

# IN **(JUSTICE)** in ORANGE COUNTY

A Case for Change and Accountability



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# EXECUTIVE SUMMARY

California district attorneys (DAs) have historically played a central role in driving incarceration. Although they are elected officials, DAs have not typically been held accountable by the public for policies and practices that perpetuate racial disparities and criminalize poverty, mental illness, and other social issues.

This is partially because their role is not well understood, and much of their work is hidden from the public. As part of the ACLU's broader efforts for DA accountability across California, this report outlines the policies and practices of the Orange County District Attorney Todd Spitzer's office and makes recommendations for urgent changes to reduce the harms the office is perpetuating.

This report summarizes data and documents provided to the ACLU of Northern California in response to a Public Records Act request initially sent to the Orange County District Attorney (OCDA) in May 2019 (see Appendix A). It is also informed by stakeholder interviews, including deputy public defenders, community activists and organizers, and formerly incarcerated residents who have more than 60 years of combined experience with the criminal legal system in Orange County. The ACLU's request for data was received by the current OCDA, who only agreed to turn over charging data from his predecessor, Tony Rackauckas. The lack of transparency with respect to charging data under his tenure is particularly concerning, given that the current DA ran on a platform of transparency. The OCDA cannot expect to build trust in the community or develop a meaningful path forward without first being transparent and accountable.

While the majority of the charging and diversion data is from 2017 and 2018, when Rackauckas was in office, all available evidence suggests that the current DA's office's policies and practices have not shifted substantially. Overall, our analysis found that people of color were more likely to be charged with a crime and more likely to be negatively

impacted by discretionary decisions related to the severity of the charge, diversion, and sentencing. More than half of all cases filed in 2017 and 2018 only included low-level offenses that should not be charged or should be decriminalized. The most common charges in 2019 and 2020, obtained and published by the nonprofit news agency Voice of OC, were entirely low-level offenses, showing Rackauckas's same pattern of criminalizing substance dependency and poverty continued after he was voted out of office.

By adopting the following targeted recommendations outlined in this report, the OCDA could begin to reverse harmful and counterproductive practices that have fueled incarceration and racial disparities. Adopting these recommendations would reduce the DA's caseload by half, freeing up much-needed resources that could be invested in preventive and holistic community support outside of the framework of criminalization.



## Key Recommendations:

### Charging Decisions

- End the over-criminalization of low-level offenses by instituting the ACLU of Northern California’s recommended decline-to-charge and pre-file diversion lists (see Appendix B), which would eliminate more than half of the DA’s caseload;
- Develop an internal policy to presumptively file wobbler offenses, which can discretionarily be filed as felonies or misdemeanors, as misdemeanors;
- Eliminate the use of sentence enhancements, including but not limited to gang enhancements and status enhancements that are major contributors of extreme sentencing and racial disparities;
- Do not charge children as adults; and
- Use existing funding streams to track and report end-to-end metrics related to charging, sentencing, diversion, and racial disparities.

### Diversion

- Reduce arbitrary restrictions and expand eligibility criteria for diversion, including adopting the ACLU of Northern California’s pre-file diversion list (see Appendix B);
- Ensure all diversion is pre-file, i.e., before a person is charged with any crime, or pre-plea and does not require any admission of guilt;
- Ensure that all diversion is offered free of charge to participants;
- Dedicate resources to understanding and eliminating racial disparities in diversion access; and
- End all partnerships with for-profit companies serving diversion in Orange County and instead partner with community-based nonprofits and restrict the DA’s Office and Probation Department’s roles to referrals.

### Police Accountability

- Support the creation of an independent office — outside of the DA, Sheriff, and other police departments — to investigate and hold law enforcement officers accountable for their illegal conduct.
- Create a committee that is responsive to families who have encountered police misconduct, brutality, and killing, including connecting them with services and compensation.
- Ensure compliance with AB 1506, which requires the California Attorney General to investigate all officer-involved killings of unarmed civilians;
- Commit to keeping a thorough database that includes all incidents of officer misconduct and ensure the database is fully available to defense attorneys.
- Do not accept any law enforcement contributions for any future campaigns to reduce conflicts of interest; and
- Establish guidelines to prevent officers with a history of misconduct, lying, or convictions during their tenure from serving as witnesses for the prosecution and reject new cases and search warrant requests from these officers.

## Immigration

- Require that prosecutors avoid adverse immigration consequences in their charging, plea negotiations, and post-conviction review practices;
- Establish a clear policy to never share information with immigration officials; and
- Establish policies to refer undocumented survivors of certain crimes or criminal attempts to legal services organizations that can help them obtain a U or T Visa.
- Adopt a process of erasing old convictions for the purposes of eliminating immigration consequences (stipulating to post-conviction motions) in cases where someone has already completed their criminal sentence. This would allow for people to seek relief that avoids immigration and other consequences after a conviction.
- Conduct comprehensive and mandatory trainings on avoiding adverse immigration consequences with line DAs and staff.

## Parole

- Institute a policy to only participate in the parole process to support an individual's release rather than reflexively opposing all releases; and
- Decline to accept funding that can be used for reentry supports, including AB 109 realignment funding, and instead ensure that those resources are invested in community-based supports.

## Addressing Racism and Racial Disparities

- Publicly acknowledge that racial disparities exist in the jurisdiction's legal system.
- Decline to file charges where arrests are tainted with racial bias and refuse to call officers with a history of racial bias or racism to testify as witnesses.
- Require racial impact analyses prior to charging decisions.
- Commit to blind charging, which prevents prosecutors from seeing demographic information before making an initial decision on whether to charge someone with a crime.
- Undertake uniform and consistent collection, analysis, and publication of race and ethnicity data.
- Commit to using existing funding to implement policies and staff training — with community input — to address racial disparities.

## Systemic Change

- Publicly support state legislation to decriminalize low-level, decline-to-charge offenses, re-classify wobblers as misdemeanors, and eliminate sentence enhancements;
- Publicly support state legislation to end police in schools and end the adult prosecution of children and expand developmentally appropriate alternatives to incarceration for all youth;
- Publicly oppose the expansion of Musick jail; and
- Work with the Orange County Board of Supervisors to ensure that funding saved from declining to prosecute low-level crimes be redirected outside of the DA's office to community-based restorative justice programming and supportive services.

# INTRODUCTION

*“We don’t have a justice system. We have an adversarial system.”*

— Yehudah Pryce, social worker, OC Young Adult Court

## The Failure of Incarceration

In recent years, we have seen unrest across the country over the killing of Black and Brown people by law enforcement who are often not held accountable for their actions. As a result, we have seen a mass shift in awareness of the way our criminal legal system works, further highlighting the racism, inequities and disparate impact our so-called “justice system” has had on Black, Brown, and low-income communities. Activists and academics have likened the current prison industrial complex to a racial caste system and highlighted the ways in which “tough on crime” policies exert social control over predominantly low-income communities of color without meaningfully preventing or addressing community harm.<sup>1</sup>

Today, the United States has the largest prison population in the world, with more than 2.1 million people incarcerated.<sup>2</sup> According to the Sentencing Project, this is a 500 percent increase over the last 40 years. This increase is not the result of rising crime and is driven primarily by legal and policy decisions. It has created a tremendous strain on state and local budgets and has led to prison overcrowding, even when increasing evidence suggests that incarceration is not an effective strategy for promoting public safety.<sup>3</sup> The state of California spends over \$13 billion each year on prison operations,<sup>4</sup> but nearly half of all people released in California are reincarcerated within three years.<sup>5</sup> Clearly the current cycle of prosecution and incarceration is producing poor outcomes at an immense cost — financially, psychologically, and socially.

In 2011, a landmark U.S. Supreme Court ruling mandated the state reduce its prison population to 137.5 percent of planned capacity.<sup>6</sup> The Legislature responded by transferring responsibility for incarcerating individuals convicted of certain

nonviolent and non-serious crimes from the state to counties, in a process known as realignment. Despite the state allocating more than \$6 billion to counties in fiscal year 2019–20 to cover the costs incurred through realignment, a 2021 state audit of select counties found that these funds have been mismanaged and that realignment led to local jail overcrowding and a lack of adequate educational and rehabilitative opportunities.<sup>7</sup> Realignment also failed to adequately address the core issue of prison overcrowding.

California voters also attempted to reduce mass incarceration by passing Proposition 47 in 2014, which reduced the penalties for certain drug and property offenses. An analysis of the release of tens of thousands of individuals due to Proposition 47 found that there was no evidence of an increase in violent crime, and recidivism rates actually declined.<sup>8</sup> However, these measures still failed to address the core issue of prison overcrowding, and prior to the pandemic, 13 of the state’s 35 prisons still operated above the Supreme Court-mandated cutoff.<sup>9</sup>

The urgent need to decarcerate was also laid bare by the 2020 outbreak of the COVID-19 virus, which caused numerous deadly outbreaks in carceral institutions. In the face of the pandemic, the California Department of Corrections and Rehabilitation (CDCR) took more definitive actions to reduce the prison population, including expediting the release of nearly 3,500 incarcerated people in April 2020.<sup>10</sup> Such actions helped bring the state prison population down to 105.4 percent of design capacity by February 2021,<sup>11</sup> but not before 217 incarcerated people and staff died from COVID-19.<sup>12</sup>

In addition to the sheer volume of people incarcerated in California, there remain stark racial disparities throughout the criminal legal

system, from arrest to prosecution and sentencing. According to the most recent statistics from CDCR, Black people represent 28 percent of the prison population,<sup>13</sup> despite comprising just 6 percent of the total state population.<sup>14</sup> State and Federal intervention is necessary to scale back failed carceral practices and improve outcomes for communities and system-involved individuals. However, DAs have a crucial role to play in advocating for state and federal changes as well as implementing reforms within their offices.

## The Role of the District Attorney and Rise of “Progressive” Prosecutors

District Attorneys are among the most powerful actors in the criminal legal system. They are elected officials who decide whether to bring charges when a crime is alleged and determine the severity of those charges. They have tremendous influence over whether someone is held in custody pretrial, diverted to treatment, sentenced to prison, or released through parole. Historically, DAs have been one of the primary drivers of incarceration by pushing “tough-on-crime” sentencing practices. In California, DAs are elected in each county every four years with no term limits.

In the wake of protest movements for Black lives, more DA candidates have run progressive platforms to end mass incarceration and systemic racism. In San Francisco, former Deputy Public Defender Chesa Boudin took office in 2020 and immediately implemented new policies such as eliminating cash bail as a condition for pretrial release and ending the prosecution of low-level drug possession.<sup>15</sup> Boudin’s policies are designed to address mass incarceration and the disparate impact the criminal legal system has had on Black and Brown communities.<sup>16</sup>

In Los Angeles in 2020, former San Francisco District Attorney George Gascón unseated two-term incumbent Jackie Lacey. Gascón’s platform included “eliminating the death penalty and money bail, expansion of diversion programs, and detailed plans regarding law enforcement accountability, immigration-informed prosecution, and data and transparency.”<sup>17</sup> In his short time in office in LA, Gascón has made headlines by upsetting the status quo.

Boudin and Gascón partnered with Contra Costa County DA Diana Becton and San Joaquin County DA Tori Verber Salazar to found the Prosecutors Alliance of California, which is committed to implementing evidence-based reforms to reduce mass incarceration. The group sent a letter to the California State Bar Association asking the organization to ban law enforcement organizations from making financial contributions to DA election campaigns, stating that it posed a conflict of interest.<sup>18</sup>

Reform-minded DAs have also won recent elections across the country, including in Colorado, Texas, Massachusetts, Pennsylvania, and Missouri.

## Orange County Snapshot

Orange County is made up of 34 incorporated cities and has a population of over 3.1 million, making it the third most populous county in California.<sup>19</sup> The county is 39.8 percent white, 34.0 percent Latinx, 21.7 percent Asian, 2.1 percent Black, and 0.4 percent Native Hawaiian or Pacific Islander. The North and South regions of Orange County have distinct economic, cultural, and political differences. North County is more Latinx (mostly Mexican) and Asian (predominantly Vietnamese and Korean), and tends to be younger, less wealthy, and Democratic. South County tends to be wealthier, less racially diverse, and Republican. Orange County has historically been a Republican stronghold, but today the county looks more purple. Even so, Republicans still hold on to a majority, despite Democrats gaining control of all seven U.S. House of Representative seats, two state legislative seats, and a county supervisor seat.<sup>20</sup>

According to Gaby Hernandez, an organizer with community empowerment group Chicanxs Unidxs who was interviewed for this report, “Orange County is ... very supportive of enforcement ... and [we are] battling with both parties for changes.” An attorney within the Orange County Public Defender’s (OCPD) Office Kathleen Rogers (a pseudonym to protect her clients) stated that, “some counties are still ... very anti-rehabilitation and very anti-progressive criminal justice reform.” Douglas Jessop, a social justice advocate at the Los Angeles District Attorney Accountability Coalition and a formerly incarcerated



resident, stated that “if you want to see mass incarceration in real time, go to Orange County. As far as the criminal justice system itself, it’s racist. It’s absolutely racist. There’s no way around that one.”

Like most jurisdictions, Orange County spends a considerable portion of its general fund on law enforcement. The county’s net budget for 2020–2021 was \$7.6 billion, with roughly 22 percent (\$1.4 billion) going to law enforcement. The OCDA’s office accounts for 12 percent (\$166.6 million) of the law enforcement spending, while the Public Defender’s Office accounts for roughly half of that, at 6.5 percent (\$89.7 million).<sup>21</sup> While alarming, this discrepancy is typical across California and the country.<sup>22</sup> OC resident Ronnie Carmona, whose late son Arthur was wrongfully convicted of two armed robberies, shared that the Public Defender’s “resources are so limited. I don’t understand how anybody could say the DA and the PD system is balanced . . . The main reason the PDs will push the person into taking a deal is because. . . there are no resources for them to fight for this person.”

As efforts to defund police departments gain traction in jurisdictions across the country, prosecutors’ role in skyrocketing incarceration must not be overlooked. The DA’s office functions as part of the same law enforcement regime that consumes local budgets while exercising little accountability to its constituents. Efforts to redirect police funding towards community services should include restricting the power, scope, and budget of DAs. This would allow for funding equity between public defenders and DAs and free up funds to invest in restorative justice models and public services that will ensure resilient and thriving communities in a way policing and incarceration cannot and never have.

Although California has one of the highest rates of incarceration in the world,<sup>23</sup> Orange County incarcerates adults at an even higher rate than the state as a whole.<sup>24</sup> Prior to the pandemic, the average daily jail population in Orange County was 5,200, but it has since dropped down to 3,300.<sup>25</sup> Despite the record low population, the county is moving forward with plans to pay \$289 million to add an additional 900 mental health beds to the Musick County Jail.<sup>26</sup> Community advocates, including the ACLU of Southern California, have organized a coalition to fight the jail expansion, pointing out that

incarceration is not a treatment for social ills. Those funds would be more effectively and compassionately invested in social programs that address the root cause of crime. Despite the OC Sheriff’s admission that “the Orange County jail has become the de facto mental hospital of Orange County,”<sup>27</sup> and the OC DA’s public assertion that “I don’t believe that we should be sending mentally ill people to jail,”<sup>28</sup> the DA has yet to respond to repeated calls to oppose the Musick expansion.

## Orange County DA

Todd Spitzer was elected in 2018, unseating five-term incumbent Tony Rackauckas. Spitzer is a former county supervisor, state assemblymember, reserve police officer, and Orange County prosecutor. The OCDA’s office had been embroiled in scandals and accusations of corruption during Rackauckas’ tenure, and Spitzer ran and won on a platform that included increased transparency. Spitzer does not identify himself as a “progressive” prosecutor, and describes his office’s role as having the “responsibility to enhance public safety and welfare and create a sense of security in the community through the vigorous enforcement of criminal and civil law.”<sup>29</sup>



In the culture through Rackauckas and now with Spitzer has remained a desire to win their cases, whether that means by some of them cheating, by some of them committing misconduct, or otherwise, the culture has been to win. I don't think it has lessened since Spitzer has been in office. I think it's still the same.

— *Deputy Public Defender Kathleen Rogers*

According to many of the various stakeholders interviewed for this report, little has changed at the OCDA. Ronnie Carmona, co-founder of the Arthur Carmona Center for the Wrongfully Convicted, said that “in the beginning, [the DA] said, ‘Reform, reform, reform.’ But once he got in, we didn’t see any of that happen.”

The deputy public defenders with whom we spoke shared the same assessment of the current administration. Rogers reported that “the culture has always been — since I’ve been around — to win over there for the DA’s Office. ... For the DAs, the way they get promoted, the way they get the best assignments, which leads to promotion, the way they get the accolades, and the media kudos, and that type of thing, is to win their cases. And if they don’t win their cases, then they are not often promoted.” She added that “[In] the OCDA culture has remained a desire to win their cases, whether that means by some of them cheating, by some of them committing misconduct, or otherwise, the culture has been to win. I don’t think it has lessened since Spitzer has been in office. I think it’s still the same.”

Assistant public defender Adam Vining, said that “I don’t think the DA’s office has changed their mentality, their priorities. I think that the Legislature or the people of California have changed their priorities and the DA’s office has continued to work in a retributive punishment system where maximum incarceration is often the goal.”

Bulmaro Vicente of Chispa, a brave organizing political home for young Latinx-identifying people who seek to uproot systems of oppression and cultivate systems grounded in community accountability, solidarity, and self-determination for communities to thrive, said that the same patterns of corruption continue in the DA’s office, specifically

the culture of impunity for the Sheriff’s Department and other departments. He shared “Many families feel robbed of accountability by the OCDA’s office.”

The OCDA’s office has been fraught with public scandals for years. According to a 2012–2013 grand jury report, corruption and ethical violations in Orange County law enforcement and among prosecutors date back decades and rival that of New York and Chicago.<sup>30</sup> The OCDA collaborated for decades with the Sheriff and local police to illegally use jailhouse informants to coax confessions from defendants.<sup>31</sup> In 2018, an Orange County organization and local residents filed a lawsuit against the OCDA’s office and OC Sheriff’s Department alleging ongoing illegal jailhouse informant practices and policies in violation of defendants’ constitutional rights.<sup>32</sup> The community-driven lawsuit, led by attorneys with the ACLU, ACLU Foundation of Southern California, and the law firm Munger, Tolles & Olsen, is still being litigated.<sup>33</sup> It was also reported that in 2018, the OCDA’s office used local funds to pay legal fees for prosecutors facing suspension by the California State Bar.<sup>34</sup>

The University of California, Irvine’s Civil Rights Clinic recently sued the OCDA’s office over its use of an unregulated DNA database. The ongoing lawsuit claims that the DNA collection is illegal and disproportionately impacts poor people. In addition to the DNA scandal, the OCDA’s office has been accused of what is being called a “pay-to-play scheme” that involves bribes and giving favorable treatment to defense attorneys who helped fund his campaign.<sup>35</sup> Our analysis does not cover the breadth of corruption in Orange County.

# METHODOLOGY

The research and analysis for this report was based on a mixed-methods approach. We collected information through public records requests, stakeholder interviews, and general research. On May 13, 2019, the ACLU of Northern California sent a California Public Records Act (PRA) request to 15 of the largest DA offices in the state of California, including the Orange County District Attorney's Office. The PRA included requests for:

- Prosecution data for calendar years 2017 and 2018;
- All documents, records, and data related to any Orange County DA office diversion program for calendar years 2017 and 2018;
- All records and data related to parole hearings;
- All office policies related to prosecution charging practices;
- All immigration-related policies.

The PRA request was received by Spitzer, who assumed office in January 2019, but requested data pertaining to the previous administration under Rackauckas, who was in office during 2017 and 2018. In response to our initial PRA request (See Appendix A), Spitzer's response included the following records:

- Adult prosecution data for calendar years 2017 and 2018;
- A PDF related to an adult misdemeanor diversion program that included descriptions and eligibility criteria; and
- The number of parole hearings attended from 2016 through 2018.

The OCDA's office did not provide responses relating to juvenile cases, the positions taken in parole hearings, immigration policies, office internal policies, training manuals, procedures, or protocols. The office claimed a variety of exemptions for not providing this data, including work product privilege and the deliberative process; not having responsive records; and information not existing within their office.

In February 2021, the ACLU of Northern California followed up with the OCDA's office to request updated prosecution, diversion, and parole data for 2019 and 2020. The office refused to provide these records.

As an entity that touts its transparency, it is unacceptable that the OCDA's office refused to allow the public access to information about how their tax dollars are being spent. All available evidence suggests that the harmful and biased practices outlined in this report continue under current OCDA office policies.

## Understanding the Data

The spreadsheet of prosecution data from 2017 and 2018 included all adult charges filed during those calendar years. The dataset included case numbers, charges filed, enhancements filed, and demographic information (age, sex, race). There was also information related to the case's disposition (dismissed, diverted, convicted, etc.) and limited information about sentencing (probation, jail, prison, etc.).

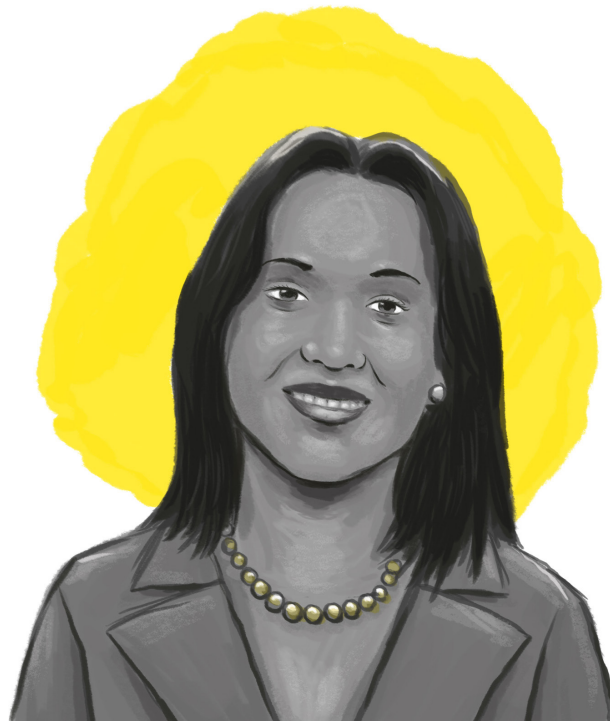
The charging dataset contained information relating to 121,200 individuals across 112,774 cases (8,456 cases included multiple defendants). Information on each individual charged was contained in a single row within the Excel spreadsheet. In order to analyze charge-level data using the statistical program STATA, we reorganized the Excel spreadsheet using INDEX(MATCH) to list all charges filed in a single column, while preserving unique case numbers and demographic information. In total, the OCDA filed 259,130 charges and 4,479 enhancements across all cases filed in 2017 and 2018.

Almost 80 percent (79.4 percent) of the 121,200 individuals (96,278) charged in 2017 and 2018 had their case status listed as "complete." Among the incomplete cases, 8.7 percent were active, 1.4 percent were in diversion, 0.1 percent were having their mental competency to stand trial being determined, and 10.3 percent had a warrant out for their arrest.

There were dozens of categories to describe the outcomes of complete cases, but for the purposes of this analysis we reclassified them into six dispositions: felony, misdemeanor, infraction, diverted, dismissed, or other. For example, the reclassified disposition of felony included people found guilty of a felony by jury trial, court trial, or a guilty plea. Our consolidated diversion category included diversion for people who faced their first charge, felony diversion, and misdemeanor diversion. The “other” disposition category represented just 438 cases (0.45 percent), and primarily included cases that were consolidated or refiled.

Disposition outcomes were only reported at the case level and were only available for completed cases. While each individual person charged by the DA may have been charged with multiple offenses, there was no additional information about whether a particular charge was filed as a felony, misdemeanor, infraction, or dropped altogether. It was unclear whether the charges listed were the initial charges filed by the OCDA or the final charges resulting from negotiations with the defense, as it is common for certain charges to be dropped or negotiated down from felonies to misdemeanors as part of a plea bargain.

The OCDA should commit to developing cross-system data platforms that track an individual from arrest to probation to identify drivers of racial disparities, reshape decision-making protocols, and limit unconscious bias. Cleaning and extracting aggregate findings from the dataset requires substantial resources that should not be the responsibility of the public. The OCDA should regularly publish key metrics on charging, diversion, sentencing, and racial disparities to hold themselves accountable to their constituents.



## Stakeholder Interviews

In addition to the quantitative analysis of charging data, we conducted interviews with various stakeholders who have personal and professional experience with Orange County’s criminal legal system. Our interviewees include:

- **Ronnie Carmona**, the mother of the late Arthur Carmona, who was wrongfully convicted in Orange County. She serves as CEO of an affordable housing organization and is co-founder of the Arthur Carmona Center for the Wrongfully Convicted. She is involved with the Innocence Project, 1000 Mothers Against Violence, PEOPLE’s Coalition, ACLU of Southern California, and victims’ rights groups. She is currently working toward her B.A. degree and has plans to attend law school in the future.
- **Douglas Jessop**, a musician and advocate with the Los Angeles District Attorney Accountability Coalition. While unlawfully incarcerated due to charges filed in Orange County, he served as a Prison Law Clerk, writing and filing cases that were heard by the California Supreme Court. He is currently a student at UCLA.<sup>36</sup>

- **Yehudah Pryce**, a social worker for the Young Adult Court in Orange County. He is a psychotherapist at the residential addiction treatment center Beit T'Shuvah, and a formerly-incarcerated community member who was released in October 2018 after serving over 16 years in prison for a nonviolent robbery that he was arrested for as a teenager. Pryce is also an active member of the Los Angeles District Attorney Accountability Coalition and recently published a report on criminalizing victims and trauma. He graduated Summa Cum Laude from Adams State University, earning his bachelor's degree in Sociology in 2019 with an emphasis in social welfare. He earned his master's in social work from USC, where he was the chair of Unchained Scholars. He is now working toward a doctorate of social work at Simmons University.<sup>37</sup>
- **Gaby Hernandez**, an organizer with Chicaxs Unidxs, a grassroots organization that focuses on the criminalization of community members, who are predominately Latinx. She is also co-founder of the Orange County Legal Clinic and has been doing work related to gang injunctions in Orange County since 2006.<sup>38</sup>
- **Bulmaro Vicente**, policy director for Chispa, a brave organizing political home for young Latinx-identifying people who seek to uproot systems of oppression and cultivate systems grounded in community accountability, solidarity, and self-determination for communities to thrive. There, he advocates and organizes community-based policies to address issues in the areas of policing, immigration, and housing. He previously served two terms as a Police Review Commissioner for the City of Berkeley, where he worked on various policies and sat on investigations relating to police misconduct. He is a lifelong Santa Ana resident and a community organizer with Chicaxs Unidxs. He earned his bachelor's degree in political science with a minor in public policy from UC Berkeley.<sup>39</sup>
- **Kelvin Hernandez**, an undocumented Orange County resident who is facing immigration-related consequences from a nonviolent charge. He is currently represented by a private criminal attorney and immigration attorney and is actively fighting his charges since being released from an immigration detention center a year ago. He has submitted a claim with the ACLU, and the University of California, Irvine Law School's Immigrant Rights Clinic has filed a lawsuit on his behalf.<sup>40</sup>
- **Adam Vining**, an assistant public defender in Orange County. He has been a public defender in Orange County for about 16 years, including seven years working to prepare serious felony cases for trial, including homicides, sex offenses, gang violence, and third strike cases. Before that, he worked on writs and appeals, supervision of misdemeanor attorneys, misdemeanor trials, juvenile court delinquency, and drug court. He recently became a supervisor at the Public Defender's office, overseeing a team of felony panel attorneys.<sup>41</sup>
- **Kathleen Rogers** (a pseudonym to protect her clients), an attorney with more than 15 years of experience in the Orange County Public Defender's office. She has handled a variety of cases, including misdemeanors, felonies, and other charges. She has also worked in the appellate department of their office.<sup>42</sup>



# CHARGING DECISIONS

In response to the ACLU’s PRA request for prosecution data from 2017–2018, OCDA Spitzer provided a dataset containing information on all adult charges filed under Rackauckas in those two calendar years. The OCDA filed 259,130 charges and 4,479 enhancements against 121,200 individuals.

## Racial & Ethnic Demographics

According to U.S. Census Bureau’s 2018 estimates, the racial and ethnic demographics of Orange County<sup>43</sup> are as follows:

- White Non-Hispanic<sup>44</sup> — 40.1 percent
- White (including white-Hispanic) — 71.5 percent
- Black — 2.1 percent
- Asian — 21.4 percent
- Hispanic — 34.2 percent
- Two or more races — 3.5 percent

The racial and ethnic demographics of people criminally charged by the OCDA are as follows:

- White — 42.9 percent (47,411)
- Black — 5.8 percent (6,454)
- Asian<sup>45</sup> — 3.0 percent (3,296)
- Vietnamese — 1.4 percent (1,557)
- Hispanic — 42.8 percent (47,346)
- Unknown or Other — 4.1 percent (4,530)

Black people are clearly overrepresented among individuals charged with a crime in Orange County. Although Black people represent just over 2 percent of the total population, they represent nearly 6 percent of people charged by the OCDA. Asian people (including Vietnamese) are largely underrepresented. Given the way demographic data is collected in Orange County compared to census data, the precise magnitude of the disparity between white Hispanic and white Non-Hispanic people

in charging decisions is difficult to tease out in the following sections and therefore should be interpreted as more suggestive than definitive. However, no matter how you slice the numbers, Hispanic people are overrepresented among those who are charged with a crime. It is unclear what “Other” refers to in the Orange County District Attorney’s data.

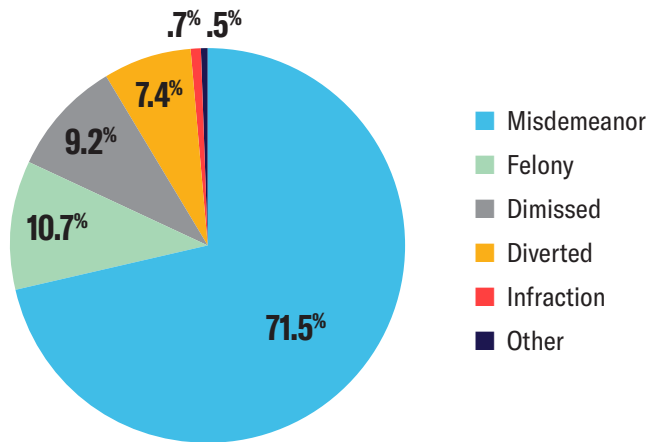
It is important to note that the way OCDA’s Office tracks demographic data — while better than some other counties — poses significant limitations on the public’s ability to hold the DA accountable. The OCDA should expand its definitions of race and ethnicity so it can provide more easily understandable data. Accountability to everyone in the community requires accounting for everyone in the community.

## Felony and Misdemeanor Charges and Cases

Because the charging data provided by the OCDA only included information about whether a person’s entire case was ultimately charged as a misdemeanor or a felony case, it is impossible to analyze the composition of charges within a case. It is likely that cases with a misdemeanor disposition are entirely composed of misdemeanor charges and that cases with a felony disposition include at least one felony charge, but this was not possible to verify.

Among the 96,278 people with completed cases, the vast majority (71.5 percent) were charged with misdemeanor cases. Only 10.8 percent of cases were felonies, less than 1 percent (0.7) were infractions, 9.2 percent were dismissed, and 7.4 percent were diverted.

**Chart 1: Dispositions of Completed Cases, 2017–2018**



Black and Latinx people are more likely to be charged with felonies than white people. A statistical analysis of felony charges on race shows that among people charged with a crime, Black people are 83.5 percent more likely than white people to be charged with a felony, regardless of age or gender. Among people charged with crimes in 2017 and 2018, Latinx people are almost 33 percent more likely to be charged with a felony than white people, regardless of age or gender. Without being able to control for specific offenses, the reasons for these charging disparities could derive from any number of reasons, including, for example, the over-policing of Black or Latinx communities or unconscious bias on the part of prosecutors with respect to charging practices.

## Wobblers

California state law defines most criminal charges as either a felony, misdemeanor, or infraction. Certain categories of charges, known as “wobblers,” can be filed as either a misdemeanor or a felony at the prosecutor’s discretion. Research shows that the discretion to file wobblers more or less punitively has led to significant racial disparities in sentencing. In California, Black people are significantly more likely to receive third-strike sentences due to wobblers being charged as felonies rather than misdemeanors.<sup>46</sup>

The structure of the OCDA’s data makes it impossible to specifically analyze the impact of discretionary decisions to file a wobbler as a felony

or misdemeanor. Someone charged with a wobbler could be facing a felony case because of a separate felony charge, or their case could be otherwise composed of misdemeanors and only converted into a felony case because of that one wobbler.

Overall, 41.2 percent of all charges were wobbler charges and 54 percent of all cases included at least one wobbler. Cases that included at least one wobbler charge were more likely to have a felony disposition — 12.3 percent compared to 7.7 percent for cases that didn’t include any wobblers.

The likelihood that cases including a wobbler will be resolved with a felony conviction are highest when the individual charged is Vietnamese or Black. Just 3.7 percent of Vietnamese people who are not charged with a wobbler face felony cases, but 14.5 percent of Vietnamese people charged with a wobbler do. In other words, if a Vietnamese person is charged with a wobbler, their chances of facing a felony conviction nearly quadruples. Seven and a half percent of Black people who are not charged with a wobbler face felony cases, compared to 13.2 percent of Black people charged with a wobbler. White peoples’ chances of facing a felony case also increase if their case includes a wobbler, but those chances only increase from 5 to 8.3 percent.

Line prosecutors’ discretionary decisions to file wobblers as felonies may be driving the increased likelihood of felony convictions and corresponding racial disparities, but it is impossible to know for sure given the office’s poor data practices. The OCDA could reduce racial disparities in felony cases that are driven by unconscious bias by better tracking the data and establishing a clear policy to presumptively file all wobblers as misdemeanors.

Kathleen Rogers, who has worked for over 15 years in the OC Public Defender’s office handling both misdemeanor and felony cases, shared that, “I’ve seen some cases where I think, this really was felony conduct. And they did this defendant a favor by not filing it as a felony. And then I’ve seen other cases where I’ve said, ‘Well, this really is very minimal conduct, they shouldn’t have filed it as a felony. . . . So I don’t know specifically, if they have policies on that, or what guidance they’re given. . . . And I don’t really notice anything consistent, sometimes they miss charges, sometimes they file everything they possibly can.”

Orange County Assistant Public Defender Adam Vining shared that “we see cases where somebody’s charged with bringing drugs into the jail. . . which is a felony. Could be charged as a misdemeanor, because it’s a personal amount of drugs for personal use. When it could be charged as a misdemeanor, they’re finding a way to charge it as a felony.” In an example of how prosecutors use wobbler charging in a “coercive” way, he explained: “If they charge a felony on a wobbler and then later, they offer a misdemeanor or the judge offers a misdemeanor, that case is going to settle almost always for a guilty plea instead of having a trial on whether the person actually did it because the risk is too high.”

## Low-Level Charges

Formal contact with the criminal legal system produces long-term, harmful consequences. Research has documented the benefits of diverting or declining to charge low-level offenses that can be better addressed through supportive means.<sup>47</sup> For example, a 2021 study of charging practices under the Suffolk County District Attorney’s Office in Massachusetts found that declining to charge a set of low-level nonviolent misdemeanors reduced the likelihood of future criminal legal system involvement with no increase in local crime rates.<sup>48</sup>

The ACLU of Northern California defines low-level offenses as those that should not be charged at all (decline-to-charge offenses) and offenses that should be referred to community-based programming before filing (diverted pre-filing offenses) (see lists of both in Appendix B). The decline-to-charge list includes very low-level offenses like simple drug possession, possession of drug paraphernalia, or driving with a suspended license. Resources used charging these current offenses could be better spent on supporting community-based substance diversion and alternatives to incarceration. The diversion list includes charges such as petty theft, DUIs, and variations of robberies and burglaries, which can be better addressed through social service programs and restorative justice interventions.

In 2017 and 2018, the OCDA filed 165,168 low-level charges, which represent 63.7 percent of all charges filed in those years. Roughly a quarter of all charges (67,660 or 26.1 percent) should be diverted, and the remaining 97,508 low-level charges (37.6 percent of all charges filed) should have been declined.

In fact, every single one of the 10 most common charges filed in Orange County was a low-level charge. These 10 charges alone represent close to half (47.7 percent) of all charges filed in 2017 and 2018.

**Table 1: Top 10 Most Common Charges Filed in Orange County, 2017–2018**

Charge	Code	Charge Type	ACLU Recommendation	Frequency	% Charges
Possession of drug paraphernalia	HS 11364(a)	Misdemeanor	Decline to charge	30,498	11.9
Possession of meth	HS 11377(a)	Misdemeanor	Decline to charge	19,645	7.7
DUI	VC 23152(a)	Misdemeanor	Divert	17,128	6.7
DUI	VC 23152(b)	Misdemeanor	Divert	16,646	6.5
Possession of controlled substance	HS 11350(a)	Misdemeanor	Decline to charge	9,463	3.7
Petty theft	PC 484(a)-488	Misdemeanor	Divert	7,575	3.0
Driving with a suspended license	PC 14601.1(a)	Misdemeanor	Decline to charge	6,855	2.7
Resisting arrest	PC 148(a)(1)	Misdemeanor	Decline to charge	5,208	2.0
Driving without a license	VC 12500(a)	Misdemeanor	Decline to charge	5,159	2.0
Driving with a suspended license	VC 14601.2(a)	Misdemeanor	Decline to charge	3,809	1.5
<b>Total</b>				<b>30,498</b>	<b>47.7</b>



Although the current OCDA’s office refused to provide updated information for 2019 and 2020, the local news outlet Voice of OC received records from the OC Superior Court that include charging data from the first year and a half of his tenure.<sup>49</sup> The following table describes charges filed between July 2018 and June 2020. The first six months of this period include charges filed under former DA Rackauckas, but the following 18 months reflect the

charging practices of the current office. It is clear that the trend of filing low-level charges continues under the current OCDA’s direction. Seven of the top 10 charges from 2017 and 2018 remain in the 10 most frequent charges across FY 2017–18 and FY 2019–20. Furthermore, all of the top 10 most frequent charges across the start of the current DA’s administration are also low-level misdemeanors, which should be declined or diverted.

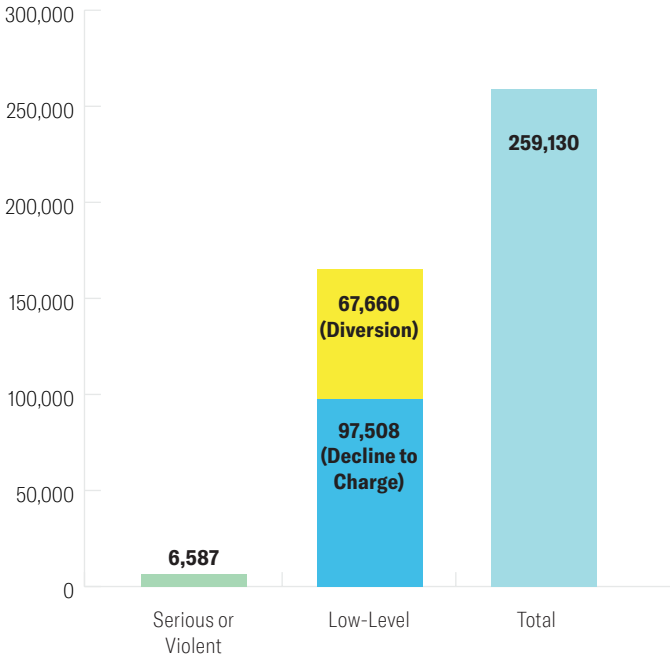
**Table 2: Top 10 Most Common Charges Filed in Orange County, FY 2018–19 and FY 2019–20<sup>50</sup>**

Charge	Code	Charge Type	Recommendation	Frequency
DUI	VC 23152(a)	Misdemeanor	Divert	17,775
Possession of drug paraphernalia	HS 11364(a)	Misdemeanor	Decline to charge	17,047
Possession of meth	HS 11377(a)	Misdemeanor	Decline to charge	13,580
Petty theft	484(a)-488	Misdemeanor	Divert	8,993
Possession of controlled substance	HS 11350(a)	Misdemeanor	Decline to charge	5,524
Driving with a suspended license	PC 14601.1(a)	Misdemeanor	Decline to charge	4,267
Disorderly Conduct	PC 647(f)	Misdemeanor	Decline to charge	3,136
DUI	VC 23152(f)	Misdemeanor	Divert	2,520
Driving with a suspended license	VC 14601.2(a)	Misdemeanor	Decline to charge	2,002
Under the Influence of Drugs	HS 11550(a)	Misdemeanor	Decline to charge	1,125

Although the number of people charged for possession of drug paraphernalia and possession of methamphetamines did decrease under the current DA, they remain two of the most common charges in the county. Earlier this year, the current OCDA publicly stated that, “I don’t believe that we should be sending mentally ill people to jail. We should be, immediately upon arrest, evaluating them and triaging them and putting them into programs.” If the OCDA’s office is truly committed to pursuing health-based solutions for individuals struggling with substance dependency or mental illnesses, it should decline to criminally file these charges. Prosecution is not an appropriate response to public health issues.

The extent to which low-level crimes dominate the OCDA’s caseload is staggering, particularly when compared to the fact that only 2.5 percent of all charges were serious or violent, as defined by California State law. Despite the DA’s rhetoric about targeting violent crimes, only 3.2 percent of all cases included at least one serious or violent felony.

**Chart 2: Frequency of Serious and Low-Level Charges**



White people are most likely to be charged with low-level crimes overall and most likely to be charged with decline-to-charge offenses. Non-Vietnamese Asian people are most likely to be charged with crimes that should be diverted, which appears to be driven by the relatively high percentage of DUIs charged against non-Vietnamese people. While Asian and Black people are charged with DUIs at roughly the same frequency, the 1,627 DUI charges to Asian people make up 21 percent of all charges filed against Asian people, and the 1,506 DUI charges filed against Black people only make up 10 percent of all charges against Black people.

**Table 2: Percent of Low-Level Charges by Racial/Ethnicity**

Race/Ethnicity	Total % of Low-Level Charges	% of Charges That Are Divertable	% of Charges That Should be Declined
Asian	59	34	25
Black	61	29	32
Latinx	62	26	37
Unknown	60	32	28
Vietnamese	62	29	33
White	66	25	41
<b>Total</b>	<b>64</b>	<b>26</b>	<b>38</b>

More than half (53.5 percent) of all cases were made up entirely of low-level charges. Astonishingly, three in 10 cases (30.0 percent) were made up entirely of extremely low-level charges on the ACLU of Northern California’s decline-to-charge list. The remaining 23.5 percent of low-level cases included a combination of charges on the decline-to-charge and diversion lists. Adopting the ACLU of Northern California’s diversion and decline-to-charge lists would immediately cut the OCDA’s caseload in half.

Yehudah Pryce, a social worker with Young Adult Court in Orange County and a formerly incarcerated community member who spent 16 years in prison for a nonviolent robbery said: “If we’re arresting people for lifestyle crimes, or survival crimes, we need to be seriously considering other alternatives to that. The default position can’t be, ‘Lock them up.’ It just can’t be.”

## Sentence Enhancements

Sentence enhancements increase the total incarceration term for a crime, based on aspects of how the crime was committed or who committed it. Nearly 80 percent of people incarcerated in California state prisons have been affected by a sentence enhancement, and over a quarter had three or more.<sup>51</sup> However, research shows that the marginal deterrent effect of sentence enhancements on already lengthy prison sentences is modest at best.<sup>52</sup> Longer sentences also have diminishing returns to public safety because individuals are less

likely to commit crimes at older ages, and because incarceration diverts resources from community-based programs and policy initiatives that hold the potential for greater impact on community safety.<sup>53</sup>

Around three percent (2.8 percent, 3,386 cases) of cases filed between 2017 and 2018 included at least one sentence enhancement. Because sentence enhancements, as tracked by the DA, only affected a small percentage of cases, the following table lists the top three enhancements, which represent over half of all enhancements filed.

**Table 3: Top 3 Most Common Sentence Enhancements**

Enhancement	Penal Code	Frequency	Percent of Enhancements
Gang enhancement	186.22(b)(1)	871	19.5
Committing crime while out on bail or release	12022.1(b)	826	18.4
Great bodily injury	12022.7(a)	630	14.1
		<b>Total</b>	<b>52.0</b>

There were persistent racial disparities across sentence enhancements, and Latinx people were most likely to be charged with each of the five most common enhancements. Overall, 3.4 percent of Latinx people were charged with at least one enhancement, compared to 3 percent of Black people and 1.7 percent of white people.

The racial disparities were particularly egregious among gang enhancements. 88 percent of gang enhancements were charged to Latinx or Black people. Latinx people were nearly eight times as likely as white people to receive a gang enhancement, and Black people were five times as likely. Gang enhancements have come under increased scrutiny in recent years for their role in driving incarceration and exacerbating racial disparities in the criminal legal system. Gang enhancements, ranging from an additional two years to life, continue to be routinely imposed on predominantly Latinx and Black people, despite the fact that there is little to no evidence that gang enhancements reduce crime.<sup>54</sup> More than

90 percent of people serving gang enhancements in California prisons in 2019 are Black or Latinx, which closely aligns with the disparities in Orange County.<sup>55</sup>

Gaby Hernandez, an organizer with Chicaxs Unidxs and co-founder of the Orange County Legal Clinic, argues that sentence enhancements that disproportionately impact people of color should be eliminated. Since 2006, Hernandez has worked on gang injunctions and gang enhancements that disproportionately criminalize Latinx community members, and she says it is very common for people who receive gang enhancements to be sentenced to 25 years to life. “We have routinely seen these practices where people are over-sentenced here in Orange County, especially when it comes to the gang enhancements,” she said. “[OCDA]’s practice has been like, ‘We’re going to give you the harshest sentence that we can.’ And so, they overcharge people and include a lot of gang enhancements, and then they give them these horrible deals but then scare them so that they do take the deals because they want to avoid getting longer sentences.”

Deputy Public Defender Kathleen Rogers highlighted a recent change to California law that gives judges more power and discretion to strike or dismiss certain enhancements. She emphasized that the DA’s office is “still pushing back quite a bit on a lot of the new legislation that’s designed to help people and to assist them with rehabilitation.” She believes that people would be better off if the DA made changes to gang and gun enhancements and other enhancements that add many years to a prison sentence and took more of a rehabilitative approach.

Yehudah Pryce, a social worker with Young Adult Court in Orange County and a formerly incarcerated community member, agrees. “Enhancements are horrible,” he said. “They’re not really related to anything that’s reflective of community and justice. They just lock a person up for as long as possible.”

Assistant Public Defender Adam Vining noted: “For the most part they charge what they can charge. Sometimes cases are overcharged, sometimes they’re undercharged but I think for the most part, generally they’re prosecuting cases to the fullest extent that they can. I think the system is set up that way, not just in Orange County, but in most places.”

*“Black and Brown communities are disproportionately affected, so what does that inculcate in us? An animosity towards the justice system. I don’t believe that’s conducive to creating safer communities, because if we can’t believe that there’s justice for us, that there’s a system now that cares about us and that accepts us and wants us to do better, it doesn’t mean that we shouldn’t get any consequences for our actions. I mean, what that does is ... it just inculcates an anti-law sentiment, and I don’t think that benefits us as a community, though it’s a natural survival response.”*

— Yehudah Pryce, social worker, OC Young Adult Court

## Youth Prosecution

Harsh sentencing for youth is unnecessary and counterproductive, as adolescents will grow to have substantially more self-regulatory capacity in just a few years, and imprisonment is associated with worse outcomes for youth.<sup>56</sup> While cognitive capacity develops by age 16, psychological maturity, when characteristics like impulsivity, sensation-seeking, future orientation, and susceptibility to peer pressure level off, does not occur until around age 26.<sup>57</sup>

The introduction of developmental science into the U.S. Supreme Court’s deliberations about the appropriate sentencing of criminally charged youth has had a substantial impact on the Court’s rulings over the past two decades,<sup>58</sup> and the California Penal Code expressly acknowledges “the diminished culpability of youth as compared to adults.”<sup>59</sup> All Orange County line prosecutors working in juvenile court should receive comprehensive training on adolescent cognitive and behavioral development.

Although it appears that Orange County youth are detained at the statewide Department of Juvenile Justice (DJJ) and in county jails at a lower rate than the state average, children in Orange County are transferred to adult court at more than twice the statewide rate.<sup>60</sup> Decades of research has found no evidence of any deterrent effect of transferring minors into the criminal (adult) legal system, and, in fact, youth who are tried as adults are more likely to be charged with a future crime than youth adjudicated in the juvenile system.<sup>61</sup>

Because the part of the brain directly related to the ability to understand choices and consequences does not fully develop until the mid-20s, some researchers have suggested raising the age of criminal responsibility to between 21 and 26 years old.<sup>62</sup> In addition to advocating for statutory changes to raise the age of adult prosecution, the OCDA should institute a presumption of non-incarceration for all youth under the age of 26.



In 2020, Gov. Gavin Newsom signed SB 823, which mandates that DJJ end most youth admissions by July 1, 2021, and permanently close by June 30, 2023.<sup>63</sup> A crucial element of successfully implementing the closure of DJJ will be to ensure that youth aren't simply funneled into the more punitive adult system. All local placements should be designed in partnership with community stakeholders to prioritize healing and successful reentry.



## CHARGING RECOMMENDATIONS

The OCDA should improve its charging practices by:

- Ending the over-criminalization of low-level offenses by instituting the ACLU of Northern California's decline-to-charge and pre-file diversion lists (see Appendix B), which would eliminate more than half of the DA's caseload;
- Developing an internal policy to presumptively file wobbler offenses as misdemeanors;
- Following the lead of the San Francisco and Los Angeles District Attorney's offices to eliminate sentencing enhancements, including but not limited to gang enhancements and status enhancements that are major contributors of extreme sentencing and racial disparities;
- Never charging children as adults and working with community partners to develop rehabilitative alternatives to placement at DJJ; and
- Establishing an open line of communication and developing meaningful relationships and partnerships with a variety of community stakeholders, especially with individuals, families, and communities most impacted by the criminal legal system in Orange County;
- Incentivizing alternatives to incarceration among line deputies and creating opportunities for promotion that are not dependent on conviction rates;
- Building an end-to-end tracking system that follows cases all the way from arrest to parole and probation, and publishing key metrics, including racial disparities, to the public through an online dashboard.

# DIVERSION

In the criminal legal system, a felony or misdemeanor conviction can lead to prison or jail time, costly fines and fees, and collateral consequences that someone carries with them the rest of their life.

A diversion program is designed to help a person avoid a criminal conviction by offering services and programming that, if successfully completed, will lead to their charges being dropped or not filed. Diversion programs vary immensely in their design, target population, and effectiveness.

The needs of individuals and communities also vary greatly. However, there are a number of elements that researchers and practitioners have identified as critical for ensuring that diversion programs do not reproduce the oppressive structures of the legal system. Regardless of the type of diversion, these critical elements are that the program must be 1) structured to prevent net-widening, 2) designed and evaluated to close racial and ethnic disparities in the criminal legal system, and 3) created and held by community-based organizations.<sup>64</sup>

Diversion programs that *increase* the number of people being arrested, charged, or otherwise impacted by the system are known as “net-widening” programs. It is therefore essential to outline clear eligibility criteria for diversion programs and to pair any expansion of diversion with a clear decline-to-charge policy. According to the OCDA’s charging dataset, the most commonly diverted charges are all extremely low-level charges that should not have been charged in the first place. Declining to charge the lowest-level crimes prevents net-widening and improves long-term outcomes for individuals.<sup>65</sup> Diversion programs can then focus on providing services and restorative justice programming to individuals that can most benefit from them.

The OCDA should also be closely tracking referrals, participation, and completion rates across race and ethnicity in order to ensure that diversion helps close existing disparities. The data provided by the OCDA strongly indicates that access to diversion

currently exacerbates existing racial disparities in the system, rather than closing them.

Rather than contracting diversion programs out to for-profit private companies, as is the norm in Orange County, diversion programs should be run by nonprofit organizations with strong ties to the community. While police officers, prosecutors, and judges can refer individuals to diversion as an alternative to incarceration, those services should be delivered outside of the criminal legal system. Community-based organizations are more trusted, expert actors and are better positioned to build long-term supportive relationships with individual participants.

In response to the ACLU’s 2019 PRA request, the charging dataset included information on diversion dispositions and referrals to three diversion programs: Deferred Entry of Judgment Misdemeanor Diversion Program/Offender Treatment Program (DEJ/OTP), PC 1000, and Prop 36. All of these programs focus on misdemeanor and/or drug diversion.

Among the 96,278 closed cases, for which disposition information is available, 8,803 cases were diverted through one of these three programs. Nearly all (97.7 percent) of those diversion referrals were to Orange County’s misdemeanor and drug diversion program DEJ/OTP. Only 194 cases were referred to PC 1000, which is California’s substance dependence and addiction diversion program. Just 48 cases were referred to diversion through Prop 36, which requires that certain nonviolent drug possession charges receive substance dependence and addiction treatment in place of jail or prison time.

Overall, 9.1 percent of completed cases filed in Orange County in 2017 and 2018 were referred to one of these three misdemeanor or drug diversion programs. There were also 643 individuals whose final disposition indicated that they were diverted,

but they were not referred to any one of the three programs described above. There was a field titled “SpecialtyCrt,” but only nine cases that were diverted without being referred to a diversion program had been sent through a specialty court. It is therefore unclear whether these individuals participated in an alternate diversion program or if the referral was not noted due to a clerical error. Race data was available for 634 of those individuals diverted through alternate means, and those individuals were disproportionately white (49.8 percent). It is unclear what diversion program those individuals were accessing, based on the available data, so these cases have been excluded from the following diversion analysis.

According to the OCDA’s dataset about diversion referrals and whether or not a person was ultimately successfully diverted, it appears that 72.4 percent of people referred to diversion successfully complete it. This is substantially lower than the 96 percent success rate that the OCDA’s diversion materials boasted, but the office also appears to have referred more people than their materials report. Their DEJ/OTP program guidebook states that roughly 2,000

people participate in the program each year, but 8,604 people were referred to DEJ/OTP over the two year period from 2017 to 2018, according to their charging dataset.

### NET-WIDENING

The DA has complete discretion over determining eligibility for DEJ/OTP diversion. To be eligible for this program, the main requirement is that a person must have committed a qualifying offense. The policy lists out eight eligible offenses, but notes that any other misdemeanor “which is minor in nature and not otherwise disqualified” could be considered. Every single one of the eligible offenses is so low-level that the ACLU recommends those charges not be filed at all. Eligible offenses include public intoxication, defrauding an innkeeper, and trespassing. Because research shows that formal legal system involvement worsens outcomes for individuals charged with very low-level offenses,<sup>66</sup> it is deeply troubling that four of the five most commonly diverted charges are on the ACLU of Northern California’s decline-to-charge list.

**Table 4: Most Common Charges in Diverted Cases**

Charge	Code	Charge Type	Recommendation	Frequency
Possession of drug paraphernalia	HS 11364(a)	Misdemeanor	Decline to charge	1,356
Possession of meth	HS 11377(a)	Misdemeanor	Decline to charge	1,162
Petty theft	484(a)-488	Misdemeanor	Divert	1,024
Driving with a suspended license	PC 14601.1(a)	Misdemeanor	Decline to charge	900
Possession of controlled substance	HS 11350(a)	Misdemeanor	Decline to charge	741

Overall, among the 9,864 cases that were referred to diversion in 2017 and 2018, 42.9 percent were entirely comprised of charges on the decline-to-charge list. Among the 102,442 cases that were not referred to diversion, 24.2 percent of them should have been diverted, because the most serious charge was on the list of charges the ACLU of Northern California believes should be automatically diverted pre-file. This demonstrates that Orange County’s diversion programs are capturing people who should not be criminally charged and widening the net of system control and surveillance. Rather than diverting offenses that should be decriminalized, the OCDA should focus on diverting cases where community-based services can more effectively take the place of incarceration. For example, the current DEJ/OTP eligibility criteria explicitly disqualifies people charged with burglary (PC 459), but the ACLU recommends diverting burglary cases where no person was present in the home.

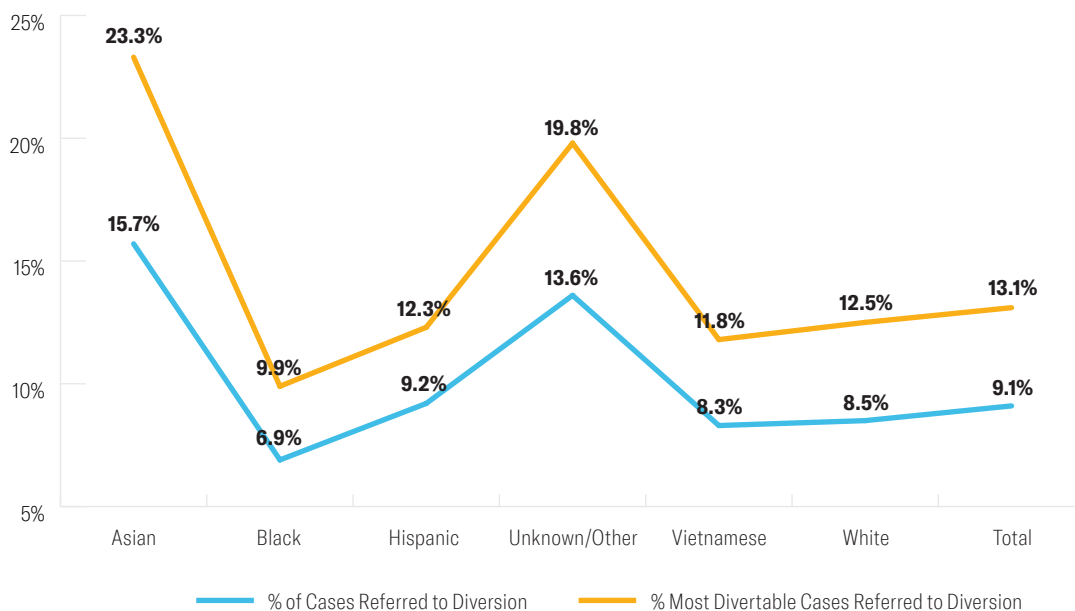
The OCDA could entirely eliminate 30 percent of its caseload by declining to charge extremely low-level cases that do not pose risks to community safety. The OCDA could then divert the 23.5 percent of cases that include diversion offenses like DUIs and petty theft, which are better addressed through community-based programming. Adopting the

ACLU of Northern California’s decline-to-charge and diversion lists could increase access to diversion while also working to avoid harmful net-widening practices.

### RACIAL DISPARITIES

There are persistent racial disparities in access to diversion in Orange County. While 9.1 percent of all cases filed in 2017 and 2018 were referred to diversion programs, just 6.9 percent of cases filed against Black people were. Although it is possible that this difference is caused by the severity of the crime, rather than racial bias, these disparities persist even across low-level cases. In comparing diversion rates among low-level cases that include one of the five most commonly diverted charges above, which we describe as the “most-divertable cases,” Black people are still less than half as likely as Asian people to be referred to diversion. Overall, 13.1 percent of the “most-divertable cases” were referred to diversion, but Black people made up only 9.9 percent of the “most-divertable cases”. In other words, Black people were least likely to be diverted among all categories of charges. The following chart depicts the percentage of all cases filed against members of a racial group that were referred to diversion, as well as the percentage of “most-divertable cases” that were referred.

**Chart 3: Access to Diversion Across Race**





Even when controlling for the severity of a case, Black people remain the least likely to have access to diversion. This implies that Orange County’s diversion programs are actually worsening racial disparities in incarceration rates, because Black people are more likely to be criminally charged and face jail or prison time for low-level divertible offenses. Orange County should partner with restorative justice diversion experts to closely examine eligibility criteria for their programs, in order to address existing racial biases.

Currently, the OCDA has complete discretion over determining eligibility for DEJ/OTP diversion. In addition to the concerns related to the offenses discussed above, there are a number of program requirements that likely contribute to these racial disparities. To be eligible for DEJ/OTP, a person cannot have had any misdemeanor convictions within the last five years, any prior felonies, or any past crimes that involve violence. Given the documented over-policing of low-income communities of color, it is more likely that Black and Brown residents will have had prior interactions with the criminal legal system. Explicitly excluding people with priors from diversion programs only exacerbates existing racial disparities.

In order to successfully complete the DEJ/OTP diversion programs, individuals must pay program fees, restitution, and submit to DNA testing. The fees for a single day of class are \$300, \$525 for a two-day class, and there are additional \$25 monthly fees for monitoring and collections. Given existing racial disparities in income and wealth, creating financial barriers to diversion will inherently discriminate against low-income people and Black and Brown people. Information on restitution was only available for 66.3 percent of people charged and did not include the amount they were charged. Based upon the available data, 32.4 percent of non-Vietnamese Asian people and 30.9 percent of Black people were charged restitution, compared to just 20.8 percent for white people. If people of color are more likely to have restitution payments that they are required to make in order to complete diversion, they are more likely to either be denied diversion due to the restitution amount or be unable to pay it off by the end of the diversion program.

Ronnie Carmona, mother of wrongfully convicted Arthur Carmona, believes that “if you’re going to offer a diversion program, you have to assume not everybody has the money. If you don’t have the money, how can you buy justice? You need money to get it, that’s the way our system is made up. ... If the interest is in helping people change, then give them access. Don’t put a cost — money, anything like that — it’s not a true diversion program.”

## THE CONTRADICTIONS OF FOR-PROFIT “DIVERSION” PROGRAMS

Orange County’s primary diversion program, DEJ/OTP, is operated by the outside vendor Pacific Educational Services (PES) They are a private, for-profit company that works in more than a dozen counties throughout California, partnering with various criminal legal system actors. Despite their presence in so many counties, there is absolutely no information about their programs’ design or outcomes on their website and little additional information is publicly available.

The lack of transparency and accountability from a private-run diversion program is concerning, especially given the broader context of massive for-profit corporations like GEO and Corrections Corporation of America rebranding themselves as rehabilitation and diversion providers.<sup>67</sup> Orange County should instead form partnerships with community-based organizations that have strong relationships with impacted communities to build their capacity to operate diversion programs that are accountable and transparent.

## OTHER DIVERSION PROGRAMS

Notably absent from all of the policies and data provided by the OCDA was any mention of mental health diversion. Deputy Public Defender Kathleen Rogers said that the current DA has been vocal about mental health diversion. “He has spoken to the media many times and issued press releases about how he supports mental health diversion. And his line deputies are fighting us at every turn. So, there’s huge pushback from the actual deputies in court. And so, the cynical side of me says that the

words [the DA] is using are for the media ...” It is particularly concerning that the charging and diversion data provided by the OCDA does not track any relevant information about mental health diversion referrals, access, or outcomes. Rather than rebranding the expansion of the Musick Jail as a mental health initiative, the OCDA should invest in and comprehensively track non-carceral treatment options for people with serious mental illnesses.

Gaby Hernandez, the Chicaxs Unidxs organizer, noted that the OCDA’s office also has an internal diversion program called the gang resistance intervention program (GRIP). We did not receive any information from the OCDA’s office regarding GRIP, but Hernandez’s research has found that the program operates more like an informant program than a diversion program and was staffed by the same people who run the gang injunction department. “If it was run by a non-profit or non-law enforcement program, then it would be more effective because it could have more buy-in and more collaboration from the families,” she said. “But the way that it’s operated is just counter-intuitive.”

We also learned about a new felony diversion program through our conversations with stakeholders. The Young Adult Court is a promising pilot program serving 18- to 27-year-olds that is fully funded by grants from outside of the county and OCDA’s office. The court is one of five such programs in the country and the only one that has a research component attached to it through the University of California, Irvine. The program does not have strict criteria, although there are some eligibility requirements, including that the offense cannot be a violent crime, include a gun, be gang-related, or pertain to someone with high level mental health needs who could better be served through mental health court. Those who meet these requirements are randomly selected into the court. This court also requires the submission of DNA, an 18-month minimum, and a restitution requirement. However, the court takes an individualized approach to clients’ needs and has creative ways to help individuals meet these requirements. Although not required, the DA’s office and the court have decided to participate in the program, according to Yehudah Pryce, a social worker and case manager in the Young Adult Court.

Pryce believes the pilot program should be expanded to include more offenses, including violent crimes, and he said the OCDA’s office was open to expanding the court to more qualifying offenses.

## PERSONAL & PROFESSIONAL PERSPECTIVES

The vast majority of the stakeholders with whom we spoke believed that increased access to diversion would serve the public interest. However, they agreed that it was being underutilized in Orange County and that the OCDA’s office’s commitment to drug and mental health diversion were more for show than used in practice.

Hernandez said one way the DA could serve the public is by “changing the culture in that department where conviction is not our goal. Understanding that incarceration does not make communities safer. It’s actually dealing with the root causes of it. So, when you link people to supportive services or actual transformational services, you’re going to see a reduction in crime.”

Pryce had this to say: “It would be nice if the DA articulated something, that their job is not just to convict. ... It’s to work with community. It’s to work with community in seeing what’s the best solution to heal the community. You’re not just bringing justice to the victim, because there’s a lot of other secondary victims to that process. So I just think you just need to do a lot more diversion, evidence-based.”

Rogers believed the DA could “change their policy ... to offer or to not oppose diversion in more circumstances. Because at the end of the day, if a person successfully completes diversion, that person is far more likely to not reoffend, and they would be rehabilitated. If they don’t complete diversion, then they can still be prosecuted. So, it’s not like [prosecutors] really give anything up by joining us in our quest for diversion.”

Vining said that “it can be counterproductive to give somebody a felony because now the limited opportunities that that person might’ve had prior to committing that act have become even more limited. And so, I think diversion makes sense for a lot of people whether they’re suffering from mental illness or addiction or poverty.”

## DIVERSION RECOMMENDATIONS

The OCDA should improve its diversion practices by:

- Not filing extremely low-level charges on the ACLU of Northern California’s decline-to-charge list (see Appendix B) in order to avoid “net-widening”;
- Reducing restrictions and expanding eligibility criteria for diversion, including adopting the ACLU of Northern California’s pre-file diversion list (see Appendix B);
- Ensuring all diversion is pre-filing and does not require any admission of guilt;
- Ensuring that all diversion is offered free of charge to participants;
- Releasing all internal policies related to diversion practices to better ensure transparency and accountability, to help facilitate trust in the community;
- Collecting data on all diversion practices and releasing it to the public annually by using existing funding streams;
- Dedicating existing resources to understanding and eliminating racial disparities in diversion access;
- Ending all partnerships with for-profit companies conducting diversion in Orange County, including but not limited to PES and GEO Group; and
- Adopting new and innovative, community-driven diversion programs housed outside the criminal legal system, to better meet the specific needs of Orange County residents.

Vicente agreed that “The OCDA uses a punitive approach, rather than a restorative approach.” He also noted that the lack of access to diversion is particularly harmful to non-citizen immigrants. “One of our priorities is to mitigate the severe penalty of deportation,” he said. “We need diversion programs tailored towards undocumented folks to prevent the risk of deportation.”

Although social justice advocate and formerly incarcerated resident Douglas Jessop said he believed it was possible for the DA’s office to better serve the interest of the public through diversion, he also believed the office’s “allegiance is somewhere else. It’s not to the people, or even justice ... It’s definitely not towards anybody of color. Absolutely not towards anybody of color.”

# POLICE ACCOUNTABILITY

## O.C. Murders by Law Enforcement

Local and national protest movements calling for police accountability have driven numerous reforms, but they have not stopped the killings or coalesced around a single definition of accountability. In fact, California has more police killings each year than any other state.<sup>68</sup>

For this report we relied on multiple data sources to provide a picture of the landscape of police shootings in California and Orange County. Caution should be used when making any generalizations about the data, as it does not capture the full spectrum of incidents that have occurred at both the state and local level. In California, the Department of Justice has been collecting data on police shootings since 2016. From 2016 to 2019, 623 people have reportedly been killed by police — roughly 155 people each year. Forty-four of those deaths occurred in Orange County.<sup>69</sup>

From 2010–2020, the OCDA’s office reviewed 142 police shooting incidents involving 145 civilians and resulting in 86 deaths. According to the OCDA’s shootings and custodial death letters reports, the office declined to charge officers in all 142 police shooting incidents. Of those incidents, 118 were under former OCDA Rackauckas and 24 were under Spitzer.

In the case of Kelly Thomas, who was brutally beaten to death by Fullerton Police Officers Manuel Ramos and Jay Cicinelli in 2011, Rackauckas did file criminal charges against the police officers.<sup>70</sup> Because the officers did not shoot Thomas, this killing was not represented in the shooting incidents described above. Although the officers’ violent and public beating of Thomas was captured on film, a jury acquitted both officers on all charges. Even when charges were filed, the entire system failed to hold the officers accountable. Out of dozens of police killings, this appears to be the only instance in which Rackauckas filed criminal charges, and it appears that the current DA’s office never has.

In August 2021, Spitzer announced that his office would not file charges against Fullerton Police Officer Jonathan Ferrell, who shot and killed Hector Hernandez in his own front yard in May of 2020.<sup>71</sup> While Hernandez had his hands in the air, Ferrell set his police dog on him, and when Hernandez pulled a knife from his pocket to defend himself against the dog, Ferrell fatally shot him. “Hector didn’t deserve to be shot and killed,” said Bulmaro Vicente of Chispa, who is a member of the Justice For Hector Coalition.

In September 2020, Kurt Reinhold, a Black man who was experiencing homelessness, was stopped by law enforcement officers for jaywalking in San Clemente. One of the officers shot and killed Reinhold for reportedly walking away during the stop. The OCDA’s office has yet to decide whether to file charges against the deputies, despite a probe his office announced shortly after the shooting, now spanning more than 13 months. In the 13 months since Reinhold’s killing, the OCDA’s office has released 21 decision letters in relation to cases where police shot people in Orange County. None of the letters expressed a finding of criminal culpability or wrongdoing on the part of the officers involved.

In 2019, Spitzer also declined to charge Anaheim police officers Sean Staymates and Kevin Pedersen. Those officers killed 50-year-old Eliuth Penaloza Nava during a police chase that lasted minutes and involved 76 bullets fired by officers, nine of which struck Nava. After witnessing video footage of the incident, the Nava family attorney said, “The [officers] know better — it looked like Bonnie and Clyde.” Anaheim Mayor Harry Sidhu described the video footage as “disturbing,” and stated that, “we failed what we expect of ourselves and what the community demands of us.” Although it declined to file criminal charges against the officers, the OCDA’s office described the officers’ conduct as “alarming

## PERSONAL & PROFESSIONAL PERSPECTIVES

and irresponsible.”<sup>72</sup> In one of the city’s largest payout for a police killing, the city of Anaheim paid \$2.9 million to Nava’s family in a settlement.<sup>73</sup>

Another fatal incident in August 2019 started as a routine traffic stop for expired plates. Buena Park Police officers Bobby Colon and Jennifer Tran killed unarmed 19-year-old David Sullivan. Attorney Kent Henderson, who represented Sullivan’s mother, described their tactics as “abysmal” and said, “They didn’t have to shoot him. ... It’s ridiculous to use deadly force in that situation.” Sullivan’s family and members of the public have called on Spitzer to re-open the case and bring justice for Sullivan. In response, the OCDA’s office doubled down on its decision, stating it was based on a “thorough, independent analysis” of the incident.<sup>74</sup>

While these refusals to hold law enforcement officials accountable for their conduct is devastating for family and community members, they are not unique to Orange County. According to one figure, 98.3 percent of police killings in the United States did not result in charges.<sup>75</sup>

Despite the lack of charges against officer-involved shootings, the OCDA’s office has brought charges against officers involved in numerous non-lethal incidents, including wage theft,<sup>76</sup> false impersonation,<sup>77</sup> falsifying police reports,<sup>78</sup> domestic violence,<sup>79</sup> and more.<sup>80</sup> One of the most recent notable cases involving illegal conduct by police officers was the Orange County Sheriff’s booking scandal that involved multiple internal audits of thousands of cases, which revealed that officers regularly booked evidence late or not at all, even though their written reports claimed they had done so. As part of the DA’s probe, 31 officers face potential charges as part of the ongoing investigation.<sup>81</sup> The OCDA’s report on the booking scandal stated that “When law enforcement officers break the law, it deprives defendants and victims of their rights, compromises the criminal justice system, and erodes the public trust in ways that it may never be able to recover. The entire system relies on the trust that those sworn to uphold the law are following it themselves.” However, the current OCDA’s office has not charged a single police officer accountable for the far more serious crime of taking a person’s life.

When it came to police killings in Orange County, Chicaxns Unidxs organizer Gaby Hernandez, said that the harm of such killings has been felt especially hard in the city of Anaheim, where almost all of the people killed were young Latinx men. The highest numbers of officer-involved killings from 2010–2020 were in the cities of Anaheim (31 civilian deaths) and Santa Ana (35 civilian deaths.) Neither Santa Ana nor Anaheim police departments are enrolled in or are participating in the Federal Bureau of Investigation’s use-of-force data repository.<sup>82</sup>

The two public defenders interviewed for this report both agreed that the current DA has been filing more charges against officers than his predecessor. Vining said that he’s “seen some charges filed against law enforcement more recently coming out of the DA’s office ...” He added that his sense is that “people who are former or current law enforcement still are treated differently than my clients are” and that police officers “get more favorable dispositions.” Rogers said that “at least in the last couple of years, they have been filing more charges against cops. It’s not anywhere near where I think it should be. But they have been filing more. ... Having said that, the officers are certainly getting much better treatment, better charges, and far better dispositions than our clients would ever get.” She also noted that “there are plenty of other officers where there is evidence that they lied, that they falsified reports, that they manipulated their body worn camera, that they did something illegal, and they’re not filed on at all. And it’s unclear if the prosecutors will ever file on them. And it’s unclear if they’re ever really reviewing the material in order to file on them. So, do they file on police? Yes, but it’s certainly not the same way that they file on everybody else.”

Vicente, of Chispa, added: “We need independent investigations of officer-involved shootings and in-custody deaths. We have seen time and time again that, regardless of who’s in power, the OCDA has failed to hold officers accountable. We need an independent investigation that is external to the county.”

## **POLICE ACCOUNTABILITY RECOMMENDATIONS**

The OCDA should improve its policies related to police prosecution practices by:

- Ensuring compliance with AB 1506, which requires the California Attorney General to investigate all officer-involved killings of unarmed civilians;
- Not accepting law enforcement contributions for any future campaigns; and
- Establishing guidelines to prevent officers with a history of misconduct, lying, or convictions during their tenure as an officer from serving as witnesses for the prosecution.

# IMMIGRATION

*“At a time of unprecedented immigration enforcement, where the federal government heavily relies on the criminal legal system to target immigrants and their families and communities, prosecutors play a critical role in determining immigrants’ fates in this country.”<sup>83</sup>*

— Rose Cahn, senior staff attorney, Immigrant Legal Resource Center

As of 2019, the immigrant population in Orange County was 949,825, or roughly 30.1 percent of the county’s total population. This is more than twice the national average of 13.6 percent.<sup>84</sup> Certain criminal convictions for noncitizen residents have serious consequences that can impact their immigration status and can result in deportation regardless of how long residents have been in this country.<sup>85</sup> Furthermore, with the rise of immigration enforcement in recent years, the federal government has leaned heavily on state and local agencies to carry out policies that lead to families being torn apart.<sup>86</sup> The OCDA’s office has a responsibility to ensure that Orange County’s most vulnerable families and communities remain safe and whole.

To get a better understanding of the Orange County DA’s office policies related to immigration practices, the ACLU’s PRA requested:

- Records that refer to office efforts to implement its obligations under Penal Code 1016.3(b), which requires that the prosecution “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution;”<sup>87</sup>
- Records that refer to office efforts to implement its obligations under Penal Code 1473.7, which allows an individual to file a motion to vacate a past conviction when they did not understand the immigration consequences during their trial, or provide evidence of actual innocence;<sup>88</sup> and

- Records, memoranda, and emails that relate to the creation and development of an immigration policy for the office.

In response to our request, the DA’s office claimed that they were exempt from disclosure under attorney work product and the deliberative process privilege. As a result, we were not able to provide any analysis related to their immigration policies and practices but instead relied on anecdotal evidence through stakeholder interviews.

## PERSONAL & PROFESSIONAL PERSPECTIVES

Kelvin Hernandez is a young immigrant man who was pulled over for tinted windows and possession of a stun gun. The consequences of these charges and the threat of deportation have been playing out in the courts for more than a year. When discussing his case and his initial experience with the courts, Hernandez recalled: “I remember I asked the clerk on the courtroom if I have a hold from ICE and he told me no, you don’t have a hold from ICE. And they [are] holding me to transfer me. So, they’re lying [to] people because it’s not affect[ing] just me, my family was affected too because my family was waiting for my release later that day and nothing happened.”

The DA has tremendous discretion in what charges to bring and whether to charge for a deportable offense or an offense that avoids deportation.

## IMMIGRATION RECOMMENDATIONS

The OCDA should improve its policies related to immigration practices by:

- Requiring that prosecutors avoid adverse immigration consequences in their charging, plea negotiations, and post-conviction review practices;
- Establishing a clear policy to never share information with immigration officials;
- Establishing policies to refer undocumented survivors of serious crimes to legal services organizations that can help them obtain a U or T Visa;
- Adopt a process of erasing old convictions for the purposes of eliminating immigration consequences (stipulating to post-conviction motions) in cases where someone has already completed their criminal sentence. This would allow for people to seek relief that avoids immigration and other consequences after a conviction.
- Conduct comprehensive and mandatory trainings on avoiding adverse immigration consequences with line DAs and staff.
- Establishing an open line of communication and developing meaningful relationships and partnerships with the immigrant community, especially with individuals, families, and communities most impacted by the criminal legal system in Orange County.

When further discussing his story and experience with the DA's office and its duties to inform him of any immigration consequences, Hernandez said, "Well, in the immigration system, one of the things with the DA office ... is they never told me the consequences that [I was] going to have on immigration. They just put on the paper, we already advised this guy. But a lot of people, they don't understand English. They don't understand even though they have a translator with them in the courtroom. And then you'll say yes to everything because nobody explained to them really the consequences that they're going to have when they assign any plea, and that's what happened with this DA office. They never advise you [of] something like that."

The DA has tremendous discretion in what charges to bring and whether to charge for a deportable offense or an offense that avoids deportation. Hernandez emphasized that "They can charge with the lesser ones, but ... they try to just do whatever they want. They don't try to negotiate. They don't think about the future of the people." Today, Hernandez is represented by a private criminal and immigration attorney as he continues to fight his case and stay united with his family.

The advocates we spoke with echoed Hernandez's concerns with the OCDA's office. All agreed that the DA should be informing people of the immigration consequences of their charges or plea deals, and did not believe it was happening properly. From the public defender's point of view, Rogers noted: "In my experience, the response [from prosecutors] that I've usually gotten is, 'Why would I want to give you an immigration-safe offer? Why would I want this person to remain in the country when they are a criminal?' ... I haven't seen a whole lot of people from the DA's office willing to work with us on immigration cases." Vining added: "There's a law in the books that says that the DA's office should consider immigration in dispositions. I'm not aware of cases where they've done that."



# PAROLE

In California the Board of Parole Hearings (BPH) is responsible for determining an incarcerated person's suitability for release on parole. During a suitability hearing, the BPH determines whether or not to grant parole.

Although their position is non-binding, prosecutors often take a position either supporting or opposing parole, which carries significant weight on whether parole is granted or denied. The ACLU's PRA requested "All records relating to how many parole hearings the office attended, how many hearings your office opposed, and how many parole hearings your office opposed when the next of kin took no position in the calendar years of 2017 and 2018."

The OCDA's office ultimately provided information on the number of hearings attended every year between 2016 and 2020. In total, they attended over 1,000 parole hearings, but did not state whether their office took a position to oppose or support a person's release. According to the BPH, parole was granted in 17 percent of hearings in 2017, 22 percent in 2018, 20 percent in 2019, and 14 percent in 2020.<sup>89</sup>

In 2011, Assembly Bill 109 was enacted to address prison overcrowding by transferring individuals serving sentences for non-serious, nonviolent, non-sex offenses from state prisons to county jails. This process, known as realignment, included shifting responsibility for prosecuting parole violations to counties. In FY 2019–20, Orange County received \$74 million from the state in Public Safety Realignment Funds.<sup>90</sup> The allocation of these funds is determined by the OC Community Corrections Partnership, and the DA is one of six voting members. In FY 2019–20, the DA's office received \$810,232 through AB 109 funding. These funds are partially spent on the AB 109 Task Force, which the DA's office formed in 2019 to conduct thousands of compliance and reporting checks among the AB 109 population under community supervision. They boasted prosecuting over 3,500 petitions among people on AB 109 supervision and

638 parole violations in FY 2019–20. They also filed 6,591 new criminal cases against 3,105 people who were currently or previously on AB 109 supervision. Rather than focusing on punitive tactics of over surveillance and prosecution, the OCDA should commit to redirecting all AB 109 funds it currently receives to community-based organizations supporting the reentry of AB 109 participants.

## PERSONAL & PROFESSIONAL PERSPECTIVES

Interviewed stakeholders throughout the criminal legal system largely agreed that the DA should not play a role in parole hearings except to support a person's release. "I don't see them supporting any parole hearing, anybody paroling," said Gaby Hernandez, of Chicaxs Unidxs. "That's just not their climate. That's not their culture. ... So for them to think that they're making the community safer by just keeping people incarcerated, they're not understanding just how it's a systemic issue. They're seeing it more like as an individual."

Ronnie Carmona, of the Arthur Carmona Center for the Wrongfully Convicted, felt that "it's important who's sitting on those [parole boards]. Because if it's a DA, if it's a parole officer, if it's somebody that works for the prison, do you think they want to see somebody walk out? No, because in their mind everybody's a criminal, that's what they are. Well, you know what? People change. People change. People change."

Deputy Public Defender Rogers stated that prosecutors "do go up to parole hearings, and they challenge parole. I am not aware of a DA advocating for parole for anyone. Not saying it doesn't happen or hasn't happened. I would be very surprised to hear it has happened." She added: "[DAs] can serve

the interest of the community a lot better by either advocating for parole, or at least not opposing it in all circumstances.”

“People who are in prison who are up for parole have a parole date to be released and one thing the DA’s office does is that they send DAs to those hearings at the prisons to oppose the release of people and that’s something they could stop doing,” said Assistant Public Defender Vining. When asked if he knew of any examples of an Orange County District Attorney supporting parole, he responded that he had never heard of one.

## PAROLE RECOMMENDATIONS

The OCDA should improve its policies related to parole practices by:

- Instituting a policy to only participate in the parole process to support an individual’s release; and
- No longer accepting AB 109 realignment funding and ensuring that those resources are invested in reentry supports for AB 109 participants.

“It’s important who’s sitting on those commissions [parole boards]. Because if it’s a DA, if it’s a parole officer, if it’s somebody that works for the prison, do you think they want to see somebody walk out? No, because in their mind everybody’s a criminal, that’s what they are. Well, you know what? People change. People change. People change.”

— *Ronnie Carmona*



# RECOMMENDATIONS

Based on our findings through record analysis, historical and legal review, and stakeholder interviews, we have composed the following list of policy recommendations:

## Charging Decisions

The OCDA should improve its charging practices by:

- Ending the over-criminalization of low-level offenses by instituting the ACLU of Northern California’s decline-to-charge and pre-file diversion lists (see Appendix B), which would eliminate more than half of the DA’s caseload;
- Developing an internal policy to presumptively file wobbler offenses as misdemeanors;
- Following the lead of the San Francisco and Los Angeles District Attorney’s offices to eliminate sentencing enhancements, including but not limited to gang enhancements and status enhancements that are major contributors of extreme sentencing and racial disparities;
- Never charging children as adults and working with community partners to develop rehabilitative alternatives to placement at DJJ;
- In keeping with the closure of the state-run youth prisons and ban on out of state residential treatment programs, work transparently with community stakeholders to develop local restorative justice programs for adjudicated youth who are responsible for serious harm.
- Conducting comprehensive and mandatory trainings on adolescent brain development and age-appropriate treatment for all juvenile court line DAs and staff.
- Establishing an open line of communication and developing meaningful relationships and partnerships with a variety of community stakeholders, especially with individuals, families, and communities most impacted by the criminal legal system in Orange County;

- Incentivizing alternatives to incarceration among line deputies and creating opportunities for promotion that are not dependent on conviction rates;
- Building an end-to-end tracking system that follows cases all the way from arrest to parole and probation and publishing key metrics, including racial disparities, to the public through an online dashboard.

## Diversion

The OCDA should improve its diversion practices by:

- Not filing extremely low-level charges on the ACLU of Northern California’s decline-to-charge list (see Appendix B) in order to avoid “net-widening”;
- Reducing restrictions (on the basis of immigration status, financial limitations and other factors) and expanding eligibility criteria for diversion, including adopting the ACLU of Northern California’s pre-file diversion list (see Appendix B);
- Ensuring all diversion is pre-file and does not require any admission of guilt;
- Ensuring that all diversion is offered free of charge to participants;
- Releasing all internal policies related to diversion practices to better ensure transparency and accountability, to help facilitate trust in the community;
- Tracking diversion referrals and completion by primary offense and by race for diversion access and outcome analysis and releasing it to the public annually;

- Create a culture within the DAs office that encourages prosecutors to seek diversion and community-based treatment alternatives instead of incarceration. Advocate for expanded state-level investment in and support of pre-plea diversion programs for felony and misdemeanor cases.
- Ending all partnerships with for-profit companies conducting diversion in Orange County, including but not limited to PES and GEO Group; and

## Police Accountability

The OCDA should improve its policies related to police prosecution practices by:

- Ensuring compliance with AB 1506, which requires the California Attorney General to investigate all officer-involved killings of unarmed civilians;
- Not accepting law enforcement contributions for any future political campaigns; and
- Establishing guidelines to prevent officers with a history of misconduct, lying, or convictions from serving as a witness for the prosecution and reject new cases and search warrant requests from these officers.

## Immigration

The OCDA should improve its policies related to immigration practices by:

- Requiring that prosecutors avoid adverse immigration consequences in their charging, plea negotiations, and post-conviction review practices;
- Establishing a clear policy to never share information with immigration officials;
- Establishing policies to refer undocumented survivors of serious crimes to legal services organizations that can help them obtain a U or T Visa;
- Providing a pathway to rectify past convictions that resulted in immigration consequences; and

- Establishing an open line of communication and developing meaningful relationships and partnerships with the immigrant community, especially with individuals, families, and communities most impacted by the criminal legal system in Orange County.

## Parole

The OCDA should improve its policies related to parole practices by:

- Instituting a policy to only participate in the parole process to support an individual's release; and
- No longer accepting AB 109 realignment funding and ensuring that those resources are invested in reentry supports for AB 109 participants.
- Not incarcerating people who have violated probation or parole
- Instructing DAs that they should not agree with probation/parole that failure to pay is a violation

## Addressing Racism and Racial Disparities

The OCDA should address racism and racial disparities by:

- Publicly acknowledging that racial disparities exist in the jurisdiction's legal system.
- Declining to file charges where arrests are tainted with racial bias and refusing to call officers with a history of racial bias or racism to testify as witnesses.
- Requiring racial impact analyses prior to charging decisions.
- Committing to blind charging, which prevents prosecutors from seeing demographic information before making an initial decision on whether to charge someone with a crime.
- Undertaking uniform and consistent collection, analysis, and publication of race and ethnicity data.
- Using existing funding to implement policies and staff training — with community input — to address racial disparities.

## Systemic Change

Beyond reforming internal policies and practices, the OCDA should support systemic changes that divest from incarceration and invest in restorative justice by:

- Publicly supporting state legislation to decriminalize low-level decline-to-charge offenses, re-classify wobblers as misdemeanors, and eliminate sentence enhancements;
- Publicly supporting state legislation to end the adult prosecution of children and expand developmentally appropriate alternatives to incarceration for all youth;
- Publicly opposing the expansion of Musick jail; and
- Working with the OC Board of Supervisors to ensure that funding saved from declining to prosecute low-level crimes be redirected outside of the DA's office to invest in community-based restorative justice programming and supportive services.

## CONCLUSION

DAs have historically been one of the primary drivers of incarceration and disparate impacts for people of color and poor people.

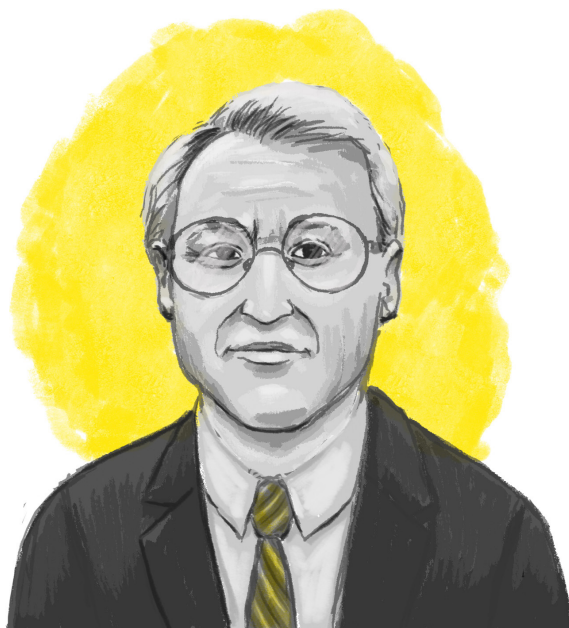
Overall, the DA spends a majority of its office's time and resources prosecuting low-level offenses that could be better addressed outside of the criminal legal system. Further, in Orange County, we found that Black people were more likely to be charged with a crime, more likely to be charged with a felony, and more likely to be negatively impacted by discretionary practices related to wobblers, enhancements, and diversion.

In order to engage in substantive dialogue that leads to improved outcomes and lasting change, it is critical that the OCDA's office work to build community trust, prioritize transparency, and proactively engage with communities that have been harmed by incarceration.

“Our communities have been targeted by law enforcement and the DA, and we can't find any justice within the system,” said Vicente, of Chispa. “It creates a lack of trust with the DA's office and the community. But there is real potential and capacity for young people and impacted residents to advocate for a more just criminal justice system.”

All stakeholders interviewed for this report believed that the DA could better serve the interest of the public by prioritizing support and treatment over punishment, engaging with the community more — especially impacted communities — and increasing transparency. Yehudah Pryce had these final words to say:

*I think a DA can be an agent of change. I think George Gascón is trying to do that. ... But we don't know if there's even a change if there's no transparency for the accountability of the DA's office, and then there's no acknowledgement of the disproportionate effects of their policies, and then there's no acknowledgement of that role that they can play in ameliorating some of these challenges that people face.*



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## Initial Public Records Act Request from the ACLU of Northern California



AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

Northern  
California

May 13, 2019

**Via U.S. Mail**

**District Attorney Todd Spitzer  
Orange County District Attorney's Office  
401 Civic Center Drive West  
Santa Ana, CA 92701**

**Re: Public Records Act Request**

Dear District Attorney Todd Spitzer:

We write to request the release of public records from the Orange county's District Attorney's office pursuant to the California Public Records Act (Government Code section 6250 *et seq.*), we seek to obtain the following information:

1. Records<sup>1</sup> of prosecution data within your possession for calendar year 2017 and 2018, including but not limited to,
  - a. Unique identifiers for each person, charges, and outcomes for all minors (any persons under the age of 18) prosecuted directly in adult court in Orange County (adult court is defined as a court of criminal jurisdiction) (otherwise known as "pipeline" or "direct file" cases) under Welfare and Institutions Code section 707.
    - i. Unique identifiers for each person, charges, and outcomes for all minors prosecuted in adult court in Orange County after any one of the following:
      1. a judicial certification to adult court following a juvenile transfer hearing under the newly amended Welfare and Institutions Code section 707 subsection (a);

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<sup>1</sup> The term "records" as used in this request is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Govt. Code § 6252, subsection (e). "Writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Govt. Code § 6252 (g).

American Civil Liberties Union of Northern California  
EXECUTIVE DIRECTOR Abdi Soltani • BOARD CHAIR Magan Pritam Ray  
SAN FRANCISCO OFFICE: 39 Drumm St. San Francisco, CA 94111 • FRESNO OFFICE: PO Box 188 Fresno, CA 93707  
TEL (415) 621-2493 • FAX (415) 255-1478 • TTY (415) 863-7832 • WWW.ACLUNC.ORG

2. a juvenile defendant's waiver of transfer hearing or stipulation to adult court following the District Attorney's motion to transfer to adult court.
  - b. Unique case identifiers, charges, and outcomes for all minors prosecuted in juvenile court in Orange county, including, but not limited to demographic data, charges filed, and case outcomes during the calendar year of 2017 and 2018.
  - c. Unique case identifiers, charges, and outcomes (including diversion) of all misdemeanor charges for minors and adults in Orange county.
  - d. Unique case identifiers, charges, enhancements and outcomes (including diversion) of all felony charges for minors and adults in Orange county.
2. All documents and records related to all diversion programs offered or used by the DA's office, how many people utilized those programs, demographics of those people, the charges they were facing, outcomes of those cases, requirements for completing diversion, and any charges or costs associated with those diversion programs for calendar years 2017 and 2018.
3. All records relating to how many parole hearings the office attended, how many hearings your office opposed, and how many parole hearings your office opposed when the next of kin took no position in the calendar years of 2017 and 2018.
4. Copies of all office policies, including but not limited to policies regarding the death penalty and when its sought, charging and plea deal offer policies, pardons and commutations, etc. Request #3 is not limited to calendar year 2017 and 2018.
5. Copies of all office policies that relate to immigration including but not limited to:
  - a. Records that refer to office efforts to implement its obligations under Penal Code 1016.3(b).
  - b. Records that refer to office efforts to implement its obligations under Penal Code 1473.7.
  - c. Records, memoranda, and emails that relate to the creation and development of an immigration policy for the office.
  - d. Request #5 is not limited to calendar year 2017 and 2018.
6. All records concerning implementation of SB 1421, including copies of any new policies, training manuals or procedures regarding SB 1421, including any policies, procedures or training manuals for making SB 1421 requests, maintaining SB 1421 records, disclosures of SB 1421 requests to criminal defendants, revisions of any *Brady* policies in light of SB 1421, and all policies and procedures for reviewing all criminal convictions, arrests and charging decisions, in view of SB 1421. Request #4 is not limited to calendar year 2017 and 2018.

Please respond to this request in ten days, either by providing the requested information or providing a written response setting forth the specific legal authority on which you rely in failing

ACLU Foundation of Northern California

May 13, 2019

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to disclose each requested record, or by specifying a date in the near future to respond to the request. See Cal. Gov't Code § 6255.

If any records requested above are available in electronic format, please provide them in an electronic format, as provided in Govt. Code § 6253.9. To assist with the prompt release of responsive material, we ask that you make records available to us as you locate them, rather than waiting until all responsive records have been collected and copied.

If I can provide any clarification that will help expedite your attention to my request, please contact us at [yhaile@aclunc.org](mailto:yhaile@aclunc.org).

Because this request is made by a non-profit organization with the intent to make this material accessible to the public as promptly as possible, we request that you waive any fees. However, should you be unable to do so, we will reimburse your agency for the "direct costs" of copying these records plus postage. If you anticipate these costs to exceed \$50.00, please notify us prior to making the copies.

Thank you in advance for providing the records we have requested. Please do not hesitate to contact us with any questions regarding this letter.

Yours Truly,

Yoel Haile  
Criminal Justice Associate  
ACLU of Northern California

American Civil Liberties Union of Northern California

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## Initial Public Records Act response from the OCDA

From: Armstrong, Ray <Ray.Armstrong@da.ocgov.com>  
Sent: Friday, June 7, 2019 4:10 PM  
To: Yoel Y. Haile <yhaile@aclunc.org>  
Subject: ACLU PRA Request

Good afternoon, Mr. Haile:

In compliance with Government Code Section 6253, this email and the attached records are in response to the ACLU's Public Records Act request dated May 13, 2019.

Request No. 1: Seeks prosecution data for all cases filed by the Orange County District Attorney's Office in 2017 and 2018.

Response No. 1: Please see the attached spreadsheet containing the information requested regarding all felonies and misdemeanors filed in superior court against adult defendants in 2017 and 2018, including all charges and sentencing information. We have excluded the information regarding cases filed in Juvenile court as that information is exempt from disclosure pursuant to Government Code section 6254(k) and Welfare & Institutions Code section 827 and cannot be disclosed without a court order. We do not keep records pertaining to the other statistical data you requested.

Request No. 2: Seeks records and documents pertaining to diversion programs offered to criminal defendants in Orange County.

Response No. 2: Please see the attached records pertaining to diversion programs in Orange County. We do not keep records pertaining to the other statistical data you requested.

Request No. 3: Seeks records regarding the number of parole hearings attended in 2017 and 2018, and the number of hearings that the victim or victim's next of kin attended.

Response No. 3: A representative from the Orange County District Attorney's Office attended 197 parole hearings in 2017 and 174 parole hearings in 2018. We do not keep statistical information pertaining to the number of hearings attended by victims or victim's next of kin.

Request No. 4: Seeks copies of all office policies regarding the death penalty, charging and plea deals, and pardons and commutations.

Response No. 4: Internal office policies are exempt from disclosure under and the attorney work product privilege and the deliberative process privilege. "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." (Code Civ. Proc. § 2018.030 (a) and Gov. Code § 6254 (k).) The core work product privilege is not limited to writings made in preparation for litigation, but also to protected writings not made in preparation for trial. (*Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810.) The deliberative process exemption protects from disclosure

records reflecting the thought processes or “deliberative thought” of elected officials and employees of a government agency, whose responsibility it is to decide how prosecutors should proceed given various circumstances. (Gov. Code § 6255, subd. (a); California First Amendment Coalition v. Superior Court (1998) 67 Cal.App.4th 159, 170.) Disclosing such materials would expose the District Attorney’s decision making process in such a way as to discourage candid discussion within the office and thereby undermine the District Attorney’s ability to ensure the fair administration of justice. The public interest in nondisclosure, that is, the interest in ensuring that those who are involved in formulating such policies and directions have the freedom to engage in open dialogue, debate and deliberation with other attorneys in order to create effective and efficient policies and procedures, clearly outweighs the interest of the public in disclosing those thought processes. (Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325; Rogers v. Superior Court (1993) 19 Cal.App.4th 469; Wilson v. Superior Court (1996) 51 Cal.App.4th 1136.)

Request No. 5: Seeks copies of office immigration policies applicable to Penal Code sections 1016.3(b) and 1473.7.

Response No. 5: Internal office policies are exempt from disclosure under and the attorney work product privilege and the deliberative process privilege. See our Response to Request No. 4.

Request No. 6: Seeks all records concerning the implementation of SB 1421, including policies and training manuals, and revisions of Brady policies in light of SB 1421.

Response No. 6: Internal office policies are exempt from disclosure under and the attorney work product privilege and the deliberative process privilege. See our Response to Request No. 4.

Should you wish to discuss this matter further, please feel free to contact me directly.

Thank you,

Ray Armstrong  
Senior Deputy D.A.  
Special Prosecutions Unit  
714-347-8795  
Ray.armstrong@da.ocgov.com

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CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

## Follow-Up Response from the ACLU of Northern California



June 20, 2019

Via Email

Ray Armstrong  
Senior Deputy District Attorney  
Orange County District Attorney's Office  
714-347-8795  
Ray.armstrong@da.ocgov.com

Re: May 13, 2019 CPRA Request

Dear Ray Armstrong:

Thank you for your June 7, 2019 response to our Public Records Act request. We sincerely appreciate your responsiveness to Request Items #1–3. That said, we do not believe that what you produced satisfies your obligations under the California Public Records Act with regards to Request Items #4–6. Nor does it provide the public with desperately needed insight into the functioning of the District Attorney's Office.

We are deeply concerned by the lack of transparency your office demonstrated in its response to Request Items #4–6 of our May 13, 2019 CPRA Request. Given the significant documented history of misconduct by your Office, the public deserves and, indeed, is entitled to insight into the operation of the OCDA. As the California Court of Appeals remarked, "The magnitude of the systemic problems [in the OCDA's office] cannot be overlooked." *People v. Dekraai*, 5 Cal. App. 5th 1110, 1149 (Ct. App. 2016). District Attorney Todd Spitzer has represented to the public that he has made significant reforms to the way in which the Office operates, yet your denial robs the public of any way to confirm the assertion. Moreover, the approach your office now takes is significantly less transparent than that of former District Attorney Tony Rackauckas. In fact, this response is nearly identical to the response the ACLU of Southern California initially received in response to a prior records request made under Rackauckas' purview. That office, however, promptly reconsidered its position and released similar records following a public battle with the ACLU of Southern California. We trust you will do the same and demonstrate to the public the breadth of the reforms your office has purportedly undertaken.

"[E]xemptions [to the Public Records Act] are to be narrowly construed, and the government agency opposing disclosure bears the burden of proving that one or more apply in a particular case," *Bd. of Trustees of California State Univ. v. Superior Court*, 132 Cal. App. 4th 889, 896 (2005), yet the scope of the exemptions you assert and your interpretations of them—as they related to our requests for office policies and guidelines—are breathtaking. In your response email, you claim "Internal office policies are exempt from disclosure under and [*sic*] the attorney work product privilege and the deliberative process privilege." To support this assertion, you cite CCP § 2018.030(a), Gov. Code § 6254(k) and *Rumac*. This is a gross

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misinterpretation of the statutes and case law on CPRA exemptions for several reasons. First, the broad scope of your exemption claim would render the Public Records Act void. Second, you abuse the deliberative process privilege when you mischaracterize our requests as “seek[ing] communications reflecting internal discussion and deliberations.” Third, you abuse the attorney work product privilege by misinterpreting the privilege to include essentially any document worked on by an attorney. Fourth, we reject your seemingly implicit claim of the official information privilege. The public interest in disclosure of the records we seek in Request Items #4-6 manifestly outweighs any perceivable interest in nondisclosure.

About your assertion of the deliberative process privilege, we do not seek communications reflecting internal discussion and deliberations—to which the exemption applies—but, rather, copies of the policies themselves. The deliberative process privilege is designed to protect the ability of policymakers “to test ideas and debate policy and personalities uninhibited by the danger that [their] tentative but rejected thoughts will become subjects of public discussion.” *Am. Civil Liberties Union of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 76 (2011). The exemption applies only to “predecisional” and “deliberative” documents. “However, a policy cannot be properly [] characterized as predecisional ‘if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.’” *Id.* at 76. The exemption, therefore, cannot apply to the final documents we have requested. To quote the California Court of Appeals, “The deliberative process privilege does not justify nondisclosure of a document merely because it was the product of an agency’s decision-making process; if that were the case, the PRA would not require much of government agencies.” *Id.*

Similarly, we do not seek your office’s attorney work product as it has been defined by law. Your office seems to take the view that any documents reviewed and/or prepared by attorneys constitute attorney work product. That is not and cannot be the law. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D. D.C. 1980) (“[t]he work-product rule does not extend to every written document generated by an attorney.”); *League of California Cities v. Superior Court*, 241 Cal. App. 4th 976, 994 (2015) (denying work-product exemption where work was not performed on behalf of client). Policies, practices, guidelines, instructions, memoranda, and the like, including those laying out “general standards to guide the Government lawyers,” constitute public records and are not work product. *Am. Civil Liberties Union of N. California v. Dep’t of Justice*, 70 F. Supp. 3d 1018, 1030-32 (N.D. Cal. 2014); *see also Jordan v. U.S. Department of Justice*, 591 F.2d 753, 774 (D. D.C. 1978) (instructions, guidelines, and effective policies “relating to the exercise of prosecutorial discretion by the United States Attorney for the District of Columbia and his assistants” not protected by work-product privilege); *Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 926 F.Supp.2d 121, 142-44 (D. D.C. 2013) (memoranda communicating policies, guidelines, and “general standards” to ICE staff attorneys not protected by work-product privilege).

When you argue the public interest in nondisclosure outweighs the public interest in disclosure, you appear to implicitly assert the official information privilege. This is wrong for two reasons. First, it is inapplicable to our requests. Second, the public interest in disclosure far





outweighs any perceivable public interest in nondisclosure. Official information is defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” CA Evid. Code Section 1040(a). It is problematic—and strains credulity—that so many documents reflecting constitutionally mandated and/or basic prosecutorial duties could only be “acquired in confidence” by your staff. *Id.* Regardless of how the information was conveyed to staff, however, the official information privilege only applies where the public interest in nondisclosure outweighs the interest in disclosure. Section 1040(b)(2). Here too, your response is worrisome.

You assert throughout your email that the disclosure of many basic documents, such as your office’s policies, practices, memoranda, and training materials on *Brady*, which would evidence either your offices’ compliance with or violations of the Constitution and other laws, would not be in the public interest. Courts have repeatedly recognized a significant “public interest in the proper functioning” of government. *Mobil Oil Corp. v. Department of Energy*, 520 F. Supp. 414, 419 (N.D. NY 1981). “Thus, for example, where the documents sought may shed light on alleged government malfeasance, the privilege is denied.” *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979) (citing *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401-03 (E.D.Mich.1965), *Aff’d.*, 377 F.2d 496 (6th Cir. 1967); *CBS, Inc. v. Block*, 42 Cal. 3d 646, 651 (1986) (“In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power.”); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 143-44 (1976)).

Here, likewise, there is a significant public interest in the functioning of your Office and the administration of justice. How your office sets out to establish and implement officewide policies regarding the systemic exercise of control over charging decisions, plea deals, pardons, commutations, diversion programs, decisions with immigration consequences, discovery policies, and general transparency and accountability bear directly on the rights of individuals in our society to due process and equal protection under law. These individuals’ rights to proper notice and understanding of the functioning of the District Attorney’s Office, as well as that of the public at large, weighs strongly in favor of public disclosure of the documents we have sought.<sup>1</sup>

In the interest of collaborating, please see our clarifications to our initial Request Items #4-5 below and provide responsive records accordingly:

**Request Item #4:** We understand District Attorney’s offices tend to possess Legal Policy Manuals, or similarly named documents, which tend to include guidelines, protocols, policies,

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<sup>1</sup> No part of this letter should be construed to waive any privileges, protections, or rights which might be available to the ACLU in any future litigation under the CPRA regarding these itemized requests.



and procedures related to charging decisions, pleas, *Brady*, professional conduct, interstate extradition, grand jury instructions, MOUs between the District Attorney and police departments regarding officer involved shootings and deaths in custody, and other issues and duties as they relate to prosecutors. If you possess such a manual, please produce it. We also request that the Office produce any other policies, guidelines, or training manuals that reasonably relate to our requests. To be clear, we are not seeking any “predeliberative” documents, like internal draft documents; we only seek the final version of these office policies.

**Request Item #5:** It is clear that Pen. Code § 1016.3(b) and Pen. Code § 1473.7 generally confer certain obligations on prosecutors to consider negative consequences of prosecutorial decisions and motions that may occur because of a person’s immigration status. We seek all office policies, protocols, training manuals, or guidelines that direct the County’s prosecutors in their implementation or compliance with the obligations under those two Penal Code sections. For example, other county district attorney’s offices have provided officewide memoranda or policy directives that summarized and provided guidance on complying with these obligations.

We strongly urge you to reconsider the position staked out in your June 7, 2019 email. If there are productive conversations to be had about the scope of your office’s response to our requests, we are eager to engage in them with you. You can contact us via email at [yhaile@aclunc.org](mailto:yhaile@aclunc.org) and [bhamme@aclusocal.org](mailto:bhamme@aclusocal.org) or via telephone at 415-293-6350.

Yours Truly,

Yoel Haile

Criminal Justice Associate  
ACLU of Northern California

Brendan Hamme

A handwritten signature in black ink that reads "Brendan Hamme".

Staff Attorney  
ACLU of Southern California

# APPENDIX B

## ACLU's Decline-to-Charge and File Diversion List

Charge Type	Recommended DA Action
Advertising without a License — BP 7027	Decline to Charge
Contracting without a License — BP 7028	Decline to Charge
Failure to bring minor to continuing education — EC 48454	Decline to Charge
Simple Drug Possession — PC 11350	Decline to Charge
Drug Possession for Sale — PC 11351	Default Pre-Plea Diversion
Peyote Possession — HS 11363	Decline to Charge
Drug Paraphernalia Possession — HS 11364	Decline to Charge
Meth Possession — PC 11377	Decline to Charge
Under the Influence of Drugs — HS 11550	Decline to Charge
Resisting Arrest — PC 148, PC 69	Decline to Charge
Possession of Dagger — PC 21310	Decline to Charge
Possession of Metal Knuckles — PC 21810	Decline to Charge
Possession of Nunchaku — PC 22010	Decline to Charge
Possession of Billy Club — PC 22210	Decline to Charge
Possession of Stun Gun — PC 22620, PC 22610	Decline to Charge
Disturbing the Peace — PC 415	Decline to Charge
Criminal Threats — PC 422	Decline to Charge
Possession of Burglary Tools — PC 466	Decline to Charge
Petty Theft — PC 484	Default Pre-Plea Diversion
Appropriation of Lost Property— PC 485	Default Pre-Plea Diversion
Vandalism — PC 594	Decline to Charge

Charge Type	Recommended DA Action
Possession of Vandalism Tools — PC 594.2	Decline to Charge
Trespassing — PC 602	Decline to Charge
Disorderly Conduct — PC 647	Default Pre-Plea Diversion
Loitering for Prostitution — PC 654.22(a)	Decline to Charge
Driving Stolen Vehicle — VC 10851	Default Pre-Plea Diversion
Driving without License — VC 12500	Decline to Charge
Driving with Suspended License — VS 14601	Decline to Charge
DUI — PC 23152	Default Pre-Plea Diversion
Vehicle Registration — VC 4152.5, VC 4159	Decline to Charge
Bringing Drugs to a Prison — PC 4573	Decline to Charge
Burglary — PC 459* (no person present)	Default Pre-Plea Diversion
Repeat Theft — PC 490.2	Default Pre-Plea Diversion
Identity Theft — PC 530.5	Default Pre-Plea Diversion
Indecent Exposure — PC 314	Default Pre-Plea Diversion
Robbery — PC 211* (Estes robberies, no injuries, etc.)	Default Pre-Plea Diversion
Possession of Ammunition (Minor) — PC 29650	Decline to Charge
Possession of Ammunition (Felon) — PC 30305	Default Pre-Plea Diversion
Carrying Loaded Firearm — PC 25850	Default Pre-Plea Diversion
Carrying Concealed Firearm — PC 25400	Default Pre-Plea Diversion
Prohibited Firearm Possession — PC 29800	Default Pre-Plea Diversion