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MEMORANDUM

Date: November 30, 2016

To: Tony Rackauckas
District Attorney

From: Stephen G. Larson

Re: First Quarterly Report re: Monitoring the Implementation of IPPEC Recommendations

I. INTRODUCTION

This memorandum constitutes our first quarterly report regarding our monitoring of the implementation by the Orange County District Attorney's Office ("OCDA") of recommendations made by the Informant Policies and Practices Evaluation Committee ("IPPEC"). This report is intended to provide you with a summary of the work we have performed during our first three months as the Independent Monitor. We are still in the process of reviewing documents and interviewing individuals to learn, process, and evaluate the facts and issues relating to the review conducted by the IPPEC. At this time, therefore, we are not providing any opinions or assessments regarding the OCDA's implementation of the IPPEC's recommendations. We will provide preliminary assessments of the OCDA's implementation of the recommendations in our subsequent quarterly reports and final assessments in our annual reports. Our first annual report will be submitted in August 2017.

II. THE IPPEC REPORT

In July 2015, in response to the controversy surrounding the use of jailhouse informants that developed during the prosecution of *People v. Dekraal*, Orange County Superior Court Case No. 12ZF0128, the OCDA voluntarily assembled a group of lawyers from outside the OCDA's office and a retired judge to independently assess and evaluate the OCDA's policies and practices regarding the use of jailhouse informants. This group became known as the IPPEC. The creation of the IPPEC followed an in-house investigation conducted by the OCDA into legal questions raised concerning the use of in-custody informants and their effects on the rights of defendants who have been charged with crimes.

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The IPPEC conducted a six-month evaluation and issued its report on December 30, 2015. The IPPEC Report contained a list of ten recommendations to the OCDA:

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

Regarding recommendation number 10, the IPPEC suggested that the monitor be a retired judge. In accordance with the IPPEC's recommendation, you selected me and my firm, Larson O'Brien LLP, to serve as the Independent Monitor and to provide the necessary professional legal services to oversee the OCDA's implementation of and compliance with the IPPEC recommendations.

III. ENGAGEMENT OF LARSON O'BRIEN LLP TO SERVE AS THE INDEPENDENT MONITOR AND SUMMARY OF OUR BACKGROUND

On August 9, 2016, the Orange County Board of Supervisors approved a two-year contract with Larson O'Brien LLP appointing us as the Independent Monitor. Pursuant to that contract, Larson O'Brien LLP will examine the issues surrounding the IPPEC report and report to you on the OCDA's implementation of and compliance with the IPPEC recommendations. Larson O'Brien LLP will submit quarterly and annual reports. This memorandum constitutes our initial quarterly report.

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The attorneys primarily responsible for handling this matter are myself, Jerry A. Behnke, and Melissa A. Meister. As set forth below, my team and I have extensive experience in criminal law and procedure, including discovery and the use of informants.

A. Stephen G. Larson

I am a former United States District Judge and a former Chief of the Organized Crime Section of the United States Attorney's Office in Los Angeles. I have a total of 27 years of trial and appellate experience, with over 30 jury trials and more than 20 appellate oral arguments, including appearances before the California Supreme Court and the United States Supreme Court.

As a federal judge, I adjudicated over a thousand cases, both criminal and civil, serving first as a United States Magistrate Judge and then as a District Judge for the Central District of California. I was designated seven times to serve as a Judge for the Ninth Circuit Court of Appeals, and was also a member of the Ninth Circuit's Jury Instruction Committee responsible for drafting and publishing model jury instructions. I presided over a number of high-profile cases, including *United States v. Nazario*, a landmark Military Extraterritorial Jurisdiction Act case involving U.S. Marines accused of manslaughter during the Battle of Fallujah; *United States v. Duro*, in which I blocked the U.S. Bureau of Indian Affairs' decade long effort to close down and expel a major migrant worker camp on the Torres Martinez Indian Reservation; *John Doe v. County of San Bernardino*, which resulted in systematic reform of educational and therapeutic services for disabled youths within the county juvenile hall system; and *Stiegel v. Warner Bros. Entertainment, Inc.*, which determined the ownership of the copyrights to the iconic comic strip Superman.

Since leaving the federal bench to resume private practice, I have successfully represented both plaintiffs and defendants in state and federal trial and appellate courts. Before opening Larson O'Brien, I chaired the litigation department of a national law firm. I presently represent government entities, businesses, and individuals in matters involving complex business disputes and tort claims; domestic and international compliance and sanctions issues; antitrust actions; intellectual property rights; water, environmental, and real property claims; and criminal and regulatory matters. In addition, I have been engaged by both public and private institutions to serve as general counsel; I also have been appointed to oversee internal audits, conduct internal investigations, and arbitrate, mediate, and settle disputes.

I was also a founding member of the United States Department of State Public-Private Partnership for Justice Reform in Afghanistan, and as a prosecutor worked with domestic and foreign law enforcement agencies conducting joint training exercises and investigations in Russia, Kazakhstan, Estonia, Latvia, Poland, Ukraine and South Korea. As a federal judge I was involved in judicial and legal reform efforts in Uzbekistan, Croatia, and Rwanda.

I received a Bachelor of Science in Foreign Service degree from Georgetown University and a Juris Doctor from the University of Southern California Law School. I have taught law school classes in constitutional law, civil rights law, and federal courts, and have conducted law

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Justice Alito in the United States Supreme Court's decision in *Kennedy v. Louisiana*. After law school, Ms. Meister clerked for the Hon. William C. Canby on the Ninth Circuit Court of Appeals.

IV. INDEPENDENT MONITOR'S SCOPE OF WORK

Pursuant to contract number MA-026-17010077, Larson O'Brien LLP will provide professional legal services to the District Attorney and maintain an attorney-client relationship with the District Attorney effective August 10, 2016 through August 9, 2018. Larson O'Brien LLP will examine the issues surrounding the IPPEC report and report to the District Attorney on the OCDA's implementation of and compliance with the IPPEC recommendations.

Initially, Larson O'Brien LLP will pursue an extensive education period to learn, process, and evaluate the facts and issues relating to the review conducted by the IPPEC. As part of this process, Larson O'Brien LLP will review relevant documents, including current OCDA policies, OCDA training materials, and court filings and will meet with and interview OCDA employees and supervisors, IPPEC members, judges, defense attorneys, and law enforcement officials.

Following this initial phase, Larson O'Brien LLP will determine the current status of implementation efforts to date regarding IPPEC recommendations. We will then provide services to the OCDA which include, but are not limited to, the following:

- a. Provide advice regarding establishing or revising policies and procedures regarding the OCDA's use of jailhouse and other types of informants.
- b. Provide advice regarding establishing or revising policies and procedures regarding the discovery obligations of the OCDA.
- c. Provide advice regarding the conduct, policies, and procedures of the CIRC.
- d. Provide advice regarding the OCDA training program and its curriculum and resources.
- e. Provide advice regarding coordinating with law enforcement agencies to implement the OCDA policies and procedures on jailhouse informants and to provide the requisite training to accomplish this objective.
- f. Provide advice regarding the integration of the OCDA Gang and Target Units.
- g. Provide advice regarding the establishment of an OCDA Conviction Integrity Unit.
- h. Provide the necessary training to support the advice given above.

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enforcement training at the FBI National Academy at Quantico and overseas on money laundering, asset forfeiture, and banking regulations.

B. Jerry A. Behnke

Jerry A. Behnke is a former Assistant United States Attorney ("AUSA") and a former Deputy District Attorney ("DDA") with 18 years of experience investigating and prosecuting criminal cases. Mr. Behnke previously served as an AUSA in the Southern District of California, where he was a member of the Major Frauds and Special Prosecutions Section as well as one of the office's discovery coordinators. Mr. Behnke also previously served as an AUSA in the Central District of California, where he was a Deputy Chief in the Riverside branch office. Mr. Behnke frequently provided training and guidance to other AUSAs and to law enforcement agents and officers regarding criminal law and procedure, including discovery. Before his work as a federal prosecutor, Mr. Behnke served as a DDA for Riverside County. Mr. Behnke was one of a group of DDAs assigned to respond to homicides and officer-involved shootings in the Coachella Valley.

Mr. Behnke has conducted more than 40 jury trials in both federal and state court and has handled more than two dozen appeals before the Ninth Circuit Court of Appeals. He has prosecuted a wide variety of crimes, including homicides and other violent crimes, public corruption, complex fraud and other white collar crimes, narcotics trafficking, contraband cigarette trafficking, sexual assaults, domestic violence, child abuse and neglect, and immigration offenses.

As an adjunct professor, Mr. Behnke has taught law school classes on white collar crime, evidence, and appellate advocacy. He graduated Order of the Coif from Loyola Law School, where he was an editor for the Loyola Law Review and a member of the Scott Moot Court Honors Board.

C. Melissa A. Meister

Melissa A. Meister is a former AUSA for the District of Arizona and the Southern District of California. She also served as a Trial Attorney for the Department of Justice in Washington, D.C. Ms. Meister has successfully tried multiple cases to verdict, briefed and argued appeals before five separate federal Court of Appeals, and provided training and mentorship to federal agents on ethics issues. She has extensive experience in fraud investigations and prosecutions, internal investigations and audits, wiretaps, and law enforcement relations. Ms. Meister has authored a United States Supreme Court amicus brief, briefed and argued a death penalty appeal before the Fourth Circuit Court of Appeals, and was an adjunct professor of legal writing at her alma mater, The University of Arizona College of Law.

Ms. Meister graduated summa cum laude and Order of the Coif from The University of Arizona College of Law, where she was an editor for the Arizona Law Review, won the College of Law's moot court competition, and had her law review note, "Murdering Innocence: The Constitutionality of Capital Rape Statutes" published. That note was subsequently cited by

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Larson O'Brien LLP will provide regular reports regarding the status of our work and the OCDA's implementation of the IPPEC's recommendations.

V. SUMMARY OF WORK PERFORMED DURING REPORTING PERIOD

We are currently engaged in the initial intensive education period. OCDA personnel have been cooperative throughout this process and have provided all documents and materials that we have requested. The OCDA has also arranged for meetings with the attorneys and supervisors that we have requested to interview. OCDA attorneys and supervisors have also been cooperative in the interviews and appear to be genuinely interested in assisting with this process and improving the OCDA. We do not believe that we have been denied any information that we have sought so far.

We are in the process of reviewing and analyzing numerous documents, including the following:

- a. IPPEC Report.
- b. *People v. Dekraai* case materials, including court opinions and briefs submitted by the parties.
- c. California Commission on Fair Administration of Justice – Report and Recommendations Regarding Informant Testimony (2006).
- d. Orange County law enforcement agencies' informant policies, including Orange County Sheriff's Department, Santa Ana Police Department, and Anaheim Police Department.
- e. Informant policies from other District Attorney's Offices, including San Diego County, Los Angeles County, Riverside County, and San Bernardino County.
- f. OCDA Informant Policy (both former and revised).
- g. OCDA training materials related to internal training of OCDA staff and external training of law enforcement officers.
- h. 1989-1990 Los Angeles County Grand Jury Report.
- i. Information re: Confidential Informant Review Committee.
- j. OCDA Operational Audit – 2015 (Altmayer Report).
- k. Information regarding the Orange County Informant Index and Case Management System.

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We have also interviewed 16 OCDA employees, including the District Attorney, Assistant District Attorneys, and Deputy District Attorneys from several different units such as the appellate and training, gangs, homicide, DNA, human trafficking, and special prosecutions units. We have also interviewed the outside member of CIRC.

VI. SUMMARY OF OBSERVATIONS REGARDING IMPLEMENTATION EFFORTS

Because we are still engaged in the initial education phase, it would be premature to offer any opinions or assessment of the OCDA's implementation of IPPEC's recommendations at this time. We can, however, report on some observations that we have made so far related to the implementation of IPPEC's recommendations. Below is a summary of our observations. We will provide a more detailed analysis of the implementation efforts in our annual report.

The IPPEC offered ten recommendations in its final report. According to the IPPEC's report, the IPPEC's recommendations were targeted to eliminate deficiencies that IPPEC identified and which IPPEC believed contributed to the jailhouse informant issues.

A. Recommendation No. 1: Revise OCDA Policies and Procedures Regarding the Use of Jailhouse Informants

The OCDA has revised its Informant Manual. This manual includes the OCDA's current policies and procedures regarding the use of jailhouse informants. The revised Informant Manual is now available on the OCDA website.

B. Recommendation No. 2: Establish a Confidential Informant Review Committee

The OCDA has established a CIRC. The CIRC includes a member from outside the OCDA—retired Orange County Superior Court Judge Stephen Sundvold. The CIRC's protocols and procedures are outlined in the revised OCDA Informant Manual.

According to the Informant Manual, the CIRC was created to provide an effective and efficient process for reviewing informant-related issues within the OCDA and to serve as a resource for prosecutors and law enforcement agencies so that proper legal standards are maintained and followed throughout the criminal justice process. Going forward, no case will be prosecuted if a jailhouse informant is involved, and no jailhouse informant will be utilized in the prosecution of a case, without prior approval of the CIRC. Similarly, no case involving a *Perkins* Operation¹ will be prosecuted without prior approval of the CIRC. Additionally, law

¹ *Perkins* Operations derive their name from the United States Supreme Court case *Illinois v. Perkins*, 496 U.S. 292 (1990). In *Perkins*, the Supreme Court held that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. *Id.* at 300. Lloyd Perkins, a suspect in a murder investigation, was in custody on a charge unrelated to the murder. *Id.* at 294. An undercover government agent posing as another inmate was placed in Perkins' cellblock. *Id.* at 294-95. The agent then asked Perkins questions that elicited

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enforcement agencies shall contact the CIRC when (1) there are questions about a confidential informant-related issue involving a homicide, gang or sexual assault case; (2) the use of a jailhouse informant and/or a *Perkins* Operation is being contemplated; (3) when a jailhouse informant is used and/or a *Perkins* Operation is conducted, irrespective of success or failure; and/or (4) an informant is involved in a high-profile case.

C. Recommendation No. 3: Overhaul the OCDA Training Program

We have learned during our initial review that the OCDA was already in the process of overhauling its training program at the time of the IPPEC report. The OCDA created a training unit which was combined with the law and motion unit in April 2015 to create the new Appellate and Training Unit. Within the Appellate and Training Unit, the Assistant Head of Court and two DDAs work full time on training. In addition to traditional live training, the OCDA offers training in multiple formats, including video publications, case updates, and training bulletins. Between April 2015 and October 2016, the OCDA conducted approximately 28 office-wide live training programs. This included a mandatory full day training program on discovery as well as an office-wide symposium on the privilege, impact, and role of being a prosecutor. Training is also offered through what OCDA calls "road shows," which are training programs conducted at individual units within OCDA during the lunch hour. We understand that between April 2015 and October 2016, the OCDA conducted approximately 90 "road show" training programs. In addition, in September 2015, the OCDA launched a new training program referred to as the Orange County Prosecutors Academy, which includes three phases—phase one for new DDAs, phase two for DDAs with nine to twelve months of experience, and phase three for DDAs with three to five years of experience.

D. Recommendation No. 4: Law Enforcement Agency Coordination & Training in Orange County Informant Index ("OCII")

IPPEC's fourth recommendation concerns coordinating with all law enforcement agencies in Orange County regarding jailhouse informant protocols and procedures and engaging in detailed training on the OCII. The OCDA conducts training for law enforcement agencies on a variety of matters including discovery and informants. Among other things, it has been reported to us that the OCDA conducts a training course for new peace officers at the Orange County Sheriff's Department Academy. We have been advised that since 2015, OCDA has conducted more than 100 training programs for outside agencies on various topics.

The OCDA is also working to have law enforcement agencies digitize the newly revised OCDA Informant Manual and upload it onto the agencies' intranet.

incriminating statements about the murder. *Id.* at 295. The Supreme Court held that the interests protected by *Miranda* are not implicated in these types of cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents. *Id.* at 300.

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E. Recommendation No. 5: Restructure the OCDA Gang/Target Unit

The OCDA is in the process of combining the Gang and Target Units into a single unit. We understand that the new model creates jurisdictional teams within the unit—a Central Team, North Team, West Team, and South Team—which are dictated by the location of courthouses within the County. There will be a single point of contact for law enforcement agencies, which will be a different DDA every month. This point of contact is the designated person whom law enforcement officers are to contact about filing new cases. New cases will then be assigned to DDAs in a random order.

F. Recommendation No. 6: Conviction Integrity Unit

The OCDA has had a conviction integrity unit in place for many years, which is referred to as the DNA unit. It does not appear that IPPEC spoke with either of the DDAs who run the DNA unit, so IPPEC may not have been aware of the current programs, which include the Camille Hill Innocence Review Panel (“CHIRP”) and the Red Flag Program. The CHIRP program is a conviction integrity forensic testing committee comprised of District Attorney Tony Račkauskas, members of the DNA unit, a member of the Associate Public Defender’s Office, and an attorney for the private defense bar. CHIRP meets twice a year to review applications from prosecuted defendants who claim that forensic testing will exonerate them. The Red Flag Program is a program designed to cross-match any newly-acquired DNA samples with closed and pending cases. Additionally, the DNA Unit has historically worked with the Orange County Crime Lab to ensure that DNA retesting is done whenever DNA testing guidelines are changed by the national Scientific Working Group on DNA Analysis (“SWGDM”).

G. Recommendation No. 7: Create Chief Ethics Officer Position

We have been advised that the OCDA is in the process of filling this position.

H. Recommendation No. 8: Reinstate Chief ADA Position

At this point, the OCDA is not implementing this recommendation as the current office structure better suits the District Attorney’s management style and the implementation of other recommendations are the priority at this point. We understand that the OCDA will re-evaluate this recommendation in the future.

I. Recommendation No. 9: Eliminate “Chief of Staff” and Create “ADA for Media Relations”

At this point, the OCDA is not implementing this recommendation. The District Attorney believes the Chief of Staff provides as much information to the public as allowable under the ethical rules of conduct, due process rights, and legal standards. Moreover, the change in title would not be helpful as the Chief of Staff also has other duties beyond media relations.

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J. Recommendation No. 10: Independent Monitor

The OCDA has implemented this recommendation by retaining Larson O'Brien LLP to serve as the independent monitor.

VII. FUTURE GOALS AND OBJECTIVES

We are still engaged in the process of becoming educated about the OCDA policies and procedures and learning and evaluating the facts and issues relating to the review conducted by the IPPEC. In addition to completing our review of relevant documents, we intend to interview a number of additional individuals, including OCDA employees, IPPEC members, judges, and defense attorneys. Once that process is completed, we will conduct a thorough evaluation of the OCDA's implementation efforts and will provide feedback regarding our assessment of whether the OCDA is effectively implementing the IPPEC's recommendations and whether the goals expressed by IPPEC—eliminating deficiencies that IPPEC believed gave rise to the jailhouse informant issues—are being met.