THE MYTH OF THE ORANGE COUNTY JAILHOUSE INFORMANT PROGRAM

"The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor. Some readers may view this concept with skepticism. Yet this notion lies at the heart of our criminal justice system and is the foundation from which any prosecutor's authority flows"

-Carol Corrigan, Hastings Law Review

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SUMMARY

Significant media coverage, finger pointing, and speculative rhetoric have been published about the alleged jailhouse informant program that is said to exist in the Orange County jails. Due to this persistent media attention, the negative impact on previous convictions, and the continued erosion of confidence, the 2016-2017 Orange County Grand Jury elected to undertake an investigation into the allegations.

A three-pronged approach was employed: a review of the structure and use of jailhouse informants; an investigation into the Orange County District Attorney's operations surrounding the use of in-custody informants; and an investigation into the Orange County Sheriff's Department operations surrounding the use of in-custody informants. In all, the 2016-2017 Orange County Grand Jury spent more than 3,500 man hours, read more than 40,000 pages of documents, listened to dozens of hours of tapes and interviewed more than 150 people in its investigation of the criminal justice system in Orange County.

The Grand Jury found that there have indeed been discovery violations in a small number of cases. Both the Orange County District Attorney and the Orange County Sheriff's Department allowed employees to drift from the core organizational mission of their agencies and this lax supervision has unfortunately resulted in the erosion of trust in the criminal justice system. Both agencies are aware of these shortcomings and have implemented organizational changes to repair the damage.

The Grand Jury found no definitive evidence of a structured jailhouse informant program operating in the Orange County jails. Allegations of intentional motivation by a corrupt district attorney's office and a conspiracy with a corrupt sheriff's department to violate citizen's constitutional rights are unfounded. Disparate facts have been woven together and a combination of conjecture and random events have been juxtaposed to create a tenuous narrative insinuating nefarious intent. That narrative does not stand up to factual validation.

Although the use of in-custody informants does occur, it is generally organic in nature, case specific and does not represent a conspiracy between the Orange County Sheriff's Department and Orange County District Attorney's office.

While the Grand Jury has now finished its investigation, the California Attorney General and the United States Department of Justice have ongoing investigations. Any further explorations of potential widespread, systemic institutional wrongdoing surrounding discovery violations or informant issues in Orange County would be better suited to these investigations; not in the trial court for the largest confessed mass murderer in Orange County history.

REASON FOR THE STUDY

The 2015-2016 Orange County Grand Jury determined that an investigation was warranted to restore confidence in the Orange County justice system, following accusations by the Orange County Public Defender's office that the Orange County District Attorney (OCDA) was engaging in prosecutorial misconduct by withholding discovery material in collusion with the Orange County Sheriff's Department (OCSD). Following in the footsteps of the 1989-1990 Los Angeles Grand Jury, the 2015-2016 Orange County Grand Jury began an investigation into the use of jailhouse informants. Per Penal Code section 936 they requested the California Attorney General provide legal counsel to assist in the investigation. The Attorney General's involvement in issues tangential to the controversy necessitated the hiring of an outside special counsel. This created a delay that prevented the 2015-2016 Grand Jury from completing the investigation.

Due to the persistent media attention, the negative impact on previous convictions, and the continued erosion of confidence, the 2016-2017 Orange County Grand Jury (OCGJ) elected to take up the investigation. The Attorney General retained outside legal counsel for the OCGJ while it performed an exhaustive investigation into the jailhouse informant controversy. A three-pronged approach was employed: (1) a review of the structure and use of jailhouse informants; (2) an investigation into the OCDA's operations surrounding the use of in-custody informants; and (3) an investigation into the OCSD operations surrounding the use of in-custody informants.

To date, there has been significant media coverage, finger pointing, and much speculative rhetoric published, but the actual *facts* surrounding the use of in-custody informants remain unreported. The OCDA commissioned an outside review of informant policies and practices. In June 2016, the OCDA reported to the Orange County Board of Supervisors (Board of Supervisors) that the OCDA had implemented seven of the ten recommendations put forth in the review and that proposals for two other recommendations were forthcoming. However, no outside entity has followed-up to ensure implementation has actually occurred. There has also been no outside review of the Orange County Sheriff's Department operations surrounding the use of jailhouse informants.

It is important to note that the OCGJ is charged with investigating *civil* issues within Orange County government and as such an investigation of *specific* criminal activities and *specific* civil rights violations are outside its charge. However, it is within the jurisdiction of the Civil Grand Jury to investigate the operations of county and city government, including the OCDA's office and OCSD, and other local law enforcement agencies. As allegations have been made that these entities have standard practices wherein they routinely violate defendants' rights in their "quest to win," it falls to the OCGJ to investigate these allegations.

METHOD OF STUDY

The OCGJ began its investigation by reviewing more than 2,000 pages of initial court documents related to the *People v. Dekraai* and *People v. Wozniak* cases where allegations of the existence and use of jailhouse informants in Orange County were first brought to light. In addition, the OCGJ reviewed articles in The *Orange County Register*, *Voice of OC*, *The New York Times*, *OC Weekly* and *The Intercept*; read more than 60 press releases from the OCSD and OCDA; reviewed the 1990 Los Angeles County Grand Jury report; and watched videos of town hall meetings and interviews with the OCDA and the Sheriff. Additionally, the OCGJ studied the 2016 Informant Policies and Practices Evaluation Committee Report (IPPEC report), the 2002-2003 Orange County Grand Jury investigative report of the OCDA's office, the 2006 California Commission on the Fair Administration of Justice report and the 2007 and 2015 Internal Audits of the OCDA's office. This initial document review formed the basis for an interview list and further document requests.

The OCGJ subpoenaed more than 8,000 pages of documents from the OCDA and obtained more than 3,000 pages of documents from the OCSD. These documents contained policy manuals, training materials, performance evaluations, meeting minutes and agendas, contracts with outside evaluators and auditors, organizational charts, and discovery documents in informant cases, as well as hundreds of hours of tape-recorded informant conversations and the OCSD special handling log. The OCGJ interviewed more than 150 individuals including active and retired deputy district attorneys, senior deputy district attorneys, assistant district attorneys, investigators, and executive staff. Interviews were conducted with dozens of OCSD personnel including special handling deputies, classification deputies, training deputies, retired deputies, members of the new Custody Intelligence Unit, and current and retired command staff.

The OCGJ also interviewed nationally recognized legal scholars, public defenders, private criminal defense lawyers, local law enforcement detectives and commanders, judges, members of the Board of Supervisors, as well as authors of various reports and audits to gain additional insight on previous recommendations, the current and legal use of jailhouse informants, and application of relevant case law.

The OCGJ was given access to the Orange County Informant Index (OCII) in the OCDA's office as well as the inmate classification records (aka TRED) used by deputies in the Orange County jails to ascertain what information is stored and available in the databases of these two offices regarding jailhouse informants. The OCGJ toured the Intake Release Center (IRC) multiple times to better understand operations and housing moves of inmates as well as a geographical understanding of Module L and Module J referred to in press accounts as the "snitch tank."

The OCGJ attended hearings in both the *Dekraai* and *Wozniak* cases, and attended multiple training sessions for prosecutors, investigators, and OCSD deputies. Inquiries were made of neighboring district attorney and sheriff's departments about the policies used regarding jailhouse informants to better understand alternative methods of classifying inmates and tracking jailhouse informant activity. Legal Counsel dug into previous Orange County cases where illegal informant use had been alleged, in an attempt to verify the allegations of systemic prosecutorial misconduct. Members of the OCGJ read extensive law review articles to better

understand the constitutional and legal issues under discussion. In all, the OCGJ spent more than 3,500 man hours, read more than 40,000 pages of documents, listened to dozens of hours of tapes, and interviewed more than 150 people in its investigation of the criminal justice system in Orange County.

All the facts contained in this report had a minimum of three corroborating pieces of evidence and the OCGJ believes this investigation has been thorough and comprehensive in its attempts to speak with all sides of the criminal justice system. This investigation was conducted independently from all other OCGJ investigations into the OCDA and OCSD.

It is also important to note that both the OCDA's office and the OCSD command staff were cooperative and transparent with the OCGJ team throughout the investigation.

BACKGROUND AND FACTS

In October 2011, Scott Dekraai walked into a Seal Beach beauty salon and committed the largest mass murder in Orange County history. There was never any doubt about his guilt; multiple witnesses, overwhelming physical evidence and a valid confession clearly implicated Dekraai. This was believed to be a slam-dunk case and the OCDA announced he would seek the death penalty. Hearing and trial dates were set and Dekraai was appointed an assistant public defender. However, in January 2014, after nearly three years of defense delay, his public defender cried prosecutorial misconduct and claimed that Dekraai's civil rights had been violated.

In the defense motions and subsequent court proceedings, it was alleged that the OCDA, OCSD, and many local law enforcement agencies were complicit in not only the use of an illegal informant program, but had actively attempted to hide and deny the existence of the program for more than 30 years. In March 2015, the court, in an unprecedented move, recused the entire OCDA's office from continuing to adjudicate the case and ordered it assigned to the State Attorney General's office. This sent shock waves through Orange County and started a national debate on the integrity of the Orange County justice system. This came at a time when national distrust of the criminal justice system was running high. Multiple incidents of misconduct on the part of law enforcement continue to be reported in the news nightly, and the systems that our society relies on to instill order are, in some cases, proving deeply flawed.

Media accounts of the Orange County informant "scandal," editorials, and exposés abounded including a New York Times op-ed in September 2015, calling for a federal investigation into the "blatant and systemic misconduct" of the OCDA. More than 30 renowned and respected legal scholars concerned about civil rights violations wrote a joint letter in November 2015, urging the United States Department of Justice to investigate the use of the informant program. In December 2015, the Orange County Register ran a series of articles titled "Inside the Snitch Tank" and hosted a public forum in March 2016 that sought to inform the public of the events. The CBS news magazine, *60 Minutes*, broadcast the story to a national audience in May 2017.

From the beginning, the OCDA and the OCSD have maintained that there is no jailhouse informant program, informants are incidental to any investigation, that their use was never hidden, and that the use of informants has been greatly distorted, exaggerated, and misconstrued in the press. In response to the media outcry, the OCSD announced the implementation of remedial improvements to ensure training and prisoner safeguards are in place and the OCDA's office convened a team of outside legal investigators to review prosecutors' use of informants. This outside evaluation team, the Informant Policies & Practices Evaluation Committee (IPPEC), produced a report in January 2016, in which they outlined ten detailed steps the OCDA should take to improve operations that they claimed were factors that contributed to the office culture that has led to the informant scandal.

As the IPPEC team had to rely solely on public documents and voluntary witnesses, they further recommended that "*an entity with document subpoena power and the ability to compel witnesses to be questioned under oath*" conduct an actual investigation into the truth of informant use. They suggested the OCGJ, the California Attorney General, or the United States Department of Justice as potential investigatory entities. The Attorney General's office has opened an investigation into allegations of misconduct of law enforcement individuals in the *Dekraai* case and originally indicated there was no plan to open a wider civil rights investigation. The Civil Rights Division of the Department of Justice eventually announced an investigation into possible inmate civil rights violations in November 2016.

Jailhouse Informant Controversy

Dekraai & Wozniak: The Use of Informants in Orange County

In spite of the fact that Dekraai had confessed, the prosecution was concerned that he would attempt an insanity defense similar to that in the 1977 *Allaway* case. In that case, the previously largest mass murder in Orange County history, Edward Allaway was convicted by a jury but avoided the death penalty and was committed to a mental institution. The OCDA held a press conference hours after the Dekraai shooting stating he would seek the death penalty against Dekraai. The office was concerned that Dekraai would successfully plead insanity and another Orange County mass murderer would escape justice. So, when notified by an OCSD deputy that there was an inmate who reportedly had an in-custody conversation with Dekraai, the prosecution team interviewed the inmate to determine if the conversation would provide evidence to counter an insanity defense. This interview formed the basis for the defense allegations of civil rights' violation in *Dekraai*.

The prosecution, who has steadfastly held that they were unaware of the informant's background during this initial interview, immediately decided they would not use his testimony and setup a secondary legal method for capturing Dekraai's in-custody conversations by recording his conversations with the informant. Conversely, the defense has argued that the OCSD intentionally placed an informant near Dekraai, that prosecutors should have been aware of the informant's background, and any conversations the informant had with Dekraai were at the request of the prosecution team, thus violating his Sixth Amendment right to counsel. The defense further argued that by not turning over all the background on the informant as part of discovery, the prosecution team further violated Dekraai's Fifth Amendment right to due

process. While it's true that the prosecution did not readily provide the requested informant background information to the defense, they argued the defense was not entitled to it because they had no expectation of using the informant's testimony at trial.

Once under court- order to produce the background documents to satisfy discovery rules, the prosecutors provided all the requested documentation in their possession. Unfortunately, many of these records were held by federal law enforcement officials and it took substantially longer than expected for them to be produced. The OCGJ subpoenaed documents from the federal government relevant to this investigation and also experienced a substantial delay in receiving them. The OCDA's complaints of slow actions on the part of the federal government that delayed the production of discovery materials in *Dekraai* appear to be credible.

The *Wozniak* case is different. Daniel Wozniak murdered his neighbor, and then murdered a friend to cover up the original murder. He did not immediately confess to the murder and entered a plea of not guilty, thus requiring the prosecution to prove his guilt in court. Convicting Wozniak was a priority for the OCDA's office and, seeing an opportunity to advance a personal agenda, a prolific informant took the initiative to solicit information from Wozniak while in custody. Given the prior use of incentives provided to this informant, it isn't a stretch of the imagination to believe that he saw in Wozniak another opportunity to ingratiate himself with law enforcement. So he reached out to a special handling deputy who notified the prosecution team that a known informant had information about their case. The prosecution met with the informant and after a single meeting determined that they would not use the informant or any information produced by him. Unlike in *Dekraai*, this prosecution team did not set up any recordings to capture future conversations and informed the defense early in the process that there was an informant who would not be used.

Emboldened by the rulings in *Dekraai*, the defense sought in *Wozniak* to again argue against the death penalty by claiming OCDA misconduct, and filed an extensive brief again alleging a secret informant program that undermined Wozniak's rights. The defense was notified early that there had been an informant, but when information on the informant was requested a year later, the request was denied. Again, the prosecution team argued that because the informant would not directly testify in court and no information presented in court came from the informant, they were not bound by *Brady* or *Rules of Evidence* to release any informant information to the defense. Ultimately, the court, in this case, did not find the defense's argument compelling and Wozniak was found guilty and sentenced to death in September 2016. The OCGJ did not find any persuasive or material evidence that the informant was intentionally placed near Wozniak and the OCDA and OCSD version of events seems credible. The court did not find any violation of Wozniak's rights and no informant was used in his prosecution.

The Legal Use of Jailhouse Informants

The use of jailhouse informants in the criminal justice system is not new and Orange County's use of informants mirrors that of jurisdictions across the nation. The Supreme Court has ruled that the use of informants is a valuable tool in "society's defensive arsenal" (*McCray v. Illinois (1967) 386 U.S. 300, 307)*. In *United States v. Dennis (183 F.2d 201, 224 2d Cir. 1950)*, the judge stated, "*Courts have countenanced the use of informers from time immemorial; in cases of*

conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly." Still, the use of jailhouse informants has a record of abuses and in many cases has resulted in wrongful prosecutions. However, the incentives for using jailhouse informant testimony are many – and this is as true for the prosecutor building his case as it is for the informant seeking favorable consideration. Several exposés have been written by local media citing excessive compensation for informants' testimony and the 1989-90 Los Angeles Grand Jury provided an extensive and comprehensive report on the abuses that existed in their county's use of jailhouse informants.

Until 2014, the use of jailhouse informants in Orange County was likely unknown to the general public. Then, the motion presented by the defense in *Dekraai* alleging outrageous government conduct, including an unlawful systemic use of jailhouse informants, led to the unprecedented decision by the court to remove the entire OCDA office from continuing to prosecute the case, and assigned the case to the Attorney General's office, who appealed the decision.[1] This recusal decision created shock waves through the local criminal justice community and ignited a national firestorm of criticism of the OCDA. Articles, exposés, and op-eds appeared, and continue to appear, at regular intervals in the media.

Defining "Jailhouse Informants"

The word informant has been used extensively in court motions and press articles but has different meanings. In the general vernacular an informant is someone who informs; however, within the context of jail communities the term has fundamentally different meanings. It is important to define this term to ensure consistency in use.

> Co-defendants and Percipient Witnesses
> It is important to clarify that a co-defendant in a case is not an informant. Neither is a percipient witness (an eyewitness) to a crime. Many of the allegations in the *Dekraai* and *Wozniak* briefs refer to co-defendants and percipient witnesses as "informants." This confuses the issue to the benefit of the defense's claims.
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> Sources of Information (SOI)
> Within the jail community there are also varying types of "informing" and it is important to make this distinction clear. The recent informant "scandal" has necessitated, for the better, the OCSD to codify these differences in order to establish stricter control and procedures surrounding jailhouse informants.
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> It is imperative for jailers to have inside information of jail politics in order to adequately ensure the safety of inmates and the security of the jail. These informants are often merely sources of information (SOI's), who, for their own safety, tip off jailers to potential fights or violations of jail protocols. SOI's have no expectation of compensation for the information provided. So, while they may be "informing" jailers of potential problems within the jail that pose safety or security risks, they are not what a deputy would consider an in-custody informant. There is no formal agreement kept

[1] The Court of Appeals upheld the recusal on November 23, 2016.

between the jailers and an SOI to provide information. Allegations that this is a new category of informant are not accurate as there have always been SOIs within a jail community.

Jailhouse Informants

In jail, information is currency. There are inmates who have information about crimes, both inside and outside of jail, and want to "sell or trade" their information for some form of compensation. This compensation could be as minimal as an extra phone call or a housing change, or it could be more substantial such as a sentence reduction. It is important to recognize that this type of informant will typically approach jailers *unsolicited* in an attempt to make a deal and is not recruited by deputies. In fact, this happens daily in a jail population of several thousand inmates and is encouraged to maintain jail safety. This is not a civil rights violation or an illegal practice. In a community where the prisoners outnumber the guards by nearly 20:1, it is a necessity. This type of informant often does not start with any kind of a formal agreement with jailers, is not initially an agent of or directed by jailers, and elicits information from fellow inmates of their own accord then seeks out deputies to "sell or trade" the information.

If the information provided to jailers by this type of informant involves an in-custody crime or violation, it is acted on at the custodial level by deputies who have been assigned to investigate in-custody crimes. Due to the recent controversy, and the OCSD's desire to use best practices, deputies will now create a formal agreement that is signed with the OCSD documenting the informant and the agreement of compensation within the jail. The cooperation of the OCDA's office is needed if any reduction in sentencing is offered.

If the information provided involves a crime that has occurred or will occur outside the jail, the information is passed to the appropriate local law enforcement (LLE) agency to act upon. The custodial deputies within the jail act as facilitators of communication between the informant and the police agency that is handling the informant and are ultimately not responsible for any part of the criminal investigation subsequent to the informant's disclosures. It is the responsibility of LLE to vet the information for accuracy and usefulness. If the information proves useful, LLE could choose to enter into an agreement with the informant. It is important to note that a prosecutor may not know of the informant's existence until local law enforcement decides to use information provided by the informant to build their case, enters into an agreement, and then notifies the OCDA.

Mercenary Informants

Mercenary informants, commonly referred to as "snitches," are a specific type of informant that has been widely reported to exist *en masse* in the Orange County jails. This type of informant signs an agreement with law enforcement to act as an agent to gather information from a suspected criminal and is promised payment either in cash, or reduced sentencing. Mercenary informants can be solicited by law enforcement or can approach law enforcement of their own accord with an offer to cooperate. This type of informant has a specific target or case that they work with law enforcement to solve and

have a signed agreement spelling out their duties as an agent of law enforcement. The OCGJ was unable to identify any of this type of informant currently housed in any Orange County jail.

While the trial court in *Dekraai* has stated that the question of the existence of a "jailhouse informant program has left the station," the OCGJ disagrees. The mere existence of informants in the jail is not conclusively indicative of a program. The OCGJ found no direct, material evidence of an organized, recognized 'program' of jailhouse informants. A program requires certain elements to be in place. The OCGJ did not find a strategic plan or schedule for jailhouse informants. The OCGJ found no formal training, no dedicated budget, no codified job descriptions, no calendaring of events, no advance scheduling of activities nor any approved recruitment material of OCSD personnel for a jailhouse informant program. There are no formal discussions with inmates during or after booking to place inmates into an organized, structured jailhouse informant program, such as those that exist for mental health, language classes, or legal assistance. No outside agency supplies dedicated personnel or resources supporting jailhouse informants, running jailhouse informants, supervising jailhouse informants or supplying jailhouse informants as seen in other program offerings within the jail communities. In short, the OCSD does not have a stable of informants that they routinely disperse throughout the jail to gather evidence on crimes either legally or illegally.

This is not to say that the OCSD is not using or has not used jailhouse informants. However, this use is almost always organic in nature, narrowly focused, and primarily to ensure the safety and security of the jails, and not to investigate crimes. A handful of special handling deputies drifted from their custodial duties, over a period of years, into investigating crimes. The lack of proper supervision and appropriate policies allowed this to continue longer than it should have. This drift does not constitute an OCSD jailhouse informant program, but rather the work of a few rogue deputies who got carried away with efforts to be crime-fighters. The negative effect was enhanced by inadequate supervision of these activities, as well as the deputies' unawareness of consequences of their actions and a lack of knowledge for the scope and breadth of their discovery obligations as part of the prosecutorial team.

Abuses of the Law: Massiah and Brady

The motion to dismiss filed in *Dekraai* alleged that an informant was used by the prosecution to obtain evidence against Dekraai in violation of his Sixth Amendment rights and that information on this informant was not disclosed to the defense team as required by law. On the heels of the *Dekraai* motion, the defense filed a similar motion in *Wozniak.* This motion also outlined the use of jailhouse informants in several Orange County capital cases extending back to the 1980's. This fueled more speculation and confusion and has resulted in some pending cases being dropped or charges being reduced.[2]

The United States criminal justice system is predicated on the basic principle that an individual is innocent until proven guilty. The state must make its case to a jury of citizens who must then believe beyond a reasonable doubt that the defendant has committed the crime of which they are accused. The state has overwhelming resources at its disposal for prosecuting and the

[2] *People v. Ortiz, People v. Palacios, People v. Vega, People v. Rodriguez*

constitution has built protections for the individual into the very fabric of the nation. These are enshrined in the Bill of Rights which includes the Fifth and Sixth Amendments, detailed through case law such as *Brady v. Maryland* and *Massiah v. United States.*

The Fifth Amendment protects the individual from self-incrimination and guarantees due process. In *Brady,* the Supreme Court established the prosecution has an affirmative duty to ensure due process and to disclose any evidence that could exonerate or mitigate the case against an individual. The Sixth Amendment confers the right of an individual to legal counsel and to confront witnesses. A violation of either of these legal principles would constitute a violation of an individual's civil rights. *Massiah* clearly outlined when an accused's Sixth Amendment right is triggered. This occurs at the moment an individual is charged with a crime. At that point the state must work to prove its case BUT may not elicit statements from the accused about themselves or the crime of which they are accused without the presence of legal counsel. The law in California is very clear: The State may not attempt to elicit evidence from an accused once they are charged with a crime without the presence of legal counsel. This includes the use of agents of the State, i.e., informants. The State may NOT place an informant with an accused individual *after* they have been arraigned, with the intention of *eliciting* information about the crime for which they have been charged. However, they may place an informant with an incarcerated defendant to elicit information about a *different, non-charged* crime. And, to ensure due process, any information that is obtained from an informant about this other crime, along with information about the informant who helped to obtain it, should be disclosed to the defense if new charges are brought.

The OCGJ heard several prosecutors claim this is an evolving area of the law. Most legal scholars and judges believe there is a "bright line" when it comes to what qualifies as *Brady* material that should be handed over to the defense. Case law has repeatedly sought to clarify the spirit enshrined in the Fifth and Sixth Amendments, not change it. However, it does appear that what qualifies as *Brady* material is an increasingly expanding list of potential evidence that requires continual training to ensure all prosecutors are educated on current expectations. The new California law AB1909, in part inspired by *Dekraai*, has upped the ante on withholding discovery and violating *Brady* obligations. This law now makes violations a felony, sending a strong message that justice is more important than a conviction.

Perkins Operations

In *Illinois v. Perkins (496 US 292,1990*), the U.S. Supreme Court ruled in keeping with *Massiah* that law enforcement officers and their agents could legally question a suspect in jail without notifying them of any constitutional rights as long as they were not interrogating the suspect about the crime with which they were charged. An undercover operation performed in a jail environment under these conditions is now referred to as a *Perkins* operation. If a person of interest in a cold case is arrested on an unrelated charge, a mercenary informant, as an agent of law enforcement, may be used to elicit incriminating statements from the suspect. Local police agencies have run *Perkins* operations to specifically work cold cases (cases which have not been solved and are generally several years old). In the majority of jailhouse informant cases the OCGJ inquired into, OCSD personnel merely facilitated placement and movement for *Perkins* operations but were not actively involved in investigating the crimes in question.

Federal Perkins Operations: Black Flag and Smokin' Aces

The heightened influence of prison gangs in California is increasingly dangerous and Orange County is no exception. In the early 2000's, one of the most prolific prison gangs with national reach, the Mexican Mafia, had a presence in Orange County that extended beyond the cells of the County jail and into the streets. A local "leader" ran gang activities including narcotics sales, on behalf of a national gang leader both inside and outside of jail. Profits from local narcotics sales were taxed and sent to the national leader. A fight for leadership in 2009 led to several assaults and attempted murders of incarcerated gang members and created serious safety issues in the Orange County jails.

A Federal task force, with assistance from the OCSD, Santa Ana Police Department and the OCDA, was formed to investigate and break-up gang influence in Orange County. As many members of the Mexican Mafia were locally incarcerated, the investigation extended into Orange County jails. This investigation had a national focus with the code name of Operation Black Flag where the Department of Justice filed cases, as well as a local focus that went by the code name Operation Smokin' Aces where the OCDA filed cases.

In order to infiltrate the prison gang, informants were necessary. In 2009, two prominent Mexican Mafia members were incarcerated in the Orange County jails and agreed to work as informants participating in *Perkins* operations for the federal task force in exchange for lighter sentences. The OCGJ wants to particularly note that these federal informant operations were not under the control and direction of the OCDA or LLE. The informants signed written contracts with the federal government and provided copious notes to their handlers on gang activity both within and outside the jails. These notes later provided the fodder for the *Dekraai* and *Wozniak* defense motions.

Operations Black Flag and Smokin' Aces concluded in July 2011 with indictments for more than 100 known gang members. One of the informants was housed in the Intake/Release Center (IRC) for his safety, awaiting relocation as part of his deal when, in October 2011, Dekraai committed his crime and was placed in the IRC on suicide watch, awaiting arraignment. There has been testimony surrounding the placement of Dekraai next to a prolific informant, but both the court and the OCGJ have found no direct evidence that this placement was more than coincidental. There are only a small number of cells for high profile or special custody inmates, and both the informant and Dekraai would have needed to be placed in protective custody. The placement of Dekraai was reasonable within this context. There is no direct evidence of a conspiracy to place an informant near Dekraai prior to his first conversation with an informant. Months of testimony and review of jail records have been unable to substantiate the claim of intentional placement and the OCGJ did not uncover any additional information that would definitively demonstrate otherwise. In fact, all the evidence and testimony the OCGJ reviewed points squarely to a coincidental placement of Dekraai next to a prolific informant who personally saw an opportunity to expand his portfolio with law enforcement and provide evidence on a high profile inmate.

Office of the Orange County District Attorney

As of 2015, there had been many press reports about alleged errors and possible misconduct by members of the OCDA's office related to in-custody informants. In response to the continuing questions and requests to revisit several cases, the OCDA contracted for an operational audit. The audit resulted in several recommendations surrounding operational structure and personnel training. It did not, nor was it intended to, address the specific use of jailhouse informants. Not satisfied with an internal audit, the OCDA hired an independent, external committee to thoroughly investigate and examine the policies and practices surrounding the use of jailhouse informants. The OCDA has maintained from the beginning that the use of in-custody informants is few and far between and no systemic attempt to hide their use was ever made. In fact, many inside the OCDA's office repeatedly stated to the OCGJ that there is no informant "program" and they are more than reluctant to use jailhouse informants in prosecuting cases.

The Informant Policies & Practices Evaluation Committee (IPPEC)

After a six-month evaluation, the Informant Policies & Practices Evaluation Committee (IPPEC) issued its report in December 2015. The report outlined several deficiencies in the OCDA's office which the authors believed led to an office culture that allowed for a careless use of informants. The committee reported that they interviewed over 75 individuals and reviewed over 2,000 pages of legal briefs and internal OCDA training materials. They proposed ten in-depth recommendations for policy, training, and personnel changes to be implemented to ensure the proper and legal use of jailhouse informants by the OCDA's office. However, little of the report dealt directly with the procedures and protocols surrounding the use of informants. Instead the report focused on issues of culture and concluded rather tenuously that this led, albeit indirectly, to discovery abuses and recommended an outside monitor to ensure implementation.

The OCGJ found that the interviews conducted by the IPPEC were primarily limited to lower level staff and, in fact, only one of the executive staff was interviewed. Many of the recommendations of the IPPEC were already being implemented prior to their investigation and including them as unique recommendations does a disservice to the work the OCDA had already implemented, particularly in the training unit. In June 2016, the OCDA reported that seven of the ten recommendations had been implemented, two were forthcoming, and one was declined. In August 2016, the OCDA requested, per the IPPEC recommendation, that the Board of Supervisors approve a $300,000 two-year contract for outside legal assistance to the OCDA to consult and advise on the implementation of the IPPEC recommendations.

The IPPEC report found that less than 1% of cases involved the use of jailhouse informants, a number they determined after surveying the entire prosecutorial staff. This appears to be an accurate number. The OCGJ interviewed dozens of prosecutors, but only one prosecutor stated being comfortable using jailhouse informants, and then only to solve cold cases. The OCGJ uncovered no systemic or wide-spread use of jailhouse informants by the OCDA, nor any intentional attempts to violate defendant's rights through the use of jailhouse informants.

The OCGJ did find instances where there were discovery failures in a few cases where informants were used. The IPPEC characterized these types of failures as a result of a "win-at-

all-costs" mentality. However, the OCGJ spoke with many credible witnesses who disputed the existence of such a mentality. Instead, the OCGJ found these discovery errors to generally be the result of high caseloads, communication breakdowns with outside LLE agencies, and an inexcusable inattention to discovery issues by a few individuals. This handful of individuals showed a lack of understanding of the critical importance of strict adherence to constitutional, statutory, and ethical standards even in the face of strong evidence of guilt in the most serious crimes. These errors do not indicate a system of abuse, but rather a lack of supervision and laziness in the practice of law.

Lack of Leadership

The IPPEC report cited a clear lack of leadership, oversight, supervision, and training in the OCDA's office. This should have come as no surprise as a 2002 Orange County Grand Jury report also found a lack of leadership in the OCDA's office. The 2002 recommendations were disregarded and 14 years later, the IPPEC Report concluded that the culture had not changed. After nearly 100 interviews with OCDA personnel, it became clear to the OCGJ that lack of leadership persists. The structure of the OCDA's office, its vertical reporting chains that create silos operating independently within the organization and its recent lack of meaningful training and oversight, combine to create an office where abuses are seldom caught and prosecutors have almost unlimited autonomy to prosecute cases as they deem fit. In fact, during interviews for this investigation the OCGJ heard statements that indicated some prosecutors felt they did not need anyone second guessing their case or that they would quit if someone tried to tell them how to run a case.

Individuals can become emotionally invested in a case and lose sight of the greater job of upholding the system of fairness required for our justice system to function properly. Without management oversight, this human tendency cannot be countered. In the case of the recent informant controversy, it is clear to the OCGJ that had individuals charged with supervising prosecutors been more aware of how those prosecutors were conducting business, their high caseload, and shoddy record-keeping habits, this entire episode could have been avoided.

The OCGJ also found there is no standardized process for supervisory promotions. The OCGJ is not impugning the promotion of any of the personnel currently in these roles. Rather the OCGJ wishes to make the point that a lack of documented standards and promotional vetting exposes the OCDA to criticism of promoting primarily for successful interpersonal relations rather than job competence. The requisite management and supervisory skills necessary to supervise a team of individuals are not related or equivalent to one's legal skills or acumen. Currently, managers are not required to have training in management or supervisorial skills. Promoting an individual because they are a good lawyer is not adequate criteria for an administrative role and can lead to sloppy management and autonomy that runs amok.

Training

"The court...finds these prosecutorial 'errors,' as they were characterized by counsel during argument, constitute significant negligence and that they therefore rise to the level of misconduct….The court further finds that the misconduct was the product of woefully inadequate legal training along with a lack of professional energy and strategic imagination." (People v. Dekraai, Ruling, August 4, 2014, p.8*)*

The OCGJ was provided nearly 7,000 pages of training documentation including content and attendance lists. A review of this material confirmed the serious deficiencies in past training that had been called out in previous operational audits of the OCDA. The OCGJ heard from many witnesses that from 2009 to 2015 training was not a priority, was regularly dismissed as merely credit for mandatory continuing legal education, and the lawyers assigned to teach too often had other full-time responsibilities.

In early 2013, a newly appointed training coordinator developed significant and comprehensive recommendations for office-wide training in multiple venues, but it was not until two years later that the OCDA began to implement the internal and external recommendations for increased training and created an internal training unit. Staffed by two full-time lawyers devoted to training, the unit is augmented by the twelve appellate lawyers who add insights to the trial performance of the OCDA based upon their evaluation of transcripts and perform training duties as needed.

The training unit has made a good beginning and has provided more than 460 training sessions since its inception. This includes more than 40 one-to-two hour training sessions on *Brady, Massiah, Perkins* and the use of jailhouse informants presented by senior lawyers in the OCDA's office to personnel in the many LLE agencies. They have also presented more extensive programs at the OCSD Sheriff's Regional Training Academy to all new recruits.

While the implementation of this training is to be applauded, there does not appear to be a clear metric that establishes the effectiveness of the current training program in ensuring content is retained and implemented. So far, all the training offered is provided through a passive, one-way delivery of information. The question of whether the newly implemented training program can shift the culture remains a concern. The OCGJ heard from some of the more senior prosecutors that they thought the training had the law "wrong." There did not appear to be any intention on the part of these prosecutors to change the way they interpreted *Brady, Massiah,* or *Perkins*.

Additionally, training on legal content should be standard in any law office. Its absence for a number of years is troubling and speaks to a lack of priorities for keeping abreast of legal changes. Organizations need to keep current in their respective field and every agency should share the same priority for trained leadership.

The OCDA revised the procedures for using informants and produced a new Informant Policy Manual that was approved and released in August 2016. Unfortunately, when asked about it in OCGJ interviews as late as November 2016, many prosecutors told the OCGJ they had not read or even been aware the new manual was available. The revised manual explains the OCDA's

amended informant record-keeping system and emphasizes the need to report timely and accurate information, as well as the consequences for failing to report the necessary information. The lack of awareness about changes in informant policy is an example of the poor communication, leadership deficiencies, and current training gaps in the OCDA's office.

Accountability

The IPPEC recommended the OCDA form a Confidential Informant Review Committee (CIRC) to review any use of jailhouse informants in the prosecution of cases. Prior to the IPPEC evaluation and recommendation, the OCDA had already formed this committee and the OCGJ subpoenaed all the policy, agenda, and supporting documents related to the CIRC. It appears that very few requests are being made to use jailhouse informants and this seems to validate other information that indicates the current use is very low.

The IPPEC also recommended the formation of a Conviction Integrity Unit (CIU) in the OCDA's office to review post-conviction claims of innocence where an informant may have been used. The OCDA responded that they already operate several conviction integrity reviews in the office and would be establishing another for post-conviction claims of innocence not covered by the established review units. After the allegations in *Dekraai* and the disclosure of the Special Handling Deputy Log (Log), new concerns arose about the integrity of cases where an informant may have been used but not disclosed to the defense.

Following disclosure of the Log, the OCDA assigned four full time lawyers to review the 1100 plus pages of notes for potential discovery issues specifically surrounding informants. The group identified more than 3,000 individuals named in the Log, categorized them based on frequency and associations, and determined that approximately 10% should be reviewed for issues surrounding the possible use of an informant. The OCGJ reviewed several of these identified cases in depth and in a large majority of cases, initiation of inmate contact for the purposes of gathering information was made by outside police agencies and not the OCDA or the OCSD. In very few instances is there any reference to OCDA contact. The OCGJ is satisfied that the OCDA is comprehensively reviewing all Log entries for potential discovery issues and informing defense counsel of any additional discovery that may result. To date, the OCDA has found very few that require a full conviction integrity review.

Orange County Informant Index (OCII)

Voluntary records on confidential informants have been maintained by the OCDA since the 1970s, first on index cards and later converted to a computer database which is now called the Orange County Informant Index (OCII). This informant database includes the name of the informant, the name of the case, case number, the date and synopsis of any testimony, and any consideration given. The OCII system was created to establish a record of the history of use, credibility, and reliability issues surrounding the use of potential confidential informants in narcotics cases and has grown to incorporate informants in general. Due to the possible incentives to inform, the motivation of an informant is always suspect and each informant must be vetted and their credibility challenged. If an informant is found to be unreliable, this should be noted in the OCII, however there is no current way to enforce this.

An informant's entry in the OCII is predicated on LLE notifying the OCDA that they relied on an informant when building their case. This notification is voluntary and LLE is often reluctant to disclose information on a confidential informant. However, courts have established that any prior history of informing qualifies as *Brady* material, thus records need to be kept. In a case where the prosecution intends to use informant testimony, the defense must be notified if a history of informing exists. Depending upon the sensitivity of the inmate's identity, some information cannot be shared in open court and must be handled either in a closed court evidentiary hearing or *in camera* (a hearing held before the judge in private chambers). The final decision to disclose informant information to the defense rests with the court. Unfortunately, there have been incidents where individual prosecutors themselves made the call, often using flawed legal reasoning. Due to the sensitive information contained in the OCII, the file is kept secure and access is restricted to only three individuals in the OCDA's office. Currently all witnesses listed in the OCDA case management system (CMS) are screened through the OCII.

The value of the OCII database is evident when considering the extent of discovery requirements and the affirmative effort required to disclose the full history on an informant linked to a case. However, the voluntary nature of providing information to the OCDA for entry into the OCII is a weakness in the effectiveness of the OCII as a complete repository of informant information. In one of the cases reviewed by the OCGJ it was noted that an informant, who worked on a case in 2009, had not been included in the OCII. It is not known how many other times this has occurred. There has been a concerted effort by the OCDA to train prosecutors on the use and value of the OCII post *Dekraai*. OCDA staff has conducted 30 training sessions on the importance and use of the OCII for new prosecutors, LLE, and OCSD personnel since 2014.

Technology

The OCGJ received overwhelming input that the current case management system (CMS) used by the OCDA is inadequate; it is only moderately useful and does not enable any reliable search of the database. However, fixing this problem has not been a top priority for budget allocations. The exponential increase of digital data from body cams, cell phone videos, and other sources makes the need for an updated system more urgent. It is the responsibility of the OCDA to meet all discovery obligations. Without proper accounting and tracking of discovery material, prosecutors cannot be certain they have fulfilled their lawful discovery obligations. Failures to meet these obligations are likely to continue to occur without new and upgraded data search and retention capabilities. In the absence of a modern capable system many prosecutors have felt the necessity to create their own system of discovery notification and records retention. This invariably results in differing discovery outcomes that are a potential liability to the county.

Office of the Sheriff-Coroner

The OCSD has also been accused of colluding on a jailhouse informant "program." However, like the OCDA, the OCSD has steadfastly denied the existence of an informant program. Much has been made in court filings about training materials within the OCSD that reference "developing" informants and how to use the information. This is portrayed as proof of an informant program. The OCGJ is confident there is **no** program of jailhouse informant use for

criminal investigation in the Orange County jails. The OCGJ has found that there is a policy and practice of in-custody informant use for facility, staff, and inmate safety and that the referenced training materials related to this subject matter. There were a limited number of incidents in the recent past where OCSD personnel sought to use mercenary informants to assist LLE and these attempts were not handled properly. The OCSD has now implemented new policy to ensure these errors do not re-occur.

Lack of Supervision

As within the OCDA's office, the OCSD suffered from weak supervision of key personnel that created an environment where individuals were allowed to drift from their core mission. Without proper training or legal knowledge, these custodial deputies engaged in activities that had the potential to jeopardize cases. The OCSD requires all new deputies to be assigned to the jails for a period of time before they go to a patrol unit. Promotion to sergeant requires another assignment in the jails as a supervisor. Many sergeants merely bide their time until they can be reassigned to the field. Individuals who wish to remain assigned to the jails often have more institutional knowledge of jail protocol and politics than their newly appointed supervisors. This promotion assignment process allowed special handling deputies to operate with more knowledge than their immediate supervisors and some of them lost sight of their primary function. Without proper supervision, these custodial deputies crossed into the realm of investigations on behalf of LLE and a federal task force, although the OCGJ found no evidence that their intent was to violate or deny inmates of their rights.

TRED

An inmate classification system is a critical element of smooth and safe jail operations. The safety of jail staff and inmates is of paramount concern, and the proper classification and housing of inmates is a vital aspect of maintaining order. Every jail facility has a classification system. The inmate classification methodology within the Orange County jail gained the nickname TRED many years ago**.** TRED is a record of inmate movement and serves as a classification database. It is a methodology for classifying and housing an inmate in accordance with various criteria, a partial listing of which includes gang affiliation, race, the nature of the offense, prior incarceration history, political and religious beliefs, and sexual orientation.

Typically an inmate is interviewed by a classification deputy upon arrival at the county jail. Based on the information gathered at this interview, the inmate is assigned appropriate housing within the jail. Informally this is characterized as housing "like with like." A classification record is thus created for each inmate as he is processed. For a returning inmate, the previously established record is updated during this intake processing. An inmate's classification record or "TRED" is updated throughout his incarceration. Changes in housing status, disciplinary incidents, and sometimes informant activity will trigger an entry onto an inmate's TRED.

This inmate classification database is a repository of highly sensitive information, yet of limited value to any prosecution as the data contained occurs after the crime for which an inmate is arrested. Access to TRED records is generally provided only under subpoena in most counties and few would question the lengths to which this data is protected or the strictly limited access

that is imposed. The OCSD asserts privilege to protect inmates and jail staff and the judicial system alone retains the authority to determine what and when information can be disclosed. In the *Dekraai* motions, the Public Defender's Office has alleged that TRED records are an organized system of informant documentation modified regularly by OCSD personnel. It is further alleged that these records were regularly kept from the Public Defender's Office in spite of defendant's discovery rights, as a further attempt by the OCSD to collude with the OCDA in a conspiracy to violate defendant rights.

After extensive documentation review and interviews, the OCGJ has concluded that the TRED system is not only similar to systems used throughout all jails in California, but is a necessary system to record the movement and classification of all inmates for the protection of the inmates, the facility, and OCSD personnel. TRED was never designed to be, and is not, a repository of information about an inmate's informant activity.

Special Handling Deputies and the Log

Prior to 2016, special handling deputies were used to coordinate informants and informant information. Much has been made of the role of special handling deputies and their Logs. Special handling deputies were a subset of classification deputies whose original role was to keep jail personnel informed about jail politics and gang interactions as well as facilitating safe movement of inmates within the jail.

The OCSD special handling deputies assigned to Operation Black Flag were managed and directed by federal agents during the operation with respect to the federally contracted informants. Some of these deputies, who received special schedule and uniform considerations, appear to have developed a perception that they had a role as investigators in addition to their responsibilities as custodial deputies within the Orange County jails. It appears to the OCGJ that this shift in perceived duties was reinforced by LLE agencies who would frequently call to inquire about various inmates and request assistance from special handling deputies to help with their active cases, cold-case development, and/or *Perkins* Operations.

The OCSD provided the OCGJ with an unredacted copy of the Log. After review, the OCGJ concluded that the Log was primarily a shift record initiated by special handling deputies to document daily events and occurrences in order to facilitate the exchange of information during shift changes. There is no doubt that comments in the Log were often juvenile, ethnically insensitive, and embarrassing to the OCSD. The Log, however, was not created as a repository of information on informants and their testimony or the purposed movement of informants within the facility.

The OCGJ was able to verify that in many incidences where notations in the Log represented movement, pertinent information had also been noted in TRED. The OCGJ did not find any occasions where the Log reflected notes on the suppression of discovery material or any notation to reflect conspiratorial coordination with the OCDA. Following disclosure in court that the Log existed, the OCSD then directed a review take place to learn of any other unauthorized records within the OCSD.

This off-the-books journal kept by the special handling deputies, unknown to both OCSD command staff and the OCDA's office, further confused the discovery issues in *Dekraai* and angered the court. The value-add from the discovery of this Log to the defense case for misconduct has been greatly exaggerated. The contents of this Log shed little light on Dekraai's movements while in-custody. It would seem that it was the failure to disclose the Log, rather than the actual contents, that created much of the angst.

Proactive OCSD Response to Controversy

The IPPEC only evaluated the OCDA office but in response to the IPPEC report the OCSD also implemented training and structural changes. These included tighter controls on the reporting and movement of all types of informants in the jails; increased training on *Brady* and *Massiah* requirements to ensure that deputies are aware of the constitutional issues surrounding the use of informants; and the hiring of a constitutional policing advisor whose role is to ensure policy and operations meet all legal requirements. The OCSD also conducted an initial internal review of the department resulting in limited disciplinary actions and some reassignments.

In response to the internal review of these issues, the OCSD has implemented policy changes to define and strengthen the procedures to be followed whenever LLE agencies request the services of OCSD jail personnel in an investigation. In particular, strict reporting procedures and approvals are now in place for any use of a mercenary informant or when directing a *Perkins* operation. This policy now requires a written request from the command staff of the LLE agency. Additionally, the request will be reviewed by OCSD command staff to verify the appropriate use of informants, including that they are properly registered, their signed informant contracts are in order, and detailed record keeping of all activities and conversations surrounding any informant are properly maintained. Direct involvement of the OCDA's office is also now required when any information is pertinent to an existing case or could rise to the possibility of additional charges against an inmate. The OCGJ was advised that since this policy was implemented in 2016 there have been no further requests for this support.

Following an internal review, the OCSD has discontinued the special handling deputies class and created the Custody Intelligence Unit. These personnel are now investigators rather than deputies and the unit reports directly to command staff within the OCSD. They retain the responsibility to manage SOI and jailhouse informant information for the safety of inmates and OCSD personnel and to ensure all discovery material is properly recorded and maintained.

The OCGJ notes that a complete internal investigation of OCSD performance or policy violation issues raised during this controversy is on hold until outside investigations of possible criminal charges and civil rights violations are completed. Investigations by the OCSD's Internal Affairs Bureau have been initiated, but cannot be completed pending the outcome of these outside investigations. Numerous personnel have been reassigned and mandatory training for all current and incoming personnel has been implemented in areas of *Brady* and evidence discovery. This is in accordance with Internal Affairs Bureau policy as well as the Police Officers Bill of Rights.

Local Law Enforcement: *Perkins* Operations & the Anaheim Police Department

The OCGJ found that the architects of most *Perkins* operations run in Orange County jails were NOT OCSD personnel but other LLE Agencies. Orange County has 25 local policing agencies, including two University Departments. Several of the departments have their own jail or detention center, operating independently of the OCSD. As the primary investigative agency for a criminal case in Orange County, the particular LLE has initial responsibility for collecting and cataloging evidence. Prosecutors urge LLE detectives to consult with them in the early stages of a criminal investigation, to ensure all discoverable evidence is accounted for and communicated appropriately.

Starting in 2011, the Anaheim Police Department (APD) conducted, or was involved in, dozens of *Perkins* operations, resulting in more than 30 gang-related cases referred to the OCDA for criminal prosecution. All of these cases were developed using two confidential informants who had conducted more than 100 *Perkins* operations in Los Angeles County. Much has been made of these cases in the press as proof of an OCDA informant program. Regrettably, prosecutors assigned to some of these cases learned for the first time at a preliminary hearing that APD did not share all the information about these informants or that the informants had financial contracts with APD. This left the county vulnerable to accusations of civil rights violations and collusion in the prosecution of these cases. A search of the OCII indicated that information about these informants had not been provided to the OCDA, so the failure to turn over pertinent information about the informants was not intentional on the part of the prosecutor.

This highlights a weakness in the prosecutorial team that can set a challenging obligation for the OCDA, who bears the affirmative burden for ensuring justice is done. In order for discovery to be properly gathered and provided to the defense in the statutorily required manner, it is essential that LLE agencies understand their obligations to share information about informants and informant operations with the OCDA. Effective training and communication are central to this coordination. The OCDA has made an excellent beginning providing more than 40 training sessions on *Brady*, and the proper use of *Perkins* operations and jailhouse informants, to sworn personnel in nearly all of the LLE agencies in Orange County. The OCDA further intends to provide follow-up training to each department at least once a year.

The issues uncovered in the APD cases serve as an urgent warning about the lack of uniformity in gathering, cataloging, maintaining, and turning over discovery throughout the Orange County judicial system. For the past two years the OCDA has dedicated a full-time prosecutor to uncovering and sharing all pertinent discovery material in these cases and the OCGJ has been advised that efforts are underway to implement a standardized record keeping system for discovery.

CONCLUSION

There have been discovery violations in a small number of cases, over a period of years, due to a number of factors that are indicative of what happens to all organizations that are not diligent in maintaining awareness of their core mission. Both the OCDA and the OCSD allowed

individuals to drift from the core organizational mission and that laxness in supervision has had the unfortunate result of an erosion of trust in the criminal justice system. Both agencies are now aware of this shortcoming and have implemented organizational changes to repair the damage.

Allegations of a corrupt OCDA's office conspiring with the OCSD's office to violate citizen's constitutional rights are unfounded. Disparate facts have been woven together and a combination of conjecture and random events have been juxtaposed to create a tenuous narrative insinuating nefarious intent. That narrative does not stand up to factual validation.

The OCGJ found no concerted effort by personnel in either the OCDA or the OCSD offices to circumvent the law in order to ensure successful prosecutions. The vast majority of prosecutors we spoke with are ethical, hard-working individuals who have not, and will not, file a case if they do not believe in the guilt of the accused. In an office where more than 15,000 felony cases are filed annually and nearly 97% are settled before they get to trial, allegations of wide-spread jailhouse informant use are not factually supported.

The current search to get to the bottom of potential discovery violations in the *Dekraai* case has devolved into a witch-hunt for agency corruption; a search that after 5 years and more than 40,000 pages of court documents remains fruitless. Previous convictions have been questioned and new trials sought for individuals who claim they may have benefitted from the right to know about the use of an informant in their case. This unfortunate episode has eroded trust in the Orange County criminal justice system, not only within the Orange County legal community, but among the public at large. However, the OCGJ found no evidence to support claims of a systemic, widespread informant program, and reports of such have been exaggerated in the press.

The violations uncovered in *Dekraai* have remedies under existing law. The remedy for evidence obtained illegally in violation of *Massiah*, such as the taped conversation between Dekraai and a jailhouse informant, is the rejection of that evidence into the trial. This has been done: The tape has been thrown out and the jury will never hear it. The remedy for prosecutorial misconduct, such as that due to egregious discovery violations, is the recusal of the prosecutor. This has also been done; the OCDA has been recused and is no longer prosecuting the penalty phase of the case. While the OCGJ has now finished its investigation, the California Attorney General and the United States Department of Justice have ongoing investigations. Any further investigation of potential widespread, systemic institutional wrongdoing surrounding discovery or informant issues in Orange County would be far more appropriately addressed by these agencies and not by the trial court for the largest confessed mass murderer in Orange County history.

FINDINGS

In accordance with California Penal Code Sections 933 and 933.05, the 2016-2017 Grand Jury requires (or, as noted, requests) responses from each agency affected by the findings presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled, "*The Myth of the Orange County Jailhouse Informant Program*," in Orange County, the Orange County Grand Jury has arrived at thirteen principal findings, as follows:

F.1. The myriad definitions and nuances of what constitutes an "informant" have caused confusion and may have contributed to the current controversy and unnecessary erosion of trust.

F.2. There is no structured jailhouse informant program operating in the Orange County Jails. The existence of informants in the Orange County jails does not constitute a program. The use of an in-custody informant is generally organic in nature, and narrowly focused.

F.3. Violations in discovery and/or *Brady* disclosure in the *Dekraai* case are limited to the actions of a few members of the OCDA and a few OCSD personnel. This does not represent a conspiracy between the OCSD and OCDA.

F.4. The OCII is an incomplete repository of informant information and history due to the voluntary discretion of LLE Agencies to contribute to it.

F.5. LLE Agencies are, and continue to be, a weak link on the prosecution team. While OCDA has no authority over these agencies, they can certainly use the bully pulpit to raise awareness of the problem and encourage participation and commitment to proper legal standards.

F.6. The elevation of personnel in the OCDA to supervisory positions is not the result of standardized, objective hiring standards and does not include any required training in management or supervisorial skills training.

F.7. The OCDA needs to continue and expand the existing training programs to include objective standards in place to evaluate the actual effectiveness of OCDA training. Doubts continue as to whether training, in its current format, will make any substantial difference without metrics to measure impact.

F.8. Interoffice communication within the OCDA is often lacking and contributes to the absence of a unifying vision or sense of leadership. This allows for individual prosecutors to drift and create individualized record-keeping systems that could pose a liability for the County. It is an untenable position to argue that poor communication within the OCDA is the culprit to explain away constitutional discovery and *Brady* obligations.

F.9. Hiring an independent monitor to oversee work recommended by IPPEC and already completed by the OCDA is a waste of County money.

F.10. Mistakes were made by personnel in the OCSD and the OCDA. In response to internal investigations, the OCSD has taken disciplinary action to the extent it is able to do so at this time. There appears to have been minimal consequences for personnel in the OCDA.

F.11. Both the OCSD and the OCDA need updated technology and record keeping systems.

F.12. In spite of no official completed investigations, the OCSD has proactively made structural and organizational changes to address the issues that arose as a result of the informant controversy.

F.13. The current promotion process in the OCSD that requires patrol officers to be reassigned to the jail contributes to a culture of inadequate supervision of long-term jail personnel.

Penal Code §933 and §933.05 require governing bodies and elected officials to which a report is directed to respond to findings and recommendations. Responses are requested, from departments of local agencies and their non-elected department heads.

RECOMMENDATIONS

In accordance with California Penal Code Sections 933 and 933.05, the 2016-2017 Grand Jury requires (or, as noted, requests) responses from each agency affected by the recommendations presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled, "*The Myth of the Orange County Jailhouse Informant Program*" in Orange County, the Orange County Grand Jury makes the following ten recommendations:

R.1.The OCDA should prioritize updating the current case management system to better track all constitutional and statutory requirements and better interface with LLE agencies and the OCII.

R.2. The OCDA should continue working to improve and prioritize its training program by designing and implementing follow-up measurements to determine the effectiveness and impact of current training content and methods.

R.3. The OCDA should implement standardized management hiring and training practices for all supervisory personnel and review employee disciplinary practices to ensure they are sufficient responses to employee actions.

R.4. The OCDA needs to send a clear message to local law enforcement agencies that successful case prosecution relies on the sharing of information, and agencies should be encouraged to share all informant information with the OCDA for input into the OCII.

R.5. Prosecutors within the OCDA need to recognize that the OCII is a tool of limited utility and should not rely solely on the OCII to vet potential witnesses. They should continue to do their due diligence in background checks of all witnesses in their prosecutions.

R.6. The OCDA should standardize its discovery record-keeping system for recording and tracking discovery materials and ensure all prosecutors are aware of and use the new uniform system.

R.7. The OCDA should review their management and communication to improve inter-office communications and break-down the negative effect of silo-ed operations

R.8. The Board of Supervisors should review and consider canceling, within the next 90 days, the OCDA independent monitor contract implemented on recommendations from the IPPEC and approved by the Board in August 2016.

R.9. The OCSD should standardize and consolidate jail activity records that have potential discovery repercussions, and minimize multiple filing systems for recording potentially discoverable material within the jail management system.

R.10. The OCSD should improve supervisor training for newly promoted sergeants that includes demonstrated supervisory skills before rotation back to the field.

REQUIRED RESPONSES

The *California Penal Code* §933 requires the governing body of any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the governing body. Such comment shall be made no later than 90 days after the Grand Jury publishes its report (filed with the Clerk of the Court). Additionally, in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such elected County official shall comment on the findings and recommendations pertaining to the matters under that elected official's control within 60 days to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05 (a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each Grand Jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefore.

(b) As to each Grand Jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the Grand Jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefore.

(c) If a finding or recommendation of the Grand Jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the Grand Jury, but the response of the Board of Supervisors shall address only those budgetary /or

> personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with Penal Code §933.05 are required as follows:

Responses are required from the following elected officers within 60 days of the date of the publication of this report:

The Orange County District Attorney (F.1-11; R.1-7)

The Orange County Sheriff-Coroner (F.1-3, 10-13; R.9,10)

Responses are required from the following governing bodies within 90 days of the date of the publication of this report:

The Orange County Board of Supervisors (F.9, R.8)