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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and TINA JACKSON,

Plaintiffs/Petitioners,

vs.

ANTHONY J. RACKAUCKAS, in his official capacity as Orange County District Attorney; and SANDRA HUTCHENS, in her official capacity as Orange County Sheriff,

Defendants/Respondents.

Case No. 30-2018-00983799-CU-CR-CXC

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE

Assigned: Judge Glenda Sanders
Dept.: CX101

Action Filed: April 4, 2018

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INTRODUCTION

1. The Orange County criminal justice system is in disrepair and disrepute. Public faith in the integrity of the Orange County District Attorney's Office ("OCDA") and the Orange County Sheriff's Department ("OCSD"), and in their ability to seek justice, has been eviscerated by continuous revelations of systemic misconduct.

2. For well over thirty years, the OCSD—currently led by Defendant/Respondent Sandra Hutchens—has operated and continues to operate a secret jailhouse informant program with the full knowledge and participation of the OCDA—currently led by Defendant/Respondent Tony Rackauckas. Large numbers of "professional" informants, working at the behest of both agencies, have interrogated criminal defendants in violation of those defendants' right to an attorney.

3. Informants also violated criminal defendants' due process rights by threatening violence to obtain the information they wanted. Some went as far as telling defendants they had been "greenlit"—meaning that the prisoner was on a hit list to be assaulted or even executed on sight, a fate they could only avoid by confessing to their involvement in the crime. In some cases, the choice was clear: confess or die.

4. Informants were paid handsomely—hundreds of thousands of dollars, in some cases—and often given time off their own sentences in exchange for unlawfully collecting this information.

5. In addition to these informant payouts, the OCDA and OCSD wasted and illegally expended public funds by creating, maintaining, and concealing this illegal program.

6. To conceal the arrangement, OCSD sheriffs have repeatedly lied under oath about the program's existence and participants. The OCDA also has routinely suppressed or failed to request evidence that could expose the constitutional violations. Such evidence, including at least three separate informant-related databases that have come to light via discovery in recent Orange County criminal cases, plainly is favorable to criminal defendants who have interacted with these informants, and the OCDA's refusal to produce it violates the United States and California Constitutions. The OCDA's policy, practice, and custom of withholding such evidence also

violates California's mandate that all evidence be produced 30 days in advance of trial.

7. The OCDA's misconduct has tainted numerous cases—the precise number is yet unknown, and that uncertainty is part of the reason this lawsuit is necessary.

8. "The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, *but in the integrity of the prosecutor*." *People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1116 (quoting Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 537)). Yet, a number of OCDA prosecutors have directly participated in concealing evidence of the program, or the office's wrongdoing, or both.

9. Despite conclusive evidence of the informant program, including in the findings of a superior court judge and appellate court justices, the OCSD continues to deny its existence. The OCDA, for its part, only acknowledged the existence of a program under the weight of multiple revelations—and then implausibly claimed to have been unaware of it prior to 2016.

10. Tony Rackauckas, Sandra Hutchens, and their respective offices have deprived many, many individuals of their constitutional and statutory rights. They have needlessly compromised meritorious prosecutions and denied individuals who are innocent until proven guilty the evidence needed to defend themselves.

11. Worse yet, Rackauckas and Hutchens have made clear that they do not intend to put a halt to these abuses. It is well past time for both of them to comply with the law. No less than the integrity of the criminal justice system in Orange County is at stake.

JURISDICTION AND VENUE

12. This court has jurisdiction under Code of Civil Procedure §§ 525, 526, 526a, 1060, 1085, and 1086.

13. Venue is proper in the Superior Court of Orange County under Code of Civil Procedure §§ 393, 394, and 395 because the Defendants/Respondents in this action are public officers situated in Orange County, and all of the acts and omissions raised in this Complaint/Petition occurred in Orange County.

PARTIES

A. Plaintiffs/Petitioners (hereinafter "Plaintiffs")

14. Plaintiff and Petitioner the People for the Ethical Operation of Prosecutors and Law Enforcement ("P.E.O.P.L.E.") is an association of residents of Orange County that includes at least one member who pays property taxes to Orange County and others who pay sales taxes to Orange County. P.E.O.P.L.E. has engaged in efforts to educate the community about the shortcomings in the Orange County criminal justice system, including within the OCSD and OCDA. Amongst other things, P.E.O.P.L.E. launched a successful court watch program, bringing community members into pre-trial hearings to look for potential *Brady* violations and to pressure actors in the criminal justice system to comply with the law.

15. P.E.O.P.L.E. has an interest in preventing the illegal expenditure of county funds, including Defendants'/Respondents' expenditure of county funds on administering, implementing, concealing, and defending the numerous illegal policies and practices addressed in this Complaint/Petition.

16. In addition to its interests as taxpayers in Orange County, P.E.O.P.L.E., as an association of California and United States residents, is interested in having Defendants'/Respondents' statutory and constitutional duties enforced. There is a substantial public interest in the enforcement of Defendants'/Respondents' duties to comply with the U.S. and California Constitutions, as well as California law, to ensure the integrity of the Orange County criminal justice system.

17. Plaintiff and Petitioner Bethany Webb is a resident of Orange County and pays taxes, including property taxes and sales taxes, to Orange County. Ms. Webb's sister was murdered and her mother was critically injured by Scott Dekraai, whose case was tainted by the informant program. The exposure of the OCDA and OCSD's misconduct resulted in the extended delay of an otherwise open and shut case, denying her the closure she deserved.

18. Ms. Webb has an interest in preventing the illegal expenditure of county funds, including Defendants'/Respondents' expenditure of county funds on administering, implementing, concealing, and defending the numerous illegal policies and practices addressed in this complaint.

19. As a California and United States resident, Ms. Webb also is interested in having Defendants'/Respondents' statutory and constitutional duties enforced. There is a substantial public interest in the enforcement of Defendants'/Respondents' duties to comply with the U.S. and California Constitutions, as well as California law, in order to ensure the integrity of the Orange County criminal justice system.

20. Plaintiff and Petitioner Theresa Smith is a resident of Orange County and pays taxes, including sales taxes, to Orange County. Ms. Smith founded an organization called the Law Enforcement Accountability Network ("LEAN") after her son was killed by Anaheim police. The OCDA found that the shooting was justified, a decision that Ms. Smith believes was incorrect and unjustified.

21. Ms. Smith has an interest in preventing the illegal expenditure of county funds, including Defendants'/Respondents' expenditure of county funds on administering, implementing, concealing, and defending the numerous illegal policies and practices addressed in this complaint.

22. As a California and United States resident, Ms. Smith has a substantial public interest in the enforcement of Defendants'/Respondents' duties to comply with the U.S. and California Constitutions, as well as California law, in order to ensure the integrity of the Orange County criminal justice system.

23. Plaintiff and Petitioner Tina Jackson is a resident of Orange County and pays taxes, including sales taxes, to Orange County. Ms. Jackson founded an organization called Angels for Justice, which provides and connects prisoners and their families with a wide array of services.

24. Ms. Jackson has an interest in preventing the illegal expenditure of county funds, including Defendants'/Respondents' expenditure of county funds on administering, implementing, concealing, and defending the numerous illegal policies and practices addressed in this complaint.

25. As a California and United States resident, Ms. Jackson has a substantial public interest in the enforcement of Defendants'/Respondents' duties to comply with the U.S. and California Constitutions, as well as California law, in order to ensure the integrity of the Orange County criminal justice system.

B. Defendants/Respondents (hereinafter "Defendants")

26. Defendant and Respondent Anthony J. "Tony" Rackauckas, Jr., is the District Attorney of Orange County, California. He is the chief policymaker for the OCDA. He is sued in his official capacity.

27. Defendant and Respondent Sandra Hutchens is the Sheriff of Orange County, California. She is the chief policymaker for the OCSD. She is sued in her official capacity.

ALLEGATIONS

A. The OCDA and OCSD Operate an Extensive, Systematic, and Illegal Jailhouse Informant Program that Violates Inmates' Constitutional and Statutory Rights

28. For over thirty years, the OCSD and OCDA have operated and continue to operate a confidential, illegal jailhouse informant program ("Informant Program") that violates the constitutional and statutory rights of people accused of crimes in numerous ways. Long concealed from defense attorneys, their clients, the courts, and the public at large, the Informant Program was uncovered in two of the highest profile murder cases the County of Orange has ever seen—*People v. Scott Dekraai* and *People v. Daniel Wozniak*. It has since resulted in dismissed or severely reduced charges in at least eighteen cases, and cast doubt on many more of which Plaintiffs are aware.

29. The key components of the Informant Program are:

a. The OCSD cultivates confidential informants to secretly gather information from targeted criminal defendants;

b. The OCSD strategically places the informants in close proximity to the target criminal defendants in order to facilitate interrogations, despite the fact that these criminal defendants are represented by counsel, and therefore such interrogations are illegal;

c. The OCSD keeps detailed logs and databases of the informants' movements and interactions with criminal defendants, employing special sheriffs' deputies to maintain the records;

d. The OCSD then rewards confidential informants who elicit information, including confessions, with jailhouse perks, money, and, most importantly, "consideration"—such

as time off their sentences;

e. The OCDA, fully aware of the Informant Program and its constitutional infirmities, then takes this information from the OCSD and uses it in its prosecutions of those criminal defendants; and, finally,

f. The OCDA does not disclose anything about the Informant Program to the criminal defendants or their defense attorneys, in further violation of the U.S. Constitution, California Constitution, and California law.

30. Although Defendant Hutchens has repeatedly told the Orange County community that no Informant Program exists, the OCSD until recently had a dedicated unit, the Special Handling Unit ("SHU"),[1] which worked with informants and developed plans by which those informants would elicit illegal confessions.

31. SHU deputies have been specifically trained in the cultivation and deployment of jailhouse informants. Details of SHU's work with informants are maintained by SHU deputies or their predecessors in the databases described below.

32. Other members of the OCSD, including deputies throughout the Orange County jail system, also engage in informant-related activities, such as cultivation of informants and intelligence gathering.

33. OCSD deputies have been taught that their notes and other records concerning informants must be kept secret, even from the courts. Indeed, as discussed below, OCSD officers have testified, falsely and under oath, that there is no Informant Program in the Orange County jails and that there are no records of informant movements or other documentation relating to informant activity.

34. Many of the OCSD's and the OCDA's attempts to shield the informant program arise from this basic fact: the program, at its core, is designed and orchestrated in order to violate

[1] On information and belief, the Special Handling Unit (hereinafter referred to as the "SHU") has been rebranded as the Custody Intelligence Unit, or CIU. Without discovery, Plaintiffs cannot be certain whether the CIU has inherited some or all of the SHU's (or former SHU's) work with respect to informants. Accordingly, Plaintiffs herein refer to any unit, past or present, which conducts informant-related work as the SHU.

inmates' constitutional rights and to cover up these violations.

35. The OCDA knows and has at all relevant times known that the OCSD's operation of the Informant Program is illegal, but it has continued to use information produced by the Program in criminal trials. As the Court of Appeal stated in *People v. Dekraai*: "Not only did the OCDA intentionally or negligently ignore the Sheriff's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the [confidential informant] program."

1. Informant Operations in Detail

36. Informant operations follow a basic pattern. The OCSD identifies a "target inmate" from whom the OCSD, the OCDA, or another law enforcement agency wishes to extract information. The OCSD then moves the target inmate and/or the informant so that the informant is in close proximity to the target, often in the same or an adjoining cell.

37. Often, the OCSD places multiple informants and targets in the same housing module in order to create a target-rich atmosphere for obtaining statements; these modules are commonly referred to as an "informant tank."

38. The OCSD also routinely arranges for "coincidental" contact between the target and informant in other locations, including while inmates are being transferred to and from jail. The OCSD has a practice of directing such operations against inmates whom the OCSD and OCDA know are represented by counsel.

39. The OCSD and OCDA have developed a core group of professional informants who are used in scheme after scheme. The informants almost always face their own serious criminal charges, and are often members of criminal street gangs, such as the Mexican Mafia. The OCSD and OCDA reward the informants with lenient sentences, vast sums of government money, and numerous other benefits.

a) Informant Tanks

40. As noted above, informant tanks are modules within the jails in which the OCSD strategically places informants so that the informants can interact frequently with target criminal defendants.

41. In 2015, a former Special Handling deputy named Jonathan Larson testified that the OCSD used informant tanks. The following exchange occurred between Larson and Dekraai's attorney Scott Sanders during a February 2015 hearing:

> Q. And is there -- there is kind of -- there is a tank in the jail in particular where there is -- you tend to put some of your informants from time to time to collect information. Is that fair to say?
>
> A. Yes.
>
> Q. And is that J? Has that been J in the past?
>
> A. Yes.
>
> Q. So you put kind of high value inmates and you put some of the informants in there; is that right?
>
> A. Yes.

42. In 2016, Dekraai's attorney uncovered a database called the Special Handling Log (described below). It revealed numerous entries about the use of informant tanks, including, most notably, Module L, Sector 20 ("L-20"), located in the Intake Release Center.

43. Other documents uncovered during the *Dekraai* litigation corroborated the OCSD's use of informant tanks. One such document, entitled "L-20 Thoughts/Requests," included the following bullet points:

- "Run the Module like any other NORMAL Module.….<u>No Special treatment</u>."
- "There are several current investigations being conducted, so <u>PLEASE</u> don't get into anything (exchanging any information with inmates). PLEASE contact S/H."
- "Module Deputies are NOT the Inmate's handlers…. Special Handling are the handlers."

44. Several members of the OCSD admitted during cross examination in *Dekraai* that both Module L-20 and tanks within Mod J were used as informant tanks.

45. Cases from the 1980s confirm that the OCSD's use of informant tanks stretches

back decades. Beginning no later than the early 1980s, the OCSD used Module A, Sector 4 ("Mod A-4") as an informant tank.

46. For instance, in *People v. William Charles Payton* in 1980, Alejandro Garcia obtained statements from capital murder defendant William Charles Payton while both were housed in Mod A-4. The next year, veteran informant Daniel Escalera also obtained statements from Payton while both were housed in the same module. Escalera was released, and then was returned to Mod A-4, and reported obtaining still more statements from Payton. During a taped interview with the OCDA in 1981, Escalera said "I got put in custody so they put me back up there with him so I . . . can . . . ." Unsurprisingly, the interviewing ADAs did not ask any follow-up questions.

b) The Databases

47. The OCSD and OCDA keep detailed records regarding their use of informants, showing, among other things, when and why informants were moved, including when they were moved to be closer to a target defendant; the tactics the informants used in eliciting information; benefits received for their participation in information gathering; inculpatory information that they elicited; and, sometimes, exculpatory statements made by the target inmate that the OCSD and OCDA never provided to defense counsel.

48. *The OCII*. Since at least 1980, the OCDA has maintained the Orange County Informant Index ("OCII"). The OCII contains significant material information regarding informants used by the OCSD and OCDA, including, for example, information relating to those informants' reliability and credibility and whether they have received benefits for their work.

49. On information and belief, the OCDA had and currently has a policy, practice, and custom of not producing information from the OCII to defense counsel, in violation of the OCDA's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Penal Code section 1054.1 et seq.

50. In *People v. Henry Rodriguez*, for example, Rodriguez's counsel specifically requested from the OCDA information about benefits received by Michael Garrity, to whom Rodriguez purportedly made incriminating statements while the two were housed together in

protective custody. The defense suspected that Garrity was a career informant who was working at the behest of law enforcement, in violation of *Massiah v. United States*, 377 U.S. 201 (1964), and that Garrity had received benefits for his work, including on Rodriguez's case.

51. Both the OCDA and the OCSD vigorously denied that Garrity expected consideration for his statements against Rodriguez, and painted him, based on the record then before the court, as a concerned individual acting solely out of altruistic motives. However, among the items suppressed in both Rodriguez's first and second trials was an entry from the OCII indicating that Garrity had received consideration in past cases in Orange County, which was important evidence regarding his reasonable expectations about possible compensation for his statements against Rodriguez. This should have been produced to Rodriguez.

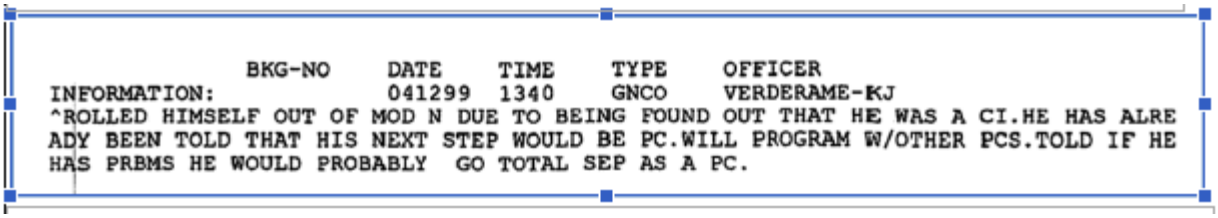
52. The same OCII entry contained explicit instructions not to produce this evidence to the defense, stating, "BJ [as the trial court concluded, likely Senior DDA Bob Jones] instructed [the then prosecuting attorney] [Dennis] Conway to refrain from providing copies to [the] defense unless ordered by the court. Per E. Hatcher [the OCII coordinator at the time]."

ORANGE COUNTY DISTRICT ATTORNEY'S DEFENDANT/~~INFORMANT~~ INDEX
HISTORY CARD

DATE	RESUME
2-3-05	inquiry by DDA D. Conway wants to use him as wit in homicide trial and needs to know if anything to discover. Checked LA clear - no hit. Per E. Hatcher
2-10-05	I called Riverside DA's office and spoke to Ron Lillard. Asked him to check to see if CI had worked for them he got back to me and said there was no record to indicate that he had received any consideration on any cases there. Bob Jones provided me with court Docs from our county which indicated CI did receive consideration on cases here in our county. BJ provided copy of Docs to DDA Conway. Copy of Docs is in CI Docu file also. BJ instructed Conway to refrain from providing copies to defense unless ordered by the court. Per E. Hatcher

53. *The TRED Records*. The OCSD also maintains an internal database, TRED, which tracks inmate placements throughout the jail. TRED records are created for each inmate and often

document important information including the reasons for particular housing movements, observations about the inmate, and communications between the inmate and deputies. TREDs also contain details about informant operations, classification adjustments designed to make informants more effective, efforts to incentivize performance, and descriptions of the reliability of particular informants.



	BKG-NO	DATE	TIME	TYPE	OFFICER
INFORMATION:		041299	1340	GNCO	VERDERAME-KJ

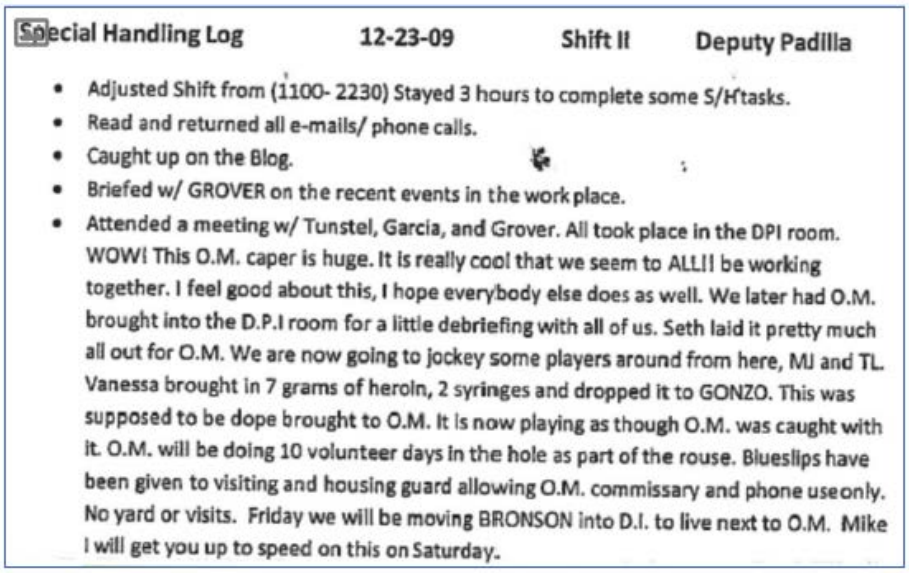
^ROLLED HIMSELF OUT OF MOD N DUE TO BEING FOUND OUT THAT HE WAS A CI.HE HAS ALRE ADY BEEN TOLD THAT HIS NEXT STEP WOULD BE PC.WILL PROGRAM W/OTHER PCS.TOLD IF HE HAS PRBMS HE WOULD PROBABLY GO TOTAL SEP AS A PC.

54. Although the OCDA, including Tony Rackauckas himself, denied knowledge of the TRED database, Sheriff Hutchens later told ABC7 Eyewitness News that "certainly the District Attorney's Office has known about it for years."[2]

55. *The Special Handling Log*. Until revelations of its existence caused the Department to cease its use, the OCSD also maintained another database called the Special Handling Log ("Log"). The Log showed that OCSD personnel often coordinated the movement and placement of informants at the behest of, or in cooperation with, local law enforcement. The 1,127 page Log detailed informant operations that were carried out against inmates represented by counsel, in clear violation of *Massiah*.

56. In the excerpt below, obtained by Scott Sanders during the *People v. Wozniak* case, Special Handling Deputy Padilla describes a "rouse" [sic] involving "O.M." (on information and belief, informant Oscar Moriel).

[2] Brown, *Did Orange County law enforcement break law by using jailhouse informants?*, *available at*: http://abc7.com/news/did-oc-law-enforcement-break-law-by-using-jailhouse-informants/1047095/.



Special Handling Log 12-23-09 Shift II Deputy Padilla

- Adjusted Shift from (1100- 2230) Stayed 3 hours to complete some S/H tasks.
- Read and returned all e-mails/ phone calls.
- Caught up on the Blog.
- Briefed w/ GROVER on the recent events in the work place.
- Attended a meeting w/ Tunstel, Garcia, and Grover. All took place in the DPI room. WOW! This O.M. caper is huge. It is really cool that we seem to ALL!! be working together. I feel good about this, I hope everybody else does as well. We later had O.M. brought into the D.P.I room for a little debriefing with all of us. Seth laid it pretty much all out for O.M. We are now going to jockey some players around from here, MJ and TL. Vanessa brought in 7 grams of heroin, 2 syringes and dropped it to GONZO. This was supposed to be dope brought to O.M. It is now playing as though O.M. was caught with it. O.M. will be doing 10 volunteer days in the hole as part of the rouse. Blueslips have been given to visiting and housing guard allowing O.M. commissary and phone use only. No yard or visits. Friday we will be moving BRONSON into D.I. to live next to O.M. Mike I will get you up to speed on this on Saturday.

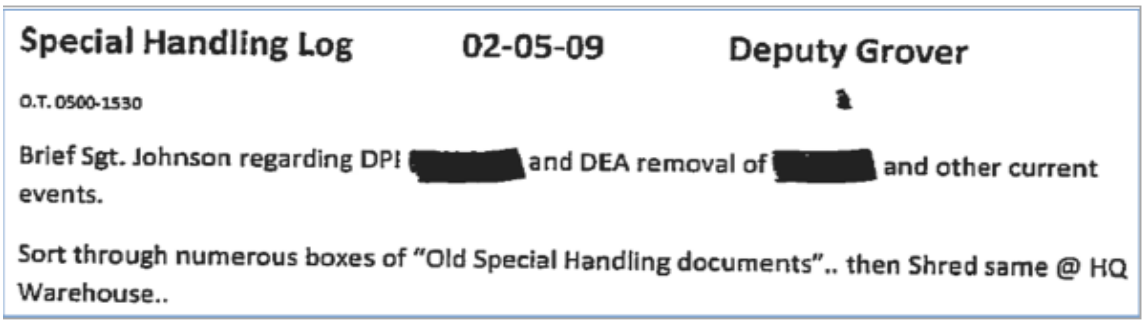
57. Padilla's and others' systematic control over inmate movements, and over the scheme as a whole, is clear:

- "We . . . had O.M. brought into the D.P.I. room for a little debriefing with all of us."
- "We are now going to jockey some players around from here."
- "O.M. will be doing 10 volunteer days in the hole as part of the rouse."
- "Vanessa brought in 7 grams of heroin, 2 syringes and dropped it to GONZO. This was supposed to be dope brought to O.M. It is now playing as through O.M. was caught with it."
- "Friday we will be moving BRONSON into D.I. [on information and belief, "disciplinary isolation"] to live next to O.M."

58. An entry from Padilla two weeks later, on January 8, 2010, reads: "We are suggesting that we call for O.M. [Oscar Moriel] to get his rec. time so if anything needs to be passed we can get it ourselves!!! Before he goes into Iso with Vega. I'm concerned about this info getting into non coop hands. We are on the precipice of this case and it is getting a little scary how much info. [sic] we are extracting."

59. The Log also makes clear that deputies engaged in document shredding sessions, despite being under an order from the U.S. Department of Justice not to destroy jail records. For

example, on February 5, 2009, Deputy Grover wrote: "Sort through numerous boxes of 'Old Special Handling documents' . . . Then Shred same @ HQ Warehouse."


Special Handling Log 02-05-09 Deputy Grover

O.T. 0500-1530

Brief Sgt. Johnson regarding DPI [redacted] and DEA removal of [redacted] and other current events.

Sort through numerous boxes of "Old Special Handling documents".. then Shred same @ HQ Warehouse..

60. There also are significant gaps in the Log, including those related to the *Dekraai* case. These gaps raise questions about what other evidence of the unconstitutional program deputies may have withheld and/or destroyed.

61. The Log and certain OCII and TRED records were produced only after protracted litigation in which the OCDA and the OCSD repeatedly denied that they were in possession of such records. They also repeatedly defied a court order to produce all such documents.

62. On information and belief, there are more records and databases that contain information about the Informant Program, its constitutional violations, and the OCDA's and the OCSD's attempts to shield the program from public and judicial scrutiny. On information and belief, such records include, but are not limited to: logs maintained by the SHU deputies located at the Theo Lacy Facility; notes maintained by module deputies in their own logs or elsewhere; Sergeant Activity Logs; Briefing Logs; Administrative Segregation Logs; and tens of thousands of pages obtained by the U.S. Department of Justice (in a federal investigation of a defendant who had a state attempted murder charge dismissed because his case was tainted by the Informant Program) and the California Attorney General (which initiated an investigation of the Program itself).

63. Such records also include documents and information held by the OCSD's Custody Intelligence Unit ("CIU"). CIU currently superintends 68 boxes of information chronicling 30 years of informant operations. At a recent hearing in the *Dekraai* matter in May 2017, the head of

the CIU, Lieutenant Andrew Stephens, testified that the CIU was still in the process of scanning these documents, and had not actually reviewed any of them, despite being in their possession since 2016.

2. The Informant Program Routinely Violates Inmates' Constitutional Right to Counsel Under Massiah

64. The Informant Program described above allows for the implementation of Defendants' policy, practice, and custom of using informants to elicit information from inmates after those inmates have been charged and are represented by counsel, in violation of *Massiah*. This has been documented in numerous cases and, on information and belief, has occurred in countless more.

65. *Defendants' illegal use of Oscar Moriel in People v. Leonel Vega*. Professional informant Oscar Moriel was a member of the Delhi street gang. Moriel was facing a life sentence for attempted premeditated murder after he repeatedly shot his victim in the back. In later court testimony, he also admitted to having killed five or six people while "hunting" rival gang members.

66. In 2009, Moriel told SAPD investigators, in recorded conversations withheld from criminal defendants in cases in which Moriel testified, that he would supply information about unsolved cases if he was given "more options." He told the investigators that his ability to "think more clearly" would improve if he received sufficient sentencing consideration in return. Moriel was promised that he would "get consideration for the level that [he] perform[ed]."

67. In the long-concealed recordings, Moriel told SAPD detectives that his memory of his conversations with Vega would be aided significantly by "options" in his case, and that, given sufficient rewards, he could "make it seem like it was yesterday."

68. Detective Charles Flynn, in turn, informed Moriel: "[Y]ou'll get maximum consideration for everything you do." He assured Moriel that their conversations would "never, ever come[] out."

69. Moriel subsequently illegally elicited incriminating information from a murder defendant named Leonel Vega. The OCSD recorded the conversation, and Moriel took notes.

The recording captured Vega denying involvement in the crime, but Moriel's notes stated that Vega admitted to the murder. The OCDA did not disclose the favorable recorded conversations between Moriel and Vega to the defense. Instead, the OCDA turned over only the four pages (of more than two hundred) of Moriel's notes in which Moriel claimed that Vega admitted to the murder. Vega was then convicted.

70. *Defendants' illegal use of Fernando Perez in People v. Dekraai*. The *Massiah* violations in Leonel Vega's case were neither accidents nor isolated incidents. Revelations in *People v. Dekraai*, a high-profile Orange County death penalty case, made clear that the Informant Program is widespread and highly systematized.

71. Four days after Scott Dekraai was charged with murder in 2011, when Dekraai was represented by counsel, the OCSD moved Dekraai into a cell next to Fernando Perez, a longtime OCSD and OCDA informant, and a member of the Mexican Mafia.

72. In a later meeting with Perez and the OCSD, Deputy District Attorney Dan Wagner learned that Perez reported receiving statements about the crime from Dekraai, after having been placed next to Dekraai in order to elicit information. Wagner and members of his prosecution team then interviewed Perez, but elected to not ask any questions about his informant history. In fact, he was awaiting sentencing on his own case, which could have exceeded forty-five years.

73. Rather than refuse to use information produced by Perez, the OCDA obtained the OCSD's approval to place a tape recorder in the jail to record Perez's discussions with Dekraai, even though the OCDA knew that Dekraai was represented by counsel. The OCSD and OCDA captured more than 100 hours of conversation between Perez and Dekraai.

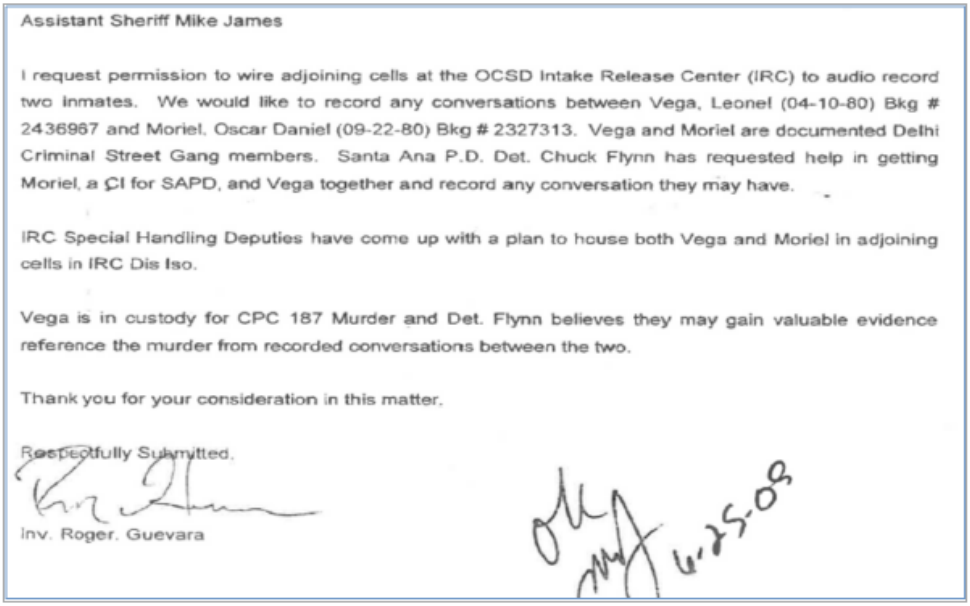
74. The OCDA went to great lengths to keep any information relating to Perez from Dekraai's defense counsel, including by refusing to turn over material they were required to produce under *Brady v. Maryland*. The OCDA also repeatedly misinformed the court about the existence and extent of the Informant Program. As *People v. Dekraai* proceeded, it became clear that the OCSD and OCDA were trying to conceal not only material information relating to Perez and the "confession" that he elicited, but also the very existence of an Informant Program that routinely and systematically violates the United States and California Constitutions.

75. *Dis-Iso Schemes*. One popular scheme employed by the OCSD was the so-called "dis-iso" scheme in which an informant and a target inmate are placed together in the jail's disciplinary isolation—dis-iso—cell, thereby giving the informant direct access to the inmate and strongly suggesting to the inmate that the informant could not be working for the OCSD.

76. In *People v. Leonel Vega*, SHU deputies intentionally orchestrated the violation of Vega's *Massiah* rights by placing him in disciplinary isolation along with Oscar Moriel. Both Moriel and SHU deputies later denied, in sworn testimony, that Vega and Moriel had been intentionally placed together in order to facilitate Moriel's informant work.

77. The SHU deputies continued their denials even after they were confronted with notes Moriel wrote, which discussed use of the dis-iso scam with Moriel and a second target. Those notes were withheld from Vega for five years.

78. In addition, a 2009 letter that also was withheld from Vega for years showed that an OCSD investigator wrote to the Assistant Sheriff that the Santa Ana police had "requested help in getting Moriel, an informant 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."



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 (04-10-80) Bkg # 2436987 and Moriel, Oscar Daniel (09-22-80) Bkg # 2327313. 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.

Thank you for your consideration in this matter.

Respectfully Submitted,

Inv. Roger. Guevara

6.25.09

79. Even *after* all of this information, including a letter that plainly laid out the "dis-iso" scheme, came to light, the OCSD and OCDA continued to insist that they had done nothing

wrong. Indeed, SHU deputy Seth Tunstall and Deputy DA Erik Peterson suggested that a former federal prosecutor, Judge Terri Flynn-Peister, had limited the documents that the OCDA could share with Vega. In her own testimony, Judge Flynn-Peister denied this accusation, and the Court credited her denial.

80. In *People v. Henry Rodriguez*, the prosecution team directed by the OCDA hid records specifically relevant to (a) the *Massiah* violation that had occurred, (b) the relationship between the informant and said prosecution team, and (c) the benefit to the informant's own case that he received in consideration for his informant efforts directed at Rodriguez.

81. TRED records and various other inmate classification documents made clear that the informant, Michael Garrity, was acting at the behest of the OCSD during his incarceration. Garrity elicited information from Rodriguez while Rodriguez was represented by counsel and then testified to Rodriguez's alleged confession at trial. Rodriguez was then convicted by the jury.

82. As the Court of Appeal eventually found, the OCSD "knew Rodriguez was confessing" to an informant and "facilitated the relationship by allowing them to remain housed next to each other for months." The Court further found that one of the district attorneys "suspected *Massiah* was implicated," but "did nothing to investigate the extent of [the informant's] work as a CI while under OCSD's supervision." Because "[p]ortraying [the informant] as a morally upright inmate with a conscience who was just trying to do the right thing was of paramount importance to the prosecution," the OCDA refused to request records from the OCSD that the OCDA knew or strongly suspected would contradict that story.

3. The Informant Program Routinely Violates Arizona v. Fulminante *by Subjecting Inmates to Threats of Violence to Elicit Information*

83. The constitutional abuses inherent in the OCSD's and the OCDA's Informant Program begin with *Massiah* violations, but they do not end there.

84. Many OCSD and OCDA informants are members of prominent criminal street gangs facing their own criminal charges for violent crimes. These informants routinely use intimidation, including threats of violence and death, in order to elicit information from target

inmates.

85. *Greenlighting*. In one common ploy, called "greenlighting," the informant explains to the target that the informant is a member of a well-known gang, and that the gang has "greenlit" the target, meaning the target is to be attacked, and possibly killed, on sight. The informant further explains that the target has been "greenlit" because of the target's involvement in the crime for which he is suspected. The informant then warns that the "greenlight" will be rescinded if, and only if, the target confesses to his role in the crime. These confessions are then used against the target at trial, including in cases that culminate in convictions.

86. The OCSD and OCDA are and have at all relevant times been aware that informants routinely used such threats to elicit information, but have done nothing to stop this practice. By turning a blind eye to the threats made by their informants, and by continuing to use these informants to gather information, the OCSD and OCDA facilitate, encourage, and benefit from the continued violation of inmates' constitutional rights.

87. *Defendants' illegal use of Raymond Cuevas and Jose Paredes in multiple criminal cases*. Raymond Cuevas and Jose Paredes are two informants whom the OCSD and OCDA—as well as the LAPD and Los Angeles District Attorney's Office—have repeatedly used. Both have employed threats of violence to coerce confessions from suspects in Orange County and throughout Southern California.

88. Paredes previously held a leadership role in the Mexican Mafia within the Los Angeles jails, and ordered assaults and killings on its behalf. Cuevas was long-time member of a local street gang before turning full-time informant. On numerous occasions, the OCSD placed Cuevas and/or Paredes in proximity to suspects from whom the OCSD wished to elicit confessions. Cuevas and/or Paredes then coerced confessions from suspects by threatening that the gangs had placed the targets on a green light list for execution, and then promising to have the suspect's names removed from the list if the suspect described his involvement in whatever crime purportedly had landed him on the list.

89. On information and belief, the OCSD and OCDA knew that Cuevas and Paredes had employed threats of violence and murder while working in Orange County. Nevertheless, the

agencies continued to use both men as informants, and continued to pay them generously for their work. During one 18-month period, law enforcement paid Cuevas and Paredes approximately $150,000. Defendants also continued to provide them with other benefits, including gifts, nearly unheard of "perks," and, most importantly, letters supporting reduced sentences for past crimes.

90. In 2012, Cuevas and Paredes coerced a confession from Anthony Calabrese, a suspect in a drive-by shooting. Calabrese was placed in protective custody because law enforcement believed that the Mexican Mafia banned its associates from participating in drive-by shootings, and that Calabrese may have violated this ban. The OCSD suggested that Cuevas and Paredes could mention to Calabrese that he had been green lit because of his presumed violation of the drive-by prohibition.

91. The OCSD then placed Cuevas in protective custody as well, wearing a wire. He informed Calabrese that Calabrese was on a Mexican Mafia green light list because of his involvement in the drive-by, but that Cuevas could have Calabrese removed from the list if Calabrese admitted his role in the shooting. Paredes later made the same offer. Calabrese eventually confessed.

92. Cuevas employed a variation on the same approach in the case of Nuzzio Begaren, who the OCDA believed had hired gang members to murder his wife. One of the alleged murderers-for-hire was Rudy Duran. Cuevas threatened Duran that if Duran did not testify about the events leading to the murder, the Mexican Mafia would order him killed and Cuevas would personally assault him.

93. The OCSD recorded those threats. Duran later testified on behalf of the prosecution. The OCDA never turned over the recording of Cuevas' threats to Begaren's defense attorneys. Begaren was then convicted. And the OCSD and OCDA continued to use Cuevas and Paredes as informants.

94. *Defendants' illegal use of Brian Ruorock in People v. Jose Derosas*. Brian Ruorock employed a similar green light scam in coercing a confession from Jose Derosas, who had been charged with attempted murder. The charge arose from a confrontation between Jose Derosas, his brother Oscar, and a man named David Montoya. When Montoya appeared to reach

for something in his waistband, one of the Derosas allegedly shot Montoya in the chest. The Derosas were moved into Ruorock's section of the Orange County Jail shortly after their arrest in 2011.

95. Ruorock, like Cuevas and Paredes, was a Mexican Mafia gang member. Like Cuevas and Paredes, he used his gang affiliation and threats of violence to coerce a confession from Jesus Derosas. He told Derosas that the Mexican Mafia believed that a child had been present at the Montoya shooting, a violation of gang rules for which Derosas could be killed. Derosas succumbed to the ploy, writing a letter to Ruorock in which he insisted that no child witnessed the confrontation with Montoya. For the OCSD, this confirmed that Derosas played a role in the shooting. Derosas was then convicted of several counts.

96. *Defendants' illegal use of Lance Wulff and Jeremy Bowles in People v. Derek Adams*. Yet another example arose in the case of Derek Adams. Adams was arrested on suspicion of murdering Gregory Heintz, who had ties to a white supremacist gang. The OCSD placed two professional informants, Lance Wulff and Jeremy Bowles, who had their own white supremacist ties, in close proximity to Adams. Wulff and Bowles used the promise of protection from gang retribution to coerce a confession from Adams. Wulff told Adams that if Adams had shot Heintz for personal, rather than gang-related, reasons, Adams would be safe. Adams then confessed to his role in the crime. Adams was then convicted.

97. The threats these informants made and continue to make are plain, they are explicit, and they are unconstitutional. Indeed, the green light scam bears a striking resemblance to the ploy used 25 years ago, in Arizona, by an informant named Anthony Sarivola. Sarivola befriended a fellow inmate, Oreste Fulminante, who was suspected of having killed his 11-year-old stepdaughter. Sarivola knew that other inmates were treating Fulminante poorly because he was accused of murdering a child. Sarivola promised Fulminante protection, but only if Fulminante would tell him about the murder. Fulminante then confessed that he had murdered his stepdaughter. The Supreme Court determined that, under these circumstances, Fulminante's confession was unconstitutionally coerced. The coercion violated his rights under the Fifth and Fourteenth Amendments because he had been presented with a "credible threat of physical

violence."

4. The OCDA Has a Policy, Practice, and Custom of Withholding Information Related to the Informant Program in Violation of **Brady v. Maryland** *and California Penal Code section 1054 et seq.*

98. On information and belief, the OCDA has a policy, practice, and custom of withholding information relating to its Informant Program from defense counsel, in violation of its constitutional and statutory obligations. Some of the cases in which material related to the Informant Program was wrongfully withheld ended in convictions. As discussed above, the OCDA withheld enormous amounts of *Brady* material in the *Dekraai* matter. Both the Superior Court and Court of Appeal found that the OCDA had violated its constitutional duties in that case.

99. *Dekraai* exposed the OCDA's cavalier attitude toward *Brady* and Penal Code section 1054. The testimony of Deputy District Attorney Peterson, for example, made clear that he simply withheld evidence whenever it advantaged him to do so. His only explanation for his repeated failures to comply with the law was that, after *fifteen years* as an Orange County District Attorney, his understanding of *Brady* was still "evolving."

100. The OCDA intentionally withheld information regarding Perez from Dekraai's defense counsel. For example, OCDA Investigator Bob Erickson wrote a memorandum to Deputy District Attorney Erik Peterson detailing the useful information unconstitutionally elicited from Dekraai and presenting it as "consideration" in Petersen's sentencing requests for Perez. Erickson wrote "I respectfully request that you keep [Perez's] name, as it relates to the *Dekraai* case, confidential. Nothing about [the informant] or his statements regarding the *Dekraai* case have been discovered to the defense." The OCDA withheld this memo from the defense for nearly two years, and disclosed it only when the court ordered it to do so.

101. Deputy District Attorney Wagner authored a memo to others within the OCDA's office stating: "Before deciding if/when/how to disclose Fernando's identity to the *Dekraai* defense lawyers, we are going to need to talk to the prosecutor(s) on Fernando's other cases and analyze several things," including the prospect of not calling Perez as a witness in the other cases

in which he had gathered information from defendants, to bolster his credibility in Dekraai's case. When the OCDA did eventually disclose Perez's identity, it withheld notes in Perez's file cautioning that Perez should not be used as an informant because he had proven to be untrustworthy.

102. The OCDA did not just fail to turn over information regarding Perez; it actively resisted discovery requests from Dekraai's attorney, Scott Sanders. Sanders first requested discovery relating to Perez on October 15, 2012. The OCDA denied this request on the basis that discovery was inappropriate because it intended to introduce only the recordings of Perez's conversations with Dekraai, not to call Perez as a witness. Only after the court granted a defense motion and ordered the OCDA to disclose records relating to Perez did the office reveal what it had been fighting so hard to keep hidden.

103. Over the next eight months, the OCDA produced several thousand pages of documents and audio and video files, much of which the government should have disclosed earlier to defense counsel, pursuant to *Brady*. Even today, there remains a gap in the Special Handling Log of approximately 5 ½ consecutive months. The timing of this gap covers the period immediately prior to Perez's contacts with Dekraai.

104. It is perhaps unsurprising that, in every one of the examples of *Massiah* and *Fulminante* violations discussed above, the OCDA also failed to abide by *Brady* and Penal Code Section 1054, as they failed to do in *Dekraai*. For example, in *People v. Nuzzio Begaren*, there was significant evidence that longtime informant Raymond Cuevas unconstitutionally coerced a witness to testify against Begaren by threatening him with violence. The OCDA never turned over to Begaren a tape that conclusively showed that Cuevas threatened to kill the witness, Duran. That tape *also* memorialized Cuevas and Duran's discussions about murdering another witness whom Cuevas deemed a "rat." The long-time OCDA Senior Deputy who withheld this evidence told a reporter that the information was not discoverable because it was "redundant."

105. Although the prosecutor later conceded that the information should have been produced pursuant to Penal Code section 1054.1, both he and Deputy District Attorney Wagner continued to insist that this evidence was not *Brady* material. In other words, two senior members

of the OCDA claimed that evidence showing (a) a potential *Massiah* violation; (b) a potential *Fulminante* violation; and (c) that the witness who testified against Begaren was planning to kill another man, was somehow not required to be produced.

106. The OCDA's routine flouting of its statutory and constitutional obligations is not limited to the cases discussed above. In *People v. Joseph Govey*, the OCDA resisted turning over impeachment information related to the informant in the case and then, on the final day for discovery compliance ordered by the court, dismissed the most serious charges against Govey. Two days later, rather than produce information that would impeach an OCDA informant and shed further light on the Informant Program, the OCDA dismissed the entire case. In the case against Govey's co-defendant, *People v. Shirley Williams*, the OCDA withheld the same information. After Williams filed a habeas petition, the OCDA vacated Williams' gang enhancement conviction, allowing her to be released from prison.

107. In *People v. Eric Ortiz*, the defense moved for a new trial based upon the failure of the prosecution to disclose information related to a key informant. The court held a hearing to determine if the withheld information would be relevant to a *Massiah* claim. A number of SHU deputies refused to testify, instead invoking their Fifth Amendment rights. The court vacated Ortiz's conviction.

108. Perhaps most shocking is the case of 14-year-old Luis Vega. In 2009, Santa Ana police arrested Vega, along with a man named Alvaro Sanchez, for attempted murder. Eyewitnesses told police that Vega was a member of the Delhi street gang and had been in the car with the shooter. Although police had no record of Vega being associated with the Delhi gang, and although Vega had an alibi for the time of the shooting, Vega was arrested and held on a $1,000,000 bond.

109. Shortly after Vega's arrest, two of the OCSD's professional informants independently informed police, in written statements, that Vega was innocent. Professional informant Juan Calderon told prosecutors both that Vega was innocent, and that Alvaro Sanchez had participated in the shooting. Oscar Moriel was, as discussed above, one of Orange County's most prolific informants. He, too, told law enforcement officials that Sanchez had confessed to

the crime *and* had admitted that Vega was not present. Prosecutors reacted by giving Sanchez a deal—16 years in prison instead of a potential life sentence—while hiding the exculpatory information from Vega's defense counsel. Luis Vega, an innocent child, languished in jail for two years before the OCDA finally dropped the charges against him, all because they wanted to hide the existence of the illegal Informant Program. Indeed, the OCDA never acknowledged that they buried the information that could have freed him; Scott Sanders uncovered it during the *Dekraai* proceedings.

110. These are only examples. The OCDA had, and, on information and belief, still has, a policy, practice, and custom of not obtaining informant-related *Brady* material from the OCSD, including but not limited to failing to investigate or otherwise confirm whether the OCSD has handed over all possible *Brady* evidence.

111. The OCDA's failure to disclose the Brady evidence discussed above also violates California Penal Code Section 1054.1, which requires OCDA prosecutors to disclose, without a request from defense counsel, "[r]elevant written or recorded statements of witnesses" (among other things). The OCDA also has a policy, practice, and custom of withholding evidence long past the 30 days before trial when California Penal Code Section 1054.7 requires such evidence be disclosed. Therefore, its policy, practice, and custom of failing to turn over information related to the Informant Program at all violates Sections 1054.1 and 1054.7 in all the same cases.

B. <u>The OCDA and OCSD's Words and Actions Establish that They Have Not Implemented Necessary Reforms and Are Not Planning To Do So</u>

112. In addition to hiding the Informant Program from defense counsel, the OCDA and OCSD have gone to great lengths to convince the public and the courts that there is no Informant Program; that the few informants the agencies have worked with always operated within the confines of the law; and that OCDA attorneys at all times properly disclosed information about these informants. None of this is true.

113. When the Informant Program and its built-in constitutional abuses first came to light in *Dekraai*, the OCSD and OCDA did not acknowledge any error. Instead, the agencies began a multi-year fight to keep the Informant Program intact, a fight in which the OCSD and

OCDA repeatedly, and knowingly, misled the court, the public, and defense counsel.

114. In *Dekraai*, multiple OCSD officers testified, falsely and under oath, that there is no Informant Program in the Orange County jails and that there are no records of informant movements or other documentation relating to informant activity.

115. Special Handling Deputies denied, under oath, that an Informant Program exists in the jails. Asked why an informant had been moved near Dekraai, they blamed nursing staff or pled ignorance, and denied there was any way to refresh their memories of why various inmate movements had been made. Deputy Grover testified that the time he spent working with informants was "less than zero."

116. After TRED records finally were revealed over the OCSD and OCDA's vociferous objections, the OCSD officers were forced to change their tune. Deputy Grover testified in 2015 that he was instructed not to mention TREDs from "day one in training in classification and Special Handling." Deputy Bieker, another SHU deputy, testified that he had been instructed to hide the existence of the TREDs: "My understanding of the TRED was that they weren't allowed in court for whatever reason."

117. Incredibly, OCSD Deputy Garcia admitted in 2015 that he had reviewed TRED records prior to his initial testimony and then *testified that no such records existed*. His explanation? "[T]hat's the way we were trained."

118. Garcia confessed that, at a meeting with the OCDA, his "superiors [at OCSD] instructed him to keep TRED records confidential." OCSD officers also admitted that TRED was, in fact, used to track informant and inmate movement and contained other notes regarding various informants.

119. The OCDA failed to be forthcoming in *Dekraai* and has repeatedly, and falsely, publicly argued, in court and otherwise, that it had no knowledge of or control over the OCSD's unconstitutional use of informants.

120. With regard to the OCDA, the *Dekraai* trial court concluded that "the People's failure to provide the defense with any information whatsoever for nearly two years concerning the existence of the computerized TRED housing records maintained within the Orange County

Jail, despite repeated orders from this court to produce just such records, constitutes a serious discovery violation."

121. The trial court ultimately disqualified the entire OCDA because the office could not be trusted to ensure that the OCSD would provide all required evidence. The Court of Appeal upheld the trial court's decision, ruling that, among other things, the "OCDA's loyalty to the Sheriff interfered with its ability to discharge its constitutional and statutory obligations . . . . Contrary to the Attorney General's[3] attempts to lay all the blame on the Sheriff, the OCDA was complicit in the wrongdoing—DAs Wagner and Simmons knew Perez questioned Dekraai, who was represented by counsel, and then obtained OCSD approval to place a recording device in Dekraai's cell for Perez to obtain additional statements."

122. The Court of Appeal added: "Based on the extensive misconduct in the record, we disagree with the Attorney General [that] it is 'sheer speculation that law enforcement officials will continue to conceal information' when the OCDA has failed to and continues to fail to properly supervise the Sheriff." The Court concluded, "[t]he magnitude of the systemic problems cannot be overlooked."

123. In the face of revelations that their offices orchestrated, condoned, and shielded from scrutiny an Informant Program that spawned innumerable constitutional violations, the OCDA and the OCSD continue to insist that they have done nothing wrong. Indeed, both agencies have gone to great lengths to mislead the courts, and the citizens of Orange County, into believing that there is no systematized Informant Program and that any constitutional violations were rare and merely the result of "good faith" mistakes.

124. For example, Defendant Hutchens has said the issue is merely one of "semantics" and that "there is no program, per se. There is activity." Contrary to these attempts to place blame on a few rogue deputies, staff throughout the chain of command knew about the Informant Program. As documented in the 2009 letter to Assistant Sheriff James, discussed above, knowledge of the program pervaded the Department's ranks.

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[3] Because the entire OCDA had been recused, the California Attorney General took over the case on appeal.

125. In the words of the trial court in *Dekraai*: "The sheriff can say what she wants, she can ignore the facts, if she thinks that's politically beneficial," but "[w]e know what happened. The debate over what has been going on in the jails is over."

126. After the OCDA was finally forced to turn over the TRED records in *Dekraai*, Tony Rackauckas and others in his office proclaimed publicly, and falsely, that the OCDA had no knowledge of the existence of these records. Asked about the lengthy history of the Informant Program in an interview with 60 Minutes in 2017, Rackauckas insisted, "It's simply not the case," and flatly stated that, directly contrary to the findings of California courts in multiple cases,[4] his "office did not withhold evidence; we have not withheld any evidence."

127. More recently, Rackauckas insinuated that his office was disqualified from the *Dekraai* case because Judge Goethals' son was denied a position at the OCDA, not as a result of any misconduct by the Office, and that the Court of Appeals upheld the Judge's decision only because of their social connections.

128. These are not the words of agencies that intend to change their ways. On information and belief, neither the OCDA nor the OCSD has taken, or intends to take, the steps necessary to stop the ongoing constitutional violations detailed above, which have become part and parcel of the way in which crimes are investigated and prosecuted in Orange County.

129. On information and belief, all of the policies, practices, and customs detailed above continue to exist.

130. In fact, a recent filing by Scott Sanders in *People v. Oscar Galeno Garcia* highlights the OCDA's continuing violations of their discovery obligations related to this illegal Informant Program under *Brady* and sections 1054.1 and 1054.7. The search warrant that formed the basis of the case against Garcia relied on statements from an out-of-custody informant to Deputy Larson—who testified inconsistently about the Informant Program in *Dekraai* and *Rodriguez*. Garcia's counsel requested discovery related to Larson's involvement in the Informant Program from DA Sandra Nassar—who was recently disciplined by the State Bar Court for her

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[4] For example, and as discussed above, the California Court of Appeal in both *Rodriguez* and *Dekraai* found that the OCDA intentionally withheld *Brady* information.

blatant and unrepentant discovery violations in a different case—but he received nothing.

131. Nassar's refusal to provide relevant impeachment evidence inspired the defense to thoroughly research other cases in Orange County involving deputies associated with the Informant Program. Through this research, Sanders discovered at least 146 other cases in which it appears that the OCDA has failed to turn over such required evidence. In these 146 cases—all of which involve events after June 9, 2016—former and current deputies who were assigned to the SHU prior to February 2016 were identified as testifying witnesses or declarants. However, there is no indication in these cases that the OCDA disclosed evidence of the deputies' involvement in or misconduct related to the illegal Informant Program.

132. For the past thirty years, the OCDA and OCSD have concealed a complex Informant Program that intentionally and routinely violates criminal defendants' rights. As the Court of Appeal found, the agencies' problems are "systemic" and "cannot be overlooked." The Court of Appeal rightly rejected the argument that it is "sheer speculation that law enforcement officials will continue to conceal information." Given the systemic abuses detailed herein, it is a near certainty.

First Cause of Action

(42 U.S.C. Section 1983; Violation of the 5th & 14th Amendments' Due Process Guarantee of *Brady* Evidence)

By All Plaintiffs

133. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

134. The Due Process Clause of the United States Constitution requires prosecutors to produce to criminal defendants all favorable, material evidence.

135. Defendants, however, have a policy, practice, and custom of suppressing evidence that is material and favorable to the defense, including evidence contained in multiple databases of information related to informants.

136. Defendants implement this policy, practice, and custom by failing to conduct basic inquiries into the existence of favorable evidence and/or by hiding the evidence that is material

and favorable to the defense of which they have knowledge.

137. Defendants' unconstitutional policy, practice, and custom directly and proximately caused systemic violations of the 5th and 14th Amendments. As a result, Plaintiffs P.E.O.P.L.E. and Webb have suffered ongoing injuries necessitating relief.

Second Cause of Action

(Violation of California Constitution Article 1, Section 7)

By All Plaintiffs

138. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

139. Article 1, Section 7 of the California Constitution guarantees the right to due process of law, including the right to receive favorable, material evidence.

140. In spite of these clear constitutional mandates, Defendants routinely fail to obtain from law enforcement agencies and disclose to criminal defendants evidence that is favorable to the defense.

141. Defendants also customarily suppress evidence that is favorable to the defense, including evidence contained in, among other places, multiple databases of information related to informants.

142. Defendants' unconstitutional policy, practice, and custom directly and proximately caused systematic violations of Article 1, Section 7 of the California Constitution. As a result, Plaintiffs P.E.O.P.L.E. and Webb have suffered ongoing injuries necessitating relief.

Third Cause of Action

(Writ of Mandate; Violation of California Penal Code Section 1054 et seq.)

By All Plaintiffs

143. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

144. California Penal Code Section 1054.1 mandates that the prosecution disclose to criminal defendants and/or their attorneys, among other things, "Any exculpatory evidence," "Statements of all defendants," and "Relevant written or recorded statements of witnesses or

reports of the statements of witnesses whom the prosecutor intends to call at the trial," regardless of whether it is material.

145. California Penal Code Section 1054.5 mandates that the prosecution respond to discovery requests within 15 days, and Section 1054.7 mandates that evidence be provided "at least 30 days prior to trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred."

146. In spite of these clear statutory mandates, Defendants customarily suppress evidence that is favorable to the defense, statements of criminal defendants, and statements of testifying witnesses. Both agencies have concealed, among other things, the existence of and evidence contained in multiple databases of information related to informants; failed to conduct basic inquiries into the existence of favorable evidence; and systematically suppressed other favorable evidence in their possession. On information and belief, Defendants also have systematically failed to produce evidence within the statutory time limits prescribed in the Penal Code.

147. Defendants' policy, practice, and custom directly and proximately caused systematic violations of California Penal Code 1054 et seq. As a result, Plaintiffs have suffered ongoing injuries necessitating relief.

Fourth Cause of Action

(42 U.S.C. Section 1983; Violation of the 6th & 14th Amendments' Guarantee of the Right to an Attorney)

By All Plaintiffs

148. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

149. The 6th and 14th Amendments to the U.S. Constitution prohibit the elicitation of incriminating information from criminal defendants after their right to an attorney has attached, including interrogation by informants working at the behest of the government.

150. In spite of these clear constitutional mandates, as detailed above, the OCDA and OCSD have a policy, practice, and custom of using jailhouse informants to elicit incriminating

information from individuals after their right to an attorney has attached.

151. Defendants' unconstitutional policy, practice, and custom directly and proximately caused systematic violations of the 6th and 14th Amendments. As a result, Plaintiffs P.E.O.P.L.E. and Webb have suffered ongoing injuries necessitating relief.

Fifth Cause of Action

(Violation of California Constitution Article 1, Section 15)

By All Plaintiffs

152. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

153. Article 1, Section 15 of the California Constitution guarantees the right to an attorney and prohibits the elicitation of incriminating information from criminal defendants after their right to an attorney has attached. This provision also bars interrogation by informants working at the behest of the government.

154. In spite of these clear constitutional mandates, as detailed above, the OCDA and OCSD have a policy, practice, and custom of using jailhouse informants to elicit incriminating information from individuals after their right to an attorney has attached.

155. Defendants' unconstitutional policy, practice, and custom directly and proximately caused the violations of Article 1, Section 5 of the California Constitution. As a result, Plaintiffs P.E.O.P.L.E. and Webb have suffered ongoing injuries necessitating relief.

Sixth Cause of Action

(Writ of Mandate; Violation of California Penal Code Section 4001.1(B))

By All Plaintiffs

156. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

157. California Penal Code Section 4001.1(b) mandates that "No law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a criminal defendant, which is deliberately designed to elicit incriminating remarks."

158. In spite of this clear statutory mandate, as detailed above, the OCDA and OCSD have a policy, practice, and custom of using jailhouse informants to elicit incriminating information from individuals after their right to an attorney has attached.

159. Defendants' policy, practice, and custom directly and proximately caused the violations of California Penal Code Section 4001.1(b). As a result, Plaintiffs have suffered ongoing injuries necessitating relief.

Seventh Cause of Action

(42 U.S.C. Section 1983; Violation of the 5th & 14th Amendments' Guarantee of Freedom from Coercive Interrogation)

By All Plaintiffs

160. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

161. The 5th and 14th Amendments to the U.S. Constitution prohibit the use of coercive methods to interrogate suspects and criminal defendants, including interrogations by informants working at the behest of the government.

162. Defendants know that informants in their employ have a custom of using coercive interrogation methods to elicit incriminating information from suspects and criminal defendants. These threats have included suggestions that an informant will not provide protection from harm or death by gang members unless the suspect confesses. Defendants have a policy, practice, and custom of approving of the informants' use of threats to elicit confessions.

163. Defendants' unconstitutional policy, practice, and custom directly and proximately caused the violations of the 5th and 14th Amendments. As a result, Plaintiffs P.E.O.P.L.E. and Webb have suffered ongoing injuries necessitating relief.

Eighth Cause of Action

(Violation of California Constitution Article 1, Section 7)

By All Plaintiffs

164. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

165. Article 1, Section 7 of the California Constitution guarantees the right to due process of law and prohibits the use of coercive methods to interrogate suspects and criminal defendants, including interrogations by informants working at the behest of the government.

166. Informants repeatedly use coercive interrogation methods to elicit incriminating information from suspects and criminal defendants at the behest of and/or with the knowledge and approval of the Defendants. These threats have included suggestions that an informant will not provide protection from harm or death by gang members unless the suspect confesses.

167. Defendants' unconstitutional policy, practice, and custom directly and proximately caused the violations of Article 1, Section 7 of the California Constitution. As a result, Plaintiffs have suffered ongoing injuries necessitating relief.

Ninth Cause of Action

(Taxpayer Action Under California Code of Civil Procedure Section 526a to Prevent Illegal Expenditure of Funds)

By All Plaintiffs

168. Plaintiffs re-allege and incorporate by reference each of the allegations above as if fully set forth herein.

169. Defendants are illegally expending and wasting public funds by developing, maintaining, and concealing the Informant Program, including through taking the specific actions alleged in this Complaint, all of which were and are supported by public funds.

170. Defendants are illegally expending and wasting public funds by developing, maintaining, and enforcing policies, practices, and customs that violate the constitutional and statutory provisions described above.

171. Defendants are illegally expending and wasting public funds by performing their duties in violation of the constitutional and statutory provisions described above.

172. On information and belief, these wastes and illegal expenditures are ongoing and as a result, Plaintiffs have suffered ongoing injuries necessitating relief.

Prayer for Relief

Plaintiffs respectfully request that this Court grant the following relief:

A. A declaration that Defendants' policies, practices, or customs detailed above violate the right to counsel as guaranteed by the U.S. Constitution and California Constitution by using informants to elicit incriminating information from criminal defendants after their right to counsel has attached.

B. A declaration that Defendants' policies, practices, or customs detailed above violate the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution and the California Constitution by using informants to coerce statements from defendants.

C. A declaration that Defendants' policies, practices, or customs detailed above violate the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution, the California Constitution, and California state law by failing to disclose exculpatory and impeachment evidence related to informants.

D. A writ of mandate ordering Defendants to comply with the discovery mandates of Penal Code Section 1054.1 et seq., including, but not limited to, disclosure of evidence favorable to the defense, disclosure of statements by witnesses who will testify at trial and by defendants in criminal cases, and compliance with the statutory discovery deadlines.

E. A writ of mandate ordering Defendants to comply with California Penal Code Section 4001.1(b), prohibiting the use of informants to elicit incriminating information from criminal defendants after their right to counsel has attached.

F. A permanent injunction enjoining Defendants from failing to comply with their discovery obligations under the U.S. Constitution and California Constitution to disclose exculpatory and impeachment evidence.

G. A permanent injunction enjoining Defendants from using informants to elicit incriminating information from criminal defendants after their right to counsel has attached.

H. A permanent injunction enjoining Defendants from coercing information from individuals in their custody by implicit or explicit threats of violence, including through the use of informants.

I. A permanent injunction requiring that if the OCDA intends to use at a criminal defendant's trial the testimony of a person to whom the defendant made a statement against the

defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant (for purposes of this proposed remedy, "Informant"), the state shall disclose to the criminal defendant any information in the possession, custody, or control of the state that is relevant to the Informant's credibility, including:

a. the Informant's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain, and all known information about all cases currently pending against the Informant or cases for which the Informant is currently jailed or confined;

b. any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the Informant's testimony;

c. information concerning other criminal cases in which the Informant has testified, or offered to testify, against a defendant with whom the Informant was imprisoned or confined, including any grant, promise, or offer given by the state in exchange for the testimony;

d. a summary of the Informant's likely testimony or, where available, a copy of the record or transcript made of any sworn proffers or statements; and

e. a copy of the Informant's jail records, including cell movements.

J. A permanent injunction requiring the OCDA to create, maintain, and preserve for disclosure (as relevant) to all criminal defendants whose cases involve an informant a database containing information sufficient to remedy the deficiencies outlined above, including but not limited to information described in subsections (a) through (c) above, and drawing from information gathered from OCSD and other law enforcement partners.

K. A permanent injunction requiring Defendants to (a) identify individuals in whose cases informant(s) testified, provided information, or otherwise were used based on information contained in TRED, OCII, the Special Handling Log, and any other relevant sources of information, (b) notify those individuals that they may have claims for habeas relief and should seek the advice of an attorney, and (c) provide all relevant evidence to those

individuals.

L. Appoint a monitor to assure compliance with the injunctive relief set forth above.

M. Costs and attorneys' fees pursuant to CCP §1021, 42 USC § 1988, and any other applicable law.

N. All other relief the Court deems just and proper.

Respectfully submitted,

DATED: October 1, 2018

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
PETER ELIASBERG
BRENDAN HAMME

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
SOMIL TRIVEDI (*pro hac vice application pending*)
MARIANA KOVEL (*pro hac vice application pending*)

MUNGER, TOLLES & OLSON LLP
JACOB S. KREILKAMP
JOHN L. SCHWAB
THOMAS RUBINSKY
ANNE K. CONLEY

By: _____
Jacob S. Kreilkamp

Attorneys for Plaintiffs/Petitioners

VERIFICATION

I, BETHANY WEBB, declare as follows:

I am a party to this action. I have read the foregoing Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate and know its contents. The matters stated in the foregoing Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate are true to my own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 30, 2018, at Huntington Beach, California.

Beth Webb

BETHANY WEBB

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On October 1, 2018, I served true copies of the following document(s) described as **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

SERVICE LIST

Leon J. Page (leon.page@coco.ocgov.com); Wendy J. Phillips (wendy.phillips@coco.ocgov.com); Rebecca S. Leeds (rebecca.leeds@coco.ocgov.com); D. Kevin Dunn (kevin.dunn@coco.ocgov.com); Carolyn M. Khouzam (carolyn.khouzam@coco.ocgov.com)
OFFICE OF THE COUNTY COUNSEL
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Tel. No. (714) 834-3300
Fax No. (714) 834-2359

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address carol.jette@mto.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 1, 2018, at Los Angeles, California.

Carol Jette