

Case No. G060988

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE**

William Thompson and Simon Cole,

Plaintiffs and Appellants,

vs.

Todd Spitzer and County of Orange,

Defendants and Respondents.

On Appeal from a Judgment of the Superior Court of California, County of Orange
Honorable William D. Claster, Department CX-104 Trial Case No. 30-2021-
01184633-CU-MC-CXC

**APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE
BRIEF IN SUPPORT OF PLAINTIFF-APPELLANTS**

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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Date: 10/27/2022

Alyssa C. Martinez
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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to California Rules of Court, Rule 8.200(c), amicus curiae Social Justice Legal Foundation (“SJLF”) respectfully applies for permission to file the attached amicus curiae brief in support of the Plaintiff-Appellants. This application is timely made under Rule 8.200(c)(1) because the Plaintiff-Appellants’ reply brief was filed on October 13, 2022. Amicus curiae is submitting this application within 14 days of October 13, 2022.

THE INTEREST OF AMICUS CURIAE

SJLF is a Los-Angeles based 501(c)(3) non-profit organization dedicated to civil rights litigation. SJLF brings impactful, precedent-setting cases to trial to advance economic and social justice and equity. The organization has a specific focus on combatting systemic injustices in the criminal legal system, including violations of the due process and privacy rights of individuals facing criminal charges. SJLF also authors amicus briefs on cases within its focus area.

Plaintiff-Appellants’ case focuses on the expansive DNA database collection program operated by the Orange County District Attorney’s Office. Via the accompanying brief, SJLF seeks to summarize and inform the Court of its observations and conclusions regarding the operation of the DNA program in Orange County misdemeanor court. The brief will provide crucial details about how the DNA program works in practice—specifically how uncounseled plea bargaining by the Orange County District Attorney’s Office results in the systematic surrender of individuals’ DNA in contravention of their strongly held privacy interests.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, Rule 8.200(c)(3), SJLF confirms that no party or their counsel authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief.

CONCLUSION

SJLF respectfully requests that the Court grant this application for leave to file an amicus curiae brief.

Date: October 27, 2022

Respectfully Submitted,

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INTRODUCTION

In 2022, a 58-year-old teacher, Eve, was charged with improper use of a disability placard. Soon after arriving at the Central Justice Center for her arraignment, an Orange County Deputy District Attorney (“DDA”) pulled her aside in the courtroom hallway and told her that “he didn’t even know what she was doing there” for such a low-level offense.¹ He then explained that once she gave her DNA, she would immediately be able to leave. While walking with her to the DNA collection office, Eve told our court observers that she did not understand why the DDA would not just dismiss the case outright if he really thought the offense was so minor, nor did she understand how DNA related to her charge.²

Eve’s story is similar to thousands of others. The Orange County District Attorney’s (“OCDA”) DNA collection program (“OCDNA”) contains nearly 200,000 individual DNA profiles, with an additional 13,000 to 20,000 added per year.³ That means roughly 1 in every 16 Orange County residents has their unique genetic structure stored in an OCDA database.⁴

¹ See Interview with Eve, in Santa Ana, Cal. (Apr. 19, 2022).

² *Id.*

³ See First Amended Complaint ¶ 12, Thompson v. Spitzer, No. 30-2021-01184633-CU-MC-CXC (Cal. Sup. Orange County, Jun. 29, 2021) (“First Am. Compl.”). Orange County public defenders have also flagged a troubling increase in the inclusion of DNA in misdemeanor deals over the last few months. See Interview with Public Defenders (Oct. 19, 2022).

⁴ According to United States Census data, the population of Orange County
(Continued...)

The OCDNA database is notable both because it is largely unregulated, and also because—while merely spanning a county—it is larger than 29 state-wide databases.⁵ Virtually every misdemeanor plea deal requires a person to give DNA, if he or she has not already.⁶ Every criminal complaint indicates whether the accused has already given DNA, allowing DDAs to easily identify people to add to the office’s ever-expanding database.

While OCDA represents that an individual’s participation in the program is based on a “knowing and voluntary waiver,” in reality the program is implemented such that individuals often provide their DNA in a coercive setting, with less bargaining power, and without full understanding of options or the consequences of giving a sample.⁷ Capitalizing on the

on July 1, 2021 was 3,167,809. As of March 2022, OCDA professed to have 195,663 individual DNA samples stored in its database. Thus, that accounts for 1 in every 16 residents. *See US CENSUS DATA, Quick Facts Orange County*, <https://www.census.gov/quickfacts/orangecountycalifornia> (last visited Oct. 26, 2022); *see also Science & Technology, ORANGE COUNTY DISTRICT ATTORNEY’S OFFICE*, <https://orangecountyda.org/science-technology/> (last visited Oct. 26, 2022).

⁵ *See CODIS-NDIS Statistics*, FEDERAL BUREAU OF INVESTIGATION, [https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis/codis-ndis-statistics#:~:text=The%20National%20DNA%20Index%20\(NDIS,profiles%20as%20of%20October%202021](https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis/codis-ndis-statistics#:~:text=The%20National%20DNA%20Index%20(NDIS,profiles%20as%20of%20October%202021)(last visited Oct. 26, 2022).

⁶ *See Exhibit A and discussion infra note 12; see also Andrea Roth, “Spit and Acquit”: Prosecutors as Surveillance Entrepreneurs*, 107 CAL. L. REV. 101, 142–44 (2019).

⁷ *See Respondents’ Brief at 30, Thompson v. Spitzer*, No. G060988 (Cal. Ct. App., Aug. 24, 2022) (“Resp’t’s Br.”); *see also Orange County, supra* note 4 (saying OCDNA is based on “knowing, voluntary consent.”).

informality of misdemeanor court, DDAs approach unrepresented defendants and, without obtaining a valid waiver of the right to counsel, pressure them to accept a DNA plea deal without consulting a lawyer. Despite a strongly felt privacy interest in their DNA, many individuals agree because they believe it will enable them to avoid a more serious conviction or sentence. The practice of bringing individuals *charged*—not convicted—with *minor* offenses under OCDNA results in OCDA’s indefinite, unregulated retention of their personal biological data and widens the net of state surveillance.⁸

The trial court erred in siding with Respondents, who claim that Appellants have not shown Respondents “violated any law, or any individual’s privacy rights, or right to counsel” nor “used coercion against any individual in any criminal matter relating to OCDNA.”⁹ Respondents aver that there is “no factual basis for Appellants’ claims” because “there is no way to know the mind of any particular defendant nor the outcome of his or her trial, had this hypothetical straw man chosen that route.”¹⁰ SJLF’s attorney observations indicate that Appellants’ allegations about

⁸ See Roth, *supra* note 6. Net-widener refers to a dealing where participants are not actually receiving a benefit in exchange for giving up their DNA. The relationship between net widening and consent also supports Appellants’ claim of unconstitutional conditions.

⁹ Resp’t’s Br., *supra* note 7, 13.

¹⁰ *Id.* at 34.

Respondents' misconduct—especially those concerning OCDA's violation of an individual's right to counsel and OCDA using coercion to expand OCDNA—have merit. This brief will provide numerous examples for this Court of such instances in support of Plaintiff-Appellants.

METHODOLOGY

SJLF attorneys observed misdemeanor court at Orange County's Central Justice Center seven times between March and October 2022. Court observation included watching arraignment court along with conversations that occur publicly between DDAs and individuals facing misdemeanor charges in the courtroom hallway. SJLF attorneys conducted 17 interviews, either by phone or in-person, with individuals who were asked to give DNA as a condition of a plea deal or dismissal of their misdemeanor charges ("Offerees"). To protect interviewees' privacy, this brief will refer to them by a pseudonym. In addition, we interviewed the Orange County Rapid Response Network, a local organization that aids immigrant communities, to discuss the impact of OCDNA on different non-profits' and grassroots organizations' members. We also interviewed Orange County public defenders ("PDs") and private criminal defense attorneys who practice in Orange County misdemeanor court. Finally, we conducted extensive research on OCDNA.

ARGUMENT

I. DDAs Obtain DNA Deals in a Coercive Setting Designed to Limit Defense Counsel Involvement and Coerce Quick Acceptance.

A. DDAs Violate An Offeree's Right to Counsel Before, During, and After Plea Negotiations.

Our court observations support Appellants' position that OCDNA violates an individual's right to counsel before, during, and after plea negotiations.¹¹ OCDNA takes advantage of the informality of misdemeanor court to approach unrepresented individuals, does not adequately advise them on access to counsel during negotiations, and in this coercive setting, has individuals sign a waiver of their rights.

1. DDAs Take Advantage of the Less Formal Protections in Misdemeanor Court to Approach Unrepresented Individuals Before They Have Properly Waived Counsel.

DDAs take advantage of the less formal protections in place for defendants in misdemeanor court to coerce rapid acceptance of DNA deals, causing the number of OCDNA samples to balloon. The process by which DDAs make DNA deals is not entirely consistent but follows a general pattern. Each morning, after the judge or commissioner gives a general advisement of rights, DDAs call individuals' names and bring them into the

¹¹ Appellants' Opening Brief at 37, Thompson v. Spitzer, No. G060988 (Cal. Ct. App., Jul. 7, 2022) ("Appellants' Opening Br.").

hallway, often in small groups of four to six people, to offer plea deals.¹² As such, a DDA, rather than a PD or the judge, is typically the first person to speak directly to any individual defendant in misdemeanor court.¹³ The long hallway of eight courtrooms is generally crowded, as the Central Justice Center is a high-volume courthouse that hosts roughly 8,000 people per day.¹⁴ DDAs' conversations with individuals tend to be brief, usually only lasting a couple of minutes where the DDA introduces him- or herself and then immediately starts laying out the conditions of a proposed plea deal for each individual. These batch deals continue throughout the day. On every occasion that we observed misdemeanor court, we saw DDAs offer DNA deals to multiple people at the same time.¹⁵

¹² To determine whether to offer a DNA deal, it appears that DDAs work from a charging sheet. *See Exhibit A.* Concerningly, the chart suggests most of these programs are not available unless the defendant gives DNA. Even more troubling, the chart indicates that already having a DNA sample in the database renders defendants ineligible for participation in most programs or, at the very least, participation under those specific terms.

¹³ *See Interview with Public Defenders, supra note 3.*

¹⁴ Sara Cardine, *Temporary Courthouse in Costa Mesa Will Hear Cases as Central Justice Center is Renovated*, L.A. TIMES (Jun. 18, 2022), <https://www.latimes.com/socal/daily-pilot/news/story/2022-06-18/some-court-cases-will-move-to-costa-mesa-as-central-justice-center-in-santa-ana>.

¹⁵ *See, e.g., Observation Notes Trip 1 (Mar. 24, 2022); Observation Notes Trip 2 (Mar. 30, 2022); Observation Notes Trip 3 (Apr. 11, 2022); Observation Notes Trip 4 (Apr. 19, 2022); Observation Notes Trip 5 (Jun. 21, 2022); Observation Notes Trip 6 (Sept. 21, 2022); Observation Notes Trip 7 (Oct. 19, 2022).*

If an offeree accepts a DNA deal, the individual returns to the courtroom and the DDA will prepare paperwork, including the OCDNA waiver. After the individual has completed the paperwork, they will be called before the judge to quickly review the plea agreement at a high level. After appearing in front of the judge, they will go to a separate room in the courthouse to give a DNA sample before heading to collections to pay the \$110 fee for giving the sample and for any other classes that are conditions of the deal.

In this plea negotiation process, the vast majority of offerees are not represented and have not yet waived the right to an attorney.¹⁶ On several occasions, our court observers noted there was no affirmative waiver of counsel before DDAs began offering deals.¹⁷ As one example, a DDA was talking about the specifics of an unrepresented offeree's case until finally he retracted the deal and said the conversation was "getting more complicated than [he was] comfy with" and then asked the offeree if he wanted a lawyer, to which the offeree responded yes.¹⁸ This occurred, however, after the offeree had spent time discussing the details of his case (while unrepresented)

¹⁶ This was noted both by our court observers through watching court proceedings and speaking with PDs.

¹⁷ See, e.g., Observation Notes Trip 1, *supra* note 15; Observation Notes Trip 3, *supra* note 15; Observation Notes Trip 5, *supra* note 15; Observation Notes Trip 7, *supra* note 15.

¹⁸ Observation Notes Trip 7, *supra* note 15.

with the DDA who was prosecuting him. At times, DDAs made plea offers before PDs even arrived in the courtroom for arraignment.¹⁹ In one instance, a DDA sought and obtained a DNA deal before the judge even took the bench and gave the general advisement of right to counsel.²⁰

Andrew, an offeree, said the brief meeting felt “like a corrupt backroom deal” because it happened outside the presence of defense counsel and judges.²¹ The 2:1, and sometimes 3:1, ratio of DDAs to available PDs compounds the risk that an individual facing criminal charges does not have an adequate understanding of his or her rights and meaningful access to counsel.²² For example, there were times when the PD assigned to arraignment court would end up counseling one client in the hallway and therefore could not advise the other individuals with whom DDAs were attempting to make a deal.²³ Lastly, there is a constant stream of individuals charged with misdemeanors, DDAs, PDs, private defense attorneys, deputies, and members of the public, coming in and out of the courtroom—

¹⁹ See Interview with Public Defenders (Mar. 30, 2022).

²⁰ Observation Notes Trip 5, *supra* note 15. Prior to the hallway meetings, judges will provide a brief advisory to the entire room, including the right to an attorney. However, the judge usually only offers this information once, such that any individual who arrives in the courtroom even a few minutes late does not receive the advisement. On several occasions, attorneys observed people who arrived late miss the advisement of rights.

²¹ See Interview with Andrew (Apr. 22, 2022).

²² See Interview with Public Defenders (Mar. 24, 2022).

²³ See Interview with Public Defenders, *supra* note 19.

adding an air of chaos and informality to misdemeanor court. DDAs take advantage of this hectic environment to approach individuals informally and conduct plea negotiations before they have properly waived right to counsel. In our observations, the inherently unequal bargaining power between an accused and the prosecutor, combined with the few formal protections provided in the misdemeanor court environment, enables DDAs to make a high volume of DNA deals unchecked.

2. DDAs Often Present DNA Deals as Limited-Time, “Take It or Leave It” Offers to Unrepresented Offerees.

Appellants allege that “Defendants present[] ‘unrepresented’ individuals ‘with DNA-driven plea deals’ in a coercive context, reasonably inducing them to ‘perceive the offer as one that they must accept at that moment,’ without counsel present, ‘or risk losing the opportunity forever.’”²⁴ Our court observers found this to be true.²⁵ In one such instance, a DDA started out by explaining that she either had an offer to give, or the person could get an attorney.²⁶ When the offeree replied that he wanted an attorney, the DDA said, “you don’t want to hear your offer?”²⁷ The offeree again replied that he wanted an attorney, and the DDA again asked, “you don’t

²⁴ Appellants’ Opening Br., *supra* note 11, 38–39 (citing First Am. Compl., *supra* note 3, ¶¶ 17, 19, 38).

²⁵ See Observation Notes Trip 4, *supra* note 15; Observation Notes Trip 5, *supra* note 15.

²⁶ Observation Notes Trip 6, *supra* note 15.

²⁷ *Id.*

want to hear your offer?”²⁸ On another occasion, a DDA told an offeree, “if you don’t want the offer it’s fine, you can get a public defender.”²⁹ On that same day, a different DDA told an offeree that he was going to “convey an offer if [the offeree] want[s] to resolve [his] case today, if not [he] can get a public defender.”³⁰

On one occasion, a DDA completely took a plea deal off the table when an offeree asked for a lawyer, stating that the offeree then “do[es]n’t want an offer” and that the offeree “can talk to a PD today or [the offeree] can take this offer.”³¹ Even when DDAs did not immediately withdraw a deal upon an offeree invoking the desire for an attorney, our court observers still heard them note that getting a lawyer would “slow things down.”³²

Appellants note in their reply that DDAs “violate alleged misdemeanants’ rights to counsel by presenting them with DNA driven plea offers with no counsel present and, critically, those plea offers contain the alleged waiver.”³³ From our observations, we have similar concerns. Based on our observations that DDAs (1) were the first person an offeree spoke to

²⁸ *Id.*

²⁹ Observation Notes Trip 5, *supra* note 15.

³⁰ *Id.*

³¹ Observation Notes Trip 6, *supra* note 15.

³² Observation Notes Trip 4, *supra* note 15.

³³ Appellants’ Reply Brief at 18, Thompson v. Spitzer, No. G060988 (Cal. Ct. App., Oct. 13, 2022) (citing Appellants’ Opening Br., *supra* note 11, 37–40).

regarding the resolution of their case, (2) proffered plea deal offers as an alternative to individuals' consulting counsel, and (3) did not present offerees with waivers of right to counsel until after they filled out all their plea agreement paperwork, it is unclear when offerees supposedly waive their right to counsel, *if* it is even happening.³⁴

3. DDAs Improperly Rely On Interpreters to Serve As De Facto Lawyers in Explaining OCDNA Deals to Non-Native English Speakers, Further Eroding an Offeree's Right to Effective Assistance of Counsel.

Orange County court interpreters effectively serve as *de facto* or informal legal advisors—from counseling offerees on their plea deals, to walking them directly to the DNA donation office.³⁵ For non-native English speakers involved with the court system, interpreters can serve as lifelines—a way to understand a system that is not easily accessible. At the Central Justice Center, interpreters not only assist non-native English speakers by translating any conversation they have with a DDA or the judge, but SJLF attorneys also witnessed DDAs asking interpreters to walk offerees through any plea deal paperwork they receive, answer any questions they have, and

³⁴ Respondents push much responsibility onto the judge to ensure a defendant's right are not violated. Resp't's Br., *supra* note 7, 35. However, observers noted that when the judge calls the accused for arraignment, he or she will accept the plea deal as the DDA describes it. Court observers have yet to see a judge reject a DNA deal, nor probe any further into the DNA waiver form or details of the DNA deal with the offeree.

³⁵ Observation Notes Trip 5, *supra* note 15; *see also* Interview with Public Defenders (Jun. 21, 2022).

counsel them on next steps—duties that should be handled by an attorney.³⁶

In one example, a DDA asked an interpreter to help a Spanish-speaking man who could not read or write to go through the paperwork, answer his questions, and have him sign the plea documentation.³⁷ The interpreter was uncomfortable but said she would try. On another occasion, a DDA told an offeree that if he had any questions, to grab the interpreter and ask her.³⁸

Court interpreters are acting as pseudo-lawyers with troubling regularity. An undocumented mother, who was nearly 7-months pregnant at the time, was working with an interpreter to review the DNA paperwork as part of her plea deal, when the interpreter stopped her and told her she should not take the deal.³⁹ The interpreter then sought out a PD for the woman, and together they were able remove the DNA collection provision from the deal and resolve the case.⁴⁰ In another instance, a Spanish-speaking offeree was walking around the courtroom asking for someone to translate the DNA waiver form for him, so he would understand what he was agreeing to.⁴¹

³⁶ Observation Notes Trip 3, *supra* note 15; Observation Notes Trip 5, *supra* note 15.

³⁷ Observation Notes Trip 5, *supra* note 15.

³⁸ Observation Notes Trip 7, *supra* note 15. On that same day, another Spanish-speaking offeree asked for an interpreter to explain the DNA waiver form to him, along with the rest of his plea paperwork.

³⁹ Interview with Public Defenders, *supra* note 3.

⁴⁰ *Id.* PDs also noted that some interpreters are better about connecting an individual with legal questions to a PD, whereas others will simply answer the questions or direct the offeree back to the DDA.

⁴¹ Observation Notes Trip 7, *supra* note 15.

When he finally connected with an interpreter, she tried answering his questions before eventually going to a PD to ask for help because her case load was over-burdened and the offeree was not on the court schedule for that day so she did not have time to help him (making it unclear why DDAs had still met with him and offered him a DNA deal before he was able to check-in with the courtroom deputy or connect with an interpreter or PD).⁴²

Putting interpreters in positions of legal counselors is particularly concerning because many offerees face potential immigration consequences as a result of their legal proceedings. By law, DDAs must take such consequences into account when discussing a possible deal.⁴³ However, that is not happening in Orange County—particularly not in the Central Justice Center which sees the most cases, the majority of which are against Latinx individuals.⁴⁴ Additionally, several PDs expressed that they only advise offerees to take DNA deals if there would be potential immigration consequences that they can avoid by giving DNA. As such, the program disproportionately ensnares undocumented individuals.⁴⁵ The fact that interpreters are placed in legal counsel roles demonstrates that offerees lack guidance in making very consequential decisions and are at serious risk of

⁴² *Id.*

⁴³ See CAL. PENAL CODE § 1016.3.

⁴⁴ Spit and Acquit, *supra* note 6, 124; see also Interview with Public Defenders, *supra* note 35.

⁴⁵ See Interview with Public Defenders, *supra* note 19.

more negative outcomes.

B. DDAs Misleadingly Present OCDNA as a Mandatory Condition of a Plea Bargain and Do Not Adequately Describe the Program, Resulting in a Critical Lack of Understanding by Offerees.

Our observations bear out Appellants' position that "many individuals are called to speak with a [DDA] without understanding that they can speak with a public defender," "alleged misdemeanants oftentimes are not informed," and "they do not understand how or where their DNA will be disseminated."⁴⁶ We have found each claim, particularly those concerning a lack of adequate understanding of key components of OCDNA, to be true and correct.

First, DDAs misleadingly convey that DNA is a mandatory condition of a plea deal while, in reality, the collection of a DNA sample is negotiable. In one instance, court observers heard a DDA state that DNA was "non-negotiable" while offering a plea deal to a young adult.⁴⁷ The young man's parents had serious concerns about their son providing a DNA sample, and when the young man's mother asked the DDA if there were any other options, the DDA said that "being shifty about DNA is fine with me," and then offered a deal without DNA.⁴⁸ However, if DDAs are not challenged,

⁴⁶ Resp't's Br., *supra* note 7, 33 (citing First Am. Compl., *supra* note 3).

⁴⁷ Observation Notes Trip 5, *supra* note 15.

⁴⁸ See Interview with Laura (Apr. 19, 2022).

alternatives are generally not conveyed to offerees.⁴⁹

At times DDAs did not even convey alternatives to providing DNA to private defense attorneys representing individuals charged with misdemeanors. On one instance, a private defense attorney conveyed to his client that there was no option that did not involve DNA for resolving her case concerning a first-time offense without going to trial—and dealing with “all the bad things that would entail”—and that collecting DNA “is standard practice in Orange County.”⁵⁰ Those more familiar with the Orange County misdemeanor court system, however, such as PDs, are generally aware that DNA can be negotiated off the table.⁵¹

Second, DDAs do not properly explain the OCDNA program to offerees. Typically, DNA deals are made in a matter of minutes, and the offerees are provided a waiver with vague and confusing language about OCDNA. Further, we noted that DDAs tend to highlight the short-term resolution of a case when offering a DNA deal, while glossing over the specifics of OCDNA, including implications for offerees’ privacy rights.⁵²

⁴⁹ Denise expressed that OCDA kept pushing for her to give DNA before going to trial. For nearly a year, she refused to give DNA until OCDA finally dropped the charges. During that time, DDAs tried to “scare” her into giving DNA by holding it out as mandatory and relying on conviction rates at trial to get her to acquiesce. *See Interview with Denise (Apr. 22, 2022).*

⁵⁰ Observation Notes Trip 7, *supra* note 15.

⁵¹ *See Interview with Public Defenders, supra* note 19.

⁵² *See, e.g., Observation Notes Trip 1, supra* note 15; *Observation Notes Trip 3, supra* note 15; *Observation Notes Trip 4, supra* note 15.

For example, we heard DDAs call the program a “DNA crime detection and prevention program” and repeatedly use the example of finding a hair follicle at the scene of a crime and using that follicle to immediately rule out the offeree as a suspect if they give their DNA.⁵³ When one offeree asked what providing his DNA to the OCDA meant, a DDA characterized the process as just a “quick cheek swab” that “stays in the system,” with no further discussion of where his DNA would be stored, who would have access to it, and what it could be used for.⁵⁴ By emphasizing how giving DNA might help an offeree in certain (rare) circumstances, without communicating the more realistic privacy-implicating consequences, DDAs foster an inadequate understanding of the alternatives, logistics, and consequences of what offerees are accepting.

C. DDAs Use A Different Waiver, with Less Protections and More Vague Language, Than the One Provided by Respondents in this Appeal.

Concerningly, we noted DDAs providing offerees with a different waiver form than the one provided in this case.⁵⁵ The waiver we observed

⁵³ Observation Notes Trip 4, *supra* note 15.

⁵⁴ Observation Notes Trip 6, *supra* note 15. See notes 71–86 and accompanying text for further discussion.

⁵⁵ See Exhibit B; see also Respondents’ Request for Judicial Notice at 4, Exhibit 1, Thompson v. Spitzer, No. G060988, (Cal. Ct. App., Aug. 24, 2022) (“Collection Waiver Form”). The offerees we spoke to with the alternative waiver were not given any other DNA-related paperwork, specifically not the waiver provided in this case.

contained less information about the program and provided less safeguards and the type of protective language designed to ensure the form is entered into knowingly and voluntarily.

First, the waiver we obtained did not distinguish between the California state database approved by Proposition 69 (pursuant to Cal. Penal Code §§ 295 and 296) and the one maintained by Orange County. The waiver we observed states that DNA samples will go to *both* the legislatively mandated state DNA database *and* to the non-legislatively authorized OCDNA database, even though many offenses OCDNA collects for would not qualify for collection in the state database.

Second, the waiver form we observed did not include appropriate signature lines for personnel that should be involved in the deal-making process, i.e., a defense attorney and an interpreter. It also did not contain declarations of what steps each party took to ensure the offeree understands what rights he or she is waiving, e.g., the DDA reviewing the form with each *pro per* defendant to make sure the waiver was made knowingly and voluntarily.

Third, the waiver form we observed did not contain any recitation of rights an offeree acknowledges and waives in entering into the agreement, in contrast to Section 2 of the waiver form provided in this lawsuit, i.e.,

acknowledging that the waiver is voluntary.⁵⁶

The deficiencies in the waiver we observed being used by DDAs as recently as June 21, 2022, calls into question any offeree's ability to understand the implications of entering into such an agreement.⁵⁷ Moreover, the differences between the form provided in this lawsuit and the one we observed raise concerns regarding the standardization of practices within OCDA and what other iterations of the waiver may be in circulation.

II. Offerees Often Feel Compelled to Accept DNA Deals Despite Strongly Felt Privacy Interests in DNA and a Lack of Understanding About the OCDNA Program.

A. Offerees Feel a Strong Privacy Interest in their DNA and Have Significant Concerns About OCDNA.

Offerees with whom we spoke overwhelmingly expressed a strong privacy interest in their DNA. Multiple interviewees stated that the idea of providing their DNA—or the actual experience of giving a sample—was at minimum unsettling and, for some, deeply troubling. Andrew stated that as soon as the DNA collection swab entered his mouth, he felt scared and wondered if he had made a big mistake by agreeing to a DNA deal.⁵⁸ Antonio

⁵⁶ See Collection Waiver Form, *supra* note 55. (“No one has made any threats or used any force against me, my family, or anyone else I know and [] no promises other than those contained on this form have been made to me in order to convince me to participate in this OCDA DNA Program”).

⁵⁷ Concerningly, our court observers saw what appeared to be a third version of the DNA waiver form in use on October 19, 2022.

⁵⁸ Interview with Andrew, *supra* note 21.

described the program as “a little weird and sketchy,” while Ryan said giving a sample “felt sucky.”⁵⁹ Denise described the DNA offer as “demeaning” and “invasive.”⁶⁰ Being asked to surrender her DNA was dehumanizing—it made her feel that she was being treated “like an animal and not a human being . . . like a lab rat.”⁶¹

In particular, many offerees had concerns about giving their DNA to a law enforcement agency. Although DDAs suggest that giving DNA will only *help* offerees in the future by excluding them as suspects in criminal investigations, several offerees were concerned about potential *misuse* of their DNA and how it might affect them and their relatives.⁶² Denise, for example, expressed concern that her DNA could be planted at a crime scene if law enforcement felt pressure to hold someone accountable for an unsolved crime.⁶³ She was also concerned about implications for her many Black and brown family members in Orange County.⁶⁴ Ray had similar concerns about being arrested for a crime he did not commit, and he worried about what giving his DNA would mean for his young daughters if they make mistakes

⁵⁹ Interview with Antonio, in Santa Ana, Cal. (Jun. 21, 2022); Interview with Ryan, in Santa Ana, Cal. (Jun. 21, 2022).

⁶⁰ Interview with Denise, *supra* note 49.

⁶¹ *Id.*

⁶² See Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a Harmless Error: DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 404–08 (2011).

⁶³ Interview with Denise, *supra* note 49.

⁶⁴ *Id.*

in the future.⁶⁵ In another example, Mario, who reported being brutally beaten by guards in an Orange County jail, was emphatic that he would not want the officers that assaulted him in jail to have access to his DNA.⁶⁶ The privacy concerns interviewees expressed were heightened for people subject to immigration enforcement, many of whom are already subjected to state surveillance through means like electronic monitoring.⁶⁷

Offerees also expressed frustration that participation in OCDNA, unlike other diversion programs, offers no benefits. For example, Max felt that he needed real help with his mental health and addiction, perhaps through drug treatment classes, instead of giving DNA.⁶⁸ Andrew expressed similar feelings. He highlighted that individuals dealing with addiction need actual rehabilitation, and providing DNA is no substitute.⁶⁹ As he explained, OCDNA is “not going to help them quit meth or drugs. It’s not going to solve anything.”⁷⁰

⁶⁵ Interview with Ray (Apr. 25, 2022).

⁶⁶ Interview with Mario (Apr. 1, 2022).

⁶⁷ See Julie Pittman, *Released Into Shackles: The Rise of Immigrant E-Carceration*, 108 CAL. L. REV. 2 (Apr. 2020), <https://www.californialawreview.org/print/released-into-shackles/>.

⁶⁸ Interview with Max (Apr. 6, 2022).

⁶⁹ Interview with Andrew, *supra* note 21.

⁷⁰ *Id.*

B. Offerees Do Not Adequately Understand the Consequences of Surrendering DNA to OCDA.

Our observations support Appellants' allegation that "misdemeanants do not have full knowledge of . . . how their DNA will be used, how long it will be kept, how long it will disseminated, and what safeguards there are to protect it."⁷¹ Whether due to deficiencies in the OCDNA waiver, DDAs' explanation of the program, or the court's review of plea conditions, many offerees do not adequately understand the consequences of surrendering DNA to OCDA—namely who will have access to their DNA, for what purpose, and for how long. When asked if they knew what would happen with the DNA sample they provided, offerees often gave vague and incorrect answers, or else stated they had "no idea."⁷² For example, Ryan incorrectly assumed that the use of his DNA would be limited to any future DUI arrests.⁷³ Andrew stated he did not know what would happen to his DNA, but he speculated that maybe the samples would be used to "cure cancer."⁷⁴ He only knew that OCDA would hold his DNA "forever."⁷⁵ Mario said that the person who took his DNA sample was "just a lady"—he did not know whether she was with OCDA, the Sheriff, or the court.⁷⁶ Nor did he know

⁷¹ Appellants' Opening Br., *supra* note 11, 55.

⁷² Interview with Ray, *supra* note 65.

⁷³ Interview with Ryan, *supra* note 59.

⁷⁴ Interview with Andrew, *supra* note 21.

⁷⁵ *Id.*

⁷⁶ Interview with Mario, *supra* note 66.

where his DNA would go or who it would be shared with, but he assumed that his sample would end up on “some database somewhere,” like an FBI database.⁷⁷ PDs confirmed that, in their experience, offerees are simply underinformed about the parameters of OCDNA, which is likely in part a consequence of the speed with which DNA deals are made.⁷⁸

C. Despite Their Serious Concerns and Lack of Understanding, Many Offerees Feel Compelled to Accept DNA Deals.

Despite concerns for their privacy, offerees often feel pressure to immediately accept a DNA deal without consulting counsel because it seems to be their only option to avoid going to trial or more onerous plea conditions.⁷⁹ Because DDAs often represent the collection of DNA as a mandatory condition to any deal, many offerees do not realize that a deal involving similar terms *without* DNA may be available for those who ask.⁸⁰ The problem is compounded by DDAs’ representations that an offeree will *lose the option of a plea deal* if they consult with a PD.⁸¹

If an offeree perceives an uncounseled DNA deal as the only way to quickly and beneficially resolve their criminal case, it makes sense they would feel immense pressure to accept the DNA offer on the spot. First,

⁷⁷ *Id.*

⁷⁸ Interview with Public Defenders, *supra* note 3.

⁷⁹ Interview with Ray, *supra* note 65; Interview with Ryan, *supra* note 59; Interview with Andrew, *supra* note 21.

⁸⁰ Interview with Public Defenders, *supra* note 3.

⁸¹ See *supra* notes 24–34 and accompanying text.

punishment for a misdemeanor conviction can be significant, including jail time. Even a short time in jail can impact personal, familial, and financial stability. For example, Mario explained that he did not want to return to the jail where he had been assaulted, and he would lose his job if he went to jail.⁸² Second, a misdemeanor conviction can have serious collateral consequences. Several offerees expressed concern over future job prospects. For example, Ray explained that giving his DNA felt like the only option to avoid having something on his record that employers would ask about.⁸³ Offerees may also be concerned about immigration consequences that could result from misdemeanor charges, e.g., potential transfer into ICE custody and/or the inability to renew DACA status.⁸⁴ Finally, taking a case to trial requires time away from work and school, which is particularly difficult for people relying on wages to support themselves and their families.⁸⁵

While these are all factors that typically incentivize a plea deal, in Orange County misdemeanor court, they compound the pressure DDAs place

⁸² Interview with Mario, *supra* note 66.

⁸³ Interview with Ray, *supra* note 65.

⁸⁴ Interview with Orange County Rapid Response Network (Apr. 15, 2022). These concerns are reasonable in Orange County, which transfers incarcerated persons to ICE more than any other county in California. See Nick Gerda, *OC Leads State in Transferring Inmates to ICE for Possible Deportation, Latest Data Shows*, VOICE OF OC (Mar. 23, 2022), <https://voiceofoc.org/2022/03/oc-leads-state-in-transferring-inmates-to-ice-for-possible-deportation-latest-data-shows%EF%BF%BC/>.

⁸⁵ Interview with Andrew, *supra* note 21; Interview with Mario, *supra* note 66.

on offerees to accept a DNA deal *immediately*, without consulting an attorney, even if they have serious reservations about giving DNA. As one interviewee said, “[t]hey force people to do this.”⁸⁶

CONCLUSION

Our on-the-ground research in Orange County misdemeanor court supports Appellants’ allegations about OCDA’s coercive DNA deals. Amicus curiae recommends this Court reverse the judgment of the trial court, allowing Appellants to proceed with their case.

Date: October 27, 2022

Respectfully Submitted,

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⁸⁶ Interview with Andrew, *supra* note 21.

Exhibit A: Charging Sheet

		TERMS				Tabled Forms	
		No OCDA DNA Reg.	Conditions	Time	Crime Eligibility		
DNA & Dismiss	None	YES	Gave DNA to OCDA \$110 Fmt	Now	-Minimal Criminal history -No victim(s)	-Dismissal Waiver Form -DNA Collection Form -Terminal/Dismissal Form -Dismiss on Case file	
DEI "Deferred Entry of Judgement"	Guilty (Temp)	YES	-DNA to OCDA -6 (335) or 12 (560) hr. class (via PTS-Saturdays) -Pay Restitution -No new law violations (60 days)	90 Days	-Lower level Misdemeanor (non-drug) -Minor Criminal History (no felonies) -No OCDA DNA -Not DUI -Not DV	-Tahl Form (Write DEI Sentence Rec) Return Date on front of Tahl Form and on Sentence Rec DEI Terms addendum -DNA collection form (Indicate what classes) -Note return on Case file	
DDP/P Deferred Drug Dismissal Program	None	YES	-DNA to OCDA -6 hr. class via Santa Ana College -Pay \$295 program fee -No new law violations (90 days)	90 Days	-Low level drug possess. -No/Minor criminal history -No OCDA DNA	-Deferred Dismissal Drug Program Agreement Form -DNA Collection Form -Continuance form (set for 90 days) -Must Offer PC 1000 -Send D to DNA office -Note return on Case file	(With comple- tive fill out form. #
OTP "Offender Treatment Program"	Guilty (Temp)	NO	-DNA to OCDA (give it again ok) -6 month OTP program -Up to 200 hrs. meetings/classes (Medicaid/Care will cover) (? for private insurance) -No new law violations (6 months)	6 Months	-All Misdemeanor drug offenses -NOT for dangerous D Q -NOT for Serious felonies	-Tahl Form (Write OTP Return Date on front of Tahl Form and on Sentence Rec) -Offender Treatment Program Form -DNA Collection Form Note Return on Case file -Must Offer PC 1000	
PC 1000 Stat Program	None	NO	-1 year program (approx. 36 hrs.) (Random Drug Testing) -Proof of enrollment: 6 months -Check-in: 12 months -Dismissal: 18 months	6/1/18 month	-Drug Cases -No Felonies w/in 5 years -No violence in the offense	-PC 1000 Terms form -Continue: 6 months 12 months 18 months -Must Offer	-Final Disposition on file

Exhibit B: DNA Waiver Form

ADDENDUM TO DEFENDANT'S TERMS AND CONDITIONS OF NEGOTIATED DISPOSITION/AGREEMENT
 (Use this form for Misdemeanor or Felony, Terminal or Probationary Plea)

CASE NO. [REDACTED] PEOPLE V. [REDACTED] DOB. [REDACTED]

STATE DNA SAMPLE

(FELONY) I understand I will be ordered to provide a DNA sample and fingerprints for the State DNA Database pursuant to Penal Code section 296 and Penal Code section 296.1.

(MISDEMEANOR) I voluntarily consent and agree to provide a DNA sample and fingerprints for the State DNA Database pursuant to Penal Code section 296 and Penal Code section 296.1.

OCDA DATABASE DNA SAMPLE

OCDA DNA Database Consent and Waiver: Pursuant to a negotiated disposition/agreement, I voluntarily consent and agree, for the purpose of crime detection and prevention, to all of the following:

- (a) that I will provide a DNA sample, fingerprints and photograph for the OCDA DNA Database;
- (b) that my DNA sample will be forensically analyzed and permanently retained, along with my DNA profile, fingerprints and photograph;
- (c) that my name and identifying information, DNA profile, fingerprints and photograph will be used for law enforcement purposes including, but not limited to, being subject to continual searches, anytime in the future, against other DNA profiles, fingerprints and photographs in any local, state, national or international law enforcement database; and
- (d) that my name and identifying information, DNA profile, fingerprints and photograph may be released to a law enforcement agency, or other entity as required by law.

I understand that I may have the right to withdraw my consent as set forth in the paragraphs above at any time, and I hereby waive and give up any such right to withdraw my consent.

I further understand that, even if I successfully complete the terms of my disposition/agreement and/or a motion to expunge my conviction pursuant to Penal Code section 1203.4 is granted, or in the event that I fail to complete the terms of my disposition/agreement, my consent and waiver of any right to withdraw my consent will still be valid and enforceable.

I agree to pay a \$110 administrative fee at the time of collection of my DNA sample for the OCDA DNA Database.

TERMS AND CONDITIONS OF PROBATION OR MANDATORY SUPERVISION, if applicable

Provide a DNA sample and fingerprints for the State DNA Database pursuant to Penal Code section 296 and Penal Code section 296.1 immediately or, if in custody, within 72 hours of release, if not already provided.

Provide a DNA sample, fingerprints and photograph for the OCDA DNA Database immediately or, if in custody, within 72 hours of release.

_____ Signature: _____

_____ Signature: _____ (Defendant)

_____ Signature: _____ (Attorney)

Jendum - Rev 5-15-19 White-Court; Yellow-OCDA DNA Collection Site; Pink-D-6

document received by the CA 4th District Court of Appeal Division 3.

CERTIFICATE OF WORD COUNT

Counsel for amicus curiae Social Justice Legal Foundation certifies pursuant to California Rule of Court 8.204 that the Application to File Amici Curiae Brief contains 299 words and the Amicus Curiae Brief in Support of Plaintiffs-Appellants contains 5,728 words (including footnotes, but excluding the cover, table of contents, table of authorities, application, signature blocks, and this certification) as measured by the word processing software of Microsoft Word used in the preparation of the application and brief.

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