KOREAN PROSECUTORS ASSOCIATION

Investigative Duties and Cooperation Between Prosecutors and Law Enforcement Officers in the United States of America

KPA PROJECT 2017

Korean Prosecutors Association
Project 2017 Team

Elizabeth S. Kim (Editor)
Supervising Deputy Attorney General
California Department of Justice, Office of the Attorney General, California, USA

SeungMo Koo (Editor/Coordinator with the Republic of Korea)
Public Prosecutor, Los Angeles Consulate General's Office of Republic of Korea

---

Helen Ahn (Writer)
Assistant District Attorney
New York, USA

H. Glenn Kim (Writer)
Deputy District Attorney
Alameda County District Attorney's Office, California, USA

Nicole Kim (Writer)
Assistant United States Attorney
United States Attorney's Office, Northern District of Illinois, Illinois, USA

Andrew Lee (Writer)
Special Agent, Criminal Investigation
Internal Revenue Service, California, USA

Jason J. Park (Writer)
Assistant District Attorney
Gwinnett County District Attorney's Office, Georgia, USA

Scott Paik (Writer)
Senior Investigator
Los Angeles County District Attorney's Office, California, USA

Christine Ro (Writer)
Assistant United States Attorney
United States Attorney's Office, Southern District of California, California, USA

Jacob Joon Ho Yim (Writer)
Deputy District Attorney
Los Angeles County District Attorney's Office, California, USA

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FORWARD

The Korean Prosecutors Association (KPA) was founded on August 28, 2010, in Los Angeles, California. In the past seven years, KPA has grown rapidly from a small gathering of local prosecutors of Korean descent, to an international organization with members in eight different countries. KPA remains dedicated to its original mission, which is to provide an infrastructure for prosecutors to network, share information, mentor the next generation of prosecutors, and provide community service and outreach. In recent years, KPA has expanded its mission to include a more global outreach consistent with its international membership and to pursue justice throughout the world.

To accomplish KPA's broader global mission, the KPA Justice Foundation was formed in 2016. The KPA Justice Foundation is the official nonprofit fundraising arm of KPA to enable KPA to provide scholarships, host community education events and conferences to train and mentor future prosecutors, and publish papers that are both academic and pragmatic in nature to serve as valuable resources for KPA member and the public.

In 2016, the KPA Justice Foundation participated in its first academic project by publishing a paper on the authentication and search and seizure of digital evidence in criminal prosecutions. The Digital Evidence Project was requested by the Supreme Prosecutors Office of the Republic of Korea, and the participants included prosecutors from Australia, Canada, and the United States. The 2016 project provided a comparative view and an explanation of how the participating prosecuting offices authenticate digital evidence, and how they obtain digital evidence through authorized search and seizure.

This year, the KPA Justice Foundation launched its second academic project and addressed the relationship between prosecutors and law enforcement officers in the United States. One of the hotly discussed and debated topics in Korea today is whether Korea should amend its laws to restructure the current relationship between prosecutors and police. And if some restructuring is deemed beneficial to the Korea society, how and to what extent the laws should be amended. To promote productive and healthy discussions, Korea has looked to many foreign practices, including those of the United States, to view how foreign prosecutors and law enforcement officers work together within the criminal justice system. With this project, KPA hopes to provide a representative sample of the U.S. federal and state prosecuting offices and how they cooperate and collaborate with the local law enforcement, and the realities of the need for the police and prosecutors to work together to obtain common goals of justice, deterrence, and public safety.

As brief background, in the United States all criminal trials are jury trials, unless parties agree to a non-jury bench trial. U.S. Const. art III, § 2. All crimes in the United States are codified, which means that there are no common law crimes, and acts or omissions that constitute a crime must be spelled out in statutes. The codification of statutes ensures the separation of powers amongst the three branches of the governments, and affords due process protections to the accused. The three branches of the government, both at the federal and state levels are the Legislative Branch (which enacts the laws), the Executive Branch (which enforces the laws), and the Judicial Branch (which ensures fair trial and pronounces the sentence for the convicted). Examples of

government officials in the Executive Branch include the Attorney General, District Attorneys, the police and other law enforcement officers.

The United States Department of Justice, through the Office of the Unites States Attorneys, prosecutes violations of the laws of the United States. The laws of the United States include, for example, crimes committed against federal statutes, crimes committed in the District of Columbia or on federal parks, and crimes committed by an officer of the United States while performing his/her duty.

The state prosecutors of the 50 states in the United States prosecute violations of state statutory laws, and the great majority of the ordinary criminal jurisdiction in the United States remains with the states. Both the federal and state prosecutors, however, could separately prosecute the same crime if both federal and state courts have jurisdiction. In some instances, an act may be illegal in one state, but not under federal law.

The prosecutors and the criminal investigators selected for this year's project represent the prosecuting offices on both federal and state levels. This publication shares the laws, and practices and procedures of prosecuting offices from across the United States, from the west coast (California), the mid-west (Illinois), the east coast (New York), and the south (Georgia). We hope this publication serves as a valuable resource and reference for KPA members and the public.

Elizabeth Kim, Supervising Deputy Attorney General, CA DOJ
SeungMo Koo, Prosecutor, Los Angeles Consulate General Office, Republic of Korea

UNITED STATES DEPARTMENT OF JUSTICE

United States Attorney's Office, Northern District of Illinois

United States Attorney's Office, Southern District of California

By: Nicole Kim, Assistant United States Attorney[1]
Christine Ro, Assistant United States Attorney[2]

[1] Nicole Kim has been a federal prosecutor for the past 11 years. She is currently an Assistant U.S. Attorney for the U.S. Attorney's Office, for the Northern District of Illinois, located in Chicago, Illinois. In the Financial Crimes Unit of the U.S. Attorney's Office, Ms. Kim has investigated and prosecuted healthcare fraud, mortgage fraud, investment fraud, national security/terrorism, Title III wire investigations, sex trafficking, firearms trafficking, and violent and narcotics crimes.

[2] Christine Ro has been a prosecutor for almost five years. She is an Assistant U.S. Attorney for the U.S. Attorney's Office, for the Southern District of California, located in San Diego, California. Currently assigned to the Reactive Crimes Unit, Ms. Ro investigates and prosecutes cases involving drug trafficking, alien smuggling, embezzlement, and wire fraud. Before joining the U.S. Attorney's Office, Ms. Ro was a Deputy District Attorney for the Imperial County District Attorney's Office where she handled misdemeanors, felonies, and narcotics sales cases.

INTRODUCTION

The United States Attorneys enforce federal laws throughout the country under the direction of the Attorney General. There are 93 U.S. Attorneys, and the President appoints a U.S. Attorney to each of the 94 federal districts (Guam and the Northern Mariana Islands are separate districts, but share one U.S. Attorney).[3] Each U.S. Attorney is the chief federal law enforcement officer in his/her district, and is also involved in civil litigation where the United States is a party.

The United States Attorneys have three statutory responsibilities: prosecute criminal cases brought by the Federal Government; prosecute and defend civil cases in which the United States is a party; and collect debts owed the Federal Government which are administratively uncollectible.[4] 28 U.S.C. § 547.

In the federal criminal process, there are 11 important steps: Investigation, Charging, Initial Hearing/Arraignment, Discovery, Plea Bargaining, Preliminary Hearing, Pre-Trial Motions, Trial, Post-Trial Motions, Sentencing, and Appeal.[5] In the federal system, the use of grand juries to charge defendants is a requirement in felony cases unless the defendant waives the grand jury indictment.

THE FEDERAL CRIMINAL PROCESS

Typically, investigations conducted by federal criminal prosecutors involve a law enforcement agency, including but not limited to the Federal Bureau of Investigation, Drug Enforcement Administration, Homeland Security Investigations, United States Secret Service, or the Internal Revenue Service. Often the law enforcement agency will propose an investigation to the U.S. Attorney's Office (USAO) and depending on certain criteria, the USAO will accept or decline the investigation. If the USAO accepts a case, the federal law enforcement agency that proposed the case will likely continue the investigation with the prosecutor assigned to the case. In other words, federal prosecutors typically do not investigate cases without the involvement of federal law enforcement.

I. INVESTIGATIVE OR LAW ENFORCEMENT OFFICERS

Pursuant to Title 18, United States Code, Section 2510(7), an "investigative or law enforcement officer" is defined as:

> "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests of offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses[.]"

Further, Title 18, United States Code, Section 115(c)(1) defines a "Federal law enforcement officer" as "any officer, agent, or employee of the United States authorized by law or

[3] https://www.justice.gov/usao/about-offices-united-states-attorneys
[4] https://www.justice.gov/usao/mission
[5] https://www.justice.gov/usao/justice-101/steps-federal-criminal-process

by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law[.]"

The United States Attorney's Offices work with various federal law enforcement agencies within the Department of Justice (DOJ), Department of Homeland Security (DHS), Office of Inspector General (OIG), and others.

A. United States Department of Justice

The United States Department of Justice is comprised of approximately 42 components, which include law enforcement agencies such as the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosions (ATF), and United States Marshals Service (USMS). Department and agency policy govern the specific duties of these agencies and officers.

The FBI investigates terrorism, counterintelligence, cybercrime, public corruption, civil rights, organized crime, white-collar crime, violent crime, and weapons of mass destruction.

The DEA investigates and enforces the controlled substances laws and regulations of the United States.

The ATF investigates offenses involving the unlawful use, manufacture, and possession of firearms and explosives; acts of arson and bombings; and illegal trafficking of alcohol and tobacco products.

The USMS oversees various responsibilities, which include: judicial security, fugitives operations, asset forfeiture, prisoner operations, prisoner transportation, and witness security.

B. Duties and Relationship

Various U.S. Attorney's Offices will typically work with the law enforcement agencies listed above. In certain cases, the USAO may work with state and local law enforcement agencies along with federal agencies to investigate and prosecute violations of federal law. Each district may have specific needs and goals; therefore, each USAO can work with various law enforcement agencies for various types of investigations. However, the duties of each officer remain the same. Each law enforcement officer and/or agent is responsible for investigating the case, gathering evidence, and preparing reports. The Assistant U.S. Attorney (AUSA) is responsible for prosecuting the case. In order for the AUSA to be successful in the complete prosecution of the defendant, the AUSA must work together with the LEO.

II. GOALS OF AN INVESTIGATION

Cooperation between prosecutors and law enforcement officers (LEOs) is critical to a successful investigation. The goals of law enforcement and prosecutors are the same—to pursue those who violate the law and protect the public from their crimes. Prosecutors work with LEOs to ensure that investigations yield the best evidence against suspects, maximize the deterrent impact of prosecutions, and obtain restitution to the victims of crime. Prosecutors also work with

LEOs to identify investigative opportunities that will strengthen evidence in a case. Prosecutors must also investigate the case not only to determine viable criminal charges, but also to prepare the case for trial and sentencing. Prosecutors cannot achieve all of these goals without the assistance of law enforcement. In this sense, prosecutors do not "direct" or "supervise" law enforcement officers in the course of an investigation. Rather, LEOs and prosecutors work as partners and their relationship usually involves a significant amount of collaboration.

III. STAGES OF A CASE

Most cases, whether reactive or complex and long-term, typically follow the same path: grand jury investigation,[6] filing of criminal charges (via complaint, information, or indictment), motion practice, plea negotiations and/or trial, and sentencing/appeal. This section will first address law enforcement coordination with prosecutors in each of these stages of a criminal case, and then address more specifically how such cooperation works in a reactive case and in a more complex, long-term investigation.

A. The Grand Jury Stage – Investigative Strategies

The federal grand jury is an independent body comprised of citizens who investigate alleged or suspected violations of federal law. U.S. Attorney Manual 9-11.101. The grand jury can initiate criminal prosecution by returning an indictment, but it also has the power to return a "no bill," which means a rejection of a proposed indictment. *See* Wright, Federal Practice and Procedure, Criminal § 110. A prosecutor is responsible for presenting evidence for the grand jury's consideration and advising the grand jury on the applicable law. The grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted;[7] however, after indictment, the grand jury may investigate additional crimes by an indicted defendant or by additional defendants for a superseding indictment.

In the initial stages of an investigation, the prosecutor typically consults with LEOs to determine what investigative strategies to pursue. One of those strategies is issuing grand jury subpoenas to obtain various kinds of evidence such as telephone call detail and subscriber records, jail calls, financial and medical records, and witness testimony.[8] A witness's testimony before the grand jury may be admissible in a later legal proceeding through the testimony of that witness. If the individual interviewed by LEOs is later charged as a criminal defendant, that defendant's statement may likely be admissible at trial as a statement of a party opponent pursuant to rule 801(d)(2) of the Federal Rules of Criminal Procedure.

When deciding which investigative strategy to pursue, it is important for prosecutors to regularly consult and coordinate with LEOs for several reasons. First, LEOs may initially know

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[6] Pursuant to the U.S. Department of Justice policy, the Department's Tax Division must first approve and authorize the U.S. Attorney's use of a grand jury to investigate criminal tax violations. *See* 28 C.F.R. § 0.70.

[7] *Hurt v. United States*, 429 U.S. 1062 (1977).

[8] In contrast to grand jury subpoenas, healthcare fraud subpoenas are investigative demands to obtain records for investigations relating to federal criminal health care fraud offenses. These records are not subject to the constraints applicable to grand jury matters set forth in Federal Rules of Criminal Procedure 6(e).

more about the history of the investigation than the prosecutor. Prior to the prosecutor's involvement, LEOs will often know not only the target's history but also the identity and background of any accomplices. LEOs may also already have identifying information for the subjects of an investigation, including their telephone numbers, email accounts and locations of the subjects' bank accounts. LEOs can help identify these "buckets" of evidence and prosecutors can work with LEOs to lawfully obtain such evidence. Prosecutors and LEOs also need to work together to find every opportunity to expand the investigation. While some evidence gathering corroborates or strengthens historical evidence, other cases require a more proactive approach such as conducting surveillance or using a wiretap to obtain real-time communications of targets. A prosecutor can provide LEOs with legal guidance and help brainstorm investigative strategies to enhance every aspect of the investigation.

B. Investigative Tools Other Than Grand Jury Subpoenas

Generally, investigations are kept covert as long as possible until the suspects are arrested and criminal charges are filed. However, grand jury subpoenas can risk "outing" an investigation to the targets and/or the targets' accomplices. In addition, grand jury subpoenas have their limits when it comes to investigating a target's electronic footprint. For example, subpoenas cannot be used to obtain the content of cell phones or email and social media accounts. For those kinds of evidence, as further explained below, a search warrant or a section 2703(d) order may be necessary. If it is necessary to maintain the covert nature of the investigation, there may be several different investigative strategies available to law enforcement other than issuing grand jury subpoenas, such as search warrants, pen register and trap and trace orders, section 2703(d) orders, and wiretaps.

1. Legal Authority

A federal prosecutor is an "attorney for the government" as defined by rule 1(b)(1)(B) of the Federal Rule of Criminal Procedure and therefore may apply for orders requesting specific relief pursuant to 18 U.S.C. § 3122 (pen registers and trap-and-trace devices), 18 U.S.C. § 2703 (records concerning electronic communications), and rule 41 of the Federal Rule of Criminal Procedure (search warrants). LEOs cannot obtain these orders and warrants from the court without a prosecutor's involvement.

2. Pen-Trap Orders

The Pen-Trap statute (18 U.S.C. §§ 3122-3124) concerns the real-time collection of subscriber, addressing and other non-content information relating to those communications, both for telephones and computers. In the Northern District of Illinois, based on information provided by a LEO, a prosecutor can submit an application to the judge for such an order and no affidavit from a LEO is required.

3. 18 U.S.C. § 2703

The stored communication portion of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2712, regulates how the government can obtain records such as stored customer or subscriber records from internet service providers and telephone companies. Section 2703 of

this Act applies when the government seeks to compel production of such records. An order pursuant to this statute also governs requests for historical cell site data for a cell phone. A showing under section 2703(d) requires a "governmental entity" to set forth "specific and articulable facts showing reasonable grounds to believe" that historical cell site data is "relevant and material" to an ongoing criminal investigation. In the Northern District of Illinois, this showing can be made by an agent affidavit setting forth such facts. If the court issues an order, the LEO will then serve the order on the particular service provider.

4. Search Warrants and Other Orders Obtained Pursuant to Rule 41 of the Federal Rules of Criminal Procedure

Under Federal Rule of Criminal Procedure 41, in order to obtain a search warrant, there must be probable cause to believe that evidence, contraband, fruits or instrumentalities of a crime are contained or exist in the item or location requesting to be searched. Fed. R. Crim. P. 41(c). In the Northern District of Illinois, the probable cause showing is set forth in a LEO affidavit and these affidavits are reviewed by the prosecutor prior to submission to the court.

Absent consent, search warrants are required to search, among other things, a suspect's cell phone after arrest, a vehicle, any physical premise (residence, office, warehouse), and the contents of a computer, or email and social media accounts. In addition, aside from search warrants, applications for prospective cell-site data, use of a cell site simulator, geolocation information, and tracking devices all require an affidavit setting forth the requisite probable cause. As with other investigative techniques, it is important for a prosecutor to coordinate with LEOs so that the prosecutor knows what physical or electronic evidence may exist and can appropriately advise the LEOs on how to lawfully obtain such evidence.

5. Wiretaps: Real-time Interception of Wire, Oral and Electronic Communications

The wiretap process is governed by 18 U.S.C. §§ 2510-2518. Cooperation and coordination between prosecutors and LEOs are critical to the success of this investigative strategy. The wiretap affidavit of an "investigative or law enforcement officer" must establish that there is probable cause to believe that a suspect has committed or is committing a federal criminal offense and that a particular device is being used to commit that offense. The affidavit must also demonstrate the need for interception, which typically involves showing how other investigative techniques have been attempted and failed, or did not achieve all of the goals of the investigation. The wiretap application is made by the prosecutor and prior to submitting the wiretap application to the judge, the application must be reviewed by several different individuals/entities within the U.S. Department of Justice. In addition, unlike other affidavits that are signed and sworn before a judge, a wiretap application requires the personal appearance of the prosecutor and the LEO, both of whom must swear to an application (AUSA) and affidavit (LEO) in the judge's presence.[9]

[9] The statute also contains a provision that allows for the warrantless, emergency interception of wire, oral, and/or electronic communications. Different procedures govern wiretaps in these situations. *See* Title 18, United States Code, Section 2518(7).

In the Northern District of Illinois, periodic reports must be submitted to the court during the interception process summarizing the interceptions obtained and containing a statement regarding the need for continued interception. Prosecutors work with LEOs to gather the information underlying these reports. In addition, wiretap cases are typically long-term investigations and involve numerous investigative techniques other than the wiretap itself. For example, LEOs may be simultaneously conducting surveillance, using known confidential sources to build a case, trying to "flip" other individuals to become cooperators, and engaging in other covert investigative techniques. It is therefore important for a prosecutor to engage with LEOs, almost on a daily basis during the time a wiretap is active—to ensure that the evidence is lawfully obtained and to provide legal guidance to LEOs in connection with their execution of these investigative techniques.

C. Filing of Criminal Charges

There are three different ways by which federal criminal charges are filed against an individual: by complaint, indictment, or information.

1. Complaint

A complaint requires an affidavit by a LEO attesting to the facts supporting probable cause that an individual has committed a federal offense. A prosecutor reviews a LEOs affidavit prior to its submission to a magistrate judge. There are typically three ways an individual can be arrested: (1) LEOs can arrest an individual based on probable cause and without a complaint; (2) a magistrate judge authorizes the filing of a criminal complaint and a warrant is issued in connection with the complaint but prior to the individual's arrest; and (3) a grand jury returns an indictment and an arrest warrant is issued with the indictment. LEOs typically notify the prosecutor before or shortly after an arrest is made. After a probable cause arrest (no arrest warrant) is made by LEOs, the prosecutor must determine whether there is sufficient probable cause to charge the individual by complaint.

Obtaining Evidence After an Arrest

After a suspect is arrested, prosecutors work with LEOs to obtain as much evidence as possible from a variety of sources. For example, search warrants can be executed for a suspect's cell phone and email accounts, or residence and vehicles. Post-arrest interviews, which occur when a suspect waives *Miranda* rights and agrees to speak with law enforcement, can also yield valuable evidence for the investigation.

Complaint Process

In the Northern District of Illinois, a LEO signs and swears out the affidavit to a criminal complaint before a magistrate judge. In addition, an individual arrested by federal law enforcement must appear before a judge for an initial appearance on the charges within 17 hours of arrest ("17-hour rule"). An arrested individual may decide to waive this 17-hour requirement for a variety of reasons, including proactive cooperating with law enforcement.

The government has 30 days from the date of arrest or the date on which an individual is served with a summons to file an indictment or information, unless an extension is approved by a judge. 18 U.S.C. § 3161(a). Within these 30 days, a prosecutor continues to work with LEOs to obtain evidence, including using the grand jury and other investigative techniques.

In addition, after a defendant is arrested, he/she can demand a preliminary hearing pursuant to rule 5.1 of the Federal Rules of Criminal Procedure. This hearing is conducted before a magistrate judge – typically the same judge who approved the criminal complaint – in order to determine whether there is probable cause to believe that the defendant committed the federal offense identified in the complaint. LEOs are heavily involved in the preparation for this hearing as it commonly involves the testimony of the LEO affiant and/or other LEOs involved in the case.

2. Indictment and Information

A grand jury can return an indictment against an individual if it finds there is probable cause to believe that the individual committed a federal offense. In contrast, an individual can also be charged with an offense by way of information, which means that the U.S. Attorney brings the charges as opposed to a grand jury. An information is typically filed in cases where an individual has already agreed to plead guilty. To proceed by information, an individual waives his/her right to be charged by indictment. Fed. R. Crim. P. 7(b). In both scenarios, however, prosecutors are closely involved in the investigation prior to the formal filing of charges.

After a defendant makes his/her initial appearance or arraignment on the indictment or information, there may be a detention hearing in certain instances held pursuant to 18 U.S.C. § 3142(f). This hearing, which typically goes before a magistrate judge, determines whether the defendant will stay in custody or be released pending trial. The judge makes an assessment of whether the defendant presents a risk of flight and/or a danger to the community. If the government requests detention, the prosecutors work with LEOs to gather all facts in favor of detention (i.e. fleeing from the arrest scene, the presence of any weapons or dangerous drugs during a search incident to arrest, or obstructionist behavior). If the judge detains a defendant, that defendant is turned over to the custody of U.S. Marshals; however, LEOs working the investigation remain on the case.

D. Pre-Trial Motion Practice and Continuing the Investigation

During this period, a prosecutor may be dealing with a variety of motions filed by the defense (*i.e.*, motions to suppress evidence, dismiss the indictment, etc.). However, a prosecutor still works closely with LEOs to obtain evidence for trial and sentencing.

E. Plea Stage

Rule 11(c)(1) of the Federal Rules of Criminal Procedure authorizes a prosecutor to negotiate a plea disposition with defense counsel. Pursuant to the U.S. Department of Justice policy, prosecutors will generally seek a plea to the most serious offense charged that is consistent with the full nature and extent of the defendant's conduct and likely to result in a conviction at

trial. The U.S. Attorney's Office in the Northern District of Illinois has its own specific plea policies.

F. Trial and Sentencing

At the trial stage of a case, LEOs are typically involved in serving trial subpoenas to various witnesses and assisting prosecutors with witness interviews and other trial preparations. After a defendant is convicted, whether by guilty plea or trial, LEOs often help prosecutors prepare for sentencings, particularly if there are contested issues regarding restitution, forfeiture, financial loss or drug amount. Evidence gathering can still occur at this late stage in order to properly prove up sentencing enhancements or other aggravating sentencing factors.

IV. CASE EXAMPLES

This section will discuss how prosecutors work with LEOs in two different kinds of cases: a non-complex, reactive case, and a long-term, narcotics wiretap investigation.[10]

A. Bank Robbery – *United States v. John Stoessel,* 15 CR 677

The investigation in this case began when the FBI was notified that an individual robbed a bank in the Chicago area. After that robbery, the FBI obtained and reviewed the bank's surveillance video and interviewed several witnesses, including the bank tellers. For the next several days, the prosecutor worked with the FBI case agent to explore various investigative avenues, such as interviewing employees at a nearby store who had contact with the defendant. Based in part by video surveillance footage obtained from the nearby store, the FBI was able to identify the bank robber as Stoessel. A few days after the first robbery, another bank was robbed by an individual matching Stoessel's description. After obtaining the video surveillance footage from the second bank as well as a traffic camera near that bank, the FBI identified that bank robber as Stoessel. The FBI agent's affidavit for the complaint, which set forth the probable cause showing, was reviewed by the prosecutor prior to its submission to a magistrate judge. The complaint was then approved and the arrest warrant issued by the magistrate judge while Stoessel was still at-large. A few days later, Stoessel was arrested. At the scene of arrest, Stoessel consented to a search of his car where additional evidence was obtained, including a cell phone. A search warrant was executed to obtain the contents of that phone.

A grand jury ultimately returned a two-count indictment against Stoessel charging him with bank robbery. Stoessel agreed to plead guilty and was sentenced approximately eight months after the filing of the indictment.

The evidence gathering in this case was more historical than proactive. In other words, LEOs used various investigative strategies to corroborate the events that already happened, such as the defendant's movements during the time of the bank robberies. In contrast, complex investigations, such as narcotics wiretap cases, typically involve more proactive investigation that occurs over an extended prior of time. This type of investigation also has different implications on a prosecutor's working relationship with LEOs.

[10] These case examples were provided by the USAO, for the Northern District of Illinois.

B. Operation Weed Train – *United States v. Martin Quintero, et al.*, 10 CR 1063

In December 2010, nearly 11 tons of marijuana were seized by LEOs in the Chicago area. The investigation began when federal custom and border patrol agents in Eagle Pass, Texas found six rail cars of a freight train loaded with "super sacks." According to shipping documents, the super sacks came from Mexico. With the assistance of a drug-sniffing canine, LEOs found a clay-like pigment inside the super sacks that camouflaged the drugs. LEOs placed the nearly 22,000 pounds of marijuana back on the train and then surveilled the train travel from Texas to the Chicago area. Once the rail cars arrived in a warehouse in Chicago Heights, LEOs used a variety of investigative techniques to maintain surveillance on the rail cars, as well as to obtain evidence against the individuals responsible for the criminal activity. LEOs worked with federal prosecutors to obtain, among other things, a wiretap over telephones, interception of closed circuit televisions inside the warehouse where individuals were unloading the super sacks, a vehicle tracking device, and search warrants for an email account, residence, and warehouses. Documents such as travel records and importation documents for the rail cars were also obtained. LEOs also conducted extensive physical surveillance, including aerial surveillance, and installed pole cameras near the warehouses where the rail cars were stored. LEOs also interviewed and secured the cooperation of several witnesses who helped obtain valuable evidence against the defendants. During the course of the investigation, LEOs discovered that each super sack weighed approximately several thousand pounds and the defendants extracted the drugs by dumping the sacks into a machine that separated the clay pigment from the marijuana.

A grand jury ultimately returned a four-count indictment against eight defendants, the most serious charge being a narcotics conspiracy. After the defendants' arrests, LEOs conducted extensive post-arrest interviews with some of the defendants. Three defendants went to trial and were found guilty by a jury of the conspiracy count. Four defendants pleaded guilty and one defendant is a fugitive from justice.

Because of the extensive scope of this investigation, there were multiple federal, state and local law enforcement agencies working together during the case. Prosecutors became involved when the rail cars were discovered in Texas in November 2010, and remained involved through the trial of the three defendants in 2012, sentencings, and appeals of their cases to the Seventh Circuit Court of Appeals. Constant communication and coordination of investigative strategies between prosecutors and LEOs were critical to the success of this case.

V. TRAINING

Training of prosecutors and LEOs occur in different forums and formats. In the Northern District of Illinois, the USAO sometimes invites LEOs to specific training events and also conducts in-house training for the prosecutors on various topics.

U.S. ATTTORNEY'S OFFICE, SOUTHERN DISTRICT OF CALIFORNIA

The U.S. Attorney's Office for the Southern District of California is comprised of San Diego County and Imperial County. Both counties have large Mexican cities immediately to their south. Tijuana, Mexico is directly adjacent to San Diego County and Mexicali, Mexico is directly adjacent to Imperial County. Within the Southern District of California, there are international ports of entry at San Ysidro, Otay Mesa, Tecate, Calexico, and Andrade. The San Ysidro port of entry is the world's busiest land crossing where over 14 million vehicles and 40 million people legally enter the Unites States each year.

The USAO, Southern District of California is comprised of over 110 prosecutors dedicated to protecting the public safety. The Criminal Division is organized into seven sections or units: Reactive Crimes Section, General Crimes Section, Major Frauds and Special Prosecutions Section, Criminal Enterprises Section, National Security and Cybercrimes Section, Appellate Section, and Asset Forfeiture and Financial Litigation Units. One of the busiest sections is the Reactive Crimes Unit which prosecutes 90% of all reactive cases presented for prosecution. Because of the Office's proximity to an international border, the Reactive Crimes Unit handles many cases involving drug trafficking, alien smuggling, illegal entries and other immigration cases, and fraudulent document cases.

When cases originate from the ports of entry and checkpoints, the AUSA must work with various law enforcement agents and officers, including the Customs and Border Protection Officers, United States Border Patrol Agents, Homeland Security Investigation Special Agents, and Drug Enforcement Administration Special Agents.

I. CASE EXAMPLES

This section will discuss how prosecutors work with LEOs in two different kinds of cases: a non-complex, reactive case, and a non-complex general crimes case that involved the Grand Jury.[11]

A. *United States v. Gutierrez* - Importation of Methamphetamine

The defendant drove into the United States through the San Ysidro, California, Port of Entry. The defendant was the driver and sole occupant of the vehicle. Customs and Border Protection Officers found 18.52 kilograms of methamphetamine inside the vehicle. Homeland Security Investigations Special Agents (HSI SA) arrived to the scene and interviewed the defendant. The defendant admitted knowledge that she was transporting narcotics into the United States for approximately $1,000.00. After the arrest, HSI SA presented a complaint to the USAO, an AUSA reviewed and approved the complaint, and then the HSI SA presented the complaint to the duty United States Magistrate Judge. As follow up, the HSI SA worked with the AUSA to obtain a search warrant to search the defendant's cellular phone.

[11] These case examples were provided by USAO, for the Southern District of California.

B. *United States v. McFadden* - Felon in Possession of a Firearm

Local police officers arrested the defendant after a dispute with his neighbor. During the dispute, the defendant fired a shotgun. When the local police arrived at the scene, they contacted federal agents as a follow up to the offense. The local police officer and the federal agent worked together and decided to present the matter as a federal case. The federal agent drafted a complaint, an AUSA reviewed and approved the complaint, and the federal agent presented the complaint to the duty United States Magistrate Judge. After filing the complaint, an AUSA presented the facts to a Grand Jury to secure an indictment. The AUSA decided to call civilian witnesses to present to the Grand Jury. During this process, LEOs had to follow-up by contacting the witnesses and securing their presence for the Grand Jury.

COMMON HYPOTHETICAL: *PEOPLE V. VINCE, JONES, AND THOMAS*

The below-described hypothetical case has been presented to all prosecutor writers for analysis and discussion.

FACTS:

Judy and her friends were walking through the apartment complexes of the 69 Village. They saw Willie and another boy named MoMo, and struck up a conversation. As they talked, two armed gunmen ran up to them and fired approximately 20 shots. Judy was hit in the head and died. MoMo was shot in the leg, and survived.

Surveillance videos showed three men had been following Willie and MoMo. Shortly before the shooting, the three men got into a car. Two of the men were then seen coming out the car and walking towards Judy and the crowd. Moments after, the same two men were seen running back into the car and driving away.

An informant told the police that a person named Ruth was involved in the shooting, and that she is Victor's cousin. Police learned that MoMo was suspected of killing Victor a few months before, but had not been arrested or charged with Victor's murder. Ruth agreed to give a statement to the police. After denying any involvement, Ruth said that she was driving through the 69 Village when she saw MoMo. Ruth believed that MoMo was responsible for killing her cousin Victor. Both Victor and Ruth were associated with a "Lower Bottoms" gang. After seeing MoMo, she called her brother Sammie and her cousin Vince and told them MoMo was in the 69 Village. Ruth was aware that her family and friends wanted to kill MoMo to avenge Victor's death.

Shortly after making the phone call, Ruth met with Sammie, Vince and friends named Thomas and Jones. All have ties to the Lower Bottoms gang. Ruth overheard Vince tell the others that MoMo had been spotted and that they needed to take care of him. Ruth said she then left for work and only heard of the murder on the evening news. The police seize Ruth's phone and saw the phone numbers of everyone who had been part of the conversation.

The police obtained warrants for the phone records. The records showed that Vince, Thomas, and Jones' phones were pinging near the 69 Village at the time of the murder. Phone records for Ruth and Sammie showed that their phones were across town during the time of

shooting. Text messages between Vince and Jones on the night of the murder alluded to having pride in committing various crimes, including one from Vince welcoming Jones to the "REDRUM" club. "Redrum" is a slang term for "murder" spelled backwards.

With this information and the fact that MoMo was still alive, the police obtained a warrant to wiretap Vince, Thomas, and Jones' phones. A phone conservation was intercepted between Vince and another individual where Vince said that they missed an opportunity and needed to keep an eye out for MoMo.

Police also obtained search warrants for Vince, Jones, and Thomas's homes. At Vince's home a gun was found that matched the bullet from Judy's head and the casings on the ground. Meanwhile, Thomas is arrested in an adjacent county and awaits trial on gun charges. The gun Thomas had been arrested with is tested and the casings match the other set of casings found at the murder scene. Vince gives a statement and confesses to his involvement.

ANALYSIS:

1. Surveillance Camera: In this scenario, LEOs can ask for the surveillance video from a cooperating entity/individual, or serve a grand jury subpoena to obtain the evidence.

2. Informant: Typically, if a federal law enforcement agency receives information from an informant, that information is documented in a report that is written by an agent. The statement is not necessarily recorded or handwritten or signed by the informant. The statement is likely hearsay so not admissible in court unless the informant testifies.

3. Ruth's Statement: Federal law enforcement agencies in the U.S. Department of Justice, such as the FBI, DEA, and ATF, must follow established U.S. Department of Justice policies regarding the recording of interviews of individuals in federal custody. If Ruth is not in federal custody and voluntarily provides information to federal LEOs as a witness or a target of an investigation, Ruth's statements will typically be documented in an agent report. However, law enforcement may have strategic reasons for recording a witness's statement depending on the circumstances. A witness's statement itself is likely hearsay and therefore inadmissible in court. However, if Ruth is a defendant, then her statement would likely be admissible in court as a non-hearsay statement of a defendant.

4. Ruth's phone: If Ruth consented to the search of her phone, then no warrant is needed. If Ruth's phone is seized by the police pursuant to an arrest, then a warrant is necessary to search the contents of her phone. The application of a search warrant to a judge is governed by rule 41 of the Federal Rules of Criminal Procedure. In the Northern District of Illinois and the Southern District of California, a LEO is the affiant in the affidavit and prosecutors review the search warrant affidavit prior to its submission to a magistrate judge.

5. Phone Records and Text Messages: Certain phone records can be obtained by a grand jury subpoena, such as call detail records and subscriber information. The retention period for call detail records varies depending on the service provider. In contrast, text messages are contents of a

phone – these records must be obtained by a search warrant. The retention period of text messages varies by service provider, however, it is typically retained for only a short period of time.

6. Wiretap: 18 U.S.C. §§ 2510-2518 govern the wiretap process. Typically, a LEO is the affiant in the wiretap affidavit and the prosecutor submits the wiretap application, which includes the affidavit to the judge. The wiretap application consists of a "full and complete statement of the facts" establishing the requisite probable cause—that the particular device is being used to commit a specified offense—as well as other threshold requirements. Such facts are typically set forth in an affidavit. Prior to submitting the wiretap application to the judge, the application must be reviewed by several individuals including the prosecutor and other individuals within the U.S. Department of Justice. The "investigative or law enforcement officer" who submits the wiretap application must then swear to its accuracy in the judge's presence.

7. Search of Vice, Jones, and Thomas's Homes: See answer to Question 4. It is the same process to obtain a search warrant for the homes. However, the affidavit must reflect the particularized set of facts outlining the probable cause specific to the search of the homes.

8. Thomas' Arrest: If the prosecutor believes there is sufficient evidence to arrest and prosecute Thomas for the murder and if Thomas is not in custody, the prosecutor and police can arrest Thomas in one of three ways. First, LEOs can arrest Thomas based on probable cause and without an arrest warrant. After Thomas is arrested, the prosecutor will determine whether there is sufficient probable cause to charge him with a crime. Second, a judge can authorize a criminal complaint against Thomas and issue an arrest warrant in connection with the complaint. Third, Thomas can be arrested and charged by way of indictment. If a grand jury finds probable cause that Thomas committed a crime, it will return a true bill and a magistrate judge can issue an arrest warrant with the indictment. If Thomas has been charged by the state in another case and is in state custody, the prosecutor can file a writ to have Thomas transferred to federal custody to face the federal charges.

9. Vince's Confession: If Vince is arrested and in federal custody, federal LEOs within the U.S. Department of Justice must follow the established Department procedures for recording interviews of individuals in federal custody. There is no requirement that the statement be video-recorded or that hand-written statements be obtained from the defendant, although LEOs may make a strategic decision to do so based on the nature of the case or other factor.

INTERNAL REVENUE SERVICE

By: Andrew Lee, Special Agent[12]

[12] Andrew Lee has been a Special Agent with the Department of the Treasury, Internal Revenue Service, Criminal Investigation Division (IRS-CI) since 1995. Special Agent Lee is currently assigned to the IRS-CI Los Angeles Field Office, in the newly formed Cyber Crimes Unit. Special Agent Lee is also the Public Information Officer and Use-of-Force Instructor for the Los Angeles Field Office. Since joining the IRS, Special Agent Lee has worked in the High Intensity Money Laundering and Related Financial Crime Area Task Force to disrupt and dismantle large-scale money laundering systems and organizations; conducted asset forfeiture investigations involving administrative, civil, and criminal forfeitures of both personal and real property; participated in the Money Service Business Task Force to combat emerging money laundering issues and to develop best practices; and worked in the Organized Crime Drug Enforcement Task Force to conduct narcotics-related money laundering investigations to identify, dismantle and disrupt national, trans-national, and international organized crime syndicates along with their support systems that launder illicit proceeds. Prior to a career in federal law enforcement, Special Agent Lee was a Revenue Agent with the IRS, Examination Division, for approximately five years where he conducted complex tax audits of corporations, partnerships, and individuals. Special Agent Lee has taught several Financial Investigative Techniques courses to Korean National Tax Service, both in Korea and in the United States.

INTRODUCTION

The Internal Revenue Service (IRS) is a bureau of the United States Department of the Treasury. It is the tax collection agency for the United States of America. The IRS is under the direction of its Commissioner of Internal Revenue, who is appointed to a five-year term by the President of the United States. The IRS is divided into three commissioner-level organizations: Commissioner; Deputy Commissioner for Services and Enforcement; and Deputy Commissioner for Operations Support.[13] Its main office is located in Washington, D.C.[14]

In fiscal year ("FY") 2015, which spans October 1, 2015 to September 30, 2016, the IRS collected almost $3.3 trillion in revenue and processed almost 240 million in tax returns.[15] The IRS has 83,000 employees, and has an annual budget of approximately $11.2 billion.

The IRS-Criminal Investigation Division (IRS-CI) is within the Deputy Commissioner for Services and Enforcement Division. It has law enforcement responsibilities of the IRS with 3,100 employees worldwide, of which approximately 2,200 are Special Agents. The IRS-CI Special Agents are assigned to 25 field offices located across the United States and in ten foreign posts (Bogota, Colombia; Bridgetown, Barbados; Frankfurt, Germany; Hong Kong, China; London, England; Mexico City, Mexico; Ottawa, Canada; Panama City, Panama; Sydney, Australia; and The Hague, Netherlands). The Special Agents assigned to foreign posts continue to build strong alliances with the IRS foreign government and law enforcement partners. These strong alliances provide the IRS-CI with the ability to develop international case leads and to support domestic investigations that have an international nexus. The IRS-CI foreign attachés are especially focused on promoters from international banking institutions that assist the United States taxpayers evade the U.S. tax requirements.

The IRS-CI Special Agents fill a unique niche in the federal law enforcement community. Today's sophisticated schemes to defraud the government demand the analytical ability of financial investigators to wade through complex paper and computerized financial records. By following the money trail and applying their astute analytical skills to the financial details, the IRS-CI Special Agents have achieved one of the highest conviction rates in federal law enforcement.

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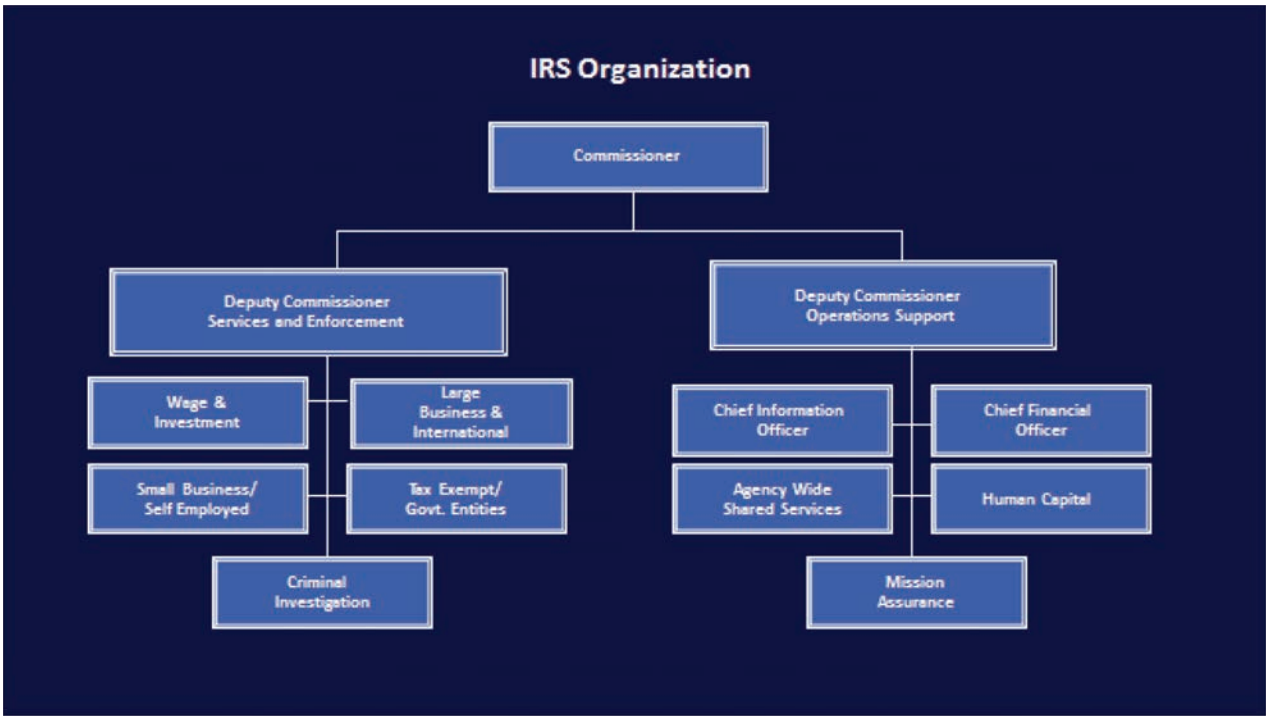
[13] www.irs.gov/about-irs/todays-irs-organization.
[14] www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority.
[15] *Id.*



MISSION AND AUTHORITY

The IRS-CI serves American public by investigating potential criminal violations of the Internal Revenue Code and related financial crimes in a manner that fosters confidence in the tax system and compliance with the law. The IRS-CI's strategic objectives are based on the overall IRS multi-year strategic plan. The Annual Business Plan is issued annually by the Chief of the CI Division, and establishes strategies and operational priorities.

The IRS authority to enforce federal laws is derived from a variety of statutes. These statutes may assign the enforcement duties to a particular department, such as the Treasury Department, or an agency of the department such as the IRS, or simply to the United States Department of Justice (DOJ). The various departments within the government then further delegate the authority to enforce the laws through Orders and Directives issued to the agencies. The agencies then issue Delegation Orders (or Rules) to specific functions, and sometimes even to specific positions, within the agency.

I. GENERAL AUTHORITY TO ENFORCE INTERNAL REVENUE LAWS AND RELATED STATUTES

Title 26, United States Code, Section 7608(b) provides the initial authority for investigating crimes arising under the Internal Revenue laws. 26 U.S.C. § 7608(b) (any criminal investigator of the Intelligence Division of the IRS may be charged by the Secretary of the Treasury with the duty to enforce criminal provisions of the internal revenue laws). The IRS Commissioner and his designated officers and employees are authorized to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the returns; summon persons liable for tax and take his/her testimony; and administer oaths. 26 U.S.C. §§ 7602, 7622; Treasury Order 150–10.

The IRS also has explicit investigatory and enforcement responsibilities pertaining to money laundering and the Bank Secrecy Act (BSA). 18 U.S.C. §§ 1956, 1957; 31 U.S.C. § 5311 et seq. Pursuant to Treasury Directive 15-42, the IRS Commissioner has been delegated:

1. Investigatory authority for violations of 18 U.S.C. § 1956 (laundering of money instrument) and § 1957 (engaging in monetary transactions in property derived from specified unlawful activity) where the underlying conduct is subject to investigation under Title 26 of United States Code or under the BSA; and

2. Seizure and forfeiture authority for violations of 18 U.S.C. § 981 and 31 U.S.C § 5317 relating to violations of sections 5313 and 5324 of Title 31 of United States Code and sections 1956 and 1957 of Title 18 of United States Code which are within the investigatory jurisdiction of the IRS.

Note: Property seized under 18 U.S.C § 981 where the investigatory jurisdiction is solely with another bureau whose representatives are not present at the time of the seizure, must be turned over to that bureau.

The IRS Commissioner gives “commissions” to each officer of the IRS-CI and designates to him/her the authority to perform all duties conferred upon such officer, under all the laws and regulations administered by the IRS, including the authority to investigate, and require and receive information. Thus, for instance, the IRS Servicewide Delegation Order 9-2 authorizes the Special Agent in Charge (SAC) to investigate violations of 18 U.S.C. §§ 1956 and 1957 (money laundering and illegal money transactions) where the underlying conduct is subject to investigation under Title 26 of United States Code or the BSA.

Other examples of “commissions” from the IRS Commissioner include: Servicewide Delegation Order 25-5, where the Commissioner delegated the authority to initiate criminal investigations of financial institutions that are not currently examined by the federal bank supervisory agencies, except for brokers or dealers in securities, to the Director of Operations Policy and Support Division of the IRS and SACs; and the delegation of the authority to initiate Title 31 of U.S. Code criminal investigations of banks and brokers or dealers in securities to the Chief of the CI Division. The Commissioner's authority for Delegation Order 25-5 is derived from Treasury Directive 15–41.

Under the Commissioner of the IRS, the responsibilities of the IRS-CI include the investigation of all alleged criminal violations arising under the Internal Revenue laws and related criminal statutes.

II. AUTHORITY GRANTED TO SPECIAL AGENTS IN PERFORMING THEIR DUTIES

The IRS Special Agents have been granted the following authority in performance of their duties:

A. Authority to Interview

The Secretary of the Treasury or his delegate may examine books and records, and take testimony under oath. 26 U.S.C. § 7602. This authority was delegated to the IRS Commissioner. Treasury Order 150-10l; 26 C.F.R §§ 301.7602-1 through 301.7605-1. The Commissioner has delegated that authority to other IRS employees via Servicewide Delegation Order 25-1.

Delegation Order 25-1 authorizes Special Agents to issue and serve summons, examine books and records, question witnesses, and take testimony under oath.

B. Authority to Issue Summons, Examine Records, and Take Testimony

The Secretary of the Treasury or his delegate has authority to issue summons, examine records, and take testimony. 26 U.S.C § 7602. This authority is granted to the IRS Commissioner. Treasury Order 150–10; 26 C.F.R §§ 301.7602–1 through 301.7605–1. The IRS Commissioner has delegated that authority to other IRS employees in Delegation Order 25-1.

C. Authority to Take Handwriting Exemplars

Whenever an agent becomes aware that the authenticity or origin of a document may be in question, he/she should attempt to obtain handwriting exemplars of the parties involved. An agent's authority to issue summons to a taxpayer or other witnesses for the purpose of taking handwriting exemplars is provided by 26 U.S.C § 7602. Compulsion of handwriting exemplars is neither a search nor seizure subject to the Fourth Amendment protections, nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. A handwriting exemplar is an identifying physical characteristic.[16]

D. Authority to Search with Warrants

Under the Fourth Amendment to the United States Constitution, people of the United States have the right “to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,” and no warrants will issue, “but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Fourth Amendment protects individuals against unreasonable searches and seizures by the government. The scope of this protection extends to any area in which an individual has a

[16] www.irs.gov/irm/part9/irm-09-001-002.

reasonable expectation of privacy. Further, the Fourth Amendment provides that all warrants must be based upon probable cause and supported by oath or affirmation.[17]

In the United States, it is unlawful to have any property used, or intended for use, in violating the provisions of the Internal Revenue laws and regulations; thus, no property rights exist in any such property. 26 U.S.C. § 7302. Special Agents, therefore, are authorized to serve search warrants and seize personal property subject to forfeiture. 26 U.S.C. § 7608. A search warrant may be issued pursuant to 18 U.S.C. Chapter 205 and the Federal Rules of Criminal Procedure for the search of the personal property used or intended for use in violation of the Internal Revenue laws or regulations. For statutory authority for searches and seizures by special agents, see 18 U.S.C §§ 3105, 3109; 26 U.S.C. §§ 7302, 7321, 7608; and Fed. R. Crim. P. 41.

Rule 41 of the Federal Rules of Criminal Procedure provides for warrants to be issued by a federal judge or magistrate upon the affidavit of a law enforcement officer. The "federal law enforcement officer" as used in Rule 41 refers to any government agent, other than an attorney for the government (as defined in Rule 1(b)(1)), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant. A warrant issued under this rule may provide for the search and seizure of any of the following:

- property that constitutes evidence of the commission of a criminal offense
- contraband, the fruits of crime, or things otherwise criminally possessed
- property designed or intended for use or which is or has been used as the means of committing a criminal offense
- person for whose arrest there is probable cause, or who is lawfully restrained

E. Authority for Warrantless Searches

A search without a warrant can be made with the consent of the person who has the right to give such consent. The consent must be voluntarily given and not the result of any undue influence or duress. Any coercion will invalidate the search and seizure. The courts have held that only persons whose constitutional rights have been violated will be heard in objection to the search. The rights guaranteed are personal and may be waived only by the person having the right of immediate possession. One person may not waive such rights for another unless the person so waiving has authorized possession of the premises.[18]

Also, a person lawfully arrested may be searched without a warrant and the premises under his/her immediate custody and control may be searched for weapons.

F. Authority to Arrest

Special Agents have authority to make arrests. 26 U.S.C. § 7608. Section 7608 provides, in part, that a special agent is authorized to execute and serve search warrants and arrest warrants; to serve subpoenas and summonses issued under authority of the United States; to make arrests

[17] www.irs.gov/irm/part9/irm-09-001-002.
[18] *Id*.

without warrant for any offense against the United States relating to the Internal Revenue laws that is committed in his/her presence, or for any felony cognizable under such laws if he/she has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and to make seizures of property subject to forfeiture under the Internal Revenue laws.

The United States Supreme Court has stated that, in the absence of a controlling federal statute, the law of arrest of the state where the arrest is made is controlling. In the absence of a statute authorizing a federal officer to make an arrest without a warrant, that officer has the same powers of arrest as a private citizen.[19] A Special Agent's power to make an arrest without a warrant as a private citizen, when valid under state law, is not made invalid because the crime is outside the scope of the Internal Revenue laws.[20]

An arrest without a warrant is a serious matter and could subject the person making the arrest to criminal and civil liability for false imprisonment or false arrest. Therefore, for a Special Agent to be authorized to make a warrantless arrest (as a private citizen), it is generally necessary that a violation constituting a felony be committed in his/her presence or he/she must reasonably believe that the person whom he/she arrests has committed a felony.[21]

Every state has its own requirements in granting federal law enforcement officers state peace officer status.

G. Authority to Carry Firearms

There is no specific statutory authority for IRS Special Agents to carry firearms. The General Counsel for the Department of the Treasury has concluded that no specific authority is necessary because "where a Federal officer has authority to make an arrest, he/she has implied authority to carry firearms."[22] 26 U.S.C. § 7608(b) (special agents have authority to make arrests).

The authority to carry firearms is limited to the conduct of official duties in enforcing any of the criminal provisions of the Internal Revenue laws or other criminal provisions of laws relating to the Internal Revenue where the enforcement is the responsibility of the Secretary of the Treasury or his/her delegate.

The authority to carry or use privately owned weapons during off-duty hours, as a private citizen, is subject to local civil and criminal restrictions. The IRS Special Agents may not use their position or credentials to qualify under state or local laws to purchase, license, carry, or use private weapons. Credentials may be displayed as occupational identification, upon request, but not to influence any decision a state or local law enforcement officer may make concerning the Special Agent's ability to carry a concealed weapon.

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[19] www.irs.gov/irm/part9/irm-09-001-002.
[20] *Id*.
[21] *Id*.
[22] *Id*.

H. Authority to Compromise a Tax Investigation

The Secretary of the Treasury or his/her delegate may compromise any civil or criminal tax case prior to referral to the DOJ. 26 U.S.C. § 7122(a). The Secretary has delegated this authority to the IRS Commissioner. 26 C.F.R § 601.203. A strict compliance with the statutory provisions is required to effectuate a compromise; thus, an attempted settlement by subordinate IRS officials will not bar criminal prosecution. A valid compromise, however, is as complete a discharge from prosecution as an acquittal by a jury.

The IRS-CI agents pursue offers in compromise in criminal investigations but only if specifically requested by counsel. After referral of an investigation to the DOJ, the authority to compromise rests with the Attorney General. Also, the tender of tax or the actual payment thereof, prior to a verdict or plea of guilty, is not a bar to criminal prosecution.

I. Authority to Settle Criminal Cases

The IRS does not have authority to engage in plea negotiations—this authority rests exclusively with the DOJ. Often, a taxpayer represented by counsel expresses a desire to negotiate an expedited plea agreement prior to the formal completion of an administrative investigation. In such cases, the Special Agent will advise the taxpayer's counsel that the IRS plea negotiations have to be conducted by either the U. S. Attorney's Office or the DOJ, Tax Division.

J. Authority to Seize Property for Forfeiture

The IRS Special Agents have authority to seize assets for forfeiture. Such authority comes from the Internal Revenue Code and other statutes. See Title 18, 26, and 31 of United States Code.

K. Title 26 Seizure

Title 26 of United States Code, specifically Section 7608, authorizes Special Agents to serve search warrants and seize personal property subject to forfeiture.

It is unlawful to have or possess any property which is used, or intended for use, in violation of the Internal Revenue laws or regulations. 26 U.S.C. § 7302; Fed. R. Crim. P. 41(b). And no property rights exist in any such property, and thus, a search warrant may be issued for the seizure of such property. 26 U.S.C. § 7321 (Secretary of Treasury authorized to seize any property subject to forfeiture pursuant to 26 U.S.C. §§ 7301, 7302, and 7303). A seizure in violation of the Fourth Amendment to the United States Constituion, however, will not sustain a forfeiture, unless the property seized is contraband per se.

A Servicewide Delegation Order 9-1 authorizes Special Agents to seize personal property for forfeiture to the United States when such property was used or intended to be used in violation of those Internal Revenue laws other than Chapters 51, 52 and 53 of the Internal Revenue Code.

L. Title 18 Seizure

Title 18, United States Code, Section 981(e) vests civil seizure and forfeiture authority in the Secretary of the Treasury relating to violations of:

- 18 U.S.C. § 1956 (within the investigatory jurisdiction of IRS)
- 18 U.S.C. § 1957 (within the investigatory jurisdiction of IRS)
- 18 U.S.C. § 1960 (within the investigatory jurisdiction of IRS)

The Secretary of the Treasury, through Treasury Order 101-05, delegated the authority to the Under Secretary of the Terrorism & Financial Intelligence. Treasury Directives 15-42 further delegated this authority to the IRS Commissioner. The Commissioner issued Servicewide Delegation Order 9-2 specifying various activities in the civil seizure and forfeiture process to be delegated to certain IRS-CI personnel.

The criminal forfeiture procedures found in Title 18, as they relate to the IRS, are governed by four statutory authorities. Three of these authorities are incorporated into the money laundering criminal forfeiture statute by reference, while the fourth is a consequence of the fact that criminal processes are governed by the Federal Rules of Criminal Procedure. These statutory authorities are as follows:

1. 18 U.S.C. § 982(b) states that the provisions of 21 U.S.C. § 853 shall govern the seizure and disposition of any property subject to forfeiture under 18 U.S.C. § 982.

2. 21 U.S.C. § 853(e)(1) provides for a temporary restraining order prior to the conclusion of a criminal investigation to preserve the availability of the property for forfeiture by restraining transfer of the property or further encumbrances.

3. 21 U.S.C. § 853(f) provides for the use of a seizure warrant for property subject to forfeiture under 18 U.S.C. §§ 982 and 853(f).

4. Pursuant to 21 U.S.C. § 853(j), and by reference in 21 U.S.C. § 881(d), civil forfeiture proceeds according to the Supplemental Rules of Certain Admiralty or Maritime Claims and Asset Forfeiture (Civil Judicial Forfeiture Procedures, 19 U.S.C. §1602 et seq.).

5. In addition, because criminal forfeiture is an integral part of the underlying criminal prosecution, the Federal Rules of Criminal Procedures govern the general process by which property is criminally forfeited.

M. Criminal Referral Authority

Treasury Order 150-35 delegates criminal referral authority to the IRS Commissioner and to Treasury General Counsel. The Commissioner has the authority to refer all criminal matters within the jurisdiction of the IRS to the DOJ for grand jury investigation, criminal prosecution, or other criminal enforcement action requiring court order or DOJ approval. Delegation Order 9-6 delegates the Commissioner's criminal referral authority to Special Agents in Charge.

Treasury General Counsel has exclusive authority to make referrals in criminal matters for judicial enforcement of summons and to determine which court decisions of a criminal tax matter should be appealed. He/she has concurrent authority with the Commissioner to refer criminal matters to the DOJ for pre-referral advice. This authority has been re-delegated to Chief Counsel by General Counsel Order No. 4 (Delegation of Authority to Chief Counsel).

TRAINING

The initial Special Agent training is conducted at the National Criminal Investigation Training Academy (NCITA). The IRS-CI Special Agents receive approximately six months of basic training before being assigned to the field.

I. NCITA

The NCITA is located at the Federal Law Enforcement Training Center in Glynco, Georgia. The NCITA is an accredited training academy and is recognized as having met all standards of a professional Federal Law Enforcement Training Academy. The NCITA is responsible for developing and monitoring formalized training programs and on-the-job training, and for scheduling and conducting training.

II. SPECIAL AGENT BASIC TRAINING PROGRAM

The Special Agent Basic Training Program is an accredited training program conducted in Glynco, Georgia. Newly appointed Special Agents must satisfactorily complete the following recruit training programs:

(1) Phase 1—Pre-Basic Orientation Training Program, 3 days

(2) Phase 2—Criminal Investigator Training Program, 9 weeks

(3) Phase 3—Special Agent Investigative Techniques, 16 weeks

(4) Phase 4—On-the-Job Training

All new Special Agents (trainees) will be scheduled to attend formal classroom training at the NCITA. Phases 1, 2, and 3 of training run consecutively with no break in between. The new Special Agent will report for duty to his/her respective field office upon successful completion of phase 3. Progression to phase 3 requires successful completion of phases 1 and 2.

An evaluation of the trainee's performance will be sent to the trainee's respective field office management upon successful completion of phases 1, 2, and 3. Satisfactory completion of each phase is required to retain employment as a Special Agent.

The Criminal Investigator Training Program (Phase 2) educates trainees in various federal law enforcement skills, including the fundamentals of criminal law, constitutional law, the rules of

evidence and criminal procedures, trial practices, investigative techniques, vehicle operation, non-lethal control techniques, and firearms.

During the Special Agent Investigative Techniques training program, students learn to investigate specific violations of federal law under CI's jurisdiction, including:

- Tax law training with emphasis on criminal violations of the tax law, including five examinations two of which are tax-related tests.

- Develop skills necessary to investigate potential criminal violations of the Internal Revenue laws and related offenses.

- Develop technical, behavioral, and critical thinking skills with the underlying emphasis on core values in a problem-solving training environment. The program is practical exercise intensive.

- "Work" three tax-training investigations. The first tax training investigation is an administrative specific item investigation. The second tax investigation is an expansion of the first, specifically a grand jury investigation which emphasizes the indirect methods of proving unreported income. The third investigation involves a QRP/RPP investigation that emphasizes the evaluation of a return preparer scheme and the planning and preparation needed to conduct a QRP/RPP undercover shopping operation. Instructions include the "how-to's" of numbering an investigation, to the more substantive instruction in interviewing techniques, report writing, documentation of evidence, the different methods of proving income, financial search warrants, and testifying in judicial proceedings.

- Plan and conduct interviews ranging from simple third-party interviews to complex subject interviews, using a wide variety of interviewing techniques.

- Make detailed presentations relative to the specific item, net worth, and bank deposit methods of proving income.

- Formulate and write a detailed Special Agent's Report with each trainee preparing many memoranda, schedules, and summaries throughout the course.

- Training to conduct money laundering investigations, and in other areas to enable the new special agents to successfully carry out their duties and responsibilities.

- Instruction in the integrated use of force, armed escort, and additional firearms training. The integrated use of force training introduces the trainee to CI's use of force procedures and consists of classroom instruction and physical training in weaponless tactics and team tactics. The firearms training includes range time.

FISCAL YEAR 2016 STATISTICS (10/01/2015 – 09/30/2016)

The chart below shows the statistics for FY 2016.

FY2016 Statistics (10/01/2015 – 09/30/2016)

	FY 2016	FY 2015
Investigations Initiated	3395	3853
Prosecution Recommendations	2744	3289
Informations/Indictments	2761	3208
Conviction Rate	92.1%	93.2%
Total Sentenced	2699	3092
Percent to Prison	79.9%	80.8%
Average Months to Serve	41	40

AREAS OF FOCUS FOR FISCAL YEAR 2016

In Fiscal Year 2016, the IRS-CI focused on the following areas of investigation:

Areas of Focus – FY2016

- International Tax Fraud
- Refund Crimes – QRP, RPP and ID theft
- Abusive Tax Schemes
- Employment Tax
- Frivolous Arguments Program – Non-filers
- Money Laundering/Bank Secrecy Act (BSA)
- Political/Public Corruption
- Cyber Crimes (including Virtual Currency)
- Organized Crime Drug Enforcement Task Force (OCDETF)
- Fraud Referral Program

SAMPLE CASES HANDLED BY THE IRS

I. CASE 1: False Tax Return Schemes and Identity Theft Investigations

The IRS-CI receives leads from the IRS-CI SDC (Scheme Development Center) where tax returns are screened for potential schemes. The Special Agent conducts investigations, including database checks, surveillances, trash searches, witness interviews, etc.

If an undercover operation and/or search warrant(s) are deemed necessary, the Special Agent will consult with the IRS-CI Criminal Tax (CT) Counsel (in-house attorney) and seek assistance from Assistant United States Attorney (AUSA) to draft the search warrant affidavit.

The AUSA will prepare the search warrant for filing and include the Special Agent's affidavit. The Special Agent will take the search warrant to the Magistrate Judge and swear to the affidavit in front of the judge. After the search warrant is signed by the judge, the Special Agent will execute the search warrant at the business, residence or at the approved location.

If a grant of immunity is necessary for a witness/target, the Special Agent will seek guidance from the AUSA and elevate the investigation to a Grand Jury Investigation from an IRS-CI Administrative Investigation.

The Special Agent will conduct witness interviews, target/subject interviews, obtain bank and other records utilizing IRS summons (or Grand Jury subpoena, if Grand Jury investigation). The Special Agent will prepare a Report of Investigation which gets reviewed at various levels, including the IRS-CI CT Counsel and the DOJ-Tax Division, before the matter is assigned to a local ASUA.

The assigned AUSA at the local U.S. Attorney's Office will review the evidence and work with the Special Agent to prepare the case for presentation to the Grand Jury for indictment. The AUSA will decide, with input from the Special Agent, which witnesses and what evidence to present to the Grand Jury. The Special Agent will testify as a summary witness in the Grand Jury proceeding. The Special Agent will also serve Grand Jury subpoenas on witnesses and third-party record keepers.

Once a true bill is obtained from the Grand Jury for an indictment, the AUSA will prepare an application for an arrest warrant from a federal judge. The IRS-CI Special Agents will execute the arrest warrant.

Subsequently, the Special Agent will assist the AUSA with all phases of pre-trial, trial and post-trial matters, including: serving trial subpoenas, locating witnesses, organizing the evidence, and assisting the AUSA at the prosecution table during trial, the sentencing proceedings, and appellate proceedings if an appeal is filed.

II. CASE 2: *U.S. v Braswell, et al.* (Tax Investigation)

An herbal remedy magnate Almon Glenn Braswell, who received a controversial pardon from President Bill Clinton for the 1983 fraud and perjury conviction, was investigated for evading more than $10 million in income taxes.

Braswell set up a shell company in Bermuda that he used to pad expenses. He used personal accounts in Bermuda to hide millions of dollars in personal assets. When the Chief Operating Officer and the Chief Financial Officer of Braswell's company are terminated, they retain a law firm, and bring information about Braswell's operations to the IRS-CI and file an IRS Reward for Original Information.

The IRS-CI investigated the case with assistance from an AUSA at the U.S. Attorney's Office, for the Central District of California.

Affidavits for search warrants were written by a Special Agent of the IRS-CI with assistance from the AUSA. A federal judge authorized the search warrant, and evidence obtained were analyzed, and witnesses were interviewed by Special Agents. Also, numerous grand jury subpoenas were issued to financial institutions and witnesses.

Braswell had multiple attorneys representing him for various matters; thus, the IRS-CI worked with the AUSA to address taint issues involving the attorney-client privilege. The attorney-client privilege issues were heavily litigated, both in the U.S. and in Bermuda

This investigation also involved bi-lateral treaties, the Mutual Legal Assistance Treaty and the Tax Information Exchange Act, which were issued with the assistance of U.S. Attorney's Office, the DOJ, Tax Division, and DOJ-OIA (Office of International Affairs). The prosecution team, composed of the IRS Special Agents, AUSAs, DOJ-Tax Division attorneys, IRS Counsel and IRS-CI attaches, traveled to Bermuda for court hearings on defendant's challenge to IRS-CI's request for records from Bermuda.

An indictment was obtained and Braswell was arrested. Braswell's tax attorney and his accountant were also indicted. The IRS Special Agents assisted AUSAs with trial preparations, hearings at the U.S. Court of Appeal, for the Ninth Circuit, and during plea negotiations, sentencing of Braswell, and the trial of his tax attorney.

Below is a press release that summarizes Braswell's tax evasion scheme, his guilty pleas, and his agreement to pay millions in outstanding taxes.

<u>USAO Press Release:</u>

March 2, 2004

FORMER OWNER OF CALIFORNIA DIETARY SUPPLEMENT COMPANY PLEADS GUILTY IN FEDERAL TAX FRAUD CONSPIRACY

The former owner of a Marina Del Rey corporation that has marketed dietary supplements to senior citizens pleaded guilty today to conspiring to evade millions of dollars in corporate income taxes during a scheme that overstated the corporation's claimed business expenses on its federal tax returns.

Almon Glenn Braswell, a 60-year-old Miami Beach resident, pleaded guilty to the felony charge this afternoon in United States District Court in Los Angeles. By pleading guilty, Braswell admitted that he had participated in a scheme to overstate the business expenses incurred by one of his companies, Gero Vita International, Inc. Braswell was the sole shareholder of Gero Vita and a number of affiliated corporations, including G.B. Data Systems, Inc. Although they were not charged in the indictment, Gero Vita and G.B. Data Systems, Inc. were also parties to the plea agreement.

In a plea agreement filed in federal court, Braswell acknowledged that his scheme caused Gero Vita to underpay its taxes by $4,468,460. However, with penalties and interest, Gero Vita now has an outstanding tax liability of $10,455,367. As part of the plea agreement, Braswell has agreed to make full payment to the Internal Revenue Service in the next three weeks.

The corporate income tax evasion was engineered through a false expense scheme. Braswell used his ownership and control of a Bermuda corporation, Deleon Global Trading, Ltd., to create false expenses on Gero Vita's books and records. The indictment alleges that the fictitious expense scheme was designed to make it appear that Deleon had sold raw materials for nutritional supplements to Gero Vita so that Gero Vita's tax liabilities could be fraudulently reduced by millions of dollars. Among other things, the indictment alleges that Gero Vita's accountant, defendant Robert Bruce Miller, created fictitious invoices that charged Gero Vita for "nutritional supplements" and "health care products" that Gero Vita had purportedly purchased from Deleon. In the plea agreement, Braswell admitted that in fact, Deleon did not supply any products to Gero Vita, nor did it conduct any business in Bermuda or elsewhere.

Braswell is scheduled to be sentenced by United States District Judge Margaret M. Morrow on September 13. As part of the plea agreement, Braswell, G.B. Data and Gero Vita agreed to cooperate with the government. If Judge Morrow accepts the agreement, Braswell will be sentenced to 18 months in federal prison, provided that Braswell, G.B. Data and Gero Vita have complied with their cooperation obligations. If Judge Morrow determines that Braswell or the corporations have failed to comply with their cooperation obligations, Braswell could be sentenced to as much as 41 months. If Judge Morrow refuses to accept the plea agreement, Braswell and the government have the option of backing out of certain provisions in the plea agreement.

One provision of the plea agreement requires Braswell, G.B. Data Systems and Gero Vita to waive the attorney-client privilege and to provide the government with documents that they previously had withheld pursuant to the attorney-client relationship.

G.B. Data Systems is now known as JOL Management Company, Inc.

Braswell was indicted by a federal grand jury in late 2002. The indictment also named Miller, a 46-year-old certified public accountant who resides in Canyon Country, California. Because of Miller's failing health, the government yesterday filed a stipulation dismissing the charges against Miller without prejudice.

The indictment also named William E. Frantz, 65, of Marietta, Georgia, in five counts. Frantz is charged with conspiring with Braswell to evade Braswell's personal income tax obligations. The indictment alleges that this scheme resulted in an underpayment of Braswell's income taxes of more than $9 million for the years 1994 through 1997. Frantz is scheduled to go on trial before Judge Morrow on April 27.

Braswell allegedly evaded the payment of personal income taxes by transferring millions of dollars from G.B. Data Systems to a bank account that Frantz' law firm maintained in Atlanta and to offshore accounts that Braswell controlled. The indictment alleges that Frantz, who acted as Braswell's personal tax preparer, failed to report the diverted funds as income on Braswell's tax returns.

This case was investigated by IRS-Criminal Investigation.
Release No. 04-028

III. CASE 3: Brooklyn Auto Sales (Narcotics Investigation)

This case involved a used car dealership, Brooklyn Auto Sales, that was engaged in narcotics trafficking and financial crimes. The defendant structured cash transactions that were deposited into banks, and failed to file reports with the federal government for cash transactions over $10,000. The IRS-CI participated in the investigation with the Organized Crime Drug Enforcement Task Force (OCDETF)[23], a multi-agency task force. At the request of AUSAs assigned to the local OCDETF, and under the direction of the Deputy Attorney General of the U.S. DOJ, the IRS-CI Special Agents are invited to participate in these OCEETF investigations. The IRS-CI enhanced the investigation in this case by providing financial-investigation expertise.

At the outset, surveillance conducted by the Drug Enforcement Agency (DEA) were encountering cars purchased at or owned by the Brooklyn Auto Sales. The dealership was filing claims as innocent owners on seized cars. Also, during other drug investigations, the Brooklyn Auto Sales surfaced. The investigation was elevated to an OCDETF investigation. The DEA submitted an OCDETF proposal. The DEA and other law enforcement agencies regularly discuss case progress with the assigned OCDETF AUSAs.

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[23] The IRS-CI is a permanent member agency of the OCDETF which operates under the direction of the Deputy Attorney General. The IRS-CI, along with the 94 USAO, Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Immigration and Customs Enforcement, U.S. Marshals Service, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Coast Guard, and the Criminal and Tax Divisions of the US. DOJ, and numerous state and local agencies combine the resources and unique expertise of these agencies in a coordinated attack against major drug trafficking and money laundering organizations. At the local level, OCDETF investigations are initiated by one or more of the above sponsoring agencies for review by the local OCDETF regional committee. Upon approval, the OCDETF proposal is forwarded to the OCDETF national committee for approval, deconfliction, and coordination.

The IRS-CI conducted undercover operations. The IRS-CI case agent wrote up an undercover operation proposal for review and approval by the IRS-CI Special Investigative Techniques Section in Washington, D.C., with advice and in consultation with the IRS-CI in-house counsel. The undercover proposal was also sent to the USAO for concurrence by the AUSAs and for legal guidance. The case agent regularly discusses case developments with the assigned AUSAs throughout the investigation. The DEA developed informants and Cooperating Sources were recruited to make contact with the target of the investigation. The IRS-CI sting, however, failed when Subject 2 refused to accept "dirty money" from the undercover agent who lacked proper introduction; after seizure of 169 kilos of cocaine from Subject 1's rental property, one 19-year-old is murdered; another tenant disappears; and Subject 1 could not initially be linked to the seized cocaine. Generally, the AUSAs would have investigative strategy meetings with DEA, IRS-CI, and other participating agencies on a regular basis and provide legal guidance throughout the investigation process.

Subsequently, arrest warrants were executed on a reverse-buy bust by the DEA. Search and seizure warrants were executed at five locations, and 175 vehicles and 6 properties were seized. Other items seized included 34 boxes of financial records and computer hard drives. The case agents for DEA and IRS-CI worked on the affidavits for search warrants and arrest warrants with the AUSAs. After the warrants were reviewed and approved by the AUSAs, the case agents for DEA and IRS-CI took the warrants in front the U.S. Magistrate Judge for approval. Once the warrants were signed by the judge, DEA and IRS-CI, with assistance from other law enforcement agencies, executed the search and arrest warrants. The IRS-CI and DEA case agents obtained grand jury subpoenas from the USAO, and served the subpoenas on various financial institutions. The other financial records were seized pursuant to the search warrants. The financial records identified large receipts of currency, identified main customers of the Brooklyn Auto Sales, and identified straw buyers. When the customers were cross-indexed to criminal databases, the results showed that Subject 1 and Subject 2 accepted currency from suspected and known narcotics traffickers for purchases of vehicles.

In the course of the investigation, six years of bank records, personal bank records of both suspects, were subpoenaed and analyzed. Also, all business accounts were obtained and an outside accountant was interviewed. The IRS-CI found that in six years, not a single cash deposit ever exceeded the $10,000 Currency Transaction Report (CTR) filing threshold.

Ultimately, the subjects were indicted for failing to file IRS Form 8300 (Currency transactions in excess of $10,000) and structuring currency transactions at banks. The case agents for DEA and IRS-CI assisted the AUSAs in drafting the indictments. At the direction of the AUSAs, the case agents presented evidence in front of the grand jury. The case agents, in general, assist the AUSAs in all phases of post-indictment and pre-trial proceeding, including trials and appeals.

The news release below describes the charges to which the defendants pled guilty (including for conspiracy to possess with intent to distribute methamphetamine), and the respective sentence imposed by the judge.

DEA Press Release:

DEA (Drug Enforcement Administration) News Release
April 09, 2010
Number: 213-621-6827

Third Defendant in Meth Conspiracy Sentenced

Los Angeles Auto Dealership Defendant Sentenced to 57 Months in Federal Custody

APR 09 *-- (LOS ANGELES) – This morning in United States District Court in Los Angeles, Alejandro Nunez, the third defendant in a drug conspiracy case involving a Los Angeles used car dealership, Brooklyn Auto Sales, was sentenced by the honorable Judge Valarie Baker Fairbank to serve 57 months in federal custody and five years probation. Nunez pleaded guilty in October 2008 to being a part of the conspiracy with Pedro Partida to possess with intent to distribute methamphetamine.*

On January 22, 2010, co-defendant Pedro Partida, the former general manager of Brooklyn Auto Sales, was sentenced to 90 months in prison after previously pleading guilty to charges including conspiracy to possess with intent to distribute methamphetamine and the failure and causing the failure to file returns relating to cash received in a trade or business.

Partida admitted in his plea agreement that he and a co-defendant, Alejandro Nunez, met with a drug trafficker on the lot of Brooklyn Auto Sales to discuss a narcotics transaction. Partida further admitted that he knew if in a 12-month period Brooklyn Auto received more than $10,000 in cash from one buyer as a result of the sale of a vehicle or vehicles, then Brooklyn Auto was required to file an IRS Form 8300, Report of Cash Transaction Received in a Trade or Business. Specifically, in December 2006, Partida admitted that he prepared and signed a sales contract which incorrectly showed that a buyer had made a down payment of less than $10,000 in cash when in fact the buyer had made a $20,000 down payment on the vehicle.

On October 14, 2009, co-defendant Jose Escobar, Sr., owner of Brooklyn Auto Sales, was sentenced to 41 months in federal prison after pleading guilty to a being a part of a conspiracy to structure financial transactions to evade currency transaction reporting requirements. As part of Jose Escobar, Sr.'s plea agreement, he admitted that he was aware of the currency transaction reporting requirements for transactions involving more than $10,000 in cash. Jose Escobar, Sr., further admitted that, from September 2000 through June 2006, he and a co-defendant knowingly agreed to make deposits of cash in incremental amounts less than $10,000 into their bank accounts to avoid the currency transaction reporting requirements. According to government filings, Jose Escobar, Sr. repeatedly and consistently deposited cash only in amounts under $10,000. Although Escobar, Sr. deposited a total of over $6 million in cash over six years, not a single deposit was over $10,000.

As a part of their plea agreements, Jose Escobar, Sr. and Partida agreed to forfeit to the United States their interest in three parcels of real property as well as their interest in the vehicles seized from the Brooklyn Auto Sales business locations. In total, Jose Escobar, Sr. agreed to forfeit his interest in approximately 149 vehicles previously seized in this investigation.

This Organized Crime Drug Enforcement Task Force (OCDETF) operation was investigated by the Drug Enforcement Administration, Internal Revenue Service – Criminal Investigation, High Intensity Financial Crimes Area Task Force, Southern California Drug Task Force, El Monte Police Department, Bell Gardens Police Department, Pomona Police Department, Los Angeles County Sheriff's Department, California Department of Motor Vehicles and the Los Angeles U.S. Attorney's Office.

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE

INTRODUCTION

In California, by State Constitution, the Attorney General of the State of California is the chief law officer of the State. Cal. Const. art. V, § 13 ("the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."). The Attorney General has direct supervision over all district attorneys in California, sheriffs,[24] and peace officers serving under the Attorney General. Cal. Const. art V, § 13; Cal. Gov't Code §§ 12550, 12560, 12571.

California is divided into 58 counties, and each county has a District Attorney's Office. The District Attorney is the public prosecutor of his/her county, and is mandated to "initiate and conduct on behalf of the people all prosecutions for public offenses." Cal. Gov't Code § 26500.

By practice, and budgeted resources, the District Attorney's Offices prosecute the majority of criminal cases in California. The Attorney General investigates and prosecutes cases both criminally and through civil complaints, and can assist any District Attorney, or take full charge of any investigation or the prosecution of violations of law. Cal. Const. art. V, § 13; Cal. Gov't Code § 12550.

In California, criminal law is set forth primarily in the Penal Code. There are no common law crimes in California; thus, to constitute a crime, all proscribed acts or omissions must be contained in the Penal Code, or other statutes, ordinances, or municipal or county regulations. Cal. Penal Code § 6 (no act or omission is criminal or punishable except as prescribed or authorized by this Code, other statute, ordinance, regulation); *Keeler v. Superior Court*, 2 Cal. 3d 619, 631 (1970). Other penal provisions, especially those dealing with white collar and regulatory offenses are located in other codes, such as the Business and Professions Code, Government Code, Health and Safety Code, and Vehicle Code.

CALIFORNIA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

The Attorney General is vested with broad powers and carries out his/her important responsibilities through the California Department of Justice (California DOJ). California DOJ's offices are located in Sacramento, San Francisco, Oakland, Fresno, Los Angeles, and San Diego, and the employees of the California DOJ engage in law enforcement and legal services.

I. LEGAL DIVISIONS

There are three Legal Divisions within the California DOJ: Criminal, Public Rights, and Civil. The work performed by each Division is briefly discussed below.

[24] Sheriffs are county law enforcement officers. Each of the 58 counties in California has a Sheriff's Department. The Attorney General has direct supervision over the sheriffs and can direct the activities of any sheriff related to the investigation, detection, or punishment of crime, or he may direct the service of subpoenas, warrants of arrest, or other processes of court. Cal. Gov't Code § 12560.

The Criminal Law Division represents the People of the State of California in criminal appeals, statewide prosecutions of certain crimes, and prosecutions of cases referred from the District Attorney's Offices due to conflicts of interest. For instance, the Deputy Attorneys General in the Criminal Law Division investigate and prosecute complex criminal cases related to financial, securities, mortgage, and environmental fraud; public corruption; transnational organized crime; and human trafficking.[25] In prosecuting these types of cases, especially those involving multi-jurisdictional criminal activity, vertical teams of prosecutors, investigators, auditors, and paralegals often work with federal and local authorities.[26] For conflict cases, e.g., a family member of one of the prosecutors, or the District Attorney himself is accused of a crime,[27] the Deputy Attorneys General on the criminal trial team travel throughout the State to prosecute these cases. Cal. Gov't Code § 12553 (if a district attorney is disqualified to conduct any criminal prosecution, the Attorney General may employ special counsel to conduct the prosecution); *see also* §§ 12550, 12552.

The Public Rights Division protects Californians by enforcing the laws that protect the environment, consumer rights, antitrust, charitable trusts, and civil rights. The mission of this Division is to safeguard the state's environment, lands, and natural resources; maintain competitive markets; prevent fraudulent business practices; protect consumers against misleading advertising claims; preserve charitable assets;[28] monitor Indian and Gaming practices; and protect the civil rights of individuals.[29]

The Civil Law Division provide legal services and representation to state officers and most state agencies. The eight sections within this Division are: Correctional Law, Tort and Condemnation, Business and Tax, Government Law, Employment and Administrative Mandate, Licensing, Health Quality Enforcement, and Health, Education and Welfare.[30]

In addition to the work done by these three Divisions, the Opinion Unit of the Attorney General's Office provides legal opinions upon request to state and local public officials and government agencies on issues arising in the course of their duties. The legal opinions issued by the Attorney General since 1985 can be searched and viewed on the Attorney General's website.[31]

II. LAW ENFORCEMENT

In addition to the legal services provided by the three Divisions and the Opinion Unit described above, the California DOJ provides public safety and law enforcement support

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[25] www.oag.ca.gov/careers/descriptions/crimlaw.

[26] *Id.*

[27] In June 2017, for instance, the Attorney General filed charges against the District Attorney of Contra Costa County for felony perjury and felony grand theft. See, e.g., news article in the Los Angeles Times, www.latimes.com/local/lanow/la-me-ln-contra-costa-da-charged-20170614-story.

[28] From the Attorney General's Guide for Charities, the pages that discuss the Attorney General's investigation and prosecution for illegal or improper use of charitable funds, or for deceptive fundraising practices are set forth in Appendix A. The full text of the Guide for Charities can be found at www.oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.

[29] www.oag.ca.gov/careers/descriptions/publicrights.

[30] www.oag.ca.gov/careers/descriptions/civillaw.

[31] www.oag.ca.gov/opinions.

services statewide, with approximately 500 sworn peace officers and 600 other law enforcement personnel.[32] These officers and employees are engaged in criminal investigations ranging from high-tech and white collar crime to acts of violence, narcotics enforcement, gambling control, criminal history information, and forensic laboratory services.[33] Also, DOJ's California Justice Information Services provides criminal justice intelligence, identification, and information and technology services to law enforcement, regulatory agencies, and the public.[34]

III. INVESTIGATIONS AND CASES FILED BY THE ATTORNEY GENERAL

The Attorney General's website contains a listing of the Attorney General's press releases.[35] The press releases, among other news and consumer alerts, contain information about criminal investigations, criminal charges, and civil lawsuits filed by the California DOJ.

A few illustrative examples of investigations conducted, and cases filed by the California DOJ are below:

- On July 27, 2017, the Attorney General announced the filing of a complaint charging multiple individuals for sex trafficking.[36]
- On June 30, 2017, the Attorney General announced, in a matter investigated with federal and other state agencies, the arrest of 86 individuals, seizure of 43 firearms, 4,875 rounds of ammunition, 112 pounds of methamphetamine, 22 pounds of cocaine, 4.7 pounds of heroin, 402 pounds of marijuana, cash, and stolen vehicles as part of a takedown of individuals connected to street gang criminal activity.[37]
- On June 26, 2017, the Attorney General announced, in a case filed in conjunction with the Los Angeles County District Attorney's Office, a stipulated judgment and damages obtain against a car donation charity.[38]
- On March 28, 2017, the Attorney General announced the filing of charges for criminal invasion of privacy.[39] The Special Agent employed by the DOJ provided the affidavit in support of the arrest warrant in the case.

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[32] www.oag.ca.gov/careers/aboutus/psle.
[33] *Id.*
[34] *Id.*
[35] www.oag.ca.gov/media/news.
[36] www.oag.ca.gov/news/press-releases/attorney-general-becerra-files-multiple-charges-sex-trafficking-case. The Amended Complaint filed in *People v. Quinton, et al.*, is attached as Appendix B.
[37] www.oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-announces-major-gang-arrests-san-bernardino.
[38] www.oag.ca.gov/news/press-releases/attorney-general-becerra-and-district-attorney-lacey-car-donation-charity-agrees. The Judgment and Permanent Injunction in *People v. People's Choice Charities*, is attached as Appendix C.
[39] www.oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-announces-charges-filed-against-david-robert. The Criminal Complaint filed in *People v. Daleiden, et seq.*, and the Affidavit in Support of Arrest Warrant, are attached as Appendix D.

- On November 4, 2016, the Attorney General announced the filing of charges for exploiting and defrauding immigrants for financial gain against Mary Brooks.[40] A Special Agent employed by the California DOJ provided the declaration in support of the arrest warrant.

IV. CRIME DATA

California law enforcement agencies report crime data to the California DOJ as part of the Federal Uniform Crime Reporting Program. This data summarizes counts for eight crimes: homicide, rape, robbery, aggravated assault ("violent crimes"), burglary, larceny-theft, motor vehicle theft ("property crimes"), and arson. When more than one crime occurs during an incident, only the most serious crime is recorded with the exception of arson.[41]

Highlights:

- In 2016, there were 443.9 violent crimes and 2,544.5 property crimes reported per 100,000 people. California's property and violent crime rates have generally been in steady decline since 1993.
- After reaching a low in 2014, the violent crime rate increased by 8.4 percent from 2014 to 2015, and 4.1 percent from 2015 to 2016.
- Conversely, the property crime rate decreased by 2.9 percent from 2015 to 2016, after increasing by 6.6 percent from 2014 to 2015.
- Between 2011 and 2016, motor vehicle theft increased by 14.7 percent, and burglary dropped by 22 percent. Over the same period of time, aggravated assault increased by 8.9 percent.

CALIFORNIA DISTRICT ATTORNEYS

The next two sections were prepared by Deputy District Attorneys from the Alameda County District Attorney's Office, located in Northern California, and the Los Angeles County District Attorney's Office, located in Southern California. These two sections provide a comprehensive overview of the investigations conducted by the local law enforcement agencies and the District Attorney's Offices, and the cooperation and collaboration between law enforcement and prosecutors to protect the public and see that justice is served.

[40] www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-criminal-charges-against-mary-brooks. The Arrest Warrant, Felony Complaint, and the Declaration in Support of Arrest Warrant, for *People v. Brooks*, are attached as Appendix E.

[41] https://openjustice.doj.ca.gov/2016/crime. This page presents information on over 11 million violent and property crimes reported between 2007 and 2016 throughout California.

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE
Oakland, California

By: H. Glenn Kim, Deputy District Attorney[42]

[42] Glenn Kim has been a prosecutor for ten years. Since 2011, he has served as a Deputy District Attorney for the Alameda County District Attorney's Office, and before that, he was a Deputy District Attorney with the Contra Costa District Attorney's Office for three years. Glenn Kim has tried over 40 criminal jury trials, including prosecutions of homicides, child sexual assaults, domestic violence, robberies, and burglaries. In prosecuting homicides and child sexual assault cases, Deputy DA Kim has worked directly with law enforcement agencies to request and direct further investigations, as needed, to successfully prosecute these cases.

INTRODUCTION

The State of California is the most populous state in the United States of America. California is divided into 58 counties. Alameda County is located in Northern California, between the counties of Contra Costa and Santa Clara, and across the bay from the County of San Francisco. The County has within it 14 incorporated cities and six unincorporated communities. The most notable cities within the County are Oakland (the County seat) and Berkeley. As of the 2010 census, the population of Alameda County was 1,510,271, and the current estimated population is 1,611,000, almost double the size of the population of San Francisco.

The Alameda County District Attorney's Office (Alameda DA's Office) was formed in 1853, and its main office is located in Oakland. The Office has approximately 150 attorneys, 60 inspectors (peace officers), 30 Victim Witness Advocates, and 110 administrative professionals who work in ten offices located throughout Alameda County.

The Alameda DA's Office is organized into multiple Divisions and Specialized Units. These Divisions include Criminal, Juvenile, and Consumer, Environmental, and Worker Protection. Some of the specialized sections within these Divisions include: Asset Forfeiture/Major Narcotics, Child Sexual Assault, Sexual Assault, Domestic Violence, Gang, Grand Jury Advisor, Identity Theft and High Tech Crimes, and Public Integrity.[43]

In addition to prosecuting criminal matters, the Alameda DA's Office prosecutes actions in the Juvenile Justice System. These actions involve conduct by minors, if committed by an adult, would have been handled as a criminal matter. The Office also brings civil and criminal actions for consumer fraud, insurance fraud, medical fraud, financial fraud, environmental protection, and crimes committed against elders. The Office protects crime victims by informing them of their rights, upholding and enforcing victims' rights, and arranging for victim support services.

The Alameda DA's Office reviews nearly 44,000 police reports annually. Of these reports, about 11,000 pertain to felony crimes, and the other 33,000 to misdemeanor crimes. From the cases that are presented to the Alameda DA's Office, the Office files new charges, files for probation violations, and/or petitions to revoke parole on over 31,000 cases.

Alameda County also has 20 plus local law enforcement agencies within the County. They include, for instance, the police departments of each of the 14 incorporated cities, the Alameda County Sheriff's Office, East Bay Regional Parks Police Department, and BART (Bay Area Rapid Transit) Police Department. These law enforcement agencies work with the Alameda County DA's Office to ensure public safety and the prosecution of those responsible for committing crimes.

[43] http://www.alcoda.org/about_us/divisions_units—

OVERVIEW OF THE CASES HANDLED BY THE ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE AND THE LAW ENFORCEMENT AGENCIES

I. TYPES OF CRIMES PROSECUTED BY THE ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

The Alameda County DA's Office prosecutes violations of law committed in Alameda County. The prosecutors in the Office bring forth criminal and civil actions in court for criminal, environmental, consumer and other violations of law to protect the public and to ensure the rights of victims and the people of the Alameda County community.

The DA's Office has six specialized Divisions (Criminal Prosecution; Juvenile Justice; Consumer, Environmental and Worker Protection; DA Inspectors; Victim-Witness Assistance; and the Alameda County Family Justice Center) and within the Criminal Prosecution Division, cases are prosecuted both horizontally and vertically. The types of cases prosecuted vertically include, but are not limited to: domestic violence, gangs, child sexual assault, human trafficking, DNA/unsolved cases, sexually violent predators, and child abduction.

A. Types of Cases Investigated by the Local Law Enforcement Agencies

Law enforcement agencies operating within Alameda County, and upholding the laws of California, work in conjunction with the Alameda DA's Office. These law enforcement agencies share one main mission—to ensure public safety. Generally, police officers represent the first line of defense and/or contact with the public when handling any calls for assistance or reports of crimes. The types of cases the police respond to range from being drunk in public to homicides. The local police officers will initially investigate a case and then funnel them through the criminal justice system, or they may decide that a case does not need to proceed any further than the initial arrest.

Typically, a local law enforcement agency investigates any case that stems out of its jurisdiction that purports to violate local or state laws. Often, the police arrest an individual without any plans to seek further prosecution in court. Some of these cases, like a bar room brawl, involve individuals that may need to have some time to cool off and sober up while in custody. In this example, the police might not know the initial aggressor of the bar brawl and decide to arrest everyone involved in hopes of keeping the peace. On many serious cases, however, the police will work in cooperation with the Alameda County DA's Office from the onset of an investigation to ensure a criminal conviction.

The police have limited power related to holding a suspect in custody. The standard or the burden needed to arrest a suspect is probable cause, and the police may detain an individual for up to 48 hours without any charges being filed following an arrest. Due process concerns come into effect 48 hours after an arrest; thus, after this period of time, the police must present the case to the DA's Office to get the case formally charged or release the suspect from custody. Once the DA's Office makes its decision to file charges, the criminal court process begins.

1. The Role of the Police Field Officers and Detectives

Most law enforcement agencies in Alameda County share a similar chain of command. The field officers respond to emergency calls, provide routine patrols, and take proactive measures when they see a crime. From the field officers that arrive on the scene of a crime, a lead investigating officer will be designated. The lead investigating officer will be responsible for gathering all the reports from various officers and summarizing everyone's role on the scene. The field officers will interview witnesses and take written statements. Most field officers are equipped with body-worn cameras and will record their contacts with witnesses.

Depending on the type of cases, a detective specializing in a specific crime (e.g., robbery, homicide, sexual assault) will be called to the scene. The investigating officer will brief the detective and turn over the investigation to him. With homicides, two homicide inspectors will be assigned, and one will take the lead homicide inspector/detective role. The homicide inspectors will delegate to police officers any additional tasks needed, such as canvasing a neighborhood for additional witnesses and searching surrounding areas for further evidence. The detectives also will direct crime scene personnel to gather evidence, and take pictures. If a Deputy District Attorney (DDA) arrives on site, the detective will brief the DDA and the DA Inspector.

2. Decision Making Process by the Police

For low level crimes, such as batteries, drug possession, drunk in public, theft, and public exposure, the investigating officer (the field officer in charge) will make a decision to either arrest or "cite out" the suspect. If the suspect is cited out, the suspect will receive a ticket with a future court date. If the DA's Office does not file charges, then the suspect's case will be dropped from calendar. If the police make an arrest or cite someone out, the officers will write a police report and the police liaison to the DA's Office will present the report to the Charging DDA for a charging decision.

In the field, the investigation ends when an investigating officer decides not to make an arrest or to cite an individual. The officer may feel that police contact is sufficient to warn the suspect against further misconduct, or that the police do not have enough basis to make an arrest.

For serious crimes, where a detective is assigned, such as for sexual assaults, homicides, and robberies, the detectives make the decision either to present the case to the DA's Office for charging, or to further investigate the case as needed. If a case is presented to the DA's Office for charging, a charging DDA also may, and often do, make requests for further investigation prior to filing any charges.

B. Horizontal Prosecution of Cases by the Alameda DA's Office

When cases are prosecuted horizontally, as opposed to vertically, different prosecutors are assigned at each stage of the criminal proceeding. Each stage of the process, from the filing of the charges to trial, is described below:

1. Filing of Charges and Custody of Defendant Post-Filing

Prosecutors known as charging DDAs will review the police reports and make a decision whether or not to file charges. The charging DDA considers many variables before making a charging decision: Can we file a probation/parole violation in lieu of filing new charges or in addition? Is there a statute of limitations concern? Do any viable defenses exist? Does the conduct itself warrant the filing of charges? Does the victim want charges filed? What evidence is available? Are witnesses cooperative and willing to testify?

Often, a witness may give a statement to the police but wish to remain anonymous or is uncooperative. The witness may fear being labeled a "snitch," fear retaliation, or may not want charges filed. Many witnesses call the police to stop the wrongful conduct, but do not wish any future repercussions. A Charging DDA has to determine whether additional evidence exists to pursue a case without the cooperation of a witness, or whether to pursue a case despite an uncooperative or reluctant witness.

In Alameda County, a law enforcement agency assigns a "DA Liaison" to the Alameda DA's Office. This DA Liaison-designated police officer will bring the police reports to the Charging DDAs, and provide any additional supplemental reports from the investigating officers. However, in many felony level cases, such as those involving sex offenses or more serious crimes, a law enforcement agency assigns a particular detective or an investigator to a case. Many times, these detectives have become invested in a case and want charges brought, and thus, they will personally bring the police reports and provide additional details to the Charging DDAs, such as the background, information on tangential investigations, and an explanation of the evidence.

The Charging DDA also must consider the fact that those in custody must be brought for arraignment within 48-hours of their arrest, more fully discussed below. Thus, the Charging DDA will require that all "in custody" cases be brought for charging considerations as soon as possible. If the 48 hours end on the day that the case is brought over for charging, then the case must be presented to the DA's Office in the morning to ensure sufficient time to get the case charged, filed, and heard in court.

In sum, the Charging DDA determines if the Alameda DA's Office can meet the standard of proof needed to sustain a conviction. After reviewing all available evidence, the Charging DDA will make three decisions: file charges based on the evidence presented in the police reports; ask for more evidence from the law enforcement officers; or decline to file any charges.

The law enforcement officers understand that the limited resources of the Alameda DA's Office do not allow the DA to file charges for every request for filing. If the Charging DDA declines to file charges because further investigation is needed, then the police have the option of either conducting further investigation or to not seek charges. If a case is not filed because of the need for further investigation, then that case will be set aside, and the DA's Office will keep a record of those types of cases to determine if additional police training is needed.

After a decision is made to file charges, but during the pendency of a criminal case, new evidence may surface that calls for further investigation.[44] The law enforcement agencies have vast resources to investigate, and at this point, the relationship between the DA's Office and a law enforcement agency plays a critical role. The law enforcement agencies rarely decline to assist the DA's Office with further investigation requests. Typically, problems arise with time constraints, and not with their unwillingness to further investigate.

A Charging DDA's decision not to file charges also entails his/her evaluation of many factors. The Charging DDA may find the facts of a case to be "de minimis." For instance, an officer may arrest someone for being intoxicated in public without the ability to take care of himself. For a first violation of this offense, a charge may not be filed especially if the person remained in jail for 48 hours awaiting an arraignment. In this simple scenario, the interests of justice, i.e., having a drunk person sober up in jail, outweighs clogging the justice system with a new case with future court dates. However, if this person has had many arrests for the same conduct, then the Charging DDA will file charges.

Once charges have been filed, the suspect becomes known as the defendant. The court will then determine the defendant's custody status. The court can release the defendant on his own recognizance (referred to as "OR"), set bail, or decline to set bail. If the defendant was cited to appear, then the court can remand the defendant into custody, keep him on OR status, or set bail and afford the defendant an opportunity to meet the bail. If the defendant cannot make bail or if no bail is set, then the defendant will remain in the custody of the Alameda County Sheriff's Department who will house the defendant in jail. The Sheriff's Department remains responsible for the custody of the defendant until such time the defendant resolves his case, gets released on OR, makes bail, or gets convicted and sent to prison. Upon conviction, the court may sentence the defendant to custody time in prison or local jail. If the defendant is sent to prison, then custody will change from the Sheriff's Department to the California Department of Corrections and Rehabilitation. If the defendant is sentenced to local jail, then the defendant will remain in the custody of the Sheriff's Department.

2. Arraignment

At arraignment, the court formally notifies the defendant of the charges he/she faces, appoints counsel, takes or continues the entry of a plea, and sets bail. The arraignment is the first step in the criminal court process. Usually, the court will read the charges directly to the defendant, set bail, and inquire whether or not the defendant needs a public defender, a private counsel, or plans on representing himself/herself.

An arraignment must occur within 48 hours of a custodial arrest, or the suspect will be released. Cal. Penal Code §§ 825, 849(a). An exception to the 48-hour rule for an arraignment exists if the police released the suspect pursuant to Penal Code section 849(b) or if the defendant is being held on a probation or parole violation. If no charges are filed, then the suspect will be released. The 48-hour rule excludes Sundays and holidays. *People v. Turner*, 8 Cal. 4th 137, 175 (1994). If the 48 hours expire while the court is out of session, then the arraignment must occur

[44] See below for a more detailed discussion on post-filing investigations.

anytime the next day. Cal. Penal Code § 825(a)(2). If the 48 hours expires while court is in session, the arraignment may occur at any time that day. *Id.*

The courts will accept reasonable delays in arraignment. The burden is on the prosecution to justify a reasonable delay. *Anderson v. Calderon*, 232 F3 1053, 1070 (9th Cir. 2000). For example, a delay may be caused by lack of resources due to an overwhelming number of arrests made on a particular weekend. In this instance, the prosecutor must show that reasonable diligent efforts were made to minimize the delay.

The arraignment DDA's responsibility includes educating the court on a defendant's criminal history, and arguing for an appropriate bail amount based on public safety concerns and the likelihood that the defendant will fail to appear for the next court date. The Arraignment DDA also will ask the court to issue protective orders when warranted. Often, the Arraignment DDA will need to argue whether or not the defendant's due process rights have been violated based on late filings, i.e., failure to charge before the expiration of the 48 hours.

Following an arraignment, the Arraignment DDAs will contact the victims and let them know the status of the case, e.g., whether the defendant remains in custody, the bail amount, the issuance of any protective orders, and the next court date.

3. Preliminary Hearing

In California, after a court arraigns a defendant on felony charges, the court will schedule a preliminary hearing. The preliminary hearing is a probable cause hearing where the DA's Office presents the evidence in front of a judge. The burden of proof at a preliminary hearing is below the burden of proof needed to obtain a conviction. The burden of proof at this stage is probable cause. The prosecutor must present the court with enough evidence to show that a crime occurred and that the defendant is the person responsible. At the preliminary hearing, the defense attorney will represent the defendant and the defense may cross-examine witnesses and present his own evidence after the prosecution has concluded the people's case-in-chief. At a preliminary hearing, the judge is the finder of fact. Cal. Penal Code §§ 860, 872. The judge will determine whether probable cause exists to hold the defendant over for trial. Once a holding order has been issued, the charges remaining become known as an "information." Once the information is filed, the defendant will be held over for trial.

4. Criminal Grand Jury Hearing

The defendant may be held over for trial pursuant to a judge's holding order at a preliminary hearing, or through a grand jury indictment. The criminal grand jury in a grand jury hearing is the trier of fact. Cal. Penal Code § 934(a). The criminal grand jury hearings are closed to the public, there is no judge present, and the defendant has no right to attend the hearing or present any evidence. In most cases, defendants remain unaware of grand jury proceedings until they are served with a grand jury indictment.

The authority of a grand jury comes from the California Constitution and the California Penal Code. Cal. Const. art. I, § 23; Cal. Penal Code § 904; *McGill v. Superior Court*, 195 Cal.

App. 4th 1454 (2011). Penal Code section 904 states that "[e]very superior court, whenever in its opinion the public interest so requires, shall make and file with the jury commissioner an order directing a grand jury to be drawn."

"[T]he grand jury serves as part of the charging process of criminal procedure, not the adjudicative process that is the province of the courts or trial jury." *People v. Brown*, 75 Cal. App. 4th 916, 932 (1999). "[T]he grand jury serves as the functional equivalent of a magistrate who presides over a preliminary examination on a felony complaint. Like the magistrate, the grand jury must determine whether sufficient evidence has been presented to support holding a defendant to answer on a criminal complaint." *Guillory v. Superior Court*, 31 Cal. 4th 168, 174 (2003).

At the grand jury hearing, the prosecutor must play the role of judge, prosecutor, and defense. They must anticipate defense objections, inform and present to the grand jury exonerating evidence, instruct them on the law, and answer questions posed by the grand jury.

Many tactical reasons exist in deciding whether or not to use the criminal grand jury process. A prosecutor may use a grand jury in mental health cases, cases where the defense delays the preliminary hearing, cases involving multiple defendants, and investigatory cases. A prosecutor may elect to conduct a preliminary hearing, when the need to preserve a witness' testimony exists, when there are close legal questions of evidence admissibility, and when key witnesses have not been located.

The grand jury may require the DA's Office to issue process for the witnesses and evidence. Cal. Penal Code § 939.7. "Grand jurors are authorized 'to order additional evidence' if 'they have reason to believe it will explain away the charge.'" *McGill*, *supra*, 195 Cal. App. 4th at 1470. The grand jury's standard of proof to indict is "probable cause." Cal. Penal Code § 939.8; *Cummiskey v. Superior Court*, 3 Cal. 4th 1018, 1029 (1992). Grand jury indictments have the same effect as a judge's holding order in a preliminary hearing. Once the indictment is filed, the defendant will be held over for trial, and if the defendant is out of custody, an indictment warrant for arrest will issue.

5. Pre-Trial

The Pretrial DDAs make offers to the defendants before a jury trial commences. These DDAs review the entirety of the case from the charging notes and all available police reports, and make offers in all horizontally prosecuted cases, from driving under the influence to homicides. The Pretrial DDA and the defense attorney will meet and discuss any possible resolution, mitigating circumstances, issues of proof, and scheduling.

The pretrial DDAs will address any discovery issues, pretrial motions, and if necessary, request further investigations from the DA Inspector. They also will work in conjunction with the preliminary hearing DDAs and the jury trial DDAs in order to make offers and keep everyone updated.

6. Trial

In jury trials, the jury is the "trier of fact." A jury trial is a proceeding where the trial prosecutor presents evidence to the jury to prove defendant's guilt beyond a reasonable doubt. The prosecutor will present evidence in the People's case-in-chief by calling witnesses and entering physical evidence through their testimony. If the jury reaches a guilty verdict, the judge will determine the sentence.

The trial DDAs prepare the case for a jury trial. First, they review everything—read all the written materials available in a case, all the police reports, internal DA notes, DA Inspector reports, business records, medical records, and witness statements. They will compare all the written reports to available recorded versions of witness statements and surveillance videos. The trial prosecutor will also review all available physical evidence. On most occasions, the trial prosecutor will contact the investigating agency and request a walk-through of the crime scene with the investigating officer or the detective assigned to the case. They will also request further investigations from either the DA Inspector or the investigating police agency.

After combing through all available evidence, the trial prosecutor will anticipate any challenges the defense may present. The trial prosecutor will prepare motions in limine, which are pretrial motions asking the Court to rule on various matters before the commencement of the trial. The motions in limine often require evidentiary hearings to determine whether or not a judge will allow certain evidence to be admitted during trial.

Last and foremost, the trial DDA will conduct a jury trial. They will pick a jury, give an opening statement, present evidence and testimony, and give a closing statement.

C. Post-Filing

This section addresses in more detail the post-filing investigations that are conducted after the charges are filed, the plea bargains, and other considerations.

1. Investigations by Law Enforcement Agencies After Filing of Charges

The police may conduct further investigations on any case even after charges have been filed. The law enforcement agencies will submit supplemental reports and ask for additional charges, or give notice of additional evidence. During the pendency of a trial, if victims provide additional evidence in support of new charges, the Alameda DA's Office may contact the law enforcement agency involved and request an investigation into the new allegations.

If a prosecutor deems additional investigation is necessary, he will request further investigations from the DA Inspector or from the law enforcement agency. The law enforcement agencies have a vast amount of resources to conduct investigations, whereas the DA's Office has a limited number of DA Inspectors. For low level crimes, where a prosecutor is not assigned to a particular DA Inspector, the prosecutor may contact the investigating officer directly and ask for assistance. If the need for an additional investigation is simply to collect evidence from the investigating agency, or to conduct follow-up interviews of witnesses, then the DDA will request

a DA Inspector to provide the investigation. If the trial DDA needs an investigating officer to clarify some things that the officer will eventually testify to, then the DDA may request that investigating officer to provide further assistance.

The law enforcement agencies are not obligated to conduct further investigations and the Alameda DA's Office cannot compel them to assist in this manner post-filing. Of course, if the law enforcement agencies do not comply with the DA's request for additional investigation, the officers run the risk that their hard work investigating a case may prove futile as the prosecuting DA may need to dismiss the case for the lack of corroborating evidence.

The DA's Office and the law enforcement agencies have a symbiotic relationship. Neither can complete its mission to provide public safety without the other. Thus, cooperation and collaboration between the DA's Office and the law enforcement agencies ensure that justice is served.

2. Investigation by DA Inspectors After Filing of Charges

When a prosecutor requests further investigation from DA Inspectors, these investigators normally will conduct their own investigations, independent of what the police have done. They will re-interview witnesses, re-examine the evidence, and pursue leads that the original investigating agencies may not have known about. These investigators act as the Alameda DA's internal police force. They can conduct their own independent investigations, work alongside and assist with on-going police investigations, or review completed police investigations and provide follow-up and further investigations as needed.

The DA Inspectors also play a crucial role in providing a bridge with the law enforcement agencies. The DA Inspectors are all former peace officers, and they have come to the Alameda DA's Office from various law enforcement agencies within the County. The Alameda DA's Office only employees those officers that have risen through the ranks of their own agencies, have exemplary experience, and have earned the respect of their fellow officers. When a prosecutor asks for law enforcement assistance to conduct further investigations, the DA Inspectors act as the intermediary between the two offices.

3. Plea Bargains
    a. Police Opinion in Plea Bargains

A prosecutor will consider all aspects of a case when offering a plea bargain, and the ultimate decision in plea bargaining lies with the prosecutor. Some factors that drive a plea bargain include the availability of evidence, victim's opinions, witness availability, defendant's criminal history, mitigating circumstances, aggravating circumstances, public opinion, judicial economy, prosecutorial resources, and police opinion. Frequently, police officers do not fully understand the legal barriers and burdens that a prosecutor must prove in order to sustain a conviction. Police officers get frustrated when, in their opinion, criminals get light sentences for crimes that they consider air tight. It is up to the prosecutor to explain why a plea bargain occurred, and why an officer's hard work may only have resulted in nominal punishment.

b. Police Investigation of Accomplices to the Crime

Prosecutors will consider tangential investigations when offering a plea bargain to the defendant. An accomplice to the crime, for instance, might have a greater criminal history and the police may want the defendant to assist in convicting the accomplice. Scenarios like this frequently arise, especially when the accomplice may have had a more significant role in committing the crime. The prosecutor may agree to dismiss a case or give a very light deal to the defendant in exchange for his cooperation with the law enforcement officers.

c. Assessing Defendant's Credibility

In deciding whether to offer a plea to the defendant, the prosecutor compares the available evidence to the defendant's statements to assess his credibility. In a perfect world, all available evidence would come from independent sources, contain DNA, be captured on a high-definition video, and the defendant would confess to everything in line with the evidence. However, in reality, many witnesses have ulterior motives, have ties to the defendant or the victim, independent witnesses have varying viewpoints of what occurred, physical evidence may not exist, and the defendant tells only half-truths. The prosecutors job requires them to seek the truth amidst a web of half-truths and lies. No manual or guidelines exist to guarantee the credibility of the defendant or any witness. The prosecutor, however, must find corroborating evidence and piece together what occurred in determining whether or not to seek a conviction or to offer a plea.

4. Suspect Statements

With low level crimes, the police interview the suspect and create a hand-written summary of what was said. The officer then reviews the summary with the suspect and the suspect signs the report. For most felony level crimes, however, the police agencies will video-record the suspect interviews.

At trial, written police reports usually fall under the hearsay rule, and thus, would not be allowed into evidence. However, the officers who wrote the reports will testify and refer to their reports to refresh their recollection. In most cases, the report itself will not be presented as evidence.

California Evidence Code section 1220 states that "a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Under this section, prosecutors may elicit defendant's statements from other witnesses, put into evidence defendant signed admissions, or present defendant's video-recordings in the prosecution's case-in-chief as an exception to the hearsay rule because these would be offered against the defendant.

However, a prosecutor may find that strategically, it benefits the prosecution to not admit into evidence defendant's self-serving statements. A defendant's confession may include self-serving statements that provide a defense. If the prosecutor uses this type of confession in the case-in-chief, then the prosecutor may inadvertently enter the defendant's defense into evidence

without having the opportunity to cross-examine and question the defendant further. In the United States, defendants have a right under the Fifth Amendment to the United States Constitution not to testify and incriminate themselves. Thus, the prosecutor may instead wish to force a defendant to take the stand and testify if the defendant wishes to get his self-serving version of events across to the jury. If the defendant takes the stand, the prosecutor will have the opportunity to cross-examine the defendant and question his credibility, motives, and veracity for truth in front of the jury.

Given the evidence, if a prosecutor determines that a defendant had lied, then the prosecutor must decide how, strategically, to use the defendant's statement. Should the prosecutor wait to cross-examine the defendant with such lies, but risk not being able to present the lies to the jury if the defendant decides not to testify? Or should the prosecutor use the lies in his case-in-chief, rather than risking the defendant not taking the stand? A skilled prosecutor relishes the chance to cross-examine a defendant at trial.

II. SUPERVISION OF POLICE WRONGDOING

All law enforcement agencies have an Internal Affairs Division that investigates all allegations of police misconduct, and address administrative discipline and reprimand. A police misconduct claim can rise to the level of a prosecutable criminal conduct, or result in a civil lawsuit, and/or administrative repercussions.

A. *Brady* Obligation and *Pitchess* Motion

Most Internal Affairs investigations do not rise to the level that would require the prosecutor to disclose the misconduct to the defense. For instance, an officer may face administrative discipline and reprimand for insubordination and rudeness, but this type of misconduct would not warrant a disclosure or influence a criminal case. However, serious allegations of misconduct may have dire consequences for criminal cases.

Prosecutors do not have an automatic access to an officer's personnel file. At the same time, prosecutors have a "*Brady*" obligation to disclose "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

California Penal Code section 832.7(a) states that an officer's personnel records "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant" to Evidence Code sections 1043 and 1046. Better known as a "*Pitchess*" motion, Evidence Code section 1043 and 1046 set forth the procedures for obtaining an officer's personnel records. The party seeking the disclosure must show good cause and "materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." Cal. Evid. Code § 1043. If the trial DDA decides that he does not need to call the officer as a witness, then the officer would not play a "material" role in the prosecutor's case-in-chief and thus, the officer's personnel records would not fall under the prosecution's *Brady* obligation.

The Alameda DA's Office has an agreement with all the local law enforcement agencies where they agree to flag officers who may have a potential *Brady* information in their personnel files. The agencies flag these officers by giving the Alameda DA's Office the names of the officers, but nothing else. At this initial stage, the DA's Office does not know what exists in the officer's personnel files to possibly make it a "*Brady*" obligation. Once the name is flagged, an alert occurs whenever a prosecutor attempts to subpoena the flagged officer.

B. Criminal Charges

If an officer's misconduct rises to the level of criminal misconduct, then the police agency will conduct dual investigations. The Internal Affairs Division will conduct one investigation, for administrative purposes, and another investigation will be conducted that follows the regular course of a criminal investigation. The dual investigations may occur simultaneously, but they will remain completely separate. The police will present the criminal investigation to the DA's Office for charging consideration as they do with any other case. If the DA's Office decides to file criminal charges against an officer, then the DA's Office can obtain the officer's personnel files without judicial oversight.

C. Civil Liabilities

Police officers may face civil lawsuits for violating an individual's constitutional rights while under the color of authority. 42 U.S. C. § 1983 ["[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."]. Aside from a federal civil lawsuit, an officer also can be sued for violating California tort laws.

SEARCH AND SEIZURE

I. WARRANTLESS SEARCH AND SEIZURE

The police do not need search warrants for searches incident to arrests, consent searches, pat searches, items in plain view, vehicle searches, probation and parole searches, and when exigent circumstances exist. However, the prosecution bears the burden in support of warrantless searches and seizures.

A. Search Incident to Arrest

A search incident to an arrest has three requirements: 1) the arrest must be lawful, 2) the arrest must be custodial, and 3) the suspect must have immediate access to the evidence seized. An arresting officer may seize any weapon that can be of immediate use against the officer and seize evidence that a suspect may immediately access.

A "lawful arrest" requires probable cause. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); *People v. Fay*, 184 Cal. App. 3d 882, 892 (1986). A probable cause to arrest requires a "fair probability" or "substantial chance" that the suspect committed a crime. *Id.* The police may search a suspect prior to forming probable cause. If the court finds that the police had probable cause to arrest, the court deems the officer's motivations immaterial. *People v. Le*, 169 Cal. App. 3d 186, 193 (1985).

A "custodial" arrest occurs when the police transports the suspect to a secured location, such as a jail, a police station, or a hospital. *United States v. Robinson*, 414 U.S. 218, 234-35 (1973). A suspect who gets cited and released is not under "custodial" arrest. *People v. Macabeo*, 1 Cal. 5th 1206, 1218 (2016).

A suspect is considered to have "immediate" access to the area accessible to the unsecured suspect. *Arizona v. Gant*, 556 U.S. 332 (2009); *People v. Leal*, 178 Cal. App. 4th 1051, 1064 (2009). An officer may search the area that constitutes the unsecured suspect's "lunging" distance. *Chimel v. California*, 395 U.S. 752, 763 (1969). However, officers may not search cell phones, unless exigent circumstances exist. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). If an officer believes that probable cause exists to search a cell phone, he may take the cell phone into evidence and apply for a search warrant. *Id.*

The "immediate access" rule includes the property "immediately associated" with the arrested suspect, such as a dropped wallet, or a vehicle search based on a reasonable suspicion. *United States v. Chadwick*, 433 U.S. 1, 15 (1977); *People v. Limon*, 17 Cal. App. 4th 524, 538 (1993).

B. Consent Search

The police may conduct a search, without a warrant, if the suspect gives them express or implied voluntary consent. *People v. Gorg*, 45 Cal. 2d 776, 782 (1955). A suspect gives express consent with words indicating consent, such as "yes" or "yeah." *People v. James*, 19 Cal. 3d 99, 113 (1977). An implied consent can come in the form of words or gestures indicating consent, such as gesture to enter one's home. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990); *Nerell v. Superior Court*, 20 Cal. App. 3d 593, 599 (1971). However, the consent given must not be due to any threats, promises, or coercion.

A suspect may place limits on his consent, such as the places or items that the police may search. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). The police officers, under the "reasonable officer" test, may search places and items that they reasonably believed the suspect authorized them to search. *Id.* at 251.

Also, third parties may consent to the search of items or places that they have "common authority" over. *United States v. Matlock*, 415 U.S. 164, 171 (1974). If the police have consent from one person who has "common authority" over the property or item, they may conduct a search even if the suspect objects. *Id.*

C. Pat Search

The police may conduct a pat down search of a suspect's clothing surface, lift bulky clothing, manipulate containers such as purses and backpacks, and search nearby discarded clothing. *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968); *People v. Lee*, 194 Cal. App. 3d 975, 984-85 (1987). The officers may pat search "detainees" for officer safety purposes. *People v. Koelzer*, 222 Cal. App. 2d 20, 27 (1963). A person is detained if they are not free to leave during the pendency of an investigation. *Florida v. Bostick*, 501 U.S. 429, 436 (1991). An investigative detention occurs when the officer is trying to ascertain if probable cause exists to arrest, if a further investigation is necessary, or to determine whether a crime has occurred. *People v. McLean*, 6 Cal. App. 3d 300, 306 (1970).

D. Plain View

The police may seize evidence that are in view from a lawful vantage point, or probable cause exists that the item being viewed is evidence, and the officers have lawful access to the evidence. *Payton v. New York*, 445 U.S. 573, 587 (1980).

The officers have a lawful vantage point if their observations come from a public place, the observations were made during a detention or an arrest, felt during a pat search, observed during the execution of a search warrant, or seen from a place where the police had lawful consent to be present. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The police also must have probable cause that the item is evidence of a crime. *Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987); *People v. Stokes*, 224 Cal. App. 3d 715, 719 (1990).

If the officers observe an item of evidentiary value on private property from a public space and do not have permission to enter that property, they must obtain a warrant, obtain consent, or have reasonable belief that exigent circumstances exist to immediately seize the evidence. *People v. Bagwell*, 38 Cal. App. 3d 127, 131 (1974).

E. Vehicle Searches

A warrantless search of a vehicle may occur for probable cause, a reasonable suspicion, for inventory, a protective search, identification and registration searches, consent, probation and parole violations, searches incident to an arrest, and exigent circumstances.

If a vehicle is on public property and probable cause exists to believe that evidence of a crime is inside the vehicle, then officers may search that vehicle as is or search the vehicle after impounding it. *United States v. Ross*, 456 U.S. 798, 809 (1982); *California v. Acevedo*, 500 U.S. 565, 570 (1991).

When officers have probable cause to arrest an occupant of a vehicle, they may search that vehicle if they have reasonable suspicion that the vehicle contains evidence of the crime for which the occupant was arrested. *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

The police may search a lawfully towed vehicle in order to take inventory of the contents of the vehicle. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *Halajian v. D&B Towing*, 209 Cal. App. 4th 1, 15 (2012). However, officers must show that towing the vehicle was necessary, and cannot tow a vehicle under the guise of a vehicle code violation as a pretext to conducting a search. *Colorado v. Bertine*, *supra*, 479 U.S. at 372.

F. Probation/Parole Searches

Upon conviction, a court may place a defendant on probation. *United States v. Knights*, 534 U.S. 12, 116 (2001). The defendant must agree to abide by the terms of the probation which frequently include a search clause or conditions. The condition may include the search of the defendant's person, personal property, vehicle, and residence. A grant of parole will subject a parolee to search conditions as a matter of law. *People v. Schmitz*, 55 Cal. 4th 909, 916 (2012).

There are four requirements to conduct probation or parole searches. First, the officer must know that the suspect is on probation or parole. *People v. Robles*, 23 Cal. 4th 789, 797 (2000). Second, the search must relate to a lawful law enforcement interest. *Id.* Third, the parameters of the search must be confined to the places and things permitted. *People v. Woods*, 21 Cal. 4th 668, 682 (1999). Lastly, the search must be reasonable in its intensity. *People v. Crenshaw*, 9 Cal. App. 4th 1403 (1992).

G. Exigent Circumstances

The prosecution bears the burden of proving that exigent circumstances existed. *People v. Coddington*, 23 Cal. 4th 529, 575 (2000). For an exigent circumstance to exist, the urgent need for police intervention must outweigh the intrusiveness of the warrantless search. "As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action." *Mora v. City of Gaithersburg*, 519 F.3d 216, 224 (4th Cir. 2008).

The facts of a case determine the existence of exigent circumstances. The courts review the totality of the circumstances, and consider the reasonable interpretation of circumstances based on the officer's training and experience, what the officers knew at the time, and common sense. *Ryburn v. Huff*, 565 U.S. 469, 476-77 (2012); *People v. Ortiz*, 32 Cal. App. 4th 286, 291-294 (1995).

II. SEARCH AND SEIZURE WITH WARRANTS

California Penal Code section 1523 states that "[a] search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate." Penal Code section 1524, subdivision (a), outlines the types of evidence that a search warrant may cover.

A. Consultation with the Prosecutor

The police officers do not need to consult the DA's Office before obtaining a search and seizure warrant from a judge. However, defense attorneys often challenge the validity of the search and seizure warrants in court proceedings, and the prosecutors will inevitably argue in support of the legitimacy of the issued warrant. The police risk having the evidence seized thrown out if they did not properly obtain a warrant. Many times, an officer will want to argue that a judge reviewed the request for a warrant, but a different judge may re-examine the request for a warrant with hind-sight vision. If the reviewing judge determines that the officer did not present a material fact or that he included misleading facts, the validity of a warrant may not stand in court. An invalid warrant determination may have disastrous effects on the evidence available in a case, which can lead to the dismissal of charges.

Most applications for warrants are routine and most of the facts are similar in context. The Alameda DA's Office teach classes for all local law enforcement agencies on how to obtain warrants and provides guidelines and templates. The Alameda DA's Office has an open-door policy, which means that any officer can present a warrant for review before submitting it to a judge. However, it is not necessary to get DA approval prior to obtaining a warrant.

B. The California Electronic Communications Privacy Act

The California Electronic Communications Privacy Act (CalECPA) governs how officers may apply for search warrants to obtain electronic communications and records of such communications. Cal. Penal Code § 1546.1(a). CalECPA outlines how to obtain subscriber information, emails, text messages, and other electronic forms of communication, describes how to obtain access to device contents, such as cell phones and computers, and how to obtain cell site location information such as phone logs.

1. Subscriber Information

Subscriber information includes contact information such as name, telephone, address, and email address that the subscriber used to maintain or open an account. Unfortunately, many providers that provide a monthly subscription service, where the subscribers pay up front, do not authenticate or require legitimate subscriber information.

2. Electronic Forms of Communication

Electronic forms of communication include the actual electronic communication and any information regarding the electronic communication. This can include, the context of the email or text message, IP addresses, web history, sender and receiver information, and information regarding the date and time the electronic communication was sent, received, or created.

3. Access to Device Contents

Obtaining access to device contents allows the police to download the electronic communication and information that is stored on the device itself, i.e. a computer or cell phone.

4. Cell Site Location Information

A cell site location information provides detailed information regarding the time, date, and location of cell sites used by a particular cellular device. With thousands of cell sites around Alameda County, this information can be used to track a cellular device's movement and transmission locations throughout a particular date and time.

To obtain a CalECPA search warrant, the affidavit must contain specific description of the communications and/or records being sought. If reasonably applicable, the CalECPA search warrant must state the time periods that the communications or data covers. A provider may bring a motion to quash the warrant if "the information or records requested are unusually voluminous in nature or compliance with the warrant otherwise would cause an undue burden on the provider." Cal. Penal Code § 1524.3(f).

Before a court issues a CalECPA search warrant, an officer may give notice to the provider to preserve records and evidence. Under the statute, a provider "shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing of an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request." Cal. Penal Code § 1524.3(g).

When the police obtain information "that is unrelated to the objective of the warrant," it must "be sealed and not subject to further review, use, or disclosure without a court order. A court shall issue such an order upon a finding that there is probable cause to believe that the information is relevant to an active investigation, or review, use, or disclosure is required by state or federal law." Cal. Penal Code §§ 1546.1(d)(2), 1524.3(c).

CalECPA requires that the "intended targets" of the warrant be notified. Cal. Penal Code §§ 1524.3(d), 1546.2. The notification must occur after the execution of the warrant or after the records are provided pursuant to the exigent circumstances exception. The police must give notice to the intended targets that a warrant for their electronic communications or records has been issued or that records have been received pursuant to exigent circumstances. The notice must include a copy of the search warrant and state that a warrant has been issued for the search of his/her electronic communications or records. It must also disclose with reasonable specificity why the government seeks the information.

A court may authorize the delaying of notice if the affidavit for the warrant requests a delay in notice and that without a delay, there may be a fair probability of an "adverse result." Cal. Penal Code § 1546.2 (b). An adverse result is defined as: (a) danger to the life or physical safety of an individual, (b) flight from prosecution, (c) destruction of or tampering with evidence, (d) intimidation of potential witnesses, or (e) serious jeopardy to an investigation or undue delay of a trial.

If officers cannot identify an "intended target" within three days of the execution of the warrant or the seizure of records, they must submit to the California Department of Justice all

notice information that would have been given to a known "intended target." Cal. Penal Code § 1546.2 (c).

The court has the option of appointing a special master to search through the records provided to ensure that "only information necessary to achieve the objective of the warrant or order is produced or accessed." Cal. Penal Code § 1546.1(e)(1).

The court may require that any obtained information "that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings." Cal. Penal Code § 1546.1(e)(2).

The law enforcement officers may serve a CalECPA warrant on a California corporation and most out-of-state corporations by means of U.S. mail, overnight delivery service, fax, or hand delivery to: (1) any officer or general manager located in California, or (2) its agent for service of process. Cal. Penal Code § 1524.2(a)(6); Cal. Corp. Code § 2110. The United States Supreme Court has ruled that California court issued warrants are binding on all providers that are (1) headquartered in California, or (2) doing business in California. A provider has five days of receipt of the warrant to furnish the required information or to submit a motion to quash or request an extension.

C. Financial Records

Financial records, such as bank account information, are "any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution." Cal. Gov't. Code § 7465(a). The Federal Fair Credit Reporting Act and the California Consumer Credit Reporting Agency Act govern the release of credit reports. 15 U.S.C. § 1681 et seq.; Cal. Civil Code § 1785.1 et seq. The police must either get consent or a search warrant for financial records or credit reports under the guidelines set forth in the federal (Federal Right to Financial Privacy Act) and the California (California Right to Financial Privacy Act (CRFPA)) statutes. However, certain information, such as the basic account information, the fact that an individual has an account, the account number and the branch associated with the account, and generic information not tied to a particular individual, do not require a search warrant.

A search warrant for financial records differ slightly from a basic search warrant. The police must serve the warrant on the custodian of records of the financial institution. The custodian of records is responsible for maintaining and having access to an institution's records. Unless a court grants the financial institution an extension of time, the CRFPA requires that the institution produce the records within ten days of the warrant being served.

The police officers may obtain consent from an account holder to get the financial records from the financial institution. The authorization must be in writing, signed and dated, identify the law enforcement agency requesting the records, describe with particularity the records being sought, specify a range of time and dates, and give the account holder the right to revoke the authorization at any time. Cal. Gov't Code §§ 7470, 7473.

If the financial institution itself is the victim, then the institution may voluntarily give the police the individual's records. The financial institution must reasonably believe that it is a victim of a crime and the information in the records will assist the law enforcement in investigating that crime. *People v. Nosler*, 151 Cal. App. 3d 125, 131 (1984). If the institution is the victim, no notice requirement exists. *People v. Muchmore*, 92 Cal. App. 3d 32, 36 (1979).

California Government Code section 7480(b) requires a financial institution to release certain account information if a crime report has been filed and the officer requesting the report certifies in writing that the allegations involve the fraudulent use of the institution's drafts, checks, or other financial instruments. This is an exception to the warrant requirement, as under these circumstances, no search warrant is required. In this instance, the financial institution must release the items dishonored, the number of items paid that created the overdrafts on the account, any overdraft agreements, the dates and amounts of deposits and debits, the account balance, a copy of the signature and any addresses on a customer's signature card, the date the account opened and, if applicable, the date it was closed, and any surveillance photographs and video-recordings. *Id*.

D. Wiretaps

The law enforcement officers wiretap when they use technology to surreptitiously "intercept" conversations through "any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system." Cal. Penal Code §§ 629.50, 631. A surreptitious interception of conversations, or a "bugging" occurs when undercover police agents record a private face to face conversation without the other party's consent. 18 U.S.C. §§ 2510(2), 2510(4). The courts have defined the term "intercept" as any conversation overheard or recorded while it was occurring in real time. *Fraser v. Mut. Ins. Co*, 352 F.3 107, 113 (3rd Cir. 2004).

A warrantless wiretap is permitted under certain scenarios. For instance, law enforcement agencies may "intercept" and secretly record a conversation "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person." Cal. Penal Code §§ 633, 633.5. However, a warrantless "bugging" becomes unlawful if the law enforcement agent, such as an informant or undercover officer, physically leaves the face to face conversation, but continues to surreptitiously record the other party.

A request for a wiretap order must include facts establishing probable cause to believe that an individual is, was, or will be committing one of the crimes specified in Penal Code section 629.50(a), that a particular communication about the offense will be intercepted, and that the device was used or leased by the person targeted. *People v. Leon*, 40 Cal. 4th 376, 384 (2007); *People v. Roberts*, 184 Cal. App. 4th 1149, 1167 (2010); *United States v. Barajas*, 710 F.3d 1102, 1107 (8th Cir. 2013).

The Alameda DA's Office gets involved in every wiretap request and sets out the procedures for such requests. In Alameda County, one judge is assigned to review all wiretap applications. A small team of prosecutors in the Alameda DA's Office is specifically tasked with writing the wiretap applications and presenting the applications to the District Attorney before submitting the application to the judge for review.

1. Wiretap Application

California Government Code section 629.50 specifies that only the District Attorney, the Attorney General of California, the Chief Deputy Attorney General, and the Chief Assistant Attorney General of the Criminal Law Division may apply for a wiretap warrant. The chief of police or chief executive officer of the applicant agency must include a statement stating that he has reviewed the application and the circumstances in support. Cal. Penal Code § 629.50(a)(3).

The application must state the name of the officer who is requesting the order and the name of the officer's agency. Cal. Penal. Code § 629.50(a)(1). It must include the name of the law enforcement agency that will execute the order. *Id.* § 629.50(a)(2). The application must include the suspect's name or if the suspect name is unidentified, any information regarding his identification must be included. *Id.* § 629.50(a)(4). The request must identify the targeted device to be tapped or the location of the device, along with the information identifying the device, such as the phone number or the computer IP address, and the known name and address of the subscriber. *Id.* The application must also include a description of the communications to be intercepted. *Id.* Any modification to the request, the addition or deletion of devices, must be accompanied with probable cause to believe that the suspect is utilizing a different or additional devices. *Id.* § 629.50(a)(8).

In addition to the identification of the suspect and the conversations sought, the application must state that normal investigative measures have been taken and failed, and establish probable cause for the wiretap order.

a. Failure of Normal Investigative Procedures

The wiretap application must demonstrate that "normal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous." Cal. Penal Code § 629.52(d). Often police officers will conclude that all non-wiretap investigation have been attempted and that other investigative tools, such as the execution of search warrants, and probation and parole searches may tip off those suspects under investigation. The courts have held that "it is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap. Instead, the adequacy of the showing of necessity is to be tested in a practical and commonsense fashion, that does not hamper unduly the investigative powers of law enforcement agents." *People v. Roberts*, 184 Cal. App. 4th 1149, 1172 (2010). "The necessity requirement ensures that wiretapping is not routinely used as an initial step in a criminal investigation or when traditional investigative techniques would expose the crime." *United States v. Oliva*, 686 F.3d 1106 (9th Cir. 2012).

b. Probable Cause

The same probable cause standard for search warrants exists for wiretap orders. *United States v. Eiland*, 738 F.3d 338, 347 (D.C. Cir. 2013). The application must establish probable cause as a link between the crime and the wiretapped device, "that the facilities from which, or the place where, the wire or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted." Cal. Penal Code § 629.52(c). There must be "probable cause to believe that particular communications" provide evidence that a designated crime listed in Penal Code section 629.52(a) has been committed, is being committed, or is about to be committed. Cal. Penal Code § 629.52(b).

c. Designated Crimes

The wiretap application must target designated crimes set forth in Penal Code sections 629.52(a)(1) through (a)(6). These crimes include communication pertaining to murder or solicitation to commit murder, information on felonies involving bombs and destructive devices, information to help locate a kidnap victim, communication pertaining to the importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of certain enumerated Health and Safety Code sections, information on street gang crimes, the use of weapons of mass destruction, and information pertaining to an attempt or conspiracy to commit one or more of the above crimes. *Id.*

d. Duty to Minimize

The wiretap order must require the law enforcement officers to minimize the interception of communications that are not subject to the wiretap order. Cal. Penal Code § 629.58.

> "To determine whether the authorities acted reasonably to minimize the interception of nontargeted communications, the court generally reviews a variety of factors relevant to the facts of the case. These factors may include whether a large number of the calls were very short, one time only, or in guarded or coded language; the breadth of the investigation underlying the need for the wiretap; whether the nonminimized calls occurred early in the surveillance; and the extent to which the authorizing judge supervised the ongoing wiretap."

People v. Sedillo, 235 Cal. App. 4th 1037, 1057 (2015).

If the intercepted communication contains suspected privileged communication, the interception must cease for two minutes, after which the officers may listen for no longer than 30 seconds to determine if the nature of the communication continues to be privileged. If the communication continues to be privileged, then "the officer shall again cease interception for at least two minutes, after which the officer may again resume interception for up to 30 seconds to redetermine the nature of the communication," and the officer shall repeat this procedure until the communication is no longer privileged. Cal. Penal Code § 629.80.

2. Consequences of Violations

In addition to the suppression of the evidence seized pursuant to an unlawful wiretap, the officers who engage in unlawful wiretapping face severe criminal and civil penalties. Cal. Penal Code § 629.86.

E. Arrests

1. Warrantless Arrests

An arrest can be made without a warrant. A warrantless arrest requires probable cause, a reasonable belief that a person committed a crime. *Henry v. United States*, 361 U.S. 98, 101 (1959). Two types of warrantless arrests exist: a conventional arrest and a pretext arrest. A conventional arrest occurs when an officer takes a suspect into custody to face anticipated criminal charges, and to ensure that the suspect does not continue to commit the crime. *Virginia v. Moore*, 553 U.S. 164, 173 (2008). An officer may use a "pretext arrest" to take an individual into custody. A pretext arrest occurs when the officer needs further investigation and is motivated to arrest an individual for a crime where probable cause currently does not exist. In a pretext arrest, the officer may arrest a suspect for any crime that he currently has probable cause for, even if he is only doing so with the ulterior motive to further investigate a different crime. *Ashcroft v. al-Kidd*, 563 U.S. 731, 739 (2011).

2. Arrest Warrants

A law enforcement officer may decide to obtain an arrest warrant for various reasons. An arrest warrant authorizes the officers to enter a suspect's home to make the arrest. During that arrest, the officers may have a plain view exception to search and seizure. If a suspect has eluded arrest and his location remains unknown, an arrest warrant will allow the officers to enter the suspect into databases of wanted suspects. Also, the officers may seek a warrant when they are concerned that the statute of limitations will expire. The courts deem an arrest warrant as the commencement of a prosecution for the purpose of stopping the statute of limitations. *People v. Robinson*, 47 Cal. 4th 1104, 1111 (2010). In California, unless exempt, misdemeanors that are not committed in the officer's presence require an arrest warrant. Cal. Penal Code § 836(a)(1).

There are seven types of arrest warrants: conventional arrest warrants, *Ramey* warrants, *Steagald* warrants, probation violation warrants, parole violation warrants, grand jury indictment warrants, and bench warrants for failure to appears. Of these, three are discussed below:

a. Conventional Arrest Warrants

A judge issues a conventional arrest warrant after reviewing the filed complaint and the accompanying police reports and declarations to determine if probable cause to arrest exists. *Steagald v. United States*, 451 U.S. 204, 213 (1981). If the suspect remains unknown, the police may obtain a John Doe warrant. *People v. Robinson*, *supra*, 47 Cal. 4th at 1138. California Penal Code section 815 states that "if it is unknown to the magistrate, judge, justice, or other issuing authority, the defendant may be designated therein by any name." As mentioned above, the

issuance of an arrest warrant tolls the statute of limitations and therefore, the officers will apply for a warrant to ensure that further investigation can occur without violating the statute of limitations.

b. *Ramey* Warrants

Law enforcement officers may request the issuance of a *Ramey* warrant, a "warrant of probable cause for arrest," when the prosecutor has yet to file charges on a case, but probable cause to arrest exists. *People v.* Ramsey, 16 Cal. 3d 263, 275 (1976); Cal. Penal Code §§ 817, 1427. A *Ramey* warrant request only requires a showing of probable cause; and thus, this warrant allows the police to arrest a suspect and attempt to gain additional evidence.

c. *Steagald* Warrants

A *Steagald* warrant is an arrest warrant that not only allows a search of the suspect's own home, but also authorizes the search of other person's residence for the purpose of arresting the suspect. *Steagald*, *supra*, 451 U.S. at 221-222; Cal. Penal Code § 1524(a)(6). With this warrant, the law enforcement officers must have probable cause to believe that the suspect they wish to arrest is inside the residence at the time when the court issues the warrant, and that the suspect will still be inside the residence when they execute the warrant. *Steagald*, *supra*, 451 U.S. at 221-222.

F. Attack on Search Warrants

Defendants often bring motions to attack the validity of a search warrant, such as motions to quash search warrants, motions to traverse search warrants (*Franks* motion, *Franks v. Delaware*, 438 U.S. 154 (1978)), and motions to disclose information. The latter motion may put witnesses in jeopardy of their safety and the results may have dire consequences on witness availability for trial and witness cooperation. Prosecutors defend the validity of a search warrant in court. If officers do not follow the guidelines and the templates, and otherwise do not seek the support that the Alameda DA's Office provides, they risk having the evidence they collected thrown out and severely weaken the strength of a case.

1. Motions to Quash Search Warrants

In almost all cases where the search warrant produces damaging evidence, the defense will seek a motion to quash the search warrant. A motion to quash is a motion to suppress on the ground that the affidavit failed to establish probable cause. Cal. Penal Code §§ 1538.5(a)(1)(B)(i), 1538.5(a)(1)(B)(iii).

A sealed affidavit requires a *Hobbs* motion (see below). *People v. Hobbs*, 7 Cal. 4th 948, 972 (1994). For an unsealed affidavit that is attached in support of a search warrant, the court will review the four corners of the affidavit to determine whether or not probable cause existed for the issuing judge at the time of the issuance of the warrant. The reviewing court gives deference to the issuing judge, and decides whether there was "substantial basis" for believing the existence of probable cause when the issuing judge first reviewed the application. *People v. Hepner*, 21 Cal. App. 4th 761, 775 (1994).

Under the severance rule, if only a portion of the search warrant for some evidence was not supported by probable cause, the court may suppress only that evidence that is affected, and the rest of the warrant and evidence obtained will remain lawful. *People v. Superior Court (Marcil)*, 27 Cal. App. 3d 404, 415 (1972).

2. Motions to Traverse Search Warrants (*Franks* Motion)

A defendant may also seek a motion to traverse, more commonly known as a *Franks* Motion. A *Franks* Motion is a motion to suppress evidence on the grounds that the facts providing probable cause were intentionally or recklessly misrepresented or distorted, or material information had been omitted. *Franks v. Delaware*, *supra*, 438 U.S. 154; *People v. Luttenberger*, 50 Cal. 3d 1, 9 (1990).

A search warrant is presumed to be valid, thus the defense bears the burden of proof by a preponderance of the evidence that the facts in the affidavit were intentionally or recklessly presented. *People v. Torres*, 6 Cal. App. 4th 1324, 1334 (1992). If the defense meets this burden, the burden shifts to the prosecutor to show that the facts were not intentionally misleading or recklessly presented. *People v. Weiss*, 20 Cal. 4th 1073, 1083 (1990).

To invalidate a search warrant under a *Franks* Motion, the court must find that the affidavit contained false or omitted information, the information was of material value and would have no longer established probable cause, the affiant officer provided the information, and that the information was intentionally added or omitted with the purpose of misleading the judge or was added or omitted with reckless disregard of the truth. *Franks v. Delaware*, *supra*, 438 U.S. at 171.

3. *Hobbs* Motions

The law enforcement officers often request that a search warrant affidavit or wiretap affidavit be sealed in order to protect the identity of confidential informants or official information. *People v. Acevedo*, 209 Cal. App. 4th 1040, 1053 (2012). With a sealed affidavit, the defense would not have the facts to bring a motion to quash or a *Franks* motion. In these cases, the defense brings a *Hobbs* motion, along with a motion to quash and a *Franks* motion. A *Hobbs* motion requests the judge to examine the sealed and the unsealed portions of the affidavit to determine whether they contain information that would reasonably likely result in the granting of either the motion to quash or the motion to traverse. *People v. Hobbs*, supra, 7 Cal. 4th at 972.

HOMICIDE CASES IN ALAMEDA COUNTY

Whether a case is prosecuted horizontally or vertically, the Alameda DA's Office routinely gets involved with the case from the onset. In a vertically prosecuted case, usually one prosecutor is assigned to the case after the Charging DDA has made the filing decision to file charges against the suspect. A horizontally prosecuted case involves different prosecutors in every step of the criminal justice proceedings.

In the Alameda DA's Office, homicides are handled as horizontal cases; thus, the trial DDA need only concentrate on the actual trial, and not worry about the prior stages of the case that are

handled by other prosecutors. The families of homicide victims have one assigned DA Victim Advocate, whose job is to keep the victim's families informed, updated, and aware of any victim compensation and other rights. The DA Victim Advocate works with all DDAs assigned to a homicide case, and remains the one consistent point of contact for the victim's families throughout the pendency of a homicide case.

For serious and violent crimes, the prosecutors in the Alameda DA's Office have a hands-on role in both investigating and prosecuting cases. A serious and violent crime would include homicides, and child sexual assault cases that are prosecuted vertically, and cases involving Cold Hit DNA.

I. Horizontal Handling of Homicide Cases

A. Homicide Duty Prosecutor

In additional to his/her regular assignments, a prosecutor assigned to Homicide Duty is on-call 24 hours a day. During Homicide Duty, the assigned DDA answers any questions from the law enforcement agencies that arise from homicide investigations, receives notices of all homicide suspects taken into custody, and takes statements from homicide suspects.

Before talking to homicide suspects, the Homicide Duty DDA reviews all investigative materials for the investigation conducted by the police up to that point—all written reports connected to the homicide, and all taped and written statements from witnesses, including the homicide suspect. The homicide detectives will review all the information with the DDA and answer any questions. On occasion, the Homicide Duty DDA may visit the crime scene to get a full picture of what had occurred.

Since the Homicide DDA must spend hours in preparation before taking a statement, often a homicide suspect in custody begins to speak with the officers before the Homicide Duty DDA's arrival. A Homicide Duty DDA's presence at the onset of a homicide suspect's statement is not required; and thus, this golden opportunity to hear the suspect's version of events is not lost. However, even if the police have interviewed the homicide suspect for a lengthy period, the Homicide Duty DDA may send the detectives back to ask follow-up questions, or the Homicide Duty DDA may take additional statements without any of the initial detective present. Given an opportunity, many homicide suspects wish to speak directly with the Homicide Duty DDA because they know that the DA has more power over whether or not they will face charges.

In most cases, a Homicide Duty DDA will want to take a separate statement, and normally this is done with the assistance of a DA Inspector. The DA inspector records the statement from the homicide suspect and acts as an additional witness and an interviewer. If the case proceeds to trial, either the Homicide Duty DDA, the DA Inspector, or both, will end up on the witness list. If the DDA taking the statement happens to also try the case, then the DDA will call the DA Inspector to testify.

Before speaking to the suspect, the DDA and the DA Inspector will reiterate to the suspect his *Miranda*[45] rights and record the conversation. The Homicide Duty DDA ensures that a suspect's statement can be used in trial and will explores all avenues of defense.

Although many police interrogators know how to get a suspect to engage in a conversation, many officers do not proceed with the pool of knowledge possessed by the prosecutors. The prosecutors on Homicide Duty have tried homicide cases to a jury and know the intricacies of the laws applicable to homicide cases. The interviewer must know the elements of the crime and also the possible defenses that may be raised. Many homicide investigators do not know the complex laws that govern possible defenses, or how a jury may react to certain methods of interrogation. Most suspects do not initially know what legal defenses may exist, thus the DDAs on Homicide Duty ask questions that elicit not only the facts necessary to solve a case, but also the facts that will ensure a sustained conviction.

The Homicide Duty DDA must take into account the legal claims that can have serious repercussions during trial. The DDA will seek to clarify answers and consider how a suspect's current statement can affect future claims of involuntary statements, claims of a false confession, claims of impairment negating intent, false alibis, claims of self-defense, a heat of passion defense, and claims of lack of premeditation.

1. Voluntary/Involuntary Statements

If a defendant makes a claim that the police coerced a confession, the Homicide Duty DDA must follow-up and address this claim. Generally, California courts have deemed a suspect's statement voluntary if the statement was made "of a 'rational intellect and a free will.'" *People v. Farnam*, 28 Cal. 4th 107, 183 (2002). The conventional term "voluntary" means that a person must volunteer their statements. If the statement was not coerced, it is voluntary. *United States* v. *Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001).

The courts look to the totality of the circumstances to determine whether a statement was coerced. *People* v. *Haydel*, 12 Cal. 3d 190, 198 (1974). The Homicide Duty DDA must show as many factors as possible to negate a claim of coercion. For example, the prosecutor should get the defendant to admit that he was not threatened physically or verbally during the conversation; make sure that no promises were made and that no expectation of favoritism existed; and that the defendant was not deprived of necessities, such as water, food, and bathroom breaks. Additional factors that the DDA should consider include, conversing about the defendant's state of awareness, or if under the influence of drugs or alcohol, making sure that the defendant's mental faculties were not significantly impaired. Additionally, the Homicide Duty DDA may ask the suspect how he feels, and whether he was threatened while in police custody.

The courts presume that any additional statements stemming from an involuntary statement also are involuntary, unless the prosecution can show a "break in the causative chain between the two confessions." *People* v. *Dingle*, 174 Cal. App. 3d 21, 27 (1985). Thus, the prosecution must establish that "the influences under which the original confession was made had ceased to operate

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[45] *Miranda v. Arizona*, 384 U.S. 436 (1966)

before the subsequent confession was made." *People* v. *McElheny*, 137 Cal. App. 3d 396, 402 (1982). In these rare cases, the Homicide Duty DDA must consider what had made the initial statement involuntary, and address the circumstances that eliminate the coercive factors. The passage of time between the initial statement and the second statement usually helps and plays the most significant role, as does the change in the identity of the questioners.

2. Claims of a False Confession

Many times, a defendant will claim that he lied to the police. This is especially so when the strongest evidence against the defendant is his own confession. A Homicide Duty DDA must not be satisfied that a suspect had confessed, but also must engage the suspect and attempt to have the suspect corroborate his statements as much as possible with questions such as: How do I know you are telling the truth? Why should I believe you? Have you told anyone else?

3. Impairment Negating Intent

The right types of questions, asked during the initial questioning of the defendant, can impede the defendant's ability to manufacture defenses at trial. One such manufactured defense is a claim that the defendant was under the influence of alcohol or drugs or some other mental impairment at the time he gave his statement. Thus, it is critical that the Homicide Duty DDA ask questions that would elicit responses that show the defendant knew the choices he made and what he was doing.

Asking about the suspect's activities, before and after the crime, without focusing on the actual crime itself, helps to show that the suspect planned out his day and knew what he had done, and what he was going to do. Engaging the suspect in a conversation about his tolerance level for drugs helps to show that the suspect was able to go about his daily routine while high on drugs.

4. False Alibis

Defendants at trial commonly attempt to provide an alibi. The suspect's initial statement can provide the necessary tools to show at trial that a claim of an alibi is false. To prevent or undermine an alibi defense, the prosecutor needs to develop an explicit time line—obtain information on witnesses who the suspect usually interacts with, obtain information about individuals with whom the defendant may have spent time with before, during and after the murder, and obtain other evidence in support of that time line, such as receipts and phone records.

5. Self-Defense Claim

The claim of self-defense usually arises when the state of evidence shows the defendant committed the crime. A self-defense claim hinges on what the defendant perceived at the time of the crime. Therefore, the prosecutor should ask questions geared towards eliciting from the suspect what he thought was going to happen at the time of the murder. Some pertinent questions to ask a suspect include: Did the suspect know of any alternatives to killing? Who had the weapon and what type of weapon? Did the victim have any weapons? If the suspect was carrying a firearm, was it already loaded and ready to fire? Why was the suspect carrying a weapon?

6. Lack of Premeditation

The prosecutor and the police may not share the same concerns regarding the premeditation element of a homicide. Often, premeditation determines the degree of punishment a defendant receives. The police focus their attention on public safety and making an arrest, while in homicide trials, the prosecuting DDA focuses on the maximum punishment the evidence justifies. The Homicide Duty DDA must uncover in detail the intricate thought process of a homicide defendant. The prosecutor must ask what the defendant planned before, during, and after the killing. For instance, the Homicide Duty DDA would want to know whether the defendant had a loaded gun, and also whether the defendant loaded the gun himself; whether the defendant waited for an opportune time so that the killing would attract less witnesses; and whether the suspect concealed himself during or after the killing.

B. Homicide Charging DA in the Oakland Police Department

The majority of homicides committed in Alameda County occur in the City of Oakland. Generally, when a homicide occurs, the police agency's homicide investigator will investigate the case, gather all the physical evidence, obtain all written and recorded statements (including those made to the Homicide Duty DDA) and then present the evidence to a Charging DDA at the Alameda DA's Office. However, in Oakland, where the majority of the homicides occur the Alameda DA's Office has an on-site Homicide Charging DDA within the Oakland Police Department (OPD). The Homicide Charger has an office located adjacent to OPD's Homicide Unit and this prosecutor charges any and all homicides that come through the OPD's Homicide Unit.

In Oakland, when a homicide occurs, as soon as possible, an OPD Homicide Sergeant will contact the Homicide Charging DDA to give an update on the investigation. The Homicide Charger is brought into the loop as soon as possible to ensure that the entire homicide investigation has guidance, from the beginning to end, from an experienced DDA who will ultimately decide whether or not to file murder charges. Most homicide cases require a lengthy period of investigation. The police interview dozens of witnesses, follow-up on a myriad of leads, listen to countless hours of jail calls, observe hours of surveillance, and then connect all the evidence. The Homicide Charger DDA not only educates the police officers on how to conduct a homicide investigation, but also assist in obtaining various warrants. The Homicide Charging DDA will also ensure that the evidence remains preserved and not destroyed.

Once a case is charged, it is often difficult to get a police agency to conduct further investigation. This is true even for homicides, although experience has shown that usually, the determining factor is the personality of the homicide investigator and his relationship with the prosecuting DDA that decides whether additional investigation will be conducted after charges are filed. A police report might summarize a witness's recorded statement and report that the individual made a "positive ID of the suspect." After reviewing the recorded statement, the DDA might want further interviews and clarifications on what the witness actually said. Therefore, the Homicide Charger will not file charges against the suspect until all the investigation is completed and the Homicide Charger has reviewed all the evidence.

The OPD does not see it as DA oversight to have a Homicide Charging DDA in its Homicide Unit. And, the Alameda DA's Office does not view this role as that of an overseer. In fact, the OPD requested an on-site DDA with homicide experience to give them guidance. The Alameda DA's Office and the local police departments play different roles, but at the same time, share a common overarching goal—public safety. Often, the ultimate goal of a police investigation is not to obtain charges. The police might focus on stopping further crimes, such as additional murders or retaliation murders. The police focus might remain that of solving a homicide and putting a suspect in custody. The Homicide Charger, on the other hand, will get involved early and often, with the goal of charging a suspect, and keeping the focus on not only solving the murder but also obtaining a conviction.

II. COMMON HYPOTHETICAL: PEOPLE V. VINCE, JONES, AND THOMAS

The below-described hypothetical case has been presented to all prosecutor writers for analysis and discussion.

A. Facts

Judy and her friends were walking through the apartment complexes of the 69 Village. They saw Willie and another boy named MoMo, and struck up a conversation. As they talked, two armed gunmen ran up to them and fired approximately 20 shots. Judy was shot in the head and died. MoMo was shot in the leg, and survived.

The surveillance videos showed that three men followed Willie and MoMo. Shortly before the shooting, the three men got into a car. Two of the men were then seen coming out of the car and walking towards Judy and the crowd. Moments after, the same two men were seen running back into the car and driving away.

An informant told the police that a person named Ruth was involved in the shooting, and that she is Victor's cousin. The police learned that MoMo was suspected of killing Victor a few months before, but had not been arrested or charged with Victor's murder.

Ruth agrees to give a statement to the police. After denying any involvement, Ruth said that she was driving through the 69 Village when she saw MoMo. Ruth believed that MoMo was responsible for killing her cousin Victor. Both Victor and Ruth were associated with a "Lower Bottoms" gang. After seeing MoMo, she called her brother Sammie and her cousin Vince, and told them MoMo was in the 69 Village. Ruth was aware that her family and friends wanted to kill MoMo to avenge Victor's death.

Shortly after making the phone call, Ruth met with Sammie, Vince and friends named Thomas and Jones. All have ties to the Lower Bottoms gang. Ruth overheard Vince tell the others that MoMo had been spotted and that they needed to take care of him. Ruth said she then left for work and only heard of the murder on the evening news. The police seized Ruth's phone and saw the phone numbers of everyone who had been a part of the conversation.

The police obtained warrants for the phone records. The records showed that Vince, Thomas, and Jones' phones were pinging near the 69 Village at the time of the murder. The phone records for Ruth and Sammie showed that their phones were across town during the time of shooting. Text messages between Vince and Jones on the night of the murder alluded to having pride in committing various crimes, including one from Vince welcoming Jones to the "REDRUM" club. "Redrum" is a slang term for "murder" spelled backwards.

With this information and the fact that MoMo was still alive, the police obtained a warrant to wiretap Vince, Thomas, and Jones' phones. A phone conversation was intercepted between Vince and another individual where Vince said that they missed an opportunity and needed to keep an eye out for MoMo.

The police also obtained search warrants for Vince, Jones, and Thomas's homes. At Vince's home a gun was found that matched the bullet from Judy's head and the casings on the ground. Meanwhile, Thomas is arrested in an adjacent county and awaits trial on gun charges. The gun Thomas had been arrested with is tested and the casings match the other set of casings found at the murder scene. Vince gives a statement and confesses to his involvement.

B. Analysis and Discussion of the Investigation and Prosecution in Alameda County

1. Surveillance Camera

The police can obtain the surveillance videos through cooperation, a search and seizure warrant, or through a subpoena duces tecum.

Often, the police will track down and make contact with the person or company that owns and operates the surveillance cameras that may have captured the evidence of a crime. Here, the apartment complexes have surveillance cameras that capture what happens in and around the property. These surveillance cameras are located in public locations, and capture videos of people and things in public places. The police will first seek cooperation from the owner of the apartment complexes to obtain these videos. The most common purpose for surveillance cameras is to deter and record wrongdoings. Therefore, the police usually get full cooperation in obtaining surveillance videos that may have captured the crimes.

If the police cannot obtain these videos through cooperative means, they may obtain a search and seizure warrant. In this scenario, the police will seek a general search and seizure warrant—the police will write an affidavit and explain why the videos are necessary. They will explain when and where the crimes occurred and the likelihood that the surveillance cameras recorded the actual crime or contain evidence surrounding how the crime occurred.

Lastly, the police may also obtain the surveillance videos by seeking a subpoena duces tecum. A subpoena duces tecum is a court order requiring nonparties to a criminal action to provide their business records. If a court issues a subpoena duces tecum, then the records must be accompanied by an affidavit from the custodian or another qualified witness who has the authority to certify the records. The custodian must certify that the copy of the records is a true copy of all records described in the subpoena; and that the records were prepared by the personnel of the business in

the ordinary course of business at or near the time of the act, condition or event. If the business does not have any of the records described, or only some, the custodian or other qualified witness must state that in the affidavit. Cal. Evid. Code §§ 1560, 1561. This method is usually reserved to obtain surveillance videos from large companies, such as from a bank for its surveillance videos at an ATM.

2. Informants

The police are very protective of their informants. In almost all instances, the information and statements obtained from an informant will not be recorded and will not include the informant's signature. The police will not record or require a signature to prevent inadvertent disclosure of any information that may allow someone to figure out the informant's identity.

Depending on any applicable hearsay exception and the judge's rulings on relevance and fairness, the informant's statement may or may not be admissible in court. If allowed, the court will often only admit an informant's statement to show the effect that the information had on the direction of the police investigation. Thus, the actual statement from the informant is not admitted into evidence, but the fact that an informant directed the police to speak with Ruth, who may have relevant information regarding the shooting, most likely will be admissible.

3. Format of Ruth's Statement: How and in what format do the police write down the statement from the suspect/Ruth? Do the police hand write it? Is it recorded? Is it handwritten and then signed by the suspect? Is it typed up and signed by the suspect? Is the statement admissible in court?

Ruth's statements to the police may be written down and/or recorded. In most instances, when a witness is contacted on the field, the police will turn on their body cameras and take a summary statement from the witness. If the initial statement is recorded on the body camera, then the officer may simply summarize the recorded statement in his police report. However, good practice require that even if an officer had a recording device, the officer should write out a summary of the witness's statement and then have the witness sign the statement. This is better practice because recording devices may malfunction or capture only a portion of the statement. Therefore, having a witness sign a summarized statement provides an extra level of thoroughness and protection from a possible recording malfunction.

If a witness such as Ruth is taken to the police station for further statements, then the interview will be video-recorded. This video recorded statement will be summarized by the interviewing officer in his report.

The admissibility of Ruth's statement in court, whether it is video or audio recorded, or written down, will depend on many factors: whether Ruth testifies and if she does, whether she contradicts her original statement, or minimizes her role in comparison to her original statement; whether she testifies truthfully about certain facts and lies about others; and whether she denies ever making certain statements.

4. Ruth's phone

As explained above, the CalECPA governs how the police can obtain a search warrant to obtain and review the information on Ruth's phone. The investigating officer would write the affidavit in support of the warrant. In this instance, the request for a search warrant would be a routine matter—it would follow a warrant template provided by the Alameda DA's Office. As such, a prosecutor need not review the affidavit.

5. Phone Records and Text Messages

For telephone records and text messages, the CalECPA sets out the procedures on how the police may obtain these records. The length of time that a phone carrier keeps its telephone records varies from company to company. Thus, it is imperative that the police obtain search warrants for relevant phone numbers as soon as possible. Once a search warrant under CalECPA has been issued, the phone carrier must retain the information for 90-day periods, which may be extended.

6. Wiretap

The wiretap applications for Vince, Jones, and Thomas's phones would follow the wiretap application procedure explained above. Here, the Homicide Charger DDA would be informed of the case from the onset and once the police determine that a wiretap might be a useful tool, the Alameda DA's Office would immediately be consulted about obtaining a wiretap. The Alameda DA's Office would take the lead with the wiretap application process, and also decide whether or not to move forward. If the Alameda DA's Office decides to apply for a wiretap, then the Office will remain involved in all aspects of the wiretap.

7. Search of Vince, Jones, and Thomas's Homes

Only a general search warrant would be required to search the homes of Vince, Jones, and Thomas. The Alameda DA's Office most likely would not get involved in obtaining these warrants.

8. Thomas' Arrest

Thomas's arrest for the murder in Alameda County would only require a general arrest warrant and the Alameda DA's Office most likely would not get involved.

9. Vince's Confession

As mentioned above, the Homicide Duty DDA would be called to observe and question Vince. The procedures outlined above would be followed. The Homicide DDA's interview is always video recorded.

VERTICAL PROSECUTION BY THE ALAMEDA DA'S OFFICE

I. VERTICAL PROSECUTION OF REACTIVE CASES

The Vertical Units within the Alameda DA's Office handle the prosecutions of all vertical reactive cases, and the assigned DDA will handle every aspect of the case from the arraignment, to pretrial and preliminary hearings, and finally to the jury trial. In most cases, a law enforcement agency's first contact with the Alameda DA's Office is with the Charging DDA. If a Charging DDA decides to file charges, then based on the nature of the crime committed, he/she will refer the matter to the Office's Vertical Unit. In some special circumstances, the police may contact the Vertical Unit directly to get the case charged and assigned.

In the Alameda DA's Office, a prosecutor assigned to a Vertical Unit, such as the Child Sex Assault unit, will begin reviewing the case after the suspect has been charged, and may decide to amend the charges after reviewing the case. In most vertical cases, the investigation remains ongoing. For example, in cases involving child sexual assaults, many victims are not entirely forthcoming at the onset of a case and may require many months before the whole truth comes out. In these types of cases, the police remain invested and involved. These cases also will often involve pretext arrests and pretext charging. In a pretext arrest, the police will arrest an individual with probable cause for a particular crime with the motive of investigating another more serious crime for which they do not currently have probable cause. A pretext charging involves charging a defendant for pretext arrest crimes, with the hope that charging him will keep the defendant in custody while affording the police additional time to further reinvestigate the more serious allegations.

A. Child Sexual Assault Cases

Child sexual assault cases are arguably the toughest cases for a prosecutor to handle. They consist of the most vulnerable victims. The perpetrators usually have no criminal backgrounds and are well known to the victims. Most child sexual assault crimes occur in the sanctuary of a child's home and a child may feel responsible for the police intervention and the disruption of his/her family life. When an allegation of child sexual abuse comes to light, the Alameda DA's Office becomes involved as soon as possible so that the victim has one prosecutor who works with him/her throughout the entire criminal court process.

All local law enforcement agencies have signed on to the "Alameda County Child Abuse Protocol," which lays out a multi-disciplinary response to child abuse allegations, including child sexual assaults. The protocol directives include responding effectively to reports of abuse, collecting information to ensure that offenders are held accountable, keeping families and victims informed of investigations, and providing the victims and families resources such as medical, therapeutic, and/or legal services.

The multi-disciplinary team consists of the Child Abuse Listening, Interviewing and Coordination Center ("CALICO"), the Alameda DA's Office, all local law enforcement agencies, and various social service organizations. The protocol applies to all cities and unincorporated areas of the Alameda County.

CALICO facilitates the team's response to a report of a child sexual abuse. CALICO conducts forensic interviews for children under the age of 18 and also for developmentally delayed adults. CALICO is a child-friendly setting, where highly trained interviewers use various techniques to ensure the victims feel comfortable, secure, and supported. CALICO interviewers conduct one-on-one interviews with a child victim in a comfortable setting designed to lessen the feelings of vulnerability and fear. Often, CALICO is where the first-time victims recount their story.

CALICO has a full-time prosecutor assigned to its location who are known as the CALICO DDA. The responsibilities of a CALICO DDA includes: attending all CALICO forensic interviews, meeting with the assigned detective, requesting further police investigation, directly charging a case or writing a report for the Charging DDA to review.

1. First Responders

Unlike other investigations, the field law enforcement officers who respond to reports of child sexual abuse will only ask questions to determine whether a crime of sexual abuse on a child has been committed. If they determine that such a crime may have occurred, the first responding officer will cease any further questioning and call the sexual assault detective, who in turn will provide a safe environment for the child to remain in, and schedule a forensic interview with CALICO. No one will ask the victim substantive questions regarding the sexual abuse until CALICO conducts its interview.

2. CALICO Forensic Interview

Immediately prior to the interview, the CALICO DDA, a detective, a CALICO staff, and the CALICO interviewer will meet and discuss the brief background and the known history of the case. Any relevant family information, such as the relationship between the victim and suspect will be discussed. Once this meeting concludes, the DDA and the detective will enter an adjacent room located next to the interview room and view the interview via a live CCTV. A CALICO staff member will remain with the victim's family in a separate location, and explain the process, available resources, and what the family can expect.

The interviewer will have an earpiece directly connected to a microphone that the DDA and the detective utilize. Throughout the interview, the DDA and the detective will ask questions, seek clarifying responses, further delve into a particular subject matter, and provide suggestions to the interviewer.

Once the interview concludes, the CALICO DDA, the detective, and the CALICO staff member will meet for post-briefing discussions. At this meeting, the team discusses the need for further investigation. They will develop a plan for child protection, therapy, medical evaluations, and further investigations, such as pretext phone calls and suspect interviews. At times, the team will determine that no further investigation is warranted and document the reasons for that determination.

The CALICO DDA and the detective will meet with the victim's guardian and discuss the process he/she can expect via the criminal justice system. The substance of the interview with the victim, however, will not be discussed.

The CALICO interview is often the first step in the healing process for a victim. This interview is usually the first time the victim has told anyone about his/her ordeals. Once the police interview the suspect, additional information may require further forensic interview and additional charges may follow.

3. Charging

Filing charges for child sexual assault cases can be very difficult. The suspects do not commit these crimes in the open, and they remain vigilant in hiding their wrongful acts. A defendant may not give a statement, the victim may not want to testify, and/or the victim may have reported the crime years after it occurred. As a result, independent corroboration, the type of evidence that trial prosecutors crave, simply may not exist. Many Charging DDAs file charges with only the CALICO interview as evidence. Thus, it is critically important for the Alameda DA's Office to get involved at an early stage to ensure that the victim has support when he/she shares the story. The CALICO process allows the victims to realize that the prosecutors believe in them, and thus, the victims begin to gain the courage needed to move forward.

A case may be charged on the stand-alone evidence of the CALICO statement. A criminal charge enables law enforcement officers to make an arrest and take the suspect into custody. Prior to the arrest, detectives may attempt a pretext phone call and interview the suspect. Often, a suspect will deny any surreptitious attempts at getting an admission, refuse to speak with officers, or deny all allegations during an interview. The words/statements from a victim speak volumes however, and depending on the strength of the statement alone, the case may get charged with no other corroborating evidence. If this occurs, it is up to the assigned DDA to make the case as strong as possible to obtain a conviction.

4. Child Sexual Assault Unit

Once a Child Sexual Assault DDA is assigned to a case, his job becomes one of relationship building. Unlike any other subject matter, a child needs to feel comfortable, safe, and secure before he/she is able to speak on the subject of sexual abuse. The case may have already been charged, but once the DDA begins to gain the victim's trust, in nine out of ten instances, more charges will follow.

Usually, a law enforcement agency's obligation to conduct investigations ends when a charge is filed. However, in child sex assault cases, further investigations may not begin until charges are filed. Thus, detectives who work on these types of cases become emotionally attached and will do what it takes to get a conviction. The detectives will continue to seek corroborating evidence by listening to jail calls, interview witnesses who may have sensed a change in the victim's behaviors, and obtain search warrants for phones and computers. These detectives do not see the initial charging as the end of their investigative duties.

The assigned DDA will get to know the child victims outside of the office setting by taking them out to eat, to the movies, and become a trusted confidante. When the strength of a case depends on the victim's statement alone, it is important to prepare the victim for what is expected in the upcoming court proceedings. Many times, testifying in court may prove detrimental to the victim's wellbeing and the DDA may decide to plea bargain a case to spare the victim the emotional toll and distress of having to retell his/her story in open court. Also, the assigned detectives understand that a victim may come to see them as his/her contact with the law enforcement, and they will stay involved in the case to ensure that the victim does not feel abandoned during the process.

B. People v. David Garrison: A Sexual Assault Reactive Case

This is a case in which I was the assigned prosecutor.

1. Facts

On the night of April 22, 2012, Jane Doe's mother walked into her ten-year-old daughter's room and saw David Garrison, her husband and Jane Doe's father, standing next to Jane Doe's bed with his pants down and his exposed penis erect. Mom asked Garrison, "What are you doing?" Garrison replied, "just call the police, just call them now." Mom called the police. Garrison stood outside with his hands in the air and was arrested. Garrison invoked his rights and refused to speak with the police.

The day after the arrest, detectives took Jane Doe to CALICO where she disclosed that for the past couple of years, Garrison would come into her room on a regular basis, frequently in the middle of the night, pull down Jane Doe's pants and fondle her vagina, and often digitally penetrated her. Jane Doe also reported that Garrison sometimes grabbed her breasts. She said Garrison touched her once or twice a week for the past couple of years and that she has seen his penis approximately three times. Jane Doe was reluctant to give any further information and denied any further conduct. The detective and the CALICO DDA were in the adjacent room and saw the interview in real time.

2. Analysis

A Charging DDA filed charges based on what Jane Doe's mother had witnessed and Jane Doe's CALICO interview. The case was immediately assigned to the vertical Child Sexual Assault Unit, and in this instance, I was assigned to the case. I immediately contacted the detective who briefed me on the case. Both the detective and I felt that Jane Doe had not been ready to disclose the full extent of Garrison's abuse, and but for the chance encounter with her mother finding the father in her bedroom, the abuse would not have been reported at that time.

The detective began to monitor defendant Garrison's jail calls. In several of defendant's conversations with his mother, he mentioned writing a journal letter to Jane Doe's mother. In a separate letter to Jane Doe's mother, defendant mentioned that he has written her a 173-page journal for her to read one day. Armed with this information, the detective contacted me to review the available investigative options.

At my direction, the detective searched defendant Garrison's jail cell without a warrant. The defendant did not have an expectation of privacy in his jail cell, and thus, he did not have any standing to bring any motions to suppress evidence found in his cell based on his rights under the Fourth Amendment to the United States Constitution. *People v. Zepeda*, 87 Cal. App. 4th 1183, 1194 (2001). The detective found and retrieved the above-mentioned journal and entered it into evidence. The hand-written journal contained approximately 180 pages, and it was clearly written for Jane Doe's mother and appeared to be an explanation of his actions. The journal did not contain any passages that would indicate that the defendant had written the journal for his attorneys or at the direction of his attorneys. The journal included an apology for his actions and alluded to much more abuse than Jane Doe had disclosed.

After many months of relationship building with Jane Doe, the victim gave a statement outlining the full extent of the abuse she had suffered. With the journal and Jane Doe's further revelations, I filed an amended complaint charging many more life crimes.

C. Cold Hit DNA Cases

The DNA unit in the Alameda DA's Office works closely with the detectives who handle cold hit DNA cases. These cases have remained unsolved for many years and a DNA hit may occur at any time.

Usually, the onset of an investigation for a Cold Hit DNA case occurs when a suspect has been identified through DNA evidence. The local crime laboratory will upload a DNA profile from an unknown person into the Statewide and Federal databases. The Department of Justice will notify the local crime laboratory of potential DNA matches to its uploads. The crime laboratory will follow its procedures to confirm the match and in turn will ask the police to provide reference samples of the suspects. The process of obtaining reference samples can take a very long time, as the location of the suspect may be unknown. Issues with pre-charging delays may surface when a suspect's identity has been confirmed but the police did not diligently act upon the information. Currently, many issues involving Cold Hit DNA cases exist, from back-logged cases needing database uploading, to the lack of resources to investigate.

The defendants in Cold hit DNA cases often challenge their cases with motions that allege violations of their right to a fair trial and due process. Because of the myriad of issues involving the legality of cold hit DNA procedures—from obtaining a suspect's name to bringing about charges—the Cold Hit DNA Unit works closely with detectives to get a case ready for charging.

D. People v. David Haqq: A Cold Hit DNA Case

This is another case in which I was the assigned prosecutor.

1. Facts

On September 22, 1998, two 15-year old girls, Jane Doe 1 and Jane Doe 2, were on their way back to Oakland High School after having lunch at a McDonald's in Berkeley. Before going to their next class, the two stopped at an AM/PM Minimart located across the street from the High

School. Jane Doe 1 noticed that a black van in the AM/PM parking lot had begun following them. As they walked near the van, Jane Doe 1 saw the driver of the van get out and forcibly grab Jane Doe 2 and push her into the van. At almost the same time, the passenger got out of the van and grabbed Jane Doe 1 from behind and forced her into the van. There were four individuals inside the van besides Jane Doe 1 and Jane Doe 2. The van then drove off.

While inside the van, a suspect who had been seated in the front passenger seat moved to the back and raped Jane Doe 1. After the front seat passenger was done, the driver exchanged seats with the passenger and raped Jane Doe 1, as someone else drove. During these incidents, Jane Doe 1 felt a lot of pain and began to bleed. While inside the van, although Jane Doe 1 could not see Jane Doe 2, she heard Jane Doe 2 being raped

The van came to a stop and when the doors opened, Jane Doe 1 ran out. After running for some time, she saw Jane Doe 2 and they both ran inside a local liquor store. Soon after, the police were contacted, and Jane Doe 1 and Jane Doe 2 were taken to a hospital. A police officer took down Jane Doe 1's statement.

At Highland Hospital, a Sexual Assault Response Team (SART) examination was performed on Jane Doe 1 and Jane Doe 2. Jane Doe 1's SART examination findings indicated that she had suffered multiple painful lacerations to her genital area which were consistent with a pattern for non-consensual intercourse. Vaginal swabs and her clothing, including her underpants, were collected as evidence.

On November 13, 2002, the Oakland Police Department's (OPD) crime laboratory concluded that sperm was present in Jane Doe 1's vaginal swabs from her SART exam. The crime laboratory also found sperm present in Jane Doe 1's underpants from a different male sperm source than that found in the vaginal swabs. A third DNA sperm profile was found on Jane Doe 2's clothing swab. The crime laboratory uploaded all three sperm DNA profile onto CODIS, the Convicted Offender DNA Index System.

On May 31, 2005, the DOJ faxed a letter informing the OPD of a DNA hit. The hit was made to David Haqq and the fax stated a new sample should be obtained from this individual. To conclusively identify the hit, the crime laboratory requested a reference sample from David Haqq.

On October 4, 2007, the information related to the cold hit on Jackie Hubbard was given to the OPD. On December 14, 2010, the OPD received a letter from the FBI indicating that the sperm DNA profile from Jane Doe 1's underpants had a hit to Gerrold Demins.

Upon learning that Gerrold Demins has an identical twin brother, reference samples were requested from both Gerrold Demins and Gerome Demins. The crime laboratory compared reference samples from both Demins brothers to one another and found that they shared an identical DNA. A DNA sample from one identical twin cannot be distinguished from the other identical twin. The laboratory concluded that neither of the Demins twin's DNA profiles could be eliminated as the sperm donor to Jane Doe 1's underpants, and thus, the laboratory could not determine which twin was responsible for the rape.

On April 21, 2011, detectives obtained a DNA reference sample from David Haqq. On June 8, 2011, Criminalist Cavness completed an analysis of defendant's reference sample which was compared to the DNA profile from Jane Doe 1's vaginal swabs and found a match. He concluded that defendant could not be eliminated as the sperm donor. The statistics show one in one quintillion that defendant cannot be eliminated as the donor of the sperm.

On November 3, 2011, the Grand Jury indicted Haqq on two counts of forcible rape in concert and one count of kidnapping with intent to rape. On May 23, 2013, a jury convicted Haqq of all charges.

2. Analysis

The DNA Unit became involved as soon as the police began investigating the case. One of the concerns the officers shared with the Unit was that the name of the suspect had been known, but that the case had not been investigated until six years after the fact. The officers requested *Ramey* warrants with the hope of gathering more evidence after arresting the three known suspects. Each of the suspects was arrested. Haqq gave a statement claiming innocence, forgetfulness and that if indeed his DNA was found, it must have been consensual sex. Hubbard asked for a priest and a lawyer. Gerrold Demins invoked his rights and refused to speak with the detectives.

The DNA Unit decided to file charges only against Haqq. Jane Doe 1 was located. She had remained traumatized nearly 13 years after enduring the gang rapes. Though Hubbard's DNA was found on Jane Doe 2, her whereabouts were unknown, and at that time, the Charging DDA decided against filing charges against Hubbard. Initially Gerrold Demins had been charged but the defense presented evidence that Gerrold Demins had a twin brother and without further evidence of the identity of the rapist, charges were dropped against Gerrold Demins.

The DNA Unit handed the case to the Child Sexual Assault Unit, as the crimes occurred when Jane Doe was 15 years old. With the hopes of resolving the case short of a jury trial and to avoid having the victim endure cross-examinations, the case was presented to the grand jury. The grand jury indicted Haqq, and an indictment warrant for his arrest was issued.

After the indictment, the detective and I went to speak with Gerrold Demins. He was offered eight years in prison to testify against Haqq, but Hubbard declined. Haqq was offered a determinate sentence of 25 years, and he declined the offer. After speaking with the detective, I decided not to file charges against Hubbard at that time.

A year and a half after the preliminary hearing, Haqq's case went to trial. The victim had been reluctant to testify, but she found the strength to testify in front of the jury. The jury convicted Haqq of all counts and the judge sentenced him to nearly 60 years to life in prison.

PROACTIVE CASES HANDLED BY THE ALAMEDA DA'S OFFICE

The Alameda DA's Office has a very proactive Consumer, Environmental, and Worker Protection Division (CEWPD). CEWPD handles complex cases and is comprised of prosecutors and DA Inspectors who focus primarily on fraud and other economic crimes, environmental violations, and unfair business practices. CEWPD has five units: consumer, environmental, real estate, insurance, and health care fraud. CEWPD DA Inspectors handle all aspects of the investigation from the start.

I. TYPES OF CASES HANDLED BY THE CEWPD'S FIVE UNITS

A. Consumer Fraud

CEWPD's consumer fraud unit is the largest unit within the Division. The term consumer fraud has a broad meaning, thus the unit handles major complex fraud cases including but not limited to public corruption, corporate fraud such as embezzlement, complex financial fraud such as investment fraud or securities fraud, and high tech crimes.

The consumer fraud unit prosecutes cases either criminally or civilly. The legal authority to prosecute cases civilly comes from the consumer protection laws under California Business & Professions Code section 17200 et seq., and false advertising laws under California Business & Professions Code section 17500 et seq.

1. Public Corruption Cases

CEWPD will investigate public corruption cases involving local politicians at the county and city level. The Alameda DA's Office will refer the case to state and federal authorities for any public corruption cases that involve a state or federal politician. To avoid any conflicts of interest, the DA Inspector's division will handle all aspects of a public corruption case and will not involve the local police associated with the politician's jurisdiction in any way.

2. Corporate Cases/Financial Crimes

CEWPD's consumer fraud unit handles all allegations of corporate fraud and financial crimes. On many occasions, the CEWPD will assist and work with outside agencies, such as other DA offices, CA DOJ, and various federal agencies.

3. Legal Irregularities

CEWPD will investigate any allegations of judicial acts of fraud or criminal activity. These allegations may have severe political repercussions and all due respect and utmost care will be afforded these cases to fully investigate a judicial officer prior to filing charges. If the DA's Office decides no conflict exists, the CEWPD DA Inspectors will handle the entire investigation.

The DA's Office will refer any allegations of prosecutorial fraud or criminal misconduct by a prosecutor to the State Bar of California and the CA DOJ for investigation.

4. High Tech Crimes

CEWPD will investigate high tech crimes but depending on the facts of the case, the resources available, and the far-reaching ramifications of such crimes, CEWPD will contact state and federal authorities for assistance. Many times, if the case meets the criteria for referral to an outside agency, the entire case will be handed over or CEWPD and the outside agency will work together to prosecute the case either civilly or criminally.

B. Environmental Protection

California state laws relating to the handling, disposal, and transportation of hazardous waste and material, the California Fish and Game Code, and the California Water Code (laws concerning the protection of water ways) give the local DA's office the authority to proceed both criminally and civilly in environmental protection cases.

C. Real Estate Fraud

The Real Estate Fraud unit handles any kind of fraud concerning real estate such as equity stripping of homes, false loan applications involving identity theft, filing of false documents, including falsified documents filed with the recorder's office, loan modification scams, and foreclosure fraud.

D. Insurance Fraud

The Insurance Fraud unit handles auto insurance frauds and worker compensation frauds. An auto insurance fraud can be based on a consumer's attempt to defraud an insurance company, or involve an organized auto insurance fraud ring where auto body shops submit false claims. Workers Compensation Fraud is based on a claimant fraud, which involves lying about injuries or where the injury occurred, and "premium" fraud cases which are based on the premiums that every employer must pay for worker's compensation insurance.

E. Health Care Fraud

The Health Care Fraud unit deals with federal and state sponsored Medicare and Medi-Cal programs. This type of fraud consists of individuals obtaining or using Medicare or Medi-Cal fraudulently and doctors who illegally provide medications, or doctors who participate in fraudulent billing activities.

II. HOW CASES IN CEWPD ARE INITIATED

CEWPD cases originate from many sources. The consumer fraud cases may come from a multitude of state agencies, the local police agencies, and also federal agencies such as the Department of Business Oversight and the Better Business Bureau. Individuals can also file a consumer fraud complaint on the Alameda DA's Office website.

The environmental fraud cases can originate from whistle blowers, the DA Inspector's investigations, and from leads provided by the Environmental Task Force. The Environmental Task Force includes all the local agencies such as the fire departments and hazmat units for all local cities in Alameda County, the California Environmental Protection Agency, and the U.S. Environmental Protection Agency. The DA Inspector's stand-alone investigations can include "dumpster diving" cases where the contents of a company's trash are sifted through to ensure that hazardous materials, such as batteries, are not being disposed of improperly.

The real estate fraud cases mostly come from the victims who directly contact the unit, the local police agencies, and from DA Inspector initiated cases.

Insurance companies and the Department of Insurance are the primary sources of cases that are brought to the Insurance Fraud unit. Insurance carriers have an incentive to prosecute both worker compensation and auto insurance fraud cases. These companies have internal civilian inspectors who inspect allegations of fraud and write reports before submitting them to the Alameda DA's Office.

A. CEWPD Cases Initiated by the Police

1. Overall Plan of the Investigation

Most police initiated cases that are brought to CEWPD start as complaints from the public. The assigned DDAs and the DA Inspectors formulate the overall plan of investigation. The local police departments that have dedicated units assigned to complex cases involving consumer fraud and these units will investigate the case and bring it to the CEWPD for charging. However, even if the police decide that criminal charges may not apply, they will still consult with the CEWPD DDAs to see if the case can be pursued as a civil action.

2. Prosecutor's Involvement in the Investigation

The DA Inspectors assigned to CEWPD are the internal investigative police agency for the unit. Thus, the CEWPD DA Inspectors handle all aspects of an investigation once the CEWPD prosecutors decide to get involved. The assigned DDA will initially decide whether to pursue criminal methods of investigation, such as obtaining search warrants, wiretaps, arrest warrants, or whether to pursue the matter in civil court and use civil discovery methods, such as subpoenas for records and depositions of parties and witnesses.

3. Police Communication with Prosecutors

Once a case has been initiated by the police and referred to CEWPD for investigation, police involvement remains minimal since in most cases, the CEWPD DA Inspectors will take over the investigation.

The police know that CEWPD has prosecutors and inspectors who are experts in the field. They will often ask the CEWPD DDAs for guidance and in most cases, hand over their investigation if they decide that criminal charges are not feasible or that civil remedies may be in

the best interests of justice. However, if the police have already conducted their own investigation and brought the case over for charging, their continued role will differ depending on whether the prosecutor pursues the case criminally or as a civil action.

B. CEWPD Cases Initiated by Prosecutors

1. Resources

The Alameda DA's Office resources come from its annual County budget, state and federal grants, and from portions of penalties paid by the defendants in civil actions. The Alameda DA's Office has over 60 DA Inspectors who are all sworn peace officers. CEWPD also employs paralegals and forensic accountants to assist the DDAs in civil litigations.

2. Obtaining Evidence

The methods by which evidence is obtained in proactive cases depend largely on whether the case will be handled criminally or civilly. If a case is handled criminally, then the same rules for search and seizure, as discussed above, will apply. If a case is handled as a civil matter, then the civil discovery methods, such as interrogatories, demand for production of documents, and depositions will be employed.

The decision whether to prosecute a case civilly or criminally can have various consequences. A civil case does not need a unanimous jury and the burden of proof is preponderance of the evidence. A criminal case on the other hand requires a unanimous verdict to convict and the higher standard of proof, proof beyond a reasonable doubt.

Many factors dictate whether CEWPD pursues a case civilly or criminally, such as, the severity of the conduct, the identity of the actors involved, and ethical considerations. For the severity of the conduct analysis, the prosecutors consider the intent of the wrongdoer. If no deliberate intent exists and the conduct was an inadvertent violation of law, then this factor would weigh in favor of a civil action. If the conduct was done with a deliberate intent to violate the law then a criminal action may be warranted. If the wrongful actor is a company and no individuals have clear liability, then a civil action may be pragmatic. In cases where discovery is required to build a case, then civil discovery methods may be the only way to move forward.

CEWPD takes ethical considerations very seriously. Under *Rule 5-100* of the California Rules of Professional Conduct, prosecutors cannot "threaten to present criminal" charges to gain an advantage in a civil case. Once the decision to file a civil case has been made, the option to file criminal charges is no longer available. Thus, the prosecutors cannot use civil discovery techniques to further a criminal investigation.

3. Interview by Prosecutors

When a prosecutor conducts his own investigation, and interviews a suspect, he will either record the interview and/or have an Inspector or another DA personnel present. If a witness is

needed to testify, then the other person who had been present can testify instead of the prosecutor, or the prosecutor can use the recording to impeach the suspect or the witness.

All witness interviews or confessions are documented by means of a written report summarizing the event and/or an audio or video-recording of the statement. The method of choice is up to the assigned DDA prosecuting the crime.

Uncooperative witnesses or accomplices will be subpoenaed to testify in court for a hearing or for trial. Cooperative witnesses or accomplices will voluntary agree to speak with the DDA and/or the DA Inspector about the crime.

C. Task Force Investigation

Many task forces are formed in order to share information and resources. The decision as to which agency will lead the investigation will depend on many factors. However, in most cases, if the Alameda DA's Office is the only prosecuting office involved, then the Office will take the lead and direct the investigation. If other prosecuting agencies are involved in the task force, an agreement as to which office will take the lead will be informally determined.

D. Conflict of Jurisdiction

If another agency and the Alameda DA's Office conduct an investigation over the same case, then the DA's Office will usually take over the investigation at the request of the other agency. Because of limited resources, in most cases, if the agency has begun an investigation, the DA's Office will defer to their investigation. The DA's Office will ultimately take over the case after the filing of charges.

II. CRIME INFORMATION

A. Crime Information Submitted to the Alameda DA's Office

In most cases, the Alameda DA's Office will refer all crime reports to the local law enforcement agencies. However, crime reports involving CEWPD will be directed to the CEWPD DA Inspectors.

B. Crime Information Obtained During Trial

A prosecuting DDA may obtain reports of a crime during his preparation for a hearing or trial. If appropriate, the prosecutor will contact a local law enforcement office and request an investigation. However, if the crime report has a direct bearing on the case at hand, such as an additional sexual abuse victim coming forward on a pending case, the DDAs will have the DA Inspectors investigate the crime and amend to add additional charges, use the new facts in plea bargaining, and/or use the new facts as prior conduct, if permitted at trial.

C. Transfer to Other Agencies

Depending on the crime information, the prosecutor who obtains the information will alert the charging DDA who, in turn, will either contact the local law enforcement agency to transfer the information or refer the information to the DA Inspectors for further investigation. All DDAs assigned to a case at any level, from pretrial to trial, have the capacity to amend charges during the pendency of a case.

III. THE FOUNDATION OF A PROSECUTOR'S INVOLVEMENT IN INVESTIGATIONS

A. Law

A law enforcement agency's duty to investigate and arrest persons for crimes committed within its jurisdiction comes from the statutory mandates to peace officers under California Penal Code section 830.1, and the city or county charter. In California, DA Inspectors fall within the definition of "peace officers." Cal. Penal Code § 830.1(a). A search warrant authorizes a peace officer to search a person or thing and to bring the same before the magistrate judge. *Id.* § 1523. A peace officer may arrest a person in obedience to a warrant, or when probable cause exists to believe the person to be arrested has committed a public offense or a felony. *Id.* § 836. A peace officer's authority extends to any place in California as follows:

> "(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves.
>
> (2) Where the peace officer has the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by him or her to give consent, if the place is within a city, or of the sheriff, or person authorized by him or her to give consent, if the place is within a county.
>
> (3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer's presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense."

Id. § 830.1(a)(1)-(3).

B. Memorandum of Understanding (MOU) with Law Enforcement Agencies

Many MOUs exist between the Alameda DA's Office and the local law enforcement agencies. These MOUs state the terms of the cooperation, and outline the procedures that the agencies and the Alameda DA's Office agree to follow. An MOU may pertain to one particular agency or encompass multiple agencies. Examples of such MOUs include, the Alameda County Child Abuse Protocol, *Brady* Procedures, a management system for sharing of information, and the Alameda County Regional Auto Theft Task Force.

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
LOS ANGELES, CALIFORNIA

BY: JACOB JOON HO YIM, DEPUTY DISTRICT ATTORNEY[46]
SCOTT PAIK, SENIOR INVESTIGATOR[47]

[46] Jacob Yim has been a Deputy District Attorney with the Los Angeles County District Attorney's Office since 2000. He has prosecuted and brought to trial over 91 jury cases, 34 complex gang murder cases, and six special circumstances murder cases. He most recently completed an eight-year assignment with the Hardcore Gang Division where he was dually-designated as a Special Assistant United States Attorney (SAUSA) in the Central District of California. As a SAUSA, he vertically prosecuted 101 cases involving gang members who committed aggravated felonies, were deported and then re-entered the United States. He trains police officers on testifying as gang expert witnesses, and has conducted investigations with law enforcement officers on wiretaps and to identify the targets of gang murders.

[47] Scott Paik has been a Senior Investigator with the Los Angeles County District Attorney's Office, Bureau of Investigation, since 2000. He provides prosecutorial support to Deputy District Attorneys by conducting additional investigations needed to obtain a conviction. He has worked in many specialized divisions within the Los Angeles DA's Office, including: Fraud Investigation Division, Special Litigations Division, Organized Crime Unit, Specialized Fraud Division, and the Hardcore Gang Unit. Before joining the Los Angeles DA's Office, he was a police officer for six years with the Los Angeles Police Department.

INTRODUCTION[48]A

The County of Los Angeles is located in Southern California. It is the most populous of the 58 counties in the State of California with approximately 10 million residents. The County spans 4,083 square miles and is divided into 88 incorporated cities and many unincorporated areas.

The Los Angeles County District Attorney's Office (LADA) serves and protects the people of Los Angeles County by prosecuting crimes that are committed in the 88 cities and the unincorporated areas of the County. The LADA is the largest local prosecutorial office in the United States with nearly 1000 Deputy District Attorneys who prosecute felonies (serious crimes) and misdemeanors (less serious crimes). Each year, the LADA Deputy District Attorneys prosecute more than 71,000 felonies from all 88 cities and roughly 112,000 misdemeanors committed in the unincorporated areas and in 78 of the County's 88 cities. The remaining 10 cities in the County, such as the cities of Los Angeles, Long Beach, Santa Monica, and Pasadena, have city prosecutors who handle misdemeanor crimes and municipal code violations that occur within their city limits.

OVERVIEW OF THE WORK OF THE LADA AND THE LAW ENFORCEMENT AGENCIES

I. CRIMINAL INVESTIGATION

In Los Angeles County, a majority of criminal investigations is conducted by the local law enforcement agencies, such as the Los Angeles Police Department (LAPD) and the Los Angeles County Sheriff's Department (LASD).[49] After completing their investigations, these law enforcement agencies present their investigative results to the LADA for filing considerations. The LADA vigorously, effectively, and fairly prosecutes all who commit crimes and ensures that those convicted of crimes are appropriately punished.

A criminal investigation can start in reaction to an offense (police respond to a crime that has already occurred) or start proactively (investigation starts before and during the commission of an offense). Thus, depending on the type of crime, Deputy District Attorneys (DDA) in the LADA and/or the DA Investigators may play a large role during the investigative phase of a criminal case.

A. REACTIVE CRIMINAL INVESTIGATIONS

Reactive criminal cases comprise the majority of cases handled by the LADA. These cases typically involve investigations by the local law enforcement agencies after a crime occurs, without any direction or prompting from a prosecutor, which are then presented to the prosecutors

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[48] The following discussions were written by Deputy District Attorney Jacob Yim.

[49] The Los Angeles County Sheriff's Department provides law enforcement services to 40 contract cities and 90 unincorporated communities in the County, and operates the County jail facilities. For additional information about the LA Sheriff's Department, visit www.lasd.org.

for filing considerations. Some examples of a felony reactive case include a robbery, theft, assault, battery, drug possession, and firearms possession.

B. Proactive Criminal Investigations

In contrast, with proactive cases, prosecutors work closely with law enforcement officers and investigators and play an active role in directing the investigations. These types of cases are assigned to designated special units within the LADA. Examples of proactive cases include felony fraud crimes, or felony public corruption cases.

For criminal offenses that are proactively investigated, the DDAs work closely with law enforcement officers from the initial investigative stage to ensure that proper legal investigative methods are utilized, and to ensure that crucial evidence is gathered for a successful prosecution. In most proactive cases, the same prosecutor files and prosecutes the case.

II. CASE HANDLING AND PROSECUTION

Similar to the different ways in which criminal investigations are handled, criminal cases can be prosecuted either horizontally or vertically.

A. Horizontally Prosecuted Reactive Cases

With a routine horizontally prosecuted case, the investigation by law enforcement officers and the subsequent prosecution by the DDA usually occur in the fashion described below.

After a crime is committed, law enforcement officers are notified and they arrive at the scene of the crime to investigate. A witness or witnesses are interviewed and physical evidence is collected. Thereafter, the case is presented to a DDA for filing with a specific charge sought by the law enforcement representative, usually a detective. The criminal charge for which the suspect was arrested, however, may not be the charge that is filed against him/her after the matter is reviewed by the Filing DDA. A Filing DDA may charge a different crime if the elements of the other crime or crimes are met.

1. Filing Charges

The decision as to whether or not to file a criminal charge is the responsibility of the numerous DDAs assigned to that role. With a reactive case, once evidence is gathered by law enforcement officers, the case is presented for filing to a Filing Deputy. A Filing Deputy (also referred to as a Complaint Deputy) is a DDA with some trial experience who would understand the strengths and weaknesses of the case and is knowledgeable about the recent case authority that may govern the collection of evidence in the case. A detective from a local law enforcement agency would bring all the materials obtained during the investigation, including reports generated from the responding officers, and review these with the Filing DDA. Any questions regarding the investigation would be posed to the detective at this meeting, and this face-to-face discussion between the prosecutor and the law enforcement officer allows for the disclosure of the strengths and weaknesses of the case as seen from the perspectives of both the Filing DDA and the detective.

The face-to-face meeting generally reduces misunderstandings that could arise from simply reading case files without a live person addressing questions and concerns.

In certain offices within the LADA, a detective would fill out a Complaint Assignment Card. (Appendix A.) This Card informs the Filing DDA of the custodial status of the suspect and also whether the case had previously been discussed with another DDA. The Card indicates if the case had been rejected or held for further investigation. This Card serves to not only address the delay officers may encounter when filing cases, but also alert the Filing DDA of the status of the filing.

In addition to the Complaint Assignment Card, a Charge Evaluation Worksheet (Appendix B) is utilized in the filing process. The Filing and/the Complaint DDA would sign this Worksheet at the time of filing. In addition, the filing officer, typically the detective, would sign that he or she has "conveyed all relevant information to the above-named Deputy District Attorney to be used in consideration of a filing decision." Also, if the case is being rejected, the Worksheet provides a section for the Filing Deputy to indicate the reason the case is being rejected or to indicate that further investigation is requested.

In order for a case to be filed, the evidentiary sufficiency of the case has to be evaluated. The Filing DDA must determine whether there is sufficient credible evidence to warrant filing of a charge and to convict the accused of the charges. The basic criterion for charging is not the "beyond a reasonable doubt" standard. A case may be filed if there is legally sufficient admissible evidence regarding all the elements of the crime. And, legally sufficient admissible evidence regarding identity must be present. Also, based on a thorough consideration of all the facts, the Filing DDA must be satisfied that the evidence proves the accused is guilty. The admissible evidence must be of such convincing force that it warrants conviction of the crimes charged, by a reasonable and objective fact-finder, after hearing all the evidence available at the time of filing and after considering the most plausible and reasonably foreseeable defenses inherent in the prosecution's evidence.

Some of the reasons for declining to file a criminal charge include: lack of corpus delicti; lack of sufficient evidence; inadmissible search and seizure; victim unavailable or declines to testify; witness unavailable or declines to testify; case being combined with other counts and cases; interests of justice; case being referred to another jurisdiction; case being deferred for revocation of parole; pre-filing deferral; probation violation being filed in lieu of the present filing; or referral to the City Attorney for misdemeanor considerations. This is not an exhaustive list, and other reasons can and do exist. The Charge Evaluation Worksheet specifically provides for the DDA to request "further investigation" as a reason for not presently filing charges.

In the Charge Evaluation Division of the LADA, to resolve disputes that may arise between the Filing DDA and the law enforcement representative who brought the case for filing considerations, an "Appeal Process/Charge Evaluation Division" form is provided. (Appendix C.) This form was created because the LADA recognizes that "on occasion, investigating officers disagree with the decision made by the filing deputy." This disagreement may concern a rejection, or a temporary rejection, as in a request for further information of a case. Although such disagreements are usually handled professionally, "in order to provide uniformity, minimize

discord, and give investigating officers a fair opportunity to have a filing decision reviewed by a second complaint deputy," an appeal procedure is posted for viewing by law enforcement officers when they come to the DA's Office to discuss the investigative matters with the Filing DDA. The appeal process is designed to give the investigator a legitimate and unbiased second opinion about the case.

2. Improper Basis for Filing

In deciding whether to file charges, the assigned DDA cannot consider any improper basis. Improper basis for charging would include race, gender, religion, national origin, physical or mental disability, and the age of the victim, witness or the accused. A mere request by a law enforcement agency to charge also would be an improper basis to file. Public or media pressure to charge or to facilitate investigation, or to intentionally assist or impede efforts of any public official or candidate for office, would all be improper basis to charge a crime. If the investigation appears incomplete, the Filing DDA could insist on further investigation before filing, unless the investigating officer is aware of specific articulable facts that the defendant would flee, and of the reasonable likelihood of obtaining a conviction.

3. After Charges Filed

After a criminal charge is filed against a suspect, he/she is arraigned in an arraignment court, usually by a Calendar DDA. The suspect may be given an offer for an early resolution, and the offer at this stage generally involves the least amount of custody time. If the defendant rejects the offer, a preliminary hearing is set within ten court days or 60 calendar days of the suspect's arraignment.

A preliminary hearing is conducted in a courtroom designated for such hearings. Usually, two or three DDAs are assigned to this courtroom to handle preliminary hearings. The case is presented to a magistrate judge, and the judge determines whether a reasonable cause exists to believe a crime had been committed and that the defendant is the individual who committed the crime. Once that determination is made, the defendant is held to answer on the charges. Two weeks from this date, the defendant would be arraigned on the felony information, which is a charging document.

At this point in the proceedings, the case is assigned to a courtroom for pretrial motions and ultimately for trial. In most instances, the Calendar DDA, who is a more senior prosecutor, would make a pre-trial offer after further review of all discovery, including any additional investigation that has been conducted. If unresolved, the matter would be set for trial.

The time prescribed for trial is 60 days from the time of arraignment. Horizontally prosecuted reactive cases are the most prevalent cases in the LADA, and they are handled by any and all DDAs with the requisite amount of knowledge and experience.

4. Hypothetical Case Demonstrating the Roles of Law Enforcement Officers and Prosecutors in Investigating and Handling a Reactive Case.

While on patrol, two LAPD officers are notified of an attempted rape and respond to the scene of the crime. They arrest the suspect near the scene of the crime. The suspect is informed of his rights including his right to counsel, and taken to the police station. While there, he declines his right to counsel and confesses to the LAPD detectives who have been assigned to the case. The detectives write an investigative report based on the suspect's confession. During the confession, the suspect also tells the detectives that he hid the knife used in the attempted rape inside his car and that the car is parked near the crime scene. A search warrant is obtained, and the knife is seized from the suspect's car. The suspect is in custody, and the criminal proceedings against him are initiated.

a. Role of Law Enforcement Officers

During the police investigation phase, the role of the responding officers is to investigate the crime: collect the testimonial and physical evidence of the purported crime. The officers would also make the arrest and be responsible for the safety of the public and the parties involved. A detective from the police department may be called to the crime scene to direct the investigation. The detective may tell the officers which witnesses to interview, what items to collect and to preserve, and/or what items or locations to photograph. If a detective is not sent to the crime scene, a detective may take on the case later and conduct further investigations, including further interviews. An assigned detective, for instance, would be responsible for conducting any subsequent interviews that are warranted, of those who have already given statements or conduct full interviews of those who only provided contact information.

b. Role of Prosecutors

The role of prosecutors is minimal during the investigative phase of the above hypothetical case. The assigned detectives from the police department would decide the progress and the conclusion of the investigation. The case is then presented to a Filing DDA for filing considerations.

Even with a simple hypothetical reactive case described above, the prosecutor could exert substantial power because he/she would decide whether sufficient evidence exists to file the case. If the assigned detective needs a search warrant issued by a judge to seize additional evidence, the detective would draft the warrant and present it to a judge for permission to conduct a search and seize additional evidence. In Los Angeles County, police officers do not need to have a DDA review and/or approve the search warrant request before presenting it to the judge. The police may seek the advice of a prosecutor in obtaining a warrant, but generally, an experienced detective knows to be thorough and comprehensive in gathering evidence.

To obtain other types of evidence, such as telephone logs, email account information, and bank account information, again a detective would draft a warrant and present it to the judge for approval. The topic of search warrants and the application process is discussed later in the chapter.

B. Vertically Prosecuted Proactive Cases

Proactive cases are criminal matters that are generally prosecuted vertically by the LADA, and handled by special units in the Office. These special prosecution units work in conjunction with the LADA Investigators (DAI) that number 300 throughout the Office. For instance, in the Bureau of Specialized Prosecutions, DAIs assist DDAs who specialize in family violence, hardcore gang, major crimes, major narcotics, sex crimes, and target crimes (crimes against peace officers, arson crimes, and child abduction offenses). In the Bureau of Fraud and Corruption, specialized units prosecute cases involving automobile insurance fraud, consumer fraud, healthcare fraud, high tech crimes, organized crimes, public assistance fraud, and cases aimed to protect the integrity of the justice system and the public. In the White Collar Crime Division, the DDAs handle real estate fraud and elder abuse cases.

The crimes handled by the LADA's special prosecution units can be extremely complex, sensitive due to the victims or the witnesses involved, or involve important or widespread public interest. For instance, the Major Crimes Division of the LADA handles particularly aggravated felony offenses that have generated significant public interest, such as crimes that are serious, brutal or heinous; crimes capable of arousing widespread public interest or concern; crimes offending public sensibilities; extraordinary white collar crimes; negligent death or serious bodily injuries to workers; environmental crimes with serious consequences to the public; crimes involving prominent persons; the killing or serious injury of a law enforcement officer or firefighter while on duty; and the maiming or killing of any animal or serious animal attacks on humans. Thus, to assist in the decision to file charges, the Office has established guidelines to determine whether to file charges in these types of cases. And, these cases are vertically prosecuted, which means the same prosecutors are involved in the case from the pre-filing investigation stage, to filing, and all stages of the trial.

Gang murder crimes are also vertically prosecuted in the Office. The case is brought to a prosecutor for filing and the same prosecutor will be responsible for the case at every stage including trial. Leading up to trial, the prosecutor may have the law enforcement agency conduct further investigations to bolster the case.

1. Role of a Prosecutor in a Vertically Prosecuted Case

Prosecutors play an important role in investigating cases that are prosecuted vertically. Often, in vertical prosecutions of gang murder cases, the prosecutors work closely with the homicide detectives from a local law enforcement agency to plan and collaborate in the investigation. The communication between prosecutors and law enforcement officers is a valuable tool in the successful prosecution of the case. The prosecutor would, for instance, give suggestions on what items and areas to include in search and seizure warrants, and the detective would draft the warrant. A prosecutor would direct the detective or DAI on whom, and when, to serve witnesses, and also identify the potential targets for a wiretap. The timing of the arrest also would be a critical issue that would be decided together with law enforcement officers because of issues with arraignment, and because some investigations involve the placement of other potential suspects together in jail cells to see if they communicate about the crimes. Follow-up interviews would also be at the direction of prosecutors as far as what witnesses need to be re-contacted and interviewed for

clarification purposes and for further case development. Since the detectives from the police agency would be familiar with the investigation, they would be in the best position to re-contact and interview witnesses with the prosecutor directing the interviews. The investigation process is a collaborative effort, which means that there is an on-going communication between law enforcement officers and prosecutors, including after office hours, and on weekends.

The decision to file a case would be made by the same prosecutor who was involved from the beginning. In order to assess the credibility of witnesses, the prosecutor would review rap sheets, test the statements against the physical evidence that has been gathered, and compare various accounts/statements given by witnesses. In evaluating credibility, prosecutors consider factors such as the victim's motive to lie, and if the victim is young, whether the investigation was unduly suggestive. The existence or the non-existence of physical corroboration, like physical injury or forensic evidence, or whether additional witnesses corroborate the victim's account, are important factors to also consider. Additionally, prosecutors consider legally admissible statements by the defendant in determining credibility.

2. Hypothetical Cases to Demonstrate the Investigation and the Handling of Proactive Cases

The cases discussed below are sample vertical cases that were both filed and prosecuted by the same DDA. The LADA is organized to provide for the prosecution of gang murders by the Gang Unit prosecutors. A task force is not formed specifically for such cases, but a task force may be formed to take down many suspects at the same time. In most cases, investigations are conducted by homicide detectives that work with gang units and gang experts. Police officers and detectives are trained to testify as gang experts in court by other agencies, other officers, and by the DDAs.

a. *People v. Smith* (Drive-By Murder)

This is an actual drive-by murder case vertically prosecuted by the LADA. The names have been changed, and the facts shortened for this publication.

Facts: Security cameras attached to a house near the scene of the crime capture footage of a dark car being driven through the neighborhood. The cameras capture an arm extending out from the car's rear passenger window and dropping a white cup onto a pavement. A minute later, the same car returns, and this time an arm extends out from the rear passenger window with a gun and fires several shots at the victim who was riding a bicycle on the street next to the car. The victim dies.

Police officers and detectives from the LAPD respond to the shooting. A witness who heard the gunshots and saw the victim lying on the ground bleeding called 911. With assistance from the witness, the police locate the video footage from the surveillance cameras, and see that a white plastic cup had been dropped from the car. They run a DNA test on the cup.

Defendant Smith, a member of the X gang, is arrested two months later in connection with an unrelated investigation. After Smith's arrest, a detective places Smith in a cell next to a man known to belong to the same X gang. During their conversation, Smith says, "That was my first

time, the first time something went wrong, and the last time." Smith also mentions the name of the street where the shooting occurred. The detective had not mentioned that street when he questioned Smith. Smith also talked about how he was a close friend of the owner of the car involved in the shooting.

An officer with the LAPD who was an expert on the X street gang knew that Smith is an X gang member. Smith also self-admitted to being a member of the X gang. The X gang has a rivalry with male Hispanic gang members in the city, and the area where the shooting occurred is claimed by the Hispanic gang.

A criminalist compared the DNA extracted from the straw found on the white cup with Smith's DNA. Smith's DNA was found to match the DNA recovered from the straw of the white cup recovered from the scene of the drive-by shooting. The DNA from the straw was a mixture of a major and minor profile that matched Smith's DNA profile. The random match probability for the major profile was estimated to be one out of one septillion.

Case Handling and Prosecution: This case was vertically prosecuted. The case was brought for filing, and the same prosecutor who filed the case handled the trial. Although some of the investigation had been conducted by the LAPD prior to the case being reviewed by the DDA, the prosecutor directed further investigations into the DNA evidence, trained the officer on how to testify as an expert, and most importantly, directed the use of an important investigation tool – that of placing gang members near one another in a jail cell and recording their conversations.

b. *People v. R.M.* (Special Circumstances Double Murder)

Facts: Defendant RM approached an apartment building in Los Angeles, and per a witness, asked victim #1 where he could buy marijuana. After hearing the victim say he did not know, the witness heard gunshots being fired from the direction of the defendant and felt the bullets zipping past him. The witness ran back to the apartment building and into a friend's home. Shortly after, a woman began to scream and say "He's out there dead," which prompted the witness to leave his friend's apartment and see the victim had been shot.

A few months after the shooting, defendant RM knocked on victim #2's door and asked the victim to accompany him to the store to buy beer. After leaving the apartment, but before reaching the store, victim #2 sustained a fatal gunshot wound in the abdomen. Several witnesses approached the victim as he fell to the ground. Multiple witnesses reported hearing the victim say, "It was RM's friend" who shot him, or specifically that it was "RM." Other eyewitnesses saw RM leaving the area and corroborated these statements.

Case Handling and Prosecution: This case was vertically prosecuted by the LADA. One issue that arose pre-trial was that some witnesses were hiding in a different State. The witness who had heard the dying declaration from victim #2, "It was RM's friend" was in hiding and needed to be located. After finding her in a different state, the LADA needed the cooperation of that other state's prosecutors to bring the witness back to Los Angeles. The LADA also requested assistance from the federal marshals to serve the witness and have her appear at a local court. The judge sitting in the other state court ordered the witness to appear for the California case. A

detective from California flew out to accompany the witness back to Los Angeles in case she became uncooperative.

Another eyewitness in the case was subject to deportation for his own criminal conduct. The defense had to be informed of this status, and a conditional examination of the witness was conducted since he would be unavailable at trial. A conditional examination is conducted to preserve a witness' testimony when it is believed that a witness may not be available for a later trial due to circumstances such as death or sickness. The defense is notified, and a hearing is conducted so that the witness could be subject to cross-examination and his testimony thereby admissible later at trial.

A vertical prosecution of this case allowed the prosecutors to become aware of the complex witness issues early on and to address them in the most effective manner available for a successful prosecution.

c. *People v. W, B, and C* (Retaliation Murder Investigated Using Wiretaps)

Facts: A gang member (#1) is murdered. The family of the murder victim #1 form a plan to retaliate for his death. Conversations were overheard during a wiretap investigation and jail cell recordings. Defendant W indicated that defendant B told him to "handle business." Defendant B gave defendant W the keys to a car, and W drove defendant C to the location of the shooting. They park and defendant C jumps out of the car and shoots the victim (#2) with a .45 caliber handgun.

Defendant W is a documented member of Gang X. He is also gang member victim #1's cousin. W's cell phone placed him at his residence before the murder, then at the crime scene, and then back at his house. Ballistics showed that a .45 caliber magazine found at W's residence had the same extraction marks as the casing found at victim #2's murder scene. Defendant W created an alibi for himself by staging a photo shoot and changing the date and time on the camera. Defendant W solicited several family members to take pictures for his alibi. Detectives from the Career Criminal Apprehension Team took pictures of the family as they took photographs to create W's alibi.

Defendant B is gang member victim #1's uncle. He borrowed a car and gave it to W to drive C to the shooting. The owner of the car said that B had the car on the day of the murder. A video camera captured what detectives believed was the same car fleeing the scene of the crime.

Case Handling and Prosecution: This case was vertically prosecuted. The vertical prosecution allowed the assigned prosecutor to direct the wiretap that was utilized in the pre-filing stages of the investigation. The wiretap captured some of the most critical communications between the parties. The time frame and targets of the wiretaps were directed by the prosecutor. The use of agents who were placed in jail cells to gather information was also discussed between the prosecutor and law enforcement agency. The vertical handling of the case allowed the prosecutor to maximize the use of the most effective tools available for investigation.

C. Other Important Considerations and Procedures

1. Corpus Delicti

There must be evidence of a corpus delicti. Corpus delicti is defined as "the body of a crime." Black's Law Dictionary (6th ed. 1990). Corpus delicti is the principle that a crime must have been proven to have occurred before a person can be convicted of committing a particular crime. It is the foundation or material substance of a crime: for example, the dead body in a murder case or the charred remains of a house in an arson case.

In cases posing novel or unclear questions of law regarding whether an act is a crime, the Filing DDA may file charges if the following are satisfied: there is a reasonable possibility that a court will later rule that a crime has been committed; the act is substantial in that it affects significant personal or property rights of others; and one can reasonably argue the crime had in fact been committed.

2. Use of Confessions

If an admissible confession from a suspect clearly shows that a crime had been committed, but the existence of the corpus delicti is difficult to prove, the suspect nonetheless would be charged if the following factors are satisfied: 1) there is enough independent evidence from which a DDA could reasonably argue corpus delicti had been established; and 2) a DDA believes the reasonable possibility that the court will rule that the corpus delicti had been independently established.

Only slight evidence is required to prove the existence of the corpus delicti independent of a confession. However, a DDA must be reasonably certain that a court would rule that the evidence that established corpus delicti was admissible under current statutory, case, or constitutional law. The slight evidence requirement applies to both issues of law and fact relating to the admissibility of evidence. The DDA would consider the highest court entitled to rule on the issue, not the local court. It is a statewide practice and not a local standard.

3. Evidence of Identity

The evidence to establish identity in direct evidence cases would follow this procedure:

When there is a single independent witness and no corroboration, the DDA would file a charge only if one of the following is present: 1) the witness knew the accused; 2) the opportunity to observe was substantial; or 3) the perpetrator possessed unique physical characteristics like those possessed by the accused.

In a single-photograph-identification case, in general, the DDA would not file charges based solely on a single photographic identification without further corroboration, but a Head DDA may authorize a deviation from this policy. In circumstantial evidence cases, the DDA must consider not only whether the evidence presented is legally sufficient to convict, but also whether

in view of all reasonably foreseeable defenses, the evidence is of such convincing force that an appellate court would sustain the conviction regardless of the defense raised at trial.

4. Declining to File

The proper basis for declining a charge would be: 1) the charge is contrary to legislative intent; 2) the criminal statute is antiquated and had not been enforced for many years, and most people act as if it was no longer in existence, or it no longer served as a deterrent or protective purpose; 3) at the victim's request, but only for the following crimes: assault or battery cases with no or little injury and the conduct was not likely to be repeated, and crimes against property not involving violence and conduct not likely to be repeated; 4) de minimis violations of law; 5) pending prosecution and other charges; and 6) disproportionate costs of prosecution, which would be made only with prior approval.

An improper basis for declining to charge would include: 1) restitution; 2) extradition not warranted; 3) relation of accused and victim; 4) unpopular statute; 5) lack of cooperation from the victim, but the DDA could consider this in determining if the case could be successfully prosecuted; 6) severe impact on the accused or accused's family; 7) improper motives of the complainant; and 8) in perjury cases, the Filing DDA should not decline to file simply because the defendant may be convicted on the original count; but in deciding to charge perjury charges, the appearance that the system condoned liars and that it may increase defendant's punishment should be considered.

A Filing DDA should not decline to charge because the local jurors, whether due to political or social attitudes, may unreasonably refuse to convict. The focus should be the statewide standard. Another improper reason to decline to file charges would be that an alleged affirmative defense existed, unless it is established the defense would result in complete exoneration and cannot be refuted by substantial evidence currently available to the prosecution. Examples of such defense would be insanity, entrapment, or double jeopardy

In LADA, for felonies, when a Filing DDA decides not to file charges, he/she must state the reasons for the rejection in writing and sign it. With misdemeanor cases, the Filing DDA may decline to charge by simply writing declined or rejected on the filing sheet. If a law enforcement officer wants to appeal the DDA's decision to reject the case, the investigating officer would go to the Assistant Head DDA or the Deputy-in-Charge to discuss. If the matter cannot be resolved at this stage, it would go to the Head DDA. If the City Attorney's Office wishes to appeal a decision, the Deputy City Attorney would first contact the filing DDA. If unresolved, the Deputy City Attorney's supervisor would go to the Head DDA or the Deputy-in-Charge.

5. Pending Further Investigation

The decision to file or reject a case is based on the factors mentioned above. In some instances, the matter may be pending further investigation, which means that the Filing DDA has asked the investigating officer to follow up on certain aspects of the investigation, and if subsequently satisfied, the matter would result in the filing of the case. A request for further investigation could be as simple as a request to clarify statements, or results of tests on submitted

items. Law enforcement officers respond well to the rejection of a case, and respond with cooperation for requests for further investigation if the DDA articulates the reasons for the rejection/request in a coherent and comprehensive fashion. In most instances, law enforcement officers are also aware of the deficiencies in the evidence.

When case materials are brought to the Filing DDA and the decision to file is made, within 48 hours of the arrest, the suspect needs to be brought to court for an arraignment. Once arraigned, the discovery process would not be completed but remain on-going, and any additional reports or evidence obtained would be turned over to the defense in a timely fashion.

6. Detectives and the District Attorney Investigators

After the filing, the LA Sheriff's Department would house the defendant. The police could conduct further investigation, and such further investigation is only limited by the law, and not any prosecutor. If the prosecutor finds that further investigation is necessary for trial, the prosecutor would ask the detective to so investigate. A District Attorney Investigator (DAI) would be used to perhaps transport some witnesses for a hearing or for trial. Also, the DAI may be asked to attend follow-up interviews of witnesses if the detective from the local law enforcement agency is not available. The reason for the DAI's presence would be to prevent the DDA from being put in a position of possibly becoming a witness in the case. For instance, if the witness were to change his/her story, the witness would have to be impeached by a statement made in this subsequent interview, and the DAI could be called for such purpose.

7. Plea Bargaining

Before initiating a plea bargain, the DDA would consider the opinion of the police and decide upon a deal. But, the DDA has the ultimate discretion in how the case is resolved, even if it was over the objection of the police agency. The prosecutor would screen the credibility of the defendant by looking at his/her rap sheet, and at his/her role in the crime. The prosecutor would consider other parties involved, such as the accomplices, and aider and abettors to the crime, to hold all responsible parties accountable for their actions. The prosecutor would consider how a deal would affect, or should affect, the resolution or investigation in the culpability of the other individuals. A principal party to the crime is the one who committed the crime (main actor). An accomplice is the individual who assisted in the commission of the crime—one who intentionally helped another to commit the crime. An aider and abettor is one who aided and abetted, by encouragement or action, the perpetration of the crime. An aider and abettor is the helper who was present at the crime scene, but in a passive role, such as a lookout.

8. Supervision of Police Wrongdoing

If there were any improper acts or wrongdoing on the part of law enforcement officers, these improprieties are discovered in several ways throughout the criminal justice process. In a reactive horizontal prosecution, judicial officers who review the application for warrants and review probable cause declarations would catch any wrongdoing and consequently, deny the warrant request. At the LADA, if law enforcement officers fail to adhere to the applicable law in obtaining evidence, the case may be rejected by the Filing DDA because critical information would

have been obtained without the proper legal authority. Thus, the supervision of police wrongdoing in routine horizontal cases would take the form of rejection of cases brought for filing by that officer, and by placing such information in a database that would reflect on that officer's future investigations.

9. Bribery and Narcotics Cases – Use of Informants

In bribery and narcotics cases where the cooperation of an informant is important, prosecutors would rely on detectives who have used these informants in the past. Also, the investigation often would involve the monitoring and recording of activities. Prosecutors would prefer to have available, and to make use of, the recorded testimony of an informant. These types of witnesses are often re-used; thus, to subject them to reveal their identity would harm subsequent investigations and may jeopardize their safety. For these reasons, if the investigation was recorded, the necessity of the informant testifying may be reduced or negated.

10. Disclosure of Informants

When an informant is used, the handling of the request for disclosure of his/her identity is a critical issue. In such a case, the defendant has the burden of showing the reasonable possibility that the informant could offer exonerating evidence that tends to benefit his case. The prosecution usually opposes such requests, through oral argument and case law, that the informant's identity is not material. If the court finds a prima facie case showing that the informant is material, then the prosecution opposes defendant's request through an in-camera procedure. An in-camera procedure is one in which the prosecutor, with the detective, speaks with the judge without the defense and explains the reasons why the informant identity should not be disclosed. The judge determines whether there is a reasonable possibility that a non-disclosure of the informant's identity would deprive the defendant of a fair trial.

If at the time of filing it appears that a judge would grant the motion to reveal the identity of the informant, no charges would be filed unless the investigating officer agrees to disclose the informant's identity if the motion is granted and the investigating officer agrees to make reasonable efforts to keep track of the informant's whereabouts. If no assurance is given that the informant would be made available for the hearing, then the case would not be filed.

Prosecutors test the credibility of informant witnesses, even though they did not interview the witness, by testing the facts against the investigation details for consistencies and discrepancies. By recording the testimonies of such witnesses, prosecutors would be able to examine the testimony of the witness even though the prosecutors did not interview the witness, and the recording could be used at trial to possibly impeach the witness with an earlier or different version of the facts the witness once provided.

III. COMMON HYPOTHETICAL: *PEOPLE V. VINCE, JONES, AND THOMAS*

The below described hypothetical case has been presented to all prosecutor writers for analysis and discussion based on the laws, and practice and procedures of their respective jurisdictions.

A. Facts

Judy and her friends were walking through the apartment complex of the 69 Village. They saw Willie and another boy named MoMo, and struck up a conversation. As they talked, two armed gunmen ran up and fired approximately 20 shots. A bullet hit Judy in the head and she was killed. MoMo was shot in the leg and survived.

Surveillance videos showed three men had followed Willie and MoMo. Shortly before the shooting, the three men got into a car. Two of the men were then seen coming out of the car and walking towards Judy and the crowd. Moments after, the same two men were seen running back into the car and driving away.

An informant told the police that a person named Ruth was involved in the shooting, and that she was Victor's cousin. The police learn that MoMo was suspected of killing Victor a few months before, but had not been arrested or charged with Victor's murder.

Ruth agrees to give a statement to the police. After denying any involvement, Ruth states that she was driving through the 69 Village when she saw MoMo. Ruth believed that MoMo was responsible for killing her cousin Victor. Both Victor and Ruth were associated with a "Lower Bottoms" gang. After seeing MoMo, she called her brother Sammie and her cousin Vince, and told them MoMo was in the 69 Village. Ruth was aware that her family and friends wanted to kill MoMo to avenge Victors death.

Shortly after making the phone call, Ruth met with Sammie, Vince, and friends named Thomas and Jones. All have ties to the Lower Bottoms gang. Ruth overheard Vince tell the others that MoMo had been spotted and that they needed to take care of him. Ruth said she then left for work and only heard of the murder on the evening news. The police seized Ruth's phone and saw the phone numbers of everyone who had been part of the conversation. Police obtained warrants for the phone records. The records showed that Vince, Thomas, and Jones' phones were pinging near the 69 Village at the time of the murder. The phone records for Ruth and Sammie showed that their phones were across town during the time of the shooting.

The text message between Vince and Jones on the night of the murder alluded to having pride in committing various crimes, including one from Vince welcoming Jones to the "REDRUM" club. "Redrum" is a slang term for "murder" spelled backwards.

With this information and the fact that MoMo was still alive, the police obtain a warrant to wiretap Vince, Thomas, and Jones' phones. A phone conversation was intercepted between Vince and another individual where Vince said that they missed an opportunity and needed to keep an eye out for MoMo. The police also obtain search warrants for Vince, Jones, and Thomas' homes.

At Vince's home, a gun is found that matched the bullet from Judy's head and the casings on the ground. Meanwhile, Thomas is arrested in an adjacent county and awaits trial on gun charges. The gun Thomas had on him when arrested is tested, and the casings match the other casings found at the murder scene. Vince gives a statement and confesses to his involvement.

B. Analysis and Discussion of the Investigation and Prosecution in LA County

As part of their investigation, the police would obtain the surveillance videos showing the men following Willie and MoMo and their subsequent actions. Usually, the police would obtain the videos through cooperation from the owner of the cameras and/or the recordings. If cooperation was lacking, a warrant could be used to seize the evidence or the owner of the recordings could be subpoenaed and ordered to bring the videos to court.

Information received from an informant can be used to establish probable cause without revealing the informant's identity when a search is made pursuant to a search warrant. Cal. Evid. § 1042(b). A disclosure of the informant's identity can be required only if the defendant can show that the informant is a percipient witness to the charged crime or that the informant might offer evidence tending to exonerate him. The informant's statement would probably be written down if it were to be included to establish probable cause, or it may be recorded if the need for further preservation exists. The statement need not be handwritten and/or typed up and signed because the statement itself would be inadmissible in court. The informant would have to testify and be subject to cross-examination if it were to be used in trial. However, when a search warrant is obtained, the defense attorney is precluded from cross-examining the officer-affiant about the information contained in the affidavit (including information about the informant) except in the rare situation where the defense can make a "substantial preliminary showing." All or part of the information in a search warrant affidavit provided by an informant (whose only relevance is supplying probable cause) may be sealed to protect the informant's identity.

In order to use Ruth's statements, she needed to have been given Miranda rights and her statements would have been recorded by the detective. The interview would have been audio-recorded and in most cases today, video-recorded. Signed confessions are rare, but when one is obtained, it is often accompanied by a video-recording of the confession to preserve the moment. This recording would show that the confession was not obtained under duress. The statement alone, without Ruth testifying, would be inadmissible in court. Before deciding to have Ruth testify, the contents of her statement would be evaluated strategically to see if the case is strongest with or without her testimony. For instance, if the suspect gave self-serving statements with her confession, any and all other evidence would be evaluated to see if it is necessary to use Ruth's statement.

The affidavit in support of the warrant for Ruth's phone, the text messages on her phone, and any residences would be drafted by the police detective. Depending on the carrier, the telephone records may be unavailable due to destruction. Prosecutors may review the affidavit in support of the warrant, but it is not necessary. The same handling detective would sign the request for the search warrant. The detective would fill out a probable cause declaration and present the information gathered during the investigation to request and obtain a warrant so that he could effectuate the arrest later.

In the LADA, the DDAs in the Major Narcotics Division would coordinate the approval, preparation, and the execution of the wiretap. The police agency detective would supply the contents and sign the affidavit as it relates to probable cause, but the preparation of the wiretap application would be done by the prosecutors.

Vince's confession would be video-recorded by the police. At times, a suspect may be asked to handwrite a confession which he would sign. In an ideal situation, this process would be video-recorded.

SEARCH WARRANTS IN CALIFORNIA

A search warrant is a valuable investigative tool used by local law enforcement agencies and the LADA's Office. This section will address what a search warrant is, the grounds for the issuance of the warrant and the governing laws, the affidavits in support of a search warrant, how warrants are executed, the advantages of using search warrants, and the mechanics of their preparation.

I. STATUTORY DEFINITIONS AND REQUIREMENTS

A. Search Warrant Defined

In California, "[a] search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate." Cal. Penal Code § 1523.

1. Form of Warrant

Penal Code section 1529 states that "[t]he warrant shall be in substantially the following form" and indicates what must appear in the warrant. The required form is as follows:

County of _____

The people of the State of California to any peace officer in the County of _____:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, according to Section 1524, or, if the affidavit be not positive, that there is probable cause for believing that _____ stating the ground of the application in the same manner), you are therefore commanded, in the daytime (or any time of the day or night, as the case may be, according to Section 1533), to make search on the person of _____ (or in the house situated _____, describing it, or any other place to be searched, with reasonable particularity, as the case may be) for the following property, thing, things, or person: (describing the property, thing, things, or person with reasonable particularity): and, in the case of a thing or things or personal property, if you find the same or any part thereof, to bring the thing or things or personal property forthwith before me (or this court) at (stating the place).

Given under my hand, and dated this _____ day of _____, A.D. (year).

Thus under California Penal Code section 1529, the following elements must appear in the warrant: service to "any peace officer"; the name of every person whose affidavit has been taken; the statutory grounds for issuance; a description, with reasonable particularity, of the persons, places, and vehicles to be searched; a description, with reasonable particularity, of the property and/or person(s) to be seized; whether the search shall take place during the daytime, or at any time of the day or night, as the case may be; the signature of the magistrate; and the date issued.

2. Statutory Grounds for Issuance of a Search Warrant

California Penal Code section 1524, subdivision (a), sets forth the statutory grounds for the issuance of a search warrant. A search warrant may be issued for any of the following grounds:

(1) When the property was stolen or embezzled.
(2) When the property or things were used as the means of committing a felony.
(3) When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered.
(4) When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
(5) When the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child, in violation of Section 311.3, or possession of matter depicting sexual conduct of a person under 18 years of age, in violation of Penal Code section 311.11, has occurred or is occurring.
(6) When there is a warrant to arrest a person.
(7) When a provider of electronic communication service or remote computing service has records or evidence, as specified in Penal Code section 1524.3, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
(8) When the property or things to be seized include an item or any evidence that tends to show a violation of the Labor Code section 3700.5, or tends to show that a particular person has violated Labor Code section 3700.5.
(9) When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault as provided in Penal Code section 18250. This section does not affect warrantless seizures otherwise authorized by Penal Code section 18250.
(10) When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in the possession of, or in the custody or control of, a person described in Welfare and Institutions Code section 8102, subdivision (a).

(11) When the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms pursuant to Family Code section 6389, if a prohibited firearm is possessed, owned, in the custody of, or controlled by a person against whom a protective order has been issued pursuant to Family Code section 6218, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law.
(12) When the information to be received from the use of a tracking device constitutes evidence that tends to show that either a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code has been committed or is being committed, tends to show that a particular person has committed a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code, or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code, or will assist in locating an individual who has committed or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code. A tracking device search warrant issued pursuant to this paragraph shall be executed in a manner meeting the requirements specified in Penal Code section 1534, subdivision (b).
(13) When a sample of the blood of a person constitutes evidence that tends to show a violation of Vehicle Code sections 23140, 23152, or 23153, and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required by Vehicle Code section 23612, and the sample will be drawn from the person in a reasonable, medically approved manner.

A search warrant should indicate which of the above 13 grounds is being relied upon for the issuance of the warrant. The search warrant forms contain appropriate blanks, one or more of which must be checked, to specify the grounds for the issuance of the warrant. The above 13 grounds are statutory and cannot be modified.

Of the Penal Code section 1524 grounds for the issuance of a warrant, numbers (2) and (4) above apply only to factual situations involving the commission of felonies, while grounds (1) and (3) apply to the commission of both felonies and misdemeanors. Ground number (5) above is limited to violations of Penal Code section 311.3, which makes it a crime to film, photograph, or videotape sexual conduct of persons under the age of 14 years, and section 311.11, which makes it a crime to possess matter depicting sexual conduct of persons under the age of 18 years. Ground number (6) above permits the issuance of a search warrant when there is a warrant to arrest a person.

B. Magistrate Defined

California Penal Code section 808 designates as magistrates: judges of the superior courts, judges of the courts of appeal, and judges of the Supreme Court. Any of these judges is empowered to act as a magistrate and issue a search warrant. A commissioner, a judge pro tem, and a referee are not magistrates.

C. Affidavit Defined

For search warrant purposes, an affidavit is a statement made under penalty of perjury before a magistrate. "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched." Cal. Penal Code § 1525. "The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist." *Id.* § 1527. Affidavits in support of search warrants are usually in writing but may be oral if recorded.

1. Form and Contents of Affidavit

The Fourth Amendment to the United States Constitution states in pertinent part that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation …." The California Constitution, Article I, section 13, contains similar language. Thus, it is recommended that the search warrant contains language that the affiant specifically swears that the facts set forth in the affidavit are true. *People v. Leonard*, 50 Cal. App. 4th 878 (1996); *People v. Hale*, 133 Cal. App. 4th 942 (2005).

The search warrant and affidavit are typically combined into a single form. The combined search warrant and affidavit form is preferable to separate forms (one for search warrants and one for affidavits) so that the affidavit can be examined in the event that there are any defects or ambiguities on the face of the warrant that might be resolved by reference to the affidavit. "An affidavit can cure the overbreadth of a warrant if the affidavit is attached to and incorporated by reference in the warrant." *United States v. Adjani*, 452 F. 3d 1140 (9th Cir. 2006); see also *People v. MacAvoy*, 162 Cal. App. 3d 746 (1984).) Also, the combined form is more streamlined than separate search warrant and affidavit forms, and therefore easier to use when follow-up search warrants are obtained which incorporate the other search warrants.

There may be more than one affiant in support of a search warrant. Cal. Penal Code § 1527; *Skelton v. Superior Court*, 1 Cal. 3d 144 (1969). Further, the affiants need not be peace officers. *People v. Bell*, 45 Cal. App. 4th 1030, 1055 (1996) [upheld a search warrant affidavit prepared by an "investigative specialist" for the San Diego District Attorney's Office, who was not a peace officer].

The affiant must state facts establishing probable cause for the seizure of the described items at the described locations. The United States Supreme Court has expressed the standard of probable cause as follows: "The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983), emphasis added. This standard for the issuance of a search warrant was reaffirmed in *United States v. Grubbs*, 547 U.S. 90 (2006). Several California appellate court decisions have held that the validity of California warrants shall now be determined according to the *Gates* case "totality of circumstances" test. *People v. Spears*, 228 Cal. App. 3d 1, 17 (1991).

According to the LADA's Search and Seizure Manual, "it is recommended that the affidavit be in a chronological and narrative form. It should include all the information the affiant has, including what he has personally seen and heard and what has been told to him by others." Furthermore, the affidavit should include a recitation of the affiant's training and experience and the affiant's conclusion that the items sought will be found at the locations to be searched. The affiant may include documents, attached and incorporated by reference.

California Penal Code section 1526, subdivision (a), states that the magistrate may examine under oath the person seeking the warrant. In most cases involving written affidavits, it is rare for the magistrate to conduct an oral examination of the affiant under oath. Usually, the magistrate simply asks the affiant to swear to the contents of the written affidavit. However, if the magistrate does examine the affiant under oath, information given during this examination will not be considered part of the affidavit unless it in reduced to writing and signed by the affiant as part of the written affidavit presented to the magistrate. *Charney v. Superior Court*, 27 Cal. App. 3d 888, 891 (1972). Therefore, great care must be exercised to ensure that any important information relayed to the magistrate during such an examination is made part of the written affidavit and is signed by the affiant unless oral or telephonic affidavit procedures are being used.

2. Sample Form - Combined Search Warrant and Affidavit

SW NO.
STATE OF CALIFORNIA - COUNTY OF LOS ANGELES
SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

_____ *swears under oath that the facts expressed*
[Name(s) of Affiant(s)]
by him/her in this Search Warrant and Affidavit and in the attached and incorporated statement of probable cause are true and that based thereon he/she has probable cause to believe and does believe that the property and/or person described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the location(s) set forth below. Wherefore, affiant requests that this Search Warrant be issued.

_____*, HOBBS SEALING REQUESTED: YES NO*
[Signature(s) of Affiant(s)] NIGHT SEARCH REQUESTED: YES NO

(SEARCH WARRANT)
THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY PEACE OFFICER IN THE COUNTY OF LOS ANGELES:
proof by affidavit and having been sworn to this day before me by

_____
[Name(s) of Affiant(s)]
that there is probable cause for believing that the property and/or person described herein may be found at the location(s) set forth herein and is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "x"(s) in that:
_____ *it was stolen or embezzled*
_____ *it was used as the means of committing a felony*

_____ it is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery, _____ it tends to show that a felony has been committed or that a particular person has committed a felony, _____ it tends to show that sexual exploitation of a child in violation of Section 311.3, or possession of material depicting sexual conduct of a person under the age of 18 years, in violation of Section 311.11, has occurred or is occurring _____ there is a warrant to arrest the person;

YOU ARE THEREFORE COMMANDED TO SEARCH:
FOR THE FOLLOWING PROPERTY/PERSON:
AND TO SEIZE IT/THEM IF FOUND and bring it/them forthwith before me, or this court, at the courthouse of this court. This Search Warrant incorporates the Affidavit upon which it is based. Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it this _____ day of _____, 20____, at _____AM/PM.

_____, HOBBS SEALING APPROVED: YES NO
(Signature of Magistrate) NIGHT SEARCH APPROVED: YES NO
Judge of the Superior Court of the State of California, County of Los Angeles.
SW & A1

D. Describing Who and What to Be Searched

The Fourth Amendment to the United States Constitution states, in part, that ". . . no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." California Penal Code section 1529 states that the property, thing, things, or persons to be searched must be described with "reasonable particularity."

In general, descriptions contained in a search warrant should be of sufficient particularity so that if an officer with no knowledge of the case were to serve the warrant, the officer would have no difficulty in locating the place, recognizing the vehicle, or identifying the person to be searched. The Court in *Steele v. United States*, 267 U.S. 498, 503 (1925) stated, "[i]t is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended."

Of particular note:

- It is important for descriptions to be accurate. An incorrect address or mistaken description may invalidate the search warrant.
- It is recommended the affiant personally observe the place, vehicle, and person to be searched to ensure an accurate description or have another reliable person do so.

1. Bank/Financial Records

The methods by which records can be seized or otherwise obtained from financial institutions are set forth in detail in the California Right to Financial Privacy Act (Financial Privacy

Act) contained in California Government Code sections 7460-7493. A law enforcement officer must comply with the Financial Privacy Act to obtain bank records. The starting point for obtaining records from a financial institution is contained in Government Code section 7480, subdivision (e)(1), which states, in part:

"Nothing in this chapter shall prohibit any of the following …(e)(1). The Attorney General, … a police or sheriff's department or district attorney… from requesting of an office or branch of a financial institution, and the office or branch from responding to a request, as to whether a person has an account or accounts at the office or branch and, if so, any identifying numbers of the account or accounts."

This subdivision permits a financial institution to voluntarily provide to law enforcement information limited to the name of the account holder(s) and the account number(s). It does not permit the financial institution to voluntarily provide any additional information such as the account activity.

The California Attorney General has found that this subdivision is legally valid since an account holder does not have a reasonable expectation of privacy in account names and numbers. Government Code section 7480, subdivision (e)(1), does not compel the financial institution to provide account names and account numbers to the requesting law enforcement agency; thus, the financial institution can voluntarily provide this information or refuse to do so, in its discretion. If the account names and numbers are not voluntarily provided by the financial institution, or if the investigating agency is seeking a more detailed information, there are several methods described in the Financial Privacy Act by which financial records can be obtained. Three such methods, a search warrant, judicial subpoena or subpoena duces tecum, and police request are set forth below:

a. Search Warrant

Financial records may be obtained pursuant to a search warrant requested under California Government Code section 7475. Note, however, that section 7475 sets forth additional conditions regarding search warrants for financial records. For example, the financial institution will notify the customer of the service of the warrant unless a court orders the financial institution to withhold notification to the customer upon a finding that such notice would impede the investigation. Also, the normal ten-day period for service and return of the warrant can be extended if the bank cannot reasonably make the records available within ten days. However, the officer serving the warrant has the right to examine the records sought at the time of the service of the search warrant. See Government Code section 7475 for additional details. A court order to withhold notification can appear on the face of the warrant. A search warrant for bank records was held valid in *People v. Meyer*, 183 Cal. App. 3d 1150 (1986).

A sample description of the financial institution and of the items to be seized pursuant to a search warrant for bank records might be phrased as follows:

LA City Bank
Branch Number 5533
1000 Hill Street
Los Angeles, California
FOR THE FOLLOWING PROPERTY:

All open or closed account documents connected with LA City Bank account number 33-101 and 33-102 or any other account in the name of John Lee from (date) to the present including the following:
a. Original or certified copy of any signature cards, powers of attorney, or applications for said accounts.
b. Copies of all checks, money orders, cashier's checks, and other items, both front and back, deposited into said accounts.
c. Copies of all deposit slips reflecting deposits into said accounts.
d. Copies of all checks, money orders, cashier's checks and other documents, both front and back, drawn on said accounts.
e. Copies of all financial statements, including monthly statements, issued for said accounts or related accounts.
f. Copies of any records pertaining to the identification of persons using said accounts, including photographs, driver's license numbers, or other means of identification.
g. Copies of all documents showing transfers, including wire transfers, ATM transfers or withdrawals to or from said accounts or any other accounts in the name of John Doe.
h. Any records concerning the use of any safe deposit boxes in relation to said accounts.

An order for nondisclosure of the service of the search warrant can be phrased as follows:

ORDER FOR NON-DISCLOSURE OF SEARCH WARRANT

It is hereby ordered that no officer, agent or employee of LA City Bank reveal the existence of this search warrant, or any action or compliance taken pursuant to this search warrant, to any person or entity except as reasonably necessary to comply with this search warrant. In no event shall the existence of this search warrant be revealed to the person(s) or entity/entities on whose account information is being sought.

DATED: _____ _____
Judge of the Superior Court

b. Judicial Subpoena or Subpoena Duces Tecum

The requirements for a judicial subpoena are set forth in California Government Code section 7476. This section also discusses obtaining financial records for grand jury proceedings. Again, notice must be given to the customer in most situations. The customer then has ten days to give notice to the financial institution that the customer has moved to quash the subpoena. Special conditions relating to the use of a subpoena duces tecum in the prosecution of insufficient funds check cases (Penal Code Section 476a) are set forth in Government Code section 7476, subdivision (c).

c. Police Request

California Government Code section 7480, subdivision (b), provides that a police or sheriff's department or a district attorney may obtain certain financial information upon request made to the financial institution when it certifies in writing that a crime report has been filed alleging certain fraudulent acts. For example, information relating to dishonored checks and overdrafts may be obtained upon certification to the financial institution, in writing, that the checks were used fraudulently. The bank will then provide a statement of account and other records for a period of time 30 days prior to, and 30 days following, the alleged illegal acts.

2. Credit Balance in Bank Accounts

Certain types of criminal activity can generate large amounts of illegally obtained proceeds. This is especially true with narcotics trafficking. Thus, a goal of the narcotics investigator should be two-fold: seize the narcotics, and also seize the proceeds derived from the sales of the narcotics. The seizure of the proceeds derived from criminal activity eliminates the profit motive and can help dismantle the criminal enterprise. At times an individual maintains large amounts of the proceeds derived from criminal activity in bank accounts. If an investigator can locate and identify these accounts, an amount of money equal to the credit balance in these accounts can be seized and forfeited pursuant to applicable forfeiture statutes.

The seizure of money from a bank account is a two-step process, and both steps can involve the use of search warrants. First, the suspect's bank account(s) must be identified. This is normally done by obtaining records from the bank or other financial institution (i.e., credit union, savings and loan) that identify the account holder and the account number of the suspect. Second, after the account has been identified, the money in the account can be seized.

A search warrant is a proper method for seizing money held in a bank account. California Penal Code section 1523 defines search warrants and states in part that it "is an order in writing … directed to a peace officer, commanding him or her to search for a person or persons, a *thing or things*, or personal property…." (emphasis added).

A sample description in a search warrant of the financial institution for the seizure of money in a bank account might be phrased as follows:

LA City Bank
Branch Number 5533
1000 Hill Street
Los Angeles, California
FOR THE FOLLOWING PROPERTY:
The amount of money on deposit in Account No. 277-4653, in the name of John Doe

3. Phone Records

The California Supreme Court has held that a search warrant is necessary to obtain from a telephone company the name and address of the holder of an unlisted telephone number. *People*

v. Chapman, 36 Cal.3d 98 (1984). Similarly, in *People v. McKunes*, 51 Cal. App. 3d 487 (1975) the court held that an individual's telephone company records relating to telephone calls made are protected by a reasonable expectation of privacy and cannot be obtained by police except by a search warrant or other judicial order.

A search warrant for telephone records can be described as follows:

. . . all telephone company records, including billing statements, telephone service records, customer service records, telephone toll records and bill file records for the following:

Person(s): John Doe;
Telephone Number(s): (213) 555-3333, including any other telephone records as described above billed to telephones at the following location(s), [insert locations], for the billing rounds which include the period of (month/year) to (month/year).
Note: Telephone toll records are maintained in "billing rounds." Each billing round encompasses approximately 30 days but does not necessarily follow the calendar month. The affidavit should contain facts, information, and opinion justifying the time period for which the toll call records are sought.

4. Pen Registers and Trap-and-Trace Devices

As defined in section 3127 of the Federal Electronic Communications Privacy Act, the term "pen register" means a device which records or decodes electronic or other impulses which identify the numbers dialed or transmitted on the telephone line to which such device is attached.

The term "trap-and-trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted. Thus, the installation of both a pen register and a trap-and-trace device allows law enforcement officers to determine telephone numbers being called to and from a particular telephone number.

The Federal Electronic Communications Privacy Act regulates the use of pen registers and trap and trace devices. 18 U.S.C. §§ 3121-3126. Section 3122 of the Act expressly authorizes a state investigative or law enforcement officer to apply for an order, or an extension of an order, authorizing the installation and use of a pen register or a trap-and-trace device, in writing under oath, to a court of competent jurisdiction of the state. Section 3123 requires the applicant to justify that the information likely to be obtained is relevant to an on-going criminal investigation (as opposed to probable cause required for a warrant). The order shall not exceed 60 days. Extensions may be granted, but only upon application, and may not exceed 60 days. The order shall direct that the order be sealed until otherwise directed by the court, and it shall direct the person owning the line or assisting in the installation not to disclose until further order of the court.

An order for a pen register or trap-and-trace device may be issued by a state court of "general criminal jurisdiction." Cal Const. Art. VI, § 10. Thus, a superior court judge can issue the order. No California case has discussed the propriety of obtaining such an order. However, a California Attorney General Opinion, No. 03-406, has concluded that the federal statutes

governing the installation of pen registers and trap-and-trace devices do not provide authority for the issuance of a state court order permitting a state law enforcement officer to install or use pen registers or trap and trace devices. The rationale of the Opinion is that in California, telephone call information is protected by a right of privacy so that such records may only be obtained by a law enforcement officer upon a showing of probable cause.

A pen register and/or a trap-and-trace device may be installed if a search warrant has been obtained. *People v. Larkin*, 194 Cal. App. 3d 650, 654 (1987). In contrast to the procedure described above, the warrant is valid for only ten days pursuant to Penal Code section 1534, and the warrant must establish probable cause.

5. Cellular Telephone Searches

The search of a cellular phone is protected by the Fourth Amendment to the United States Constitution. This means that law enforcement must have a search warrant, consent, or a valid exception to the warrant requirement to search the contents of a cellular phone, particularly the sections of the phone that are not carrier specific, including the address book, photo, and video files and the data on or in any application. *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007). The records held by the carrier are governed by the Stored Communications Act. 18 U.S.C. § 2701. A search of a cellular phone can reveal historical and prospective data.

It is important to search a cellular phone properly. The cellular phone should be turned off and the data accessed via a forensic tool. If the cellular phone is searched while it is still on, the cellular phone will be in communication with its carrier's MTSO. Searches of data types that are updated via the MTSO, such as viewing e-mail or text messages, can result in a new download of data to the device. This download can be considered a wiretap, and therefore the cellular phone must be disconnected from the carrier prior to initiating the search. See *Riley v. California*, 573 U.S. __ 134 S. Ct. 2473 (2014) which held that with a cellular telephone, a search warrant is required to access the data and contents.

E. Mechanics of Preparation

1. Preparing the Search Warrant and Affidavit

The DDA assisting in the preparation of the warrant should:

- Become thoroughly familiar with the case by reading all relevant reports and discussing the facts with the affiant.
- Obtain and examine all police reports, arrest records, photographs, and diagrams that may be attached as exhibits. Make certain that no pages are missing and all copies are legible. Illegible exhibits may result in the suppression of the warrant. *Kaylor v. Superior Court*, 108 Cal. App. 3d 451 (1980).
- Obtain from the affiant an accurate and verified description of the items sought and the premises, vehicle(s), and person(s) to be searched.
- Prepare the relevant forms, listing the name(s) of the affiant(s), the statutory grounds, the premises, vehicle(s), and person(s) to be searched, and the items sought.

- Prepare the Statement of Probable Cause. Include the affiant's background and expertise, the factual information gathered, information received from informants, facts indicating the reliability of informants, corroboration, reasoning, conclusions and expert opinions of the affiant, and justification for nighttime service and/or Hobbs sealing if sought.
- Attach all exhibits. Make certain they are clearly labeled and legible.

2. Presenting the Search Warrant and Affidavit to the Magistrate

The following procedures are recommended:

- The magistrate swears the affiant(s). The suggested oath is: "Do you swear that everything in this affidavit is true to the best of your knowledge and belief?" If there is more than one affiant, all the affiants must be sworn. The magistrate then reads the search warrant documents. If the magistrate feels that probable cause for the search has been established, he or she will ask the affiant(s) to sign the search warrant face sheet.
- The judge will then date and sign the search warrant. Make certain this is done. The warrant is now ready to be served.

3. Legal Standard for Issuance of the Search Warrant

In *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the United States Supreme Court stated that the standard of probable cause for the issuance of a search warrant is a "fair probability" that contraband or evidence of a crime will be found in a particular place. This "fair probability" standard was re-affirmed by the United States Supreme Court in *United States v. Grubbs*, 547 U.S. 90 (2006) and was followed by the California Supreme Court in *People v. Hobbs*, 7 Cal. 4th 948, 975 (1994). If the magistrate appears reluctant to issue the search warrant, he/she should be reminded of the "fair probability" standard applicable to its issuance.

4. Making Copies of the Search Warrant and Affidavit

The recommended best-practice procedure with the LADA are as follows: prepare several copies of the search warrant documents (although only an original is required by statute). Copies of the search warrant should be prepared for the officer-affiant, the DA case file, and the defense attorney(s). The copies will make it easier to review the warrant documents for later court proceedings rather than having to subpoena the original version. Also, sufficient extra copies of just the Search Warrant face sheet (but not the Statement of Probable Cause) should be prepared so that a copy of the face sheet can be left at each location and with each person described on the warrant.

5. Sealing the Affidavit

California Penal Code section 1534 states that all documents relating to a search warrant become open to the public as judicial records following the execution and return of the warrant. However, all or part of the search warrant documents may be sealed pursuant to a court order under certain limited circumstances, as set forth below. A request for an order to seal can be made at any time, but it is most often sought at the time of the issuance of the warrant.

a. Sealing to Protect the Identity of an Informant

In California, parties can request to seal all or part of a search warrant affidavit to protect the identity of an informant (whose only relevance is supplying probable cause). *People v. Hobbs*, *supra*, 7 Cal. 4th 948.

b. Sealing to Protect an On-Going Investigation

Sometimes it may be desirable to seal all the search warrant documents to protect the integrity of an on-going investigation. Such an order would go beyond the sealing authorized under the *Hobbs* case mentioned above which authorizes sealing only to protect the identity of an informant. A request to seal all search warrant related documents may be appropriate if there are no court proceedings pending (e.g., no case has been filed, or if a case has been filed but arrest warrants remain outstanding). However, once arrests are made and/or the investigation has concluded, the search warrant documents should be unsealed so that a public return can be filed and discovery provided to the defense.

6. Return of the Warrant

The warrant must be executed and returned within the ten days following its issuance. The search warrant may be returned to the issuing magistrate or his court. Cal. Penal Code § 1534. If the tenth day is a holiday or weekend, the next court day is permitted. *People v. Stevenson*, 62 Cal. App. 3d 915 (1976). The day of issuance of the warrant is day zero. Cal. Gov't Code § 6800. A late return will not necessarily invalidate the warrant. A warrant which was not returned within ten days can be declared invalid only if the defendant can demonstrate prejudice as a result of the late return. *People v. Head*, 30 Cal. App. 4th 954 (1994); *People v. Schroeder*, 96 Cal. App. 3d 730 (1979); *People v. Couch*, 97 Cal. App. 3d 377 (1979); *People v. Kirk*, 99 Cal. App. 3d 89 (1979). The "return package" consists of the original search warrant documents, an inventory of all the items seized, and a "return" form in which the officer who executed the warrant (not necessarily the affiant) swears that the inventory is a true list of everything seized during the execution of the warrant, including items not listed on the warrant.

F. Conducting the Search

In California, by statute, only peace officers are authorized to serve search warrants. Cal. Penal Code §§ 1528, 1529, 1530. This includes peace officers from a different jurisdiction who, having insufficient probable cause to obtain a search warrant for their own search, accompany officers from the department that obtained and served a search warrant in another case. Thus, in *People v. Carrington*, 47 Cal. 4th 145 (2009), officers from the Los Altos Police Department, who obtained a search warrant to search the defendant's residence for articles taken in a burglary, were accompanied by officers from the Palo Alto Police Department who were investigating a murder connected to the burglary. During the service of the warrant, officers observed two items of evidence relating to the murder. In upholding the search, the California Supreme Court stated the following: Officers from another jurisdiction may accompany officers conducting a search pursuant to a warrant without tainting the evidence (pertaining to crimes that are the subject of

their own investigation) uncovered in the process, even when the officers lack probable cause to support issuance of their own search warrant. *Id.* at 167.

The search warrant "forms" that are used by the LADA are directed to "any peace officer in the County of Los Angeles." This language is based on Penal Code sections 1523 and 1529. Section 1523 defines a search warrant as "an order in writing, in the name of the people, signed by a magistrate, directed to a *peace officer*…." (emphasis added). Section 1529, which contains the language that should be used in a warrant, states that the warrant is "directed to any peace officer in the County of _____." Pursuant to this direction, a DA Investigator may serve a search warrant, but not a DDA. Cal. Penal Code § 830.1(a) ["any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer"].

Also, California Penal Code section 830.8 states that "Federal criminal investigators and law enforcement officers are not California peace officers …." A federal criminal investigator or law enforcement officer may nonetheless be the affiant for a state search warrant. *People v. Bell*, 45 Cal.App.4th 1030, 1055 (1996). However, the search warrant should be served by a peace officer as defined in Penal Code section 830.1 with the federal agents merely assisting in the search.

II. ORAL AFFIDAVITS, TELEPHONICALLY AUTHORIZED SEARCH WARRANTS, AND FACSIMILE AND ELECTRONIC MAIL SEARCH WARRANTS

In most instances, search warrants and supporting affidavits are prepared in writing and personally signed by the affiant and the issuing magistrate in the manner discussed above. However, the law also provides for the use of oral affidavits, telephonically authorized search warrants, facsimile search warrants, and electronic mail (e-mail) search warrants.

The use of oral affidavits and telephonically authorized search warrants—prepared in accordance with statutory requirements and setting forth adequate probable cause for their issuance—has been upheld in several cases. *People v. Ramos*, 30 Cal. 3d 553 (1982); *People v. Sanchez*, 131 Cal. App. 3d 323 (1982). No emergency or other justification need be shown for the use of an oral affidavit or telephonically authorized search warrant. *People v. Peck*, 38 Cal. App. 3d 993, 1000 (1974).

A. Oral Affidavits

An oral affidavit is one in which the affiant verbally states to the issuing magistrate the probable cause for the warrant. The affiant's statement is recorded on a tape recorder or recorded and transcribed by a court reporter. No written statement of probable cause is presented to the magistrate.

The statutory authority and procedures related to oral affidavits are set forth in California Penal Code section 1526, subdivision (b)(1), which states in relevant part: "In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath under one of the following conditions: (1) The oath shall be made under penalty of perjury and recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purpose of

this chapter. In these cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in these cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court."

Section 1526, subdivision (b), only provides that the affidavit may be oral. The search warrant still must be in writing as required by California Penal Code section 1523. A failure to have a written search warrant may result in the warrant being declared invalid. *Bowyer v. Superior Court*, 37 Cal. App. 3d 151, 164 (1974).

Oral Affidavit Procedures: The following procedures should be followed in providing an oral affidavit in support of a search warrant:

(1) Fill out the form including the name(s) of the affiant(s), the statutory grounds for issuance, the premises to be searched and the items/person(s) to be seized.
(2) Go to the court or residence of the judge with the filled-out Search Warrant form.
(3) When all parties are together, use a tape recorder or a certified court reporter to record the proceedings. First, all parties need to introduce themselves on the record and spell their names. If a tape recorder is used, each speaker must state his/her name each time he/she speaks in order to make it easier to transcribe the tape. All parties must speak clearly.
(4) The judge will swear the affiant.
(5) The affiant will then read out loud a line or two of the COMMAND TO SEARCH portion of the Search Warrant form for identification purposes. The judge will read the Search Warrant form (silently) and then state that he/she has read the Search Warrant form.
(6) The affiant should state his/her identity, experience and expertise, and then relate fully the probable cause for the issuance of the Search Warrant. This oral affidavit should contain the same information as would appear in a conventional written affidavit in support of a search warrant.
(7) The judge may ask questions of the affiant. All questions and answers must be on the record.
(8) If there is more than one affiant, each must be identified and sworn before giving his/her statement.
(9) Police reports and other documents may be described and submitted to the judge. The judge will state that he/she has read them. The affiant will state that the reports and records will be attached to the transcript of the proceedings and that they are part of the probable cause for the issuance of the Search Warrant.
(10) The judge will be asked if he/she finds probable cause for the issuance of the Search Warrant. If the answer is yes, the judge will date and sign the Search Warrant and describe this as he/she does so. If night service is requested and approved, the judge will state he/she finds justification for night service and so indicate on the Search Warrant. The same process will be followed with the *Hobbs*[50] sealing request (sealing to protect an on-going investigation).
(11) The Search Warrant can be served.
(12) If a tape recorder was used, a transcript must be obtained. If a court reporter was used, he/she will prepare a transcript of the proceedings. Any written documents presented to the judge must be attached to this transcript.

[50] *People v. Hobbs*, *supra*, 7 Cal. 4th 948.

(13) The tape and/or transcript must be certified as described in California Penal Code section 1526 and will be presented to the judge along with the Search Warrant and Return form. After certification, these will be filed with the court clerk.

B. Telephonically Authorized Search Warrants

A telephonically authorized search warrant is one in which the affiant calls the magistrate on the telephone, states the probable cause for a search warrant, and then obtains verbal authorization from the magistrate to sign the magistrate's name to the warrant. The entire telephone call must be tape recorded. Thus, the warrant can be issued simply as the result of a telephone call to the magistrate.

California Penal Code section 1528, subdivision (b), permits a magistrate to orally authorize a peace officer to sign the magistrate's name on a "duplicate original search warrant." In effect, this statute permits a search warrant to issue when the affiant's oral affidavit is not taken in the presence of the magistrate and when the only contact with the magistrate is over the telephone.
The magistrate can give verbal authorization over the telephone to the peace officer/affiant to sign the magistrate's name on a "duplicate original warrant."

Section 1528, subdivision (b), reads in relevant part: "The magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original warrant shall be deemed to be a search warrant for the purposes of this chapter, and it shall be returned to the magistrate as provided for in section 1537. The magistrate shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the duplicate original warrant with the clerk of the court as provided for in section 1541."

This section does not eliminate the requirement of a written search warrant. It merely creates a procedure for signing the magistrate's name on a written warrant when the magistrate is not physically present to sign the search warrant.

<u>Telephone Search Warrant Procedures:</u> The following procedures are followed in the LADA for telephone-authorized search warrants:

(1) Affiant/officer contacts the DDA and discusses the case. If the DDA says the case is appropriate for a telephonic search warrant, he or she will instruct the officer to prepare an "original" search warrant and a "duplicate original."
(2) Officer prepares an original search warrant and one copy. The copy has words "duplicate original" written across the top. If it is not possible to prepare a copy at the time the warrant is prepared, then the original should be labeled "duplicate original" and a copy labeled "original," can be prepared later. No affidavit need be prepared. It will be done telephonically.
(3) Conference call is set up between the officer, the DDA, and the judge. Telephonic recording device is set up. When all parties are on the line, the recorder is turned on and the person working the recorder announces, "Recorders are on." It is not essential that the recording be done through the District Attorney Command Post, but the entire conversation must be recorded. A simple

suction cup style induction coil and a cassette tape recorder may be attached to the affiant's telephone just as long as the recording is intelligible and all sides of the conversation are recorded.
(4) DDA introduces self and asks others to do so. All parties must identify themselves each time they speak and should speak slowly and clearly.
(5) DDA asks judge to swear the officer. Officer is sworn.
(6) DDA asks officer to read verbatim the "duplicate original" warrant. Officer reads the warrant, including the words "duplicate original."
(7) DDA asks the officer to state the probable cause for the warrant.
(8) Officer states the probable cause fully and completely. The DDA and the judge can and should ask questions of the officer.
(9) If there is more than one affiant, each affiant should be identified and sworn before giving his/her statement, and the names of all affiants should appear on the face of the warrant, although a name may be omitted to keep confidential the identity of the affiant. The name of at least one affiant must appear on the warrant.
(10) DDA asks the judge if he/she is satisfied that the probable cause for the warrant has been shown (and justification for night search, and/or *Hobbs* sealing, if requested).
(11) Judge says yes. (If the judge says no, the DDA, the officer and the judge should discuss what additional probable cause is necessary and officer should attempt to obtain such additional probable cause.)
(12) DDA asks the judge if he/she authorizes the officer to sign the judge's name to the duplicate original warrant (and endorse for nighttime service, and/or *Hobbs* sealing, if requested). The judge says yes.
(13) DDA asks the judge to spell his/her full name and state his/her court assignment.
(14) DDA tells the officer to sign the judge's name and describe what he is doing (including nighttime endorsement and/or *Hobbs* sealing, if authorized). Officer should also place the judge's court assignment on the warrant.
(15) Office describes that he is signing the judge's name and court assignment (and signing nighttime endorsement and/or *Hobbs* sealing, if applicable).
(16) DDA tells the officer to place the date and time on the "duplicate original" warrant and describe doing so. Officer does so.
(17) DDA thanks all parties and informs the officer that the search warrant can be served.
(18) WARRANT IS SERVED. The officer serving the warrant must note the exact date and time of service on the face of the duplicate original in the space provided. Cal. Penal § 1534(b).
(19) Tape is transcribed. The officer and the DDA who assisted in obtaining the search warrant listen to the tape and verify and correct the transcription.
(20) Officer takes the "duplicate original" search warrant, the "original" search warrant, the tape, the transcript, and the certification forms to the judge. The judge will sign the certification forms and will sign the "original" search warrant form and place the same date and time of the issuance and service as on the "duplicate original."
(21) Officer files the warrant return with the court clerk including the return form, the original search warrant, the duplicate original, the tape, the transcript, and the certification forms.

C. Facsimile Search Warrants

California Penal Code section 1526, subdivision (b)(2), provides for the issuance of a search warrant through the use of a facsimile machine.

A facsimile search warrant is one in which the Search Warrant, the Statement of Probable Cause and accompanying documents are all prepared and signed by the affiant in the usual manner and then sent by facsimile machine to the magistrate for review and signature. The affiant also calls the magistrate, is sworn over the phone (this need not be recorded) and verifies that the correct number of pages have been received and that all pages are legible. The magistrate verifies that the affiant has signed the affidavit. The magistrate then reads all the documents and if the magistrate is satisfied the warrant is valid, he or she signs it (this will be deemed the "original") and sends a facsimile of the signed warrant back to the affiant. This is marked "duplicate original" by the affiant and can then be served. The original search warrant, the duplicate original, and all supporting documents are filed with the return of the warrant.

D. Electronic Mail Search Warrants

California Penal Code section 1526, subdivision (b)(2), also provides for the issuance of a search warrant through electronic mail.

A search warrant may be obtained through the use of an e-mail. The procedure for obtaining a search warrant by e-mail is similar to the procedure for a facsimile search warrant. The Search Warrant, the Statement of Probable Cause, and accompanying documents are sent to the magistrate by e-mail. The affiant's signature is in the form of a digital signature. Over the telephone the magistrate will swear the affiant and confirm the receipt of the documents and verify the affiant's digital signature as genuine. If the magistrate issues the warrant, he or she sends a copy of the signed search warrant to the affiant by e-mail. The affiant acknowledges receipt of the search warrant over the telephone and writes the words "duplicate original" on it. The warrant may then be served. The original warrant or any affidavits or attachments are then returned as provided in California Penal Code section 1534.

III. UNITES STATES SUPREME COURT DECISIONS GOVERNING SEARCH WARRANTS

The relevant decisions of the United States Supreme Court (USSC) favor the use of search warrants. The current state of the law makes it extremely difficult for a defendant to prevent the admission of evidence seized pursuant to a search warrant. The three USSC decisions discussed below have had tremendous impact on the law and the litigation of search warrants.

A. *Illinois v. Gates*, 462 U.S. 213 (1983): Totality of the Circumstances Test

In *Gates*, the USSC abandoned the old and highly technical "two-prong test" for determining whether an informant's information establishes probable cause. Instead, the Court adopted a "totality of the circumstances" approach. The *Gates* case and the totality of the circumstances standard are applicable in California. *People v. Spears*, 228 Cal.App.3d 1, 19 (1991).

The *Gates* opinion is also important because it states that the standard for probable cause for the issuance of a warrant is a "fair probability" that contraband or evidence of a crime will be found in a particular place. This "fair probability" standard was reaffirmed by the USSC in *United*

States v. Grubbs, 547 U.S. 90, 95 (2006). The *Gates* opinion also states the duty of a reviewing court "is simply to ensure that the magistrate had a 'substantial basis for concluding' that probable cause existed." *Gates*, *supra*, at 238.

B. *United States v. Leon*, 468 U.S. 897 (1984): Good Faith Exception

In *United States v. Leon*, the USSC established a "good faith exception" to the exclusionary rule when a search warrant is obtained. Thus, under the *Leon* opinion, evidence seized pursuant to a search warrant will not be suppressed if officers obtained the warrant in good faith and acted in reasonable reliance on a warrant issued by a neutral and detached magistrate. The evidence is admissible even if the search warrant is later found to be unsupported by probable cause. However, the *Leon* good-faith exception may not save the warrant if the affidavit contains substantial intentional misstatements, or if the magistrate was not neutral and detached, or if the officer-affiant was not acting in good faith.

C. *Franks v. Delaware*, 438 U.S. 154 (1978): Traversal of Warrant

In the *Franks* case, the USSC held that before a defendant can traverse a search warrant, the defendant must make a "substantial preliminary showing" with an offer of proof pointing out the specific areas of the affidavit that is claimed to be false, accompanied by supporting reasons. Thus, under *Franks* the affiant officer can be cross-examined only in rare cases about information contained in the affidavit via a motion to traverse.

IV. THE USE OF SEARCH WARRANTS AND ADVANTAGES

A. Search Warrants and Arrest Warrants

1. Residence of a Third Party vs. Residence of Person to be Arrested

In *Steagald v. United States*, 451 U.S. 204 (1981), the U.S. Supreme Court held that officers seeking to enter the residence of a third party to serve an arrest warrant upon a person they reasonably believe to be within that residence can enter the location only if: the third party consents, exigent circumstances exist, or the officer has a search warrant for that residence. The holding in the *Steagald* case is limited to situations involving the residence of a third party.

However, entry pursuant to the arrest warrant alone may still be made into the residence of the person named in the arrest warrant so long as officers have "reasonable grounds" to believe the person is home. *People v. Jacobs*, 43 Cal. 3d 472, 478 (1987); *Steagald*, *supra*, 451 U.S. at 214, fn. 7; *Payton v. New York*, 445 U.S. 573, 602-603 (1980).

2. California Statute on Point

California Penal Code section 1524, subdivision (a)(6), specifically provides for the issuance of a search warrant "when there is a warrant to arrest a person." Basically, the statute requires only that the affiant identify himself or herself, describe how he or she knows that an arrest warrant exists for a specific person, and set forth the facts showing that the person sought is at the place to

be searched. The person to be arrested should be described with "reasonable particularity." Thus, the person should be described by name, sex, age, height, weight, hair, eyes and distinguishing characteristics to the extent known.

B. Advantages of Search Warrants

1. *Ramey* Problems and Subsequent Case Law

The court in *People v. Ramey*, 16 Cal. 3d 263, 273 (1976), limited the right of officers to enter a home to make an arrest without an arrest warrant. However, since officers serving a search warrant are validly within the premises and their entry is judicially authorized, a warrantless arrest within the premises while serving a search warrant is legal. *People v. McCarter*, 117 Cal. App. 3d 894, 908 (1981).

2. Withdrawal of Consent to Search

A person who has consented to a search can withdraw that consent at any time. *People v. Hamilton*, 168 Cal. App. 3d 1058, 1068 (1985). Also, the voluntariness of a consent is a question of fact. If a judge finds that the consent was not voluntary, on appeal the inferences and conflicts in the evidence will be resolved against the People and in support of the judge's ruling. This problem does not exist if a warrant is used.

3. Keeping Informant Identity Confidential

Information received from an informant can be used to establish probable cause without revealing the informant's identity when a search is made pursuant to a search warrant. Cal. Evid. § 1042(b). The disclosure of the informant's identity can be required only if the defendant can show that the informant is a percipient witness to the charged crime or that the informant might offer evidence tending to exonerate the defendant. Also, when a search warrant is obtained, the defense attorney is precluded from cross-examining the officer-affiant about the information contained in the affidavit (including information about the informant) except in the rare situation where the defense can make a "substantial preliminary showing" as required by *Franks v. Delaware*, *supra*, 438 U.S. 154. Further, the California Supreme Court in *People v. Hobbs*, *supra*, 7 Cal. 4th 948 held that all or part of the information in a search warrant affidavit provided by an informant (whose only relevance is supplying probable cause) may be sealed to protect the informant's identity.

4. Officer Protection

An officer serving a facially valid search warrant in an otherwise lawful manner is considered to be acting in the performance of his duties. The penalty for a crime committed upon such an officer may be enhanced by special allegations applicable to crimes committed against peace officers. This is true even if it is later determined that the warrant was based upon an insufficient affidavit. "[W]e cannot imagine the Legislature or the voters intended to divest a peace officer of special statutory protection simply because the warrant he was serving when attacked is later found lacking in probable cause." *People v. Gonzalez*, 51 Cal. 3d 1179, 1222 (1990). Also,

an officer obtaining and serving an invalid warrant is entitled to "qualified immunity" from civil damages. See *Malley v. Briggs*, 475 U.S. 335 (1986).

C. Wiretaps in Los Angeles County

Due to the sensitive nature of wiretaps, in Los Angeles County, all wiretaps are processed through a single judge who sits in the downtown central court of the Los Angeles County Superior Court. Wiretap requests are made with the assistance of the Major Narcotics Division of the LADA even if the matter being investigated is not a drug case. The Major Narcotics Division has the most familiarity and expertise in this area of law.

To obtain permission to wiretap, an affidavit by a detective is presented to a judge, and the legal sufficiency and scope of the affidavit is highly scrutinized. In this type of case, the detective would fill out a probable cause declaration with information gathered in the investigation to present to a judge in order to later effectuate an arrest.

PRESENTATION TO THE CRIMINAL GRAND JURY

I. THE CRIMINAL GRAND JURY

The District Attorney's Office may appear before the Criminal Grand Jury at all times to present witnesses and to give information and advice. Cal. Penal Code § 935. A DDA is assigned on a full-time basis as the Legal Advisor to the Criminal Grand Jury. The Criminal Grand Jury holds hearings as requested by the District Attorney's Office to inquire into public offenses committed or triable within the Los Angeles County and return indictments. *Id.* at § 917. An indictment hearing is conducted for the purpose of initiating a criminal prosecution. The Criminal Grand Jury also conducts investigative hearings in which its subpoena powers assist in determining whether further investigation or prosecution is appropriate. A proceeding that begins as an investigation may ultimately result in a request for an indictment.

The LADA strongly favors referring the following types of cases to the Criminal Grand Jury:

- Filed complaints, regardless of the charge, in which the preliminary hearing has been unreasonably delayed.
- Complicated factual issues, multiple counts, or multiple defendants or suspects.
- Crimes committed by members of organized criminal enterprises or groups.
- A need to temporarily protect the identity of a victim or witness.
- In the best interest of either the victims or witnesses to be protected at the early stage of a criminal proceeding.
- Potential to generate publicity prejudicial to a fair trial.
- Indictment needed to prevent the flight of a defendant from the jurisdiction or assist in the extradition of an accused from another jurisdiction.
- Necessary to join co-defendants to avoid conducting multiple jury trials.
- Necessary to a criminal investigation being performed by the LADA.
- Investigation by a law enforcement agency where it would be beneficial to use the Criminal Grand Jury.

The above list of circumstances is not exhaustive. Subject to the review and the Office approval process, it is appropriate to bring any case before the Criminal Grand Jury if the prosecutor determines that justice will be best served by utilizing the indictment process or investigative powers of the Criminal Grand Jury. Except for investigative hearings, the policy of the LADA is to only present matters to the Criminal Grand Jury when the anticipated evidence supports requesting an indictment.

II. REFERRAL OF MURDER CASES PENDING PRELIMINARY HEARING TO THE GRAND JURY

One of the most important purposes of California Proposition 115 was to "create a system in which justice is swift and fair." On average, murder cases pending preliminary hearing remain in the preliminary hearing court longer than other criminal cases, and far in excess of any legal necessity. Regardless of the defendant's consent to delay, when it is apparent that the preliminary hearing for a murder case will not be conducted within 60 days of the defendant's arraignment, the assigned prosecutor will consult with his or her Head Deputy to determine whether to seek an indictment from the Criminal Grand Jury.

III. INVESTIGATIVE HEARINGS

The Criminal Grand Jury has investigative functions in which its subpoena power may be of assistance in ascertaining the truth. Generally, the investigative powers of the Criminal Grand Jury are used prior to the filing of a complaint or before a preliminary hearing. However, the investigative power of the Criminal Grand Jury may be used after the preliminary hearing or indictment as long as the prosecution is not using the Criminal Grand Jury solely to prepare a pending matter for trial, but has good faith inquiry into other charges. *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1041 (3d Cir. 1980). Thus, if the prosecution has some other legitimate purpose in using the investigative powers of the Criminal Grand Jury post-indictment or preliminary hearing, the fact that the People may derive an incidental benefit from the investigation on the pending matter does not preclude the use of the Criminal Grand Jury. *Id.* Even after indictment, the Criminal Grand Jury may properly be interested in additional charges or other aspects of a person's conduct. *M.B. v. Superior Court of Los Angeles County*, 103 Cal. App. 4th 1384, 1396 (2002).

LADA BUREAU OF INVESTIGATION[51]

I. INTRODUCTION

The LADA is the largest local prosecutorial office in the United States.[52] As a result, its operations are divided into many Divisions and Bureaus, and one such division is the Bureau of Investigation.[53] This Bureau is the fourth largest law enforcement agency in the Los Angeles

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[51] The following discussions were submitted by Senior Investigator Scott Paik.

[52] www.da.co.la.ca.us/about/office-overview.

[53] Other divisions include the Bureau of Administration, the Bureau of Special Operations, and the Bureau of Line Operation (32 Area Branch Offices). http://da.co.la.ca.us/sites/default/files/pdf/org-chart-0417.pdf.

County, and its primary function is to provide prosecution support for Deputy District Attorneys.[54] The investigators within the Bureau of Investigation play a crucial role in the County's criminal justice system by conducting "some of the most unique, sensitive and complex criminal investigations in law enforcement."[55]

II. BRIEF BACKGROUND OF THE BUREAU OF INVESTIGATION

In the late 1800s, the LADA's Office employed detectives from the Los Angeles County Sheriff's Office to investigate criminal cases for the District Attorney. In 1891, a dispute arose between the Sheriff and the District Attorney over the appointment of a particular deputy sheriff to the District Attorney's Office. As a result, in 1908, the sitting District Attorney, John D. Fredericks, organized his own detective force and called it the "Department of Criminal Investigation." A few years later, in 1913, the Los Angeles County Board of Supervisors formally recognized the District Attorney's detective force by separately funding it and including it in the County budget. In 1928, the newly elected District Attorney Buron Fitts reorganized the detective force and renamed it the "Bureau of Investigation," a name still used today. In 1978, through amendments in the California Penal Code, the investigators at the District Attorney's Offices were given sworn peace officer standing and authority. Cal. Penal Code § 830.1.

III. CALIFORNIA PEACE OFFICERS AND THEIR AUTHORITY

In California, law enforcement officers are peace officers. Cal. Penal Code §§ 830.1-830.55. Some examples of California peace officers include the Attorney General of California, a police officer, a sheriff, a detective, an investigator, a special agent, a highway patrol officer, a parole agent, a marshal, and a coroner. *Id.* The authority and the jurisdiction of a California peace officer are set forth in the Penal Code. Cal. Penal Code § 830 et seq. A peace officer in California can make an arrest, with or without a warrant, and search suspects and seize evidence incident to an arrest. *Id.*, §§ 832, 834, 836.

All California peace officers are required to successfully complete an introductory training course prescribed by the Commission on Peace Officer Standard and Training (POST).[56] The introductory training course is the Regular Basic Course, and this Course is taught at 39 different police academies located throughout California. "The Regular Basic Course curriculum is divided into 42 individual topics, called Learning Domains. The Learning Domains contain the minimum required foundational information for given subjects, which are detailed in the Training and Testing Specifications for Peace Officer Basic Courses. The training and testing specifications for a particular domain may also include information on required instructional activities and testing requirements. The course is covered in minimum of 664 hours."[57] However, each academy may extend the training hours, and the training provided by the Los Angeles Police Academy is six months long. Each District Attorney's Office has its own way of recruiting and hiring its investigators.

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[54] www.da.co.la.ca.us/about/office-overview.

[55] *Id.*

[56] Cal. Penal Code § 832.

[57] https://www.post.ca.gov/regular-basic-course.aspx

IV. FIVE DIVISIONS WITHIN THE BUREAU OF INVESTIGATION

The LADA's Bureau of Investigation is divided into five divisions: Criminal, Specialized Fraud, Fraud Corruption, Special Operations, and Administrative.

The Criminal Division provides direct prosecutorial investigation support to the LADA's branch offices. The Specialized Fraud Division investigates and prosecutes Public Assistance Crimes: welfare fraud, workers' compensation fraud, and automobile insurance fraud. Within these Divisions, specific task forces are set up to enforce the violations of these statutes (e.g., Social Security Criminal Investigation Task force, and Auto Insurance Task Force).

The Fraud and Corruption Division handles cases involving the justice system, high-technology crimes (computer forensic investigation, cyber-crime investigation, cyber investigation response team), and the white-collar crimes (major fraud, white collar crime, elder abuse, real estate fraud, consumer protection, environmental crimes).

The Special Operations Division investigates and prosecutes target crimes, such as arson, celebrity stalking, crimes against police officer; child abduction cases; major crimes; and organized crimes. In handling these cases, the Special Operations Division works with many Task Forces: High Intensity Drug Trafficking Area (HIDTA), Innocence Lost, Joint Regional Intelligence Center (JRIC), LA Human Exploitation & Trafficking, LA IMPACT, LASD-Intel, Sex Crime - SAFE TF, Sexually Violent Predator, and U.S. Drug Enforcement Agency Tobacco and Firearm (SWBIT).

The Administration Division provides administrative support, including training, employee relations, background investigations, and also has within it the Internal Affairs office.

V. DA INVESTIGATOR FUNCTION WITHIN THE LADA'S OFFICE

In providing prosecution support to the DDAs, the DA investigators serve many functions. For instance, the investigators may conduct criminal and non-criminal investigations, serve as the liaison between the local law enforcement agencies and the DA's legal staff, and act as the law enforcement arm of the DA's Office.

A. Criminal and Non-Criminal Investigations

The DA investigators provide investigative support to the DDAs by conducting any additional investigations needed to close the gap between the level of evidence required to satisfy the probable cause standard at a preliminary hearing, and the level of evidence required to obtain a conviction under the beyond a reasonable doubt standard of proof. The additional investigative support provided by the investigators ensures that the person charged is responsible for the offense, and provides justice for the victim and the public.

B. Liaison Between Law Enforcement Agencies and the Prosecutors

Most DA investigators are former law enforcement officers from local agencies; therefore, they are familiar with the investigative process of the local police, and have an established

relationship with local law enforcement officers. With most crimes, initial investigations are performed by the local police or the sheriff's office. As a result, when additional investigation is needed, the DA investigators act as a liaison between the DDAs and the local police/sheriff in requesting and obtaining additional evidence.

C. Law Enforcement Arm of the District Attorney's Office

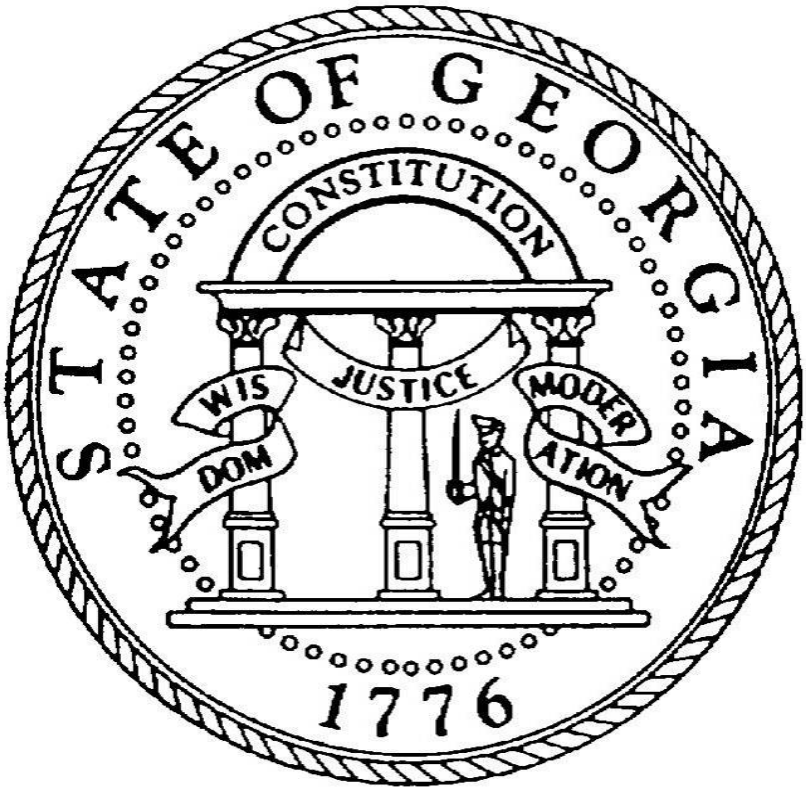
In this role, the DA investigators serve and enforce criminal and/or civil process; detect and/or locate unidentified witnesses in criminal prosecutions and other pre-complaint investigations; collect and organize criminal intelligence data pertaining to organized crimes, terrorist activities, gangs, and other threats to public safety; conduct special investigations concerning corruption, malfeasance, or other impropriety by government agencies, officers, or employees; locate and/or transport victims, witnesses, or defendants in criminal investigations and/or prosecutions; and investigate political improprieties related to election laws.

D. Investigative Assistance to Other Law Enforcement Agencies

When other law enforcement agencies require additional resources, the LADA's Office may provide these other agencies with the needed resources. For example, the DA's Office may assist with computer forensic analysis, provide an undercover officer or vehicular and/or electronic surveillance team, or provide wiretap operations.

E. Investigation Support to Special Fraud and Special Operations Unit

In addition to providing prosecution support to the DDAs in the 32 branch offices of the LADA's Office, the DA investigators provide investigative support to the prosecutors in the Special Prosecutions Unit. This Unit has original jurisdictional responsibilities to investigate matters involving local government corruption, complex frauds, organized crime syndicates, computer-related crimes, and the inter-agency law enforcement task forces. The DA investigators will detect and investigate unreported crimes and bring the perpetrators for prosecution. In providing support to this Unit, the DA investigators could do all or any of the following: procure and process witnesses; witness protection and relocation of witnesses; subpoena service/body attachment; pretrial investigations to supplement the initial investigation to strengthen the case (both adult and juvenile criminal cases); reconstruct crime scenes; assist other law enforcement agencies with investigations; and assist other law enforcement agencies with vehicular and electronic surveillance; and make arrests of known fugitives.



GWINNETT COUNTY DISTRICT ATTORNEY'S OFFICE
Lawrenceville, Georgia

By: Jason J. Park, Assistant District Attorney[58]

[58] Jason Park is an Assistant District Attorney for the Gwinnett County District Attorney's Office. He is currently assigned to the Drug Task Force, a special investigation unit that utilizes court-sanctioned investigative techniques to prosecute complex murder, criminal street gang, and multi-jurisdiction narcotics trafficking cases. He conducts wiretap investigation of violent gang and narcotics cases in conjunction with the federal and local law enforcement officers. He also teaches Advanced Search Warrant and Trial Testimony at the Gwinnett County Police Academy. Previously, he was a Senior Assistant District Attorney in the Violent Offenders Division, Gangs Unit, of the Fulton County District Attorney's Office in Atlanta, Georgia, and a Felony Trial Assistant District Attorney in the Gangs Bureau of the Kings County District Attorney's Office in Brooklyn, New York.

INTRODUCTION

I. GWINNETT COUNTY, GEORGIA

Gwinnett County is located in the north central portion of the State of Georgia, east of Atlanta. As of 2016, its population is estimated to be 907,135, making it the second-most populous county out of 159 counties in Georgia. The most-populous county in Georgia is the County of Fulton where the City of Atlanta is located.

The County was created in 1818, and the County seat is Lawrenceville. Gwinnett County has 17 incorporated cities and, of those, Auburn, Duluth, Lawrenceville, Lilburn, Norcross, Snellville, and Suwanee have its own police departments. The rest of the County is served by the Gwinnett County Police Department which has approximately 800 POST-certified police officers and 300 civilian employees.

II. THE COURTS

In Georgia, misdemeanor criminal cases are prosecuted in State Courts by the Solicitor General's Office. All felony criminal cases are prosecuted by the District Attorney's Offices in superior courts, which are the courts of general jurisdiction with exclusive constitutional authority over felony criminal cases, and over cases involving title to land, equity, declaratory judgments, habeas corpus, mandamus, quo warranto, prohibition, adoptions, and divorce. In Gwinnett County, there are ten Superior Court judges (felony cases) and six State Court judges (misdemeanor cases). The judges are either elected in a countywide general election or appointed by the governor when vacant.

GWINNETT COUNTY DISTRICT ATTORNEY'S OFFICE

I. THE ORGANIZATION OF THE GWINNETT COUNTY DA'S OFFICE

In the superior courts, each courtroom, or a judge, is assigned a team of three prosecutors (one supervising prosecutor and two junior prosecutors), two investigators, a secretary, and a victim advocate. With ten superior court judges in Gwinnett County, a total of 30 prosecutors are assigned to the ten courtrooms to prosecute felony criminal cases.

Three Deputy Chief Assistant District Attorneys oversee these ten teams. In addition, there is a special team (known as the Drug Task Force) dedicated to the prosecution of drug and gang cases. The Drug Task Force is overseen by Chief Assistant District Attorney and it consists of three prosecutors and two investigators. Recently, a Special Victims Unit was created consisting of three prosecutors and two investigators to prosecute sex crimes.

In addition, three prosecutors handle juvenile cases in Juvenile Court, with the assistance of two investigators and a legal assistant.

The three Deputy Chief Assistant DAs, the Chief Assistant DA, and the District Attorney rotate on-call status 24 hours a day, seven days a week, to assist law enforcement organizations working in Gwinnett County. The Deputy Chief Assistant DAs are also responsible for managing all Grand Jury presentations, preliminary hearings, and the Fast Track program.

A. Gwinnett County DA Investigators

The Gwinnett County DA's Office has a current Criminal Investigation staff of 25 investigators. The duties of a Criminal Investigator include reviewing cases received from local, state and federal law enforcement agencies; completing investigative reports; locating and interviewing victims and witnesses; serving legal documents such as subpoenas; locating and transporting physical evidence for trial; testifying in court proceedings; and investigating complaints received directly by the DA's Office. A majority of the DA Criminal Investigators have 15-plus years of law enforcement experience, and many have retired from their previous law enforcement careers. As such, each DA Criminal Investigator is uniquely qualified to investigate in his/her own specialized subjects of expertise, such as arson, wiretap, white collar, narcotics, homicide; thus, DA Criminal Investigators cover all major areas of criminal investigation done by the DA's Office.

The DA Criminal Investigators are on-call and available to assist other law enforcement officers in the field with investigations including homicides, white collar crimes, and drug related crimes. Also, two Criminal Investigators are assigned to work with Assistant DAs involved in juvenile court prosecutions.

B. Gwinnett County DA Victim Witness Program

Under the Georgia Crime Victim's Bill of Rights[59] enacted in 1995 and amended in 2010, a list of mandated notifications and victim rights are available to anyone who has been victimized.

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[59] Crime Victim's Bill of Rights House Bill 567
Effective July 1, 2010, the following updates have been made to the Crime Victim's Bill of Rights:

- The right to reasonable, accurate, and timely notice of any scheduled court proceedings or any changes to such proceeding.
- The right to be present at all public court proceedings involving the crime.
- The right to be heard at any scheduled court proceeding involving the release, plea, or sentencing of the accused.
- The right to file a written objection in any parole proceeding involving the accused.
- The right to confer with the prosecuting attorney in any criminal prosecution related to the victim.
- The right to proceedings free of unreasonable delay.
- The right to be treated fairly and with dignity by all criminal justice agencies involved in the case.
- The right to be entitled to notification of the release of an accused from custody.
- Advisement on how to file a complaint with the Judicial Qualifications Commission.
- The right to restitution as the law provides.
- The right to attend restitution hearings.
- The names and telephone numbers of contact persons at the office of the investigating agency where the victim may apply for the return of any of the victim's property that was taken during the course of the investigation.
- The right to refuse to submit to an interview by the accused, the accused's attorney, or an agent of the accused.
- The right to set conditions for the interview if a victim agrees to be interviewed by the accused, the accused's attorney, or an agent of the accused.

The Gwinnett County DA's Victim Witness Unit is set up to ensure that crime victims' rights are preserved under Georgia law. The Unit's goal is to pursue justice on behalf of the victims and to provide the best possible support as their cases proceed through the criminal justice system. Approximately ten Victim Witness advocates presently work in the Gwinnett County DA's Office.

II. INVESTIGATION AND PROSECUTION OF CASES

A. Reactive Cases

1. Criminal Investigation by the Local Law Enforcement Agencies

A majority of cases that are brought to the Gwinnett County DA's Office for indictment considerations are investigated and prepared by the local law enforcement agencies without any prompting or direction from the DA's Office. If a case must be categorized as either reactive or proactive, the majority of the cases would surely fall into the reactive category, and these cases include anything from murder, theft, sex crimes, and property crimes.

The "reactive" cases typically are those where a law enforcement officer responds to a criminal incident and makes an arrest on scene or after a short investigation. A law enforcement officer will complete his investigation in reaction to a crime, apprehend the suspect(s), and then present an indictment package to an Assistant DA for consideration of the evidence to determine what criminal charges will be presented for indictment purposes. Typically, an indictment package will contain all the written reports of the investigating officer, a list of witnesses, a list of evidence, search warrants, and arrest warrants. In this scenario, the perpetrator is often already under arrest. However, when the perpetrator is identified but not yet in custody, the case can be presented to the grand jury and a grand jury warrant will be obtained.

2. Additional Investigation in Reactive Cases

For more serious crimes, like murder and rape, additional investigations are conducted even after the suspect has been indicted. A prosecutor may ask the investigating case officer or the DA Criminal Investigator to conduct additional investigations to search for follow-up witnesses, obtain jail calls, or to conduct additional forensic investigations.

3. Indictment Decision by the DA's Office

A prosecutor decides which criminal charges should be submitted on the indictment or accusation based on the evidence presented. Often, the charges filed are different from those contained in the arrest warrant obtained by the investigating officer. The assigned prosecutor evaluates the weight of the evidence, determines the legality of the methods used in obtaining such evidence, and applies the facts and circumstances to determine the proper charges to indict the

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- The accused, the accused's attorney, and any agent of the accused shall not contact a victim in an unreasonable manner; and if the victim has clearly expressed a desire to not be contacted, no contact shall be made.
- A victim who has been subpoenaed to testify in court may be exempt from the rule of sequestration.
- The right to be notified of post-conviction proceedings.
- The right to request an inmate to not contact a victim by mail post-conviction.

suspect. The prosecutor has discretion either to dismiss the arrest warrant or replace the charges on the arrest warrant with another charge that correctly reflects the law.

For a prosecutor to dismiss an arrest warrant, the prosecutor must be able to articulate the basis of such action. Insufficiency, or lack of evidence, is the oft-cited reason for the dismissal, and this category includes: deficient or illegal identification procedure, illegal or insufficient basis for the arrest, law enforcement misconduct, or lack of criminal activity. If a law enforcement officer wants to challenge the decision to dismiss, he/she may formally request a review of the dismissed charging decision which then will be discussed with a Deputy DA or the District Attorney. Oftentimes, a decision to dismiss involves a subsequent further investigation jointly conducted by the DA's investigators and the law enforcement officers, rather than a dismissal of the case in its entirety.

4. Prosecution of Police Misconduct

Complaints of police misconduct can be filed by any aggrieved person, and even anonymously, as long as the complaint contains sufficient factual information to warrant an investigation. The investigation could be handled internally within the officer's agency by his immediate supervisor, or if more serious, by the Internal Affairs Unit. In a majority of these cases, the investigating agency will apply for and obtains the corresponding arrest warrant. For criminal prosecutions, such as after the issuance of an arrest warrant, the investigation would be turned over to the DA's Office. See Grand Jury discussion below for the grand jury consideration of charges against peace officers.

5. Prosecution of Prosecutorial, Judicial, or Government Official Misconduct

If a District Attorney or his/her staff member has been indicted, the court is required to notify the Attorney General of the State of Georgia who will prosecute the case in a superior court. Ga. Code Ann. § 15-18-27. The Attorney General, in turn, may refer the case to the Prosecuting Attorneys' Council of Georgia which may select its own prosecutor or request a prosecutor from another circuit to prosecute the case in superior court. Section 145-11-4 of the Official Code of Georgia provides the statutory guidelines for conflict of interest situations or any other disqualifications that would cause the recusal of the District Attorney.

Section 145-11-4 defines misdemeanor offenses specifically applicable to "public officers" in addition to any other applicable offenses. Judicial or public official misconduct cases are prosecuted by prosecutors of the jurisdiction. See Grand Jury discussion below for the grand jury consideration of charges against public officials.

B. Vertically Prosecuted Cases

In the Gwinnett County DA's Office, a vertical prosecution system exists whereby a prosecutor who decides the charges on the indictment takes the case to its completion either by plea or trial.

1. Proactive Investigation and Prosecution

While the majority of the cases prosecuted by the Gwinnett County DA's Office are reactive in nature, there are special circumstances under which a proactive investigation is conducted by the DA's Office. Often, proactive drug investigations are conducted with a confidential informant or an undercover officer who targets a known source of narcotics. These types investigations can be conducted without any assistance from prosecutors, and the investigating law enforcement officers can obtain their own search warrants without the DA's Office involvement.

The only investigative method that requires the assistance of the DA's Office, and perhaps the most notable of proactive investigations, is a wiretap investigation conducted in cooperation with the local and federal law enforcement agents to investigate the activities of multi-jurisdiction drug trafficking organizations. In Georgia, by statute, an application for a wiretap must be made by a prosecutor.

Gwinnett County is designated as High Intensity Drug Trafficking Area (HIDTA) by the Drug Enforcement Administration (DEA) of the United States Department of Justice. As a result, local and federal prosecutors often work closely with both the local and federal law enforcement agencies to combat critical drug-trafficking activities. The Gwinnett County Police Department is one of the few police departments in Georgia equipped with a "wire room" where a contemporaneous recording can be made of court-authorized interceptions. The following discussions illustrate a typical wiretap investigation.

2. Case Study of a Proactive Investigation Leading to an Arrest

a. Request for Assistance to Wiretap

On November 1, 2010, members of the Gwinnett County Police Department Narcotics Investigation Unit requested assistance from the Gwinnett County DA's Office in an on-going investigation that now required a wiretap.

The target had been identified by a confidential informant ("CI") who believed that her mother had died of overdose as a result of buying and using heroin from the target who is trafficking significant amounts of narcotics in Buford, a city in Gwinnett County. The CI had known the target for many years as she had heard her mother talk about the target being the main distributor behind all the smaller sellers of heroin.

b. Initial Application and Authorization to Wiretap

Georgia law requires that any application for an authorization for a wire interception be made by the principal prosecutor of the judicial circuit within which the criminal acts are occurring. As such, the principal prosecutor of the county, the District Attorney, submitted an application to the Superior Court, based on the sworn affidavit of an officer who provided the factual information necessary for such authorization. Based on the application and the affidavit, the superior court

judge signed an order requiring the service provider to disclose information sought for a 30-day period.

c. Tracker

The CI provided information regarding the target's couriers who were moving narcotics in various locations (stash houses) in Gwinnett County. In order to follow the movements of the couriers, detectives provided information necessary to obtain a court authorization to place a tracking device on the vehicle of the couriers. A prosecutor from the Drug Task Force of the DA's Office submitted an application and obtained the authorization from the court.

d. Stash House and Arrest of Couriers

Based on the information from the tracking device and the on-going interception of wireless communications, the officers found the location of the stash house and placed it under surveillance. When officers gleaned from the intercepted calls that a transaction was about to occur, and observed a vehicle leaving the stash house carrying significant amounts of narcotics, a vehicle stop was made for a traffic violation (a whisper stop) and four kilograms of narcotics was recovered. The driver and a passenger were arrested.

The law enforcement officers also consulted with the assigned prosecutor and obtained a search warrant for the stash house and recovered additional four kilograms of methamphetamine, two kilograms of cocaine, and $400,000 in U.S. currency. The prosecutor was present at the time of the execution of the search warrant to observe the investigation.

e. Extension and Amendment

Based on this development, the prosecutor made subsequent applications to extend the interception of the original cellular phone and amended the application to add other cellular phone numbers involved in the drug conspiracy. The prosecutor submitted an application with additional affidavits articulating facts sufficient to provide probable cause and the court authorized the subsequent extensions and amendments to continue monitoring the target telephones.

f. Arrest of Target

Based on the extensions and amendments, the officers obtained sufficient evidence to obtain an arrest warrant to charge the Target with multiple counts of Trafficking and placed the Target under arrest.

C. Other Criminal Proceedings Applicable to Both Reactive and Proactive Cases

1. Preliminary Hearing

Rule 26.1 of the Uniform Rules for the Superior Courts of Georgia provides:

"Immediately following any arrest but not later than 48 hours if the arrest was without a warrant, or 72 hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or the law officer having custody of the accused shall present the accused in person before a magistrate or other judicial officer for first appearance.

At the first appearance, the judicial officer shall:
(A) Inform the accused of the charges;
(B) Inform the accused of the right to remain silent, that any statement made may be used against the accused, and of the right to the presence and advice of an attorney, either retained or appointed;
(C) Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application;
(D) Inform the accused of his or her right to a later pre indictment commitment hearing, unless the first appearance covers the commitment hearing issues, and inform the accused that giving a bond shall be a waiver of the right to a commitment hearing;
(E) In the case of warrantless arrest, make a fair and reliable determination of the probable cause for the arrest unless a warrant has been issued before the first appearance;
(F) Inform the accused of the right to grand jury indictment in felony cases and the right to trial by jury, and when the next grand jury will convene [In state court, see State Court Rule 26.1(F)];
(G) Inform the accused that if he or she desires to waive these rights and plead guilty, then the accused shall so notify the judge or the law officer having custody, who shall in turn notify the judge;
(H) Set the amount of bail if the offense is not one bailable only by a superior court judge, or so inform the accused if it is."

A preliminary hearing is conducted in a courtroom located in the Gwinnett County jail where the accused defendant is seen before a magistrate. At common law, it was customary for an accused and the witnesses to be brought before a justice of the peace soon after the arrest in order to determine whether there was reason to believe that the person arrested had committed a crime. In Georgia, the magistrate who presides over the commitment hearing decides whether there is sufficient reason to suspect the guilt of the accused to bind him over for trial. Ga. Code Ann. § 17-7-23.

There are enumerated offenses in Georgia for which a magistrate judge cannot set a bond.[60] At this stage in the proceedings the defendant is typically assigned an attorney to represent him/her,

[60]Ga. Code Ann. § 17-6-1(a): The following offenses are bailable only before a judge of the superior court:
(1) Treason; (2) Murder; (3) Rape; (4) Aggravated sodomy; (5) Armed robbery; (5.1) Home invasion in the first degree; (6) Aircraft hijacking and hijacking a motor vehicle in the first degree; (7) Aggravated child molestation; (8) Aggravated sexual battery; (9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II; (10) Violating Code Section 16-13-31 or Code Section 16-13-31.1; (11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson, aggravated assault, or burglary in any degree, had previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection; (12) Aggravated stalking; and (13) Violations of Chapter 15 of Title 16.

and it is also the first time the prosecutor gets involved in the case in court. If a magistrate judge finds that there is sufficiency of the arrest warrant, then the case will be "bound over" to the superior court.

The Fourth Amendment to the United States Constitution requires a prompt judicial probable cause hearing for a person arrested without a warrant, and the Georgia courts have followed the U.S. Supreme Court decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), by requiring that such hearing be held within 48 hours of the arrest. If not, the burden shifts to the government to demonstrate the existence of bona fide emergency or other extraordinary circumstances for the delay. In Georgia, the remedy for failing to hold a probable cause hearing within the statutory time period is release from custody, but not a dismissal of charges.[61]

2. Grand Jury

In Georgia, DAs have the duty to "attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them."[62] In Gwinnett County, 23 citizens comprise of a grand jury and meet once a week for approximately four months. When a quorum is established, a grand jury will hear approximately 20-25 cases on a given day.

Typically, the same officer who testified in the preliminary hearing will testify in front of the grand jury. Georgia law provides for a reasonable bond to be set if a defendant is not indicted within a 90-day period from the date of his/her arrest. The prosecutor who handled the preliminary hearing will also draft the indictment in vertically prosecuted cases. For a non-wiretap or non-murder case, prosecutors are rotated to cover preliminary hearings; therefore, it is unlikely that the same prosecutor will handle the case again post preliminary hearing. For serious crimes, the assigned prosecutor will handle the case from the initial investigation all the way to the resolution of the case either by plea or trial.

The criminal grand jury proceedings are secret proceedings and the grand jurors are sworn to secrecy. In Georgia, a special procedure must be used when a grand jury is considering charges against peace officers and public officials. In these cases, the accused has a right to appear before the grand jury and make a sworn statement, if he/she so elects, at the conclusion of the presentation of the prosecution's evidence.

3. Arraignment

An arraignment is the stage of the criminal proceeding where a defendant is, for the first time, brought before a superior court judge and informed of the formal charges pending against him/her. The indictment can be read in public or the defendant can waive such reading.[63] The defendant would also be appointed counsel, if it has not already been done, and an initial bond motion is heard. The defendant can plead either guilty or innocent, will be provided discovery materials available at the time, and will set a bond and motions schedule. An arraignment is

[61] *State v. Gilstrap*, 230 Ga. App. 281, 282 (1998).
[62] Ga. Code Ann. § 15-18-6(2).
[63] *Harris v. State*, 11 Ga. App. 137 (1912).

regarded as a critical stage in a criminal proceeding and the purpose is to put the defendant on notice of the charges pending against him/her and to give him/her an opportunity to plead.[64]

Rule II(C)(1) of Unified Appeal Procedure of Georgia requires the prosecutor to announce, prior to arraignment, whether or not the State intends to seek the death penalty. If the prosecutor fails to so notify the defendant, the prosecutor may announce the decision to seek the death penalty then re-arraign the defendant.

The arraignment also serves to form the issues to be tried, and to identify the person indicted when the defendant signs the plea at arraignment. If a defendant fails to plead either guilty or not guilty, the clerk has the responsibility of entering not guilty plea on the minutes of the proceedings.

In Georgia, the court bears the responsibility of fixing the time of arraignment as there is no law requiring that a defendant be arraigned within a specified period of time. This is also a critical time in the trial proceedings because section 17-7-110 of the Official Code of Georgia Annotated requires that all pretrial motions, including demurrers and special pleas, be filed within ten days after the date of the arraignment. The court may extend this time for filing.

4. Plea Bargaining and Negotiation

A plea discussion is highly encouraged and desired as it is an essential part of a criminal case. There are simply too many cases for a prosecutor to try them all. From the defendant's perspective, a plea discussion may result in a prompt disposition of the case, diminishing the uncertainty of the outcome. More often than not, an agreed disposition of a case will result in a lesser sentence than if the defendant is found guilty and sentenced by the court. While it is improper for a trial judge to impose a harsher sentence simply because the defendant chose to go to trial, the same defendant runs the risk that more damaging evidence will come out during trial that the judge might not have been privy to pre-trial.

In Georgia, a defendant is entitled to be informed that an offer has been made by a prosecutor in exchange for a guilty plea, and to be advised of the consequences of the choices confronting the defendant.[65] However, the trial judge is not required to accept a plea agreement.[66]

The Gwinnett County DA's Office policy requires that a prosecutor make a plea offer based on a number of factors including, but not limited to: the severity of the crime committed (weight of the narcotics, extent of the injury, amount of monetary loss, etc.); the proportionality of the criminal responsibility; the criminal history of the perpetrator; and the impact on the community. A prosecutor's plea offer also should take into consideration the opinion of the police or the victims. However, for example, a battered spouse often wants minimum penalty for the abuser, or a victim may want a disproportionate sentence, and in these situations, the prosecutor would make the final determination on the appropriateness of the plea offer. The plea offer is often conveyed in writing.

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[64] *Tarver v. State*, 95 Ga. 222 (1984).
[65] *Whitehead v. State*, 211 Ga. App. 121, 122 (1993).
[66] *Sartin v. State*, 201 Ga. App. 612 (1991).

A prosecutor may dismiss a case if the defendant agrees to take a polygraph test and the results are favorable to the defendant.

5. Bond Hearing

The judges in Georgia consider four factors when determining the bond issue. *Ayala v. State*, 262 Ga. 704 (1993). The trial court may release a person on bail if the court finds the person: poses no significant risk of fleeing from the jurisdiction of the court or of failing to appear in court when required; poses no significant threat or danger to any person, to the community, or to any property in the community; poses no significant risk of committing any felony pending trial; and poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

6. Motions

Often, in a wiretap narcotics case, a defense attorney will file motions to suppress the wiretap evidence and the drugs recovered as evidence. In doing so, they often attack the legality of the court authorization of wire interception and/or the search warrant, as well as the legality of the traffic stop. Officers involved in the investigation will come and testify in these hearings. Typically, all post-arrest investigations are done during the period when motions are heard, and more often than not, by the DA Criminal Investigators. During the course of the preparation for the hearings, the prosecutor and the case investigating officer will also discuss the plea offer or recommendation. While it is entirely up to the prosecutor, an offer is rarely communicated to the defendant before it has been discussed with the officer. The DA Criminal Investigators will also hand-serve subpoenas on witnesses during this time.

7. *Lafler*/*Frye*[67] Hearing

The purpose of this hearing is for the prosecutor to put on record in open court his/her recommendation and offer to the defendant. Typically, the State's offer is communicated at the time of the arraignment and the purpose of this hearing is to make sure the defendant is aware of the State's recommendation. At this hearing, the judge confirms that the defense attorney has communicated the offer to the defendant and the defendant either accepts or rejects the offer. If the offer has not been made, the case is reset. If the defendant is hearing the offer for the first time at the time of this hearing, the case is continued to the next *Lafler*/*Frye* hearing date. If the offer had been made and the defendant rejects the offer, the case is set for a trial.

8. Trial Calendar

Typically, 40 to 60 felony cases get placed on a monthly trial calendar in a given courtroom and the attorneys and the court schedule which case will be tried and when. A majority of the cases plead at this time.

[67] *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

THE WARRANT PROCESS

I. SEARCH WARRANT APPLICATION

In Georgia, courts prefer searches pursuant to search warrants, and they are presumed reasonable. Any officer of Georgia or its political subdivisions, or a university, college or school charged with the duty of enforcing the criminal laws may file a written complaint for the issuance of a search warrant. Ga. Code Ann. §§ 17-5-20, 17-5-21. A search warrant must describe the person and premises with such *particularity* that a reasonably prudent officer would be able to locate the person, premises, and property and know that he/she had authority to search those places without depending on his/her discretion.

Unless the case is extraordinarily complex, in which case a prosecutor will review and approve the affidavit and complaint for a search warrant, the investigating officer will typically draft the complaint and affidavit based on his investigation. Investigating officers who draft these documents must undergo an extensive training session taught by prosecutors every two years. These officers are also provided templates and samples to use. For the most complicated cases, a prosecutor does review the affidavit and complaint for a search warrant, and often at the request of the investigator. In all cases, however, a search warrant application is submitted by the investigating officer, with the exception of the wiretap surveillance and interception application.

The affidavit in support of the warrant sets out the probable cause upon which the search warrant is based. The affidavit must be a written complaint, by a certified peace officer of Georgia who is charged with the duty of enforcing criminal laws. If the affidavit is supplemented verbally, then it must be preserved. Every affidavit is different because it is tailored to the facts of the case. The affidavit will be judged only on the facts actually contained within the four-corners of the affidavit. Any omitted facts cannot be added after the warrant is issued.

Warrants can only be issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The test of probable cause is whether it would justify a man of reasonable caution to believe that an offense has been or is being committed, and this requires merely a probability - less than a certainty, but more than a mere suspicion or possibility.[68]

II. EXECUTION OF SEARCH WARRANT

Pursuant to Official Code of Georgia Annotated, section 17-5-25, a search warrant must be executed within ten days from the time of issuance. If the warrant is executed, the duplicate copy must be left with any person from whom any instruments, articles, or things were seized. A search warrant not executed within ten days from the time of issuance is void and must be returned to the court of the judicial officer issuing the same as "*not executed*."

Official Code of Georgia Annotated, section 17-5-26, provides that a search warrant may be executed at any reasonable time within the ten-day period. Once evidence has been seized

[68] *Lewis v. State*, 255 Ga. 101, 335 S.E.2d 560 (1985).

within ten days, there is no requirement that a second warrant be issued to conduct any forensic examination of the seized evidence even after the ten days have expired.[69]

Section 17-5-27 of Official Code of Georgia Annotated provides:

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant if, after verbal notice or an attempt in good faith to give verbal notice by the officer directed to execute the same of his authority and purpose:
> (1) He is refused admittance; (2) The person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice or the presence of the person or persons therein is unknown to the officer; or (3) The building or property thereof is not then occupied by any person.

No-Knock warrants are justified only when police have reasonable grounds to believe that notice would either increase their peril or lead to immediate destruction of evidence. The purpose for the knock and announce rule comes from the Fourth Amendment reasonableness requirement; thus, officers must wait a reasonable time.

Official Code of Georgia Annotated, section 17-5-28, provides the scope of the search authorized:

> In the execution of the search warrant the officer executing the same may reasonably detain or search any person (named in the warrant) in the place at the time:
> (1) To protect himself from attack; or (2) To prevent the disposal or concealment of any instruments, articles, or things particularly described in the search warrant.

III. RETURN OF SEARCH WARRANT

Official Code of Georgia Annotated, section 17-5-29, provides instructions regarding the return of the warrant. A written return of all instruments, articles, or things seized must be made without unnecessary delay before the judicial officer named in the warrant; an inventory of any items seized must be filed with the return and signed under oath by the officer executing the warrant; and a copy of the search warrant must be left at the place searched (if unoccupied) or with a person present during the search. Where an electronic search warrant is being executed, a copy must be left with the registered agent listed on the search warrant.

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[69] *Mastrogiovanni v. State*, 324 Ga. App. 739 (2013) (a second warrant is unnecessary to conduct a forensic exam of a computer that occurs long after the seizure at GBI headquarters).

IV. ELECTRONIC WARRANTS AND ORDER

A. Wiretap Application[70]

Under applicable federal and state statutes, only the "principal prosecuting attorney" or the elected district attorney having jurisdiction over prosecution of the crime under investigation can make a written application to a superior court judge to seek an investigation warrant to conduct a wiretap investigation based on a sworn affidavit from an investigative or a law enforcement officer of the United States. 18 U.S.C § 2516(2); Ga. Code Ann. § 16-11-64(c). This order seeks authorization to intercept and record all types of electronic and oral communications (to include, but not limited to: electronic communications, oral communications, and data based communications) occurring over the specified target telephones. At the state or the county level, this would typically mean that an elected district attorney in whose jurisdiction the crime has occurred, or the jurisdiction in which the sought-after evidence can be found, is making the application. The affiant is typically a POST-certified law enforcement officer assigned to a federal law enforcement agency.

B. Cell Tower "Dumps"[71]

A prosecuting attorney can make an application to a superior court to issue an ex-parte order authorizing the disclosure of wire or electronic communications records and information, to include only the cell phone number of any subscriber(s) and/or customer(s) using any cell tower(s) supporting communications near the specified address during the time periods specified in electronic storage. 18 U.S.C §§ 2703 (c)(1)(B), 2703(d); Ga. Code Ann. §§ 16-11-66.1(a) & (b), 16-11-70.

C. Pen Register and Trap and Trace[72]

The elected district attorney can make an application to a superior court to issue an order authorizing the installation and use of a pen register and trap and trace device pertaining to a particular phone number with or without the subscriber information in order to record or decode dialing, routing, addressing, or signaling information, including registration and authentication, associated with the transmission of wire or electronic communications from the target device, and to capture and record the incoming electronic or other impulses which identify the originating numbers or other dialing, routing, addressing, or signaling information reasonably likely to identify the sources of wire or electronic communications, provided the information does not include the contents of any communication. 18 U.S.C. §§ 3122, 3123(a)(1), (b), (c) & (d), 3124(a) & (b), 3127; Ga. Code Ann. §§ 16-11-60, 16-11-64.1.

As defined in section 2510(15) of United States Code, and all state codes that track the federal definitions, an "electronic communications service provides users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). A "wire communication" is most simply characterized as an "aural transfer" (e.g., spoken words) carried

[70] See Appendix A for template.
[71] See Appendix B for template.
[72] See Appendix C for a template.

"in whole or part" by wire (e.g., telephone lines and successor technologies with a physical connection) while an "electronic communication" is most simply characterized as other data (e.g., text messages, pictures and most Internet data) carried "in whole or part" by either wire or wireless (e.g., radio frequency, including cellular voice and data networks) technologies. 18 U.S.C. § 2510(1) & (12).

A "pen register" and a "trap and trace device" record, decode or capture all non-content information (dialing, routing, addressing and signaling) related to such communications. 18 U.S.C. § 3127(3) & (4). As such, an application for pen register and trap and trace seeks access to everything related to, coming from, or going to the Target Device, EXCLUDING communications content (which a superior court may authorize solely pursuant to a search warrant or equivalent PC-based court order for stored content or intercept authorization, a wiretap order.

D. Email Content and Social Media Content [73]

An investigating officer can make an application to a superior court to issue an order disclosing contents of an email account, including content of all incoming and outgoing text messages, audio, photographic and video files, IP addresses for all outgoing and incoming communications and logins and logouts, any and all subscriber and/or customer account information, including but not limited to: name; address; social security number; length of service (including start date) and types of services utilized; any and all telephone numbers, email addresses, instrument numbers (including but not limited to ESN, IMEI, IMSI, MDN, MEID, MIN), other subscriber numbers, other subscriber identities, and any temporarily assigned network addresses associated with the account content; any and all means and source of payment for the services, including but not limited to: any financial transaction card, bank account number, or electronic transfer of funds, associated with payment for the services associate with the account content. 18 U.S.C. § 2703(a) & (b); Ga. Code Ann. §§16-11-66.1, 17-5-20.

E. Telephone Tracking[74]

An investigating officer can make an application to a superior court to issue an order to track a particular cellular device by requiring a service provider to disclose any and all geolocation/cell site/tower location information to include dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received, including but not limited to: any and all geographic location information, current listing of all towers referenced in the records including address, latitude, longitude, range, orientation, and sector layout; the specific portion of the cell tower receiving a transmission at the beginning and end of each call; precision location information, Ranging (RTT) data, Network Element Identifier (NEID), per call measurement data (PCMD), Mediation Report (Ceer/ X-mine2), and NELOS information, real-time GPS location, geolocation (also known as e911) and/or assisted GPS at 15 minute intervals, and any numeric, alpha, or alphanumeric identifiers; any and all information retained by a telecommunications company that pertains to the subscriber including but not limited to: telephone number dialed by the customer, the number of telephone calls directed to a customer, other data related to the telephone calls typically contained on a customer telephone

[73] See Appendix D for a template.
[74] See Appendix E for a template.

bill, such as: the time the calls started and ended, the duration of the calls, the time of day the calls were made, and any charges applied; Automated Messaging Accounting (AMA) records (a carrier billing mechanism data base search which provides records of originating and terminating caller information); any and all subscriber and/or customer account information, including but not limited to: name; address; social security number; length of service (including start date) and types of services utilized; any and all telephone numbers, instrument numbers (including but not limited to ESN, IMEI, IMSI, MDN, MEID, MIN, TMSI), other subscriber numbers, other subscriber identities, and any temporarily assigned network addresses associated with the services provided, private identification number in hexadecimal (HEX); and any and all means and source of payment for the services, including but not limited to: any financial transaction card, bank account number, or electronic transfer of funds, associated with payment for the services provided. 18 U.S.C. § 2703(c); 47 U.S.C. §§ 1001, 1002; Ga. Code Ann. §§16-11-66.1, 16-11-70, 17-5-20.

F. Vehicle Tracking[75]

An investigating officer can make an application to a superior court to issue an order authorizing the officer to attach a tracking device on or inside a specified vehicle. *United States v. Jones*, 132 S. Ct. 945 (2012); Ga. Code Ann. § 17-5-20, et seq. The officer must describe the vehicle with particularity (year, make, model, vehicle identification number, registration information) and further articulate that the vehicle has been used or will be used in commission of specified crimes or is intended for use in such specified crimes.

G. Electronic Records Based on IP Address[76]

A prosecutor can make an application to a superior court to issue an order disclosing records and information pertaining to a particular IP address, including transaction records and subscriber information, customer account information (name, address, social security number, length of service, starting date, types of services provided, methods and means of payment for services, financial transaction card, bank account number, electronic transfer of funds, electronic numbers, instrument numbers (including but not limited to ESN, IMEI, IMSI, MDN, MEID, MIN), other subscriber numbers, and any and all Internet Protocol addresses used in the application for services and used by this subscriber, without content; and complete IP logs for this subscriber, without content. 18 U.S.C. § 2703(c); Ga. Code Ann. §§ 16-11-66.1, 16-11-70.

H. Cell Site Simulator ("Stingray")[77]

A prosecuting attorney can make an application to a superior court judge for an order authorizing law enforcement to use a cell-site simulator, an investigative device capable of broadcasting signals that will be received by the target device or receiving signals from nearby cellular devices. 18 U.S.C. §§ 2703(c), 3122(a)(2); Ga. Code Ann. § 16-11-64.1.

Such a device may function in some respects like a cellular tower, except that it will not be connected to the cellular network and cannot be used by a cell phone to communicate with others.

[75] See Appendix F for a template.
[76] See Appendix G for a template.
[77] See Appendix H for a template.

The device, commonly known as "Stingray," may send a signal to the target device and thereby prompt it to send signals that include the unique identifier of the device.

Law enforcement officers may monitor the signals broadcast by the target device and use that information to determine the target device's location, even if it is located inside a house, apartment, or other building. The investigative device may interrupt cellular service of phones or other cellular devices within its immediate vicinity. Any service disruption to non-target devices will be brief and temporary, and all operations will attempt to limit the interference with such devices.

In order to connect with the target device, the device may briefly exchange signals with all phones or other cellular devices in its vicinity. These signals may include cell phone identifiers. The device will not complete a connection with cellular devices determined not to be the target device, and law enforcement will limit collection of information from devices other than the target device.

To the extent that any information from a cellular device other than the target device is collected by the law enforcement device, the law enforcement officers will delete that information, and law enforcement will make no investigative use of it absent further order of the court, other than distinguishing the target device from all other cellular devices.

Accordingly, the applicant requests an authorization to employ an electronic investigative technique to locate the target device by collecting and examining (1) radio signals emitted by the target device for the purpose of communicating with cellular infrastructure, including towers that route and connect individual communications; and (2) radio signals emitted by the target device in response to radio signals sent to the cellular device by the officers, for a period of 45 days, during all times of day and night without geographic limit, and at multiple locations and/or at multiple times at one location, if and as needed to locate the target device. 18 U.S.C. §§ 3122, 3123O; Fed. R. Crim. P. 41; Ga. Code Ann. §§ 17-5-20, 16-11-64.1.

COMMON HYPOTHETICAL: PEOPLE V. VINCE, JONES, AND THOMAS

The below-described hypothetical case has been presented to all prosecutor writers for analysis and discussion based on the laws, and practices and procedures of their respective jurisdictions.

A. Facts

Judy and her friends were walking through the apartment complexes of the 69 Village. They saw Willie and another boy named MoMo, and struck up a conversation. As they talked, two armed gunmen ran up to them and fired approximately 20 shots. Judy was hit in the head and died. MoMo was shot in the leg and survived.

Surveillance videos show three men following Willie and MoMo, and shortly before the shooting, the three men get into a car. Two of the men are then seen coming out the car and

walking towards Judy and the crowd. Moments after, the same two men are seen running back into the car and driving away.

An informant tell the police that a person named Ruth was involved in the shooting, and that she is Victor's cousin. The police learned that MoMo is suspected of killing Victor a few months before, but had not been arrested or charged with Victor's murder.

Ruth agrees to give a statement to the police. After denying any involvement, Ruth says that she was driving through the 69 Village when she saw MoMo. Ruth believed that MoMo was responsible for killing her cousin Victor. Both Victor and Ruth were associated with a "Lower Bottoms" gang. After seeing MoMo, she called her brother Sammie and her cousin Vince and told them MoMo was in the 69 Village. Ruth was aware that her family and friends wanted to kill MoMo to avenge Victor's death.

Shortly after making the phone call, Ruth met with Sammie, Vince and friends named Thomas and Jones. All have ties to the Lower Bottoms gang. Ruth overheard Vince tell the others that MoMo had been spotted and that they needed to take care of him. Ruth said she then left for work and only heard of the murder on the evening news. The police seize Ruth's phone and see the phone numbers of everyone who had been part of the conversation.

The police obtain warrants for the phone records. The records show that Vince, Thomas, and Jones' phones were pinging near the 69 Village at the time of the murder. The phone records for Ruth and Sammie show that their phones were across town during the time of shooting. The text messages between Vince and Jones on the night of the murder allude to having pride in committing various crimes, including one from Vince welcoming Jones to the "REDRUM" club. "Redrum" is a slang term for "murder" spelled backwards.

With this information and the fact that MoMo was still alive, the police obtain a warrant to wiretap Vince, Thomas, and Jones' phones. A phone conservation is intercepted between Vince and another individual where Vince said that they missed an opportunity and needed to keep an eye out for MoMo.

The police also obtained search warrants for Vince, Jones, and Thomas's homes. At Vince's home a gun was found that matched the bullet from Judy's head and the casings on the ground. Meanwhile, Thomas is arrested in an adjacent county and awaits trial on gun charges. The gun found on Thomas at time of his arrest is tested, and the casings match the other set of casings found at the murder scene. Vince gives a statement and confesses to his involvement.

B. Analysis and Discussion

1. Surveillance Camera: How the Police Would Obtain the Surveillance Videos

The protocol in a murder case for first responding officer is to secure the crime scene and the witnesses available before the incident is turned over to a homicide detective. As part of the initial investigation, the assigned detective would secure all surveillance footages in the vicinity. Most often, the detective will first seek cooperation from the apartment management to obtain the

surveillance footage.[78] If the apartment management refuses to cooperate, the detective can obtain the surveillance footage by way of a search warrant with sufficient articulation of facts that would assert that the footage contains evidence of the criminal incident. Alternatively, and lastly, a prosecutor or detective can obtain the surveillance footage by way of a subpoena duces tecum, a legal instrument of general discovery with the burden of showing relevancy and materiality of the footage.[79]

2. Informant: Recording and Use of an Informant's Statement

A statement from an informant who wants to remain anonymous would typically be mentioned in writing, at least, by an investigator in her report. However, often these statements are recorded. An informant's statement rarely is handwritten and signed since the statement itself is not admissible in court unless the informant testifies and is subject to cross-examination. The statement alone cannot be introduced as evidence as it would be considered a hearsay and would fail to pass the protection afforded under the Confrontation Clause of the United States Constitution. The statement itself has little probative value other than to show that the detective directed her attention to Ruth; thus, it would not be considered a hearsay, and would be admissible if offered not for the truth of the statement therein but only for the purpose of explaining the detective's conduct, and to show why the detective took subsequent investigative action.[80]

3. Ruth's Statement: How It Is Recorded and May Be Used in the Case.

Since Ruth is merely a person of interest at this stage of the investigation (thought to be "involved" but without any concrete proof of her involvement), a detective would typically take a video-recorded statement from Ruth. Given the circumstances, *Miranda* warnings would not be necessary since she is not thought to be in custody.[81] Whether Ruth's statement is admissible in court would hinge on whether the trial court make a finding that the statement was made voluntarily without a slightest hope of benefit and without the remotest fear of injury. If Ruth is charged with Conspiracy to Commit Murder and refuses to testify, this statement would be

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[78] In Georgia, the surveillance footage will be admitted as business records if the management certifies: that he has personal knowledge of the business filing record system of the business entity with specific location and description of records; that the records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters; that the records were kept in the course of the regularly conducted activity of the above-named business entity; and, that the records were kept in the course of the regularly conducted activity as a regular practice. Ga. Code Ann. §§ 24-8-803(6), 24-9-912(11).

[79] Ga. Code Ann. § 24-13-23.

[80] Ga. Code Ann. § 24-8-801.

[81] A statement given by an accused to a law enforcement officer is admissible against him only if the statement was voluntary, and in Georgia, that means that the statement must not have been induced by "hope of benefit," among other things. A "hope of benefit" arises from "promises related to reduced criminal punishment — a shorter sentence, lesser charges, or no charges at all." *Brown v. State*, 290 Ga. 865, 868-869 (2012); see also *White v. State*, 266 Ga. 134, 135 (1996) ("The promise of a benefit that will render a confession involuntary under [former] OCGA § 24-3-50 must relate to the charge or sentence facing the suspect."). Thus, "[a] promise not relating to charges or sentences, including a promise regarding release after questioning, has been held to constitute only a collateral benefit … and even if it induces a confession, it does not require the automatic exclusion of that evidence." *Brown, supra*, 290 Ga. at 869. When a court considers whether a statement was voluntary, it must look to the totality of the circumstances, and at trial, the State bears the burden of proving by a preponderance of the evidence that a statement was, in fact, voluntary. *Edenfield v. State*, 293 Ga. 370, 373-374 (2013).

admissible as she would retain her Fifth Amendment rights as a criminal defendant. If she is not charged but called to testify as a witness, this statement cannot be introduced as evidence unless she testifies in such a way that her statement is be used as a prior inconsistent statement, during cross-examination for impeachment purposes.[82]

4. Ruth's Phone: Warrant for Search and Seizure of Ruth's Phone.

To search and seize information from Ruth's phone, the case detective would write the affidavit in support of the warrant since, as a practical matter, she would be the person most familiar with the case. A prosecutor typically does not get involved in reviewing the affidavit. The case detective would submit a search warrant application to a superior court judge in a murder case. The applicable Georgia statute specifically provides that "any judicial officer authorized to hold a court of inquiry…may issue a search warrant," so a magistrate may issue a search warrant for any area of the county in which her district lies. Ga. Code Ann. § 17-5-21. The judges of recorder's court or municipal court also may issue search warrants for any area within the municipality. Since 2001, a search warrant application may be heard by video- conference. *Id.* § 17-5-21.1.

5. Phone Records and Text Messages: Warrant for Search and Seizure of These Records

To obtain a warrant for these records, the case detective would contact a Drug Task Force Electronic Evidence Assistant DA and provide a statement establishing specific and articulable facts and showing reasonable grounds to believe the records and information requested would be relevant to an on-going criminal investigation and request that a superior court judge order the disclosure of phone records, transactional records, and subscriber information. 18 U.S.C. § 2703(c); Ga. Code Ann. §§ 16-11-66.1, 16-11-70. This order typically also contains cell phone location information and most service providers keep telephone records for two years. Since 2015, service providers do not keep text messages but these can be obtained by way of a search warrant to search the cellphone obtained. The detective can make a sworn affidavit to search and seize the contents of the cellphone. Ga. Code Ann. § 17-5-20, et. seq.

6. Wiretap: How a Wiretap Request Is Made and the Roles of the Police and the Prosecutor

As discussed above, only the district attorney can make an application for wire interception based on affidavit provided by a law enforcement officer. The detective would submit a written statement in the affidavit portion of the application which is then submitted for a superior court judge's authorization. Commonly called "Title III" investigation, wiretap investigation intercepts wire and electronic communication pursuant to a court order, under section 2518 of title 18 of United States Code, for up to 30 days.

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[82] In impeaching a witness with a prior inconsistent statement, the cross-examiner must meet three requirements. First, the prior statement must contradict or be inconsistent with the witness's in-court testimony; second, the prior statement must be relevant to the case; and, third, the examining attorney must lay the proper foundation with the witness. The purpose of the foundation requirement is to give the witness an opportunity to admit, explain, or deny the prior contradictory statement.

The affidavit must provide probable cause to believe that the interception will reveal evidence of a predicate felony offense and the application must show that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed or to be too dangerous, and also that the surveillance will be conducted in a way that minimizes the interception of communication that do not provide evidence of a crime.

Thus, the detective presents the status of the investigation and articulates the specific facts sufficient to show such interception will reveal evidence of gang-related homicide. It is then up to the prosecutor to determine whether the affidavit meets the criteria and approve and prepare an application meeting the requirements for a wiretap investigation. The possibilities of obtaining incriminatory conversations among suspects in a gang homicide are often a common basis for obtaining a wiretap because the suspects discuss their plans to commit the offense, to procure or conceal weapons, and also discuss information related to the crime and assistance. During the wiretap investigation, the prosecutor often "lives" in the wire room and meets with the monitors and the detective daily.

7. Search of Vice, Jones, and Thomas's Homes: The Search Warrant Process

Typically, a search warrant for a suspect's home is requested from the start, through an application for the warrant submitted by the case detective, and the warrant is executed by the local law enforcement agency without any involvement from the DA's Office.

8. Thomas' Arrest: The Role of the Prosecutor and the Police for the Arrest Warrant

Unless the matter being investigated requires a wiretap wherein a prosecutor directs the investigation in consultation with the detective and case agents, an arrest warrant process is entirely within the discretion of the case detective. In a wiretap or a joint investigation, much discussion will be held as to the timing of the arrest to determine the recovery of the maximum admissible evidence.

9. Vince's Confession: How the Confession Is Recorded

A suspect's confession will almost invariably be video-recorded. In Georgia, only voluntary confessions are admissible. Ga. Code Ann. § 24-8-824. The confession must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. The totality of the circumstances test applies in determining whether or not a confession was freely and voluntarily given.[83]

The Georgia Supreme Court has said that it is proper to consider the following factors in determining whether the "totality of the circumstances" test has been met: (1) age of the defendant; (2) education level; (3) knowledge of the defendant as to both to the substance of the charge and the nature of his right to consult an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends, or attorney; (5) whether the accused was interrogated before or after formal charges has been filed; (6) methods used in interrogation;

[83] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

(7) length of interrogation; (8) whether or not the accused refused to give a voluntary statement on prior occasions; and (9) whether the accused repudiated the extrajudicial statement at a later date.[84]

The Court in *Rose v. State*, 314 Ga. App. 79, 82 (2012) held, "although Rose never signed the Miranda waiver form, we have held that "[t]he refusal to sign a waiver of rights form before speaking to police does not render the statements involuntary and inadmissible…. The refusal to sign a waiver form does not constitute an invocation of the right to remain silent or the right to counsel." Further, if a person makes a statement to the police after Miranda warnings are given and without invoking his right to remain silent or his right to an attorney, he "has in effect waived his rights."

When a defendant is read and understands his Miranda rights, he must invoke them clearly and unambiguously. A defendant does not invoke his Miranda rights by remaining silent.[85]

[84] *Riley v. State*, 237 Ga. 124, 128 (1976).
[85] *Barnes v. State*, 2010 Ga. LEXIS 499 (June 28, 2010).

STATE OF NEW YORK

By: Helen Ahn, Assistant District Attorney

INTRODUCTION

New York City, in the State of New York, is divided into five boroughs (Bronx, Manhattan, Queens, Brooklyn, and Staten Island), and each borough has its own District Attorney's Office. The District Attorney is elected to a four-year term.

The District Attorney's Office of New York (Manhattan) for instance, handles more than 100,000 criminal cases each year, and the Office is organized into three legal divisions: Trial Division, Investigation Division, and Appeals Bureau.[86] The Trial and Investigation Divisions are subdivided into specialized bureaus.[87] The specialized bureaus within the Trial Division include: Special Victims Bureau, Cybercrime & Identity Theft Bureau, Crime Strategies Unit, Forensic Sciences/Cold Case Unit, Hate Crimes Unit, Vehicular Crimes Unit, Violent Criminal Enterprises Unit, Public Assistance Fraud Unit, and Special Litigation Bureau.[88] The Investigation Division of the Manhattan DA's Office prosecutes white collar and organized crimes, in addition to more traditional fraud and corruption cases.[89]

Information pertaining to other District Attorney's Offices of New York City can be found on their websites.[90]

NEW YORK: PROSECUTION AND LAW ENFORCEMENT COOPERATION

There are three major classes of offenses for which a person may be prosecuted in New York: violations, misdemeanors, and felonies. A violation is an offense that carries the lowest sanction, and is not defined as a crime. The maximum term of imprisonment for a violation is 15 days. Examples of violations are unlawful possession of marijuana, drinking alcohol in public, harassment, and disorderly conduct.

A misdemeanor is the less serious crime, but higher than a violation. Misdemeanors are divided into two classes: "A" and "B." The maximum term of imprisonment is one year in county jail for a class "A" misdemeanor, and three months in jail for a "B" misdemeanor. Examples of misdemeanor crimes are shoplifting, trespassing in a building, and jumping a turnstile.

A felony is the more serious crime. Felonies are crimes for which more than one year of imprisonment may be imposed. Felonies are divided into five classes, "A" through "E." An "A" felony is the most serious crime, and an "E" felony is the least serious. Examples of felonies are robbery, burglary, grand larceny, sale of narcotics, and murder.

Some of the major classes of offenses are defined in the Penal Law of New York State, and others can be found in statutes such as the Vehicle and Traffic Law, or in local ordinances, such as the New York City Administrative Code.

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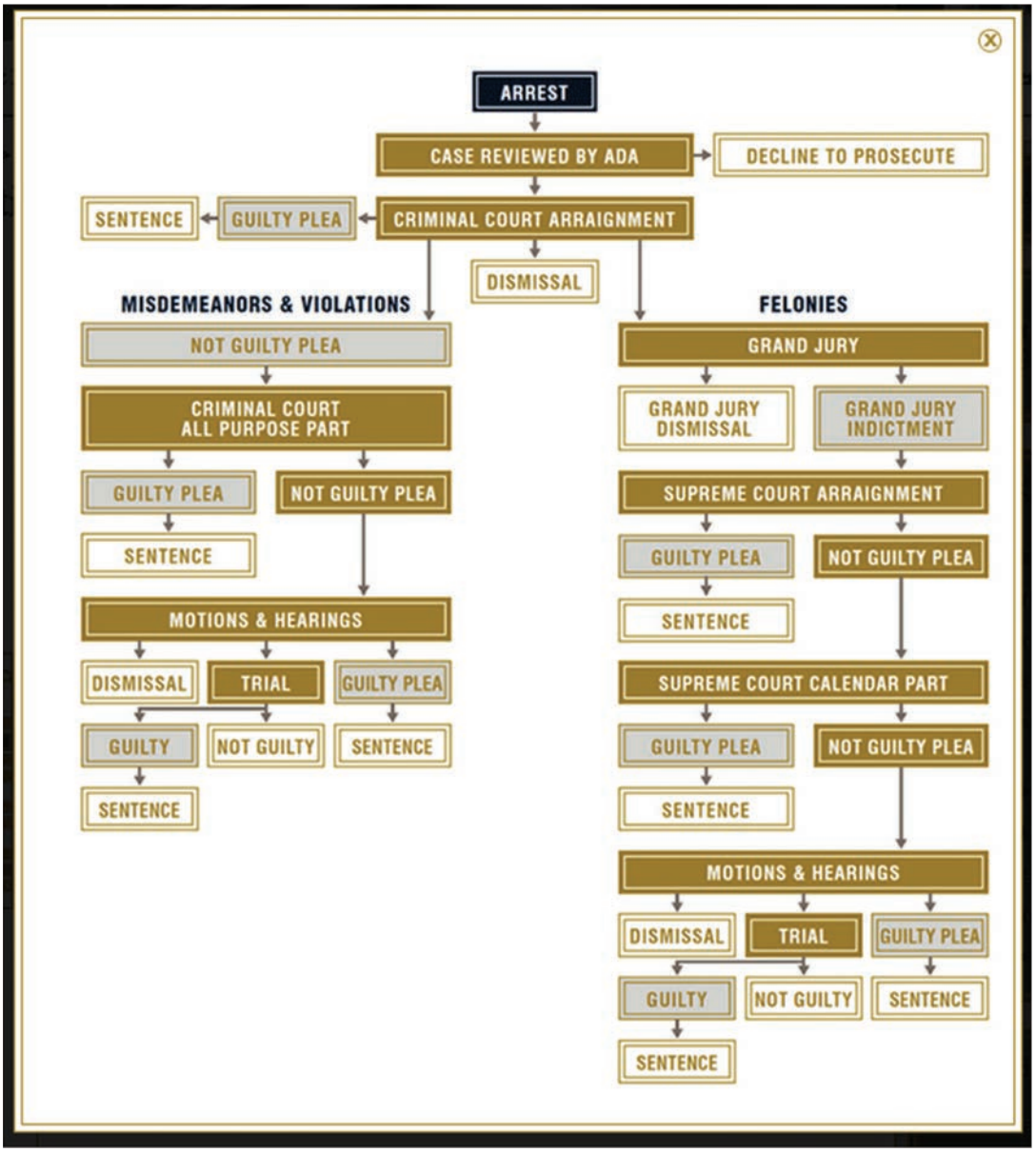
[86] http://manhattanda.org/office
[87] http://manhattanda.org/trial-division
[88] *Id.*
[89] http://manhattanda.org/investigation-division
[90] http://bronxda.nyc.gov (Office of the Bronx District Attorney); http://www.queensda.org (Queens District Attorney's Office); http://www.brooklynda.org (The Brooklyn District Attorney's Office); and http://rcda.nyc.gov (Office of the District Attorney Richmond County/Staten Island).

The chart below illustrates the criminal process in New York from arrest to case resolution.



I. DIVISIONS WITHIN THE DA'S OFFICE OF NEW YORK

The Manhattan District Attorney's Office is divided into three major divisions: Trial Division, Investigation Division, and Appeals Division. Two are discussed below.

A. THE TRIAL DIVISION

The Trial Division has principal responsibility for prosecuting misdemeanor and felony crimes. It is comprised of six trial bureaus, and a number of specialized bureaus and units that target certain types of crimes or have other specialized knowledge, training and experience. The trial bureaus are each staffed by approximately 50 Assistant District Attorneys (ADA) of varying

levels of experience. In addition to the legal staff and supervisors, each bureau has a bureau administrator, investigative analysts, and paralegals.

After completing a comprehensive training program, first-year ADAs begin by handling misdemeanor prosecutions in Criminal Court, including a wide variety of cases such as misdemeanor assault, driving while intoxicated, drug possession, and theft offenses. As ADAs gain experience, they handle more serious felony cases in Supreme Court. These cases include homicides, shootings, stabbings, sexual assaults, burglaries, assaults, drug and gun possession, robberies, and other types of violent crime.

Prosecutors in the Trial Division prosecute cases vertically. This means that the ADAs are assigned cases immediately after arrest and are responsible for those cases to final disposition by trial or plea. The vertical prosecution system allows one prosecutor to usually stay with the case from start to finish to better serve the victims, witnesses, and law enforcement officials involved in the prosecution of the case. Felony ADAs in the specialized bureaus and units develop expertise in certain types of crimes, such as sex crimes, child abuse, domestic violence, elder abuse, cybercrimes, identity theft, hate crimes, vehicular crimes, and other serious violent crimes.

The Trial Division also handles public assistance fraud, litigation surrounding psychiatric evaluations, and landlord-tenant narcotics evictions. The Crime Strategies Unit of the Trial Division identifies groups and individuals most responsible for committing crimes in the local communities.

B. THE INVESTIGATION DIVISION

The Investigation Division of the New York County DA's Office is a recognized leader in white collar and organized crime prosecutions.[91] Within the Office's jurisdiction lies one of the world's centers for global trade and finance; thus, many of the world's financial transactions pass through New York's markets. Consequently, the Manhattan DA's Office has jurisdiction to pursue cases that other local prosecutors cannot, and one of the core philosophies of this Office is to root out fraud by policing the financial markets.

To achieve this goal, the New York County DA's Office launches proactive investigations that target individuals and entities who misuse New York's financial institutions for illicit purpose, or whose conduct undermines the integrity and stability of the City's financial institutions and markets. These proactive investigations usually start and end with a prosecutor's discretion.[92] Some of the areas of proactive investigation include international money laundering, investment and securities fraud schemes, frauds perpetrated on the markets themselves, and cybercrime and computer security threats.

Because of the geographic jurisdiction of the Manhattan DA's Office, it is able to bring cases addressing criminal conduct anywhere in the United States, or around the world, that makes

[91] www.manhattanda.org

[92] The New York City Police Department (NYPD), however, may consult the prosecutor, but these complex cases usually begin with a complaint to the DA's Office, and such complaint is handled by an ADA who specializes in that specific area of criminal law.

use of New York's financial institutions. Past cases have included investigations and prosecutions of rogue regimes and foreign banks that tried to use New York banks to defeat economic sanctions. Also, since 2009, three cases involving three large international banks have led to the seizure of more than $1.1 billion. Beyond the funds recovered, these cases have changed practices in international banking, and have helped to make New York City more secure against the threats of terror finance and the proliferation of weapons of mass destruction.

The Investigation Division also investigates and prosecutes more localized and traditional cases involving fraud and corruption—ones that protect the lives and livelihoods of the citizens who live, work, and play in New York City. These include white-collar crimes that are typical of many big-city DA's Offices, such as embezzlement, insurance fraud, credit card and check fraud, and other forms of theft. But the Investigation Division's portfolio of cases is more extensive, matching the size and complexity of the city that the Office protects. These cases not only recover compensation for victims and large monetary penalties, but also save billions of dollars in collateral economic costs for all New Yorkers. In this regard, the DA's Office of New York targets diverse areas, such as construction fraud, concrete and construction testing fraud, mortgage fraud, organized crime, tax fraud, public benefit fraud in housing, Medicaid, and public assistance, as well as medical insurance fraud and environmental crimes. These investigations also protect the city's most vulnerable and powerless citizens, through the creation of specialized units to handle fraud against the elderly and against immigrant populations.[93]

Within the Investigation Division, there are many sub-divisions.[94] Of particular note are the five listed below:

1. Major Economic Crimes Bureau

Within the Major Economic Crimes Bureau, the Office commits its resources to prosecuting some of the most important and complex economic crimes, while upholding the integrity and security of New York's major financial markets. This Bureau focuses on criminal conduct committed in the financial sector, including securities, commodities, and investment fraud; mortgage fraud and financial institution fraud; commercial bribery and kickbacks; bank

[93] www.manhattanda.org

[94] The Investigation Division is comprised of the following divisions: Major Economic Crimes Bureau, Rackets Bureau, Financial Frauds Bureau, Public Corruption Unit, Cybercrime & Identity Theft Bureau, Asset Forfeiture and Tax Crimes Unit. www.manhattanda.org/investigation-division. The Investigation Division ADAs are assisted in their investigations by the Forensic Accounting and Financial Investigations Bureau and the Investigations Bureau. ww.manhattanda.org/rackets-bureau. Prosecutions have been brought against criminal enterprises in a variety of industries, including garment, trucking, waste removal, construction, and residential management industries, and a variety of labor unions that service those industries. In many of these prosecutions, the defendants were charged with Enterprise Corruption, the New York State version of the federal "RICO" (Racketeer Influenced and Corrupt Organizations) law. This approach allows the DA to pursue civil remedies that complement criminal prosecutions, such as freezing the assets of a corrupt entity or compelling the entity to be placed in receivership. By enforcing the law and using the forfeiture remedies available in enterprise corruption and other prosecutions, the DA is able to recoup some of the millions of dollars lost by the state through fraud and corruption. More importantly, these prosecutions have brought much needed reform within these industries. Prosecutors in the Bureau work closely with a variety of local, state, and federal law enforcement agencies, including the NYPD, the New York State Police, the New York City Department of Investigations, and the New York State Inspector General's Office.

fraud; structured investment schemes; fraud via the Internet; and international money laundering and terror financing.

2. Rackets Bureau

The Rackets Bureau conducts long-term investigations into the corrupt activities of criminal enterprises.[95] The Bureau is, and has been, responsible for some of the most important cases in the areas of organized crime, public corruption, corruption and fraud in the construction industry, and other specialized cases. The Bureau's prosecutions focus not only on specific corrupt industries, but also on the methods employed by criminal organizations to infiltrate legitimate businesses, enterprises, unions, and governmental entities.

3. Investigations Bureau

Within the New York County DA's Office, there are several bureaus staffed with non-legal investigators to assist prosecutors. The Investigations Bureau harkens back to the days of Thomas E. Dewey who created a small internal force of sworn police investigators to combat corruption and organized crime. Still bearing the official title "Rackets Investigators" that they were given in the 1930s, these dedicated men and women work to support the cases and investigations of both the Trial and Investigation Divisions. From locating reluctant witnesses, to long term undercover operations, to witness interviews, to the execution of search warrants and wire taps, the DA's Investigations Bureau supports the core mission of the Office—to investigate and prosecute all manner of crime without fear or favor. Many of these Investigators are still active members of the NYPD, or are retired members of the NYPD.[96]

4. Forensic Accounting and Financial Investigations Bureau

The Forensic Accounting and Financial Investigations Bureau (FAFI) was created in June 2011. This Bureau is staffed with Forensic Accountants and Financial Investigators, and provides forensic accounting and financial investigative services to all bureaus and units within the Investigation Division, as well as addressing specific needs of the Trial Division. The services provided include the analysis of all manner of financial documents, the preparation of spreadsheets and flow charts to identify and quantify the crimes being investigated, and Grand Jury and trial testimony. FAFI financial investigators, with a prosecutor who is in charge of the investigation, will conduct interviews of targets, victims, and witnesses, assist in the execution of search warrants, prepare and serve subpoenas, conduct FinCEN and CLEAR report searches, and conduct field surveillance as needed.

5. Detective Squad

The DA's Detective Squad is the investigative arm of the District Attorney, and is staffed with active NYPD detectives. These types of investigators are employed by the five county District Attorneys and the Special Narcotics Prosecutor. Today, there are more than 300 member

[95] These long-term investigations often involve wiretaps. In New York State, unlike the federal jurisdiction, major modifications in the law have been undertaken by the state legislature rather than by the courts.

[96] www.manhattanda.org/investigation-division.

detectives throughout New York City. These highly skilled investigators are all active police officers. Unlike detectives in a local police department, these detectives report directly to the District Attorney. Typically, an investigator will have more than 20 years of law enforcement experience, and many begin their careers working for the NYPD or other local police agencies. Recognized as experts in their field, these detectives can either work independently or alongside members of the NYPD, the New York State Police, Federal Bureau of Investigation, Homeland Security, or the DEA. District Attorney investigators also regularly work cold case homicides, organized crime, narcotics, sex crimes, complex frauds, and official corruption cases.[97]

II. NEW YORK CRIMINAL PROCESS

A. ARREST, CUSTODY, AND INITIAL INVESTIGATION

In New York, most criminal actions begin when a person is taken into police custody. An arrest is lawful when the police officer has probable cause to believe that the person being arrested has committed a particular offense.

Once the defendant is in custody, he may have been identified by the victim or witnesses, and he may make a statement to the police. He will always be searched, and the officers are entitled to seize any contraband or evidence found during the search. Such evidence includes the proceeds of the crime, any tools used to commit the crime, distinctive clothing, or other items that help connect the defendant to the crime, the victim, or with the scene of the crime. The arresting officer takes seized property to the NYPD Property Clerk's Division to be vouchered.

Once transported to the precinct, the defendant will be fingerprinted and his/her pedigree information will be gathered. At this time, the arresting officer also prepares the arrest report, the complaint report, invoices (vouchers) for any seized evidence, requests for any forensic laboratory testing, and other police forms.[98]

At this initial stage, the NYPD determines the arrest charges but will sometimes consult with a supervising prosecutor in the Complaint Room (Early Case Assessment Bureau, hereafter "ECAB"). Depending on the type of crime, a detective may be assigned to enhance the case in order to investigate the case further and to provide assistance to the prosecutor who will be assigned to the case. In New York City, the Police Department assigns specialized detectives to felony crimes such as murder, assault, rape and sex crimes, arson, burglary, grand larceny, kidnapping, robbery, and domestic violence crimes.

The NYPD records all interrogations of suspects and defendants on video. The assigned detective leads the interview and another detective assists with the recording of the interview. The interview begins with the reading of the *Miranda*[99] rights, then the interview proceeds. If there are any written statements, the detective has the suspect/defendant put his initials and date each

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[97] http://nycdia.com/dia-history/

[98] For some less serious crimes, the arresting officer may give the defendant a Desk Appearance Ticket (DAT). A DAT releases a defendant from custody before arraignment and requires the defendant to appear for arraignment on a specified date.

[99] *Miranda v. Arizona*, 384 U.S. 436 (1966).

page. Likewise, at the end of the written statement, the case detective signs the statement with the date and time of the written statement. The case detective keeps a copy of the video-recording and hands over a copy of the recording to the assigned prosecutor. In some cases, the prosecutor will have the arresting officer/detective bring the defendant to ECAB and the prosecutor will interview the defendant and this interview will be vide-recorded.

In New York City, all prosecutorial offices have the video equipment and technology to record prosecutor-led interviews and interrogations of a suspect and/or defendant. Such prosecutor-led interviews may be taken at the local police precinct's detective squad or in the ECAB of the local DA's Office. In almost all cases, the case detective or law enforcement officer associated with the case investigation is present.

Eyewitness statements are not typically recorded (video or audio). When, however, a law enforcement officer interviews an eyewitness, such interview notes are memorialized in a detective's case notes or in a patrol officer's memo book. Prosecutors may sometimes take handwritten notes of a witness's statement, but such note-taking practices vary with each prosecutor.

After all the initial paperwork is completed by the arresting officer, the defendant will be taken by the arresting officer/detective from the police precinct to Central Booking for further processing by the Department of Corrections.

In most cases, an ADA in the Complaint Room (ECAB) will review the facts over the telephone with the arresting officer/detective, and sometimes with the complainant or other witnesses, as the defendant is being transported to Central Booking. In certain cases, an arrest warrant may be necessary to secure the defendant's appearance before a Court.

B. ARREST WARRANTS

In *Payton v. New York*, 445 U.S. 573 (1980), the United States Supreme Court held that the police had to obtain an arrest warrant before they could enter a suspect's home to make an arrest unless exigent circumstances existed or the police entered by consent. A warrant of arrest is a process issued by a local criminal court directing a police officer to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument.

New York Criminal Procedure Law section 120.10 et seq. governs procedures that must be followed for an arrest warrant. [100] In New York City, an arrest warrant is drafted by a prosecutor

[100] New York Criminal Procedure Law § 120.10 et seq. provides the statutory basis for a warrant of arrest. "A warrant of arrest is a process issued by a local criminal court directing a police officer to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument. The sole function of a warrant of arrest is to achieve a defendant`s court appearance in a criminal action for the purpose of arraignment upon the accusatory instrument by which such action was commenced." *Id.* § 120.10.

"A warrant of arrest must be subscribed by the issuing judge and must state or contain (a) the name of the issuing court, and (b) the date of issuance of the warrant, and (c) the name or title of an offense charged in the underlying accusatory instrument, and (d) the name of the defendant to be arrested or, if such be unknown, any name or description

by which he can be identified with reasonable certainty, and (e) the police officer or officers to whom the warrant is addressed, and (f) a direction that such officer arrest the defendant and bring him before the issuing court." *Id.*

"A warrant of arrest may be addressed to a classification of police officers, or to two or more classifications thereof, as well as to a designated individual police officer or officers. Multiple copies of such a warrant may be issued**."** *Id.*

Section 120.20 states that a warrant of arrest is issuable "[w]hen a criminal action has been commenced in a local criminal court by the filing therewith of an accusatory instrument, other than a simplified traffic information, against a defendant who has not been arraigned upon such accusatory instrument and has not come under the control of the court with respect thereto: (a) such court may, if such accusatory instrument is sufficient on its face, issue a warrant for such defendant`s arrest; or (b) if such accusatory instrument is not sufficient on its face as prescribed in section 100.40, and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument that is sufficient on its face, the court must dismiss the accusatory instrument." *Id.* subd. (1).

Moreover, even when an "accusatory instrument is sufficient on its face, the court may refuse to issue a warrant of arrest based thereon until it has further satisfied itself, by inquiry or examination of witnesses, that there is reasonable cause to believe that the defendant committed an offense charged. Upon such inquiry or examination, the court may examine, under oath or otherwise, any available person whom it believes may possess knowledge concerning the subject matter of the charge." *Id.*, subd. (2).

Finally, under section 120.20, subdivision (3), "[n]otwithstanding the provisions of subdivision one, if a summons may be issued in lieu of a warrant of arrest pursuant to section 130.20, and if the court is satisfied that the defendant will respond thereto, it may not issue a warrant of arrest. Upon the request of the district attorney, in lieu of a warrant of arrest or summons, the court may instead authorize the district attorney to direct the defendant to appear for arraignment on a designated date if it is satisfied that the defendant will so appear."

Section 120.30 of the New York Criminal Procedure Law states that "[a] warrant of arrest may be issued only by the local criminal court with which the underlying accusatory instrument has been filed, and it may be made returnable in such issuing court only." *Id.*, subd. (1).

Section 120.40 pertains to attaching accusatory instrument to warrant, and states that "[a] town court, village court or city court which issues a warrant of arrest may attach thereto a duplicate copy of the underlying accusatory instrument. If one or more duplicate copies of the warrant are issued, such court may attach as many copies of such accusatory instrument to copies of such warrant as it chooses. In any case where, pursuant to subdivision five of section 120.90, a defendant arrested upon such a warrant of arrest is brought before a local criminal court other than the town court, village court or city court in which the warrant is returnable, a copy of the accusatory instrument constitutes a valid basis for arraignment, as provided in subdivision one of section 170.15."

Section 120.50 addresses to whom a warrant of arrest is addressed. "A warrant of arrest may be addressed to any police officer or classification of police officers whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued."

Section 120.60 of the New York Criminal Procedure Law states that "[a] warrant of arrest may be executed by (a) any police officer to whom it is addressed, or (b) any other police officer delegated to execute it under circumstances prescribed in subdivisions two and three." *Id.* subd. (1). "A police officer to whom a warrant of arrest is addressed may delegate another officer to whom it is not addressed to execute such warrant as his agent when: (a) He has reasonable cause to believe that the defendant is in a particular county other than the one in which the warrant is returnable; and (b) The warrant is, pursuant to section 120.70, executable in such other county without endorsement by a local criminal court thereof; and (c) The geographical area of employment of the delegated police officer embraces the locality where the arrest is to be made." *Id.* subd. (2). "Under circumstances specified in subdivision two, the police officer to whom the warrant is addressed may inform the delegated officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request him to act as his agent in arresting the defendant pursuant to such warrant.

(the accusatory instrument), and the facts contained within the arrest warrant accusatory instrument is sworn to by a law enforcement officer in front of a judge. The prosecutor does not appear before the court for an arrest warrant. In more remote and rural jurisdictions outside of New York City, the law enforcement officer will often draft the arrest warrant and the accusatory instrument himself, without the assistance or need of a local prosecutor. The arrest warrant itself is always addressed to law enforcement and does not involve the prosecutor. N.Y. Crim. Proc. § 120.50.

C. FILING CHARGES AND ARRAIGNMENT

The prosecutor determines the sufficiency of the evidence to support the charges originally brought by the police,[101] determines the final charges, and drafts the complaint (the accusatory instrument) upon which the defendant will be prosecuted. The complaint must allege facts providing reasonable cause to believe that the person charged committed specific offenses. In all criminal cases, the arresting officer/detective must sign the charging instrument (the complaint) drafted by the prosecutor.[102]

In some instances, after evaluating the evidence brought by the Police Department, the DA's Office will decline to prosecute a case for various reasons. The case itself is not dismissed, but may need further investigation and evidence in order for criminal charges to be brought against the defendant.

A case is ready for arraignment when the complaint has been filed, the defendant has been interviewed by the attorney, and the defendant's criminal history is available.[103] In New York City, defendants are usually brought before a judge of the Criminal Court of the City of New York for arraignment within 24 hours of arrest. Once the case has been docketed by the Court and the complaint and the defendant's criminal history are ready, the defendant is produced for arraignment in Criminal Court.[104]

Upon such request, the delegated police officer is to the same extent as the delegating officer, authorized to make such arrest pursuant to the warrant within the geographical area of such delegated officer`s employment. Upon so arresting the defendant, he must proceed as provided in subdivisions two and four of section 120.90." *Id.* subd. (3).

[101] In certain situations, the arresting officer/detective may bring a criminal case to the Complaint Room after conducting his/her investigation and making his arrest. The NYPD's Legal Bureau possesses limited subpoena power to issue subpoenas to telephone companies, banks, credit card companies, internet companies, and other financial institutions; they may also obtain security video footage from certain locations to further their investigation. Consequently, detectives do have evidence regarding certain types of crimes prior to speaking to a prosecutor. However, in order to obtain specific content evidence from Facebook, Yahoo, Apple, Google and Gmail, the NYPD can only obtain a search warrant with assistance from a prosecutor.

[102] In some jurisdictions outside of New York City, the arresting officer/detective drafts and signs the accusatory instrument (the complaint).

[103] Almost all Manhattan cases—felonies, misdemeanors, and violations—are arraigned in the Criminal Court of the City of New York. Arraignment Parts are staffed in Criminal Court seven days a week, 365 days a year, both day and night. After arraignment, Criminal Court handles only misdemeanors and violations. The Supreme Court of the State of New York handles felony cases after indictment. (Note: in New York State, the highest appellate court is the Court of Appeals, and not, as one might expect from the name, the Supreme Court).

[104] N.Y. Crim. Proc., Article 10

At arraignment in Criminal Court, the defendant is informed of the charges against him[105] and a bail determination is made.[106] Bail is a collateral, in the form of cash or bond, that must be posted by the defendant to ensure that he returns to court on a future date. He is also given various notices, including: whether the case will be considered by a Grand Jury; whether he made statements to the police; and whether there was an identification by a witness. If the defendant cannot afford an attorney or obtain one in time, one is appointed for him prior to the arraignment.

If the defendant is charged with a violation or a misdemeanor, he may plead guilty at arraignment.[107] In some cases, a defendant charged with a felony is offered a misdemeanor plea at arraignment. Many defendants plead guilty at arraignments, though guilty pleas can also be entered at later stages in the case. The defendant can plead guilty to all of the charges in the complaint, or to less than all of the charges or to a lesser charge when offered by the ADA. If a defendant pleads guilty, the judge delivers the sentence. With a felony, where there is no misdemeanor offer, a defendant is not asked to enter a plea at Criminal Court arraignment.

Felonies are crimes for which more than one year of imprisonment may be imposed. In a few felony cases, plea offers may be made at Criminal Court arraignment. Otherwise, the Judge presiding at Criminal Court arraignments will adjourn the case to another court, pending action by a Grand Jury. The case will remain in this part for all proceedings prior to indictment or, if appropriate, a misdemeanor disposition.

D. OBTAINING ELECTRONIC OR DIGITAL EVIDENCE

Over the past few decades, we have become a surveillance society with the proliferation of video cameras on public streets and on private residences and buildings. In New York City, the events of 9/11 along with concerns for responding to crime in the local communities have spawned an increase in government and business use of surveillance cameras. So it comes as no surprise that there has been an increased use at criminal trials of digital evidence, especially video images, due to the pervasiveness of surveillance cameras. Recently, the NYPD created Neighborhood Community Officers (NCO) who are specifically tasked with obtaining surveillance footage from residences and businesses within their precincts when a crime occurs.

When a crime occurs, one of the initial steps of a police investigation is to canvass the area to look for video cameras. To that end, the police rely on citizen cooperation to preserve, download, and obtain video footage. When citizens do not cooperate, the police can rely on their

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[105] N.Y. Crim. Proc., Article 100

[106] If appropriate, the ADA in the Arraignment Part will request that bail be set and give reasons for the requested bail conditions. Once the defense counsel responds, the court will set the bail amount. If the defendant or someone on his behalf posts the amount of money or bond required to make bail, he will be released. A defendant also can be released on his own recognizance if the court feels that bail is unnecessary. If the case is particularly serious, the court may remand the defendant, who is then held in custody without bail.

[107] If the defendant does not plead guilty, misdemeanor and violation cases are adjourned from arraignments into calendar parts in Criminal Court. If bail is set and the defendant cannot post the bail, the New York City Department of Corrections detains him in jail until the next court date. If bail is set, the DA's Office has six days or 144 hours to present the case before a Grand Jury. The NYPD is no longer responsible for the defendant's custody. Defendants who are released on their own recognizance or who posted bail must appear in court on the appointed date. If a defendant fails to appear, the Judge will issue a bench warrant for the defendant's arrest.

administrative subpoena power from their Legal Department[108] or reach out to a prosecutor for a subpoena to obtain surveillance footage. The police have a Technical Assistance Response Unit (TARU) that have trained investigators to download video pre-arrest; moreover, all the local DA's Offices in New York City have Video Unit technicians who are trained to download video footage from security video cameras post-arrest from various locations through their jurisdictions. Digital video evidence is an integral part of any investigation. It is the silent witness that is difficult to impeach. Proper collection, preservation and subsequent authentication of digital video evidence, as with any other item of evidence, will ensure it is admitted at trial.

In New York State, wiretaps and video surveillance warrants are governed by Criminal Procedure Law section 700 which states that a justice may issue an eavesdropping warrant or a video surveillance warrant upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application. No eavesdropping or video surveillance warrant may authorize or approve the interception of any communication or the conducting of any video surveillance for any period longer than is necessary to achieve the objective of the authorization, or in any event longer than 30 days. Such 30-day period will begin on the date designated in the warrant as the effective date, which date may be no later than ten days after the warrant is issued.

Wiretaps require a court order based upon a detailed showing of probable cause. To obtain a court order, a three-step process is involved. First, a law enforcement officer must swear to a detailed affidavit showing that there is probable cause to believe that the target instrument is being used to facilitate a specific, designated crime. In New York, as in most state and federal jurisdictions, the prosecutor drafts this affidavit for the law enforcement officer. Second, the prosecutor along with a law enforcement officer must go before a judge in camera to obtain the court order for a wiretap. Both must swear to the truth of facts contained within the wiretap affidavit before a judge. The prosecutor and the law enforcement officer must demonstrate that the wiretap affidavit properly sets forth all alternative forms of investigation that law enforcement tried before resorting to wiretapping. The prosecutor must show that the affidavit establishes

[108] The NYPD possesses subpoena power. This power comes from New York City Administrative Code § 14-137 which authorizes the NYPD to issue subpoenas for video surveillance footage, telephone records, and bank and credit card records. Section 14-137 states: The commissioner, and his or her deputies have the power to issue subpoenas, attested in the name of the commissioner and to exact and compel obedience to an order, subpoena or mandate issued by them and to that end may institute and prosecute any proceedings or action authorized by law in such cases. The commissioner, and his or her deputies may in proper cases issue subpoena duces tecum. The commissioner may devise, make and issue process and forms of proceedings to carry into effect any powers or jurisdiction possessed by him or her. The commissioner, each of his or her deputies, the chief clerk, and the first and second deputy clerks of such department and hearing officers of the division of licenses or any superior officer of the rank of sergeant or above specifically designated by the commissioner, are authorized and empowered to administer oaths and affirmations in the usual or appropriate forms, to any person in any matter or proceedings authorized as aforesaid, and in all matters pertaining to the department, or the duties of any officer or other person in matters of or connected with such department and to administer oaths of office which may be taken or required in the administration or affairs of such department, and to take and administer oaths and affirmations, in the usual or appropriate forms in taking any affidavit or disposition which may be necessary or required by law or by order, rule or regulation of the commissioner for or in connection with the official purposes, affairs, powers, duties or proceedings of the department, or of such commissioner or member of the force or any official purpose lawfully authorized by said commissioner. Any person making a complaint that a felony or misdemeanor has been committed may be required to make oath or affirmation thereto, and for this purpose the commissioner, each of his or her deputies, the chief clerk, or deputy clerks of the department, the inspectors, captains, lieutenants and sergeants have power to administer oaths and affirmations.

probable cause to believe that the named target was a criminal and that he/she was using the wiretapped instrument, and that he/she was using the wiretapped instrument to commit a designated crime. If the judge approves the wiretap application, a court order is then issued and the period of time during which such interception is authorized. Third, the court order usually requires that interim status reports be made to the issuing judge while the wiretap is in progress; then the prosecutor and law enforcement officer must return to that same judge.

In addition to video surveillance footage, other important investigative tools are telephone records and text messages. The NYPD obtains telephone and cellular phone records through requests made to the NYPD Legal Department. Once the NYPD Legal Department receives a request from a detective, subpoenas are issued based on the police subpoena power authorized under New York City Administrative Code section 14-137. With such authority, the police may obtain subscriber information, account information, and call details. The police do not need a prosecutor to obtain phone records; however, on a practical level, state-wide, telephone carriers often respond faster to subpoenas issued by a prosecutorial office and/or a Grand Jury subpoena (which only be issued by a prosecutor with an open Grand Jury investigation). The retention periods for subscriber information, call detail records, cell towers, text messages, pictures, IP session and information, IP source and information, bill history, and payment history vary from carrier to carrier. (See Appendix A - the retention periods of major cellular service providers in the United States).

E. SEARCH WARRANTS

The prosecutor will determine whether a search warrant is needed in all stages of the investigation of a criminal case. In simplest terms, for a search warrant of a building or residence, the prosecutor and law enforcement officer work together to draft the application for a search warrant.

In New York, Criminal Procedure Law section 690 governs the statutory requirements for a search warrant. Under the law, a police officer, a prosecutor or a public official may go before a local criminal court to request the issuance of a warrant.[109] The law provides for either a police officer or a district attorney to apply for a search warrant. The law, however only requires that a public servant must swear and subscribe to the search warrant affidavit.[110]

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[109] New York Criminal Procedure Law § 690.05 states that a local criminal court may, upon application of a police officer, a district attorney or other public servant acting in the course of his official duties, issue a search warrant.

[110] New York Criminal Procedure Law §690.35 addresses search warrants and the application process. It states that an application for a search warrant may be in writing or oral. If in writing, it must be made, subscribed and sworn to by a public servant specified in subdivision one of section 690.05. If oral, it must be made by such a public servant and sworn to and recorded in the manner provided in section 690.36. *Id.*, subd. (1).

The application must be made to a local criminal court having preliminary jurisdiction over the underlying offense, or geographical jurisdiction over the location to be searched when the search is to be made for personal property of a kind or character described in section 690.10 of this article except that: (i) if a town court has such jurisdiction but is not available to issue the search warrant, the warrant may be issued by the local criminal court of any village within such town or, any adjoining town, village embraced in whole or in part by such adjoining town, or city of the same county; (ii) if a village court has such jurisdiction but is not available to issue the search warrant, the warrant may be issued by the town court of the town embracing such village or any other village court within such town, or, if such town or village court is not available either, before the local criminal court of any adjoining town, village embraced

The United States Supreme Court has held that absent exigent circumstances, the police must obtain a search warrant before searching a cellular phone seized incident to a lawful arrest. *Riley v. California*, __ U.S. __, 134 S.Ct. 2473 (2014). Under this exception, the prosecutor must establish the search is conducted contemporaneously with the arrest, and also the presence of exigent circumstances that arose either from the need to protect the safety of the officer or to protect evidence from destruction or concealment.

In New York State, the prosecutor writes the affidavit in support of the warrant based on the facts recited to the prosecutor by law enforcement, and the law enforcement officer reviews the affidavit. Then both prosecutor and the law enforcement officer swear to the truth of the facts contained within the affidavit before the judge. In recent practice, local DA's Offices in New York City have also incorporated affidavits of forensic analysts as part of the search warrant application to extend the statutory ten-day requirement for the execution of search warrants.

F. CRIMINAL GRAND JURY

Under New York State law, unless the defendant consents, all felony cases must be presented to the Grand Jury.[111] Grand Juries are empowered to hear evidence presented by prosecutors, and to take various actions regarding the evidence and legal charges they are to consider. In New York State, hearsay is inadmissible in the Grand Jury. Therefore, all police witnesses and civilian witnesses must testify before the Grand Jury. The Grand Jury can also conduct independent investigations. Grand Juries sit for a term of approximately one month. Each Grand Jury is comprised of 23 citizens who hear and examine evidence concerning offenses and take action based on such evidence. In New York County, the ADA who drafted the felony complaint in ECAB becomes the assigned prosecutor for the entire pendency of the case (including the Grand Jury presentation and indictment filing, all the way through sentencing).[112]

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in whole or in part by such adjoining town, or city of the same county; and (iii) if a city court has such jurisdiction but is not available to issue the search warrant, the warrant may be issued by the local criminal court of any adjoining town or village, or village court embraced by an adjoining town, within the same county as such city. *Id.*, subd. (2)(a).

A local criminal court with geographical jurisdiction over the location where the premises to be searched is located, or which issued the underlying arrest warrant, when the search warrant is sought pursuant to section 690.05(2)(b) of this article, for the purpose of arresting a wanted person. Any search warrant issued pursuant to this section shall be subject to the territorial limitations provided by section 690.20 of this article. *Id.*, subd. (2)(b).

The application must contain: (a) The name of the court and the name and title of the applicant; and (b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person, or, in the case of an application for a search warrant as defined in section 690.05(2)(b), a statement that there is reasonable cause to believe that the person who is the subject of the warrant of arrest may be found in the designated premises; and (c) Allegations of fact supporting such statement. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons containing allegations of fact supporting or tending to support those contained in the application; and (d) A request that the court issue a search warrant directing a search for and seizure of the property or person in question; and (e) In the case of an application for a search warrant as defined section 690.05(2)(b), a copy of the warrant of arrest and the underlying accusatory instrument. *Id.*, subd.(3).

[111] N.Y. Crim. Proc., Article 190.

[112] Each jurisdiction in New York State has different policies in regards to the prosecutor assigned to a criminal matter.

The Grand Jury proceedings are secret and only specifically-authorized persons can be present. In addition to the ADA and the Grand Jurors, there is a stenographer and a Grand Jury Warden who oversees administrative aspects of the proceedings. The ADA is the legal adviser of the Grand Jury and examines all witnesses who testify before it, including any defendant or defense witnesses. At least 16 Grand Jurors must be present for any Grand Jury to hear evidence and take action. Furthermore, at least 12 members of the Grand Jury who have heard the evidence must agree before any affirmative action can be taken.

The Grand Jury can vote for an indictment (a written statement charging an individual with the commission of a felony), direct the filing of a prosecutor's information (which contains non-felony charges), direct the removal of a case to Family Court, or issue a report. For the first three actions, the Grand Jury must determine that the evidence is legally sufficient and that it provides reasonable cause to believe that the defendant has committed the crime. Otherwise, the Grand Jury dismisses the matter. If the Grand Jury votes for an indictment, the case is adjourned to a Supreme Court Arraignment Part.

Once a defendant has been indicted for a felony charge and the indictment has been filed, he or she is arraigned on the indictment in Supreme Court. Criminal Court no longer has jurisdiction over a defendant once an indictment has been filed.

At Supreme Court arraignment, the prosecutor gives the defendant a copy of the indictment and the Voluntary Disclosure Form, which includes information about the case, such as the date, time and place of the crime, and of the arrest. The defendant is also informed about the substance of his statements and of his identification. The defendant then enters a plea of guilty or not guilty to the indictment. Bail may be reviewed and different conditions may be set.

The majority of cases do not go to trial. The defendant can plead to all of the charges in the indictment, or to fewer or lesser charges offered by the ADA. The ADA considers various factors in negotiating a plea—the opinion of the police is usually not a factor in plea negotiations. Unless a sentence is negotiated as part of a plea agreement, the judge will determine the defendant's sentence based on the facts of the case, the defendant’s prior criminal history, and the laws governing permissible sentences.

After a Grand Jury indictment has been voted and the defendant has been arraigned in Supreme Court, his case does not go straight to trial. Instead, the case is adjourned to a Supreme Court Calendar Part. In the Supreme Court Calendar Part, attorneys file motions to address a number of legal issues and defendants can plead guilty. Numerous legal motions and court hearings can occur before a trial, in both Criminal Court and Supreme Court.

G. PRE-TRIAL MOTIONS AND HEARINGS

Prior to trial, the defendant presents motions to the court to obtain information and documents and to examine the physical evidence. The defendant is entitled to a copy of his statement and, if applicable, those of his co-defendants who will be tried jointly. This includes

any statements made before a Grand Jury. Also, any photographs, drawings, scientific reports, or evidence seized from the defendant must be made available.

1. Motion to Dismiss

The defendant can move to dismiss the complaint or indictment as being technically defective, for not being supported by sufficient evidence or in the interest of justice, or because he was denied a speedy trial.

2. Motion to Suppress Evidence

Before trial, the defendant can move to prohibit the introduction of evidence at trial on the ground that it was unlawfully or improperly obtained. Suppression motions most commonly seek to prohibit the introduction of identification evidence, evidence seized from the defendant, and the defendant's statements.

3. Admissibility of Identification Evidence

Identification evidence, for example identification at a line-up, is examined during a *Wade*[113] hearing. At issue is whether the police conduct during the identification procedure was proper. If the judge finds that the police acted improperly, he can decide if the witness' "independent basis" for the identification is strong enough to withstand the pressures of police impropriety. If the independent basis for the identification is weak or non-existent, the witness is not permitted to identify the defendant at trial.

4. Admissibility of Statements Made by the Defendant

Statements made by the defendant or his admission evidence is litigated in a *Huntley*[114] hearing. At the hearing, the issues include whether the defendant was given his *Miranda*[115] warnings, whether those warnings were complete, and whether his decision to confess to the police was knowing, intelligent, and voluntary.

5. Admissibility of Physical Evidence Seized from the Defendant

The admissibility of physical evidence seized from the defendant is litigated in a *Mapp*[116] hearing. The main question is whether certain physical evidence seized from the defendant can be introduced at trial. At the *Mapp* hearing, issues discussed include an officer's probable cause to arrest the defendant, the propriety of his stop or frisk of the defendant, and the pertinent details surrounding the seizure of the evidence.

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[113] *United States v. Wade*, 388 U.S. 218 (1967).
[114] *People v. Huntley*, 15 N.Y.2d 72 (N.Y. 1965).
[115] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[116] *Mapp v. Ohio*, 367 U.S. 643 (1961).

III. SAMPLE CASES PROSECUTED BY THE TRIAL DIVISION

Listed below are some recent cases from the Trial Division that highlight the cooperation and collaboration between prosecutors and law enforcement officers. [117]

A. *PEOPLE V. JOHN REED*

In *People v. John Reed*, the defendant, a police officer, was convicted for unlawfully arresting a man and illegally searching a woman, in addition to filing falsified documents with the NYPD and the Manhattan DA's Office to conceal the circumstances of the man's arrest. The officer defendant was found guilty of all of the counts in the indictment: two counts each of Offering a False Instrument for Filing in the First Degree and Official Misconduct, and one count of Making a Punishable False Written Statement. As proven at trial, Officer Reed, a member of the NYPD since 2006, arrested a 21-year-old man near the corner of West 183rd Street and Saint Nicholas Avenue while on patrol in the 34th Precinct. The officer claimed to both his NYPD supervisor and the ADA screening the case that he arrested the man for interfering in the search and investigation of a 20-year-old woman whom he suspected of purchasing marijuana. The officer claimed in his statements, and in paperwork filed with both the NYPD and the Manhattan DA's Office, that the man entered a "fighting stance," before lunging and swinging a fist at him. However, during the investigation against the police officer, which began after the falsely arrested man filed a complaint against him, the prosecutors subpoenaed surveillance video from the arrest location, and the video revealed that not only had the man not engaged in those actions, but that the officer had unlawfully searched the woman as she stood on the sidewalk. Due to officer Reed's conduct, the underlying criminal case against the two individuals was dismissed.

The lead prosecutor, with the assistance of the NYPD's Internal Affairs Bureau, three Rackets Investigators and an Investigative Analyst, was able to locate and interview several eyewitnesses to the incident. These witnesses, the falsely arrested man, and one investigator testified at trial.

B. *PEOPLE V. JOSE DIAZ, ET AL.*

In *People v. Jose Diaz, et al.*, 32 members of a Manhattan narcotics trafficking organization were charged for possessing and selling crack cocaine. The 102-count New York State Supreme Court indictment charged 32 defendants with Conspiracy in the Second Degree, and various counts of Criminal Sale of a Controlled Substance. Brothers Jose and Carlos Diaz were charged with "Operating as a Major Trafficker," also known as the "Drug Kingpin" statute, for their roles as ringleaders. The defendants operated this highly structured trafficking ring out of just a few buildings on one Manhattan block.

The indictment followed a long-term investigation (which included the use of court-authorized wiretaps for six months, and undercover buys by undercover detectives) conducted by the Manhattan DA's Office Trial Division and the NYPD's Narcotics Borough Manhattan North. From August 29, 201x, to December 26, 201x, the defendants engaged in a conspiracy related to the possession and sale of cocaine in neighborhoods of Northern Manhattan, primarily in the

[117] Case names have been changed.

lobbies and gated basement entrances of residential buildings. Working in shifts, members of this criminal organization sold crack cocaine to customers 24 hours per day. In total, the defendants were accused of engaging in more than 100 crack cocaine sales, including more than two dozen sales to undercover NYPD detectives.

Defendant Jose Diaz acted as the "boss" of the narcotics organization by obtaining the ring's supply of cocaine; controlling and directing the packaging, processing, and distribution; providing packaged cocaine to members of the organization; and monitoring its sales, including collecting and distributing the proceeds. Defendants Omar and Juan Carlos served as the organization's "supervisors" whenever Jose Diaz was not present, typically during nighttime and early morning hours. Defendants, allegedly acted as "managers" of the criminal organization, and determined the time and locations of sales, as well as monitoring and directing the activities of the organization's street sellers, "steerers," and lookouts.

The indictment charged seven defendants with acting as street-level sellers, conducting approximately 100 sales over the course of the 16-month conspiracy. Fifteen defendants who were tasked with directing customers to sale locations were charged as "steerers,"as well as aiding in the concealment of the organization's activities by acting as lookouts. Several defendants had various roles in the criminal enterprise: two of the "steerers" were also charged with providing and maintaining storage locations for the organization's crack cocaine; one defendant was further charged with delivering the organization's narcotics from those packaging and storing locations to the sales locations; one collected proceeds from the street-level dealers and transferred those proceeds to the three supervisors; and another was charged with purchasing large quantities of the organization's narcotics to redistribute to his own customers.

C. *PEOPLE V. DIXON, DESMOND, WILLIAMS, AND COLT*

In *People v. Dixon, Desmond, Williams and Colt*, four defendants were charged with conspiring to sell pistols, assault weapons, revolvers, and ammunition. The defendants were all charged in a New York State Supreme Court indictment with Conspiracy in the Fourth Degree, as well as various counts of Criminal Sale of a Firearm in the First, Second, and Third Degrees. This was a long-term investigation that included the use of court-authorized wiretaps and social media analysis conducted by the Manhattan DA's Office Violent Criminal Enterprises Unit and detectives from the NYPD's Firearms Investigation Unit. The defendants sold 86 firearms, including 65 pistols, 13 revolvers, 5 assault weapons, and 3 shotguns, and corresponding ammunition, to an undercover NYPD detective posing as a firearms dealer. The sales took place in or around the undercover detective's vehicle on over 15 separate transactions in Manhattan and the Bronx. The defendants coordinated sales over the phone, through text messages, and through Facebook and Instagram messages. The Virginia-based defendants purchased the weapons from local firearms dealers, at times using straw purchasers. The U.S. Marshals Service for the Eastern District of Virginia, Norfolk and Capital Area Regional Fugitive Task Force, and the Virginia Beach Police Department's Warrant and Fugitive Unit also assisted in the investigation.

IV. SAMPLE CASES PROSECUTED BY THE INVESTIGATION DIVISION

Below are two recent cases from the Investigation Divisions that highlight the importance of cooperation between prosecutors and law enforcement officers.[118]

A. *PEOPLE V. GABRIEL NORTH*

In *People v. Gabriel North*, the defendant, the owner a petroleum transportation company, was convicted for overseeing and engaging in a scheme to defraud thousands of residential, commercial, and municipal customers throughout New York City by shorting heating oil deliveries and reselling the stolen surplus to co-conspirators for significant profit. The defendant was convicted of Enterprise Corruption, and more than $7.4 million was ordered in restitution, fines, and forfeiture. Defendant was sentenced to 3-9 years in state prison. This case was proactively investigated by the Manhattan DA's Office (four prosecutors in the Rackets Bureau, one prosecutor in the Asset Forfeiture Unit, two Investigative Analysts, two Financial Investigators, and two IT Analysts), the NYPD, the Business Integrity Commission, Department of Investigation, Department of Consumer Affairs, and Department of Taxation and Finance as part of an effort to shut down industry-wide fraud.

Defendant and his transportation company were hired to deliver millions of gallons of heating oil to thousands of residential, commercial, and municipal properties throughout New York City. As the owner of the company, he employed several co-defendants (separately convicted) as drivers and outfitted delivery trucks with drop hoses and bypass valves that enabled the drivers to divert oil back into the delivery truck, shorting certain customers of full deliveries while allowing company drivers to print falsified delivery tickets for completed orders. As part of the scheme, the defendant advised his drivers on how much heating oil to short customers at specific delivery addresses, obtained information about locations that were easier to defraud than others, and tipped complicit terminal dispatchers for sending drivers to those locations. The defendant compensated the drivers based on how many gallons of oil they stole.

Over a five-month period, the defendant stole more than a million gallons of heating oil from customers in Manhattan, Brooklyn, Queens, the Bronx, and Staten Island. Search warrants were served on defendant's business and personal computers, and subpoenaed bank records revealed that the defendant also profited from the resale of stolen oil, and between February 2010 and December 2013, the defendant sold more than 800,000 gallons of stolen heating oil through another company he owned, and to other companies in the industry, for a profit of approximately $2 million.

More than 40 individuals were indicted in connection with the investigation in November 2015, and more than 15 defendants plead guilty to related crimes.

B. *PEOPLE V. MICHAEL KORDICH*

In *People v. Michael Kordich,* defendant was sentenced to 2 1⁄3 to 7 years in state prison and full restitution ordered for stealing hundreds of thousands of dollars from investors by

[118] Case names have been changed.

engaging in a securities fraud scheme. Defendant pled guilty to Grand Larceny in the Second Degree, four counts of Grand Larceny in the Third Degree, six counts of violations of the Martin Act, and one count of Scheme to Defraud in the First Degree. Defendant took advantage of registration exemptions to print worthless shares of stock and then sold them to investors, who were duped into thinking that they were supporting an eco-friendly product. In reality, the defendant used the money to pay household bills, restaurant tabs, purchase furniture, and to make payments to a private boarding school.

The defendant obtained money from numerous investors by promising freely tradable stock in a public company called Safetek International, Inc. During this time, Safetek traded on the Over-the-Counter Pink Market under the ticker symbol "SFIN." Defendant acted as Safetek's chief fundraiser, and was in charge of raising capital for the company. In order to obtain freely tradable stock, defendant abused Section 3(a)(10) of the Securities Act of 1933, a statute meant to aid companies in financial distress by allowing the company to issue stock in exchange for existing debts. To qualify for this relief, defendant filed papers in court in Seminole County, Florida, containing false information.

The defendant told investors that their money would be used by Safetek to fund a start-up subsidiary company called Newave Packaging Inc., which would sell an environmentally friendly plastic wrap for the food industry. Under this scheme, defendant defrauded investors of more than $800,000. In addition to taking money directly from the investors, defendant also profited from his fraudulent scheme by selling shares of Safetek in the open market. He did so while touting the company to victim-investors, most of whom were either unable to sell their stock, or had to sell their shares at a loss.

Two prosecutors spearheaded the investigation along with two investigators, a financial investigator, and the New York Regional Office of the Securities Exchange Commission, the Saratoga County Sheriff's Office, and the U.S. Marshals Florida Regional Fugitive Task Force.