDA POLICIES & PROCEDURES REGARDING THE USE OF JAILHOUSE INFORMANTS

The OCDA needs a clear and consistent policy regarding its use of jailhouse informants. Below is a suggested policy, the elements of which should be included in any policy adopted by the OCDA.

INTRODUCTION

It is the policy of the OCDA to carefully evaluate and strictly control the use of jailhouse informants as prosecution witnesses. The use of a jailhouse informant as a witness involves significant risks to the integrity of this office and fair administration of justice. It is the policy of this office that the use of a jailhouse informant as a witness in a criminal prosecution will be the rare and infrequent exception. Accordingly, the District Attorney, as Chair of the Confidential Informant Review Committee (CIRC), must give prior approval to the use of any jailhouse informant as a witness in a criminal prosecution or a grand jury hearing. Strong corroborating evidence is required to demonstrate that a jailhouse informant is offering truthful testimony. A trial deputy who wishes to call a jailhouse informant as a witness must comply with all relevant state and federal statutes and the legal policies of this office.

OFFICE POLICY

A jailhouse informant is a person other than a co-defendant, percipient witness, accomplice or co-conspirator whose testimony is based upon statements made by the defendant while both the defendant and the jailhouse informant are in a custodial setting. (Penal Code section 1127a.) This policy includes all jailhouse informants, whether or not they seek leniency or any other benefit from this office or other law enforcement officials in return for their testimony. An informant witness in a so-called "*Perkins Operation*" (*Illinois v. Perkins* (1990) 496 U.S. 292, 294) is deemed to be a jailhouse informant for the purpose of this policy and must be approved by the CIRC prior to being called to testify in a criminal prosecution or a grand jury hearing. A prosecutor shall notify his/her supervisor immediately when the prosecutor becomes aware that a potential jailhouse informant has come forward and offered his or her cooperation to this office or any law enforcement agency.

No jailhouse informant shall be called to testify to a defendant's oral statements, admission, or confession unless strong evidence corroborates the truthfulness of the jailhouse informant's statements. This evidence must consist of more than the fact that the jailhouse informant appears to know details about the crime thought to be known only to law enforcement officials.

It shall be the responsibility of the CIRC to determine if and when a prosecutor may offer the testimony of a jailhouse informant in a criminal prosecution or a grand jury hearing. The CIRC shall consider the factors set forth in this policy in determining whether to approve the use of a jailhouse informant. The members of the CIRC shall include: the District Attorney, the Senior Assistant District

Attorneys, the Assistant District Attorney of the Gang Unit, and the Assistant District Attorney of the Homicide Unit. The District Attorney, at his or her discretion, may appoint one additional temporary member to the CIRC for a term of six months on a rotating basis. This temporary member shall be either a Deputy District Attorney or an Assistant District Attorney who has significant jury trial experience. The District Attorney shall also appoint a retired judge or a neutral individual as a permanent member of the CIRC. The District Attorney shall serve as chair of the CIRC and may designate a Senior Assistant District Attorney as the acting chair in the District Attorney's absence.

A trial deputy who wishes to call a jailhouse informant as a witness in a criminal prosecution or a grand jury hearing must obtain prior approval of the CIRC. All such requests must be approved by the trial deputy's supervisor and submitted in writing to the CIRC through the trial deputy's chain of command. The written request to offer the testimony of a jailhouse informant must include the following information:

- the present status of the case in which the jailhouse informant's testimony will be offered, including the crimes charged in the complaint, information, or indictment;
- a description of how contact was initiated between the jailhouse informant and law enforcement;
- a description of the facts and circumstances surrounding the jailhouse informant obtaining the defendant's admission/confession;
- a detailed description of the crime and the evidence (excluding the jailhouse informant's proposed testimony) that supports the charges and/or the special circumstance allegations;
- the evidence/testimony offered by the jailhouse informant;
- a description of the evidence that corroborates the jailhouse informant's proposed testimony and whether or not that information was available to the jailhouse informant other than through the statements of the defendant. (*e.g.*, newspaper articles or documents found in the informant's jail cell or in his/her possession);
- an analysis of the strengths and weaknesses of the prosecution's case with and without the testimony of the jailhouse informant;
- a complete description of the jailhouse informant's criminal background, including his/her true name, all known aliases, all pending cases in any jurisdiction, all misdemeanor and felony convictions, all arrests and documented law enforcement contacts and any information regarding gang affiliations. The trial deputy should also identify the jailhouse informant's past crime partners and co-defendants and any connection to the defendant in the present case;
- any benefit promised or given to the jailhouse informant by any member of the prosecution team, including, but not limited to, any law enforcement officer or any employee of the District Attorney's Office on the pending case or any other case in which the jailhouse informant has been a cooperating witness regardless of jurisdiction;

- a description of any prior offers *to provide* information by the jailhouse informant to law enforcement, whether or not the informant testified, the quality of the testimony and any and all promises made or benefits provided to the informant, whether monetary or otherwise;
- a description of how the trial deputy intends to comply with Penal Code section 1191.25, which requires the prosecution to make a good faith effort to notify the victims, if any, of any crime which was committed by or alleged to have been committed by the jailhouse informant before the jailhouse informant is called to testify;
- a draft of the written statement of consideration to be lodged with the trial court pursuant to Penal Code section 1127a(c); and
- confirmation that the trial deputy has strictly complied with Penal Code sections 4001.1(a) and 4001.1(b).

The CIRC shall consider the above factors in its decision to approve or disapprove the use of a jailhouse informant's testimony. The Chair of the CIRC shall notify the requesting trial deputy of the committee's decision in writing. The decision is final and no jailhouse informant may be called to testify as a prosecution witness unless prior approval is given by the CIRC.

Once a jailhouse informant who has been authorized by the CIRC testifies, the trial deputy shall submit a memorandum memorializing the event through the chain of command to the Chair of the CIRC. The memorandum shall include:

- the name of the jailhouse informant;
- the name of the case, the date of the testimony, the court case number, the law enforcement DR number, the OCDA case number of the case in which the jailhouse informant testified and the case numbers of the case or cases in which the jailhouse informant received leniency or any other benefit;
- a synopsis of the jailhouse informant's testimony and evaluation of its credibility; and
- a description of any consideration that was provided or will be provided to the jailhouse informant in exchange for the testimony.

Should any employee of this office or any member of law enforcement acquire any information that suggests that a jailhouse informant is attempting to fabricate or has fabricated evidence in any case, that employee or law enforcement official shall immediately inform the Chair of the CIRC by a memorandum through his/her chain of command setting forth the relevant facts. Should the trial prosecutor learn during a trial that a jailhouse informant is attempting to fabricate or has fabricated evidence, the prosecutor shall immediately notify the court and defense counsel. The trial prosecutor shall also prepare a memorandum setting forth all the pertinent facts and forward it through his/her chain of command to the Chair of the CIRC.

It is the policy of this office that all employees and law enforcement officers have a duty to preserve all records and documents relating to any jailhouse informants. This duty includes any jailhouse informant they have transported, assisted with

housing, interviewed, or called as a witness. This policy includes, but is not limited to, all notes, memoranda, computer generated documents, any records of promises made, any payments made or rewards given to a jailhouse informant or to any other person for the benefit of the jailhouse informant.

It is the policy of this office that all prosecutors and investigators shall be familiar with the statutory law relating to jailhouse informants and shall comply with all provisions, including:

- no law enforcement official shall give, offer, or promise to give any monetary payment in excess of fifty dollars (\$50.00) in return for an a jailhouse informant's testimony in any criminal proceeding (Penal Code section 4001.1(a));
- the trial deputy shall make a good faith effort to notify the victims, if any, of any crime that was committed by, or alleged to have been committed by, the jailhouse informant before the jailhouse informant is called to testify (Penal Code section 1191.25);
- the trial deputy shall file with the court a written accounting of any considerations or benefits promised or given to the jailhouse informant (Penal Code section 1127a(c));
- the trial deputy shall request that the court give a cautionary instruction to the jury regarding jailhouse informant testimony (Penal Code section 1127a(b));
- except where a defendant's right to counsel has not attached, no law enforcement official and no jailhouse informant may take any action that is designed to elicit incriminating statements from a defendant beyond merely listening to the defendant's statements (Penal Code section 4001.1(b); *People v. Clair* (1992) 2 Cal.4th 629, 657; *Illinois v. Perkins* (1990) 496 U.S. 292, 294); and
- the trial deputy shall comply in all respects with *Brady v. Maryland* (1963) 373 U.S. 83 and all state statutory and ethical discovery rules.

RECOMMENDATION NO. 2: ESTABLISH A CONFIDENTIAL INFORMANT REVIEW COMMITTEE (CIRC) WITH DEFINED PROTOCOLS AND INCLUDE AN “OUTSIDE” OR INDEPENDENT MEMBER ON THE CIRC.

As discussed in Recommendation No. 1, is it critical that the OCDA continue the use of its recently established CIRC. As previously stated, IPPEC also recommends that there be an “outside” or independent member of the CIRC who participates in all the CIRC confidential informant review meetings. To protect the sanctity of the attorney-client privilege and attorney work-product of the OCDA, this independent member should be appointed by the OCDA as a part-time employee of the OCDA’s Office. Preferably, this independent member of the CIRC should be a retired criminal defense attorney or a retired judge who worked as a criminal defense attorney prior to taking the bench.

RECOMMENDATION NO. 3: OVERHAUL THE OCDA TRAINING PROGRAM, WITH EXTENSIVE ADDITIONAL TRAINING REGARDING DISCOVERY OBLIGATIONS AND THE USE OF JAILHOUSE INFORMANTS.

The OCDA Training Program is inadequate. IPPEC's evaluation revealed that the lack of training throughout the OCDA office was a primary contributing factor to the issues involving jailhouse informants. The IPPEC urges the OCDA to recognize that science and technology are changing the way law enforcement does its job. The legal and investigative tools that are best practices today may be changed by a court decision tomorrow. The OCDA must stay on the forefront of these changes. Toward this end, the OCDA must establish and support a full-time training unit, led by an Assistant District Attorney and staffed by some of the best and most experienced prosecutors in the office. The mission of the Training Unit should be to produce relevant and timely legal education to prosecutors and law enforcement officers in Orange County. The unit should also partner with other prosecutorial and law enforcement agencies throughout Southern California to develop the best training possible, and best practices for, criminal prosecution.

The Training Division should establish the following programs:

A comprehensive multi-week training program for newly hired deputy district attorneys. This program should include criminal law and procedure, discovery, ethics, office policy, calendar management, courtroom presentations, including preliminary hearings, jury trials, and law and motion practice. The prosecutor-instructors must give feedback to the new hires and to the office's executive staff on the progress of the training classes. A graduation and swearing-in ceremony for those lawyers who successfully complete the new prosecutors' training program should be considered to acknowledge their accomplishments.

Monthly weekend morning seminars. Prosecutors will receive four hours of compensatory time for their attendance. The seminars will cover criminal law, ethics, evidence, trial tactics, and mandatory State Bar MCLE subjects. Saturday seminars will also focus on office policy, such as the Confidential Informant Review Committee and *Brady* issues. The Training Division will obtain State Bar approval for all seminars, and attendees will receive State Bar MCLE credits.

Office-wide DNA training. The goal of this training is to educate staff on the latest DNA science and prepare every prosecutor to present DNA evidence to a judge or jury. Within one year, every deputy district attorney will be expected to complete this training.

Office-wide AB 109 (Realignment) and Proposition 47 training. The enactment of AB 109 and Proposition 47 have dramatically changed the landscape of the criminal justice system. The realignment as to where felony inmates are housed and the sentencing of new felons has changed the way the criminal courts dispense justice. The impact of these laws are not just felt in felony courts. In many counties, AB 109 and Proposition 47 have changed the way misdemeanor crimes are prosecuted and sentenced. Prosecutors must have the latest, up to the minute knowledge of how to deal with these changes in the justice system. All deputy district attorneys will be required to complete this one day training.

Domestic Violence Prosecution College. Domestic violence is one of the most devastating crimes in our society. It can be a difficult crime to prosecute and often presents challenges to law enforcement officers, as well as prosecutors. This training will present the latest techniques for successfully prosecuting these crimes while dealing fairly with all parties.

Felony Prosecution and Sentencing College. For deputies moving from prosecuting

misdemeanors to the Felony Panel, felony trials can be a challenging area of the law. This college will prepare prosecutors for this assignment in such areas as calendar management, felony sentencing and the impact of AB 109, prosecutorial discretion and the three-strikes law, victim's rights and Megan's Law, mental health issues, law and motion practice and case settlement, and office policy. Completion of this college is required before a prosecutor is assigned to the Felony Panel.

Homicide Prosecution College. For most prosecutors, a murder trial is an intense and challenging experience. Homicide trials and capital litigation are complex areas of the law. This training will prepare prosecutors for the most difficult cases of their careers. Among the topics that will be covered are the law of homicide and capital case litigation, pre-trial investigation, jury selection, mental health defenses, opening statement and final argument, presentation of penalty phase evidence, and post-conviction remedies. Successful completion of this college should be a prerequisite to assignment in the Homicide, Gang, and Target units. CIRC/OCII (see below)/Brady training must be a prerequisite to assignment in the Homicide, Gang, or Target Units! One comment that the IPPEC heard repeatedly at various levels throughout the OCDA was the erroneous belief that if a prosecutor does not use a jailhouse informant at a preliminary hearing or a trial, the prosecutor does not need to turn over the statements of the jailhouse informant. This clearly is not the law and the test for *Brady* is not whether the information is used at a preliminary hearing or at trial. A number of prosecutors within the OCDA appear to be confusing the requirements of Penal Code section 1050 (turning over a criminal defendant's statements that will be used at trial at least 30 days before trial) with the prosecutor's discovery obligations under *Brady*. These two obligations are separate and can create two different discovery productions.

OCII Training. Currently the OCII is maintained by one Deputy District Attorney. This Deputy District Attorney inputs all the information received by law enforcement and prosecutors, and notifies prosecutors of witnesses who have an informant history. The current practice in the Office is for this Deputy District Attorney to also train all law enforcement agencies on the protocols and procedures of using the OCII. The OCII is the cornerstone of discovery production regarding jailhouse informants and thus must be reliably maintained. Assigning one Deputy District Attorney to these three essential functions of the OCII and training others on the protocol is inadequate. An additional Deputy District Attorney should be tasked with a regular compliance check on all Orange County prosecutors and law enforcement agencies to verify that the OCII contains all informants' information, activities, and benefits received.

Grand Jury College. The grand jury is one of the most important institutions in our criminal justice system. This college will familiarize prosecutors with the resources of the grand jury; prepare them to be more effective when appearing before this historic institution; and teach prosecutor's duties of discovery specific to grand jury proceedings.

Specific Training Re Relationship and Interaction with Law Enforcement (Particularly for Target Unit and Gang Unit DAs). As a result of its interviews, and observation of the live testimony presented during the hearing on the motion for new trial in *People v. Ortiz*, the IPPEC strongly recommends that Target Unit and Gang Unit (or preferably a combined unit) deputies receive specific training regarding maintaining an ever-important professional and detached relationship with law enforcement. Particularly in the Target Unit, where deputies are actually embedded in the gang units of certain law enforcement agencies, maintaining an objective and detached relationship is critical. The IPPEC heard from numerous deputies that it is not uncommon for Target Unit deputies to be subject to inappropriate pressure from their law enforcement counterparts to file cases that the deputies were otherwise not comfortable filing. The IPPEC heard reports of deputies being ridiculed and even harassed by law

enforcement for not being aggressive enough in filing certain gang cases. Additionally, to the degree Target Unit deputies continue to be embedded in the same office space with their law enforcement counterparts, it is inevitable that social relationships and friendships will develop between the Target Unit deputies and their law enforcement counterparts. The IPPEC is strongly of the view that close social and friendship-type relationships between embedded deputies and their direct law enforcement counterparts are fertile ground for deputies (particularly young and impressionable deputies) to have their judgment impacted in a way that does not benefit the constitutional role of the prosecutor. Should the OCDA continue with its practice of embedding Target Unit deputies with law enforcement, the IPPEC urges that there be: specific training regarding maintaining professional distance and detachment; regular rotation (at least every two years) of Target Unit deputies; a careful screening process by which only experienced and more senior deputies are placed in these positions; and a specific process by which a deputy who feels pressured to sway from his or her independent legal judgment has an avenue to express concern to his or her supervisor who in turn will immediately address the matter with the involved law enforcement agency.

Develop a Program of "Brown Bag" Lunch-Time Lectures. The lectures should be specifically targeted to meet the needs of individual units in the office.

OCDA Management/Leadership Training. It was clear to the IPPEC that while both dedicated and hardworking, the OCDA management and leadership team is not exercising the quality of leadership to run what is essentially the largest law firm in Orange County. Leadership training is needed on how to form a cohesive office that implements and adheres to the same policies and procedures consistently. There is also clearly a need for motivational, leadership, and team building training in the office.

RECOMMENDATION NO. 4: COORDINATE WITH THE OCSD AND ALL LAW ENFORCEMENT AGENCIES IN ORANGE COUNTY REGARDING JAILHOUSE INFORMANT PROTOCOLS AND PROCEDURES, INCLUDING OCDA'S JAILHOUSE INFORMANT POLICY, AND ENGAGE IN DETAILED TRAINING ON THE ORANGE COUNTY INFORMANT INDEX (OCII).

Law Enforcement Training. OCDA must have regularly scheduled training with all Orange County Law Enforcement Agencies, including all new hire classes. The training should include, but not be limited to, the following:

- The prosecution team's discovery obligations;
- Jailhouse informant statutory and case law;
- OCDA's Jailhouse Informant Policy; and
- OCII Protocol and Procedures

Training Special Handling and Classification Unit Deputy Sheriffs at the Orange County Sheriff's Department. Other than interviewing Orange County Sheriff Sandra Hutchins, the IPPEC did not interview any individual deputy sheriffs. However, during the IPPEC's six-month evaluation, based on various legal briefs and testimony in various jailhouse informant related cases, it appeared that the Special Handling and Classifications Unit Deputies lacked training regarding law enforcement's obligations under both *Massiah v. United States* and *Brady v. Maryland* and applicable California laws and ethical standards. These Units at the OCSD should receive detailed specific training regarding the legal issues associated with jailhouse informants.

Due to the magnitude of training OCSD and local Orange County police departments, including all new law enforcement hires, a Deputy District Attorney should be assigned to this position. This Deputy District Attorney should also be responsible for ensuring that *Brady* information held by law enforcement agencies regarding confidential informants is transmitted to the OCII unit for inclusion in the database.

RECOMMENDATION NO. 5: RESTRUCTURE AND COMBINE INTO ONE UNIT THE OCDA GANG UNIT AND TARGET UNIT.

Two different units prosecute gang-related cases within the Office - - the Target Unit and the Gang Unit. The Gang Unit prosecutes all gang-related adult felonies and serious juvenile cases. Gang cases can range in severity and complexity, but include a significant number of homicide and death penalty cases. Gang cases often involve multiple defendants, again adding to the complexity of prosecuting these cases.

The Target Unit was initiated with grant funds in the early 1990's to specifically "target" serious gang offenders. Office attorneys and investigators are out-stationed to, and embedded with, local police agencies for the purpose of "targeting" gang members for apprehension and prosecution. The program serves as a partnership between the OCDA's Office, the Probation Department, and local law enforcement. Although having prosecutors embedded with local law enforcement creates obvious efficiency, it also has the potential to create undue, and at times unfair, pressure on the prosecutor to file cases that he or she does not believe should be filed. The IPPEC is concerned that having Target Unit prosecutors "housed" with law enforcement risks blurring the lines of the objective professional distance required between prosecutors and law enforcement.

Both the Target Unit and the Gang Unit prosecute cases that can range in severity and complexity, but include among the most violent and complex cases within the Office. Both units share the same goals and expertise, but they do not collaborate on training or best practices.

IPPEC recommends combining the Gang and Target units to provide for greater collaboration on training and best practices.

RECOMMENDATION NO. 6: ESTABLISH AN OCDA CONVICTION INTEGRITY UNIT.

The OCDA should join the Los Angeles County District Attorney's Office and the Santa Clara District Attorney's Office in establishing a Conviction Integrity Unit ("CIU") that will be dedicated to re-examining post-conviction claims of innocence. This unit would have responsibility for investigating and evaluating claims of wrongful convictions, including those involving jailhouse informants. Instituting such a unit will improve the OCDA's ability to detect and remedy police and prosecutor mistakes earlier in the judicial process and ensure that those with information regarding improper investigations and prosecutions have a place to come forward with their claims. Establishment of this unit will also signal to the public that the OCDA is open to learning about the mishandling of cases. It will also provide for a neutral group of prosecutors whose job is not simply to defend convictions, but to critically examine whether they were lawfully obtained.

RECOMMENDATION NO. 7: ESTABLISH AN OCDA CHIEF ETHICS OFFICER POSITION.

The OCDA should establish a senior position of “Chief Ethics Officer.” This attorney should be an experienced criminal lawyer with particular expertise in professional ethics and discovery obligations. The Chief Ethics Officer should work closely with the supervisor of the Training Unit to enhance the professional integrity of the OCDA. This attorney should be given an employment contract with a duration of at least three years, and the employment contract should specifically protect the attorney in this position from retaliation for bringing matters to the attention of the OCDA. This attorney should establish an internal mechanism for all members of the OCDA and for individuals outside the OCDA’s Office, such as criminal defense attorneys and others, to report possible ethics violations or improprieties by members of the OCDA’s Office. This position should also have the authority to conduct investigations into internal ethical violations, and to make recommendations to the District Attorney regarding discipline for any ethical breaches found. The IPPEC envisions the logistics of such an operation being somewhat analogous to the Chief Ethics Officer and compliance positions established by numerous corporations following the passage of the Sarbanes-Oxley Act and recommends that there be such reporting avenues as a 1-800 number and an anonymous reporting mechanism.

RECOMMENDATION NO. 8: REINSTATE CHIEF ASSISTANT DISTRICT ATTORNEY POSITION.

As the second-in-command, a Chief Assistant District Attorney (“CADA”) would assist the District Attorney in the day-to-day management of the office. The Senior Assistant District Attorneys, the Chief of the Bureau of Investigation, the head of the Training Unit, and the Head Supervisor of the office clerical staff would report directly to the CADA. The CADA should take a daily “hands on” approach with the head of the Training Unit. The CADA would chair the Special Circumstance Committee and the CIRC in the District Attorney’s absence and oversee the scheduling and paperwork flow for those committees. The District Attorney may wish to request that the CADA develop a protocol for the review of major cases, perhaps a Major Case Review Committee, to assist the District Attorney in making important decisions for prosecutions of significant import. A few managers expressed the hope that a CADA would bring more structure to the management of the office which in turn would help avoid future issues such as the current jailhouse informant issues. Among addressing numerous other needed management concerns, the CADA should be tasked with implementing the Jailhouse Informant Policy recommended by this Report.

RECOMMENDATION NO. 9: ELIMINATE “CHIEF OF STAFF” POSITION AND CREATE A POSITION OF “ASSISTANT DISTRICT ATTORNEY FOR MEDIA RELATIONS.”

The Chief of Staff position should be re-designated as the Assistant District Attorney for Media Relations, and be staffed with an Assistant District Attorney who will develop a transparent and professional relationship with the press.

With one exception, every member of the OCDA’s Office who was interviewed expressed what could only be described as an extreme level of concern regarding the toxic and combative relationship between the OCDA’s Office and the press. While members of the OCDA’s Office were careful not to attack the OCDA Chief of Staff or members of the OCDA Media Relations Unit personally, there is an overwhelming frustration that the OCDA’s Office does not have a more transparent and less hostile relationship with the press.

Most members of the OCDA’s Office believe that the jailhouse informant controversy had been greatly overblown because of a lack of transparency, and the fact that the Chief of Staff and Media Relations Unit did not immediately and openly address the issues and the problems in the *Dekraai* case. The perception of most members of the OCDA’s Office is that the combative relationship between the Chief of Staff and the press only furthered various members of the press, and certain members of the public, to focus on the jailhouse informant issue so that it eventually took on a life of its own, well beyond the level of the actual problems involved in the *Dekraai* matter and a handful of other cases.

While some of the press coverage – including articles, op-eds, and letters to the press – contained inaccurate or unsubstantiated information, the OCDA must shoulder responsibility by its failure to provide straightforward complete answers to press inquiries.

RECOMMENDATION NO. 10: APPOINT AN INDEPENDENT “MONITOR” FOR A THREE-YEAR PERIOD TO OVERSEE OCDA COMPLIANCE WITH THE IPPEC’S RECOMMENDATIONS.

To ensure that the IPPEC’s recommendations are taken seriously, the IPPEC recommends that the OCDA appoint an independent Monitor. The IPPEC suggests that the Monitor be a retired Judge and if asked, the IPPEC would appreciate the opportunity to provide potential nominees for the Monitor position. For at least the next three years, the Monitor should provide an annual report to the public reporting on the OCDA implementation and compliance with the IPPEC recommendations.

VIII. CONCLUSION

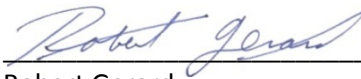
While undoubtedly most prosecutors in the OCDA's Office are ethical and hard working professionals, there are significant issues within the office in the areas of training, supervision, and overall culture. There is an immediate need for stronger leadership, training, supervision, mentoring, and oversight to change the culture. The purpose of the recommendations of the IPPEC is to recognize these issues and to help reinstate the public's trust and confidence in our system of justice.

Each of us on the IPPEC has been honored to participate in this process and remains open to providing further assistance to the Orange County District Attorney's Office and the County of Orange.

Respectfully submitted,



Patrick Dixon



Robert Gerard



Blithe Leece



Laurie Levenson



The Honorable James Smith (Ret.)

EXHIBIT 1

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
BRENDA RAAB
BY: _____, 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 teeming 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’s 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 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

EXHIBIT 2

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: WALEEN FERRIS 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, 879, 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.

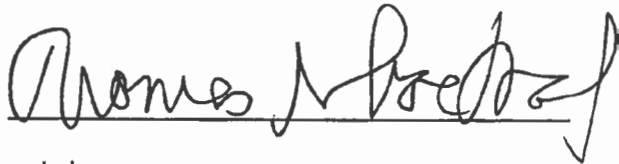
“The rights of the respective parties here are extremely important ones, namely, defendant’s right to a fair trial and the People’s right to prosecute persons believed to be responsible for the commission of serious crimes.” Guillen, supra, at pages 1006-07, citing Uribe, supra at 857-58.

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