

**Investigation of the  
Orange County District Attorney's Office  
and the  
Orange County Sheriff's Department**



**U.S. Department of Justice**  
Civil Rights Division

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## I. EXECUTIVE SUMMARY

The United States has conducted an extensive investigation of the Orange County District Attorney's Office (OCDA) and the Orange County Sheriff's Department (OCS), pursuant to our authority under the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (previously codified at 42 U.S.C. § 14141). We have determined that there is reasonable cause to believe that the Orange County District Attorney's Office and the Orange County Sheriff's Department engaged in a pattern or practice of conduct—the operation of a custodial informant program—that systematically violated criminal defendants' right to counsel under the Sixth Amendment and right to due process of law under the Fourteenth Amendment.

While our review focused on custodial informant activity from 2007 through 2016, the informant controversy continues to undermine public confidence in the integrity of the Orange County criminal legal system. Neither agency has implemented sufficient remedial measures to identify criminal cases impacted by unlawful informant activities or prevent future constitutional violations. This report provides a public accounting of the scope and impact of the informant program on the Orange County criminal legal system.

We opened our investigation in December 2016 amid serious concerns that the custodial informant program operated by OCDA and OCS had undermined confidence in the criminal legal system in Orange County.<sup>1</sup> The custodial informant program came to light in 2014 during OCDA's prosecution of Scott Dekraai for mass murder. *People v. Dekraai* involved multiple rounds of evidentiary hearings about the custodial informant program over the course of three years. Dozens of witnesses from OCDA and OCS testified about the program. The hearings resulted in the court-ordered recusal of OCDA from the *Dekraai* case and, ultimately, the dismissal of the death penalty from consideration.

In the midst of the *Dekraai* proceedings, then-Orange County District Attorney Tony Rackauckas asked the United States to conduct an investigation of OCDA's custodial informant practices and offered us "unfettered access" to documents and personnel at OCDA.<sup>2</sup> We focused our investigation on: (1) whether OCDA and OCS used custodial informants to elicit incriminating statements from individuals in the Orange County Jail, after those individuals had been charged with a crime, in violation of the Sixth Amendment; and (2) whether OCDA failed to disclose exculpatory evidence about those custodial informants to criminal defendants in violation of the Fourteenth Amendment. We reviewed thousands of pages of documents, made

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<sup>1</sup> See, e.g., Matt Ferner, *There's a Jail Snitch Program In Orange County, And Here Are the Inside Memos that Detail It* (April 21, 2017), Huffington Post (on file); Editorial Board, *Dishonest Prosecutors, Lots of Them* (September 30, 2015), New York Times, available at <https://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html>; November 17, 2015 letter from Erwin Chemerinsky, John Van de Kamp, and 35 signatories requesting DOJ investigation (on file).

<sup>2</sup> Letter from Tony Rackauckas, Orange County District Attorney, to Loretta Lynch, Attorney General of the United States, January 4, 2016 (on file).

numerous site visits to OCDA and OCSD, and conducted dozens of interviews in the course of our investigation. In particular, we conducted 17 transcribed interviews with OCDA prosecutors about specific cases they personally handled involving custodial informants.

The evidence reveals that custodial informants in the Orange County Jail system acted as agents of law enforcement to elicit incriminating statements from defendants represented by counsel, and that for years OCSD maintained and concealed systems to track, manage, and reward those custodial informants. The evidence also reveals that OCDA prosecutors failed to seek out and disclose to defense counsel exculpatory information regarding custodial informants. We therefore have reasonable cause to believe that this pattern or practice of conduct by both agencies resulted in systematic violations of the Sixth and Fourteenth Amendments.

### *The Custodial Informant Program*

Although law enforcement officers can and do use informants in custodial settings in compliance with constitutional safeguards, OCSD and OCDA operated a custodial informant program in a way that broke from common practices and, thus, exacerbated the risks of constitutional violations. OCSD's Special Handling Unit took primary responsibility for managing the activities of custodial informants inside the jail, and the Unit documented its activities in official jail records. The Special Handling Unit had authority over the jail's classification and housing systems and used those systems to strategically place informants near investigative targets. While classification and housing systems are intended to ensure the safety and security of inmates, the Special Handling Unit commandeered those systems to conduct criminal investigations using custodial informants. The Special Handling Unit and OCDA provided informants with benefits that made their jail time easier. They also provided informants formal leniency in the form of reduced charges or sentencing requests. Deputies in the Special Handling Unit and prosecutors in OCDA's gang and homicide units repeatedly relied on the same experienced informants to build criminal cases. Yet, OCSD and OCDA failed to ensure that the use of custodial informants comported with constitutional requirements.

### *Sixth Amendment Right to Counsel*

The Sixth Amendment guarantees all accused persons the assistance of counsel, a right meant to ensure fairness in criminal proceedings. The Sixth Amendment prohibits law enforcement from using informants to elicit statements from defendants about conduct that defendants have been charged with and for which they are represented by counsel. But this is exactly what OCDA and OCSD did: custodial informants in the Orange County Jail worked as agents of law enforcement to elicit incriminating statements from represented defendants while they were housed together in the jail. OCSD placed informants in proximity to represented defendants so that the informants could elicit inculpatory statements in the absence of the defendant's counsel. OCSD hid records for tracking and managing the informants inside the jail. The informants sought and expected benefits for their in-custody informant work, and informants were directly or impliedly promised by law enforcement that such benefits would be forthcoming. The way that OCDA and OCSD used custodial informants repeatedly violated defendants' Sixth Amendment right to counsel.

*Fourteenth Amendment Right to Due Process of Law*

The Fourteenth Amendment’s Due Process Clause requires prosecutors to disclose to criminal defendants material evidence in the possession of the prosecution team that is favorable to the defendant. OCDA prosecutors repeatedly failed to meet their constitutional disclosure obligations when it came to the use of custodial informants. Prosecutors failed to disclose evidence that defendants in the Orange County Jail had been questioned by informants in violation of their Sixth Amendment rights. Prosecutors also failed to disclose evidence that defendants could have used to impeach custodial informants’ testimony by showing that the informants had a motive to lie or were simply unreliable people. In a number of cases, prosecutors themselves were unaware of evidence that had to be disclosed, but the evidence was nevertheless in the possession of the law enforcement agents assisting them, and the Fourteenth Amendment required prosecutors to seek the evidence out and disclose it to defendants. OCDA prosecuted a number of cases where custodial informants testified about confessions that they had obtained from defendants in the Orange County Jail—sometimes the same informant across numerous cases. But prosecutors did not question whether these confessions were obtained in violation of the Sixth Amendment or whether law enforcement had provided benefits or promised the informants that they would be rewarded for their work. As a result, prosecutors repeatedly violated criminal defendants’ Fourteenth Amendment rights.

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Restoring trust in Orange County law enforcement will require recognition and remediation of the harms caused by the law enforcement practices described in this report. Since we opened our investigation, OCSJ and OCDA have taken important steps to develop systems for managing custodial informants and ensuring that materials are appropriately disclosed to criminal defendants. But more work remains to be done. It has been eight years since much of the misconduct came to light, and OCDA has still not taken adequate steps to ensure that prosecutors understand and carry out their constitutional disclosure obligations. Both agencies must improve their coordination and sharing of information to ensure that OCSJ deputies have appropriate guidance about the constitutional requirements for investigations involving custodial informants and that OCDA prosecutors have a complete picture of every investigation involving a custodial informant.

At the end of this report, we have broadly identified the changes that are necessary for meaningful and sustainable reform. Ultimately, strengthening the criminal legal system in Orange County will increase the effectiveness of OCDA’s and OCSJ’s law enforcement efforts and will better serve the safety of Orange County residents.

## II. BACKGROUND

### A. Orange County, California

Orange County, California covers 790 square miles—an area that includes the cities of Anaheim, Santa Ana, and Irvine—and has a population of over three million.<sup>3</sup> It is governed by a board of supervisors, which consists of five elected supervisors, each representing one of five districts.<sup>4</sup> In addition, there are six countywide elected officials, including the Sheriff-Coroner and the District Attorney.<sup>5</sup>

### B. The Orange County Sheriff's Department

The Orange County Sheriff's Department (OCSD) is led by Sheriff-Coroner Don Barnes, who has served in that capacity since January 2019. Prior to his election, Barnes had served in OCSD for 30 years. The Department is organized into six Commands; the two relevant to this investigation are the Custody Operations and Court Services Command, and the Field Operations and Investigative Services Command.

The Custody Operations Command is responsible for the Orange County Jail system, which consists of four facilities. The Intake/Release Center (IRC) is responsible for all processes that involve arrestees being booked and released. Located in the Central Jail Complex in Santa Ana, the IRC contains five maximum-security housing units and has capacity for more than 800 inmates. The Central Jail Complex also includes the Central Men's Jail and Central Women's Jail. Both facilities house sentenced and pre-trial maximum security inmates. The Central Men's Jail houses approximately 1,430 inmates, and the Central Women's Jail houses up to 380 inmates. The Theo Lacy Facility is a maximum-security jail complex in the city of Orange. It has capacity for 3,442 inmates and houses individuals waiting for trial on misdemeanors and felonies. It also houses inmates who have been sentenced and are waiting to be transferred to state prisons.

The IRC is the first stop for most arrestees.<sup>6</sup> New arrestees are brought to the center from other local jails or directly after their arrest. One of the first steps through the jail system is

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<sup>3</sup> United States Census Bureau, Quick Facts, Orange County, California, <https://www.census.gov/quickfacts/orangecountycalifornia>.

<sup>4</sup> Orange County Government, Orange Cty. California. <http://ocgov.com/residents/gov/elected>.

<sup>5</sup> The countywide elected positions consist of Assessor, Auditor-Controller, Clerk-Recorder, District Attorney-Public Administrator, Sheriff-Coroner, and Treasurer-Tax Collector. *See* Orange County Government, Orange Cty. California. <http://ocgov.com/residents/gov/elected>.

<sup>6</sup> We understand that OCSD altered the process for classifying arrestees in 2019, including adopting an objective classification and housing system in its jail. The description here reflects the process that was in place during our site visits throughout 2016-2018, and during the periods covered by our investigation.

classification, a process that jails typically use to determine a person's dangerousness or vulnerability, which are important considerations in making decisions about where to house inmates.<sup>7</sup> In classification, a classification deputy conducts an interview and, based on this interview and a review of the person's background (including current charges, criminal history, prior institutional experiences, and any alleged gang involvement), the arrestee is classified and issued a wristband that is color-coded to reflect the assigned classification level. Security classifications range from minimum security to maximum security, and include administrative segregation and protective custody. After being classified, the arrestee is moved to screening, where a classification deputy (called a "driver") assigns the person to a housing unit in the County jail system.

Classification deputies do not use objective criteria for determining arrestees' classification level, though the classification process was intended to use such objective criteria. Instead, they make subjective determinations about what each inmate's classification should be, based largely on previous criminal history and their impressions of the inmate during the interview. Decisions on housing are similarly discretionary. Deputies record their impressions, along with the classification and housing decisions, in an electronic record known as a "TRED," contained in OCSD's Automated Jail System.<sup>8</sup> Deputies told us that, for inmates who have been previously incarcerated in the Orange County Jail system, they make classification decisions and housing assignments based in part on a review of that individual's TRED, which may contain comments about an inmate's previous housing in custody, in-custody discipline, gang affiliation, classification screening notes, and transportation requirements.

The IRC consists of housing modules, called "mods," that each have six sectors; each sector has 16 cells. L Mod is the medical wing; individuals with serious mental health issues or on suicide watch are housed there. L Mod at the IRC also houses individuals placed in restrictive housing, where the inmates remain in their cells for the vast majority of the day.<sup>9</sup>

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<sup>7</sup> Following a separate investigation by the U.S. Department of Justice into conditions at the Orange County Jail, which concluded in December 2019, OCSD changed its system for classifying inmates. The following description of inmate classification at the Orange County Jail reflects the system that OCSD used previously and was in effect when the specific incidents discussed in this report occurred.

<sup>8</sup> The term "TRED" is apparently not an acronym but instead is OCSD jargon that originated when OCSD tracked classification decisions on index cards. Deputies added information to the cards repeatedly and began to refer to an index card as a "re-tread," like re-treads on a car tire. At some point deputies shortened "re-tread" to "TRED," and they continue to use that term for the computerized classification system.

<sup>9</sup> Restrictive housing in Orange County appears to be comparable to what in other jurisdictions may be called solitary confinement, segregation, or isolation. It is a type of detention that involves three basic elements: removal from the general prisoner population, whether voluntary or involuntary; placement in a locked room or cell, whether alone or with another prisoner; and



Housing at Theo Lacy ranges from multi-bunk dormitory-style “barracks housing” in minimum-security buildings to one- or two-person cells. In the more secure “module-style” housing units at the facility, no more than eight inmates are allowed to congregate at any one time. Inmates at Theo Lacy could also be placed in restrictive housing.

### **C. The Orange County District Attorney’s Office**

Since 2019, the Orange County District Attorney’s Office (OCDA) has been headed by Todd Spitzer. District Attorney Spitzer unseated Tony Rackauckas, who had held the position since 1998. OCDA is comprised of approximately 250 deputy district attorneys and 23 attorney managers.

Since at least the 1990s, the Office has participated in an initiative known as TARGET, which is an acronym for Tri-Area Gang Enforcement Team. The program represents an effort to combat gang activity by placing prosecutors in police departments to work with gang enforcement units. The goal is to seek to “enhance the effectiveness of prosecution” of individuals who are suspected of leading gang activity. Any time a judge is making a decision on pretrial release or sentencing for one of those individuals—whether for a driving under the influence conviction, probation violation, vandalism, or any other matter—a TARGET prosecutor seeks a disposition that reflects the individual’s gang involvement.

OCDA also maintains a Bureau of Investigation. The Bureau of Investigation has 165 sworn police investigators and 57 non-sworn support team members. Investigators are tasked with supporting attorneys in every unit of the district attorney’s office, except appeals and writs. The investigators have police powers; are armed; and carry tasers, batons, and handcuffs. Investigators are responsible for subpoenaing and interviewing witnesses, observing interviews between attorneys and witnesses, executing arrest warrants, and providing witness protection during trials. During the period covered by our investigation, some investigators also compiled and disseminated discovery. They also perform investigative tasks, such as operating hidden cameras and covertly placing GPS tracking devices on the cars of individuals under investigation. If an individual dies in custody in Orange County, or if a police officer shoots someone, OCDA will take over the case, with Bureau investigators handling the investigation. Finally, investigators engage in trial strategy with their deputy district attorney counterparts.

### **D. Events Leading to Our Investigation**

The Orange County District Attorney’s Office and Sheriff’s Department came under scrutiny in 2014, after a controversy involving the agencies’ use of custodial informants<sup>10</sup> came

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inability to leave the room or cell for the vast majority of the day, typically 22 hours or more. *See* U.S. Dep’t of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 3 (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download>.

<sup>10</sup> The terms “custodial informant,” “jailhouse informant,” and “confidential informant” appear throughout this report. For the purposes of this report, “confidential informants,” often

to light in *People v. Dekraai*, a capital case. The Orange County Superior Court eventually held that OCDA had committed constitutional violations that led the court to recuse the entire Office from the death penalty phase of the *Dekraai* case. The trial court's recusal decision was affirmed by a California Court of Appeal in 2016. The appellate court found that OCDA had a "real" and "grave" conflict in the case, due to its "intentional or negligent participation in a covert CI [Confidential Informant] program to obtain statements from represented defendants in violation of their constitutional rights, and to withhold that information from those defendants in violation of their constitutional and statutory rights."

After the trial court's rulings in the *Dekraai* case, the District Attorney's Office convened the Orange County District Attorney Informant Policies & Practices Evaluation Committee "to examine the OCDA policies and practices regarding the use of jailhouse informants."<sup>11</sup> That committee made several recommendations, including that the informant controversy be independently investigated by the Department of Justice. After the Committee issued its report, then-Orange County District Attorney Tony Rackauckas wrote to then-Attorney General Loretta Lynch requesting a full investigation of the informant-related policies and practices of his office and promising "unfettered access" to documents and personnel.<sup>12</sup> The Department of Justice accepted that invitation on December 15, 2016.

### III. OUR INVESTIGATION

The Civil Rights Division opened this investigation pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (Section 12601). Section 12601

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abbreviated as "C.I.s," are those who provide information to law enforcement and whose identity is kept secret to protect their safety or to ensure that their informing activities will not be detected. Confidential informants may be in or out of police custody. "Custodial informants," sometimes called "jailhouse informants," are a subset of confidential informants who conduct their information-gathering activities in custodial settings like jails and prisons. In this report, we frequently quote materials that refer to "C.I.s" and "confidential informants." Those references typically involve confidential informants who were in custodial settings and thus can also be fairly characterized as custodial informants.

<sup>11</sup> Committee members included 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, ethics law and professional responsibility attorney Blithe Leece, and legal scholar and ethics expert Professor Laurie Levenson of Loyola Law School. Orange County District Attorney Informant Policies & Practices Evaluation Committee Report at 1 (12/30/2015), available at [http://big.assets.huffingtonpost.com/IPPEC\\_REPORT\\_1.pdf](http://big.assets.huffingtonpost.com/IPPEC_REPORT_1.pdf).

<sup>12</sup> January 4, 2016, letter from OCDA to DOJ (on file).

prohibits law enforcement agencies from engaging in a pattern or practice<sup>13</sup> of conduct that deprives individuals of their rights under the Constitution or laws of the United States.

We focused our investigation on custodial informants. Our task was to determine whether OCSD and OCDA used custodial informants to elicit incriminating statements from individuals after they had been charged with a crime, in violation of the Sixth Amendment. For cases in which OCSD and OCDA used custodial informants in this way, we then determined whether OCDA made disclosures to defendants about the custodial informants that were required by the Fourteenth Amendment.

We asked to review case files for OCDA prosecutions in which a custodial informant had been involved in some aspect of the investigation or prosecution, regardless of whether the informant ultimately testified. OCDA informed us that its Homicide and TARGET Units and Gang Enforcement Team most often tried cases involving custodial informants, and the vast majority of the case files provided to us involved those units. OCDA gave us only closed cases, meaning cases that concluded by verdict, guilty plea, or dismissal. As a result, our review was limited to cases charged before February 2017. In any event, though OCDA told us that it suspended its use of custodial informants sometime in 2014, during the *Dekraai* proceedings, prosecutors nevertheless continue to litigate and make informant-related disclosures in pre-2014 cases, and our understanding is that OCDA intends to resume its use of custodial informants if the need arises in future cases.

In addition to reviewing case files, we interviewed a wide range of OCDA employees. For example, we interviewed five senior prosecutors about custodial informant practices, policies, and training. We also interviewed 17 OCDA prosecutors about specific cases involving custodial informants, as well as the head of OCDA's Investigations Bureau, paralegals, investigators, and employees of administrative and information technology services. We met with senior OCDA leadership from the Rackauckas and Spitzer administrations. We met with District Attorney Spitzer and senior members of his administration several times to discuss the agency's current remedial efforts. All told, we spent 45 days onsite at OCDA to speak with personnel and review documents.

With regard to OCSD, we focused on custodial informant activity by its Special Handling Unit from 2007 through 2016 because that unit managed high-risk and high-profile inmates, including custodial informants. OCSD disbanded the unit in late 2016. We received hundreds of thousands of documents from OCSD relating to its use of custodial informants, including departmental memoranda, activity logs, and computer database entries that deputies made regarding the movement and use of custodial informants. We spoke with approximately 50

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<sup>13</sup> A pattern or practice exists where violations are repeated rather than isolated. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (noting that the phrase "pattern or practice" "was not intended as a term of art," but should be interpreted according to its usual meaning "consistent with the understanding of the identical words" used in other federal civil rights statutes). A pattern or practice does not require the existence of an official policy or custom. *United States v. Colorado City*, 935 F.3d 804, 811 (9th Cir. 2019).

OCSO sworn personnel about the Department's informant practices. We spent 22 days onsite at the Orange County Jail to tour the facilities, speak with personnel, and review policies, training materials, and inmate records or "jackets."

Three subject matter experts assisted us with this investigation. Two of these experts are former prosecutors, one with experience as a federal district court judge, and the third is an expert in custodial classification. Together, these experts have decades of expertise in the use of informants, criminal discovery, and jail classification procedures. One of these experts accompanied us onsite. All of these experts reviewed documents and provided invaluable insights that informed both the course of this investigation and this report.

We thank OCSO, OCDA, the Orange County Attorney's Association, the Association of Orange County Deputy Sheriffs, the Orange County Public Defender, and members of the private defense bar who have cooperated with this investigation and provided us with insights into the operation of Sheriff's Department and District Attorney's Office.

#### **IV. OCSO AND OCDA OPERATED A CUSTODIAL INFORMANT PROGRAM THAT REPEATEDLY DEPRIVED CRIMINAL DEFENDANTS OF THEIR SIXTH AND FOURTEENTH AMENDMENT RIGHTS**

Our investigation revealed that from 2007 to 2016 there existed a well-established program in Orange County to use custodial informants to obtain incriminating statements from defendants in homicide and gang-related prosecutions who were housed at the Orange County Jail and then use those statements against the defendants at trial. Through the execution of the custodial informant program, OCSO and OCDA engaged in a pattern or practice of conduct that resulted in the deprivation of criminal defendants' Sixth and Fourteenth Amendment rights.

Over the relevant timeframe, the Orange County Sheriff's Department placed the management and execution of custodial informant activities under the auspices of a division of the Department called the Special Handling Unit. The Special Handling Unit focused informant activities in certain parts of the jail and manipulated existing jail systems to accomplish its task. It recorded its activities in existing jail systems while also creating its own investigative reports and a journal of its day-to-day operations. The Orange County District Attorney's Office prosecuted dozens of cases involving custodial informants, offered and provided those informants leniency for their assistance, and at times worked closely with OCSO deputies on investigative strategies involving custodial informants.

##### **A. The Sixth Amendment and Custodial Informants**

The Sixth Amendment guarantees that accused persons shall have the assistance of counsel. U.S. Const. amend. VI. This right is meant to "assure fairness in the adversary criminal process." *United States v. Cronin*, 466 U.S. 648, 656 (1984).

The right to counsel attaches at the initiation of formal charges and applies to any law enforcement questioning thereafter. *Maine v. Moulton*, 474 U.S. 159, 170-71 (1985). In California, formal charges are initiated the moment the complaint is filed. *People v. Viray*, 134 Cal. App. 4th 1186, 1198-99 (6th App. Dist. Dec. 14, 2005). Law enforcement officers violate

the Sixth Amendment when, after charges have been filed, they elicit an incriminating statement from a defendant about the charged offense in the absence of defense counsel. *Massiah v. United States*, 377 U.S. 201, 206 (1964). This prohibition against eliciting statements from represented defendants extends “to the use of jailhouse informants who relay incriminating statements from a prisoner to the government.” *Randolph v. People of the State of Cal.*, 380 F.3d 1133, 1143 (9th Cir. 2004).<sup>14</sup>

A Sixth Amendment violation occurs when information is obtained from a criminal defendant about the crime being prosecuted and two conditions are met. First is “agency,” which means that the informant “was acting as an agent of the State when he obtained the information.” *Randolph*, 380 F.3d at 1144. Second is “elicitation,” which means that the informant “made some effort to ‘stimulate conversations about the crime charged.’” *Id.* (quoting *United States v. Henry*, 447 U.S. 264, 271 n.9 (1980)). The Sixth Amendment is violated at the moment a government agent elicits inculpatory statements from a charged individual outside the presence of counsel. *Kansas v. Ventris*, 556 U.S. 586, 592 (2009).

## **B. The Fourteenth Amendment and Discovery About Custodial Informants**

Like the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment ensures the fairness of criminal proceedings. One of its requirements is that prosecutors must disclose evidence that is favorable to the accused—often called “the *Brady* rule,” from the Supreme Court case establishing it, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose favorable evidence is one of the prosecutor’s “principal” duties because of the “significant advantage the state has over an individual defendant in regards to gathering information and [it] seeks to level the playing field.” In *Brady*, the 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.” 373 U.S. at 87. The Supreme Court later held that prosecutors have a duty to disclose material evidence that is favorable to the accused even when the defendant has not requested it. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

To prove that a prosecutor violated the *Brady* rule, a defendant must demonstrate that the evidence at issue was (1) exculpatory or impeaching, (2) withheld by the government, whether willfully or inadvertently, and (3) material to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 280–82 (1999); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.”).

Evidence is exculpatory when it relates to guilt or punishment and is favorable to the accused. *Brady*, 373 U.S. at 87. Prosecutors must disclose evidence of innocence that is provided

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<sup>14</sup> Not all uses of jailhouse informants result in a violation of the right to counsel. For example, jailhouse informants may be used to gather information from inmates about contraband or criminal activity inside the jail for which the inmates have not been charged. Jailhouse informants also may gather information about activity unrelated to the crime being prosecuted. *Moulton*, 474 U.S. at 180 n.16.

by custodial informants. For example, an informant may report that someone other than the defendant admitted to committing the crime. Such information would be exculpatory and must be provided to the defense, whether or not the government expects to call the informant as a witness.

Exculpatory evidence also includes impeachment evidence, which is evidence that bears on the credibility of a witness. *Giglio*, 405 U.S. at 154. Prosecutors must disclose any impeachment material related to a testifying informant because such evidence could show an informant's motive to lie. *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) (holding that nondisclosure of benefits provided to a testifying informant violated *Brady* because it could have impacted his credibility). Prosecutors must be attuned to *Brady* obligations in informant cases because informants may be "cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

One key type of impeachment material related to informants is evidence that an informant witness has lied in the past. *Benn v. Lambert*, 283 F.3d 1040, 1056 (2002) (holding that prosecutors violated *Brady* by not disclosing that an informant had lied about stealing drugs and money during drug busts and smuggling guns into a prison). Another key category of impeachment evidence is any agreement between an informant and the government in which the informant provided information in exchange for some sort of leniency, such as a promise not to prosecute an informant or reduce an informant's sentence. *Giglio*, 405 U.S. at 154–55.<sup>15</sup>

The prosecution must disclose any benefits it gives or promises it makes to an informant as impeachment evidence. A prosecutor must disclose, for example, custodial benefits that an informant receives in exchange for his or her cooperation. This can include the provision of special food, visits, phone calls, and preferred housing assignments to informants who are in custody. Prosecutors must also disclose any financial compensation the government provides to informants who cooperate. *Banks v. Dretke*, 540 U.S. 668, 699–703 (2004); *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986).

The prosecutor's responsibility also extends to locating evidence that is in the possession of other law enforcement agents who are on the prosecution team. This means that prosecutors must affirmatively seek out "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The government cannot avoid disclosing exculpatory evidence to the defense simply because it is in the hands of the investigating agency, rather than the prosecutor. "That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by

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<sup>15</sup> Evidence of an "agreement" with an informant can also demonstrate agency under the Sixth Amendment and *Massiah*. See *Henry*, 447 U.S. at 270–71; *Randolph*, 380 F.3d at 1144.

allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.” *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995).

Evidence is material if there is a “reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). This means that a defendant needs to show that “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. A prosecutor who is unsure about the materiality of exculpatory evidence should disclose it. *Agurs*, 427 U.S. at 108.

### **C. How the Custodial Informant Program Came to Light: *People v. Scott Dekraai***

The existence of a custodial informant program operating in Orange County came to light during the prosecution of Scott Dekraai. In what was called “the worst mass killing in the history of Orange County,” on October 12, 2011, Dekraai walked into the salon where his ex-wife worked and opened fire, killing her and seven others. Minutes later, law enforcement officers found him just blocks from the crime scene. He confessed to detectives shortly after his arrest. Two days later, then-Orange County District Attorney Tony Rackauckas announced his plans to seek the death penalty.

Shortly after Dekraai arrived in Module L at the Intake/Release Center of the Orange County Jail, an inmate named Fernando Perez<sup>16</sup> questioned Dekraai about the shooting, and Dekraai spoke in detail about the murders in ways that would bolster OCDA’s case for the death penalty. Five days after the murders, OCSD’s Special Handling Unit set up a meeting between OCDA prosecutors and Perez. While Dekraai’s guilt was not in question, OCDA was concerned that Dekraai would argue that he was not criminally responsible for the murders due to a history of post-traumatic stress disorder. Before leaving the jail, prosecutors sought permission from OCSD to wire up Perez individually, but OCSD declined. Prosecutors and OCSD settled on wiring up Dekraai’s cell and sending Perez back to the cell next to Dekraai’s. OCSD began recording their conversations that day and captured statements from Dekraai about his guilt and his state of mind. In late 2016, OCDA provided the defendant with 179 tape recordings of Dekraai’s jail visits, including tape recordings of conversations between Dekraai and his lawyer, and recordings that OCSD made after OCDA directed it to cease all recording activity.

OCDA initially characterized Perez as a passive listener who had no stake in Dekraai’s case, asking Dekraai no questions and seeking nothing in exchange for passing Dekraai’s statements on to deputies within the Special Handling Unit. Dekraai’s defense lawyer filed a motion for more information about Perez to determine whether Perez was an agent of law enforcement. OCDA opposed this motion, but the Court granted it, and OCDA provided Dekraai’s lawyer with thousands of pages of discovery material that made clear that, at the time Perez elicited Dekraai’s statements, he had been working as a custodial informant within the

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<sup>16</sup> Fernando Perez’s identity as an informant became public during litigation in *People v. Dekraai*, where Perez testified as a witness in March 2014. In this report, when we refer to informants by name, we do so only when their identities are already widely known.

Orange County Jail for over a year in exchange for benefits from law enforcement agencies, including the federal government and OCDA.

In early 2014, Dekraai's lawyer moved to dismiss the death penalty from consideration on the grounds that the prosecution team had engaged in "outrageous government misconduct," legal grounds that permit courts to dismiss criminal cases when the actions of law enforcement officers or informants are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431–32 (1973). The defense contended that the prosecution violated Dekraai's Sixth Amendment right to counsel at least two separate times, made false and misleading statements in court, and failed to disclose material evidence related to the use of informants inside the jail in numerous other cases prosecuted by OCDA.<sup>17</sup> The defense argued that the court should have "no confidence the prosecution team will comply with its obligations under *Brady*" and therefore would be "unable to ensure a fair trial in the penalty phase for Dekraai." The defense also moved to recuse OCDA from further handling the prosecution, arguing that the Office was institutionally incapable of protecting Dekraai's due process rights.

After extensive hearings in 2014, OCDA conceded that Dekraai's Sixth Amendment right to counsel had been violated, and the court prohibited OCDA from using Dekraai's statements to Perez at Dekraai's trial. The court concluded that while custodial informants within the Orange County Jail were sometimes moved near targeted defendants at the behest of outside law enforcement for the purposes of eliciting incriminating statements about their charged crimes, "[s]uch 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."

The court's conclusion was soon called into question. After the 2014 *Dekraai* hearings, Dekraai's lawyer learned that OCSD actually had voluminous information about when and why law enforcement moved informants inside the jail. OCSD documented inmate movements in electronic records known as TRED records,<sup>18</sup> and had done so since 1990. After the TRED records came to light, OCDA and Dekraai's lawyer *jointly* requested a supplemental hearing that began in February 2015. After hearing evidence about the TRED records that directly contradicted earlier testimony from deputies assigned to the Special Handling Unit, the court concluded that two of those deputies "either intentionally lied or willfully withheld material evidence from this court during the course of their various testimonies."

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<sup>17</sup> A court may dismiss an indictment for outrageous government conduct for violating due process only in "extreme cases" in which the defendant can demonstrate that the government's conduct "violates fundamental fairness" and is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (quoting *United States v. O'Connor*, 737 F.2d 814, 817 (9th Cir. 1984)).

<sup>18</sup> As described in footnote 8, *supra*, the term "TRED" is jargon for the records that OCSD maintains to document its decisions about how to classify inmates in the Orange County Jail.



Based on the TRED records and other evidence, the court found that OCSD's and OCDA's deliberate use of Fernando Perez to elicit statements from Dekraai was far from an isolated incident, as Perez was just one of many informants working in the Orange County Jail under the direction of Special Handling Unit deputies. On March 12, 2015, three and a half years after Dekraai's arrest, the court found that OCSD "habitually ignored the law over an extended period of time" by failing to disclose the TRED records "despite numerous specific discovery orders issued by [the] court."

The court stated that there was "no direct evidence to suggest that the District Attorney actively participated in the concealment of information," but went on to note that this fact "really just aggravates the entire situation because someone has to be in charge of criminal investigations and prosecutions in Orange County." OCDA was "the chief law enforcement officer in [the] county," and its abdication of its role in the *Dekraai* proceedings "actually deprived [the] defendant of due process in the past" and would "likely prevent [the] defendant from receiving a fair trial in the future." The court recused OCDA from further prosecuting the case, stating, "[T]he District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial."

The California Court of Appeal unanimously affirmed the court's recusal order on November 2, 2016, rejecting the argument that OCDA bore none of the blame for the misconduct. "The court recused the OCDA only after lengthy evidentiary hearings where it heard a steady stream of evidence regarding improper conduct by the prosecution team," the court explained.

In 2017, Dekraai renewed his motion to dismiss the death penalty after yet another source of voluminous information regarding the custodial informant program came to light—the Special Handling Log, a series of Microsoft Word documents totaling 1,157 pages in which deputies assigned to the Special Handling Unit recorded their day-to-day activities, including their cultivation and use of custodial informants. The log entries, which covered a four-year period from September 2008 through January 2013,<sup>19</sup> had an unexplained gap from April through October of 2011. The entries also demonstrated that deputies had been "shredding" jail documents relevant to the *Dekraai* proceedings in contravention of a 2009 Orange County Board of Supervisors Resolution and despite the existence of a legal requirement to preserve the documents for litigation.

The Special Handling Log left little question that the custodial informant program had been designed to elicit incriminating statements from defendants. And the evidence of "shredding" contained in the Log, as well as testimony indicating that the Log's unexplained gap

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<sup>19</sup> Deputies apparently ceased using the Special Handling Log on January 31, 2013, at the beginning stages of the *Dekraai* proceedings. This fact later prompted the court to conclude that the Log's termination was "neither an accident nor a coincidence." Ruling on Motions for Sanctions Related to Ongoing Discovery Abuse, *People v. Dekraai*, No. 12ZF0128, at 16 (Cal. Sup. Ct. Aug. 18, 2017).

was due to the intentional deletion of entries, added to the prosecution team’s history of discovery abuse in the *Dekraai* case. OCDA immediately recognized that the Log contained evidence relevant to *Dekraai*, as well as to other criminal cases prosecuted by OCDA. One month after the Log’s existence came to light, OCDA announced that it would “analyze the extent of the impact of the newly uncovered SH [Special Handling] Log on open and closed criminal cases” and would “determine what cases, if any were affected,” and what *Brady* or *Massiah* violations, if any, needed to be reported to defendants or the court. OCDA abandoned this effort in 2017, though it later re-initiated a review of the Log.

After an extensive third round of hearings in *Dekraai*, including testimony from the executive staff of OCSD, the court struck the death penalty as a “remedial sanction necessitated by the ongoing prosecutorial misconduct related to discovery proceedings which has effectively compromised this defendant’s right to procedural and substantive due process and prospectively to a fair penalty trial.” Instead, the court sentenced Dekraai to eight consecutive life terms without the possibility of parole.

The *Dekraai* proceedings brought many features of the custodial informant program to light. We discuss these features, as well as others that we uncovered through our investigation, in the subsections that follow.

#### **D. OCSD’s Special Handling Unit Took Primary Responsibility for Custodial Informant Activities**

Until 2016, when OCSD disbanded the unit, all custodial informant activities at the Orange County Jail were assigned to the Special Handling Unit. Deputies in the Special Handling Unit were responsible for managing “special handling inmates”—generally speaking, individuals who OCSD believed required closer supervision than other inmates, including people assigned to be housed in administrative segregation or protective custody, and gang members. Informants were a type of protective custody inmate. Special Handling also maintained and organized schedules for outdoor recreation and also for “dayroom,” a period during which inmates were allowed into a common space in the module where they could access showers, television, telephones, and interact with other inmates.

In addition to inmate management, Special Handling deputies gathered, maintained, and distributed jail intelligence. This included the cultivation and management of informants within the jail. The Special Handling Unit also lent its intelligence-gathering assistance—including custodial informants—to outside law enforcement agencies. While most large jail systems have internal investigation units, those units investigate serious jail incidents, the flow of contraband, the use of force by staff, and staff misconduct; it is unusual for such units to be tasked with building criminal cases for prosecution based upon conduct outside of the jail.

Special Handling deputies documented their informant cultivation and management in several places, including classification database entries, activity logs, and departmental memoranda. Notations within OCSD’s Automated Jail System reveal that Special Handling deputies frequently moved inmates around the jail to help informants elicit incriminating statements from other inmates; they were not bound by OCSD’s classification system in making their housing assignments.

Deputies used TRED records to document the classification, status, history, and movement of custodial informants and targeted defendants—the heart of the informant program. One OCSD sergeant testified in court proceedings about a typical deputy’s use of TRED records: “if he moved a CI [confidential informant] next to an inmate to gather information he would put that information in the TRED system.” One custodial informant’s TRED records contained an entry from a Special Handling deputy stating that the informant had been “producing good information” related to ongoing gang issues in the county and would be moved to “further accommodate his information gathering for Special Handling as well as [the Santa Ana Police Department].”

Deputies in the Special Handling Unit also documented their informant cultivation and handling activity in the Special Handling Log. Special Handling deputies used the Log to record information about the operation of the informant program. As one OCSD commander testified regarding the Special Handling Log: “You can see that quite a few deputy sheriffs at the Intake/Release Center spent a good deal of time cultivating and utilizing confidential informants.”

The Special Handling Unit also collected, summarized, and booked into evidence hundreds of pages of notes taken by multiple informants housed in OCSD custody, which they then passed to outside law enforcement agents. These notes were informants’ means of keeping deputies—their handlers—apprised of their activities, including the progress they were making to obtain information from targeted defendants. In their notes, informants also requested the tools they needed to facilitate their information gathering, such as writing supplies.

#### **E. As Part of the Informant Program, OCSD and OCDA Engaged in Investigative Strategies that Exacerbated the Risks of Sixth and Fourteenth Amendment Violations**

##### **1. OCSD repeatedly placed informants next to investigative targets.**

The defining feature of the custodial informant program was the deliberate placement of informants near targeted defendants for the purpose of eliciting incriminating statements. Special Handling deputies overrode inmates’ classifications, coordinated housing, and arranged recreation schedules to allow known informants access to inmates targeted for investigation. These activities are inconsistent with standard jail classification and housing practices.

For example, in the fall of 2009, the Special Handling Unit moved an experienced custodial informant next to a defendant who had been charged with a murder in which law enforcement had been unable to find the victim’s body. Noting the housing change, a Special Handling deputy wrote in the informant’s TRED that the informant was not to be rehoused “without notifying Special Handling.” Three days after this move, the informant began generating extensive notes about his conversations with the defendant. The notes, passed to Special Handling deputies, included inculpatory statements by the defendant, summaries of the defendant’s conversations with his attorney, and potential defenses he might raise at trial. The informant prefaced his notes with an “Executive Summary” and referred to himself throughout the notes as “your CI [confidential informant] Affiant.”

The Special Handling Unit also focused on inmates housed in solitary confinement. It was easier for the Special Handling Unit to manipulate housing when each inmate had their own cell. Also, people in solitary confinement spend so much time alone that they may be more vulnerable to stimulation from other inmates, including informants. *See Henry*, 447 U.S. at 274 (“[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.”).

After moving informants close to targeted defendants, the Special Handling Unit ensured that informants would have ample opportunities to elicit incriminating statements. For example, Special Handling deputies would coordinate the timing of informants’ and targeted defendants’ “dayroom” time. In restrictive housing modules, deputies typically limited access to the dayroom to one inmate at a time. During dayroom, inmates could shower, watch television, and make phone calls. They could also approach and speak to the other inmates who remained in their cells. Fernando Perez explained that while he was working as an informant in Module L-20, he would make his rounds during dayroom and “check on everybody” each day to see if anyone needed anything. He ultimately elicited a confession from Isaac Palacios during dayroom, explaining in a note to the Special Handling Unit that his “mission was done.” Perez also elicited incriminating statements from Scott Dekraai and Daniel Wozniak during dayroom. And Oscar Moriel secured a confession from Leonel Vega during a dayroom conversation in 2009.

The Special Handling Unit also made use of “disciplinary isolation,” a more severe form of solitary confinement, as a technique to bring informants and targeted defendants together. Deputies had the discretion to address a violation of OCSD rules with the loss of privileges such as dayroom, recreation, phones, and visits, or, in some cases, through placement into disciplinary isolation. As explained in Section V.B, below, Special Handling deputies intentionally placed informant Oscar Moriel next to Leonel Vega in disciplinary isolation in 2009 so that Moriel could ask Vega about the murder that Vega had been charged with. While this placement did not result in an incriminating statement from Vega at the time, it did provide Moriel with uninterrupted access to Vega and allowed him to build his credibility and trustworthiness with Vega. The relationship proved to be useful the following month when Special Handling deputies again brought Vega and Moriel together in the same module—L-20—to enable more communications between the two.

Similarly, the Special Handling Unit placed informants and defendants in cells connected by plumbing pipes or air vents to make it easier for informants to elicit information from defendants. Some inmates believed that they could speak freely through the pipes of the plumbing system by emptying out the water from the toilet in their cells. The Special Handling Unit recorded conversations between Leonel Vega and Oscar Moriel as Moriel introduced himself to Vega through the pipes in disciplinary isolation. And later that summer, before the Special Handling Unit moved Vega into Module L-20 where Moriel was waiting for him, Moriel reminded deputies that certain cells in L-20 were also “connected through the plumbing.” He recommended certain cells where he and Vega could “talk through the sink and the toilet.”

The strategies that the Special Handling Unit and their informants collectively pursued through the guise of following official jail procedures contributed to the pattern or practice of

Sixth Amendment violations that we found. *See Henry*, 447 U.S. at 274 (“By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel.”).

2. OCSD concentrated its custodial informant program within certain jail modules.

OCSD concentrated informant activity within certain modules in the Orange County Jail. The Special Handling Unit would move custodial informants and targeted defendants into these modules for the purposes of coordinating informant activities. Deputies in the jail knew that these modules were “snitch tanks” due to the likelihood that the Special Handling Unit would put informants there. One OCSD document we reviewed, titled “L-20 Thoughts/Requests,” reminded deputies to defer to Special Handling in Module L-20: “There are several current investigations being conducted, so PLEASE don’t get into anything (exchanging any information with inmates). PLEASE contact S/H [Special Handling].” The document also noted that “Inmates are handpicked to be in L-20 for both OCSD & other agencies,” and admonished that “Module Deputies are NOT the inmate’s handlers . . . Special Handling are the handlers.”

In one case, the Special Handling Unit placed a murder defendant in L-20, where an experienced custodial informant had been housed for six months. Within days of the defendant’s arrival, he allegedly confessed to the informant about his charged murder. After reaching out to a Special Handling deputy, the informant was interviewed by an OCDA prosecutor, OCDA investigator, and OCSD investigator about the defendant’s inculpatory statements. During the tape-recorded interview, the informant revealed that he had coerced an unlawful confession from the defendant by threatening gang retaliation if the defendant did not explain the reason for his involvement in the charged murder. Instead of admonishing the informant for unlawfully eliciting an incriminating statement, the prosecutor told the informant that he should contact the investigating police department if he heard anything else from the defendant. When the informant responded that the defendant was unlikely to open up like that again, the OCDA prosecutor responded, “Well, every day you can learn.” The informant later revealed during grand jury testimony<sup>20</sup> that, after his interview with the prosecutor, he did in fact elicit additional incriminating statements from the defendant.

3. OCSD and OCDA often deployed multiple informants against individual defendants.

Informants in the Orange County Jail often did not work alone. Sometimes the informants worked together as a team, and other times they worked in succession. In the jail environment, the use of multiple informants against a single target increased the likelihood that at least one

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<sup>20</sup> While Federal Grand Jury transcripts are sealed pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, California Penal Code section 938.1(b) permits defendants to obtain state grand jury transcripts within ten days of the grand jury proceedings. Additionally, the public can obtain state grand jury transcripts ten days after receipt by the charged defendant unless the transcripts are ordered sealed.

informant would obtain an incriminating statement. Once the defendant got to court, prosecutors could build their cases based on multiple informants or choose among them.

In jail records and informant notes, we saw evidence that multiple informants coordinated between themselves and with OCSD deputies to secure confessions. These records provide strong evidence of agency and elicitation under *Massiah*. OCDA had numerous cases with multiple informant witnesses. But prosecutors often failed to investigate each informant's history, the benefits they may have received, or whether the informant was involved in a violation of the Sixth Amendment.<sup>21</sup> These strategies and failures of diligence contributed to the pattern or practice of Sixth and Fourteenth Amendment violations by keeping the full scope of the informant program from coming to light.

At times informants even worked together as teams to elicit incriminating statements from defendants. As described more fully in Section V.A, the informants who elicited statements from defendant Paul Smith worked together so closely that when one of them was set to be released, the others made a succession plan for taking over his informant responsibilities without interrupting their efforts to get Smith to confess.

OCSD recorded plans to use multiple informants in official jail memoranda. After one informant reported that a defendant had confessed to murder, OCSD deputies completed an "operations plan" to place the defendant with two informants at OCSD's Theo Lacy Facility. The plan apparently involved multiple OCSD employees, including Theo Lacy Special Handling deputies, an OCSD investigator, and an OCSD sergeant. It described how the informants were to be placed in cells with microphones or otherwise given concealable recording devices to capture their conversations with the defendant. These formal "plans" to use informants to seek confessions, signed off on by high-ranking jail officials, are further evidence that knowledge of the informant program was widespread within the jail. They are also strong evidence of the agency and elicitation prongs of *Massiah*. See, e.g., *Sanders v. Cullen*, 873 F.3d 778, 812–13 (9th Cir. 2017) (noting the importance under *Massiah* of factors like the provision of recording

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<sup>21</sup> Simply declining to call an informant witness involved in a Sixth Amendment violation does not cure the violation. In *Kansas v. Ventris*, the Supreme Court clarified that "the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation." 556 U.S. 586, 592 (2009). In addition to a defendant's incriminating statements, a Sixth Amendment violation may also result in derivative evidence useful to the prosecution. In such circumstances, the fruit of the poisonous tree doctrine applies. See *United States v. Kimball*, 884 F.2d 1274, 1278–79 (9th Cir. 1989) (citing *Massiah v. United States*, 377 U.S. 201 (1964)). For evidence to be suppressed as the fruit of a Sixth Amendment violation, the "violation must at a minimum have been the 'but for' cause of the discovery of the evidence." *Kimball*, 884 F.2d at 1279. Thus, if the government obtains derivative evidence as a result of a defendant's uncounseled confession, simply declining to call the informant at trial is insufficient. But without notifying the defendant that the derivative evidence can be traced back to a Sixth Amendment violation, the defendant will be at a disadvantage to challenge the admission of the evidence at trial.

equipment to informants and the expectation that informants would report back to law enforcement).

OCDA personnel—both prosecutors and investigators—were aware that multiple custodial informants within the Orange County Jail were obtaining incriminating statements from represented defendants about the crimes with which they had been charged. In fact, OCDA prosecutors repeatedly relied on these informants to make their cases, at times presenting multiple informant witnesses in the same case. Yet when we interviewed OCDA prosecutors about the multiple-informant cases that they handled, they generally reported that they were unaware of the evidence we found that informants had elicited statements from charged defendants at the direction of law enforcement and that informants had received benefits in exchange for their assistance. Prosecutors are charged with the responsibility to uncover this kind of information and to provide it to the defense. OCDA's failure to do so in the cases we examined significantly contributed to the pattern or practice of Sixth and Fourteenth Amendment violations.

Evidence from the multiple-informant cases we reviewed suggests that prosecutors were in fact aware of at least some of the potential Sixth and Fourteenth Amendment issues presented, and they handled the cases in such a way as to avoid litigating the constitutional questions. For example, in a case in 2012, an OCDA prosecutor decided to drop three informant witnesses after the defense complained about the delay of discovery related to one of the informants. The prosecutor recognized that he would have to brief the potential issues under *Massiah* and *Brady*, and so explained to the court that he would simply not call the informant at all. At the same time, he also dropped two other informants without explanation.

Between 2007 and 2011, one senior prosecutor in the Office prosecuted six cases, which together involved a total of 12 custodial informants. In one of his cases, the prosecutor decided to limit the testimony of a custodial informant to prevent him from testifying about the defendant's in-custody statements, which meant that there was no evidence about any potential *Massiah* issues. And in October 2014, another prosecutor dropped all charges against a defendant in a felony solicitation of murder case after the court ordered her to produce records about four informants involved in the case. Just months earlier, she had represented to the court that there were no informants in the case, though she had been present when two of the informants testified against the defendant in a grand jury proceeding. The same prosecutor also claimed that she did not know about the informants' history, though at least two of the informants had entries in OCDA's informant index, and another prosecutor was then handling a case involving one of the other informants.

Using multiple informants in a single case was a crucial strategy that jail deputies and prosecutors pursued across many of the cases that we reviewed. They pursued this strategy without sufficient care for Sixth and Fourteenth Amendment protections.

#### 4. OCSD and OCDA used experienced informants who worked on multiple cases.

The informant program often relied on seasoned informants whom jail personnel and prosecutors used across multiple cases and operations. Under the Sixth Amendment, courts consider an informant's past informing history as evidence of state agency. *Henry*, 447 U.S. at

270; see also *United States v. York*, 933 F.2d 1343, 1376 (7th Cir. 1991) (“Whether the principal exercises its control strictly, by targeting specific individuals, or casually, by loosing an informant on the prison population at large, is irrelevant.”). Past informing history might also be relevant to elicitation, depending on the facts. In the *Dekraai* case, for example, the superior court judge presiding over the case, Judge Goethals, explained that the “course of conduct” between informant Fernando Perez and his law enforcement handlers established that Perez was working on their behalf when he elicited statements from Dekraai.

OCSD documented informants’ past history through a variety of records. OCSD’s TRED records, in particular, contain a wealth of information about informants’ past informing experience and benefits received. For example, the TRED records for one informant who testified in at least two cases show that by the time he testified in a case in 2012, he had been working for multiple law enforcement agencies since at least 2000, including OCSD and OCDA. The TRED records of another informant who cooperated on multiple OCDA cases also detail his extensive informant history and work inside the jail. Multiple entries in the inmate’s TRED records indicate that he was an informant for at least three separately named agencies and that his housing locations were dictated as needed by his cooperation.

That repeat informants were a cornerstone of the informant program came to light in the *Dekraai* case. Prosecutors provided minimal information about informant Fernando Perez to the defense, and refused the defense’s requests for additional information. But with what Dekraai’s attorney called “extraordinary luck,” he recognized the inmate’s name. The attorney was then handling a different murder case that also involved Fernando Perez. And in that case, too, Perez claimed that, like Dekraai, a defendant named Daniel Wozniak confessed to him while they were housed next to each other at the Orange County Jail. After drawing this connection, the attorney tried to figure out how big of an informant Perez was.

The attorney reviewed publicly available information about OCDA’s own case against Perez to confirm his suspicions. The attorney believed that he found “considerable evidence” that Perez had already received “substantial and unusual benefits on his two pending life cases,” and that he was cooperating with federal law enforcement. He asked OCDA to give him additional information about Perez’s past informant history, as well as any other benefits Perez had received. OCDA refused. The prosecutors claimed that because they had no plans to call Perez as a witness, any additional information about him was irrelevant. They argued that even if there was information that could establish agency or elicitation under *Massiah v. United States*—such as information about Perez’s credibility, previous work with law enforcement, or benefits received—they were under no obligation to provide it because they had no plans to call Perez as a witness. Judge Goethals disagreed, explaining that “either direct or circumstantial evidence may be useful” in proving either prong of *Massiah*, and that the defense was entitled to discovery in order to intelligently investigate the chain of events that led to Dekraai confessing to Fernando Perez at the Orange County Jail. He ordered the prosecutors to produce the information.

As voluminous discovery came in, it became incontrovertible that Perez had worked as an informant not only against Dekraai and Wozniak, but also against numerous other inmates at the Orange County Jail. Indeed, by the time Perez had elicited incriminating statements from Dekraai in October 2011, he had been working as an informant in the jail for over a year. And



jail records later revealed that the Special Handling Unit viewed Perez as an informant as early as November 1999.

The prosecutors handling the case against Dekraai later claimed that it did not occur to them to look into Perez's history as an informant. But they were aware of Perez's informant history. Perez had come to them "in the posture of a jailhouse snitch," as the lead *Dekraai* prosecutor testified, and OCSD informed them that he "had provided reliable information on prior occasions." But when they met with Perez in October 2011 to discuss his conversations with Dekraai, they were not "curious" about his history, or how it was that the two inmates had come together in a jail cell within a few days of Dekraai's crime.

Oscar Moriel was perhaps the most prolific informant that we encountered in our investigation. At least five separate prosecutors, including the senior prosecutor who oversaw the gang unit, were aware in 2009 that Moriel was working as an informant in the jail, and OCDA created an entry for Moriel in the OCII—OCDA's internal informant tracking system—in August 2009. But when Moriel's work as an informant was exposed in the *Dekraai* litigation in 2014, OCDA prosecutors admitted that the Office had failed to properly disclose evidence about Moriel in all of the cases in which he participated.<sup>22</sup>

Whether informants worked consistently on cases for OCSD while being held pretrial at the Orange County Jail, or whether they freelanced for outside agencies while out of custody, the extensive evidence that we reviewed shows that the continued success of the informant program depended on the use of repeat informants. The records we reviewed showing the informants' histories contained critical evidence of agency and elicitation under *Massiah v. United States*.

5. OCSD and OCDA provided benefits to informants in exchange for their assistance.

OCSD and OCDA made the informant program attractive to informants by rewarding them with benefits for their work. The practice of rewarding informants with benefits—often referred to as "consideration" by courts—further illuminates the close relationship that existed between informants and law enforcement in Orange County. The practice also had consequences under the Sixth and Fourteenth Amendments. Courts look to the benefits that an informant receives to determine whether the informant was acting as an agent of the government under *Massiah*. An agreement to provide an informant financial compensation or leniency in exchange for testimony can establish agency. *Henry*, 447 U.S. at 270–71; *Randolph v. People of the State of Cal.*, 380 F.3d 1133, 1144 (9th Cir. 2004) ("We recognize that agreed-upon compensation is often relevant evidence in determining whether an informant is acting as an agent of the State."); *see also United States v. Brink*, 39 F.3d 419, 423 n.5 (3d Cir. 1994) (An "informant who is

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<sup>22</sup> OCDA continued to experience such informant-related setbacks throughout 2014. In April of that year, the court suppressed the informant's statements in *People v. Brown* due to late discovery concerning their informant's history. And in October 2014, a prosecutor dropped all charges against Joseph Govey in a felony solicitation of murder case after the court ordered the prosecutor to produce records about informants in the case.

offered money, benefits, preferential treatment, or some future consideration, including, but not limited to, a reduction in sentence, in exchange for eliciting information is a paid informant.”).

Rewarding an informant with benefits also has Fourteenth Amendment implications. For one thing, evidence that an informant was an agent of law enforcement may be relevant to proving a Sixth Amendment violation under *Massiah* and should be disclosed, as a *Massiah* violation may lead to exclusion of the defendant’s incriminating statements. *See United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th. Cir. 2000) (“The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would be different.”); *see also Henry*, 447 U.S. at 274 (presumptive remedy for a *Massiah* violation is the suppression of evidence). The Fourteenth Amendment also requires the government to disclose information relevant to the credibility of a witness for the government. *Giglio*, 405 U.S. at 155. In cases that rely on the testimony of a custodial informant, the informant’s credibility is a core issue. An informant who expects to receive leniency or a more comfortable term of incarceration has an incentive to lie in order to preserve that arrangement. Oscar Moriel demonstrated this attitude in his early conversations with Santa Ana police detectives. He told detectives that the more “options” they could give him, the better position he would be in to “think more clearly.” With more “options,” Moriel suggested that his “memory” could “fall back into place.” Under the rule in *Giglio*, this is exactly the kind of information that goes to an informant’s credibility or relationship with the government and must be disclosed to the defense. In the cases we reviewed, it was not.

OCSO and OCDA repeatedly rewarded informants with benefits for their work. In the jail setting, OCSO provided informants with preferential treatment while they were in custody. Benefits that improve a defendant’s conditions of confinement are “consideration” under California law. *See Cal. Penal Code § 1127a* (“consideration” includes, among other things, “amelioration of current or future conditions of incarceration”). The benefits that OCSO conferred, described below, eased the informants’ stay and furthered their expectation for future benefits.

Telephone Privileges: The Special Handling Unit granted informants special telephone privileges in exchange for their work. To communicate with people outside the jail, the majority of inmates rely on making collect phone calls. Such calls are expensive and are typically recorded and monitored by jail personnel. We reviewed evidence that Special Handling deputies authorized a number of informants to make non-collect phone calls.

Special Food: Special Handling deputies provided custodial informants with special food and meal privileges. Oscar Moriel, for example, requested Mexican food and Kosher meals from deputies. A Special Handling deputy wrote in the Special Handling Log that he would follow up with the kitchen staff about fulfilling Moriel’s dietary request. Another entry details a meeting between an OCSO investigator and one of his informants. The investigator talked to the informant “and brought him some In and Out.”

Custody Arrangements: OCSO also helped informants secure special custody arrangements. One custodial informant got to remain in Orange County Jail until his parole date, an arrangement that benefited both the informant and the Special Handling Unit. “Sheesh . . . I

wanted to thank you . . . for doing the footwork & keeping me here in county until my parole date,” the informant wrote. “I know it benefits you as well, but it really makes things a lot easier on me & truly appreciate your efforts—another reason why you got 9 pages tonight . . . .”

Formal Leniency: OCDA provided benefits to informants by seeking more lenient sentences or making special sentencing requests in informant cases. Prosecutors reduced charges, argued for lighter sentences, or otherwise assisted informants in resolving their cases favorably.

By providing benefits to informants—both to ease their stay in custody, and to assist them in their cases—OCSD and OCDA made the informant program an attractive option to informants in the jail.

## **V. OCSD AND OCDA ENGAGED IN A PATTERN OR PRACTICE OF CONDUCT THAT DEPRIVED CRIMINAL DEFENDANTS OF THEIR SIXTH AMENDMENT RIGHTS**

The custodial informant program in Orange County operated for years before coming to light in 2014. We believe that OCDA and OCSD stopped using custodial informants at trial sometime in 2014 following the allegations of informant-related misconduct in *People v. Dekraai*. However, while the informant activity at issue in the cases we reviewed took place before 2014, some of these cases remain in active litigation by OCDA, and OCDA continues to make disclosures in pre-2014 cases involving custodial informants. Also, OCDA did not provide us with access to open cases; indeed, the most recent prosecution in the case files that OCDA provided to us began in 2017.

In this section, we describe specific violations of the Sixth and Fourteenth Amendment rights of criminal defendants in Orange County that we uncovered in our review of specific cases. We use the four cases as exemplars of the broader pattern or practice we identified.

### **A. *People v. Paul Smith***

In 1988, someone came into Robert Haugen’s apartment in Sunset Beach, California, and stabbed him to death. The police had no leads, and the case went cold. In 2007, police reopened the case and ran a DNA analysis on blood found in the victim’s kitchen and bathroom. Then, later that year, Paul Smith was arrested in Las Vegas, Nevada on domestic violence charges. Police collected Smith’s DNA after his conviction on the domestic violence offenses and ran it through the national DNA database, where it matched the DNA profile of the blood found in Robert Haugen’s kitchen and bathroom. In 2009, OCSD investigators traveled to Las Vegas to talk to Paul Smith, and he admitted that he had been in Robert Haugen’s apartment—but he did not admit to the murder. Smith claimed that he went to Robert Haugen’s apartment the day before the murder to buy marijuana and cut himself while playing with a knife.

On March 6, 2009, based on the DNA evidence and Smith’s admission to being in Haugen’s apartment, OCDA filed a complaint charging Smith with Haugen’s murder. With the filing of the complaint, Smith’s right to counsel attached, *People v. Viray*, 134 Cal. App. 4th 1186, 1198–99 (6th App. Dist. Dec. 14, 2005), and the Sixth Amendment prohibited law

enforcement from attempting to elicit any further statements from Smith about Haugen's murder without his counsel present. *Massiah v. United States*, 377 U.S. 201, 206 (1964).

On June 15, 2009, OCSO transported Smith from Las Vegas to Orange County. Unbeknownst to Smith, a trio of informants awaited his arrival. The Special Handling Unit instructed jail personnel to place Smith in Module L-20, where the informants prepared for his arrival, and deputies included a note in Smith's TRED records not to move Smith out of L-20 without first notifying the Special Handling Unit. The three informants that OCSO placed in L-20 with Smith—A.A., B.B., and C.C.—all had significant histories of serving as custodial informants for law enforcement agencies.

In addition to housing Smith in the same part of the jail as three informants, OCSO also ensured that the informants would have ample opportunity to talk to Smith about Haugen's murder. Nine days after Paul Smith's arrival in Module L-20, OCSO arranged for Smith and the three informants to have "dayroom" time together. A deputy noted that he made the dayroom arrangements "at the request of [C.C.] and [B.B.]" because "[t]hey feel if they get this time w/ SMITH they can get details on his crime."

In late June 2009, one of the informants, B.B., was set to be released. The three informants and OCSO deputies coordinated to ensure that the effort to obtain statements from Smith would continue after B.B.'s release. An entry in the Special Handling Log reads that "[C.C.] . . . will be spearheading the case on Smith." Another entry reads, "[B.B.] advises any operations currently in the works have been properly maneuvered for [C.C.] and [A.A.] to take over should he leave." So not only did OCSO coordinate with the informants on eliciting statements from Paul Smith, OCSO also assisted the informants in developing a succession plan when one of the informants was set to be released.

B.B. was in fact released, and A.A. did in fact continue eliciting statements from Paul Smith after B.B.'s release. A.A. kept detailed notes on conversations with Smith, and between July and December 2009, A.A. made at least 15 entries into notes on those conversations. In the first entry, dated July 9, 2009, A.A. wrote that Paul Smith confessed to the murder of Robert Haugen: "[Smith] said 21 years ago he committed a murder. . . . Robert Haugen was stabbed 18 times in an apartment and killed. He tried to [get] rid of body by setting fire to it . . . ."

A.A. ended up testifying against Paul Smith at Smith's trial for Robert Haugen's murder, telling the jury about how Smith had confessed to A.A. at the Orange County Jail. This testimony was likely important to the jury in weighing Smith's defense for the other most important piece of evidence against him: his DNA at the crime scene, which Smith said came from cutting himself with a knife while he was at Haugen's apartment to buy marijuana. A.A.'s testimony about Paul Smith's unambiguous and graphic confession gave the jury a solid basis for rejecting Paul Smith's defense.

Had Paul Smith's attorney known that his client's Sixth Amendment rights had been violated—because A.A. worked at the direction of law enforcement and elicited the statement from Smith without Smith's counsel present—the jury would likely not have heard the confession at all. But they did hear it, and on November 2, 2010, the jury convicted Paul Smith of murder. The court later sentenced him to life without parole.

Paul Smith's lawyer was also not aware of the two other informants who spoke to his client in the Orange County Jail, B.B. and C.C. Neither B.B. nor C.C. testified at Smith's trial, but their efforts to get Paul Smith to confess at the jail are nevertheless significant. That OCSD placed three informants around Paul Smith immediately upon his arrival at the Orange County Jail; that OCSD coordinated the informants' dayroom time; and that OCSD deputies actively collaborated with the informants on how they could get Paul Smith to confess are all important evidence of a *Massiah* violation. These facts tend to show that OCSD and the informants worked together to obtain a confession from Smith, thus establishing the agency prong of *Massiah*. These facts also suggest that the informants were not waiting passively for Smith to confess but actively engaged him in conversation, thus establishing *Massiah*'s elicitation prong.

In June 2016, six years after Paul Smith was convicted, OCDA informed his counsel by letter of some of the informant activity that led to Smith's confession. Paul Smith previously challenged his conviction in habeas proceedings based on this information, arguing that his conviction is tainted by unlawful informant activities. Our team interviewed the prosecutor who handled Paul Smith's case, and we confronted him with an OCSD report that unambiguously states that B.B. acted as an informant, that B.B. secured an inculpatory statement from Smith, and that OCSD investigators planned to advise OCDA of B.B.'s cooperation. When we questioned the prosecutor about this report, he stated that he had never seen it. But he immediately recognized its significance for Paul Smith's Sixth Amendment rights and stated that he would disclose the report to Smith's counsel after the interview. He did so. On July 16, 2019, 21 days after our team's interview, Paul Smith's lawyer filed for a postponement in Smith's habeas proceedings, citing the newly disclosed B.B. report and the need to brief the court on this new evidence of a Sixth Amendment violation. In November 2020, the court, after reviewing all habeas pleadings and exhibits, ordered an evidentiary hearing after finding disputed factual and legal issues relating to Smith's *Brady* and *Massiah* claims.

Four years after the filing of the habeas petition, two years after Department of Justice investigators provided the Smith prosecutor with the nondisclosed OCSD informant report, and on the day of the scheduled evidentiary hearing, OCDA withdrew its opposition to Smith's habeas petition. OCDA told the court that it withdrew its opposition in part because Smith's prosecutor had failed to disclose the B.B. informant report and that the OCSD investigators, if called to testify in the habeas proceeding, would invoke their Fifth Amendment right against self-incrimination. On August 9, 2021, the court granted Smith's habeas petition, vacated the conviction, and scheduled the case for trial.

### ***B. People v. Leonel Vega***

Three boys were waiting at a bus stop near Memorial Park in Santa Ana in 2004 when a white sedan drove up to them. The men inside the car flashed gang signs and asked the boys, "Where you from?" and "Who do you claim?" One of the boys, Giovanni Onofre, approached the car and said, "Alley Boys." One of the men got out and pointed a gun at him. The boys ran in different directions. Giovanni Onofre was later found shot in the head.

D.D. would later say that the day after Onofre's murder, D.D. was at a house near Memorial Park with other members of Delhi, the rival gang to Alley Boys in Orange County. A

Delhi member named Leonel Vega was there too, passing around a newspaper article about the killing and bragging that he had “gotten one.”

Early on, there were no leads in the case. There were inconsistencies in the eyewitness identifications, and investigators did not initially suspect Vega as one of the men in the car. Vega became a suspect only after D.D. came forward to OCSD deputies at the Orange County Jail in 2005. D.D. was then awaiting trial on a third-strike offense and sought a deal. D.D. told law enforcement about what Vega had said at the party the day after the murder.

OCDA charged Vega with Onofre’s murder on August 16, 2007; Vega was taken to the Orange County Jail to await trial. But by 2006, D.D. had been convicted and sentenced to 33 years to life. Without a deal on the table, D.D. was unwilling to cooperate and refused to testify at Vega’s preliminary hearing.

Then, in early 2009, Oscar Moriel made himself known to Orange County deputies. A third-strike candidate and a member of Delhi, Moriel had been in custody at the Orange County Jail since 2005 on a charge of attempted murder. With his trial slated to begin in April 2009, Moriel offered deputies his help in solving several gang-related homicides. He told Special Handling deputies that he was willing to testify in exchange for leniency in his attempted murder case.

In the summer of 2009, OCSD and the Santa Ana Police Department tried to get Leonel Vega to confess to Oscar Moriel about Giovanni Onofre’s murder. Jail records show that OCSD and the Santa Ana police mounted three separate operations aimed at helping Moriel develop a relationship with Vega and make as many attempts as he needed to get a confession. These operations are strong evidence that Moriel acted as an agent of law enforcement to elicit a confession from Vega in violation of Vega’s Sixth Amendment rights.

1. First Moriel operation: Vega and Moriel together in disciplinary isolation

In June 2009, Special Handling deputies moved Vega and Moriel into disciplinary isolation, where the deputies had placed hidden recording devices to capture their conversations. OCSD described the plan in a June 24, 2009, memorandum approved by the Assistant Sheriff who oversaw the day-to-day operations of all jails in the county. As described in the memorandum, the purpose of the operation was to put Moriel in a place where he could get information from Vega about the Onofre murder:

ORANGE COUNTY SHERIFF'S DEPARTMENT  
Santa Ana, California



**TO:** Assistant Sheriff M. James  
**FROM:** Inv. Roger Guevara  
**DATE:** Thursday, June 25, 2009  
**RE:** Request to Record Inmates in Intake Release Center Housing

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Assistant Sheriff Mike James

I request permission to wire adjoining cells at the OCSD Intake Release Center (IRC) to audio record two inmates. We would like to record any conversations between Vega, Leonel [REDACTED] and Moriel, Oscar Daniel [REDACTED]. Vega and Moriel are documented Delhi Criminal Street Gang members. Santa Ana P.D. Det. Chuck Flynn has requested help in getting Moriel, a CI for SAPD, and Vega together and record any conversation they may have.

IRC Special Handling Deputies have come up with a plan to house both Vega and Moriel in adjoining cells in IRC Dis Iso.

Vega is in custody for CPC 187 Murder and Det. Flynn believes they may gain valuable evidence reference the murder from recorded conversations between the two.

TRED records and the Special Handling Log corroborate that the Special Handling Unit coordinated the movements of Leonel Vega and Oscar Moriel. In an entry in Vega's TRED on June 30, 2009, a Special Handling deputy wrote that Vega was to be housed in disciplinary isolation until further notice. The deputy added, "DO NOT MOVE FOR ANY REASON BEFORE CONTACTING S/H [Special Handling]." That same day, the same deputy wrote in Moriel's TRED that Moriel, too, was being moved to disciplinary isolation. The deputy added, "CONTACT S/H [Special Handling] BEFORE MOVING ANYWHERE." The deputy also made an entry that day in the Special Handling Log. He wrote that he "[m]oved bodies around in Dis Iso [Disciplinary Isolation] to accommodate wiring cells for DPI [Dignitary Protection/Intelligence] in the Vega caper," and that he "[m]ade computer moves and entries to move Moriel into Housing DI [Disciplinary Isolation]." He also noted that he personally escorted Moriel to his new housing in disciplinary isolation.

The very next day, Moriel wrote the first of what would become hundreds of pages of notes that he passed to the Special Handling Unit over the next two years. In that first note, dated July 1, 2009, Moriel recounted his first conversation with Vega that day. The topic was Vega's charged crime, the murder of Giovanni Onofre.

In addition to Moriel's notes, taped conversations of the two men in disciplinary isolation show Moriel's efforts to elicit statements from Vega. Though Moriel was not able to coax an incriminating statement from Vega at the time, he tried. The taped conversations from disciplinary isolation reveal Moriel's attempts to build camaraderie with Vega. Twenty minutes after Vega arrived in disciplinary isolation, Moriel had him talking, and instructed him on how to

better communicate through the plumbing that connected their cells. Moriel also assured Vega that he was not an informant—“I doubt they would . . . try to use me”—and then went on to ask Vega what was going on in his case.

2. Second Moriel operation: attempts to bolster Moriel’s gang status

Moriel believed that he would be more effective as an informant if he could re-establish his bona fides as a Delhi gang member. He had begun to build a relationship with Vega in disciplinary isolation, but Vega heard rumors that Moriel was cooperating with law enforcement. Vega asked Moriel directly if he was an informant, and questioned Moriel about his “protective custody” jail classification, because OCSD used that classification for, among other things, informants.

Special Handling deputies, working with a task force comprised of local and federal law enforcement agencies, mounted a second operation in early July 2009 to improve Moriel’s standing with the gang.<sup>23</sup> Moriel worked with Special Handling and other task force members to set up the plan. An undercover detective posed as Moriel’s uncle and handed over \$1,500 of federal task force funds to Vega’s girlfriend, with the message that she was to give the money to Delhi gang leaders as a show of Moriel’s respect and loyalty. The undercover detective also supplied Vega’s girlfriend with fake OCSD reports that supported Moriel’s claim to Vega that authorities considered him to be a dangerous gang member. Moriel later wrote that the operation was successful in restoring his reputation and standing within the gang, and in quashing rumors that he was working for law enforcement. In addition, Vega spoke more openly with Moriel about Giovanni Onofre’s murder after this operation.

3. Third Moriel operation: Moriel and Vega in Module L-20

The third Moriel operation, like the first, involved coordinating Vega’s and Moriel’s housing assignments in the jail so that Moriel could again attempt to obtain incriminating statements from Vega. First, OCSD reclassified Moriel from “protective custody” to a “Level-3 total separation” inmate, and Moriel’s TRED confirms that the Special Handling Unit reclassified Moriel “to better assist them with their investigation.”

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                DATE      TIME      TYPE      OFFICER
INFORMATION:   071409   1614      GNCO      GARCIABJ
^ WAS RE-HSD AND CLASSIFIED AS A LVL-3 TOT/SEP AT THE REQUEST OF SAPD INV'S FLYNN AND
GALLARDO. ^ IS THEIR CI AND IS BEING RECLASSIFIED TO BETTER ASSIST THEM WITH THEIR
INVESTIGATION.
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Based on this new classification, Special Handling moved Moriel to Module L-20—a location that, as noted earlier in Section IV.E, the Special Handling Unit used frequently to stage jailhouse informant activity.

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<sup>23</sup> At the time, the Santa Ana Gang Task Force was a task force comprised of SAPD detectives, an FBI agent, and a deputy assigned to the Special Handling Unit.



Next, the Special Handling Unit moved Vega to Module L-20, too. Just before the move, Moriel explained that deputies should “keep in mind” that certain cells in L-20 were connected through their plumbing, a feature that would allow the inmates housed there to surreptitiously communicate through the pipes: “Him and I can talk through the sink and toilet and his speech will not be guarded because he’ll feel as if he’s on a safe line,” Moriel wrote.

Special Handling deputies followed Moriel’s advice. They moved Vega into one of the cells that Moriel suggested. Moriel later reported back that the “toilet communication works fine,” And that Vega was “very comfortable” and had “no suspicions whatsoever.”

That same day, August 1, 2009, Moriel wrote a four-page note that described Vega’s confession to the murder of Giovanni Onofre. Moriel said that Vega came to his cell to talk to him about his case during “dayroom” on August 1, 2009.<sup>24</sup> Though D.D., who originally implicated Vega in the murder, had refused to testify at the preliminary hearing, Vega was worried that D.D. might testify in the future. Then Moriel asked Vega what happened that day in Memorial Park, and Vega allegedly explained that he posed as a member of Alley Boys to lure a young man into his car, and then shot him.

OCDA charged Vega with the murder of Giovanni Onofre on August 16, 2007, and it was then that his Sixth Amendment right to counsel attached. At that point, law enforcement or their agents could no longer lawfully question Vega about the case without his lawyer being present.

Moriel was acting as an agent of law enforcement for the purposes of the *Massiah* rule when he elicited statements from Vega about Onofre’s murder without Vega’s counsel present. When Vega confessed to Moriel on August 1, 2009, Moriel had been working closely with law enforcement as an informant on the Vega case for months. Special Handling deputies intentionally placed Vega and Moriel together—first in disciplinary isolation, and later in Module L-20—to gain information about the Onofre murder. Law enforcement had assured Moriel that he would receive leniency in his own cases in exchange for his work. Moriel was facing a third strike and was clear that he needed “options.” Detectives were clear that the amount of help Moriel would get from law enforcement depended on the amount of help he provided: Five months into Moriel’s cooperation, one detective assured him that he would be rewarded for providing useful information—“You’re doing stuff for me, and then I’ll be doing stuff for you . . . you’ll get maximum consideration for everything you do. You do a lot, and we do a lot. You do little, and you get a little. . . . Understand?” As Judge Goethals later wrote in *Dekraai*, it was clear that “Oscar Moriel sought and expected consideration for [his] in custody informant work” and was “directly or impliedly promised by law enforcement that such consideration would be forthcoming.”

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<sup>24</sup> As described in Section IV.D, “dayroom” was an opportunity for inmates kept in solitary confinement to leave their cells for an hour a day. They could shower, make phone calls, or, as here, approach other inmates to communicate.

The elicitation prong of *Massiah* is also clear. As Moriel wrote in his note to the Special Handling Unit, he directly asked Vega “what exactly happened” that day in Memorial Park in 2004 when Giovanni Onofre was murdered. Moriel’s entire course of conduct is further evidence of elicitation. Moriel had been trying to get Vega to talk about the Onofre murder since the Special Handling Unit first placed them together in disciplinary isolation. When the Special Handling Unit moved the two of them into Module L-20 the next month, Moriel continued to probe Vega about his case. Moreover, Moriel knew that he would only get leniency if he could deliver good information to law enforcement. *See, e.g., Henry*, 447 U.S. at 270–71 (holding that informant being paid on a contingent-fee basis is relevant to determining elicitation within the meaning of *Massiah*). Moriel worked with law enforcement over three distinct operations to get what he knew would help his case: another inmate’s confession to murder.

### ***C. People v. Joseph Govey***

Based on a tip from longtime informant E.E., Huntington Beach Police arrested Shirley Williams and Joseph Govey after a vehicle pursuit in 2011. Police dispatched undercover detectives, marked patrol units, and a helicopter to look for Govey, who was wanted as a “parolee at large” after failing to report to his parole and probation officers. Police recovered a gun and counterfeit bills at the scene of their arrest. Two days later, OCDA charged the couple with multiple counts, including felony evading, possession of firearm by a felon, possession of ammunition, and possession of fictitious instruments. Prosecutors added gang enhancements against both defendants, alleging that the underlying charges related to Govey’s “active participation” in the white supremacist gang known as Public Enemy Number 1, or PEN1, and that the couple committed the crimes for the benefit of the gang.

When OCDA charged Govey and Williams in 2011, their right to counsel attached for those charges. *See Massiah*, 377 U.S. at 206; *People v. Viray*, 134 Cal. App. 4th 1186, 1198–99 (6th App. Dist. Dec. 14, 2005). It was then illegal for law enforcement to elicit statements from either defendant about the charged crimes without their lawyers present. That included asking questions about Govey’s membership in PEN1, because Govey’s charges included gang enhancements alleging that he committed his crimes as an “active participant” of the gang.

When Govey was booked into the Orange County Jail on August 19, 2011, OCSD moved him into a module with multiple informants. Three informants would later claim that shortly after his arrival, Govey enlisted two of them to send word to members of PEN1 that E.E. should be killed. One informant, F.F., said that Govey asked F.F. to “take care” of E.E. F.F. believed that other members of PEN1 viewed F.F. as a “snitch” and said that Govey offered to help make things right with the gang if F.F. helped Govey with E.E. A second informant, A.A., said that A.A. called a member of PEN1 on Govey’s behalf to relay that Govey wanted E.E. killed. A third informant, G.G., claimed to overhear Govey’s conversations with F.F. and A.A., and reported the conversations to OCSD deputies.

At the time the informants encountered Govey in August 2011, G.G. and A.A. had long been working as informants inside the jail. In fact, A.A. worked with Special Handling deputies one year earlier to obtain key incriminating statements from defendant Paul Smith while they

were housed together in a different module at the jail.<sup>25</sup> And before G.G. reported to deputies about overhearing Govey's conversations, G.G. had already been taking notes about Govey "to help deputies out." In January 2012, based on the accounts of the three informants, OCDA filed additional charges against Govey for soliciting the murder of E.E., along with more gang enhancements.

After the filing of these charges, Govey's right to counsel expanded to encompass the solicitation of murder charges. The *Massiah* rule prohibited law enforcement from eliciting more statements from him about the solicitation—through detectives or informants—without his counsel present. OCSD nevertheless used a fifth informant, H.H., to extract additional information from Govey about the solicitation of murder charge, as well as Govey's ties to PEN1. Investigator Bill Beeman made sure that H.H. had access to Govey while Govey was housed in disciplinary isolation in 2012.

In late 2011, a Special Handling deputy interviewed H.H., and designated H.H. as a Special Handling "management case." H.H. was "not to be moved without talking to S/H [Special Handling]," the deputy wrote in the TRED. Two months later, the deputy updated the TRED that H.H. was "A S/H [Special Handling] PROJECT AND WILL BE CLASSIFIED AS TOTAL SEPERATION." And two months after that, the deputy "flexed" H.H.'s classification and re-housed H.H. again, "DUE TO BEING A S/H MANAGEMENT CASE." This same deputy introduced H.H. to Investigator Beeman, who was working on the Govey case. According to a memo that Beeman prepared describing H.H.'s cooperation, H.H. "had access to Govey" and agreed to "be a sponge," and provide information to Beeman about Govey. H.H. had lengthy talks with Govey over several weeks, and they "developed a level of trust." According to the Special Handling Log, deputies in the Unit recorded at least some of these conversations. At Beeman's direction, H.H. made several calls on Govey's behalf to pass on information to other members of PEN1. These conversations also touched on Govey's solicitation of murder charge, which Beeman was then investigating— H.H. told Beeman the identities of individuals Govey allegedly attempted to contact in order to get E.E. killed.

Govey's Sixth Amendment right to counsel had attached for the solicitation of murder charges as well as the gang enhancement. H.H. talked to Govey about both. In doing so, H.H. was acting as an agent of law enforcement for the purposes of *Massiah*. The Special Handling Unit introduced H.H. to Beeman so that H.H. could assist with the Govey investigation. H.H. began speaking with Govey because Beeman told H.H. to do so—making H.H. a government agent for the duration of the time H.H. spoke with Govey while Govey was in disciplinary isolation. OCSD also ensured that H.H. had access to Govey. When Govey was moved to disciplinary isolation in 2012, a Special Handling deputy noted in his TRED that "Per Spec Ops," Govey would remain there for the rest of his time in custody. OCSD's "Special Operations/Intelligence Detail" was where Investigator Bill Beeman was then assigned. That same day, the same deputy wrote in the Special Handling Log that inmates were moved in

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<sup>25</sup> The facts of *People v. Smith* are described above in Section V.A.

disciplinary isolation “in order to accommodate in-coming CI’s [confidential informants] as well as to make room” for Govey.

The elicitation prong of *Massiah* is also clear. Beeman may have told H.H. to merely “be a sponge,” but Beeman’s own memo describing the activities demonstrates that H.H. was much more than that. At Beeman’s direction, H.H. made phone calls to associates in PEN1 and assisted law enforcement by identifying individuals on the street whom Govey hoped to involve in his plot to have E.E. murdered. H.H.’s actions demonstrate that H.H. was not merely listening as Govey spoke unprompted, but rather H.H. was actively engaged in ongoing discussions with Govey for weeks about PEN1 business and the solicitation of murder charge.

Beeman summarized H.H.’s work in a memo to the prosecutor handling H.H.’s case. Based on Beeman’s memo, H.H. received leniency in exchange for their assistance. H.H. pleaded guilty to voluntary manslaughter but received a “midterm instead of the upper term” that was imposed on their co-defendant because “they had provided useful information to Investigator Bill Beeman.”

When we interviewed the OCDA prosecutor who handled H.H.’s case, he agreed that H.H. assisted Bill Beeman in investigating Govey’s solicitation of murder charges. When we asked the prosecutor about the memo describing H.H.’s work, he agreed that it raised “red flags” about a potential *Massiah* violation. He told us that he shared that information with the OCDA prosecutor handling Govey’s case, and thus the prosecutor responsible for informing Govey’s defense lawyer about the Sixth Amendment breach. H.H.’s prosecutor’s notes from February 2014 indicate that he “left a message” with the prosecutor handling the Govey case. He also told us that he notified the Govey prosecutor in person about H.H.’s role in the Govey case. He told us that he believed that he gave the Govey prosecutor Beeman’s memo describing H.H.’s cooperation, but “can’t really remember.” H.H.’s prosecutor also admitted that Beeman’s memo should have been turned over to Govey’s attorney.

We also asked the Govey prosecutor about H.H.. She told us that she had never heard of H.H.; she said she only knew about the three informants who spoke to Govey before OCDA charged him with solicitation of murder, and the fourth informant who tipped off police on Govey’s whereabouts in August 2011. We found no references to H.H. in the Govey case file. We also found no references to H.H. in communications we reviewed between the Govey prosecutor and Beeman from the spring and summer of 2014—following the time when H.H.’s prosecutor claims that he informed the Govey prosecutor about H.H., and following the time he approved leniency for H.H. based on Beeman’s memo. At the time, the Govey prosecutor was actively litigating informant discovery issues in that case, and she sought assistance from Beeman and the Special Handling Unit to gather required information for the defense. When we asked the Govey prosecutor about the leniency that OCDA provided to H.H., she told us that it was relevant to Govey’s case, should have been disclosed to the defense, and was not: “[H.H.] was trying to get information out of Govey, who I guess had developed some kind of trust with [H.H.]. So [H.H.] was either cooperating on [their] own or being asked to cooperate.” She also told us that Beeman’s memo suggested that H.H. was asking Govey about the solicitation of murder charges regarding E.E., which raised *Massiah* issues. The leniency that OCDA granted to

H.H. for their work as an informant against Joseph Govey could have been used, in combination with Beeman's memo, to prove a Sixth Amendment violation.

The Govey prosecutor also told us that she never received any message from H.H.'s prosecutor nor spoke to him about H.H.—directly contradicting H.H.'s prosecutor's account. The Govey prosecutor also told us that during the litigation of informant discovery in the Govey case, she sought advice from high-ranking prosecutors at OCDA, including H.H.'s prosecutor and his supervisor, the head of OCDA's homicide unit, who had signed off on leniency for H.H. in February of that year. The Govey prosecutor said that she believed that if other members of OCDA had knowledge about another informant in the Govey case, they should have shared that information with her. Finally, she told us that, had she known about H.H., she would have provided information in discovery to the defense about H.H.'s work.

#### **D. *People v. Edgar Bengoa***

On May 7, 2010, Robert and Laura Alvarado were parking their car at their home in Anaheim when two young men walked up to them and demanded their money. During the robbery, one of the individuals shot Mr. Alvarado in the arm; the injuries were not life-threatening. Three days later, a police officer attempted to interview 16-year-old Edgar Bengoa and Salome Orellana-Pineda because they matched the descriptions of the Alvarado suspects. As the officer approached, both Bengoa and Orellana-Pineda fled. As Orellana-Pineda ran away, he threw a firearm on the ground and was apprehended. A search of Orellana-Pineda at that time resulted in the recovery of the Alvarados' camera and cell phone. Later that evening, police arrested Edgar Bengoa at his residence.

After his arrest, Bengoa told law enforcement that he was present during the crime, but that he ran away to a nearby car before the robbery took place and did not participate in the robbery or the shooting. That version of events is consistent with the Alvarados' attempts to identify their assailants from photographic line-ups that included pictures of Bengoa and Orellana-Pineda. Laura Alvarado was unable to identify either of them, and it appears that Robert Alvarado affirmatively picked someone other than Bengoa as the shooter. OCDA nevertheless believed that Bengoa was potentially the shooter and charged him with robbery, assault with a firearm, and for engaging in the crime to benefit a criminal street gang.

With the filing of these charges, Bengoa's right to counsel attached, and *Massiah* prohibited law enforcement from attempting to elicit any statements about the charged crimes from Bengoa without his lawyer present. Lacking a solid identification of Bengoa from the victims, though, OCSD decided to use informants to elicit statements from Bengoa in the hopes of shoring up the evidence against him.

At Bengoa's trial, OCDA called I.I. as a witness against Bengoa. I.I. testified that—approximately a month after Bengoa's arrival in his module at Theo Lacy—Bengoa admitted to I.I. that he robbed and shot the victim. I.I. inferred that Bengoa was aiming for the victim's chest or head but missed and struck the victim's arm. OCDA argued to the jury that Bengoa was the shooter, based on I.I.'s testimony at trial.

OCDA sought to portray Bengoa's confession to I.I. as spontaneous and unprompted. The OCDA prosecutor said to I.I., "so it's not like someone from the Orange County D.A.'s Office sent you in and said ask questions of Mr. Bengoa about this robbery." I.I. answered no. On December 24, 2012, a jury convicted Bengoa of two counts of robbery and participation in criminal street gang activity. The jury acquitted Bengoa of the assault with a firearm charge, apparently rejecting I.I.'s testimony that Bengoa was the shooter. Bengoa was sentenced to 28 years to life. On May 22, 2013, Bengoa's co-defendant pled guilty to personal use of a firearm and robbery and was sentenced to 15 years.

Unbeknownst to the jury that convicted Bengoa or the attorney who represented him, I.I. had a significant history as an informant for OCSD. And I.I. was not the only informant to speak to Bengoa. OCSD also used an informant, J.J., to elicit statements from Bengoa, and the Special Handling Unit took careful and deliberate steps to ensure that Bengoa would talk to both informants. At least some of Bengoa's conversations with the informants, and perhaps all of them, violated Bengoa's right to counsel under *Massiah*.

While Bengoa was in custody but before his trial for the robbery and shooting, OCSD became aware that Bengoa was a suspect in an unsolved murder in Los Angeles and decided to assist the Los Angeles Sheriff's Department (LASD) in their investigation. In August 2012, OCSD created an operational plan, which was active for one week, with the stated objective of using I.I. and J.J. to elicit and record inculpatory statements made by Bengoa about the uncharged Los Angeles murder. Executive staff at both OCSD and LASD signed off on the plan. Pursuant to the plan, J.J. was to be put in the same cell as Bengoa and was to wear a surreptitious recording device during dayroom time with Bengoa. The plan also called for OCSD to put Bengoa and I.I. in adjoining cells and to place a recording device in the vent connecting the cells to capture any conversations between the cells. Despite this extensive planning and the use of two recording devices, we were unable to locate any recordings from this case in the materials provided to us by OCSD and OCDA.

The *Massiah* rule only prohibits the elicitation of incriminating statements about offenses with which someone has been charged and is represented by counsel. It does not extend to criminal activity for which the investigatory target has not been charged and does not have counsel. For these reasons, the Los Angeles murder of which Bengoa was suspected but had not been charged was fair game for I.I. and J.J. OCSD simply had to ensure that the informants did not ask Bengoa about the robbery and shooting that he had been charged with.

The evidence demonstrates, however, that J.J. spoke to Bengoa about more than the uncharged Los Angeles murder. Within days of J.J.'s assignment to Bengoa's cell, Bengoa allegedly confessed to J.J. to both the Los Angeles murder and the robbery and shooting. The operational plan that resulted in these alleged confessions, as well as the circumstances surrounding the execution of the plan, establish both the agency and elicitation prongs of *Massiah*. Agency is clear because OCSD deliberately planned to have I.I. and J.J.—both of whom had served as informants for OCSD in the past—serve as informants against Bengoa. The strongest evidence of elicitation would be the surreptitious recordings of I.I. and J.J. speaking with Bengoa, but, as noted above, we did not receive any recordings from OCSD or OCDA. Elicitation can nevertheless be inferred from the circumstances: OCSD sent two experienced

informants to speak to Bengoa as part of an elaborate operation to obtain a confession; it deployed two recording devices over a one-week period in the expectation that Bengoa would confess to the informants; an investigator from the Anaheim Police Department interviewed I.I., who would later testify, the day after the operation concluded about the robbery and shooting; and Bengoa made an alleged confession about the robbery and shooting within days of J.J. arriving in his cell. *See Henry*, 447 U.S. at 270-71, 274 (holding that elicitation and agency could be inferred from an informant’s prior relationship with law enforcement, his understanding that he would only receive benefits if he provided assistance, the fact that the informant has “some conversations” with the defendant, and the fact that the informant would appear to the defendant as “no more than a fellow inmate”); *Sanders v. Cullen*, 873 F.3d 778, 812–13 (9th Cir. 2017) (noting, for the agency prong of *Massiah*, the importance of factors like the provision of recording equipment to informants and the expectation that informants would report back to law enforcement); *but see Kuhlmann v. Wilson*, 477 U.S. 436, 460 (1986) (finding that a federal court of appeals hearing a case in habeas erred by failing to accord the state trial court’s factual finding that that the police had instructed the informant only to listen, the instructions *were obeyed*, and the accused’s statements were spontaneous and unsolicited and the informants actions did not amount to elicitation of the defendant’s incriminatory statements).

OCDA did not use any of the information or statements that OCSD collected as part of the August 2012 operation at Bengoa’s trial. But they did use the earlier confession that Bengoa made to I.I. in June 2012. Whether the June 2012 confession was the fruit of a *Massiah* violation is a closer question and one that we do not purport to answer here. *See United States v. Kimball*, 884 F.2d 1274, 1279 (9th Cir. 1989) (finding that for evidence to be suppressed as the fruit of a Sixth Amendment violation, the “violation must at a minimum have been the ‘but for’ cause of the discovery of the evidence”). In any event, Bengoa’s attorney would likely have explored this issue had he been aware of the evidence suggesting a *Massiah* violation. This evidence included the fact that both informants had served as informants for OCSD in the past, and the fact that OCSD followed up on the June 2012 confession with a full-blown informant operation in August 2012.

During the summer of 2019, we interviewed the prosecutor who handled Bengoa’s case at trial. He told us that he had never seen the August 2012 operational plan before we showed it to him, and he did not know about I.I.’s prior history as an informant for OCSD. Once he learned of each of these pieces of information, their significance was immediately apparent to him, and without hesitation he said that he would have disclosed the plan, recordings, and I.I.’s informant history to Bengoa’s attorney had he known about them.

In light of how OCSD documented the August 2012 informant operation, it is not surprising that the prosecutor was unaware of it. While OCSD created a full operation plan, the agency made no reference to the operation in any of its reports regarding its investigation of Edgar Bengoa. These other reports were drafted in such a way as to leave the reader with the impression that any informant contacts were by serendipity rather than by design.

## **VI. OCSD AND OCDA ENGAGED IN A PATTERN OR PRACTICE OF CONDUCT THAT DEPRIVED CRIMINAL DEFENDANTS OF THEIR FOURTEENTH AMENDMENT RIGHTS**

We have reasonable cause to believe that the Orange County Sheriff's Department and the Orange County District Attorney's Office engaged in a pattern or practice of conduct that deprived individuals of their right to a fair trial in violation of the Fourteenth Amendment.

As noted in Section IV.D, OCSD's Special Handling Unit created and collected a wealth of evidence documenting the custodial informant program—TRED records, the Special Handling Log, departmental reports and memoranda, notes from informants, recordings, and so on. Some of that evidence showed that inmates in the Orange County Jail had been questioned by informants in violation of their Sixth Amendment rights, and the informant testimony could have been excluded. Some of that evidence would have given a jury reasons not to trust the informants who would end up testifying before them, either because the informants had a motive to lie, or because the informants were simply unreliable people. Both kinds of evidence are favorable to the accused because both can seriously undermine the accused's alleged confession—core evidence of guilt in most cases—by having the confession excluded entirely or giving the jury reasons to doubt whether the accused actually confessed. We identified a number of cases where the prosecution team had this kind of evidence, but OCDA failed to provide it to the defense. When we interviewed 17 OCDA prosecutors about the custodial informant program, we asked many of them about the undisclosed Sixth Amendment and impeachment evidence that we had identified from cases that they personally handled. The typical response we received was that the prosecutor was seeing the evidence for the first time, or had seen the evidence for the first time years after the conviction, but that they immediately recognized its significance for a Sixth Amendment violation or the impeachment of an informant. The prosecutors then typically said that if they had known about this evidence when they were handling the case originally, they would have disclosed it to the defense. We received these kinds of responses more than 50 times during our interviews.

Regardless, a prosecutor's responsibility includes locating evidence in the possession of other law enforcement on the prosecution team. *Kyles*, 514 U.S. at 437. A prosecutor's personal knowledge of the existence of material evidence is legally irrelevant to whether a defendant's Fourteenth Amendment rights were violated. Further, in the case of OCDA, prosecutors' lack of awareness "really just aggravates the entire situation because someone has to be in charge of criminal investigations and prosecutions in Orange County." *People v. Dekraai*, No. 12ZF0128, 2015 WL 4384450 at 7 (Cal. Super. Ct. Mar. 12, 2015).

And not all OCDA prosecutors can reasonably claim a complete lack of awareness. The Office itself prosecuted case after case involving custodial informants who had come forward in the Orange County Jail saying that someone had confessed to them about their charged offenses—many of them from the same module, under similar circumstances, and supported by the same deputies from the Special Handling Unit. But the Office did not investigate whether these confessions were actually spontaneous rather than deliberately sought or whether the informants were acting on their own instead of at the direction of law enforcement.



At times OCDA used the same informants over and over again without looking into the potential *Massiah* problems, apparently disregarding the fact that some informants were obtaining a significant number of jailhouse confessions. Oscar Moriel is perhaps the best example. Several prosecutors were aware of his prolific informant activities. In March 2009, Special Handling deputies arranged interviews at the Orange County Jail between Moriel and two OCDA prosecutors. A few months later in August 2009, a different prosecutor put Moriel's name into OCDA's internal informant index for the express purpose of tracking his informant activities. Records from the Santa Ana Police Department show that a fourth prosecutor talked to detectives in the police department about Moriel a few months after that in October 2009. And at the trial of Leonel Vega in December 2010, Vega's attorney observed in open court that "[t]his guy [Moriel] seems to be a magnet for jailhouse confessions." Moriel ended up assisting OCDA with the prosecutions of seven different defendants and also assisted federal law enforcement on major gang-related investigations. And yet the wealth of information about Moriel's informant activities—the OCSD reports on his informant operations, the dozens of times that his name appears in the Special Handling Log, the untold numbers of TRED records mentioning Moriel, his more than 300 pages of notes documenting his efforts to get inmates to confess—did not make it out of the hands of the prosecution team until three rounds of evidentiary hearings in *Dekraai*.

One of the prosecutors handling Oscar Moriel's case stressed to us that, until the federal investigation on which Moriel was working was exposed, he had no idea that Moriel was working as an informant. This same prosecutor handled Moriel's case in early 2009 when Moriel came forward as an informant, and the prosecutor was working with the TARGET unit directly out of the Santa Ana Police Department, where Moriel's SAPD handlers worked. The prosecutor even questioned Moriel with another OCDA prosecutor at Orange County Jail in March 2009 about cases on which Moriel wished to assist law enforcement, and he granted Moriel immunity for what Moriel said during the interview so that Moriel would provide as much information as possible. When we confronted the prosecutor with this history of his personal involvement in Moriel's informant activities, the prosecutor told us that he had forgotten.

Even when prosecutors saw obvious indications that OCSD's informants were operating outside constitutional bounds across a number of cases, they failed to act to stop the pattern. From 2007 to 2011, one senior prosecutor handled six cases that together involved a total of 12 custodial informants. In two of those six cases, informants elicited statements in violation of *Massiah*, and in another case, the prosecutor limited the testimony of a custodial informant to prevent him from testifying about the defendant's in-custody statements, which meant that there was no evidence about any potential *Massiah* issues. In another case, after the defense moved to continue based on OCDA's disclosures regarding one custodial informant witness, the prosecutor responded that he would simply not call the informant because of the "difficulty" in obtaining all discovery relevant to the informant, as well as his "nature as a 'professional snitch.'" The prosecutor also dropped two additional custodial informant witnesses in the same case without any explanation.

OCDA also worked directly with the Special Handling Unit, such as in the *Dekraai* case, where in October 2011 the Special Handling Unit set up a meeting between the *Dekraai* prosecutors and custodial informant Fernando Perez about the statements that *Dekraai* had made

to Perez. The following day, OCSD granted OCDA's request to record any future conversations that may occur between Dekraai and Perez.

In another case, a senior OCDA prosecutor knew that an OCSD investigator had directed an informant to have conversations with a represented defendant over a period of several weeks; the prosecutor even granted the informant leniency based on this work. The prosecutor told us that he accepted the investigator's representation that there were no *Massiah* issues and did nothing else to investigate whether the informant's contact was improper under the Sixth Amendment, even though this same prosecutor was at that time in active litigation about strikingly similar *Massiah* and *Brady* issues in the *Dekraai* proceedings.

Some OCDA prosecutors told us that they did not investigate potential *Massiah* and *Brady* issues in their cases because they believed that allegations by the defense are no more than that—allegations. The lead *Dekraai* prosecutor bemoaned an “atmosphere” in Orange County where it was “a commonplace occurrence for certain criminal defense lawyers to . . . routinely make accusations of prosecutorial misconduct.” This same prosecutor admitted to us that when the allegations of *Massiah* and *Brady* violations arose in the *Dekraai* case, OCDA's initial response was not to investigate and evaluate whether the allegations were true, but rather to defend against the allegations. Another prosecutor who is now in a supervisory position at OCDA told us that when her deputies face *Brady* motions she accompanies them in court and “typically will take over.” The supervisor told us: “And I fight hard because these things are being misused, unethically brought up by the defense, and it's disgusting. And so I go in, fight hard. And in every single instance, they've been withdrawn.”

The personal knowledge or the good or bad faith of individual prosecutors may bear on their moral culpability or their compliance with attorneys' ethical obligations, but for the purposes of the *Brady* rule, their state of mind is irrelevant. The law puts the obligation to disclose favorable evidence on the prosecutor's shoulders, and with it comes the obligation to seek out favorable evidence that is in the possession of any law enforcement agents working on behalf of the prosecution team. “[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

The cases we discuss above involved numerous pieces of evidence that should have been disclosed to the defense. In the case against Paul Smith, TRED records, the Special Handling Log, and informant notes all tended to show a Sixth Amendment violation that could have led to Smith's alleged confession being excluded. In Edgar Bengoa's case, there was an operational plan and TRED records likewise suggesting a violation of the Sixth Amendment.

The *Brady* issues presented by the Leonel Vega case, also discussed above, warrant more extensive discussion, which appears below. We also describe as exemplars two other cases that involved *Brady* violations.

### A. *People v. Leonel Vega*

OCDA charged Leonel Vega with the gang-related murder of Giovanni Onofre in 2007. Prosecutors alleged that Vega shot and killed Onofre near Memorial Park in Santa Ana in 2004 because Vega believed Onofre was a member of a rival gang. The case against Vega relied heavily on the testimony of informants. OCDA used, or considered using, four informants, three of whom came forward while in custody at the Orange County Jail. Three informants testified at trial. As explained above, one of the informants, Oscar Moriel, worked closely with law enforcement to elicit a confession from Vega while they were in custody together in August 2009 in violation of Vega's Sixth Amendment rights.<sup>26</sup>

A new prosecutor took over the prosecution of Leonel Vega in 2010 after Moriel had completed his informant work on the case. The prosecutor was assigned to OCDA's TARGET gang unit and worked directly out of the Santa Ana Police Department (SAPD), an agency investigating the Onofre shooting and working with Moriel through much of 2009 and 2010. Around the same time, the same prosecutor also took over Oscar Moriel's prosecution, meaning that he was handling both the case against Vega and the case against the informant who tied Vega to Onofre's murder. Moriel was facing a third strike and life in prison for attempted murder.

*Brady v. Maryland* required that Vega's prosecutor provide exculpatory information to his defense lawyer. That included information that the defense could have used to impeach the three informants lined up to testify. *See United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir. 1992). In cases that depend on informant testimony, evidence that demonstrates an informant's motive to lie is highly relevant and must be turned over. *Giglio*, 405 U.S. at 154 (1972); *United States v. Bernal-Obeso*, 989 F.2d 331, 335 (9th Cir. 1993) (noting that when law enforcement makes the choice to use an informant, "it is essential that relevant evidence bearing on the credibility of an informant-witness be timely revealed"). Informants understand that "they can mitigate their own problems with the law by becoming a witness against someone else." *Bernal-Obeso*, 989 F.2d at 334. For that reason, the usefulness of an informant's testimony "depends in large measure on the degree to which he both is and can be presented to a fact finder as a reliable person." *Id.* at 335-36.

The prosecutor was also required to provide the defense with information that would have supported a *Massiah* claim that an informant acted as an agent of law enforcement to elicit a confession from a defendant without counsel present. A successful *Massiah* claim can result in the suppression of the informant's testimony or other remedies. *Massiah v. United States*, 377 U.S. 201, 207 (1964); *United States v. Henry*, 447 U.S. 264, 274 (1980); *Randolph v. California*, 380 F.3d 1133, 1143, 1147 (9th Cir. 2004). Here, the prosecutor was required to turn over information about the informants' past work or agreements with law enforcement, as well as benefits or leniency the informants expected to receive. *United States v. Blanco*, 392 F.3d 382,

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<sup>26</sup> See Section V.B.

392 (9th Cir. 2004) (holding that nondisclosure of special immigration treatment provided to confidential informant violated *Brady* and *Giglio*).

In fact, the prosecutor had significant information in his possession that the defense could have used to impeach prosecution witnesses or to demonstrate that a *Massiah* violation had occurred, as described in more detail below. He turned over very little of the information.

1. Moriel's notes to the Special Handling Unit

By July 2009, Moriel was copiously documenting his observations and conversations inside the jail, and passing along notes to his handlers in the Special Handling Unit. The notes contained important impeachment information because they showed Moriel's willingness to cooperate and to give law enforcement whatever information they needed. The notes confirmed that Vega was an important target—the two talked so much that Moriel wrote well over a hundred pages summarizing what Vega had told him. Moriel also wrote down conversations with other inmates in which they purportedly implicated themselves or others in criminal activity. In his notes, Moriel offered advice to Special Handling deputies on where to house other inmates so that they would be more accessible to Moriel for questioning. He also made requests for custodial benefits, including special phone privileges and other materials that would assist him in his informant work, as described above in Section IV.B.

2. SAPD and OCSD records documenting Moriel's informant work

SAPD and OCSD also kept records of Moriel's efforts to secure a confession from Vega. One SAPD report described an undercover task force operation to shore up Moriel's standing as a member of Delhi. This report confirmed that, among other things, law enforcement transferred \$1,500 of federal funds to Moriel's Delhi associates on Moriel's behalf, in order to shore up Moriel's standing in the gang and to quash rumors that Moriel was cooperating with law enforcement. Recordings of Moriel's conversations with law enforcement in 2009, from the early months of his cooperation, also contained impeachment evidence. These recordings demonstrated—in Moriel's own words—just how desperate he was to get a deal. Moriel told detectives that his “memory can fall back into place” if they could give him some options in his case. “I'm looking at a third strike. I'm looking at life in prison,” Moriel explained, “So the more options I have to work with and to choose from, the better position I'll be to think more clearly.”

OCSD created formal reports about Moriel's work as an informant, too, including a June 2009 plan to place Moriel and Vega next to each other in disciplinary isolation where the Special Handling Unit could record their conversations. A high-ranking commander at OCSD signed off on this plan to obtain “valuable evidence” about the Onofre murder. Jail recordings of Moriel and Vega in disciplinary isolation in June 2009 likewise illustrated Moriel's early attempts to elicit incriminating statements from Vega. TRED records for Moriel and Vega also verified that the Special Handling Unit changed Moriel's classification level and strategically housed the two inmates together so that Moriel could gain Vega's trust and more easily question him. That jail deputies manipulated the jail's classification and housing systems to assist Moriel's informant work was strong evidence of agency and elicitation under *Massiah*. See, e.g., *Randolph*, 380 F.3d at 1146 (by placing informant in cell with defendant after the informant indicated willingness to cooperate, the state “intentionally created a situation likely to induce Randolph to make

incriminating statements without counsel's assistance.") (citing *United States v. Kimball*, 884 F.2d 1274, 1278 (9th Cir. 1989)). Finally, there were dozens of entries in the Special Handling Log that referred to Moriel and documented his numerous meetings with Special Handling deputies and detectives from other agencies. Between February 2009, when Moriel first came forward, to August 2009, when Moriel secured Vega's confession, there were 18 separate entries in the Special Handling Log describing Moriel's work as an informant; and in all, we found 186 references to Oscar Moriel in the Log.

### 3. Records of OCDA involvement

OCDA supported Moriel's work as an informant in the jail. OCDA prosecutors conducted two recorded interviews with Moriel in March 2009, shortly after Moriel came forward to the Special Handling Unit. A third OCDA prosecutor approved Moriel's entry into the Orange County Informant Index, or OCII, in August 2009, just after he elicited a confession from Vega. There was also an "informant debriefing log" from SAPD in which detectives noted that they sent a letter to OCDA about Moriel in August 2009, and that they discussed Moriel's work in October 2009 with the head of the OCDA gang unit and the Vega prosecutor's direct supervisor.

Vega went to trial in December 2010. About a month before trial, the prosecutor provided the defense with just four pages of Moriel's notes, which contained only Vega's confession on August 1, 2009. He provided none of the other materials described above. The four pages were enough, however, to raise concerns about a *Massiah* violation. In late November, defense counsel filed a motion for discovery on Moriel's informant activities, and raised the issue again one week later during the middle of trial. Counsel told the court that Moriel was set to testify as an informant in another case that the prosecutor was handling, and that case, too, involved Moriel's testimony about a confession. "This guy seems to be a magnet for jailhouse confessions," defense counsel told the court, and "[y]ou can't send somebody down there who is an agent of the government extracting confessions from people who are represented by counsel." The court reminded the prosecutor of his constitutional obligations, telling defense counsel that he assumed the prosecutor would "comply with Brady and will disclose anything that's exculpatory to your client." But still the prosecutor did not disclose any of the materials described above.

During his testimony, Moriel said that he hoped to receive some benefit, but that no one at OCDA, SAPD, or the FBI had made any promises to him for future leniency. During his closing argument, the prosecutor reminded the jury of Moriel's testimony that he had been given "no promises of leniency" and "no consideration had been offered in this case." Moriel's testimony and the prosecutor's representations were misleading, but without the materials to impeach Moriel or question him about his extensive relationship and cooperation with law enforcement, the defense was at a considerable disadvantage.

On December 16, 2010, a jury found Vega guilty of murder, with the special circumstance of committing the crime for the benefit of a gang, use of a firearm, and street terrorism. In 2011, Vega was sentenced to life without the possibility of parole, as well as a consecutive sentence of 25 years to life.

When testifying about the Vega case in the *Dekraai* proceedings in 2014, the prosecutor admitted that he failed to provide Vega with discovery that should have been turned over. He agreed that Vega had been entitled to receive evidence of the many confessions that Moriel claimed to overhear in the jail. “Hindsight is 20/20,” he testified, acknowledging that if he could have taken a “global look” at all of the cases in which Moriel was cooperating, he may have taken steps to pursue information about additional informant statements and revealed them to counsel. Of course, at the same time the prosecutor was handling the prosecution of Vega, he was also prosecuting three other defendants in a case where Moriel would eventually testify at trial. He was also prosecuting the case against Moriel himself. The judge overseeing the *Dekraai* case specifically cited his disbelief in this prosecutor’s testimony when he removed OCDA from the penalty phase of the case. In 2014, OCDA recognized that “Vega’s confession to Moriel had been taken in blatant violation of *Massiah* and that copious evidence of that violation had not been produced to Vega.” OCDA agreed to vacate Vega’s conviction. Rather than re-trying the case, prosecutors negotiated a deal where Vega pleaded guilty to voluntary manslaughter with a weapons enhancement, and in exchange received a 15-year sentence. It appears that Vega, who was originally sentenced to life without parole *plus* 25 years to life, has been released from state custody.

In 2019, we interviewed the two prosecutors who handled the Vega case before and after the trial prosecutor.<sup>27</sup> When we showed them the information about Moriel’s informant work with OCSD and SAPD that had not been disclosed—including TRED records, entries from the Special Handling Log, Moriel’s notes, SAPD records and interviews about Moriel’s cooperation, and recordings of Moriel and Vega in custody—both prosecutors told us that they had never seen the materials. The relevance and probative value of the information, however, was obvious to them immediately. They told us that had they known about this information, they would have disclosed it to Vega’s counsel.

### **B. *People v. Shirley Williams***

In August 2011, the Huntington Beach Police Department arrested Joseph Govey and Shirley Williams with an illegal firearm, ammunition, and counterfeit bills. Two days later, OCDA charged the couple. In addition to underlying charges for weapons and counterfeit money, OCDA sought gang enhancements. That meant that prosecutors had to prove beyond a reasonable doubt that Govey and Williams committed the offenses “for the benefit of, at the direction of, and in association with” the white supremacist gang known as Public Enemy Number 1, or PEN1. OCDA claimed that Govey was a member of PEN1 and that Williams was “associated” with PEN1. They argued Williams’s association with PEN1 based on her relationship with Govey and her previous contacts with PEN1 members.

Under *Brady v. Maryland*, OCDA was required to provide both Williams and Govey with favorable and material evidence that their lawyers could use to defend them against the underlying charges and gang enhancements. *Brady*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Because OCDA bore the burden of proving that they acted “in association

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<sup>27</sup> The trial prosecutor resigned from OCDA before we began our investigation.

with” PEN1 to prevail on the gang enhancement charges against both Govey and Williams, evidence showing that Govey was *not* a member of PEN1 acting “in association with” PEN1 at the time of the arrests had to be disclosed. Because her association with PEN1 was heavily dependent on her relationship with Govey, such evidence would undermine the enhancement of Williams’s charges.

OCDA had such evidence. On January 26, 2012, an OCDA prosecutor sat down for an interview with an informant, K.K., at the Orange County Jail. An OCSD investigator was there, too, along with deputies from Theo Lacy’s Special Handling Unit. At the time, that same prosecutor was handling the case against Govey and Williams. But he was at the jail that day to learn what information K.K. could offer prosecutors to further their cases. K.K. shared knowledge about PEN1 and the Aryan Brotherhood, or “the Brand,” a closely related white supremacist prison gang. As one OCDA prosecutor explained the connection between the two gangs, “the Brand really operates from within the prison system. And they rely a lot on PEN1 to do their work on the streets. . . . [M]ost members of PEN1 aspire to become members of AB [the Aryan Brotherhood]. It’s kind of a stepping stone.” In fact, as PEN1 member K.K. explained, one of the founders of PEN1 had recently become a member of the Aryan Brotherhood, which allowed for closer coordination.

During the lengthy interview, K.K. revealed that Govey was not in good standing with the Aryan Brotherhood and had not been in good standing for quite some time. K.K. explained that gang leaders had placed Govey on a permanent kill list years earlier. As a result, PEN1 members had stabbed and assaulted Govey numerous times over the years. In fact, K.K. received a direct order to kill Govey in 2007, just after K.K. “got brought into PEN1.” K.K. attacked Govey with a plastic shiv in a state prison yard. K.K. also told the OCDA prosecutor about a more recent attempt on Govey’s life at the Orange County Jail. There, the assailant did not “have anything personal against Govey, but [Govey] is in the hat and he was given a chance, and so, unfortunately, he is to be killed.” The order to kill Govey was irreversible, K.K. said, and was still in effect to that day. In short, Govey “was in the hat with the brand [the Aryan Brotherhood], and what that means is that you’re not coming out. You’re to be killed.”

If Williams’s lawyer had known about K.K.’s January 2012 statements that Govey was an enemy of the Aryan Brotherhood and that PEN1 members repeatedly tried to kill him, he could have used those statements to undermine her gang enhancement. Using this evidence, the attorney could have argued that Govey was not a member of the Aryan Brotherhood’s “stepping stone” gang, PEN1. The jury could then have weighed the evidence to determine whether Williams’s alleged crimes were really linked to PEN1 and thus whether Williams was deserving of additional punishment for helping a criminal street gang.

But OCDA never provided K.K.’s statements to Williams’s attorney. Williams went to trial in March 2013. OCDA put on testimony by Asraf Abdelmuti, a deputy sheriff at OCSD who worked in the Special Investigations Bureau and frequently testified as a gang expert. Abdelmuti testified that, in his opinion, Govey was an “active participant” of PEN1 and Williams was “associated” with the gang when police arrested them in 2011. Abdelmuti based his opinion on “gang backgrounds” that he prepared for both defendants. Govey, Abdelmuti said, was “in constant communication” with other members of PEN1 and would frequently send messages

related to gang politics. As for Williams, Abdelmuti pointed to evidence that connected her over the years with “known” members of PEN1. She was “somebody who has been around the scene or been involved in some way or another since 2003,” he said. But the strongest evidence that Williams was “in association with PEN1” was her relationship with Govey and the fact that police arrested them together in 2011. Abdelmuti said nothing about Govey being on the Aryan Brotherhood’s kill list and did not explain how Govey’s status with the Aryan Brotherhood and PEN1 members like K.K. could be reconciled with Govey’s alleged status as an active participant with PEN1.

The gang enhancements against Williams were the most critical issue at her trial, but, because the defense did not know about K.K.’s statement to OCDA, at no point did the defense question OCDA’s underlying assertion that Govey was an “active participant” in PEN1. Instead, the defense argued that, unlike Govey, Williams was only peripherally involved with the gang. Defense counsel subjected Abdelmuti to the most vigorous cross-examination of all of the witnesses, pointing out that Abdelmuti could identify just four occasions over a period of nine years where Williams fraternized with people believed to be involved with PEN1. At the close of evidence, defense counsel moved to dismiss the enhancements altogether, arguing that OCDA failed to present enough evidence that Williams was involved with the gang. The judge denied the motion. There was sufficient evidence for the count to proceed to the jury, he explained, namely “[e]vidence that Mr. Govey is, in fact, a member of a criminal street gang, in which case this crime would be committed in association with him.” The jury found Williams guilty of all charges, including the gang enhancements.

K.K.’s interview came to light during discovery in *People v. Govey* in 2014. Ultimately, OCDA dismissed all charges against Govey in October 2014, after the court ordered the prosecution to disclose information related to the other informants in Govey’s case. In 2015, based on the information that emerged during Govey’s case, OCDA and Williams’s counsel stipulated to dismiss the gang enhancements against Williams. With time served, Williams was released. An internal OCDA review of the Govey and Williams prosecutions found that “statements about Govey’s claims of inactivity in PEN1 were just as exculpatory to Williams as they were to Govey.”

When we interviewed the prosecutor who handled the Williams case at trial, she confirmed that she did not disclose the OCDA interview with K.K. to Williams before trial. The prosecutor told us that she did not know about the K.K. interview before the Williams trial. She told us that had she known about it, she would have disclosed it:

### ***C. People v. Ramon Alvarez***

In the early morning hours of June 28, 1998, Ruben Leal, who was a member of the F-Troop gang, was shot in the head with a high-powered rifle at a house in Santa Ana. When officers from SAPD responded to the scene, they found Mr. Leal’s body in the backyard, wrapped in a tarp, covered in ice, in a children’s inflatable pool.

There were four people at the house: Ramon Alvarez, an F-Troop gang member, an F-Troop affiliated member, and a cousin of one of the gang members. For reasons left unclear in the records we reviewed, police arrested Alvarez and transported him to the Santa Ana Jail.



Within a week, an informant, L.L., alleged that Alvarez confessed to Leal's murder while both were inmates at the Santa Ana Jail. At the time, L.L. was serving a state sentence at the Santa Ana Jail while awaiting transfer to the federal court system on a pending violation of parole. After hearing the Alvarez confession, L.L. reached out to Santa Ana police seeking a lenient sentence for his federal probation violation. L.L. told the police that he would not testify about the alleged confession unless he received leniency. Again for reasons that were not clear in the record we reviewed, Santa Ana police were unable to work out a deal for L.L. in 1998. L.L. therefore refused to assist them. Without L.L.'s anticipated testimony that Alvarez admitted to murdering Leal, there was not sufficient evidence to prosecute Alvarez, and the case went cold.

Twelve years later, in 2010, the Santa Ana police reopened the Alvarez case and contacted L.L., who at that point was incarcerated in state prison. L.L. agreed to cooperate and dropped his original demand that he be granted leniency in exchange for his testimony. Explaining his apparent change of heart, L.L. testified at a preliminary hearing in *People v. Alvarez*, "you know what, it's the right thing to do. This way if I die, I die with a clear conscience." L.L. ultimately testified under oath three separate times that he had been offered nothing in exchange for his testimony against Alvarez.

In his opening statement at Alvarez's January 2012 trial for Leal's murder, the prosecutor emphasized that L.L. received no benefit in exchange for his testimony: "[L.L.] says he'd like to do something good before he dies, give the family of the victim in this case some closure ... He has gotten nothing. He is getting nothing. There is no hidden deal, nothing." Despite L.L.'s testimony, the jury could not reach a unanimous verdict, and Alvarez was not convicted. Prosecutors elected to retry Alvarez the following June, and this time the jury found him guilty of second-degree murder. The court sentenced him to 15 years to life.

Unknown to both juries and directly contradicting the prosecutor's representation about L.L. receiving no benefit for his testimony, L.L. had in fact, prior to his testimony, entered into a secret financial agreement with SAPD. In a habeas affidavit dated July 25, 2018, L.L. stated that under the agreement, approximately four months after the Alvarez sentencing, SAPD hand-delivered a check to him in the amount of \$11,000 as payment for his cooperation.

In response to the L.L. habeas affidavit, the California Department of Justice began an investigation into the secret payment of \$11,000. In a report dated September 6, 2018, the California Department of Justice determined that Santa Ana police had authorized the informant payment as compensation for L.L.'s cooperation in the case against Ramon Alvarez.

We interviewed the prosecutor who handled Alvarez's two trials. The prosecutor conceded during our interview that he could not have successfully prosecuted Alvarez without L.L.'s testimony. The prosecutor also conceded that the only reason for the jury to believe L.L., who "had a rap sheet a mile long," was that he was getting nothing for his testimony. Law enforcement payments to informants are heartland *Brady* materials that must be disclosed to defense counsel, and the nondisclosure in this case violated the Fourteenth Amendment. See *Banks v. Dretke*, 540 U.S. 668, 699–703 (2004).

On September 16, 2020, the California Supreme Court summarily denied Alvarez's petition for writ of habeas corpus, in which he alleged a *Brady* violation regarding OCDA's

failure to disclose the \$11,000 payment to the informant. Alvarez then proceeded into federal habeas corpus and asserted the same *Brady* violation. On March 23, 2022, the federal court found that OCDA's nondisclosure of the \$11,000 informant payment violated *Brady*, vacated Alvarez's murder conviction, and ordered retrial within 60 days of the court's judgment. On May 25, 2022, the state court dismissed the murder charge against Alvarez after OCDA said that it would not retry the case. Alvarez was then remanded into federal custody to finish serving a concurrent sentence on different charges.

## **VII. REMEDIAL EFFORTS UNDERTAKEN BY OCSD AND OCDA**

Both OCSD and OCDA have taken steps to respond to the court's rulings in the *Dekraai* case and to bring their custodial informant practices in line with constitutional requirements. OCDA in particular has made a number of positive changes under its current leadership to its management structure, policies, training, supervision, and staffing that are intended to prevent the kinds of Sixth and Fourteenth Amendment violations that led to our investigation. But challenges still remain. Most crucially, eliminating the pattern or practice of Sixth and Fourteenth Amendment violations that we have identified will require a level of cooperation and coordination between OCSD and OCDA that does not now exist.

Our analysis of each agency's current remedial efforts follows. The next Section identifies additional remedial efforts that we believe are required.

### **A. OCSD's Remedial Efforts**

#### **1. Policies and training**

OCSD had no policies on custodial informants until 2014. OCSD refined its approach to custodial informants in 2016, creating a policy on custodial investigations that required the Sheriff or his designee to review any custodial informant operation for compliance with *Massiah*. The sergeant in the Classification Unit must approve any inmate movement required by the operation, and OCSD must document that movement in TRED records. The Custody Intelligence Unit (CIU) (discussed in the following section) will also generate a secure operation file containing an operation agreement, plan, movement documentation, reports, and names and contact information for all informants and handlers.

OCSD's revised informant policies are not consistent with OCDA's policies. For example, OCDA defines a jailhouse informant as an informant "whose testimony is based on statements made by the defendant while both the defendant and the jailhouse informant are in a custodial setting." But OCSD's policies include a variety of definitions of custodial informants, and it is not always clear how those definitions impact OCSD's informant practices. OCSD and OCDA have thus not engaged in sufficient coordination regarding custodial informant practices.

In addition, OCSD has created a new category of informant—a "Source of Information" (SOI)—that does not exist in OCDA's policies. An SOI is an "inmate who provides information to law enforcement regarding criminal activity, or any non-criminal activity related to jail security; but has not been directed to do so by law enforcement and has not requested, been offered, nor received any benefit or consideration in return for the information." According to

OCSD, SOIs are not “informants” because they neither act at the direction of law enforcement nor receive any benefit for their cooperation. Neither OCDA prosecutors nor CIU investigators were aware of the term “source of information” before OCSD added the term to its policies in 2014. OCSD began using the SOI category to relieve deputies of their obligation to gather and maintain the same amount of documentation and authorization required for other informants cooperating in pending criminal cases. We reviewed a sample of SOI files from 2017 and 2018, and all files from 2019—the only three years for which there were files at the time of our review—and noted several concerns. First, there was no system in place to track SOIs who later become “jailhouse informants,” as OCDA’s policy defines them. In other words, there was no system to ensure that a jailhouse informant’s history of cooperating with law enforcement, including information that might impeach their credibility or reliability, would be disclosed when that information was maintained in SOI files. We also found that OCSD did not track individual informants’ history of cooperation in SOI files. Since the time of our review, OCSD has adopted provisions in policy that appear to be intended to track SOIs over time. However, we have not had the opportunity to assess how these policy provisions are implemented in practice, including how they are coordinated with OCDA, to ensure that OCSD and OCDA meet their preservation and disclosure obligations.

OCSD did not provide deputies with any training on the Sixth or Fourteenth Amendment issues surrounding informant use until 2016. That year, OCSD began offering new deputies a course in Jail Investigations Intelligence Gathering that covers both *Brady* and *Massiah*. OCDA has also provided deputies a 50-minute informant training with the aid of OCDA’s Informant Manual focused largely on non-custodial confidential informants. Following the *Dekraai* proceedings, OCDA and OCSD also provided training to deputies on *Brady* issues.

## 2. Custody Intelligence Unit

In 2016, OCSD created the CIU to replace the investigative function of the Special Handling Unit. Under current OCSD policy, CIU is led by a Special Services Bureau Captain who supervises a team with a sergeant, investigators, and investigative assistants. To work in CIU, investigators must pass a written test, complete an oral interview, and amass investigative experience in the jail or on patrol. CIU investigators supervise informants, coordinate in-custody operations, obtain jail security intelligence, and provide training as necessary. CIU also investigates all in-custody jail crimes, primarily assaults and drug possession offenses. If there is a criminal element present, CIU investigates, and OCDA decides whether to file charges. If OCDA declines charges, CIU closes the criminal matter and handles the matter through the jail discipline system.

CIU personnel must be certified investigators and have previous experience in either the jail or patrol setting. Special Handling deputies cultivated informants with the objective of being promoted out of the jail into prized investigative positions. By assigning experienced investigators to the CIU, OCSD has eliminated the risk that personnel assigned to the unit will attempt to cultivate informants to assist with pending criminal cases in order to demonstrate their fitness for investigative assignments. Second, the separation of CIU from Classification substantially diminishes the ability of CIU investigators to improperly classify or move informants to targeted defendants in order to obtain statements from represented defendants.

While CIU will inform the Classification Unit about threats and crimes that take place in the jail, CIU has no authority to determine the classification status of an inmate.

## **B. OCDA's Remedial Efforts**

OCDA has undertaken a number of steps aimed at preventing *Massiah* and *Brady* violations in the future, including undertaking an internal investigation, reviewing the Special Handling Log, and making changes to policy and training programs within the Office. Yet, eight years after the prosecutorial misconduct came to light in *Dekraai*, these steps remain insufficient to fully reveal or redress the violations that resulted from the informant program, or to prevent similar violations from recurring.

### 1. Internal investigations

In July 2020, OCDA issued a special report on its administrative investigation into the “informant scandal.” The report focused exclusively on the actions of the two *Dekraai* prosecutors, even though the prosecutorial misconduct in that case was the subject of significant litigation and public reporting, resulting in the forced recusal of OCDA from the *Dekraai* case and ultimately the dismissal of the death penalty. The report found “clear and convincing evidence to a reasonable certainty” that the two prosecutors had “committed malpractice due to intentional negligence” on that case. But the report ventured no further than that. The internal investigation team conducted only a “ cursory review” of five other prosecutions in which confidential informants were used, but found that there was “insufficient evidence” to determine whether the prosecutors on those cases had committed misconduct or malpractice. The report made no findings as to whether legal violations occurred in those five cases, though courts in two of the cases granted new trials on the basis of legal violations arising from informant use,<sup>28</sup> and in the remaining three cases<sup>29</sup> we determined that there is reasonable cause to believe that legal violations in fact occurred. In August 2021, after Paul Smith’s habeas petition alleging *Massiah* and *Brady* violations was granted resulting in a new trial, OCDA announced that it would be retaining an outside entity to review OCDA’s handling of the Smith case. We are not aware of any other effort at OCDA to investigate the custodial informant program or the potential misconduct of any OCDA employees.

It is important for OCDA to acknowledge the misconduct that occurred during the *Dekraai* prosecution. But OCDA’s internal investigation failed to address all of the constitutional violations that we identified, or that may have occurred in cases that the agency did not identify for us. For this reason, we think it is critical that Orange County establish an independent body to conduct a more comprehensive review of past prosecutions involving custodial informants.

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<sup>28</sup> *People v. Ortiz*, No. 11CF0862 (Cal. Super. Ct. Nov. 18, 2015); *In re: Henry Rodriguez*, No. G053326, 2017 WL 2705349 (Cal. App. 4th, June 23, 2017).

<sup>29</sup> Two of the three cases are identified in this report. *See People v. Isaac Palacios*, *see supra* Section IV.E.4; *People v. Leonel Vega*, *see supra* Sections V.B and VI.A.

## 2. Efforts to redress wrongful convictions

OCDA has also taken some steps redress past convictions. The Office created a Conviction Integrity Unit in 2019 to review past cases, and has conducted some review of the Special Handling Log to identify potentially material evidence that prosecutors did not disclose to defendants. Nevertheless, OCDA has not designed these initiatives to fully address past violations resulting from the informant program, or to prevent problems which, absent intervention, will arise in the future.

The Conviction Integrity Unit investigates claims of factual innocence from individuals convicted of a serious or violent felony and sentenced to more than five years in prison. Senior OCDA prosecutors and investigators staff the Unit, and a managing Assistant District Attorney who reports to the executive management team and District Attorney acts in an oversight role.

The Conviction Integrity Unit is a welcome development. In 2021, there were 161 exonerations nationwide, and the National Registry of Exonerations found that conviction integrity units played a part in 61 of these exonerations. Moreover, “official misconduct”—that would encompass the constitutional violations described in this report—played a role in 102 of the 161 exonerations.<sup>30</sup> But OCDA’s conviction integrity unit requires claims of factual innocence and puts the burden on the defendant to find and present evidence. This means that the Unit will have little impact on assisting OCDA to remedy the violation of defendants’ Sixth and Fourteenth Amendment rights through the misuse of custodial informants. Placing such a high standard upon individual defendants is particularly misplaced where, as here, OCDA itself possesses of a wealth of evidence of these violations. Many defendants will be in prison, without access to post-conviction counsel, and unable to develop the factual record or conduct an independent investigation to support their claims. Nevertheless, OCDA retains sole discretion for determining whether to re-open the investigation, how to conduct any new investigation, and how to resolve the claims.

OCDA has also acknowledged that the Office needs to address the legal issues prompted by the discovery of the OCSD Special Handling Log. In 2016, prosecutors admitted that the Log contained information that defendants Scott Dekraai and Daniel Wozniak were entitled to under *Brady v. Maryland*. But at the time, OCDA also pledged that it would “analyze the entirety of the SH Log material to determine what other cases, if any, were affected,” and what “violations, if any . . . need to be reported to defendants, the court, and the CAG [California Attorney General].”

OCDA did not live up to this pledge. The project was flawed from the start. OCDA put the lead prosecutor from the *Dekraai* case in charge, even though his own conduct regarding the

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<sup>30</sup> The National Registry of Exonerations Annual Report at 1, April 12, 2022, Newkirk Center for Science & Society at the University of California Irvine, the University of Michigan Law School, and Michigan State University College of Law, <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf>.

Special Handling Log was at issue in that case; he admitted in the *Dekraai* proceedings that he had a deficit in terms of understanding *Massiah*; and the *Dekraai* court found a sworn statement he made about the use of an informant in that case “seriously misleading.” Ultimately, Judge Goethals recused the entire OCDA office from prosecuting the *Dekraai* case due, in part, to this individual prosecutor’s misconduct. The court concluded that “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.” Yet, OCDA tasked the lead *Dekraai* prosecutor with a project that purported to ensure that countless unknown defendants received information to which they were constitutionally entitled.

The scope of the project was also too narrow, as OCDA set out to review the Special Handling Log in isolation from other important information. The Log itself is difficult to navigate. Special Handling deputies made daily entries in the Log over the course of more than four years to document their activities, including those that involved informants, often using jargon, abbreviations, and informants’ aliases. The exculpatory or impeachment value of any entry in the Log can often be deciphered only with reference to other evidence in the cases that are implicated. For example, we found that, for a number of Log entries, the evidentiary value came to light only when paired with TRED records. But OCDA’s review did not include TRED records. Without a comprehensive look at all materials known to be relevant, an isolated review of the Special Handling Log will fail to identify deprivations of constitutional rights. Predictably, several months into the initial project in September 2016, the lead *Dekraai* prosecutor informed his superiors of his findings that “we have not yet uncovered any new *Massiah* violations.”

After the California Court of Appeals affirmed Judge Goethals’s order recusing OCDA from the *Dekraai* proceedings, OCDA transferred some of the attorneys assigned to review the Special Handling Log and did not replace them. Several prosecutors reported that they appealed to OCDA leadership for additional resources for the project but received no response. OCDA fully abandoned the incomplete project in the middle of 2017.

In 2019, OCDA informed us that it was creating a new Special Handling Log Review “Task Force.” The newer review team included five prosecutors, two of whom were involved in the prior review of the Log. We continue to have concerns about this process, including what standard of review OCDA is employing in its analysis; the Office’s failure to obtain and examine other relevant materials—such as TRED records—that provide much-needed context for Log entries; and the lack of any memorialized methodology or centralized registry of case review results and disclosures to defense counsel. Absent a methodology that systematically identifies, obtains, and discloses all relevant informant documents, OCDA’s Special Handling Log review disclosures will likely be underinclusive.

Finally, OCDA has undertaken another review as a result of our investigation. During our interviews of prosecutors, we asked them about a number of documents that we had obtained from both OCDA and OCSA. Prosecutors are reviewing those documents to determine whether any of them should be disclosed to defendants. OCDA’s reliance on our investigation to learn of material that they should disclose to the defense is problematic because the cases that OCDA produced to us likely do not represent the entire universe of cases in which the Office used a custodial informant.

Further, OCDA’s reviews are likely to be insufficient because OCDA has no systematic mechanism to account for cases handled by former employees. When we began our investigation, OCDA did not track cases involving custodial informants, was not able to identify those cases through any automated means, and had not assembled a list of custodial informant cases for any prior state or local inquiries into its practices. After receiving our request for the files of cases involving custodial informants, OCDA polled prosecutors currently employed by the Office, asking them to identify the custodial informant cases that they worked on. Due to these shortcomings, we are aware of three cases involving custodial informants that OCDA failed to identify but that we learned about through other means. For example, OCDA failed to independently identify *People v. Wozniak* as a case involving an informant despite considerable media attention and lengthy litigation of informant issues beginning in 2014. Indeed, the *Wozniak* case involved an informant—Fernando Perez—who worked on *numerous* cases in Orange County. That case was, in part, responsible for bringing informant issues in the County to light, yet OCDA failed to identify it as relevant. Given this deficiency, there may be additional cases involving custodial informants that OCDA failed to identify and that we did not otherwise learn about. For OCDA to meet its disclosure obligations in all of the custodial informant cases that it has handled, it must develop systems for reliably identifying those cases in the first place.

### 3. Updated policies

OCDA has also updated its Informant Manual, as well as other policies, to provide guidance to prosecutors on how to avoid constitutional violations when using custodial informants. For example, the most recent iteration of the Informant Manual, in 2020, sets forth the procedural requirements that law enforcement agencies and prosecutors must follow when working with any kind of informant. The Manual also establishes the Cooperating Informant Review Committee (CIRC), which oversees the use of custodial informants in OCDA cases.

Second, following *Dekraai*, OCDA established two policies addressing the prosecution’s duty to disclose *Brady* material to the defense. These policies outline prosecutors’ duty to provide defendants with information contained in the personnel records of law enforcement officers that could be used to impeach the officers or undermine their credibility as witnesses. The policies likewise describe constitutional and state statutory requirements for disclosure of this specific type of evidence, the timing for disclosures, and *Brady* material related to law enforcement witnesses.

Third, in December 2016, OCDA instituted a policy to ensure it can handle allegations that prosecutors have violated specific statutory and ethical obligations to provide discovery. Under the policy, prosecutors must report to their supervisor any allegations—whether made orally or in writing, by a defendant or a court—that they intentionally and in bad faith altered, modified, or withheld any information or evidence filed in a criminal case. If any prosecutor or supervisor believes that there may be some merit to the accusation, they must immediately notify senior leadership, who will brief the District Attorney, who will then take “appropriate actions.”

We have identified a number of shortcomings in OCDA’s Informant Manual and recent policies, all of which we have shared with OCDA previously, and none of which are covered in other OCDA policies. Most importantly, the Manual and new policies do not bind anyone outside of OCDA—including deputies working for OCSD. This gap in accountability is

fundamental to the pattern or practice of violations that we found. OCDA must require a commitment from its law enforcement partners, including OCSD, to adhere to the prosecution team’s Fourteenth Amendment responsibilities. The Office must set parameters on what information must be documented about informants, under what circumstances consideration may be promised or provided to an informant, the points at which OCSD must consult with OCDA about using an informant, and what informant-related information OCSD must provide to OCDA. Without such commitments and accountability, OCDA’s Informant Manual and *Brady* policies will fall short.

Further, the Manual and the new policies do not set out specific procedures for prosecutors to comply with these requirements. One policy reminds prosecutors of their constitutional duty to search for and disclose all *Brady* material possessed by the prosecution team, but does not describe the steps they must take to do so. Similarly, the Informant Manual does not describe how law enforcement officers should provide informant-related material to OCDA. There is a need for specific guidance. As one senior prosecutor (who is responsible for training OCDA and outside agencies on disclosure obligations and confidential informants) explained his process, he would tell law enforcement agents to “give me everything that they have.”

Finally, OCDA’s ethics policy is narrower than the California Rules of Professional Conduct, which requires a prosecutor to timely disclose to the defense all evidence or information the prosecutor “knows or reasonably should know” is exculpatory.<sup>31</sup>

#### 4. Training

Following *Dekraai*, OCDA began providing training on the topic of informants and *Brady*, which was delivered by a senior prosecutor. This training focused on prosecutors’ obligations to comply with *Brady*, including the duty to disclose material within the possession of the prosecution team. But like the new policies, the training failed to instruct prosecutors on *how* they could ensure that they had met this obligation—specifically, it did not offer guidance on how prosecutors can ensure that they actually receive all informant discovery from the entire prosecution team—or provide sufficient detail on what prosecutors’ disclosure obligations are in certain circumstances, such as when informants were not called as witnesses.

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<sup>31</sup> Cal. Rules Prof’l. Conduct r. 3.8(d) (“The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”).



5. Efforts to improve the management and sharing of information

a. *Orange County Informant Index*

During our investigation, OCDA maintained an internal information-sharing system called the Orange County Informant Index (OCII), which “is comprised of a computerized database and hard paper files” that is intended to serve as “a reference point for determining informant issues with regards to *Brady* notification and reliability issues with informants.” We requested direct access to the OCII because, based on its stated purpose, it should contain evidence relevant to any Sixth and Fourteenth Amendment violations. OCDA declined to provide us the access we requested. We were nevertheless able to interview the prosecutor who serves as the OCII administrator, who described the functioning and parameters of the OCII in great detail. In addition, the case files that we received from OCDA at times included discrete entries from the OCII that OCDA had provided to defendants in individual criminal cases. Based on our interview with the OCII administrator and the individual OCII records that we reviewed, we have serious concerns about OCDA’s reliance on the OCII to prevent Sixth and Fourteenth Amendment violations.

The OCII has been, at best, underutilized—a critical shortcoming for a system that the OCII administrator described as “participation-based.” The Index can only serve its function if law enforcement agencies add information to the system and seek out information from the system at all critical junctures. But this did not happen. Before the *Dekraai* proceedings, this was by design; informants only had to be added to the OCII after they had received a benefit. While the tracking of benefits should be a core component of the OCII, restricting the system to informants who already received benefits rendered it underinclusive.

Our review of the OCII entries that OCDA made available to us in individual case files revealed inconsistencies in the kind and quality of information that prosecutors recorded. For example, the OCII entry for the prolific informant Oscar Moriel consisted, in 2014, of an index card with only two entries, dated 2009 and 2014, which merely document that he was added to the OCII in 2009 and used as a witness in 2014. Unless Moriel’s OCII entry has been updated, prior to his death in 2021, it includes no reference to his more than 300 pages of notes, to the dozens of Special Handling Log entries concerning him, to his TRED records, or to the OCSD operation reports documenting his work as an informant. By comparison, other OCII files that we reviewed are more extensive, containing criminal histories, letters of consideration, memoranda regarding prior cooperation, and evidence of unreliability or untruthfulness. The relative completeness of these entries shows the potential of the OCII, but the inconsistency across the Index demonstrates that the system remains unreliable.

OCDA has reported to us that it now automatically cross-references OCII every day against OCDA’s electronic case management system to create a list of potential witnesses who have entries in the OCII database. The OCII coordinator—a Deputy District Attorney assigned to the Major Narcotics Unit—reviews the daily list to verify the match, and, if the individual is to be called by OCDA for its case-in-chief, he provides the supervisor of the unit prosecuting the case written notice that the witness is in the OCII, along with a copy of the OCII file. The file includes, at a minimum, an OCII card with biographical data and law enforcement contacts, and perhaps a criminal history and past letters from law enforcement recommending leniency in

recognition of the informant's assistance. After providing this notice, the OCII Coordinator memorializes that he has done so in the OCII file.

There are still substantial deficiencies with this system. For example, the OCII can be searched only by an informant's identifying information, not by case number, law enforcement agent, or prosecutor. Further, until the OCII contains or at least reflects all discovery that the prosecution team has on custodial informants, and until prosecutors consistently act on that information, the OCII will continue to fall short and fail to serve its purpose of preventing Sixth and Fourteenth Amendment violations.

*b. Document management*

There was considerable variation among the case files that OCDA made available, with some being incomplete or commingled with other cases. When asked, prosecutors could not identify any written policies governing what should be maintained in a case file or how cases should be transferred between successive prosecutors. This had serious consequences not only on the Office's ability to provide information relevant to our investigation but to respond to courts' and defendants' requests in past and ongoing criminal litigation.

For example, in one instance, OCDA was unable to locate the physical case file for a case with *Massiah* and *Brady* issues—a case that necessitated an internal review and the testimony of two prosecutors during *Dekraai*. The file was found in the Santa Ana Police Department five years later. In another instance, a deputy told us that emails she recalled having included in her case file were not there when she reviewed prior to her interview with us. Other prosecutors told us that, when they received cases from predecessors, they were not provided information on custodial informants—or even told of their existence at all. And when we asked which cases the Office had prosecuted with custodial informants, OCDA was unable to tell us at the outset, instead querying their current prosecutors about such cases. This resulted in significant gaps that we were able to identify using public sources. But in the absence of a searchable electronic database, OCDA will continue to struggle to identify and maintain its case materials. The absence of such a system—and more importantly, policies, protocol, and accountability to ensure the Office preserves important case information—will hinder OCDA's ability to manage, oversee, and audit its own performance.

OCDA told us that it plans to move to an electronic system and selected a vendor for this purpose. It has also instituted a policy for transfer of case files. But there is no requirement to document information related to non-testifying informants (or informants about whom that decision has yet to be made) or what discovery OCDA has sought or gathered to date.

OCDA also reported that it will transition to an electronic discovery system. This could assist OCDA in preventing the inconsistent provision and documentation of discovery to defense counsel that we saw in the cases we reviewed. But OCDA still needs a clearly identifiable and understandable standalone *Brady* policy that prosecutors can consult for legal and policy guidance on what they should disclose to defendants on custodial informants. It also needs protocols on where and how prosecutors should look for discovery related to custodial informants so they are not reliant on what—if anything—law enforcement agencies elect to

collect, preserve, and provide prosecutors. An electronic system alone cannot remedy these potential pitfalls.

## VIII. RECOMMENDED REMEDIAL MEASURES

The remedial efforts by OCDA and OCSD described above represent positive steps toward preventing the kinds of Sixth and Fourteenth Amendment violations that occurred in the custodial informant program. But both agencies must do more to address the institutional deficiencies that we have identified in the areas of management, supervision, policy, and training related to the use of custodial informants at the Orange County Jail. These deficiencies must be addressed by OCDA and OCSD in a coordinated manner to ensure that the agencies approach the use of custodial informants consistently and in compliance with all legal requirements. The recommended remedial measures outlined below are consistent with the Department's policies on informants.

Some of the recommended remedial measures outlined below encompass all custodial informants at the Orange County Jail, not only custodial informants who speak to defendants about their charged offenses. This broader scope is sometimes necessary because establishing different systems to manage different kinds of custodial informants would likely create confusion and lead to similar problems to those outlined above. An individual custodial informant may play different roles in different cases over time, and, to satisfy their *Brady* obligations, OCSD and OCDA must maintain information about informants in a way that allows the agencies to capture comprehensive pictures of informants' assistance to law enforcement.

### A. Joint Recommendations to the Orange County District Attorney's Office and the Orange County Sheriff's Department

1. OCDA and OCSD should develop and implement integrated, consistent, and comprehensive custodial informant policies across both agencies addressing the use and disclosure of custodial informants consistent with the Sixth and Fourteenth Amendments and generally accepted practices. The policies should address, at a minimum, constitutional requirements for custodial informants, what types of documentation must be created and maintained when custodial informants are used, disclosure obligations for testifying and non-testifying custodial informants, the scope of the "prosecution team," and the duty to locate and preserve *Brady* material possessed by OCSD for production to OCDA.
2. OCDA and OCSD should develop and implement formal *Brady* and *Massiah* training programs that reflect the policies of both agencies and incorporate adult learning methods, written curricula, and generally accepted training practices. Each agency should provide *Brady* and *Massiah* training to relevant employees annually and create mechanisms to elicit feedback from trainees regarding the quality of the trainings. Both agencies should review and reconcile their respective *Brady* and *Massiah* training curricula before any training occurs.
3. OCDA and OCSD should develop, train on, and implement electronic document management systems for the secure maintenance and sharing of information related to

custodial informants to ensure that OCDA has unfettered access to custodial informant information in the possession of OCSD.

4. OCDA and OCSD should develop and implement a memorandum of understanding between the agencies setting forth the responsibilities of both agencies when custodial informants are used. The memorandum should mirror the relevant provision of the custodial informant policies of both agencies and should require open communication and close coordination from the moment that either agency contemplates using a custodial informant in the Orange County Jail. The memorandum should also state that OCDA may not be able to go forward with using a custodial informant in a criminal prosecution if the protocols set forth in the memorandum and OCDA's policies are not followed.
5. OCDA and OCSD should undertake a comprehensive, coordinated review of past investigations and prosecutions that involved custodial informants. The goals of this review should be to identify all information that must be disclosed to criminal defendants and to ensure that each agency has complete records of past custodial informant activity. The review should encompass all sources of information of custodial informant activity, including the Special Handling Log; TRED and other classification records; housing histories for custodial informants and investigative targets; and OCDA and OCSD reports, memoranda, and case files related to custodial informants. If OCDA or OCSD learns of materials relevant to their review that are no longer in existence, they should document what materials are missing, the reason that they are missing, and what efforts the agencies made to obtain the materials.
6. OCDA and OCSD should regularly audit and cross-reference their custodial informant files to ensure the files' completeness and consistency across the agencies. The agencies should immediately correct any errors or incompleteness revealed by the audits and cross-references.
7. OCDA and OCSD's custodial informant policies, training, document management system, comprehensive review, memorandum of understanding, and audits should encompass any situation in which an individual assists law enforcement while in custody. OCDA and OCSD should ensure that they employ a consistent approach to documentation, record preservation, coordination, and communication regardless of whether an informant is seeking benefits in exchange for assistance, is a co-defendant of the investigative target, or is expected to testify.

#### **B. Recommendations to the Orange County District Attorney's Office**

8. OCDA should develop and implement an electronic document management system to securely maintain and preserve all OCDA case files.
9. OCDA should develop, train on, and implement a comprehensive policy detailing the proper organization and content of case files. The policy should specify what information must be included in case files and should require that all required materials for a case in the possession of prosecutors, investigators, paralegals, and support staff must be

contained in the case file. The policy should require OCDA case files to include documentation of all instances in which an individual in custody seeks to assist law enforcement with an investigation or prosecution, any information that the individual provides, any benefits that the individual seeks or receives, and all information in the possession of the prosecution team bearing on the individual's reliability or credibility. The policy should also require prosecutors to document all decisions regarding disclosure to the defense and to maintain a copy of all disclosures made to the defense.

10. OCDA should develop, train on, and implement a policy requiring OCDA to audit case files to determine compliance with the case file policy. The policy should require that any errors revealed by the audits must be corrected immediately.
11. OCDA should revise, train on, and implement a comprehensive policy detailing the information and materials that must be contained in the Orange County Informant Index (OCII). The policy should require OCDA to maintain all custodial informant materials in the OCII, including all previous instances in which informants sought to assist law enforcement, all benefits that the informants sought or received, and all information related to informants' reliability and credibility.
12. OCDA should develop, train on, and implement a policy requiring the agency to regularly audit OCII files to determine whether OCDA has consistently updated the files with required entries and materials. The policy should require that any errors revealed by the audits must be corrected immediately.
13. OCDA should develop and implement a process for identifying all custodial informant cases in which disclosures must be made pursuant to the Sixth and Fourteenth Amendments, making legally required disclosures, and appropriately resolving convictions tainted by violations. As part of this process, OCDA should develop a case intake system to accept cases for review from any source, including prosecutors, other law enforcement agencies, defense attorneys, criminal defendants, and members of the public. To the extent possible, consistent with OCDA's ethical obligations regarding privilege, grand jury secrecy, and obligations to protect informant confidentiality, OCDA should involve individuals from the criminal defense bar, other prosecuting agencies, former judicial officials, and state bar authorities in its case reviews and should document all decisions about disclosure and case resolution.
14. OCDA should develop and implement policies for OCDA supervisors with regard to legally required disclosures to the defense and the use of custodial informants.
15. OCDA should develop and implement formal training for supervisors that reflects its policies on custodial informants, and incorporates adult learning methods, written curricula, and generally accepted training practices. OCDA should provide comprehensive training to new supervisors as well as annual training to all supervisors, and OCDA should create mechanisms to elicit feedback from trainees regarding the quality of the trainings.

16. OCDA should hold supervisors accountable for the quality of their supervision of prosecutors' compliance with the Sixth and Fourteenth Amendments.
17. OCDA should develop, train on, and implement a policy on the transfer of cases from one prosecutor to another that identifies categories of cases that require the transferring prosecutor to submit a formal memorandum detailing case status, disclosures made to the defense, any contemplated use of custodial informants, and any discussions with defense counsel about possible settlement.

### **C. Recommendations to the Orange County Sheriff's Department**

18. OCSD should develop, train on, and implement a policy requiring OCSD to maintain comprehensive files on custodial informants. The policy should require OCSD to maintain all custodial informant materials in the informant files, including all previous instances in which informants sought to assist law enforcement, all benefits that the informants sought or received, and all information related to informants' reliability and credibility.
19. OCSD should develop, train on, and implement a policy requiring the agency to regularly audit custodial informant files to determine whether OCSD has consistently updated the files with required entries and materials. The policy should require that any errors revealed by the audits must be corrected immediately.
20. OCSD should ensure that classification and housing decisions are, or continue to be, based on objective factors and made consistently across OCSD facilities.
21. OCSD should implement a systematic, on-going audit process of the initial and reclassification custody and special population assessments to ensure their reliability, accuracy, and compliance with OCSD classification policies and national generally accepted classification standards.
22. OCSD should implement a systematic audit process to ensure offenders are housed according to their custody/risk assessments and any special population status(es), i.e., protective custody, disciplinary history, administrative segregation, medical needs, and mental health needs.
23. OCSD should hold classification supervisors accountable for the quality of their management of the accuracy, reliability, and integrity of the custody assessments and housing assignments.

## **IX. CONCLUSION**

For the foregoing reasons, the United States concludes that there is reasonable cause to believe that Orange County District Attorney's Office and the Orange County Sheriff's Department engaged in a pattern or practice of conduct that deprived individuals of rights protected by the Sixth and Fourteenth Amendments. This pattern or practice included OCSD's coordinated placement of custodial informants near represented defendants in homicide and gang-related prosecutions while they were housed in the Orange County Jail in order to elicit

incriminating statements about their charged crimes in violation of the Sixth Amendment. Our investigation revealed that the custodial informant program operated for years and that OCSD employed elaborate systems to cultivate, manage, deploy, and reward informants in the jail. The practice that formed the backbone of the program—intentional placement of informants with targeted defendants—was systemized and managed by the Special Handling Unit and concentrated in particular parts of the jail. The Special Handling Unit documented its informant cultivation and management in secretive jail systems such as TRED records and the Special Handling Log.

OCDA failed to disclose material, favorable evidence about informants to defendants in violation of the Fourteenth Amendment. These disclosure failures allowed the custodial informant program in the Orange County Jail to operate so widely and for so long because so much of its existence remained hidden from prosecutors and certainly from criminal defendants.

OCDA prosecutors often failed to investigate the backgrounds of custodial informants in their cases, missing key discovery that was in the hands of law enforcement, and even missing information from their own tracking system, the Orange County Informant Index. Prosecutors failed to inquire of OCSD how and why multiple or repeat custodial informants were surfacing in their cases. And when faced with overwhelming evidence of OCSD's informant program during the *Dekraai* proceedings, OCDA continued to resist making disclosures in that case and, in other cases, simply dropped informants from their witness lists to avoid surfacing *Massiah* and *Brady* problems. Even now, almost six years after the *Dekraai* recusal ruling, OCDA has failed to undertake a sufficient inquiry into the scope of the custodial informant program in Orange County.

We are encouraged by the steps that OCDA and OCSD have taken to prevent Sixth and Fourteenth Amendment violations from occurring in the future. We look forward to working with OCDA and OSCD on identifying the further reforms that need to be developed and implemented.