

Secret Snitches

California case reveals long-standing practice of planting jailhouse informants, sparking allegations of misconduct and civil rights violations

By Lorelei Laird

Angry about a child custody dispute, Scott Dekraai armed himself with three handguns, drove to the beauty salon in Seal Beach, California, where his ex-wife worked and opened fire. The two-minute rampage in October 2011 left eight people dead and one injured, making it the worst mass shooting in Orange County history. Within an hour, Dekraai was pulled over by police and confessed. Numerous witnesses, including a survivor, could testify that he was the shooter. There was no reason

to think that convicting him would be difficult.

Nonetheless, Dekraai's attorney contends, prosecutors decided they wanted some insurance—so they planted an informant in the cell next to him at the Orange County Jail. "Inmate F" struck up a friendship with Dekraai and began asking questions.

This planting of an informant next to a suspect was not an isolated incident, according to Dekraai's public defender, Scott Sanders. After a year of investigation, Sanders filed a 505-page motion alleging that the DA's office and the Orange County Sheriff's Department had a long-standing practice of planting undercover informants next to high-value defendants represented by counsel. In addition, the DA's office routinely failed to hand over discoverable evidence and, when asked about it, deputies and prosecutors repeatedly lied, Sanders claims.

If true, such practices would be a violation of civil rights. The U.S. Supreme Court ruled in 1964's *Massiah v. United*

States that police officers who use undercover informants to interrogate someone represented by counsel violate the accused's Sixth Amendment right to an attorney. And failing to turn over exculpatory information on this practice is a violation of the defendant's 14th Amendment due process rights under 1963's *Brady v. Maryland*.

Sanders' allegations were explosive, triggering a year of hearings that led to an even bigger revelation: For more than 25 years, the sheriff's department has maintained a database called Tred for tracking jail movements, but had almost never disclosed its information. That means prosecutors who knew about Tred records could have violated *Brady* dozens, hundreds or even thousands of times—and two decades of convictions could be called into question.

The revelations were so damning that Orange County Superior Court Judge Thomas Goethals disqualified the DA's entire 250-lawyer office from prosecuting Dekraai. "It is arguable whether or not the evidence currently before

Orange County public defender Scott Sanders leveled explosive allegations that prosecutors maintained a secret database and planted jailhouse informants next to high-value defendants.



Scott Dekraai was placed in a cell next to Fernando Perez, who had informed on another of Sanders' high-profile clients.



A recording device was placed in the cell of Dekraai, who faces the death penalty for killing his ex-wife and seven others.

this court ... reaches the standard of 'outrageous governmental misconduct,'” Goethals wrote in March 2015. “What cannot be debated is the fact that serious, ongoing discovery violations continue to occur in this case.”

TRUTH AND CONSEQUENCES

Despite the seriousness of the charges, almost nobody involved had faced professional consequences since the practice was revealed. Though Goethals said in his recusal order that two deputies lied under oath, neither has been fired nor charged with perjury. The relevant prosecutors have also kept their jobs, though one resigned voluntarily.

Jim Tanizaki, the senior assistant district attorney in charge of violent crime at the Orange County District Attorney's Office, denies there's a systemic problem because Orange County DAs are adequately trained on *Brady* and *Massiah*. It's now making sure that Orange County law enforcement gets the same training. He declined to comment on discipline of individual prosecutors because it's a personnel matter.

Capt. Jeff Hallock of the Orange County Sheriff's Department says that Sheriff Sandra Hutchens has acknowledged bad informant policy and a lack of training in *People v. Dekraai*. He says the department has responded by improving informant policies, though he couldn't go into details. Action on individual deputies is on hold, he says, until the attorney general's office finishes an outside investigation it announced in March of 2015.

Confidence in that investigation is low in some circles, however. The attorney general's office took over Dekraai's prosecution and immediately appealed the recusal order, arguing that the misconduct was solely attributable to the OC sheriff's office. That concerns Erwin Chemerinsky, law school dean at the University of California at Irvine and a prominent critic of the scandal.

“I'm worried that the California attorney general has such a close relationship with the DA's office that [the investigation] might not happen,” says Chemerinsky, who is a regular contributor to ABAJournal.com.

The attorney general's office declined to comment.

Another panel, convened by District

Attorney Tony Rackauckas to report on his office's practices, issued a January report that was critical of the office. Despite concerns about the panel's independence (among other things, Rackauckas had the right to review and approve all of the panel's press releases), the report criticized the office's “serious deficiencies” in training and supervision, leading to a “win-at-all-costs mentality.” It suggested numerous reforms, including establishing a committee to review use of informants.

Rackauckas said in January that his office would implement many, but not all, of the reforms. At the panel's suggestion, Rackauckas asked the U.S. Department of Justice to investigate.

That echoed months of calls from outsiders for the DOJ to intervene. In November, Chemerinsky and dozens of other prominent legal minds signed a letter requesting a DOJ investigation. In July 2015, the *Orange County Register* reported that the Justice Department's Civil Rights Division is indeed “keeping an eye” on the situation.

Tanizaki and Susan Kang Schroeder, the chief of staff for the OC District Attorney's Office, say they would welcome a federal investigation and cooperate fully. In February, they said they were implementing all but two of the panel's suggestions.

DIGGING DEEPER

When Dekraai arrived at the jail, Sanders' motion says, he was placed in a cell directly next to Inmate F—now publicly known as Fernando Perez. A week after Dekraai's arrest, Perez told deputies and DAs that Dekraai was talking about his crime, and deputies installed a recording device in Dekraai's cell.

Dekraai was on suicide watch, so his cell was in easy view of the deputies' work area. Deputies normally would not have permitted an inmate to stand in front of another inmate's cell chitchatting, the motion says. But they never objected to the conversations between Perez and Dekraai. And there was no inmate on Dekraai's other side to notice, because that inmate was moved the day the recording device was placed.

From the start, Sanders says, he and other members of the defense team thought something was “too convenient” about all this. But his suspicions

increased when he learned the informer was Inmate F/Perez—who had also informed on Sanders' other high-profile murder client, Daniel Wozniak. (Wozniak was sentenced to death in January for two murders.) There was evidence suggesting Perez had been a witness in other cases. And, unusually, he had been waiting years for trials on two serious felonies.

Sanders requested further discovery on Perez as an informant, but the lead prosecutor fought the request by conceding that Perez was acting as a government agent, and thus there was no need for discovery on the issue. Sanders now believes this was to avoid revealing the extent of the prosecution's *Massiah* and *Brady* violations. So Sanders sought, and eventually received, a court order.

That order was a major breakthrough for the defense. The prosecution produced a huge amount of information during an eight-month period in 2013, much of it informant notes from other cases in which Perez had been a witness. Early on, Sanders says, it became clear that a former deputy DA and gang prosecutor, Erik Petersen, had planned to use Perez in several cases—but withheld almost all of Perez's notes. The DA's informant files on Perez were so thin they didn't even have an entry for his work with Dekraai.

But the real key, Sanders says, was the discovery of another informant named Oscar Moriel, who had informed on some of the same defendants as Perez. In one case, Moriel wrote a note to a sheriff's deputy suggesting that he be placed into disciplinary isolation with a target to get information from that person, since it had worked with an inmate called Leonel Vega.

Intrigued, Sanders pulled information on Vega, who was sentenced in 2011 to life without parole for a gang-related murder. He discovered that prosecutors had only turned over four pages of Moriel's notes to Vega's attorney. Yet Sanders had almost 200 pages.

“Once we figured that out, we knew we had to kind of go through every last word of what the informants wrote,” he says. “And then it was just kind of revelation after revelation.”

PIECING TOGETHER A PUZZLE

The more Sanders saw, he says, the more he started to look outside of the discovery documents for information on informants. He pulled court transcripts and other documents from cases involving informants. He spoke to trial and appellate attorneys involved in those cases. It was like working on a puzzle, Sanders says, but with the pieces scattered across Orange County.

Eventually, the puzzle came together to show long-established systems in Orange County for violating inmates' civil rights. According to the *Dekraai* motion Sanders eventually filed, sheriff's deputies and state prosecutors would plant informants next to high-value

inmates in violation of *Massiah*, cover it up by withholding discoverable evidence, and sometimes lie about it in court.

Sanders describes a pattern in which sheriff's deputies train jailhouse informants on what they want and how to document it—but either don't create or don't turn over records of that training. Then they move targeted defendants next to informants. In fact, Sanders says, the research convinced him that jailers have been using parts of the jail as “intentionally designed breeding grounds for *Massiah* violations.” This goes back decades, he says, suggesting “an almost unfathomable number” of cases with civil rights violations.

Even Sanders had some trouble believing it. “There were definitely many moments where it all seemed surreal,” he says. “I was constantly taking what I was finding to critical ears and asking if the analysis made sense.”

But the evidence was there. And because he was making such serious accusations, Sanders was extremely thorough about documenting that evidence. His 505-

Sanders' allegations were so damning that an Orange County judge disqualified the DA's office from prosecuting Dekraai.

page *Dekraai* motion was accompanied by more than 15,000 pages of exhibits put together by two paralegals. Understanding the issues and writing it took the better part of a year, he says, requiring “pretty much every moment I could find.” (A related motion in *People v. Wozniak*, his other death penalty case, was 754 pages.)

Despite its incendiary accusations, the *Dekraai* motion did not initially drop a bomb. Instead of ruling out the death penalty, as Sanders had requested, Goethals called for testimony on his allegations.

Meanwhile, the judge in *Wozniak* authorized discovery of inmate movement records for Perez, over the objections of prosecutors and the Orange County counsel's office. The resulting documents showed Sanders why the informant files on Perez were thin: The juicy stuff was elsewhere. Detailed files were in the system called Tred, maintained by the Orange County Sheriff's Department. No Tred records had been turned over to Sanders in *Dekraai* discovery.

Sanders says he was lucky to get them.

“Usually a judge would go in camera and you'd have a hearing, and I think what's happened a lot in the past is that counsel would lose that hearing and therefore never even learn about the existence of Tred records,” Sanders says. “[This judge] just said, ‘Turn everything over to them.’”

Further research by Sanders showed that the Tred system had been in place for decades—on computers since 1990, and even earlier on paper. But throughout the decades, Tred information was almost never turned over to defense attorneys—because deputies had simply decided it wasn't discoverable, Sanders says.

SKETCH BY JEFF GOERTZEN/ORANGE COUNTY REGISTER, PHOTOGRAPH BY MARK RIGHTMIRE/ORANGE COUNTY REGISTER



Defense attorney James Crawford told the media he was beaten by an investigator with the district attorney's office after an argument at the courthouse.

"Their policy ... was that as long as the information was placed in the Treds, it did not have to be disclosed under *Brady*," he says.

Many defense attorneys around the county say they were unaware Tred records existed. Sanders says such records could possibly be obtained via discovery, if defense lawyers made the right series of requests to a sympathetic judge—but that almost never happened.

Hallock says Tred records were never a secret. While the county counsel always objects to their release on security and confidentiality grounds, he says, "they've been discovered on numerous occasions." Orange County, in a written statement to the *ABA Journal*, says the county always asserts official privilege and any release a judge orders is typically protected.

And the *Dekraai* prosecution team had withheld that information—not only in discovery, but in the hearings Goethals had ordered. In those hearings, Sanders says, sheriff's deputies said there was no informant program,

and informants denied the implications of statements in their notes.

In the recusal order, Goethals wrote that two sheriff's deputies, Seth Tunstall and Ben Garcia, neglected to mention Tred while testifying under oath, even when they should have. "This court concludes that deputies Tunstall and Garcia have either intentionally lied or willfully withheld material evidence from this court," Goethals wrote in his March 2015 order.

To make matters worse, Tunstall and deputy DA Petersen had also raised suspicions with testimony about one of Goethals' colleagues, Judge Terri Flynn-Peister. She was a federal prosecutor in the case of Vega, on whom Moriel had informed. Tunstall testified that Flynn-Peister ordered him to withhold most notes. Petersen, the state prosecutor on the case, testified that he believed Flynn-Peister deliberately withheld the notes. But she took the witness stand and told Goethals that was false.

PHOTOGRAPH BY JONAH LIGHT

Tunstall, Garcia and other sheriff's deputies have since invoked their Fifth Amendment rights against self-incrimination when asked to testify in informant-related cases. Petersen resigned in early September. In court papers, he said he was taking a job in another state.

The discovery of Tred means there's no telling how many cases could be tainted by *Brady* violations, Sanders says. "If you have police agencies that are willing to just basically completely ignore *Brady* for 25, 30 years," he says, "there's no decent starting point."

TAINTED CASE

One such case involves Henry Rodriguez, convicted in 2005 as an accomplice to the 1998 murder of Jeanette Espeleta. When she died, Espeleta, 20, was eight months pregnant. She had recently served child support papers on Richard Tovar, a friend of Rodriguez's, and authorities believe Tovar conspired to kill her with Rodriguez and another man, Nicolas Gray. Rodriguez admitted to helping dump Espeleta's body in the ocean, but denied participating in the murder.

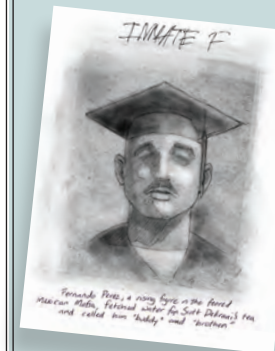
Rodriguez's first conviction was thrown out for *Miranda* violations. In his 2005 retrial, prosecutors introduced information from a jailhouse informant, Michael James Garrity, who reported that Rodriguez had admitted to helping plan the murder and had even made jokes about it.

Rodriguez denied having spoken to Garrity, so Rodriguez's attorney, James Crawford, subpoenaed inmate movement records. In court, Laura Knapp, the senior deputy Orange County counsel, acknowledged the existence of the files yet denied they exist, calling them "highly confidential investigatory files, which are not written or created and should not be disclosed."

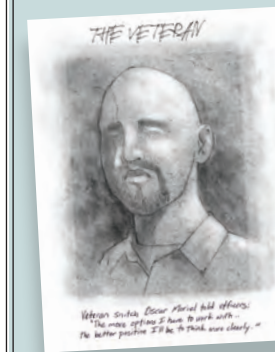
"And the county counsel comes in and tells the judge on the record I'm fishing and there's no such thing as inmate movement records," recalls Crawford, a solo defense lawyer in Orange, California.

But there were such records, he says—in Tred. Shortly after Knapp's statement, she and a sheriff's deputy went into an in-camera hearing and disclosed the Tred records to Judge Frank Fasel, who declared the records discoverable with some redactions and ordered them submitted under seal. He also asked the county to summarize the hearing.

Both sides agree that the records were



Informant Fernando Perez was used in multiple cases, yet few notes on his work were turned over in discovery requests.



Sanders discovered that another jailhouse snitch, Oscar Moriel, had informed on some of the same people as Perez.

filed—but the documents were sealed from Crawford. And the court-ordered summary included nothing to indicate that Garrity was an informant, Crawford says. Asked about this, the county referred the *ABA Journal* to its response to Rodriguez's habeas corpus petition. In it, the county denies that the summary was inadequate and says the judge ultimately found the Tred records of limited relevance.

Unable to argue that Garrity was an informant, Rodriguez was convicted of first-degree murder and sentenced to life in prison. It was his first conviction.

A decade later, Crawford saw media reports about the *Dekraai* hearings and noticed that the details sounded a lot like the details of Rodriguez's case. After speaking to Sanders, he petitioned for a writ of habeas corpus. Over the objections of the DA's office, a judge unsealed records from the office showing that prosecutors knew Garrity had been given consideration for his work, but had been told to keep that information from Crawford.

In February, the judge overturned Rodriguez's conviction and ordered a new trial.

UNRELIABLE INFORMANTS

Crawford also believes Garrity manufactured Rodriguez's confession—and not just because Rodriguez says so. During discovery, Crawford learned that Garrity had reported a confession by an inmate called Juan Huizar. Not only did Huizar deny ever speaking to Garrity—he denied it in Spanish because he barely spoke English. Prosecutors in Rodriguez's retrial stipulated that Garrity spoke no Spanish.

Manufactured confessions are a known problem with using informants—but far from the only one. According to Alexandra Natapoff, a professor at Loyola Law School in Los Angeles, jailhouse informants have a very strong incentive to snitch: They're typically rewarded with leniency, perks at the jail or even cash.

"This is an enormous problem for wrongful conviction; it's an enormous problem for constitutional rule-breaking," says Natapoff, author of the book *Snitching: Criminal Informants and the Erosion of American Justice*. "It is becoming an increasingly recognized blot on the integrity of the criminal justice system."

A 2005 study from the Center on Wrongful Convictions at Northwestern University found that about 46 percent

SKETCHES BY JEFF GOERTZEN/ORANGE COUNTY REGISTER

of death row exonerees were victims of false informant testimony.

Part of the problem is that using criminal informants requires law enforcement to trust the word of people who may not be trustworthy. “The use of informants always requires this compromise,” Natapoff says. “It is by definition a deal ... that in some way lets [the informant] off the hook.”

Another problem with informants, Natapoff says, is that there’s vast discretion and little accountability for law enforcement and prosecutors. Only a few jurisdictions require independent corroboration of informant statements, reliability hearings or recording of confessions. This not only permits false confessions, she says, but also makes it difficult to detect prosecutorial misconduct.

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“American law ... in effect, relies on the integrity of law enforcement and prosecutors to obey the rules,” she says. “It is very difficult to wrest that kind of information from the government.”

If there’s wrongdoing, Natapoff adds, the need to cover it up creates a motive to commit more civil rights violations. In the *Dekraai* motion, Sanders details the case of Luis Vega, a 14-year-old accused of attempted murder. While he was incarcerated, informant Moriel and another witness separately told authorities that Sergio Elizarraraz had claimed responsibility for the murder. Nonetheless, Vega remained imprisoned for 11 months after authorities had reason to think he was not guilty—and Moriel’s statement was never turned over to Vega’s attorney. In the *Dekraai* motion, Sanders says this was likely to avoid revealing that Moriel was an active informant.

When prosecutors withhold evidence, the resulting convictions are threatened. The informant revelations in Orange County have forced new sentences, trials or hearings in at least seven cases.

The new sentences are remarkably lenient. One defendant, Isaac Palacios, was sentenced to about four years of time served for one murder (downgraded to manslaughter) and had another murder charge dismissed. Some defense attorneys believe these are sweetheart deals intended to avoid discovery in a retrial.

“I think what happened is they didn’t want to have another hearing where we pointed out all the lies and all the stuff they were hiding,” says Palacios’ attorney, Gary Pohlson of Newport Beach. Pohlson and Goethals are former law partners. “The DA had lied to me about discovery on more than one occasion.”

“If the case goes bad, rather than risking that information coming to light, the government can often, in effect, bribe defendants through advantageous plea deals,”

Natapoff says. “And we’ve seen this as a rampant practice in Orange County.”

GETTING PERSONAL

Natapoff has nothing but praise for Sanders, who she says “went above and beyond the call of duty” during the year-plus of research that uncovered the scandal. He may also be popular with defense lawyers in Orange County—at least those who had clients affected by informants. Many, like Crawford, came to Sanders after seeing media reports about his work.

But Sanders is considerably less popular among Orange County prosecutors. *The OC Weekly*, a local alternative paper, describes prosecutors mocking Sanders to his face as a paranoid conspiracy theorist. The judge in Wozniak’s penalty trial rebuked both

Sanders and the prosecutor, Matt Murphy, for attacking one another personally in court papers.

Sanders says he isn’t comfortable

commenting on the personal attacks. He’d rather focus on his extensively documented allegations.

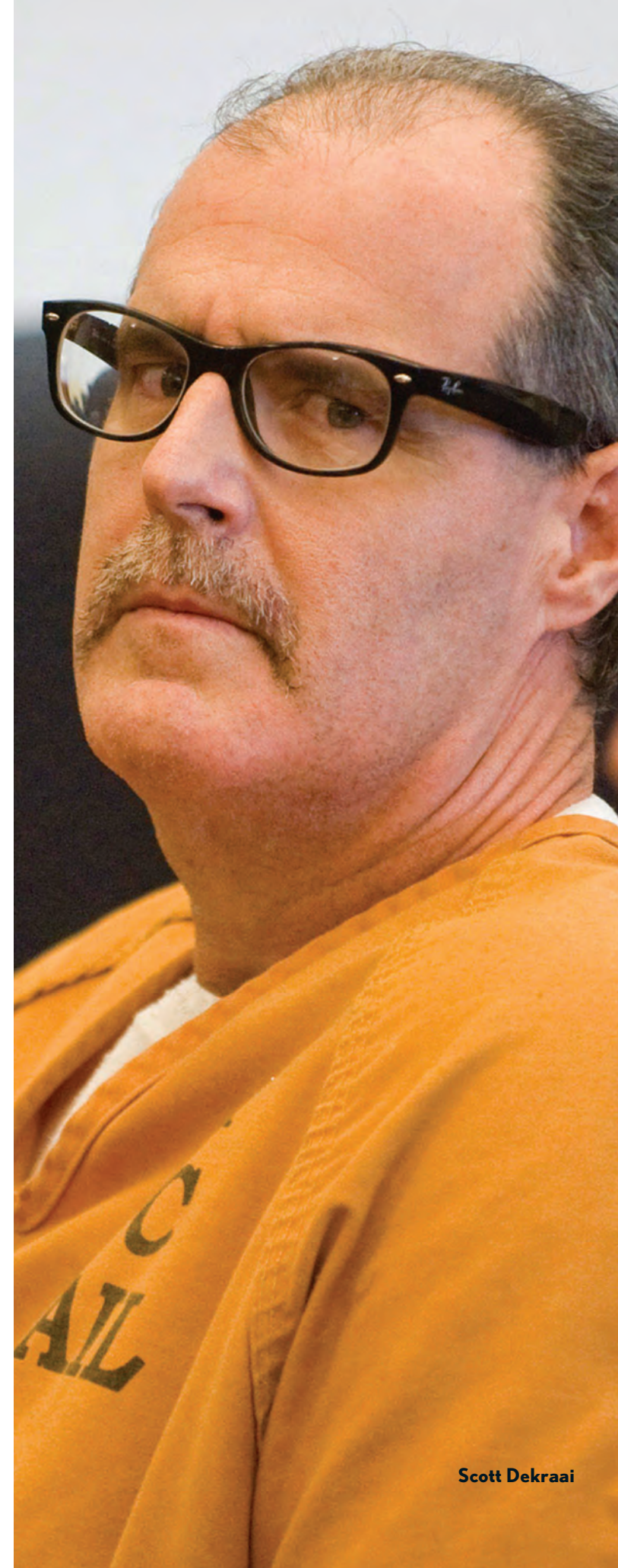
Tanizaki says there’s no “office policy of vendetta.” But David Swanson, a criminal defense lawyer in Newport Beach, says he’s seen difficulties for defense attorneys associated with Sanders. Everyone knows everyone in Orange County’s criminal bar, he says, and some prosecutors seem to see the matter as an “us-versus-them situation.”

The situation turned violent in March when, Crawford told the media, he was beaten in court by an investigator for the Orange County District Attorney’s Office. Crawford said he had a brief argument with the investigator, who then attacked him when his back was turned. The assailant reportedly slammed Crawford’s head into a bench multiple times, breaking a bone in his forehead and causing his left eye to swell shut.

The reported attack came two weeks after Crawford won Rodriguez a new trial. Crawford’s attorney, Jerry Steering, says he doesn’t know of any other motive for the beating. The district attorney’s office did not comment, and the investigator was not identified. The California Attorney General’s Office said it was reviewing the matter.

The us-versus-them mentality extends to the bench. California attorneys are permitted to file for removal of a judge from a case for prejudice without explaining why. The Orange County Superior Court says that from December 2010 to January 2014, Goethals had one such motion filed against him in a murder case. After Goethals ordered the hearings in February of 2014, those motions jumped to 56, with 46 in 2014 and 10 through early December of 2015.

Pohlson says he’d heard the DA actually ordered prosecutors to file for Goethals’ removal from cases. But Schroeder says the office’s management has never



Scott Dekraai

made such a request. Individual deputy DAs make their own decisions based on experience and the judge’s reputation, she says.

“As a general rule, we empower our prosecutors to review their cases,” says Tanizaki. “And whenever they’re assigned to a trial judge, they have an independent responsibility or authority to paper a judge that they don’t believe can be fair and objective and responsible for that particular case.”

In December, Orange County Superior Court Judge Richard King—like Goethals, a former prosecutor in the county—denied a motion to disqualify Goethals from a murder case. In a strongly worded opinion, King wrote that the “blanket papering” of Goethals appeared to be an attempt to “intimidate, punish and/or silence” the judge. The district attorney’s office has appealed that order, arguing that California law does not permit judges to turn down properly and timely filed disqualification motions.

Swanson, a solo attorney with two cases affected by informants, says “circumstantially, it’s pretty obvious” that DAs were penalizing Goethals.

“Very few people had a problem with him before” the *Dekraai* hearings, Swanson says. “I think he was probably considered one of the best places for lawyers to go on both sides.”

FAMILIES STILL SUFFER

If the allegations have roiled Orange County’s legal community publicly, they may have done the same in private for the families of Dekraai’s eight victims. Four-and-a-half years after the murders, Dekraai is still awaiting a penalty trial. Sanders has offered a guilty plea in exchange for life in prison, but Rackauckas has publicly insisted that his office has the duty to seek death.

“The delay affects me on a daily basis,” says Paul Wilson, who lost his wife, Christy, in the shooting. “I have to continue to go back into court and, you know, sit 15-20 feet away from this guy that’s basically ruined my family. It takes everything out of my soul that day that I have to go into court.”

Prosecutors and the defense have publicly traded accusations about who’s responsible for delays. Wilson says victims’ families are divided—but he blames Rackauckas, who he says is grandstanding about the death penalty. Executions in California technically resumed in November, when the state introduced a new lethal injection protocol—but the process is notoriously slow.

“At the end of the day, even if this guy is handed down this judgment of the death penalty, it’s not the death penalty,” Wilson says. “He’s not going to die. He’s going to sit in prison until he dies of natural causes, which is really just life in prison without parole.” ■

PHOTOGRAPH BY MARK RIGHTMIRE/ORANGE COUNTY REGISTER