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Monty Wilkinson
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Editor
K. Tate Chambers

Assistant Editors
Becky Catoe-Aikey
Brenda S. Mercer

Law Clerks
Sarah Tate Chambers
Emily Godwin
Gurbani Saini
Brandy Sanderlin

Internet Address
https://www.justice.gov/usao/resources/united-states-attorneys-bulletins

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Introduction

Rod Rosenstein
Deputy Attorney General of the United States

Prosecuting violent crime and ensuring the public safety of all Americans is an important Department of Justice priority. On April 5th of this year, Attorney General Jeff Sessions directed all federal prosecutors "to engage in a focused effort to investigate, prosecute, and thus deter violent criminals." This issue of USA Bulletin is part of that effort. The USA Bulletin authors have focused their attention on a wide variety of criminal justice issues, investigative strategies, and law enforcement techniques that will benefit our colleagues as they investigate violent criminal activity and prepare for trial.

The August USA Bulletin issue also highlights two important facets of the Department's violent crime strategy: the dismantling of violent criminal gangs, such as MS-13, and the prosecution of narcotics cases, such as heroin. Our experience as federal prosecutors has confirmed that violent gangs and the illicit drug trade are two of the primary drivers of violent crime and two of the most serious threats to public safety. The articles in this issue provide vital information to help ensure that we prevail against those who would rob our communities of the peace and security they rightfully deserve.

During the past several months, the Attorney General and I have had an opportunity to meet and talk with many of the law enforcement officers and prosecutors of this Department who have dedicated themselves to public service. We have also heard from crime victims and community leaders who rely upon the Department of Justice to uphold the principles of our democratic republic and to ensure justice for all. I want to express my personal thanks to all of those with whom the Attorney General and I have spoken and to the writers and editors of USA Bulletin for their hard work on behalf of our shared commitment to public safety and to justice.

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Transnational Gangs: Prosecution of an MS-13 Gang Member Extradited from Mexico

Andrew M. Scoble
Assistant United States Attorney
Northern District of California

I. Introduction

This article discusses key aspects of the prosecution of Jaime Balam, a member of the transnational criminal organization *La Mara Salvatrucha* (MS-13). That prosecution was part of "Operation Devil Horns," a law enforcement initiative against members of a San Francisco-based MS-13 clique, but focused specifically on Balam's involvement in a February 2009 shooting in Daly City, California. Because Balam was indicted at the end of Operation Devil Horns and after the trial of two gang members who had been identified and indicted for the February 2009 shooting, it proved necessary to extradite Balam from Mexico. This article reviews that process, with particular emphasis on the mandatory approvals from three separate Criminal Division components: the Organized Crime and Gang Section (OCGS), the Capital Case Section (CCS), and the Office of International Affairs (OIA).

Close coordination with OCGS, CCS and OIA in a prosecution of this sort is not only advisable, it is required under applicable provisions of the U.S. Attorneys' Manual (USAM).[1] Moreover, because of the compressed deadlines imposed by an extradition request, it is important to understand the timing issues and to prepare an efficient work plan. As will be clear from the summary below,[2] the process can be lengthy, and the prosecutor should plan carefully in order to minimize delays and maximize the chances of success. Ultimately, a successful extradition in a gang case can send a powerful message—that federal law enforcement will pursue those who commit violent gang crimes on U.S. soil, even if it takes arresting them abroad and bringing them back to face charges in United States district court.

II. The MS-13 Attack on February 19, 2009

The factual statement set out below is based on evidence presented by the government at the trial of *United States v. Danilo Velasquez and Luis Herrera*, which commenced on October 24, 2011, and is also based on admissions contained in the written plea agreements of MS-13 defendants, including Luis Herrera and Jaime Balam.[3] Defendant Velasquez has a pending appeal of his convictions.

On the evening of February 19, 2009, commuter traffic was backed up in front of the light rail station in Daly City, California. In one of the many cars stopped at a red light sat four young Hispanic males out for a standing Thursday evening dinner engagement. They were about to become victims of a violent crime that would leave one of them dead and two severely wounded. MS-13 gang members

[1] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-110.101, .320 (OCGS) [hereinafter USAM]; USAM § 9-10.040 (CCS); USAM § 9-15.210 (OIA).
[2] For the reader's convenience, an abbreviated timeline of the *Balam* case is set forth as an appendix at the end of the article.
[3] United States v. Danilo Velasquez, No. 3:08-cr-0730 WHA, 2011 WL 175887 (N.D. Cal. Oct. 24, 2011).

Danilo Velasquez (a.k.a. "Triste") and Jaime Balam (a.k.a. "Tweety"), believing the victims to be rivals, walked up and poured gunfire into the victims' car from pointblank range.

The vehicle driver was shot in the neck and survived. The right front passenger suffered four gunshot wounds but survived. His brother, in the rear right passenger seat, miraculously escaped injury, but the ball cap he wore was pierced by a bullet. The left rear passenger was not so lucky; shot multiple times, he died soon after.

A. Subsequent Investigation Discloses a *Jale* by Members of MS-13 "20th Street"

In the ensuing months, two MS-13 gang members were identified and charged as part of a broader racketeering case. Luis Herrera (a.k.a. "Killer") was ultimately alleged to be the driver of the shooters' car. Street leader Danilo Velasquez (a.k.a. "Triste") was ultimately alleged to be one of the gunmen. Their case was severed and set for trial on October 24, 2011. On November 8, 2011, Herrera pleaded guilty to various racketeering-related charges pursuant to a written plea agreement after the start of that trial. On November 29, 2011, the federal jury returned verdicts of guilty on all four counts against defendant Velasquez. The government subsequently pursued charges against Jaime Balam (a.k.a. "Tweety"), ultimately obtaining a ten-count indictment from a federal grand jury in August 2012. Balam was arrested in Mexico in October 2013 and was extradited to the United States in February 2015. He entered his guilty pleas on August 16, 2016, and was sentenced in United States District Court on November 8, 2016.

Evidence presented by the government at the 2011 trial of MS-13 street leader Danilo Velasquez and admissions in guilty pleas of other MS-13 defendants revealed the following:

On February 19, 2009, members of San Francisco, California's "20th Street" clique of MS-13 went on a "hunt" for rival *Norteño* gang members. Eventually, their hunt took them into neighboring Daly City, where their attention focused on a car containing four young Hispanic males. Two of the young males wore white baseball-style caps with piping in red (a color associated with the rival *Norteño* gang), and loud hip-hop music emanated from their car. Believing they had found rivals, the MS-13 members now pursued in two cars. Herrera drove the lead car, with gunmen Velasquez (armed with a Cobray M-11/9mm pistol) and Balam (armed with a Lorcin .380-caliber pistol). When the victims' car stopped at a red light, boxed in by the heavy traffic, the shooters' car stopped close behind. Velasquez and Balam hopped out, walked up to flank the victims' car, and poured in gunfire from outside the rear passenger windows.

It was over in moments. The left rear passenger received multiple gunshot wounds and died shortly afterwards. The vehicle driver was shot in the neck. He survived. The right front passenger suffered four gunshot wounds in the neck, chest, and right arm, including a bullet lodged between his jugular vein and carotid artery. He, too, survived his wounds. That victim's brother, in the rear right passenger seat, miraculously escaped injury, but the ball cap he wore was pierced (and some of his hair clipped off) by a bullet.

The four victims, it turned out, were not rivals of MS-13. They were not gang members at all. The murdered man was a San Francisco City College student supporting himself by working at the local water district. The right front passenger was a first-year law student in San Francisco. That passenger's brother, sitting directly behind him in the car, was a University of California, Berkeley graduate and an AT&T engineer. The driver was a Bank of America employee.

Velasquez and Balam returned to the stolen Honda, and Herrera drove off toward San Francisco. San Francisco Police found the Honda abandoned the following day in the Castro District of San Francisco. The .380-caliber pistol used by Balam was recovered by San Francisco Police officers on March 5, 2009, during a traffic stop effected in the Mission District of San Francisco; gang member Luis Herrera was one of the occupants of that car, and the officers learned that the gang members and

associates in the car were engaged in a "hunt" for rivals to shoot. Approximately eight months later, the mother of a juvenile in San Francisco turned in to the police the Cobray 9mm firearm used by Velasquez.

On February 24, 2009—long before investigators came to learn of Balam's role in the Daly City attack—Balam was encountered by Homeland Security Investigations (HSI) special agents and placed into removal proceedings. He was removed to Mexico on February 26, 2009. Balam, a citizen of Mexico, had previously been encountered in New Mexico in 2006 and was given a voluntary return to Mexico in October 2006. He was found again in San Francisco in October 2008 and removed to Mexico in November 2008. He returned to San Francisco again.

Jaime Balam, the investigation revealed, was "jumped in" to the 20th Street clique of MS-13 in approximately 2008. With membership came the obligation to perform *jale* (literally, "work," but in this context meaning a violent act committed on behalf of the gang). *Jales* often took the form of acts of violence designed to protect and enhance MS-13 and 20th Street's territorial claims and reputation. Many of the acts of violence committed by 20th Street members were directed at known members of the rival *Norteño* street gang, which also operates in San Francisco and the San Francisco Bay Area.

B. Background: *La Mara Salvatrucha* and Operation Devil Horns

La Mara Salvatrucha, or MS-13, is a violent transnational criminal street gang with members and associates in the United States and Central America. In October 2012, the U.S. Treasury Department designated MS-13 as a Transnational Criminal Organization (TCO), meaning that U.S. persons are now prohibited from conducting financial transactions with MS-13 and any property of MS-13 in the United States is blocked. Following a July 2011 executive order authorizing the Treasury Department to target TCOs with economic sanctions, this designation added MS-13 to a list that already included the Brother's Circle, the Camorra, the Zetas, and Yakuza.[4]

MS-13 has garnered a reputation as an extremely violent and dangerous gang whose members are often (but not always) recognizable by their tattoos. Some law enforcement estimates place its membership at 30,000 or more in a variety of countries, including El Salvador, Guatemala, Honduras, and Mexico. In the United States, its numbers are believed to exceed 8,000, operating in more than forty states and the District of Columbia. In this country, the TCO has been linked to numerous crimes, including murder, drug trafficking, sex trafficking, and human trafficking. MS-13, including its leadership, members, and associates, is alleged to be a criminal enterprise as defined by 18 U.S.C. §§ 1961(4)[5] and 1959(b)(2)—that is, a group of individuals who engage in activities affecting interstate commerce.[6]

MS-13 is believed to have formed in Los Angeles, California, during the 1980s. Its members are principally of El Salvadoran background, although many other MS-13 members have roots in other countries, such as Honduras, Guatemala, and Mexico. MS-13 has local chapters, or "cliques," located throughout the world. Within the United States, major MS-13 cliques are well established in Virginia, the District of Columbia, Maryland, New York, Texas, North Carolina, and California. These cliques typically hold meetings to plan criminal activity, to collect illicit proceeds generated from criminal activity, and to have members pay their monthly dues into the clique treasury, a portion of which is remitted to MS-13 leaders in El Salvador, including gang leaders imprisoned there.[7]

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[4] *See* Samuel Rubenfeld, *Treasury Labels MS-13 Transnational Criminal Organization*, WALL ST. J. (Oct. 11, 2012).

[5] 18 U.S.C. §§ 1961(4) (2012 & Supp. III 2015), *preempted by* Melanson v. U.S. Forensic, LLC, 183 F. Supp. 3d 376 (E.D.N.Y. 2016).

[6] *Id.* § 1959(b)(2) (2012), *declared unconstitutional by* United States v. Conyers, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017).

[7] *The MS-13 Threat: A National Assessment*, FBI (Jan. 14, 2008).

Beginning in approximately 2005 in the Northern District of California, agents of HSI initiated Operation Devil Horns, partnering with various local law enforcement agencies to address the violent crimes of a San Francisco-based MS-13 clique known as "20th Street MS-13," or simply "20th Street." The gang included approximately 140 active members with an area of operation in the Mission District of San Francisco, California. The gang was primarily composed of foreign nationals from Central America, many of them present unlawfully in the United States. Investigation revealed that 20th Street was a criminal enterprise participating in a variety of criminal activities, including murder, attempted murder, drug distribution, the manufacturing and distribution of identity documents, illegal sales of firearms, burglary, robbery, assaults on rival gang members, and vehicle theft.

As reflected in the public court records, this federal investigation resulted in more than forty criminal arrests. At least twenty-eight individuals were charged with violations of 18 U.S.C. § 1962(d) (RICO conspiracy)[8] or 18 U.S.C. § 1959 (the Violent Crime in Aid of Racketeering, or "VICAR," statute), including, in some cases, murder in aid of racketeering activity.[9] Several 20th Street MS-13 gang members and associates were prosecuted under 8 U.S.C. § 1326 (illegal re-entry after deportation).[10] Others were prosecuted for violating 18 U.S.C. § 922(g)(5) (unlawful possession of a firearm by an alien).[11] Many defendants entered guilty pleas. Eleven went to trial, and HSI San Francisco Special Agents and the HSI National Gang Unit collaborated with DOJ Gang Squad trial attorneys in pursuit of RICO convictions. While two secured acquittal of all charges, seven were convicted and sentenced to life in prison. At least twelve other defendants received sentences ranging from seven to thirty-five years in prison.[12]

Jaime Balam (a.k.a. "Tweety") was the last of the MS-13 defendants to be charged in connection with Operation Devil Horns, and he was the last to be convicted.

C. Charging and Extraditing the MS-13 Member from Mexico

Prosecuting Jaime Balam in this case required coordination with three separate Department of Justice components: the Organized Crime and Gang Section (OCGS), the Capital Case Section (CCS), and the Office of International Affairs (OIA). Each handled a different aspect of the prosecution, but the particular requirements and deadlines were in some cases intertwined. The prosecutor should plan to contact each component and ascertain the requisite procedures and their associated deadlines well before seeking charges. For instance, as is described below, the extradition process influences in no small way the particular charges included in the indictment. Similarly, an extradition request to the Mexican government cannot succeed without first obtaining the necessary authorization not to seek the death penalty for death-eligible charges.

1. The Mandatory Approval Process with the Organized Crime Gang Section

In this case, we believed that charges against Jaime Balam should include murder and attempted murder in aid of racketeering (with one count for each victim). We considered adding associated conspiracy charges (pertaining to both RICO and VICAR statutes), as well as a § 924(c) charge and a

[8] 18 U.S.C. § 1962(d) (2012).
[9] *Id.* § 1959 (2012), *declared unconstitutional by* United States v. Conyers, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017).
[10] 8 U.S.C. § 1326 (2012).
[11] 18 U.S.C. § 922(g)(5) (2012).
[12] *See* United States v. Ivan Cerna, et al., 3:08-cr-00730-WHA; United States v. Jaime Balam, 3:12-cr-00625-WHA; United States v. Eliseo Patino, 3:05-cr-00666-CRB; United States v. Sebasian Pacajoj-Riqeq, 4:07-cr-00019-MJJ; United States v. Oliver Marota, 3:08-cr-00406-MMC; United States v. Josue Hernandez, 3:09-cr-00292-MMC; United States v. Rony Avila, 3:09-cr-01146-MHP; United States v. Javier Pacheco-Ake, 3:11-cr-00261-WHA.

substantive firearm charge under § 922(g)(5).[13] Ultimately, we settled on a ten-count indictment, but only after confirmation with OIA that each charge would satisfy the "dual criminality" requirement (discussed below). However, the first step in this process was consultation with OCGS.

No RICO criminal charges may be brought without prior approval of OCGS.[14] The review and approval process, centralized with OCGS, requires the AUSA to submit a final draft of the proposed charging document along with a RICO prosecution memorandum.[15] Each new charging document requires separate approval.[16] There are similar requirements with a similar review process for charges under the VICAR statute (18 U.S.C. § 1959).[17]

It is advisable to allow at least fifteen working days, and typically more if there is a backlog at OCGS, for securing the mandatory approval. Anticipate the need for revisions. Be aware that the fact that a grand jury has been scheduled to return the indictment and is about to expire will not excuse the review process.[18]

Here, the trial jury had returned its guilty verdicts against street leader Velasquez on November 29, 2011.[19] Velasquez was sentenced on February 15, 2012. Driver Herrera had entered guilty pleas on November 8, 2011, and was sentenced the following January. The decision to continue the investigation and seek charges against Balam was made in the months following trial. After several months of follow-up investigation and several drafts of proposed charges, there were intensive discussions with the OCGS reviewer in early August 2012. OCGS approved racketeering-related charges on August 13, 2012.

The grand jury returned a sealed[20] ten-count indictment on August 21, 2012. These were as follows:

> (1) Racketeering conspiracy, in violation of 18 U.S.C. § 1962(d).[21] This count focused on Balam's agreement to participate in the conduct of the affairs of MS-13, alleged to be a racketeering enterprise within the meaning of the statute.
>
> (2) Conspiracy to commit murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5).[22] In simple terms, this count was based on the agreement to murder rivals, cooperators, and others defying the will of the gang.

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[13] *Id.* §§ 924(c), 922(g)(5).
[14] *See* USAM § 9-110.101 (2009).
[15] USAM § 9-110.210; *see also* U.S. DEP'T OF JUSTICE, USAM, CRIMINAL RESOURCE MANUAL §§ 2071–2083 (1997) (giving guidance on preparing the RICO memorandum).
[16] USAM § 9-110.101.
[17] *Compare* USAM §§ 9-110.800–.816 (2011) *with* 18 U.S.C. § 1959 (2012), *declared unconstitutional by* United States v. Conyers, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017).
[18] *See* USAM § 9-110.210.
[19] *See infra* Appendix.
[20] The original sealing order was based upon concern that public filing of the charges might warn the defendant that he had been charged in connection with the February 19, 2009 incident—or draw the attention of MS-13 members and associates, who would then tip him off. We obtained a limited unsealed order on November 19, 2012, allowing the government to obtain certified copies of the sealed indictment for use in connection with any future extradition proceedings. Four days after Balam's October 21, 2013 arrest in Mexico, we obtained an order unsealing the entire case.
[21] 18 U.S.C. § 1962(d) (2012).
[22] *Id.* § 1959(a)(5).

(3) Conspiracy to commit assault with a dangerous weapon in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(6).[23] This count mirrored the preceding count and encompassed attacks falling short of murder.

(4) Three counts of attempted murder in aid of racketeering activity, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(5) and 2(a).[24] Each surviving victim in the car was the subject of a separate count.

(5) Murder in aid of racketeering activity, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(1) and 2(a).[25] This count charged the gang-related murder of the victim in the rear seat and was alleged in such a way as to accommodate Balam's responsibility for his own firing and that of his companion—although forensic analysis indicated that the victim died from wounds received from a .380-caliber pistol, and witness testimony indicated that the Lorcin pistol was used by Balam.

(6) Using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and causing death thereby, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(j)(1) and 2(a).[26] This count was also based on the murder resulting from the hunt and included both Balam's own use of a handgun and his assisting the second shooter in the attack.

(7) Using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2(a).[27] This count was based not only on the February 19, 2009 attack, but logically encompassed other instances of the gang's use of firearms.[28]

(8) Knowingly possessing a firearm and ammunition while being an alien illegally in the United States, in violation of 18 U.S.C. § 922(g)(5).[29] The evidence revealed that Balam was a citizen of Mexico, was present in the United States without having obtained permission as required, and had in fact been removed to Mexico prior to the February 19, 2009 attack.

Of special note is that the charges based on violations of §§ 1959(a)(1) and 924(j)(1) were death-eligible and so required review by CCS.

Securing the sealed indictment was only the first step in bringing Jaime Balam to court. The next steps involved close coordination with both CCS and OIA to obtain authorization not to seek the death penalty in this case so that, in turn, we could provide the necessary assurances to the government of Mexico that the death penalty would not be sought—a precondition to extradition from Mexico.

In addition, it was necessary to ascertain precisely where the defendant could be found by Mexican authorities. We obtained sealed search warrants for social media data pertaining to accounts

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[23] *Id.* § 1959(a)(6) (2012).

[24] *Id.* § 1959(a)(5); *id.* § 2(a).

[25] 18 U.S.C. § 1959(a)(1) (2012), *declared unconstitutional by* United States v. Conyers, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017); *id.* § 2(a).

[26] 18 U.S.C. § 924(j)(1) (2012); *id.* § 2(a).

[27] 18 U.S.C. § 924(c)(1)(A); *id.* § 2(a). Prosecutors seeking to charge aiding and abetting a violation of 18 U.S.C. § 924(c) (2012) should review Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014), which requires proof that the defendant learned of any circumstance constituting an element of the crime at a time when the defendant still had a realistic opportunity to withdraw from the crime. *See* Rosemond v. United States, 134 S. Ct. 1240, 1245, 1251–52 & n.10 (2014).

[28] Our indictment did not explicitly allege brandishing and discharging of a firearm; it would have been better practice to do so.

[29] 18 U.S.C. § 922(g)(5) (2012).

operated by Jaime Balam. These yielded photographs evidencing continued participation in MS-13 (and so pertaining to the charged RICO conspiracy) as well as data that provided Balam's location within Mexico. These efforts, supplemented by discreet surveillance, allowed us to provide the Mexican authorities with a specific residence address, ultimately leading to the defendant's arrest on the Provisional Arrest Warrant issued by the Mexican government.

2. Obtaining Expedited Post-Indictment Review from the Capital Case Section

Coordination with CCS began well before presentation of the indictment. It should be noted that the USAM provisions then in effect provided for an expedited *post-indictment* review in such cases as ours; pre-indictment review is now mandatory. Of greatest relevance to this discussion, we learned, were two points: the Mexican government requires assurances that the death penalty will not be sought for a defendant extradited from Mexico, and CCS will not present a "no seek" recommendation based on the need to extradite *until* the defendant is in custody. These policies effectively require recourse to the provisional arrest procedure followed by a formal extradition package.

USAM sections 9-10.000 to 9-10.200 set forth the requirements and procedures for obtaining review of any death-eligible charge, regardless of whether the intent is to seek the death penalty or not.[30] Effective April 7, 2014, every case involving an offense punishable by death must be submitted for pre-indictment review by CCS, absent "extenuating circumstances."[31] At the time of the *Balam* indictment, however, this mandatory provision was not yet in effect. Nonetheless, because the government of Mexico will not grant extradition without assurances that the death penalty will not be sought, it was necessary to contact CCS and start the process early.

Fortunately, CCS provides for expedited review in appropriate cases. USAM section 9-10.070 addresses the situations in which prosecutors may seek expedited review, including a case where extradition of the defendant or a crucial witness will be requested from a country that, as a precondition to granting extradition, requires assurances that the death penalty will not be sought or requires that the evidence from the crucial witness will not be used to seek the death penalty.[32] Section 9-10.070 describes the contents of the submission.[33] In a case such as that involving Balam's contemplated indictment and extradition, the submission should provide a description of the relevant facts, the defendant's criminal history, the federal interest in prosecuting the case, the rationale for why the death penalty should not be sought, and any applicable deadlines for decision.[34] It is wise to start gathering the information early. The submission should also include, on its face, the basis on which the case qualifies for an expedited decision. The CCS submission will be reviewed by the Chief of CCS, and if it satisfies the requirements for expedited decision, the case will be transmitted to the Attorney General, through the Deputy Attorney General, for final decision; this process now bypasses the otherwise applicable review by the Capital Review Committee.

In this case, we submitted a CCS memorandum to be vetted through the Attorney General's Review Committee on Capital Cases (AGRCCC). With the CCS memorandum seeking expedited review, we submitted a copy of the prosecution memorandum and indictment, the required Death Penalty Evaluation Form, and a sealed non-decisional, case-identifying information form. The CCS memorandum on its face highlighted the applicable timetable for decision: sixty days (minus time for translation) from the date of the defendant's apprehension in Mexico pursuant to a provisional arrest warrant. The CCS memorandum included a discussion of pertinent facts and charges, information about the defendant

[30] USAM §§ 9-10.000–.200.
[31] USAM §§ 9-10.040, .060.
[32] *See* USAM § 9-10.070(A).
[33] USAM § 9-10.070.
[34] USAM § 9-10.070(B).

(including his citizenship, age, and lack of criminal history), information about the victim and victim impact (including the position of the victim's family about seeking the death penalty in this case), reasons for not seeking the death penalty (including an assessment of statutory and non-statutory aggravating and mitigating factors under 18 U.S.C. § 3592(a)-(c)), and an evaluation of the quality of the evidence.[35]

The intertwined deadlines merit some explication. Here, we contacted CCS several weeks before the anticipated indictment date (and, internally, we had started drafting the necessary paperwork approximately one month earlier). The indictment contained the Special Findings that would, if necessary, support a request for the death penalty. The indictment was returned on August 21, 2012. While the focus of our efforts shifted to locating Balam in Mexico and obtaining his extradition, we worked with CCS to prepare a fully vetted CCS memorandum, with accompanying attachments and related forms, that could be signed by the U.S. Attorney and submitted on a moment's notice. In sum, we had the necessary paperwork essentially completed by early 2013, and we were in a position, once Balam was actually in custody, to submit the fully prepared, signed CCS memorandum and attachments within a matter of days.

As it turned out, on October 21, 2013, Balam was arrested in Mexico pursuant to a provisional arrest warrant. We forwarded our submission to CCS within days. Soon afterward, we received the AGRCCC draft memorandum with its recommendation and promptly returned the U.S. Attorney's written certification of the accuracy of the facts set forth in the AGRCCC memorandum, which provided the basis for its recommendation. Within approximately two weeks, the U.S. Attorney received the Attorney General's letter authorizing and directing her, in order to facilitate the extradition of Balam from Mexico, not to seek the death penalty against him. This letter arrived a full month before the deadline for receipt of the final extradition package in Mexico—a deadline which, as it turned out, we met with only days to spare.

3. Securing the Provisional Arrest and then Extradition of Balam Through the Office of International Affairs

We began consulting with OIA well before presenting the indictment to the grand jury. Given the interplay of the "dual criminality" provision and the "rule of specialty," such consultation is necessary. Moreover, as will be clear from the timeline presented below, the extradition process involves other entities and persons (including, for instance, the Department of State, translators, Mexican authorities and courts, and the defendant himself) over whom the prosecutor has no control. As it turned out, we succeeded in obtaining Balam's extradition, but it took nearly two years.

Accordingly, prosecutors who believe that the case will involve extradition should contact the appropriate country desk at OIA as soon as possible. Here, we contacted OIA's Mexico Desk shortly after deciding to seek an indictment. OIA guided us through several key steps at the outset, including review of the applicable extradition treaty, discussion of the key requirements for an extradition request, and the need to present affidavits or declarations from two non-government witnesses in support of the extradition request. Equally important was OIA's guidance regarding the various deadlines involved, including the critical requirement that the government of Mexico receive the fully completed, translated extradition package no later than sixty days after the defendant's arrest in Mexico.

The logical starting point following the initial contact with OIA is to review the applicable extradition treaty. OIA maintains an online list of United States extradition treaties.[36] In the case of Mexico, we found that the treaty incorporates several significant provisions that must be taken into account in shaping the indictment. Chief among these are the "dual criminality" provision and the "rule of specialty." Under the dual criminality provision, extradition will be granted only for offenses that are

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[35] *See* 18 U.S.C. §3592(a)–(c) (2012).

[36] Additionally, the Extradition Treaty Between the United States of America and the United Mexican States is reproduced at Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059.

criminal in both the United States and Mexico.[37] It is not required, however, that the crimes in both countries contain identical elements; it is enough if the two countries punish the same basic evil.[38] As it happened, each of the ten felony counts in the indictment returned on August 21, 2012, and listed above, was an extraditable offense under the treaty.

Under the rule of specialty,[39] on the other hand, defendants can only be prosecuted in the United States for those crimes on which their extradition has actually been granted.[40] This significant restriction means that obtaining a superseding indictment to adjust the charges closer to trial, but after extradition, will not be possible. Accordingly, before framing the indictment, prosecutors should consider their evidence carefully by referring to the extradition treaty to ensure that "dual criminality" can be satisfied for each charge in the indictment. If the investigation is not yet complete, it may be necessary to delay the prosecution and the extradition request. This, of course, can raise the risk that the defendant learns of the charges, or simply fears the possibility of charges in the United States, and takes steps to hide. In our case, fortunately, the investigation was completed well before presentation of the proposed indictment, and we were able to draft all of the charges that our evidence supported and that we thought we would want to present at trial.

The government of Mexico requires the prosecutor to submit an affidavit addressing points of law, the precise charges on which extradition is sought, the essential elements of those crimes, and the absence of certain legal impediments (e.g., double jeopardy or statute of limitations).[41] It also requires a case agent to submit an affidavit setting forth the probable cause showing for each charge. But in addition, it requires affidavits or declarations from two non-government witnesses in support of the probable cause showing. In this case, we benefited from the availability of cooperating defendants who could provide the required declarations. The second unusual requirement—a commitment that the government will not seek the death penalty—is discussed above.[42]

From the outset, we grappled with the strategic question of how to initiate the extradition request. One option was simply to present the completed extradition package to the government of Mexico. Choosing this approach means taking the time to assemble all of the necessary affidavits and exhibits and to have them translated. In this case, that meant two declarations from non-government witnesses, a prosecutor's affidavit, and a case agent's affidavit. Because extradition will not be granted without the formal extradition package,[43] it sometimes makes best sense to proceed directly to this step.

However, if there is urgency to the case—including the risk that the defendant may learn of the effort to secure his arrest abroad and so flee—it may be preferable to proceed with a request for a provisional arrest warrant.[44] This second approach entails submitting a diplomatic note that contains the particulars of the defendant and information on the crime or crimes with which he is charged. This presents a way to have the defendant arrested and to also complete the necessary preparations so that the fully completed, translated extradition packet can be submitted within the sixty days required by the applicable extradition treaty.[45]

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[37] *Id.* at Article 1.

[38] *See e.g.,* Zhenli Ye Gon v. Holt, 774 F.3d 207, 214–17 (4th Cir. 2014) (deciding case where Mexican citizen challenged determination that he was extraditable to Mexico; court applied Blockburger "elements" test).

[39] Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 17.

[40] *See Zhenli Ye Gon*, 774 F.3d at 220–21 (discussing rule of specialty but declining to reach appellant's claim).

[41] Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 10.

[42] *Id.* at Article 8.

[43] Of course, it is always possible that a defendant, once in custody, will waive formal extradition and agree to be transported to the United States. The risks inherent in depending on that circumstance are apparent.

[44] Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 11.

[45] *Id.*

In this case, however, there was yet another compelling reason to proceed via provisional arrest. As we learned from CCS, in cases involving an expedited "no seek" request based upon the need to extradite, the request will typically not be processed until the defendant is actually in custody pursuant to the provisional arrest. In practice, this means that, even while preparing the Provisional Arrest request, the prosecutor will need to start drafting the extradition affidavits and associated attachments and to prepare the CCS memorandum and its attachments. The defendant's arrest in the foreign country sets in motion a number of interlocking deadlines, all of which culminate in the presentation of a fully translated, sworn extradition package that contains the necessary assurances that the death penalty will not be sought.[46] This package must be presented no later than sixty days following the defendant's arrest.[47]

With these various points in mind, we began drafting the paperwork to request that the Mexican government issue a provisional arrest warrant for Balam, while we simultaneously gathered materials to prepare the full extradition package. Key in this process was learning the defendant's specific whereabouts in Mexico. In this case, we were lucky enough to learn of the defendant's social media presence and obtained the issuance of a search warrant under seal some weeks before the presentation of the indictment. The search warrant results yielded digital data which helped to locate the defendant at his home village in the Yucatán. Following indictment, we acted on this data in submitting a similar sealed search warrant request that confirmed the defendant's presence. HSI agents detailed to Mexico worked with Mexican law enforcement officials to conduct surveillance and obtain an address for use in the provisional arrest request.

The extradition process teaches patience. In this case, we contacted OIA in August 2012 prior to obtaining a sealed indictment on August 21, 2012. Thereafter, we drafted documents to request Balam's provisional arrest and simultaneously started to prepare the affidavits, declarations, and associated exhibits that would be required for the formal extradition package. The defendant was located at an address in Mexico in early January 2013, and that allowed us to put the provisional arrest request into final form. The completed paperwork—including the prosecutor's formal commitment to prepare the extradition package, to assume the costs of translation, and to provide the requisite assurances that the death penalty would not be sought—went to OIA in April 2013. It was then forwarded to the Department of State, sent on to the U.S. Embassy in Mexico City, and ultimately presented to the Mexican government on or about May 8, 2013. Meanwhile, we were revising the affidavits and attachments for the extradition package.

The Mexican government issued a provisional arrest warrant in or about early June 2013. There ensued a period of preparation for the actual arrest, which required the presence of an Interpol representative. In October 2013, Mexican law enforcement agents went to arrest Balam at his residence. He was not there. It turned out that he had left for Cancun with a load of produce to sell. It was unclear whether he would be tipped off to the agents' attempt to arrest him. However, to their great credit, on October 21, 2013, Mexican law enforcement agents took Balam into custody.

It is not an overstatement to say that furious activity ensued. The final extradition package was due in Mexico, fully translated and delivered through diplomatic channels to the Mexican government, no later than December 19, 2013. In November 2013, the complete set of affidavits went into final form. Affidavits from the prosecutor and case agent and declarations from two cooperating defendants were sworn in triplicate originals. (One fully executed set was retained in the Northern District of California.) Before that could happen, however, we needed authorization from the Attorney General not to seek the death penalty. On November 19, 2013, the Attorney General sent a letter authorizing and directing the U.S. Attorney, in order to facilitate the extradition of Jaime Balam from Mexico, not to seek the death penalty against him. Thus, by early December 2013, the entire package, in final form and fully translated,

[46] *Id.*
[47] *Id.*

was ready to be forwarded to the Department of State. On December 17, 2013, we were notified that the U.S. Embassy had forwarded the translated extradition package to the government of Mexico.

That was not the end of the waiting. In June 2014, a Mexican court ordered the extradition of Jaime Balam pursuant to the formal request of the United States. The defendant exercised his right of appeal. That appeal was eventually denied, and in October 2014, a Mexican court signed off on the extradition request. The decision now moved to *La Secretaria de Relaciones Exteriores* (the counterpart of our Department of State) for final approval of the extradition request. Final approval would then require U.S. law enforcement to effect Balam's transportation to the United States within sixty days. On February 20, 2015, Jaime Balam arrived in the United States. On February 23, 2015, he made his initial appearance before the duty Magistrate-Judge in the United States District Court in San Francisco. Just more than six years had elapsed since the MS-13 attack in nearby Daly City.

One other practice pointer bears note. Through OIA, we had requested that Mexican authorities arresting Jaime Balam also conduct a search for evidence of the charged crimes. This search resulted in the seizure and forwarding to the United States of a cell phone with a SIM card in it, a second SIM card seized from the defendant's wallet, and a blue belt. (Blue is a color associated with MS-13.) It also resulted in the opportunity for Spanish-speaking HSI agents to conduct a *Mirandized* interview of the defendant at the offices of the Mexican state police who arrested Balam on the provisional arrest warrant. Both procedures were requested and accommodated under the extradition treaty. We subsequently obtained a federal search warrant for the cell phone and second SIM card in the Northern District of California. These efforts yielded evidence for possible use at trial, including evidence of the defendant's continuing membership in MS-13.

D. Resolution of the Case

Under the circumstances of the case, not the least of which was the battle over extradition, Balam was ordered detained pending trial. The government turned over voluminous discovery on a hard drive pursuant to a protective order designed to maximize protections for victims and civilian witnesses. Due to defense counsel's schedule, trial was set for April 2017. The defendant, although offered an earlier trial date with different counsel, expressed his preference to keep the attorney with whom he started. In order to forestall any later due process challenge to lengthy pretrial detention, we requested on the record at various appearances that the district court repeat its advice concerning the defendant's right to a speedy trial, reconfirming his choice to waive speedy trial rights in order to prepare for trial with the original attorney.

On August 16, 2016, nearly five years after the trial that produced the convictions of driver Herrera and gunman Velasquez, Jaime Balam entered into a written plea agreement with the government. He entered guilty pleas to all but the VICAR murder count, which carries a mandatory life sentence where the death penalty is not sought. The parties jointly recommended a sentence of 330 months (twenty-seven and one-half years) in federal prison.

On November 8, 2016, the district court held a sentencing hearing. The murder victim's family had an opportunity to address the court (and the defendant) at the sentencing hearing. The district court sentenced Jaime Balam to a term of 330 months in federal prison.

III. Conclusion

Pursuing racketeering charges, especially those involving gang-related murders, where the defendant is located in a foreign country, is typically a time-consuming and complicated process. Any RICO or VICAR charges require approval from OCGS. Further constraints are imposed by the following: the need to ensure that charges are extraditable under the appropriate treaty; the need to obtain necessary approvals in the case of death-eligible charges, including authorization to provide the necessary

assurances as a precondition to extradition; the need to provide affidavits from two non-government witnesses; and the need to abide by the rule of specialty. Further complications may arise from difficulties in locating the defendant (a process in which social media search warrants may prove useful), preparing a request for provisional arrest, and needing to react swiftly once the defendant is in custody in the foreign country.

But all this work is surely worth the effort when a murder has been committed on United States soil. The message we send is powerful: if members of a transnational criminal organization such as MS-13 commit violent crimes in the United States, we will pursue them relentlessly, even if it takes years. We will find them, arrest them, and bring them back to face charges in the courts of the country where they committed their crimes. It may take years, but one day, law enforcement agents will knock at their door. It is no exaggeration to say that the rule of law is at stake. We cannot afford the risk that members of a TCO may come to believe that they can elude responsibility for their violent crimes.

ABOUT THE AUTHOR

❑ **Andrew M. Scoble** has been an AUSA in the Northern District of California since 1992. He has previously served as Deputy Chief and Chief of OCDETF and as an SLC. Since 2010, he has been assigned to the Organized Crime Strike Force and has prosecuted a variety of gang cases involving RICO and VICAR charges. He has earned an Attorney General Award (2012) and a Director's Award (2016) in connection with two of these prosecutions.

APPENDIX: An Abbreviated Timeline of the *Balam* Case

10/24/2011:	Trial of Luis Herrera and Danilo Velasquez commences
11/08/2011:	Luis Herrera enters guilty pleas
11/29/2011:	Jury convicts gunman Danilo Velasquez of all pending charges
by 2/2012:	Luis Herrera (driver) and Danilo Velasquez (gunman) sentenced
by 4/2012:	Decision made to seek indictment and extradition of Balam
by 8/10/2012:	Contact made with OCGS, CCS and OIA
8/21/2012:	Indictment returned against Jaime Balam (second gunman)
late 2012:	AUSA drafts paperwork for requesting Provisional Arrest Warrant (PAW) and extradition, as well as CCS memorandum
12/2012:	AUSA forwards first drafts of extradition affidavits to OIA.
2/2013:	Balam residence in Mexico confirmed and location forwarded to OIA
3/25/2013:	Fully vetted, internally approved memorandum prepared and ready for forwarding from USAO to CCS once defendant is in custody
4/08/2013:	AUSA forwards completed request for OIA to open provisional arrest/extradition file with Mexico; commitment to prepare extradition package in timely fashion, to pay costs of extradition, and to provide assurances that death penalty will not be imposed
5/08/2013:	Diplomatic note requesting provisional arrest delivered to GOM
10/09/2013:	Updated extradition affidavits and exhibits submitted to OIA
10/21/2013:	Balam arrested on PAW in Yucatán, Mexico (starts sixty-day clock)
10/25/2013:	CCS memorandum submitted for expedited review
11/19/2013:	Attorney General authorizes “no seek” based on need to facilitate the extradition of Balam from Mexico
12/02/2013:	Entire extradition package, translated, ready for Department of State
12/17/2013:	U.S. Embassy confirms delivery of translated extradition package to GOM
6/17/2014:	Mexican court orders extradition of Balam, who files appeal
by 10/07/2014:	Mexican district court has denied defendant’s appeal and found him extraditable; decision now lies with *La Secretaria de Relaciones Exteriores*

2/20/2015:	Law enforcement transports Balam to the United States
2/23/2015:	Balam’s initial appearance in U.S. District Court, San Francisco
8/16/2016:	Balam enters guilty pleas to nine counts of pending indictment
11/08/2016:	Balam sentenced to 330 months in prison

Prosecution of Criminal Organizations: A More Effective Means to Curbing Violence

Joseph A. Cooley
Trial Attorney
Organized Crime and Gang Section
Criminal Division

I. Introduction

The tragic reality of the culture of many of the large urban street gangs in this country is that shooters are fungible. Due to their limited resources and overwhelming caseload, state prosecutions typically focus on a particular incident. Understandably, a murder will draw more focus than an incident that does not result in a death. In most cases, the subject directly responsible for this murder is the focus of the investigation. Assuming an effective prosecution of this subject is developed, all too often the defendant is quickly replaced by another who, like the first, is willing to follow orders to take out the next designated target.

A federal prosecution that focuses on the organization responsible for directing the violence will be more effective by addressing both "the shot-callers" and the "soldiers" that ultimately carry out these violent missions. Typically, the organization will have an "enforcer" that relays the mission from "shot-caller" to "soldier" and usually supervises to ensure that the mission is carried out. An effective means of curbing the urban violence is to target each person responsible for the deadly outcome. To further enhance the effectiveness of targeting organizations, a constant vigil of that organization should be maintained. A one-time prosecution of a criminal organization will rarely be sufficient in curbing violence in the long term. An experienced federal prosecutor recognizes that "today's defendant is tomorrow's cooperator." Incorporating these cooperators into subsequent investigations of the criminal organization will greatly disrupt, if not dismantle, the organization.

II. RICO: a Criminal Organization's Worst Nightmare

> *So when I have a ballgame, you ain't never gonna hear me say, "You better go get that guy." Never, I ain't never gonna . . . [also] we don't talk about no f..king drugs in the circle. That's all they [feds] wanna hear, that's conspiracy to a f..king RICO Act. That's life!*[1]

This statement was one of the many admonitions Vargas and others made during a Universal Leadership Meeting held in a remote community center in Willis, Texas, on May 29, 2005.[2] In attendance were seventeen of the ALKN leaders of Texas, along with two prominent ALKN leaders from Chicago,

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[1] Alexander Vargas (a.k.a. "Pacman") former Regional Inca of the Almighty Latin King Nation (ALKN), Southeast Region, Chicago, Illinois. Page 43 of Transcript to Government Trial Exhibit #125, United States v, Nava, et al., No. 5:09-CR-004 (N.D. TX, February 16, 2010).

[2] *See* Third Superseding Indictment at 17, United States v. Vargas, No. 2:10-CR-109 (N.D. Ind. ___); *see also* Press Release, Office of Public Affairs, U.S. Dep't of Justice, Six Alleged Members of the Almighty Latin King and Queen Nation Indicted for Racketeering Conspiracy (June 29, 2010).

Vargas and Sisto Bernal (a.k.a. "Suge"), the ALKN National Enforcer. The Chicago leaders were invited to Texas to address the statewide ALKN leadership. Unbeknownst to these ALKN leaders, an Alcohol Tobacco, Firearm, and Explosives (ATF) Task Force wired the community center for video and audio recordings pursuant to a Title III authorization from a District Court in the Southern District of Texas.

Vargas's declaration was an attempt to warn those in attendance that they could be subject to a life sentence in a prosecution under the Federal Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. § 1961, et seq.[3] The ALKN arranged the Universal Leadership Meeting, normally an annual event, to discuss the affairs and practices of the gang.[4] The participants raised issues relating to drug trafficking and general discussions of conspiracy to murder, potentially RICO predicate acts as Vargas cautioned. As discussed below, Vargas predicted his RICO fate, that of the other Chicago Latin Kings who made the trip to Texas,[5] and another prominent leader who attended the meeting, Donte Reyes (a.k.a. "DK"), South Regional Inca of Texas.

A. Houston Investigation

The electronic surveillance of the May 29, 2005, Universal Leadership Meeting, was a product of an ATF investigation that was initiated by the arrest of an ALKN leader on November 29, 2003. Shortly after his arrest, this ALKN leader, CS1, began to cooperate with ATF. CS1 provided detailed historical information regarding the ALKNs in Texas and their association with New York and Chicago.

In 2001, CS1 went to Chicago to receive "the blessing" from the "Nations Enforcer," Sisto Bernal. From that point, CS1 organized the Texas ALKNs into four regions: South, West, Central, and East.[6] By the end of 2003, the Texas ALKNs' membership was in excess of one thousand. Although he remained in custody following his arrest, CS1 made countless consensual recordings. In addition, with the assistance of CS1's girlfriend, ATF made controlled buys of guns and drugs from ALKN members. The girlfriend was also instrumental in making arrangements for the facility used for the May 29, 2005 Universal Leadership Meeting.

This ATF investigation resulted in federal and state prosecutions of over twenty defendants. These charges included drug and weapons violations, while one was convicted for murder in a state prosecution. No RICO charges were pursued. For some time, other prominent Latin Kings who participated in the May 29th meeting, including the Chicago Latin Kings and Reyes, eluded prosecution.

B. Lubbock Investigation

The Drug Enforcement Administration (DEA) Regional Office in Lubbock, Texas, initiated an investigation into the West Region ALKN in September 2007. Three of the leaders from that region, Jose Nava (a.k.a. "Chino"), Texas State Enforcer, his brother Luis Nava (a.k.a. "Flaco"), and their cousin Jesus Martinez (a.k.a. "Solid") attended the 2005 Universal Leadership Meeting.

On May 4, 2008, Jose Nava, located in Big Spring, Texas, ordered a drive-by shooting of a rival drug organization in retaliation for a shooting incident where Jose Nava was shot a few weeks earlier.[7] As

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[3] 18 U.S.C. §§ 1961–1968 (2012).

[4] *See* Third Superseding Indictment, supra note 2, at 9.

[5] Aside from Vargas and Bernal, two other Chicago Latin Kings traveled to Texas: Jose Zambrano (a.k.a. "Speedy"), Southeast Regional Enforcer, and Hiluterio Chavez (a.k.a. "Tails"), Southeast Regional Treasurer. Although they did not attend the Texas Universal Leadership Meeting with Vargas and Bernal, they were captured on video during the after-party.

[6] *See* Third Superseding Indictment, supra note 1, at 4–5.

[7] *See* Press Release, Office of Public Affairs, U.S. Dep't of Justice, Almighty Latin King and Queen Nation Gang Members Sentenced to Life in Prison for their Roles in Multiple Murder, Narcotics and Firearms Crimes (May 13, 2010).

directed by Jose Nava, two vehicles were involved in the mission that included the ultimate shooter, James Cole (a.k.a. "Blitz"), and four others.[8] They drove by a family gathering of the rival member's residence. After the lead car passed, Cole rode up in the second car and then unloaded an AK47-type of assault rifle, striking six persons, and killing two, including a woman that was twenty-six weeks pregnant.[9]

In the summer of 2008, an arrest of an ALKN member led to his cooperation. This confidential source, CS2, provided detailed information regarding the operations of Jose Nava and other ALKN members. Aside from information on the murders that occurred on May 4, 2008, the CS2 explained the drug trafficking operations of Jose Nava and his brothers. CS2 identified Dante Reyes (a.k.a. "DK"), mentioned above, and their source of supply of cocaine, located in the Texas Valley area in Mission, Texas. According to the CS2, Jose Nava would obtain kilogram quantities of cocaine from Reyes, either by way of couriers that would travel from the Valley to Western Texas or by meeting halfway in San Antonio. Occasionally, Jose Nava or others would travel to the Valley area to obtain the cocaine.

Based on information from a source received the previous night, DEA initiated surveillance on December 9, 2008, at the residence of Jose Nava in Lubbock, Texas. Later that evening, surveillance observed that Jose Nava and his wife traveled one hundred miles to Big Spring, Texas, the known residence of Reynaldo Nava and his wife. From there, they drove fifty miles to Midland, Texas, the known residence of Luis Nava and his wife. After that, they drove over 300 miles to a motel in San Antonio, Texas, arriving the following morning, December 10th. On December 13th, Reynaldo Nava and his wife joined Jose Nava and his wife in San Antonio. Shortly thereafter, the four left San Antonio in two separate vehicles and headed back to Lubbock, Texas. A traffic stop led to the seizure of the kilogram of cocaine in Reynaldo Nava's vehicle. These arrests were followed by search warrants executed at the residences of all three Nava brothers.

This December 13th cocaine seizure was followed by a complaint charging all three Nava brothers and their paramours with conspiracy to possess with the intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 846.[10] This initial complaint was followed by an indictment.[11]

On February 19, 2009, the Superseding Indictment was returned to include eleven other members and associates of the West Region ALKN and charges related to the May 4, 2008 murders. The case was prosecuted by the United States Attorney's Office (USAO) of the Northern District of Texas (Lubbock Division) with Assistant United States Attorney (AUSA) Cody L. Skipper, the Criminal Division's Gang Unit,[12] and this author. Although it was composed of seasoned gang prosecutors, the prosecution team had no experience with RICO or charges under Violent Crimes in Aid of Racketeering ("VICAR"), in violation of 18 U.S.C. § 1959. Instead, they relied on more familiar drug trafficking related charges.

The superseding indictment charged all seventeen defendants with a 21 U.S.C. § 846 conspiracy.[13] In addition, Jose Nava, James Cole, and the four other ALKN members involved with the May 4, 2008 murders were charged substantively under Using and Carrying a Firearm to Commit Murder During and in Relation to a Federal Drug Trafficking Crime, in violation of 18 U.S.C. § 924(j)

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[8] *See id.*
[9] *See* Third Superseding Indictment, *supra* note 1, at 23–24; *see also* Almighty Latin King and Queen Nation Members Sentenced to Life in Prison for Their Roles in Multiple Murder, Narcotics and Firearms Crimes, *supra* note 7.
[10] 21 U.S.C. § 846 (2012).
[11] United States v. Nava, et al, 5:09CR0004 (N.D. Tex. January 6, 2009).
[12] In late 2010, the Gang Unit merged with Organized Crime and Racketeering Section to formed the Organized Crime and Gang Section.
[13] § 846.

(hereinafter § 924(j)).[14] Jose Nava and James Cole elected to go to trial and were convicted of the murders and other related charges. They later received three consecutive life sentences.

Ultimately, the *Nava* case resulted in convicting a total of twenty defendants charged in the investigation.[15] Although successful, the shortcoming of this prosecution was that some of the violent members of the ALKN Texas West Region were not readily chargeable as part of a drug conspiracy under 21 U.S.C. 846.[16] Consequently, those members avoided prosecution in this case. As discussed below, these gang members would not have been so fortunate if the prosecution team would have pursued RICO charges.

C. Hammond Investigation

The Northern District of Texas prosecution led to a subsequent ALKN prosecution by the USAO of the Northern District of Indiana (NDIN) with AUSA David Nozick, the Criminal Division's Organized Crime and Gang Section, and this author. The focus of this investigation was the Chicago Southeast Region of the ALKN headed by Alexander Vargas.

In late 2006, Jose Vargas (brother of Alexander) and another person were shot and killed by a member of a rival gang.[17] Consequently, Alexander Vargas ordered that the leaders of that gang be targeted. On February 25, 2007, James Walsh and Gonzalo Diaz, leaders of that rival gang, were shot and killed as they left a bar in Griffith, Indiana.[18]

A total of five Latin Kings were involved in those murders—two regional enforcers, Jose Zambrano (a.k.a. "Speedy") and Ivan Quiroz (a.k.a. "Captain Kirk"); two shooters, Brandon Clay (a.k.a. "Cheddar") and Jermaine Ellis (a.k.a. "J-Dub"); and a fifth Latin King, Jason Ortiz (a.k.a. "Creeper"). All five of these subjects had traveled from Illinois to Indiana to wait for their victims to leave a party being held at the Sopranos Lounge. After the shootings, they all fled in one vehicle while being pursued by the police. The subjects abandoned the vehicle. A short time later, Clay, Ellis, and Ortiz were taken into custody. The following day, the two murder weapons were recovered a short distance from the abandoned vehicle, registered to Quiroz and his wife. In addition, Clay and Ortiz provided post-Miranda statements implicating each other and Ellis. Ellis, a juvenile at the time, did not give a statement. After being held locally for forty-eight hours, all three subjects were later released without being formally charged.

During the summer of 2009, agents from the Federal Bureau of Investigation (FBI) Merrillville, Indiana Regional Office developed a source, CS3, a Latin King member who was targeted by the ALKNs for failing to submit to a violation.[19] CS3 provided historical knowledge of the Southeast Region of the

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[14] 18 U.S.C. § 924(j) (2012).

[15] Dante Reyes was the primary cocaine supplier to Jose Nava and could have been charged in that case. However, the *Nava* prosecution team deferred to an ongoing FBI investigation out of McAllen, Texas, that targeted Reyes and other ALKN members and associates. Yet the *Nava* superseding indictment did include Reyes's right-hand man among the seventeen defendants charged. Shortly after that superseding indictment was unsealed, Reyes fled across the border to Mexico. Consequently, the McAllen-based FBI investigation stalled.

[16] § 846. Some of the Texas West Region ALKQN members were suspected of other crimes that were not directly involved in the drug trafficking. The West Region ALKQN was spread out over several townships in West Texas, including Lubbock, Big Spring, Midland, and others ranging approximately 150 miles. Due to this vast area, the prosecution team believed a jury may have had difficulty holding these other members not directly involved with drug trafficking accountable under an § 846 conspiracy theory.

[17] *See* Third Superseding Indictment, *supra* note 1, at 19.

[18] Third Superseding Indictment, *supra* note 1, at 19–21.

[19] CS3 was scheduled to be "violated" (subjected to a beating) for failing to "post-up" (stand guard at an assigned area) as required by low-level members. After fending off the violation with a gun, CS3 fled the area. The ALKN issued a "KOS" (kill on sight order) on CS3.

Chicago ALKNs. In addition to CS3, there were other ALKN cooperating defendants that were serving sentences from previous prosecutions.

Clearly, the "centerpiece" of the government's evidence were the recordings of the May 29, 2005 Universal Leadership Meeting. The audio and video of the ALKN leadership meeting was classic enterprise evidence. In addition, other videos recorded that day showed firearms being distributed to the Texas security team prior to the arrival of the Chicago ALKN leadership. Other videos showed all of the leaders except Vargas and Bernal being searched by the security team for recording devices and weapons prior to the meeting with the Chicago leaders. This electronic evidence was bolstered by cooperating defendants generated in the *Nava* case.

In addition, all of the targets of this initial indictment had extensive criminal histories and other contacts with law enforcement.[20] Some of these arrests documented criminal activity, such as the Walsh and Diaz murders, that were not previously adjudicated. It can be said that a RICO prosecution could be viewed as a criminal's "life-time achievement" award. When a gang member's years of activity is viewed as a whole, a "pattern of racketeering activity" is readily apparent. A final piece of the indictment was provided by the recorded jail calls made by Jason Ortiz.[21]

On June 17, 2010, a seven-count indictment was returned charging Alexander Vargas (a.k.a. "Pacman"), Sisto Bernal (a.k.a. "Suge"), Jose Zambrano (a.k.a. "Speedy"), Jason Ortiz (a.k.a. "Creeper"), Brandon Clay (a.k.a. "Cheddar"), and Jermain Ellis (a.k.a. "J-Dub") with RICO conspiracy.[22] Ortiz and Clay were also charged with the February 25, 2007 murders of Walsh and Diaz pursuant to VICAR, 924(j), and other related violations.

As with the *Nava* case, the prosecution team recognized the impact of joining several members of the gang into one case. Unlike in *Nava*, the prosecution team decided that a *Glecier* RICO conspiracy charge would be a better option than relying on a drug conspiracy to charge the gang.[23] To establish a criminal conspiracy violation under 18 U.S.C § 1962(d), we had to prove each of the following elements:

1. The existence of an enterprise;
2. That the enterprise was engaged in, or its activities affected, interstate commerce; and
3. That each defendant knowingly agreed that a conspirator [which may include the defendant] would commit a violation of 18 U.S.C. § 1962(c) [that is, committing two predicate acts].[24]

Of the three elements, the only real issue would be to determine which predicate acts to include in the RICO conspiracy. As part of a pattern of racketeering activity, the indictment included the following violations:

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[20] As with many departments, absent an arrest scenario, the Chicago Police Department had a practice of generating "field contact" reports with known or suspected gang members. These reports often explain the circumstances surrounding the contact and who accompanied the individual.

[21] While incarcerated for previous state violations, Ortiz generated several hours of recorded jail calls. These recorded conversations with other members and associates contained a treasure trove of enterprise evidence, including drug trafficking, weapons distribution, and members targeted for violations. The prosecution teams deemed much of the content of these calls to be admissible evidence as coconspirator statements.

[22] United States v. Vargas,et al 2:10CR109RL (N.D. Ind. June 17, 2010).

[23] United States v. Glecier, 923 F.2d 496, 498-500 (7th Cir. 1991), *see also* U.S. DEP'T OF JUSTICE, ORGANIZED CRIME AND GANG SECTION, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS at 310 (2016) (stating that it upheld the proposition that "it is sufficient to allege that it was part of the RICO conspiracy that the defendant agreed that a conspirator, which could be the defendant himself, would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise and to include sufficient allegations to inform the defendant of the nature of the charge.").

[24] *See* Salinas v. United States, 522 U.S. 52, 63 (1997).

1. Murder in violation of Indiana Code §§ 35-42-1-1,[25] 35-41-1-4,[26] and 35-50-2-9;[27]
2. Multiple acts indictable under 18 U.S.C. § 1951 (robbery affecting interstate commerce);[28]
3. 18 U.S.C. § 1952 (interstate travel in aid of racketeering);[29]
4. Multiple acts involving narcotics trafficking in violation of 21 U.S.C. § 841(a)(1) (distribution and possession with the intent to distribute a controlled substance);[30] and
5. 21 U.S.C. § 846 (conspiracy to distribute and possession with the intent to distribute a controlled substance).[31]

Although, there were a total of six persons involved with the Walsh and Diaz murders, only Ortiz and Clay were originally charged with these murders. The other defendants were all charged in the RICO conspiracy along with Ortiz and Clay. The RICO conspiracy specified thirty-seven "overt acts" that were either RICO predicate acts or conduct that demonstrated the defendant's on-going participation in the affairs of the enterprise.[32] This indictment was viewed as a "place-setter," with the expectation that the investigation would progress to include additional charges and new defendants.

As stated above, Zambrano was captured on video during the after-party at the May 29, 2005 Universal Leadership Meeting. Confronted with this and other evidence, Zambrano elected to cooperate. He was soon joined by Ellis. Both pleaded guilty to the RICO conspiracy, which included admitting to their involvement in the Walsh and Diaz murders. Although Zambrano was not charged substantively with these murders, we nevertheless were required to obtain "no seek" authorization through the Capital Case Section prior to his plea agreement.[33]

Although Ellis's cooperation was useful, Zambrano's cooperation could not have been more critical to the success of this prosecution. Zambrano's tenure with Latin Kings started when he was eleven years old, and upon his arrest at age thirty, he was one of four Southeast Regional Enforcers. Zambrano had intimate knowledge of the Latin Kings, from the foot soldier to the Corona, the overall leader of the ALKN affiliated with the Chicago faction. In addition, Zambrano had direct knowledge of multiple murders, the distribution of hundreds of kilograms of cocaine and thousands of kilograms of marijuana, and other RICO predicate acts committed by the enterprise. With the cooperation of Zambrano and Ellis, coupled with that of other cooperators, many of the ALKN Chicago Southeast Region members, and others, were exposed to prosecution.

Approximately four months later, on October 22, 2010, the Superseding Indictment was returned in this case. The Superseding Indictment added Vargas to the charges related to the Walsh and Diaz murders.[34] In addition, the ongoing investigation revealed that Clay was involved in two other Chicago

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[25] IND. CODE ANN. § 35-42-1-1 (West 2017).
[26] *Id.* § 35-42-1-4.
[27] *Id.* § 35-50-2-9.
[28] 18 U.S.C. § 1951 (2012).
[29] *Id.* § 1952 (2012 & Supp. III 2015).
[30] 21 U.S.C. § 841(a)(1) (2012).
[31] *Id.* § 846.
[32] For example, a possession of a firearm is not a listed predicate act. However, possession of this weapon in an area controlled by the gang can demonstrate participation in the affairs of the enterprise.
[33] No such requirement was necessary for Ellis due to the fact he was a juvenile when he shot and killed Diaz.
[34] With the cooperation of Zambrano and Ellis, there was sufficient evidence to also charge Ivan Quiroz in the Walsh and Diaz murders. However, Quiroz was a significant flight risk due to his family ties in Mexico, where he had previously fled immediately following the Walsh and Diaz murders. Consequently, the prosecution team elected not to charge by way of indictment until Quiroz was taken into custody on an outstanding warrant based on a sealed

murders, those of Edward Delatorre on November 26, 2006, and Christina Campos on April 22, 2009. Along with Clay, there were five others involved in the Delatorre murder, including two shooters. Clay served as a "lookout." As for the two shooters, one was prosecuted for this murder in Cook County, Illinois, while the other shooter fled apprehension but was subsequently killed in Detroit, Michigan, approximately eighteen months after the Delatorre murder.[35]

Clay was joined by Ortiz and two other Latin King members in the incident that involved the Campos murder. In addition to Clay and Ortiz, the identified shooter, Martin Anaya (a.k.a. "Lefty"), was charged substantively with the Campos murder. A fourth Latin King, a juvenile who had minimal involvement, was not charged.

In addition to these four murders, the RICO conspiracy charged in the Superseding Indictment listed eleven other murders occurring from December 20, 2001, through March 2, 2009, as "overt acts" that were committed by Latin King members. Ten of these murders were previously prosecuted by the State Attorney's Office in Cook County, Illinois, and were included as "enterprise evidence." The other murder occurred in Whiting, Indiana, a week prior to the Walsh and Diaz murders. In that incident, Isaiah Cintron, a recently discharged U.S. Marine, was shot and killed while visiting neighborhood friends. One of the weapons used in the Walsh and Diaz murders was traced to the Cintron murder.[36]

On November 16, 2011, the fifteen-count Third Superseding Indictment was returned in this case. This indictment was the culmination of multiple investigations into the Latin Kings. A total of fifteen additional defendants were included in the case. One of the new defendants was the ALKN Texas South Regional Inca Dante Reyes,[37] who, as indicated above, attended the May 29, 2005 Universal Leadership Meeting. Also of note, Hiluterio Chavez, the fourth Chicago Latin King member that traveled to this Texas Universal Leadership Meeting, was charged in the RICO conspiracy and Hobbs Act robbery conspiracy. Two other notable defendants were current and former Chicago police officers.[38] These defendants, along with Chavez and Bernal, were involved in home invasions of drug dealers. Six of the other new defendants were involved in one or both of two new murders that were included as part of the RICO conspiracy.[39] The final indictment included a total of twenty murders, two being the murders involving the *Nava* investigation in Big Spring, Texas, occurring on May 4, 2008.

For over fourteen months, Zambrano and Ellis were the only defendants to enter into plea agreements. Shortly after the takedown of the new defendants in the Third Superseding Indictment, the floodgates opened. Alexander Vargas was one of the first of the remaining defendants who sought to cooperate. Vargas's initial proffer took two days. His plea agreement followed within a week. Once Vargas's cooperation was known, ultimately all but one defendant entered their guilty pleas. As with Vargas, most of these defendants agreed to cooperate.

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complaint. Ultimately, Quiroz was arrested, and on April 19, 2011, the Second Superseding Indictment was filed that included Quiroz in the case.

[35] Two of the others involved were girls that set up the two shooting victims. Both of these girls were charged in the Third Superseding Indictment.

[36] Later, the investigation of this case determined that Quiroz and Hiluterio Chavez directed another to shoot at Cintron's vehicle (resulting in his death) due to the mistaken belief that the vehicle contained rival gang members. The shooter was later killed in another incident a few years after the Cintron murder.

[37] After deferring his prosecution in the *Nava* case, Reyes was arrested on a sealed warrant upon returning from Mexico.

[38] The two police offers were being investigated by the FBI for some time. Shortly after the original indictment in this case, Antonio Martinez, who left the Chicago Police Department on medical disability, was approached by the FBI and agreed to cooperate. Clearly, Martinez was concerned that he could be implicated by one or more of the defendants in the case.

[39] As with Zambrano's case, although these murders were not charged substantively, we were required to obtain authorization not to seek the death penalty through the Capital Case Section.

The sole remaining defendant, Martin Anaya, elected to go to trial. Several cooperating defendants, including Zambrano and Vargas, testified against him. As mentioned, Anaya was charged with the RICO and drug conspiracy for the VICAR murder of Christina Campos. There was some testimony that Campos was killed by "friendly fire." Consequently, Anaya was acquitted of the VICAR murder but convicted on the remaining charges. At sentencing, the Court found Anaya accountable for the Campos murder but, nevertheless, decided on a variance and sentenced him to 360 months.

In all, seventeen of the twenty-three defendants convicted in this case were held accountable for one or more of the murders that were charged. As indicated below, this prosecution served as a model for later prosecutions in the NDIN that were brought by AUSA Nozick. Further, the outcome of this case conditioned many of the future defendants and their attorneys in these subsequent prosecutions to quickly realize the advantage of cooperating.

III. Other RICO Prosecutions in NDIN

A. Imperial Gangsters

The investigation to follow the *Vargas* case focused on a gang known as the Almighty Imperial Gangster Nation (IG). The IG investigation was initiated following the murder of Latroy Howard, which occurred on June 19, 2010.[40] Juan Briseno (a.k.a. "Tito") was indicted for the Howard murder on VICAR and § 924(j) murder charges on June 2, 2011.[41]

This indictment was followed by three superseding indictments. During the course of the case, AUSA Nozick partnered with trial attorney Bruce Hegyi of the Criminal Division's Capital Crimes Section.[42] A total of twenty-four defendants were charged. Eleven of these defendants were charged with one or more of the thirteen murders included in the case. As with the *Vargas* case, the charging decisions on murders were not limited to the shooter(s). All but two of these defendants pleaded guilty. Also similar to the *Vargas* case, many of these defendants cooperated with the government.

Juan Briseno was one of the defendants who went to trial. In addition to the RICO and drug conspiracies, he was charged with substantive counts involving a total of six murders and four attempted murders. The government sought the death penalty. At trial, the jury returned guilty verdicts on the RICO and drug conspiracies, five of the six murders, and two counts relating to attempted murder. All of Briseno's victims were arguably a result of gang-on-gang violence. Consequently, the jury did not unanimously agree on the death penalty. On June 16, 2015, Briseno was sentenced to five consecutive life sentences plus 120 months.

1. Two Six Investigation

The IG investigation was followed by an investigation of one of their many rivals, the Two Six Nation (Two Six). In this case, AUSA Nozick partnered with trial attorney Andrew L. Creighton of the Criminal Division's Organized Crime and Gang Section. This case originated with a criminal complaint that charged two members of the Two Six with a murder that occurred on May 16, 2003, in East Chicago, Indiana. The complaint was filed on August 23, 2013, charging these defendants with a § 924(j) murder. This case evolved over the next twenty-eight months, culminating in the filing of the Third Superseding Indictment on December 2, 2015, charging RICO and drug conspiracies that originated in January 1991, in addition to murders charged under VICAR and § 924(j).[43]

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[40] *See* Third Superseding Indictment at 15, United States v. Briseno, No. 2:11-CR-77-PPS (N.D. Ind.).
[41] United States v. Briseno, 2:11CR00077-PPS (N.D. Ind. June 2, 2011).
[42] *See* Press Release, Office of Public Affairs, U.S. Dep't of Justice, Leader of Imperial Gangsters Sentenced to Life in Prison for Five Murders, One Attempted Murder and Other Gang-Related Crimes (June 15, 2015).
[43] United States v. Pennington, 2:13-CR-00111-PPS (N.D. Ind. December 2, 2015).

A total of ten defendants were charged in this case. Seven of these defendants were charged with one or more of the five murders included in the case. Of these, one murder case was taken over from the Lake County, Indiana State's Attorney's Office. The other four murders charged were basically "cold cases."

2. Follow-up Latin King Investigation

As though full circle, AUSA Nozick led a second prosecution on the Latin Kings. This case was initiated with the July 15, 2015 indictment of Anton Lamont James, charged with VICAR and § 924(j) murders for killing Martin Hurtado Jr. on October 28, 2014. Unlike the *Vargas* case, the focus of this investigation was primarily limited to the criminal activities of a newly constituted Latin King region formed in Northwest Indiana, with chapters located in East Chicago, Gary, and Hammond.

On January 19, 2017, the Third Superseding Indictment was filed in this case. AUSA Nozick partnered with AUSAs Dean Lantern and Abizer Zanzi. This indictment charged thirty-eight defendants with RICO and drug conspiracies. The Hurtado murder charges and other related counts, including prostitution charges, were part of this indictment. Although Hurtado's was the only murder substantively charged, two other murders were included as overt acts of the RICO conspiracy, naming a total of five defendants responsible for these murders. In addition, at least twenty-five overt acts were part of the RICO conspiracy, including shootings, robberies, weapons possessions, and three arsons.[44]

3. Demonstrative Impact on Reduction of Violence

The four prosecutions in the NDIN have resulted in excess of ninety defendants charged with involvement in a criminal enterprise. Twenty-six homicides were prosecuted, either substantively or as part of the RICO conspiracies charged.

A look at the homicide statistics for East Chicago, Indiana, serves as a strong measure of the effect that these prosecutions had on the communities of Northwest Indiana. During the five-year span from January 2006 until January 2011, there were seventy homicides reported in East Chicago, Indiana. The *Vargas* case was first indicted in the summer of 2010. During the proceeding five-year span, from January 2011 until January 2016, there were thirty-two homicides reported in East Chicago, Indiana.

IV. Miscellaneous Considerations

A. RICO Predicate Acts

In the *Vargas* case, the Third Superseding Indictment listed eighty-five overt acts in the RICO conspiracy.[45] Aside from the several murders, robberies committed by the defendants, in particular those who were Chicago police officers at the time, were a significant aspect of the case.[46] Drug trafficking related violations were also included as predicate acts, despite the absence of any significant drug seizures or extensive drug-related conversations captured by means of consensual or Title III authorized

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[44] United States v. James, et al., 2:15CR00072-PPS (N,D. Ind., January 19, 2017.)

[45] The overt acts listed in indictments in the *Vargas* case and the subsequent investigations were not restricted to RICO predicate acts. Other activity such as firearm possession, gang meetings, and "posting up" (maintaining a presence on a street controlled by the gang) were also included to demonstrate further participation in the affairs of the gang.

[46] *See* Andrew Creighton, *The Hobbs Act, 18 U.S.C. § 1951*, U.S. ATTORNEYS' BULL., Jan. 2012, at 18 (explaining that these robberies were included as predicate acts under state law as well as under the Hobbs Act, 18 U.S.C. § 1951). This article provides an excellent overview of Hobbs Act.

recordings.[47] The December 13, 2008 seizure of a kilogram of cocaine in the *Nava* case was the only significant quantity of drugs acquired in this investigation.[48]

Several other listed overt acts in the *Vargas* case included violations of interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952.[49] Aside from the Chicago–Texas aspect of the case, the close proximity of Chicago to Indiana made interstate travel to promote drug trafficking a common occurrence. Although not included as a listed predicate act, witness tampering is a routine gang practice that is one of several other potential predicate acts that could be included in RICO conspiracies.

B. Use of Cooperators in Future Prosecutions

As with the Latin King investigation, RICO prosecutions, in particular, can lead to successive prosecutions. Often, a cooperating defendant from one case can be used in future prosecutions. Several of the cooperating defendants in the *Vargas* case have been debriefed in successive prosecutions. For one, Alexander Vargas testified in a trial against two Latin King members that were part of a case charged in *United States v. Ruibal*, prosecuted by AUSAs Russell A. Kavalhuna and Sally J. Berens. In that case, a total of thirty-one defendants were charged in a RICO conspiracy involving a multitude of attempted murders in the Holland, Michigan area.[50] Two other defendants were charged with VICAR offenses. As with the two that went to trial, all were convicted.[51]

C. Cooperating Witness Safety

There is an ever-growing concern about a cooperating inmate's safety. Upon his arrival, an inmate is typically confronted by other inmates in most medium- and high-level Bureau of Prisons (BOP) facilities. These inmates demand that the new arrivals present their "paperwork" (plea agreements and Presentence Investigation Reports) for inspection. In addition, federal inmates have access to PACER to determine whether the government filed any motions, sealed or otherwise, on behalf of the suspected cooperating inmate.

Upon approaching a defendant that is interested in cooperating and after demanding truthfulness and candor, the prosecutor needs to address witness security next. In the past, this author and other prosecutors would suggest the possibility of the Witness Security Program (WITSEC).[52] Once admitted into WITSEC, referred to as Phase I, cooperating inmates are typically placed in BOP facilities with other cooperating inmates.

Another promising option now being offered by BOP is the "Gang Drop-out" Program. The "Drop-out" program is designed for inmates that renounce their gang affiliation. After the certification process, BOP will place this inmate in a facility that is limited to other inmates that have also renounced their gang affiliation. Normally, this process can be expedited for those inmates that were cooperating government witnesses.

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[47] Many USAOs are reluctant to proceed on historical or "dry" drug conspiracy cases. However, a compelling criminal case may be developed when this historical drug evidence is presented in the context of other gang activity.
[48] The circumstances surrounding the single kilo of cocaine was representative of years of drug trafficking as testified by cooperating defendants.
[49] 18 U.S.C. § 1952 (2012 & Supp. III 2015).
[50]See Superseding Indictment in United States v. Ribal, et, No. 12-CR-00132, (W.D. Mich. February 8, 2013)
[51] United States. v. Ruibal, No. 12-CR-00132, 2014 WL 198663, at *1 (W.D. Mich. Jan. 16, 2014).
[52] See Linda A. Seabrook & Jelahn Stewart, *Snitches Get Stiches: Combating Witness Intimidation in Gang-Related Prosecutions*, U.S. ATTORNEYS' BULL., May 2014, at 83, 88 for a helpful discussion of witness security measures, including WITSEC.

V. Conclusion

The above cases demonstrate that an investigation that focuses on the organization will commonly disclose new evidence of “cold case” murders, leading to the prosecution of those responsible and preventing their involvement in future violence. In addition, targeting those responsible for ordering or directing the shooter(s) will aid in breaking the constant cycle of replacing one apprehended or deceased shooter with yet another.

ABOUT THE AUTHOR

❑ **Joseph A. Cooley** has been a prosecutor with United States Department of Justice since June of 1994, first starting as a Special Assistant U.S. Attorney in the NDIN and later as an AUSA. He served as an AUSA in the SDFL from 2002 until 2008. Since November 2008, he worked in the Criminal Division, starting at the Gang Unit and then with the merger the Organized Crime and Gang Section. Before becoming a lawyer, Mr. Cooley served on the Chicago Police Department (CPD) for approximately fourteen years. As a police officer, he worked in various capacities that included tactical work in the Public Housing Unit, Special Operations Group, and later as a detective. Throughout his career in law enforcement, he has focused on investigating and prosecuting violent street gangs and other domestic and foreign criminal organization.

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Kings Only of Corners and Blocks: A Primer on Using the Historical Conspiracy Strategy to Address the Violence of Non-Traditional Leaderless Street Gangs

Tate Chambers
Assistant Director
Office of Legal Education/EOUSA

I. The Mandate from the Attorney General

America is experiencing a rise in violent crime. In his remarks before the National Summit on Crime Reduction and Public Safety, Attorney General Jeff Sessions outlined the rise:

> In 2015, we as a nation suffered the largest single-year increase in the violent crime rate since 1991, and the largest jump in the murder rate since 1968. The preliminary data for the first half of 2016 showed further increases, with large cities seeing an average increase in murders of nearly twenty-two percent compared with the same period the year before.[1]

In April of this year, General Sessions told the International Association of Chiefs of Police that:

> These numbers should trouble all of us — especially those of us charged with protecting public safety. Behind all the data are real people whose safety and lives are at stake. My fear is that this surge in violent crime is not a 'blip' but the start of a dangerous new trend — one that puts at risk the hard-won gains that have made our country a safer place. While we can hope for the best, hope is not a strategy. We must act decisively at all levels — federal, state and local — to reverse this rise in violent crime and ensure public safety.[2]

General Sessions tied the rise in violence to the rise in drug dealing when he spoke before the 30th DARE Training Conference, "We know drug trafficking is an inherently violent business. If you want to collect a drug debt, you can't, and don't, file a lawsuit in court. You collect it by the barrel of a gun. There is no doubt that violence tends to rise with increased drug dealing."[3] General Sessions also tied the rise in violence to increased gang activity when he spoke before the National District Attorney's Association in Minneapolis in July of this year stating:

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[1] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks at the Opening of the National Summit on Crime Reduction and Public Safety (June 20, 2017).
[2] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Keynote Remarks at the International Association of Chiefs of Police Division Midyear Conference (Apr. 11, 2017).
[3] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks at the 30th DARE Training Conference (July 11, 2017).

> We can never cede a single neighborhood or a block or street corner to criminal gangs. Much of the nation's rising murder rate is a result of violent gang activity. . . . While criminal gangs have been growing and are numerous, their numbers are finite. If we target them aggressively, we can reduce homicides and make our communities safer.[4]

Speaking before the National Association of Attorneys General, General Sessions promised:

> It is a basic civil right to be safe in your home and your neighborhood. We are diminished as a nation when any of our citizens fear for their life when they leave their home; or when terrified parents put their children to sleep in bathtubs to keep them safe from stray bullets; or when entire neighborhoods are at the mercy of drug dealers, gangs and other violent criminals. So, we need to act decisively at all levels-federal, state and local- to reverse this rise in violent crime and keep our citizens safe. This will be a top priority for the Department of Justice during my time as Attorney General.[5]

In an op-ed piece in the Washington Post on June 16, 2017, General Sessions wrote:

> Some skeptics prefer to sit on the sidelines and criticize federal efforts to combat crime. But it's not our privileged communities that suffer the most from crime and violence. Minority communities are disproportionately impacted by violent drug trafficking. Poor neighborhoods are too often ignored in these conversations. Regardless of wealth or race, every American has the right to demand a safe neighborhood. Those of us who are responsible for promoting public safety cannot sit back while any American communities are ravaged by crime and violence.[6]

General Sessions understands the difficulty of addressing the gang problem. In April of this year he said:

> Are these gang and cartel members violent and formidable foes? They sure are. But they are also mortal, and that means they can be arrested, prosecuted, and imprisoned for their crimes. And that's what we are going to do. . . . The Justice Department has zero tolerance for gang violence. If you are a gang member, know this: We will find you. We will devastate your networks. We will starve your revenue sources, deplete your ranks and seize your profits. We will not concede a single block or street corner to your vicious tactics.[7]

On March 8, 2017, General Sessions put his words into action when he issued a memorandum to all federal prosecutors entitled, "Commitment to Targeting Violent Crime." In that memo, he directed all federal prosecutors, stating:

> I am today directing the 94 United States Attorney's Offices to partner with federal, state, local, and tribal law enforcement to specifically identify the criminals responsible for significant violent crime in their districts. Once identified, the United States Attorney's Offices must ensure that these drivers of violent crime are prosecuted, using the many tools at a prosecutor's disposal. To accomplish this goal, in all cases, federal prosecutors should coordinate with state and local counterparts to identify the venue (federal or state) that best ensures an immediate and appropriate penalty for these violent offenders. . . . When it is

[4] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks to the National District Attorneys Association (July 17, 2017).
[5] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks at National Association of Attorneys General Annual Winter Meeting (Feb. 28, 2017).
[6] Jeff Sessions, *Jeff Sessions: Being Soft on Sentencing Means More Violent Crime. It's Time to Get Tough Again.*, WASH. POST (June 16, 2017).
[7] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks on Violent Crime to Federal, State and Local Law Enforcement (Apr. 28, 2017).

determined that federal prosecution of these violent offenders is appropriate, federal prosecutors should use the substantial tools at their disposal to hold them accountable and ensure an appropriate sanction under federal law.[8]

The mandate is clear. Work with state and local law enforcement to identify and investigate the most violent offenders in your communities. If you, the state, and local authorities decide you should prosecute the individual, use every tool available to ensure an immediate and appropriate penalty. The impact is also clear. Three months after the Attorney General issued the memo, the number of federal defendants charged with unlawful possession of a firearm increased nearly twenty-three percent in the second quarter of 2017 compared to the same period in 2016. The Department is on pace to charge the most defendants with firearm offenses since 2005. The projected number for the entire year is an increase of eight percent from fiscal year 2016, twenty percent from fiscal year 2015, and twenty-three percent from fiscal year 2014.[9]

II. The Challenge of Non-Traditional Gangs

The mandate is clear, however, the challenge is also clear. Violent street gangs have changed over the last several years. Many of them no longer fit the traditional schematic of the street gangs of the past. Today, many gangs are "leaderless," "horizontal" organizations instead of the tightly controlled "pyramid" organizations of the past. And these changes make them harder to prosecute. Let's look at one city—Chicago—to see these changes and how they have impacted law enforcement's efforts to fight violent crime.

Chicago Tribune reporter, David Heinzmann, wrote the seminal article on the rise of the leaderless gangs in Chicago, "Street gangs, once compared with Fortune 500 companies for their organizational skills and ruthless pursuit of profits, are now mostly made up of small, leaderless sets of members bound together by personal relationships rather than geographic or narcotics-trade ties. Personal insults and petty conflicts, often inflamed by social media posts, are just as likely to lead to a shooting as is competition for drug turf. Taken together, these changes have created an anything-goes atmosphere on the streets. … It is no secret that the nature of Chicago's street gangs has changed, resulting in less centralized and less hierarchical organizations. Chicago's top police officials have spoken frequently about how the splintering of the city's gangs has fueled the city's nonstop violence. . . . gang members on the street have no bosses giving orders. The violent results have become increasingly unpredictable."[10] Heinzmann continued, "the old hierarchical rules of engagement are nonexistent. . . . The disruption in gang structure also changed the way they did business, according to the investigators. Most of the drug-dealing is now controlled by the individual sets, with the proceeds used to fuel activities on the street rather than funneled up a chain of command."[11] *New York Times* reporter, John Eligon, wrote in his article, *Bored, Broke and Armed: Clues to Chicago's Gang Violence* that "An overwhelming majority of the city's 3, 451 shootings this year [2016] were gang-related, the police say. What that means has become increasingly fuzzy, as the large, well-organized operations built around drug dealing have splintered, and are now little more than cliques or sets. . . . those highly organized operations have fizzled over the last twenty-five years as prosecutors swept up gang leaders, and the city demolished public housing projects, dispersing gang members primarily to minority neighborhoods on the West and South

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[8] Memorandum from Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, U.S. Dep't of Justice 1 (Mar. 8, 2017).
[9] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Federal Gun Prosecutions Up 23 Percent After Sessions Memo (July 28, 2017).
[10] David Heinzmann, *Leaderless Chicago Street Gangs Vex Police Efforts to Quell Violence*, CHI. TRIB. (July 20, 2016).
[11] *Id*.

Sides. Now they are everywhere and nowhere—gangsters by name, but kings only of corners and blocks."[12]

Writing for *Newsweek*, Josh Saul interviewed an older, long-time gang member Benny. Saul wrote that "Benny says that back in his day and into the 1990s, when the gangs of Chicago had clear lines of authority, most of the violence involved turf squabble and disputes over drug deals. If a gang member wanted to shoot a rival, he went to a leader for permission or risked punishment for attracting police attention that would endanger profit margins. And gang members honored a strict code against shooting children and bystanders. 'When you had the gangs controlling the trafficking, the shootings were ordered,' Benny says. 'It was business.'"[13] Saul interviewed one of the younger members of the leaderless gangs and "he explains how most gang members no longer have a leader issuing or enforcing rules. They operate in small crews of as few as a dozen members and open fire with no concern for who might catch a stray bullet. . . . He says young men shoot each other over seemingly insignificant insults and conflicts. . . . He scoffs at the idea of asking a higher-up for permission before attacking a rival and says there's no real leader of his small GD crew, echoing what I heard from other young gang members. 'Everybody's on the same level,' says [the gang member], who claims he's been shot in the stomach and back, 'If we want to shoot someone, we just pull up on them and start shooting.'"[14] Veteran police officers note that the fractured nature of the leaderless gangs has made life more chaotic on the street.[15]

Over the decades, prosecutors learned how to attack the organized gangs who had strong leadership at the top, several levels of leaders below, and with the foot soldiers at the bottom of the pyramid. Everyone in the pyramid took their orders from the leaders above. Long-term grand jury investigations, T IIIs, large scale RICO and CCE investigations, and starting at the bottom and flipping defendants all the way to the top were and still are effective tools against these organized gangs. They are designed to address the criminal enterprise. The leaderless gangs, however, are more difficult to attack using many of the tools we used before on the organized gangs. The gangs are small. They are splintered. There are no leaders to target.

However, there is one traditional strategy that works well against these non-traditional gangs—the historical conspiracy. The leaderless gangs of today are not as large or as organized as the gangs of the past and they do not usually sell nearly the weight of drugs, but they still work together to sell small amounts of drugs and to commit other violent crimes, such as Hobbs Act robberies. Also, they still use guns to protect and facilitate their drug dealing and their armed robberies. The historical conspiracy is still a viable tool to bring the defendants and their criminal acts together for prosecution.

III. The Historical Conspiracy Strategy

At a recent training session at the National Advocacy Center, I asked a room of students how many had worked a Title III case. Almost every hand went up. Then I asked them how many had worked a historical conspiracy case. Very few hands went up and several said they had never heard the term. With the changing landscape in gang prosecutions, it is important that every prosecutor know the basics of how to put together a historical conspiracy case.

The historical conspiracy strategy has been used successfully for many years in the U.S. Attorney community. For years, it was the basic strategy used to successfully prosecute all types of criminal organizations from outlaw motorcycle gangs to large drug enterprises. Also for many years, it was a common strategy used against traditional street gangs. Today, it can also be an effective weapon against

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[12] John Eligon, *Bored, Broke and Armed: Clues to Chicago's Gang Violence*, N.Y. TIMES (Dec. 22, 2016).
[13] Josh Saul, *Why 2016 Has Been Chicago's Bloodiest Year in Almost Two Decades*, NEWSWEEK (Dec. 15, 2016).
[14] *Id*.
[15] Annie Sweeney & Jeremy Gorner, *10 Shootings a Day: Complex Causes of Chicago's Spiking Violence*, CHI. TRIB. (July 1, 2016).

the leaderless gangs and is another tool in the prosecutor's toolbox, one you may want to consider in carrying out the Attorney General's mandate to address the violent street gangs. This article will provide a basic primer on how to use that tool.

The historical conspiracy strategy is based on the theory that street gang members conspire together to control specific areas of the city, deal drugs and commit other crimes in that area, and use guns and violence to maintain their control of their drug trade and to war with other gangs. Each act by a gang member in furtherance of the conspiracy, whether the act is a crime or not, is an overt act of the conspiracy.

There are seven simple steps to investigating a historical conspiracy case. First, you need to build your team of federal, state, and local law enforcement. Next, you need to identify the crew you are targeting and who the trigger pullers, the most violent members, are in that crew. Then, you have to pull the paper, every report of every incident, involving those trigger pullers. Next, you need to organize those incidents in a format you can work with to determine what charges are available to you. Then, you will sift through the reports to identify potential charges and other overt acts of the conspiracy. You will also identify potential witnesses for the grand jury phase of your investigation. Finally, working closely with your team, you will choose which gang members to indict and draft the indictment.[16]

A. Build the Team

In developing a historical conspiracy strategy, there is no substitute for a solid relationship with state and local law enforcement.[17] Attorney General Sessions made cooperation between the federal authorities, the state, and local authorities an essential piece of his attack on violent crime. In a speech before the National Association of Attorneys General, General Sessions said, "About 85 percent of all law enforcement officers in our nation are not federal, but state and local. Today, they are better educated, trained and equipped that ever before. These are the men and women on the front lines—the ones doing most of the tough and often dangerous work that keeps our neighborhoods safe."[18] In a speech before state and local law enforcement, General Sessions said, "To turn back rising crime, we must rely heavily on all of you in state and local law enforcement to lead the way—and you must know that you have our steadfast support. The federal government should use its money, research, and expertise to help you figure out what is happening and determine the best ways to fight crime. We should strengthen partnerships between federal and state and local officers. And we should encourage the proactive policing that keeps neighborhoods safe. This Department of Justice will do just that."[19] Deputy Attorney General, Rod Rosenstein, in a speech before the National Sheriffs Association, addressed the value of working in task forces with state and local law enforcement. He said that "The Department of Justice and federal law enforcement agencies need to partner with other law enforcement agencies. Perhaps the best example is the joint federal, state, and local task force model. The use of joint task forces increases our crime fighting abilities exponentially. Task forces bring together federal, state and local law enforcement officers with the goal of sharing resources and information to combat a particular crime problem. There are terrorism task forces, violent crime task forces, drug task forces, fugitive task forces, identity theft task forces, and

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[16] At first glance the historical conspiracy strategy may sound like a lot of work-time and resource intensive. But it is not as difficult as it may sound. You can easily run several of these strategies at once. From 2011 to 2016, in the Peoria Division of ILC, we ran seven historical conspiracy task forces simultaneously.

[17] *See* Tate Chambers, *Project Safe Neighborhoods and Gangs—An Expansion of Focus*, U.S. ATTORNEYS' BULL., July 2008, at 1; Stacey D. Haynes, *Proven Law Enforcement Strategies*, U.S. ATTORNEYS' BULL., Mar. 2010, at 1.

[18] Press Release, Attorney General Jeff Sessions Delivers Remarks at National Association of Attorneys General Annual Winter Meeting, supra note 5.

[19] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks on Efforts to Combat Violent Crime and Restore Public Safety Before Federal, State and Local Law Enforcement (Mar. 15, 2017).

others. Task forces are resource-multipliers, and they result in thousands of successful prosecutions at the state and federal levels. By sharing information, discussing investigations, and collaborating on strategy, we can combat crime in ways none of us could do alone."[20] On March 31, 2017, General Sessions placed his beliefs about the importance of working with state, local, and tribal law enforcement in a memorandum to all heads of Department Components and United States Attorneys, where he directed them to work with state, local, and tribal law enforcement. General Sessions said "We understand the crucial role interagency partnerships play in successful crime prevention strategies, and the Department is proud of the longstanding relationships it has with our federal, state, local and tribal law enforcement partners. The Federal government alone cannot successfully address rising crime rates, secure public safety, protect and respect the civil rights of all members of the public, or implement best practices in policing. These are, first and foremost, tasks for state, local, and tribal law enforcement. By strengthening our longstanding and productive relationships with our law enforcement partners, we will improve public safety for all Americans."[21]

What is the first step in building your team? Seek out your district's Law Enforcement Coordinator (LEC) to mentor you in developing a relationship with state and local law enforcement and. spend time with law enforcement. You should also join the local police chiefs' association and attend their monthly dinner meetings. Show up for the annual law enforcement memorial ceremony. Show them that what is important to them is also important to you. Attend their social events. Nearly every Sheriff's Office has an annual charity golf outing. Even if you do not play golf, show up for the post-round dinner and, if possible, contribute a few door prizes. A few U.S. Attorney hats or coffee cups will go a long way. I always sponsor one of the holes and then the name of the U.S. Attorney's Office appears in the program. Participate in their community outreach events and attend the National Night Out events. For years we helped pass out ball bats to fans at the annual Police Bat Night at the local minor league baseball game. Become a frequent visitor at the police department and the sheriff's office and when scheduling meetings, suggest their office instead of yours.

One of the most valuable partners on your team is the local State's Attorney. Appreciate that it is the State's Attorney's Office who is carrying the heavy water in the fight against violent gang crime. Establish regular meetings at the States Attorney's Office, where you and the police join the State's Attorney in reviewing the past week's violent crime incidents. Make it clear that you are not there to poach cases. If after discussing whether to take a case federal or state, remember the States Attorney has the right of first refusal, but be willing to step in when asked and take that gun or small drug case which may not meet your prosecution guidelines, but is important to your partners. Make it clear that your goal is not to act as the federal big brother, but instead, you are there to be a member of the team and serve the common goal of reducing violent crime. Be open. Be transparent. Be sincere. Keep your word. Don't over promise. Do what you say you will do.

Disabuse yourself of the idea that federal agents are superior to state and local officers. As General Sessions said, today's state and local officers are highly educated, well-trained, and committed to their work. Every police department and sheriff's office is full of talented, dedicated men and women who you will be fortunate to team up with them.

In my district, I covered ten counties. I scheduled "County Priority Meetings" in each county. The LEC and I would ask the Sheriff of those counties to host the meetings and to invite state and local law enforcement and the county prosecutor. At the meetings, we would discuss the most serious violent crime threats in that specific county and form strategies to address those threats. Again, do what you say you

[20] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Deputy Attorney General Rod Rosenstein Delivers Remarks at the National Sheriffs Association Annual Conference (June 26, 2017).
[21] Memorandum from Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, U.S. Dep't of Justice 1 (Mar. 31, 2017).

will do. Don't over promise. If you can use the federal resources to aid the county, do your best. If you cannot, admit it. Your candor will be appreciated.

One of the best ways to get to know the state and local officers is to develop a training course and offer it to the departments. Work with your LEC to determine their training needs—a course in conspiracy, search and seizure, especially Terry stops, or asset forfeiture is always welcome.

Recognize the good work of your state and local partners. At the conclusion of a case, obtain certificates of appreciation from your office, signed by the U.S. Attorney, for the officers who worked the case. Present the certificates at local law enforcement gatherings before your officers' peers and supervisors, so it is clear that the U.S. Attorney's Office appreciates and values their work.

Although federal law enforcement assets are often limited in small or medium sized districts, make sure you include the federal agents in your efforts from the very beginning. If the federal agents already have a relationship with the state and local officers, use them to introduce yourself to the team. If they do not have a relationship, take them with you as you interact with the state and local officers. The federal agents are essential to the success of your strategy. Make sure they are part of the team from the beginning.

Also, remember you are part of a much larger team than just your district team. You have the resources of the Department to assist you in this work.[22] Use them.

Do not forget another essential member of your team—the paralegal or legal assistant. They are vital to your success. Include him or her in the investigation from the beginning. It will be his or her task to organize the discovery as you gather it during the investigation. It will be much easier for the paralegal or assistant to do that if he or she is included at the start and can suggest strategies for organizing the discovery and, if necessary, presenting the evidence at trial.

As you develop your relationship with state and local law enforcement, learn which officers are familiar with the street gangs and are willing to work with you to combat them. You cannot complete the next step in the strategy—identifying the targets—without them.

B. Identify the Targets

The first step in identifying the targets is to mine the experience and knowledge of the state and local gang experts. These officers know the crews. They know their territory. They know their members, and they know which of those members are the shooters. Ask them which crew is responsible for the most violence in your area. Then, determine which members of that crew are the trigger pullers. Pull the criminal history for each trigger puller. Identify which ones may be good candidates for federal treatment. Look for trigger pullers who may qualify as Armed Career Criminals, Career Offenders, or Three Strike candidates. Look for trigger pullers that have criminal histories with prior convictions for violence and drugs.[23]

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[22] *See* Robert J. Raymond, *The Criminal Division Offers Expert Advice and Assistance for Gang-Related Cases*, U.S. ATTORNEYS' BULL., May 2006, at 47; Mark Kraft, et al., *ATF's Unique Technology, Investigative Experience, and Statutory Authority in Gang Prosecutions*, U.S. ATTORNEYS' BULL., May 2006, at 23.

[23] *See* Christopher Graveline & Joseph Wheatley, *The Detroit One Violent Crime Reduction Initiative: How It Works and How Similar Programs May Benefit Your District*, U.S. ATTORNEYS' BULL., June 2017, at 83; Brendan Groves, *No Panacea, Some Promises, Much Potential: A Review of Effective Antigang Strategies*, U.S. ATTORNEYS' BULL., July 2008, at 38.

C. Pull the Paper

Now that you have your list of possible targets, pull the paper. A historical conspiracy case is in the paper. You will review the police reports for every incident involving your targeted gang members. You are looking for past crimes where the elements necessary to prove a crime are present. No additional act by the defendant is necessary. You are also looking for incidents that, although they may not be crimes, are evidence of the defendants conspiring together to commit crimes.[24] The beauty of the case "being in the paper" is that the defendants cannot undo the evidence. Your case is complete and they cannot impact it. You just need to discover it.

D. Organize the Paper

Once you have a list of the crew's trigger pullers and have pulled the paper, the real work begins. Pull the police reports on every incident involving the most violent members for the last five years. That includes reports where they were arrested, not arrested, charged, not charged, stopped and identified, and even reports where they were a victim. Pull reports of search warrants and car stops where they were present. In sum, pull every report that includes their name. If you selected an active crew as your gang target, your pull may produce hundreds of reports. Place all of the reports in chronological order. Then direct your team members to read each report and write a short one-paragraph synopsis. For example: April 14, 2015- Search Warrant at 111 Green Street- guns and drugs found- John Smith and Bob Jones present but not arrested. Place the summary paragraphs in chronological order. Now you have a summary of every contact between the police and your shooters for the last five years. Review it as a team. Often, your local gang experts will add context to the events as you go through them.

As you proceed through the summaries, keep in mind that at this point you are looking to see who you can charge and you are also looking to see who may be a possible witness. The girlfriend, who was with a shooter in one report, may no longer be his girlfriend and may be willing to talk to you when you start the grand jury phase of the case. The victim of a shooting incident, where your shooter was there, but could not be charged, may also be willing to testify for you. Look for incidents that show, not only criminal conduct, possession of a gun or drugs, but also association. A car stop where your shooter was in the car with three other crew members, minutes after a shooting four blocks away, but was not charged, may prove important later in developing your case.

At the end of your team's review of the paper, make a decision on which shooters to continue targeting. It is not unusual to start with a list of thirty gang members and during the paper review to whittle that number down to ten or fifteen targets.[25]

Again, do not forget that there are numerous federal resources you can use to support each step of your investigation and prosecution.[26] Read the *United States Attorneys Bulletins*. You can find them under the Publications tab on justice.gov. There is a complete education on prosecuting gang cases in the pages of the articles you will find on the website. Several of those articles are footnoted in this article. Do not limit yourself, however, to the gangs, guns, and drug issues. You may find the exact answer to a question you have in a white collar or terrorism article.

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[25] *See* K. Tate Chambers, *Developing a Step-by-Step Application of the New Orleans Strategy to Combat Violent Street Crews in a Focused Deterrence Strategy*, U.S. ATTORNEYS' BULL., May 2014, at 90; Carlos A. Canino, et al., *New Methods for Solving Old Problems: Combating Gang Criminality in a St. Louis Community*, U.S. ATTORNEYS' BULL., July 2008, at 33.

[26] Joshua Rock, *National Gang Intelligence Center*, U.S. ATTORNEYS' BULL., June 2017, at 95.

E. Review the Paper for Charges

What are you looking for as you review the police reports of each incident? You are looking for potential charges against the trigger pullers. Every gang conspiracy has two bedrock charges: possession of a firearm by a felon (18 U.S.C. § 922(g)) and possession of a controlled substance with intent to distribute (21 U.S.C. § 841(a)(1)(A)). All the other charges in your indictment, including your conspiracy charges, will build off these two crimes.[27]

Here is a quick overview of the most common possible charges you may find in the paper you pull and review.

1. Firearm Charges

a. Possession of a Firearm/Ammunition by a Prohibited Person—18 USC § 922(g)

The foundation firearm charge is possession of a firearm/ammunition by a prohibited person. To prove the charge you need to prove three elements. First, that the defendant knowingly possessed the firearm or ammunition. The possession can be actual or constructive. "A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others."[28] The possession may be sole or joint. "More than one person may possess an object. If two or more persons share possession, that is called 'joint' possession. If only one person possesses the object, that is called 'sole' possession. The term 'possess' … includes both joint and sole possession."[29] A firearm is a weapon, which "will or is designed to or may readily be converted to expel a projectile by the action of an explosive." [30] The government is not required to produce the gun at trial and prove that it is operable. [31] The term "ammunition; means ammunition or cartridge cases, primers, or propellant powder designed for use in any firearm."[32]

Second, the government must prove that at the time he possessed the firearm/ammunition, the defendant was a prohibited person. The four most common prohibited person categories you will use in a gang indictment are a felon, a fugitive from justice, an unlawful user of controlled substances, and an alien illegally and unlawfully in the United States. Often a defendant will stipulate to his prohibited category, such that he is a felon. [33]

Third, the government must prove that the firearm/ammunition traveled in interstate commerce prior to the possession. "This requirement is satisfied if the firearm traveled in interstate or foreign commerce prior to the defendant's possession of it. A firearm has traveled in interstate or foreign commerce if it has traveled between one state and any other state or country, or across a state or national boundary line. The government need not prove how the firearm traveled in interstate commerce; that the firearm's travel was related to the defendant's possession of it, or, that the defendant knew the firearm had traveled in interstate commerce."[34]

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[27] Joseph Alesia & John Lausch, *Use of Federal Statutes to Attack Street Gangs*, U.S. ATTORNEYS' BULL., July 2008, at 15.
[28] COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT (2012 ED. REV. FEB. 2013).[hereinafter FED CRIM. JURY INSTR. 7th Cir. 4.13 (2012 ed. Rev 2013)].
[29] *Id*.
[30] 18 USC § 921 (a)(3) (2012).
[31] U.S. v. Dotson, 2013 WL 1339029 (7th Cir. Apr. 4, 2013).
[32] FED CRIM. JURY INSTR. 7th Cir. 18 U.S.C. § 922 (2012 ed. Rev. 2013).
[33] Old Chief v. United States, 519 U.S. 172 (1997).
[34] FED. CRIM. JURY INSTR. 7th Cir. 922(g)(3) (2012 ed. Rev. 2013).

ATF will usually provide an expert to testify to where the firearm/ammunition was manufactured. Surprisingly, defendants will often not stipulate to the interstate nexus of the firearm/ammunition. It is important that you link up with an ATF firearms expert early in your case. In historical conspiracy, you will often have dozens of firearms you need examined. Because you are working a violent crime case, ATF should be part of your team from the beginning. Work with your ATF agent to locate and engage an ATF firearms expert.[35]

The lion's share of your gun charges will be § 922 (g) charges. They will come from car stops, search warrants for gang houses, stop and frisks, and guns thrown during chases. Work closely with your agents to tie the gun to the defendant. Although it often does not bear fruit, testing for fingerprints and DNA is worthwhile. Also, do not forget to ask your ATF agent to submit the gun to the National Integrated Ballistic Information Network (NIBIN). Discussion of the merits of the NIBIN system is beyond the scope of this article, but it is important that you understand that entire historical conspiracy cases can be built from aggressive use of NIBIN on your gang guns. It is an excellent tool for the violent crime prosecutor. [36]

What do you do if your defendant is not a prohibited person? If that is your situation, look at these charges.

b. Possession of a Firearm with an Obliterated Serial Number—18 U.S.C. § 922(k)

Often gang guns have obliterated serial numbers. Because many of the gang guns are stolen, the gang members attempt to remove the serial numbers. They believe this will prevent law enforcement from tracing the firearm, discovering it is stolen, and charging the defendant with possession of a stolen firearm. To prove possession of a firearm with an obliterated serial number, the government must show: that the defendant knowingly possessed the firearm; that the firearm had traveled in interstate commerce; that the serial number had been removed, altered or obliterated; and that the defendant knew the serial number had been removed, altered or obliterated. [37] The defendant's knowledge of the removed, altered or obliterated serial number can be proved by showing that the defendant carried and/or used the firearm.[38]

c. Possession of a Stolen Firearm or Ammunition—18 U.S.C. § 922(j)

As mentioned above, many gang guns are stolen. They are obtained in burglaries of homes, vehicles, and stores, such as pawn shops. To prove this charge, the government must show: that the defendant knowingly possessed, received, concealed, stored, bartered, sold, disposed of, or pledged or accepted as security for a loan, a firearm or ammunition; that the firearm or ammunition was stolen; that the firearm or ammunition had traveled in interstate commerce; and that the defendant knew or had reasonable cause to believe that the firearm or ammunition had been stolen. [39] The interstate travel can occur either before or after the firearm or ammunition was stolen.[40] The defendant's knowledge that the firearm was stolen can be inferred from circumstantial evidence.

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[35] *See* Ellen V. Endrizzi, *ATF Resources To Combat Violent Crime*, U.S. ATTORNEY'S BULL.. June 2017. at 39.
[36] *Id*.
[37] 18 U.S.C. § 922(k) (2012).
[38] *See* U.S. v. Sanchez-Badillo, 540 F.3d 24, 32 (1st Cir. 2008); U.S. v. Thornton, 463 F.3d 693, 699 (7th Cir. 2006); U.S. v. Sullivan, 455 F.3d 248, 261 (4th Cir. 2006).
[39] 18 U.S.C. § 922(j) (2012).
[40] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Section 110511, 108 Stat. 1796, 2019 (1994).

d. Possession of a Firearm in a School Zone—18 U.S.C. § 922(q)

Unfortunately, gangs often operate in neighborhoods that include schools. A charge that is often overlooked is possession of a firearm in a school zone. To prove this charge, the government must show that the defendant knowingly possessed the firearm; that it traveled in interstate commerce, and that the possession occurred at a place that the defendant knew or had reasonable cause to believe was a school zone. [41] The term "school zone" is defined in 18 U.S.C. § 921(a)(25) as "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of public, parochial or private school."[42] The term "school" is defined in 18 U.S.C. § 921 (a)(26) as "a school which provides elementary or secondary education, as determined under State law."[43]

Often it is not the status of the defendant or a gun or where it is possessed that produces the charge. It can also be the nature of the firearm.

e. Illegal Possession of a Machine Gun or a Sawed-off Shotgun/Rifle or a Silencer

Law enforcement commonly seize machine guns, sawed-off shotguns and rifles, and silencers from gang members. The National Firearms Act makes it illegal to possess these firearms unless they are registered in the National Firearms Registration and Transfer Record.[44] And, they are rarely, if ever, registered. The National Firearms Act was "originally designed to make it difficult to obtain types of firearms perceived to be especially lethal or to be the chosen weapons of 'gangsters' most notably machine guns and short-barreled long guns."[45]

A firearm that must be registered is defined under 26 U.S.C. § 5845 as "(1) a shotgun having a barrel . . . of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel . . . less than 18 inches; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle is such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; . . . (6) a machinegun; (7) any silencer." A "machinegun" is defined under 26 U.S.C. § 5845 as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, with manual reloading, by a single function of the trigger." To prove a violation of 26 U.S.C. § 5861(d), the government must show: (1) the defendant knowingly possessed the firearm; (2) the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record; and (3) the defendant knew the features of the weapon that brought it within the scope of the Act.[46]

On occasion, it is the evidence of what the defendant did with a firearm that will make your charge. Using the firearm in a robbery, transferring the firearm to a prohibited person, and transferring a firearm knowing it will be used in a crime of violence can all be charged federally.

f. Hobbs Act Robbery—18 U.S.C. § 1951

The Hobbs Act Robbery statute is one of the most valuable tools of the violent crime prosecutor. "The statute is an essential tool in attacking gangs and organized crime and in assisting local law enforcement faced with widespread violent crime."[47] To prove a Hobbs Act Robbery, the government must show:

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[41] 18 USC § 922(q) (2012).
[42] 18 USC § 921(a)(25) (2012).
[43] *Id*.
[44] *See* 26 USC § 5861(d) (2012).
[45] WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION (2012).
[46] *See* Staples v. United States, 511 U.S. 600, 619 (1994).
[47] Andrew Creighton, *The Hobbs Act, 18 U.S.C. § 1951*, U.S. ATTORNEYS' BULL., Jan. 2012, at 18.

1. That the defendant knowingly obtained money or property from or in the presence of a victim;
2. That the defendant did so by means of robbery,
3. That the defendant believed that the victim parted with the money or property because of the robbery; and
4. That the robbery affected interstate commerce.[48]

"Robbery" is defined under 18 U.S.C. § 1951 as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence[or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.]"[49] Most often, Hobbs Act charges arise out of fast food restaurant, convenience store or gas station robberies by gang members.[50] Last year, the United States Supreme Court approved charging robberies of drug dealers as Hobbs Act violations, "ruling that the interstate commerce element of the stature was met when the robber intentionally targeted drug dealers to obtain drugs and drug proceeds."[51] Where a firearm is used, Hobbs Act cases often lead to 18 U.S.C. § 924(c) charges and if there is a series of robberies the § 924(c) charges can "stack", meaning the sentences increase after the first 924(c) conviction and must be served consecutively. We will discuss § 924(c) charges later in this article.

2. Drug Charges

a. Possession of a Controlled Substance with Intent to Distribute

The bedrock drug charge is possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1)(A). This is the most common drug charge you will find in the reports. Similar to firearm possessions, drug possession will come from car stops, search warrants of gang houses, stop and frisks, and throw downs during police chases. To prove possession of a controlled substance with intent to distribute, the government must show: (1) the defendant knowingly possessed the controlled substance; (2) the defendant intended to distribute the substance to another person; and (3) the defendant knew the substance contained some kind of controlled substance.[52] The government does not have to prove that the defendant knew the substance was a specific controlled substance but only that it was some kind of controlled substance.[53] As for possession, it can be actual or constructive. "A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others. A person many possess an object even if he is not in physical contact with it. More than one person may possess an object."[54] You may be fortunate enough to have direct evidence of intent to distribute such as undercover recordings or drug ledgers, but that is often not the situation. Instead, you will have to rely on circumstantial evidence such as the quantity of the drugs, whether the quantity was too large for personal use, whether they were packaged for sale in distribution quantities, the value of the drugs, unexplained cash, materials used to package drugs for distribution (such as scales, and cutting and packaging materials), and the presence of firearms used to protect the drug trade. Work with your team's

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[48] FED. CRIM. JURY INSTR. 7th Cir. (2012 ed. Rev. 2013).
[49] *Id.*
[50] *See* Christopher Graveline & Bonnie S. Greenberg, *Hobbs Act Robbery*, U.S. ATTORNEYS' BULL., June 2017, at 17.
[51] *Id.*; *see also* Taylor v. United States, 136 S. Ct. 2074 (2016).
[52] FED. CRIM. JURY INSTR. 7TH CIR. 841(A)(1)(3) (2012 ed. Rev. 2013).
[53] *Id.*
[54] *Id.* at 4.13.

DEA agent to find an agent who has been qualified as an expert witness before in federal court to testify to distribution factors.

Occasionally, the reports will give rise to other less commonly used charges. Generally, the evidence you need to prove these charges does not come until the grand jury phase of your investigation. Those charges are as follows.

b. Use of a Communication Facility in Causing or Facilitating a Drug Felony in Violation of 21 U.S.C. § 843(b)

To prove this charge the government must show two things: first, the defendant knowingly used a communication facility; and, second, the defendant acted with the intent to commit, cause, or facilitate the commission of a drug felony.[55] An offense is facilitated if the use of the communication facility makes the offense easier or if it assists in committing the offense.[56]

c. Using or Maintaining a Drug Premises in Violation of 21 U.S.C. § 856(a)(1) and Managing a Drug Premises in Violation 21 U.S.C. § 856 (a)(2)

Stash houses, cutting/packaging houses, distribution houses, and shooting galleries are all part of the landscape in the gang world.

To prove the charge of Using or Maintaining a Drug Premises in violation of 21 U.S.C. § 856(a)(1), the government must prove that the defendant knowingly opened, leased, rented, used or maintained a place and the defendant did so for the purpose of distributing or using a controlled substance.[57] To prove the charge of Managing a Drug Premises in violation of 21 U.S.C. § 856(a)(2), the government must prove; (1) the defendant managed or controlled a place; (2) the defendant was an owner, lessee, agent, employee, occupant, or mortgagee of that place; (3) the defendant knowingly rented or leased the place, profited from the place, made the place available for use with or without compensation; and, (4) the defendant did so for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.[58] The drug activity does not need to be the sole or even the primary activity in the residence.[59]

d. Distribution of Controlled Substances to a Person Under 21 in Violation of 21 U.S.C. § 859

The elements for this charge are: (1) the defendant knowingly delivered a controlled substance to an underage person; (2) the defendant knew that it was a controlled substance; (3) the defendant was at least eighteen years of age; and (4) the underage person was under twenty-one years of age.[60] It is not an element that the defendant knew the person he was distributing to was under twenty-one.[61]

e. Distribution or Possession with Intent to Distribute in or Near Schools, Colleges, Playgrounds, Public Housing Facilities, Youth Centers, Public Swimming Pools, or Video Arcades in Violation of 21 U.S.C. § 860

It is a violation to distribute or possess with intent to distribute controlled substances "in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing

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[55] *Id.* at 843(b)(1).
[56] *Id.* at 843(b)(2).
[57] *Id.* at 856(a).
[58] *Id.* at 856(a)(2).
[59] *See* FED. CRIM. JURY INSTR. 7th Cir. 856(a)(2), cmt. (2012 ed. Rev. 2013).
[60] 21 U.S.C. § 859 (2012) (formerly 21 U.S.C. § 845(b) (2012)).
[61] United States v. Barrios-Perez, 317 F.3d 777 (8th Cir. 2003).

facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility…."[62] Several of these crimes require that you prove a violation of 21 U.S.C. § 841(a)(1), but they are substantive offenses not simply sentencing provisions.[63] The defendant does not have to know that prohibited facility even existed.[64] School does not have to be in session for 860 to apply.[65] The measurement of the 1,000 feet is by a straight line from the edge of the prohibited property to the site of the distribution or possession.[66]

f. Employment or Use of Persons Under 18 Years of Age in Drug Operations

It is a violation for any person at least eighteen years of age to knowingly (1) "employ, hire, use, persuade, induce, entice, or coerce a person" under eighteen years of age to distribute controlled substances; (2) to "employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any controlled substance offense; and (3) to receive a controlled substance from a person under 18 years of age, other than an immediate family member.[67]

g. Conspiracy to Distribute Controlled Substances in Violation of 21 U.S.C. § 846.

The conspiracy to distribute charge is the workhorse of your historical conspiracy indictment. The conspiracy pulls together all the players and incidents, and tells the story about the crimes committed by your violent street gang. Your goal is to build all of the substantive charges you found in the paper into a conspiracy charge. To prove the conspiracy, you must show: (1) the conspiracy as charged in the indictment existed; and (2) the defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy.[68] The government is not required to prove that an overt act occurred.[69] But, you should allege and prove them. You will tell the story of conspiracy through the overt acts.[70]

The essence of a conspiracy is the agreement between two or more people.[71] The agreement can be established with circumstantial evidence.[72] As the Court wrote in *Ocasio v. United States*, 2016 WL 1723296 (U.S. May 2, 2016), "[i]n order to establish the existence of a conspiracy . . . , the Government has no obligation to demonstrate that each conspirator agreed personally to commit – or was even capable of committing—the substantive offense . . . . It is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it. In other words, each conspirator must have specifically intended that some conspirator commit each element of the substantive offense." Testimony of a defendant's coconspirators is alone sufficient to convict the defendant of conspiracy unless the testimony is incredible or insubstantial on its face.[73] Defendants do not need to know the identities of other coconspirators. The court in *Odom* wrote, "[i]t is enough that each member know that he or she is participating in a joint enterprise."[74] Under *Pinkerton v. United States*,

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[62] 21 U.S.C. § 860 (2012).
[63] United States v. Sepulveda-Hernandez, 752 F.3d 22, 25 (1st Cir. 2014).
[64] United States v. Dimas, 3 F.3d 1015 (7th Cir. 1993).
[65] United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).
[66] United States v. Soler, 275 F.3d 146 (1st Cir. 2002).
[67] 21 U.S.C. § 861(a) (2012).
[68] FED. CRIM. JURY INSTR. 7TH CIR. 5.08(B) (2012 ed. Rev. 2013).
[69] *See* FED. CRIM. JURY INSTR. 7TH CIR. 5.08(B), cmt. (2012 ed. Rev. 2013).
[70] Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy,* U.S. ATTORNEYS' BULL., May 2006, at 1; *see also* Marc Agnifilo, Kathleen Bliss & Bruce Riordan, *Investigating and Prosecuting Gangs Using the Enterprise Theory*, U.S. ATTORNEYS' BULL., May 2006, at 15; *see also* Jason F. Cunningham & Sharon R. Kimball, *Gangs, Guns, Drugs, and Money*, U.S. ATTORNEYS' BULL., May 2014, at 12.
[71] United States v. Jimenez-Recio, 537 U.S. 270, 274-75 (2003).
[72] United States v. Shoemaker, 2014 WL 1226719 (5th Cir. Mar. 25, 2014).
[73] United States. v. Benedict, 855 F.3d 880, 886 (8th Cir. 2017), *appeal docketed*, (No. 17-5812) (Aug. 28, 2017).
[74] United States v. Odom, 13 F.3d 949, 959 (6th Cir. 1994).

328 U.S. 640, 647–48 (1946), a coconspirator can be held criminally liable for substantive crimes committed by their coconspirators if the substantive crime was in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiracy. A conspirator can be held accountable for acts of coconspirators after they stopped being active in the conspiracy, such as when they are arrested, unless they can show that they withdrew from the conspiracy.[75] To withdraw the defendant, "there must also be affirmative action, either the making of clean break to authorities, or communication of the abandonment in a manner calculated to reach coconspirators."[76] The burden is on the defendant to show that they withdrew from the conspiracy.[77] Conspiracy is a continuing offense. Venue is proper in any district in which it was begun, continued, or completed.[78] One of the advantages of using a conspiracy charge is that the statements of conspirators made in furtherance of the conspiracy are admissible at trial.[79]

3. 18 U.S.C. 924[c] and 924[o]—Where the Drugs, Guns, and Violence Come Together

a. 18 U.S.C. 924(c)(1)(A) Possession of a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime or Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime

A defendant can violate 18 U.S.C. § 924(c) by possessing a firearm in furtherance of a crime of violence or drug trafficking crime. Or, he can violate § 924(c) by using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime. To prove the possession in furtherance crime, the government must prove: (1) the defendant committed the specific crime of violence or drug trafficking crime alleged in the indictment; (2) he knowingly possessed a firearm; and (3) his possession of the firearm was in furtherance of the specific crime of violence or drug trafficking crime.[80] The terms "drug trafficking crime" and "crime of violence" are both defined by statute.[81] The term "in furtherance of" means "[a] person possess a firearm 'in furtherance of' a crime if the firearm furthers, advances, moves forward, promotes or facilitates the crime. The mere presence of the firearm at the scene of a crime is insufficient to establish that the firearm was possessed 'in furtherance of' the crime. There must be some connection between the firearm and the crime."[82] The "in furtherance" prong can be established where the defendant possessed the gun to protect himself, his drugs, and his proceeds from the sale of the drugs.[83] Some of the factors that establish "in furtherance" are "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon was stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the gun is found."[84]

To prove that the defendant used or carried a firearm during and in relation to a crime of violence or drug trafficking crime, the government must show: (1) the defendant committed the crime of violence or drug trafficking crime; and (2) he knowingly used or carried a firearm during and in relation to that

[75] United States v. Hill, 42 F.3d 914, 917 (5th Cir. 1995).
[76] *Id*.
[77] Smith v. United States, 568 U.S. 106, 112 (2013).
[78] 18 U.S.C. § 3237(a) (2012).
[79] FED. R. EVID. 801(d)(2)(E); *see* discussion of 801(d)(2)(E) in Jason F. Cunningham, *Drug Conspiracies: The Confrontation Clause and Federal Evidence Rule 801(d)(2)*, U.S. ATTORNEYS' BULL., July 2013; *see also* Seth Adam Meinero, *A Capital of Conspiracies: Prosecuting Violent-Crime Conspiracies in the District of Columbia Superior Court*, U.S. ATTORNEYS' BULL., July 2013.
[80] FED. CRIM. JURY INSTR. 7TH CIR. NO. 924(C)(1)(A)(3) (2012 ed. Rev. 2013).
[81] 18 U.S.C. § 924(c)(2)–(3) (2012).
[82] FED. CRIM. JURY INSTR. 7TH CIRC. NO. 924(C)(5) (2012 ed. Rev. 2013).
[83] FED. CRIM. JURY INSTR. 7TH CIR. 924(c)(5), cmt. (2012 ed. Rev. 2013).
[84] *Id.*

crime.[85] The term "use" means "the 'active employment' of a firearm. The term is not limited to use as a weapon, and includes brandishing, displaying, bartering, striking with, firing, and attempting to fire a firearm. A defendant's reference to a firearm calculated to bring about a change in the circumstances of the offense constitutes 'use' during and in relation to a crime. However, mere possession or storage of a firearm, at or near the site of the crime, drug proceeds or paraphernalia is not enough to constitute 'use' of that firearm.[86] The term "in relation to" means that "there is a connection between the use or carrying of the firearm and the crime of violence or drug trafficking crime. The firearm must have some purpose or effect with respect to the crime: its presence or involvement cannot be the result of accident or coincidence. The firearm must at least facilitate, or have the potential of facilitating, the crime."[87] A defendant can be held criminally liable for a § 924(c) substantive offense committed by a coconspirator if the § 924(c) violation was in furtherance of the conspiracy and was reasonably foreseeable.[88]

b. 18 U.S.C. § 924(o)

Section 924(o) reads, "A person who conspires to commit an offense under 18 U.S.C. § 924(c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer of muffler, shall be imprisoned for any term of years or life." As Groban and Hicks wrote in their article, Conspiracy and Firearms—Will Firearm Conspiracy Charges Add Value to Federal Prosecutions, "Section 924(o) offers a conspiracy charge addressing crimes that, at their core, involve firearms use and possession. This charge is particularly well-suited to gang-related crimes that rely on firearm use and possession to control gang activity. This charge is also well-suited to cover Hobbs Act robberies and narcotics offenses where the use and possession of firearms are critical elements of the offense. In addition, as with all conspiracy charges, § 924(o) allows for the introduction of conspiracy evidence during the entire duration of the conspiracy, rather than limit it to a substantive crime. When the introduction of evidence under Federal Rule of Evidence 404(b) proves difficult, a firearms conspiracy charge may allow for introduction of evidence regarding firearm use."[89] As Groban and Hicks point out, "[Section 924(o)] provides a 20-year maximum penalty, or life if the weapon qualifies under the statute's provisions,"[90] which provide the enhanced penalty when the conspiracy involves a machinegun or destructive device, or is equipped with a firearm silence or muffler.[91] Groban and Hicks also note that "[t]he 924(o) charge may be available when firearm possession or use is part and parcel of the underlying crime, but the particular defendant may not actually use or possess the firearm."[92] [93]

4. Charging Juveniles

You will often face the question of whether to charge juveniles in your indictment. Although you can charge juveniles, there are several additional steps you need to be aware of before you start down that

[85] FED. CRIM. JURY INSTR. 7TH CIR. NO. 924(C)(1)(A)(1) (2012 ed. Rev. 2013).
[86] *Id*. at 924(c)(1).
[87] *Id.*
[88] United States v. Roberson, 474 F.3d 432, 433 (7th Cir. 2007), *abrogated on different grounds by* Dean v. United States, 137 S.Ct. 1170 (2017).
[89] Margaret S. Groban & Pamela J. Hicks, *Conspiracy and Firearms—Will Firearm Conspiracy Charges Add Value to Federal Prosecutions?*, U.S. ATTORNEYS' BULL., July 2013, at 19.
[90] *Id.*
[91] 18 U.S.C. § 924(o) (2012).
[92] Groban & Hicks, *supra* note 89.
[93] For a discussion of accessory lialibility, see James D. Peterson, *"In for a Penny, In for a Pound"—Accessory Liability in Group Violence Cases*, U.S. ATTORNEYS' BULL., June 2017, at 3.

road. Completing those steps can take time away from your other case tasks. Consider working with your local prosecutor to determine whether they can prosecute the juveniles. It may save you time and effort if they can. If not, school yourself in the process and simply understand you need to complete several additional steps.[94]

5. Evidence and Discovery

After you have determined your targets and charges at this stage the next step is for your team to make a trip to the police department's evidence room. Set aside at least a couple of days. Have your policer officer teammate make the contact with the evidence technician to make sure the dates are convenient for them. Ask the evidence technician to pull the evidence for each incident where evidence was taken. Make sure the drugs and guns have not been destroyed. Although there are methods of proving up destroyed evidence at trial, it is much better to have the exhibit. Based on what you learn at the evidence room, take another look at your target and charge list.

As you work through the paper, it is good time to organize the discovery.

When you work a historical conspiracy case, you will need to organize your discovery three different ways depending where you are in the process. During the investigation, it is best to organize the discovery by event in chronological fashion. When it comes time to draft the indictment and when, after indictment, you are working out plea agreements, you will need the discovery organized by defendant. At trial, you will need it organized by witness because that, of course, is how you will present it. The paralegal or legal assistant on your team will most likely be well-versed in organizing discovery. If not, there are excellent courses at the National Advocacy Center that will provide them that expertise. Take advantage of your resources.[95]

Now that you have what you believe are solid targets with solid charges, start planning your grand jury strategy. The purpose of the grand jury investigation is to develop corroboration of your anticipated charges and to discover new ones if possible.

F. Conduct the Grand Jury Investigation

1. Witnesses

When you were reviewing the paper, you were also looking for potential witnesses for your grand jury phase of the investigation. Reviewing prior cooperators is the first place to look for witnesses. Who has cooperated against this crew or its members in the past? Is there prior grand jury or trial testimony? Are there reports of interview with the cooperators? Collect it all. Next, look for former romantic partners or spouses, former crew members, crew members serving time, cell mates, and rival crew members. Identify who has information on your targets and who is willing to provide that information. Once you have a list of potential witnesses, run your Brady/Giglio background on the witnesses. Leave no stone

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[94] *See* Nancy Oliver, *When Children Commit Adult Crimes: Demystifying Federal Prosecution of Juveniles*, U.S. ATTORNEYS' BULL., July 2008, at 24; *see also* Darcie N. McElwee, *Juvenile Prosecution, Prevention, Intervention, and Education: A Collection of Project Sentry Programs*, U.S. ATTORNEYS' BULL., Mar. 2010, at 50.

[95] *See* Catherine Kuo Dick, *Gang Experts: Best Practices and Avoiding Pitfalls*, U.S. ATTORNEYS' BULL., June 2017, at 55; *see also* Jessica Affeldt, *Drug Ledger Analysis Capabilities of the FBI's Cryptanalysis and Racketeering Records Unit*, U.S. ATTORNEYS' BULL., Sept. 2016, at 83; *see also* Jeanne Anderson, *Expert Codebreakers in Court*, U.S. ATTORNEYS' BULL., May 2014, at 41.

unturned in fulfilling you Brady/Giglio commitments. This is one of the most important things you will do during your investigation. Make sure you do it right.[96]

2. Mine the Electronic Sources

There are three main sources of electronic evidence you will use to support the evidence you found in the paper and to corroborate your grand jury witnesses: social media, jail calls, and phone records.

The leaderless gangs use social media extensively. As Patrick Frye wrote in his article "Band Crew: Detroit Bust of Street Gang Relied on Facebook, YouTube videos, the street gang actively used social media like Facebook, Instagram, Twitter, . . . and YouTube to post photographs, videos, and statements that identified and highlighted the existence of the gang, a member's affiliation with the gang, and gang-related accomplishments. They also left electronic records on their smartphones, which they used to plan their criminal activities, update each other about gang activity, boast about the gang, promote the gang, and disrespect rival gangs."[97]

Jail calls are an invaluable source of information and evidence. Even though they are warned they are being recorded, the gang members still talk about their crimes on the phone. Be aware, however, that although the phone traffic between your defendants can be very valuable to your investigation, it is also very time consuming for your task force to listen to all the calls and analyze all those phone call records. Allow ample time for the task.[98]

G. Draft the Indictment

When drafting the indictment, you want to tell the complete story about the gang, its members, and their crimes.[99] One way to do that is to lead off with a count charging Membership in a Criminal Street Gang in violation of 18 U.S.C. § 521. Starting with an § 521 charge allows you to tell that complete story. To prove § 521, the government must show: (1) the existence of a criminal street gang; (2) the defendant participated in the criminal street gang knowing that the gang's members engaged in a continuing series of federal felony crimes of violence or federal drug felonies or conspiracies to commit either; (3) the defendant committed a federal felony crime of violence or a federal felony drug offense; (4) the defendant purpose in committing that felony offense was to promote or further the criminal activities of the street gang or to maintain the defendant's position in the gang; and (5) the defendant has been convicted within the past five years for a state or federal drug offense for which the maximum sentence is at least five years or a state or federal crime of violence or a state or a federal conspiracy to violate either the drug or violent crime law. A criminal street gang is defined at an ongoing group, club, organization, or association of five or more people, whose primary purpose is the commission of at least one federal felony drug or violent crime offense, and whose members engage or have engaged within the past five years in a continuing series of federal felony drug or violence crime offenses that affect interstate

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[96] *See* Heather Cartwright & Ronald L. Walutes, Jr., *Victim and Witness Challenges in Gang Prosecutions*, U.S. ATTORNEYS' BULL., May 2006, at 35; *see also* David Jaffe, *Witness Maintenance in Long-Term Violent Crime Cases*, U.S. ATTORNEYS' BULL., June 2017, at 11; *see also* Linda A. Seabrook & Jelahn Stewart, *Snitches Get Stitches: Combating Witness Intimidation in Gang-Related Prosecutions*, U.S. ATTORNEYS' BULL., May 2014, at 83.
[97] Patrick Frye, *Band Crew: Detroit Bust of Street Gang Relied on Facebook, YouTube Videos*, INQUISITR (Sept. 24, 2015).
[98] Bruce Ferrell, *Gangs and the Internet*, U.S. ATTORNEYS' BULL., July 2008, at 30; *see also* HON. PAUL W. GRIMM ET AL., BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE (West Academic Publishing 2016).
[99] For example of a historical conspiracy indictment, *see generally* Superseding Indictment, United States v. Watts, et al., No. 1:12-cr-10137-JES-JEH (Feb. 21, 2013) (available on PACER); *see generally* Second Superseding Indictment, United States v. Fitzpatrick et al., 1:13-cr-10111-JES-JEH (July 22, 2014) (available on PACER).

commerce.[100] Next, charge the Conspiracy to Use, Carry and Possess Firearms in Relation to and in furtherance of a Drug Conspiracy in violation of 18 USC 924(o). Follow that with the Conspiracy to Distribute Controlled Substance in violation of 21 USC 846. You can incorporate by reference large portions of the "story of the gang" from the § 521 charge into the conspiracy counts.

A few notes on drafting a conspiracy charge.[101] At a minimum, a conspiracy charge must allege the duration of the conspiracy and the statute constituting the object the conspiracy.[102] For a conspiracy to distribute controlled substances, you also need to allege the minimum drug quantities.[103] It is not required to prove an overt act in furtherance of the conspiracy for a drug conspiracy, but you want to allege overt acts in furtherance of the conspiracy. You can allege overt acts one of two ways—either generally, such as "during the time period of the conspiracy, the defendants carried firearms to protect their drug trade" or specifically, such as "on December 6, 2016, Defendant Jones carried a firearm, namely a Glock pistol, for the purpose of protecting the gang's drug trade."

You do not have to allege the precise beginning and ending dates of the conspiracy. Instead use terms such as "beginning in or about" and "continuing to in or about".[104] When you allege who the defendants conspired with, always add the language "the defendants also conspired with persons known and unknown to the grand jury."[105]

As you draft your drug conspiracy, stay aware of the "buyer-seller" rule. A conspiracy requires more than just a buyer-seller relationship. The government must prove that the buyer and the seller had the joint criminal objective of distributing the controlled substance to others.[106]

Finally, while it is proper to allege a conspiracy with more than one object, such as to sell cocaine, heroin, and marijuana, you should charge in the conjunctive and prove in the disjunctive.[107] Make sure, however, that when you allege more than one drug, you also allege an amount for each drug.

Follow the conspiracy charges with the substantive charges. Order the substantive charges chronologically. Don't block them by defendant. Remember your indictment should tell the story of the gang's criminal activities, and the best way to do that is chronologically.

As you draft your substantive charges, remain vigilant to not violate the Department's Petite policy. That policy discourages federal prosecution of criminal charges that are based on the same acts or transactions involved in prior state prosecutions whether the prior state prosecution resulted in conviction, acquittal, or dismissal on the merits. The policy does not apply to using prior state offenses as overt acts of a federal conspiracy charge unless the prior state offenses make up a substantial part of the federal conspiracy charge. If you believe you may a Petite issue, work with your supervisor to determine whether you need to seek a waiver to prosecute from the Department.[108]

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[100] 18 U.S.C. § 924(o) (2012).
[101] *See* Lori A. Hendrickson, *Jury Instructions in Conspiracy Cases*, U.S. ATTORNEYS BULL., July 2013; Seth Adam Meinero, *A Capital of Conspiracies: Prosecuting Violent-Crime Conspiracies in District of Columbia Superior Court*, U.S. ATTORNEYS BULL., July 2013.
[102] *See* United States v. Bascaro, 742 F. 2d 1335, 1348 (11th Cir. 1984), *abrogated on other grounds by* United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007).
[103] Alleyne v. United States, 133 S. Ct. 2151 (2013).
[104] United States v. Edmonson, 962 F.2d 1535, 1541 (10th Cir. 1992).
[105] Rogers v. United States, 340 U.S. 367, 375 (1951).
[106] FED CRIM. JURY INSTR. 7TH CIR. 5.10(A) (2012 ed. Rev. 2013).
[107] United States v. Vickerage, 921 F.2d 143, 147 (8th Cir. 1990).
[108] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-2.031 (2009).

IV. Conclusion

You built your team. The trigger pullers have been identified. All the paper has been pulled and reviewed. Your witnesses have gone before the grand jury. The indictment has been drafted, and the discovery is organized. You are ready to indict.

ABOUT THE AUTHOR

❑ **Tate Chambers** graduated from Southern Illinois University School of Law in 1982. After clerking for Judge Richard Mills on the Illinois Appellate Court, Tate joined the United States Attorney's Office in the Central District of Illinois in 1984. Since then he has served in numerous roles in ILC including Associate United States Attorney, OCDETF Lead Task Force Attorney, PSN Coordinator, Violent Crime Coordinator, Gang Coordinator, Smart on Crime Coordinator, Appellate Chief and Peoria Branch Chief. From 2007 until 2009 he served as the PSN National Coordinator working at EOUSA in Main Justice in Washington, D.C. From 2009 to 2011, he worked as a Criminal Program Manager for the Evaluation and Review Staff at EOUSA in D.C. Since June of 2016, he has served as Editor of the United States Attorneys' Bulletin, working as an Assistant Director for the Office of Legal Education/EOUSA in Columbia, South Carolina. Tate is a retired Judge Advocate General Officer from the Illinois Army National Guard.

Investigating and Prosecuting Heroin Overdose Cases

Don Allegro
Senior Litigation Counsel
Central District of Illinois

I. Introduction

One tool in the toolbox to help stem the current tide of heroin-related deaths in the United States is the prosecution of heroin dealers responsible for distribution of fatal doses of heroin.

In most communities, the circle of heroin traffickers and addicts, who are dependent upon each other for regular commerce in the drug—with circles of distributors sometimes selling to the same users multiple times per day—is a relatively closely knit group. Given this, prosecuting select overdose cases and seeking the stiff statutory penalties applicable can have a magnified deterrent value on the heroin dealer community, particularly where the prosecutor can roll up multiple dealers in the chain of distribution of a fatal dose.

Although no enforcement technique alone will stop heroin dealing and illicit use, the immediate goal of a community facing a heroin overdose crisis is to save lives. If federal prosecutors can make heroin dealers cautious with regard to whom they sell their potentially lethal product, the significant effort required to put these cases together will have been worthwhile.

This article is intended to provide a non-exhaustive checklist of issues and ideas to consider when investigating and prosecuting heroin overdose cases. Part II will lay a foundation for understanding the chemical nature of heroin and how it kills; Part III will highlight investigative steps and techniques that can help identify the trafficker and build the case; and Part IV will address prosecution and trial.

Although this article primarily discusses "heroin" overdoses, the principles discussed apply to other opiates and synthetic opiates that are prone to abuse, including fentanyl and its various forms.

II. How Heroin Works in the Human Body

To lay a foundation for understanding the evidence typically associated with heroin overdose cases, a discussion of the nature of heroin, methods of its administration, and its signs and symptoms is set forth below.[1]

[1] For further information on the nature of heroin intoxication and some of the other information contained in Part II of this article, consult materials used and available to police officers who are certified Drug Recognition Experts (DREs). The DRE program, founded by the Los Angeles Police Department in the late 1970s and presently active in many states, is a tremendous resource on drug influence and symptomatology. As of publication, the Washington State Patrol maintained on-line links to DRE training resources at http://www.wsp.wa.gov/breathtest/dredocs.php#manuals.

A. Nature of Heroin

Heroin is a narcotic analgesic, or opioid, derived from morphine.[2] Morphine, along with codeine and thebaine, are the primary opiates derived from the opium plant. Heroin induces euphoria, alters moods, and sedates.[3] As an "analgesic," heroin relieves pain by attaching to nerve receptors in the brain, thereby increasing the pain threshold and lowering the perception of pain.[4]

Heroin (the chemical name is diacetylmorphine) was developed circa 1870 as a pain-relieving substance in lieu of morphine, which had been used as early as the Civil War and was found to be addictive.[5] Ironically, heroin was developed as a non-addictive alternative, and for some time, drug companies marketed it as a cough suppressant.[6]

Other types of narcotic analgesics typically seen in federal criminal cases include many in pill form, such as hydromorphone (commercially sold as Dilaudid), which also is derived from morphine and has addictive properties similar to heroin, and hydrocodone (commercially sold as Lortab, Vicodin, and Hycodan), which is derived from codeine but is close to heroin in pharmacological profile.[7] Reportedly, it is the most frequently prescribed narcotic analgesic. Oxymorphone is derived from thebaine.[8] Oxycodone (commercially sold as OxyContin, Percodan, and Percocet) is a semi-synthetic drug derived from thebaine, less addictive than morphine but more so than codeine.[9] Addicts or abusers may attempt to make some of the aforementioned pills more potent by bypassing the slow-release coatings used by the pharmaceutical companies, usually by crushing or cutting the pills. Oxycodone manufacturers have incorporated a gelling agent to discourage injection, but the agent does not prevent it.[10]

Other synthetic opiates include Demerol (less likely to result in an overdose because there is less respiratory depression), methadone (a "maintenance program," non-injected substitute for heroin with slower and longer lasting effects and slower and milder withdrawal), and fentanyl (a high potency, short duration synthetic with a high overdose potential).[11]

Fentanyl, which sometimes is used in surgery and can be administered via injection or skin transmission by patches, is widely recognized as potentially fatal in very small doses and as dangerous to law enforcement officers who handle it.[12] Fentanyl also has been produced in the form of a lollipop for children with severe pain. Some dealers have mixed fentanyl with heroin in order to boost the potency (and therefore the marketability) of their heroin.[13] Fentanyl is perhaps eighty to one hundred times more potent than heroin and has a shorter duration, about two to four hours versus four to six for heroin.

Carfentanil, an analog of fentanyl, is one of the most potent opiates in existence. It may be one hundred times more potent than fentanyl.[14] Carfentanil or another fentanyl analog may have been

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[2] *Narcotic Analgesics*, DRUGS.COM (last visited July 14, 2017).
[3] *Id.*
[4] *Id.*
[5] *Heroin History: 1900s*, NARCONON (last visited July 28, 2017).
[6] *Id.*
[7] *See Narcotic Analgesics*, *supra* note 2.
[8] *See What are Synthetic Opiates?*, OPIUM.COM (last visited July 28, 2017).
[9] *See id.*
[10] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD & DRUG ADMIN., ANESTHETIC & ANALGESIC DRUG PRODS. ADVISORY COMM. & DRUG SAFETY & RISK MGMT. ADVISORY COMM., AVRIDITM (IMMEDIATE RELEASE OXYCODONE HYDROCHLORIDE) TABLETS WITH ABUSE-DETERRENT PROPERTIES CC-70 (Sept. 10, 2015).
[11] *See Narcotic Analgesics*, *supra* note 2.
[12] *See Opioid Facts*, U.S. DEP'T JUST. (last updated Sept. 22, 2016).
[13] *See id.*
[14] Press Release, Drug and Alcohol Enforcement, DEA Issues Carfentanil Warning to Police and Public: Dangerous Opioid 10,000 times more potent than morphine and 100 times more potent than fentanyl (Sept. 22, 2016).

responsible for the deaths of 125 people in the Moscow theater hostage incident in 2002, where Russian forces sprayed an aerosol mist into the theater to subdue the terrorists.[15] Emergency workers were told to bring Naloxone, but they did not anticipate hundreds of people being exposed to high-potency opiates.[16]

Chinese companies marketed carfentanil for shipment to the United States via common carrier.[17] It was not a controlled substance in China until March 2017.[18] Like fentanyl, carfentanil may be mixed with heroin as a cheap means to increase potency.

B. Methods of Administration

Depending on the type of opiate, the substance may be swallowed, smoked, snorted, injected, or taken via patch or suppository.[19] Illicit users typically inject heroin via syringe or snort it. Any method of administration can result in an overdose, but an overdose is more common when heroin is injected into the bloodstream due to the more immediate effect on the brain.

At a crime (death) scene, investigators typically will find the tools of injection, or a "hype kit," including a syringe, lighter or matches, cotton ball or cigarette filter, spoon (perhaps folded to make a better cooker), and sometimes an improvised tourniquet (maybe a rubber tube or belt).

C. How Heroin Kills

The breathing of human beings is regulated by an area of the brain stem that reacts to carbon dioxide buildup in the blood by signaling the body to breathe more deeply and rapidly. However, heroin inhibits the ability of the brain to sense carbon dioxide buildup. Accordingly, if a heroin user passes out or goes to sleep following an injection of heroin (a frequent result, particularly for a more casual or irregular user) and is left unattended, the user could die from respiratory arrest or hypoxia (oxygen deprivation).[20] Heroin also might cause heart failure by slowing the heart rate and reducing blood pressure or by causing an irregular heart rate and rhythm.[21]

Users injecting fentanyl can expect an immediate onset of the drug, so investigators should suspect fentanyl in situations where users of heroin who were tolerant of the drug injected themselves and immediately passed out.

Some heroin victims may linger for a long time in a state of unconsciousness before finally dying from the effects of hypoxia. As discussed in Part II.E. below, this may have consequences for post-mortem toxicology results.

Narcotic antagonists (Naloxone or Narcan) can counteract the effect of heroin by blocking the narcotic analgesic at neuron receptor sites.[22] A user who has been administered an antagonist normally requires continued monitoring because antagonists have a shorter duration in the system than heroin. If

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[15] Chem. & Biological Weapons Nonproliferation Program (1), *The Moscow Theatre Hostage Crisis: Incapacitants and Chemical Warfare*, MIDDLEBURY INST. INT'L STUD. MONTEREY (Nov. 4, 2002).
[16] *Id.*
[17] Erika Kinetz, *China Carfentanil Ban a 'Game-changer' for Opioid Epidemic*, U.S. NEWS & WORLD REPORT (Feb. 16, 2017).
[18] *Id.*
[19] NATIONAL INSTITUTE OF HEALTH, NATIONAL INSTITUTE ON DRUG ABUSE, HEROIN DRUG FACTS (2017).
[20] *See id*.
[21] *Heroin's Damage to Lungs and Heart*, NARCONON (last visited Aug. 2, 2017).
[22] *See Narcotic Analgesics*, *supra* note 2.

the antagonist wears off and the heroin kicks back in, the user could lapse back into unconsciousness. Multiple doses of a narcotic antagonist may be ineffective in reviving a victim of fentanyl or carfentanil.

Responding officers should be aware that rescue breathing may be required to keep an unconscious opiate overdose victim alive.

D. Signs of Heroin Use

Knowing the signs of heroin use can aid in understanding the evidence in an overdose case, including the evidence at the crime scene, and can aid in understanding accounts of behavior of victims and witnesses. It is also useful to know what to look for when face-to-face with heroin users, typically during pre-grand jury or pre-trial witness interviews. Evidence of heroin use and addiction includes:

- Frequency of use. A key to understanding the behavior of addicted heroin users is frequency of use. Heroin, depending on its purity, generally provides users with the pharmacological effect they seek for a period of four to six hours. Thus, in a twenty-four-hour day, a heroin "addict," that is, a person who needs to continually experience the pharmacological effects of heroin, typically will need to "shoot up" four to six times. As indicated, fentanyl has a shorter duration, about two to four hours.

  A casual user of heroin (a "chipper") may evolve into an addict because, as the user enjoys the feelings associated with heroin and begins to use it at an accelerated rate, the user develops a tolerance to the drug and requires more frequent and larger amounts.[23] The brain may become chemically dependent on continued use to the point where, in order to feel "normal," the addict must have pharmacologically significant heroin present in the bloodstream at all times, which means shooting up four to six times per day.

  Heroin users, including cooperating witnesses, often lie about their frequency of heroin use, claiming they use it a few times per week. This is such a cliché that it is analogous to the falling down drunk driver who, when pulled over and stumbling out of his car, says he only had two beers. If a heroin user is an addict, complete with the physical signs discussed below, the user probably injects or snorts heroin four to six times per day.

- Puncture marks. Heroin users often will claim that their visible puncture marks are the result of donating blood or some medical procedure. However, almost all medical injections, except those involving the drawing of blood or emergency medical procedures, involve injections into the skin, not a vein. Heroin injection puncture marks usually will be located over a vein, most typically in the crook of the elbow, but they could be anywhere a vein is close to the skin surface.

  Additionally, medical injections are distinguishable because they invariably are sterile, that is, the needle and the injection site are sterilized, thereby resulting in little or no visible puncture mark. Since a heroin user rarely bothers with sterilization (unless the user is a medical professional), a user's injection site will result in a visible puncture mark because a small infection of the skin will result, forming a relatively easy-to-see (although still very small) scab or oozing wound.

  Users also often claim to be diabetics and blame their puncture marks on insulin injections. This is another falsehood—insulin is injected under the skin, not into a vein. They may further try to hide their marks by injecting over tattoos, under body hair, etc. Also, users who have damaged their veins from repeated injections may display a thrombosed vein or a large sore, often called a tunnel or corn.

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[23] NIH: National Institute on Drug Abuse, Research Report Series: Heroin (2014).

As discussed below, the assigned homicide detective should attend the heroin overdose victim's autopsy and ensure that the forensic pathologist looks for a fresh injection site that is the likely entry point for the fatal dose of heroin; the presence of the injection site will support the argument that heroin was the cause of death. Fresh injection sites typically display oozing fluid or a blood crater but no scab.

- Possession of the aforementioned "hype" kit.
- Depressed vital signs, including pulse, respiration, blood pressure, and body temperature.
- Constricted pupils ("miosis") below 3.0 mm. This probably is the single most reliable indicator of opiate influence. Since not too many prosecutors carry around a pupilometer to measure pupil size, the prosecutor, when interviewing a witness who is a suspected heroin user, can casually compare the eyes of the witness to those of someone else in the room.

  A more precise way to look for heroin influence without a pupilometer is to compare the diameter of the pupils to the widths of the sides of the iris. The typical pupil size in room light is 4.0mm,[24] and an iris should measure 12.0mm. Accordingly, the width of the pupil should be about the same as each side of the iris.

  When a person is under the influence of an opiate, her pupils may not react to changing light levels and could just stay constricted. A simple way to assess this is to have the person close her eyes for thirty seconds and then open them. Also, miosis may not be evident when the user is under the influence of methadone.[25]

  When the user is coming down from the influence of heroin, he also may display hippus, a rhythmic contraction of the eye.[26] But unless the user is under the influence of other drugs in addition to heroin, the eyes should not display horizontal or vertical nystagmus, that is, the horizontal or vertical bouncing of the eyes as they move through a range of gaze,[27] a condition that might be seen with intoxication via alcohol or such drugs as phencyclidine and certain central nervous system depressants. However, drug abusers often are under the influence of multiple drugs at once, so nystagmus is not an absolute disqualifier for heroin use.[28]

- "On the nod," that is, the person appears semi-conscious or sleepy. Heroin users on the nod are easily awakened and, even while in the semi-conscious state, may be alert to questions and capable of carrying on a conversation.
- Other behavioral symptoms: euphoria, inability to concentrate, and itching of face, arms, or body.
- Other physical symptoms: constipation, slow or raspy speech, dry mouth, slow breathing, cool skin, and vomiting.

Despite the foregoing, be aware that heroin addicts are often fully functioning. As long as they are in a state of equilibrium (that is, they have sufficient heroin in their system to stave off feelings of withdrawal), they may appear completely normal. However, even fully functioning and seemingly normal

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[24] *See* U.S. DEP'T OF TRANSP., TRANSP. SAFETY INST., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., HS172 R01/11, DRUG EVALUATION AND CLASSIFICATION TRAINING 8 (2011).

[25] *Compare* U.S. DEP'T OF JUSTICE, DRUG ENF'T ADMIN., DRUGS OF ABUSE, A DEA RESOURCE GUIDE 42 (2017) (noting pupil dilation as bodily effect of heroin) *with id.* at 44 (lacking pupil dilation in enumeration of bodily effects).

[26] DRUG EVALUATION AND CLASSIFICATION TRAINING, *supra* note 26.

[27] DRUG EVALUATION AND CLASSIFICATION TRAINING, *supra* note 26, at 20, 22, 24.

[28] For further information on examination of the eyes to deduce drug influence, a complex subject, see *supra* note 1.

addicts will display constricted pupils, depressed vital signs, and, if they inject the heroin, puncture marks.[29]

E. Evidence of Heroin in Bodily Fluids

In order to deal with toxicology issues that are integral to proving cause of death and are discussed later in Part III.E. in the context of investigating the case, the federal prosecutor should understand what happens to heroin once it enters the bloodstream, that is, how heroin is metabolized.

As to the lingo of toxicology, doctors will talk in terms of a "plasma half-life." This refers to the length of time that it takes a given concentration of drug in the body to be reduced by one-half.

The bad news for prosecutors is that the plasma half-life of heroin is only minutes, usually described as two to six minutes.[30] This means that there could be traces of heroin that survive in the blood for about a half hour or so, but if the victim lives longer after injecting the heroin, there will be no trace of heroin found in post-mortem toxicology tests of bodily fluids.

The good news is that heroin metabolizes into 6-monoacetylmorphine (sometimes called 6-am or 6-mam),[31] which is a metabolite unique to heroin.[32] In other words, the presence of 6-am in a bodily fluid is evidence of the use of heroin, not any other opiate or any other drug. However, the bad news concerning 6-am is that it also has a relatively short half-life, about twenty-eight minutes. Accordingly, traces of 6-am should still exist in the bodily fluids for up to six to eight hours after administration of the heroin.[33] However, if the victim lingers in a long state of unconsciousness after taking heroin and before death, the metabolizing process might eradicate traces of 6-am.

6-am metabolizes into morphine,[34] which also is an indicator of heroin but not a unique metabolite. The presence of morphine could indicate ingestion of other substances containing opiates, including codeine, cough syrup, Tylenol-3, and the like.

The plasma half-life for morphine is about four hours, so traces of morphine should remain in the bodily fluids for an extended time, longer than a heroin victim likely would linger after a fatal dose.

Overdoses often occur when the user combines heroin with other depressant-type drugs like benzodiazepines (diazepam or its commercial version Valium is a prime example; also, alprazolam or Xanax, zolpidem, or clonazepam); therefore, the presence of such drugs may be reflected in post-mortem toxicology reports. In such cases, the issue for the federal prosecutor will be proving that the heroin was independently sufficient to kill the victim or, at the minimum, the heroin was the "but-for" cause of death, that is, but for the use of the heroin, the victim would have lived.[35] This standard was set forth in *Burrage v. United States*. [36]

Although a discussion of *Burrage* is beyond the scope of this article, *Burrage* supports the proposition that, even where the victim was under the influence of other drugs as well as heroin, this influence does not necessarily disqualify the case for prosecution.[37] As Justice Scalia explained, when

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[29] *See* U.S. DEP'T OF JUSTICE, DRUG ENF'T ADMIN., DRUGS OF ABUSE, A DEA RESOURCE GUIDE 42 (2017)..
[30] U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DRUGS AND HUMAN PERFORMANCE FACT SHEETS 74 (2014).
[31] Rania Habal, *Heroin Toxicity*, MEDSCAPE (Dec. 19, 2016).
[32] *6-Monoacetylmorphine (6-MAM), Confirmation, Meconium*, MAYO CLINIC (last visited July 27, 2017).
[33] *Opiates Drug Information*, REDWOOD TOXICOLOGY LABORATORY (last visited July 27, 2017).
[34] Rania Habal, *supra* note 33.
[35] Burrage v. United States, 134 S. Ct. 881, 887–88 (2014).
[36] *Id.*
[37] *See id.* at 883.

heroin combines with other drugs or medical factors and death results, heroin may be the but-for cause of death if it was the "straw that broke the camel's back."[38]

Fentanyl can be recovered in bodily fluids as fentanyl or its metabolite, norfentanyl.[39] It may be present in the urine for up to seventy-two hours, but concentrations may be minute.[40] Because fentanyl may result in a quick death, it may not be completely distributed throughout the body and is more prone to discovery in central (chest and heart) blood samples. After processing by the liver, seventy-five percent of fentanyl is released via urine.[41]

III. Investigation of the Heroin Overdose

A proper investigation of a heroin overdose case requires processing the crime (death) scene and evidence according to standard homicide protocols, identifying the dealer of the fatal dose, and identifying the cause of death. However, preliminary to these nuts-and-bolts steps, because these investigations are reactive in nature, law enforcement should be organized and prepared to react.

A. Organize and Prepare a Law Enforcement Team to React

In some jurisdictions, drug overdose deaths are not treated as homicides. No complete crime scene investigation is conducted, and sometimes no autopsy is performed.

Federal prosecutors who intend to initiate federal involvement in these cases should first determine if the appropriate law enforcement agencies are prepared to devote the necessary assets and take the necessary investigative steps. Ideally, the prosecutor would want a team consisting of homicide investigators and narcotics officers or agents prepared to respond to a report of a heroin overdose death.

The role of the homicide investigators is to control and document the crime scene in the manner of a standard murder investigation and ensure that the appropriate forensic pathologist performs an autopsy. The role of the narcotics officers is to respond to the crime scene, identify the dealer of the fatal dose, and quickly launch a proactive investigation to target the dealer and make an arrest.

Accordingly, the federal prosecutor who anticipates charging such cases should consider consulting with law enforcement officials to establish a multi-disciplinary or multi-agency team of police and agents prepared and trained to respond to overdose deaths.

B. Process the Crime Scene According to Homicide Investigation Protocols

Investigations of heroin overdose cases share a number of things in common with more traditional investigations of murders, but they share one thing in particular: if the crime scene is not properly documented and investigated, the chances of conviction start to exponentially decrease. Moreover, if the crime scene is not properly documented or there is a departure from good police procedure, at trial, defense counsel will be sure to point out these failures to the jury, whether the failures are material to the defendant's guilt or not.

Proper control and processing of a crime scene is a sophisticated process that, to be done well, requires highly trained police officers (uniformed officers, detectives, and crime scene technicians) acting as a team, normally under the direction of the detective assigned responsibility for the case. A

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[38] *Id.* at 887–88.
[39] *Fentanyl*, MAYO MED. LABORATORIES (last visited 2017).
[40] *Id.*
[41] Sebastiano Mercadante, et al., *Itraconazole–Fentanyl Interaction in a Cancer Patient*, 24 J. PAIN & SYMPTOM DEV., 286 (2002).

non-exhaustive list of crime scene processing procedures is included in the Appendix, which is a typical "Violent Crime Investigation Checklist."

Beyond this checklist, some of the procedures typically significant in a heroin overdose case include the following:

- Obtain necessary search warrants or consents to search. Bear in mind that the first person in the chain of distribution of the fatal dose of heroin, and the one criminally liable for the death, may live with the victim at the scene or share the cell phone with the victim and therefore have a reasonable expectation of privacy. It is best practice in any murder investigation to obtain a search warrant or non-challengeable consent to search the death scene, and this applies to heroin overdose investigations as well.
- Locate and seize the victim's cell phone and other electronic devices. The cell phone and related records may be the single most important evidence in the case because it would be typical for the victim to engage in a series of calls or texts with the drug dealer shortly before death in order to arrange the purchase of the fatal dose of heroin. Additionally, it would be typical if the victim's cell phone contained evidence of a preexisting relationship with the dealer.
- Complete a crime scene diagram depicting the parameters of the scene, location of the victim, and locations of evidence, including the following:
  - Heroin and any other drugs, illicit or prescription.
  - "Hype kit," including used syringe.
  - Drug paraphernalia and packaging. Suspected packaging of the fatal dose of heroin should be submitted for fingerprint analysis.
  - Puncture wounds on the victim.
- Photograph and collect all the drugs at the scene, including prescription drugs. Each prescription drug bottle should be photographed to document all information on the label, including the prescribing doctors, dates of prescription, type of drug, number of pills, and other identifiers. Then, the number of pills remaining in each bottle should be documented. This number allows the prosecutor to calculate whether the prescription drugs were abused or taken at the prescribed rate. This is a potential issue in proving whether the but-for cause of death was heroin. Illicit drugs should be submitted for lab analysis for quantity and chemistry.
- Process drug evidence at the death scene for fingerprints. Again, process any suspected drug packaging at the death scene for fingerprints, even if it consists of a tiny balled-up wad of tin foil. If the packaging of the fatal dose of heroin is not checked for fingerprints, at trial, defense counsel will highlight the omission.
- Process the scene of the drug transaction. The transaction involving the fatal dose of heroin may have taken place indoors, in a car, or outdoors. Once this location is identified, process the scene to the extent possible for evidence tying both the defendant and the victim to the scene. For example, if the transaction took place in a motel room, execute a search warrant and search and process the room and gather motel and video records. If the transaction took place in a car, process the outside and inside of the car for fingerprints. If the transaction took place outside, gather video evidence and, as discussed later, cell site locator records.

- Attempt to determine the preexisting medical conditions of the victim. This can be done by interviewing the family and acquaintances of the victim and by locating and seizing medical records at the scene.
- Photograph the crime scene in detail using outside-in photography. Outside-in photography refers to starting with broader photographic views, typically the outside of the crime scene and general area, and then progressing into and through the crime scene to the point of taking tighter, detailed photos of the body, instrumentalities around the body, etc.
- Canvass the area around the crime scene for witnesses and evidence. Besides a standard search for witnesses, this may include the following:
    - Documenting all vehicles parked within a certain radius of the crime scene, where appropriate.
    - Identifying and collecting all video evidence around the location.
- If the victim was still alive when police arrived, document the physical condition of the victim (e.g., shocky, clammy skin, convulsions, coma, blue lips, pale or blue body, pupils and vital signs, etc.).
- Attempt to determine an approximate time of death based on the condition of the body. This is typically done by documenting the deceased's body temperature and extent of rigor mortis and livor mortis (lividity).

In any homicide case, proving a timeline of events is crucial. In an overdose case, the time of death is important because this event is one in a series that logically should take place in sequence: (1) drug transaction, (2) injection of heroin, and (3) death. Phone records, videos, and witness accounts may fix the approximate time of the drug transaction, which often is followed in close proximity by the injection of heroin. Moreover, as discussed in Part II.E., the post-mortem toxicology results may suggest how long the victim lingered (was alive and metabolizing the heroin) after injection. The condition of the body, as documented by detectives who arrive to conduct the death investigation, logically should support a time of death consistent with this sequence and consistent with the post-mortem toxicology.

How to approximate the time of death based on the condition of the body, and whether any useful approximation can be made at all, are subjects of some disagreement in the medical community. Forensic pathologists in some jurisdictions believe that police and coroners responding to the scene should carefully record the body temperature of the deceased (orally, rectally, or via a thermometer thrust from outside the body into the liver), the time the temperature was taken, and the ambient temperature at the scene. Based on the fact that a dead body will cool at a particular rate (1.5 degrees Centigrade at room temperature), the pathologist may be willing to offer an opinion as to the approximate time of death.

Some pathologists also may be willing to include in this calculus the extent of rigor and livor mortis in the body at the scene, as documented by the police or a deputy coroner. Rigor mortis (muscle stiffness) starts in smaller muscles such as in the face and hands, radiates out to larger muscles, and lasts up to twenty to thirty hours, depending on conditions, before the muscles become pliant again. Livor mortis (pooling of the blood in lower areas of the body, characterized by a purplish coloring of the skin) starts about thirty minutes after death and, depending on conditions, becomes fixed (that is, the purplish coloring will not blanche when the skin is pressed) in about six hours.

Ideally, based on the condition of the body at the crime scene, the forensic pathologist may give an opinion as to the approximate time of death, or at least the pathologist may be willing to explain how factors such as lividity and rigor mortis can impact this calculation. Other pathologists prefer to use broader ranges when estimating time of death based on bodily condition only and may decline to offer an opinion with any specificity.

C. Mount an Active Investigation to Target the Dealer

Another investigative rule-of-thumb common both to traditional murder investigations and drug overdose investigations is that, as time slips by without identifying the person responsible, the chances of conviction decrease. Investigators can enhance the likelihood of a successful prosecution by doing some or all of the following:

- Question witnesses and examine the victim's electronic devices. Early identification of the source of the fatal dose of heroin typically will come from one or a combination of two sources: persons close to the victim, (often heroin users) who may know where the victim obtained the heroin, and the victim's cell phone, which in its last series of calls or texts may identify the dealer.
- Make a controlled buy from, or phone call to, the dealer. Ideally, narcotics officers responding to the scene of the overdose can quickly identify the dealer and target him, often by arranging an immediate controlled buy of heroin. As indicated, persons close to the victim may also be heroin users, know the dealer, and be willing to target him. Such persons may be in the chain of distribution of the fatal dose of heroin and wish to cooperate by making a controlled buy in the interest of mitigating their own punishment. Even if there is no such person available to cooperate, knowledgeable narcotics officers may know the dealer and be able to use a cooperating informant unconnected to the victim to make a controlled buy.
- Interrogate the dealer. A main objective of making a controlled buy from the dealer is to arrest him and attempt interrogation. If investigators have moved quickly, the dealer may not know of the victim's death and be more willing to admit a relationship with, or even distributions to, the victim. The interrogating officer typically should disguise his interest in the victim by starting with questions about general topics and progressing to the more specific—starting with questions about the just-completed controlled buy, identities of customers, the dealer's phone numbers, where she sells or stores heroin, and the like, and progressing to the dealer's relationship with the victim, locations, dates, and times of contact with the victim, and the circumstances of the fatal distribution. If the dealer admits a relationship with or distributions to the victim, the interrogating officer should have the dealer identify a photo of the victim (a photo of the living victim, not one from the crime scene).
- Seize the dealer's cell phone or other electronic devices. As previously indicated, ensure that legal authorization to search is obtained.
- Seek to determine the dealer's source for the fatal dose of heroin and target accordingly. A central goal of every heroin death investigation should be to roll up as many persons as possible who are in the chain of distribution of the fatal dose.

D. Conduct a Historical Investigation of the Dealer and Others in the Chain of Distribution

Whether or not an active investigation succeeds in identifying and implicating one or more dealers in the death, the federal prosecutor should consider a number of historical investigative steps:

- Obtain and analyze phone records of participants in the transaction, including cell site locator records. The idea is to show contacts between the victim and dealer relevant to the fatal dose transaction and to put the victim and dealer in the same general area (i.e., cell tower antenna sector) at the time of the transaction. As previously indicated, the phone records should reveal the approximate time of the transaction, which will be followed in sequence—often in close proximity because the victim may be feeling the effects of withdrawal and "need" to take the heroin quickly—by the time of death. Since service providers generally maintain cell site locator records only for a limited time, these records should be obtained early in the investigation, not as trial approaches.[42]

  It is recommended that cell site location analysis be performed by an agent or other person capable of testifying as an expert witness. This will debunk the various lines of cross-examination that defense counsel will attempt to use to cast doubt on the accuracy of the cell site location analysis, such as claiming that the location results are affected by weather events, passing vehicles, excessive call traffic, etc. Although any agent can extract the cell site location data from the records and testify as a summary witness as to what the records show, an expert is necessary to do this debunking.

  One such expert would be an agent assigned to the FBI CAST (Federal Bureau of Investigation Cellular Analysis Survey Team). Reportedly, the FBI, which originally had a cadre of only about ten such agents nationwide, now is in the process of training agents in the Field Divisions in anticipation that they will qualify in court as experts. Other possible sources of expertise would be the DEA (Drug Enforcement Administration) technology section and any experts at the state level.

  The prosecutor can hope to rely on a witness subpoenaed from the cellular service provider to testify as an expert, but this carries drawbacks, such as the possibility of not knowing the name of the witness or his qualifications until a few days before trial.

- Investigate other possible sources of the fatal heroin and eliminate those not involved. Analyze the victim's phone records and identify everyone else the victim communicated with around the time of the fatal dose transaction. Then obtain the phone records and cell site locator records of all persons who conceivably could be alternate sources of the fatal heroin, investigate the involvement of each, and eliminate those not involved. Even for persons who, for one reason or another, can be eliminated without further investigation as the source of the heroin, the federal prosecutor, at a minimum, should obtain subscriber phone records. These will allow the prosecutor, via a Rule 1006 summary exhibit,[43] to give a complete account of all contacts by the victim during the relevant time frame.[44]

- Consider subpoenaing eliminated, alternate heroin sources to the grand jury. Keep in mind that Justice Department policy generally discourages subpoenaing a target of investigation.[45] Department policy requires that even subjects be admonished of their rights.[46] At a minimum, police should interview these persons because they may be necessary witnesses at trial.

- Obtain and analyze video surveillance evidence, motel records, and other evidence placing the victim and dealer together for the drug transaction. Although video evidence today is fairly

[42] Suzanne Choney, *How Long Do Wireless Carriers Keep Your Data?*, NBC NEWS (Sept. 29, 2011).
[43] FED. R. EVID. 1006.
[44] *See infra*, Exhibit 2.
[45] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-11.150 (2009).
[46] *Id.* § 9-11.151 (2009).

ubiquitous, the time stamps on surveillance videos maintained by commercial establishments often are inaccurate. Since video timing should be consistent with phone records and approximate time of death, ensure that the police collecting video evidence interview a person with first-hand knowledge concerning the accuracy of the video's time stamp. That person may very well be a necessary witness at trial.

- Check with other area law enforcement agencies concerning uncharged conduct or incomplete investigations concerning the heroin dealer. Even evidence from incomplete investigations can help determine useful information, such as the phone numbers used by the dealer and associations with other dealers in the chain of distribution.

E. Determine the Cause of Death

Many of the issues discussed in this article apply to any drug distribution resulting in death, not just ones involving heroin. A case might turn out to involve a death resulting from multiple controlled substances such as a "speedball," a combination of heroin and cocaine.[47] If all the controlled substances came to the victim from the same source, or if at least a single drug from the source was the but-for cause of death, the prosecutor may consider charging that source with distribution resulting in death. The main tools available to the prosecutor to determine the cause of death are as follows:

- Autopsy report. The forensic pathologist's opinion as to the cause of death is the starting point. Keep in mind that pathologists are unlikely to phrase their conclusions in accordance with the standard in *Burrage v. United States*, which, as indicated, requires federal prosecutors to prove in a heroin case that heroin was an independently sufficient cause of death or, at the minimum, to prove that the victim would have lived, but for the ingestion of the heroin by the victim.[48] The pathologist may phrase the cause of death as being a combination of heroin and some other substance, such as Valium, alcohol, etc., all the while believing that the victim died of a heroin overdose and the other substance(s) played only a peripheral role. The best practice is that prior to charging, the federal prosecutor should contact the pathologist and elicit the pathologist's opinion in terms of the *Burrage* standard.

  Procedurally, a detective (preferably the lead homicide detective) should attend the autopsy and recover any evidence from the pathologist. Also, the forensic pathologist may have obtained medical records of the victim which, in the context of an autopsy, may be disclosed to the pathologist as an exception to HIPAA.[49] These may help the pathologist eliminate preexisting medical conditions as factors in the death.

  Some things to look for in an autopsy report relevant to proving a heroin overdose include the following:

  - Evidence of preexisting medical conditions, other drugs or alcohol, or the lack thereof. If the victim is otherwise healthy and the only disrupter introduced into the victim's system was heroin, the pathologist may conclude by process of elimination, combined with accounts from the crime scene (usually conveyed to the pathologist by the coroner or police), that heroin was the cause of death.

  - Puncture marks, including the age of the puncture marks and whether the location of the marks is consistent with any witness testimony.

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[47] NATIONAL INSTITUTE OF HEALTH, NATIONAL INSTITUTE ON DRUG ABUSE, HEROIN DRUG FACTS (2017).
[48] *See* Burrage v. United States, 134 S. Ct. 881, 881 (2014).
[49] 45 C.F.R. § 164.512(g)(1) (2016).

- Brain tissue damage from hypoxia during deep unconsciousness. As indicated, heroin may kill by causing the victim to pass out and then fail to breath at a rate and depth to sustain life. Depending on the length of this process of oxygen starvation, brain tissue damage may or may not be apparent during the pathologist's examination of the brain.
- Heavy lungs and fluid in the lungs. These are signs of a heroin overdose because the resulting respiratory depression can cause fluid buildup.
- Full bladder. This often is a sign of an overdose but could be caused by various drugs besides opiates.

- Toxicology report. As part of the autopsy, the pathologist will take blood, urine, and other bodily fluid samples from various sites in the victim's body for submission to a laboratory for toxicology analysis. The autopsy report will not be issued until the toxicology results come back from the lab. Some issues pertaining to toxicology that the federal prosecutor should anticipate include the following:
  - The federal prosecutor should ensure that the laboratory employed by the pathologist can screen the fluids to a sufficiently low level of detection (different laboratories have different screening thresholds); otherwise, evidence of heroin metabolites might escape detection. This is particularly the case where fentanyl is involved because it may be present in minute amounts in bodily fluids.
  - As previously indicated, heroin metabolizes within minutes into 6-am, which is a unique heroin marker, but 6-am then metabolizes within a relatively short time into morphine, which is not a unique metabolite of heroin and could indicate ingestion of non-heroin opiates.[50]
  - Depending on the pathologist, and depending on the condition of the body, the pathologist may or may not be willing to draw any conclusions from the concentration levels of substances in the bodily fluids. For example, if there appears to be a very high concentration of morphine in the blood and a low level of ethanol (alcohol), and the federal prosecutor concludes from this that she can thwart any claim by the defense that the victim died of alcohol intoxication, the forensic pathologist may not agree. Post-mortem deterioration of the body, as in the case of a body that has started to decay, can undermine such straight line reasoning. The federal prosecutor should communicate with the forensic pathologist to see how the pathologist interprets those numbers.
  - Consult with the pathologist on the significance of the particular bodily fluid involved (blood or urine) and from where in the body the fluid was drawn. For example, the pathologist may indicate that there is a difference in blood drawn from the heart and blood drawn from the femoral artery, which may or may not impact the opinion concerning cause of death.
  - In some cases there is not a clear "heroin was the cause of death" opinion by the pathologist, such as where there is no trace of heroin or 6-am in bodily fluids but other evidence in the case nonetheless establishes that the victim overdosed on heroin. In these cases, it may be necessary for the federal prosecutor to retain a toxicologist to testify in

[50] *See supra*, notes 33, 34, 36 and accompanying texts.

more detail than the pathologist concerning how a heroin overdose could kill a person without leaving clear evidence of heroin in the person's bodily fluids.

- Coroner records. In most jurisdictions, coroners are public officials who may not be forensic pathologists or even medical doctors. A separate privately or publicly employed forensic pathologist may perform the autopsy. Nevertheless, in most jurisdictions, a coroner or deputy coroner will go to the scene and may provide a report or account of evidence at the scene to the pathologist. Federal prosecutors should determine what, if any, record or information a coroner might have, particularly any information not incorporated into the autopsy report.
- Reports and statements from paramedics, EMTs, or ambulance crews.
- Victim medical records and history. Have police interview the victim's friends and family about the victim's medical history, including stints in rehabilitation clinics, etc. The prosecutor should follow up by obtaining the victim's medical records, which may be obtained via grand jury subpoena as an exception to HIPAA[51] or after indictment pursuant to court order.[52] Obtaining medical records may help in some different scenarios.
    - If the victim had other medical conditions and these were not known to the forensic pathologist or conclusively ruled out as having played a role in the death, the prosecutor should obtain victim medical records and provide them to the pathologist for review.
    - If the victim received other medical treatment or prescription drugs, the records may be necessary to determine whether the victim abused the prescription drugs or the prior treatment somehow contributed to death. As previously indicated, investigators should seek to locate and recover as evidence any prescription drugs in the victim's possession.
- Interviews and subpoenas directed to the victim's medical treatment providers to testify pursuant to a protective order. Besides obtaining records of the victim's health care providers, if the victim received medical treatment in close proximity to death or was taking a course of prescribed medication at the time of death, it may be necessary to call these providers as trial witnesses to debunk defense claims that the treatment or prescribed drugs played a role in the death.

HIPAA provides that disclosures of protected health information may be made in judicial proceedings if the court issues a qualified protective order that (1) "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation" involved, and (2) requires that the information be returned to the health care provider or destroyed at the end of litigation.[53]

The federal prosecutor should file a motion for such a HIPAA protective order, seeking authorization to subpoena the witnesses to testify, obtain any necessary health records, interview the witnesses prior to trial, and elicit testimony at trial.

[51] 45 C.F.R. § 164.512(f)(1)(ii)(B) (2016).
[52] *Id.* § 164.512(e)(1)(i).
[53] *Id.* § 164.512(e)(1)(v).

IV. Prosecution of the Heroin Overdose Case

The two issues most likely to be points of contention in a heroin overdose trial are (1) identity, that is, whether the defendant or some other dealer was the source of the fatal dose of heroin, and (2) cause of death.

A. Proving Identity

Every case is different, and while some of these suggestions have already been discussed, the following may be helpful.

- Corroborate cooperating witnesses. It is beyond the scope of this article to review all the techniques for examining and rehabilitating cooperating witnesses at trial, but where an important cooperating witness's testimony places the defendant and victim together for the fatal transaction, it is suggested that the federal prosecutor, as a trial preparatory exercise, chart out the major points made in the cooperating witness's testimony juxtaposed with the objective evidence, including phone records, cell site location records, video evidence, and the like.

  Besides preparing these charts as a trial preparatory exercise, the prosecutor also may be able to show the charts to the jury. To the extent that the charts reflect non-record information such as testimony, the charts would not be admissible as summary exhibits under Federal Rule of Evidence 1006,[54] but the charts could be used as pedagogical exhibits in closing argument.[55]

- Establish the preexisting supplier–consumer drug relationship between the defendant and victim. In almost every case, the victim will have had a preexisting relationship with the heroin dealer. This can be proven via witnesses, cell phone contact records, and cell phone directories. Depending on the federal court involved, this evidence may be characterized as other-acts evidence, discussed below.

- Use other-acts evidence. In some jurisdictions, the federal prosecutor may want to be cautious about admitting evidence of prior drug transactions to prove the defendant's knowing distribution of heroin, even where such transactions are "inextricably intertwined" with the fatal transaction, because at least some federal courts, in particular the 7th Circuit, have moved to limit other-acts evidence under Rule 404(b) of the Federal Rules of Evidence[56] for the purpose of proving mens rea.[57]

  However, in the context of a drug-death case where identity often is the central issue at trial, other-acts evidence should be more palatable when offered to prove identity. Evidence of prior transactions or contacts between the defendant and victim can show how the victim would have known to call the defendant to buy heroin, how the victim would have known where to find the defendant or would have known his phone number, and why the defendant would have been willing to sell to the victim. Even if no ongoing conspiracy is charged and the case involves a one-count indictment charging distribution resulting in death, the prosecutor should be able to

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[54] FED. R. EVID. 1006.
[55] Exhibit 1 is an example of such a pedagogical exhibit used during closing argument in a heroin death trial where the defendant was two persons removed from the victim in the chain of distribution. The chart summarizes testimony of cooperating witness Kyle (first level in the chain of distribution) and corroborating phone, cell site location, and video evidence pertaining to the distribution by Waldrip (the defendant and second level in the chain of distribution) via Kyle to Kathi (the victim).
[56] FED. R. EVID. 404(b).
[57] *See, e.g.,* United States v. Gomez, 763 F.3d 845, 853–57 (7th Cir. 2014).

argue that the fatal transaction did not take place in a vacuum, that the victim and defendant would have had a preexisting relationship involving heroin, and that the preexisting distributor–consumer relationship between the defendant and the victim tends to prove that the defendant was the heroin source on that final, fatal occasion.[58]

- Prepare a list of the victim's contacts the day of the fatal dose transaction and eliminate everyone but the defendant as the source of the heroin.[59]

- Establish a timeline of the day of the fatal transaction. This can be drafted as a pedagogical exhibit for closing argument.[60] Alternatively, the exhibit might be admissible under Rule 1006[61] if limited to summarizing information in records of phone contacts, video time stamps, cell site location, and the like.

- Establish the location of the distribution and tie the defendant and victim to the location at the relevant time. The federal prosecutor should attempt to identify the suspected location of the fatal transaction and tie the defendant and victim to the location at the relevant time via available evidence such as the following:
  - Witness accounts;
  - Fingerprints or other physical evidence;
  - Video evidence;
  - Receipts—check the crime scene for receipts or other evidence of where "hype kit" components (syringe, cotton balls) were purchased;
  - Cell site location evidence.[62]

- Tie evidence at the crime (death) scene to the defendant. This may include contact information in the victim's cell phone and the drug packaging from the fatal dose. Where the defendant's identifiable fingerprints are not recovered from the packaging, consider calling a fingerprint

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[58] Exhibit 5 is an example of a motion in limine seeking to admit Rule 404(b) evidence tending to put the defendant in the chain of distribution of the fatal dose.
[59] Exhibit 2 is a summary exhibit admissible under Rule 1006 summarizing all contacts in the victim's phone records during the period around the fatal transaction. The exhibit also incorporated information from the phone records of the defendant (Waldrip), phone records of other heroin sources whom the victim called but who did not furnish the fatal drugs, and subscriber records of other uninvolved persons who had contact with the victim's phone. Testimony and other evidence at trial eliminated all these listed contacts except the defendant as the source of the fatal dose of heroin.
[60] *See infra* Exhibit 1. Exhibit 3 is an example from a heroin death trial of a Rule 1006 exhibit summarizing four sets of phone records where the defendant–heroin dealer was three persons removed from the victim in the chain of distribution. The chart summarizes contacts between Trent (defendant and third level of distribution), Land (second level), Hull (first level), and Tyler (victim). This exhibit not only helped show the involvement of the three heroin distributors in the fatal transaction but also helped fix the time of the transaction (about 7:25 PM), which was consistent with a time-stamped video and cell site locator records putting the four parties in the same general area at that same time.
[61] FED. R. EVID. 1006.
[62] Exhibit 4 is one slide in a series of slides summarizing and depicting the information concerning cell site location in phone records of the defendant and the victim, and putting both in the same general vicinity at the time of the fatal transaction.

expert to explain how the defendant could have handled the package without leaving recoverable latent fingerprints.

B. Proving Cause of Death

The discussion in Part II concerning determining the cause of death covers most of the evidence relevant to cause of death. This includes testimony by the forensic pathologist, perhaps a toxicologist, perhaps a deputy coroner, responding police officers who viewed or moved the body, and paramedics or EMTs.

In addition, the federal prosecutor should consider calling a family member as a witness. Obviously, as in a murder case, it is useful to call a family member to personalize the victim and introduce a living photo of the victim. More specific to the issues at trial, the family member can recount the victim's struggles and involvement with drugs, help rule out other medical conditions as contributing to death, identify when the victim was last seen alive, and identify the victim's phone and phone numbers. A family member also may have knowledge of the relationship between the victim and the defendant.

Crime scene evidence including photos of the deceased victim should be introduced to prove the death itself, how it was investigated, and other relevant issues. Most courts will allow at least limited photos of the deceased in the face of a Rule 403[63] challenge by the defense.[64]

The testimony of the victim's doctors or other treating medical personnel may be necessary to explain the role, or lack thereof, of preexisting medical conditions or prescribed medicines in the victim's death. Pursuant to HIPAA, the federal prosecutor should seek a protective order that authorizes pre-trial interviews by the government of such personnel and also authorizes their testimony at trial while otherwise protecting the privacy of the medical information.[65]

Finally, with respect to jury instructions, the federal prosecutor should consider drafting an instruction consistent with *Burrage* explaining the standard for proving cause of death. A close reading of the *Burrage* opinion will reveal a variety of useful language.[66] Where the defendant is one or more levels removed from the victim in the chain of distribution, another instruction that might be considered is an instruction indicating that such a person is nonetheless liable for the death.[67]

C. Non-Exhaustive List of Potential Expert Trial Witnesses

As previously discussed, among the expert witnesses the prosecutor should consider are the following:

- Forensic pathologist;
- Toxicologist;
- Toxicology laboratory technicians. Absent a clarification of the holding in *Williams v. Illinois*,[68] it would be prudent to seek a stipulation under *Crawford v. Washington*[69] allowing the testifying

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[63] FED. R. EVID. 403.
[64] Exhibit 6 is an example of a motion in limine seeking to admit such photos.
[65] *See* 45 C.F.R. § 164.512(e)(1)(v) (2016). Exhibit 7 includes an example motion for a protective order and the order.
[66] *See infra*, Exhibit 8.
[67] *See infra*, Exhibit 9.
[68] Williams v. Illinois, 132 S. Ct. 2221, 2221-22 (2012). In a 4–1–4 split, the Supreme Court held that a testifying government expert could rely on a DNA report by a non-testifying analyst to form an opinion.
[69] *See* Crawford v. Washington, 541 U.S. 36, 59, 59 n.9 (2004).

pathologist to rely on the toxicology laboratory technicians' testing reports in forming an opinion as to cause of death;

- Medical personnel who treated the victim or prescribed other drugs;
- Cell site location expert;
- Chemist who analyzed recovered drugs;
- Fingerprint analyst who searched for latent prints anywhere or on any item (dwelling, car, packaging, etc.) that the dealer might have touched and that is related to the fatal drug transaction;
- Drug Recognition Expert (DRE), other law enforcement officer expert, or cooperating witness/heroin addict concerning physiological effects of heroin, its addictive properties, its appearance, its packaging, hype kits and methods of administration, other tools of the heroin trade, etc.

V. Conclusion

Prosecuting heroin overdose cases can be complex. The cases are highly likely to go to trial given the high penalties involved, and dealing with the victim's family members is a necessary but often difficult task. However, as indicated, these prosecutions can have an outsized deterrent effect, particularly if prosecutors vigorously pursue every person involved in the chain of distribution of a fatal dose of heroin.

ABOUT THE AUTHOR

❑ **Don Allegro** is Senior Litigation Counsel in the Central District of Illinois. He has been an Assistant United States Attorney for twenty-three years, serving in the Northern District of Florida, Southern District of Iowa, and Central District of Illinois. Prior to becoming a lawyer, Mr. Allegro was an Infantry Officer for five years in the United States Marine Corps and a Police Officer for over six years with the Los Angeles Police Department.

Exhibit One: Wilson Testimony Phone Call Versus Object Evidence

Kyle Wilson Testimony Versus Objective Evidence
Sunday, December 15, 2013

Time	Event	Call From	Call To	Location
KATHI PICKS UP KYLE AT MOLINE BUS STATION				
1:02-:08	Calls (3)	Kyle (bus station)	Kathi	
KATHI WANTS HEROIN, KYLE CALLS SCROWTHER & JOHNS FROM WEST RI				
1:22	Call – 41 secs	Kyle (Kathi)		West RI sector
1:23-:25	Calls (4)	Kyle (Kathi)		West RI sector
1:26	Call – 113 secs	Kyle (Kathi)		West RI sector
UNSUCCESSFUL, KYLE CALLS WALDRIP				
1:28	Call – 57 secs	Kyle (Kathi)	Waldrip (LL)	West RI sector
WALDRIP'S NEXT CALL IS TO MANGRUM; KYLE/KATHI PICK-UP WALDRIP AT HIS HOUSE				
1:30	Call – 14 secs	Waldrip (landline)	Mangrum (Bell)	Waldrip landline
1:34	Calls (2) – 5 secs, 43 secs		Kyle (Kathi)	Waldrip sector
KYLE/KATHI/WALDRIP GO TO MANGRUM'S; KYLE/KATHI WAIT ABOUT ½ HOUR IN THE CAR				
2:07	Call – 31 secs	Kyle (Kathi)		Mang/CVS sector
2:07	Call – 97 secs	Kyle (Kathi)		Mang/CVS sector
2:10	Call – 34 secs	Kyle (Kathi)		Mang/CVS sector
KYLE/KATHI DROP OFF WALDRIP, GO TO CVS TO BUY SYRINGE & COTTON BALLS; KYLE INJECTS KATHI				
2:21	Call		Kyle (Kathi)	Mang/CVS sector
2:21	Kathi's car enters CVS lot			CVS video
2:27	Kathi CVS cash register purchase of syringe & cotton balls			CVS video
2:29	Kathi exits CVS			CVS video
KATHI PASSES OUT IN PARKING LOT, KYLE FLEES ON FOOT IN A PANIC, CALLING WALDRIP & SCROWTHER				
2:44-:45	Calls (2) – 1, 8 secs	Waldrip	Mangrum (Bell)	Waldrip landline
2:52	Call – 239 secs	Kyle (Kathi)	Waldrip (landline)	Mang/CVS sector
2:53	Kyle walks past CVS door E/B			CVS video
2:57	Call	Kyle (Kathi)	Kyle's mom (HyVee)	Mang/CVS sector
2:58	Call	Kyle (Kathi)	Kyle's mom	Mang/CVS sector
3:04-:06	Calls (3)	Kyle (Kathi)	Kyle's sister	Moline sector
3:08	Call – 650 seconds	Kyle (Kathi)		Moline sector
3:21	Call	Kyle (Kathi)	17	Moline sector
3:33	Call	Kyle (Kathi)	Kyle's sister	Moline sector

Exhibit Two Call Charts

CALL CHART FOR 309-230-3935 ON 12/15/2013 BETWEEN NOON AND 18:00

TO/FROM	PHONE NUMBER	TIME	CALL DURATION (in Seconds)	SUBSCRIBER	PROVIDER
TO	5060	12:06 pm	26	Genesis Medical – Illini Campus	Windstream
TO	-8142	12:07 pm	164	TracFone	Verizon
TO	3837	12:12 pm	105	Christine	Verizon
TO	4624	12:14 pm	418	John Management Group/Cheryl	Verizon
TO	4624	12:21 pm	28	John Management Group/Cheryl	Verizon
TO	0031	12:22 pm	89	Jim	Mediacom
TO	2868	12:24 pm	161	Janyce	AT&T
TO	0197	12:27 pm	198	Pamela	AT&T
FROM	3837	12:37 pm	30	Christine	Verizon
TO	3837	12:38 pm	400	Christine	Verizon
TO	2868	12:49 pm	124	Janyce	AT&T
TO	5060	12:58 pm	27	Genesis Medical – Illini Campus	Windstream
FROM	2868	12:59 pm	162	Janyce	AT&T
FROM	4257	1:02 pm	78	Metrolink station number	Unknown
TO	2868	1:04 pm	253	Janyce	AT&T
FROM	4257	1:07 pm	5	Metrolink station	Unknown
FROM	4257	1:08 pm	63	Metrolink station	Unknown
TO	5016	1:22 pm	41	Jeremy	I-Wireless
TO	9225	1:23 pm	34	Susan	US Cellular
TO	9225	1:24 pm	5	Susan	US Cellular
TO	225	1:24 pm	37	Susan	US Cellular
TO	9225	1:25 pm	34	Susan	US Cellular
TO	2806	1:26 pm	113	Adele	Sprint

1

CALL CHART FOR 309-230-3935 ON 12/15/2013 BETWEEN NOON AND 18:00

TO/FROM	PHONE NUMBER	TIME	CALL DURATION (in Seconds)	SUBSCRIBER	PROVIDER
TO	2311	1:28 pm	57	**Waldrip landline**	Mediacom/AT&T
FROM	2806	1:34 pm	5	Adele	Sprint
FROM	2806	1:34 pm	43	Adele	Sprint
TO	9225	2:07 pm	31	Susan	US Cellular
TO	2806	2:07 pm	97	Adele	Sprint
TO	9225	2:10 pm	34	Susan	US Cellular
FROM	9225	2:21 pm	6	Susan	US Cellular
TO	2311	2:52 pm	239	**Waldrip landline**	Mediacom/AT&T
TO	0621	2:57 pm	30	HyVee	AT&T
TO	6116	2:58 pm	307	Lisa	Sprint
TO	9490	3:04 pm	46	James	US Cellular
TO	9490	3:05 pm	30	James	US Cellular
TO	9490	3:06 pm	73	James	US Cellular
TO	5016	3:08 pm	650	Jeremy	i-Wireless
TO	17	3:21 pm	27	N/A	N/A
TO	9490	3:33 pm	11	James	US Cellular
FROM	5016	3:36 pm	6	Jeremy	i-Wireless
FROM	5016	3:36 pm	7	Jeremy	i-Wireless
FROM	5016	3:37 pm	2	Jeremy	i-Wireless
FROM	5016	3:37 pm	2	Jeremy	i-Wireless
FROM	5016	3:37 pm	2	Jeremy	i-Wireless
FROM	3837	3:42 pm	6	Christine	Verizon
FROM	3837	4:13 pm	14	Christine	Verizon
FROM	3837	4:24 pm	24	Christine	Verizon
FROM	5016	4:53 pm	3	Jeremy	i-Wireless
TO	6116	5:48 pm	60	Lisa	Sprint
TO	5016	6:01 pm	487	Jeremy	i-Wireless

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Exhibit Three List of Phone Calls

CONTACTS BETWEEN HULL, LAND, TRENT, AND 8/29/14

Start Time (Central)	Duration (seconds)	Calling number (From)	Subscriber or contact (From)	Called number (To)	Subscriber or contact (To)
7:04 AM	4	3095	Curtis Land	8178	Phil Trent
8:21 AM	4	3095	Curtis Land	8178	Phil Trent
8:41 AM	3	3095	Curtis Land	8178	Phil Trent
1:26 PM	18	3095	Curtis Land	8178	Phil Trent
1:46 PM	text	0685	Tyler	6433	Kyle Hull
2:01 PM	text	6433	Kyle Hull	0685	Tyler
2:01 PM	text	6433	Kyle Hull	0685	Tyler
2:02 PM	text	0685	Tyler	6433	Kyle Hull
2:06 PM	text	6433	Kyle Hull	0685	Tyler
2:13 PM	text	0685	Tyler	6433	Kyle Hull
2:14 PM	text	0685	Tyler	6433	Kyle Hull
2:14 PM	text	6433	Kyle Hull	0685	Tyler
2:15 PM	text	0685	Tyler	6433	Kyle Hull
2:15 PM	text	6433	Kyle Hull	6433	Kyle Hull
3:01 PM	text	0685	Tyler	6433	Kyle Hull
3:23 PM	4	3095	Curtis Land	8178	Phil Trent
3:24 PM	25	3095	Curtis Land	8178	Phil Trent
3:37 PM	3	3095	Curtis Land	8178	Phil Trent
3:37 PM	0	3095	Curtis Land	8178	Phil Trent
3:38 PM	51	3095	Curtis Land	8178	Phil Trent
3:38 PM	text	6433	Kyle Hull	0685	Tyler
3:39 PM	text	0685	Tyler	6433	Kyle Hull
3:39 PM	text	6433	Kyle Hull	0685	Tyler
3:43 PM	text	0685	Tyler	6433	Kyle Hull
3:57 PM	text	6433	Kyle Hull	0685	Tyler
3:58 PM	text	0685	Tyler	6433	Kyle Hull
4:01 PM	26	6433	Kyle Hull	8178	Phil Trent
4:02 PM	51	8178	Phil Trent	6433	Kyle Hull
4:04 PM	text	6433	Kyle Hull	0685	Tyler
4:05 PM	text	0685	Tyler	6433	Kyle Hull
4:14 PM	text	6433	Kyle Hull	8178	Phil Trent
4:20 PM	text	0685	Tyler	6433	Kyle Hull
4:21 PM	23	3095	Curtis Land	8178	Phil Trent
4:22 PM	text	6433	Kyle Hull	0685	Tyler
4:22 PM	4	6433	Kyle Hull	8178	Phil Trent
4:22 PM	76	6433	Kyle Hull	8178	Phil Trent
4:23 PM	text	0685	Tyler	6433	Kyle Hull
4:41 PM	text	0685	Tyler	6433	Kyle Hull
4:55 PM	25	8178	Phil Trent	3095	Curtis Land
4:55 PM	66	0685	Tyler	6433	Kyle Hull
5:08 PM	text	0685	Tyler	6433	Kyle Hull
5:15 PM	text	6433	Kyle Hull	0685	Tyler
5:20 PM	63	6433	Kyle Hull	0685	Tyler
6:08 PM	119	8178	Phil Trent	3095	Curtis Land
6:21 PM	88	8178	Phil Trent	3095	Curtis Land
6:27 PM	0	8178	Phil Trent	3095	Curtis Land
6:29 PM	52	8178	Phil Trent	3095	Curtis Land
6:37 PM	19	095	Curtis Land	8178	Phil Trent
6:44 PM	49	6433	Kyle Hull	8178	Phil Trent
7:06 PM	86	6433	Kyle Hull	8178	Phil Trent
7:08 PM	72	0685	Tyler	3095	Curtis Land
7:15 PM	79	8178	Phil Trent	3095	Curtis Land
7:18 PM	49	3095	Curtis Land	0685	Tyler
7:19 PM	10	3095	Curtis Land	0685	Tyler
7:24 PM	0	8178	Phil Trent	3095	Curtis Land
7:24 PM	4	3095	Curtis Land	8178	Phil Trent
7:24 PM	0	8178	Phil Trent	3095	Curtis Land
7:24 PM	8	3095	Curtis Land	8178	Phil Trent
7:25 PM	28	8178	Phil Trent	6433	Kyle Hull
7:25 PM	0	3095	Curtis Land	8178	Phil Trent
8:13 PM	0	8178	Phil Trent	3095	Curtis Land
8:14 PM	0	8178	Phil Trent	3095	Curtis Land
10:01 PM	4	8178	Curtis Land	8178	Phil Trent

Exhibit Four Map

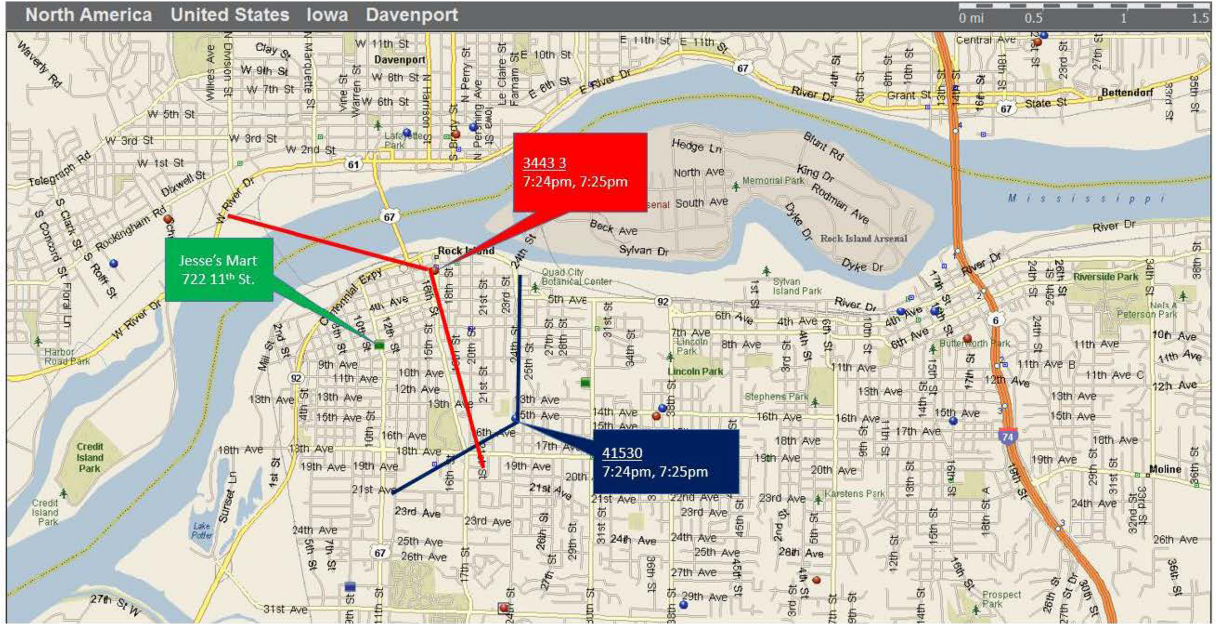

Exhibit Five: Supplemental Motion In Limine Concerning Rule 404(b) Evidence

E-FILED
Thursday, 04 June, 2015 02:18:25 PM
Clerk, U.S. District Court, ILCD

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Criminal No. 4:14-cr-40050**
	)	
STEVEN WALDRIP,	)	
a/k/a "Steve-O"	)	
	)	
Defendant.	)	

GOVERNMENT'S SUPPLEMENTAL MOTION IN LIMINE CONCERNING RULE 404(b) EVIDENCE

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby requests pursuant to Rule 404(b) of the Federal Rules of Evidence that the Court permit the government to introduce evidence of defendant Waldrip's middleman role in the distributions of heroin to an undercover officer for the purpose of proving his identity as middleman in distributing a fatal dose of heroin.

Waldrip was charged in this case with one count of distributing heroin to Kyle Wilson and victim KS, resulting in KS' death (Count 1) and three counts of distributing heroin to an undercover police officer (Counts 2 through 4).

In a prior motion, Waldrip sought to exclude evidence of his pre-existing relationship with government witnesses Wilson and BM and his sales of drugs to them. The government responded that this evidence should be admitted as evidence of the defendant's identity as the source of the fatal dose of heroin involved in Count 1. The Court's decision presently is pending.

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After arguments on that motion, the defendant pleaded guilty to Counts 2 through 4. The Court allowed supplemental briefing to address the impact of the defendant's plea to Counts 2 through 4 on admissibility of evidence in the trial on Count 1.

In this supplemental motion in limine, the government requests that the Court allow the government to introduce evidence of the defendant's role as middleman for Damel Mangrum in the distributions of heroin to the undercover officer (Counts 2 through 4) for the purpose of proving his identity as Mangrum's middleman in distributing the fatal dose (Count 1).

I. FACTUAL BACKGROUND

Waldrip is charged in Count 1 with distributing heroin on December 15, 2013, resulting in the death of "KS."

On that date, Wilson met KS, an acquaintance, and, after KS asked if Wilson could get some heroin, Wilson, using KS's phone, called Waldrip. Wilson was a heroin addict and Waldrip had been his regular heroin supplier for several months.

After Wilson arranged a heroin purchase from Waldrip, KS and Wilson drove to Waldrip's residence, picked him up, and, at Waldrip's direction, drove a short distance to the residence of Damel Mangrum, near a Rock Island school. There, Waldrip instructed KS and Wilson to wait in the car while Waldrip entered the residence of Mangrum. Waldrip returned to the car with the heroin, which he provided to Wilson and KS.

KS and Wilson dropped off Waldrip at his home and went to a nearby pharmacy, where Wilson injected KS with the heroin, resulting in KS's death.

Cell site locator records will support Wilson's testimony by showing that KS's cell phone was used to call Waldrip and subsequently, at the relevant time, the phone was located in the vicinity of the residences of Waldrip and Mangrum, who live a few blocks away from each other.

While KS' death was under investigation, police enlisted BM, an informant to speak to Wilson about KS's death. BM had a long history of buying heroin from Waldrip, and BM had met Wilson through Waldrip. According to BM, when she ordered heroin from Waldrip, he often would say, referring to Mangrum, "Do you want the dope from the guy near the school?"

BM recorded Wilson discussing his role in the death of KS and the fact that Waldrip was the source of the heroin.

After Waldrip was identified as the source of the heroin that killed KS, BM further assisted the police by introducing an undercover police officer to Waldrip. During April and May 2014, Waldrip distributed heroin to the officer on three occasions, distributions that are reflected in Counts 2 through 4. With respect to each purchase, Waldrip told the undercover officer to wait in a car and walked, under surveillance, to the residence of Damel Mangrum, where Waldrip obtained the heroin.

Waldrip entered pleas of guilty to Counts 2 through 4, admitting that on each occasion he went to the area of the school in Rock Island, obtained drugs from an individual there, and distributed the drugs to the undercover officer.[1]

II. ARGUMENT

Evidence of Waldrip's role as Mangrum's middleman in the sales to the undercover officer in April and May 2014 should be admitted to help prove his identity as Mangrum's middleman in the sale of the fatal dose of heroin to KS and Wilson in December 2013.

Other acts evidence may be admitted if (1) the other acts are relevant under Rules 401 and 402 of the Federal Rules of Evidence for the purpose the proponent is offering the other acts evidence, (2) the other acts are admitted for the purpose of establishing one of the permitted

[1] The government's memory of the factual basis for that plea is uncertain, but the transcript has been ordered.

exceptions listed in 404(b)(2), and the proponent identifies a "propensity-free chain of reasoning" through which the Court can deem the evidence relevant, and (3) the evidence survives the balancing test of Rule 403. *United States v. Gomez*, 763 F.3d 845, 853-57 (7th Cir. 2014).

The evidence of Waldrip's role as Mangrum's middleman role in the March and April transactions meets all three of these requirements.

A. Evidence That Waldrip Was The Middleman In Sales To The Undercover Officer Is Relevant to Establishing His Identity As The Middleman In The Sale To Wilson And KS

The issue at trial will be the identity of the dealer who passed the fatal dose of heroin to Wilson and KS. Evidence that Waldrip was Mangrum's middleman in connection with distributions to the undercover officer will help identify Waldrip as the middleman in distributing the fatal dose.

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable . . . than it would be without the evidence." This evidence passes that test.

Wilson will testify that the heroin came from Waldrip, who went into Mangrum's house to get the drugs, and cell site records will reflect Wilson's call to Waldrip and put the parties in the vicinity of the residences of Waldrip and Mangrum at the relevant time. After Waldrip was identified as having been the middleman for the fatal dose, BM introduced the undercover officer to Waldrip, who again engaged in distributions acting as Mangrum's middleman.

Since not all heroin sold in Rock Island originated with Damel Mangrum, and not all heroin dealers distributed heroin for Mangrum, proving that Waldrip was a middleman for

Mangrum in distributing to the undercover officer will make it considerably "more probable" that Waldrip was Mangrum's middleman in connection with the fatal dose.

B. Waldrip's Role As Middleman In Distributions To The Undercover Officer Is Relevant Via A Propensity Free Chain Of Reasoning

Gomez does not exclude Rule 404(b) evidence whenever the jury might draw a propensity inference from other acts evidence. *Id.* at 846. Instead, *Gomez* instructs that "Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established *only* through the forbidden propensity inference." *Id.* (emphasis in original).

As indicated, the issue at trial will not be the cause of death of KS, or whether the substance purchased by the undercover officer was heroin or not, but whether Waldrip was the heroin middleman involved in these transactions.

The government anticipates the defense will assert that Kyle Wilson and BM are grossly mistaken in identifying Waldrip, or they are cooperating witnesses willing to falsely identify Waldrip in an effort to get leniency in their own cases. Accordingly, the purpose of the testimony about Waldrip's role as Mangrum's middleman in the sales to the undercover officer will not relate to Waldrip's propensity to sell heroin, but to show his identity as the middleman in the sale to Wilson and KS.

Under *Gomez*, this use of the evidence satisfies the "propensity free chain of reasoning" standard. In *United States v. Brown*, 471 F.3d 802, 806 (7th Cir. 2006), Brown was charged with being a party to a drug transaction interrupted by police. The party's identity was in issue at trial because he fled and was not apprehended. Instead, Brown was identified as the party by a cooperating witness. In response to Brown's claim that the cooperator was a liar and "picked [Brown's] name out of a hat," the government elicited from the cooperating witness that he had purchased drugs from Brown on many prior occasions. *Id.*

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Not only did the Seventh Circuit rule in *Brown* hold that evidence of Brown's prior drug transactions with the cooperator was admissible to prove the defendant's identity under 404(b), *id.*, the Court in *Gomez* specifically endorsed *Brown* as an example of a propensity free chain of reasoning for admission of evidence under Rule 404(b), stating that the theory of admissibility in Brown "– that evidence of other transactions between the defendant and a witness is admissible to bolster the witness's identification of the defendant as a participant in a charged transaction – is a distinct and widely acknowledged theory of admissibility under Rule 404(b)". *Gomez*, 763 F.3d at 861-62. The court went so far as to cite an evidence hornbook as proof that this was black letter law. *Id.*

Post-*Gomez* decisions by the Seventh Circuit reinforce that when identity is in issue in a particular, charged transaction, admitting evidence of uncharged transactions involving the defendant to prove identity in the charged transaction meets the propensity free chain of reasoning standard. *United States v. Vance*, 764 F.3d 667, 669-70 (7th Cir. 2014) (coconspirator's testimony about the defendant's involvement in prior robberies was admissible under 404(b), post-*Gomez,* to prove the defendant's identity as a bank robber); *United States v. McMillian*, 744 F.3d 1033, 1039 (2014) (anticipating the *Gomez* ruling and holding that defendant's uncharged, sexually explicit online communications with someone he thought was a 14-year-old girl were admissible under 404(b) to prove identity).

The problem with the *Gomez* standard is that it can be interpreted as requiring the exclusion of virtually all other acts evidence. However, clearly this is not what the Court meant, given its recent decisions applying the standard. *United States v. Schmitt*, 770 F.3d 524, 534-35 (7th Cir. 2014) (where defendant was charged with unlawfully possessing a firearm as a felon, evidence of his motive for possessing the firearm – selling drugs – was admissible based on

propensity free chain of reasoning); *United States v. Curtis*, 781 F.3d 904, 910-11 (7th Cir. 2015) (evidence of defendant's failure to pay 2013 payroll taxes was admissible to prove he knowingly and willfully failed to pay income taxes in 2010 through 2012).

District Court decisions also have rejected such a narrow reading of *Gomez*. *United States v. Klemis*, No. 11-30108, 2015 WL 300424, at *3-4 (S.D. Ill. Jan. 22, 2015) (in a heroin death case, evidence that the defendant sold marijuana to his drug customers was admissible for a non-propensity purpose, to establish that the defendant used the marijuana to entice his customers into an ongoing drug-purchasing relationship); *United States v. Gallardo*, No. 13CR660, 2015 WL 832287, at *4 (N.D. Ill. Feb. 25, 2015) (evidence of conversation between the defendant and an undercover officer about buying drugs in 2013 was admissible for a non-propensity purpose, to prove the defendant's role in laundering drug proceeds in 2012).

Collectively, these decisions indicate that the Seventh Circuit meant to allow other acts evidence where relevance can be established by a propensity free chain of reasoning, even if the evidence, viewed differently, is capable of implying a propensity to commit the crime charged.

Here, given the holding in *Brown* allowing other acts evidence to prove identity, the endorsement of this holding in *Gomez,* and the post-*Gomez* decisions applying the propensity free chain of reasoning standard, the evidence that Mangrum was the middleman in the distributions of heroin to the undercover officer should be admitted to show Mangrum's role as middleman in distributing the fatal dose.

C. The Probative Value Of Evidence Of Waldrip's Role In Distributing To The Undercover Officer Is Not Substantially Outweighed By Danger Of Unfair Prejudice

The very nature of Rule 404(b) evidence is that its admission holds some risk that the jury will improperly rely on a forbidden propensity inference. *Gomez*, 763 F.3d at 857. But that

does not mean Rule 404(b) evidence is always inadmissible under Rule 403. In deciding the admissibility of 404(b) evidence, "the court should consider whether the fact to which the evidence pertains is seriously contested and whether a jury instruction could cure the potential prejudicial effect." *United States v. Schmitt*, 770 F.3d 524, 535 (7th Cir. 2014) (danger of unfair prejudice did not substantially outweigh probative value because evidence was highly probative and defendant did not concede the point).

In this case, Waldrip's identity as the person who passed on the fatal dose of heroin to KS and Wilson is "seriously contested," as it is the main issue for trial. In order to address any potential unfair prejudice, this Court can issue a limiting instruction advising the jury that the evidence of Waldrip's dealings with the undercover officer is offered only to support the witness' knowledge and identification of Waldrip in connection with the fatal dose. "[S]uch instructions are effective in reducing or eliminating any possible unfair prejudice from the introduction of Rule 404(b) evidence." *United States v. Jones*, 455 F.3d 800, 809 (7th Cir. 2006) (internal quotations omitted).

WHEREFORE the government respectfully requests that the Court permit the government to introduce evidence of Waldrip's middleman role in the distributions of heroin to the undercover officer for the purpose of proving his identity as middleman in distributing the fatal dose.

Respectfully submitted,
JAMES A. LEWIS
United States Attorney

By: *_/s/ Donald Allegro_*
Donald Allegro
Assistant United States Attorney
1830 Second Avenue, Suite 250
Rock Island, Illinois 61201
Tel: (309) 793-5884

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2015, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to defense counsel.

/s/ Donald Allegro
Donald Allegro
Assistant United States Attorney

Exhibit Six: Governments Motion In Limine Concerning Photos of the Deceased

4:15-cr-40032-SLD # 19 Page 1 of 7

E-FILED
Friday, 22 July, 2016 02:35:05 PM
Clerk, U.S. District Court, ILCD

Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) **Criminal No. 4:15-cr-40032**
)
ANTHONY JOHNSON,)
a/k/a "Smoke")
a/k/a Vincent T. Johnson)
)
Defendant.)

GOVERNMENT'S MOTION IN LIMINE
CONCERNING PHOTOS OF DECEASED

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby files this motion in limine, seeking leave to introduce photos of the deceased.

The government seeks leave to introduce three photos of the deceased.[1] The government intends to offer the photos, all of which are photos of the deceased at the crime scene, because the photos are relevant and the probative value of showing the jury these three photos far outweigh any unfair prejudice. The photos will allow the jury to have a complete visual picture of events, assist in corroborating witness accounts, and help establish the overall timeline of events. Additionally, a potential issue at trial is likely to be time of death. These photos show not only the deceased's lividity, but also shows the deceased holding a cell phone. The picture depicting the deceased holding the cell phone is particularly relevant because it directly connects

[1] The government will file a copy of all photos of the deceased with the Court, and for the purposes of this motion will reference the three photos sought to be introduced at trial as the image numbers on the disc. Therefore, the government, for purposes of this motion seek to introduce image numbers: 40, 46 and 56.

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the defendant with the crime scene and the events that took place there on March 21, 2015 and April 1, 2015.

I. FACTUAL BACKGROUND

On March 29, 2015, EE and her husband, Matthew checked themselves into Genesis East Hospital to detox from heroin. Later that day, they were transferred to Genesis West Hospital. On March 31, 2015, EE checked out of Genesis West Hospital. EE was picked up by a friend, David Egger, and driven to the Hillside Motel in Rock Island, Illinois. After stopping at the motel, Egger and EE briefly stopped by his home and then Egger dropped EE off at her residence at approximately 1:30 pm. In the evening of April 1, 2015, police responded to a call at 125 1/2 E. Rushmore Street in Davenport, Iowa. EE's mother was present at the scene. When officers entered the apartment, they observed EE deceased lying face down on a blanket near a TV on the floor of the living room. In EE's hand was a flip cell phone. After EE was moved, another cell phone was found underneath her. Officers found a heroin drug kit in the kitchen and two used hypodermic needles in the bathroom.

Shortly after officers arrived on scene, came to the home. was driven to the home by David Egger. told the police that he and EE entered the hospital on March 29, 2015, but when he could not reach EE he left the hospital to find her. told officers that their heroin supplier went by the name of "Smoke." He described Smoke as a heavy set black male named Anthony, later identified as Anthony Johnson. stated he purchased heroin from Johnson about 50 times, always buying a half gram for about $80 to $90. Johnson would also sell heroin to EE, usually for a reduced price. and EE would meet Johnson at different locations including the downtown Davenport bus station, casinos, and motels including the Hillside Motel in Rock Island, Illinois. informed officers the last time he knew EE

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purchased heroin from Johnson was the previous Saturday when Johnson drove to their house and sold the heroin from his car. [redacted] gave officers permission to search the house and his and EE's cell phones with phone numbers (309) 751-7983 and (563) 275-8604.

When officers searched EE's cell phones, they found a contact listed by the name of "Anthony 'Smoke' Johnson." The number associated with the name was (563) 499-4410. At approximately 1:40 pm on March 31, 2015, EE called Johnson's phone number. This was one of the last calls EE made prior to the discovery of EE's body.

II. ARGUMENT

Rule 403 of the Federal Rules of Evidence provides that otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. "The term 'unfair prejudice,' . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," such as on the basis of emotion. *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "Because all probative evidence is to some extent prejudicial, [the Seventh Circuit has] consistently emphasized that Rule 403 balancing turns on whether the prejudice is *unfair*." *United States v. Eads*, 729 F.3d 769, 777 (7th Cir. 2013) (citation omitted) (emphasis in original).

The government expects the main issue at trial to be the identity of the heroin supplier. Here, the circumstances surrounding the deceased's departure from the hospital, travel to the motel in Rock Island, and then finally the actions she took at her residence and the evidence left behind after her death, are all relevant and material to the jury's understanding of the timeline of events and the elements of the crime.

Photos 40 and 46 depict the scene as the deceased was found. In particular, photo 46 shows the deceased wearing a medical bracelet. This will help the jury understand the timeline; that EE left the hospital, and the series of events that unfolded happened within hours of her departure. Additionally, photo 46 shows an open cell phone still in the deceased's hand. This also corroborates the timeline; witnesses will testify that the last two phone calls placed by the deceased were at 1:40 pm to Genesis Hospital and to the defendant. Evidence will also show that it was from that phone that the deceased made contact with the defendant to purchase heroin and that the police used the same phone to set up the subsequent controlled buy with the defendant after EE's death. Photo 56 depicts more of the deceased's face and arms, showing the discoloration of the body resulting from livor mortis as well as blood from the heroin injection site. *United States v. McVeigh*, 153 F.3d 1166, 1203 (10th Cir. 1998) ("even 'graphic depictions' of murder are relevant to support 'other evidence about how the crime occurred, even when the element is uncontested – indeed, even when the defendant offers to admit to the element.'") (quoting *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997)); *United States v. Fields*, 483 F.3d 313, 355-56 (5th Cir. 2007) (despite the fact that some of the points made by photos were not in dispute, the government needed the photos to demonstrate that the body had decomposed too much for much physical evidence to be found, a point made more effectively with images rather than vague generalizations).

Not only are the photos probative, they are not unfairly prejudicial because they allow the government to present to the jury, in a conservative manner, a more complete, visual picture of events as opposed to relatively vague testimony. The government believes the jury will expect to see photos of the deceased as she died and may hold the failure to produce such photos against the government. *Gonzalez,* 127 F.3d at 621 (two photos of dead men on the sidewalk riddled by

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bullets were admissible because "limiting the proofs to clinically abstract propositions may prevent the jurors from acquiring an accurate picture of events, and that disappointing their expectations about what evidence would normally be available to establish a proposition may lead them to draw inaccurate inference about what actually happened (based on conjectures about why evidence is being hidden from their view)."); *Old Chief,* 519 U.S. at 188 (government is entitled to present relevant evidence regardless of stipulation because "there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. . . . A prosecutor who fails to produce [such expected evidence], or some good reason for his failure, has something to be concerned about" because "triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.").

As is evident in the complete photo pack, the three photos chosen by the government are among the most conservative ones available that still allow the government to prove its case. *United States v. Briseno*, 88 F. Supp.3d 849, 851 (N.D. Ind. 2015) (in case involving six murders, prosecutor could juxtapose in opening statement a photo of each victim while alive with a photo of each victim after being murdered where "the government has not chosen the most inflammatory photos" and its proof goes "as far as the government's proof needs to go to prove the murders").

The Court may allow these photos to be presented to a jury where the "fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of . . . unfair prejudice . . ., rather than under any general requirement that evidence is admissible only if directed to matters in dispute." Fed. R. Evid. 401 advisory committee's note.

Here, there is no danger of unfair prejudice in the three conservative photos, given that "no rule of law . . . limits the prosecutor to one piece of evidence in support of each element of the offense, . . .even when the element is uncontested." *Gonzalez*, 127 F.3d at 621. "A criminal defendant may not stipulate or admit his way out of the full evidentiary force of the Government's case." *Old Chief,* 519 U.S. at 186. The government is entitled to "demur at a defense request to interrupt the flow of evidence telling the story in the usual way." *Id.* at 188-89.

WHEREFORE the government respectfully requests that the Court permit the government to introduce photos of the deceased as set forth above.

Respectfully submitted,
JAMES A. LEWIS
United States Attorney

By: */s/ Crystal Correa*
Crystal Correa
Assistant United States Attorney
318 S. 6th St.
Springfield, Illinois 62701
Tel: (217) 492-4450

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to defense counsel.

/s/ Crystal Correa
Crystal Correa
Assistant United States Attorney

Exhibit Seven: Governments Motion For Protective Order

E-FILED
Thursday, 17 December, 2015 03:21:03 PM
Clerk, U.S. District Court, ILCD

Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Criminal No. 4:15-cr-40032**
	)	
ANTHONY JAMES JOHNSON,	)	
	)	
Defendant.	)	

GOVERNMENT'S MOTION
FOR PROTECTIVE ORDER

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby requests that the Court issue an order providing for the use of relevant, protected health information at trial but prohibiting the parties from using or disclosing such information for any other purpose pursuant to the Health Insurance Portability and Accountability Act (HIPAA).

Defendant Johnson is charged with distributing heroin to an individual referred to herein as "EE", causing EE's death. Evidence at trial will establish that on the morning of March 30, 2015, EE was admitted to Genesis Medical Center, Davenport, IA, for complaints related to drug withdrawal and substance abuse. EE was a heroin addict who had struggled during the year leading up to her death to quit using the drug. EE had been admitted to Genesis several times previously and treated with standard anti-withdrawal and anti-anxiety drugs such as diazepam and lorazepam.

On this occasion, EE's medical doctor, a doctor employed by the practice group Sound Physicians, Davenport, IA, prescribed therapeutic doses of diazepam while EE was in the

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hospital, and medical personnel administered those dosages as ordered. On the morning of March 31, 2015, EE was discharged from the hospital. Shortly thereafter, she met her regular heroin supplier, Johnson, in Rock Island, IL, and purchased from him a quantity of heroin. EE went home, injected the heroin, and died. Police searching EE's residence found a number of prescription drug bottles. Based on the number of pills remaining, dates prescribed, and instructions concerning administration of the drugs, EE appeared to have taken the drugs as prescribed by her doctors. The post-mortem toxicological analysis of EE's bodily fluids revealed evidence of heroin usage (heroin metabolites) and diazepam ingestion. The autopsy report indicated that EE died of "mixed drug (heroin and diazepam) intoxication."

At trial, the government will be obligated to prove that Johnson's heroin was the "but for" cause of EE's death, that is, EE would have lived had she not injected the heroin. *Burrage v. United States*, 134 S.Ct. 881, 888-90 (2014).

Accordingly, the government intends to elicit the testimony of EE's doctors and other medical personnel that, as reflected in EE's medical records, the diazepam was administered correctly and in therapeutic dosages, and EE would not have died from the diazepam. The government also intends to elicit testimony from medical personnel that at the time of discharge from Genesis, a few hours before her death, EE was in good health.

The government obtained the records of EE's medical treatment from Genesis pursuant to a grand jury subpoena,[1] and such records have been produced to the defense during the course of discovery.

Regulations promulgated under HIPAA provide that disclosures of protected health information may be made in judicial proceedings if the Court issues a qualified protective order

[1] Genesis properly provided the records pursuant to grand jury subpoena. 45 CFR §164.512(f)(1)(2)(B).

that (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested, and (2) requires that the information be returned to the covered entity, here, Genesis or Sound Physicians, or destroyed at the end of the litigation. 45 CFR §164.512(e)(1)(v).

Accordingly, the government requests that the Court issue an order allowing at trial the use of testimony by medical personnel and medical records concerning (1) EE's prior course of treatment at Genesis, Sound Physicians, and elsewhere for substance abuse or addiction during the year leading up to her death, including medications prescribed, (2) the state of EE's health upon admission to Genesis on March 30, 2015, EE's state of health during her ensuing hospitalization, and her health at the time of discharge on March 31, 2015, including the results of medical testing during this period of hospitalization, (3) the type, amounts, and timing of drugs administered to EE by medical personnel during said period of hospitalization, (4) instructions by medical personnel to EE concerning use of prescription drugs and other matters at the time of discharge.

The government also requests that the order (1) authorize the doctors and other medical personnel involved in the treatment of EE to participate in pre-trial interviews with government agents and prosecutors, (2) prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested, and (3) require that the information be returned to the covered entity, here, Genesis, or destroyed at the end of the litigation.

Further, since trial presently is scheduled for March 14, 2016, and the government intends to issue trial subpoenas to medical personnel, interview them prior to trial, and provide the defense with any resulting discoverable information, the government requests that the Court

issue such order no later than January 4, 2016. This date will provide the defense with the normal time to respond to this Motion.

WHEREFORE the government respectfully requests that the Court issue an order allowing the use of relevant, protected health information at trial but prohibiting the parties from using or disclosing such information for any other purpose pursuant to HIPAA.

Respectfully submitted,
JAMES A. LEWIS
United States Attorney

By: *_/s/ Donald Allegro_*
Donald Allegro
Assistant United States Attorney
1830 Second Avenue, Suite 250
Rock Island, Illinois 61201
Tel: (309) 793-5884

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to defense counsel.

*_/s/ Donald Allegro_*
Donald Allegro
Assistant United States Attorney

Exhibit Eight: Governments Instruction No. 22 Cause of Death

Exhibit 8

GOVERNMENT'S INSTRUCTION No. 22

CAUSE OF DEATH

If you find that the defendant distributed heroin, you may find that the defendant's heroin was the cause of [redacted] death if the heroin was independently sufficient to have killed her. Alternatively, if you find that the defendant's heroin combined with other drugs or factors to produce [redacted] death, you may find that the heroin was the cause of death if [redacted] would have lived but for her use of that heroin. That is, you may find the heroin distributed by the defendant was the cause of [redacted] death if, so to speak, the defendant's heroin was the straw that broke the camel's back.

21 U.S.C. § 841(a)(1); *Burrage v. United States,* 134 S. Ct. 881, 887 (2014)

Exhibit Nine: Governments Instruction No. 21 Distribution of Heroin Resulting in Death

Exhibit 9

GOVERNMENT'S INSTRUCTION No. 21

DISTRIBUTION OF HEROIN RESULTING IN DEATH

The defendant is responsible for [redacted] death if the defendant distributed to [redacted] the dose of heroin, or was in the chain of distribution of the dose of heroin, that killed [redacted]

United States v. Walker, et al, 721 F.3d 828 (7th Cir. 2013), *vacated on other grounds by, Lawler v. United States,* 124 S.Ct. 2287 (May 19, 2014).

Appendix

VIOLENT CRIME INVESTIGATION CHECKLIST

I. INITIAL RESPONSE

A. Dispatch police to scene

1. Note dispatch information
2. Be aware of persons or vehicles leaving the scene
3. Approach cautiously
4. Assess safety

B. Emergency care

1. Assess victim injuries
2. Call for medical personnel
3. Guide and control medical personnel at scene
4. Document medical personnel and actions at scene
5. Obtain dying declaration as appropriate
6. Document statements by persons at scene
7. Document statements during transport
8. Control victim property and evidence during and after transport

C. Secure and control persons at scene

1. Control persons at scene
2. Identify persons at scene
3. Exclude unauthorized and non-essential personnel from scene

D. Establish and preserve scene boundaries

1. Identify focal point of the scene and extend outward
2. Establish physical barriers
3. Document entries and exits of all persons
4. Mark and protect evidence at scene
5. Document original location(s) of victim(s) and objects

E. Transfer control of scene to chief detective

1. Initial responders brief the detective
2. Initial responders assist in control of scene
3. Initial responders transfer entry/exit and other documentation to detective

F. Document actions and observations at scene

1. Detective documents initial observations at the scene
2. Detective documents conditions at scene
3. Detective documents persons and statements of persons at scene
4. Detective documents his own actions and those of others at scene

II. PRELIMINARY EVALUATION OF SCENE

A. Assess the scene

1. Debrief first responders
2. Evaluate or establish path into scene
3. Reevaluate scene boundaries and security
4. Determine scene investigation priorities
5. Establish a CP/staging area outside the scene
6. Establish communications between multiple scenes
7. Establish a secure location for evidence storage
8. Ensure witnesses have been identified and are separated
9. Canvass the surrounding area and document findings
10. Conduct initial documentation and photography of conditions that may change while scene is being processed

B. Conduct scene walk-through and initial documentation

1. Take preliminary photos and make rough sketches and notes
2. Identify and protect fragile or perishable evidence

III. PROCESS THE SCENE

A. Determine investigation team composition

1. Assess additional personnel needs
2. Assess forensic needs

3. Assess security needs
4. Document and assign tasks to team members

B. Control contamination

1. Limit access to essential personnel
2. Use established pathways
3. Consider collection of elimination samples
4. Establish equipment and trash staging areas
5. Use protective equipment to minimize contamination
6. Clean, sanitize, or dispose of tools and equipment between collections

C. Document the scene

1. Document times of arrival and departure
2. Determine types of documentation needed (photos, videos, checklists, evidence logs, etc.)
3. Photograph the scene (inside-out or outside-in), including items of evidence in place
4. Consider videotaping the scene
5. Prepare sketches and take measurements
6. Document transient conditions (smells, sounds, etc.)
7. Document environmental conditions (temp, humidity, rain, light, etc.)
8. Collect dispatch tapes and police car videos/recordings

D. Area canvass

1. Locate and interview witnesses
2. Identify video/photographic/audio surveillance in vicinity
3. Document vehicles parked within appropriate radius of scene
4. Check police/fire/other public records for stops, tickets, calls for service, etc. in vicinity before/at/after time of crime
5. Locate evidence outside immediate scene (expended bullets, blood trails, discarded instrumentalities, etc.)
6. Locate and search trash sites

E. Collect evidence

1. Identify types of evidence present
2. Focus on easily accessible and open evidence progressing to out-of-view evidence
3. Conduct a systematic search (spiral, grids, zones)
4. Determine progression of collection methods so initial collection does not compromise subsequent collection
5. Monitor environmental conditions that may affect evidence
6. Package the evidence with proper packaging material, name of collector, dates, and case identifiers
7. Document description of evidence, condition, location collected, who collected it, and when
8. Maintain chain of custody
9. Securely transport
10. Submit for analysis without delay (to avoid tampering claims)

F. Impression evidence (footwear, tire tread)

1. Locate by visual, lighting, or chemical techniques
2. Develop by photography or chemical enhancement
3. Collect by photography, physical lifting, or physical collection of the item
4. Consider elimination samples
5. Package and document

G. Latent prints (fingers, palms, feet)

1. Locate by visual, lighting, or chemical techniques
2. Develop by photography, chemical, or powder
3. Collect by photography, physical lifters, or taking the actual item
4. Consider elimination samples
5. Package and document

H. Biological evidence (blood, semen, saliva, urine, perspiration, tissue, bone, hair, fingernails, teeth)

1. Locate by visual, lighting, or chemical

2. Collect the stained portion, the actual item, or representative portion

3. Collect control samples

4. Package (air dryable) and document

I. Arson/explosive evidence

1. Locate by visual or smell

2. Document by photography, video, notes, and sketches

3. Collect liquid residues or bomb components

4. Collect a burned sample from point of origin

5. Package (nonporous containers) and document

J. Trace evidence (hair, fibers, glass, paint, gunshot residue, entomological (insects), botany, soil, cosmetics, oils, plastics)

1. Locate by visual, lighting, or taping

2. Collect manually (tweezers, forceps, gloved hand), by taping, by scraping, by vacuuming, or entire item

3. Collect control samples

4. Package and document

K. Victims

1. If deceased, photograph victim, injuries/wounds, and possessions at scene from all angles, far and close, and over time as items are removed from the body or the body is moved

2. If not deceased, photograph at scene to the extent possible and at hospital or police station

IV. PROCESS THE DEFENDANT

A. Photograph

1. injuries or lack thereof

2. clothing

3. hands

4. tattoos, scars, etc.

B. Take fingerprints

C. Collect samples (hair, blood, fingernail scrapings, handwriting samples, items on clothing, GSR, etc.)

D. Collect clothing including shoes

E. Search person and effects

F. Check for criminal history, warrants, other police contacts, property ownership, welfare records, leases/rental contracts, telephones/pagers, utilities, email, employment history, education history, firearms, vehicles, associates, monikers, gang affiliation, etc.

G. Collect instrumentalities, weapons, etc.

H. Search residences, places of employment, storage lockers, vehicles, etc.

I. Observe and monitor, particularly interaction with co-defendants

J. Prepare for interview

K. Interview

L. Ask for polygraph

V. PROCESS THE VICTIM

A. Arrange for medical transport for autopsy

B. Take finger and palm prints before autopsy

C. Photograph body and victim's possessions from arrival at autopsy through completion of autopsy

D. Detective recovers victim's clothing and possessions

E. Detective present during autopsy

F. Detective receives evidence recovered during autopsy (blood, hair, fingernail scrapings, bullets, etc.)

VI. SUBMIT EVIDENCE FOR ANALYSIS AND RECEIVE RESULTS

VII. LOCATE AND INTERVIEW WITNESSES

VIII. CONDUCT SEARCHES AND COLLECT ADDITIONAL EVIDENCE AS INDICATED

IX. RECONSTRUCT THE CRIME

A. Consider evidence, statements, and analyses based on above

B. Determine actions of victim and defendant prior to and during crime

C. Establish actions of defendant after crime

D. Examine backgrounds of victim and defendant

E. Determine motive

F. Tie defendant to instrumentalities or other objects or possessions involved in crime

The Effective Use of a Criminal as a Witness: A Special Problem

Stephen S. Trott
Senior Circuit Judge
United States Court of Appeals for the Ninth Circuit

"[T]he informer is a vital part of society's defensive arsenal."
McCray v. Illinois, 386 U.S. 300, 307 (1967).

"Without informants, we're nothing."
Clarence M. Kelley, Director, Federal Bureau of Investigation.

"[Our immunity statutes reflect] the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."
Kastigar v. United States, 406 U.S. 441, 446 (1972).

"This Court has long recognized the 'serious questions of credibility' informers pose. We have therefore allowed defendants 'broad latitude to probe [informants'] credibility by cross-examination' and have counseled submission of the credibility issue to the jury 'with careful instructions.'"
Banks v. Dretke, 540 U.S. 668, 701–02 (2004) (citations omitted).

"A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery."
United States v. Bernal-Obeso, 989 F.2d 331, 333–34 (9th Cir. 1993) (citation omitted).

"[An] individual prosecutor has a duty to learn of any favorable evidence [to a defendant] known to the others acting on the government's behalf in the case, including the police."
Kyles v. Whitley, 514 U.S. 419, 437 (1995).

I. Preface

In the hands of an experienced physician, a scalpel is a marvelous tool. It can remove a deadly tumor or repair a diseased heart. The success of such procedures, of course, depends upon the skill of the surgeon because that same scalpel in inexperienced or careless hands can fatally nick a healthy artery, sever an unseen nerve, or even perform an operation on the left knee when the right one is the problem.

A cooperating criminal used as a witness against other criminals is much like a scalpel. Jimmy the Weasel Fratianno can be used to bring down the West Coast Mafia, Sammy the Bull Gravano to unseat mob boss John Gotti, and Michael Fortier to deliver a crushing testimonial blow to Timothy McVeigh in the Oklahoma Federal Building bombing case. In point of fact, one of the most useful, important, and, indeed, indispensable weapons in civilization's constant struggle against criminals, outlaws, and terrorists is information that comes from their associates. But, as in the case of a scalpel, the careless, unskilled, or unprepared use of a cooperating criminal as a witness has the capacity to backfire so severely that an otherwise solid case becomes irreparably damaged, and the fallout can sometimes

wreck a case and even tarnish a prosecutor's reputation or career.

A cooperating criminal is far more dangerous than a scalpel because an informer has a mind of his own, and almost always, it is a mind not encumbered by the values and principles that animate our law and our Constitution. An informer is generally motivated by rank and, frequently, sociopathic self-interest, and will go in an instant wherever he perceives that interest will be best served. By definition, informer-witnesses are not only outlaws but turncoats. They are double-crossers, and a prosecutor not attuned to these unpleasant truths treads without cleats on slippery ice. In a moment, a prosecutor can effectively go from prosecutor to the object of an investigation—with chilling consequences.

Moreover, an informer, even apparently fully on board, can commit perjury, obstruct justice, manufacture false evidence, and recruit other witnesses to corroborate his false stories. After forty years in our justice system, I conclude that the greatest threat to the integrity of our justice process and to its truth-seeking mission—indeed, even to prosecutors themselves—comes from informers poorly chosen for their roles and then carelessly managed and handled.

On the other hand, the reality is that *police and prosecutors cannot do without them—period*. Often they do tell the unalloyed truth, and on occasion, they must be used in court. If a policy were adopted never to deal with criminals as prosecution witnesses, many important prosecutions—especially in the area of organized and conspiratorial crimes—could never make it to court. In the words of Judge Learned Hand in *United States v. Dennis*:

> Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly.

United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950) *aff'd*, 341 U.S. 494 (1951).

As articulated by the Supreme Court, "Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law." *On Lee v. United States*, 343 U.S. 747, 756 (1952).

Our system of justice requires percipience of a person who would testify in court. It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves. Terrorist and Klan cells are difficult to penetrate. Mafia, cartel, and gang leaders use underlings to do their dirty work. They hold court in plush quarters and send their soldiers out to kill, maim, extort, sell drugs, run rackets, and corrupt public officials. To put a stop to this, to get at the bosses and ruin their organizations, it is necessary to turn underlings against those at the top. Otherwise, the big fish go free, and all you get are the minnows. They are criminal minnows to be sure, but one of their functions is to assist the sharks to avoid prosecution. Snitches, informers, coconspirators, and accomplices are therefore indispensable weapons in a prosecutor's battle to protect a community against criminals. For every setback, such as the ones mentioned in this material, there are scores of sensational triumphs in cases where the worst scum of the earth have been called to the stand by the government. Vincent Bugliosi successfully used members of the murderous Manson family as witnesses to put Charles Manson, their leader, away for life. In fact, Sharon Tate's murder went unsolved for months until Virginia Graham, who was serving time for "floating" a bad check, went to the authorities with information from her jailhouse conversation with her dormmate, Susan Atkins. In jail for a different murder, Atkins bragged to Graham about her enthusiastic part in the slaughter of Roman Polanski's wife, Jay Sebring, and others. "The more you kill, the better you like it," said Susan. The rest is history. For her assistance, Graham shared a monetary reward with a second jailhouse snitch, Ronnie Howard.

The prosecutions of the infamous Hillside Strangler, the Grandma Mafia, the Walker–Whitworth espionage ring, the final John Gotti case, the first World Trade Center bombing case, and the Oklahoma City Federal Building bombing are only a few of the hundreds of examples of cases where such witnesses

have been effectively used with stunning success. President Nixon's misdeeds in office might never have been uncovered had it not been for his underlings' decisions to cooperate with the Special Counsel.

The indispensable value of informants to law enforcement officials responsible for investigating Internet crimes and computer hacking is illustrated in the "Anonymous" case. Please note that it was an informant who gave the FBI the information it needed to identify one of the hackers, and then the cooperating hacker himself secretly blew the whistle on his fellow criminals.

> "Hackers Busted After One Becomes FBI Informant" Associated Press, March 7, 2012
>
> The FBI said it captured the legendary hacker known as "Sabu" last June, and he turned out to be Hector Xavier Monsegur, 28, a self-taught, unemployed computer programmer with no college education, living on welfare in public housing in New York.
>
> His exploits made him a hero to some until he made a rookie mistake — he posted something on-line without cloaking his IP address, or computer identity — and someone tipped off the FBI.
>
> Soon after his arrest, he pleaded guilty and began spilling secrets, leading to charges Tuesday against five people in Europe and the U.S. and preventing more than 300 attacks along the way, authorities said.
>
> . . . .
>
> Law enforcement officials said it marked the first time core members of the loosely organized worldwide hacking group Anonymous have been identified and charged in the U.S.
>
> . . . .
>
> Monsegur and the other defendants were accused in court papers of hacking into corporations and government agencies around the world, including the U.S. Senate, filching confidential information, defacing websites and temporarily putting victims out of business. Authorities said their crimes affected more than 1 million people.
>
> Prosecutors said that among other things, the hackers, with Monsegur as their ringleader, disrupted websites belonging to Visa, MasterCard and Paypal in 2010 and 2011 because the companies refused to accept donations to Wikileaks, the organization that spilled a trove of U.S. military and diplomatic secrets.
>
> Also, prosecutors said, Monsegur and the others attacked a PBS website last May and planted a false story that slain rapper Tupac Shakur was alive in New Zealand.

Larry Neumeister & Raphael Satter, *Hackers Busted After One Becomes FBI Informant*, YAHOO! NEWS (Mar. 6, 2012). The final chapter in the adroit use of Hector Monsegur occurred on May 27, 2014. Facing a sentence of twenty-one to twenty-six years, Monsegur received at the request of the prosecutors a sentence of "time served" with one year of supervised release. Between the time of his arrest and his sentence, Monsegur worked tirelessly with the FBI to stop hackers, and he also taught the agents how to be better at their assigned responsibilities.

In complex fraud cases, an insider is often indispensable in order to unravel and to explain the intricacies of the scam. A good example is the "Crazy Eddie" case involving a $100 million financial statement fraud including income tax evasion, securities violations, and international money laundering. Eddie Antar, the President and CEO of Crazy Eddie's Electronics, was finally sent to prison on the testimony of his cousin, Sam Antar, the company's CFO. Check out the chapter "The Antar Complex" in *Frankensteins of Fraud*, by Joseph T. Wells. This is a "must-read" for white collar prosecutors. Sam Antar now consults (for free) with fraud auditors and investigators both inside and outside the government.

However, while you are at it, read also another chapter in Wells's book, the chapter called "It's a Wonderful Life." This chapter details how an "insider" with his own agenda double-crossed the FBI during the investigation of price-fixing at Archer Daniels Midland, "the agri-chemical giant known to Sunday morning television [in 1990] as the 'Supermarket to the World.'" JOSEPH T. WELLS, FRANKENSTEINS OF FRAUD (2000). This insider, Mark Whitacre, sued his FBI handler and the Bureau for abuse (unsuccessfully) and ended up pleading guilty to thirty-seven counts of fraud.

But how does a prosecutor become adequately schooled and skilled in this peculiar area of his or her craft? The required curriculum cannot usually be found in the classrooms of our law schools, but only on the streets and in the jails and courtrooms of our towns and cities. Knowledge here comes from the trenches, from the veterans, from the school of hard knocks, and, hopefully, it comes before troublesome mistakes are made.

I draft this outline, not with the goal of enabling any person to win a given case, but to attempt to shed disinfecting light on a recurring problem that frequently knocks the justice system loose from its moorings and causes it to capsize.

Furthermore, I do not claim to have all the answers to the challenges I discuss. Each case and each witness will be different. All I can do is alert you to the problems with the hope that your solutions will enable you to achieve your goals and those of your agency. As the motto of the United States Department of Justice says, "The government always wins when justice is done." Let us begin.

II. Witness Types

In the early stages of a prosecutor's career, most prosecution witnesses are normal citizens who, by virtue of some misfortune or otherwise, have been either the victim of, or a witness to, a criminal act. Mr. Jones, for example, is called to the stand and testifies that he was swindled out of his life's savings; Mr. Wilson tells the jury about his stolen car; Mrs. Johnson identifies the body of her son who was killed in a robbery; or Agent Bond recounts his discovery of cocaine in the defendant's luggage at the airport.

With these kinds of witnesses, character, credibility, and integrity are usually not critical issues, either during the investigation of the case or in court. The most generally expected from the other end of the table is a defense based on the assertion that such a witness—although admittedly a good person—is simply mistaken as to what he or she believes was seen or heard.

Sooner or later, however, another type of not-so-reliable witness starts to make an occasional appearance on the subpoena list, and the prosecutor begins to venture out onto a totally different sea, where he or she is frequently ill-prepared to navigate—the watery and treacherous domain of the accomplice, the coconspirator, the snitch, and the informer. After Mr. Jones testifies as the victim of a swindle, one of the swindlers is called to the stand in an attempt to convict the mastermind who cooked up the scheme and who hid all the loot in foreign bank accounts. After Mr. Wilson laments the disappearance of his Mercedes, the car thief is called in pursuit of the kingpin who, for profit, runs hot German cars into Mexico. After the mother of the murdered bank teller identifies her dead son, the defendant's cellmate is called to recount a jailhouse confession; and after agent Bond identifies the cocaine, the mule points the finger of guilt at the brains of the organization.

The usual defense to this kind of criminally involved witness is never just a polite assertion that he is mistaken. Not surprisingly, the rejoinder, ordinarily mounted amidst loud, indignant, and sometimes even enraged accusations, is that the witness is lying through his teeth for reasons that should be patently obvious to every decent person in the courtroom, especially the jurors.

In this vein, the surprised prosecutor, on occasion, will discover that his or her own personal integrity is on the line. Such an unexpected turn of events is not a laughing matter. It is neither helpful to a prosecutor's case nor very comforting personally to have the defense persuasively arguing to the court and jury that you, as a colossal idiot, have given immunity to the real killer in order to prosecute an

innocent man. Alan Dershowitz in his book, *The Best Defense*, describes this defense tactic as follows:

> In representing criminal defendants—especially guilty ones—it is often necessary to take the offense against the government: to put the government on trial for its misconduct. In law, as in sports, the best defense is often a good offense.

ALAN M. DERSHOWITZ, THE BEST DEFENSE xiv (1983) (emphasis omitted).

In this perilous world, "character," "bias," and "credibility" aren't just interesting issues in a book about evidence—they become the pivotal win or lose elements in the prosecution's case, from start to finish. How these witnesses are managed and how these issues are approached and handled when they arise—*especially during discovery*—may determine the success or failure of the case.

There are two principal reasons why this type of frontal offensive can be marshaled against these kinds of witnesses. Unfortunately, the two reasons and their legal and tactical ramifications are not fully appreciated by a prosecutor or an investigator until he or she has been in the profession long enough to observe firsthand a case or an investigation go monumentally sour because of a treacherous witness. Working with the Joneses, the Wilsons, the Johnsons, and the Bonds of the world gives an unseasoned prosecutor a false sense of security with all witnesses. The two reasons appear obvious enough on paper, but unless they are uppermost in a prosecutor's or an investigator's consciousness at all times when dealing with criminals as witnesses, serious and irremediable errors in judgment can occur.

The first of the two reasons relates to the general nature of a person/witness predisposed to criminality. Read it and commit the message to memory:

1. Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law.

This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers, and thieves are not far behind. Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom “truth” is a wholly meaningless concept. To some, “conning” people is a way of life. Others are just basically unstable people. A “reliable informant” one day may turn into a consummate prevaricator the next. In case you have any doubts about the observation that criminals are capable of unfathomable lies under oath, try on for size this essentially accurate article from the front page of the *Los Angeles Times*.

Denver - Marion Albert Pruett’s is an appalling but compelling story.

> Held in federal prison, he bartered his way to freedom by agreeing to testify against a prisoner accused of killing Pruett’s cellmate [who himself was scheduled to testify for the government]. In exchange, the U.S. [government] took him into its secret witness security program, giving him a new identify and a new start in life.
>
> By last October and by his own account, however, Pruett had committed a string of [six] bank robberies and had murdered two convenience store clerks, near Denver, another in Fort Smith, Arkansas, and a savings and loan employee in Jackson, Mississippi. Now back in jail, Pruett recanted the testimony that had led to his freedom and declared that he, Marion Pruett, had actually killed his cellmate.

The full story of Pruett’s rampage is recounted in the book “*WITSEC, Inside the Federal Witness Program*” by Gerry Shur, who created the program and directed it for thirty-four years. This book is mandatory reading for anyone working in this arena.

Or, if Mad Dog Pruett doesn’t stand up the hair on the nape of your neck, how about the story of

Willie Kemp, who, in return for money, trumped up criminal cases against thirty-two innocent people. The *National Law Journal* told the story on February 27, 1995 under this headline:

> Postal Agents Stamped by Scandal:
>
> Scam Exposed
>
> For 15 months, Willie Kemp and the others had infiltrated the Cleveland Post Office, ostensibly looking for evidence against drug users and dealers. Flush with government money, they lived to the hilt, renting fancy cars, living in pricey condos, wearing expensive clothes, and hosting parties.
>
> "The inspectors had arranged for them to be hired as postal workers, so they were getting regular paychecks," Mr. Maloney [the ex-prosecutor] says. "But they also were being paid about $100 extra per transaction. On top of that, they were pocketing the drug buy money the inspectors were giving them."
>
> Prosecutors and defense attorneys believe the inspectors obtained the names of postal employees who had signed up voluntarily for substance abuse counseling. At the beginning of the investigation, it appears, agents gave informants a list of workers who could be targets. Several of them were in drug counseling, a fact that was supposed to be confidential.
>
> . . . .
>
> The postal inspectors wired their informants and sent them out with thousands of dollars in buy money. The inspectors never saw the targets and only heard barely audible tapes of the informants striking up conversations and describing the deals.
>
> Then the informants returned to the inspectors with drugs they'd allegedly just purchased.
>
> "If they had searched the informants, the inspectors would have known that the informants were bringing drugs to the deal and had the buy money hidden in their socks following the deal," says Mr. Maloney.
>
> The other voices on the tapes, he says, were "friends paid by Willie Kemp and the other informants to play the role of the postal workers." The drugs[] too were phony. Bags of white powder they said was cocaine purchased from postal employees was really baking soda.
>
> When Mr. Moore was arrested, a public defender recommended that he plead guilty. Insisting that he was innocent, he demanded a trial. "I was certain that once the agents and informants saw me in court, they would recognize I was the wrong person and I would be immediately let go," he told the NLJ.
>
> Instead, in a bench trial, Common Pleas Judge Richard J. McMonagle believed the informants and found Mr. Moore guilty in December 1992 on all four counts of drug trafficking. In February 1993, as the scheme began to unravel, the judge set aside the conviction.
>
> In November, Leroy Lumpkin became the last of the 32 postal workers indicted to have his case dismissed, according to Mr. Maloney and Cuyahoga County Asst. Prosecutor Sean Gallagher, who took over the investigation when Mr. Maloney went into private practice last year.
>
> Mr. Gallagher says an investigation into the inspectors' conduct is pending.
>
> Informants Convicted

> "All of the informants involved have been convicted of perjury and falsifying evidence and are in prison." Mr. Gallagher says. "The focus now is on the postal inspectors. Did they know what was happening? Did they knowingly commit any crimes?"
>
> The two inspectors in charge of the investigation—Timothy Marshall and Daniel Kuack—were fired. Both declined requests for interviews, and their attorneys did not return calls for comment. The 19 postal workers fired after they were arrested in September 1992 have been reinstated to their jobs.

Mark Curriden, *The Informant Trap: Postal Agents Stamped by Scandal*, NAT'L L. J., Feb. 27, 1995.

Another example is Operation Corkscrew in Cleveland in the early 1980s. In that embarrassing meltdown, an informer-undercover operative who promised to make cases against allegedly crooked judges pocketed the intended bribe money instead and then manufactured bogus tape recordings of the supposed bribes. On the tapes, the informer pretended to be a crooked judge who had just taken the money. The informer and two other imposters who also falsely played the parts of judges ended up in jail.

Mark Whitacre's scary saga has been turned into a book called *The Informer*, by Kurt Eichenwald. This true story of deceit and dangerous double-dealing is a must-read for all prosecutors and investigators.

A striking example of what you may be up against occurred in Boston in 1984. The government was prosecuting an associate of the mayor for political corruption. The government's key witness was George Collatos, who had cut a sweet deal in return for his testimony against the mayor's associate, Theodore Anzalone. Unfortunately, and unknown to the government, Collatos secretly contacted the defendant before the trial and asked for $200,000 in return for "truthful" testimony that would result in an acquittal. When the defense confronted Collatos on cross-examination with this extortionate request and asked him point blank if it happened, Collatos said, "I do not remember." Not surprisingly, Anzalone was acquitted and Collatos was later convicted of perjury. This was not an example of the successful use of the government's time and resources, but it does unmask the nature of the challenge.

Read Northern Mariana Islands v. Bowie for the saga of a cooperating witness (C.W.) caught on paper attempting to "influence" the testimony of other C.W.s in his favor and against a co-defendant. *Northern Mariana Islands v. Bowie* 243 F.3d 1109 (9th Cir. 2001). The prosecutors' failure to respond appropriately to this information resulted in the reversal of a conviction. *Id.* at 1125.

The second of the two reasons why converted criminals come under such heavy fire pertains to the general disposition of jurors towards informers. To a prosecutor, it is of equal importance as the first. Commit it to memory:

2. Ordinary, decent people are predisposed to dislike, distrust, and frequently despise criminals who "sell out" and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such "scum."

A graphic example of jurors' unfavorable reactions to an informant-witness can be found in the DeLorean case. The following is an excerpt from the *American Lawyer* about one of the government's main witnesses:

> Testimony from a 'Creep'
>
> Ruth Sutton remembers that when James Timothy Hoffman, a jowly 43-year-old 225-pounder in a government-purchased brown polyester suit, took the stand as the prime witness against John DeLorean, "he never looked anyone in the eye. He was just not believable from the minute he spoke."
>
> "I believed nothing Hoffman said," recalls Jo Ann Kerns. "And I kept thinking to

myself, 'If Hoffman can do this to DeLorean, he can do this to any of us.'" Kerns's point should not be mistaken for a broader argument about entrapment or sting operations: "I'm all in favor of going after people if the Government knows or has reason to believe that they are dealing in narcotics. Then anything goes. Any tricks that the Government can come up with. But here it was just Hoffman's word. And then we never saw DeLorean on the tapes actually participate in the conspiracy."

Prosecutor Walsh took Hoffman through the story of how he had befriended DeLorean because his son and DeLorean's had played together when the two were neighbors near San Diego in 1980. Hoffman explained that it was the sons' friendship -- not an intention to try to snare DeLorean in a drug deal -- that had led Hoffman to call DeLorean two years later (on June 29, 1982) -- by which time Hoffman, coincidentally, had become a Government informant. "This guy's father of the year," (juror) Holladay recalls thinking to himself. "He's using his own son to make up a story to get money as an informant."

Why hadn't all of Hoffman's conversations with DeLorean been taped, once DeLorean had made his supposed drug deal overture? Because the equipment hadn't been available or had been faulty, Hoffman said.

If DeLorean had really asked on June 30, whether Hoffman still had his "connections in the Orient" necessary to do a drug deal, and Hoffman had said yes, why had DeLorean, desperate as he was, waited until July 11 to come to California to meet with Hoffman? And why, asked Weitzman repeatedly, hadn't that meeting been taped? Hoffman said he didn't know why DeLorean had waited and that the meeting hadn't been taped because the federal agents didn't think it was important enough to arrange for a taping on a Sunday.

"I still figured I was pretty sure DeLorean had been in a conspiracy with Hetrick after Hoffman testified," says Hal Graves, "but I knew one thing for sure: Hoffman is a pitiful, psychopathic liar -- the kind that believes what he's saying but can't tell the truth. I can tell people like that. My own father used to tell stories and they'd change over the years, yet he'd still believe them. That's how this guy was."

Every juror, except Wolfe, uses words and phrases like "completely unbelievable" (Jackie Caldwell's description) in assessing Hoffman, while Wolfe says "[h]e was probably lying a lot." For some, like Andersen, Sutton, Kerns, Dowell, Lahr, and Holladay—jurors who would never see the full elements of conspiracy—this was not as important as it was for the others, like Graves, Caldwell, Gelbart, and Hoover. Later, their view of the case—that DeLorean had indeed conspired in some way with Hetrick but that Hoffman couldn't be counted on to be telling the truth about his initial contact with DeLorean—would be the fulcrum of the jurors' entrapment decision.

A third example of this ever-present problem with jurors occurred in a major federal corruption/fraud case in Los Angeles in 1985. The headlines and partial text from the *Los Angeles Times* follow:

Los Angeles - Jury Acquits Bank Official in Moriarty Fraud Case.

A Los Angeles federal jury Monday acquitted former Orange County bank official Nelson Halliday of conspiring with confessed political corruption figure W. Patrick Moriarty in an alleged money-laundering scheme.

. . . .

The verdict stunned federal prosecutors and prompted a suggestion by Halliday's attorney that the government may have problems in its continuing investigation of

political corruption because of Moriarty's lack of credibility as a witness.

. . . .

"They flat didn't believe the man," [Halliday's attorney] said of the jury's verdict Monday afternoon. "I would love to defend anybody with Moriarty as a complaining witness."

. . . .

Charles Williamson, 49, of Garden Grove, one juror who said he *believed that Halliday was guilty* on all counts, confirmed that the jurors simply didn't believe Moriarty's testimony.

"Had he *not* been on the stand *maybe the evidence would have been enough*.'

William Overend, *Jury Acquits Bank Official in Moriarty Fraud Case*, L.A. TIMES (July 16, 1985) (emphasis added).

With the foregoing in mind, let me confront you with some observations that color the answer to the threshold question of whether or not to use an accomplice or a snitch as a witness in the trial of any particular case. The observations are as follows:

1. Calling to the stand an actual participant-eyewitness to the crime who knows the criminals and their escapades—superficially, a devastating witness—can backfire, even if he is telling the truth, and have the unintended effect of making your case *worse* rather than better, *if* the eyewitness is a crook who has bartered for some sort of consideration in return for his testimony.
2. Evidence amounting to a complete confession—normally the end of a defendant's chances with a jury—can actually have the unanticipated effect of making your case *weaker* rather than stronger, *if* the witness upon whom the jury has to rely for the truth of the testimony is a person they will not trust.

Why? Because in the hands of a skillful defense tactician, all the liabilities and the *inseverable baggage* that such a witness brings to your case, along with the "confession" or the revelations, become the elements of reasonable doubt the defense is looking for and the brush with which the rest of your case is then tarred. Like the effect of the proverbial red herring, the issue of the defendant's guilt can leak away—as it did in the Moriarty/Halliday case—while the prosecutor attempts to defend against the forceful assertions of deceit and misconduct on the part of the government's witnesses; and once a prosecutor loses control and begins in desperation to defend rather than prosecute, disaster is right around the corner! The defense will go after these witnesses with everything she can find, hoping to make them the vulnerable links in your chain. (Remember, "The best defense is a good offense.")

A sure way to compound this problem is to call more informer-witnesses to the stand than you have to. As with alibi witnesses, if one cracks, they all go down, and possibly so does your case.

In 1991, the *Miami Herald* devoted much of its front page and first section to a negative series of stories about informants. The lead article in the spread demonstrates how ambivalent we are about criminals as witnesses and how their misuse can create chaos:

> Privileged criminals -- lying, cheating and stealing for the United States of America -- infest the courtrooms of the land.
>
> The government labels them CIs, or confidential informants, and they are a booming, megabuck industry that thrives in secrecy -- and almost no public oversight.
>
> Some get rich. Some corrupt cops. Some fabricate testimony. Some trap innocent people. Some get away with -- if not murder -- assault, robbery, and cocaine trafficking.

> Some CIs are extremely effective and proud of what they do. “I'm a magnet for maggots,” says Alex Spiegel, 41, sipping Amstel Light at R.J.’s Landing on the Intracoastal.
>
> Gregarious and charming, Spiegel and his breed could easily call their shadowy enterprise Rats 'R Us.
>
> Bankrolled by burgeoning U.S. drug forfeitures, tax bounties and undercover funds, CIs buy leniency for themselves and twist deftly through a sometimes- careless criminal justice system.
>
> Lawmen argue emphatically they need rats to catch rats. Police simply could not crack big drug and public corruption cases without CIs. “They don't line up to meet you in the National Cathedral,” says Thomas V. Cash, special agent in charge of Miami's Drug Enforcement Administration office.
>
> As the government enrolls more and more informants, almost like an addict, questions about costs, fairness, and effectiveness intensify. So do complaints.
>
> “If Benedict Arnold were alive today, the government would give him an ID, a Mercedes and call him a hero,” says Fred Haddad. “There is such a mania over drugs. No one gives a damn what it takes to stop it.”

Sydney P. Freedberg & Dexter Filkins, *The Shadow World of Snitches: U.S. Pays Megabucks to Confidential Informants*, MIAMI HERALD, July 21, 1991, at 1A.

What this article should teach you among other things is how fast the media *and* an informant will turn against you if something goes wrong. For example, take this case reported in the *New York Times* on July 2, 2014.

“Takeover of Kenmore Hotel: Informer Recalls His Complicity”

> It was as if the Fifth Infantry Division had come marching down East 23rd Street.
>
> Late in the morning of June 8, 1994, police officers, federal Marshals and F.B.I. agents invaded one of New York City’s grand temples of dysfunction: the 22-story, 641-room ulcer known as the Kenmore Hotel.
>
> They ran into the lobby, which stank of mildew and urine. They ran up the stairs, as crack vials crackled beneath their feet.
>
> They battered down doors and rousted residents in that vast rabbit warren. They arrested 18 tenants on charges of drug dealing; the tenants sat, dazed, in handcuffs on the sidewalk.
>
> The takeover of the Kenmore was at the time the largest federal forfeiture to fight drug dealing in American history.
>
> “The Kenmore Hotel has been permeated by violence and become a virtual supermarket of crack cocaine,” Mary Jo White, then the United States attorney in Manhattan, told reporters. Gov. Mario M. Cuomo visited the scene and Mayor Rudolph W. Giuliani held an all-points press conference.
>
> Why not? It was liberation.
>
> There is another more unsettling version. Two police informers now claim that the conquest of the Kenmore was a dirty victory, another chapter in an era in which the police and prosecutors fought a blood tide of homicides, crack and heroin, and too often took disturbing liberties.
>
> . . . .

> A confidential informer, a man whose career in snitching for the police and federal agencies extends back to the Watergate era, said the assault on the Kenmore was constructed of illegalities. This informer, Earl Robert Merritt, described how he had worked with narcotics officers – before and after the takeover – to frame more than 150 Kenmore residents as dealers.
>
> "I planted drugs, I planted guns, I made false reports," Mr. Merritt said. "I was given a list – little stars by the list of tenants who I was suppose to set up."
>
> "I helped send hundreds of people out in handcuffs," he added, "and I'd say 80 percent were innocent."
>
> . . . .
>
> Mr. Merritt took his accusations to the Manhattan district attorney last year. He said an assistant prosecutor in the mid-1990s had directed him to swear falsely that he had witnessed certain crimes.
>
> . . . .
>
> A quick-witted fellow with owlish eyes, Mr. Merritt lived in an ethical netherworld. He was a crack addict, and in the 1980s had been convicted of felony fraud and became a fugitive. (A judge later tossed out the conviction.)
>
> . . . .
>
> You cannot paint me with a halo on my head," he said. "I'm a nasty son of a bitch."
>
> . . . .
>
> Mr. Merritt offers his own caution: "A confidential informant is a very powerful character. We don't need a badge or gun. And we ruin lives."
>
> . . . .
>
> Mr. Merritt described being driven to the Manhattan district attorney's office on a rainy evening. A prosecutor was typing statements for him, which he was going to swear to before a judge.
>
> "Read this carefully and don't stray from the statement," the prosecutor told him, he said. "You're going to have to swear to this. Do you have a problem, Tony?"
>
> He said he looked at the prosecutor and asked: "So you want me to commit perjury?"
>
> "I don't want to hear that," the prosecutor replied, according to Mr. Merritt.
>
> . . . .
>
> "This is not just a Kenmore story," Mr. Merritt said. "This was happening everywhere."

Michael Powell, *Takeover of Kenmore Hotel: Informer Recalls His Complicity*, N.Y. TIMES (July 2, 2014).

This contextual perspective is not designed to scare you off or make you gun-shy, but instead to recognize the validity of the maxim that "to be forewarned is to be forearmed." If you know where the pitfalls are, you will be able successfully to avoid them.

The appropriate questions, therefore, are not really whether criminals should ever be used as government witnesses, but *when* and if so, *how*? The material covered in the following outline of my

presentation is designed to do nothing more than to accomplish the two main goals of a prosecutor and an investigator:

1. To discover the truth, the whole truth, and nothing but the truth; and
2. To present persuasively and forthrightly what you have unearthed to a jury and to convince them to rely on it in arriving at a just verdict. As the Supreme Court said in *Brady v. Maryland*, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system . . . suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

A. Rules of Thumb

Tread with care. In this regard, there are a few important rules of thumb that should normally be observed:

1. The Department of Justice, the FBI, and, most probably, your own office maintain at all times guidelines regarding the use of confidential informants. Be familiar with those guidelines.
2. Make agreements with "little fish" to get "big fish." A jury will understand this approach, but they may reject out of hand anything that smacks of giving a fat deal to a "big fish" to get a "little fish." It will offend their notion of basic fairness and play into the hands of the defense. In a well-known East Coast legal disaster, a police chief was let off the hook relatively easily in order to prosecute subordinates. Angered at this inverted set of priorities, juries acquitted all the subordinates. It is also the case that sometimes, even though you have a bigger fish in mind, the one you already have in the net is simply too big to give anything substantial in return for his cooperation. Don't keep going when the stakes are no longer favorable. *You must be prepared in compelling terms to defend and justify the deal you have made to the jury in your final argument, after it has been attacked by the defense.* "Why was this witness given immunity? Because it is unacceptable to get just the bagman and let the crooked senator get away, that's why. The integrity of government—indeed our very way of life—demands it!"
3. Do not give up more to make a deal than you have to. This is a temptation to which too many prosecutors succumb. If you have to give up anything at all, a plea to a lesser number of counts, a reduction in the degree of a crime, or a limitation on the number of years that an accomplice will serve is frequently sufficient to induce an accomplice to testify; and it sounds more appropriate to jurors when they discover that both fish are still in the net. Total immunity from prosecution should be used only as a last resort. Convict them and then make them testify before the grand jury. Resort to post-conviction "use immunity" if necessary. Sometimes if the smaller fish is firmly in the net, all you have to give him is "an opportunity to help himself" at sentencing. Do this without winking. Tell him it's his choice. You will do no more than advise the judge of his cooperation and "substantial assistance" pursuant to section 5K1.1 of the Federal Sentencing Guidelines, or lack thereof, as the case may be. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2017). This frequently works because the criminal has no other options to get what he wants.

   Section 9-27.600 of the United States Attorneys' Manual makes it clear as a matter of policy that if possible, an offender should be required "to incur . . . some liability for his/her criminal conduct." U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.600 (2017). Non-prosecution agreements must only be used as a last resort and should be avoided unless there is no other avenue that will lead to your objective. See *id.* § 9-27.600–.650 for Department policy and procedure in this area.

   It is a good idea in a nonthreatening way to remind the defendant's attorney that a sentencing court may properly consider the defendant's refusal to cooperate in the investigation of a related criminal conspiracy after his Fifth Amendment rights are gone. *Roberts v. United States*, 445 U.S. 552, 556 (1980). He can stand before the judge as a person who helped or a person who did not help.

The option is his. You will be surprised how often this will be all you need. Acceptance of responsibility becomes a premium at sentencing. Be tough. The crook will respect you. It must appear that he needs you, not vice versa.

4. You *must always be in control*, *not the witness*! The moment you sense that the witness is dictating terms and seizing control of the situation, you're in very deep trouble, and you must reverse what has happened. *You* must be in control, not your informants. Do not fix their parking tickets, smooth over their rental car defalcations, or intervene in all their problems with the law without expecting repercussions later on. Inexperienced prosecutors and investigators tend to coddle such witnesses for fear of losing their testimony. This fear stems from not understanding what drives them. The basic deal is all you need to keep them on board. As to all the rest, they are just using you, and you have lost control. Be resolute. Turn down any inappropriate request, but remember *a mere request* by an informer witness for *any* form of consideration is *Brady* material. If they won't cooperate with you, get rid of them!

5. The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him, and the snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony out of the air and stray details. This is why O. J. Simpson's lawyers asked that he be in solitary quarters while in the Los Angeles County Jail. They knew any prisoner who got close to him might manufacture incriminating statements.

   Possibly the most infamous episode of jailhouse snitch perfidy involved Leslie Vernon White, who brought to light the chilling inmate slogans "Don't go to the pen—send a friend" and "Why spend time—drop a dime." *See* ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 63–66 (Praeger 2002). This is just part of his unnerving story:

   > New York Times - California Shaken over an Informer.
   >
   > In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward. Now lawyers and prosecutors must ponder whether fiction was often their method.
   >
   > That is the unhappy implication behind the crisis in law enforcement that has been unfolding in Southern California since an inmate, Leslie Vernon White, who has testified in numerous highly publicized cases, demonstrated in October [1988] how he could fabricate the confessions of other inmates without ever having talked to them. He said later he had lied in a number of criminal cases. . . .
   >
   > Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some of them sentenced to death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.

   Robert Reinhold, *California Shaken over an Informer*, N.Y. TIMES (Feb. 17, 1989).

   Tragically, every generation of prosecutors seems to have to learn these difficult lessons for themselves. The historian George Santayana observed that those who do not learn the lessons of history are condemned to repeat its worst episodes. How true. In 2015, twenty-five years after Leslie Vernon White torched the criminal justice system in Los Angeles, an identical jailhouse informant problem erupted in neighboring Orange County with similar effects. In short, the misuse of jailhouse informants came to light in the death penalty prosecution of Scott Dekraai with such explosive force that it caused Superior Court Judge Thomas Goethals to recuse the Orange County District Attorney's Office from the case. His ruling ignited a firestorm of adverse publicity and public condemnation.

When called as witnesses, Sheriff's Deputies took the Fifth Amendment. Former Los Angeles District Attorney Gil Garcetti and Former California Attorney General John Van de Kamp asked for an investigation of the fiasco, calling it a crisis. For the whole sordid story, use Google to access the Orange County Register's extensive reports by David Ferrell and Tony Saavedra.

Even Los Angeles isn't immune from reinfection. On July 12, 2016, the *Huffington Post* reported that Daniel Timms, a jailhouse informant prepared to testify against Marion "Suge" Knight in a high profile murder case, had allegedly turned against his handlers. Rian Grim & Matt Ferner, *A Strange Twist in the Suge Knight Case: Jailhouse Snitch Turns on Detectives*, HUFFPOST (July 12, 2016). According to the article, "Timms told Knight's attorneys that [two county sheriffs] urged him to lie about what Knight said when they were housed next to each other in jail." *Id.* Timms said that in exchange for his false testimony against Knight, his wife's nephew would receive a sweet deal in a separate murder case. *Id.* The District Attorney's Office denies these allegations, but once again, jailhouse informants prove to be radioactive. *Id.*

Meanwhile, on the other side of the country, the United States Attorney's Office in Washington, D.C., had to dismiss murder charges in the notorious Chandra Levy murder case because the credibility of their "star" jailhouse informant witness had evaporated. According to the *Washington Post* in an article dated July 29, 2016, the witness, gang leader Armando Morales, recently told an acquaintance that he falsely testified that a former cellmate, Ingmar Guandique, had confessed to killing Levy in Rock Creek Park. Keith L. Alexander & Lynh Bui, *Secret Recordings Emerged and the Chandra Levy Case Rapidly Unraveled*, WASHINGTON POST (July 29, 2016). Morales' testimony was the key in 2010 to Guandique's conviction because neither DNA, nor forensics, nor eyewitnesses linked Guandique to the crime. *See id.* Guandique, no angel himself, has been sitting in prison since his trial and now faces deportation. *Id.* Before the trial, he had pleaded guilty to two other attacks on women in Rock Creek Park. *Id.*

The mess is apparent, but here's the unanswerable question: Was Morales lying on the witness stand then, or is he lying now? Has he just trashed a valid conviction, or did the jury convict an innocent man?

Sorting out the truth from fiction when it comes to people like Leslie Vernon White, Timms, and Morales is a prosecutor's Mt. Everest. Even if you believe you have climbed it successfully, sometimes your "guides" are waiting to push you off a cliff on your way down. University of Virginia Law School Professor Brandon L. Garrett reports that twenty-two percent of the first 330 wrongful-conviction DNA exoneration cases involved informant testimony, including jailhouse informants and other types of incentivized witnesses.

Yes, the more things change, the more they seem to stay the same. Don't let it happen to you!

The precautionary rule of thumb with an alleged jailhouse admission or confession offered by another inmate is that it is false until the contrary can be proved beyond a reasonable doubt. If you do not know how Leslie Vernon White was able to concoct credible confessions without talking to the alleged confessor about the crime, you better find out. By using the telephone and misrepresenting who he was, he was able to collect enough inside information about a crime from official sources to convince investigators that he heard about it directly from the suspect. As light but instructive reading, you might try *Key Witness*, by J.F. Freedman. It's a novel, but one that will open your eyes. Could a potential snitch looking for information on a defendant to trade to the police to help the snitch out of trouble really hack into a defense attorney's computer files? Think about it.

6. DO *NOT* CALL CRIMINALS TO THE STAND AS WITNESSES UNLESS IN THE MOST CAREFUL EXERCISE OF YOUR JUDGMENT SUCH A MOVE WILL SIGNIFICANTLY ADVANCE YOUR ABILITY TO WIN YOUR CASE. Remember, this is an area where less can be more! When you do call an informer, be prepared for war. The injection of a dirty witness into your

own case gives tremendous ammunition to the defense, ammunition that frequently is more powerful than the benefit you expect. Here, for example is a laundry list from the National Association of Criminal Defense Lawyers of the kinds of weaknesses your opponent will be looking for:

> If the informant was addicted to drugs or alcohol during the time to which the statement relates, witnesses and medical records showing this addiction must be introduced. If the informant failed urinalysis tests while on pretrial release and while "cooperating" with the government, the pretrial services reports showing continued drug use should be offered. If you can document inconsistencies or critical omissions between what the informant claimed during one interview or grand jury appearance and what he said in another, these must be carefully set forth during the hearing. Similarly, any evidence you have about other false statements made by the informant, particularly those made under penalty of perjury (such as false statements on loan applications, tax returns, drivers license applications, INS forms, etc.) should be introduced. Prior convictions of the informant (admissible to impeach credibility under Rule 609) or opinion or reputation evidence showing the informant was not a truthful person (admissible under Rule 608) must be put in the record. If you have evidence tending to show the informant had a reason to lie about your client or any evidence of bias, it must be offered. And, of course, you need to establish what sentence the informant was facing, what the mandatory minimum and guideline ranges were without cooperation, and what other benefits (such as immunity for relatives) the informant got in return for his or her cooperation. All these factors are indicia of a lack of credibility of the declarant and, hence, are indicia of a lack of trustworthiness of his statements.

Juries expect prosecutors to be men and women of integrity. If you don't show the proper distance between yourself and the witness in court, and if you haven't handled your witness correctly beforehand, your own credibility can become suspect; and a prosecutor without credibility in court might as well throw in the towel. You must always ask not just what does the witness have to say, but what will the jury think not only of him as a person but also of *you* for how you have handled the situation.

Don't try to make these tough calls by yourself. Call in an experienced prosecutor who is not involved in your case for advice. Try it out on a friend who is not a lawyer. Your friend's reaction may surprise and inform you regarding your decision.

If I were responsible for running a prosecutor's office, I would require *all* assistants to run these decisions by an experienced noninvolved supervisor before going ahead. Line prosecutors are so close to the action that they sometimes lose perspective on these issues.

7. If you decide to call an informer as a witness, you will end up spending much time with him preparing for his testimony. Not all such witnesses are hardcore street criminals, and some of them are affable and will try to ingratiate themselves into your good favor. Remain courteous, but do not let down your guard and share the kind of information with them you might share with a friend or colleague. Today, he might be testifying for you, but as gang-member Henry Harris did in the El Rukns cases in Chicago in the 1990s to AUSA Bill Hogan, tomorrow he may decide to turn against you. So, never say anything to a witness—or for that matter to anybody, including people on your own team—that you would not repeat yourself in open court or want to see on the front page of the *Washington Post* or your hometown newspaper. The last witness for the defense in the DeLorean case was a disgruntled ex-DEA agent who testified that one of the prosecutors boasted of seeing the investigative team on the cover of *Time* magazine. The agent claimed that the investigation was driven by "blind zeal" to get a celebrity. Although this claim was untrue, it was damaging to the government's attempt to rebut the claim of entrapment.

Then there was the testimony during the O.J. Simpson trial regarding C. Anthony "The Animal" Fiato, a federally protected Mafia enforcer, and his brother Larry. According to this testimony. Detective Philip Vanatter had allegedly made statements to the brothers Fiato that were inconsistent with his testimony regarding the reason why he went to Simpson's house after Simpson's wife was found murdered. These statements to the Fiatos were used by the defense to mount a vigorous claim that Vanatter was a perjurer. Whatever Vanatter may or may not have said to the Fiatos, both of whom were called to the stand by the defense, it is certain that he learned (or relearned) (1) *not* to talk to informers about sensitive case related matters, and (2) that criminals are as prone to testify for you as they are to testify *against* you. It all depends on where they see the best butter for their bread.

8. Assume at all times—especially when you are on the telephone—that you are being taped. If you want to read a chilling account of an informer who secretly tape-recorded the improper remarks of an investigator trying to get him to cooperate, read the chapter in Alan Dershowitz's book, *The Best Defense*, titled "The Boro Park Connection." When the investigator discovered for the first time on the witness stand that he had been taped, his chair turned into a real hot seat. But read the book; don't take my word for it.

   Remember, informers are *not* your friends. Keep a healthy arm's length between yourself and such a witness. In this same vein, keep them away from strategy discussions about your case. If the witness starts to believe he is one of the team, or a "junior G-man," he may be tempted to try to help you by manufacturing evidence that doesn't exist.

9. Law enforcement agents handling informers can unintentionally cause significant problems. The agents simply do not appreciate the courtroom and credibility implications of getting too close to an informer witness. On occasion, they became too close to their star witness. In the prosecution in 1995 of attorney Patrick Hallinan in Reno, Nevada, for example, the agents became very friendly with their witness, Ciro Mancuso, who was being used against his ex- attorney Hallinan, even to the point of permitting Mancuso to prepare and type their police reports (DEA 6s). Moreover, the agents permitted him, without supervision, to gather evidence, which the defense at trial successfully attacked as fraudulent. In addition, the agents allowed him to keep $2 million in excess of the $5 million already provided for in the plea agreement, *all* of which went untaxed. Remarkably, the agents allowed Mancuso to keep a firearm even though he was a convicted felon. These unnecessary mistakes evince a lack of control of the witness, and they were successfully exploited during the trial by the defense to attack Mancuso's motives and credibility *and* to besmirch the government's bona fides. The lesson here is that your agents must be as aware as you of the need for appropriate and careful handling of informers, i.e., people of questionable character who are profiting from their cooperation. You *must* meet with the agents early in an investigation to discuss this problem and to establish appropriate ground rules.

   Any prosecutor dealing with federal agencies with well-developed informant programs would do well to read *Deadly Alliance*, by Ralph Ranalli, and *Black Mass*, by Dick Lehr and Gerard O'Neill. If you do not know the name of the toxic informant in this debacle, you should: Whitey Bulger. Both books recount the story of the FBI's Top Echelon Informant Program gone bad in Boston. The headline generated by this train wreck was "Jury Convicts Former FBI Agent of Bribery, Protecting Gangsters." Sometimes there are things you may need to know but the agency is reluctant to tell you. Beware! The official cases arising out of this debacle are *United States v. Salemme*, 91 F. Supp. 2d 141 (D. Mass. 1999) and *United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000). Read also Judge Nancy Gertner's Memorandum and Order in *Limone v. United States*, 497 F. Supp. 2d 143 (D. Mass. 2007), awarding $100 million to four persons wrongly convicted as the result of the FBI's improper activity with a valuable informant—who happened to be the real killer.

10. Never forget that the defense may try to prove that *your* witness actually did what he claims was done

by the defendant. The jury argument goes like this: "Of course he has extensive knowledge of the facts of this crime. *He* is the one who committed it, that's why! Now, ladies and gentlemen, he's lying to save his own skin, encouraged by the disreputable plea bargain given to him by the careless and inept prosecutor."

11. By the way, if you believe that problems with informants are unique to our justice system, officials in Washington, D.C., now believe that the George W. Bush Administration was led astray by informants in connection with the decision to attack Iraq. As reported by the *New York Times* in 2005,

> WASHINGTON, Nov. 5 – A top member of Al Qaeda in American custody was identified as a likely fabricator months before the Bush administration began to use his statements as the foundation for its claims that Iraq trained Al Qaeda members to use biological and chemical weapons, according to newly declassified portions of a Defense Intelligence Agency document.
>
> The document, an intelligence report from February 2002, said it was probable that the prisoner, Ibn al-Shaykh al-Libi, "was intentionally misleading the debriefers" in making claims about Iraqi support for Al Qaeda's work with illicit weapons.
>
> . . . .
>
> Mr. Libi was not alone among intelligence sources later determined to have been fabricating accounts. Among others, an Iraqi exile whose code name was Curveball was the primary source for what proved to be false information about Iraq and mobile biological weapons labs. And American military officials cultivated ties with Ahmad Chalabi, the head of the Iraqi National Congress, an exile group, who has been accused of feeding the Pentagon misleading information in urging war.

Douglas Jehl, *Report Warned Bush Team About Intelligence Doubts*, N.Y. TIMES (Nov. 6, 2005).

B. The Initial Contact

1. Your first hurdle involves ethical considerations. Is the prospective witness represented by an attorney? Has he been indicted? If so, are you required to work through that attorney, even though you suspect his or her integrity? The American Bar Association's Model Rule of Professional Conduct 4.2 and Disciplinary Rule 7-104(A)(1), for example, prohibit contacting a person represented by a lawyer on the subject of the representation without going through the lawyer. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 1981); ABA CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (AM. BAR ASS'N 1980). Many states also have such ethical standards for lawyers. Also, Standard 4.1(b) of the ABA Minimum Standards for Criminal Justice provides, in part, as follows:

> A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval.

ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §3-4.1(b) (AM. BAR ASS'N 2017).

If the prospective witness is under indictment and he calls you and says that he wants to cooperate but that he doesn't want his lawyer to know about it, be very careful. This is a situation that must be handled with great care. You will be confronted not just with Fifth Amendment waivers, but Sixth Amendment waivers also, which carry a greater burden. And remember, a defendant may be able to waive his rights, but he cannot waive *your* ethical obligations.

Federal prosecutors' conduct in this area is now governed by 28 U.S.C. § 530B (2012), called the McDade Act after the Congressman who sponsored it. The McDade Act, which went into effect in April 1999, requires all federal government attorneys to abide by "State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." For guidance, federal prosecutors must contact the Department of Justice's Professional Responsibility Advisory Office for the latest policy and rules, which have changed almost yearly since 1985. The Tenth Circuit has ruled that the McDade Act says what it means and means what it says. *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1287–89 (10th Cir. 1999). For background and history on this issue you will want to read *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998), *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993), and *In re Hanes*, 940 P.2d 159 (N.M. 1997).

Lopez will show you how problematic this process can be. The prosecutor in *Lopez*, who arranged for a meeting between the defendant and a magistrate judge, ended up on the other end of an ethics complaint filed by the defendant's lawyer with the Arizona State Bar. Although the prosecutor was exonerated—a year later—his advice is as follows: "Regardless of the Department policy and regulations, *never* communicate with a represented person without the permission of the lawyer; it is not worth the professional risk." The Ninth Circuit's language in *Lopez* may validate this advice: "[W]e are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions [than dismissing the indictment], such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to discipline and punish government attorneys who attempt to circumvent the standards of their profession." *Lopez*, 4 F.3d at 1464.

Check the law of your own jurisdiction on this issue, and if you work for the Justice Department, make sure you have a copy of the latest Department Regulations covering this area. To be protected by these regulations, your conduct must comport with them.

2. A second complication with which you may be confronted in this context is the situation in which the witness at some point during debriefing begins to tell you about ongoing or new crimes in the offing in addition to those that have already happened. For a general look at the problem of handling new or ongoing crimes that crop up during the handling of a case, read *Maine v. Moulton*, 474 U.S. 159 (1985), and check the Department's regulations on the subject.

   This particular hurdle can become unusually touchy when the witness with whom you are dealing is an attorney who himself is under suspicion of criminal conduct and he suddenly offers up his own clients with respect to new or ongoing offenses in return for leniency or immunity. This rare but real situation should immediately set off loud alarm bells in your analytical mind, raising questions of privilege, Fifth Amendment rights, Sixth Amendment rights, conflict of interest, and disciplinary rules, especially if the suggestion is made that the attorney wear a wire and work his clients with respect to crimes in progress. If you are not extremely cautious, you may succeed in convicting the attorney's clients, but you may do so at the expense of your own license to practice law, a mission that has the potential to backfire.

3. Take great care in the debriefing of any recruited codefendant whom you plan to use against his cohorts to avoid "invading the common defense camp." If the witness without warning begins to tell you the particulars of a defense strategy meeting he has attended with his codefendants and their attorneys, you are in trouble. This pitfall is easily avoidable up front by advising the witness *in writing* not to tell you about any such meetings. For additional guidance, see *Weatherford v. Bursey*, 429 U.S. 545 (1977), *United States v. Brugman*, 655 F.2d 540 (4th Cir. 1981), *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), and *United States v. Mastroianni*,749 F.2d 900 (1st Cir. 1984).

C. Who Goes First, You or the Witness?

1. The first problem that usually arises is the "Catch 22" situation where you want to know exactly what the witness has to offer before committing yourself to a "deal," but the witness, even though desirous of cooperating, is afraid to talk for fear of incriminating himself unless he is promised something first. When you get into such a bind, never buy a pig in a poke! If you first give a criminal absolute immunity from prosecution or commit irrevocably to a generous deal and then ask him what he knows, the probability is that you will get nothing but hot air. *Remove the witness's incentive to cooperate, and you will lose all the fish, both big and little*. Never forget that almost always they are cooperating because you have them in a trap. Open the door too early and their willingness to cooperate will evaporate.

   The answer to this seeming dilemma is very simple. Get a proffer! Promise the witness in writing that you will not use what he tells you at this stage of the proceedings against him, but make it equally clear that your decision whether or not to make a deal and what that deal might or might not entail will not be made until after you have had the opportunity to assess both the value and the credibility of the information. Tell him, "It's an opportunity to help yourself; take it or leave it." If he doesn't trust *you* enough to go first, how in the world are you going to trust him? You can talk possibilities, but that is all! And remember, once you have committed to something, your word must be as good as gold, both with respect to what you will do if he delivers *and* what you will do if he doesn't! Caveat: If he later tells you something different from what he told you in the proffer, *Brady* is implicated.

2. Make sure that the full extent of the preliminary understanding is in writing and signed by all parties. *Try to anticipate all problems that you may be confronted with down the road*. Consider adding a "*Mezzanatto* provision" by which the informant agrees that any statements he makes during meetings and negotiations can be used to impeach any contradictory testimony he might give at his own trial should cooperation break down. In United States v. Mezzanatto, the Supreme Court held that such a provision is a valid waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). *United States v. Mezzanatto*, 513 U.S. 196, 196 (1995).

3. Remember, the document may come back to haunt you if it is badly drafted. Make sure you examine it as a probable court exhibit, and try to avoid drafting it so it can somehow be used against you or that you can't use it yourself. *Do not forget that your side of the agreement—immunity or whatever—will be used in court by the defense as the "reason the witness is lying."* The defense will characterize it as a "payoff," a "bribe," etc. Do not cause for yourself unnecessary problems by giving away too much.

4. Probe relentlessly for secret "side deals" with the police. If they exist, and they may, get them out in the open. The defense is entitled to know *everything* that the witness, his relatives, or his friends, for that matter, have been promised in return for cooperation. If for the first time on cross-examination the jury finds out that the chief investigator on the case has been paying the witness $100 a week pending the trial, or fixing his parking tickets, you will be in deep trouble.

5. The federal agencies should inform the prosecution if one of the indicted defendants has been a cooperator in the past and what benefits he or she received, been promised, or asked for as a result of that cooperation.

D. Extracting Information from the Witness

1. A prosecutor must *never* conduct such an interview without an investigator present. And remember, never say anything to a crook that you do not want repeated in open court. He may be taping you!

2. Once the preliminary understanding is arrived at and the witness is now prepared to tell you what he or she knows about the case, the suspect, etc., precautions must still be taken to get the witness to tell the *whole* truth, not just parts of it.

3. Your first line of defense here *is the witness's attorney*. Impress the requirements of absolute honesty and full disclosure on the witness's attorney and ask the attorney to have a private discussion with the witness to try to pound this into the witness's skull. *These witnesses invariably hold back information that makes themselves "look bad."* It is devastating in front of a jury to find out that the first thing such a witness did was lie to the prosecutor or the case agent! Deliberate omissions are just as bad as outright lies, and they are discoverable. Don't start the interview until *the attorney* assures you that he believes that his client is ready to come completely clean.

   In the rare circumstance in which the prosecutor has specific reason to believe that the cooperating witness has made a prior statement to his or her attorney that contradicts the cooperating witness's testimony, the prosecutor should raise that with the witness's counsel; consider disclosure obligations; and consider whether the prosecution can continue to call the witness if the contradictory statement is not produced.

4. When you do start the interview, repeat the necessity of complete "honesty" and "full disclosure." Discuss perjury and the witness's liability for false evidence, etc. The objective is to "get at the truth"—not "get the suspect." Let the witness know that if he gets to court, the truth will certainly come out on cross-examination. Tell him that the defendant isn't going to sit there and let him "gild the lily." You want to hear it *now*, not later. One frequent problem confronted here is that the witness will falsely minimize his own role in the scheme. Warn him not to do this, and be on the lookout for evidence that this is what he is doing. It will stand out like a sore thumb *if* you are looking for it.

   One incredible mistake made on more than one occasion—especially by agents—is to listen to the informer's story and then tell him, "That's not enough; you'll have to come up with more." The impetus for such a statement comes from agents' knowledge that informers hold some material back, but such a "can opener" should not be used for two reasons. First, the informer may react by making up "better stuff," an eventuality for which you do not want to be responsible. Second, when jurors become aware of such a tactic, they will become *very* willing to believe that *you* and your agents have solicited false information. This mistake played a significant role in the failed prosecution of attorney Patrick Hallinan in Reno, Nevada, in 1995. When the jurors found out that the cooperating informer Mancuso had not fingered his own lawyer Hallinan until *after* agents told him he needed to come up with more, the force of the government's case slipped away. If you have done your job correctly before the interview turns to what the witness knows, this half-a-loaf mess should not occur.

5. Do not feed the witness key information. First, let the witness tell the complete story on his or her own; then ask any questions needed to fill in the gaps, etc. One of your best jury arguments is that "the witness must have been there (or talked in confidence to the defendant) because he knows details that only somebody who was there would know!" Don't give this away by being arguably the source of the inside information. Make sure everybody on your team understands this and doesn't let the cat out of the bag. The investigators should watch for this kind of evidence during the interview and take good notes. However, criminals and especially jailhouse snitches are notoriously famous for finding out key details by stealing discovery files from fellow inmates in jail or, as did Leslie Vernon White, using the telephone to dupe unsuspecting members of law enforcement.

   Remember, *all notes are discoverable*, as are inconsistent statements, lies, false denials, and untrue "I don't remembers."

6. The defendant knows more about the informer than you do! This advantage may enable the defendant to mount an attack on cross-examination, etc., based on facts or circumstances of which you are unaware and about which the informer has not told you. To avoid being caught unprepared, *ask the informer* what the defendant might bring up to discredit him or his testimony. Take your time on this because you're now probing for information the informer may not want to tell you about. Once again, a real story from a real trial is the best example of this problem:

> "The Impossible Victory." Experts say it is rare for prosecutors to face defense attorneys who know more about the government's witnesses than the government itself does. But that is exactly what happened in the Willy and Sal case. In addition to spending untold millions on attorneys, [Falcon] and Magluta also hired a score of private investigators who fanned out across the United States and throughout Latin America to track down incriminating information about the government's witnesses. "What made the difference was the fact that Sal Magluta and Willy [Falcon] were willing to fight this and fund an investigation that could expose all of these things," says Black, who adds this victory to a growing string of wins, including his representation of William Kennedy Smith and former Miami police officer William Lozano. "How many people can afford to hunt these things down? Do you know how many witnesses we investigated before the trial? They called about 30 accomplice witnesses, but they had given us notice on their witness list of about 81, and added 4 or 5 more just before trial."
>
> Among the government's many witnesses, Nestor Galeano proved to be a favorite of the defense team. His testimony, they believe, was also a turning point in the case. Before the trial commenced, defense attorneys obtained several letters Galeano had written in prison to a friend in Colombia, fellow cocaine smuggler Manuel Garces. In those letters, Galeano eloquently explained his belief that the American justice system is corrupt and that the only way to deal with it is to play along, to do whatever it takes to get out of prison, including, defense attorneys claimed, lying on the witness stand to please prosecutors. "Those letters were an overwhelming embarrassment to the government," says Krieger. "Or at least they should be."

Jim Defede, *The Impossible Victory*, MIAMI NEW TIMES (Feb. 29, 1996).

Post Script: As indicated earlier, one of the jurors was bribed in this case, which helps explain the defense verdict. In any event, what the defense uncovered on the government's witnesses stands as a good lesson.

7. Do not be afraid to subject the story and the witness to intense scrutiny and cross-examination. Do not fear that the witness will crack. If he does, it's better that it happens in your office than in court. Prosecutors without much experience tend to treat such witnesses far too softly for fear they will not hold up or they will stop cooperating. This is wrong. Bear down!

8. Be on the lookout for any telltale suggestions that the informer is really the one who committed the crime under investigation and that he is falsely casting the blame on someone else to save his own skin. *See Northern Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001). If he knows much of the inside information about the crime, the defense may argue that he learned it not from the defendant, but because he is the perpetrator! To understand the dimensions and ramifications of such a defense, read *Kyles v. Whitley*, 514 U.S. 419 (1995).

   An extreme example of this situation occurred in Los Angeles, California. Looking while in jail for information to trade to the authorities in return for leniency, Michael Birman successfully solicited three thugs on the outside to kill someone at random. When they did, Birman called the Sheriff's Department from jail and gave deputies specific information about the murder, asking in return to be released from custody on his own case. Birman did not reveal, of course, the purpose of the murder and the names of the killers. How did Birman compensate his coconspirators? He promised he would give them information about lucrative robberies they could commit. No doubt, Birman would have framed someone else had he had the opportunity. Fortunately, the plot failed, but it illustrates the lengths to which criminals will go to acquire something to trade.

Given the right showing, which will probably include a copy of this handout, do not be surprised if a judge grants a motion for the appointment of "an expert" or an investigator to examine the complete background and credibility of a proposed criminal/informant witness. The Criminal Justice Act, 18 U.S.C. § 3006A(e)(1) (2012), would seem to accommodate such a request for indigent defendants. *See United States v. Chase*, 499 F.3d 1061 (9th Cir. 2007); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973).

E. Test the Witness's Story

In *Lilly v. Virginia*, the Supreme Court said that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lilly v. Virginia*, 527 U.S. 116, 132 (1999). Take this warning to heart as you evaluate an informer's potential evidence.

1. Mistrust everything an informer says. Be *actively* suspicious. Look for *corroboration* on everything you can; follow up all indications he may be fudging.
2. Secure information on the witness's background.
   a. Mental problems. Mental or physical problems affecting the competency of a witness to testify, such as psychiatric disorders or a stroke, are *Brady* material. *Silva v. Brown*, 416 F.3d 980, 987–88 (9th Cir. 2005).
   b. Probation reports.
   c. Prior police reports.
   d. Consult other prosecutors who have either prosecuted the witness or used him in court. What do they think about his credibility? How did the jurors react to him? Was he a helpful witness or was he more trouble than he was worth? Criminal misconduct of an informant while working for the police is *Brady* material. *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002).
   e. Sentencing memoranda filed by the prosecution in previous cases.
   f. Prison files regarding the witness's behavior while incarcerated.
   g. Search for any promises, explicit or implicit, that investigators or other prosecutors have made to the witness in return for his cooperation or testimony.
3. Assess the motivation of the witness. Why did he decide to cross over? *You must understand why he has turned in order to keep him on your side once he has crossed over.* This understanding will keep you from making mistakes caused by thinking you have to be friendly and generous to keep him on the team. Normally he will stay with you so long as the carrot he seeks is still in the future.

   Do you really understand people who commit crimes? Why do people commit armed robberies, cheat the government, sell drugs, swindle the elderly, attack Nancy Kerrigan?

   What makes them tick? How do they think?

   And when they get caught, why do they rush like lemmings to the prosecutor's office to squeal on their friends and relatives and associates and colleagues?

   Why does Sammy the Bull Gravano testify against John Gotti? Why does Jimmy the Weasel turn against the Mafia? Carlos Lehderer against Manual Noriega? John Dean against President Nixon? Jeff Gilooly against Tonya Harding, his ex-wife?

   Do you know what a sociopath is? Of what a sociopath is capable?

   Do you know how criminals behave when caught and what motivates them? Can you sort out the truth from lies? Do you know how to control Sammy the Bull? Jimmy the Weasel? Carlos

Lehderer? Jeff Gilooly?

Or will they control and con you?

Unless you understand criminals and can control their treacherous behavior, *you* may be their next victim.

On occasion, you will get a witness who is truly sorry for what he did. Play this for what it's worth with the jury—but first make *absolutely sure* the sentiment is real. Usually, it is phony.

4. Be wary of drug addicts. Consider a medical examination, and find out from a doctor the effect of the drug your witness abuses on his capacity as a witness. Does Valium ruin your memory? You might want to call the doctor during your case-in-chief. Drug use is *Brady* material.

5. If your witness is "on loan" from a foreign government where due process is not a high priority, be careful the witness has not been given a script or a mission. *Xiao v. Reno* chronicles the tale of an Assistant United States Attorney caught in the deadly fallout caused by an informer witness who took the stand for the government, lied on direct, and then subsequently revealed his lie, explaining that he was under pressure by the government of the People's Republic of China to falsely incriminate the defendant. *Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993), *aff'd* 81 F.3d 808 (9th Cir. 1996). Now the witness is seeking asylum in this country because he fears he will be killed if he returns to China, and the AUSA is under investigation for allegedly lying to the court and committing other ethical violations as this mess unraveled.

6. THE KEY TO WHETHER OR NOT A JURY WILL ACCEPT THE TESTIMONY OF A CRIMINAL IS THE EXTENT TO WHICH THE TESTIMONY IS CORROBORATED. THE RULE THAT ALLOWS THE CONVICTION OF A DEFENDANT BASED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE MAY PROTECT YOU FROM RULE 29, BUT IT WILL CUT VERY LITTLE ICE WITH THE JURORS.

The *New York Times* in its discussion of the Friedman corruption case (prosecuted by former Mayor Rudy Giuliani), 854 F.2d 535 (2d Cir. 1988), put it this way:

> The Government's greatest strength in the case was also its greatest weakness: Mr. Lindenauer. His strength was his intimate knowledge of the bribery and extortion schemes that suffused the parking bureau, and his ability to describe them at length and in detail on the witness stand, his weakness was that he had been part of the scheme, and collected nearly $250,000 from it, working in concert with Mr. Manes.
>
> Mr. Lindenauer pleaded guilty last March to federal charges of racketeering and mail fraud, reduced from a 39-count indictment as part of an agreement with the Government for his testimony. He faces a prison term of 25 years and $500,000 in fines, but is not expected to be sentenced until his role is completed in other trials relating to the municipal scandal.
>
> Mr. Lindenauer had a long history of lying and other fraudulent behavior, which defense lawyers forced him to admit during his cross-examination and exploited as they sought to undermine his credibility. *But piece by piece, portions of his testimony were corroborated by other Government witnesses*. In the end, the jury of seven women and five men agreed with Mr. Giuliani returning guilty verdicts on all but a handful of counts against the four defendants.

Richard J. Meislin, *Friedman Is Sentenced to 12 Years in Corruption Case*, N.Y. TIMES (Mar. 12, 1987) (emphasis added).

Check out everything your witness says. Look for documentary evidence, corroborating witnesses, prior consistent statements—everything. If he says he made an important telephone call,

bring in the phone company records. If he says he was in Las Vegas, prove it independently of what he says with hotel clerks and records. In a well-publicized espionage case in Los Angeles, the person who passed secret documents to the spy testified that he received money in return, which he put into his bank account. The prosecutor corroborated this with excellent charts and bank and payroll records, showing conclusively that he put more money into his account while he was spying than he earned from his salary. The excess matched his statement to the FBI and his testimony with regard to the amounts of the payoffs. In United States v. Martinez, the prosecutor was allowed to prove that others, against whom the witness had informed, pleaded guilty, this to rebut Martinez's attack on the witness's motives and credibility. *United States v. Martinez*, 775 F.2d 31 (2d Cir. 1985). *Martinez* holds that when the defense attacks a witness's credibility, evidence that might not have been admissible on direct can be adduced on redirect to rehabilitate the witness. *Id.* at 37.

7. Never overlook the *appropriate* opportunity to have your witness contact the suspect to try to extract from him some incriminating statements—on tape, of course. This is dynamite if you can get it. Your investigator will help you and the witness come up with a plausible scenario for such a contact. But don't stumble over *Massiah v. United States*, 377 U.S. 201 (1964) or *Henry v. United States*, 361 U.S. 98 (1959).

8. In fact, the inherent weaknesses in the word of an informer can be used to satisfy the "necessity requirement" for a federal wiretap pursuant to 18 U.S.C. § 2518(1)(c), (3)(c) (2012). *United States v. Gomez*, 358 F.3d 1221, 1227 (9th Cir. 2004) ("The truth-seeking function of our courts is greatly enhanced when the evidence used is not tainted by its immediate informant source and has been cleansed of the baggage that always comes with them.").

9. Consider the polygraph, but <u>don't</u> use it just because it's there. The machine is fallible! It is a tool, not a guarantee. Many experienced prosecutors will counsel you not to use it on a bet. This group of suspects is notorious for setting polygraph tests on their ears. In a major case against ultra-right wing terrorists, the prosecutors made "the deal" contingent on passing the poly. Although they became convinced that the witness was telling the truth, he couldn't pass the test. The defense had a field day with this on cross-examination, and the prosecutors now cite this as a mistake.

   a. Talk to your polygraph operator about its efficacy.

   b. <u>Don't</u> refer to it in court if you use it as an investigative tool.

   c. The latest from the Supreme Court on polygraph results and *Brady* is *Wood v. Bartholomew*, 516 U.S. 1 (1995). Polygraph results per se are not *Brady* material, but statements made to the instrument's operator may be. *Kyles* applies to polygraph operators. ["c" is misaligned for this paragraph]

10. The best way to anticipate the downside to a witness is to cast yourself in the role of the defense attorney for your suspect. If you were defending your target, how would you attack this witness and his testimony? Hire yourself, as if you were to take the other side of the case. Do the kind of investigation a good defense attorney would do of those collateral things that shed light on the witness's credibility.

    A favorite tactic of a thorough defense attorney is to subpoena the federal prison security tapes made of cooperating inmates talking on the telephone to people on the outside. If your cooperating witness is in prison, you and justice will be well served if you review the tapes yourself to see if they contain statements that torpedo your case or the witness's credibility. Such tapes, unknown previously to the prosecutor, cropped up post-trial in Los Angeles in the case of *United States v. Torres-Ramos*, CR 06-0656-SVW-1 (C.D. Cal. 2009). According to the trial judge in his Order undoing the government's hard fought victory, the tapes between a detective and two of the government's key turncoat witnesses indicated that benefits had been conferred upon those witnesses that were not made known to the defense before trial.

Also, if they exist, make sure to review the electronic intercepts of your cooperating witness made during the investigation. Here is the text of what unsuspecting mob boss and cooperating government witness Ralph Natale said to confederates while discussing two flipped mobsters who had become government informants: "It's a shame. You know, if you commit a crime and you get caught, you should go to jail. But now these guys turn and become liars and try to give their [jail] time to somebody else." This will be the defense attorney's theme, and there it is, coming out of your own witness's mouth.

What does it look like from the defense's side of the tracks? Then cross back over and ask: Can the weaknesses be explained? Spend a lot of time at this exercise. Call in a friend to help you. Every minute will be well worth it. It enables you to determine how to shore up your witness before the defense even gets to him. Do not pass up any opportunity you can find to watch defense attorneys cross-examine cooperating criminals. Then you will be able to anticipate and to prepare for the onslaught.

F. If You're Convinced, Negotiate a Final Agreement, but Don't Give Up Too Much, and Don't Give It Away Too Soon!

1. Put the total agreement in writing, but before you do, read *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985). This case contains an educational discussion about what a plea agreement can and cannot say. Rewards and payments are tricky. Money for a witness will be trouble if not handled openly and with clean hands. There exists no outright legal prohibition against rewards, and indeed, they have been approved on the ground that they serve the public policy interest of bringing witnesses to crimes forward with their information. *See* 18 U.S.C. §§ 1012, 1751, 3056 (2012 & Supp. III 2015); *United States v. Murphy*, 41 U.S. (16 Pet.) 203 (1842); *United States v. Walker*, 720 F.2d 1527 (11th Cir. 1983); *United States v. Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984); *United States v. Cuellar*, 96 F.3d 1179 (9th Cir. 1996). Payments to an informant on a contingency basis, however, may be viewed as an inducement to entrapment. *United States v. Civella*, 666 F.2d 1122, 1129 (8th Cir. 1981). If a witness asks for some sort of a "cut" or "percentage" or "reward," such a request may be discoverable even if it is turned down. By way of example, consider this *New York Times* coverage of this issue in the DeLorean case:

> LOS ANGELES, July 26– Federal District Judge Robert M. Takasugi today characterized James Timothy Hoffman, the Government's informer and star witness in John Z. DeLorean's trial on narcotics charges, as "a hired gun.'"
>
> He said he found it "quite offensive" that the Government had failed to disclose sooner that Mr. Hoffman had "demanded" a share of any money seized in the case.
>
> . . . .
>
> Mr. Hoffman instigated the Government's investigation of Mr. DeLorean when he told a Government agent in l982 that Mr. DeLorean had asked him for help arranging a narcotics deal.
>
> . . . .
>
> Mr. DeLorean's lawyers, Mr. Weitzman and Donald M. Re, contended that the prosecution had improperly withheld documents that would lead them to learn last week that Mr. Hoffman had demanded up to l0 percent of any assets seized as a result of the investigation of Mr. DeLorean. Mr. Hoffman made the demand Sept. 3, l982 and was rejected.
>
> The Government had hoped to seize several million dollars in cash and

> property belonging to William Morgan Hetrick, an admitted cocaine smuggler charged with Mr. DeLorean as a co-conspirator, and $2 million that was to have been invested by Mr. DeLorean, according to the Government's version of the purported drug scheme.
>
> Judge Takasugi, saying he was addressing the issue in "real world" terms, characterized Mr. Hoffman's demand as "a percentage of the take" and said he found it "quite offensive," particularly since Mr. Hoffman had testified that he was "motivated in part by good" to furnish information.
>
> "If there is such a thing as a smoking gun in terms of the [credibility] of Mr. Hoffman," the judge said, Mr. Hoffman's demand was it.

Judith Cummings, *DeLorean Witness Called 'Hired Gun,'* N.Y. TIMES (July 27, 1984).

But, although a reward or a monetary inducement does not automatically disqualify the recipient as a competent witness, the jury *must* be advised of the arrangement. The issue is not one of competency; it is one of credibility, and that is an issue for the jury. In my opinion, juries look askance at any arrangement whereby a prosecution witness will benefit financially from his testimony. So do some judges. Read what Judge Wiggins had to say about money and informers in *United States v. Cuellar*, 96 F.3d 1179 (9th Cir. 1996).

Make sure the agreement will make sense to the jury if it ever gets in evidence, but be aware of the law that governs how plea agreements can and cannot be used. They are not automatically admissible in their entirety in evidence! *See United States v. Edwards*, 631 F.2d 1049, 1052 (2d Cir. 1980); *United States v. Spriggs*, 996 F.2d 320, 324–25 (D.C. Cir. 1993). Consider adding a paragraph to the extent that if the witness backs out, everything he has said during the negotiations can be used against him. *See United States v. Stirling*, 571 F.2d 708, 730–31 (2d Cir. 1978); *United States v. Mezzanatto*, 513 U.S. 196 (1995).

2. Warning! Avoid any temptation to try to sanitize the witness by making with his attorney a secret deal unknown to the witness. The simple fact that the witness does not know about a favorable deal in exchange for his testimony does not permit you to call that witness to the stand to tell the jury under oath that he does not stand to gain anything from his cooperation. This ploy was condemned by the Ninth Circuit in *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc).

3. Equally fatal was a prosecutor's decision secretly to derail a planned psychiatric examination of an accomplice witness in order to try to avoid creating discoverable information that would hurt his credibility. In Silva v. Brown, the witness's attorney had advised the prosecutor he feared his client might be insane. *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005). Recognizing that a mental evaluation might "supply ammunition to the defense," the prosecutor cut a deal with the witness: no mental evaluation, and murder charges would be dropped in exchange for his testimony. *Id.* at 984. In granting the defendant a new trial in this capital case, the Ninth Circuit said, "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." *Id.* at 991. Don't lock the witness in so strongly to a particular evidentiary script that the ground rules violate the defendant's rights to confrontation. If you require a witness to stick to his or her original story in order to secure a "deal," this effectively makes the witness immune from cross-examination! Such agreements have produced reversals on appeal. All you can require substantively is that the witness tell the truth. *See People v. Medina*, 41 Cal. App. 3d 438, 454 (1974).

4. Tell the witness all the ground rules:

   a. What he will have to do in terms of testifying, i.e., grand jury, two trials, or whatever.

   b. How long it will take. Do not underestimate!

c. He does *not* have a credit card to go around committing other crimes while you are using him as a witness. Tell him not to call you if he gets a ticket. Do not leave this to the imagination.

d. Security precautions may be in order. Decide what is necessary and what is available. If the witness is going into a witness security program, make sure that you and the witness understand exactly what this entails. Get a copy of the witness's memorandum of understanding with the Marshal's Service and read it yourself.

5. Hold something back.

   a. The witness must perform *first*. If you give him everything to which he is "entitled" before he testifies, you may be unpleasantly surprised when he disintegrates on the witness stand. I preferred, if possible, to have such a witness plead guilty before testifying and be sentenced afterwards. If the witness's motivation to cooperate is removed, you will be lost. Do not rely on his sense of honor! See *United States v. Insana*, 423 F.2d 1165 (2d Cir. 1970) and *Darden v. United States*, 405 F.2d 1054 (9th Cir. 1969), which sanction this approach.

6. Have the defendant execute a signed and witnessed statement regarding what he knows that can be used in case he goes sour, either during the trial or later. Be familiar with the law of impeaching your own witness—prior inconsistent statements, prior consistent statements, etc. A case on this subject that ought to be read by all prosecutors intending to use a turncoat as a witness is United States v. DiCaro, one of the leading cases on the subject of witnesses who are "overcome by amnesia" when they take the stand. *United States v. DiCaro*, 772 F.2d 1314 (7th Cir. 1985). The latest word by the Supreme Court on attempting to use a coconspirator's statement as a declaration against penal interest can be found in Williamson v. United States, holding that confessions of arrested accomplices may be admitted under Rule 804(b)(3) "if they are truly self-inculpatory rather than merely attempts to shift blame or curry favor." *Williamson v. United States*, 512 U.S. 594, 595 (1994). The Supreme Court has also used the same approach with respect to prior consistent statements: they will be admissible only if they were made before the alleged motive to fabricate or improper influence arose. *Tome v. United States*, 513 U.S. 150, 156 (1995). However, watch for *Crawford v. Washington*, 541 U.S. 36 (2004), confrontation complications.

G. Is Your Case Stronger Without Calling the Informer to the Witness Stand?

1. Quite possibly, the most effective (and most safe) way to use a cooperating accomplice is to use the information obtained from him to develop other evidence of your target's guilt, independent evidence strong enough to relieve you of the necessity of calling him to the stand. In fact, this should be your tactical goal: to build a case that does *not* depend on the testimony of the accomplice.

   Use him to help you do this. Ask him if he knows of any way independently to corroborate what he tells you. He may be useful in identifying other excellent witnesses to what he has told you.

   For a blueprint of how to use an informer's tape-recorded conversation with a suspect *without* calling the informer to the stand, read these cases: : (1) *United States v. Davis*, 890 F.2d 1373, 1379 (7th Cir. 1989); and (2) *United States v. McClain*, 934 F.2d 822, 832 (7th Cir. 1991). In both, the government's tactic of keeping a notorious informer off the stand survived objections based on the Sixth Amendment and Federal Rules of Evidence 607 and 806.

2. Remember, however, that such an approach should not be used dishonestly to milk helpful information from a witness and then unfairly dump him without consideration on the proverbial ash heap. The integrity of your office requires that you play fair, even with criminals. A witness you may decide not to call to the stand may nevertheless have given you sufficient assistance in building your case to merit substantial consideration.

H. Managing the Witness's Environment

1. Be mindful of where the witness is going after you take his statement and secure his cooperation. If he is going back to jail, serious problems may occur unless you take precautions to keep him away from other potential troublemakers. If he goes back into the "general population," chances are some other inmate will find out he is a snitch and confront him as an enemy. When this happens, it is not unusual for the witness to lie to his accuser and deny everything, or worse, to say that he was coerced into lying by you and the police. You then have a scared witness who may recant all, and you have a defense witness who will come in and tell the jury that your witness said he made it all up "just to get a deal," etc. These people also have a disquieting way of showing up unexpectedly as the predicate for a writ of error *coram nobis* or a motion for a new trial. One answer to this problem, of course, is to take advantage of the federal Witness Security Program, which has a very effective chapter behind bars as well as on the outside.

   You must keep the witness out of harm's way. Warn him against saying *anything* to anybody, and especially to other prisoners, and have your investigator contact him *frequently* to keep the fires of cooperation burning. If you neglect the baby-sitting aspects of this business, you will get burned. If you do have access to a witness security program, know what it can do for you, how it does it, and what it can't do. Then use it! If you don't have one available, start one. It is an essential ingredient of the fight against organized crime. Take note: if you fail to protect your witness and he gets killed or injured because he is cooperating, you may find yourself on the short end of a civil law suit. To understand your exposure, read *Miller v. United States*, 561 F. Supp. 1129 (1983), *aff'd* 729 F.2d 1448 (3rd Cir. 1984); *Galanti v. United States*, 709 F.2d 706 (11th Cir. 1983); and *Wallace v. City of Los Angeles*, 16 Cal. Rptr. 2d 113 (Ct. App.), *modified* (Feb. 4, 1993).

   Please take a moment in this regard to reflect on the tragic and sobering fate of Collier Vale as recounted on November 5, 1990, in the *Los Angeles Times*:

   > Monterey – Collier Vale was one of the most respected lawyers in the Monterey County district attorney's office, a driven prosecutor who won numerous high-profile convictions and was a prime candidate for a judgeship.
   >
   > But after 10 years as a prosecutor, where he frequently worked 60 to 70 hours a week and slowly rose through the ranks in the office, Vale felt that a single case had ruined his reputation and destroyed his career.
   >
   > On a Thursday evening last month, after telling friends he was tired of defending himself against accusations that never seemed to end, Vale put a pistol in his mouth and pulled the trigger.
   >
   > The case that friends say led to Vale's suicide involved the death of a confidential informant in one of his murder investigations. He was unjustly blamed for the woman's death, his colleagues say, and he was haunted by the case.
   >
   > His ordeal highlights the pressures and responsibilities prosecutors face when dealing in the shadowy world of confidential informants. It is a world where prosecutors try to protect people who sometimes can't be protected, where blame is quickly assigned when the interests of witnesses and suspects suddenly collide.
   >
   > "Collier's case was a prosecutor's nightmare," said Ann Hill, a deputy district attorney who worked with Vale. "What makes it so frightening is something like this could happen to any of us, no matter how conscientious we are . . . and Collier was maybe the most conscientious of us all."
   >
   > Vale's informant was killed in a burst of automatic gunfire, after her identity was inadvertently revealed. Local press reports appeared to blame Vale

> for the mix-up, and the story eventually received national attention on the tabloid television show, "A Current Affair." Vale was extremely upset, friends said, when the controversy became a major issue in the June election campaign for district attorney.
>
> When the family of the murdered informant filed a wrongful death suit against the county and a local police department, Vale knew he would soon face a series of hostile depositions and possibly an embarrassing, highly publicized trial.
>
> Vale, 39, was a proud man, friends said, and he could no longer endure the indignity of being constantly blamed for a witness's death.
>
> "Collier saw this whole thing as humiliation and a failure," said his girlfriend Melinda Young. Her eyes filled with tears and she slowly shook her head. "He just couldn't let it go."

Miles Corwin, *Informant's Murder Led Prosecutor to Suicide*, L.A. TIMES (Nov. 5, 1990).

I. Discovery: A Veritable Minefield, Even for the Experienced Prosecutor

1. Prosecutors are discovering that they are frequently being called to task for *Brady* and *Giglio* failures to seek and to find and to turn over "exculpatory information" and information weighing upon the credibility of a witness. Numerous high-profile cases have been destroyed by these failures. Alan Dershowitz's advice that the "best defense" is to put the government on trial for its misconduct has turned into reality. Unless you are thinking *Brady*, *Giglio*, *Kyles*, and discovery *from the moment you enter a case*, you may well end up in the Department's Office of Professional Responsibility. *Brady* and *Giglio* are no longer a defendant's shield—they have become a powerful sword.

   In response to these developments, Deputy Attorney Ogden wisely on January 4, 2010, promulgated for his Department a comprehensive memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery*. Without fail, you must obtain a copy of this document, digest it, and follow it without exception. This document references the United States Attorneys' Manual § 9-5.001 et. seq., which you must also review. Moreover, each United States Attorney's Office and Department litigating component handling criminal matters should develop a uniform criminal discovery practice and policy that comports with the relevant circuit court and district court precedent, local rules, and practice.

2. The defense has a right to *everything* that reflects on the credibility of the witness—maybe even your "work product" notes as a "statement of a government witness." *Goldberg v. United States*, 425 U.S. 94, 94–95 (1976) holds that a prosecutor's notes taken during a witness interview may well be statements under the Jencks Act. *See also United States v. Ogbuehi*, 18 F.3d 807, 810–11 (9th Cir. 1994). If you put something on paper, expect that it will have to be turned over. If it does, you won't be embarrassed. If it doesn't, so be it. Don't forget *United States v. Harris*, requiring the FBI to preserve rough notes of witness interviews. *United States v. Harris*, 543 F.2d 1247, 1248 (9th Cir. 1976); *see also United States v. Riley*, 189 F.3d 802, 806–07 (9th Cir. 1999). If you have any doubt about a piece of evidence, the very fact of that doubt should cause you to seek a pretrial *Brady* ruling from the court *ex parte in camera,* if possible. If you haven't read *Giglio v. United States*, 405 U.S. 150 (1972) if possible. If you haven't read *Giglio v. United States*, 405 U.S. 150 (1972) in a while, you must do so.

3. On April 19, 1995, the Supreme Court decided a very important case discussing a prosecutor's *Brady* duty to disclose "favorable evidence" to the defense. If you are a prosecutor and have not read this case, you must do so *immediately* because it establishes certain *affirmative discovery duties* on the part of a prosecutor that, if neglected, may wreak havoc with your work.

Kyles v. Whitley, 514 U.S. 419 (1995) is the case. It involves a prosecutor's failure in a murder case to turn over to the defense (1) impeachment evidence concerning key eyewitnesses, and (2) inconsistent statements made by an informant, Beanie, who was never called to the stand but who the defense claimed was the real killer of defendant Kyles's alleged victim. Because five Justices decided that had this evidence been turned over to the defense a different result was reasonably probable, Kyles's conviction and death sentence were overturned.

In rendering this decision, the Court held that a prosecutor has an *affirmative duty* promptly to inquire and to learn from *all* agencies involved in the case whether evidence favorable to the defense exists. Justice Souter described this duty as follows:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that *the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case*, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady* [*v. Maryland*, 373 U.S. 83, 87 (1963)]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.
>
> . . . .
>
> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. [*See United States v. Agurs*, 427 U.S. 97, 108 (1976)] ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 . . . (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. The prudence of the careful prosecutor should not therefore be discouraged.

Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (citations omitted) (emphasis added); *see also Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process.").

Kyles is not the first case to put an affirmative duty on prosecutors to search out impeaching information regarding informer witnesses. In *United States v. Osorio*, the court held that a "prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows [about the witness], simply by declining to make reasonable inquiry of those in a position to have relevant knowledge." *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991). "The government, as represented by its prosecutors in court, is under a duty of inquiry regarding information concerning the criminal past of its cooperating witnesses . . . ." *Id.* at 761–62. The *Osorio* panel went out of its way to castigate the government for what it called "sloppy practice." *Id.* at 760. Read the opinion for a discussion of the effect of tardy disclosure to the defense of impeaching evidence.

United States v. Mahaffy is mandatory reading for prosecutors working with outside agencies such as the Securities and Exchange Commission. *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012). In *Mahaffy*, the Second Circuit reversed multiple convictions because the defense was not told pre-trial about SEC witness depositions that contradicted the theory of the government's securities fraud case. *Id.* at 130–34. Judge Parker's thorough opinion explains in exquisite detail why such evidence was material and how it could have been used by the defense to undercut the prosecutors' theory. *Id.* Judge Parker adds this icing to the cake: "In light of the government's mishandling of material exculpatory and impeaching material, we wonder whether the government will choose to subject the defendants to yet a third trial." *Id.* at 134. Get the message?

The Ninth Circuit has held that *Brady* and *Kyles* require the prosecution—when it decides to rely on the testimony of a witness with a significant criminal record—"to obtain and review [that witness's Department of Corrections] file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc).

Equally important in the Supreme Court's opinion in *Kyles* is the Court's blessing of an attack by the defense on the caliber of the investigation conducted by the police as a way to defeat the legitimacy of the prosecution's case. *Kyles v. Whitley*, 514 U.S. 419, 443 n.14, 446 n.15 (1995). In particular, the failure of the police to investigate whether the informant Beanie was the actual killer is identified by Justice Souter as fair game. *Id.* at 443 n.14. This means that a prudent investigator or a prosecutor will conduct an investigation of the informant's possible complicity and duplicity in any situation where it can be anticipated that one of the defenses might be (as in *Kyles*) that the "informant did it." Not only is such an investigation an excellent way to make sure that you have the right defendant, but it will save you when you do have the right defendant from the fate of the prosecutors in *Kyles* (*Kyles*'s "blessing" of attacks on the quality the investigation is not a general one that permits such an attack in all cases but is limited to instances where the quality of the investigation has some particular relevance to the assessment of some particular evidence that is before the jury). *Kyles*, by the way, is a textbook on how *not* to put together a case. To say that the investigation shot itself in the head is charitable.

4. In the federal prison system, prisoners' telephone calls to the outside are tape-recorded. In *United States v. Merlino*, the Court of Appeals held (1) that *Kyles v. Whitley* "cannot be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"; and (2) that the defense had failed to make a showing that Bureau of Prisons tapes of more than 2,000 calls involving cooperating witnesses in the Witness Security Program contained *Brady* material. *United States v. Merlino*, 349 F.3d 144, 154–55 (3d Cir. 2003). Thus, the Court of Appeals affirmed the District Court's denial of a subpoena for the tapes. *Id. Nevertheless*, be aware of this fertile ground as a source of information that might damage the credibility of prisoner witnesses. *Check it out!*

5. If you knowingly fail to turn over information to the defense to which the defense is entitled, you will be in BIG trouble. Read United States v. Kojayan for an example of how awful that trouble can be. *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993). Not only did the assistant get into trouble in that case, but his whole office was taken to task. *Id.* at 1320, 1324. Every competent defense attorney in America can be expected relentlessly to search for something you have "suppressed and failed to turn over." Make a mistake, and you'll never forget the hot water in which you find yourself. (Problem was that the government made representations in closing regarding a "missing witness" that were inconsistent with information known to the government, but not to the defense, because the fact that the government had not called that witness because he was cooperating in a larger investigation had not been disclosed.) *See Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005) (discussing situation where prosecutor failed to disclose a deal with a witness requiring the witness not to undergo a planned psychiatric evaluation before the witness testified for the state).

6. See *United States v. Hickey* for a case denying defense access to the file of a witness in a Witness Security Program on the ground that the witness was in danger. *United States v. Hickey*, 767 F.2d 705 (10th Cir. 1985). The Court held that under such circumstances, a general outline of the deal with the witness was all that the defendant was entitled to. *Id.* at 708–09.

J. Guilty Pleas: The Factual Basis

The Supreme Court held in *United States v. Ruiz* that "the Constitution does not require the [g]overnment to disclose material impeachment evidence [regarding informants and other witnesses] prior to entering into a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 623 (2002). Nevertheless, you can expect a defendant who discovers dirt about an informer to attempt to undo a plea of guilty by claiming "actual innocence." But *Ruiz* does *not* give a prosecutor the option of falsely answering discovery motions. *See Ruiz*, 536 U.S. 622. After you read *Ruiz*, always read *Banks v. Dretke*, 540 U.S. 668 (2004).

The best way to attempt to forestall unnecessary post-judgment litigation is to require at the time of the plea that the defendant explain in excruciating detail *under oath* exactly what he or she did that constitutes *every* element of the crime to which the plea is being entered. You cannot overdo this process. Don't be shy. Require the defendant to confess to everything, in *his own words*. Don't *you* describe what happened and simply require the defendant to agree. Make the *defendant* describe the conduct *and* his state of mind, and *make* the defendant do it under oath.

This way, any marginal doubt about the defendant's guilt is erased, and any new information about the informer-witness's credibility is irrelevant: the defendant has admitted the charge. Do the same with your cooperating coconspirator or accomplice.

K. Trial Tactics

1. Motions in limine to limit cross examination and opening statement.

   a. Although discovery is virtually limitless when it comes to factors weighing on the credibility of a cooperating criminal, careful consideration should be given to making a motion in limine to preclude the defense from going into inflammatory areas on cross-examination that are really a general attack on character rather than credibility. The key to such a motion, of course, is Rule 403 of Federal Rules of Evidence, which provides:

      > Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presenting cumulative evidence.

      FED. R. EVID. 403.

      Rule 403 has been interpreted on numerous occasions to limit cross-examination of government witnesses. *See United States v. Bari*, 750 F.2d 1169, 1179 (2d Cir. 1984) (precluding cross-examination relating to the psychiatric history of a government witness); *United States v. Nuccio*, 373 F.2d 168, 171 (2d Cir. 1967) (excluding cross-examination of homosexuality); *United States v. Rabinowitz*, 578 F.2d 910, 912 (2d Cir. 1978) (upholding trial judge's refusal to permit cross-examination with respect to government witnesses' prior act of sodomy and psychiatric treatment therefor); *United States v. Glover*, 588 F.2d 876, 878 (2d Cir. 1978) (preclusion of cross-examination on psychiatric history after *in camera* review of psychiatric records); *United States v. Singh*, 628 F.2d 758, 764 (2d Cir. 1980) (limitation of cross-examination based on privacy concerns); *United States v. Burke*, 700 F.2d 70, 82–83 (2d Cir. 1983) (allowing cross-examination on the involvement of a witness in a significant robbery but precluding cross-examination on the details).

In this regard, it should be argued (when appropriate) that permitting the defense to elicit extraneous and highly inflammatory information flies in the face of Rule 403 and, in so doing, prejudices the government by causing the jury to focus unduly on elements of the witnesses' character not relevant to credibility.

This, however, is an area in which a prosecutor should tread with great care. The right to confront and cross-examine a witness is a guarantee of constitutional dimensions, and a successful motion in limine in this area may backfire on appeal unless it is carefully crafted so as *not* to deprive the defendant of too much. *United States v. Mayer* ought to be read and digested when you are contemplating erecting a protective barrier around a testifying criminal. *United States v. Mayer*, 556 F.2d 245 (5th Cir. 1977). *Mayer* states the following in this regard:

> "(C)ross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope. This is especially true where a prosecution witness has had prior dealings with the prosecution or other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution in exchange for the prosecutor's actions in having some or all of the changes against the witness dropped, securing immunity against prosecution for the witness, or attempting to assure that the witness receives lenient treatment in sentencing."

Id. at 248–49 (citations omitted) (quoting *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974); citing *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976); also citing *United States v. Dickens*, 417 F.2d 958 (8th Cir. 1969); and citing *Beaudine v. United States*, 368 F.2d 417 (5th Cir. 1966).

The Ninth Circuit agrees with the Fifth Circuit. In *United States v. Brooke*, Judge Reinhardt said:

> We have previously pointed out that "[w]hen the case against a defendant turns on the credibility of a witness, the defendant has broad cross-examination rights." *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984). We cannot overemphasize the importance of allowing full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary. These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross-examination and otherwise is indisputably in the interests of justice. Ordinarily, such inquiries do not require the expenditure of an inordinate amount of time, and courts should not be reluctant to invest the minimal judicial resources necessary to ensure that the jury receives as much relevant information as possible. Nor should unwarranted fear of juror confusion present any impediment. Federal jurors, who are expected to follow the complex testimony and even more intricate instructions that are presented in many of our criminal cases, such as multiple conspiracy prosecutions, are unlikely to be confounded by a defendant's inquiry into the bias and credibility of a key government witness. In any retrial, the district court should afford Brooke a full and fair opportunity to question Kearney regarding any of his past activities that are probative as to the credibility of his testimony or as to any bias that may underlie it.

United States v. Brooke, 4 F.3d 1480, 1489 (9th Cir. 1993); *see also United States v. Larson*, 495

F.3d 1094 (9th Cir. 2007) (en banc).

If such a motion is made, and if it is successful, it obviously has ramifications with respect to opening statements and what counsel can and cannot say.

2. Voir dire.

   a. Let the jury know, without making a "big thing" about it, that you are going to call a witness that is getting something in return for his testimony. Ask if the jurors will reject such a witness out of hand or if they will fairly listen to what the witness has to say. Adopt early an attitude that you aren't real pleased with having to do this, but crimes aren't all committed in heaven so all our witnesses aren't angels, etc. Preempt the defense. If a judge is reluctant to ask these questions, point out that they are all no different than asking a prospective juror whether he or she will give undue credibility to a police officer just because he is a police officer, etc.

3. Opening statement.

   a. Front matter-of-factly and briefly all the "bad stuff," including the deal, but don't dwell on it. Follow up the bad stuff with references to matters that corroborate what he says. This is sometimes called the "doctrine of inoculation." But don't put all your eggs in the accomplice's basket. The case stands on its own two feet. Refer as matter-of-factly as possible to the witness. The objective here is to control the manner in which the jury first hears of the dirt. If you do not do this and instead turn over the opportunity to the defense to "uncover the government's dirty laundry," you will be in deep tactical trouble.

   A trap lies waiting for you, however, unless you are careful. If you *under*-inform the jurors about the extent of the witness's negative baggage, a clever defense attorney might accuse you of hiding relevant information, or "gilding the rotten lily." In the prosecution of Robert Wallach, for example, the prosecution only briefly referred in opening statement to the fact that its principal witness was a multiple felon. The defense immediately countered by expanding in detail and revealing that the witness had committed 113 felonies, all of which, except one, had resulted in virtually no sentence because of his cooperation with the prosecution. The jury was then asked, "Why did these facts not come from the government? Why is the government not honest with you about the facts?" To avoid this trap, be thorough and clinical in your presentation.

4. Jury instructions.

   a. In *Banks v. Dretke*, the Supreme Court all but mandated cautionary jury instructions with respect to a testifying informer's credibility, referencing "Federal Jury Practice and Instructions, Criminal § 15.02 (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony)". *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (citing 1A KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 15.02 (5th ed. 2000). You must be familiar with the instructions that cover accomplices, corroboration, perjurers, drug addicts, immunity, prior convictions, the witness security program, etc. Always review them with care *long before* jury selection. This will cause you to look for effective ways to cope with the cautionary admonitions that always crop up when an accomplice or an informer enters into a case. Figure out your jury arguments as early as possible.

   b. The following is excerpted from a favorable jury instructions on the credibility of accomplices given in the case of *United States v. Stanley Friedman*, a case successfully prosecuted in 1987 in Connecticut involving corrupt New York City politicians. *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988). One significant feature of the instruction is that it advises the jury not to second-guess a prosecutor's decision to make a deal with a witness. It also advises the jury that dislike for a witness is not a basis standing alone to disregard his testimony.

INSTRUCTION

I now turn to the question of accomplices. Almost all of the important witnesses in this case are accomplices of one sort or another. An accomplice is a person who is guilty of and could be prosecuted for any crime or crimes of which the defendants are accused. The law lays down several rules which govern your treatment of accomplice testimony. In the first place, it is no concern of yours or of mine why the Government chose not to indict a certain person or if it did indict him, why it determined to treat that with leniency. The decision of what persons should be prosecuted and what pleas of guilty should be accepted from persons who are indicted are matters which the Constitution and Statutes of the United States have delegated to the Attorney General of the United States, who, in turn, has delegated it to the United States Attorney and his counterparts in other judicial districts. It is an awesome responsibility, but the Constitution and statutes do not give you or me any authority to supervise its exercise.

Also, as I believe I told you when you were being selected, if you once come to the conclusion that an accomplice witness has given reliable testimony, you are required to act on it exactly as you would act on any other testimony you found to be reliable, even though you may thoroughly dislike the witness giving it to you.

However, the law imposes upon you stringent requirements as to how to evaluate such testimony before concluding it to be reliable. Obviously, it's much more pleasant to be a witness than a defendant. The law requires that you scrupulously examine an accomplice's motives in persuading the Government to accept him as a witness rather than prosecuting him as a defendant. So, you can be sure that he's neither made up a story to incriminate someone nor colored the facts of an otherwise true story to make someone appear to be more guilty than he actually is.

I'm going to discuss with you in some detail the testimony of the Witness Lindenauer, not because I think his testimony is more important that any other witness -- that is a question wholly within your province to determine -- but simply because all attorneys in the case spent so much time on this particular aspect of his testimony that it lends itself to illustrating the principles involved.

In the first place, Lindenauer told you that he had lived a life characterized by acts of wrongdoing, many of which involved deception. This is obviously a factor you will take into account in determining the reliability of his testimony.

In the second place, he was able to negotiate a plea which considerably reduced the total scope of the sentence that might have been imposed upon him had he been convicted of all his wrongdoings.

And finally, he hopes, as he specifically told you, that the testimony he gave in the case will induce the judge before whom he pled guilty to be lenient in imposing sentence.

These circumstances could have affected Lindenauer in at least three possible ways. They could have caused him to make up imaginary facts in order to incriminate some or all of the defendants, or they could

have caused him to color existing facts to make them appear to be more incriminating than they actually were. Or, on the other hand, they might have caused him to conclude that his best hopes of salvation [were] to be able to convince the judge who ultimately sentences him that he was scrupulously honest in his testimony before you. You should take account of these and any other possibilities that might occur to you in evaluating his testimony.

The foregoing principles apply in varying degrees to all so-called accomplice witnesses. Some face sentences and some testified under grants of various types of immunity, which greatly reduced the possibility of their ever being prosecuted. They all, in one way or another, could conceive it to be in their own best interest to achieve and retain the good will of the Government.

Now, in this connection, what you're concerned with is the witness's perception of this situation. And much has been argued about the risk he runs of perjury if he testified untruthfully. In that situation you must look at his perception of what would happen to him, and it might well be argued that his perception is that the best way of avoiding such things would be to curry favor with the only person who can prosecute him for perjury[:] namely, the Government.

On the other hand, it may just as logically result in his thinking that the best way to avoid it is to avoid the commission of perjury. It's his perception that you focus on, what you think he thinks, how you think that would influence his testimony.

Of course, that's not the only thing you consider. You consider every element of credibility in dealing with the witness, how his testimony fits in with other evidence in the case, and all the other things that I mentioned to you.

5. Direct examination.

   a. Make it pointed, and at times turn it into the equivalent of cross-examination. You are not the champion of the witness. You are a person charged with getting at the truth; and you aren't at all embarrassed by having to call to the stand a crook to do it.

   b. Bring out *all* the problems, such as every benefit being extended to the witness in consideration of his testimony, previous inconsistent statements, etc., and confront the witness with them. Don't wait for the defense. You must control the manner in which the jury first hears of the dirt, or the dirt will end up on you. Go on the offense. Section 607 of the Federal Rules of Evidence allows you to do this. FED. R. EVID. 607. For the proposition that this kind of anticipatory material is appropriate on direct, see also *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), *abrogated on different grounds by Salinas v. U.S.*, 522 U.S. 52 (1997); *United States v. Hedman*, 630 F.2d 1184, 1198–99 (7th Cir. 1980); *United States v. Craig*, 573 F.2d 513, 519 (7th Cir. 1978); *United States v. Necoechea*, 986 F.2d 1273, 1280 n.4 (9th Cir. 1993); *United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir. 2004). The jury must rely on *you* to get at the truth! If a witness lied to someone, *you* must bring that out. Ask the witness if he lied, and then tell him to explain why he did that. Probe his attitude about testifying. Frequently it can be convincing—if it is candid. If there is a lot of this stuff, weave it in slowly rather than giving the jury too much to swallow in one bite. Remember, however, not to vouch for the witness's credibility.

   Your goal in this regard is to steal every bit of legitimate thunder that the defense might

be able to muster on cross. Vaccinate the jurors by controlling the manner in which they are exposed to the problems. If the jury has already heard it from you, it loses a lot of its sting. Put in a different perspective, the best defense that you can provide for a witness against vigorous cross-examination is to have revealed the problems yourself to the jury during opening statement and then on direct. If the jury first hears about such damaging and troublesome matters from you, the defense is disarmed, and you build your own credibility. Under your skillful questioning, you can couch these matters in a sterile setting, minimize their dramatic impact, and cushion them with an appropriate explanation. Examples of such material are prior convictions, grants of immunity or leniency, deals, promises, rewards, perjury, mistakes, inconsistencies, etc. *See United States v. Henderson*, 717 F.2d 135 (4th Cir. 1983); *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981) *abrogated on different grounds by Salinas v. U.S.*, 522 U.S. 52 (1997); *United States v. Hedman*, 630 F.2d 1184, 1198–99 (7th Cir. 1980); *United States v. Craig,* 573 F.2d 513, 519 (7th Cir.), *cert. denied,* 439 U.S. 820 (1978); *United States v. Oxman*, 740 F.2d 1298 (3d Cir. 1984), *judgment vacated*, *U.S. v. Pflaumer*, 473 U.S. 922 (1985); *United States v. McNeill*, 728 F.2d 5 (1st Cir. 1984). In *People v. Gordon*, the California Supreme Court even went so far as to sanction an admonition by a prosecutor to a jury in opening statement that one of his own witnesses might not be completely truthful. *People v. Gordon*, 10 Cal. 3d 460, 474 (1973). The court noted that "a party does not necessarily have a free choice of witnesses but must take those who know the facts, and therefore cannot vouch for them." *Id.* at 474 n.8.

As discussed earlier, cast yourself temporarily in the role of the defense attorney and figure out how you would cross-examine your own witness. Make a list of the areas you would attack, and then seek ways to prevent the attack by neutralizing the area before the defense attorney gets a chance.

If the witness is in the federal witness security program and receiving subsistence payments, *go into it on direct*. Otherwise, on cross-examination the defense will ask, "How much are you getting for your testimony?"; the answer may crush your case. *See United States v. Partin* 601 F.2d 1000 (9th Cir. 1979) *abrogation on different grounds recognized by United States v. Reward*, 889 F.2d 836, 857–58, 858 n.16 (9th Cir. 1989). Have a game plan to handle every aspect of the program if it is attacked as a method of purchasing testimony. What will you say in final argument?

If you anticipate a defense based on the argument that the informer/witness is really the perpetrator, after *Kyles* you probably have the option of using direct to put on evidence in the form of "conscientious police work"—that is, that the police investigated this possibility and concluded that it was not true. *Kyles v. Whitley*, 514 U.S. 419, 446 n.15 (1995). Or you might want to wait until redirect to wheel out these guns. The point here is that you must have a cogent plan to meet this contingency *before* the trial starts. But watch out for the rule against personally "vouching" for a witness. *See United States v.Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005). One note of caution: *See United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005). One note of cautionif the court has ruled that the defense may explore the quality of the police work, then it may be advisable to go there first. If, however, there is no ruling, we have almost certainly opened the door to the sloppy investigation defense if we start down this road before the court has ruled.

If you like to write out verbatim the questions that you intend to ask a witness with the answers that he has told you he will respond with, be careful that you are not accused of perjuriously scripting the witness's testimony. Whatever you do, do not give a copy of such a document to the crook. If you do, it may come back to haunt you if the crook decides to cross back to the underworld with the "script" in his possession. Such a script was used (unsuccessfully) to accuse a United States Attorney in Oklahoma of manufacturing evidence.

6. Corroboration.

   a. As I have already mentioned, when evaluating your evidence and planning your case, always start from the proven rule of thumb that THE JURY WILL NOT ACCEPT THE WORD OF A CRIMINAL UNLESS IT IS CORROBORATED BY OTHER RELIABLE EVIDENCE. (And you should not either.) Jurors will also pick and choose, accepting that part of a crook's testimony that is corroborated and rejecting that part that is not. I cannot stress this point too strongly. If you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informant, get back out in the field and go back to work. Corroboration is to an accomplice's testimony what gasoline is to a car: without it, you get nowhere. The best thing that can happen to you is that the leads provided to you by the witness will uncover so much other good evidence that *you won't have to call him at trial*! Deciding not to use an accomplice, however, can be a difficult judgment call, especially when his evidence is very probative. On occasion, you may not have to make this decision until late in a trial, when you can get a better sense of how everything is going than is possible before a trial starts. To retain the option of calling him, simply do not refer to his identity during voir dire or your opening statement. Simply say, "And we will prove that the defendant personally made the decision to execute his rival," without saying how you intend to do so. Then, if you decide at the end of your case in chief that you need the accomplice's testimony, you can use it without fear of claims of sandbagging—so long as you have completed discovery and notified the court that you are retaining this approach as an option. Do not surprise the judge. Some might deny you this opportunity if you do.

   At the risk of repeating myself, let me give you yet another example of this important principal: the Walker/Whitworth espionage series of cases. Because of glaring weaknesses in the Whitworth case, John Walker himself was called as a witness against his accomplice.

   This tactic was successful, but the jurors' observations as reported in the *Washington Post* are very educational:

> Jurors expressed considerable sympathy for Whitworth and extreme distaste for Walker, the chief witness against the former Navy colleague he recruited into the spy ring.
>
> In the first afternoon of deliberations, when they were finally permitted to express their views about the long trial, jurors "vented our individual feelings," Young said, and there was an outpouring of hostility against Walker. "The man gives a new meaning to the word low," juror Minda Amsbaugh, a bank officer, said.
>
> Foreman Neumann called Walker "the most villainous person I've ever seen," and added, "I personally would feel that it's not just" if Walker were released from prison before Whitworth.
>
> "John Walker was clearly a worm, clearly a despicable character," Young said. "There was a feeling it was just too bad there wasn't another person on trial," he added, referring to Walker. "Walker seems to have gotten the better of this deal and Jerry's left holding the bag."
>
> But, he said, the jury believed that Walker was "essentially telling the truth" in his testimony about Whitworth's participation in the ring.
>
> Walker agreed to plead guilty to espionage and is to be sentenced to life in prison in return for more lenient treatment for his son, Navy Seaman Michael Lance Walker, who also pleaded guilty and is to be sentenced to 25 years.

> "We all had our favorite little lies that we thought we detected" in Walker's testimony, Browne said, "*but in the end it didn't make a difference because there was enough corroborating testimony* on all the major issues." He said he thought payment schedules seized in both men's homes were "especially damning," a factor also cited by Neumann.

(Emphasis added).

b. Physical evidence is the best. Corroborate *everything* you can. Prove the guilt of the witness as well as the guilt of the defendant. Corroboration is what the jurors want and what they look for. Make it visual: prepare charts, blow up pictures, etc.

c. In choosing the order of witnesses, where it makes chronological sense, consider corroborating the witness before you put him on the stand; i.e., have the storekeeper ID him first as the bystander robber, then he can take the stand and ID his killer accomplice. You are allowed to prove the substantive guilt of your witness to establish the truth of his claim to firsthand knowledge of the crime in question. The fact of his guilty plea is also admissible, *but* a limiting instruction constricting the use to which such a plea can be put is required. *See United States v. Halbert* 640 F.2d 1000, 1006–07 (9th Cir. 1981). Such testimony is tricky and should be handled with great care. The witness's plea is *not* admissible directly to prove a defendant's guilt, only to reflect on the witness's credibility, on his first-hand knowledge, or to dampen claims that the witness has been given a free ride for his cooperation. . Read *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994) and *United States v. Johnson*, 26 F.3d 669, 675–78 (7th Cir. 1994) for good discussions of this issue. Whatever you do, don't say, "And our turncoat witness, George Bultaco, will tell you he has pleaded guilty to the very same crime for which the defendant is on trial." [paragraph "c" is misaligned]

If he is going to testify about his arrest, put the arresting officer on first to tell the jury what happened. If the jurors have already heard it from someone else, it is easily accepted by them when the same thing comes from him.

7. Preparation of the witness for cross-examination.

a. Prepare the witness for cross-examination, but be careful not to create a rehearsed witness who can be unmasked as such by the defense. Your witness must be able to survive a vigorous cross-examination to have any substantial value in the eyes of the jurors. Coaching a witness is a process that may need to be revealed on discovery, especially if a transcript or tape exists of the session. If you try to reconfigure a witness's confused story before it becomes testimony, the more you may be digging a hole for you and your witness, especially if the witness then claims on the stand that he wasn't coached. Read *Banks v. Dretke*, 540 U.S. 668 (2004) for a refresher on this pitfall.

b. The main thought to pound into the witness's head is that he must not play games with the defense attorney or allow himself to get upset. The only specific instructions I ever gave a witness was to remember at all times that testifying is not designed to "get anyone" or to protect himself, it is a time to tell "the truth about *everything* no matter who asks the questions—me, the defense attorney, or the judge." If a defense attorney ever asked such a witness what I told him to say or do on the stand, the answer was, "The prosecutor told me to answer all the questions truthfully no matter who asks them, the prosecutor, you (referring to the defense attorney), or the judge." Also, the witness should *not* play to the jury by looking at them. Jurors do not like this.

8. Perjury and false testimony.

a. In *Mooney v. Holohan*, the Supreme Court held that the knowing use by a prosecutor of perjury constitutes a violation of due process of law. *Mooney v. Holohan* 294 U.S. 103, 112–13 (1935). In

Alcorta v. Texas, the Court condemned the behavior of a prosecutor who told a prosecution witness not to volunteer certain information obviously helpful to the defendant, but if specifically asked, to be truthful about it. *Alcorta v. Texas* 355 U.S. 28, 31–32 (1957). The witness lied, leaving the information known to the prosecutor out of his testimony. *Id.* The prosecutor took no steps to correct the witness's testimony, and the Court concluded that petitioner was denied due process of law. *Id.* at 31.

The Second Circuit extended the reach of these holdings in a case where an informer lied on direct examination about whether he had stopped his compulsive gambling. *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). In fact, the government charged their witness after the trial with perjury, and he was convicted of the same. *See id.* at 456. The government claimed, however, that it did not discover that the informer had lied until after the trial. *Id.*

The Second Circuit was unimpressed and reversed the original target's conviction, holding based on the facts that the government should have known that its witness was lying. *Id.* at 457. What this means is that a prosecutor must be vigilant during the testimony of an informer to spot any surprise testimony that is not the truth and to identify it as such for counsel for the defense.

Also, a prosecutor faced with reason to believe that a cooperating witness may be prepared to commit perjury or has solicited others to do the same has a constitutional due process obligation to investigate and to avoid this possibility. *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1117–18 (9th Cir. 2001); *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004). A prosecutor may not fail to act under these circumstances.

However, it does not mean that a prosecutor is precluded from calling a witness to the stand who intends to lie but whose lies will serve as the predicate for the introduction of prior inconsistent statements or the likes. The key is full disclosure to the Court and to defense counsel.

9. Final argument.

   a. Accentuate the corroboration. Brush off the defense. Tell the jury, "We know that. I told you all about that during my opening statement and again during the direct examination! The issue in this case isn't whether Terry Miller is a crook with a prior felony conviction who lied to the police after he was arrested; the issue for you to decide is whether he has told the truth under oath here in court about his crime partner (point out the defendant), Alfred Mason, the defendant. And with that in mind, let's talk about the *evidence* that corroborates his testimony and proves independently and conclusively that Alfred Mason murdered David Kernan."

   An excellent tactic is to acknowledge the cautionary jury instructions and then to suggest to the jurors that they set aside at the outset of their deliberation the testimony of the accomplice for the purpose of testing the case on the basis of the rest of the evidence. The jury will do this anyway, and this approach enables you to argue that the case is "solid" without his testimony, but that with his corroborated testimony, all doubt has been erased. You called this obviously unseemly witness to leave no stone unturned in proving what happened.

   "Let's suppose that Terry Miller [the accomplice witness] himself was killed during the shooting and never ever made it into this courtroom," I told them, "and let's see what the rest of the evidence shows." Then I took a Sherlock Holmes approach to "solving the case," and the jurors usually loved it. They want to be the detectives, not just the jurors. Invite them to solve it with you. Dwell on the strength of the circumstantial evidence. Then after I described an airtight case against the defendant, I told the jurors to add the accomplice's testimony to the mix, and the defendant's guilt is established not only beyond a reasonable doubt, but to an absolute certainty. "Terry Miller's testimony is just frosting on the cake; he is not the government's 'key witness,' as the defense would have you believe"; he was Mason's choice as an accomplice.

In making this argument, you can fashion out of the corroborating and circumstantial evidence a web that points towards and snares the defendant. If you work towards this argument from the beginning of your case preparation, it will frequently fall easily into place. Its purpose, among other things, is to give the jury a device to *shift the focus from your witness back to the defendant and to the incriminating and corroborating evidence*. Do not buy into what the defense attorney says the case is all about.

b. Do not overlook the opportunity to turn the results of an aggressive cross-examination, making your witness look like a horrible person, into an advantage. In other words, turn the tables. The worse the defense makes the defendants' "former" best friend and partner look with crimes, drug use, tax evasion, lies, and the likes, the more able you will be to counter by pointing out—probably in final closing argument after your witness has been thoroughly savaged—that the *defendants* chose him as a partner to hang out with, not the government. If the witness is so awful and rotten, what does that say about his pals, the defendants? Birds of a feather flock together?

If the facts lend themselves to this rebuttal argument, you will be able to lay the groundwork for it on direct and, *especially,* redirect examination of your witness. Also, if a defendant takes the stand, you will have a golden opportunity to develop in great detail the extent of the witness's and the defendants' relationship.

This argument also serves to swing the spotlight off your witness and focus it where it belongs—on the defendants. The Organized Crime Strike Force used this tactic to great advantage with their cooperating mafia witness Henry Hill. The worse the defendants made Hill look, the worse the defendants looked. Furthermore, who knows more about crime than criminals? Did you expect witnesses in a murder/drug/terrorist case to come from the Sisters of the Poor?

c. During your *rebuttal argument*, be prepared if necessary to justify and defend any deal that you have made, but *do not vouch* for the witness! Read *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992), *United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997), and *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) to see what you cannot do and cannot say to a jury in this regard. Point out that crooks don't usually commit their crimes on video tape and leave copies lying around for everyone to review. Point out also that we can't go to central casting and get our witness; we have to go to people who know something about the crime, and unfortunately, some of those people are going to be the crooks themselves. You didn't choose these witnesses; the *defendant did* by recruiting them into his scheme.

They aren't the government's friends, *they are his friends*!

Sometimes to catch a thief, it takes a thief. "The integrity of government demands it. It is simply unacceptable to convict only the bagman and let the crooked politician get off. If we never made deals with the little fish, the smart big fish would always get away. Is that what you want to happen?" Once again, get the spotlight off your witness and onto the real crook.

This is also a good time to dust off the tried-and-true argument that when a defense attorney has the law on his side, he talks about the law; when he has the facts, he talks about the facts; but when he has neither, he attacks the prosecutor and the government.

d. One aspect of the witness that you can emphasize is his motive to tell the truth. Point out that he can only have a motive to tell the truth because that is what will get him what he wants. Lies will only destroy the deal and cause him to be prosecuted for perjury. "He wants to stay out of jail. All he has to do to stay out is tell the truth, not lie. Lies will put him right where he doesn't want to be—in prison. His motive based on the evidence and the record can only be to tell the truth!" To this, you can add, "By stepping forward and telling you what he knows, he has made himself

publicly into an informer, a snitch." Do you think that a person does that lightly? Of course not. That is not something that a person would willingly do if it were just make-believe! However, be careful to make these arguments using only the *evidentiary* record without *vouching*.

e. Be very careful how you use the plea agreement. Again, you may not "vouch" for the witness. A number of cases in different circuits have severely criticized prosecutors for misuse of the terms of a plea agreement, referring to the polygraph, etc. For a comprehensive view of the problems in this area, read *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983), *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992), *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992), and *United States v. Perez*, 67 F.3d 1371 (9th Cir. 1995), *opinion withdrawn in part*, 116 F.3d 840 (9th Cir. 1997).

A thorny aspect of using the plea agreement's requirement that the witness "tell the truth" is that it may look like vouching, *unless* this provision is brought up after and in response to a defense attack on the witness's credibility *because* of the plea agreement. Read *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir. 1988), *United States v. Shaw*, 829 F.2d 714, 716 (9th Cir. 1987), *United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir. 2004), and *United States v. Necoechea*, 986 F.2d 1273, 1278–79 (9th Cir. 1993).

III. Postscript

In 1883, over a century ago, prosecutor William H. Wallace assumed the task of prosecuting the infamous Frank James, brother of Jesse, for murder. To do so, Wallace called a member of the James gang to the stand, one Dick Liddil. Liddil was a convicted horse thief, an accused murderer, and a traitor to the band, who was trying to evade the punishment his crimes deserved. As was to be anticipated, Liddil's credibility and character came under fierce attack by the defense, as did the state for "its misconduct" in making an unholy deal with him. Here is prosecutor Wallace's reply to the jury. Although some of it certainly would be inappropriate under today's standards, you might find much of it useful.

> Dick Liddil was a member of a band of train robbers, known as "The James Gang." This nobody denies. If he had not been, he could not have rendered the state the vast benefit that he has. When men are about to commit a crime they do not sound a trumpet before them. They do their work in secret and in darkness. Neither when they are forming bands for plunder or death, do they select conscientious, honest citizens. A man contemplating murder would not say, "come along, Mr. Gilbrath, or Mr. Nance, [both jurors,] and join me in my fiendish task." Their work is done when honest, law-abiding men are asleep, and "beasts creep forth." For this reason, when the state would break up a band of criminals, it must depend upon the assistance of one of their peers in crime to do it. Hence it is a custom, as old as the law, to pick out from a desperate band one of their own number, and[] use him as a guide to hunt the others down. No honest, law-abiding man objects to this. When men go about where this is done, crying "perfidy," "traitor," "treason," you can put them down as the enemies of good government, or so steeped in prejudice that they know not what they do. Liddil, the least depraved man in the most secret, desperate band, perhaps the world ever saw, has thus been used; and the state has chosen[] to call him as a witness in this case. Mountains of abuse have been heaped upon him; the English language has been ransacked for terms of [vilification]. Once, forsooth, and after he got to be a train robber, too, he was a splendid fellow; splendid enough to be the boon companion of so pure and great a man as Frank James. You remember that the defendant himself testified that Liddil, passing under an *alias*, was his guest, ate at his table, and slept under his roof. Liddil was one of the heroes then, of whom we have heard so much. But suddenly he makes a change. He leaves the shades of crime and comes out into the sunlight of law and order; and all at once, strange to say, he is transformed into a "viper," a "villain," a "scoundrel," a "demon," or such "execrable shape" as his old tutor's counsel can give him. But let the

attorneys for the defense go on with their abuse; it is a part of their business. I shall not retort by calling the defendant a "viper," a "perjurer," a "demon," and the like.

. . . .

It is said that Dick Liddil surrendered, and bargained with the governor of the state, and [Police Commissioner] Craig and [Sheriff] Timberlake, to convict Frank James, guilty or innocent, in order to obtain immunity for himself. I deny that. There is no proof about it, and I have a right, in answer, to emphatically and positively deny it. The only contract with Liddil was that always made with those turning state's evidence, as we call it, namely, that he should tell the whole truth and nothing but the truth; and if he told a falsehood he did it at his peril, and the contract was ended.

JAMES FRANK, ET AL., THE TRIAL OF FRANK JAMES FOR MURDER: WITH CONFESSIONS OF DICK LIDDIL AND CLARENCE HITE, AND HISTORY OF THE "JAMES GANG" 245–46, 247 (Kansas City, Missori, G. Miller, Jr. 1898) (emphases omitted).

I'm sorry to report the tag to this story: Frank James was acquitted. Why? Because the *only* evidence tying him to the murder came from Dick Liddil. So there's nothing new to my claim that an absence of corroboration will be fatal to your case. *See* WILLIAM A. SETTLE, JR., JESSE JAMES WAS HIS NAME, 129–44 (1966).

Finally, and I repeat, *never* at any time lose control of the witness. He will try to manipulate you if he can, thinking that you need him, not vice versa. Be prepared to say "no" to outlandish requests, and let him know at all times that you are in charge. This can be done politely, but it must be done firmly, and believe it or not, he will usually respect you for it. He must trust you to a certain degree, but it doesn't hurt to have an element of fear built into the trust and respect. You do not want to let him think he can cross you and get away with it.   If he commits perjury, prosecute him for it. That's your duty. The truth is your stock-in-trade!

Warning: Everyday new developments arise in this area. Before relying on anything in this outline, make sure it is still good law. Also, if you do not know who Nancy Kerrigan or anyone else in this outline is, try Google.

ABOUT THE AUTHOR

❑ **Judge Stephen S. Trott** is a senior judge on the United States Court of Appeals for the Ninth Circuit. He was nominated to the bench by President Ronald Reagan on August 7, 1987, confirmed by the Senate on March 24, 1988, received commission on March 25, 1988, and assumed senior status on December 31, 2004. Judge Trott graduated with a Bachelor of Arts degree from Wesleyan University and received his law degree from Harvard Law School. Before sitting for the Ninth Circuit, he served as a District Attorney for Los Angeles County, California, and later became the United States Attorney for the Central District of California. He then served as the Justice Department's Assistant Attorney General in the Criminal Division and subsequently became the Associate Attorney General for the Department.

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Note From the Editor . . .

This issue completes a two part series focusing on Violent Crime. We offer our sincere thanks to Steve Cook and Andrew Goldsmith from the Office of the Deputy Attorney General for their leadership on these two issues. We are pleased to offer Judge Trott's updated article on using criminals as witnesses. The majority of the trial attorneys in the United States Attorneys community over the last few decades have benefited from his insights about the dangers of using criminals as witnesses.

Thank you,

K. Tate Chambers