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Gangs & Organized Crime

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Gangs & Organized Crime

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Introduction

David Jaffe

Chief

Organized Crime and Gang Section

Criminal Division

Since the Department of Justice (Department) was created 150 years ago, it has been committed to investigating, prosecuting, and vanquishing organized criminal groups and gangs.

Organized crime and gang crime exact a harrowing toll. Criminal groups are diverse in both their compositions and the ways they cause misery in lives around the country. Neighborhood gangs and transnational gangs like MS-13 spread violence, traffic drugs, intimidate, threaten, and extort, hurting innumerable victims in countless communities. White-supremacist gangs wreak havoc in prisons and on streets while spewing their racist ideology. Organized West African fraudsters prey on lonely hearts seeking romance and ensnare them in illicit schemes. Domestic and foreign organizations employ a variety of sophisticated methods to hide their communications, launder their assets, plot against rivals, and harm everyday Americans.

Unfortunately, I am well acquainted with the proliferation and operation of organized criminal groups. For the past 10 years, I have been honored to work alongside and lead the attorneys and staff of the Criminal Division's Organized Crime and Gang Section (OCGS), a specialized unit charged with developing and implementing strategies to disrupt and dismantle the most significant regional, national, and international gangs and organized crime groups. Along with United States Attorney's Offices (USAOs) across the country, we investigate and prosecute important racketeering and gang cases and work with numerous domestic and foreign law enforcement agencies to construct and coordinate effective enforcement strategies.

Despite the sinister designs of organized criminals and gangs, Assistant United States Attorneys and talented OCGS trial attorneys, intrepid agents, marshals, and officers, savvy forensic examiners and analysts, and other able staff and partners are meeting the challenge to thwart them. Because of the Department's dedicated public servants, more and more of these gang members and associates are being brought to justice. And for those who have not been caught and

prosecuted yet, they can be assured they will be held accountable soon.

This issue of the *Journal of Federal Law and Practice* showcases just some of the Department's efforts to tackle a wide array of organized crime and gangs through painstaking investigations and successful prosecutions.

As to investigation and enforcement, this issue features articles on forensic examinations of illicit business records, such as those racketeering enterprises maintain; cryptanalysis of jail and prison communications of prison gangs and communications of Sureño gangs; obtaining gang evidence in foreign countries; exploiting social media in gang cases; the Federal Bureau of Investigation and Bureau of International Narcotics and Law Enforcement's Transnational Anti-Gang Task Force and its efforts to disrupt and dismantle gangs in Central America; and a task force addressing drug trafficking and gang activity in Native American communities in Wisconsin.

As to prosecution, this issue focuses on prosecuting juvenile gang members in the federal system; boons and pitfalls of using gang cooperators; prosecuting West African romance and re-shipping schemes; the Federal Witness Protection Program as a durable tool for developing organized crime prosecutions; novel legal issues in racketeering cases; and two USAOs' strategies to address the bane of loosely knit, violent neighborhood gangs. In addition, an article on the Department's prosecution of the Ku Klux Klan during the Reconstruction Era and other white-supremacist gangs today demonstrates the Department's historic commitment to battling not only criminal organizations in general, but the long-standing fight against violent white supremacists.

My deep thanks to OCGS and the Executive Office for U.S. Attorneys' Office of Legal Education and Legal Programs for organizing this issue and to all the authors, reviewers, and editors for their hard work on these thoughtful, informative articles.

Are You Maximizing Ledgers and Other Business Records in Drug and Organized Crime Investigations?

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Federal Bureau of Investigation

All businesses keep records. Whether it is legitimate or illicit, a multi-billion-dollar corporation or a small, home-based operation, all businesses need to keep track of inventory, shipments, debt, expenses, profit, payroll, and other critical information. How these records are kept can vary greatly from one organization to the next. Illicit business records in particular are often voluminous, complex, incomplete, and cryptic in nature.

Understanding and interpreting the information in these records can give investigators and prosecutors a unique view into an operation from the perspective of the business transactions. The Cryptanalysis and Racketeering Records Unit (CRRU) of the FBI Laboratory has forensic examiners specially trained to examine these records.

I. Illicit business records examinations

The CRRU examines records of suspected illicit businesses to determine their true nature. Specifically, the Illicit Business Records team specializes in records of drug, gambling, loan, commercial sex, and human smuggling businesses. The evidence CRRU routinely examines includes ledgers, notebooks, pay/owe sheets, and other handwritten documents. Manually entered spreadsheet data, such as Microsoft Excel sheets and the like can also be examined, and with prior approval on a case-by-case basis pending available resources, electronic communications may be accepted.

Forensic examiners undergo extensive training on illicit business records and follow established procedures to determine whether records contain characteristics of illicit businesses and, if so, which business. If a specific business is identified, the examiner sets out to determine the size and scope of the business, including the following analytical findings when applicable:

- Revenues and profits;
- Dates of operation;
- Names and/or roles of participants;¹ and
- Other related information as found, such as bulk cash, weapons, legitimate business information, etc.

CRRU reports contain an overview of the contents of the records, with accompanying annotated images, to help illustrate the findings. Attachments containing transaction information referenced in the report are included so the details can be thoroughly reviewed.

II. Illicit business examination results

Presented below are synopses of the results provided in typical drug, gambling, and loan reports.

A. Drugs

Drug record examinations attempt to identify the specific drug(s) contained in the records and the total quantity purchased, sold, transported, or manufactured. Where possible, the monetary value of the drug transactions is provided, along with the date range of transactions. A comprehensive list of all drug transactions contained in the submitted evidence, typically organized by account/individual, is provided, as well as an identification of the roles and responsibilities of key operational players, where possible (for example, supplier, transporter).

Commonly, drug ledgers include large amounts of monetary information. While CRRU procedures do not include money laundering, it is common to find large volumes of money in drug ledgers. Where possible, examiners report bulk cash, money wires, and other financial transactions identified in the records. Moreover, identification of fees commonly associated with the movement of drugs and money, terminology commonly associated with drugs, and other characteristics typically identified in drug records are reported.

¹ Due to the incomplete and fragmented nature of illicit business records, names are commonly recorded as initials, nicknames, codes, or other cryptic ways to refer to the participants.

B. Loans

Examining credit transactions attempts to determine the total loan volume in the records, including the total number of loans, as well as the total amount of principal and payments identified. The examiner also provides an explanation of the types of loans identified (for example, juice/vig loans or knockdown loans),² as well as the terms of each loan, including the calculated annual interest rate.

C. Gambling

Examining gambling records attempts to ascertain and explain the size and scope of the business, whether the records involve gambling devices, sports bookmaking, or numbers/lottery schemes. These reports typically aim to provide total wagering volume, dates of operation, gross and/or net profits, and the identities and roles of the operation's participants where possible. Detailed schedules of wagering activity may be included as attachments to the report.

Gambling reports also include in-depth explanations of the types of wagers, participant roles, and other unique characteristics present in the records. Furthermore, electronic communications are periodically examined in gambling examinations, as they are a traditional method for placing wagers. Images are often included to help the reader better understand the concepts and relationships presented in the report.

III. Duplication

An important component of all CRRU examinations is an attempt to eliminate duplicative transactions. Through their training and expertise, examiners are well aware that illicit business records often contain the same data repeated multiple times, and they are experienced in detecting the repetition of this data and not over inflating the volume of business transactions. Moreover, while performing this due diligence, examiners periodically find that a transaction is reported in evidence recovered from separate locations,

² A juice or vig loan, generally requires the borrower to make periodic, interest-only payments. These interest-only payments continue indefinitely until the borrower repays the entire principal balance or the terms of the loan are re-negotiated. A knockdown loan generally requires the borrower to make a specific number of periodic payments to satisfy a loan, where each payment is comprised of both principal and interest.

thereby linking those locations. In these instances, the examiner includes the link in the report.

IV. How to maximize CRRU results

Results from CRRU examinations can be used in countless ways throughout an investigation and prosecution. The earlier an investigator and/or prosecutor brings the CRRU on board, the more value that can be derived from the results. For example, perhaps during an arrest or trash pull, one small piece of paper with suspected ledger-type notations is recovered. If this paper is sent in for examination, CRRU analysis of this one piece of paper might prove useful in helping obtain probable cause for a search warrant.

That search warrant might produce several notebooks for examination. Those results may prove helpful when preparing indictments, as the total volume of transactions during specific time periods may prove useful when meeting weight or money thresholds. “You will receive a well-documented report that clearly summarizes your records. You can confidently rely on this report to establish drug quantities for mandatory minimum sentences, for guideline drug quantities or to determine amounts of money laundered,” said Heather Rattan, Assistant United States Attorney (AUSA) for the Eastern District of Texas, who has worked with CRRU for over 20 years as a state and federal prosecutor.

As John Han, a trial attorney in the Organized Crime and Gang Section of the Department of Justice stated, “From documents and physical objects seized during search warrants, CRRU was able to identify business records and devices used to carry out illicit activities involving loan sharking and illegal gambling, and to determine the nature and significance of the illegal transactions from written notations in these records.”

Feedback from prosecutors and investigators reveals that CRRU reports are useful tools in obtaining plea agreements, as well as for corroborating witness and informant information. In most cases, a complete list of transactions and the associated account or individual is attached to the report.³ This enables prosecutors and investigators to create a historical accounting of an individual’s transactional involvement in the business. Salvatore Astolfi, an AUSA for the

³ In some cases, a portion of the records may be analyzed due to volume or time constraints, as agreed upon by the CRRU examiner and the contributor.

Eastern District of Pennsylvania, said the “CRRU helped build and strengthen our evidence in the case,” and the examiner was able to “paint a detailed picture of the nature and extent of the criminal activity” that “no doubt helped us secure the convictions of every defendant charged and lengthy sentences for the leaders and top members of the organization.”

CRRU forensic examiners provide expert testimony at trial in support of all issued laboratory reports. The examiners prepare appropriate demonstrative aids for review before trial and are available for any necessary pre-trial conferences. CRRU examiners “are totally prepared for cross examination. Our judges respect them and accept them as expert witnesses,” said Guy Till, an AUSA for the District of Colorado who has worked with CRRU since the 1990s.

CRRU testimony focuses on illicit business records in general and on the specific records examined from an independent, expert perspective. Examiners are adept at helping juries understand not only how an analysis was done, but also how to make sense of records that can be complex, intricate, and often fragmented. Mr. Han said, “The expert testimony was exceptionally helpful to the jury because the expert was able to distill and explain difficult and complicated concepts in a clear and simple way for laymen to easily understand.”

CRRU examiners can also speak to other relevant business practices within the scope of their expertise. “I have called four examiners as witnesses; each one was polished and persuasive. Everyone was well credentialed and committed to excellence,” said Ms. Rattan.

Finally, examiners can testify at sentencing, and/or CRRU reports can be used in lieu of testimony. Report totals can be used to help determine and, often, enhance sentences, due in large part to the transactional information they provide. Mr. Till, who has called CRRU examiners in sentencing hearings, also stated, “Economics is generally what holds the narcotics conspiracy together. The CRRU witness can lay the business records out for both the jury and the judge clearly and professionally.”

It should be noted that the cost of examiner testimony is covered by the FBI Laboratory and never by any law enforcement entity or prosecutor’s office. This practice protects the integrity and independence of FBI examiners, their opinions, and the FBI Laboratory.

In summary, CRRU analyses of business records in drug and organized crime investigations can be a valuable tool in the proverbial

toolbox of an investigation and prosecution. “Getting CRRU involved early on in the investigation will reap tremendous benefits towards the successful prosecution of racketeering cases,” said Mr. Han. Ms. Rattan concluded with, “This unit is committed to excellence and adds value to organized crime investigations.”

About the Author

Melissa A. Corradetti is a Forensic Examiner with the Cryptanalysis and Racketeering Records Unit of the FBI Laboratory in Quantico, Virginia. She is assigned to the Illicit Business Records team and is the Transnational Organized Crime Program Manager. Ms. Corradetti has been with CRRU since 2004. She previously worked with the United States Marshals Service, and before that, she worked in the private sector. Ms. Corradetti is a graduate of the College of Charleston.

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Jail and Prison Communications in Gang Investigations

Scott Hull

Forensic Examiner

Cryptanalysis and Racketeering Records Unit

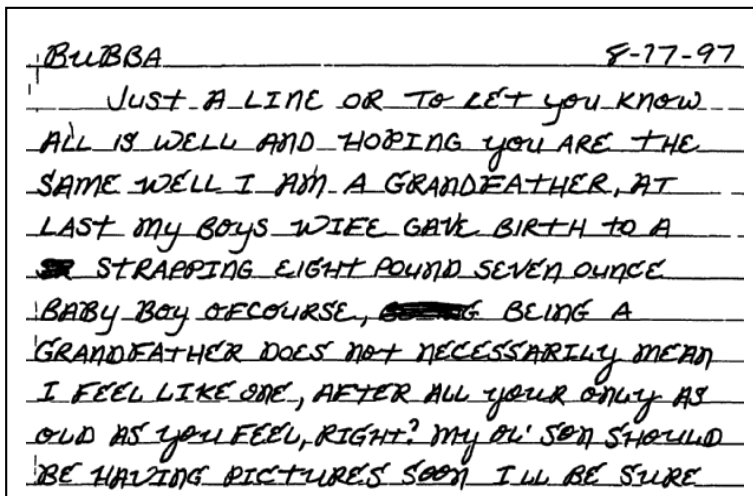
Federal Bureau of Investigation

I. Introduction

A long-simmering feud between two prison gangs came to a head one August day in 1997 at the United States Penitentiary (USP) in Lewisburg, Pennsylvania. White inmates allegedly associated with the Aryan Brotherhood assaulted black inmates believed to belong to a group called the D.C. Blacks with homemade knives, stabbing six and killing two.

The hit order was supposedly given by Barry Mills and Tyler Bingham, both at the top of the Aryan Brotherhood hierarchy and incarcerated at the Administrative Maximum facility in Florence, Colorado. At the “Alcatraz of the Rockies,” Mills and Bingham were constantly watched by prison staff; calls, visits, and mail were all thoroughly monitored. The order to carry out the hit, however, still got out.

Bingham and Mills denied any responsibility in ordering the hits, but a letter written by Bingham was intercepted and sent to the Federal Bureau of Investigation’s Cryptanalysis and Racketeering



BUBBA 8-17-97
JUST A LINE OR TO LET YOU KNOW
ALL IS WELL AND HOPING YOU ARE THE
SAME WELL I AM A GRANDFATHER, AT
LAST MY BOYS WIEE GAVE BIRTH TO A
~~BE~~ STRAPPING EIGHT POUND SEVEN OUNCE
BABY BOY OFCOURSE, ~~BEING~~ BEING A
GRANDFATHER DOES NOT NECESSARILLY MEAN
I FEEL LIKE ONE, AFTER ALL YOUR ONLY AS
OLD AS YOU FEEL, RIGHT? MY OL' SON SHOULD
BE HAVING PICTURES SOON I'LL BE SURE

Figure 1: Intercepted letter from Bingham.

Records Unit (CRRU) to determine if there were any coded messages hidden within.

The hit order was embedded within the letter by a complex system that used variations in the handwriting of each letter of the words to conceal the enciphered message. CRRU was able to locate a hidden message within the letter and decrypted it. The message contained an order to move on the DC Blacks. This evidence was introduced at trial, where a CRRU Forensic Examiner provided expert witness testimony. The evidence and testimony proved critical in the conviction of the two gang leaders. At sentencing, both were sentenced to multiple consecutive life terms.¹

II. Gang communication methods

Classic ciphers, such as the one used by the Aryan Brotherhood in Figure 1, have a rich and varied history in their use within government, military, and diplomatic circles, as well as by prisoners. Mary, Queen of Scots, imprisoned by Queen Elizabeth of England for plotting to overthrow her, wrote and received enciphered messages to and from her supporters in a plot to assassinate Queen Elizabeth. One such letter detailing the plan was intercepted and deciphered by England's spymaster, Sir Francis Walsingham. The deciphered letter was used as Exhibit A at Mary's trial, where she was found guilty and executed in 1587.²

Prisoners of war in both World War II and Vietnam used a method of tap codes to send enciphered messages by tapping on walls or bars. Modern-day inmates, especially prison gangs, use elaborate encryption schemes to communicate with associates both inside and outside of prison. These schemes often include methods to hide the message from prison staff. Inmates are known to use invisible ink made with urine, lemon juice, or other liquids. Another method,

¹ Christopher Goffard, *Invisible Ink Got Gang's Deadly Note Past Guards*, L.A. TIMES (June 27, 2006), <https://www.latimes.com/archives/la-xpm-2006-jun-27-me-code27-story.html>.

² DAVID KAHN, *THE CODEBREAKERS: THE COMPREHENSIVE HISTORY OF SECRET COMMUNICATION FROM ANCIENT TIMES TO THE INTERNET* 122–24 (1996).

referred to as ghost writing, involves using a stylus containing no ink or lead to indent a message into paper.

Inmates can also write a seemingly innocuous letter where the intended message is concealed. For example, it may be hidden as every fifth word or the first letter of each line. A Nuestra Familia prison gang dropout explained to prison authorities that he would use a playing card to split open the seams of a manila envelope. Then, using a homemade stylus with a flattened staple as the tip, he would scratch a message along the inside of the envelope. Finally, using syrup from a breakfast packet, the seams were resealed and a letter inserted, knowing that if the letter was searched, nothing would likely be found.



Figure 2: Homemade stylus using a staple rolled into paper.

Despite the numerous methods to conceal messages, some codes are sent overtly. Sometimes, a short, encrypted message is buried within the pages of a letter in hopes that prison officials will overlook it. Other times, the encrypted message is readily observable. The following case examples include a combination of both.

III. United Society of Aryan Skinheads: Dustin “Crash” Jeffries

On the night of April 23, 2006, Donny McLachlan was alone in a garage in Costa Mesa, California, preparing to inject himself with methamphetamine when a group of individuals approached. Per court records, McLachlan feared the individuals were from a rival gang called Public Enemy Number One (PEN1) seeking retaliation after McLachlan provided information to the police about a recent murder. In the ensuing melee, McLachlan was stabbed in the chest but managed to flee.

Police arrested Dustin Jeffries on suspicion that he stabbed McLachlan. Jeffries, also known as Crash Dummy or Crash, was a member of a gang called the United Society of Aryan Skinheads (USAS). Police theorized that Jeffries carried out the assault on McLachlan on behalf of PEN1 in an effort to ease tensions between USAS and PEN1.

While awaiting trial for the attempted murder of McLachlan, Jeffries sent a letter through an intermediary to Chuck Davis, the

leader of USAS incarcerated at Calipatria State Prison. The letter asked for help getting the money necessary to post bail and contained an enciphered message.³

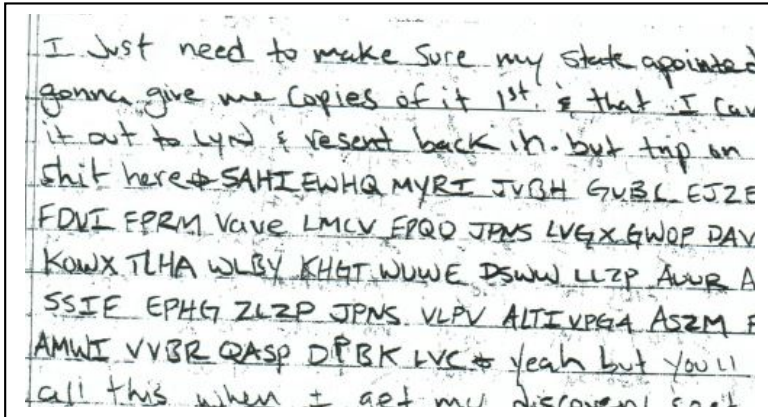


Figure 3: Enciphered portion in letter.

Gang investigators at Calipatria State Prison noticed the enciphered message and sent the letter to the CRRU for analysis. The cipher was decrypted and revealed the motive behind the attack on McLachlan. The decryption read, “Attempt murder on Donny McLachlan when I did that for Nick Rizo⁴ [sic] to stop all the bullshit between USAS PENI all is telling Nick Calub Mitchell Rizo [sic] debriefed is willing to testifie [sic] Donny telling too.”

A CRRU Forensic Examiner provided expert witness testimony at Jeffries’s trial. Jeffries was found guilty on all charges and sentenced to life in prison.

IV. MS-13: murder for hire

In 2008, MS-13 Gang members Martin Teran and Josue Benitez were in a bar in Houston, Texas, where Teran was overheard by the bar’s bouncer offering \$5,000 to Benitez to assist in the murder of an individual in Columbia, South Carolina. The hit order originated in Central America. Teran and Benitez traveled to South Carolina and, on November 2, 2008, Jorge Ramos was shot and killed outside his home in West Columbia, South Carolina.

³ California v. Jeffries, No. G042058, 2010 WL 1390852 (Cal. Ct. App. 2010).

⁴ According to provided testimony, Dominic Rizzo ran PEN1 in 2006.

On November 14, 2008, the bouncer contacted law enforcement to tell them that he overheard Teran and Benitez talking about the murder. Both were arrested and extradited to South Carolina.

While in jail awaiting trial, a letter sent to Benitez from Teran was intercepted and found to contain an enciphered message. This letter was sent to CRRU for decryption. The decrypted text was in Spanish and contained a discussion about the gang's plans to prevent the bouncer from testifying in the upcoming trial. The coded letter and CRRU Forensic Examiner's decryption were key pieces of evidence at the trial. Both Teran and Benitez were found guilty on all counts and sentenced to life in prison.⁵

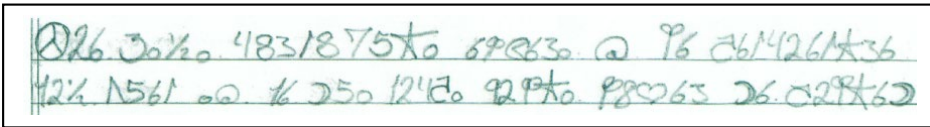


Figure 4: Top portion of the encrypted letter.

V. Summary

Inmates commonly use encrypted messages. Deciphered communications can provide a wealth of information to investigators and prosecutors. Decryptions have revealed operational plans, admissions of guilt, organizational structures, communication methods, and other information that can be vital to ongoing cases.

The CRRU supports federal, state, local, and tribal law enforcement agencies and prosecutor's offices. For procedures on submitting evidence for examination, contact CRRU at 703-632-7334 or via email at codebreakers@fbi.gov.

About the Author

Scott Hull is a Forensic Examiner in the Cryptanalysis and Racketeering Records Unit of the FBI Laboratory in Quantico, Virginia, where he has worked since 2007. Mr. Hull examines communications suspected of containing enciphered material. Before working in CRRU, Mr. Hull worked in various agencies in the United States and overseas as an Information Technology Specialist. Mr. Hull holds a Bachelor of Science degree in Mathematics from Virginia

⁵ United States v. Martin Teran, 496 F. App'x 287, 290 (4th Cir. 2012) (not precedential).

Commonwealth University and a Master of Science degree in Business Administration from Boston University.

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Federally Prosecuting Juvenile Gang Members

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Prosecuting juvenile gang members in the federal system can productively address gang violence. This article seeks to assist federal prosecutors in successfully navigating the sometimes opaque language and mechanics of the Juvenile Justice and Delinquency Prevention Act of 1974 (JDA), both where the prosecutor seeks to maintain a juvenile within the juvenile offender process and also when the prosecutor seeks to transfer the offender to adult status. As discussed more fully below, each avenue of prosecution under the JDA has pitfalls and unique challenges.

I. Who qualifies as a juvenile?

Pursuant to 18 U.S.C. § 5031, a person is a juvenile in one of two circumstances. First, any “person who has not attained his eighteenth birthday” is a juvenile.¹ Second, a person currently under the age of 21 can be considered a juvenile with respect to acts of juvenile delinquency committed while that person was younger than 18.² Once a person turns 21, he is prosecuted as an adult, regardless of when he committed the crime.

These age demarcations are important to keep in mind when considering whether to proceed against a juvenile offender. Significantly, before juvenile turns 21, crimes committed before the age of 18 are prosecuted under the JDA, but the day he turns 21, the JDA does not apply. Thus, delaying indictment until an offender turns 21 can have significant consequences for the juvenile offender, for he will be treated as an adult offender simply because of that delay. Not surprisingly, defendants are quick to challenge any delay during

¹ 18 U.S.C. § 5031.

² *Id.*

which time an offender becomes 21. To determine whether a prosecutor's delay in charging a juvenile after his 21st birthday is proper, courts generally look to the reasons for the delay. The analysis is similar to defending a pre-indictment delay pursuant to a constitutional speedy trial challenge. For example, the Second Circuit has held that "[i]t is not improper for the government to delay an indictment for 'legitimate considerations, such as the need to obtain evidence and the difficulties that necessarily arise in a complex RICO investigation.'"³

II. Charging a juvenile offender

All defendants who qualify as juvenile offenders due to their age initially proceed as a juvenile, regardless of a prosecutor's ultimate intention to transfer to adult status. In other words, in order to initiate proceedings against an offender who is juvenile, the prosecutor must comply with the requirements of the JDA before filing a motion to transfer to adult status.

To initiate a proceeding under the JDA, prosecutors file an information against a juvenile. No grand jury may be used to investigate at this point. A juvenile information is similar to an adult information, except the juvenile is only named by initials, and the charging language must reference the JDA. In the information, a prosecutor should include language stating that the charges are generally based on the authority to proceed against juveniles under 18 U.S.C. § 5032 and then set forth the actual criminal offenses as one would in an indictment.

There is nothing in the JDA that requires a prosecutor to file an affidavit with the information outlining any evidence or probable cause supporting the charges contained in the information. Some United States Attorney's Offices (USAOs), nevertheless, file an affidavit to educate the court as to the basis for the charges, to support applications for detention, and to use later as evidence in a transfer hearing.

³ United States v. Scarpa, 4 F. App'x 115, 117 (2d Cir. 2001) (not precedential) (quoting United States v. Hoo, 825 F.2d 667, 671 (2d Cir. 1987)); *see also* United States v. Doe, 627 F.2d 181, 184 n.4 (9th Cir. 1980); United States v. Torres, No. CRIM.A. 12-10089, 2013 WL 451667, at *2-*3 (D. Kan. Feb. 6, 2013); Martinez v. Romero, 661 F.2d 143, 144 (10th Cir. 1981).

The U.S. Attorney then files a certification detailing the grounds for federal jurisdiction in the case, accompanied by a copy of a delegation memorandum. This is a critical step for an USAO to obtain jurisdiction in a juvenile matter. All filings are made under seal.

III. All juvenile proceedings are secret and sealed

Once a prosecutor initiates a juvenile proceeding by filing a juvenile information and a jurisdictional certification, the entire proceeding is subject to the limitations set forth in 18 U.S.C. § 5038, which forbids disclosure of the identity of the juvenile offender, as well as information and records related to the juvenile proceedings, to anyone except the court, the prosecuting authorities, the juvenile's counsel, and others specifically authorized to receive such records.⁴

IV. Speedy trial considerations

Pursuant to the JDA, 18 U.S.C. § 5036, the court must dismiss a juvenile information “[i]f an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun.”⁵ The 30-day clock begins to run only upon federal detention of the juvenile after the filing of a juvenile information. The defense, however, can consent to adjournments, and a court can exclude time if it makes the familiar finding that a delay “would be in the interest of justice in a particular case.”⁶ A juvenile can also cause the delay, which would justify exclusion of speedy trial time, by, for example, lying about his or her age.⁷

Thus, while there are ways to stop the speedy trial clock, in general, juvenile proceedings can move quicker than adult proceedings. Since typical gang investigations and prosecutions involve multiple defendants and multiple criminal incidents, prosecutors should carefully consider the speedy trial implications of juvenile proceedings

⁴ 18 U.S.C. § 5038.

⁵ 18 U.S.C. § 5036.

⁶ *Id.*

⁷ *United States v. Juvenile Male*, 595 F.3d 885, 896–97 (9th Cir. 2010); *United States v. Romulus*, 949 F.2d 713, 716 (4th Cir. 1991); *see also United States v. Doe*, 571 F. App'x 656, 661 (10th Cir. 2014) (not precedential).

and the likelihood that juvenile cases will move quicker than their adult co-defendant cases when deciding whether to proceed against a juvenile without transferring that juvenile to adult status.

V. Detention before adjudication

Pretrial detention is permissible under the JDA. A judge can order pretrial detention if the court determines that detention is required to secure the juvenile's timely appearance in court or to ensure the juvenile's safety or the safety of others.⁸ Factors that can be argued for detention of juveniles include risk of flight, dangerousness, alien or nonresident status, and lack of parental supervision or control.

The statute also requires that, whenever possible, detention shall be in a foster home or community-based facility located in or near the juvenile's community.⁹ Prosecutors, therefore, should be prepared when seeking detention in a detention facility, arguing factors such as those listed above with particular focus on dangerousness and inadequacy of supervision at a foster home or halfway house.

Under the JDA, to the extent possible, an alleged delinquent's pending disposition should be kept separate from adjudicated delinquents.¹⁰ Any pretrial detention should not be within an institution or setting in which the juvenile has regular contact with adult persons convicted of or awaiting trial on criminal charges.¹¹

VI. The delinquency hearing

The delinquency hearing is basically the trial for a juvenile for whom the prosecutor has not sought to transfer to adult status. There is no jury trial right in delinquency hearings, and thus, all such hearings are bench trials.¹² Nevertheless, a juvenile still enjoys all other constitutional rights of criminal defendants, including the right to counsel, the right to cross-examine government witnesses, and the protection against self-incrimination. The government must still prove the juvenile's delinquency under the "beyond a reasonable doubt" standard.¹³ In addition, double jeopardy rules apply. A juvenile may

⁸ 18 U.S.C. § 5034.

⁹ 18 U.S.C. § 5035.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

¹³ *In re Winship*, 397 U.S. 358, 361–62, 368 (1970).

not be transferred for criminal prosecution following a delinquency proceeding.¹⁴

VII. Disposition

If the court finds a juvenile to be a delinquent, a disposition hearing shall be held within 20 days of the finding of delinquency, unless a “further study” of the juvenile is ordered by the court.¹⁵

The disposition hearing is not to be held “until any prior juvenile court records of [the] juvenile have been received by the court or the clerk of the juvenile court certifies in writing that the juvenile has no prior record or that the juvenile’s record is unavailable and why it is unavailable.”¹⁶

VIII. Observation and study

If the court desires more detailed information concerning the adjudicated delinquent, it may commit him or her to the custody of the Attorney General for observation and study by an appropriate agency. Generally, if the juvenile is in custody, the appropriate agency for conducting the observation is the Bureau of Prisons (BOP). The agency must complete a study of the delinquent to ascertain the juvenile’s personal traits, mental capabilities, background, and previous delinquency or criminal experience, as well as any mental or physical defects and any other relevant factors. The designated agency must submit to the court, as well as to the attorneys for the juvenile and the government, the results of the study within 30 days, unless the court grants additional time.¹⁷

IX. Sentencing

Sentencing is a critical issue in deciding whether to proceed against a juvenile in a gang case without transferring that juvenile to adult status. As set forth below, a federal juvenile defendant, in many instances, does not face a significant—or in many cases any—term of imprisonment, even if the crime is a serious violent felony. Accordingly, gang prosecutors should exercise caution when deciding to proceed against a juvenile under the JDA.

¹⁴ 18 U.S.C. § 5032.

¹⁵ 18 U.S.C. § 5037(a).

¹⁶ 18 U.S.C. § 5032.

¹⁷ 18 U.S.C. § 5037(e).

At a disposition or sentencing hearing, the court may suspend the findings of juvenile delinquency, order restitution, place the juvenile on probation, or commit him or her to official detention.¹⁸ The length of time for which probation may be ordered or that detention can be imposed depends on whether the juvenile has reached 18 years of age at the time of disposition.¹⁹ “When selecting among the dispositions authorized under Section 5037, the district court must exercise its discretion ‘in accordance with the rehabilitative function of the FJDA, which requires an assessment of the totality of the unique circumstances and rehabilitative needs of each juvenile.’”²⁰

Probation may be ordered by the court for a juvenile found to be delinquent. The length of that probation is determined by the age of the juvenile at disposition.²¹ If the juvenile violates a condition of probation before the expiration of the term, the court may, after a dispositional hearing, revoke the term and order a term of official detention, including a term of juvenile delinquent supervision.²²

Official detention may also be ordered by the court for a juvenile found to be delinquent, and the maximum length of time is determined by the age of the juvenile at the time of the disposition hearing, not the age at the time the charges were filed.²³ The United States Sentencing Guidelines are relevant only for the purposes of determining the maximum term of official detention. Thus, they need not be considered when determining a juvenile sentence below this threshold.²⁴

For purposes of BOP placement, all juveniles sentenced under the JDA shall be detained and placed in accordance with 18 U.S.C § 5039. This means that, whenever possible, detention shall be in a foster home or community-based facility located in or near the juvenile’s home, and the juvenile shall not be detained in any institution in which the juvenile has regular contact with adults.²⁵

¹⁸ 18 U.S.C. § 5037.

¹⁹ 18 U.S.C. § 5037(b)–(c).

²⁰ *United States v. H.B.*, 695 F.3d 931, 937 (9th Cir. 2012) (quoting *United States v. Juvenile*, 347 F.3d 778, 787 (9th Cir. 2003)).

²¹ 18 U.S.C. § 5037(b).

²² *Id.*

²³ 18 U.S.C. § 5037(c).

²⁴ *United States v. M.R.M.*, 513 F.3d 866, 868 (8th Cir. 2008).

²⁵ 18 U.S.C. § 5039.

Like so many areas of concern, the JDA is silent about what happens to a juvenile who turns 21 during his or her period of incarceration. One view is that, without further guidance from the JDA, BOP must keep the individual in a juvenile facility for the entire sentence. According to BOP, however, once adjudicated delinquents reach 21, they may be designated to a BOP institution as an adult. A change in placement is not required, however, and BOP may retain the inmate in a contract juvenile facility for continuity of program participation.

If official detention is ordered, the court may include a requirement that the juvenile be placed on a term of juvenile delinquent supervision after official detention, and the length of that detention depends on the age of the juvenile at the time of disposition.²⁶ As with adult offenders, the court may, before the expiration of the term and after a dispositional hearing, modify, reduce, or enlarge the conditions of supervision.²⁷ If the juvenile violates a condition of supervision, the court may order a dispositional hearing, revoke the term of supervision, and order a term of official detention.²⁸

X. Transferring defendants to adult status

Given the burdens of the above-described process and the limited punishment available to juvenile offenders, prosecutors, particularly those handling organized crime or gang cases, will most likely forgo the juvenile process unless they intend to transfer the offender to adult status. Transfer to adult status is often the most appropriate way to address offenders who have committed the most heinous crimes before their 18th birthday.

Short of a juvenile's waiving her JDA rights and agreeing to proceed as adult, there are two avenues for transfer to adult status—there is a limited, *mandatory* transfer process and a somewhat broader, *discretionary* transfer process. Prosecutors are advised that, regardless of whether a juvenile is transferred under the mandatory or discretionary transfer process, the juvenile still enjoys the right to appeal the transfer with an immediate interlocutory appeal.

²⁶ 18 U.S.C. § 5037(d).

²⁷ 18 U.S.C. § 5037(d)(4).

²⁸ 18 U.S.C. § 5037(d)(5).

XI. The preferred method: waiver

The JDA is a statutory, rather than constitutional, scheme, and thus, a juvenile defendant can waive his or her rights under the JDA. The JDA provides for waivers; however, it provides little guidance on the form of that waiver other than the waiver must be in writing, and it must be made upon advice of counsel.²⁹ In practice, a waiver can be executed in a separate document, with a district court fully allocuting the juvenile, or the waiver can be a provision in a plea or cooperation agreement, and the court can address that provision during the broader plea colloquy.

In addition to foregoing the collection of records and the lengthy evidentiary hearing, a waiver has the advantage of avoiding the interlocutory appeal process, assuming the juvenile also waives his or her appellate rights as part of any plea or cooperation agreement.

XII. The mandatory transfer process to adult status

In limited circumstances, transferring a juvenile to adult status is mandatory. Pursuant to 18 U.S.C. § 5032, mandatory transfer applies when a juvenile has previously been found guilty of an act that, if committed by an adult, “would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense,” or is a listed offense (18 U.S.C. §§ 32, 81, 844(d), (e), (f), (h), (i), or 2275 of this title, subsection (b)(1) (A), (B), or (C), (d), or (e) of § 401 of the Controlled Substances Act, or §§ 1002(a), 1003, 1009, or 1010(b) (1), (2) or (3) of the Controlled Substances Import and Export Act).³⁰ In addition, for mandatory transfer to apply, the juvenile has to have committed the instant offense after his or her 16th birthday, and the new offense that the prosecutor seeks to transfer has to be the same type of offense as the prior adjudicated offense.³¹

²⁹ See 18 U.S.C. § 5032.

³⁰ *Id.*

³¹ *Id.*

The language the JDA employs for mandatory transfers implicates the holding of *Sessions v. Dimaya*³² to an extent. While this portion of the JDA does not employ the phrase “crime of violence,” it does require that the previously adjudicated act, if committed by an adult, “would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another.”³³ Post *Dimaya*, however, if the act in question is not one of the enumerated crimes set forth in the mandatory transfer section, the act will only be eligible for mandatory transfer if the act, if committed by an adult, “would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another.”³⁴ Notably, conspiracy cannot serve as a “crime of violence.”

XIII. Transfer in the interest of justice: discretionary transfers

Upon a motion, the government can seek to transfer a juvenile to adult status in the interest of justice—a discretionary transfer.³⁵ Specifically, the government may make a motion to transfer in the interest of justice where a juvenile 15 years or older committed an act that, if committed by an adult, would be a felony that is a crime of violence or an enumerated offense, including violations of 21 U.S.C. §§ 841 (drug trafficking—but not conspiracy to traffic drugs/21 U.S.C. § 846); 952(a) (drug importation); 955 (drugs on vessels); or 959 (drug manufacture or distribution with intent to import); violations of 18 U.S.C. § 922(x) (possession of a handgun or ammunition); or violations of 18 U.S.C. §§ 924(b) (transporting firearms with intent to commit a felony); (g) (interstate travel to acquire firearms for criminal purposes); or (h) (transferring a firearm to be used in a violent or drug trafficking crime).

As previously discussed, post *Dimaya*, in determining whether an offense can qualify for transfer under the discretionary transfer process, the crime must either fall within the list of enumerated offenses or qualify under the elements clause in section 16(a). That is, it must be “an offense that has as an element the use, attempted use,

³² *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

³³ *Dimaya*, 138 S. Ct. at 1204; 18 U.S.C. § 5032.

³⁴ 18 U.S.C. § 5032.

³⁵ *Id.*

or threatened use of physical force against the person or property of another.”³⁶ Remember, post *Dimaya*, conspiracies, including RICO conspiracies and VICAR conspiracies, do not qualify as crimes of violence because they fall under section 16(b).

In addition, the government may move to transfer a juvenile in the interest of justice who is 13 and older when the juvenile committed specific violent crimes: 18 U.S.C. §§ 113(a), (b), (c) (assault); 1111 (murder); 1113 (attempted murder); or if the juvenile possessed a firearm during the commission of violations of 18 U.S.C. §§ 2111 (robbery); 2113 (bank robbery); 2241(a) or (c) (aggravated sexual abuse).³⁷ As the JDA specifically enumerates what crimes are “crimes of violence” under this paragraph, *Dimaya* is not implicated.

XIV. Hearing on the motion to transfer

Once the government files a motion to transfer in the discretionary transfer process, the court must conduct a hearing to determine if such a transfer would be in the interest of justice.³⁸

Reasonable notice of the transfer hearing must be given to juveniles, their parents, guardians, or custodians, and counsel.³⁹

The strict rules of evidence do not apply to the transfer proceeding, except with respect to privileges.⁴⁰ Unlike the requirement of proving delinquency beyond a reasonable doubt, the court makes its

³⁶ 18 U.S.C. § 16(a).

³⁷ 18 U.S.C. § 5032.

³⁸ 18 U.S.C. § 5032; *United States v. Three Male Juveniles*, 49 F.3d 1058, 1060 (5th Cir. 1995); *see also* *United States v. Y.A.*, 42 F. Supp. 3d 63, 74 (D.D.C. 2013) (juvenile has a right to counsel at the transfer hearing).

³⁹ 18 U.S.C. § 5032; *see* *United States v. David A.*, 436 F.3d 1201, 1208 (10th Cir. 2006) (government must make reasonable efforts to notify juvenile’s parents, guardian, or custodian; transfer motion delay of 84 days, while government attempted to contact fugitive father, was on the outer limits of reasonable but did not violate juvenile’s right to a speedy trial; attempting to notify the father by notifying other family members was deemed to be “reasonable efforts”).

⁴⁰ *United States v. Juvenile Male*, 554 F.3d 456, 460 (4th Cir. 2009); *United States v. SLW*, 406 F.3d 991, 995 (8th Cir. 2005); *United States v. Doe*, 871 F.2d 1248, 1254–55 (5th Cir. 1989). Therefore, hearsay is admissible at the hearing. *United States v. Juvenile Male*, 554 F.3d 456, 459 (4th Cir. 2009); *United States v. Doe*, 871 F.2d 1248, 1254–55 (5th Cir. 1989).

determination as to whether to transfer to adult status is in the interest of justice by a preponderance of the evidence.⁴¹ The preponderance standard applies because a transfer hearing is not a criminal proceeding that results in adjudication of guilt or innocence, but rather, a civil proceeding that results in the adjudication of the juvenile's status.⁴²

XV. Factors to consider for transfer to adult status

The six factors that must be considered “in assessing whether a transfer would be in the interest of justice” include: (1) “the age and social background of the juvenile;” (2) “the nature of the alleged offense;” (3) “the extent and nature of the juvenile’s prior delinquency record;” (4) “the juvenile’s present intellectual development and psychological maturity;” (5) “the nature of past treatment efforts and the juvenile’s response to such efforts;” and (6) “the availability of programs designed to treat the juvenile’s behavioral problems.”⁴³ On a motion for prosecution of a juvenile as an adult,

“a district court is not required to make a specific finding as to whether each of the six factors favors transfer to adult status or juvenile adjudication[;] [t]he district court need only make specific findings as to the six factors and then balance them,” and “the weight a court assigns each factor is within its discretion.”⁴⁴

A court’s failure to make explicit findings on each factor can result in a remand of the court’s decision.⁴⁵ As will be discussed more thoroughly below, the factor related to “nature of the alleged offense”

⁴¹ *United States v. Robinson*, 404 F.3d 850, 858 (4th Cir. 2005); *United States v. Brandon P.*, 387 F.3d 969, 976–77 (9th Cir. 2004); *United States v. Doe*, 49 F.3d 859, 868 (2d Cir. 1995); *United States v. A.R.*, 38 F.3d 699, 703 (3d Cir. 1994); *United States v. Parker*, 956 F.2d 169, 171 (8th Cir. 1992).

⁴² *Brandon P.*, 387 F.3d at 976–77; *United States v. Doe*, 49 F.3d 859, 868 (2d Cir. 1995); *A.R.*, 38 F.3d at 703.

⁴³ 18 U.S.C. § 5032.

⁴⁴ *Brandon P.*, 387 F.3d at 977 (quoting *United States v. Doe*, 94 F.3d 532, 536–37 (9th Cir. 1996)); *see also* 18 U.S.C. § 5032; *United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990).

⁴⁵ *United States v. C.G.*, 736 F.2d 1474, 1478–79 (11th Cir. 1984).

often receives significant, if not the most, weight. The court has discretion, however, on how to weigh the factors.⁴⁶

In considering the first factor, the court should focus on the defendant's age at the time of the offense.⁴⁷ Unless the government intentionally delays the filing of juvenile charges, however, the court can also consider the defendant's age at the time of the transfer motion.⁴⁸ Current age is significant for a determination of the appropriate rehabilitation programs for the juvenile.⁴⁹ Thus, factual findings should be made as to how the juvenile would fit into a program for rehabilitation.⁵⁰ Furthermore, a court's likelihood of granting a transfer motion increases with the age of the juvenile.⁵¹

A judge must also consider evidence concerning the juvenile's social background, such as his or her home environment and relevant cultural considerations.⁵² Proof that the juvenile had a long

⁴⁶ *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996);

United States v. Doe, 871 F.2d 1248, 1254 (5th Cir. 1989).

⁴⁷ *United States v. Nelson*, 68 F.3d 583, 589 (2d Cir. 1995).

⁴⁸ *Id.* (“[U]nless the government intentionally delays the filing of juvenile charges, there is every reason to give weight also to the age at the time of the transfer motion.”); *see also* *United States v. Ramirez*, 297 F.3d 185, 193 (2d Cir. 2002) (citing *Nelson*, 68 F.3d at 589 (finding district court properly considered defendant's current age at time of the transfer)).

⁴⁹ *Ramirez*, 297 F.3d at 193; *see also* *United States v. H.S.*, 717 F. Supp. 911, 917 (D.D.C. 1989) (finding that “the more mature a juvenile becomes, the harder it becomes to reform the juvenile's values and behavior.”), *rev'd on other grounds, In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363 (D.C. Cir. 1990) (reversed due to improper consideration of evidence of crimes with which the juvenile had not been charged during analysis of the nature of the alleged offense factor).

⁵⁰ *Nelson*, 68 F.3d at 589.

⁵¹ *See, e.g.*, *United States v. Gerald N.*, 900 F. 2d 189, 191 (9th. Cir. 1990);

United States v. Doe, 49 F.3d 859, 867 (2d Cir. 1995); *see also*

United States v. Juvenile Male, 554 F.3d 456, 468–69 (4th Cir. 2009) (“A juvenile's age toward the higher end of the spectrum (eighteen), or the lower end (fifteen), is to be weighed either for or against transfer.”).

⁵² *See, e.g.*, *United States v. Juvenile Male*, 492 F.3d 1046, 1049 (9th Cir. 2007) (district court made “clearly erroneous finding[s] with regard to the defendant's social background,” in failing to consider the defendant's exposure to domestic violence and improperly comparing him to other juveniles in his community even though there was no such comparison in the record).

association with a violent gang may weigh in favor of a transfer.⁵³ Evidence concerning the age and social background of the juvenile can normally be presented by the juvenile probation officer.

As stated above, the second factor, nature of the alleged offense, is often the most significant factor the court will consider in deciding whether to transfer. Most courts weigh this factor more heavily than the other factors, especially if the crime is serious.⁵⁴ Of course, in most gang cases, the alleged offense is typically quite serious, and thus, there is even a stronger basis in gang prosecutions for transferring the offender to adult status.

In determining the nature of the offense(s) alleged, the district court should assume the juvenile committed the offense charged in the information.⁵⁵ “Such a presumption is not inconsistent with a juvenile’s due process rights because the trial itself [serves to correct] for any reliance on inaccurate allegations made at the transfer stage.”⁵⁶

Although the court shall assume the juvenile committed the offense, it is recommended that the prosecutor present live testimony, rather than relying solely on affidavits or proffer statements, to the court. A case agent or other witness can make a record for this factor that will more likely ensure both a successful motion to transfer and a better record for the inevitable interlocutory appeal.

Many courts expect that the parties will hire experts and subject the juvenile to psychological evaluation(s) to address the fourth factor—the juvenile’s present intellectual development and psychological maturity. Significantly, the JDA does not require such an evaluation. But the JDA specifically precludes the use of statements made before or during a transfer hearing at subsequent criminal prosecutions.⁵⁷

⁵³ See *United States v. Doe*, 49 F.3d 859, 867 (2d Cir. 1995).

⁵⁴ See *United States v. Juvenile Male*, 844 F. Supp. 2d 312, 319–20 (E.D.N.Y. 2011); *United States v. Robinson*, 404 F.3d 850, 859 (4th Cir. 2005); *United States v. Wellington*, 102 F.3d 499, 506–07 (11th Cir. 1996).

⁵⁵ *United States v. Juvenile Male*, 269 F. Supp. 3d 29, 40 (E.D.N.Y. 2017) (reaffirming *Nelson*, 68 F.3d at 589, in holding that the court, for the purposes of considering this factor, should assume that the juvenile committed the charged offense).

⁵⁶ *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 369 (D.C. Cir. 1990).

⁵⁷ 18 U.S.C. § 5032.

Proof that a juvenile is abnormally low in intelligence or immature for his or her age would not be favorable for transfer.⁵⁸ By contrast, a juvenile may have developed a streetwise intellect or precociousness that could weigh in favor of a transfer.⁵⁹

A district court is also allowed to consider criminal conduct after actions that formed the bases for the juvenile charges.⁶⁰ This consideration would fall under the “social background” factor, “responses to treatment” factor, or an unnamed factor that helps determine whether the transfer is in the “interest of justice.”⁶¹ Because “the transfer factors are weighed and not numerically tallied, the inaccurate characterization of the consideration of the conduct does not result in error.”⁶²

Of all the preparation required to conduct an effective transfer hearing, the final factor, the availability of programs designed to treat a juvenile’s behavioral problems, requires very little in practice. BOP is well aware of the JDA and discretionary transfer hearings and, thus, has witnesses available who travel the country to testify about BOP’s programs to address juvenile offenders. As long as that remains the case, prosecutors need only contact BOP and schedule the witness to address this factor.

XVI. The interlocutory appeal

An order transferring a juvenile for adult prosecution—regardless of whether it is a mandatory or discretionary transfer—is immediately appealable under 28 U.S.C. § 1291.⁶³ Since a transfer decision made

⁵⁸ United States v. Doe, 74 F. Supp. 2d 310, 320 (S.D.N.Y. 1999), *aff’d*, United States v. Ramirez, 297 F.3d 185, 193 (2d Cir. 2002) (immaturity and lack of intellectual development weigh against transfer to adult status).

⁵⁹ United States v. C.P.A., 572 F. Supp. 2d 1122, 1130 (D.N.D. 2008) (finding that defendant’s low IQ and psychological immaturity were not obstacles to rehabilitation and thus weighed against transfer; however, her “streetwise” nature and lack of remorse for her actions show a level of psychological maturity that is not conducive to rehabilitation; these competing qualities make consideration of this factor neutral, and thus the court relied on other factors).

⁶⁰ United States v. Male Juvenile E.L.C., 396 F.3d 458, 462 (1st Cir. 2005).

⁶¹ *Id.*

⁶² *Id.* at 463.

⁶³ United States v. J.J.K., 76 F.3d 870, 871 (7th Cir. 1996).

pursuant to the JDA constitutes the equivalent of a “final decision,” both parties can proceed immediately with an interlocutory appeal.⁶⁴

This appellate right poses a particularly difficult challenge in gang cases where prosecutors would necessarily consider charging a juvenile offender. In multi-defendant gang and racketeering cases, the interlocutory appeal of a transfer decision almost guarantees the juvenile will remain severed from a larger conspiracy or RICO case. Even in single defendant cases charging acts of violence, the significant delay that an interlocutory appeal necessarily entails delays justice for the victims and also creates risk that witnesses’ memories will fade, witnesses will become less cooperative, or that the case will deteriorate in other ways.

Accordingly, in deciding whether to proceed against an individual who would be subject to the JDA, prosecutors should give great thought to how the interlocutory appellate process will impact their overall prosecution.

XVII. Conclusion

The JDA, perhaps by design, is a difficult statute to navigate, especially for prosecutors investigating and charging serious violent crime cases. All proceedings against juveniles, whether they be delinquency proceedings or transfer proceedings, require a prosecutor to engage in significant investigation to secure relevant records and make important tactical decisions given how quickly a delinquency proceeding can be scheduled or how slow a transfer and attendant the transfer process may take. Thus, it is strongly recommended that a prosecutor proceed cautiously and deliberately before deciding to proceed federally against juvenile offenders.

About the Authors

David Jaffe is the Chief of the Organized Crime and Gang Section (OCGS) of the Criminal Division, U.S. Department of Justice (Department). Mr. Jaffe began his career as an Assistant District Attorney in Manhattan from 1994–2000, where he tried homicide, sexual assault, robbery, and other violent crime cases. From 2000–2001, he served as the general counsel for the Criminal Justice Coordinator for Mayor Rudolph Giuliani. From 2002–2006, he served

⁶⁴ *Id.* at 872 (collecting cases and noting “an order issued under 18 U.S.C. § 5032 is appealable as a collateral order”).

as an Assistant United States Attorney for the Southern District of New York, where he worked in the general crimes and violent crimes units and prosecuted several racketeering cases against violent street gangs. Finally, from 2006 to the present, he has worked at the Department in Washington, D.C., first as a trial attorney and deputy chief at the Gang Squad and Domestic Security Section, and then in his current position with OCGS.

Darcie McElwee is an Assistant United States Attorney for the District of Maine out of the Portland office, where she primarily prosecutes violent crime, such as robbery, arson, firearms cases involving domestic violence, interstate domestic violence, stalking, and sex trafficking cases. In her 15th year as the coordinator for Maine's *Project Safe Neighborhoods* program, Darcie engages in community outreach regarding gun violence and illegal gun possession. Darcie is a native Mainer and a graduate of Bowdoin College and the University of Maine School of Law.

Scams-R-Us

Prosecuting West African Fraud: Challenges and Solutions

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I. Pull the thread

A new young agent comes into your small South Mississippi Branch office for the first time and says, “I need a search warrant.” His response to the request “tell me what you have” does not reveal the results of an undercover buy or other typical case you handle. Instead, this agent has two cellphones from what appears to be a romance fraud victim who, rather than forwarding the package as requested by her online paramour, called the local police. Your enthusiastic agent has obtained a signed takeover for the victim’s email account and is prepared to track the delivery of the cellphones to an address in South Africa. You look at the agent and say, “You know this is not going anywhere, right?” To which he replies, “That’s what everyone in my office says.”

Three years later, after countless search warrants covering 344 email accounts containing more than 1 million emails, dozens of grand jury subpoenas on banks and money transfer companies, and the verification of millions of dollars in losses by credit card and cell phone companies, textbook publishers, small businesses, and the human victims of hundreds of stolen individual identities and accounts—it turns out that you and everyone in the agent’s office were wrong. The agent pulled that one tiny thread and found a remarkable and worthwhile case spanning multiple continents and resulting in an international takedown and a sprawling trial that found the heads of a decade long international financial fraud conspiracy guilty and sentenced to decades in prison.

II. Prosecuting West African fraud is possible

Many prosecutors and agents balk when faced with West African fraud investigations. We understand. The initial loss amounts are often paltry; once you get past the initial stages, the investigations sprawl, involve hundreds of targets, thousands of victims, and enormous quantities of evidence; some of that evidence is overseas, frequently in places that do not cooperate with us; and the defendants are primarily overseas, often in places that do not extradite. Know that these cases are solvable, however, and the workload from doing so is not as overwhelming as it can seem.

The first hurdle in West African fraud cases is that we look at the initial case, the first thread, and say that there is not sufficient loss to justify a federal investigation. As described above, one of our cases began with just two cell phones being re-shipped to South Africa. The sprawling nature of these cases, however, should obviate any such concerns. In our experience, fraudsters involved in these crimes are not doing single, one-off frauds. They are involved in hundreds and often thousands of similar small frauds at the same time. They have often been defrauding people for years, working with the same people and using the same email accounts.

The second problem is that so much of the evidence is overseas. There are countries that we never successfully received evidence from, regardless of existing Mutual Legal Assistance Treaties (MLATs). Nonetheless, we were able to successfully investigate and prosecute these cases because we had so much other evidence. In particular, the vast amount of electronic communications and financial records available in the United States often makes the difficulty in obtaining evidence from overseas less relevant.

Similarly, extradition from certain West African countries can be difficult or even impossible. Nonetheless, as with other cases involving foreign defendants living overseas, this should not stop the prosecution. People with money to burn, such as successful fraud perpetrators, often travel or even move to other countries. We have had significant success cooperating with a number of countries in Africa and elsewhere that are more than happy to arrest and extradite indicted defendants in these cases (feel free to contact the authors for more specifics—we do not want to discourage defendants from traveling to these countries by naming them publicly).

The next biggest problem, once you start investigating, is knowing when to stop, which we will discuss more in the charging section. Just know that there are logical stopping points and ways of grouping charges and defendants, which becomes obvious the more you learn about a particular case.

III. Investigation

The sprawling international investigation that underlay the biggest case on which the authors partnered, *United States v. Ayelotan*,¹ began with the recovery of two fraudulently purchased cell phones and the subsequent takeover of a single romance scam victim's email account in a small town in southern Mississippi.² Two months of emails between the agent and our fraudster produced a \$3,000 counterfeit check on the account of an association based in Kansas City, Missouri.³ This gave us probable cause for search warrants on just two email accounts used by the fictitious paramour.

Analysis of the two accounts revealed romance scams, re-shipping scams, and counterfeit check scams.⁴ It also revealed the existence of numerous international co-conspirators. Numerous co-conspirators meant numerous more email search warrants. The warrants were done in batches, grouping the accounts by service provider, rather than drafting separate warrants for each individual account. This made for long affidavits but happier magistrates and clerks. It also meant months of tedious review by the industrious agent. Using a combination of key word searches and long hours of reading, he was able to ascertain tidbits of information that led to more connections between, and eventually the identities of, the scammers.⁵

¹ *United States v. Ayelotan*, No. 14-cr-00033 (S.D. Miss. June 5, 2017).

² *See United States v. Ayelotan*, 917 F.3d 394, 399–400 (5th Cir. 2019) (“Agent Todd Williams, posing over email as the target victim, helped unravel the whole scheme.”).

³ Brief of Appellee at 13, *United States v. Ayelotan*, 917 F.3d 394 (5th Cir. 2019) (No. 17-60397), 2018 WL 3829940.

⁴ *See, e.g.*, Press Release, U.S. Dep't of Just., *Three Nigerians Sentenced in Int'l Cyber Financial Fraud Scheme* (May 25, 2017) [hereinafter *Press Release*].

⁵ *Ayelotan*, 917 F.3d at 401 (“At trial, the Government admitted oodles of emails that the defendants sent to their romantic targets And they revealed the defendants' fraudulent activities.”).

At the same time, agents started conducting knock-and-talk interviews with U.S. victims and co-conspirators. Unfortunately, almost every knock and talk, it seemed, resulted in the U.S. person alerting the international scammer that they were approached by U.S. law enforcement. One U.S. victim even scanned and sent a Homeland Security Investigations (HSI) agent's business card to his online "girlfriend." He became our first U.S. defendant. Needless to say, knock and talks were quickly abandoned.

We never counted how many grand jury subpoenas we issued. As time passed and we needed to search the same accounts again, we learned by mistake to request updates instead of the whole account, so as not to get information we already had.

Fortunately, the investigation received the support of the HSI Cyber Crime Center (C-3), the International Organized Crime Center (IOC-2), and the Criminal Division's Office of International Affairs (OIA).⁶ With their help, we had meetings with international law enforcement in Washington, and the agents went to Nigeria and South Africa, establishing significant coordination with foreign law enforcement. The South African Police Service (SAPS) in particular had their own cyber unit and provided significant help.⁷

But the bulk of the work came down to that first agent spending months combing emails for clues. Identification was a necessary goal for prosecution. He found nicknames, connections, and references that led to Facebook accounts that identified the perpetrators. Transactions and individuals were identified throughout the United States, including New York, Indiana, Wisconsin, Arizona, California, North Carolina, and Mississippi, and overseas in the Philippines, Vietnam, Belarus, England, Canada, Nigeria, and South Africa, among other places.

The emails set out a systematic method of recruiting witting and unwitting participants to further the scheme—people known as "eMules."⁸ Search warrants of the eMules' emails set out romance and

⁶ Press Release, *supra* note 4.

⁷ *Id.*

⁸ *Ayelotan*, 917 F.3d at 399 ("Using dating websites like 'seniorpeoplemeet.com,' well-honed conversation scripts, and step-by-step guides, the conspirators cultivated online relationships, then sweet-talked their 'paramours' into laundering their money. Next, the conspirators would cajole their enamored victims into becoming money mules, conduits for stolen

work-from-home schemes. The targets of these schemes were both men and women who were lonely and had the time to invest in laundering money and re-shipping merchandise. Often these targets were widows and widowers or single moms working low paying, blue-collar jobs.

It seemed like the conspiracy used the entire cyber underground economy, including black market underground forums selling stolen credit cards and other illegal goods and services, hacking, virtual private networks (VPNs), re-shipping, and money laundering.⁹ The perpetrators purchased stolen Personally Identifiable Information (PII), including bank information, through underground sites and used the information to establish fraudulent internet, eCommerce, and ePayment accounts.¹⁰ They used digital currencies, internet payment platforms, and prepaid cards along with exploitation of money remitters.

The investigation and emails revealed that our conspirators had specific roles. Some spent all their time on romance sites emailing victims and unwitting helpers. Others spent their time purchasing identity and account information on the dark web. Emails revealed a series of scripts provided by the leaders to the “Yahoo Boys,” who spent their days on dating sites trolling for vulnerable lonely hearts or providing fraudulent work-from-home solicitations.¹¹ One role uncovered through the emails was the shipper.¹² Individuals who would use stolen credit card information, obtained by others involved in the conspiracy, to purchase online click-and-ship U.S. Postal Service (USPS) labels to ship fraudulently obtained computers, TVs, clothing, shoes, everything imaginable from one lonely heart victim to another and, finally, to Africa. These labels were electronically altered by the shippers and used over and over again, causing thousands in losses to the USPS. U.S. Postal Inspectors spent countless hours tracking shipments revealed through the emails and identifying the fraudulent payments along with eventual real destinations.

funds, even providing prepaid shipping labels for the swindled cash and goods.”)

⁹ Brief of Appellee at 5–11, *United States v. Ayelotan*, 917 F.3d 394 (5th Cir. 2019) (No. 17-60397), 2018 WL 3829940.

¹⁰ *Id.* at 8.

¹¹ *See Ayelotan*, 917 F.3d at 399.

¹² Brief of Appellee at 10–11, *United States v. Ayelotan*, 917 F.3d 394 (5th Cir. 2019) (No. 17-60397), 2018 WL 3829940.

It is important to remember that the perpetrators of these schemes are good at what they do. They have been running these schemes for decades, and they share the best and most effective techniques with each other, even mentoring newcomers to the fraud business. When a technique works, it is quickly shared among the criminal community. When a technique doesn't work, they quickly share that too so others will not make the same mistake. We have found targets widely sharing fraudulent love letters, responses to charges of fraud, pictures, and other techniques through email. They even share roles within the frauds so that the best spammer may handle the initial contact with victims, the best writer may handle later contact with them, and some fraudsters may specialize in making phone calls to the victims.

Finally, with the dollar losses adding up and the scams beginning to target larger amounts in individual retirement accounts, we had to pull the trigger. Our investigation stopped when we came across an individual in Canada that progressed from obtaining a few thousand dollars in credit card advance checks to withdrawing tens of thousands of dollars of an elderly couple's retirement savings. Soon after this discovery, we indicted 23 defendants in three foreign countries and the United States. We executed arrest and search warrants on the same day in two foreign countries and five federal districts. The assistance of prosecutors and law enforcement here and overseas was phenomenal.

IV. Working with live victims in digital cases

While it can seem possible to investigate West African fraud with almost no interaction with individual victims, relying instead on email, bank records, and wire transfer records to prove the conduct, you need to talk to individual human victims anyway. There are four primary reasons for making sure that you include individual victims in both your investigation and your prosecution.

First, talking to individual victims helps your investigation. We found that, even after reviewing countless emails and financial transactions, contact with individual victims can lead to more leads and better evidence. It can also lead to new investigations of similar crimes perpetrated by different actors.

Second, in most districts, we need the victims for venue. Because these schemes often originate overseas and take place entirely online,

our evidence, our mules, and our targets may all be housed outside of our district. Because these are conspiracies, having even a single victim in our district can be enough to confer venue.

And third, we need a human face for the judge and jury. There is not a lot of jury appeal in big, faceless corporations losing, for the corporations, relatively small amounts of money—when you earn a billion dollars a year in profit, losing \$5,000 at a time can seem insignificant. But the widow who just got juked out of her house, her car, her life savings, and a second mortgage taken out for an imaginary West African orphanage will strongly resonate with your jury and can show the real harm these schemes cause. Similarly, getting victim impact statements can help personalize the crime for judges during sentencing, resulting in a more appropriate sentence from judges who may view cybercrime as victimless.

Finally, it's required by law. The Crime Victims' Rights Act of 2004¹³ requires that we contact the victims and keep them abreast of court proceedings and outcomes and give them a chance to be heard.

Working with victims of these kinds of fraud can be difficult because such victims may not believe they are victims—many of them became victims through romance fraud and are heavily invested in their “relationship.” That they have never met or even talked to the object of their affection does not significantly lessen their commitment to the relationship.

A victim who has been so expertly manipulated is going to have a very hard time believing it. This leads to very delicate conversations, and we have to accept that, even if we can convince victims that some of the scheme was fraudulent, the victims may never believe that all of it was. Victims seem especially hard to convince that their “lovers” were fake. Even now, we have victims who became defendants, pleaded guilty, agreed to cooperate, and did jail time, but still believe that some part of the fraud was real.

As with any victim, you need to deal with victims of West African fraud gently and respectfully, regardless of how difficult it is to convince them that they are victims. Walk them through the evidence, show them the indictment, get them in touch with the Victim/Witness Coordinator, and keep pressing, albeit gently.

In one case, we had a victim who insisted that her online love was innocent, even though he introduced the victim to the “boss” that the

¹³ 18 U.S.C. § 3771.

victim knew was engaged in fraud. No amount of argument from us about how her online love was actually multiple people involved in similar relationships with dozens of others would convince our victim. Finally, we showed the victim the list of other victims who had taken the fraudster's fake last name, as if they were married, as our victim planned to do. There were dozens of them, both male and female. That seemed to finally break through. Once convinced, victims often become much more useful to the investigation, "remembering" communications, accounts, and criminal activity they had somehow forgotten before. Of course, this kind of progressive candor may create disclosure obligations for the prosecution at trial.

V. Charging decisions

Deciding what and who to charge in such a wide-ranging group of fraud schemes is a daunting task. Four attorneys and our lead agent set aside several days to go through and find a logical and provable, as well as reasonable, number of fraud schemes.

First, we looked at the scheme that got us started and where that led. We wanted to include the few Mississippi victims we identified. We also wanted to use a variety of the other scams we uncovered to ensure we would be able to access all relevant conduct that was provable for sentencing purposes. We had to follow the progression of the investigation so that we had a story that made sense. And we had to tie the various co-defendants to each other through their emails and social media accounts in order to support conspiracy charges. We also wanted to charge those identified through the emails as the more experienced fraudsters who were directing and teaching the younger Yahoo Boys. These considerations allowed us to select a particular group of defendants and the particular schemes that formed the basis of our indictment.

Many West African fraud schemes use Americans, called "mules" or "eMules," as intermediaries in an attempt to hide the sources or destinations of fraudulently obtained goods and money.¹⁴ Mules are often victims of romance and work-from-home scams who believe that they have legitimate jobs.¹⁵ So how do we decide which mules are worth charging and which are not? We look for indications of knowledge that they are participating in a crime. An additional

¹⁴ See, e.g., *Ayelotan*, 917 F.3d at 399, 401.

¹⁵ *Id.* at 399.

consideration was the possibility of cooperation and testimony from these charged co-conspirators. As noted above, our investigation stopped when we uncovered an eMule in Canada who was withdrawing tens of thousands of dollars from an elderly couple's retirement savings. This defendant was part of the network of older, more experienced scammers and, therefore, made our hit list of defendants to be charged. Here, we also decided that we had to charge two women in California: one who sent a fraudulent check to a Mississippi victim and was actively producing counterfeit checks going all over the country; and the other who was helping convert proceeds to layered prepaid cards and, finally, wire transfers to Africa. The second woman even suggested ideas to her African contact of other scams they could try, making the decision to charge her that much easier. These mules did not know each other, but we could show their controllers were associated.

One final consideration in charging decisions for defendants located overseas involves the Rule of Specialty.¹⁶ The Rule of Specialty does not allow us to prosecute defendants for any violations different from those that were the subject of the extradition. This limits plea bargaining options, as you cannot offer a plea to an information for a charge with a lower statutory maximum, even though that benefits the defendant. Something to keep in mind and a possible reason to charge offenses ranging more widely in severity than you might normally.

VI. Discovery

The nature and volume of the evidence, which included dozens of seized devices and roughly one million email messages, meant that discovery was a gigantic undertaking—perhaps the single most challenging aspect of the case.

These were the early days of the Department's use of Relativity¹⁷ as an eDiscovery platform, and no one on our team had any experience with it. Unfamiliarity notwithstanding, our view at the time, which seems right in retrospect, was that no feasible alternative existed given the quantity of data. We managed to make it work in the end, but there were hard lessons learned along the way, and those lessons likely apply to any other large-scale evidence management platform in

¹⁶ JUSTICE MANUAL § 9-15.500.

¹⁷ A web-based file review tool.

the event the Department eventually moves on from Relativity. For a comprehensive treatment of electronic discovery and related issues, see the *eLitigation* issue of this Journal from earlier this year.¹⁸ From our particular experience, three especially important points emerged.

First, while one can never foresee every possible issue, your team should do its best to communicate to the tech people all of your anticipated needs from day one through sentencing, including a *very* detailed description of how any “outputs” should look. We faced setbacks and long delays when we discovered the software was not doing things we assumed it would. Those surprises included: (1) all images were uploaded in black and white, which saved space in the database but was unacceptable for presentation at trial; (2) there is no fast or easy way to export documents to PDF in bulk (for example and hypothetically, in response to a tech-averse defense attorney asking for a printout of all his client’s emails); and (3) the software put date/timestamps on email messages but used different time zones for different messages, needlessly complicating our ability to show the chronology of important communications. These problems and others could have easily been fixed on the front end—we just never thought to ask.

Second, it is worth spending the time to organize and cull materials *before* transmitting them for upload into the database. When the files are in your possession, you can easily manipulate them in Windows File Explorer, putting them in nice folders and removing whatever you do not need in the database. Once you send it to Relativity, all that gets set in stone. Failing to appreciate that fact at the outset, we dumped all the evidence into the system in a poorly structured mass, and we later suffered for it. For starters, the data was too large, causing long wait times when searching and loading documents. We should have omitted things like forensic extractions of computers; these generally don’t belong in a system like Relativity because they are massive in size and consist mostly of useless data, like operating system files and software applications. Compounding the problem, we did not sort the materials into a sensible folder structure before transmitting it for loading. These platforms have incredibly powerful search functions, but you will often just want to browse your way to the item you need. To do that, you need to have things sorted *before* they are loaded. (Note also that systems like Relativity may be limited

¹⁸ 68 DOJ J. FED. L. & PRAC., no. 3, 2020.

in how many layers of nested folders they can handle, so be careful once you start getting to sub-sub-sub-subfolders.)

Third, strongly consider requesting that the court appoint a discovery coordinator for the defendants. We struggled for months to produce discovery to the multitude of defense counsel, all with varying degrees of technological experience. Once appointed, our discovery coordinator supplied separate eDiscovery software to defense counsel and trained them in its use, all of which facilitated our production of discovery materials and the lawyers' access to them. And throughout the entire process, the coordinator served as a single point of contact for us, for the various defense counsel, and for the court on the countless occasions when questions arose. Many defense attorneys are not experienced with electronic discovery on the scope we are dealing with, and the discovery coordinator can be a critical resource for them and for you as you collectively navigate the process.

VII. Reverse proffers

Given the strength of the evidence, there was surprising resistance among virtually all defendants to plea offers that would have resulted in below-guidelines sentences. Without speculating about what might explain that pattern, we quickly grasped that reaching fair, negotiated resolutions was going to be more difficult than usual. With that understanding, we embarked on a marathon series of reverse proffers.

These meetings, at which prosecutors and agents met with each individual defendant and his lawyers, served two purposes. The first was to systematically present the evidence to convince both the lawyer and their client of our position that conviction was all but certain. This case was anything but straightforward: The schemes were complex, the proof of the perpetrators' identities was complex, and the wheat-to-chaff ratio in the discovery was extremely low. It was, therefore, important that each defendant, even though he had competent counsel, be shown a roadmap to the government's case.

The second purpose of the reverse proffers was to bridge what we perceived as a cultural divide between our West African-born defendants and the U.S. criminal justice system. Most American defendants come to court having at least a rough familiarity with the process, but there were concerns that that was not the case with these fraud perpetrators, some of whom appeared to reject the basic legitimacy of U.S. law as applied to them. Moreover, while each of the defendants spoke English at least conversationally—indeed, they used

English to ensnare their victims and perpetrate the fraud schemes—the specialized vocabulary of the U.S. judicial process was likely outside their experience.

Facing those issues, we had the good fortune of receiving help from an HSI agent of West African heritage who spoke the language, knew the culture, and could credibly convey to the defendants the gravity of their situation and the options realistically open to them. This agent traveled from out of district to attend the reverse proffers, and it is likely that most of the pleas would not have happened without him. His availability was an extraordinary stroke of good luck, and we would encourage prosecutors to seek out similarly qualified agents. (Needless to say, these conversations happened with the consent and participation of defense counsel, who were happy that someone could get through to their clients, even if that person was a government agent.)

VIII. Trial

After toiling to produce discovery and negotiate pleas, we ultimately proceeded to trial against three of the twenty defendants indicted in the case.¹⁹

The documentary evidence for the defendants' guilt was overwhelmingly strong—which was good—but also extremely voluminous—which can be difficult. Given the sprawling paper record, our primary challenges at trial were (1) to curate a manageable sample of the evidence, arranged so as to make the jury *understand* what the defendants did; and (2) to display the human-interest aspects of the case so as to make the jurors *care* what the defendants did.

Our indictment alleged some 91 overt acts in furtherance of the fraud conspiracy. To begin, we discarded all but a handful of those, keeping the ones that most directly involved our trial defendants and that were most readily comprehensible to an uninitiated layperson. We then organized the proof using a bespoke exhibit numbering system. The vast majority of trial exhibits corresponded with a particular overt act, so we used a decimal point to format our exhibit numbers *xx.yy*, where *xx* was the corresponding overt act, and *yy* was a sequential number within that overt act. We used the same system

¹⁹ United States v. Ayelotan, No. 14-cr-00033 (S.D. Miss. June 5, 2017); *see also Ayelotan*, 917 F.3d at 400.

for the series of documents, emails, and social media posts that identified each of our trial defendants.

We also obtained permission from the court to break the testimony of our main case agent into multiple occasions throughout the trial, each time focusing on a particular trial defendant or overt act. The purpose was to make the evidence more understandable by placing the agent's testimony directly adjacent to related testimony from victims, cooperators, and corporate representatives. The court allowed this with the proviso that each of the defense attorneys could cross each time, but the government could not go back and rebut or supplement his testimony from a prior session. We believe this system aided the jurors in their understanding of the evidence during trial and their review of the exhibits during deliberations. And we know for certain that it helped us keep ourselves organized.

Once the exhibits were in evidence, we liberally highlighted and annotated them. This was sometimes just for ease of reading: For example, where a BlackBerry Messenger log identified the conversation participants by eight-digit PIN numbers, we highlighted Defendant 1's PIN in yellow and Defendant 2's in green. Other times, marking up the exhibits helped anchor the connections between them and the testimony. For example, a large spreadsheet documenting cell phone purchases might be the subject of testimony by three separate witnesses (the phone company representative, the credit card company representative, and the case agent). We would have each of those witnesses write his or her initials next to the particular rows they discuss, making the links crystal clear in the moment: The phone the agent seized is the same phone purchased with the stolen credit card number, which is the same credit card number found in the defendant's emails. We are not believers in waiting until summation to draw those connections.

We also used charts, as both demonstrative and summary exhibits. It was part of the money-laundering scheme that the defendants would shuffle fraud proceeds across a network of prepaid card accounts in a sort of shell game. Such movement between bank accounts is infinitely easier to depict visually rather than verbally, and so we were able to show in a single chart what otherwise took long, mind numbing stretches of witness testimony. Even better, we successfully admitted the charts as summary exhibits that went back during deliberations,²⁰ serving as miniature closing arguments that concisely encapsulated entire clusters of evidence.

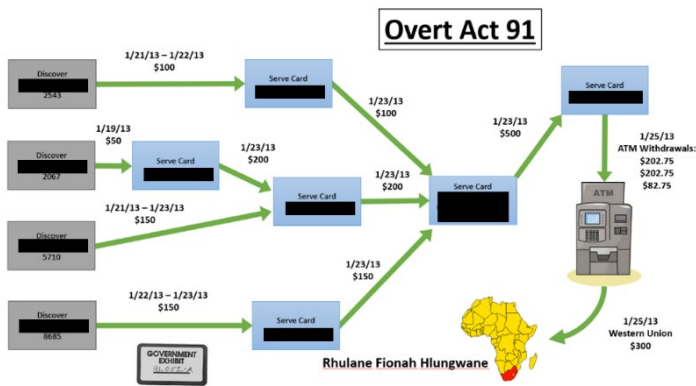


Figure 1: Overt Act 91 summary chart

Ultimately, though, the documents were mostly pretty dry stuff, no matter how well organized. It was, therefore, critical to elicit victim testimony that lent pathos to the government’s case. We achieved that goal with our very first witness, a victim in her fifties who had been exploited emotionally—if not financially—by a trial defendant posing as a love interest on a dating site. Although her pain and humiliation were palpable, this victim was also an unlikely hero of the case—it was her call to local police that started to unravel the whole conspiracy.

Although the romance-scam victims were the most obvious source of human interest, other witnesses pleasantly surprised us. We called a representative from the accounting department of a medium-sized professional association, anticipating testimony for the ministerial purpose of stating that a check purportedly from her organization was fake. We got that and more: The witness described the hundreds of

²⁰ See FED. R. EVID. 1006.

exasperating hours she and her colleagues spent responding to the deluge of fraud that began after her employer's checks began circulating in scammer networks. And each of the individual consumer victims—even if their only injury was the inconvenience of replacing their credit cards—was another human face with whom a juror might identify. Given all that, we would advise trial teams on similar cases *not* to accept stipulations in place of victim testimony on points not in dispute. (Such stipulations might otherwise be attractive for the sake of efficiency, because the fraudulent acts are usually not contested, but only the identity of the perpetrators.)

IX. Finale

The result after three plus weeks of trial, the discharge of a juror midway through deliberations, and countless moments of angst was guilty verdicts as to all three defendants. The defendants were sentenced, based on actual and intended losses, to 1,380 months, 1,140 months, and 300 months of incarceration respectively.²¹ Needless to say, there was an appeal. We knew we were on solid ground in the appeal, however, when the Court interrupted defense counsel within two minutes by asking: “Counsel, is that your BEST argument?”

About the Authors

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²¹ Press Release, *supra* note 4; *see also Ayelotan*, 917 F.3d at 400 (“The district court sentenced each defendant to the statutory maximum for each conviction, running consecutively.”).

years working in information technology, primarily as a consultant on large-scale mission-critical database systems.

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Gathering Gang Evidence Overseas

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I. Introduction

In the last two decades, federal prosecutors have seen a dramatic increase in transnational organized crime committed by established criminal organizations, as well as new “cyber” criminal groups formed to exploit tools created to steal and manipulate the personally identifying information of citizens all over the world. Even more prevalent are nationwide gangs, such as MS-13, which cross state and international borders to conduct gang business.

Some of the obvious reasons for how these criminal organizations easily cross state and international boundaries are the rapid advancements in the internet, connection speed, and the amount of data the average person can transmit online. The internet connects the world, facilitating criminal enterprises that operate abroad in their efforts to target perceived cash-rich U.S. companies and individuals for financial fraud, causing devastating losses. The technology and coding necessary to commit even the most basic identity fraud offenses is readily available to any person willing to purchase them.

Couple this availability with the ease of moving across state and international borders—whether virtually or physically—and a target of an investigation could be anywhere in the world and possess the ability to order violence against an individual in the United States or commit tens of thousands of fraud offenses with a personal computer. Federal investigations now commonly target criminal organizations,

violent gangs, or drug-trafficking cartels that operate abroad and direct criminal activity that has substantive effects in the United States.

As such, federal prosecutors routinely need to gather evidence located all over the world. The main targets of an investigation can be located anywhere—as long as they have a cell phone or computer to communicate with their criminal associates. When targets (and likely the leaders) are located abroad, prosecutors must consider whether extraterritorial jurisdiction applies; what, if any, constitutional protections apply to those targets located abroad; how to obtain admissible evidence; and how to facilitate bringing the defendant to the United States to stand trial.

First, this article focuses on the criminal statutes available for extraterritorial application, as well as the permissible domestic applications of the same to targets abroad. The Racketeer Influenced and Corrupt Organizations Act (RICO), Violent Crime in Aid of Racketeering (VICAR) Act, money laundering, and drug-trafficking statutes may be applied domestically even if targets take some action, if not all of their actions, to commit specific crimes outside of the United States. In conjunction with this discussion, we cover some of the preliminary evidence-gathering vehicles available even at the beginning of an investigation. Next, we explain the application of the Fourth Amendment and *Miranda*¹ rights abroad. Finally, we review formal tools, such as mutual legal assistance treaties (MLATs) and extradition treaties, and the role they play in completing investigations and bringing international actors before a U.S. court.

A. Extraterritoriality application of statutes

Extraterritoriality is a principal of U.S. law that permits a sovereign nation to criminalize conduct that occurs outside the nation's territorial limits. The Supreme Court has ruled that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."² Determining whether a statute applies extraterritorially is a matter of statutory construction, and a careful examination of this subject could fill an entire journal. For our purposes, however, it's worth reviewing specific statutes useful in

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991);
Cf. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284–85 (1949).

prosecuting gangs and organized criminal entities that (1) have explicit congressional intent to apply extraterritorially; and (2) criminal statutes that courts have held apply extraterritorially due to implicit congressional intent.

For several criminal statutes, Congress either expressly articulated that they apply extraterritorially, or they have been interpreted to have that application. For example, several drug-trafficking and terrorism offenses have explicit language that the statute shall be applied extraterritorially. Those include but are not limited to the following:

- The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*;³
- Violent Crimes in Aid of Racketeering Activity (VICAR), 18 U.S.C. § 1959;⁴
- The Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507;
- Hostage Taking, 18 U.S.C. § 1203;
- Witness Tampering, 18 U.S.C. § 1512;
- Murder/Violent Assault of U.S. Nationals Abroad, 18 U.S.C. § 2332;
- Specific Money Laundering offenses under 18 U.S.C. §§ 1956, 1957;
- Various child-sex offenses and travel to do the same, 18 U.S.C. § 2242 *et. seq.*;
- Various child-pornography offenses, 18 U.S.C. §§ 2251(c) and 2260(a);
- Sex Trafficking of Children, 18 U.S.C. § 1591;
- Hate Crimes, 18 U.S.C. § 249;

³ *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090, 2105 (2016). For more of a detailed discussion of RICO's extraterritorial application, please read Teresa Wallbaum, *Novel Legal Issues in Gang Prosecutions*, *infra* page 87.

⁴ For more of a detailed discussion of VICAR's extraterritorial application, please read Teresa Wallbaum, *Novel Legal Issues in Gang Prosecutions*, *infra* page 87.

- Kidnapping, 18 U.S.C. § 1201;
- Computer Abuse, 18 U.S.C. § 1030;
- Access Device Fraud, 18 U.S.C. § 1029;⁵
- Identity Fraud, 18 U.S.C. § 1028(A);⁶
- Use of a Firearm, 18 U.S.C. § 924(c);⁷
- Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1);⁸
- Wire Fraud, 18 U.S.C. § 1343;⁹ and
- Conspiracies to distribute/smuggle narcotics into the United States, e.g., 21 U.S.C. § 846.¹⁰

Using extraterritoriality may allow you to charge various members of a criminal organization who operate solely abroad with impunity with various offenses—whether or not the target of your investigation is a U.S. citizen or has ever entered the country.

⁵ *United States v. Ivanov*, 175 F. Supp. 2d 367, 375 (D. Conn. 2001).

⁶ *United States v. Hernandez-Arias*, No. 11cr368, 2011 WL 4835752, at *2 (S.D. Cal. Oct. 11, 2011).

⁷ *See United States v. Shubin*, 722 F.3d 233, 246–47 (4th Cir. 2013) (holding section 924(c) extraterritorially application is predicated upon the extraterritorial jurisdiction of the underlying crime).

⁸ *See United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980); *United States v. Larsen*, 952 F.2d 1099, 1100–01 (9th Cir. 1991); *United States v. Wright-Barker*, 784 F.2d 161, 167 (3d Cir. 1986).

⁹ *United States v. Hijazi*, 845 F. Supp. 2d 874 (C.D. Ill. 2011) (applying wire fraud extraterritorially with the limitation that the court allowed this application as the U.S. government was the victim). *But see* *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

¹⁰ *See Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967) (holding a conspiracy to smuggle drugs into the United States though there was no evidence the conspiracy was formed in the United States and no overt acts were committed in the United States as a permissible extraterritorial application); *United States v. Lawrence*, 727 F.3d 386 (5th Cir. 2013) (extraterritorial application of conspiracy to distribute five or more kilograms of cocaine aboard an aircraft).

B. Permissible domestic application of criminal statutes

Although it is important to have a general understanding of extraterritoriality, many investigations and subsequent prosecutions involve permissible domestic applications of various criminal statutes, even if your target is conducting criminal acts solely overseas, so long as those criminal acts constitute a crime within the United States. Dependent upon the criminal acts, an indictment can be crafted as a permissible domestic application of the various statutes we have discussed. Specifically, even when a case involves foreign activity that is *not* reached by a permissible extraterritorial application, a statute nonetheless has permissible domestic application when the alleged conduct is within “the ‘focus’ of congressional concern.”¹¹ So, if the alleged conduct involves the acts that the “statute seeks to ‘regulate,’” and if the parties who are allegedly injured are among those “that the statute seeks to ‘protect,’” then the claim qualifies as a domestic application, even if the case also involves some amount of foreign activity.¹²

If the target of your investigation is a criminal organization or violent international gang with leadership located abroad ordering violence within the United States, a VICAR or RICO indictment could be brought as a permissible domestic application of the RICO or VICAR statutes if the essential elements of the underlying racketeering activity alleged in the RICO, or the violent crime alleged in the VICAR, were committed in the United States—for example, if the victim was physically hurt or murdered in the United States. Another example is a sophisticated cyber-criminal group disseminating malware to infiltrate a U.S. computer to obtain trade secrets or personal identifying information of companies and U.S. residents. Such activities would likely be criminalized as a domestic application of a statute, such as 18 U.S.C. § 1028, as the group’s criminal activity establishes an essential element within the United States. It is, therefore, a permissible domestic application of a criminal statute to that group even though the targets may never have set foot in the United States and the mechanisms and vehicles employed to commit the crimes were located outside the United States.

¹¹ *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 266 (2010).

¹² *Id.* at 267 (alteration in original).

II. Constitutional protections for international searches, seizures, and interrogations

When taking investigative steps in a foreign country, U.S. constitutional protections may still apply. First, this section examines the applicability of the Fourth Amendment to foreign searches and seizures. Second, it examines *Miranda*'s applicability abroad.

For all evidence obtained abroad, there is a threshold question that must be addressed before any further analysis is done: Does the way the evidence was obtained “shock the conscience” of the court?¹³ “The ‘shocks the judicial conscience’ standard is meant to protect against conduct that violates fundamental international norms of decency.”¹⁴ This principle can apply even without United States involvement and require the exclusion of evidence obtained by agents of a foreign country against a foreign national.¹⁵ To shock the judicial conscience, the conduct must be “egregious”; merely illegal conduct does not meet this high standard.¹⁶ Courts have indicated that torture or other truly shocking conduct likely needs to be involved.¹⁷

A. Fourth Amendment analysis

There are three guiding questions to a Fourth Amendment analysis for international searches and seizures: (1) Does the defendant have standing? (2) What was the United States' involvement in the search/seizure? (3) Was the search/seizure reasonable?

1. Standing

The Fourth Amendment provides that “The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁸ The first

¹³ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

¹⁴ *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009);

United States v. Mitro, 880 F.2d 1480, 1483–84 (1st Cir. 1989).

¹⁵ *See, e.g., United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970) (suggesting that “rubbing pepper in the eyes” or other shocking conduct by a foreign officer could warrant exclusion on due process grounds).

¹⁶ *See United States v. Getto*, 729 F.3d 221, 227 (2d Cir. 2013) (finding that an alleged warrantless search would not constitute shocking the conscience).

¹⁷ *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975).

¹⁸ U.S. CONST. amend IV (emphasis added).

question for a Fourth Amendment analysis is, who are “the people” the Amendment protects?

“The people” refers to a class of persons who are part of the national community or who have otherwise developed sufficient connections with the United States to be considered part of that community.¹⁹ This, at minimum, includes U.S. citizens living abroad and, likely, lawful U.S. permanent residents. On the other hand, a foreign national simply directing his crimes toward the U.S. or traveling to the United States on occasion would not be considered “the people” for Fourth Amendment purposes. Thus, the Fourth Amendment does not apply to searches and seizures (including wiretaps) involving nonresident aliens conducted in a foreign country with the participation of U.S. agents.²⁰

The investigators should make every effort to determine if the targets of an investigation are U.S. citizens, resident aliens, or have other significant connections to the United States. If connections to the United States are unknown, or if the defendant has some prior connections to the United States, it is important to proceed with caution: The Fourth Amendment may apply.

2. Who performed the search/seizure, and was it part of a “joint venture?”

If the target of the search/seizure has standing under the Fourth Amendment, the next inquiry considers the level of U.S. government involvement in the search/seizure. If the United States had no involvement, that is, the foreign country acted on its own to conduct the search/seizure, then the Fourth Amendment does not apply.²¹ Because the Fourth Amendment does not apply, and there is no reasonableness inquiry by the court, the evidence obtained by the foreign law enforcement officers is admissible even if they did not

¹⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

²⁰ *See, e.g., United States v. Cho-Ing Tseng*, 311 F. App'x 950, 951–52, (9th Cir. 2009) (not precedential).

²¹ *See United States v. Rose*, 570 F.2d 1358, 1361 (9th Cir. 1978) (holding that neither the Fourth Amendment nor the exclusionary rule is applicable to the acts of foreign officials).

follow their own law in obtaining it, provided that the circumstances surrounding its collection do not shock the conscience of the court.²²

If the search/seizure was conducted exclusively by the U.S. government, then the Fourth Amendment would apply.²³ This situation, however, is rare; U.S. law enforcement officers typically cannot conduct searches and seizures in foreign countries. Instead, U.S. law enforcement officers will request to work with foreign counterparts to effectuate the search or seizure. Courts will then look to see if the foreign counterparts acted as part of a “joint venture” with the United States and/or were acting as agents or virtual agents for the United States.²⁴

A determination that a joint venture existed between the United States and foreign authorities requires a finding that there was “substantial” involvement by U.S. agents in the foreign law enforcement action.²⁵ The mere existence of a reciprocal relationship, whereby evidence is shared by a MLAT, is not sufficient to trigger a joint venture finding.²⁶ Courts consider a variety of factors in assessing whether a “joint venture” existed. No one factor is dispositive, and likely, some combination of factors is necessary for a finding of a joint venture.²⁷ Some of these factors include: (1) whether there was an agency relationship between the United States and the foreign country to the extent that the United States had some element of control over the direction, plan, and instigation of the search, seizure, or arrest; (2) whether there was active participation by U.S. officials in the search, seizure, or arrest; (3) whether there was a daily exchange of information between the United States and the foreign

²² See, e.g., *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968) (evidence recovered in searches that were illegal under Philippine law were admissible and not subject to the exclusionary rule).

²³ *United States v. Conroy*, 958 F.2d 1258, 1264 (5th Cir. 1994).

²⁴ *Rose*, 570 F.2d at 1362; *United States v. Behety*, 32 F.3d 503, 510–11 (11th Cir. 1994).

²⁵ *Behety*, 32 F.3d at 510–11.

²⁶ See *United States v. Omar*, Crim. No. 09-242, 2012 WL 2277821, at *3 (D. Minn. June 18, 2012) (no joint venture where “there is no evidence that demonstrates that the United States had any part in dictating the manner in which the Dutch law enforcement officials would carry out the MLAT requests”).

²⁷ See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 229 (4th Cir. 2008) (presence of federal officers by itself is not sufficient for a joint venture).

authorities; (4) whether the United States had control of or immediate access to the evidence seized; (5) whether there was physical force or protection provided by U.S. entities; and (6) whether continuous translation, interpretation, or decoding services were provided by the United States.

3. If the Fourth Amendment applies abroad, when is the evidence admissible?

If the Fourth Amendment applies to evidence obtained in a foreign country, the reviewing court will decide if the search was “reasonable” under the Fourth Amendment.²⁸ Typically, courts consider whether the search complied with the law of the country where it occurred.²⁹ In at least the Fifth, Seventh, and Eleventh Circuits, however, compliance with foreign law is not necessarily dispositive, and U.S. legal norms play some role in deciding what is admissible.³⁰ According to the Ninth Circuit, even if a search does not comply with foreign law, the evidence may be admitted under the good-faith exception if U.S. officers reasonably relied on foreign officials’ representations that the search was legally valid.³¹

As in a domestic case, Fourth Amendment issues must be considered during any overseas investigative activity and subsequent foreign arrest. When contemplating undergoing either, you should do the following: Determine the citizenship and residence status of the target; make a decision about the level of involvement U.S. agents will have in the search/seizure; if U.S. agents will participate, make sure they observe and document their observations for trial to avoid calling a foreign law enforcement officer; and document all foreign law enforcement officers participating, including those who provided assurances that the actions taken were valid under local law.

B. *Miranda* abroad

Any statement by a defendant to law enforcement—whether U.S. or foreign—must be voluntarily made. The voluntariness requirement is

²⁸ *United States v. Getto*, 729 F.3d 221, 228 (2d Cir. 2013) (also noting that the warrant requirement does not apply).

²⁹ *See, e.g., United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995).

³⁰ *See United States v. Emmanuel*, 565 F.3d 1324, 1330 (11th Cir. 2009); *United States v. Conroy*, 589 F.2d 1258, 1265 (5th Cir. 1979); *United States v. Andreas*, No. 96 CR 762, 1998 WL 42261, at *3 (N.D. Ill. Jan. 30, 1998).

³¹ *Barona*, 56 F.3d at 1087.

based on the Fifth Amendment right against self-incrimination and the Due Process Clause and recognizes that “coerced confessions are inherently untrustworthy.”³²

If foreign authorities question a suspect on their own without any participation, involvement, or guidance provided by U.S. law enforcement authorities, *Miranda* warnings are not required, and the statement should be admissible in U.S. courts.³³ Even if the statement obtained by a foreign officer is in violation of the foreign country’s laws regarding interrogations, U.S. courts have refused to apply the exclusionary rule.³⁴

Custodial interrogations conducted outside the United States by U.S. law enforcement authorities require *Miranda* warnings.³⁵ The defendant’s nationality is irrelevant; a nonresident alien brought to trial in the United States may invoke his Fifth Amendment rights.³⁶ The court will examine the totality of the circumstances to ensure the defendant knowingly and intelligently waived his rights. As such, precautions that one would use in the domestic context—such as translating *Miranda* rights, informing the defendant orally and in writing, etc.—should be followed.

Giving *Miranda* warnings in a foreign country also presents unique problems. Frequently, it may not be possible to provide the suspect with a lawyer or have a lawyer present during questioning. U.S. law enforcement must do “the best they can to give full effect” to a suspect’s right to the presence of counsel.³⁷ But the *Bin Laden* court held that “extraordinary efforts,” such as flying an American public defender overseas, are not required because of the significant delays

³² *Dickerson v. United States*, 530 U.S. 428, 433 (2000).

³³ *See United States v. Frank*, 599 F.3d 1221, 1228 (11th Cir. 2010); *United States v. Molina-Chacon*, 627 F. Supp. 1253, 1262 (E.D.N.Y. 1986).

³⁴ *See United States v. Covington*, 783 F.2d 1052 (9th Cir. 1985) (holding that the exclusionary rule is not suited to deter foreign police from violating their own laws).

³⁵ *United States v. Rommy*, 506 F.3d 108, 131 (2d Cir. 2007) (“[T]he parties [do not] dispute the applicability of Fifth and Sixth Amendment protections to the custodial interrogation of a foreign national outside the United States by agents of this country engaged in a criminal investigation.”).

³⁶ *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 201 (2d Cir. 2008).

³⁷ *United States v. Bin Laden*, 132 F. Supp. 2d 168, 189–91 (S.D.N.Y. 2001).

that could result.³⁸ Law enforcement agencies typically have a stock form for the extraterritorial advice of rights that acknowledges both the defendant's rights and the limits on effectuating them in the foreign context.

Finally, *Miranda* may still apply even if foreign authorities are the ones interrogating the suspect if they are acting as part of a joint venture with the United States and/or are acting as agents of the United States. This is a fact-based determination involving the level of involvement by the United States and/or the level of control by the United States.³⁹ Generally, “‘mere presence at an interrogation’ or indirect involvement of United States law enforcement agents will not give rise to a joint venture, whereas ‘coordination and direction of an . . . interrogation does.’”⁴⁰

U.S. law enforcement agents are limited in conducting overseas interrogations of U.S. citizens for narcotics offenses by the Mansfield Amendment. This law states that “[n]o officer or employee of the United States may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.”⁴¹

Practically, if you are seeking a custodial interrogation of a suspect overseas, here are some tips to keep in mind: Make sure you have a *Miranda* International Advice of Rights form that is in the suspect's language. Ensure the U.S. agents conducting the interview document the defendant's condition, paying special attention to any indication of physical abuse. Keep a record of foreign law enforcement officers present and be aware of any apparent influence or effect of foreign law enforcement officers. If your agents suspect the detainee has been abused, they must take steps to ensure the statements are voluntary. Efforts to attenuate the effects of prior abuse could involve allowing for a lapse in time, changing locations, ensuring the abusive foreign law enforcement officer is not present, and including adequate warnings of the defendant's rights. Finally, if foreign authorities conduct their own interview, U.S. agents should learn the substance of the interview after the fact to prevent any argument regarding a joint

³⁸ *Id.*

³⁹ See *Covington*, 783 F.2d at 1056.

⁴⁰ *United States v. Harun*, 232 F. Supp. 3d 282, 287 (E.D.N.Y. 2017).

⁴¹ 22 U.S.C. § 2291(c)(5).

venture. The interview can be admitted by calling the foreign law enforcement officers at trial.

III. Obtaining evidence from abroad

U.S. prosecutors conducting a criminal investigation or other investigation with a view to criminal referral may obtain a wide range of assistance from abroad.⁴² U.S. authorities may obtain information and evidence through a variety of means—including police-to-police requests, publicly available resources, direct contact with potential witnesses if foreign law permits, and voluntary production. There are, however, circumstances where a prosecutor must follow formal procedures involving the foreign government, both to obtain the assistance and to ensure the evidence is admissible in a U.S. court. For example, the following situations almost always require a formal request for assistance from the United States to the relevant foreign government: compelled production of records or testimony for use at trial; judicially authorized investigative measures (for example, searches and seizures, wire intercepts, controlled deliveries, and certain undercover activities); and immobilization and/or forfeiture of assets.

A bilateral MLAT is a mechanism to facilitate law enforcement efforts of the treaty partners,⁴³ and the United States is a party to

⁴² Available assistance may include information exchange (for example, locating and identifying persons and items), foreign evidence gathering (for example, search and seizure, production of documents), obtaining testimony or statements, service of process, restraint and forfeiture of assets, and investigative support (for example, undercover investigations, controlled deliveries, intercepted communications).

⁴³ *See, e.g.*, Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Mar. 18, 1985, S.TREATY DOC. NO. 100-14 (1988), 1985 WL 301941. The United States also is a party to many multilateral treaties that may be used for mutual legal assistance. For example, as to mutual legal assistance between the United States and many countries in Central America when no mutual legal assistance treaty is in force, the Inter-American Convention on Mutual Assistance in Criminal Matters, S. TREATY DOC. NO. 105-25, is used. Additionally, even in the absence of a treaty relationship, mechanisms such as letters rogatory (requests between courts) and letters of request (requests between prosecution authorities) are

such instruments with over 50 foreign jurisdictions. MLATs typically designate the Attorney General as the United States' Central Authority for handling requests pursuant to the treaty, and the Attorney General's authority has been delegated to the Office of International Affairs (OIA).

In general, when the treaty's requirements are met, an MLAT obligates a treaty partner to use its available procedures, including compulsory measures, to execute a U.S. request. The process for handling an outgoing MLAT request is straightforward: When OIA determines a request complies with the requirements of the relevant treaty and foreign law, it transmits that request to the foreign government.⁴⁴ The treaty partner then independently assesses the request to confirm it qualifies for assistance within the parameters of the treaty and its domestic law, and if so, it will endeavor to execute the request. If, however, a treaty partner views a request as not in conformity with the MLAT or fails to meet its domestic legal standards, it will likely decline to execute it.

The legal standards that apply to requests for different types of assistance vary widely among foreign countries, and prosecutors should consult with OIA before drafting a mutual legal assistance (MLA) request.⁴⁵ An MLA request drafted for one country may not meet another country's legal standards. In general, however, requests for assistance should be drafted precisely to identify the evidence or other assistance sought and to establish a nexus between the facts of the case and the assistance requested—for example, by describing the criminal conduct and explaining how it connects to the evidence sought. At a minimum, the statement of facts must provide sufficient detail to demonstrate the evidence sought is relevant to the investigation or prosecution. The request should state details that provide a basis for the assistance requested.⁴⁶

available when assistance must be requested through formal channels. *See* 28 U.S.C. § 1781; 18 U.S.C. § 3512.

⁴⁴ The same process is followed for letters of request when no MLAT is in force. All such requests are similarly transmitted by OIA.

⁴⁵ *See generally* JUSTICE MANUAL § 9-13.500 *et seq.*

⁴⁶ As noted below, if intending to submit a request for the disclosure of stored computer data, it is often advisable to first request that the data be preserved before executing the request for disclosure to ensure that it will not be deleted by the Communications Service Provider.

A few additional points regarding MLATs are worth noting: First, confidentiality provisions are common in modern MLATs and may allow both U.S. authorities and their partners to request assistance without public disclosure of their investigation.⁴⁷

Second, many treaties provide that evidence or information produced may only be used in connection with the investigation and prosecution described in the MLAT request, absent the prior consent of the requested country. In some instances, countries may impose additional conditions on the use of the evidence, for example, by requiring that it remain confidential.⁴⁸

Third, obtaining evidence using a MLAT may facilitate its admissibility in court. For example, MLATs, as self-executing treaties, are on equal footing with federal statutes and may provide their own mechanism for self-authentication, as Rule 901(b)(10) of the Federal Rules of Evidence recognizes.⁴⁹ Thus, for MLATs that contain language that “no further authentication or certification shall be necessary,” apart from an attestation that may be satisfied by the MLAT’s certification form, the MLAT itself provides an independent legal basis for self-authentication. Multiple courts have also held that a certification authenticating foreign business and/or foreign public records does not constitute testimonial hearsay.⁵⁰

Some practical tips are also worth noting. First, if you are investigating a cyber-criminal group, you may need forensic images of hard drives, copies of financial records, emails, server-farm data, copies of websites, and a variety of other complex material. You should consider taking advantage of the 24/7 network facilitated by the Computer Crime and Intellectual Property Section (CCIPS) in order to preserve the data for a later MLAT. The “24/7 Cybercrime Network” has over 70 countries that have agreed to partner and comply with the terms of the Council of Europe’s Convention on

⁴⁷ See, e.g., Treaty on Certain Aspects of Mutual Legal Assistance in Criminal Matters Between the United States of America and the Republic of Finland art. 7, U.S.-Fin., Dec. 16, 2004, S. TREATY DOC NO. 109-13.

⁴⁸ See, e.g., Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance art. 6, U.S.-Mex., Dec. 9, 1987, 80 Stat 271.

⁴⁹ See, e.g., *Cheung v. United States*, 213 F.3d 82, 94–95 (2d Cir. 2000). Depending on the language of the MLAT, the treaty may also provide an independent basis for a hearsay exception. See, e.g., FED. R. EVID. 901(b)(10).

⁵⁰ See, e.g., *United States v. Bansal*, 663 F.3d 634, 666–67 (3d Cir. 2011).

Cybercrime. If a request is made for data that falls under this convention, the partner country must expeditiously preserve the data. This process may allow you to submit an MLAT request later in time in order to obtain that data.

Second, identifying your targets and crimes early in your investigation is critical to account for some of the time restraints associated with obtaining evidence abroad. Unlike in an investigation based only on domestic evidence, obtaining evidence abroad requires navigating foreign judicial systems, each with its own analog of probable cause, reasonable suspicion, and other legal requirements. Your request for evidence must comply with their standards, as well as those required by the treaty. Further, the mechanisms available to our international colleagues may differ from those available in the United States. It is important to be cognizant of these differences when requesting evidence so as to not further delay a potentially complex and lengthy process. While MLATs can be highly effective law enforcement tools, the process may be slow and uncertain, and some requests may take a long time to execute.⁵¹ Although federal prosecutors may seek a court order to toll the applicable statute of limitations or the speedy trial clock in order to request evidence abroad, see 18 U.S.C. §§ 3292 and 3161(h)(8), prosecutors should plan ahead and request evidence abroad as early as possible.

Finally, no matter what type of criminal organization you target, coordination with OIA, as well U.S. law enforcement personnel, is critical to the success of your investigation and prosecution. These professionals are subject-matter experts, and some reside in country and have relationships with their foreign counterparts in order to facilitate the execution of MLAT requests, parallel investigations, and extraditions.

IV. Obtaining fugitives from abroad

When a prosecutor indicts or otherwise charges a fugitive who is abroad, the next issue is to bring the defendant before a U.S. court. There are several ways to bring fugitives to the United States to face charges, receive a sentence, and/or serve a sentence previously

⁵¹ See, e.g., *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 381–82 (2d Cir. 2003) (describing MLAT request for bank records held in a foreign country that had not been completed after more than two years).

imposed.⁵² Perhaps the most well-known means to bring a defendant from a foreign country to the United States is the legal process of extradition.

For the United States, extradition is primarily a treaty-based legal process, and the United States currently maintains bilateral extradition treaties with approximately 100 countries.⁵³ Other countries, however, may have the means to extradite a fugitive to the United States absent a treaty. The relevant treaty, the law of the country from which extradition is sought, and the existing practice between the United States and that foreign country all factor into the form and content of the documents the United States must submit to request an arrest and extradition of a fugitive. When U.S. prosecutors consider whether to seek the extradition of fugitives, they must consult with OIA, which will assist in preparing the extradition request.⁵⁴

The usual international extradition begins with locating the fugitive in a foreign country.⁵⁵ After a defendant is located, and once the OIA and the Department of State determine an extradition request meets treaty requirements, the Department of State transmits the request to the foreign government. Depending on the country, an extradition may begin in two different ways: In non-urgent cases, the United States presents a complete extradition request, which includes all the documents and information the treaty requires. By contrast, in time-sensitive or urgent situations, a “provisional arrest” may be appropriate. Pursuant to such a request, the fugitive is arrested “provisionally,” pending receipt of the complete documentation in support of extradition. In such provisional-arrest cases, the complete extradition request and supporting documents must be prepared,

⁵² Extradition may not be the prosecution’s only option to procure the defendant’s presence for trial. Deportation or expulsion, for example, may be viable alternatives to extradition, depending on the foreign country involved and the nationality of the fugitive. These options should be discussed with OIA.

⁵³ See A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2019, U.S. DEPT. OF STATE.

⁵⁴ See generally JUSTICE MANUAL § 9-13.100 *et seq.*

⁵⁵ The responsibility to locate a fugitive rests with the U.S. prosecutor and the relevant investigating agency. Resources available to assist with the fugitive investigation include agency attachés stationed abroad, the U.S. Marshals Service, and Interpol.

translated (if going to a non-English speaking country), certified, and presented to the foreign country within a period of time specified by the treaty, usually between 40–60 days from the time of arrest. While it may be possible in rare circumstances to obtain an extension of this deadline, a fugitive may be released from foreign custody if the relevant materials are not received in compliance with the treaty’s terms.

Not all extradition treaties are alike, and not all treaties define the same offenses as “extraditable.” Whether the criminal conduct alleged is covered by an extradition treaty as an extraditable offense depends on a number of variables, including the age of the treaty; whether the treaty is a list treaty (setting out specific offenses covered) or a modern, dual-criminality treaty (defining extraditable offenses as those punishable by more than a year of imprisonment under the laws of both countries); and if the offense is not covered by the bilateral extradition treaty, whether a multilateral convention expanding the scope of extraditable offenses is available and reaches the offense in the particular case.⁵⁶ If the fugitive has been convicted and is sought to serve a prison sentence, under some treaties, the time remaining to be served must exceed any minimum period specified.

Extradition treaties apply the “rule of specialty,” a principle that limits the offenses for which a fugitive may be detained, tried, or punished to those charged offenses for which the fugitive’s extradition was granted. This limitation usually precludes prosecuting a fugitive for conduct not covered in the charging documents that served as the basis for the extradition, except under a few limited circumstances when the treaty specifies. For example, if a defendant is extradited on one count of drug trafficking, once he/she arrives in the United States, a prosecutor generally may not supersede the indictment to add additional counts unless the terms of the applicable treaty allows it or the foreign government waives the rule of specialty.

Like MLATs, international extradition can be a highly effective law enforcement tool, but it can be time consuming and impossible in certain circumstances. Some countries, for example, have constitutional or statutory prohibitions on extraditing their nationals,

⁵⁶ As subject-matter experts, OIA may assist prosecutors in emphasizing facts in their extradition request that pertain to the elements of the foreign crime to enable foreign authorities to understand that the alleged conduct would also constitute a crime in the foreign country.

and foreign-born fugitives may flee to their country of birth, where they may be insulated from extradition. Moreover, some countries require certain assurances from the United States before extraditing a fugitive, such as an assurance that the death penalty will not be sought or imposed if a fugitive is charged with capital eligible offenses.⁵⁷

Despite these occasional difficulties, OIA will work with prosecutors to achieve a successful outcome. Annually, hundreds of fugitives are returned to the United States. Typically, a defendant who has been extradited is returned directly to the district where the charges originated and has his or her first appearance before the court there.⁵⁸ Importantly, where an extraterritorial venue statute applies and establishes venue in the district where the fugitive is “first brought,” for example, 18 U.S.C. § 3238, arrangements must be made to ensure the arrival of the fugitive in the district where the charges are pending.

While they are almost always unsuccessful, defendants also occasionally challenge aspects of the extradition in U.S. court. The most common challenge is when a defendant claims a violation of the Sixth Amendment Speedy Trial Clause, arguing the government did not act with “reasonable diligence” in securing the defendant’s presence from abroad in order to ensure that he or she received a prompt trial. Generally speaking, a defendant’s speedy trial claim will not succeed if the government can show that the delay was wholly justifiable because it proceeded with reasonable diligence.⁵⁹ Extradited defendants may also attempt to challenge the charges by alleging their extradition was illegal, but such challenges to the actions of a foreign sovereign are typically meritless.⁶⁰

⁵⁷ See, e.g., Extradition Treaty with Argentina art. 6, U.S.-Arg., June 10, 1997, S. TREATY DOC. NO. 105-18.

⁵⁸ See FED. R. CRIM. P. 5(C)(4) (“If the defendant is surrendered to the United States in accordance with a request for the defendant’s extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.”).

⁵⁹ See *Doggett v. United States*, 505 U.S. 647, 656 (1992).

⁶⁰ See *United States v. Trabelsi*, 845 F.3d 1181, 1186 (D.C. Cir. 2017); *United States v. Campbell*, 300 F.3d 202, 209–10 (2d Cir. 2002).

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Exploiting Social Media in Gang Cases

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In February 2019, three men followed Abel Mosso into a New York City subway station.¹ Two of the men, alleged associates of MS-13, attacked Mosso inside a subway car before dragging him onto the platform.² There, the third man, an alleged member of MS-13, warned bystanders not to interfere by shouting, “Nobody get involved, we’re MS-13, we’re going to kill him.”³ He then shot Mosso multiple times in the head.⁴ Investigators found on Facebook a video of the murder,⁵ which they believe was motivated by the belief that Mosso was a member of the rival 18th Street Gang.⁶ The video was later used as evidence when the government charged the three men with murder in aid of racketeering and intentionally discharging a firearm during a crime of violence.⁷

As illustrated by the Mosso case, social media platforms such as Facebook, Instagram, Twitter, and YouTube can be a source of valuable evidence in gang-related investigations. The use of social media by gangs is “ubiquitous,”⁸ and “[s]ocial media and other forms

¹ Press Release, Dep’t of Just., Ten Alleged MS-13 Members and Associates Charged with Three Murders, Attempted Murder, Murder Conspiracy and Firearms Offenses (May 14, 2020) [hereinafter EDNY Press Release], <https://www.justice.gov/usao-edny/pr/ten-alleged-ms-13-members-and-associates-charged-three-murders-attempted-murder-murder>.

² *Id.*

³ *Id.*; Complaint at 13 n.11, United States v. Gutierrez et al., No. 1:20-mj-349 (E.D.N.Y. Mar. 5, 2020).

⁴ Complaint, *supra* note 3, at 6–7.

⁵ *Id.*

⁶ See EDNY Press Release, *supra* note 1; see also Complaint, *supra* note 3, at 14 (noting one of the defendants had a photo of the victim displaying an 18th Street Gang hand sign).

⁷ Complaint, *supra* note 3, at 1–2, 5–7; see also EDNY Press Release, *supra* note 1.

⁸ National Gang Intelligence Center, *National Gang Report 2015*, FED. BUREAU OF INVESTIGATION 10 (2015), <https://www.fbi.gov/file-repository/stats->

of technology play an essential role in the illicit activities of gang members.”⁹ Members and their associates use social media to communicate with each other;¹⁰ to recruit new members;¹¹ to facilitate

services-publications-national-gang-report-2015.pdf/view [hereinafter National Gang Report].

⁹ *Id.* at 10, 39.

¹⁰ *See, e.g.*, Press Release, Dep’t of Just., 35 Members and Associates of Bloods Gang Plead Guilty to Racketeering Conspiracy and Related Charges, Including Drug Trafficking and Wire Fraud (Mar. 12, 2018), <https://www.justice.gov/opa/pr/35-members-and-associates-bloods-gang-plead-guilty-racketeering-conspiracy-and-related> (describing how the private message function of Facebook was used by gangs to communicate); Press Release, Dep’t of Just., Three Members or Associates of Wildboys Gang in South Carolina Sentenced for Violent Crimes in Aid of Racketeering (June 2, 2017) [hereinafter Wildboys Press Release], <https://www.justice.gov/opa/pr/three-members-or-associates-wildboys-gang-south-carolina-sentenced-violent-crimes-aid> (illustrating how gang members used Facebook and YouTube to communicate with each other); National Gang Report, *supra* note 8, at 41 (“[S]ocial media platforms enable fast communication and coordination efforts among . . . gang members.”).

¹¹ National Gang Report, *supra* note 8, at 8 (“Gangs are also increasing their use of technology—social media in particular—in order to spread their message and recruit new members.”); *id.* at 39–40 (providing examples where gangs used social media for recruitment); *see also* Rick Sobey, *YouTube won’t take down Latin Kings-linked rap videos cited in federal indictments*, BOS. HERALD (Jan. 7, 2020), <https://www.bostonherald.com/2020/01/07/latin-kings-youtube-rap-videos-with-federally-indicted-new-bedford-gang-members-will-stay-online/> (quoting former Organized Crime and Gang Section prosecutor as saying rap videos made by gangs and posted to YouTube are a “powerful recruitment tool”).

criminal activity;¹² to taunt and threaten rival gangs;¹³ to intimidate potential witnesses;¹⁴ and even to boast about or broadcast their involvement in illegal acts.¹⁵ Thus, information in the hands of social

¹² See, e.g., Press Release, Dep't of Just., *Federal Racketeering Indictment Targets Santa Fe Spring-Based Street Gang that Operates under Control of Mexican Mafia* (June 14, 2016), <https://www.justice.gov/usao-cdca/pr/federal-racketeering-indictment-targets-santa-fe-spring-based-street-gang-operates> (“[G]ang members used Facebook and text messages to advertise narcotics sales, make threats, plan attacks and negotiate transactions involving firearms and ammunition.”); Press Release, Dep't of Just., *MS-13 Gang Member Sentenced to 60 Months in Prison for Obstruction of Child Sex Trafficking Laws* (Aug. 11, 2014) <https://www.justice.gov/opa/pr/ms-13-gang-member-sentenced-60-months-prison-obstruction-child-sex-trafficking-laws> (describing how a MS-13 member used Facebook to communicate with minor subsequently coerced into prostitution by gang).

¹³ See, e.g., William Wan, *How Emoji Can Kill: As Gangs Move Online Social Media Fuels Violence*, WASH. POST, June 13, 2018, <https://www.washingtonpost.com/news/speaking-of-science/wp/2018/06/13/how-emoji-can-kill-as-gangs-move-online-social-media-fuels-violence/> (“Instead of tagging graffiti, some rival gang members now upload video of themselves chanting slurs in enemy territory. . . . Rival gang members often will follow and even friend each other on social media to exchange insults. . . .”); Wildboys Press Release, *supra* note 10; National Gang Report, *supra* note 8, at 42, 44.

¹⁴ See, e.g., Ben Brasch, *Two Cobb MS-13 Leaders Among Those Indicted In Alleged Gang Shooting*, ATLANTA J.-CONST. (Sept. 20, 2018), <https://www.ajc.com/news/local/two-cobb-leaders-among-those-indicted-alleged-gang-shooting/EtLi3hlBfzKy3t3LoAqjIo/> (stating a MS-13 member sent threatening messages via Snapchat to gang-related shooting victim while he was in the hospital).

¹⁵ See, e.g., Xerxes Wilson & Nick Perez, *Two sentenced in murder of 15-year-old Brandon Wingo*, DEL. NEWSJ. (Jan. 31, 2020), <https://www.delawareonline.com/story/news/crime/2020/01/31/two-sentenced-murder-15-year-old-brandon-wingo/4564219002/> (stating convicted killer in gang-related shooting made social media posts where he “brandished the murder weapon” and called it the “Wingo dropper” in a reference to the victim’s name); Jacob Rascon, *Inside MS-13 gang’s mafia-like structure* (July 13, 2018), <https://www.click2houston.com/news/2018/07/13/inside-ms-13-gangs-mafia-like-structure/> (quoting the head of the FBI’s Gang Task Force as saying MS-13 members use social media to transmit videos of murders to gang leaders); Wildboys Press Release, *supra* note 10 (stating gang members used Facebook and YouTube to “post photographs and videos depicting firearms, large amounts of cash, and what purported to be controlled substances”).

media providers may be direct evidence of a crime, may suggest a motive for a gang member's actions (for example, retaliation for an insulting social media post by a rival gang member), or may shed light on an organization's inner workings. Even when those involved with gangs use social media for mundane purposes, doing so creates a digital trail that can identify the location of an individual at a given time, establish associations with others, and more. And in some cases, social media accounts belonging to witnesses or victims may contain information relevant to the investigation.

In general, social media providers possess two classes of information about accounts on their platforms: non-content (for example, subscriber information, transactional logs, and location information) and content (for example, messages sent and received, posts, and uploaded photos and videos). However, the data available in a given investigation will depend on several factors. First, provider policies about the data that is collected and how long that data is retained vary. In addition, users can prevent a provider from collecting certain data or delete it after it comes into the provider's hands. For example, a user may choose not to provide certain identity information when creating an account, to delete incriminating messages immediately after sending them, or to prevent the provider from determining where he is by turning off the location functionality on his mobile device. Thus, the types of information that investigators acquire from a social media provider can vary from case to case.

To effectively use social media as an investigative tool, prosecutors and law enforcement must be knowledgeable about the methods by which they can acquire information from providers and the ways in which this data can be used to further an investigation. When seeking information from social media, investigators can follow two paths. First, the government can seek disclosure of the data directly from the provider. When doing so, the government must abide by the rules set forth by three statutes: (1) the Stored Communications Act (SCA),¹⁶ which is sometimes referred to as the Electronic Communications

¹⁶ 18 U.S.C. § 2701 *et seq.*

Privacy Act (ECPA);¹⁷ (2) the Pen Register Act;¹⁸ and (3) the Wiretap Act.¹⁹ Alternatively, law enforcement can independently collect information by reviewing publicly available social media profiles or obtaining information with the consent of the account holder. Both paths offer effective means for collecting evidence.

I. Obtaining disclosure from the provider

In the vast majority of cases, obtaining information directly from the social media provider requires the government to issue legal process to compel the production of data.²⁰ This legal process will be issued pursuant to one of three statutes—section 2703 of the SCA, section 3123 of the Pen Register Act, or section 2518 of the Wiretap Act—depending on the type of information the government is trying to acquire. Prior to seeking legal process, investigators and prosecutors should determine whether the provider requires the target account to be identified a certain way. For example, Facebook requires that legal process identify the target account via particular identifiers, such as an email address or a unique user ID or username that can be found in the URL for the target account's page.²¹ They should also identify the provider's preferred method of service (such as via an online portal or by email) and to whom and where legal process should be directed. Law enforcement guidelines published by the provider and the ISP List maintained by the Computer Crime and Intellectual Property Section (CCIPS) can assist with these tasks.

¹⁷ Passed in 1986, ECPA created the Stored Communications Act and Pen Register Act and expanded the scope of the Wiretap Act to encompass electronic communications. *See* Pub. L. No. 99-508, 100 Stat. 1848 (1986). Some, however, use its name to refer to the portion of the legislation that is now known as the Stored Communications Act.

¹⁸ 18 U.S.C. § 3121 *et seq.*

¹⁹ 18 U.S.C. § 2510 *et seq.*

²⁰ In certain circumstances, such as when there is an emergency involving risk of death or serious bodily injury, social media providers can disclose information relating to the subscriber of a social media account to the government in the absence of legal process. *See* 18 U.S.C. § 2702; 18 U.S.C. § 3125.

²¹ *Information for Law Enforcement Authorities*, FACEBOOK (last visited Sept. 4, 2020), <https://www.facebook.com/safety/groups/law/guidelines/>.

A. The Stored Communications Act

Of the three statutes governing the acquisition of evidence from social media providers in criminal investigations, the SCA is likely used the most. This statute, when combined with relevant court decisions, essentially divides the information stored by a social media provider into three categories, with different rules about what legal process should be used to obtain each.

Regardless of the information the government intends to seek, it should consider issuing a preservation request, pursuant to section 2703(f) of the SCA, to the social media provider soon after determining that an account is of interest. Either a prosecutor or a law enforcement officer can submit to a provider a preservation request, which requires the provider to preserve for a period of 90 days information relating to the target account that is in its possession at the time the request is executed; the preservation can be extended for an additional 90 days at the government's request.²² By requiring the provider to take a snapshot of the account and retain it, section 2703(f) offers the government an opportunity to avoid the deletion of evidence—which may occur because the account holder seeks to destroy information or because the provider purges data after a certain amount of time in its regular course of business—before legal process can be served.

Investigators and prosecutors should also be aware that most, if not all, social media providers will notify the account holder upon receipt of legal process that compels the provider to disclose information about a user to the government.²³ In appropriate circumstances, however, prosecutors may obtain a court order, pursuant to section 2705(b) of the SCA, that prohibits the provider from doing so. This order can be issued by a court, upon an attorney's application, if the court believes that notifying the account holder will result in evidence tampering or destruction, flight from prosecution, witness

²² 18 U.S.C. § 2703(f)(1), (2).

²³ See, e.g., FACEBOOK, *supra* note 21; *How Google Handles Government Requests for User Information*, GOOGLE (last visited Sept. 4, 2020), <https://policies.google.com/terms/information-requests>; *Information for Law Enforcement*, INSTAGRAM (last visited Sept. 4, 2020) <https://help.instagram.com/494561080557017>; *Guidelines for Law Enforcement*, TWITTER (last visited Sept. 4, 2020), <https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support>.

intimidation, a risk to the life or safety of an individual, serious jeopardy to an investigation, or an undue delay of a trial.²⁴ While the SCA permits the issuance of a section 2705(b) order “for such period as the court deems appropriate,”²⁵ Department of Justice policy limits the duration of the orders sought by prosecutors to one year in most cases.²⁶ In addition, judges are free to limit the duration of section 2705(b) orders to even shorter periods.²⁷ Prosecutors should track the expiration of nondisclosure orders and renew them when appropriate to ensure the social media provider does not notify the account holder upon the order’s expiration when doing so would have an adverse result.

Finally, to facilitate the authentication of evidence at trial, a blank Rule 902(11) and 902(13) certification should be served upon the social media provider along with the legal process requiring disclosure. When completed by a provider representative, this certification should allow the information produced to self-authenticate when certain prerequisites are met.²⁸ However, prosecutors should keep in mind when authenticating evidence obtained from social media that proving the evidence is a fair and accurate copy of the original data held by the social media provider is unlikely to be sufficient. Instead, the government must also “produce evidence sufficient to support a finding that the item is what the proponent claims it is.”²⁹ In the social media context, this typically requires the government to go beyond the Rule 902 certification and introduce evidence—whether taken from logs obtained from the social media provider, content stored within the account, testimony from witnesses, or other sources—that establishes that the account and its activity can be attributed to a particular individual.³⁰

²⁴ 18 U.S.C. § 2705(b).

²⁵ *Id.*

²⁶ Memorandum from the Deputy Attorney General Rod Rosenstein on Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) at 2 (Oct. 19, 2017) <https://www.justice.gov/criminal-ccips/page/file/1005791/download>.

²⁷ *See* 18 U.S.C. § 2705(b).

²⁸ *See* FED. R. EVID. 902(11), (13).

²⁹ FED. R. EVID. 901(a).

³⁰ *See* Hon. Paul W. Grimm *et al.*, *Best Practices for Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 22–23 (2017); *see also* United States v. Lewisbey, 843 F.3d 653 (7th Cir. 2016) (holding social media posts were

In addition, to the extent the data produced by the social media provider constitutes business records, the Rule 902(11) certification will permit its admission under the business records exception to the rule against hearsay.³¹ Prosecutors should be aware, however, that content generated by the account holder (such as communications or uploaded photos or videos) does not constitute a business record of the social media provider.³² Thus, it cannot be admitted for the truth of the matter asserted under Rule 803(6).³³

1. Basic subscriber information

Social media providers will typically be able to provide some basic subscriber information (BSI) about an account. BSI is a set of non-content information that includes the account holder's name, addresses, and other identifiers (for example, a telephone number or a temporarily assigned network address, such as an Internet Protocol (IP) address).³⁴ It also encompasses records of session times and durations, length of service, date of account creation, types of service used, and the means and source of payment (such as a credit card number) made to the provider.³⁵ The government can obtain this

adequately authenticated as defendant's when, inter alia, government could establish that email addresses associated with account had been used by defendant, profile contained over 100 photos of the defendant, and Facebook app on defendant's phone led to the account); *United States v. Vayner*, 769 F.3d 125, 132–33 (2d Cir. 2014) (concluding that the appearance of defendant's name and photo, along with some biographical details, on social media profile printout were insufficient to authenticate it as defendant's because all information on the page was publicly available and there was "no evidence [the defendant] himself had created the page or was responsible for its contents."); *United States v. Landaverde-Giron*, 15-0258, 2018 WL 902168, at *2 (concluding the government "provided sufficient extrinsic evidence, via biographical information, photographs, nicknames, and conversations" to show that the account was linked to defendant MS-13 member).

³¹ See FED. R. EVID. 803(6).

³² See *Grimm et. al, supra* note 30 at 23–24; *Landaverde-Giron*, 2018 WL 902168, at *2.

³³ See Fed. R. Evid. 803(6)(d).

³⁴ 18 U.S.C. § 2703(c)(2)(a), (b), (e).

³⁵ 18 U.S.C. § 2703(c)(2)(c), (d), (f).

information via the use of a grand jury, trial, or administrative subpoena.³⁶

BSI can be helpful in an investigation in several ways. First, this information can be used to identify the person who used the account. Even if the account holder failed to provide his real name or used a throwaway email address to register, the IP address used to create or access the account may provide a method to determine the user's identity and authenticate the account as his. Investigators can determine what Internet Service Provider (ISP) controls the IP address and issue legal process to the ISP to obtain records identifying the customer who was assigned the IP address at the time it was used to access the account. This process can also geolocate the account holder at the time he accessed his social media account via a given IP address by asking the ISP that controls the IP address to identify the address to which the IP address was assigned at the relevant time. Additionally, BSI may identify accounts used by the account holder—such as an email account or a phone number—of which the government was unaware, thus providing new investigative leads.

2. Other non-content information

The second category of information is non-content information (with the general exception of location information) that does not constitute BSI. The SCA requires the use of a court order issued under section 2703(d) of the statute to obtain this data.³⁷ These orders can be obtained from any court with jurisdiction over the offense being investigated or in the district where the social media provider is headquartered³⁸ upon an attorney application establishing “specific and articulable facts showing that there are reasonable grounds to believe that the . . . information sought [is] relevant and material to an ongoing criminal investigation.”³⁹

³⁶ 18 U.S.C. § 2703(c). This information can also be obtained via a section 2703(d) order or a search warrant issued under section 2703.

18 U.S.C. § 2703(c)(1)(A), (B).

³⁷ 18 U.S.C. § 2703(c)(1)(B), (d). Alternatively, this information can be obtained with a search warrant issued under 18 U.S.C. § 2703(c)(1)(A).

³⁸ 18 U.S.C. § 2703(d) (providing jurisdiction to issue such an order to a “court of competent jurisdiction”); 18 U.S.C. § 2711(3) (defining “court of competent jurisdiction”).

³⁹ 18 U.S.C. § 2703(d).

Section 2703(d) orders can be used to obtain message headers, which reveal with whom a social media account holder communicated via the platform and when. Among other things, this information may be helpful to establish associations with others and could help create probable cause for a search warrant for the contents of the account⁴⁰ by establishing that targets were communicating with each other at times relevant to criminal activity (and thus that those communications may constitute evidence of that crime). In addition, social media providers may possess information that allows them to identify other accounts that an account holder may use in response to a section 2703(d) order. This may be helpful to the government by identifying previously unknown accounts used by a target that may contain evidence relevant to the investigation. Furthermore, depending on the types of functionality they offer and their practices with respect to logging activity, social media providers may produce transactional logs that reflect various types of user activity (for example, when a password was changed).

3. Content and location information

The final category of information consists of user-generated content (for example, messages, posts, and uploaded files) possessed by the social media provider and information about the user's location, such as GPS coordinates, that the provider may collect and store. CCIPS generally recommends the use of a search warrant issued under section 2703 of the SCA to obtain this information, notwithstanding provisions of the SCA that are more permissive,⁴¹ to minimize the risk the evidence will be challenged and/or excluded on Fourth Amendment grounds.⁴² Furthermore, investigators are likely to encounter resistance from social media providers if they attempt to compel the disclosure of content or location information with legal process less than a search warrant.⁴³ Thus, the government is likely to

⁴⁰ See *infra* Part I.A.iii.

⁴¹ See 18 U.S.C. § 2703(a), (b), (c)(1)(B).

⁴² See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (addressing the reasonable expectation of privacy in location information held by a cellular service provider); *United States v. Warshak*, 631 F.3d 266 (2010) (addressing the reasonable expectation of privacy in the contents of communications held by an email service provider).

⁴³ See, e.g., *FACEBOOK*, *supra* note 21; *INSTAGRAM*, *supra* note 23; *TWITTER*, *supra* note 23.

encounter delay if it chooses to seek the disclosure of content or location with a subpoena or section 2703(d) order because the provider may litigate the propriety of such legal process.

4. Prospective collection: Pen Register and Wiretap Acts

When the government wishes to compel a provider to disclose information relating to communications on a prospective basis, one of two statutes applies. First, the Pen Register Act permits a court to authorize the installation and use of a pen register and/or trap-and-trace device for the purpose of collecting up to 60 days of dialing, routing, addressing, or signaling (DRAS) information upon an attorney application certifying that the information likely to be obtained is relevant to an ongoing criminal investigation.⁴⁴ The statute requires that orders issued pursuant to its authority contain a nondisclosure provision that prohibits the recipient social media provider from notifying the account holder about the order “unless and until otherwise ordered by the Court.”⁴⁵ Once DRAS information is collected pursuant to a pen register order, it is possible to obtain a Rule 902(11) and/or 902(13) certification from the provider to facilitate its authentication and admissibility at trial.

Pen register orders have several useful applications in the context of social media providers. For example, they can be used to prospectively collect the message headers associated with communications being conducted through the target account. In addition, law enforcement can obtain the IP addresses used to access the target account, which can be helpful both with attributing account activity and in determining the user’s location.

When the government wishes to go beyond the collection of metadata to the interception of the content of communications, such as private messages, sent via social media platforms, the Wiretap Act governs. This statute permits a judge to issue an order authorizing interception for up to 30 days upon an affidavit establishing both probable cause that the communications contain evidence of particular criminal offenses⁴⁶ and that the wiretap is necessary to

⁴⁴ 18 U.S.C. § 3123(a)(1), (c)(1).

⁴⁵ 18 U.S.C. § 3123(d)(2).

⁴⁶ See 18 U.S.C. § 2516(1) (listing predicate offenses for Title III orders).

obtain this evidence because other investigative avenues are unlikely to succeed, too dangerous to try, or have been tried and failed.⁴⁷

II. Other investigative options

In some cases, law enforcement may be able to obtain information on social media platforms itself or with the assistance of, among other things, a cooperating gang member or associate. While typically faster than using legal process to compel disclosure by the social media provider, these methods are not always an option. For example, if the account holder chose to utilize privacy settings to protect his social media account, the information that law enforcement can independently obtain may be limited. The reach of these methods is also frequently limited to content of communications or files (for example, photos and videos) shared via the platform. That said, in appropriate circumstances, these methods can be effective and efficient ways to obtain valuable evidence in a form that can still be used when it comes time for trial.

The most straightforward of these methods involves the investigator looking online for information, such as Tweets or Facebook posts, that the account holder shared publicly. If the target account is protected by privacy settings, investigators may nonetheless be able to view it using a cooperating witness or undercover agent who the account holder has granted the ability to view the account and its activity.⁴⁸ Alternatively, information of interest—such as incriminating messages sent from a gang member to a cooperator—may be stored within the account of the cooperator, and law enforcement may obtain that evidence directly from the cooperator with his consent. Indeed, some social media providers, such as Facebook and Twitter, facilitate the ability of law enforcement to search social media accounts via consent by providing users with the ability to download a database of information, including but not limited to the contents of

⁴⁷ See 18 U.S.C. § 2518(1), (3), (5).

⁴⁸ For example, Tweets posted to an account protected by privacy settings can be viewed only by those that are “following” the account. Similarly, a Facebook user may restrict access to their account or certain posts by, *inter alia*, limiting their viewership to individuals the user has added as a “friend.”

communications, associated with their accounts;⁴⁹ this dataset can be given to law enforcement for review.

In general, law enforcement's acquisition of information from social media accounts using the aforementioned methods should be consistent with the Fourth Amendment.⁵⁰ And while social media providers typically do not complete a Rule 902(11) or 902(13) certification with respect to information that law enforcement obtains independently, that does not preclude the use of independently obtained evidence at trial. Prosecutors often find they can authenticate the information via testimony of a witness with knowledge,⁵¹ such as the agent who viewed the social media profile and documented it in a screenshot or the cooperator who exchanged messages with the target account. Prosecutors might also authenticate the information obtained through these methods via its "appearance, contents, substance, internal patterns, and other distinctive characteristics."⁵²

III. Conclusion

Social media offers great opportunities to the government in gang-related cases. CCIPS stands ready to help prosecutors and investigators make the best use of this investigative resource if they have questions or need additional information and guidance.

About the Author

Mysti Degani is a senior counsel in the Criminal Division's Computer Crime & Intellectual Property Section, where she has worked since 2008. She specializes in issues relating to the collection

⁴⁹ See, e.g., *How do I download a copy of my information on Facebook?*, FACEBOOK (last visited August 3, 2020), <https://www.facebook.com/help/212802592074644>.

⁵⁰ See *United States v. Meregildo et al.*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) ("Where Facebook privacy settings allow viewership of postings by 'friends,' the Government may access them through a cooperating witness . . . without violating the Fourth Amendment."); see also *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.").

⁵¹ See FED. R. EVID. 901(b)(4).

⁵² FED. R. EVID. 901(b)(4); see *Landaverde-Giron*, 2018 WL 902168, at *2.

and use of electronic evidence in criminal investigations. Before joining the Department of Justice, she served as a clerk at the U.S. District Court for the District of Massachusetts and obtained her law degree from Harvard Law School.

A Guide to Using Cooperators in Criminal Cases

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I. Cooperators generally

Cooperators are vital to law enforcement’s ability to successfully dismantle criminal organizations, and the criminal justice system has long recognized that “the informer is a vital part of society’s defensive arsenal.”¹ After all, who better to provide information on the hierarchy and inner-workings of an organization than a criminal’s associate or partner in crime. Indeed, “many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.”² While, however, the use of a cooperator can be a highly effective tool during an investigation, it can also be a prosecutor’s most perilous tool. The careless use of a cooperator to further an investigation or help secure a guilty verdict can backfire—potentially causing irreparable harm to the case or an agent and a prosecutor’s reputation.

Today, law enforcement officers, attorneys, and courts often use the terms confidential informant and confidential source interchangeably with the terms cooperating witness and cooperating defendant. The terms, however, have very different meanings. On the one hand, the terms confidential informant and confidential source generally refer to an individual who provides assistance to law enforcement and whose identity generally warrants protecting. In other words, a confidential informant often provides information to an investigative agency with the expectation that the agency will take the steps necessary to protect the informant’s identity from disclosure to the public. On the other hand, the terms cooperating witness and cooperating defendant generally refer to individuals who provide useful and credible

¹ *McCray v. State of Illinois*, 386 U.S. 300, 307 (1967).

² *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

information to an investigative agency and the government, often in exchange for a benefit of some sort, such as leniency, and who may be called to testify at a future criminal proceeding or trial, if needed.

This article focuses on the basic DOs and DON'Ts for preparing and using cooperating witnesses and cooperating defendants (“cooperators”) to further investigations and testify in criminal proceedings. These are basic rules and provide guidance that applies generally to cases. As you read through the below DOs and DON'Ts, it is important to keep in mind that every case is different, and what works in one case may not always work in another.

II. Basic DOs and DON'Ts for using cooperators during the investigative phase of your case

A. Do be involved in an investigation as early and as much as you want to be

You decide when and how much to get involved in an investigation. When working with law enforcement, especially during complex, long-term investigations, the earlier you can be involved, the better. Unlike state prosecutors, federal prosecutors often have the opportunity to get involved in an investigation early on—meaning we can assist with drafting search warrants, pings, and other types of process; be present for interviews of victims, witnesses, cooperators, and potential targets; and help agents decide what steps should be taken next in order to further an investigation.

In large-scale investigations, the earlier you meet potential cooperators and establish a rapport with them, the more successful you are likely to be in obtaining information from them and corroborating that information. By meeting early on with a cooperator, you are able to establish you are in charge, set your expectations, emphasize the importance of them always being truthful, address their concerns regarding safety and potential retaliation from targets and their associates, and take steps to preserve and obtain corroborating evidence.

Early involvement in an investigation often leads to the discovery and seizure of reliable corroborating evidence. But when you learn of information late in a case, corroborating evidence may have been destroyed or may no longer exist. For example, if your cooperator tells you about a trip that he and his criminal associates took to obtain

narcotics, you will want to obtain evidence that corroborates his version of events. Obtaining cell site location data would be an obvious choice for you. Telephone companies, however, only maintain cell site information for a finite time. If you do not know that you need to preserve and obtain cell site location data early on in your investigation, such data may have already been purged when you request it from the phone company. This forces you to think of other ways to corroborate a cooperator's testimony regarding being in a particular location at a particular time—such as reviewing credit/debit card transactions, phone GPS, social media tagging, seemingly innocuous notes found during the execution of a search warrant, etc.

During the pre-indictment phase of a case, numerous tools are available to a prosecutor for locating such evidence, including grand jury process, search warrants, non-disclosure orders, and consensual recordings, just to name a few. The longer you wait to become involved in a case, however, the harder it might be for you to proactively use information provided to you by a cooperator.

B. Don't blindly trust your cooperator

So, what does this mean? Corroborate, corroborate, corroborate! No detail is too small. Even if you cannot corroborate every major detail related to your cooperator's story, jurors tend to believe a cooperator whose statement is supported by other evidence. When a prosecutor can show jurors that a cooperator provided reliable, truthful testimony relating to some topics, jurors are more likely to believe the cooperator is, likewise, being truthful on other matters that may remain unsubstantiated by the time you get to trial.

As the prosecutor on the case, you hold all the cards. For example, whether to believe a cooperator's story; whether to enter into a cooperation agreement with a cooperator; and whether to make a recommendation of leniency are all decisions that lie within your purview. And while an individual wishing to cooperate has no choice but to trust you and take you at your word, you should never blindly trust your cooperator.³ Instead, test your cooperator when you meet with him. Do this by asking questions you already know the answer

³ *Banks v. Dretke*, 540 U.S. 668, 701–02 (2004) (jurors suspect informers' motives and frequently disregard their testimony as untrustworthy and unreliable).

to, which allows you to evaluate his demeanor and character when he responds. Knowing how your cooperator responds to difficult questions helps you assess the credibility of his statements moving forward.

Investigate any inconsistencies in your cooperator's story and follow up on any indications that he may be lying to bolster his importance to the case and obtain more leniency from the court. This is imperative to your case. The truth will always come out—and always at the worst time. If you are not prepared for the worst, your case will likely implode in front of your eyes and the jury's. "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to . . . scrutiny."⁴

And if you're meeting with your cooperator and you believe he is being untruthful, do not be afraid to confront him about his lies and do not hesitate to end your meeting. Be honest when you do this; tell your cooperator that you believe he is being untruthful and give him the opportunity to gather his thoughts and come back to the table at a time when he intends to be more truthful. Ending the interview early minimizes the potential *Giglio/Brady*⁵ information that will be developed as a result of your cooperator's lies while potentially preserving your cooperator's ability to be a viable and forceful witness down the road. Finally, make sure your cooperator knows there are consequences to lying, falsely implicating another individual, or trying to protect another individual, including charges for perjury.

C. Do make sure your cooperator understands that the only thing that matters is the truth

It is not your cooperator's job to make your case for you. Your cooperator's only job is to tell the truth, regardless of the positive or negative impact his statements have on your case. It is not your cooperator's job to falsely implicate another individual to strengthen your case or to worry about how his information might impact your case. Remind your cooperator of this. Make sure he knows you want

⁴ *Lilly v. Virginia*, 527 U.S. 116, 132 (1999).

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963) (defining a prosecutor's duty to disclose favorable information material to guilt or punishment); *United States v. Giglio*, 405 U.S. 150 (1972) (defining a prosecutor's duty to disclose impeachment material that goes to a witness's bias, interest, prejudice, or motive to fabricate).

the good, the bad, and the ugly. Having all of this information is the only way you can successfully present and defend your case down the road.

It is inevitable that your cooperator will be cross-examined at trial about wanting to please the government and how he would say anything to make the government happy. By ensuring your cooperator knows you only care about the truth, however, he will be well-equipped to handle such accusations on cross-examination.

D. Don't give away the farm or make promises or offers of benefits that you cannot or should not keep

Despite some cooperators seemingly having good intentions or altruistic motives, most cooperators are motivated by self-interest. They ask themselves and, oftentimes, you as the prosecutor, "What's in it for me?"

Judge Trott said it best:

[A]n 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.⁶

A prosecutor must establish early on that he is in charge, because a cooperator will inevitably try to manipulate you. A cooperator's self-interest will push him to push the envelope with you—to see just how much you and the agents are willing to give up in exchange for his highly coveted information. You must be prepared to say "no" to a cooperator's outlandish requests. And you must do so in a firm but respectful manner, a manner that sets the tone for all future

⁶ Judge Stephen S. Trott, *The Effective Use of a Criminal as a Witness: A Special Problem*, 65 U.S. ATT'YS BULL., no. 5, 2017, at 102.

interactions between you and the cooperator. Promise your cooperator you will evaluate in good faith the information he provides and that you and your agents will look into any safety issues he expresses, but do not make promises you cannot or should not keep. Remember, anything you say to your cooperators is fair game for them to use against you or your agents at a later date. So, think before you speak. Be friendly, but don't become friends. Be firm, but be respectful. And be honest. You expect honesty from your cooperator. They expect honesty from you. And while they may not like your honesty, they will respect you for it.

E. Do use the grand jury to lock in your cooperator

Effectively using the grand jury as an investigative tool takes both foresight and extensive preparation on the part of a prosecutor. And despite being an invaluable investigative tool, prosecutors often underutilize the grand jury in their investigations, especially when it comes to cooperators.

Having a cooperating witness testify before the grand jury can accomplish a few things for your case. First, it can allow you to see how ordinary citizens assess the credibility of your cooperating witness. Second, it allows normal, everyday citizens to ask questions. This gives a prosecutor insight into things that a jury might deem important at a future trial but which you may have overlooked or not thought about. Third, it locks in your cooperator's testimony. This last point can be essential as your case progresses in the event your witness forgets certain things or becomes a reluctant or recalcitrant witness when it is time for him to testify. Therefore, protect your case—especially when your cooperator's information is vital to charging and convicting someone. The wheels of justice turn slow, memories fade, sober witnesses fall off the wagon, and sometimes, a person who wants to cooperate one day may choose not to cooperate the next. But if you prepared well and your cooperating witness testified before the grand jury, such testimony can be used to keep your case on track by helping to refresh your witness's recollection or impeach a now uncooperative cooperator.

F. Don't coach your cooperator

When eliciting information from your cooperator, your cooperator does not need to know what you already know. Nor does he need to know what information and evidence you need in order to make your case. And do not try to elicit information in a way that only meshes with the government's version of events. Instead, let your cooperator tell you their version of events by asking non-leading, open-ended questions. Information is need-to-know and should only flow one way—from your cooperator to you and your agents. If, however, you do provide your cooperator with any case-related information, always assume information is being related back to the cooperator's criminal associates, which could lead to the destruction of evidence or tampering with potential witnesses.

G. Do know what you're walking into

Your cooperator is in this position because he is a criminal willing to break the law. It is important to know your cooperator's background before you meet with him. Do your research: know whether he has previously been accused or found guilty of lying; are you dealing with a fraudster or someone who has spent his life conning others; investigate his potential criminal exposure in your case; know his relationship to the other associates involved in the crime; is he related to his criminal associates; is he in a romantic relationship with any of them? Knowing this type of information will provide you with insight on how, when, and where to approach a cooperator, what topics you may want to broach early, and what topics you may want to delay discussing with your cooperator.

H. Don't let your cooperator cooperate without first owning his own baggage

Sometimes, good people do bad things. And when it comes time to admit to having done those bad things, a person's natural instinct is to minimize or justify his bad decisions and criminal conduct. After all, who wants to be thought of badly by others? Therefore, it is important to help your cooperator understand that, while he may have made a bad decision or two, that does not necessarily mean he is a bad person. Preparing your cooperator to "own the bad" and admit his wrongs, without trying to simultaneously justify or excuse his conduct, will help your cooperator appear more credible to the court and the jury.

The jury's perception of your cooperator's credibility will be the cornerstone of your case. If the jury believes your cooperator, your chances of success are higher than if the jury believes you tendered a witness who was untruthful and attempted to pull one over on them. Before you commit to using a cooperator to further your case, your cooperator must atone for his own sins. He must own his baggage. He must admit to his criminal conduct. When assessing the credibility of your cooperator, part of the jury's analysis will turn on whether your cooperator admitted to his own criminal or bad conduct. If they believe he admitted his own wrongdoings, a jury is more likely to listen to what he has to say about others. If, however, the jury believes your cooperator is hiding something, they are more likely to view his testimony with skepticism. In other words, the jury will try and pick his story apart, rather than give him the benefit of the doubt. This is why it is imperative that your cooperator admit the full scope of his involvement in the crimes about which he is testifying, as well as any other crimes he committed. If you don't have the tough discussions with your cooperator that are necessary to learning this information, you will not be adequately prepared when it comes to tendering the testimony and protecting your cooperator at trial.

I. Do evaluate whether you *should* use your cooperator before committing to doing so

Before deciding to use a cooperator at trial, ask yourself whether you *should*, all things considered. Does your cooperator have too much baggage to overcome? Does your cooperator have the types of convictions a jury might find especially unsavory? For example, has your cooperator been convicted of crimes involving the exploitation of children? Does the type of case being prosecuted mitigate your cooperator's past convictions? If you're prosecuting a defendant for RICO⁷ and VICAR⁸ offenses, including murders and kidnappings, the fact that your cooperator has a prior conviction for a dangerous assault or admits to committing a murder may lend credence to your cooperator's story. If you are prosecuting someone for wire fraud and your cooperator has a conviction for murder, is that the type of criminal history a jury is likely to see past? Has your witness made too many inconsistent statements? Will a jury get confused by those

⁷ 18 U.S.C. §§ 1961–1968 (Racketeer Influenced and Corrupt Organizations).

⁸ 18 U.S.C. § 1959 (Violent Crimes in Aid of Racketeering).

inconsistencies or simply write off his testimony altogether? Can you corroborate enough of your cooperator's information to get past all his inconsistencies? How does your cooperator's criminal conduct measure up against the person he is cooperating against? Are you making a deal with the devil to catch a low-level player?

Just because someone wants to cooperate does not mean you should let him, especially in multi-defendant cases. Evaluate your case as a whole and ask yourself whether you are better off having your potential cooperator occupying a seat at the defense table or testifying against others. Does your case become too fragmented if your cooperator is not sitting at the defense table? Is your cooperator's involvement in the criminal activity so extensive that it would benefit your case more to have him at the table than "on the side of the government"? How might a deal with your cooperator affect the sentences of other, less culpable defendants? If you give away the farm to your cooperator, is your judge more likely to give leniency to those who did not cooperate?

All of these are factors you should consider when deciding whether you *should* use a potential cooperator when the opportunity presents itself.

J. Don't ever meet with your cooperator alone

Regardless of how good a rapport or relationship you believe you have with your cooperator, always be prepared for him to turn on you, to back out of his story, to make false allegations against you, or to lie to you. Never, and I mean never, meet with your cooperator alone. Always have an agent or other law enforcement officer present with you. Failing to do so could put you in the position of becoming a witness down the road and open you up to an Office of Professional Responsibility (OPR) investigation, public allegations of prosecutorial misconduct, or withholding material information from the defense and courts. When a cooperator turns on you, and it is inevitable that one will, you need a witness to protect yourself and corroborate your version of events. If a cooperator is willing to turn on his friend or a long-time criminal associate for some benefit, how long do you think it will take that same cooperator to turn on you?

III. Basic DOs and DON'Ts for using cooperators at trial

The power of a cooperator's testimony at trial, especially in a gang case, cannot be overstated. Some prosecutors would argue the quintessential gang or racketeering case cannot be brought without that insider's perspective to testify about, for example, what the defendant said before he pulled the trigger or where the gang went afterwards to lay low. The cooperator in a gang case provides that insider perspective that a time-place-matter witness, the girlfriend, or the low-level accomplice simply cannot.

A. Do begin prep sessions with the cooperator early

Prepping a cooperating defendant or witness, particularly if the witness is in custody, is time consuming. It is imperative that, similar to becoming involved early in an investigation, you begin preparing the cooperating witness early, preferably months before trial.

Scheduling the prep sessions for an in-custody cooperating defendant can be difficult. You must coordinate the schedules of the defense attorney and the United States Marshals Service, who may only allow prep sessions on certain days or for certain periods of time. Additionally, while your cooperating witness should be separated in custody from the other defendants, you also need to be mindful of dates when other defendants in the case appear in court, so as to avoid run-ins in the courthouse lock-up that can have negative (and oftentimes devastating) effects on the cooperator. In addition, the cooperating defendant will want to use the trial prep sessions to discuss other matters important to him or her, such as the date of sentencing, witness and family protection issues, and other matters, which can derail a three-hour prep session and turn it into a one-hour prep session. If you begin prep sessions months before trial, you can answer these questions and schedule multiple prep sessions without butting up against your trial date and causing undue stress on yourself and the trial team.

B. Do a mock direct and cross

Most cooperating defendants or witnesses have never testified before or been cross-examined. Long and detailed prep sessions serve as a mock direct examination, but you also need to prepare the witness for what he or she will experience on cross-examination.

With respect to a mock cross-examination, you should ask a colleague to conduct a mock cross-examination of the witness. While you could certainly do it, the mock cross will be more real and courtroom-like with another prosecutor who may not be familiar with the cooperating witness. The mock cross should focus on the most difficult areas for a cooperating witness, such as past drug use or abuse, criminal conduct, past lies, and the cooperation benefits the witness will receive in exchange for his or her testimony. For example, it is important for a cooperating witness to be candid about criminal conduct and his or her role in that conduct, rather than minimizing one's role. Likewise, it is equally important for a cooperating witness to be candid about past misstatements or lies about criminal conduct; admitting the same on cross-examination defuses potential landmines, whereas obfuscating or trying to explain the prior statement provides an opportunity for follow-up questions in front of the jury, which prolongs the issue unnecessarily.

C. Do front the benefits and the bad stuff

As noted above, you need to know your cooperator better than anyone else, because the defendants on trial *will* know (and will have told their attorneys) about all the criminal conduct they (the defendants and your cooperator) have ever done together. The jury needs to hear this from you first. The cooperator must own his baggage and, then, at trial, you own it too.

As we all know, the prosecutor holds a special and different role in our criminal justice system—to pursue justice. Along those lines, it is imperative that the prosecutor be viewed as not hiding or obfuscating any evidence from the jury in its presentation of its case-in-chief, especially when it comes to a cooperator whom you are asking the jury to believe on crucial issues of the case, that is, who pulled the trigger. Fronting the bad stuff also allows your cooperator to frame the bad conduct in a way that he or she wants. This is not spinning the bad information but providing context to what may have been a complicated situation. In this way, the jury has heard your cooperator's side of the story first, and the cross-examination of the cooperator on that same topic will face an uphill battle to turn around the jury's view, the foundation for which you laid.

In addition to fronting the baggage, you must also front the benefits provided to the cooperator. Some trial lawyers subscribe to the practice of “burying” the benefits provided to a witness, perhaps in the middle of a direct examination, so as not to draw attention to the

same. This may work in many trials. Respectfully, however, that is not what federal prosecutors do; instead of burying it, you should embrace it and present it in a way that communicates to the jury that the witness understands the gravity of the situation and can be believed. For example, after you present the extent of the sentencing discount that the cooperating defendant or witness expects to receive at sentencing, ask a series of follow-up questions about what the cooperating witness *understands* would happen if he or she lied (lose the deal and go to prison longer) or who ultimately decides what his or her sentence will be (judge, not prosecutor). By doing so, you link the cooperator's benefit in exchange for cooperation to telling the truth.

D. Do litigate the bad stuff

Fronting the bad stuff (as noted above) doesn't mean you have to agree to the admission of all your cooperator's baggage, criminal or otherwise. Litigate the bad stuff but do so outside the presence of the jury.

As you prepare your cooperator for trial, draft motions in limine to address prior criminal conduct or non-criminal baggage that is inadmissible at trial. The right to cross-examination, even of a government cooperating witness, is not unlimited. For example, uncharged criminal conduct unrelated to the case may be inadmissible on cross-examination of your cooperating defendant or witness under Rule 608(b)⁹ and Rule 403 of the Federal Rules of Evidence,¹⁰ even though your witness acknowledged the same in the grand jury. While the degree of success here may vary depending on the jurisdiction and judge, addressing these matters pre-trial flags sensitive areas for the judge and, even if you lose the motion, may cause the judge to reign in a defense attorney and limit him or her to one question on that sensitive topic.

E. Consider immunity for recalcitrant witnesses

In any gang case, there will be a witness who refuses to meet or prep with you beforehand. This may be the rival gang member who testified in the grand jury years ago, but the lights of the public courtroom may be too much for him or her. This witness may also have criminal exposure from his or her prior testimony, and you

⁹ FED. R. EVID. 608(b).

¹⁰ FED. R. EVID. 403.

should be prepared with statutory immunity in advance of that trial testimony.

The Office of Enforcement Operations requires at least two weeks for a statutory immunity petition. This petition must also be approved by the United States Attorney in your office. If the witness invokes on the witness stand, or just before, you have likely missed your window to immunize that witness without causing significant delays in the trial and the judge's annoyance. Consider obtaining statutory immunity early for such a witness and you can be prepared for the inevitable pitfalls that trial brings.

F. Don't object too much

Knowing when and how often to object is an art form that the most-seasoned trial lawyer may not yet have mastered. In the case of a gang cooperator on cross-examination, the objection must be used carefully and sparingly.

Trust yourself and your preparation. Trust that you have sufficiently prepared your witness to handle a withering cross-examination. It is the prosecutor's job to seek justice, not to protect the government's lead witness and cooperator. Objecting too much may give that impression. Resist the urge to object, even if it is to an arguably objectionable question, where the answer is relatively harmless, and your objection will be perceived as protecting the witness from a sensitive or embarrassing area or topic. In the end, these types of objections will do more harm than good.

G. Do present the corroboration

As noted above, no detail—when it comes to corroboration of your cooperating defendant—is too small. You have gone through the trouble of corroborating your witness during the investigation, and now, it's time to present that corroboration.

After the cooperating defendant or witness testifies, be prepared to call a series of corroborating witnesses *immediately* after the cooperator's testimony. For example, if the cooperator testified that the defendant rented a car on a particular occasion and used the car in a violent act, call the records custodian from the rental car company to testify about the rental car records, which will corroborate who rented the car and the date in question. If the cooperator testified about how he or she was arrested on a certain date relevant to a violent criminal act, call the police officer who arrested the cooperating witness that day, which corroborates that, in fact, the

witness was arrested at the time and place he or she claimed. These corroborating witnesses may last days, and the defense may not ask many questions of them at all, allowing the government to call multiple witnesses per day and doing so quickly.

At times, when you are corroborating your cooperating witness or defendant during trial, you may feel the temptation to cut a witness and move on to the next big event or big witness in your gang trial. The defense attorneys may roll their eyes at the seeming insignificance of a witness or may ask questions designed to undercut the government's reason for calling the witness. The jury may even seem bored or confused at points. *Resist the temptation to cut a corroborating witness.* Remember: in doing this, you are setting up your argument in closing/rebuttal when you contend that the jury can believe the cooperating witness because the other witnesses that followed and the evidence therefrom corroborated the cooperating witness in a variety of ways.

H. Do use records, photos, and other pedagogical charts

Gang trials can get confusing. Inevitably, your cooperator will testify about a multitude of persons, many of whom share the same or similar nicknames, and the cooperator may not know his or her true name. This will quickly become confusing for your jury. Remember, you lived this investigation for years, but this is the first time this group of 12–16 persons has heard this testimony before.

Photographs and other charts, for example showing the hierarchy of the gang, provide a series of benefits. First, photographs assist your cooperator in recounting the members of the gang and assist the jury by putting a face to a name. The jury does not need to see the face of every gang member; however, if your cooperator will identify and discuss that person, the jury needs to see him or her. Additionally, if your cooperator is discussing two different persons, each who go by “Man Man,” the photograph may assist the jury to differentiate between the two. Using photographs also provides a break in testimony for your cooperator. Testifying (and doing a direct examination) is exhausting, and having your witness identify a photograph and answer routine questions about the person gives the cooperator a quick break from the more difficult questions of remembering a conversation from years ago or recalling who was present for a gang meeting.

I. Do be ready if the witness goes south

Murphy's law applies to trials, especially gang trials where your witnesses may be of questionable ethical background. Along those lines, you must be ready for your witness to go "south" on you and provide a different story. If it happens, be ready.

This tip applies less to cooperating defendants than a cooperating witness. For example, perhaps in the grand jury, you locked in members of an opposing gang to testify as to who shot at him or her and how their two respective gangs were engaged in a conflict over drug territory. This is persuasive evidence to support your enterprise evidence. This is the type of witness you may not have had the opportunity to prepare for as much as you would like (if at all), he may be hostile, and you may not have entered into a plea agreement with him. While you hopefully will never have to experience this, the feeling of a witness, especially a cooperating witness, changing his or her story on the witness stand in front of the jury can be excruciating. The way you present testimony in the case-in-chief matters, and where there appears to be a breakdown between the prosecutor and witness, it can negatively impact your case in the eyes of the jury.

To address the inevitable hiccups in testimony, prepare two direct examinations, especially for a recalcitrant witness. One direct examination should detail the examination as if the cooperating witness recounts the facts as he or she did in the grand jury and, if possible, during the trial prep session. The second direct examination should be a contingency plan, just in case the witness (either intentionally or unintentionally) changes his or her testimony on the witness stand. This type of contingency is why, as noted above, you will lock in your cooperating witness in the grand jury.¹¹ By locking in your witness in the grand jury and following the guidance set forth above, you ensure that the testimony will come into evidence at trial under Rule 801(d)(1)(A). Lastly, if you expect a witness to depart from his or her prior grand jury testimony, alert the judge at sidebar before

¹¹ See *United States v. Schmitt*, 770 F.3d 524, 536 (7th Cir. 2014) ("Government officials dealing with witnesses who may later become uncooperative would be wise to secure their grand jury testimony while they are still cooperating."); FED. R. EVID. 801(d)(1)(A) advisory committee's note to 1972 proposed rules (stating that the rule protects a party from the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case").

the testimony begins. The judge will appreciate the heads up and, hopefully, grant you some leeway in laying a foundation for admission of that prior sworn testimony.

About the Authors

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Novel Legal Issues in Gang Prosecutions

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I. Introduction

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ and the Violent Crimes in Aid of Racketeering Statute (VICAR)² provide powerful tools in prosecuting gang cases. Both statutes allow prosecutors to prove that a gang constitutes an enterprise, as that term is defined under RICO³ and VICAR.⁴ By doing so, prosecutors can reach a host of offenses—including certain state offenses—that qualify as racketeering activity under RICO⁵ and enumerated offenses under VICAR.⁶

In other words, both RICO and VICAR are structured as federal crimes that also involve state and federal predicate statutes. As a practical matter, a RICO or VICAR indictment thus lists not only the overarching federal violation, but also includes a list of other statutes. In a RICO indictment, this list appears in two places—the charged racketeering activity and a special sentencing factor, if applicable. In a VICAR indictment, the list appears in the definition of the enterprise (although specific statutory citations are optional) and as a predicate crime for the VICAR charge (where statutory citations are not optional). This framework can give rise to the following novel legal issues.

II. RICO conspiracy as a crime of violence

Beginning with *Johnson v. United States*,⁷ the Supreme Court redefined the “violent felony” and “crime of violence” definitions that

¹ 18 U.S.C. § 1961 *et seq.*

² 18 U.S.C. § 1959.

³ 18 U.S.C. § 1961(4).

⁴ 18 U.S.C. § 1959(b)(2).

⁵ 18 U.S.C. § 1961.

⁶ 18 U.S.C. § 1959(a).

⁷ 576 U.S. 591 (2015).

appear in multiple federal statutes. The definitions typically contained two components—any crime that has, as an element, the use, attempted use, or threatened use of force (the “elements” or “force” clause) and the residual clause, which used slightly different language to cover crimes that posed a serious risk of injury. In *Johnson*, the Court held the residual clause in the Armed Career Criminal Act⁸ was unconstitutionally vague.⁹ Other decisions followed: *Sessions v. Dimaya*¹⁰ held that section 16(b) was unconstitutional, and in *United States v. Davis*,¹¹ the Court held that the residual clause in section 924(c)(3)(B) was similarly unconstitutionally vague.

Before these decisions, a RICO conspiracy was generally considered a crime of violence if the underlying racketeering activity included crimes of violence, with the theory being that an agreement to commit a crime of violence created a risk of serious bodily injury if completed and, thus, fell under the residual clause.¹² After the dismantling of the residual clause, conspiracies fail to qualify as a crime of violence because the typical conspiracy does not satisfy the elements/force clause because a conspiracy is simply an agreement.¹³

⁸ 18 U.S.C. § 924(e)(2)(B)(ii).

⁹ *Johnson*, 576 U.S. at 2557–58.

¹⁰ 138 S. Ct. 1204 (2018).

¹¹ 139 S. Ct. 2319 (2019).

¹² *See, e.g.*, *United States v. Scott*, 642 F.3d 791, 801 (9th Cir. 2011) (stating RICO conspiracy to commit murder is crime of violence under U.S.S.G. § 4B1.1); *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (stating a conspiracy “is itself a crime of violence when its objectives are violent crimes”; thus, a RICO conspiracy with murder, kidnapping, and robbery as its objective constituted a crime of violence under section 924(c)) (internal citations omitted); *United States v. Ciccone*, 312 F.3d 535, 542 (2d Cir. 2002) (stating RICO conspiracy with extortion as its object is a crime of violence under the Bail Reform Act); *United States v. Doe*, 49 F.3d 859, 866–67 (2d Cir. 1995) (finding no error in district court’s ruling that a RICO conspiracy was a crime of violence under the Juvenile Delinquency Act); *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993) (holding that a RICO conspiracy to commit robbery fell within residual clause of section 924(c) and specifically declining to address whether it could also qualify as a crime of violence under the force clause).

¹³ *See, e.g.*, *United States v. Jones*, 935 F.3d 266, 269 (5th Cir. 2019) (holding RICO conspiracy is not a crime of violence under section 924(c)); *United States v. Jackson*, 932 F.3d 556, 558 (7th Cir. 2019) (vacating

A RICO conspiracy, however, may be a crime of violence under one scenario—if it has a special sentencing factor that charges a crime of violence. This conclusion is based on a three-part analysis. First, a RICO conspiracy has two different statutory maximum sentences based on whether the government charges and proves certain additional facts. Ordinarily, the statutory maximum sentence for a RICO violation (including conspiracy) is 20 years’ imprisonment.¹⁴ But that maximum is increased to life “if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment.”¹⁵ The underlying sentencing factor can be either a state or federal statute, but it must qualify as racketeering activity under section 1961(1), and it must carry a maximum sentence of life imprisonment. The most commonly charged state crime is murder, but in some states, other crimes such as kidnapping, attempted murder, conspiracy to commit murder, and robbery may also meet these requirements. State or federal drug trafficking may also qualify as a special sentencing factor if the alleged quantities trigger a possible life sentence.¹⁶

conviction of using or carrying a firearm to commit a crime of violence under section 924(c) and remanding for resentencing); *United States v. Carcamo*, 773 F. App’x 971 (9th Cir. 2019) (not precedential) (reversing section 924(c) conviction for possessing firearm during crime of violence predicated on RICO conspiracy under section 1962(d)); *United States v. Davis*, 785 F. App’x 358, 360–61 (9th Cir. 2019) (not precedential) (stating RICO conspiracy is not a crime of violence under section 924(c)); *United States v. Brown*, 797 F. App’x 52, 54 (2d Cir. 2019) (not precedential) (stating government concession that section 924(c) convictions based solely on RICO conspiracy had to be vacated); *United States v. J.R.*, 717 F. App’x 621 (7th Cir. Mar. 30, 2018) (not precedential) (stating RICO conspiracy not crime of violence under Juvenile Delinquency Act); *see also United States v. Villegas-Rosa*, Case No. 17-00016-CR, 2019 WL 3323134, at *4 (W.D. Mo. July 24, 2019) (granting defendant’s motion to dismiss portion of counts that alleges RICO conspiracy as a predicate crime of violence under section 924(c)); *Sandoval v. United States*, 08-CR-134-RJC-19, 2019 WL 7374631, at *3 (W.D.N.C. Dec. 31, 2019) (holding RICO conspiracy not crime of violence).

¹⁴ 18 U.S.C. § 1963(a).

¹⁵ *Id.*; *United States v. Warneke*, 310 F.3d 542, 549 (7th Cir. 2002), *as amended on denial of reh’g and reh’g en banc* (Jan. 10, 2003).

¹⁶ *United States v. Garcia*, 474 F. App’x 909, 912 (4th Cir. 2012) (not precedential); *see also Chue v. United States*, 894 F. Supp. 2d 487, 491 (S.D.N.Y. 2012) (stating charged racketeering activity included drug

Second, RICO is a divisible statute because it has multiple substantive provisions¹⁷ that contain different elements, and the statute contains two statutory maximum sentences, depending on the charged racketeering activity.¹⁸ As a result, the modified categorical approach applies in determining whether the charged crime is a crime of violence.¹⁹

Third, to increase the statutory maximum sentence, the government must comply with *Apprendi v. New Jersey*,²⁰ in which the Supreme Court held that, as a matter of constitutional law, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²¹ Thus, under *Apprendi*, to increase the statutory maximum sentence in a RICO conspiracy, the government must charge that aggravating fact—that is, conduct (1) that constitutes racketeering activity; (2) upon which the RICO violation was based; and (3) that carries a

trafficking in quantities that carried a statutory maximum of life imprisonment).

¹⁷ 18 U.S.C. § 1962(a)–(d).

¹⁸ 18 U.S.C. § 1963(a); *United States v. Williams*, 898 F.3d 323, 333 (3d Cir. 2018) (holding that section 1962(c) is divisible), *cert. denied*, 139 S. Ct. 1351 (2019).

¹⁹ *See Descamps v. United States*, 570 U.S. 254, 262 (2013) (modifying categorical approach applicable when the statute in question is “‘divisible’—i.e., comprises multiple, alternative versions of the crime[.]”); *United States v. Taylor*, 495 U.S. 575, 602 (1990) (“This categorical approach, i.e., may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases[.]” which allows the court to look at an indictment or jury instructions.).

²⁰ 530 U.S. 466 (2000).

²¹ *Id.* at 490; *see also Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (“If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.”); *United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003) (“[A]ny fact extending the defendant’s sentence *beyond the maximum authorized by the jury’s verdict* would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.”) (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002)).

possible life sentence—in the indictment, and the jury is required to find it proven beyond a reasonable doubt in a special verdict.²²

Apprendi also held that any aggravating fact that increases the statutory maximum is “the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an ‘element’ of the offense.”²³ Thus, under *Apprendi*, the elements of the offense charged in the special sentencing factors become elements of the life-eligible RICO; if the crime charged in the special sentencing factor qualifies as a crime of violence under the elements/force clause, then the RICO conspiracy becomes a crime of violence as well.²⁴

²² See, e.g., *United States v. Nguyen*, 255 F.3d 1335, 1343 (11th Cir. 2001). And the Supreme Court has repeatedly emphasized that it makes no difference for *Apprendi* purposes how the legislature structures a statute, what it calls a fact that increases the statutory maximum sentence, or whether it intends for that fact to be treated as an element of the offense. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (“[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”) (emphasis omitted); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (“[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”).

²³ *Id.* at 494 n.19.

²⁴ *Apprendi* also dictates the same result in a substantive RICO under section 1962(c) when a substantive racketeering act raises the statutory maximum. Notably, the Second Circuit has held that, because RICO requires a pattern of racketeering activity, a substantive RICO is a crime of violence if the government proves “(1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as ‘crime[s] of violence[.]’” *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009). *Ivezaj* is incorrect in requiring that two or more racketeering acts must be crimes of violence, as that conflates the pattern requirement with the crime of violence analysis. A crime qualifies as a crime of violence when it has, as an element, the use, threatened use, or attempted use of force. Thus, logically, so long as a substantive RICO has at least one racketeering act that qualifies as a “crime of violence,” the elements/force clause mandates that the entire crime qualifies as a crime of violence. This is so, under *Apprendi*, because the

Although there is no circuit case directly on point,²⁵ at least one court has addressed the broader issue of whether a conspiracy can be converted to a crime of violence if the government must prove an aggravating factor that includes the use of force.²⁶

III. The role of predicate statutes in VICAR

The VICAR statute provides,

Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished.²⁷

The phrase “in violation of the laws of any State or the United States” creates the so-called VICAR predicate. There are two common challenges to VICAR predicates—it is not a “proper”

racketeering act is a “thing[] the ‘prosecution must prove to sustain a conviction.’” *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

²⁵ In *United States v. Green*, 969 F.3d 1194 (11th Cir. 2020), the Eleventh Circuit assumed without deciding that aggravated RICO conspiracy can serve as a crime of violence in a section 924(c) prosecution but found that the indictment in that case did not adequately charge an aggravated RICO conspiracy because it did not cite 18 U.S.C. § 1963(a), which states the penalties for RICO violations.

²⁶ In *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020), the First Circuit held that two forms of aggravated conspiracy—conspiracy to use a weapon of mass destruction resulting in death and conspiracy to bomb a public place resulting in death—constitute crimes of violence. The panel explained that, while conspiracies to commit a violent act do not necessarily qualify as crimes of violence, “conspiracies that are categorically defined to result in death” generally do. *Id.* at 104; *see also* *United States v. Ross*, 969 F.3d 829, 837–40 (8th Cir. 2020) (kidnapping resulting in death is crime of violence because use of force is element of aggravated crime).

²⁷ 18 U.S.C. § 1959.

predicate, and it does not qualify as a crime of violence when the VICAR offense is itself used as a “crime of violence.”

A. The propriety of a VICAR predicate

A predicate offense need not categorically match the enumerated federal VICAR offense, with the possible exception of a threat to commit a crime of violence under 18 U.S.C. § 1959(a)(4).²⁸ Rather, a defendant violates VICAR when the government can prove that his conduct constituted both a violation of the enumerated crime described in the VICAR statute and a violation of the state or federal crime alleged as the VICAR predicate.²⁹ As the Fourth Circuit held in *United States v. Keene*,

Nothing in [section 1959’s] language suggests that the categorical approach should be used to compare the enumerated federal offense of assault with a dangerous weapon with the state offense of Virginia brandishing. In fact, the most natural reading of the statute does not require any comparison whatsoever between the two offenses. By using the verb “assaults” in the present tense, the language requires that a defendant’s presently charged conduct constitute an assault under federal law, while simultaneously also violating a state law. The VICAR statute includes no language suggesting that *all* violations of a state law also must qualify as the enumerated federal offense, a result that would be required under the categorical approach.³⁰

“This unambiguous statutory language precludes application of a formalistic, overinclusive categorical approach, and instead holds defendants accountable for their actual conduct as presented to a jury.”³¹ The court’s analysis in *Keene* is correct.

Beyond the plain language of section 1959, the analysis in *Keene* is consistent with common sense. Congress intended section 1959 to

²⁸ *United States v. Keene*, 955 F.3d 391, 393 (4th Cir. 2020). The court reserved the question whether the categorical approach applied to a VICAR offense involving a threat to commit a crime of violence under section 1959(a)(4). *Id.* at 396–97.

²⁹ *Id.* at 399.

³⁰ *Id.* at 397 (footnote omitted).

³¹ *Id.* at 398.

apply uniformly across the United States as a federal crime. The predicate requirement was included simply to avoid criminalizing new conduct.³² Requiring the state predicate to categorically match the enumerated offense would limit the application of section 1959 “to the drafting whims of fifty state legislatures, a result plainly not intended by Congress.”³³

Although *Keene* is the only circuit opinion directly on point, in *United States v. Mills*,³⁴ the Eastern District of Michigan phrased the question as:

whether a state’s statute that criminalizes conduct that satisfies the generic federal definition of that offense can be used as a predicate crime for purposes of a VICAR offense, even if the state’s law also criminalizes conduct beyond that prohibited under the generic definition. Based on the circumstances of this case, the answer is yes.³⁵

The court held that the Michigan statute was a proper predicate, despite including broader conduct that the court believed was not covered by VICAR.³⁶ Specifically, the court stated,

Indeed, where state law can be violated in multiple ways, preventing the Government from bringing VICAR charges premised on a way that tracks the generic definition of the crime of violence would unduly frustrate Congress’s intent when VICAR was first enacted.³⁷

While *Keene* is the better-reasoned opinion because it tracks the statutory language and legislative history, *Mills* provides a secondary

³² *United States v. Le*, 316 F. Supp. 2d 355, 360 (E.D. Va. 2004).

³³ *Id.* For additional arguments for use outside the Fourth Circuit, see the government’s appellate briefs in *Keene*, 2019 WL 5597944 (4th Cir. 2019); Response and Reply Brief of Appellant, *United States v. Keene*, No. 19-46009(L), 2019 WL 6699301 (4th Cir. Dec. 6, 2019).

³⁴ 378 F. Supp. 3d 563 (E.D. Mich. 2019).

³⁵ *Id.* at 578.

³⁶ *Id.* at 581. Although the ultimate holding of this case is correct, since VICAR assault covers the federal generic definition, it does, in fact, cover the “apprehension-type” assault.

³⁷ *Id.* (citing *Le*, 316 F. Supp. 2d at 360).

argument should a court conclude that the categorical approach applies.

B. VICAR as a crime of violence

The correct approach begins by evaluating the enumerated VICAR offenses—murder, kidnapping, maiming, assault with a dangerous weapon/resulting in serious bodily injury, and threats to commit a crime of violence—by a generic, federal definition, not by the underlying predicate statute.³⁸ Some courts, however, disagree with this approach and “look through” to the VICAR predicate and use that statute to determine whether the VICAR offense is a crime of violence.³⁹ Other courts—especially in VICAR murder cases—reach a

³⁸ See *Manners v. United States*, 947 F.3d 377, 380 (6th Cir. 2020) (“The relevant predicate offense is thus 18 U.S.C. § 1959(a)(3)[.]”); *United States v. Frazier*, 790 F. App’x 790, 791 (6th Cir. 2020) (not precedential) (“*Manners* held the categorical approach required analysis of the generic offense of assault with a dangerous weapon, not a specific federal or state law offense.”); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016) (“Section 1959 reaches the generic conduct described therein, without concern for the labels a state may use in criminalizing the conduct that qualifies as a VICAR predicate.”); *Le*, 316 F. Supp. 2d at 361 & n.13 (same) (collecting cases); see also *United States v. Baires*, 206 F. Supp. 3d 1167, 1179 (E.D. Va. 2016) (looking to the definition of felony murder set forth in a section 1111 since section 1959(a) does not define murder); *United States v. Lobo-Lopez*, 206 F. Supp. 3d 1084, 1097 (E.D. Va. 2016), *dismissed*, 697 F. App’x 187 (4th Cir. 2017) (not precedential) (“Importantly, § 1959(a) refers to “murder,” but does not define that term; thus, it is appropriate to look to the definition of felony murder set forth in 18 U.S.C. § 1111[.]”); *United States v. Jones*, No. 16-cr-30026, 2017 WL 3725632, at *5 (W.D. Va. 2017) (looking to federal generic definition); see also *Castillo v. United States*, No. 16-CV-431, 2020 WL 1490727, at *7 (W.D.N.C. Mar. 24, 2020) (citing *Manners* and holding, “By requiring both common-law assault and the use of a dangerous weapon, § 1959(a)(3) has as an element the use, attempted use, or threatened use of physical force against the person of another.”).

³⁹ See, e.g., *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019) (stating VICAR murder crime of violence, but VICAR kidnapping is not, based on the charged state predicates); *United States v. Simmons*, No. 16CR130, 2018 WL 6012368, at *2 (E.D. Va. Nov. 16, 2018) (stating VICAR murder and VICAR attempted murder qualify as crimes of violence); *United States v. Moreno-Aguilar*, 198 F. Supp.3d 548, 551–54 (D. Md. 2016) (stating VICAR murder is a crime of violence based on the elements of the charged state predicates).

conclusion without clearly identifying which approach they have adopted.⁴⁰

The generic approach is based on section 1959's plain language and legislative history. The plain language of the statute does not define the enumerated crimes in section 1959(a) or provide cross references to other statutes; accordingly, the generic definition in effect at the time of VICAR's enactment controls.⁴¹ VICAR's legislative history makes clear that this was intentional: "While Section [1959] proscribes murder, kidnapping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, *it is intended to apply to these crimes in a generic sense*, whether or not a particular State has chosen those precise terms for such crimes."⁴² The generic approach is the most logical, as states vary widely on how they criminalize conduct, and prioritizing state law over the generic definition would subject VICAR "to the drafting whims of fifty state legislatures, a result plainly not intended by Congress."⁴³ Under this analysis, VICAR murder, VICAR attempted murder, VICAR maiming, VICAR assault with a dangerous weapon, and VICAR assault resulting in serious bodily injury qualify as crimes of violence under a generic analysis.

A VICAR predicate may also provide the element necessary to satisfy the elements clause, although not for the reasons relied on by those courts that simply look through to the state predicate. Specifically, the Supreme Court's decision in *Mathis v. United States*⁴⁴ and the Fourth Circuit's decision in *Keene* provide a secondary argument. In *Mathis*, the Supreme Court held that, in a general sense, an element is any "thing[] the 'prosecution must prove to

⁴⁰ See, e.g., *United States v. Oliva*, 790 F. App'x 343, 350 (3d Cir. 2019) (not precedential) (stating, in VICAR murder case, "[t]he discharge of a firearm, coupled with resulting personal injury, qualifies as a use of physical force."); *United States v. Machado-Erazo*, 986 F. Supp 2d 39, 53–54 (D.D.C. 2013) (holding that murder qualifies as a crime of violence because it requires "the use, attempted use, or threatened use of physical force against another person" without specifying the definition of murder the court was applying).

⁴¹ See generally *Scheidler v. National Organization for Women, Inc. et al.*, 537 U.S. 393 (2003); *Nardello v. United States*, 393 U.S. 286 (1969).

⁴² 129 Cong. Rec. 22,906 (1983) (emphasis added).

⁴³ *Le*, 316 F. Supp. 2d at 360.

⁴⁴ 136 S. Ct. 2243 (2016).

sustain a conviction.”⁴⁵ Because VICAR requires that the defendant’s conduct be “in violation of the laws of any State or the United States,”⁴⁶ the government must prove the elements of the predicate crime (and the jury must be instructed on those elements).⁴⁷ Thus, to find a defendant guilty of a VICAR offense, the jury must find both the VICAR enumerated offense *and* a violation of the state or federal predicate. Accordingly, a VICAR offense can be a crime of violence if either the VICAR enumerated crime *or* the VICAR predicate constitute a crime of violence, since conviction under VICAR requires the defendant’s conduct to have violated both.⁴⁸

Regardless of the standard applied, courts have consistently held that VICAR murder,⁴⁹ VICAR attempted murder,⁵⁰ and VICAR

⁴⁵ *Id.* at 2248.

⁴⁶ 18 U.S.C. § 1959(a).

⁴⁷ *United State v. Keene*, 955 F.3d 391 (4th Cir. 2020).

⁴⁸ It is also irrelevant whether the VICAR predicate is a felony or a misdemeanor. Nothing in section 1959 supports the conclusion that the predicate must be a felony. Moreover, the legislative history makes clear that Congress intended a broad application of the enumerated crimes. When Congress discussed the incorporation of 18 U.S.C. § 16 into 18 U.S.C. § 1959(a)(4) (threatening to commit a crime of violence), it made clear that “[t]he term means an offense—*either a felony or a misdemeanor.*” S. REP. NO. 98-225, at 307 (1983) (emphasis added). Thus, nowhere in the legislative history is any hint that Congress intended to limit the application of VICAR to state or federal felonies.

⁴⁹ *See, e.g., United States v. Mathis*, 932 F.3d 242, 264–65 (4th Cir. 2019); *United State v. Oliva*, 790 F. App’x 343, 350 (3d Cir. 2019) (not precedential); *United States v. Baires*, 206 F. Supp. 3d 1167, 1180 (E.D. Va. 2016); *United States v. Moreno-Aguilar*, 198 F. Supp. 3d 548, 551–54 (D. Md. 2016); *United States v. Machado-Erazo*, 986 F. Supp. 2d 39, 53–54 (D.D.C. 2013); *United States v. Walton*, 2018 WL 7021860, at *4 (N.D. Ga. Nov. 5, 2018); *United States v. Umaña*, 2017 WL 373458, at *4–*6 (W.D.N.C. Jan. 25, 2017).

⁵⁰ *See, e.g., Walton*, 2018 WL 7021860, at *4. Attempted murder is, by definition, the attempted use of physical force to commit murder, which, itself, has the use, threatened use, or attempted use of force as an element. Moreover, courts have consistently held that the attempt to commit a crime of violence is itself a crime of violence. *See United States v. St. Hubert*, 909 F.3d 335, 351–53 (11th Cir. 2018) (attempting Hobbs Act robbery qualifies as a crime of violence under section 924(c)(3)(A)); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016) (“We have ‘generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of

assault with a dangerous weapon/resulting in serious bodily injury are crimes of violence.⁵¹ VICAR kidnapping, when predicated on the federal definition, is not a crime of violence, but under the theory above, it could qualify if the state kidnapping statute requires the use of force.⁵²

IV. Extraterritorial application of RICO and VICAR

A. Extraterritorial application of RICO

“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁵³ In *RJR Nabisco, Inc. v. European Community*,⁵⁴ the Supreme Court applied this standard to RICO in the context of a private civil lawsuit filed by the European Community and 26 of its member states against RJR Nabisco, alleging that RJR participated in a global money laundering scheme and acquired another company to expand its scheme.⁵⁵ In sum, the Supreme Court held that RICO can apply to

violence.”) (citation omitted); *see also, e.g.*, *United States v. Armour*, 840 F.3d 904, 907–09 (7th Cir. 2016) (attempting federal bank robbery is a “crime of violence” under section 924(c)(3)(A)). Indeed, “[i]t is difficult to fathom a situation where ‘one can attempt to kill a person without intentionally using violent physical force as required by Section 924(c)’s force clause.” *Harris v. United States*, No. 12-cr-00232, 2019 WL 3548815, *3 (D.S.C. Aug. 5, 2019) (cleaned up) (quoting *United States v. Music*, C/A No. 09CR00003-003, 2019 WL 2337392, at *5 (W.D. Va. June 3, 2019)).

⁵¹ *See, e.g.*, *Manners v. United States*, 947 F.3d 377, 380 (6th Cir. 2020); *United States v. Frazier*, 790 F. App’x 790, 791 (6th Cir. 2020) (not precedential); *United States v. Mills*, 378 F. Supp. 3d 563, 583 (E.D. Mich. 2019); *Davis v. United States*, 430 F. Supp. 3d 141, 146 (E.D. Va. 2019); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016); *United States v. Jones*, No. 16-cr-30026, 2017 WL 3725632, at *4 (W.D. Va. Aug. 29, 2017).

⁵² *Mathis*, 932 F.3d at 264–67.

⁵³ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (cleaned up) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

⁵⁴ 136 S. Ct. 2090 (2016).

⁵⁵ *Id.* at 2098. The European Community claimed that RJR’s participation in the scheme constituted a “pattern of racketeering activity consisting of

racketeering activity committed abroad, so long as the specific charged predicate racketeering activity applies extraterritorially.⁵⁶ Although *RJR Nabisco* did not specifically address whether RICO conspiracy under section 1962(d) applies extraterritorially, the Court presumed so for purposes of its opinion.⁵⁷

To determine whether a statute applies extraterritorially, the Court uses a two-step framework.⁵⁸ First, the Court decides whether the presumption against extraterritoriality has been rebutted.⁵⁹ The presumption is rebutted if the “statute gives a clear, affirmative indication that it applies extraterritorially.”⁶⁰ If the presumption is not rebutted, the Court moves to the second step and determines whether the application of the statute is domestic.⁶¹ It does so “by looking to the statute’s ‘focus.’ If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a

numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act.” *Id.*⁵⁶ *Id.* at 2103. The Court also considered whether RICO’s private right of action under 18 U.S.C. § 1964(c) applies to injuries suffered in foreign countries. *Id.* at 2099. On that issue, the Court held that the RICO private right of action in section 1964(c) failed to overcome the presumption of extraterritoriality, so a private RICO plaintiff must prove domestic injury. *Id.* at 2106; *see also* *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694, 707–08 (3d Cir. 2018) (dismissing a private RICO cause of action because the plaintiffs failed to allege a domestic injury).

⁵⁷ *Id.* at 2011 (“We therefore decline to reach this issue, and assume without deciding that § 1962(d)’s extraterritoriality tracks that of the provision underlying the alleged conspiracy.”); *see also* *United States v. Firtash*, 392 F. Supp. 3d 872, 883–88 (N.D. Ill. 2019) (applying *RJR Nabisco* to RICO conspiracy).

⁵⁸ *RJR Nabisco*, 136 S. Ct. at 2101; *see, e.g.*, *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 192 (5th Cir. 2017) (applying the two-step framework).

⁵⁹ *RJR Nabisco*, 136 S. Ct. at 2101.

⁶⁰ *Id.* at 2101. Courts determine whether a clear indication of extraterritoriality exists by using traditional tools of statutory interpretation. *Roe v. Howard*, 917 F.3d 229, 241 (4th Cir. 2019); *United States v. Vasquez*, 899 F.3d 363, 378 (5th Cir. 2018).

⁶¹ *RJR Nabisco*, 136 S. Ct. at 2101; *see also* *United States v. Napout*, 332 F. Supp. 3d 533, 553 (E.D.N.Y. 2018) (holding that federal wire fraud statute was domestic violation because defendant’s participation in wire fraud occurred primarily in the United States).

permissible domestic application even if other conduct occurred abroad.”⁶²

Applying the two-step framework in *RJR Nabisco*, the Court held that Congress rebutted the presumption against extraterritoriality in RICO by including predicates that “plainly apply to at least some foreign conduct.”⁶³ Thus, a RICO violation “may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial.”⁶⁴

While *RJR Nabisco* sets the requirements for an extraterritorial application of RICO, foreign activity may be admissible evidence even if the racketeering activity does not apply extraterritorially. First, it may come in as a permissible domestic application of RICO if the domestic conduct is relevant to the predicate statute’s “focus.”⁶⁵ Second, *RJR Nabisco* does not preclude evidence of wholly extraterritorial activity from being admitted for other purposes, such as proving an element other than racketeering activity. For example, extraterritorial activity could prove the existence of the enterprise or the defendant’s relationship to that enterprise. Extraterritorial activity could also serve as an overt act, since RICO conspiracy does not require an overt act, and overt acts are not limited to racketeering activity.

B. Extraterritorial application of VICAR

In *RJR Nabisco*, the Supreme Court did not decide whether VICAR applies extraterritorially. Based on *RJR Nabisco* and other relevant cases, there are two primary scenarios in which VICAR could apply extraterritorially: (1) the VICAR predicate expressly applies extraterritorially; and (2) the VICAR predicate applies extraterritorially under *United States v. Bowman*.⁶⁶

⁶² *Id.* at 2101. Conversely, “if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” *Id.*

⁶³ *Id.* at 2102.

⁶⁴ *Id.* at 2103.

⁶⁵ See also *Napout*, 332 F. Supp. 3d at 552–55 (demonstrating the domestic application of wire fraud statute).

⁶⁶ 260 U.S. 94, 98 (1922).

The two scenarios are straight-forward. In those scenarios, the defendant committed a crime that applies extraterritorially, either expressly or by application of *Bowman*'s principle that a criminal statute applies extraterritorially when it protects "the right of the government to defend itself."⁶⁷ This result is analogous to *RJR Nabisco*'s focus on the extraterritorial application of the racketeering activity. As a result, in those scenarios, VICAR has extraterritorial application.

In *United States v. Leija-Sanchez*,⁶⁸ the Seventh Circuit addressed a variation that incorporated concepts from both scenarios. The court held that section 1959 applied extraterritorially to a murder in Mexico because most of the activity occurred in the United States (the recruitment and payment), and the murder was designed to facilitate the operation of a criminal enterprise in the United States.⁶⁹ Although not expressly discussed in the opinion, the government's argument focused on the illegality of the conduct under the VICAR predicates and the Illinois long-arm statute.⁷⁰ The Seventh Circuit, relying on *Bowman*, held that a crime may have more than one situs and, further, that section 1959 criminalizes attempts and conspiracies. Thus, "the § 1959 offense is not murder (or some other crime) in isolation, but the multiple acts by which a crime such as murder facilitates a criminal enterprise."⁷¹ The Seventh Circuit subsequently reaffirmed its holding after the Supreme Court's decision in *Morrison*, noting that "*Morrison* does not undermine our 2010 decision. It does not mention either *Bowman* or § 1959. A decision such as *Bowman*, holding that criminal and civil laws differ with respect to extraterritorial application, is not affected by yet another decision showing how things work on the civil side."⁷²

More recently, the Ninth Circuit examined the extraterritorial application of VICAR in *United States v. Perez*,⁷³ similarly focusing on

⁶⁷ *Id.* at 98; see also *United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013).

⁶⁸ 602 F.3d 797 (7th Cir. 2010).

⁶⁹ *Id.* at 800.

⁷⁰ 720 ILL COMP. STAT. § 5/1-5; see Transcript of Oral Argument, *United States v. Leija-Sanchez* 2010 WL 674360 (7th Cir. Feb. 12, 2010).

⁷¹ *Leija-Sanchez*, 602 F.3d at 800.

⁷² *United States v. Leija-Sanchez*, 820 F.3d 899, 901 (7th Cir. 2016).

⁷³ 962 F.3d 420 (9th Cir. 2020).

the VICAR predicate.⁷⁴ Applying *RJR Nabisco*, the court reaffirmed that RICO “may have extraterritorial effect, ‘but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.’”⁷⁵ As the Ninth Circuit reasoned,

there is an evident analogy between RICO and VICAR . . . [because] VICAR incorporates RICO’s definition of “racketeering activity,” and it, too, brings under its umbrella some wholly extraterritorial acts, such as the federal prohibition on a United States national killing another United States national abroad. In light of this authority, then, VICAR at least *may* reach a crime committed abroad with sufficient nexus to the conduct of an enterprise’s affairs.”⁷⁶

The *Perez* court cabined its analysis by holding that “[i]f the laws of the United States or the States cannot reach foreign conduct, neither may VICAR,” and it then focused on the extraterritorial application of the charged state predicate (California’s attempted murder).⁷⁷ As *Perez* makes clear, however, VICAR can apply to a crime committed outside the United States if there is sufficient domestic activity to

⁷⁴ Before *Morrison* and *RJR Nabisco*, the Ninth Circuit address the extraterritorial application of VICAR without reference to the VICAR predicate. See *United States v. Vasquez-Velasco*, 15 F.3d 833, 840–41 (9th Cir. 1994); *United States v. Lopez-Alvarez*, 970 F.2d 583, 596 (9th Cir. 1992); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203–06 (9th Cir. 1991). Those cases involved kidnapping, murder, and attempted murders of a DEA agent and suspected DEA agents. The Ninth Circuit held that VICAR applied abroad, in part because the enterprise engaged in drug trafficking and “drug trafficking by its nature involves foreign countries and because DEA agents often work overseas, the murder of a DEA agent in retaliation for drug enforcement activities is a crime against the United States regardless of where it occurs. Thus, we found that Congress would have intended that section 1959 be applied extraterritorially to cases involving the murder of DEA agents abroad.” *Perez* does not mention these cases. Before relying upon this theory, prosecutors are encouraged to contact the Organized Crime and Gang Section for guidance.

⁷⁵ *Perez*, 962 F.3d at 440 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016)).

⁷⁶ *Id.* (citation omitted).

⁷⁷ *Id.*

satisfy the predicate statute.⁷⁸ In *Perez*, the conspiracy to commit VICAR murder was affirmed because the jury was instructed that, consistent with state law, it needed to find an overt act in California, even though the murder itself occurred abroad.⁷⁹

Although the case law regarding the extraterritorial application of VICAR is in flux, it is clear that VICAR applies extraterritorially in two primary scenarios—the VICAR predicate expressly applies extraterritorially or it applies extraterritorially by application of *Bowman*.

V. Conclusion

Although federal offenses are governed by federal generic definitions, the “predicate” offenses underpinning both RICO and VICAR can raise a series of novel legal issues. Thus, it is important to understand the full scope and application of those predicates at the charging stage to ensure that the RICO or VICAR serve the overall goal of the indictment.

About the Author

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⁷⁸ *Id.*

⁷⁹ *Id.* at 443.

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The Transnational Anti-Gang Forces

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I. Introduction

Mara Salvatrucha (MS-13) is a hyper-violent international criminal organization composed primarily of Salvadorans. It began as a local gang in Los Angeles but grew substantially after mass deportations of Salvadorian citizens back to El Salvador in the 1990s.¹ Experts estimate that MS-13 has approximately 40,000 to 70,000 members worldwide.² The fungible leadership structure and transnational nature of MS-13 make it difficult for prosecutions to have a long-term impact on the operations of this gang solely on United States-based prosecutions.

The Criminal Division's Organized Crime and Gang Section (OCGS) is a specialized group of prosecutors charged with developing and implementing strategies to disrupt and dismantle the most significant regional, national, and international gangs, including MS-13. Since 2016, OCGS prosecutors, working with United States Attorney's Offices (USAOs), have indicted over 100 MS-13 leaders and the most violent members in the District of Maryland, New Jersey, Nevada, the Eastern District of Virginia, the Middle District of Tennessee, the Eastern District of California, the Southern District of Texas, the Northern District of Texas, and elsewhere.

To increase the reach and longevity of enforcement actions against MS-13, in 2007, the National Civil Police of El Salvador, in collaboration with the Federal Bureau of Investigation (FBI) and the Bureau of International Narcotics and Law Enforcement (INL) created the Transnational Anti-Gang Unit (TAG) in El Salvador. The

¹ INSIGHT CRIME, MS13 IN THE AMERICAS: HOW THE WORLD'S MOST NOTORIOUS GANG DEFIES LOGIC, RESISTS DESTRUCTION (2018).

² *Id.* at 3; *The MS-13 Problem: Investigating Gang Membership as well as its Nexus to Illegal Immigration, and Assessing Federal Efforts to End the Threat: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Kenneth A Blanco, Acting Assistant Attorney General).

primary mission of the TAG is to disrupt and dismantle transnational gangs and provide intelligence to support related U.S. investigations.³ The program later expanded to include TAG units in Guatemala and Honduras in 2010 and 2011 respectively.

This article describes the unique nature of MS-13, the structure of TAGs, how TAGs can provide support to an investigation, and some practice pointers when interacting with these units. This article primarily focuses on TAG El Salvador and the threat posed by MS-13, but many of the concepts discussed apply to its rival gang, Barrio 18, and the TAG operations in Guatemala and Honduras.

II. What makes MS-13 unique?

Its central tenets and fungible leadership structure set MS-13 apart from most gangs encountered in the United States and abroad.

Violent gangs and organized crime syndicates are not a new phenomenon, but what sets MS-13 apart, and to some extent its rival, Barrio 18, is the gang's view of its primary mission of increasing its power through violence. Unlike gangs using violence to facilitate illegal economic activity (for example, drug trafficking and extortion), for MS-13, economic activity is secondary to increasing its control over rivals and populations through fear and violence.⁴ In fact, despite territorial and numerical growth over the decades, MS-13 members and leadership remain "relatively impoverished."⁵ This applies to recruitment into the gang as well. A recent study found that only 5.7% of gang members reported joining for access to resources.⁶

Leadership resides in the National Leadership Council (also known as "Ranfla"). This council, composed of the historical leaders of the gang, are serving long sentences in Salvadoran prisons. The council provides guidance to outside leadership who, in turn, disseminate the orders to various "programs" operating in El Salvador and abroad. From there, the "programs" control various "cliques" who carry out the

³ See *Anti-Gang Initiatives*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/violent-crime/gangs> (last visited Aug. 7, 2020).

⁴ INSIGHT CRIME, *supra* note 1, at 3–4.

⁵ *Id.* at 5.

⁶ JOSE MIGUEL CRUZ ET AL., *THE NEW FACE OF STREET GANGS: THE GANG PHENOMENON IN EL SALVADOR* 40 (2017).

day-to-day activities of the gang.⁷ The main requirement to becoming a “jumped in” gang member is that, depending on which region or country you were recruited from, you must participate in a number of murders. To ensure continuity of operations and to frustrate law enforcement efforts, every management position in the gang has a pre-selected replacement ready in the event the leader is killed or incarcerated.

Despite its international growth, the high-level leadership remains centralized in El Salvador, and virtually all members of the gang are Salvadoran. Therefore, it is not uncommon for U.S. investigators to find that the direction and approval of acts of violence committed in the United States came from leadership in El Salvador.⁸ The populations they extort and victimize are primarily Salvadoran, both living in El Salvador and emigrants residing abroad. In a recent study, only 1% of the gang members surveyed grew up in the United States.⁹

Because of its primary motives and fungible leadership, MS-13 operates in many respects like a terrorist organization or insurgency movement.¹⁰ Recognizing this, in 2019, Attorney General Barr created Joint Task Force Vulcan (JTFV) to coordinate a whole-of-government approach with the goal of eradicating MS-13 and its threat to U.S. populations.¹¹ In July 2020, the JTFV announced a major takedown of key MS-13 criminal leadership and, for the first time ever, brought terrorism related charges against a leader accused of coordinating

⁷ “Programs” are a subdivision of the gang who report to leadership and control one or more smaller groups known as “cliques” INSIGHT CRIME, *supra* note 1, at 32–33.

⁸ Press Release, U.S. Dep’t of Just., Six MS-13 Members with Ties to New Jersey Indicted on Gang-Related Charges Including Racketeering Conspiracy, Murder, and Multiple Murder Conspiracies (Apr. 25, 2018); Press Release, U.S. Dep’t of Just., MS-13 Leader in El Salvador Charged with RICO and Terrorism Offenses (July 15, 2020).

⁹ MIGUEL CRUZ ET AL., *supra* note 6, at 19.

¹⁰ Karla Martinez, *¿Marero O Terrorista? Examining the Supreme Court of El Salvador’s Designation of Gang Members as Terrorists*, 47 GA. J. INT’L & COMP. L. 683, 684, n.3 (2019); INSIGHT CRIME, *supra* note 1, at 22.

¹¹ Press Release, U.S. Dep’t of Just., The Department of Justice Announces Takedown of Key MS-13 Criminal Leadership (July 15, 2020).

violent activities in the United States while imprisoned in El Salvador.¹²

III. What are TAGs, and who is in charge?

TAGs are task forces belonging to the host countries that develop complex, transnational anti-gang investigations in Central America. They also disseminate leads and intelligence to U.S. law enforcement.¹³ They differ from local police units insofar as the officers are vetted and receive training, mentoring, and technical assistance from the United States. As police units of the host countries, however, they are subject to the domestic laws, constitutions, and regulations of the countries where they operate.

TAGs also have FBI agents assigned to provide training, mentoring, and support to their counterparts. These agents also route incoming and outgoing leads from FBI field offices. For an investigator based in the United States, these units can provide actionable intelligence and information about subjects, witnesses, and organizations under investigation.

Capacity building support is provided by the INL, the FBI, and the Department of Justice's (Department) Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT). Although OPDAT is part of the Department, it is primarily funded by the Department of State and is dedicated to capacity building in the host nations.¹⁴ These advisors focus on capacity building for investigations and prosecutions in the region, thereby supporting U.S. security interests in preventing crime before it arrives to the United States.¹⁵

¹² Press Release, U.S. Dep't of Just., MS-13 Leader in El Salvador Charged with RICO and Terrorism Offenses (July 15, 2020).

¹³ See *FBI Anti-Gang Initiatives*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/violent-crime/gangs> (last visited Aug. 7, 2020).

¹⁴ See *Office of Overseas Prosecutorial Development Assistance and Training*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-opdat> (last visited Aug. 7, 2020); U.S. DEP'T OF STATE, THE DEPARTMENT OF JUSTICE'S OFFICE OF OVERSEAS PROSECUTORIAL DEVELOPMENT, ASSISTANCE AND TRAINING (OPDAT): COMBATTING TRANSNATIONAL AND DOMESTIC ORGANIZED CRIME IN THE NORTHERN TRIANGLE (2019).

¹⁵ *The MS-13 Problem: Investigating Gang Membership as well as its Nexus to Illegal Immigration, and Assessing Federal Efforts to End the Threat: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. 7 (2017) (statement of Kenneth A Blanco, Acting Assistant Attorney General).

The operational work of TAG units and the FBI is complemented by a full-time Department Resident Attorney Advisor from the Organized Crime and Gang Section (OCGS) in El Salvador. The position complements the expertise and deep bench of prosecutors at OCGS who indict and try complex RICO prosecutions along with USAOs against the most significant MS-13 leaders, members and associates.

Begun as a proof of concept through long-term details, the OCGS prosecutor coordinates the dissemination of evidence and leads to other U.S. prosecutors, provides guidance, and identifies evidence in the region that is useful to prosecutions in the United States. Through TAG units, OCGS has utilized vetted Salvadoran police officers to serve as expert witnesses in U.S. based prosecutions of MS-13.¹⁶

Like all law enforcement agencies, TAGs are subject to the workloads, laws, and regulations of the police units to which they belong. Depending on the situation, the laws of the host country may be more or less permissive than the United States. For example, toll and financial records in El Salvador may be obtained upon the request of a local prosecutor. Undercover activity in El Salvador, however, requires several levels of approval, and the proactive use of confidential informants/cooperating defendants is rare.¹⁷ Requests for assistance and information can be submitted as leads through the FBI and OCGS representatives in country who will help determine the best way to support the investigation. The type of assistance depends on the case and can include intelligence on individuals, programs, and cliques. In addition, TAG units can support U.S. investigations by providing expert testimony or interpreting coded messages.

IV. The importance of including local prosecutors

While working with international counterparts, it is important to recognize that the law enforcement and judicial systems of the foreign country may appear similar but can differ in important respects. For instance, the Salvadoran judicial system is self-described as mixed with a tendency towards an accusatorial system.¹⁸ Depending on the

¹⁶ *Id.*

¹⁷ Code of Criminal Procedure art. 175 (El Sal.), https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072931433_archivo_documento_legislativo.pdf.

¹⁸ *Id.* at Preamble II.

stage of the case, the judiciary and prosecutors play a more proactive role than a U.S. prosecutor or investigator is accustomed to.

The role of prosecutors and investigators differ from the U.S. model. Prosecutors in El Salvador fall under a separate, independent branch of the government. While the police depend on the executive branch, the prosecutors depend on the Office of the Attorney General of El Salvador (FGR). The FGR is an independent body charged with investigating crimes with the collaboration of the police.¹⁹ Also, unlike the U.S. model, for cases under investigation in El Salvador, the prosecutors maintain investigative control over a case. To take any formal investigative step for use at a local trial, the police must receive an administrative order from the prosecutor. This means that, if proactive assistance is required, a request must come from a local prosecutor.

For this reason, U.S. prosecutors may consult with both the Office of International Affairs (OIA) and OCGS, who can help facilitate or provide guidance on the best way to route your request. The OCGS prosecutor in El Salvador has knowledge of both local and U.S. law and can help navigate and direct any requests for assistance to the appropriate agency. The OIA Trial Attorney assigned to the region can ensure the evidence obtained is admissible and, if your target is overseas, the charged crime is extraditable.

V. Cooperation and collaboration

Cases, leads, and evidence provided by the TAG and Attorney General's Office in El Salvador often form the genesis for investigations in the United States and vice versa. This can raise different legal issues involving international assistance once the case is brought to trial in the United States.

The most common issues involve voluntary statements and foreign, judicialized wire interceptions. For instance, voluntary statements obtained by foreign law enforcement officers are generally admissible, even if no *Miranda* warnings are provided.²⁰ The rationale is that the exclusionary rule's prophylactic effect would not apply to foreign

¹⁹ See CONSTITUCION DE LA REPUBLICA DE EL SALVADOR (1983), art. 193.

²⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring admonitions about Fifth and Sixth Amendment rights before a custodial interrogation); *United States v. Abu Ali*, 528 F.3d 210, 227 (4th Cir. 2008); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003).

actors.²¹ In El Salvador, taking voluntary statements from targets is not prohibited, but the statements must be judicially ratified and reproduced to be admissible.²² Statements obtained by U.S. investigators working overseas should comply with U.S. law and *Miranda* in order to ensure admissibility.²³

With respect to foreign, judicialized telephone interventions, they are generally admissible subject to two “very limited exceptions.”²⁴ The first exception, rarely applicable, is if the conduct of the foreign police shocks the conscience of the court reviewing the conduct.²⁵ The second and more commonly litigated is if the U.S. agents’ participation in the investigation was so substantial that it constituted a joint venture.²⁶

If the court determines that U.S. investigators directed or controlled the local investigations, the United States will have to demonstrate that the evidence gathering complied with the Fourth Amendment’s reasonableness requirement.²⁷ This does not include technical assistance, sharing of leads and evidence, and close collaboration, which occurs in many wire centers internationally.²⁸

VI. Conclusion

TAGs operate as the first line of defense in preventing the growth of MS-13 across borders through their domestic investigations. In addition, TAGs and Department assets in El Salvador and neighboring countries can provide support and subject matter

²¹ *United States v. Bin Laden*, 132 F. Supp. 2d 168, 182 n.9 (S.D.N.Y. 2001).

²² CONSTITUCION DE LA REPUBLICA DE EL SALVADOR (1983), art. 12; Code of Criminal Procedure art. 90–92 (El Sal.), https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072931433_archivo_documento_legislativo.pdf.

²³ *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177 (2d Cir. 2008).

²⁴ *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995) (quoting *United States v. LaChapelle*, 869 F.2d 488, 489–90 (9th Cir. 1989)).

²⁵ *Id.*

²⁶ *United States v. Escalante-Melgar*, No. 16-453, 2020 WL 968091, at *4 (D.N.J. Feb. 28, 2020).

²⁷ *Id.*; *United States v. Peterson*, 812 F.2d 486, 490–92 (9th Cir. 1987).

²⁸ *See, e.g., United States v. McVicker*, 979 F. Supp. 2d 1154, 1180–81 (D. Oregon 2013) (citing cases); *Escalante-Melgar*, 2020 WL 968091, at *4.

expertise to support U.S. based investigations of transnational gangs like MS-13.

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Wisconsin Native American Drug and Gang Initiative

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I. Background

Wisconsin has 11 federally recognized Native American tribes, with tribal communities and reservations spread throughout the state. Nine of the tribes have tribal police departments.²⁹ These tribal police departments took on drug trafficking and violent gang activity despite low staffing, poor or absent training, and little to no coordination between agencies.

Illegal drug and gang activity in cities near each tribal community influences the Native American communities. Although all tribal communities face abuse of opioids, methamphetamine, and heroin as common sources of addiction and crime, for years, gangs in Milwaukee, Madison, and Minneapolis/St. Paul directed regionally influenced illegal drugs toward the tribes.

In 2007, tribal police chiefs and the Wisconsin Department of Justice, Division of Criminal Investigation (DCI), met to create what was then the 18th Drug Task Force in Wisconsin: The Native American Drug and Gang Initiative (NADGI). The newly formed NADGI Board of Directors, comprised of DCI representatives and tribal police chiefs, sought grant funds from the State of Wisconsin and the Department of Justice (Department). NADGI receives state and federal funds that cover the costs of equipment, training, overtime funds, and operational expenses associated with task force activities. The NADGI board meets at least twice a year to provide formal updates and discuss drug and violent crime trends in member communities. Coordination with the Department enhances resources for investigation and prosecution. NADGI has 10 tribal law enforcement members:

²⁹ Two northern Wisconsin tribal communities—the Forest County Potawatomi Community near Crandon and the Sokaogon Chippewa Community in Mole Lake—do not have tribal police departments. These communities contract with the Forest County Sheriff's Department to provide law enforcement services.

- The Bad River Police Department, located in Bayfield County (northwestern Wisconsin);
- The Lac Courte Oreilles Police Department, located in Sawyer County (northwestern Wisconsin);
- The Lac du Flambeau Police Department, located in Vilas County (northern Wisconsin);
- The Ho Chunk Police Department, located in 15 counties across central Wisconsin;
- The Oneida Police Department, located in Outagamie County and Brown County (northeastern Wisconsin);
- The Red Cliff Police Department, located in Bayfield County (northwestern Wisconsin);
- The St. Croix Police Department, located in 4 counties in northwestern Wisconsin;
- The Stockbridge–Munsee Police Department, located in Shawano County (northeastern Wisconsin);
- The Menominee Tribal Police Department, located in Menominee County and Shawano County (northeastern Wisconsin); and
- The Great Lakes Indian Fish and Wildlife Commission (GLIFWC).³⁰

NADGI supports the Forest County Sheriff’s Department, which is an associate member of the task force, with drug and gang investigations in its tribal areas of responsibility.

The task force structure differs from other drug task forces in the state. Other drug task forces involve police agencies assigning officers who work full time for the task force, usually on a timeline that combines new and experienced officers. Larger agencies tend to become members of these task forces—who else can afford to staff one

³⁰ GLIFWC is an intertribal co-management agency that maintains and monitors fishing, gathering, and hunting activities established in treaties between 11 Ojibwe tribes and Congress. The tribes are located across Minnesota, Wisconsin, and Michigan, and ceded land in those states in exchange for continued hunting and fishing rights in the ceded territories. GLIFWC has a law enforcement arm that monitors, investigates, and cites violations of those rights into tribal courts for the respective tribes.

or more officers away from normal patrol and investigative duties and devote the officers to specialized work for one or more years? The task forces typically cover one or two counties or a metropolitan area.

This normal task force structure presented a significant problem to coordinating efforts across tribal communities. Because of minimal staffing and disproportionately large drug and gang problems, NADGI is comprised of officers who also engage in ordinary duties associated with police work. Also, NADGI has to cover a much broader area. Unlike other Wisconsin drug task forces, NADGI covers 20 counties from the Minnesota border on the west to the northeastern corner of the state along Lake Michigan and the Michigan border. Jurisdictional issues not found in other task forces in the state are present as well: The Menominee Indian Reservation has tribal courts, with more serious offenses prosecuted in the U.S. District Court for the Eastern District of Wisconsin.³¹ The remaining tribes ceded criminal court jurisdiction to the state through what is commonly referred to as “Public Law 280” and sought prosecutions through their respective District Attorney’s Offices.³²

The solution to the problem turned out to be simple: Each tribal police department built their own NADGI team from their own officers. Essentially a “task force within a task force,” tribal departments identified these officers to tribal leadership and community contacts and encouraged the officers to develop relationships with those groups. Community members were encouraged to contact tribal leaders and council members who, in turn, could pass along information to NADGI team members. This means community members and tribal government have “skin in the game” in identifying and addressing issues of public concern.

The aforementioned NADGI Board of Directors oversee the task force. The NADGI Board consists of the police chiefs of the nine tribal law enforcement agencies and the Chief Warden of GILFWC. A full-time Wisconsin DCI senior special agent serves as the NADGI Task Force Commander and oversees field, administrative, and

³¹ Relevant to this article, these offenses are listed in the Major Crimes Act, 18 U.S.C. § 1153(a), and some crimes of general federal jurisdiction such as firearms offenses found in Title 18 of the U.S. Code and drug offenses found in Title 21 of the U.S. Code.

³² Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326).

training operations. Each component NADGI team has a team leader, who reports to the tribal police chief.

NADGI team members are required to attend an intensive investigative training offered through Wisconsin DCI or the United States Drug Enforcement Administration upon assignment. Team members also attend a yearly, two-day in-service provided by Wisconsin DCI. Recent additions to the yearly training include sessions on sex trafficking and human trafficking. Ad hoc training offered by local District Attorney's Offices, the Indian Country Coordinator for the U.S. Attorney's Office (USAO) for the Eastern District of Wisconsin, and the Tribal Liaison for the USAO for the Western District of Wisconsin supplement the tactical and investigative training with directed training on investigations and their relation to a changing legal landscape.

The task force is unique and based on the notion that law enforcement for Native communities needed to be coordinated, regardless of location, and involve more than just investigations that end with an arrest and prosecution. The mission of NADGI goes beyond core law enforcement functions (investigate, arrest, prosecute) and involves buy-in and participation from tribal governments and communities through outreach and response to crimes with the biggest impact on the community. The core missions recognize that problems do not go away after an arrest, and drugs often reappear in communities after search warrants are executed.

II. Core missions

NADGI has four core missions: (1) attrition; (2) deterrence and prevention; (3) reassurance; and (4) communication/coordination. Each core mission is briefly discussed below.

A. Attrition

NADGI fulfills this core mission through both reactive and proactive police work. Reactive work involves responding to incidents after they happen in an effort to collect information and develop sufficient evidence for a successful prosecution of those who perpetrate violence on behalf of gangs or engage in criminal conduct to support an addiction. Proactive work involves the use of confidential and anonymous community sources and other law enforcement techniques to identify and eliminate those who are planning gang activity or trafficking illegal drugs. Technical support from DCI means access to

monitoring, tracking, and surveillance equipment previously unavailable to small, cash-strapped departments. Efforts in support of this core mission can include NADGI team members from other agencies, along with local, state, and federal law enforcement partners, which acts as a force multiplier and enables the task force to “take the fight” to those who harm tribal communities through drug trafficking and violence. Information gleaned from NADGI investigations often serve, to identify sources of illegal drugs who operate outside tribal areas, which allows state and federal law enforcement to send a strong message that tribal areas are not safe havens for criminal activity. Several recent cases involved information gleaned from NADGI team activities supporting law enforcement missions in major cities, which disrupted drug trafficking organizations and even financial support for a terrorist organization in the Middle East.

B. Deterrence and prevention

NADGI fulfills this core mission by providing free training programs to community and professional groups each year. The training programs cover a large range of issues, from drug trend and identification courses to workplace violence prevention. Providing community members with the necessary tools to identify signs of drug abuse or gang activity and the confidence to know how to report the activity, and to whom, leads to the public having a stake in outcomes. Knowing that neither the police, nor the tribal government, nor the community members can battle drug trafficking and gang activity alone leads to cooperation between the groups.

C. Reassurance

NADGI meets this core mission in two ways: through a visible law enforcement presence that conducts operations in response to community tips and assistance and by ongoing interaction with every level of tribal governments as those bodies develop policies related to policing and responses to drug addiction and violence. Having a publicly known team available for feedback can put public pressure on tribal governments to act in the tribal community’s best interest; this is reassuring to both tribal members and leaders. Furthermore, the NADGI task force is mindful to respect individual cultural differences among the Native American communities it covers.

D. Communication and coordination

Less a core mission than a method by which the task force fulfills the others, constant and responsive communication between the public and NADGI team members, between NADGI team members and tribal leadership, and between NADGI team members and outside agencies enables information sharing and, often, a rapid response time to community problems. Long-term investigations still occur, and trust developed through successful and visible operations means NADGI team leaders can assuage community concerns should someone feel like NADGI is not doing enough or not doing it quickly enough.

III. Example

The best example of coordination between the NADGI task force, tribal governments, tribal service providers, and outside law enforcement agencies is found in NADGI efforts on the Menominee Indian Reservation (MIR) in the community of Neopit in February 2016.

MIR residents and members of the Menominee Indian Tribe of Wisconsin had struggled with an epidemic of synthetic cannabinoids since approximately 2012. These drugs, locally referred to as “Ish,” provided a significant high at a cost lower than that of other street drugs. Community members and first responders saw the often horrendous side effects of abuse of “Ish,” which included adverse reactions like seizures, loss of consciousness, and combative disposition. Nowhere was “Ish” a larger problem than in Neopit, a community of approximately 900 tribal members.

The Neopit community called for a town meeting and requested the Menominee Police Department and its NADGI Team to attend. The community sought assistance in awareness training and initiating a solution to the problem. During the town meeting, members of tribal government, homeowners, heritage groups, and police officers were present. Because of this meeting, informal support groups formed to provide support to those looking for help. These support groups consisted of families who struggled with another family member’s addiction and former users of “Ish.” Tribal legislators initiated efforts to provide funding aimed at efforts to open a satellite police station in the community intended for faster response to calls and to demonstrate a proactive community effort to thwart those distributing the synthetic drugs.

Tribal law enforcement met with community leaders on numerous occasions to assure citizens that efforts were underway to arrest and prosecute those who were responsible for trafficking the substance in Neopit and elsewhere. NADGI team members met with state and federal partners and developed a strategic approach centered on eliminating the source of synthetic cannabinoids. These efforts culminated in several prosecutions in the U.S. District Court for the Eastern District of Wisconsin and in Menominee Tribal Courts. Federal and state law enforcement also raided and closed several businesses in the Milwaukee area, whose owners imported synthetic cannabinoids and prepared them for distribution from storefronts in Milwaukee and Green Bay.

IV. Conclusion

In the fall of 2015, representatives from four Minnesota tribes formed the Great Nations Gang and Drug Task Force. NADGI provided technical and training assistance to the member tribes after they expressed interest in forming a cooperative group to address similar problems with drug and gang activities. Because of NADGI's structure, it is easily transferrable to other areas where tribal communities face similar problems. Recruiting dedicated and motivated tribal officers who are willing to work with tribal leaders and community members ensures that, whether coordinated by a state or federal agency, law enforcement meets cultural concerns and addresses local community needs.

Coordination efforts between law enforcement, tribal community members, and tribal leadership continue successfully to this date. Community services through the tribe address current substances of abuse and the treatment needs of those who abuse the chemicals; NADGI team members work with the community and tribal leadership to focus on issues of local concern, whether it is emerging acts of violence or drug trafficking. The success of the task force and the continued efforts of the dedicated officers assigned to NADGI teams means a brighter future for safety in tribal communities across Wisconsin.

About the Author

Andrew Maier is an Assistant United States Attorney and the Indian Country Coordinator for the United States Attorney's Office for the Eastern District of Wisconsin. He wishes to thank Senior Special Agent Bryan Kastelic of Wisconsin DCI, who is the NADGI Task Force Commander, for his assistance and for providing historical information for this article.

An Introduction to the Office of Enforcement Operations

J. Robert Bryden II

Director

Office of Enforcement Operations

Federal Witness Security Program

Criminal Division

The Criminal Division's Office of Enforcement Operations (OEO) is pleased to contribute to this issue of the *DOJ Journal of Federal Law and Practice* devoted to the mission of the Criminal Division's Organized Crime and Gang Section (OCGS) and the use of witnesses and cooperators. OEO provides investigative and prosecutorial support, legal advice, and statutorily required review and approval in almost 40 distinct subject areas, and OCGS is currently one of our primary partners.

As the Director of OEO, I supervise the operations of over 80 employees—attorneys, paralegals, case analysts, and support staff—who are committed to effectively and efficiently overseeing critical Department of Justice (Department) functions entrusted to us by the Attorney General and Congress. These critical functions are designed to support investigative and prosecutorial efforts of federal prosecutors and law enforcement agents across the country. Daily, OEO reviews and approves use of the most sensitive investigative and prosecutorial tools at the federal government's disposal, including many of the most important enforcement tools available in the fight against organized crime and gang violence, terrorism, drug and human trafficking, public corruption, child exploitation, and other crimes. Chief among these tools is the Federal Witness Security Program (Program). As Director of OEO, I serve by direct delegation from the Attorney General as the Director of the Program. This year marks the 50th anniversary of the passage of the Organized Crime Control Act of 1970, the legislation that helped my predecessors and I, with our agency partners, the United States Marshals Service and the Federal Bureau of Prisons, build the Program into what it is today.

The Program, then and now, is described in greater detail in the following pages. OEO, however, oversees the use of many other techniques and procedures that are critical to enabling federal prosecutors and agents to fulfill their mission, including Title III wiretaps (to be featured in an upcoming issue of the *DOJ Journal*),

Special Administrative Measures, grand jury and trial immunity requests, news media subpoenas, and Freedom of Information Act and Privacy Act requests. The majority of OEO's responsibilities are explained in the Justice Manual, and we maintain updated lists of the approval, consultation, and notification requirements involving OEO that are applicable to United States Attorney's Offices (USAOs) and federal law enforcement agencies. Additionally, our units have developed go-bys, forms, and guidance documents designed to help the Department obtain and use these indispensable tools and services to successfully investigate crimes, prosecute criminals, and secure and sustain convictions. OEO stands ready to help; federal prosecutors should call on us anytime for questions, advice and guidance, or other assistance in advancing their prosecutorial efforts.

About the Author

J. Robert “Rob” Bryden II served as an Assistant Attorney General in the Special Prosecutions and Organized Crime Section of the Office of the Attorney General for the Commonwealth of Virginia before joining the Criminal Division as a Trial Attorney in OEO's Electronic Surveillance Unit (ESU) in 2010. He also served as a Special Assistant United States Attorney for two years. He was selected to serve as ESU's Deputy Chief in 2013, ESU's Chief in 2016, OEO's Principal Deputy Director in 2017, and its Acting Director in 2019. He continues to work on a variety of high-profile investigations and legislative matters since being appointed OEO Director in 2020.

The Federal Witness Security Program: A Retrospective Look

Susan K. Dozier

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I. Introduction

With the passage of the Omnibus Crime Control and Safe Streets Act of 1968 and the Organized Crime Control Act of 1970, Congress armed federal law enforcement and prosecutors with three invaluable tools in the fight against organized crime: the Racketeer Influenced and Corrupt Practices Act (RICO), the Wiretap Act (Title III), and the Federal Witness Security Program (Program).¹ Equipped with these tools, the federal law enforcement community could more effectively prosecute an organization's most culpable yet elusive leaders, legally eavesdrop on mobsters' private criminal conversations, and perhaps most importantly, expend government funds to better protect those testifying against the organization. Fifty years later, a retrospective look at the evolution of the Program will assist today's prosecutors in understanding the benefits and limitations of the Program as an important tool in developing and prosecuting criminal cases.²

¹ The Program, first authorized by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) was also amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984). Statutory authority for the Program is found at 18 U.S.C. §§ 3521–3528.

² This article is not a policy document, Program primer, or guidance manual for navigating the Program application process. For more detailed information, please consult JUSTICE MANUAL §§ 9-21.000–9.21.1020 or contact the Office of Enforcement Operations, Special Operations Unit.

II. A brief historical perspective

Much credit for the passage of Program legislation is owed to a group of prosecutors in the Organized Crime and Racketeering Section (OCRS). Founded in 1954, OCRS, the precursor to today's Organized Crime and Gang Section (OCGS), was tasked with spearheading the Department of Justice's (Department) efforts to root out organized criminal elements that were viewed by many as growing unchecked.³ By the 1960s, these prosecutors grew increasingly frustrated with cases hampered or foiled entirely by the murder of key eyewitnesses. Chief among them was Gerald Shur, a young prosecutor who later became known as "the Godfather of the Program." He was known to share tales with anyone who would listen about mobsters named *Fat Vinnie*, *Joey Big Nose*, and *Jimmy the Weasel*⁴ avoiding prosecution because eyewitnesses were "taken care of" before a jury could be sworn. Without testimony from important witnesses, many top Mafia officials went unpunished. As widely depicted in both print and film, high-level members of the Mafia, simply put, could eliminate witnesses along with the cases against them.

Starting in the 1950s and well into the 1960s, Department officials, including Attorney General Robert F. Kennedy, testified before Congress regarding the urgent need to legislate witness protection. Attorney General Kennedy, in testimony before a Senate subcommittee on September 25, 1963, said, "[A]s evidence becomes harder to obtain, the importance of informants increases correspondingly. They, to say the least, are hard to come by. The usual reply of a convicted hoodlum in a position to give information is that he doesn't want to trade a jail cell for a hearse."⁵ In addition to Attorney General Kennedy and other Department officials pressing for change, the public learned first-hand the value of witnesses to proving the criminal activities of the Mafia. In October 1963, mobster

³ *Historical Timeline*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal/history/historical-timeline> (last visited Nov. 19, 2020).

⁴ Okay, so maybe the names are made up; that is, after all, the very essence of the Program.

⁵ Statement by Attorney General Robert F. Kennedy to the Permanent Subcommittee on Investigations of the Senate Government Operations Committee, 87th Cong. 20 (1963).

Joseph Valachi,⁶ a Genovese crime family associate, made headlines when he broke *omertà*, the Mafia blood oath of secrecy, and confirmed to the public its existence. He also went so far as to name the heads of New York's *La Cosa Nostra* (LCN) families, as well as individuals responsible for murders committed on behalf of LCN.⁷ Though it took until the end of the decade, Congress eventually saw fit to give the law enforcement community the crime-fighting arsenal necessary to better protect witnesses who were helping bring down LCN and other such organized crime syndicates.

While law enforcement and lawmakers rightly identified the need for instituting such measures, Congress recognized the potential for abuse in providing government-funded protection to witnesses, most of whom were cooperating defendants with criminal records (cooperators).⁸ Thus, Congress mandated that only the Attorney General or his delegate, chosen from a select group of the Department's highest-ranking officials, could approve Program protection.⁹ Thereafter, the Criminal Division established the Office of Enforcement Operations (OEO) to oversee the daily administrative operation of the Program. Ever since, the job of approving, denying, or terminating Program protection has been delegated by the Attorney General to the Program's Director, who currently sits dual-hatted as the OEO Director. There have been six Program Directors since its inception, four of whom helmed the ship between 2010 and today.

⁶ More about Joseph Valachi and clips of his testimony before a 1963 Senate subcommittee can be seen at JOE VALACHI | JOE CARGO, <https://www.youtube.com/watch?v=gJz9ajyh688> and JOE VALACHI 1963 MCCLELLAN HEARINGS COMPILATION, <https://www.youtube.com/watch?v=hh3-YmYrgYw>.

⁷ Emanuel Perlmutter, *Valachi Names 5 as Crime Chiefs in New York Area*, N.Y. TIMES (Oct. 2, 1963), <https://www.nytimes.com/1963/10/02/archives/valachi-names-5-as-crime-chiefs-in-new-york-area-accuses-genovese.html>.

⁸ In 1996, Criminal Division Acting Assistant Attorney General John Keeney testified before the Senate Judiciary Committee about the Program. In his prepared statement, he testified that 97% of Program participants had criminal backgrounds. Oversight of the Department of Justice Witness Security Program Hearing Before the Sen. Comm. on the Judiciary, 104th Cong. 47 (1996) (Statement from John Keeney, Acting Assistant Attorney General). In the past two years, less than a handful of Program applicants had no criminal record.

⁹ 18 U.S.C. § 3521(d)(3).

From Shur, the Program's first Director, to its current Director, little has changed regarding the requirements for Program consideration and the best practices for prosecutors and agents to navigate the application process. Yet, while statutory and policy requirements and the processes have remained relatively constant, the Program's infrastructure and participant profile has changed over time. This article explores how those changes have altered the management and facilitation of the Program and ends with a look at the effects modern day technological advancements had on the Program in its pursuit to keep safe those vital witnesses needed to secure convictions.

III. Looking back to understand what lies ahead

By the very nature of the era in which it was created, with a focus on organized crime and labor union corruption, initial membership in the Program largely consisted of Mafia insiders of all ranks and sizes. One could be excused for mistaking the Program's roster for central casting for *The Godfather*,¹⁰ as "goodfella"¹¹ types dominated the participant profile in its earlier years. Membership has since evolved, in direct response to shifting prosecutorial priorities as determined by the Attorney General.

For example, in the 1980s through the 1990s, with the Department's resources focused on disrupting and dismantling international drug cartels, narcotics trafficking witnesses and cooperators—think *Narcos*¹² or *American Gangster*¹³—dominated the participant profile. Despite the influx of drug trafficking cooperators during that time, the Program population continued to include other organization insiders who helped law enforcement disrupt and dismantle groups involved in firearms trafficking, domestic and international terrorism, human smuggling and sex trafficking, and other criminal elements such as motorcycle and prison gangs and white supremacist groups.

The evolution of Program membership was driven in large part by the law enforcement community, particularly with respect to who went in the Program and for how long. From LCN mobsters to drug dealers, terrorists to international criminal street gang members,

¹⁰ THE GODFATHER (Paramount Pictures 1972).

¹¹ GOODFELLAS (Warner Bros. 1990).

¹² *Narcos* (Gaumont International Television 2015–2017).

¹³ AMERICAN GANGSTER (Imagine Entertainment 2007).

when it comes to deciding who to sponsor for Program consideration and how to help that person succeed in the Program, it helps to understand some of the overall changes since 1970 that have affected the Program.

A. Infrastructure change to accommodate Program needs

1. Changes in cooperator plea bargaining as the catalyst

How federal prosecutors charge and plea bargain cases has changed over time, and as a result, the types of Program services available had to evolve, leading to necessary changes in Program infrastructure. At the outset of the Program, it was common for federal prosecutors to “case bargain,” that is, in exchange for cooperation, the insider avoided prosecution or received a lenient sentence or no sentence of imprisonment. If the cooperator was not charged and was approved for Program services, they (and their families) were whisked away under the cover of night to an undisclosed location to begin a new life, with the expectation that they would refrain from further criminal activity.

While today’s federal prosecutors retain discretion in who and what to charge, charging decisions are governed by the Principles of Federal Prosecution (Principles) to ensure relative uniformity throughout the Department. The Principles present a non-exhaustive list of “substantial federal interest” factors that federal prosecutors may consider in deciding to pursue a prosecution, including whether someone is willing to cooperate in the prosecution of others. As the Principles note, “Generally speaking, a willingness to cooperate should not by itself relieve a person of criminal liability. There may be some cases, however, in which the value of a person’s cooperation clearly outweighs the federal interest in prosecuting him/her.”¹⁴

As a result, over time, less cooperators received a “get-out-of-jail-free card” and, instead, routinely pleaded guilty to one or more charges and were sentenced accordingly. In some cases, even with cooperation, cooperators received substantial sentences, including life imprisonment. Given that more cooperators were going to be spending

¹⁴ JUSTICE MANUAL § 9-27.230.

time in custody, and some for extended periods, the Program needed to adapt to meet prosecutorial needs.

2. Two types of services evolved

Today, the Program offers two types of services: (1) protection to participants who are federally incarcerated; and (2) protection to participants who are relocated within the community. Individuals authorized for in-custody services are referred to as “prisoner witnesses” (PWs), and their physical security is managed by the Federal Bureau of Prisons (BOP). Individuals authorized for in-community services are referred to as “relocated witnesses” (Relos), and their physical security is managed by the United States Marshals Service (USMS). OEO sets Program policies; oversees the Program’s daily administrative operations, including Program admission; and serves in an ombudsman role, resolving issues that arise between Program participants and the BOP, the USMS, and/or the sponsoring United States Attorney’s Office (USAO). Physical security needs are left to the experts and handled by the BOP and the USMS, whose dedication, assistance, and loyalty are essential to the success of the Program.

In the 1970s, the annual number of new Relos outnumbered PWs. But if the cooperator had to complete a sentence first, those earlier Program PWs were designated to one of BOP’s 36 facilities, where they were integrated into the general inmate population,¹⁵ or a secure PW-only floor in one of two BOP facilities, where they did not interact with the general population. The second option was more secure than the first because the PW floor only held a small number of Program inmates, and the facility’s main population had no access to the floor. For both options, additional measures were implemented to account for a PW’s safety while incarcerated. Nevertheless, both options were less than ideal since cooperators were either sharing the same roof or building with non-cooperators, and interactions between the two groups could not always be controlled. Regardless, because the overall number of PWs was smaller and more easily managed, this arrangement sufficed.

In the 1980s, the annual number of new PWs steadily increased and soon began to greatly outnumber the amount of Relos accepted each

¹⁵ *Historical Information*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/history/timeline.jsp> (last visited Nov. 19, 2020).

year.¹⁶ A growing PW population meant that it would be harder to hide cooperators in general population, away from the incarcerated defendants they were set to testify against or other prisoners who could do them harm on behalf of those defendants. Because the Program needed facilities that could be better controlled while accommodating long-term custodial sentences, OEO turned to the BOP for a solution.

3. BOP rose to the challenge

During the 1980s, the BOP added several protective custody units (PCUs) to house PWs. To ensure maximum security, each PCU was structured to be a self-contained facility to which only cleared BOP staff had access. PWs designated to a PCU were physically separated from the rest of the inmate population.¹⁷ More PCUs were added in the 1990s, again to accommodate growing demand, and the current location of each is not publicized. Because of the need to conduct interviews and engage in trial preparation, federal prosecutors and agents who have sponsored a cooperator for in-custody services know where the PWs are housed. Unless, however, expressly authorized to do so by the Attorney General, or his or her designee, sharing information about the Program or an individual associated with the Program—even with other prosecutors, agents, or the court—is a felony punishable by imprisonment and/or a fine.¹⁸

For those who have never sponsored a PW, understanding some of the commonly reported inconveniences can be helpful. For example, prosecutors and agents must travel to conduct interviews with PWs at their designated facility, as PWs are not returned to the district for pretrial interviews or meetings. Often, a PW is placed in a facility that exceeds the BOP's usual 500-mile radius policy,¹⁹ making it difficult for prosecutors and family members to visit the PW. Thus, it is common to hear that prosecutors, agents, the PWs, and/or their family find the PW's facility "geographically undesirable."

¹⁶ In 2017, PWs accounted for 70% of those accepted to the Program, though that percentage has reached as high as 80% in some prior years.

¹⁷ Note, however, that all female prisoners, and a select few male prisoners due to extenuating circumstances, continue to be integrated into the general prison population while receiving in-custody Program services.

¹⁸ 18 U.S.C. § 3521(b)(3).

¹⁹ *Custody & Care*, FED. BUREAU OF PRISONS, https://www.bop.gov/xinmates/custody_and_care/designations.jsp (last visited Nov. 19, 2020).

It is also common to hear complaints about the multiple steps that must be taken to gain access to one's own witness. Prosecutors should be aware that the moment an in-custody cooperator's Program application is submitted to OEO, additional security measures are implemented to limit access to the cooperator. This results in prosecutor and agent access to the witness becoming more restricted and the applicant being placed in more solitary conditions for their protection until a Program decision is made.²⁰ If the applicant is approved, the PW is moved to a PCU, and access becomes wholly controlled by the Program for security reasons.²¹ Understandably, ceding access to and control of the witness to the Program is quite difficult for many prosecutors and agents, especially as they prepare for trial. Awareness of these restrictions in advance of submitting a Program application will help prosecutors and agents successfully prepare for interacting with the Program and their sponsored PW. Despite such hurdles, the security needs of your cooperator should always take precedence over prosecution team convenience.²²

To some, the advent of PCUs had the negative effect of creating additional red tape for a prosecution team already burdened with the stresses of an investigation and trial. The continued cooperation of a necessary witness is often strengthened, however, when their safety is prioritized. In-custody cooperators who are approved for Program services are typically relieved of having to look over their shoulders every day or, at least, they look less than when they were in general

²⁰ Because of the nature of what is at stake and the breadth of information that must be collected and analyzed, decisions on Program applications can take some time. If you are contemplating recommending someone for Program consideration, please contact the Special Operations Unit (SOU) as soon as possible for more information.

²¹ Note, however, that not all PWs receive a PCU designation. A polygraph examination is administered to all applicants in prisoner cases to assess whether the in-custody cooperator is applying to the Program for the purpose of infiltrating the Program. In some cases, negative examination results have required placement somewhere other than a PCU. Nevertheless, even access to a PW who is placed somewhere other than a PCU is wholly controlled by the Program.

²² Delaying application for PW services for the sake of trial convenience may also negatively impact PW Program consideration if the custodial time remaining on the PW's sentence is less than one year. Before taking or postponing Program application action, contact OEO to discuss further.

population. Admission to the Program, however, does not transform life in a PCU to a holiday at “Club Fed.” These units are not large by prison standards and are categorized as “administrative facilities,” which means cooperators with varying BOP threat-level designations are housed under the same roof. This space issue results in terrorists and gang members, many of whom may have had a direct hand in terrible violent acts, being housed with non-violent and potentially lower-level criminals, such as white-collar cooperators. Although surrounded by other similarly situated cooperators who are all, in theory, on “Team Prosecution,” they do not always get along. OEO and the BOP routinely work together to “balance the yards” at PCUs to ensure personality conflicts and allegations of collusion by same-case witnesses are kept to a minimum.²³

In addition, because of their limited physical size and smaller maximum capacity, PCUs are not conducive to many of the amenities, including inmate programming and visitation, that are available to the main institution’s general population. Finally, PWs must abide by stringent Program rules, and those who fail to follow them are subject to removal from the PCU and/or the Program and risk denial of post-release relocation services, irrespective of whether their cooperation is complete. Consequently, the tradeoff for the extra layers of security is that a PW’s life in a PCU can feel very constricted. Early and often, prosecutors and agents should discuss the benefits and challenges of PCU life with cooperators so they have a better understanding of what lies ahead before they are approved for PW services. Prosecutors and agents must also remain vigilant against making promises to the cooperator about what life will be like in a PCU.

²³ The Program does its best to accommodate all PWs who need and qualify for in-custody services. Providing services, however, to multiple witnesses in the same case while minimizing risk of collusion allegations presents significant challenges since PCU space is limited. Prosecutors should keep in mind separate issues and consider using the extraordinary resources of the Program only for those PWs who truly need it.

4. Prisoner witness service does not guarantee relocation service

Despite more cooperators serving prison sentences, many are eventually released, and it is important to note that PW status does not guarantee relocation services upon release.

Some releasing PWs decline to seek Program relocation because they believe the threat to their safety has passed or that it only existed inside the prison and they are able to return home without reprisal. Some PWs decline consideration because they believe the sponsoring law enforcement agency will provide them with a sizeable cash payment so they can handle their own relocation.²⁴ To be clear, while a prosecutor and agent may not agree with the PW's assessment of the threat or the PW's ability to manage his/her own security, neither can force the PW to request relocation services. At all times, consideration for membership and participation in the Program is completely voluntary.

Furthermore, though an agency "lump-sum payout," as PWs often refer to the sponsor's payment, has happened in the past, PWs should be disabused of the notion that any such payment is guaranteed or sufficient to cover anything more than their immediate, short-term needs upon release from custody. They should also know that the Program does not provide payouts to witnesses in this fashion. The misinformation distributed through the prison "grapevine" regarding grossly exaggerated benefits supplied by sponsoring agencies (or the Program) in the past is hard to combat. Prosecutors and agents should discuss realistic alternatives to the Program with PWs early and often so that PWs can fairly weigh their options.

For those PWs who do want to be considered for relocation services, prosecutors must understand that some are subsequently denied post-release services because they do not statutorily qualify for them. The Program is one of "last resort" and may only be used when no other means will suffice to keep the witness alive. Thus, the availability of alternate means to protect them would disqualify them from receiving relocation services from the Program.²⁵ For those PWs who want to be considered and do qualify for relocation services,

²⁴ Decisions to provide payments to PWs who do not enter the relocation part of the Program are exclusively the responsibility of the sponsoring law enforcement agency and/or the USAO.

²⁵ 18 U.S.C. § 3521(c).

prosecutors must submit a new Program application for director consideration.²⁶

Since the inception of the Program, the USMS has “protected, relocated, and given new identities to more than 8,600 witnesses and 9,900 family members.”²⁷ For those PWs who do eventually become Relos, many are “institutionalized,” meaning they suffer from social or life-skill deficits having spent a long period in prison and, therefore, adjusting to life in relocation under a new identity is very difficult. The challenges posed to Relos are especially notable when you consider the changes in the Program’s participant profile over the last few decades.

B. Change in Program participant profile: who is impacted and why?

1. A new type of “gangster”

As discussed earlier, in the beginning, most Program participants were organized crime insiders of varying Mafia ranks and affiliations. Whether these initial participants were mob bootleggers, enforcers, hitmen, caporegimes, consiglieres, or Dons, the Mafia generally had been historically viewed as the “honorable society.”²⁸ Reputationally, Mafia and other such “traditional” organized crime groups were said to never kill law enforcement or family members of enemies, and leadership expected its members to live by a code. While many members certainly lacked formal education beyond grade school and had years-long criminal records that ran the gamut from petty crimes to serious felonies, this was not uniformly true of all mobsters. Some participants had formal educations, including high school diplomas,

²⁶ The same form is used whether applying for prisoner witness or relocation services. The information, however, supplied by the sponsoring USAO for a relocation application must be geared toward explaining why relocation services are necessary and warranted. An updated assessment addressing the threat to the witness and the risk they and their joining family pose to the unknowing public should they be relocated with new identities is required from the law enforcement agency supporting the relocation request.

²⁷ *Witness Security Program*, U.S. MARSHALS SERVICE, <https://www.usmarshals.gov/witsec/> (last visited Nov. 19, 2020).

²⁸ Robert Neville, *The New Mafia Is Deadlier*, N.Y. TIMES (Jan. 12, 1964), <https://www.nytimes.com/1964/01/12/archives/the-new-mafia-is-deadlier-the-old-sicilian-gangsters-had-a-rural.html>.

and showed signs of civic awareness. After all, Mafia members had to understand people and politics in order to know which politicians were susceptible to extortion or worthy of bribing.

Some Program participants held legitimate jobs, owned their own businesses, or possessed actual technical skills in addition to knowing how to run a criminal enterprise. Many were middle-aged or even senior-aged when they entered the Program. Most knew how to drive and had navigated the bureaucracy of getting a driver's license. They generally knew how to balance a checkbook, were first-generation immigrants who spoke English in addition to their primary language, many were sharp dressers, had immediate and extended family in the neighborhood, and—for the most part—had successfully assimilated into society.²⁹ By all accounts, most were quite capable of assimilating into society again in another location.

Compare that participant profile to today's criminal street gang profile, using as an example *La Mara Salvatrucha* (MS-13),³⁰ whose members appear to come from a much different criminal tradition and social setting. Many cooperators in MS-13 cases have prior criminal records, as did the old-school mobsters whom prosecutors were “flipping” in the 1970s. But the similarities appear to end there. Preferring to “stand out” rather than “blend in,” many MS-13 members proudly tattoo their body and/or face to show allegiance to one of the world's largest and most violent street gangs.³¹ The Program does not discriminate based on an applicant's easily recognizable physical characteristics. The increased prevalence of cooperators who advertised membership in MS-13 or other violent gangs in this way, however, presents heightened security and assimilation challenges. Tattoos and piercings, including common ones uniquely placed, can serve as a roadmap to that person's prior identity and past life. Moreover, modern Program participants often face other obstacles to blending in elsewhere. They are not just relatively younger; many are younger by decades, and some are barely of voting age. Similarly, when it comes to criminal tradition, it appears the only tradition the gang instills in its members is the

²⁹ *The Demise of the Mafia*, HISTORY, <https://www.history.com/topics/crime/the-demise-of-the-mafia> (last visited Nov. 19, 2020).

³⁰ See *The MS-13 Threat: A National Assessment*, FEDERAL BUREAU OF INVESTIGATION, https://archives.fbi.gov/archives/news/stories/2008/january/ms13_011408 for more information on MS-13.

³¹ INSIGHT CRIME, MS13 IN THE AMERICAS (2018).

violence-affirming belief that anyone perceived to pose a threat to the gang and members' criminal livelihoods should be targeted for death.

In addition to the destructive nature of the gang's activities, many of these gang members appear to lack many significant real-life skills: Some have limited English-speaking skills, and many have never held legitimate jobs, established bank or credit accounts, or otherwise sufficiently managed money or saved for the future. A majority left their immediate family back in their home country, and their fellow gang members became their only family here.

2. Immigration woes

Similarly, gone are the days when most Program participants were U.S. citizens. A significant number of today's potential participants, and the family members they want to bring into the Program with them, are foreign nationals without legal immigration status in the United States. After the attacks on 9/11 and the creation of the Department of Homeland Security (DHS), immigration status was removed from the purview of the Department and became the province of DHS. For today's Program applicants who want in-community Program services, a lack of legal immigration status creates additional processing requirements for the Program because the Attorney General, even in the Department's highest profile cases, cannot unilaterally rectify immigration issues without the approval and assistance of DHS.

Those in the PW population who are foreign nationals must have their immigration status resolved before being released to the community, irrespective of whether relocation services are under consideration. If their immigration statuses are not resolved before BOP release, those foreign national PWs will be released to the custody of DHS to be held in an Immigration and Custom Enforcement (ICE) detention center until their immigration status is resolved. The Department has no control over where or how long they are held in ICE custody. This is not an ideal place for government cooperators. One should not be fooled into thinking this is a non-issue because the cooperator is a lawful permanent resident (LPR), aka a "green card holder." Once convicted of certain crimes, DHS will revoke the cooperator's LPR status, so another form of "status" must be

obtained before the foreign national can be approved for Program relocation services and released from ICE custody.³²

The biggest takeaway here is that prosecutors with cooperators who have unresolved immigration matters should remember that immigration status must be addressed with DHS *before* Program entry and the receipt of any relocation services. Prosecutors and agents should consult early and often with OEO before taking immigration or Program application action. OEO Program Analysts have become quite adept at navigating the interagency processes and are ready to assist, but they are by no means immigration experts.

3. The USMS adapted

The changes in the participant profile since the Program's inception has had little to no impact on the BOP, but it has impacted the USMS. Once approved for relocation services, the Program is for life, unless the Relo chooses to leave or is terminated for cause. Of the nearly 19,000 Relos approved since the Program's inception, many remain in the Program today, creating a varied "client" base for the USMS. When it comes to relocation services, one size does not fit all, leading the USMS to exercise flexibility in client management so that it can continue to meet evolving needs.

Program relocation services include much more than just physical protection, which sets the Program apart from witness security programs in other countries. The primary goal of the Program is to keep witnesses safe to ensure their ability to testify in court, but protection does not end when the case concludes. The Program exists to protect witnesses and keep them safe from retaliation from the criminal organization even after testimony ends. Fifty years of Program experience has shown that the Program works best when participants are able to quietly assimilate into a community and hide in plain sight. Therefore, successful long-term Program participation occurs when participants become self-sufficient and can function in society in their new identities without being reliant upon the type of

³² Generally, this is resolved by the sponsoring law enforcement agency obtaining Deferred Action for the foreign national. Deferred Action is an act of administrative convenience that stays deportation removal proceedings. It is not, however, a long-term immigration fix. Other avenues toward legal immigration status, such as an *S* visa, should be considered. Contact OEO for further information relating to *S* visas for foreign nationals who assist in major criminal investigations or prosecutions.

continuous support the USMS provides during the initial phases of relocation.

To that end, the USMS provides particularized and individually tailored protection and other relocation services for each Program participant. With changes in sentencing practices, an increasing number of PWs are released and accepted for relocation services, including Program participants who were members of national or transnational criminal organizations or are foreign nationals. As such, the USMS had to develop secure access to a wider array of services in order to ensure Program participants were able to hide in plain sight. These services are offered to help a participant succeed not only in the Program but also in his or her everyday life and otherwise “assure the health, safety, and welfare of that person, including [his or her] psychological well-being and social adjustment” to the Program.³³

Although the USMS is exceptional in identifying qualified and trustworthy professionals to provide necessary services, not all clients, especially the younger ones, take advantage of them. As a result, they struggle to assimilate and, subsequently, voluntarily leave the Program. Similarly, irrespective of age, some Program participants have a long history of criminal conduct and derived their sense of self-worth from their association with their criminal organizations. Leaving the comfort of even a dangerous group can be difficult, and many find the pressures of following Program rules and living a crime-free life too difficult, such that they prefer to voluntarily terminate regardless of the threat against them.

The first six months in relocation is a critical period, and how a Relo does during this period can be a good indicator of how they will do over time. Living under a new identity in a new location is not an easy adjustment and requires real commitment. Prosecutors and agents can help with the transition by encouraging cooperators to take advantage of the opportunities offered to them by the USMS. Prosecutors should also refrain from making any promises to the witness about the Program or what life will be like once relocated. To help manage the Relo’s expectations, prosecutors and agents should inform the witness that all terms of the agreement and the Government’s obligations will be set forth in a memorandum of understanding that the witness will execute to enter the Program. Prosecutors and agents should discuss these five major tenets of the

³³ 18 U.S.C. § 3521(b)(1).

Program with the witness: (1) follow all Program rules; (2) do not commit any crimes; (3) prioritize your safety by thinking before acting at all times; (4) listen to the handler, who is there to protect you and help you succeed; and (5) when in doubt of what to do, contact the handler.

C. Impact of the modern digital age on the Program

For 50 years, the bedrock of the USMS's role in the Program has been to ensure the safety of Relos, regardless of what brought them to the Program. As discussed above, the demographics of Program membership has changed dramatically over the Program's life. To continue to fulfill its responsibility of providing protective services, though, the USMS has to look beyond the "who" of Program membership to recognize the worlds from which participants come into the Program and also the world into which they are released.

In making that evaluation, the USMS, like agents and prosecutors throughout the country, have had to consider how the digital revolution has reshaped society and criminal justice. Specifically, the USMS has to grapple with how the ubiquity of advanced technologies affects the witnesses in its charge. One such issue concerns the nature and volume of data that trails Relos and how someone granted a new identity can manage their new identity while being mindful of the digital shadow cast by their prior lives.

Today's Program entrants have come of age in an era of rapid advances in the use of technology to collect and disseminate personally identifiable information (PII), including biometric data, regardless of whether the witness knowingly provided that information. Whether that information was collected through a social media account previously used by the Relo, by their former employer, or through the rewards program at the Relo's former national pharmacy, the USMS cannot erase the information that is already out there, but it can (and does) work with Relos to establish rules and behavior intended to mitigate the potential security risks posed by the digital existence and permanence of such data. For example, the prevalence of facial recognition algorithms means that, while Relos may access social media using their new identities, posting photographs of themselves is not permitted, lest their new account be connected to an older profile they established under their previous

name.³⁴ For Relos inclined to post “selfies,” even an unintended connection made by the social media platform would constitute an identity, and possibly location, security breach *by the Program participant*, triggering an immediate review of the Relo’s case for removal from the Program. In the last decade, social media security breaches have been the main reasons for cause terminations.³⁵ The Program recognizes that social media involvement is a “normal” part of today’s world and, understandably, is used by many to feel less disconnected or isolated. The temptation to use it to reconnect with one’s past is too great, however, and therefore, its use is not recommended at all.

Also, running afoul of law enforcement in any way can risk exposing a Relo’s identity if the Relo is subject to routine law enforcement checks such as fingerprinting. Contrary to what popular television shows about the Program might have you believe, the USMS does not intervene if a Relo is arrested and fingerprinted. Furthermore, irrespective of guilt, if Mr. Smith’s fingerprints are shown as belonging to Mr. Johnson, the Relo’s chance of remaining in the Program are next to zero, which is why, “do not commit any crimes” and “avoid any situation that can get you arrested” are among the first tenets stressed to Relos.

There are times when a Relo has no control over whether his/her new identity is breached, such as when a third party collects information for security or commercial purposes. Recent examples of this include cameras and software used in retail settings to collect biometric or other personal data about its customers. In the private sector especially, the USMS has no access or control over this data, making remediation, even if possible, highly improbable. Altogether, these obstacles can be managed—but it requires Relos to take responsibility for their activities and develop and use situational awareness to avoid jeopardizing their safety.

³⁴ Facebook’s facial recognition software, for instance, operates at near-human levels of facial recognition, boasting a 97% accuracy rate in its analysis of an individual in a photo. YANIV TAIGMAN ET. AL., *DEEPFACE: CLOSING THE GAP TO HUMAN-LEVEL PERFORMANCE IN FACE VERIFICATION* (2014).

³⁵ Beware that foreign nationals who terminate for cause may be subject to removal from the United States by DHS.

IV. Conclusion

Fifty years since its inception, the Program's mission remains the same—to protect government witnesses and cooperators so that the most serious and violent criminals can be prosecuted using testimony not limited or denied to prosecutors by a witness's fear of reprisal. As prosecutors continue to build cases to dismantle gangs and organized crime groups, finding that critical cooperator will arguably remain the single most important way to break the case wide open. And while the Program, which has evolved into one of the most effective and successful crime fighting tools against gangs and criminal organizations, will help keep witnesses alive, it is not without its limitations. Prosecutors must be equally aware of the Program's benefits and limitations before they seek to use it. Fortunately, prosecutors are not alone in navigating these difficult issues.

For nearly the life of the Program, OEO, working hand in hand with the BOP and the USMS, has developed an expertise that can greatly support prosecutors and agents. From answering initial questions about how the Program works to dealing with technological issues like facial recognition, OEO can provide the information that prosecutors and agents need at every step. Contact OEO early and often. Furthermore, the Program continues to adapt to our changing society so it can handle the logistical and technological challenges that the next fifty years promises to bring.

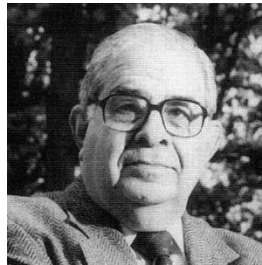
About the Authors

Susan K. Dozier began her 25-year legal career as a Deputy District Attorney in Los Angeles County, where she served for more than 15 years before joining the Department's Criminal Division, Office of Enforcement Operations (OEO) in 2010. As a Trial Attorney in OEO's Electronic Surveillance Unit (ESU), she worked on hundreds of complex wiretap requests in drug cartel, gang, and organized crime cases. In 2014, she formalized the ESU's wiretap training program for the field and then detailed to the White House in 2015 to serve as a Senior Domestic Policy Advisor for Criminal Justice reform. She returned to the Criminal Division in 2016 to serve as Deputy Chief of OEO's Special Operations Unit (SOU). In 2018, she was selected to serve as SOU's Acting Chief and Acting Deputy Director of the Program until her full appointment to the positions in March 2019.

Don O’Hearn began his 27-year law enforcement career with the New York State Police before joining the U.S. Marshals Service in the Eastern District of New York. He has served in many USMS leadership positions within New York and New Jersey. In 2009, he joined USMS headquarters as Chief of International Investigations and has since been progressively promoted to the Chief of Staff, Assistant Director of the Office of Professional Responsibility, and currently, the Assistant Director of the Federal Witness Security Program, where he commands a staff of approximately 250 of the USMS’s best and brightest in the field of witness protection.

* * *

**In Memory of Gerald “Gerry” Shur,
“Godfather” of the Program.**



As Deputy Director of the Program, it was an honor to write this article on the occasion of the 50th anniversary of the legislation establishing it. It is equally an honor to pay tribute to the legendary Gerry Shur, whose passing sadly coincided with this article’s finalization. Gerry’s stamp on the Program still looms large, and I had hoped to meet him one day and express my gratitude for the opportunity to further his legacy. But for Gerry’s vision, dedication, and the sacrifices he made more than 50 years ago, the Program might not be what it is today. This article, a retrospective look at the Program, is wholeheartedly dedicated to Gerald “Gerry” Shur.³⁶

A handwritten signature in blue ink, which appears to read "Don O'Hearn". The signature is written in a cursive, flowing style.

³⁶ Emily Langer, *Gerald Shur, Founder of the Federal Witness Protection Program, Dies at 86*, WASH. POST (Sept. 2, 2020), www.washingtonpost.com/local/obituaries/gerald-shur-founder-of-the-federal-witness-protection-program-dies-at-86/2020/09/02/6fe09696-eba5-11ea-b4bc-3a2098fc73d4_story.html.

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Thwarting White-Supremacist Gangs: DOJ's Early Mission and Federal Prosecutors' Current Battle

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On June 22, 1870, President Ulysses S. Grant—the man who led the Union Army to victory in the Civil War and helped secure the end of legal slavery in the United States—signed into law “An Act to establish the Department of Justice.”¹

The nascent Department of Justice (Department) had a daunting immediate mission: investigate and prosecute the Ku Klux Klan, a widespread movement of thuggish white-supremacist associations terrorizing formerly enslaved African Americans and their allies throughout the South.

During the months and years that followed, the Department's prosecutors drove gaggles of Ku Klux members into hiding, secured thousands of indictments and hundreds of convictions, and even obtained significant jail time for some Klansmen. The Department dealt the Klan a devastating—albeit temporary—blow.

Now, on its 150th anniversary, the Department's prosecutors in the United States Attorneys' Offices (USAOs) and the Criminal Division are still battling violent and organized criminal groups built on a foundation of white supremacy. Some of these gangs originated in corrections systems across the country. Their assaults, drug trafficking, and homicides have spilled outside prison walls and into countless communities.

The legacy of the Department's early efforts to squelch Klanism and violent white supremacy continues today with its prosecutions of race-based prison and street gangs that pose a grave threat to public safety.

¹ An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870). Throughout this article, the Department of Justice is referred to as the “Department.”

I. Vanquishing the Ku Klux Klan

A. Ku Klux origins and “outrages”

The Union’s military victory in the Civil War in 1865 paved the way for a revolution in the United States’ legal system.

The ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution from 1865–1870 abolished slavery; conferred citizenship to any person born or naturalized in the United States; prohibited any state from denying due process and equal protection of the law for any citizen, including the formerly enslaved; and guaranteed that neither the United States nor any state shall deny any citizen’s right to vote based on the citizen’s “race, color, or previous condition of servitude.” Each amendment gave Congress the power to enforce its provisions by “appropriate legislation.”²

This constitutional commitment to human dignity and justice provided hope that the country could be “reconstructed”—not rebuilt as it was under an archaic regime, but erected anew as a nation where all are equal under the law. Eric Foner, one of the foremost historians of the Reconstruction era, has characterized this period as the nation’s “second founding.”³

Despite the promise of a new order, some scorned the proposition of an epoch of legal equality.

Throughout the postbellum South, white supremacists clung to beliefs on which their states had seceded from the Union and sought to impose a new form of slavery.⁴ They despised the civil rights now guaranteed to African Americans, especially Black men’s enfranchisement. They were dismayed the federal government and

² U.S. CONST. amend. XIII, §§ 1, 2; U.S. CONST. amend. XIV, §§ 1, 5; U.S. CONST. amend. XV, §§ 1, 2.

³ See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (Norton & Company, Inc. 2019).

⁴ The secession declarations and resolutions of several state legislatures that voted to join the Confederacy explicitly cited devotion to slavery and white supremacy as a basis for leaving the Union. Some of these proclamations voiced outrage at the notion of Black suffrage. See JAMES W. LOEWEN & EDWARD H. SEBESTA, *THE CONFEDERATE AND NEO-CONFEDERATE READER: THE “GREAT TRUTH” ABOUT “THE LOST CLAUSE”* 116, 127–28, 141, 153, 156, 158 (University Press of Mississippi 2010) (compiling the resolutions of South Carolina, Mississippi, Texas, Virginia, and Arkansas).

Republicans—the partisan allies of African Americans—assumed control of local governments, often supported by new Black voters.

In mid-1866, Confederate war veterans in Pulaski, Tennessee, formed an association wedded to the old ways. They named their group by bastardizing the Greek word *kuklos*—meaning a ring, band, or circle—yielding the mysterious-sounding “Ku Klux.”⁵

The Ku Klux Klan’s founders fancied themselves intellectuals and society’s elite. It is unclear if they took a direct part in any violence toward Blacks or civil-rights proponents. But in September 1866, they posed for a group portrait calling themselves “Midnight Rangers,” evocative of the nighttime raids for which Klansmen would become infamous. Some early adherents dressed in elaborate robes, masks, and costumes that were carnival-like, ghoulish, or menacing. These founders and supporters established a moniker, image, and cause that other groups of similarly disgusted or enraged white men willing to do violence took up enthusiastically. They desired to become a political force, which evolved into a pernicious resistance against federal efforts to guarantee African Americans’ rights.⁶

Historian Elaine Frantz Parsons cautions that the Klan was not a single enterprise, similar to some of today’s organized crime syndicates and highly structured national and transnational gangs. Rather, it was a movement of myriad local groups united in restoring white racial dominance in the postwar, post-emancipation South.

“Wedding small-scale organizations with an insistent discursive claim to regional coherence,” Frantz writes, “the many small groups that comprised the first Ku-Klux Klan would together become the most widely proliferated and deadly domestic terrorist movement in the history of the United States.”⁷

Local groups assuming the Ku Klux mantle began spreading. Federal authorities began to notice the Klan as a resistance movement by mid-to-late 1867. In December 1867, one Columbia, South Carolina, based officer with the Freedmen’s Bureau—the federal agency created in 1865 to provide relief and economic and educational support to newly freed Blacks throughout the South—

⁵ ELAINE FRANTZ PARSONS, *KU-KLUX: THE BIRTH OF THE KLAN DURING RECONSTRUCTION* 29–31 (2015).

⁶ *Id.* at 30–44, 45–49.

⁷ *Id.* at 6.

expressed concern about the “kuKlux” and its purpose to “annoy and intimidate the colored people.”⁸

By the winter of 1867–68, evidence of Klan violence emerged. In the ensuing years—especially around election seasons—more violence erupted as the Freedmen’s Bureau and other federal authorities gathered reports of Ku Klux targeting Blacks and their white associates and allies.⁹ Freedmen’s Bureau officers characterized the attacks as “outrages,” a term much of the nation would use to describe Klan violence against freedpeople.¹⁰ General Oliver Otis Howard, Commissioner of the Freedmen’s Bureau from 1865–1874 and a founder of Howard University, characterized the Ku Klux as a “monster terrible beyond question.” He stated its “main object from first to last was somehow to regain and maintain over the negro that ascendancy which slavery gave, and which was being lost by emancipation, education, and suffrage.”¹¹

The Klan’s intimidation tactics and campaign of violence—through threats, property damage, assaults, murders, and sexual violence—could be singularly brutal.

Politics tinged some of the violence. Klansmen, who largely served the interests of the Southern Democratic Party during that era, issued constant threats to Black and white Republican civic and political leaders and whipped and drove some of them from their homes and communities. One Alabama freedman reported how, in 1869, a Klansman invaded his home, beat him, “ravished a young girl who was visiting [his] wife,” and wounded a neighbor because they dared to “vote[] the radical [*i.e.*, Republican] ticket.”¹² Klan violence was particularly fierce in places such as upstate South Carolina, where there was a clear white majority population with a large number of

⁸ *Id.* at 8, 55.

⁹ *Id.* at 7, 55–57.

¹⁰ WILLIAM S. MCFEELY, GRANT 368 (1981); *see also African American Records: Freedmen's Bureau*, NAT'L ARCHIVES, <https://www.archives.gov/research/african-americans/freedmens-bureau> (last visited Nov. 19, 2020) (cataloging reports of “mobs and outrages” from state Freedmen’s Bureau officers).

¹¹ OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD, Vol. II, 375 (1907).

¹² ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863-1877 425–27 (Harper & Row 1988).

white Republicans. In these areas, the balance of power between the white supremacists and the Republicans was fragile.¹³

Brawley Gilmore, a South Carolina freedman, vividly described examples of Ku Klux terror, including intimidation, reprisal for reporting crimes, murder, and even a savage form of target practice:

We lived in a log house during the Ku Klux days. They would watch you just like a chicken rooster watching for a worm. At night, we was scared to have a light. They would come around with the “dough faces” on, and peer in the windows, and open the door. If you didn’t look out, they would scare you half to death.

John Good, a [Black] blacksmith, used to shoe the horses for the Ku Klux. He would mark the horseshoes with a bent nail or something like that; then after a raid, he could go out in the road and see if a certain horse had been rode. So, he began to tell on the Ku Klux.

As soon as the Ku Klux found out they was being give away, they suspicioned John. They went to him and made him tell how he knew who they was. They kept him in hiding; and when he told his tricks, they killed him.

When I was a boy . . . , the Ku Klux would come along at night a-riding the [Blacks] like they was goats. Yes, sir, they had them down on all-fours a-crawling, and they would be on their backs. They would carry the [Blacks] to Turk Creek bridge and make them set up on the bannisters of the bridge. Then, they would shoot them offen the bannisters into the water. I declare them was the awfulest days I ever is seed.¹⁴

¹³ W. SCOTT POOLE, NEVER SURRENDER: CONFEDERATE MEMORY AND CONSERVATISM IN THE SOUTH CAROLINA UPCOUNTRY 109 (2004).

¹⁴ BELINDA HURMENCE, BEFORE FREEDOM, WHEN I JUST CAN REMEMBER: TWENTY-SEVEN ORAL HISTORIES OF FORMER SOUTH CAROLINA SLAVES 9–10 (Blair 1989). In the 1930s, the Federal Writers Project (FWP) collected narratives of formerly enslaved people. It bears noting the white FWP field workers transcribed their interviews based on their own interpretations of dialect. *Id.* at xiv. Hurmence slightly edits the original FWP manuscript of Gilmore’s interview from 1936. The FWP’s original, verbatim transcription is

Klan members also committed ferocious sexual and sexualized violence. While Klansmen claimed they needed to protect white women from the sexual desires of Black men, Black women were frequent targets of Ku Klux predations, and Klansmen's crimes often reflected their own psychosexual frailty.¹⁵

The growing litany of outrages commanded the nation's attention. The threat of the Klan—both as individual violent crews and a collective terrorist movement—demanded a strong federal response.

B. The creation of the Department and enactment of the Enforcement Acts

Congress' establishment of the Department of Justice in 1870 arose from dual necessities: the need to consolidate the federal government's legal advocacy and policy under a single Cabinet-level bureaucracy, and the urgency to safeguard freedpeople's rights by quashing Ku Klux Klan violence.

To address the stark threat the Klan posed to the rule of law throughout the South, Congress passed three statutes, collectively known as the Enforcement Acts. Two of which—the First Enforcement Act of 1870 and the Ku Klux Klan Act of 1871—were among the new legal tools the Department employed to put down the Klan.¹⁶

available in the Library of Congress collection at <https://www.loc.gov/resource/mesn.142/?sp=124>.

¹⁵ For example, in North Carolina, a Freedmen's Bureau Commissioner from Raleigh detailed how disguised attackers beat a freedwoman, stripped off her clothes, whipped her with a board, and burned off her pubic hair before cutting her with a knife. In another North Carolina incident, Klansmen forced a Black man to mutilate his own genitals due to a labor conflict. *The Ku Klux Klan in Reconstruction North Carolina: Methods of Madness in the Struggle for Southern Dominance: Black Victims of Violence*, N.C. STATE UNIV. (Aug. 1, 2020). In an episode in South Carolina, Klansmen severely beat a white prostitute suspected of sleeping with Black men, forced her to lie in the middle of her yard, and poured hot tar on her vagina. As a Black man looked on in horror, Klansmen beat his wife and raped one of his daughters. POOLE, *supra* note 13, at 112.

¹⁶ The Second Enforcement Act, enacted on February 28, 1871, primarily addressed regulating voting registration and administering fair elections. Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1871).

1. Establishing the Department

The act establishing the Department centralized many of the federal government's legal functions under the authority of the Attorney General, a Cabinet post that had existed since George Washington's first presidential administration in 1789.¹⁷

The act also established the Solicitor General as the Department's second-highest ranking officer. It assigned the post its current responsibility to argue cases involving the United States before the Supreme Court and also gave the Solicitor General a role in lower-court litigation. Relevant to the Department's ensuing litigation of the Klan cases, the act provided the Attorney General "may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any court of the United States, or may require the solicitor-general or any officer of his Department to do so."¹⁸

Significant for the eventual Enforcement Act prosecutions, the act codified the Attorney General's supervision of the U.S. Attorneys—which the statute refers to as "district attorneys"—and the United States Marshals.¹⁹

2. First Enforcement Act of 1870

The foundation of federal efforts to protect voting rights for the next quarter century, the First Enforcement Act—enacted May 31, 1870, just a month before the act establishing the Department—sought to ensure the right of all qualified citizens to vote in state and local elections, regardless of "race, color, or previous condition of servitude."²⁰

¹⁷ Judiciary Act of 1789, ch. 29, 1 Stat. 73, § 35 (1789). The Judiciary Act also created the positions of the United States Attorneys and Marshals for the federal judicial districts but did not place them under the Attorney General's supervision. *Id.* at §§ 27, 35.

¹⁸ An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162, § 5 (1870).

¹⁹ *Id.* at §§ 15, 16, 17. Immediately before this codification, the Secretary of Interior had "supervisory powers . . . over the accounts of the district attorneys [and] marshals . . ." *Id.* at § 15.

²⁰ Enforcement Act of 1870, ch. 114, 16 Stat. 140, § 1 (1870); FONER, *supra* note 3, at 118.

The Act imposed civil and criminal penalties to enforce this right. Among its criminal provisions, it established misdemeanors for obstructing voting rights “by force, bribery, threats, intimidation, or other unlawful means” to any citizen or citizen’s family member.²¹ Harsher penalties existed for conspiring or going “in disguise upon the public highway, or upon the premises of another,” as Klansmen were wont to do, with intent to violate any provision of the Act; and for “injur[ing], oppress[ing], threaten[ing], or intimidat[ing] any citizen with intent to prevent or hinder” a citizen from exercising “any right or privilege granted or secured to him by the Constitution or laws of the United States,” or for exercising those rights. These offenses were felonies, punishable by up to 10 years in prison.²²

The First Enforcement Act conferred exclusive jurisdiction to the federal courts to hear criminal matters falling under its provisions.²³ This proved critical to the Department’s efforts, especially where local authorities were unwilling or unable to enforce freed people’s rights.²⁴

In addition to authorizing the Department’s officers to enforce the law, the Act authorized the President to employ the military to “aid in the execution of judicial process issued under this act.”²⁵

3. Ku Klux Klan Act of 1871

The Third Enforcement Act, enacted on April 20, 1871, came to be known as the “Ku Klux Klan Act.” In addition to imposing civil liability on any person who deprived any individuals of constitutional civil rights “under color of any law” of any state,²⁶ the Act also established federal criminal offenses for several violent and threatening actions the Ku Klux had been perpetuating throughout the South, even since the prior year’s passage of the First Enforcement Act.

²¹ *Id.* at §§ 4, 5.

²² *Id.* at § 6 (a fine of up to \$5,000 could also be imposed). If an individual, during the commission of interfering with voting rights or conspiring to violate other rights under federal law, committed any other felony or misdemeanor, the individual was subject to the same penalties established for the other crimes under the prevailing state law. *Id.* at § 7.

²³ *Id.* at § 8.

²⁴ FONER, *supra* note 12, at 459; JEAN EDWARD SMITH, GRANT 544 (2001).

²⁵ Enforcement Act of 1870, ch. 114, 16 Stat. 140, § 13 (1870).

²⁶ Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, §§ 1, 2, 6.

A significant portion of the Act related to conspiracies to commit numerous acts, including conduct relating to obstructing justice. These offenses included conspiracies to undermine the federal government's authority; prevent or threaten federal officials from executing federal law; injure federal officers for discharging their duties; deter witnesses from, or injure them because of, testifying truthfully in any court matter; or to deter grand and petit jurors from rendering indictments and verdicts.

Similar to the First Enforcement Act, the Ku Klux Klan Act re-established the offense of “conspir[ing] together, or go[ing] in disguise upon the public highway or upon the premises of another” to deprive rights, but tied it specifically to “depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.” The act also created offenses for interfering with any citizen's right to vote, or injuring the person or property of a citizen for voting, in presidential and congressional elections.

All these offenses were considered a “high crime,” punishable by a fine between \$500 and \$5,000; by “imprisonment, with or without hard labor, . . . for a period of not less than six months nor more than six years”; or both.²⁷

Expanding a power set forth in the First Enforcement Act, the Ku Klux Klan Act authorized the President to employ the military to suppress “all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder” local or federal law and the rights guaranteed under the Constitution and where local authorities were unable—or failed or refused—to protect equal-protection rights. States or parts of a state under such conditions would be deemed in “rebellion against the government of the United States,” and the President could “suspend the privileges of the writ of habeas corpus” to overthrow “such rebellion.”²⁸

Congress clearly intended both the First Enforcement Act and the Ku Klux Klan Act to broaden Fourteenth and Fifteenth Amendment protections, which cover state action, by prohibiting private

²⁷ *Id.* at § 2.

²⁸ *Id.* at §§ 3, 4.

individuals' interference with the civil rights those amendments established.²⁹

C. The prosecutions

With its new battery of statutes, the Department headed south to battle the Klan, establishing an honorable precedent. As Pulitzer laureate Ron Chernow wrote, "Through the Justice Department, the federal government would emerge as the undisputed champion of civil liberties in the southern states, carving out a new role."³⁰

1. Akerman and Bristow

Initially leading the Department's efforts was Attorney General Amos T. Akerman, who served from June 23, 1870, until December 13, 1871. Akerman may have been an unlikely champion. A New England expatriate who settled in Georgia, he operated a farm with slave labor and served in the Confederate Army. But after the war, he joined the Republican Party and became a zealous defender of civil rights for African Americans, with the will to aggressively use the Department's new authority to enforce those rights.³¹

The Department's first Solicitor General, Benjamin Bristow of Kentucky, was equally committed to ensuring freed people's rights. Bristow served as a Union colonel during the Civil War and then as U.S. Attorney for the District of Kentucky from 1866–1870. While U.S. Attorney, Bristow wrote Akerman's predecessor, Attorney General Ebenezer R. Hoar, it "is a matter of first importance to the 225,000 Colored people of this state" that civil-rights laws be "maintained and enforced."³²

²⁹ As the sponsor of the First Enforcement Act, Senator John Pool of North Carolina, stated, if Congress could not proscribe the actions of private individuals in addition to public officials to safeguard those rights, "the danger to the liberty of the citizen is great indeed in many parts of this Union." FONER, *supra* note 3, at 118.

³⁰ RON CHERNOW, GRANT 703 (2017).

³¹ Gretchen C.F. Shappert, *Fighting Domestic Terrorism and Creating the Department of Justice: The Extraordinary Leadership of Attorney General Amos T. Akerman*, 68 DOJ FED. L. & PRAC., no. 1, 2020, 127, 133 n.45, 135. Shappert, the current U.S. Attorney for the District of the Virgin Islands, is a national authority on Ackerman. Her recent article extensively profiles his leadership as the 31st Attorney General of the United States.

³² CHERNOW, *supra* note 30, at 701.

Akerman and Bristow's strong leadership was needed as Ku Klux prosecutions swelled the U.S. Attorneys' caseloads. The peak of Klan prosecutions occurred from 1871–74. The sheer volume of defendants forced the Department to exercise considerable prosecutorial discretion, which has generated criticism among some recent historians. Akerman authorized prosecutors to use the quite modern tactic of securing criminal cohorts' cooperation to crack Klan units. In South Carolina, for example, he spared from punishment defendants who confessed and identified leaders, while bringing a few dozen of the worst offenders to trial.³³

Two districts—the Northern District of Mississippi and the District of South Carolina—accounted for 48% of the Department's Enforcement Act cases over 13 years from 1871–84.³⁴

2. Northern District of Mississippi

In the Northern District of Mississippi from 1871–84, four of the district's five U.S. Attorneys were native Southerners and longtime Mississippi residents. Three, like Akerman, served in the Confederate Army. Despite their prior loyalty, they believed the only way to reestablish order and tamp down Klan violence was through federal enforcement.³⁵

G. Wiley Wells—the one native northerner from this group and a Union Army veteran—served as the U.S. Attorney from 1870–75 and brought nearly 700 Ku Klux indictments.³⁶ Wells was an enthusiastic enforcer, reveling in mounting up to help the Marshals arrest Klansmen. In a telegram to Solicitor General Bristow in 1871, he remarked he had just returned from Tishomingo County, the northeast corner of Mississippi, where he and the United States Marshal had “captured five KK with disguises.”³⁷

Over the longer period from 1871–84, the United States Attorneys and their assistants secured 585 convictions in Northern Mississippi,

³³ FONER, *supra* note 12, at 458.

³⁴ Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890*, 53 J. S. HIST. 3, 422–23 (1987).

³⁵ EXEC. OFFICE FOR U.S. ATTORNEYS, *Bicentennial Celebration of the United States Attorneys: 1789–1989* (1989).

³⁶ *Biography of Guilford Wiley Wells*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS (last visited July 15, 2020); FONER, *supra* note 12, at 457.

³⁷ Cresswell, *supra* note 34, at 428.

nearly all of which involved prosecutions of Klan members. The district's conviction rate was 55%, almost double the Department's overall average. Nearly all 262 convictions in 1872 resulted from jury trials tried by Wells himself and a single assistant.³⁸

The enforcement effort in Northern Mississippi could be perilous for marshals and prosecutors. Marshals suffered snubs, threats, and assaults. Deputy Marshal C.H. Wissler—whose own in-laws were Klan members—was fatally shot at his home shortly after providing critical testimony in Klan cases. Wells received a letter warning he would be killed, and a deputy marshal wrote Akerman that Wells had once “received such a dose of poison that we despaired of saving his life.” One Assistant United States Attorney (AUSA) who handled hundreds of Klan cases wrote he was “threatened and [he] was repeatedly informed [he] was in constant danger.”³⁹

Despite the courageous efforts of the marshals and prosecutors to hold Klansmen accountable, sentences for those convicted were typically light. Part of the reason was statutory. Enforcement Act prosecutions in Northern Mississippi and elsewhere were commonly charged as conspiracy offenses—not substantive crimes of violence, which were typically local offenses—and the maximum sentence was 10 years or 6 years, depending on which statute was violated.⁴⁰

Another part of the reason was the district judge, Robert A. Hill—who encouraged defendants to plead not guilty and take cases to trial—typically imposed a sentence of a fine of \$25 and the posting of a \$1,000 peace bond that would be forfeited if the defendant reoffended. There were some exceptions. One historian who examined 100 of the 446 convictions from 1872–73 found that Hill sentenced five egregious assailants to incarceration terms of 24 hours, six months, two years, five years, and seven years. Wells, while writing proudly of the district's prosecutions, bemoaned Hill's lenient sentences: “If our kind hearted judge can only be kept from destroying the effect produced by the convictions of these midnight assassins, I can within six months rid this entire district of the Ku Klux.”⁴¹

³⁸ *Id.* at 436; EXEC. OFFICE FOR U.S. ATTORNEYS, *supra* note 35, at 96.

³⁹ Cresswell, *supra* note 34 at 433, 434. Not surprisingly, civilian witnesses were also imperiled. In 1873, Wells reported to the Department that four witnesses who testified before a grand jury were murdered. *Id.* at 432.

⁴⁰ Enforcement Act of 1870, ch. 114, 16 Stat. 140, § 6; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 2; Shappert, *supra* note 31, at 140.

⁴¹ Cresswell, *supra* note 34, at 436.

Historian Stephen Cresswell surmises the high conviction rates in Northern Mississippi resulted from jurors—many of whom were Democrats—knowing Hill’s sentencing proclivity; they did not fear convicting their neighbors, knowing they would likely receive a mere fine. “The only thing that makes the northern district of Mississippi fundamentally different from other districts,” Cresswell asserts, is “that a combination of aggressive Democrats [Klansmen and their allies], energetic federal prosecutors, and a mild judge led to large numbers of Enforcement Act convictions.”⁴²

3. District of South Carolina

The District of South Carolina, site of some of the most intense Klan-sown chaos, required not only aggressive prosecution, but military intervention. This was the only state where the federal government needed to invoke the Enforcement Acts’ military provisions.⁴³

At Akerman’s urging, President Grant, on October 17, 1871, declared a “condition of lawlessness” and suspended habeas corpus in nine upstate counties. Federal troops and cavalry deployed to assist with apprehending Ku Klux suspects against whom federal authorities had spent months collecting evidence. Within just a few days of Grant’s declaration, United States Marshals, escorted by cavalry, made scores of arrests. By early January 1872, United States Attorney David T. Corbin informed Akerman 472 arrests had been made so far. By April 1872, that number increased to 533.⁴⁴

In addition, many Klansmen—fearing, realistically or not, severe punishment under federal law—surrendered to authorities. In the two weeks after the suspension of habeas corpus, 300 men surrendered in Yorkville, in York County. Crowding in jails was so bad that federal authorities allowed many of the “lesser” criminals to be bailed out. Even confessed murderers were allowed to be bailed to their homes to clear jail space for yet worse offenders.⁴⁵

⁴² *Id.* at 439.

⁴³ FONER, *supra* note 12, at 457.

⁴⁴ *Id.*; RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA 98–99 (1996).

⁴⁵ ZUCZEK, *supra* note 44, at 99.

While the aggressive arrests in South Carolina could be seen as an enforcement victory, the actual prosecutions of Klan defendants, which began in earnest in 1871, were less successful.

Prosecutors faced numerous difficulties. They had a limited budget, problems securing evidence, and reluctant witnesses. Defendants were assisted by legal defense funds and hired talented, experienced lawyers as defense counsel.⁴⁶

Overall, from 1871–84, the Department charged a total of 1,504 Enforcement Act cases in South Carolina. The peak occurred in the first three years, with later prosecutions focused on non-Klan political intimidation and election fraud. Of these cases, there were 168 convictions (11%), 61 acquittals (4%), and 1,275 *nolle prosequi* (85%).⁴⁷

Richard Zuczek, the senior historian at the United States Coast Guard Academy, opines the prosecution campaign in South Carolina yielded dubious results:

After a wave of political terrorism unprecedented in the history of the United States, a handful of low-ranking Ku Klux Klan members had been sentenced to a few years in jail. To be sure, hundreds had been arrested, indicted, and now awaited trial. But many more had avoided arrest, while a large proportion of those arrested were walking around free—and would never see the inside of a courtroom.⁴⁸

Despite the dismal conviction rate and the inability to keep many Klansmen behind bars, the Department's enforcement efforts caused

⁴⁶ FONER, *supra* note 12, at 457–58.

⁴⁷ Cresswell, *supra* note 34, at 422. *Nolle prosequi* is an abandonment of the prosecution.

⁴⁸ ZUCZEK, *supra* note 44, at 104. Even if criticism of the Department's prosecutions in South Carolina is warranted, not all Klansmen prosecuted everywhere were low-lying fruit. In North Carolina—where the Department's prosecutors secured hundreds of indictments against Klansmen—the Department convicted Randolph Shotell, a Confederate veteran who had led the Klan in Rutherford and Polk Counties. Arrested in July 1871, Shotell wound up serving two years in a federal prison in Albany, New York, where 65 Klansmen from across the South were sent to serve time. FONER, *supra* note 12, at 457–58; Gordan McKinney, *The Klan in the Southern Mountains: The Lusk-Shotwell Controversy*, 8 APPALACHIAN J. 2, 91 (1981); CHERNOW, *supra* note 30, at 708.

as many as 2,000 Klansmen to flee South Carolina.⁴⁹ Akerman wrote how one state judge, sympathetic to the Ku Klux, was critical of the prosecutions and rued that “fifteen hundred to two thousand of his [Ku Klux] neighbors h[ad] absconded.” Akerman’s natural reaction was “none but the guilty would flee.”⁵⁰

From the standpoint of pure disruption of the Klan’s criminal activities, the government’s strategy in the South Carolina worked.

4. Larger purposes

Nationally, in the decade-plus period of Enforcement Act prosecutions from 1871–84, the Department charged 5,386 cases, resulting in 1,529 convictions (28.4%), 502 acquittals (9.3%), and 3,355 (62.3%) *nolle prosequi*.⁵¹ The overall conviction rate was not stellar.⁵²

But Foner recognizes the “larger purposes” of the enforcement policy—“restoring order, reinvigorating the morale of Southern Republicans, enabling Blacks to exercise their rights as citizens”—largely prevailed.⁵³ Other historians agree.⁵⁴

⁴⁹ FONER, *supra* note 12, at 457–58.

⁵⁰ MCFEELY, *supra* note 10, at 372.

⁵¹ Cresswell, *supra* note 34, at 422.

⁵² By comparison, the contemporary conviction rate for all charged Department defendants is typically in excess of 90%, either through guilty pleas or verdicts at trial. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH Ctr. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

⁵³ FONER, *supra* note 12, at 458–59.

⁵⁴ See CHERNOW, *supra* note 30, at 709, 710 (“By 1872, . . . the Ku Klux Klan had been smashed”; praising Akerman for “superlative service in squashing the Klan”); ZUCZEK, *supra* note 44, at 103 (acknowledging “some historians contend that federal intervention in South Carolina destroyed the Klan, and bolstered the [Grant] administration’s enforcement program”); Cresswell, *supra* note 34, at 439 (acknowledging historians William C. Harris and Everette Swinney opine that due to the Department’s prosecutions, Klanism ceased). *But see id.* (“[W]hen the focus is shifted from the early 1870s to the whole of the late century”—which would include the later, infamous federal retreat from enforcement after the election of 1876—“it becomes clear that the enforcement program in northern Mississippi, as elsewhere, was a notorious failure. Black participation, honest elections, and the Republican party [in the state] virtually disappeared.”); ZUCZEK, *supra* note 44, at 104–

Also telling, contemporaries whose stakes were on the line affirmed the policy's success. In October 1871, Senator Adelbert Ames, a Mississippi Republican, wrote:

Had it not been for the Ku Klux law . . . we would not have any showing at this election. At one time, just previous to the passage of that law, the K.K. organizations were being perfected in every county in the state. It is believed by our friends that had the law not been passed, not one them would have been safe outside of a few of the larger cities. As it is, the K.K.'s, cowards as they are, have for a time at least suspended their operations in all but the eastern parts of the state. Recent convictions in North Carolina and the President's action in putting a part of South Carolina under martial law has had a very subduing effect all over the South. It is perceptible here.

By 1872, Frederick Douglass, the era's foremost champion of African Americans and the civil rights of all people, succinctly stated, "Peace has come to many places as never before. The scourging and slaughter of our people have so far ceased."⁵⁵

Foner concludes the federal government's full use of its "legal and coercive authority . . . broke[] the Klan's back," reduced Southern violence dramatically, and resulted in "an acquiescence in the rule of law."⁵⁶

D. Aftermath

Regardless of the paltry conviction rate and criticism about how the Department exercised discretion, its enforcement effort dismantled the Ku Klux for decades. Not until the 1910s and '20s, alas, would a new incarnation of the Klan wreak more terror in communities all over the country, not only in the South.⁵⁷

Myriad racial challenges would beset the nation in the century and a half following Reconstruction. Following the presidential election of

05 (arguing Klan violence in South Carolina began to subside *before* the crackdown of 1871–72; still, this does not account for the sustained impact of aggressive federal enforcement even after violence began to decrease).

⁵⁵ CHERNOW, *supra* note 30, at 709–10.

⁵⁶ FONER, *supra* note 12, at 458–59.

⁵⁷ PARSONS, *supra* note 5, at 8.

1876, the federal government largely retreated from aggressive enforcement in Southern states, the result of a political compromise.⁵⁸ Other individuals and hateful groups continued to intimidate, threaten, assault, murder, and control African Americans throughout the South and elsewhere.⁵⁹ State-sanctioned discrimination persisted into the second half of the 20th century. Numerous racial conflicts required intensified federal action on additional legal fronts.

But during the ferment of the Enforcement Act prosecutions, the Department accomplished its narrow mission of defeating the country's most prominent white-supremacist movement and its denizens. More enduring, the Department firmly established itself as a guarantor of constitutional and civil rights and a formidable foil to violent racist groups.

II. Tackling today's white-supremacist prison and street gangs

Violent white-supremacist criminal groups continue to menace the country.

The Anti-Defamation League (ADL) has admonished, "The growth and spread of . . . white supremacist gangs has become one of the United States' most serious—but least talked about—white supremacist problems."⁶⁰

⁵⁸ CHERNOW, *supra* note 30, at 849; FONER, *supra* note 3, at 126.

⁵⁹ See ZUCZEK, *supra* note 44, at 139 (noting that while the government's attention was focused on eradicating the Klan, gun-and-sabre clubs cropped in small towns in South Carolina, "with many appearing across the up-country region to replace the Ku Klux Klan network." These clubs "aimed to cow, and if necessary destroy," local militia led by African Americans.); see also JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 282–86 (6th ed. 1988) (detailing racial violence, including thousands of lynchings, against African Americans from late 19th century into the early 20th century in the South and North).

⁶⁰ ANTI-DEFAMATION LEAGUE, WHITE SUPREMACIST PRISON GANGS IN THE UNITED STATES: A PRELIMINARY INVENTORY 1 (2016). Many white-supremacist groups of varying stripes exist in the United States. Some "traditional" white supremacist groups, like Neo Nazis, may commit some violent acts or other crimes, but are primarily political in nature. *With Hate in their Hearts: The State of White Supremacy in the United States*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/reports/state-of-white-supremacy#neo-nazis> (last visited Nov. 6, 2020). Others, like

Prisons are breeding grounds for white-supremacist gangs. The ADL has identified nearly 100 white-supremacist prison gangs operating in one or more states. At least 35 states have at least one operating within their borders, and most of these states have multiple. The gangs have also metastasized into the federal prison system. As members are released from prison, the presence of the gangs in outside communities grows. Some white-supremacist sets are just as active on the street as they are behind bars.⁶¹

As it viewed the Ku Klux Klan 150 years ago, the Department considers white-supremacist gangs a grave threat to public safety. Some of the Department's most significant investigations and prosecutions in recent years have focused on crushing them.

A. Origins and culture of white-supremacist gangs

Contemporary white-supremacist gangs are closely tied to criminal groups that emerged in state corrections systems. Racist beliefs inform their identities and, sometimes, motivate their crimes. But like other gangs, their primary drivers are maintaining power, often through horrific violence, and making money, frequently through trafficking drugs like methamphetamine.

Droves of white-supremacist gangs operate across the country. But two gangs—the Aryan Brotherhood and the Aryan Brotherhood of Texas—may be the best known and most powerful.

1. The Aryan Brotherhood

The oldest, most notorious white-supremacist gang is the Aryan Brotherhood (AB).

The AB formed at California's San Quentin State Prison in 1964 during a period of desegregation of state and federal prisons. In many instances, white and Black inmates commingled for the first time, and violent conflicts emerged. A group of Irish bikers in San Quentin

Outlaws Motorcycle Gangs, are primarily criminal in nature, and may have some racist views, but have usually had "a small amount of crossover between white supremacist subcultures," though ties to white-supremacist groups have grown in recent years. ANTI-DEFAMATION LEAGUE: BIGOTS ON BIKES: THE GROWING LINKS BETWEEN WHITE SUPREMACISTS AND BIKER GANGS 3 (Sept. 2011). This article focuses on criminal gangs, built on notions of white supremacy, that originated mainly in prisons and spread to outside communities.

⁶¹ ANTI-DEFAMATION LEAGUE (2016), *supra* note 60, at 1, 2–3.

allied with other white sets and formed the AB to defend against a violent Black prison gang, the Black Guerilla Family.⁶²

By 1975, the AB proliferated into most California state prisons, where racial strife and attacks between race- or ethnic-based prison gangs were raging. As numerous high-ranking AB leaders were sent to federal prison, the gang took root in the federal Bureau of Prisons (BOP) system. The organization then split into two divisions: the California AB and the federal-system AB, each allied with the other but with its own ruling “commission.” The AB as a whole grew precipitously, in part by subsuming racist skinhead gangs operating behind bars. Current estimates place the AB’s total membership at about 20,000 inmates in both state and federal prisons.⁶³

Joining the AB can be an arduous process. New recruits typically go through a one-year probation in which they are indoctrinated with the gang’s racist beliefs. They take a “blood in, blood out” oath, which usually requires them to commit a violent act, such as an aggravated assault or murder of a corrections officer or rival gang member, as part of initiation. As one criminologist explains the oath, “Once an individual has joined, he is a member for life. Blood must spill in order to be admitted and released from membership.”⁶⁴

A former AB commissioner, John Greschner, once described how AB members, or “brothers,” ruthlessly operate behind bars:

For the Aryan Brotherhood, murder is a way to make a social statement. If blacks attack whites, we send a message. We go pick one of their shot callers. We catch them walking across the [prison] yard under guard escort. It don’t matter. We’re going to butcher him in front of God and everybody at high noon in the middle of the yard. And it’s not just going to be a few clean stab marks. It’s going to be a vicious, brutal killing. Because that’s how brothers take care of business⁶⁵

⁶² *Aryan Brotherhood*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/aryan-brotherhood> (last visited July 19, 2020).

⁶³ *Id.*

⁶⁴ MARY BOSWORTH, *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES*, Vol. 1 40–41 (2005).

⁶⁵ S. POVERTY LAW CTR., *supra* note 62.

AB members are involved in extortion and drug dealing—primarily methamphetamine—in prison. On the streets, they have been responsible for high-profile murders in California, Indiana, Texas, and elsewhere. Finding reliable witnesses to testify against the AB can be challenging; AB members often fear they will “blood out” for cooperating with law enforcement, and non-AB inmates and civilians similarly fear lethal consequences for snitching.⁶⁶

2. The Aryan Brotherhood of Texas

While they may share similar names, the Aryan Brotherhood of Texas (ABT) is a separate gang from the California-based AB.

The ABT emerged from the building-tender program within the Texas Department of Corrections (TDC). For decades, building tenders were inmates—mostly white—whom corrections officers, also mostly white, used to carry out punishments on other inmates. Tenders were allowed to carry weapons, normally considered contraband, to inflict punishments and threaten other inmates. In exchange for their assistance to prison authorities, these favored inmates received additional privileges, such as freer mobility within the prison, more access to recreational facilities, single cells as opposed to shared cells, and having their own infractions overlooked by corrections officers.⁶⁷

Following a federal civil suit that resulted in dismantling the building-tender system,⁶⁸ the white ex-tenders were integrated into the prison population along with inmates of other races. Similar to the situation in the California prison system during its desegregation process, tensions arose between various racial and ethnic groups, and they coalesced into gangs. The crew that became the ABT absorbed

⁶⁶ BOSWORTH, *supra* note 64, at 41.

⁶⁷ *Id.*; See Ruiz v. Estelle, 503 F. Supp. 1265, 1274–75, 1288, 1296–97 (S.D. Tex. 1980) (finding while tenders were “primarily white,” whites constituted only 39% of the TDC’s nearly 25,000 inmates; explaining the many privileges tenders were allowed and how tenders “often brutalize[d] their fellow prisoners, with the tacit approval or direction of civilian prison personnel”).

⁶⁸ See Ruiz, 503 F. Supp. at 1387 (among other relief ordered by the court, TDC “officials will be charged with the duty of instituting, performing and supervising practices that will extirpate and abate staff brutality, the use of building tenders, [and] abuse of the disciplinary process”).

smaller white sets and organized, like AB did in California, to defend against other race- and ethnic-based gangs.⁶⁹

In 1981, the inmates who became the ABT's founders contacted the California organization seeking permission to form an AB clique in Texas. When the AB's leadership rejected the proposal, the inmates established their own prison gang.⁷⁰

Like the Ku Klux looking to reclaim the power Confederates lost during Reconstruction, ABT members sought to regain the institutional power they had as building tenders through extraordinary violence. From 1983–84, 52 inmates were killed in prison violence within the TDC. Despite constituting a small fraction of the overall inmate population, ABT members were responsible for approximately one-third of these murders.⁷¹

The Southern Poverty Law Center (SPLC) reports that, by 1985, the ABT became the “masters” of Texas prisons.⁷² The ADL now characterizes the ABT, though “always a minority of the prison population,” as the “top predators” in the TDC.⁷³

The ABT has a highly organized paramilitary structure, with leaders carrying titles of sergeants, captains, majors, and generals. The very top tier, a group of five generals assigned to different regions of Texas, is known as the “Steering Committee” or “Wheel.” The Wheel oversees the gang’s criminal activities inside and outside the prison system and orders punishments—sometimes sadistic—to members who violate the gang’s rules and to individuals who cooperate with law enforcement against the ABT.⁷⁴

⁶⁹ *Aryan Brotherhood of Texas*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/aryan-brotherhood-texas> (last visited July 24, 2020).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Aryan Brotherhood of Texas*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/profiles/aryan-brotherhood-of-texas> (last visited July 24, 2020).

⁷⁴ *Id.* In one instance, an ABT inmate who violated the gang’s rules by associating with a Black inmate was shanked 41 times. In another instance, ABT members beat, shocked with a battery charger, and murdered by strangulation with a plastic zip tie a 19-year-old woman believed to have reported that an ABT member sexually assaulted her. Her assailants attempted to cover up the murder by bathing her body in acid to eliminate DNA evidence, encasing it in concrete, and dumping it in a nearby lake.

The ABT's total membership, both inside and outside prison, is estimated at about 2,000 members, making it one of the largest white-supremacist gangs in the country. This may be an underestimate, considering the ABT's reliance on a crucial network of female associates, who smuggle messages and contraband inside prisons but are not allowed formal membership.⁷⁵

3. Racist ideologues or straight-up hoodlums?

White-supremacist gangs commonly adopt the Nazi symbolism of swastikas and the lightning bolts of the Nazi Schutzstaffel, or "SS." Constitutions of some gangs also extol the "the racial purity of the white race" and the "sublime principles of White Supremacy."⁷⁶

But both the AB and the ABT are not based solely on racial beliefs. Any means to enhance their power, sway, and prestige—especially through acts of violence and drug trafficking—may trump pure devotion to white supremacy.

The AB and the ABT, prolific traffickers of methamphetamine,⁷⁷ have cultivated drug-trafficking and other business partnerships with

Gangland: Aryan Terror (History Channel television broadcast 2009); *Texas Aryan Brotherhood Members Charged with Capital Murder*, ANTI-DEFAMATION LEAGUE (Sept. 26, 2006), <https://www.adl.org/news/article/texas-aryan-brotherhood-members-charged-with-capital-murder>.

⁷⁵ ANTI-DEFAMATION LEAGUE, *supra* note 73.

⁷⁶ Further, AB inductees have been required to read Hitler's *Mein Kampf*, and members identify themselves with shamrock tattoos flanked by swastikas and SS bolts. ABT members also rely on *Mein Kampf* as a seminal text for training new recruits and include a swastika in its logo bearing a shield and sword. One of ABT's symbols is the number 88, a reference to the *88 Precepts*, a white-supremacist tract popular in neo-Nazi circles. The number is also code for repeating the eighth letter of the alphabet—HH—an abbreviation of the Nazi salute "Heil Hitler." *Id.*; *White Supremacist Prison Gang Symbols: Aryan Brotherhood*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/aryan-brotherhood> (last visited July 19, 2020); *Gangland: Aryan Terror*, *supra* note 74; *Hate on Display Hate Symbols Database: Aryan Brotherhood of Texas*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/aryan-brotherhood-of-texas> (last visited July 25, 2020).

⁷⁷ See, e.g., Press Release, U.S. Attorney's Office (N.D. Tex.), *Aryan Brotherhood of Texas Members/Associates Convicted for Roles in Methamphetamine Distribution Conspiracy Sentenced to Lengthy Prison*

criminals of different racial and ethnic backgrounds, such as members of Mexican cartels.⁷⁸ Ex-AB leader Michael Thompson stated the AB is foremost “a criminal organization,” with supremacist ideology a secondary principle: “Is there racism? You bet there’s racism. Is it dominant? No.”⁷⁹ ABT member Dale Jameton succinctly stated why, among some ABT members, ideological purity may be ancillary: “Money’s green. Money ain’t black, money ain’t white.”⁸⁰

Still, other members may have stronger race-based beliefs and find fellow members who traffic drugs distasteful. “They’re race traitors,” ex-AB member Casper Crowell opined. “The Heroin Brotherhood. That’s what they should really be called.”⁸¹

Although the overwhelming majority of crimes white-supremacist gangs commit are typical of those other gangs perpetrate and not racial in nature, some of their crimes are motivated by hate.⁸²

Sentences (Feb. 10, 2017) (announcing sentences, ranging from 300 months to life in prison, for seven ABT members and associates convicted of methamphetamine trafficking); Press Release, U.S. Attorney’s Office (W.D. Tex.), Five Waco Area Aryan Brotherhood Members and Associates Sentenced to Federal Prison for Role in Methamphetamine Distribution Operation (June 26, 2015) (announcing sentences, ranging from five years to 35 years in prison, for five ABT members and associates, for their roles in a methamphetamine-distribution conspiracy).

⁷⁸ DRUG ENF’T ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT 117 (2018); Seth Ferranti, *Mexican Cartels Tap US Prisons to Expand Operations and Draft New Talent*, THE DAILY BEAST (July 11, 2017), <https://www.thedailybeast.com/mexican-cartels-tap-us-prisons-to-expand-operations-and-draft-new-talent>.

⁷⁹ S. POVERTY L. CTR., *supra* note 69.

⁸⁰ *Gangland: Aryan Terror*, *supra* note 74.

⁸¹ S. POVERTY L. CTR., *supra* note 69. In addition, some purely ideological white supremacists similarly view white-supremacist gangs that forge business relationships with criminals of other races as “race traitors.” Elspeth Reeve, *White Supremacists Think the Aryan Brotherhood Is a Gang of Race Traitors*, THE ATLANTIC (Apr. 5, 2013), <https://www.theatlantic.com/politics/archive/2013/04/white-supremacists-think-aryan-brotherhood-gang-race-traitors/316583/>.

⁸² For example, in September 2001, following the 9/11 terror attacks, ABT member Mark Anthony Stroman committed a series of shootings and multiple murders in the Dallas, Texas, area, targeting convenience-store employees who appeared Middle Eastern. Stroman was sentenced to death and executed in July 2011. ANTI-DEFAMATION LEAGUE, *supra* note 73. In

B. Federal prosecutions to thwart white-supremacist gangs

While the Department's early prosecutors needed to rely on the Enforcement Acts to tackle the Klan, today's federal prosecutors have a slew of statutory tools to address white-supremacist gangs.

Congress designed the racketeering statutes—including the Racketeer Influenced and Corrupt Organizations Act (RICO)⁸³ and the Violent Crimes in Aid of Racketeering Activity Act (VICAR)⁸⁴—for dismantling criminal “enterprises” whose members engage in a “pattern of racketeering activity.”⁸⁵ The AB, the ABT, and other white-supremacist gangs certainly fit this bill. Members of white-supremacist gangs typically engage in or conspire to commit a variety of criminal activities, such as assaults, homicides, drug trafficking, and extortion, to bolster their organizations. They routinely commit the violent offenses enumerated under VICAR to maintain or increase their gang's power and influence.

These statutes work well for charging multiple defendants and presenting evidence with a clear overall picture of how the gangs operate. Successful RICO and VICAR prosecutions can dismantle whole sets of gangs in one fell swoop. Depending on the charges, defendants can face sentences of decades or life in prison,⁸⁶ or even death for a crime such as murder in aid of racketeering.⁸⁷

Under Department policy, the Organized Crime and Gang Section (OCGS), within the Department's Criminal Division, supervises the Department's RICO, VICAR, and other racketeering cases and prosecutes them alongside AUSAs. OCGS must review and approve all indictments for the racketeering statutes.⁸⁸

November 2011, ABT member Scott Cantrell was sentenced to 450 months in prison for a series of racially motivated arsons, which he committed to gain status within the gang. Press Release, U.S. Dep't of Just., Member of Aryan Brotherhood Sentenced to 450 Months in Prison in Connection with Hate Crime Involving Church Arson and Attempted Murder of Disabled African-American in Texas (Nov. 30, 2011).

⁸³ 18 U.S.C. § 1961 *et seq.*

⁸⁴ 18 U.S.C. § 1959.

⁸⁵ 18 U.S.C. §§ 1961(4)–(5).

⁸⁶ 18 U.S.C. §§ 1959(a), 1963(a).

⁸⁷ 18 U.S.C. § 1959(a)(1).

⁸⁸ See JUSTICE MANUAL § 9-110.010 (providing OCGS “supervises prosecutions” of the following statutes: RICO (18 U.S.C. §§ 1961–1968);

“White supremacist gangs have been a constant and worrisome focus of OCGS’s investigations and prosecutions,” says Kim S. Dammers, Principal Deputy Chief for OCGS.

Dammers, who served as an AUSA for the Northern District of Georgia for over 15 years and has prosecuted a slew of violent gangs, notes it is often hard for investigators to get a handle on individual white-supremacist cliques’ designs for mischief. “Because these groups generally espouse their hatred and vitriol in private meetings with First Amendment protections, we too often learn of their true capacity for violence only when they begin overt violent acts.”⁸⁹

According to Dammers, in the last six years, OCGS has prosecuted over 200 white-supremacist gang members for RICO and/or VICAR offenses, including multiple murder charges. “The driving commitment that these white supremacist groups have to foment racial division and unrest, and their willingness to use large scale violence to accomplish this, makes them particularly dangerous.”⁹⁰

Racketeering investigations can take considerable time and resources. If, for evidentiary or practical reasons, federal prosecutors decide not to pursue racketeering charges, firearms, crime-of-violence, or drug offenses can be quite effective for prosecuting white-supremacist sets and individual members. These are palatable offenses to charge—especially when solid evidence is readily available to prove them—and a gang member can be cauterized quickly by the likelihood of pretrial detention,⁹¹ subject to a mandatory-minimum sentence,⁹² or both for some of these offenses. United States Attorney’s

illegal gambling (18 U.S.C. §§ 1511, 1955); loansharking (18 U.S.C. §§ 891–896); violent crimes in aid of racketeering (18 U.S.C. § 1959); and gambling ships (18 U.S.C. §§ 1081–1083)).

⁸⁹ Interview with Kim S. Dammers, Principal Deputy Chief, Organized Crime and Gang Section (July 28, 2020).

⁹⁰ *Id.*

⁹¹ See 18 U.S.C. §§ 3142(e)(1)–(3) (setting forth rebuttal presumptions in favor of pretrial detention, under predicate conditions, for defendants charged with: crimes of violence punishable by 10 or more years in prison; drug-trafficking crimes under 21 U.S.C. § 801 *et seq.*, punishable by 10 or more years; felonies involving possession of a firearm or other dangerous weapon that are not otherwise crimes of violence; and other qualifying offenses).

⁹² See, e.g., 18 U.S.C. § 924(c) (possessing a firearm during and in relation to a crime of violence or drug-trafficking crime, with graduated minimums for

Offices (USAOs) can indict any of these charges without OCGS approval.⁹³

C. Recent prosecutions

Over the last two decades, the Department has launched some high-profile prosecutions against white-supremacist gangs.⁹⁴ In the last few years, prosecutors in the USAOs and OCGS have obtained significant victories.

1. Northern District of Texas: historic takedown

In 2015, the USAO for the Northern District of Texas and its partners with the Texas Department of Public Safety (Texas DPS) and the Dallas Police Department (DPD) began a massive investigation into violent white-supremacist gangs in north Texas.

Among these gangs were larger, notorious enterprises, such as the ABT and the Aryan Circle, plus smaller criminal groups, such as the Irish Mob, the Dirty White Boys, the White Knights, and the

mere possession (five years), brandishing (seven years), and discharge (10 years)); 21 U.S.C. § 841(b) (providing mandatory minimums of five or 10 years for drug offenses involving certain weight thresholds).

⁹³ In addition, the “criminal street gangs” sentencing enhancement may pile on even more time. For an eligible defendant who participates in a white-supremacist gang that meets the definition of “criminal street gang,” his or her conviction for a felony drug-trafficking offense, crime of violence, or offense involving human trafficking, sexual abuse, sexual exploitation, or transportation for prostitution or any illegal sexual activity—or a conspiracy to commit those crimes—is subject to an increased sentence of 10 years above the statutory maximum for the offense of conviction under qualifying circumstances. 18 U.S.C. § 521.

⁹⁴ See, e.g., Hil Anderson, *Feds Charge 40 Aryan Brotherhood Figures*, UNITED PRESS INT’L. (Oct. 17, 2002), https://www.upi.com/Top_News/2002/10/17/Feds-charge-40-Aryan-Brotherhood-figures/29701034896516/ (discussing 10-count indictment in Central District of California against 40 individuals, most of whom were leaders and members of AB); Press Release, U.S. Attorney’s Office (S.D. Tex.), All 36 Charged ABT Members And Associates Convicted Of Federal Racketeering Charges In The Southern District Of Texas (Aug. 13, 2014) (six-year effort to eviscerate the ABT spanning five districts—the Eastern, Northern, Southern, and Western Districts of Texas, and the Western District of Oklahoma—resulting in convictions of 73 defendants and decimation of the gang’s leadership and overall organization).

Peckerwoods, all of which were involved in an array of traditional criminal ventures, such as drug and weapons trafficking.⁹⁵

According to P.J. Meitl, the AUSA who shepherded the investigation, the prosecution was designed to make a significant community impact. “We focused on targets with extensive and violent criminal histories,” Meitl says.⁹⁶ The USAO’s investigation had two phases.

During the first phase of the investigation, which concluded in August 2017, the USAO charged 91 defendants. Of these defendants, 89 were convicted, one remained a fugitive, and the last died before trial. Collectively, the gang members had previous convictions for 736 offenses, including 76 violent crimes and one murder. The guilty defendants were held accountable for trafficking 965 kilograms of methamphetamine, with a street value of \$10 million, and for possession and use of 88 firearms and dangerous weapons.

By the sentencing for the first phase’s final defendant on August 14, 2017, the 89 gang members received a combined sum of over 1,070 years in federal prison. With that sentence, then-U.S. Attorney John Parker declared ABT and Aryan Circle “have essentially been decimated in north Texas.” The USAO believed this prosecution to be the largest prosecution of violent white-supremacist gangs in the nation’s history.⁹⁷

The second phase of the investigation targeted most of the same gangs from the first phase, plus the Soldiers of Aryan Culture. Following the investigation led by the Texas DPS and DPD—with assistance from the Marshals Service, the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and other local partners—the USAO filed an indictment charging 57 gang members and associates with conspiracies to kidnap and conspiracies to traffic methamphetamine and other drugs. Most of these defendants had violent criminal histories. Combined, they had 587 prior convictions. The USAO

⁹⁵ Press Release, U.S. Attorney’s Office (N.D. Tex.), In Largest Case Prosecuted in U.S. Focusing on White Supremacist Prison Gang Members, Swift Justice Leads to Conviction of 89 Members/Associates of Aryan Brotherhood of Texas and Aryan Circle (Aug. 14, 2017).

⁹⁶ Interview with P.J. Meitl, Assistant U.S. Attorney (July 24, 2020).

⁹⁷ Press Release, U.S. Attorney’s Office (N.D. Tex.), *supra* note 95.

charged seven more defendants in this phase, for a total of 64 defendants.⁹⁸

The defendants committed a range of violent and dangerous offenses. In January 2018 and February 2018, four defendants—one of whom was nicknamed “Nazi”—kidnapped and held a victim for several days to obtain stolen drug proceeds that the defendants believed belonged to them. The defendants pointed a pistol at his head, threatened to kill him, struck him with a large wooden object behind his head, and used a hatchet to dismember part of his left index finger. One of the defendants—who displayed a large Hitler tattoo on his head—attempted to run over officers during his arrest. In sum, the court found the defendants responsible for trafficking over 1,600 kilograms of methamphetamine, possessing or using 59 firearms, and trafficking cocaine and heroin from 2015–18. By the sentencing for the second phase’s final defendant on February 13, 2020, 64 white supremacists had been sentenced to a combined 820 years in federal prison.⁹⁹

Reflecting what others have reported, Meitl was surprised at first that “the racist ideologies of these individuals often gave way when money could be made or drugs could be sold or purchased.” But Meitl found that racist thought often manifested during the gangs’ violent episodes, including “murders, stabbings, poisonings, beatings, and group attacks. These defendants used the ideology as an excuse or justification for their behavior.”¹⁰⁰

2. Western District of Louisiana: Aryan Circle prosecution

The Aryan Circle (AC), another white-supremacist gang and one of the ABT’s chief rivals, operates inside and outside state and federal prisons in Texas, Louisiana, and elsewhere.

Like the ABT, it originated in the Texas prison system in the mid-1980s. By the 1990s, it grew more powerful in the TDC through violent beefs with other prison gangs, white and nonwhite.

⁹⁸ Press Release, U.S. Attorney’s Office (N.D. Tex.), *57 Member/Associates of Various White Supremacists Gangs Charged in Kidnapping and Drug Conspiracies* (May 1, 2018).

⁹⁹ *Id.*; Press Release, U.S. Attorney’s Office (N.D. Tex.), *64 White Supremacists Sentenced to Combined 820 Years in Federal Prison* (Feb. 14, 2020).

¹⁰⁰ Interview with P.J. Meitl, *supra* note 96.

Eventually, it spread to outside rural and suburban areas throughout Texas, Louisiana, and Missouri. The ADL estimates the AC has over 1,500 members and associates inside and outside the prison system, making it one of the largest white-supremacist gangs in the United States.¹⁰¹

On March 20, 2018, the Department announced the unsealing of a superseding indictment charging eight AC members or associates for their roles in the murder of a fellow AC member in 2016.¹⁰²

Two of the defendants, one a member of the AC and the other a senior leader, admitted to being accessories-after-the-fact to the racketeering-related murder, in which the victim was shot point-blank in the head during an AC meeting in Turkey Creek, Louisiana. Both pleaded guilty to the accessory offense, and the senior leader also pleaded to drug-trafficking and weapons charges. On November 20, 2018, the district court sentenced the senior leader to 157 months in prison and the other defendant to 150 months.¹⁰³ On December 13, 2018, the district court sentenced a third AC member to 130 months for his role as an accessory to the murder.¹⁰⁴

3. Eastern District of Arkansas: Operation “To the Dirt”

The New Aryan Empire (NAE) is a white-supremacist organization that began as a prison gang in Arkansas in 1990. Local law enforcement estimates it grew to roughly 5,000 members in the region. It occasionally collaborates with other gangs, such as the

¹⁰¹ Press Release, U.S. Attorney’s Office (W.D. La.), Eight Individuals with Alleged Ties to the Aryan Circle Arrested and Charged in Connection with Evangeline Parish Murder (Mar. 20, 2018); ANTI-DEFAMATION LEAGUE, *supra* note 60, at 10.

¹⁰² Press Release, U.S. Attorney’s Office (W.D. La.), *supra* note 101.

¹⁰³ Press Release, U.S. Attorney’s Office (W.D. La.), Aryan Circle Gang Leader and Gang Member Sentenced to Prison for Being Accessories-After-The-Fact to Racketeering Murder, Among Other Charges (Nov. 20, 2018).

¹⁰⁴ Press Release, U.S. Attorney’s Office (W.D. La.), Aryan Circle Gang Member Sentenced to Prison for Being an Accessory-After-The-Fact to Racketeering Murder (Dec. 14, 2018). As of the submission date for this article, the USAO for the Western District of Louisiana and OCGS’s prosecution of the remaining defendants was still pending.

White Aryan Resistance. The NAE's slogan is "To the Dirt," referring to its rule that members must remain in the gang until death.¹⁰⁵

On October 3, 2017, the USAO for the Eastern District of Arkansas and OCGS secured an indictment against 44 NAE members and associates for numerous firearms and drug-trafficking offenses. On February 12, 2019, the Department announced the unsealing of a superseding indictment charging an additional 11 members and associates of the gang. Seventeen of the 54 defendants were charged under RICO and VICAR.¹⁰⁶

From 2014–16, NAE associates and its president solicited members and associates to murder a confidential informant, believing he provided information about the NAE's financier to law enforcement. In January 2016, two NAE members unsuccessfully attempted to murder the informant. The following year, NAE members and associates kidnapped, stabbed, and maimed two people for cooperating with law enforcement regarding another NAE member.¹⁰⁷

Besides the violent acts, these NAE members were heavily involved in methamphetamine distribution and gun offenses. During the investigation, law enforcement made 59 controlled purchases and seized over 25 pounds of methamphetamine, \$70,000 in cash, and 69 firearms.¹⁰⁸

The first defendant in the case pleaded guilty and was sentenced on May 20, 2019, to over 21 years in prison for his role in a conspiracy to distribute methamphetamine. The second defendant in the case was sentenced in October 2019 to 120 months. The third defendant was sentenced on March 26, 2020, to over 12 years. From July through

¹⁰⁵ Press Release, U.S. Attorney's Office (E.D. Ark.), *Dover Man Sentenced to More Than 12 Years in Prison for Meth Distribution* (Mar. 26, 2020); Jason Murdock, *What is New Aryan Empire? Arkansas White Supremacist Gang Accused of Meth Trafficking, Disfiguring Person's Face with Hot Knife*, NEWSWEEK (Feb. 13, 2019), <https://www.newsweek.com/arkansas-white-supremacist-new-aryan-empire-gang-rico-meth-trafficking-1330084>.

¹⁰⁶ Press Release, U.S. Attorney's Office (E.D. Ark.), *Multiple White Supremacist Gang Members Among 54 Defendants Charged in RICO Indictment* (Feb. 12, 2019).

¹⁰⁷ *Id.*; Interview with Liza Brown, Assistant U.S. Attorney (July 25, 2020).

¹⁰⁸ *Id.*

October 2020, four additional defendants were sentenced to terms of 120 months, 84 months, over 12 years, and 121 months.¹⁰⁹

ATF, FBI, and DEA investigated the case, in partnership with state and local agencies. While the prosecution is still pending, ATF's Acting Resident Agent-in-Charge characterized the enforcement operation—dubbed “To the Dirt”—as “a major disruption” of NAE that “affected the whole Arkansas River Valley area.”¹¹⁰

III. Conclusion

The Department's sesquicentennial year finds America in a new crucible of racial justice. Following the police-involved death of George Floyd in Minneapolis, Minnesota, in May 2020, the nation is reassessing the integrity of the criminal justice system and many vestiges of historic white supremacy. Whether this public discourse results in significant legal or policy changes remains to be seen.

During this period of uncertainty, the Department's history of confronting criminal white-supremacist groups is reassuring. In the 1870s, it smashed the Ku Klux Klan and vindicated its victims. Today, it suppresses sets of white-supremacist gangs that deal drugs, assault, and murder behind bars and on the streets.

In its ongoing, 150-year battle against violent white supremacists, the Department of Justice is a namesake it can embody: a civic ideal and moral virtue.¹¹¹

¹⁰⁹ Press Release, U.S. Attorney's Office (E.D. Ark.), Dardanelle Man Sentenced to More Than 21 Years in Prison for Meth Conspiracy: Defendant Distributed Methamphetamine to Members of White Supremacist Gang (May 20, 2019); Press Release, U.S. Attorney's Office (E.D. Ark.), *supra* note 105; Interview with Liza Brown, Assistant U.S. Attorney (November 9, 2020).

¹¹⁰ Press Release, U.S. Attorney's Office (E.D. Ark.), *supra* note 105.

¹¹¹ See Jeffrey Toobin, *Loretta Lynch's Ideal of Justice*, THE NEW YORKER (Feb. 20, 2017), <https://www.newyorker.com/magazine/2017/02/27/loretta-lynchs-ideal-of-justice> (quoting former Attorney General Loretta E. Lynch, “We are the only Cabinet agency named after an ideal.”); Press Release, U.S. Attorney's Office (N.D. Oh.), U.S. Attorney Justin Herdman's statement commemorating Juneteenth (June 19, 2020) (“The Department of Justice is the only cabinet-level agency named for a moral virtue—Justice—and that is what we seek, what we obtain, and what we are committed to preserving.”).

About the Author

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Violent Neighborhood Gangs: Two Districts, Two Strategies

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“If you talk to police chiefs around this country,” Christopher Wray, Director of the Federal Bureau of Investigation (FBI) recently testified, “you will find that in a lot of cities, it’s neighborhood gangs that are really terrorizing the communities.”¹

Loosely knit, violent neighborhood gangs are a bane across the United States. These criminal sets may not be as highly structured, organized, and sophisticated as larger national or transnational criminal groups, such as MS-13, 18th Street, Crips, Bloods, Latin Kings, Gangster Disciples, Aryan Brotherhood, and other infamous street gangs, but the levels of violence they commit can be just as dangerous and deadly, and the misery they cause is just as devastating. Some are organized enough to be successfully prosecuted under racketeering statutes. Indeed, FBI Director Wray recognizes the threat of neighborhood gangs is, unfortunately, alive and well.²

This article focuses on strategies to investigate and prosecute neighborhood crews from two United States Attorney’s Offices (USAOs) in two distinct districts: the District of the Virgin Islands, a jurisdiction of Caribbean islands with one of the smallest populations of any federal district; and the extra-large Middle District of Florida, which covers a wide swath of the country’s third most populous state.

On the one hand, the USAO in the Virgin Islands employs several tools to dismantle larger gangs—collaborative partnerships, exploitation of technological and forensic tools, use of RICO and violent crime in aid of racketeering statutes—and also prosecutes local crimes in federal court and engages in youth-focused gang prevention

¹ Testimony of Christopher Wray before Senate Homeland Security and Governmental Affairs Comm. (Nov. 5, 2019), <https://www.cspan.org/video/?466018-1/fbi-director-wray-dhs-undersecretary-testify-terrorism-threats>.

² *Id.*

efforts. The USAO in the Middle District of Florida, on the other hand, takes an all-of-the-above approach that can also serve as a template for other USAOs in their efforts to battle neighborhood gangs.

I. The District of the Virgin Islands

The United States Virgin Islands (USVI), the southern- and eastern-most point of the United States, is not only one of the smallest federal districts, but also one of the most violent.

Although the territory is roughly twice the geographic area of Washington, D.C., the territory's murder rate far outpaces the continental U.S. and rivals that of countries with the highest crime rates in the world. In 2019, at least 40 homicides were identified in the territory.³ As of October 30, 2020, at least 40 homicides were reported.⁴ Annualized against United Nations' population estimates, these numbers equate to a 2019 homicide rate of 38.2 victims per 100,000 and a 2020 projected rate of 50.6 victims. To put this in perspective, the FBI estimates that, in 2018, the United States murder and non-negligent manslaughter rate was 5.7 victims per 100,000. Also, compare this statistic to the 2018 rates in countries such as Honduras (38.9 victims per 100,000), Jamaica (43.9 victims per 100,000), and El Salvador (52 victims per 100,000).⁵

³ *Homicides 2019*, ST. THOMAS SOURCE (Dec. 21, 2019), <https://stthomas.com/content/2019/12/21/homicides-2019/>.

⁴ *Homicides 2020*, ST. THOMAS SOURCE (Nov. 1, 2020), <https://stthomas.com/content/2020/11/01/253161/>.

⁵ *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1999–2018 Table 1*, U.S. DEP'T OF JUST. FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1> (last visited June 15, 2020). Murder overall in the United States has been declining since 2017. See *2019 Preliminary Semiannual Uniform Crime Report*, U.S. DEP'T OF JUST. FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/preliminary-report/tables/table-3/table-3.xls> (last visited Nov. 2, 2020). For the international comparison, see the *Victims of Intentional Homicide, 1990–2018*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNDOC), <https://dataunodc.un.org/content/data/homicide/homicide-rate> (last visited Nov. 2, 2020). For a general discussion with slightly different statistical findings, see Charlotte Amalie, *USVI Murder Rate Drops 6.42% In 2 Years . . . But It Still Moves Up 1 Spot In World Per Capita Homicide Rate*, VI FREE PRESS (May 31, 2020), <https://vifreepress.com/2020/05/usvi-murder-rate-drops-6-42-in-2-years-but-it-still-moves-up-1-spot-in-world-per-capita>

Much of the violence in the USVI is associated with the transshipment of guns, narcotics, and currency through the region, but a large portion of the gun-related violence is also associated with the operation of loosely affiliated street gangs in discrete neighborhoods and housing projects.⁶ Numerous examples of the havoc these crews wreak plays out across the territory.

In one instance in September 2013, a crew of seven men planned and participated in the robbery of a jewelry store at the St. Thomas waterfront. The two masterminds of the robbery, who did not participate directly, planned the robbery from behind bars, while in prison—one of the two is now deceased and the other is pending trial in federal court. Four of the men entered the store and two brandished guns to threaten store employees and steal merchandise. One of the men also used a large hammer to break the display case. They fled, and the fifth man drove a getaway car. The sixth man had obtained a rental car that was used as the getaway car. The seventh helped buy the straw hats and sunglasses, which were used as disguises. Six of the co-conspirators were indicted for Hobbs Act robbery and possessing or brandishing a firearm during and in relation to a crime of violence, and the getaway driver was indicted for conspiracy to commit a Hobbs Act robbery. Three of the men were found guilty after a two-day trial, while the other four pleaded guilty. The District Court for the Virgin Islands sentenced the men to prison terms ranging from 61–162 months.⁷

homicide-rate/#:~:text=Despite%20the%20fact%20that%20the,top%20per%20capita%20homicide%20rates.

⁶ See, e.g., Press Release, U.S. Attorney's Office (Dist. V.I.), Project Safe Neighborhoods Targets Communities Most Affected By Gun Violence (Dec. 6, 2013) (announcing office-led community meetings in apartment complexes throughout the territory "to afford those persons most affected by gun violence an opportunity to meet and hear from law enforcement and other agencies charged with keeping our communities safe, and to provide a forum for community members to voice their concerns and needs").

⁷ Press Release, U.S. Attorney's Office (Dist. V.I.), Federal Jury Convicts Three Men of Hobbs Act Robbery and Related Gun Charges (Jan. 25, 2018); Press Release, U.S. Attorney's Office (Dist. V.I.), Man Pleads Guilty to Conspiracy to Commit Hobbs Act Robbery of the Gems and Gold Corner Jewelry Store (Mar. 5, 2018); Press Release, U.S. Attorney's Office (Dist. V.I.), Four Men Sentenced in Connection with Gems and Gold Corner Jewelry Store Armed Robbery and Firearms Charges (July 19, 2018); Press

In another example, members of a local gang, known to law enforcement as the Paul Girard Criminal Enterprise (Enterprise) were charged in a federal RICO indictment currently pending in federal court. According to the indictment, gang members besieged St. Croix with numerous acts of violence. One Enterprise member admitted in federal court that he and other associates participated in murdering a rival gang member who was waiting for his child at a daycare center on September 4, 2015. The Enterprise member sprayed gunfire from his AK-47 into the passenger side of the victim's SUV, killing him, and admitted to doing this murder to maintain his position in the Enterprise. He also admitted that, on February 2, 2016, he ambushed members of a rival gang outside a supermarket, ultimately shooting and killing one of the rivals. Another Enterprise member admitted that she acted as the financial and logistics facilitator for the gang, including renting the cars Enterprise associates used to commit five different attempted murders on two separate occasions. This second Enterprise member also admitted to laundering drug proceeds for the gang. Both Enterprise members pleaded guilty to racketeering-related charges in December 2019 and January 2020 and are awaiting sentencing.⁸

Interrupting this cycle of violence that neighborhood gangs and others commit and apprehending trigger-pullers is a top priority of the United States Attorney's Office for the District of the Virgin Islands (USAO-DVI). The USAO-DVI's strategy for addressing loosely knit violent sets is much like its strategy to combat more organized violent gangs and transnational criminal organizations.

The investigation and prosecution of violent crime in the USVI is unlike the investigation and prosecution of violent crime in any other jurisdiction in the United States. By virtue of its unique location on the edge of the Atlantic and Caribbean, the territory has been claimed by a wide variety of sovereigns over the years—Spain, England, Holland, France, the Knights of Malta, Denmark, and the

Release, U.S. Attorney's Office (Dist. V.I.), *One More Man Sentenced to 87 Months in Prison for His Role in the Gems and Gold Corner Jewelry Store Armed Robbery* (Aug. 7, 2018).

⁸ Press Release, U.S. Attorney's Office (Dist. V.I.), *Two Members of the Paul Girard Criminal Enterprise Plead Guilty to RICO Charges* (Jan. 15, 2020).

United States.⁹ Its population of approximately 104,000 residents reflects the diversity of the region and the region's complex history. That extraordinary diversity, combined with the small size of our island communities, creates challenges for law enforcement. Native islanders are frequently reluctant to cooperate with law enforcement because of close familial connections within the community and because of fear of retaliation.

In addition, law enforcement surveillance operations in the territory are difficult to staff. Federal law enforcement agents—many of whom are not native to the USVI—are unable to infiltrate closely knit street gangs because of the longstanding personal relationships between gang members. Moreover, traditional investigative techniques are frequently ineffective. Rugged terrain, narrow roads, and a lack of confidential human sources interrupt conventional surveillance and make evidence collection extremely difficult. Few neighborhoods are monitored by pole cameras, and gang-related activity in remote, rural areas is difficult to monitor with aerial surveillance.

A third challenge for law enforcement is the ease of travel between the islands of the USVI, Puerto Rico, and adjacent countries. The British Virgin Islands, for example, lie only a few miles from St. John. Regulated and unregulated travel between the islands is common, mainly by boat, but also by small aircraft.

For federal prosecutors and law enforcement, the effective investigation and prosecution of violent crime requires flexibility and adaptability. Several factors contribute to our recent successes in the USVI.

First, the federal law enforcement family—although small—is close-knit and committed to working together. Federal law enforcement in the USVI is an active participant in the Puerto Rico-Virgin Islands High Intensity Drug Trafficking Areas Program and the Organized Crime Drug Enforcement Task Forces initiatives. Coordination between federal law enforcement agencies is essential because the local Virgin Islands Police Department (VIPD) is severely understaffed, due to attrition and budget cuts. According to the VIPD Police Commissioner, the VIPD employs 40% fewer sworn officers than 10 years ago. Staff shortages in the VIPD severely limit the

⁹ James Gardner, *V.I. History: Symbol of the Office of the Governor*, ST. THOMAS SOURCE (Jan. 16, 2020), <https://stthomassource.com/content/2020/01/16/v-i-history-symbol-of-the-office-of-the-governor/>.

VIPD's ability to offer qualified local law enforcement to serve as task force officers on federal violent crime and drug task forces. With local law enforcement resources stretched almost to the breaking point, strategic federal partnerships are essential.

Because human intelligence and community cooperation are so difficult to obtain, federal law enforcement relies heavily on intensive evidence collection and forensic analysis. The Bureau of Alcohol, Tobacco, Firearms, and Explosives's (ATF) National Integrated Ballistic Information Network (NIBIN), for example, enables agents to obtain digital images of recovered pieces of ballistic evidence, such as spent bullets and cartridge casings, which are compared to the NIBIN database for possible matches. NIBIN *hits* enable federal law enforcement to link crimes and guns, which assists in identifying suspects.

Agents also use ATF's eTrace, an internet-based firearm trace request submission system, to track a recovered firearm from its manufacturer or importer to its introduction into the distribution chain to the original unlicensed firearm purchaser. This information can be of tremendous value in firearms trafficking cases and in cases where the original owner of the gun is relevant to the investigation.

Another piece of technology that has historically assisted law enforcement in their investigation of local street gangs and violent offenders is ShotSpotter, a gunfire locator or firearms detection system that detects and conveys the location of gunfire using an advanced system of sensors and logarithms. ShotSpotter has been only partially operational in the USVI since the September 2017 hurricanes. Efforts are underway, however, to reinstitute it in several Virgin Islands communities.

With so few cooperating witnesses and defendants, federal agents rely heavily on other forms of forensic evidence, including DNA, fingerprints, digital forensic analysis, and phone toll analysis. Every effort is made to provide independent corroboration for witness testimony because there are so few forthcoming witnesses, and mistrust of law enforcement runs high in many of the communities located in the territory.

Strategic charging is also an essential component of our strategy in the USVI. One advantage utilized by the USAO-DVI is its ability to prosecute local offenses in federal court. Title 48, United States Code, section 1612(c) (Revised Organic Act), provides that the District Court

of the Virgin Islands shall have concurrent jurisdiction with the local courts of the Virgin Islands over local criminal offenses

which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction.¹⁰

This district court is the only federal court, other than the United States District Court for the District of Columbia that exercises supplemental jurisdiction over local charges that arise out of the same facts and circumstances as related federal charges.¹¹

In other words, the Revised Organic Act provides that the district court will exercise supplemental jurisdiction over violations of the Virgin Islands Code that arise out of the same facts and circumstances as federal charges.¹² This jurisdictional grant promotes efficiency and avoids potential double jeopardy and collateral estoppel issues by permitting the resolution of all related charges in one proceeding. Hence, federal prosecutors frequently consider charging local offenses as part of a federal prosecution. Doing so enables prosecutors to effectively broaden the scope of some federal cases to include serious local crimes, such as kidnapping or additional firearms offenses. Indeed, several territorial gun-related crimes carry potential penalties that are higher than the federal penalties for comparable federal offenses, which provides federal prosecutors with enhanced flexibility during plea negotiations.

Another advantage is the significant impact of every case the USAO-DVI prosecutes. Local media provides extensive coverage of federal court proceedings, and Virgin Islanders are deeply invested in their community and follow local news with a keen interest. Over the years, federal law enforcement officers and federal prosecutors have

¹⁰ 48 U.S.C. § 1612(c).

¹¹ See D.C. CODE § 11-502(3) (granting the United States District Court for the District of Columbia jurisdiction over “[a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense”).

¹² 48 U.S.C. § 1612(c).

frequently heard from their neighbors and friends that these federal cases have had a lasting positive effect on the territory.

Finally, the USAO-DVI is committed to preventing violence in the first instance by encouraging youths not to join criminal groups.

In St. Thomas and St. Croix, the USAO-DVI, along with other law enforcement agencies, proudly supports Camp DEFY (Drug Education for Youth). This program, which combines classroom learning with fun and educational activities, teaches important skills, such as setting goals, avoiding violent conflicts, and refusing drugs offered by a friend. Classes address topics such as substance abuse prevention, self-esteem, conflict resolution, citizenship, and gang awareness. Outside activities have included a tour of the Virgin Islands Legislature in Charlotte Amelie. Every session inside and outside the classroom is designed to foster positive values, and a healthy, gang-free, and drug-free lifestyle.¹³ The recent pandemic interrupted these efforts, but the USAO-DVI looks forward to resuming active participation in our neighborhoods as soon as possible.

Camp DEFY is a prime example of how a USAO, along with other federal and local law enforcement partners, community leaders, and concerned citizens, can work together to provide recreational opportunities for youth, delivered with a positive message of hope and empowerment. The program gives young Virgin Islanders the opportunity to spend time with role models and caring adults who encourage them to set goals, dream big, and resist the negative influences of gangs, drugs, and violence.

Despite all the challenges, the effective use of federal law enforcement and prosecution resources, coupled with earnest prevention efforts, continues to improve the quality of life in the USVI.

II. The Middle District of Florida

The Middle District of Florida (MDFL) serves 35 of Florida's 67 counties and includes Fort Myers, Jacksonville, Ocala, Orlando, and Tampa. It is the second most populous district in the nation, with

¹³ Press Release, U.S. Attorney's Office (Dist. V.I.), Virgin Islands U.S. Attorney's Office and Project Safe Neighborhoods Sponsor Camp DEFY: VI Youth Meet with the Legislature of the Virgin Islands (Aug. 14, 2019).

approximately 12.6 million of the state's 20.1 million residents.¹⁴ The MDFL is a diverse mix of urban, suburban, and rural communities and, in many ways, mirrors the nation as a whole.

The MDFL's violent crime trends tend to closely adhere to national averages. As discussed above, in 2018, the United States murder and non-negligent manslaughter rate was 5.7 victims per 100,000. The murder and non-negligent rate in each of the MDFL's divisions were:

- Fort Myers: 5.3;
- Jacksonville: 4.6;
- Ocala: 8.1;
- Orlando: 5.4; and
- Tampa: 3.8.¹⁵

The rate of all violent crime offenses in Florida was 394.9 per 100,000 people; the national rate was 380.6.¹⁶

But behind the numbers, in small sections of the MDFLs poorest communities, neighborhood gangs¹⁷ are responsible for ongoing cycles of horrific, tit-for-tat shootings. These gangs are informal but extremely violent. The MDFL's neighborhood gangs shoot and kill people over drug debts, territory,¹⁸ and property, as well as to settle perceived instances of disrespect.

¹⁴ *Population and Demographic Data—Florida Products*, OFFICE OF ECONOMIC & DEMOGRAPHIC RESEARCH, <http://edr.state.fl.us/content/population-demographics/data/index-floridaproducts.cfm> (last visited Nov. 2, 2020).

¹⁵ *2018 Crime in the United States, Metropolitan Statistical Area Table*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/ucr/> (last visited Oct. 8, 2020).

¹⁶ *Id.*

¹⁷ "They start as young as 13. Their crimes range from vandalism to drug dealing to murder. . . . 'They frequently change groups and names,' Tampa police Maj. Marc Hamlin said." Dan Sullivan, *Young, Violent, Organized: the Trouble with Gangs*, TAMPA BAY TIMES (Sept. 9, 2015), <https://www.tampabay.com/news/publicsafety/crime/young-violent-organized-the-trouble-with-gangs/2246291/>.

¹⁸ "A Bradenton gang of drug dealers . . . used violence, including six murders, to protect its heroin and cocaine business. Their turf was 11th Street East in Oneco. Their reign of violence included three murders on New Year's Day 2016 that initially stumped local detectives." Jessica DeLeon,

The overall violent crime strategy for the USAO for the MDFL (USAO-MDFL) is tailored to the neighborhood gang threat. The strategy is to combat neighborhood gangs by working closely and directly with local agencies,¹⁹ in addition to traditional federal partners, to prosecute dangerous offenders, dismantle drug trafficking organizations, secure lengthy sentences for armed felons, and build proactive conspiracy cases against violent gang members.²⁰ The strategy's overarching guiding principle is to focus on current violence by prosecuting the people who are committing violent crime and focusing enforcement operations in the places where it occurs.²¹

As an extra-large district with a fast-growing population,²² the USAO-MDFL must make strategic use of its limited resources. Prosecuting every qualifying armed career criminal is simply not possible. The USAO-MDFL, therefore, does not focus exclusively on traditional prosecution criteria, such as criminal history and the availability of minimum mandatory sentences due to, for example, drug quantity. Instead, the USAO-MDFL uses all statutory tools available to disrupt and dismantle groups engaged in shootings "right now." This approach requires precision based on the best available information from local law enforcement agencies.

They Murdered People to Protect Heroin and Cocaine Business in Oneco. Now Some Face Life in Prison, BRADENTON HERALD (Nov. 6, 2019), <https://www.bradenton.com/news/local/crime/article237033929.html>.

¹⁹ This is an enormous challenge. The USAO-MD-FL has 116 local partners (state attorneys, police departments, and sheriff's offices).

²⁰ See Rod J. Rosenstein, *A Proven Plan to Prevent City Murders*, BALTIMORE SUN (Sept. 12, 2015), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-rosenstein-0913-20150912-story.html>.

²¹ "The promising programs upon which PSN was based all included a focused deterrence logic model whereby enforcement resources were aimed at the *people, places* and contexts believed to be producing high rates of gun crime and violence." EDMUND F. MCGARRELL ET AL., PROJECT SAFE NEIGHBORHOODS—A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT, NAT'L INST. OF JUSTICE 170 (April 2009) (emphasis added).

²² For example, Sumter County, Florida, experienced a 42.2% growth rate from 2010 to 2019. *Demographics*, SUMTER CNTY. ECON. DEV. <https://sumterbusiness.com/demographics/> (last visited Oct. 2, 2020). Sumter County is served by the USAO-MDFLs Ocala Division, a four-county division under the responsibility of a small branch staffed by four criminal division Assistant United States Attorneys (AUSAs).

The USAO-MDFL's strategy differs significantly from a policy in which every prosecutable gun and drug case in a given area is charged federally as part of a surge operation. Actionable intelligence drives the USAO-MDFL's strategy. The USAO-MDFL's prosecution posture is to federally charge those suspected of engaging in ongoing retaliatory cycles of violence, irrespective of potential sentences, and to deprive them of the use of drug houses, places where violent crime takes place. To execute this strategy, the USAO-MDFL employs an all-of-the-above approach, using Organized Crime Drug Enforcement Task Force (OCDETF),²³ racketeering conspiracy,²⁴ violent crime in aid of racketeering (VICAR),²⁵ arson,²⁶ Hobbs Act,²⁷ bank robbery,²⁸ carjacking,²⁹ and felon-in-possession of firearms and ammunition³⁰ prosecutions.

For example, in response to regular (at least monthly) shootings³¹ in the Tampa Park public housing area, the USAO-MDFL and the FBI Safe Streets Task Force initiated an OCDETF investigation into the neighborhood gang operating there known as the Bird Gang. After months of surveillance and enforcement operations, over 25 Bird Gang members were arrested in December 2018 on federal drug and firearms charges.³²

At the conclusion of the investigation, the Bird Gang's drug house, known as the Blue House, was condemned as part of the above-described *places* component of the USAO-MDFL's neighborhood

²³ Most often yielding charges under 21 U.S.C §§ 841(a)(1), 846, and 856.

²⁴ 18 U.S.C. § 1962(d).

²⁵ 18 U.S.C. § 1959.

²⁶ 18 U.S.C. § 844.

²⁷ 18 U.S.C. § 1951.

²⁸ 18 U.S.C. § 2113.

²⁹ 18 U.S.C. § 2119.

³⁰ 18 U.S.C. § 922(g)(1).

³¹ For example, "On May 29, 2018, in the middle of the afternoon, [Leon] Williams and [Reginald] Jones[, Jr.] shot at people whom they believed had been communicating with law enforcement [in an effort to stop the Bird Gang from selling drugs.]" Press Release, U.S. Attorney's Office (M.D. Fla.), Jury Convicts Gang Members of Drug-Related Shooting (Nov. 21, 2018), regarding *United States v. Williams, et al.*, No. 18-cr-573-T-23 (M.D. Fla. 2018).

³² *United States v. Lillie et al.*, No. 18-cr-571-T-24 (M.D. Fla. 2018); *United States v. Griffin et al.*, No. 18-cr-573-T-23 (M.D. Fla. 2018); *United States v. Flores*, No. 19-cr-413-T-35 (M.D. Fla. 2019); and *United States v. Williams et al.*, No. 18-cr-573-T-23.

gang strategy. This condemnation had the real-world effect of depriving any remaining gang members from continuing to sell drugs there. It also had symbolic significance because a location that had been an epicenter of violence for generations is out of commission. For more than 18 months following the Bird Gang takedown and the shutdown of the Blue House, there were no shootings in Tampa Park.

The Drug Enforcement Administration (DEA) and the St. Petersburg Police Department likewise initiated an OCDETF investigation to dismantle a neighborhood gang engaged in significant drug trafficking on 36th Street in St. Petersburg, a notorious open-air market and hot bed for neighborhood gang violence. The investigation yielded the seizure of 2.5 kilograms of cocaine and over \$16,000 and the successful prosecution of seven defendants in federal court.³³

When possible and appropriate, the USAO-MDFL uses racketeering conspiracy³⁴ cases to dismantle neighborhood gangs. The power of racketeering charges lies in their capacity to incorporate violations of state law and, ultimately, give the jury a complete understanding of the full scope and extent of the neighborhood gang's criminal conduct. For example, the USAO-MDFL cites, among other things, Florida's murder statutes³⁵ and robbery statutes³⁶ in its racketeering conspiracy cases.³⁷

In executing its neighborhood gang strategy, the USAO-MDFL is mindful that coordination with the Department of Justice (Department) is often required. For example, 18 U.S.C. § 924(j) is a death penalty-eligible offense, triggering the requirements of Justice Manual § 9-10 *et. seq.*, including consultation with the Capital Case Section and submission of a capital case memorandum and, ultimately, a decision by the Attorney General on whether to seek the death penalty as to each capital offense and as to each defendant. All federal prosecutors must be mindful that, if they possess evidence that would support charging a capital offense, the Attorney General alone

³³ United States v. Heatly et al., No. 19-cr-158-T23 (M.D. Fla. 2019); United States v Booth, No. 19-cr-157-T-35 (M.D. Fla. 2019); United States v. Martin, No. 19-cr-213-T-35 (M.D. Fla. 2019); United States v. Nolton, No. 19-cr-214-T-33 (M.D. Fla. 2019); United States v. Anderson, No. 20-cr-081-T-02.

³⁴ 18 U.S.C. § 1962(d).

³⁵ FLA. STAT. §§ 782.04, 777.04, 777.011.

³⁶ FLA. STAT. §§ 812.13, 777.011, 777.04.

³⁷ United States v. Rodriguez et al., No. 18-cr-205-T-02 (M.D. Fla. 2018).

decides how to proceed. The capital case process is confidential. The Department speaks with one voice on capital punishment on any particular case, and only after the Attorney General has made a decision.

In *United States v. Rodriguez*, the USAO-MDFL, ATF, and the Manatee County Sheriff's Office used racketeering conspiracy, drug, arson, and VICAR charges to target neighborhood gangs in Manatee County, Florida. In particular, Manatee County's Oneco neighborhood was a location for multiple gang-related and drug-related homicides and shootings. Since the arrest of seven neighborhood gang members on federal racketeering conspiracy, VICAR arson, firearms, and drug charges in April 2018, there have been no homicides in Oneco.³⁸

There was a *places* component to the *Rodriguez* investigation as well. One of the drug-related murders occurred at the gang's drug house on 11th Street in Oneco, and the house itself was a frequent target of drive-by shootings committed by rival gangs. For many years, their drug house was an around-the-clock drug distribution and prostitution hub. The *Rodriguez* indictment included drug premises charges under 21 U.S.C. § 856, and all persons known to sell narcotics there were prosecuted.³⁹ Since the takedown, the location is no longer an active drug or prostitution house.

In combating neighborhood gangs through drug prosecutions, the USAO-MDFL often sets aside traditional drug quantity thresholds

³⁸ *Id.* On February 5, 2020, in Tampa, Florida, U.S. District Judge William F. Jung sentenced Jordan Rodriguez to three terms of life imprisonment. Rodriguez's co-defendants, Alfonzo Churchwell and Andrew Thompson, also received multiple life terms of imprisonment in January 2020. All three were found guilty after a nearly four-week jury trial on firearms, racketeering, murder, arson, and drug charges. The men worked together to protect their drug business in Bradenton's Oneco neighborhood with violence. Other defendants and gang members pleaded guilty to arson and other charges. Press Release, U.S. Attorney's Office (M.D. Fla.), Multiple Life Sentences Handed Down In Bradenton Gang Racketeering And Murder Case (February 5, 2020). Count One was a racketeering conspiracy charge under 18 U.S.C. § 1962(d). The core components of that racketeering conspiracy charge were: (1) enterprise description; (2) roles of enterprise members; (3) conspiracy allegation; (4) pattern of racketeering activity; (5) method and means; (6) overt acts; and (7) notice of special sentencing allegations. See Superseding Indictment, Count One, *United States v. Rodriguez et al.*, No. 18-cr-205-T-02 (M.D. Fla. 2018), ECF No. 255.

³⁹ *Rodriguez*, 18-cr-205-T-02.

because violence in the illegal drug trade emerges at the place where control over territory matters. Wholesale traffickers acquiring and smuggling multi-kilogram quantities of illegal drugs often arm themselves, but they are not typically attempting to maintain physical control over a specific area. Once the drugs are smuggled into the United States, wholesale-level drug trafficking organizations need to move them to distribution hubs and then, ultimately, to street-level dealers. Those traffickers are often armed and prepared for violence, but because transportation operations are conducted in secret via a wide-variety of means and routes, they are often successfully carried out without violence.

In contrast, enduring control over specific geographic territory is the lifeblood of a street-level drug dealer. Control over territory ensures a street-level drug dealer has reliable access to the market. Thus, while there are other causes of neighborhood gang violence, such as disrespect over social media, conflicts over drug distribution territory remains a major cause of violence. Neighborhood gangs use violence to retaliate against customers and distributors who fail to pay their debts, even over relatively small quantities of drugs. They use violence to deter and kill rivals. The USAO-MDFL, therefore, often charges neighborhood gang members under the 21 U.S.C. § 841(b)(1)(C) penalty provision that does not require proof of drug quantity.

For example, the USAO-MDFL supports the Tampa Police Department's (TPD) Violent Impact Player (VIP) program. Tampa VIP is a targeted and prioritized enforcement program focused on neighborhood gang members. Most Tampa VIP prosecutions are single-defendant drug and firearms prosecutions. The USAO-MDFL finds it beneficial to support this program mostly through a single VIP AUSA.

The benefit of having a single VIP AUSA with primary responsibility for supporting the program is that it yields consistency in terms of guidance and expectations to officers and detectives in the field.⁴⁰ As stated above, the USAO-MDFL has 116 local partners. The

⁴⁰ To be sure, this is a heavy burden for a single AUSA. In many ways, the program's success rides on that AUSA's productivity, creativity, diligence, accountability, initiative, and perseverance. "Civilization is one long anxious search for just such individuals." Elbert Hubbard, *A Message to Garcia* (1899).

USAO-MDFL cannot realistically or effectively provide close support to every local agency. By, however, essentially detailing one AUSA to, and embedding that AUSA within, a large local agency that has both a sophisticated violent crime program and a significant neighborhood gang problem, the USAO-MDFL gains efficiencies and situational awareness while making the best use of thinly spread personnel resources.

The VIP AUSA attends TPD's weekly violent crime meeting, receives real-time regular briefings on all shootings occurring within the City of Tampa from patrol officers in the field, and learns in real-time about patrol officers' encounters with VIP members, which often involves the seizure of drugs or firearms from VIP members following traffic stops or the execution of search warrants. From 2016 to 2019, the VIP program contributed⁴¹ to a consistent drop in violent crime (over 200 fewer between 2015 and 2018).⁴² These results were

⁴¹ A 2017 University of South Florida study validated the VIP program's enforcement criteria and, controlling for other factors, credited the program with accounting for, in and of itself, 7.9% of the overall drop in Tampa violent crime.

⁴² In 2015, UCR data indicates there were 2,298 reported violent crimes in Tampa. In 2016 there were 1,906, in 2017 there were 1,785, in 2018 there were 1,598, and in the first half of 2019, there were 799 (suggesting a level of violent crime consistent with 2018). *2016–2019, Crime in the United States, Metropolitan Statistical Area Tables*, FED. BUREAU OF INVESTIGATION, ucr.fbi.gov (last visited Oct. 8, 2020). Unfortunately, as of this writing, violent crime in the MD-FL is once again on the uptick as it is in many places in the United States. For example,

New numbers suggest that violent crime in the city of Tampa has surged in the first few months of 2020, but it may not be the pandemic shutdowns fueling the alarming trend. At least one county commissioner thinks gangs could be to blame.

Violent crime is up more than a third in Tampa over the first five months of 2020 compared with the same period last year, according to the Tampa Police Department. By May 25 of this year, 221 crimes involving guns had been reported. By the same date in 2019, only 162 crimes involving guns had been reported.

Matthew McClellan, *Tampa Leaders Discuss Solutions Amid 'Surge' in Violent Crime*, FOX13 TAMPA BAY (May 28, 2020), <https://www.fox13news.com/news/tampa-leaders-discuss-solutions-amid-surge-in-violent-crime>.

achieved through a relatively small number of federal prosecutions.⁴³ For example, in 2019, the VIP AUSA charged seven VIPs/neighborhood gang members. This validates the overarching guiding principle of the USAO-MDFL's strategy: a keen focus on offenders engaged in current violence.

Again, in addition to specific people, the USAO-MDFL focuses on specific places to combat neighborhood gangs. Drug houses are a focus of the USAO-MDFL's neighborhood gang strategy. Drug houses are central locations for violence. They attract violence. Neighborhood gang members may use guns at or near their drug houses to collect drug debts. Rival neighborhood gangs may commit drive-by shootings targeted at the drug houses of their enemies.

In the case of *United States v. Harris*,⁴⁴ the USAO-MDFL and the Department's Organized Crime and Gang Section (OCGS) prosecuted a violent neighborhood gang, the Harris gang. Six defendants were charged in a 28-count indictment that included charges for racketeering conspiracy, drug trafficking, seven planned and premeditated murders, one attempted murder, two armed kidnappings, and drug and firearms violations.⁴⁵ One of the jurisdictional bases for the prosecution was the gang's use of multiple drug houses in Bradenton, Florida, and the violence associated with those drug houses.⁴⁶

For example, one of the witnesses against the Harris gang made multiple purchases of crack cocaine from the defendants at one of their drug houses.⁴⁷ He had been told that once he purchased drugs from the Harrises; he was forbidden to buy drugs from any other supplier.⁴⁸ After he failed to pay a drug debt, Nathaniel Harris went to his home.⁴⁹ When the witness answered the door, Harris shot

⁴³ *United States v. Rivers*, No. 19-cr-43-T-35 (M.D. Fla. 2019); *United States v. Edon*, No. 19-cr-48-T-33 (M.D. Fla. 2019); *United States v. Newton*, No. 19-cr-133-T-36 (M.D. Fla. 2019); *United States v. McKinney*, No. 19-cr-207-24 (M.D. Fla. 2019); *United States v. Jones*, No. 19-cr-206-T-02 (M.D. Fla. 2019); *United States v. Sinadinos*, No. 19-cr-255-T-60 (M.D. Fla. 2019); *United States v. Daniels*, No. 19-cr-591-T-30 (M.D. Fla. 2019).

⁴⁴ No. 12-cr-205-T-17 (M.D. Fla. 2012).

⁴⁵ Second Superseding Indictment, *United States v. Harris*, ECF No. 82.

⁴⁶ *Id.* at Count One, ¶ 17, Count 7, ECF No. 82.

⁴⁷ *Id.*, at 102, ECF No. 1427.

⁴⁸ *Id.*, at 117, ECF No. 1427.

⁴⁹ *Id.*, at 115, ECF No. 1427.

him.⁵⁰ The witness survived, but he was paralyzed.⁵¹ Law enforcement later executed a search warrant at one of the drug houses; resulting in the seizure of drugs, money, a ledger, firearms and ammunition; and the shutdown of that particular drug house.⁵² The witness' testimony supported substantive drug charges under 21 U.S.C. § 841(a)(1), conspiracy charges under 21 U.S.C. § 846, a discharge of a firearm in furtherance of a drug trafficking crime charge under 18 U.S.C. § 924(c)(1)(A)(iii), and a drug premises charge under 21 U.S.C. § 856.⁵³ It also provided support for the overarching racketeering conspiracy charge under 18 U.S.C. § 1962(d).⁵⁴

As part of its all-of-the-above neighborhood gang strategy, the USAO-MDFL partners with an ATF enforcement group dedicated to enforcement of the Hobbs Act and other violent crime statutes. Specifically, ATF's Strategic Pattern Armed Robbery and Technical Apprehension (SPARTA) enforcement group is a joint federal-state-local task force that targets criminal groups, including neighborhood gangs, engaged in home invasions, commercial armed robberies, and carjackings. The USAO-MDFL supports the SPARTA group by providing real-time, around-the-clock support. SPARTA cases are, for the most part, not adopted state cases. All the search warrants, phone location warrants, and arrest warrants are federal.

Experienced ATF agents work multi-defendant, commercial armed robbery cases side by side with experienced violent crime detectives from local law enforcement agencies throughout the Tampa Bay area. Some local officers, full-time task force officers (TFOs), and others are special federal officers (SFOs) who assist on a part-time basis. Both the TFOs and SFOs play critical roles. The TFOs provide a full-time capability and are available to conduct surveillance and prepare affidavits for federal search warrants. The SFOs serve as liaisons for their respective sheriff's offices and police department districts. They are SPARTA's eyes and ears, enabling the task force to initiate violent crime investigations on neighborhood gangs as early as possible.

The SPARTA enforcement group's partnership with the USAO-MDFL yields a steady stream of federal violent crime cases.

⁵⁰ *Id.*

⁵¹ *Id.*, at 172, ECF No. 1427.

⁵² *Id.*, at 17–33, ECF No. 1404.

⁵³ *Id.*

⁵⁴ *Id.*

The defendants are often charged with armed robberies of stores or armed carjackings⁵⁵ in neighborhoods plagued by gang-driven gun violence.

In addition to ATF's SPARTA enforcement group, the USAO-MDFL also works closely with the FBI on violent crime cases involving neighborhood gangs operating across multiple local jurisdictions. For example, in 2017, a Fort Myers-based crew committed a string of armed commercial and bank robberies up and down Florida's Gulf Coast.⁵⁶ Rashid Iman Turner, Petrie Addison, and Dakiriya Lias robbed Family Dollar and Dollar General stores in Lehigh Acres.⁵⁷ They threatened to kill store employees and their families.⁵⁸ Turner and Addison later robbed a Wells Fargo bank in Spring Hill.⁵⁹ Zachary Gloster assisted Turner and Addison in robbing Seacoast Banks in Arcadia and Port St. Lucie.⁶⁰ AUSA Michael Gordon and the FBI worked closely with state and local law enforcement agencies, including the Ft. Myers Police Department, the Lee County Sheriff's Office, the Pasco County Sheriff's Office, the Hernando County Sheriff's Office, the Florida Highway Patrol, the Arcadia Police Department, the Port St. Lucie Police Department, and the Sarasota County Sheriff's Office to build a comprehensive and, ultimately, successful federal case against the defendants.⁶¹

Similarly, the USAO-MDFL worked with the FBI and local partners, including the Clearwater Police Department, the Pinellas

⁵⁵ For example, ATF's SPARTA enforcement group partnered with the Lakeland Police Department to investigate an armed carjacker, Terese Colston, who shot a police officer in the face. Press Release, U.S. Attorney's Office (M.D. Fla.), Carjacker Who Shot Lakeland Police Officer Sentenced To 30 Years In Federal Prison (July 3, 2019). Colston pleaded guilty to carjacking, in violation of 18 U.S.C. § 2119, brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 30 years' imprisonment on July 3, 2019. *United States v. Colston*, No. 18-cr-400-T-33 (M.D. Fla.).

⁵⁶ Press Release, U.S. Attorney's Office (M.D. Fla.), Leader of Armed Robbery Crew Sentenced To 41 Years (Sept. 16, 2019).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *United States v. Addison et al.*, No. 18-cr-080-T-36 (M.D. Fla. 2018).

County Sheriff's Office, and the Tampa Police Department, to investigate and prosecute two defendants, Riley Harris and Dajor Atkins, who committed armed robberies of AT&T stores.⁶² Harris pleaded guilty to three armed robberies of AT&T stores, stealing a total of \$243,895 worth of cash and merchandise.⁶³ Atkins joined him for the last one as a lookout, in which they stole \$47,890 worth of cash and merchandise.⁶⁴

Sometimes, the MDFL's neighborhood gangs metastasize and affiliate with national gangs. Using its all-of-the-above strategies, the USAO-MDFL has successfully targeted such larger groups through long-term undercover investigations. For example, in *Operation Blackjack*, an ATF and Pasco County Sheriff's Office OCDETF investigation into arms and narcotics trafficking activities centered in Pasco County, Florida, the USAO-MDFL charged 39 individuals associated with the Aryan Brotherhood and the Unforgiven prison gang with firearms and narcotics violations.⁶⁵

In addition to enforcement, the USAO-MDFL has robust community engagement and crime prevention programs. Criminal Division AUSAs serve as mentors and counselors to recently released former federal inmates deemed at high risk of reoffending by U.S. Probation as part of the MDFL's intensive re-entry court program. AUSAs and staff from all office elements routinely volunteer to participate in events at elementary schools throughout the district. The USAO-MDFL's public affairs unit sponsors courageous conversation events, which bring law-enforcement, local leaders, and community members together in order to work jointly and cooperatively on crime reduction and prevention efforts.

⁶² United States v. Harris et al., No. 18-cr-483-T-36 (M.D. Fla. 2018).

⁶³ *Id.*, ECF No. 71.

⁶⁴ *Id.*; Press Release, U.S. Attorney's Office (M.D. Fla.), Jury Convicts Armed Robbery Getaway Driver/Lookout (September 3, 2019).

⁶⁵ Press Release, U.S. Attorney's Office (M.D. Fla.), Thirty-Nine "Unforgiven" And "United Aryan Brotherhood" Gang Members And Associates Indicted For Arms And Drug Trafficking In Pasco County (Nov. 15, 2018).

III. Conclusion

While smaller and less organized than highly structured, better known national and transnational gangs, neighborhood gangs are a threat to communities everywhere, inflicting a significant share of agony. Squarely tackling these violent crews is a critical part of USAOs' overall efforts to reduce violent crime.

The USAOs' strategies in the Districts of the Virgin Islands and Middle Florida provide helpful examples of how to address these sets. Through using the most effective statutes in the federal quiver, forging strong partnerships with all appropriate law enforcement agencies, task forces, and the Department's OCGS, and relying on the best available forensic and technological tools, these USAOs are seeing success in dismantling neighborhood crews. Further, their efforts to prevent additional neighborhood gang violence through youth outreach and re-entry programs reflect a holistic approach to crime reduction and a recognition that prosecutions alone cannot eliminate community violence.

As long as neighborhood gangs continue to imperil their neighbors, these USAOs, and others, will continue to thwart them with thoughtful strategies and all effective means.

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Cryptic Communications Used by MS-13 and 18th Street Gangs

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The Cryptanalysis and Racketeering Records Unit (CRRU) is part of the Federal Bureau of Investigation (FBI) Laboratory Division. Established in the 1940s, the CRRU examines cryptic communications and provides decryptions and analysis for federal, state, and local law enforcement agencies and international partners. The CRRU has observed that MS-13 and 18th Street gang members routinely utilize clandestine communications in furtherance of their criminal activity. These communications may come in the form of written messages, emails, and spoken conversations. Additionally, it has been observed that the gangs routinely establish new encryption systems to try to avoid law enforcement detection. These observations are based on the examination of numerous gang communications, consultation with other law enforcement agencies and gang experts in the United States and El Salvador, and from debriefing cooperating inmates and other confidential sources.

MS-13 and 18th Street members routinely use *ciphers*, *transpositions*, *code words*, and *veiled speech* in their clandestine communications.

- **Ciphers** substitute letters or numbers with other letters, numbers, or symbols to hide their meaning. For example, substituting 13-1-18-1 for MARA. In this instance, the letters of the alphabet were replaced with their corresponding number in alphabetical order: A=1, 13=M, and 18=R.
- **Transpositions** rearrange letters or numbers. Commonly transposed words include gang terms, such as *Mara* (Rama), *Dope* (Pedo), and *Trucha* (Chatru), as well as monikers, including *Pelon* (Lonpe), *Casper* (Percas), and *Killer* (Llerki).
- **Code words** are used to replace words or phrases with other words or phrases. These code systems often involve themes, such as religion, work, or health. Examples are references to a gang

meeting as a *church service* and referring to an active gang member as a *true believer*.

- **Veiled Speech** involves talking around a subject. For example, the speaker may use a description of a person (“the tall one”) rather than referring to that person by name. This technique requires shared experiences or knowledge and is often created on an impromptu basis.

MS-13 and 18th Street inmates have developed methods to communicate clandestinely within the prison system, such as *wilas* and three-way mailing systems. A *wila*, also known as a *kite*, is a small, handwritten message. It can involve micro-printing on paper or even etching a message into Styrofoam, tinfoil, or plastic. The text contained on a *wila* is often encrypted. A three-way mailing system is a method utilized to circumvent prohibitions against inmate to inmate communications. A message is sent to a third party outside the prison system with instructions to re-mail a portion of the message to the intended recipient inside the prison. Sometimes, all or part of these messages are encrypted.

Clandestine communication methods between MS-13 and 18th Street members can potentially provide law enforcement with intelligence about criminal activities, gang structure, and internal conflicts within the gangs. At a minimum, using encrypted communications shows collaboration between individuals and an intent to conceal information. It may also indicate that the sender believes the information is significant and worthy of being concealed. For assistance regarding clandestine communications, please contact the CRRU at codebreakers@fbi.gov.

About the Author

Jessica Affeldt is a Forensic Examiner in the Cryptanalysis and Racketeering Records Unit of the FBI Laboratory in Quantico, Virginia, where she has worked since 2013. Ms. Affeldt decrypts ciphers and other cryptic communications and analyzes cryptic and unknown symbols. Before working in the CRRU, Ms. Affeldt worked as an examiner in the FBI’s Latent Print Operations Unit.

This is publication 20-73 of the Laboratory Division of the FBI. The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the FBI or the U.S. government. This work was prepared as part of their official duties.

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Note from the Editor-in-Chief

The Office of Legal Education is pleased to bring you this issue devoted to the investigation and prosecution of gangs and organized crime. Where once La Cosa Nostra held sway, today's criminal landscape includes not only traditional organized crime groups, but also prison gangs, street gangs, and foreign fraudsters. I know that the diverse mixture of topics will be of practical use to federal prosecutors. In addition, this issue will give the general reader insight into how the Department of Justice combats this type of crime, including unique "behind the curtains" views of the Office of Enforcement Operations and the Federal Witness Security Program, better known in popular parlance as the "Witness Protection Program."

My sincerest thanks go out to this issue's points of contact, Seth Adam Meinero, National Violent-Crime and Narcotics Coordinator for the Executive Office for United States Attorneys, and Kim S. Dammers, Principal Deputy of the Organized Crime and Gang Section, who took time out of their busy schedules to recruit authors and see this issue through to completion. The tireless trio of Managing Editor Addison Gantt and Associate Editors Gurbani Saini and Phil Schneider, assisted by law clerks Joshua Garlick and Mary Harriet Moore, did their usual stellar job in bringing this, the last issue of 2020, to publication.

May you, dear reader, enjoy this issue as we look forward to 2021—and a better year!

Chris Fisanick
Columbia, South Carolina
November 2020