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**Editor**  
K. Tate Chambers

**Assistant Editors**  
Becky Catoe-Aikey  
Brenda S. Mercer

**Law Clerks**  
Sarah Tate Chambers  
Emily Godwin  
Gurbani Saini  
Brandy Sanderlin

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

Send article submissions to  
Editor,  
U.S. Attorneys' Bulletin,  
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Office of Legal Education,  
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# Prosecuting Violent Crimes I

## In This Issue

<b>Introduction</b> .....	1
<b>By Jeff Sessions, Attorney General</b>	
<b>“In for a Penny, In for a Pound”—Accessory Liability in Group Violence Cases</b> .....	3
<b>By James D. Peterson</b>	
<b>Witness Maintenance in Long-Term Violent Crime Cases</b> .....	11
<b>By David Jaffe</b>	
<b>Hobbs Act Robbery</b> .....	17
<b>By Christopher Graveline and Bonnie S. Greenberg</b>	
<b>Victims, Terrorists, and the Scales of Justice</b> .....	21
<b>By Jeff Kahan, Nathan S. Williams, Alope Chakravarty, and Steven Mellin</b>	
<b>ATF Resources to Combat Violent Crime</b> .....	39
<b>By Ellen V. Endrizzi</b>	
<b>Gang Experts: Best Practices and Avoiding Pitfalls</b> .....	55
<b>By Catherine Kuo Dick</b>	
<b>Operation Sudden Impact: The Effective Use of Federal and State Resources to Combat Gang Violence</b> .....	63
<b>By Reema M. El-Amamy</b>	
<b>A Uniform Approach to Mental Condition Evidence in Capital Trials: The Interplay Between Federal Rules of Criminal Procedure 12.2 and 16</b> .....	73
<b>By Jeffrey A. Zick</b>	
<b>The Detroit One Violent Crime Reduction Initiative: How It Works and How Similar Programs May Benefit Your District</b> .....	83
<b>By Christopher Graveline and Joseph Wheatley</b>	
<b>Investigating and Prosecuting Prison Gangs: BOP Resources to Assist Federal Prosecutors</b> .....	91
<b>By Kevin Schwinn</b>	
<b>National Gang Intelligence Center</b> .....	95
<b>By Joshua Rock</b>	
<b>Editor's Note</b> .....	97
<b>By K. Tate Chambers</b>	

# Prosecuting Violent Crime

## Introduction

*Jeff Sessions*

*Attorney General of the United States*

The Department of Justice is committed to combatting violent crime and ensuring public safety. Federal agents and prosecutors work tirelessly every day with state, local, and tribal colleagues to bring violent criminals to justice and to deter individuals from resorting to violence.

Because of law enforcement's persistence, community-based policing, and other advances, America is now a far safer country than it was thirty years ago. But we recently have seen disturbing increases of violent crime in many communities. Transnational criminal organizations, drug trafficking networks, and criminal street gangs are extracting a toll on communities across this country. Such criminal conduct is unconscionable and we will not accept it.

Pursuant to Presidential Executive Order, I established the Department's Task Force on Crime Reduction and Public Safety on February 27, 2017. The Task Force is responsible for identifying ways that the federal government can more effectively combat violent crime, including gun crime, drug trafficking, and gang offenses. The Task Force already has begun to identify strategies that would further support our law enforcement partners, prevent crime, and improve inmate reentry programs. These strategies seek to leverage existing efforts while improving the effectiveness of our work.

This issue of USA Bulletin supports the Task Force's mission of creating a safer America. Collecting papers from subject matter experts throughout the Department, the Bulletin offers dynamic ideas for fighting violent crime and advancing professional training. It is an important resource for every Assistant United States Attorney and Criminal Division prosecutor dedicated to dismantling criminal organizations, apprehending violent offenders, and advocating for victims of violence.

I am grateful to the Executive Office for U.S. Attorneys' Office of Legal Education for compiling this outstanding Bulletin, and I thank each of the writers, reviewers, and editors who contributed to it.

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# “In for a Penny, In for a Pound”— Accessory Liability in Group Violence Cases

*James D. Peterson*  
*Trial Attorney*  
*Capital Case Section*  
*U.S. Department of Justice*

Well than, O'er shooes, o'er boots.  
And in for a Penny, in for a Pound.  
Whee—ho— Toby.

EDWARD RAVENSCROFT, *THE CANTERBURY GUESTS, OR, A BARGAIN BROKEN A COMEDY* (1695)

## I. Introduction

On February 1, 2017, the John T. Vaughn Correctional Facility erupted in violence as inmates attempted to take control of the facility. Four guards and forty-six inmates were held hostage. Officer Steven Floyd Sr. was brutally murdered. Delaware called the incident a riot. Inmates called it a protest.

Less than 24 hours after it started, the prison was secured and the officer was found murdered. The incident started at 10:38 on the morning of February 1<sup>st</sup>, when a corrections officer radioed for assistance from Building C, which houses about 125 inmates. For the morning shift, Officer Floyd, Officer Smith, and Officer Wilkinson were assigned different parts of Building C.<sup>1</sup> Officers Hammond, McCall, and Tuxward were working on the boilers in the basement of Building C. Officer Smith was brutally attacked by a large group of inmates. There were at least five inmate attackers who all wore contraband masks and were armed with various contraband weapons. Officer Smith witnessed Officer Floyd and Officer Wilkinson being attacked and covered in blood. Approximately ten to fifteen inmates attacked Officer Wilkinson. Sgt. Floyd was initially lured into the ambush when he tried to break up a staged fight. He was brutally beaten and was thrown into a closet and locked inside. When Officers Tuxward, Hammond, and McCall tried to rescue Sgt. Floyd from the locked closet, inmates threatened to kill them. Several inmates then tortured Sgt. Floyd before murdering him. His screams could be heard by the other captive guards. At least one Associated Press report stated that the head of the corrections officers' union in Delaware believed that inmates had practiced taking over the prison before they took three guards and a counselor hostage.

Governor John Carney vowed that Delaware will hold accountable “anyone who was responsible,” stating:

This was a long and agonizing situation. I want to thank all those involved in responding, including officers at the Department of Correction and the Delaware State Police, as well as our federal partners. Our priority now will be to determine what happened and how this happened. We will hold accountable anyone who was responsible. And we will make whatever changes are necessary to ensure nothing like it ever happens again.<sup>2</sup>

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<sup>1</sup> Civil Complaint at 29, *Floyd, et. al v. Delaware Dep't of Corr.*, 1:17-cv-00431-RGA (D. De. 2017).

<sup>2</sup> [Press Release, Governor John Carney, Statement on Fallen Correctional Officer \(Feb. 2, 2017\)](#).

But who was responsible and for what? Is only the inmate who inflicted the last and ultimately fatal blow to Officer Floyd responsible for the murder? Are only the inmates who actually struck blows against the officers responsible for the serious assaults and kidnappings? Are the inmates who “staged” a fight to lure Officer Floyd into a trap responsible for the murder even if they did not know or intend that he would ultimately be tortured and murdered? Are the inmates who procured and provided the makeshift contraband weapons used in the uprising responsible for the murder? Even if the weapon they fashioned was not the one actually used? How about the contraband masks? Conversely, is the government limited to prosecuting for murder only the one inmate who administered the ultimately fatal injury and only if the coroner can conclusively establish the precise wound that caused the death of Officer Floyd? Ultimately, is anyone guilty and can the government prove guilt? Is the government barred from prosecuting all who created a grave risk of death for a great number of individuals, staff and inmates alike, simply because the evidence will never establish who struck a particular blow or in fact which blow resulted in death?

## II. Accessory Liability

Aiding and abetting liability and *Pinkerton* liability are perhaps the most powerful tools in a prosecutor’s toolbox when dealing with complicated, multi-defendant murder and assault cases. The old, and anachronistic, English phrase “in for a penny, in for a pound” closely summarizes a defendant’s criminal liability in multi-party assault-murder cases. The federal aiding and abetting statute, 18 U.S.C. §2, states that a person who furthers—more specifically, who “aids, abets, counsels, commands, induces or procures”—the commission of a federal offense “is punishable as a principal.” That provision derives from common-law standards for accomplice liability. This statute reflects a centuries-old view of culpability: A person may be responsible for a crime he has not personally carried out if he helps another to complete its commission.<sup>3</sup>

In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court held that even though there was no evidence that one of the conspirators directly participated in the substantive offense charged in the indictment, that particular conspirator could still be convicted of the substantive offense based on the principle that the act of one partner may be the act of all.<sup>4</sup> In so holding, the Supreme Court indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense “was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of...the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.”<sup>5</sup> *Pinkerton* created liability for those participating in a conspiracy for those foreseeable, but perhaps unintended, acts.

Perhaps, it would be better to update and Americanize the phrase to “in for a dime, in for a dollar,” although that phrase has drawn criticism when used to explain accessory liability in federal court.<sup>6</sup> This article attempts to explore the contours of accessory and *Pinkerton* liability in group assault-murder cases. The focus is on prison murder cases only because there are a number of cases dealing precisely with the issues, which are particularly well defined.

Aiding and abetting liability and conspiracy liability are similar and related theories of criminal responsibility. Aiding and abetting is a rule of criminal responsibility for acts one assists another in performing and makes the defendant a principal when he consciously shares in any criminal act, whether or not there is a conspiracy. If a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to a conspiracy.<sup>7</sup> In one sense,

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<sup>3</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1244 (2014).

<sup>4</sup> *Id.* at 645–48.

<sup>5</sup> *Id.* at 647–48.

<sup>6</sup> *Waddington v. Sarausad*, 555 U.S. 179 (2009).

<sup>7</sup> *Nye & Nissen v. United States*, 336 U.S. 613 (1949).

aiding and abetting liability is broader since it does not require the existence of an agreement, express or implied.<sup>8</sup> In another sense, conspiracy liability, specifically *Pinkerton* liability, is broader since it more clearly includes unintended, but foreseeable, outcomes such as the death of a victim.

### III. Aiding and Abetting and *Pinkerton* Liability in Serious Assault and Murder Cases

In *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985), Judge Richard A. Posner considered the reach of aider and abettor liability to a prison murder case where one of the defendants unlocked a pair of handcuffs and provided a shank. The actual perpetrator, Thomas Silverstein, was being escorted from the shower to his cell. When he passed inmate Randy Gometz's cell, he reached his handcuffed hands into the cell. An officer who was close to Silverstein heard the click of the handcuffs being released and saw Gometz raise his shirt to reveal a shank—which had been fashioned from the iron leg of a bed—protruding from his waistband. Silverstein drew the knife and attacked one of the guards, Merle E. Clutts, stabbing him 29 times and killing him. Gometz argued that the evidence was insufficient to convict him of aiding and abetting Silverstein in murdering Clutts. He claimed that there was insufficient evidence that he knew why Silverstein wanted a knife. Judge Posner disagreed, stating:

If Silverstein had wanted to conceal it on his person in order to take it back to his cell and keep it there for purposes of intimidation, escape, or self-defense (or carry it around concealed for any or all of these purposes), he would not have asked Gometz to release him from his handcuffs (as the jury could have found he had done), for that ensured that the guards would search him. Since the cuffs were off before Silverstein drew the shank from Gometz's waistband, a reasonable jury could find beyond a reasonable doubt that Gometz knew that Silverstein, given his history of prison murders, could have only one motive in drawing the shank and that was to make a deadly assault.<sup>9</sup>

In *United States v. Horton*, 921 F.2d 540 (4th Cir. 1990), Judge J. Harvie Wilkinson III considered the scope and breadth of aider and abettor liability in a prison murder case in which the jury was unsure whether the defendant was a principal or accessory. The court started the opinion by stating:

This case is significant because it concerns crimes of violence committed by multiple assailants where it is unclear which assailant was the principal. We find that the district court properly instructed on aiding and abetting in response to a jury inquiry and we find no denial of the defendant's right to a unanimous verdict where it is possible that some jurors found him guilty as a principal and some found him guilty as an aider and abettor. Finally, a review of the record discloses that the defendant suffered no prejudice from the time allotted for argument on the supplementary aiding and abetting instruction. Therefore, we affirm the judgment of conviction.<sup>10</sup>

The victim, inmate Harold Hoston, was stabbed to death in the shower of a cellblock in Lorton prison. Horton and two other inmates, DaCoster and Green, lingered near the shower area talking to other inmates. Previously, one of the assailants had warned other inmates to stay away from the shower area because there was going to be a fight with Hoston. Another inmate heard Hoston scream and saw Horton stab Hoston in the stomach. At that point, Hoston had already sustained a stab wound to the chest. When Hoston tried to flee, Green and DeCoster blocked his path and Horton stabbed Hoston some more in the back. The cause of death was the unobserved stab wound to the heart. Three shanks were recovered, and there were three assailants. No evidence linked the specific shanks to the fatal wound or the shanks to a specific individual. After deliberations began, the jury sent out a note that said, “For any of the verdict

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<sup>8</sup> *Pereira v. United States*, 347 U.S. 1 (1954).

<sup>9</sup> *Fountain*, 768 F.2d at 798–99.

<sup>10</sup> *Horton*, 921 F.2d at 541.

[sic] do you have to inflict the body injury, or two, be the one to inflict the fatal injury to be convicted of first-degree murder?” Over the defense’s objection, the court instructed the jury on aiding and abetting liability. The jury then found the defendant guilty of first degree murder. In upholding the verdict and the instruction, the Fourth Circuit held:

Here the identity of the actual principal is not certain. The evidence tends to show that Horton, DaCoster, and Green participated jointly in the murder, but the exact role of each is unclear, and there is no direct evidence of who delivered the fatal blow. The only eyewitness, Steve Lofton, saw Horton stab Hoston in the stomach and several times in the back, but he did not see the beginning of the fight or who delivered the stab wound to the heart. Lofton's testimony thus does not rule out the possibility that Green or DaCoster was the principal. The jury may have harbored doubts on this score: the presence of three shanks -- any one of which could have been used to make any of the stab wounds -- and the large number of stab wounds on the body tend to point to more than one assailant. One officer testified in fact that he saw someone who appeared to be DaCoster "tussling" in the shower.

Though the identity of the principal may be uncertain, there was ample evidence that a murder was committed in the course of a group assault. The evidence of concerted action included testimony that DaCoster, Green, and Horton lingered on the tier together, went down to the shower together and came out together. One officer testified that they were friends. Lofton's testimony alone provides sufficient evidence that Horton substantially aided and abetted either DaCoster or Green or both in the murder -- if he did not deliver the fatal blow himself. The cases appellant cites are all inapposite because they involve aiding and abetting instructions where there was insufficient evidence that anyone other than the defendant was involved in the crime alleged.

This case is thus a classic one for an aiding and abetting instruction -- the commission of a criminal offense is not in doubt, but the identity of the principal may be unclear, and the defendant's participation in the venture can be established by the evidence. The very purpose of 18 U.S.C. § 2 is to render equally culpable all who participate in an offense. Here there was evidence from which a jury could have convicted Horton as an aider and abettor, and an instruction to that effect was therefore proper.<sup>11</sup>

In *United States v. Rosalez*, 711 F.3d 1194 (10th Cir. 2013), the most recent and far-reaching case discussing accessory liability in group prison violence cases, the court discussed both accessory liability and *Pinkerton* liability for a prison attack that resulted in the death of an inmate. The inmate, Zuniga, was a member of the Sureños, a prison gang. Hernandez was the shot caller, or leader, of the gang at that prison. Feeling disrespected by Zuniga, Hernandez ordered the beat down of Zuniga. Hernandez and fellow Sureños Rosalez recruited members Pluma, Morones, Alvarado, and Vasquez to carry out the beating, and two other members, Ruelas and Gonzales, to act as look outs. According to defendant Alvarado, the plan was for them to beat Zuniga “bad enough that he would...get a medical transfer” out of FCI Florence.<sup>12</sup> Per the instructions of Hernandez and Rosalez, the four inmates (Pluma, Morones, Alvarado, and Vasquez) who were to carry out the beating were given locks tied to fabric belts. Rosalez, Alvarado, and Vasquez met in Vasquez’s cell. They were then joined by Morones and Pluma. Pluma, Morones, Alvarado, and Vasquez then walked directly into Zuniga’s cell. Ruelas and Gonzalez, the other two Sureños members recruited to assist, waited outside of Zuniga’s cell to watch for correctional officers.

Morones entered the cell first and swung his padlock and hit Zuniga in the face or head. Zuniga attempted to fight back, but the four attackers all began to hit him with their padlocks. Alvarado's padlock broke after a few blows, so Alvarado proceeded to grab or “hug” Zuniga around the torso while the other

<sup>11</sup> *Id.* at 544.

<sup>12</sup> *Rosalez*, 711 F.3d at 1199.

three attackers (Pluma, Morones, and Vasquez) continued to hit Zuniga with their locks. At some point, Zuniga slid down to the floor, and Alvarado and Vasquez said to Morones and Pluma, “that's it, ya estuvo, that's enough.”<sup>13</sup> Morones said in response, “no, that's not. He hasn't had enough yet.”<sup>14</sup> Morones and Pluma continued to beat Zuniga, and Morones also stabbed Zuniga with a mop handle. Zuniga did not fight back. Alvarado and Vasquez ultimately left Zuniga's cell and attempted to dispose of their bloody clothing. When they left the cell, Zuniga was still breathing and making sounds. Several minutes later, Morones and Pluma left Zuniga's cell and returned to their prison housing unit. Prison video footage did not capture the actual attack, since that occurred inside of Zuniga's cell. But the video footage did show the four attackers (Pluma, Morones, Alvarado, and Vasquez) entering and subsequently exiting Zuniga's cell, and it also showed the actions of the two lookouts (Ruelas and Gonzalez).

Rosalez, Hernandez, Ruelas, and Pluma were tried jointly for conspiracy to commit assault which resulted in serious bodily injury and death, second degree murder, and aiding and abetting that murder. Morones and Pluma were also charged with possession of contraband in prison. They were convicted of all charges. Morones successfully moved to sever his trial and was convicted of all charges. Rosales, Hernandez, and Ruelas appealed, challenging the jury instructions regarding coconspirator and accomplice liability for murder in the second degree.

The gist of Rosalez's arguments was that he “was charged [in the superseding indictment] with conspiracy to commit an assault, and with aiding and abetting the commission of second degree murder,” but the jury instructions allowed the jury “to convict [him] of murder in the second degree under a theory nowhere pled in the Superseding Indictment, namely, a theory based on *Pinkerton* liability.”<sup>15</sup> The conspiracy instruction provided, in pertinent part:

If you find a defendant guilty of the conspiracy charged in Count 1, the conspiracy to assault Pablo Zuniga-Garcia, and you find beyond a reasonable doubt that during the time the defendant was a member of the conspiracy another co-conspirator committed the murder in the second-degree charged in Count 2, and the murder was committed to achieve an objective of, or was a foreseeable consequence of the conspiracy to assault Pablo Zuniga-Garcia, then you may find the defendant guilty of Count 2, murder in the second-degree, even though the defendant may not have participated in any of the acts which constitute the offense described in Count 2.<sup>16</sup>

The defendants also challenged the jury instruction defining the difference between aiding and abetting and conspiracy, which was given as follows:

Aiding and abetting and coconspirator liability are alternative theories by which the Government may prove a defendant's criminal liability for a charged offense. Sometimes jurors have difficulty understanding the legal difference between the criminal offense of "conspiracy" and "aiding and abetting." "Conspiracy" depends and is based on any agreement, unspoken or expressed, whether carried over into a conspiratorial act or not; whereas "aiding and abetting" depends on a showing of conscious participation in a criminal act, i.e., knowingly assisting in the performance of the criminal act charged. It is the element of "agreement" that distinguishes conspiracy from aiding and abetting.<sup>17</sup>

Additionally, the Tenth Circuit rejected the defendants' claim that holding Rosalez and Hernandez responsible for an unintended, although foreseeable, murder violated due process, holding:

We are not persuaded, however, that holding Rosalez responsible for the acts of Pluma,

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<sup>13</sup> *Id.* at 1200.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1210.

<sup>16</sup> *Rosalez*, 711 F.3d at 1202.

<sup>17</sup> *Id.* at 1203.



Morones, Alvarado, and Vasquez-Duran is contrary to *Cherry* or otherwise violates the due process limitations inherent in *Pinkerton*. That is because the acts of those four individuals, i.e., beating Zuniga severely, were within the scope of the conspiracy and thus necessarily foreseeable to the other members of the conspiracy. Moreover, as we have already noted, the evidence presented at trial would have allowed the jury to reasonably find that the conspiracy did not end until Morones and Pluma ceased beating Zuniga.<sup>18</sup>

#### IV. Mens rea—the Pink Elephant in the Room

Use of *Pinkerton* conspiracy and aiding and abetting law to hold criminal participants responsible for the unintended, but foreseeable, consequences of the enterprise has been criticized as being too broad.<sup>19</sup> Notwithstanding that criticism, the everyday reality of prosecuting criminals for conduct for which they are loath to admit involvement requires prosecutors to use the tools at their disposal to achieve justice.

In fact, *Pinkerton* liability and aiding and abetting law evolved to address that specific difficulty. Citing *United States v. Rabinowich*, 238 U.S. 78, 88 (1915), the Supreme Court in *Pinkerton* stated:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.<sup>20</sup>

The Tenth Circuit also confronted that criticism head on in *United States v. Rosalez*, 711 F.3d 1194 (10th Cir. 2013). The defendant argued that the use of “the *Pinkerton* doctrine lessened the government’s burden of proof significantly by eliminating the *mens rea* requirement for second degree murder and by eliminating the *mens rea* requirement for aiding and abetting liability.” Plainly, according to the evidence admitted at trial, both Hernandez and Rosalez directed and anticipated that Zuniga would be beaten severely, but not killed. Yet they were convicted of his murder. The Court found that argument lacking in merit, holding that “the acts of those four individuals, i.e., beating Zuniga severely, were within the scope of the conspiracy and thus necessarily foreseeable to the other members of the conspiracy.”<sup>21</sup> The court also found that the conspiracy was ongoing, stating, “as we have already noted, the evidence presented at trial would have allowed the jury to reasonably find that the conspiracy did not end until Morones and Pluma ceased beating Zuniga.”<sup>22</sup>

Any discussion of *mens rea* for foreseeable, but unintended, outcomes in aiding and abetting cases must necessarily consider *Rosemond v. United States*, 134 S. Ct. 1240, 1244 (2014). In *Rosemond*, the Supreme Court expressly held that a defendant must share the prior knowledge that a firearm was possessed in a 924 case, although the Court also specifically “express[ed] no view” on whether an aider and abettor would be liable for the natural and probable, but unintended, consequence of participation in a criminal enterprise.<sup>23</sup>

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<sup>18</sup> *Id.* at 1207.

<sup>19</sup> Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1345–46 (2002); John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 *S.C. L. REV.* 237, 249 (2008).

<sup>20</sup> *Pinkerton*, 328 U.S. at 643.

<sup>21</sup> *Rosalez*, 711 F.3d. at 1207.

<sup>22</sup> *Id.*

<sup>23</sup> *Rosemond*, 134 S. Ct. at fn. 7.

## V. Causation—a Distinct but Related Concept

The issue of cause of death is a legally distinct concept from *Pinkerton* and aiding and abetting liability, but can be intertwined in group violence cases. Stated simply, when multiple assailants beat, stab, or shoot a victim, separating out the actual cause of death may be difficult or impossible. Adding to that difficulty is the inevitable claim by the defense that the government cannot, but somehow legally must, determine who struck the fatal injury.

The Supreme Court provides some additional guidance in a case involving very strange facts. In *Henderson v. Kibbe*, 431 U.S. 145 (1977), the Court ruled that there is no constitutionally required causation limitation for a murder conviction where the death was foreseeable but unlikely or unintended. The defendant, after robbing an intoxicated man with a co-defendant, abandoned him at night on an unlit, rural road where the visibility was obscured by blowing snow. Twenty or thirty minutes later, while helplessly seated in the road, the man was struck and killed by a speeding truck. The defendant was subsequently convicted of second-degree murder and other charges. The New York statute in question permitted a second-degree murder conviction if a defendant “engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.” Not surprisingly, the defendant argued that it was the negligence of the truck driver, rather than the defendants’ action, that had caused the victim’s death and that the defendants could not have anticipated the fatal accident. The Court reversed the Second Circuit and reinstated the convictions holding that a separate instruction on causation beyond the simple reading of the statute was unnecessary:

The New York Court of Appeals concluded that the evidence of causation was sufficient because it can be said beyond a reasonable doubt that the “ultimate harm” was “something which should have been foreseen as being reasonably related to the acts of the accused.” It is not entirely clear whether the court’s reference to “ultimate harm” merely required that Stafford’s death was foreseeable, or, more narrowly, that his death by a speeding vehicle was foreseeable. In either event, the court was satisfied that the “ultimate harm” was one which “should have been foreseen.” Thus, an adequate instruction would have told the jury that if the ultimate harm should have been foreseen as being reasonably related to defendants’ conduct, that conduct should be regarded as having caused the death of Stafford.<sup>24</sup>

The Tenth Circuit also considered the homicide causation requirement in *United States v. Hatatley*, 130 F.3d 1399 (10th Cir. 1997). In *Hatatley*, the two defendants had been drinking heavily when the victim, who was also heavily intoxicated, arrived. The victim pulled one defendant from his car, and they started fighting. When the first defendant was getting the worst of the fight, the second defendant jumped in and started beating the victim. The fight soon ended, and all three participants continued drinking together. The two defendants at some point forced the victim into a car and left the residence where they were consuming alcohol. The victim was at some point pulled from the car and possibly beaten some more. He was then left “drunk and beaten in the freezing desert,” where he was found dead the next day.<sup>25</sup> The government contended, with supporting expert testimony, that the victim died as a result of blunt force trauma. The defendants contended, with supporting expert testimony, that the victim died as a result of hypothermia. The court instructed the jury that:

In your consideration of the Government's burden to prove that the Defendant's conduct caused Kee Smith’s death, you are instructed as follows:

When the conduct of two or more persons contributes concurrently as proximate causes of death, the conduct of each person is a proximate cause regardless of the extent to which

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<sup>24</sup> *Kibbe*, 431 U.S. at 155–6.

<sup>25</sup> *Hatatley*, 130 F.3d at 1402.

each contributes to the death.<sup>26</sup>

The government also asked for, and received the following instruction:

If the defendant's conduct placed Kee Smith in a position of danger, and the defendant failed to safeguard Kee Smith, the defendant's conduct should be regarded as having caused the death of Kee Smith.<sup>27</sup>

The Tenth Circuit affirmed the correctness of both instructions and held that “[w]hen a person puts another in a position of danger, he creates for himself a duty to safeguard or rescue the person from that danger.”<sup>28</sup>

## VI. Back to the Vaughn Prison Riot

Revisiting the facts of the Vaughn Prison Riot in the context of aiding and abetting and *Pinkerton* liability shows how flexible and plastic those concepts can be in order to achieve justice for those who participated in the riot that resulted in the murder of Officer Floyd. Those who agreed to participate in the riot share responsibility for Officer Floyd's foreseeable death. Those inmates who agreed to participate in the ruse to lure Officer Floyd to try to break up a fight are responsible for his kidnapping, assault, and murder under a *Pinkerton* liability theory. Likewise, all inmates who practiced and participated in the riot may share *Pinkerton* liability for the kidnappings, assaults, and murder. Concerning the inmates participating in the detention, assault, and intimidation of correction officers Tuxward, Hammond, McCall, and Floyd, all are responsible for the kidnappings, assaults, and murder under a *Pinkerton* liability theory, as well as under aiding and abetting law.

Although the Vaughn Prison Riot is one of the more recent and serious examples of mass violence resulting in death, the state prison riot at Vaughn is not unique to the state system. On May 20th, 2012, as many as 300 inmates were involved in a riot that resulted in the death of one guard and injury to five other correctional officers and three inmates at the Adams County Correctional Center, a federal penal facility operated by a private corporation in Mississippi. In 1987, thousands of inmates rioted and took control of the U.S. Penitentiary in Atlanta, Georgia, for eleven days. Fortunately, no innocent staff or inmate lives were lost. More common, and more relevant to this article, are the many murders and serious assaults that take place each year in federal prison facilities. Aiding and abetting and *Pinkerton* conspiracy liability should be fully explored in order to hold accountable all inmates who participate in these violent crimes.

### ABOUT THE AUTHOR

□ **James D. Peterson** is a trial attorney in the Capital Case Section, providing litigation and trial assistance and expertise to local U.S. Attorneys' Offices that are prosecuting death penalty cases. Jim has been with the Department of Justice in the Capital Case Section since 2012. Prior to joining CCS, Jim was a state prosecutor in Virginia for over eighteen years. During that time, he tried more than 130 jury trials, including multiple capital murder cases. Jim is a past recipient of the Warren Von Schuch Award for outstanding Virginia prosecutor. He has lectured throughout the country on subjects relating to computer crimes, the insanity defense, and capital case litigation, as well as mental health issues in criminal trials.

<sup>26</sup> *Id.* at 1406.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

# Witness Maintenance in Long-Term Violent Crime Cases

*David Jaffe*

*Chief*

*Organized Crime and Gang Section*

*Criminal Division*

*U.S. Department of Justice*

## I. Introduction

Long-term violent crime cases pose many challenges to federal prosecutors. Prosecutors must constantly: direct agents to develop and enhance portions of the case; draft subpoenas, 2703(d) orders, wiretap applications, indictments and prosecution memoranda, capital case submissions and RICO review submissions; and coordinate and schedule grand jury time. In the crush of all of these responsibilities, witness development and maintenance sometimes results in no more than simply meeting the witness, debriefing him or her, and then placing that person in the grand jury, all on the same day.

For most cases, such limited contact with a witness would most likely be sufficient. Long-term violent crime cases, however, demand more attention to witness development, testimony preservation, and basic witness maintenance. A long-term racketeering investigation into a structured gang or enterprise can often require two years or more of work, and depending on the number of indicted defendants, the ensuing prosecution can take another two or more years before completion of trial and, hopefully, sentencing.

Thus, the victim or witness of a violent incident faces the prospect of testifying in court many years after the incident actually occurred. The passage of so much time, in turn, poses unique problems for prosecutors. The witness's memory might well deteriorate over time. The witness's physical or mental health may undergo drastic changes over the span of two or more years. Especially in gang cases, a witness's personal circumstances may have changed so dramatically that it would impact their willingness or ability to participate in the criminal case. Such changes include changes in place of residence, whether they have been arrested or convicted for crimes; changes in relationships to victims or other witnesses; and receiving threats or other forms of intimidation or influence from defendants or their supporters. And of course, the witness may lose interest in the case or the desire or motivation to participate. All of these concerns only grow with the passage of time.

Accordingly, especially in long-term, violent crime investigations and prosecutions, witness development and maintenance are of paramount concern. Thus, prosecutors, working with their case agents, should develop a plan to secure a witness's testimony, preserve it in a way consistent with any *Jencks/Giglio* concerns, but that still allows a witness's memory and truthful testimony to be memorialized in useable fashion, and attempt to maintain a witness's long-term cooperation with the investigation. Such a plan does not necessarily require a tremendous amount of work, but it does require a commitment, especially from the agents, to work with witnesses throughout the entire pendency of the investigation and litigation.

## II. Develop a Witness Maintenance Plan

A witness maintenance plan requires steps both by agents and prosecutors. The suggestions below are some examples of how to develop a plan and maintain witnesses. Law enforcement agents play a key

role in witness maintenance. They must develop a decent working relationship with every witness to insure the witness's short-term and long-term cooperation, and assess their credibility and state of mind as a case slowly winds its way through the court system.

To develop these relationships, the agents should consider meeting with every witness in the case, and have that initial meeting well before the case is charged. This requirement would seem obvious, yet there are many agents and prosecutors, especially in long-term racketeering cases, that will include a particular incident in a Racketeer Influenced and Corrupt Organization (RICO) indictment based solely on police reports and other law enforcement paperwork, and not attempt to have even telephonic contact with victims or witnesses until after indictment, or right before trial. Whether to meet with every witness is a judgement call for the prosecutor and agents to make. In certain cases it is essential. That decision depends on several considerations including the type of witness. For example, is the witness a key eye witness or a record keeper. It also depends on the nature of the case. Is it a one-count gun case investigated by an officer the prosecutor has worked with on numerous cases or is it a complex RICO prosecution. Also, there are case secrecy concerns. Would talking to a witness alert the defendant to the coming charge and give him the opportunity to flee or destroy evidence. All of these factors should be taken into consideration in deciding whether to interview witnesses.

Failing to meet with witnesses prior to charging is quite inappropriate in certain cases for several reasons. First, agents and prosecutors must meet, face to face, with victims and witnesses prior to indictment to assess the witness's credibility, the strength of the witness's proposed testimony, the nature and strength of any evidence that would tend to corroborate or undercut that testimony, and the defendant's guilt for both the incident in question and the overall case. Moreover, early face-to-face contact with every witness is necessary in order to determine whether the witness will be available to testify at trial. Finally, as purely a defensive matter, it is important to meet early with potential witnesses to determine whether they have been contacted by defense attorneys or experts, which can enable an agent or prosecutor to learn if the defense is aware of an investigation, is developing affirmative or other defenses to particular crimes, or is potentially tampering with witnesses.

Further, agents must develop some type of professional, on-going relationship with every civilian witness, if not all witnesses, in a case. Given the potential duration of a long-term investigation and prosecution, there is a great risk that witnesses will no longer become cooperative, may endure personal physical or mental challenges that may make their availability for trial questionable, or may simply move away or disappear during the pendency of a case. Thus, it is of paramount importance that agents maintain regular contact with as many witnesses as possible during the pendency of a case.

To accomplish this important task, agents and prosecutors should develop a witness maintenance plan. Especially in larger cases, agents should divide the work so that as many witnesses can be covered as possible. Special attention should be paid to whether an agent can develop a connection with a witness. Agent-witness contact can be detrimental to a case if an agent is antagonizing the witness or otherwise disrupting a witness's life. Indeed, some agents simply do not possess the interpersonal skills necessary to develop and maintain good working relationships with certain, or all, witnesses, and thus a prosecutor must pay close attention to how witnesses are reacting to individual agents, and insure that the right agent is working with the right witness in each case.

Once agents begin to contact witnesses and develop some type of professional relationship with each witness, it is imperative that agents maintain that relationship throughout the pendency of the case. In most cases, that simply involves some periodic contact with each witness to insure that the witness is still alive, the witness's personal situation is relatively unchanged, and the witness is still cooperative and prepared to testify at trial. Of course, the frequency and nature of these "check-up" contacts must be determined by the individual needs and circumstances of each witness. Some witnesses may only need a telephone call every 6 to 8 weeks, while other witnesses may need weekly or even daily contact. As part of an overall witness maintenance plan, agents and prosecutors should discuss the frequency and nature of

each “check-up” contact with each witness.

Moreover, especially in long-term violent crime cases, many witnesses will have needs that go far beyond a simple telephone call. Some witnesses may have substance abuse issues, financial problems, difficulty securing housing, domestic issues, problems securing state or federal subsidies and benefits, and physical or mental issues. Many state prosecutors offices have entire units dedicated to connecting witnesses with state and federal assistance programs and providing needed counseling and other services to victims and witnesses. There is nothing quite like that in the federal system. However, agents and prosecutors should make full use of the United States Attorney’s Office victim-witness coordinators whenever possible. As these resources are limited, agents will most likely be called upon to fill any resultant gaps and assist witnesses with obtaining needed services.

In certain circumstances, the prosecutor must take the lead in developing a relationship with witnesses or victims. For example, in capital-eligible cases, the death penalty protocol requires prosecutors to speak with family and survivors to determine their views on the death penalty. Specifically, the United States Attorney Manual provides that

[u]nless extenuating circumstances exist, the United States Attorney or Assistant Attorney General should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney or Assistant Attorney General should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney or Assistant Attorney General should notify the family of the victim of all final decisions regarding the death penalty.<sup>29</sup>

Indeed, it is quite difficult to broach this emotionally difficult topic and explore these views without the prosecutor first developing some kind of relationship with family members and other involved individuals. Similarly, in cases involving particularly traumatic events, such as rapes or very violent assaults, prosecutors should spend additional time with witnesses simply to prepare the witness for testimony that could be quite difficult, if not traumatic. A good working relationship with such witnesses, developed early in the investigation, can greatly assist a prosecutor to effectively develop and prepare a witness for trial.

Of course, prosecutors must be fully cognizant of their statutory obligations concerning victims and witnesses as well. Pursuant to [18 U.S.C. § 3771](#), crime victims possess certain rights, including:

- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- ....
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- ....
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 ([42 U.S.C. 10607\(c\)](#)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.<sup>30</sup>

These specific provisions of the statute require a bare minimum of contact between the prosecutor

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<sup>29</sup> [USAM § 9-10.100](#).

<sup>30</sup> [18 U.S.C. § 3771 \(2012 & Supp. III 2015\)](#).

and each victim and witness. However, as discussed, long-term investigations and prosecutions require far more contact with all witnesses and victims to effectively develop and maintain a case.

### III. Preserving Witness Testimony for Trial

In addition to supervising and coordinating agent efforts to develop and maintain relationships with witnesses and victims, prosecutors have additional responsibilities in securing and preserving witness testimony for trial. Due to the fact that witnesses' memories deteriorate over time, and their motivations and allegiances may shift during the course of an investigation and prosecution, prosecutors will want to insure that the most detailed and accurate account of a witness's observations and knowledge are memorialized and preserved such that the government will be in the best position to present its case at the time of trial.

A prosecutor has limited options for preserving a witness's testimony. The prosecutor may simply interview the witness from time to time, without memorializing the statement, and hope that that their statement does not vary or deteriorate over time. The prosecutor or agent may write a report of his or her recollection of that witness's statement. The prosecutor could ask the witness to adopt the statement as well. The prosecutor could have the witness provide sworn testimony before a grand jury. Finally, if the witness has criminal exposure, the prosecutor could require the witness to plead guilty to a cooperation agreement that provides for penalties for providing false, incomplete, or misleading testimony.

As a threshold matter, absent unusual circumstances, there is little way to preserve a witness's prior statements for use at trial without that witness being available to actually testify at trial. Even prior sworn testimony of a witness cannot simply be introduced wholesale at trial without that witness on the stand in court absent truly unusual circumstances. Specifically, pursuant to [Federal Rule of Evidence 804\(b\)\(1\)](#), former testimony of a witness may be admissible when that witness is unavailable and the prior testimony:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.<sup>31</sup>

Moreover, former testimony of a witness who is unavailable to testify at trial may be admissible, when:

A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.<sup>32</sup>

Both of these situations are highly unusual. More typically, government witnesses will be available for trial, but they may no longer fully remember the relevant events, or their loyalties or motivations may have shifted such that they may no longer wish to provide full, truthful testimony.

In such situations, the government may refresh the recollection of, or impeach, its own witnesses. The Federal Rules of Evidence specifically permit "any party, including the party that called the witness" to attack or impeach a witness's credibility.<sup>33</sup> In such situations, however, the material that the government has to conduct the impeachment can have significantly different evidentiary value. Specifically, a prior police or agent report may not effectively impeach a witness, since the witness can refuse to adopt the report as his or her prior statement, or may otherwise contest the validity or accuracy

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<sup>31</sup> FED. R. EVID. 804(b)(1).

<sup>32</sup> FED. R. EVID. 804(b)(6).

<sup>33</sup> FED. R. EVID. 607.

of that prior statement. Indeed, courts have rejected government attempts to introduce into evidence an agent's report to impeach a witness precisely on those grounds.<sup>34</sup>

However, a witness's prior sworn grand jury testimony does not suffer from the same infirmities. It is considered completely reliable, and thus a hostile witness's prior grand jury testimony not only can be used to impeach that witness, but also may be admitted into evidence substantively at trial as well.<sup>35</sup>

Accordingly, in determining how to preserve a witness's testimony, the prosecutor must weigh important factors. First, the prosecutor must consider the witness's short term and long-term ability to remember the relevant facts in question, and the ability of an otherwise cooperative witness to give consistent testimony over a long period of time. Some memorialization is usually appropriate, but a prosecutor may decide that a witness is relatively reliable and stable, and thus there is no need to have that witness testify in the grand jury.

Second, the prosecutor must consider whether the witness will remain cooperative over the duration of the investigation and prosecution. Family members, friends, romantic partners, and even individuals who live in the same community as the defendant may be willing to cooperate in the short term, but outside pressures may cause those witnesses to refuse to cooperate, or become hostile to the government, by the time of trial. For such witnesses, the safer course would be to "lock in" that witness's testimony, provided it is truthful, accurate, and complete, by having that witness testify in the grand jury, and thus have the witness's grand jury transcript ready and available at trial.

Finally, the prosecutor must determine whether the witness should be charged with crimes, if applicable, and required to plead guilty to a cooperation agreement. Where a cooperation agreement exposes a witness to a significant penalty if he or she lies, or gives incomplete or untruthful testimony, there is often sufficient motivation for the witness to continue to cooperate, and thus little need to needlessly create *Jencks* material by requiring the witness to testify before the grand jury. However, even if the witness executes a cooperation agreement, the prosecutor must also decide whether the agreement is sufficient to motivate the witness to cooperate with the government on the case in question, and whether, because of memory or other issues, the witness's testimony, nevertheless, should be preserved via grand jury testimony.

At bottom, many of these questions revolve around evaluating the risks of creating potentially damaging *Jencks* material, and the rewards of possessing sworn prior statements of one's witnesses. The prosecutor must make that evaluation on an individual basis, witness by witness, to engage in the most accurate cost-benefit analysis possible. Significantly, the prosecutor's cost-benefit analysis in that regard is best informed by a well-established professional relationship between the government and the witness, through agent-witness contact, prosecutor-witness contact, or both.

## IV. Conclusion

The investigation and prosecution of a long-term gang or violent crime case is necessarily labor and resource intensive. There are incredible demands placed on agents and prosecutors as they struggle to coordinate disparate aspects of an investigation and prosecution to bring a case to indictment and trial. As a result, some seemingly more mundane tasks, like keeping in regular contact with witnesses, and servicing their sometimes annoyingly frequent requests and demands, can fall by the wayside. However, it is critically important for the long-term success of these complex cases that agents and prosecutors,

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<sup>34</sup> See, e.g., [United States v. Shoupe](#), 548 F.2d 636 (6th Cir. 1977).

<sup>35</sup> See, e.g., [United States v. LaVictor](#), 848 F.3d 428, 452 (6th Cir. 2017).



early on, develop a comprehensive plan for securing witness testimony, preserving that testimony, and ensuring that the witnesses will remain part of the government's case during the long pendency of an investigation and trial.

#### **ABOUT THE AUTHOR**

□ **David Jaffe** joined the Department of Justice in 2002 as an Assistant U.S. Attorney for the Southern District of New York. In 2006, David joined the Criminal Division with the Gang Squad, which later became the Organized Crime and Gang Section. David has prosecuted numerous gang and large-scale drug trafficking conspiracies. He has held the position of Deputy Chief, Principal Deputy Chief, and is currently the Acting Chief of the Organized Crime and Gang Section, Criminal Division.

# Hobbs Act Robbery

*Christopher Graveline*  
*Chief*  
*Violent and Organized Crime Unit*  
*U.S. Attorney's Office*  
*Eastern District of Michigan*

*Bonnie S. Greenberg*  
*Assistant Director, Criminal Programs*  
*Office of Legal Education*  
*Executive Office for U.S. Attorneys*  
*U.S. Department of Justice*

## I. Introduction

On March 8, 2017, Attorney General Sessions issued a memorandum emphasizing the Department's commitment to prosecution of violent crime, noting that one of the "substantial tools" prosecutors have at their disposal to target violent crime is the Hobbs Act robbery statute—[18 U.S.C. § 1951](#). We wholeheartedly agree. The authors of this article have 41 years of experience with the Department of Justice. We both believe that federal prosecution of criminals who commit robberies will make our communities substantially safer. We hope this article will assist you in prosecuting these types of cases in your district.

The Hobbs Act prohibits robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce."<sup>36</sup> The elements of a Hobbs Act robbery are (1) robbery, and (2) interference with commerce.<sup>37</sup> The "minimal effect" on interstate commerce can be met when the robbery impacts the assets of an "inherently economic enterprise."<sup>38</sup>

Of course, prosecuting a Hobbs Act robbery is not as simple as that. Interstate commerce, for example, can be a thorny factual and legal issue in Hobbs Act prosecutions. In 2012, Andrew Creighton, a trial attorney with the Criminal Division's Organized Crime and Gang Section, wrote a thorough and helpful United States Attorney Bulletin article outlining the legal elements of Hobbs Act robbery and the various interstate commerce issues. We recommend reviewing this article for an overview of the statute and the various interstate commerce issues.

Prosecutors should be aware of the United States Attorney's Manual policy regarding the Hobbs Act robberies, which provides: "[18 U.S.C. § 1951](#) is to be utilized, as a general rule, only in instances involving organized crime, gang activity, or wide-ranging schemes."<sup>39</sup> Note that there are many exceptions to the general rule. Some of the considerations include the egregiousness of the crime or the offender's recidivism. Prosecutors who are unsure whether a particular case would be appropriate to charge under the Hobbs Act should consult with the Organized Crime and Gang Section of the Criminal Division.

Within these parameters, there are many types of cases that could qualify for prosecution under

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<sup>36</sup> [18 U.S.C. § 1951\(a\)](#) (2012).

<sup>37</sup> *Stirone v. United States*, 361 U.S. 212, 218 (1960).

<sup>38</sup> *United States v. Tillery*, 702 F.3d 170, 174 (4th Cir. 2012) (internal quotations omitted).

<sup>39</sup> [USAM § 9-131.040](#).

the Hobbs Act. The “typical” Hobbs Act cases, of course, are the convenience store or gas station robberies. However, the Hobbs Act reaches conduct broader than that. For example, in the spring and early summer of 1995, several small businesses in the Dallas area were victimized in a series of crimes that became known as the “driveway bank robberies.”<sup>40</sup> The perpetrators surveilled the stores and robbed the victims, usually in the drive-up lane at the bank or in their store parking lot, immediately after the victims had made substantial bank withdrawals for use in their check cashing activities. The effect on interstate commerce was based on the victims’ check-cashing activities and because the stores sold goods shipped in from outside of Texas. These robberies caused one victim’s store to permanently close.

Similarly, the Third Circuit and the Fourth Circuit affirmed Hobbs Act robbery convictions, reasoning that the interstate commerce nexus was met when the robbers knew that the business owners kept proceeds from their businesses at their home.<sup>41</sup> These courts reasoned that the proceeds were business and not personal assets, and therefore met the interstate commerce requirement. Another example of an appropriate use of the Hobbs Act statute (prosecuted by one of your authors), involved a three-time convicted robber who robbed an elderly couple in their hotel room. The interstate commerce element was satisfied because the couple was refunded their hotel room rental for that night and cancelled their second night stay at the hotel.<sup>42</sup> A word of caution in this area is to be sure to check your circuit-specific law regarding these types of robberies as to what is required to satisfy the “effect on interstate commerce” element.<sup>43</sup>

Lastly, the Hobbs Act can be used to prosecute drug dealers who commit robberies of other drug dealers. This aspect of Hobbs Act robbery was featured in *The Wire*, an iconic HBO series that aired from 2002 to 2008. In the series, Omar Little was a Baltimore stick-up man, frequently robbing street-level drug dealers. This was known throughout the drug dealing community, as people on the street screamed "Omar comin'!" when they saw him approach. Last year the Supreme Court authorized Hobbs Act prosecutions of robbers like Omar Little, ruling that the interstate commerce element of the statute was met when the robber intentionally targeted drug dealers to obtain drugs and drug proceeds.<sup>44</sup>

We believe that Hobbs Act prosecutions should be a vital part of any anti-violent crime program. Business robberies strike at the very lifeblood of any neighborhood or community. If business owners and customers do not feel secure in both their personal safety and property, they will go elsewhere. It is not uncommon for the victim companies to have such an economic loss that they close, as happened in the *Robinson* case, *supra*. As businesses leave an area, the vacant business fronts become emblematic of the lack of economic opportunity for the people who live in that area. Moreover, business closures have hidden costs. When a corner grocery or store closes due to repeated robberies, that departure equates into longer trips for the elderly residents in that area just to get the basic staples of life. Thus, protecting the business community has a direct bearing on the quality of life of a community and is of utmost importance.

By aggressively prosecuting Hobbs Act cases in federal court, with the mandatory consecutive [18 USC § 924\(c\)](#) count(s), the law enforcement community sends a strong message that business robberies will not be tolerated. An individual with a minimal criminal history will most likely face approximately 9 to 11 years in prison for an armed robbery of a business in federal court. Multiple Hobbs Act counts, with the potential of charging second or subsequent [18 USC § 924\(c\)](#) counts, quickly add up

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<sup>40</sup> [United States v. Robinson](#), 328 F.3d 708 (5th Cir. 1997).

<sup>41</sup> [United States v. Powell](#), 693 F.3d 398 (3d Cir. 2012); [United States v. Donahue](#), 607 Fed. App'x. 233 (4th Cir. 2015) (per curiam).

<sup>42</sup> [United States v. Wiggins](#), No. CRIM. WDQ-13-0146, 2014 WL 3700345, at \*1 (D. Md. July 23, 2014) (appeal pending).

<sup>43</sup> See [United States v. Wang](#), 222 F.3d 234, 240 (6th Cir. 2000) (no showing of a substantial connection between the robbery and the restaurant's business when robber robbed private citizens in their house, and \$1,200 of the \$4,200 stolen was restaurant proceeds).

<sup>44</sup> [Taylor v. United States](#), 136 S. Ct. 2074 (2016).

to lengthy sentences. Thus, these prosecutions directly lead to getting some of the most dangerous and brazen criminals off the streets for a significant period of time.

The combination of federal and state resources, and the sharing of information, is a force multiplier. Not only will the cases be more successful from the sharing of resources and intelligence, but it is likely that there will be less robberies as the robbery “sprees” will be stopped earlier.

Moreover, as the word spreads through the criminal underworld that these types of robberies will result in a trip to federal court, secondary benefits also begin to develop. The deterrence effect can curb armed robberies as individuals inclined to commit these crimes begin to learn that this misconduct will result in decades in prison. Additionally, robbers facing lengthy federal prison sentences are far more likely to cooperate with law enforcement authorities, not only to solve business robberies, but numerous other crimes as well, including murders, shootings, and illegal narcotics distribution. For example, in a recent Hobbs Act prosecution in Detroit for a string of Dollar General store armed robberies, one of the robbers decided to cooperate with the FBI, which led to state charges on four individuals for a previously unsolved murder. Finally, by bringing these cases in federal court, it is possible to bring multiple robberies committed in two or more jurisdictions (for example, over state county lines) in a single prosecution. This joinder can preserve law enforcement resources, allow juries to see the totality of the conduct, and permit sentencing courts to sentence on all the offense conduct.

If your district is not currently prosecuting these types of cases, or would like to prosecute more of them, communication and coordination is essential. First, within the U.S. Attorney's Office itself, a discussion should be had with office leadership to determine under what circumstances and how these cases should be brought. What are the office's thresholds—a single robbery or multiple robberies? Shots fired or firearm brandished? What is the office's policy on stacking [18 USC § 924\(c\)](#) counts? Once these questions are answered within the office, coordination with the local FBI and/or ATF office should be next to determine their level of interest and resources. Many FBI and ATF offices have existing violent crime task forces that can direct their attention to these types of crimes. If no task force exists, or if you are dealing with a smaller regional office, a conversation with local FBI and/or ATF leadership should identify how many agents they can devote to these cases and how they fit into the district's priorities.

Once the federal law enforcement partners are on the same page, coordination with local authorities is necessary. Certain jurisdictions may welcome the federal assistance in addressing this problem while others will push back, asserting territorial jurisdiction. In either case, establishing a clear protocol as to which cases should proceed in federal court and which should remain in state court will ease any misunderstandings as to who will prosecute.

The combination of state and federal law enforcement agencies to combat these types of offenses, typically referred to as a “task force,” has been successful in your authors’ districts. Once you have your task force set, here are some tips to help your task force be the best task force ever:

- Keep an eye on state deadlines.
- Coordinate frequently with your state and local partners. Try to have a meeting at least once a month. Make sure you include all relevant partners and keep them informed. Communication is the key.
- Don’t “cherry pick” the good cases.
- Educate your fellow AUSAs so you have help with the cases.

We hope that this information helps you prosecute Hobbs Act robberies in your district. Please contact either one of us if we can assist.

#### **ABOUT THE AUTHOR**

□ **Christopher Graveline** is the Chief of the Violent and Organized Crime Unit, Eastern District of Michigan. He has prosecuted numerous violent crime, gangs, and drug conspiracy cases in his time in the Eastern District of Michigan.

□ **Bonnie S. Greenberg** is an Assistant Director for the National Advocacy Center, on detail from the U.S. Attorney's Office in the District of Maryland. She has worked on a wide variety of cases, including violent crime, child exploitation, narcotics, immigration, and white collar.

# Victims, Terrorists, and the Scales of Justice

*Jeff Kahan*  
Trial Attorney  
Capital Case Section  
U.S. Department of Justice

*Nathan S. Williams*  
Supervisory Assistant U.S. Attorney  
Charleston Branch Manager  
District of South Carolina

*Aloke Chakravarty*  
Assistant U.S. Attorney/ATAC Coordinator  
District of Massachusetts

*Steven Mellin*  
Assistant U.S. Attorney  
Southern District of Texas

## I. Introduction

Crimes of terror strike at diverse communities and institutions—from a once-anonymous courthouse in Oklahoma City to landmark skyscrapers in New York. By design, such offenses are indiscriminate and maddeningly cruel to victims who have done nothing to invite the offenders’ wrath. The unpredictability and diffuse impact of these crimes present unique challenges for prosecutors.

In recent years, the Department prosecuted two high-profile offenders for crimes of terror—Dzhokhar Tsarnaev, who bombed spectators at the Boston Marathon, and Dylann Roof, who shot parishoners engaged in Bible study at the Emanuel African Methodist Episcopal (A.M.E.) Church in Charleston, South Carolina. The cases illustrate the Department’s efforts to balance the demands of successful criminal prosecutions with the needs of victims.

## II. *United States v. Dzhokhar Tsarnaev*<sup>45</sup>

On the third Monday of every April, the Commonwealth of Massachusetts commemorates Patriots’ Day, marking the date with a school holiday,<sup>46</sup> reenactments of Revolutionary War battles,<sup>47</sup> and the annual running of the Boston Marathon.<sup>48</sup> The marathon attracts around 30,000 participants and 500,000 spectators.<sup>49</sup> The race has become synonymous with Patriots’ Day in the minds of many Bostonians, resulting in the appellation, “Marathon Monday.” The marathon draws the largest crowd of

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<sup>45</sup> *United States v. Tsarnaev*, No. 1: 13 CR 10200 - 001 – GAO, 2015 WL 3945832 (D. Mass. June 24, 2015).

<sup>46</sup> See *Massachusetts Legal Holidays*, SEC’Y COMMONWEALTH MASS. (last visited June 9, 2017).

<sup>47</sup> See Jessica Casserly, *Local Towns Blend New Events with Annual Patriots’ Day Traditions*, HANSCOMB AIR FORCE BASE (Apr. 4, 2017).

<sup>48</sup> See *The Boston Marathon, Boston Marathon History*, BOSTON ATHLETIC ASSOCIATION (last visited June 9, 2017).

<sup>49</sup> See John S. Kiernan, *Boston Marathon Facts*, WALLET HUB (Apr. 12, 2017).

any sporting event in New England.<sup>50</sup> Those spectators line the entire 26.2-mile course, from its start in rural Hopkinton to its finish on Boylston Street in downtown Boston.<sup>51</sup>

During the 117th running of the marathon, on April 15, 2013, brothers Dzhokhar and Tamerlan Tsarnaev each detonated an improvised explosive device near the race's crowded finish line. The bombs killed three spectators and wounded hundreds of other people watching or running the marathon. The brothers constructed the bombs from pressure cookers that they filled with low-explosive powder and shrapnel, placing them inside backpacks for portability. Surveillance cameras captured the Tsarnaevs walking together toward the finish line about ten minutes before the first explosion, each carrying a backpack. Tamerlan, aged 26, headed to the immediate vicinity of the finish line. Nineteen-year-old Dzhokhar stopped and waited for several minutes outside the Forum restaurant, placing his backpack on a cast iron tree grate behind a group of children. Dzhokhar then placed a seventeen-second cell phone call to his brother on a "burner" registered a day earlier to "Jahar Tsarni."



Bombing Site One

Seconds after hanging up the phone, Tamerlan detonated the bomb he had left by the finish line, killing 29-year-old restaurant manager Krystle Campbell. Down the street at the Forum restaurant, the patrons stared toward the nearby blast in horror, but Dzhokhar merely glanced in the direction of the smoke and chaos before turning to walk in the opposite direction without his backpack. Ten seconds after the first explosion, Dzhokhar activated the second bomb and continued down the street with his right hand in his pocket. The second bomb killed 23-year-old Lingzi Lu and eight-year-old Martin Richard. Lu and Richard, like Campbell, died on Boylston Street; hundreds of other casualties survived and were transported to nearby hospitals, but at least sixteen people lost one or more limbs. As first responders rushed to save the lives of the injured, Dzhokhar shopped for milk at a nearby supermarket, where surveillance cameras

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<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

captured his struggling to decide the appropriate purchase.



Bombing Site Two

Three days after the bombings, the Federal Bureau of Investigation (FBI) conducted a press conference at which it released surveillance images of the Tsarnaevs as they walked near the marathon route. The agency hoped to obtain assistance from the public in identifying the pair. The brothers soon discovered their newfound notoriety and hatched a plan to escape the area. Five hours after the press conference, they approached 26-year-old M.I.T. Police Officer Sean Collier as he sat in a cruiser on the campus of the renowned university. One brother fatally shot Collier three times in the face at point-blank range. As Collier sat hemorrhaging in the driver's seat, at least one of the brothers reached into the car and attempted to take the officer's sidearm, but retention mechanisms built into the holster thwarted the effort. Forty-five seconds after approaching Collier's car, the brothers fled on foot in the direction from which they had come.

Less than two hours later, the Tsarnaevs carjacked Northeastern University graduate student Dun Meng, who had pulled to the side of the road to answer a text message. The brothers stopped their Honda Civic behind Meng's Mercedes SUV, and Tamerlan approached the victim's passenger door. When Meng lowered the window, Tamerlan reached in, unlocked the door, and entered the car. He pointed a silver handgun at Meng and demanded money, asking if the driver knew about the explosions in Boston. When Meng said he did, Tamerlan claimed responsibility for the bombings. Tamerlan added that he had just killed a police officer in Cambridge. Tamerlan asked if Meng's car had GPS and whether the lease agreement permitted the car to travel to New York City. During the conversation, Tamerlan stated that he was a Muslim and that Muslims hate Americans. Tamerlan directed Meng to drive to Watertown.

When the Mercedes stopped in Watertown, Dzhokhar parked the Civic behind it, and the two brothers transferred materials from the smaller car to Meng's vehicle. Tamerlan took over as the driver of the Mercedes, placing Meng in the front passenger seat and Dzhokhar in the rear. Tamerlan proceeded to a nearby bank, where Dzhokhar ordered Meng to surrender his ATM card and PIN, which Dzhokhar used to withdraw \$800. Tamerlan then drove to a gas station, where Dzhokhar unsuccessfully attempted to use Meng's credit card to purchase fuel at the pump. When Dzhokhar entered the gas station's interior space to pay with cash, Tamerlan placed the gun in a door panel so he could operate a portable electronic device. In this moment of inattention, Meng opened his door and ran to another gas station across the street, where he implored the manager to call the police.



Visibly shaken by the hostage's escape, Tamerlan entered the gas station where Dzhokhar was shopping for snack food. The pair quickly departed in the stolen SUV.

In response to Meng's carjacking report, police transmitted a description of the stolen Mercedes and contacted the vehicle's satellite service for assistance in locating the car. Watertown police officers converged on the SUV, which was traveling in a convoy with the Tsarnaevs' recently retrieved Honda Civic. Eventually, one officer located and began following the Tsarnaevs. Without warning, the brothers stopped their cars on a residential side street. Tamerlan emerged from the Mercedes, firing a pistol at the pursuing officer's cruiser. The officer reversed his patrol car and retreated about seventy yards down the street before exiting to a position of cover and returning fire. As other officers arrived, a firefight erupted in which Tamerlan held officers at bay with gunfire while Dzhokhar ignited and tossed three bombs at the police. The last such device was another pressure-cooker bomb that produced a fireball four stories high.

One officer maneuvered to the Tsarnaevs' flank and engaged Tamerlan in a close-range shootout, during which the brother's pistol malfunctioned. Wounded by gunfire, Tamerlan threw the pistol at the nearby officer and retreated up the street, only to have an officer tackle him moments later. As a group of officers attempted to restrain the still-struggling Tamerlan, Dzhokhar entered the Mercedes, turned it around on the narrow street, and accelerated toward the melee, prompting the police to scatter to the sides. Dzhokhar drove over Tamerlan, dragging him about fifty feet before striking a police cruiser and dislodging his injured brother. Police handcuffed Tamerlan and placed him in an ambulance, but he died shortly thereafter.

Dzhokhar abandoned the Mercedes several blocks away, and the police cordoned off a large area of the surrounding neighborhood before performing a house-to-house search. On the evening of April 19, 2013, Watertown resident David Henneberry called the police to report blood on a boat he kept in his backyard. Responding officers fired approximately seventy rounds into the boat and took Dzhokhar into custody. While hiding in the boat and apparently anticipating his own death, Dzhokhar used a pencil to write a statement on a bulkhead, expressing envy of his brother's martyrdom. He continued with his manifesto, explaining his religious and political motives:

"The U.S. government is killing our innocent civilians[,] but most of you already know that. As a Muslim[,] I can't stand to see such evil go unpunished.[We] Muslims are one body[;] you hurt one you hurt us all. . . . [We are] fighting men who look into the barrel of your gun and see heaven[;] now how can you compete with that[?] . . . Now I don't like killing innocent people[;] it is forbidden in Islam[,] but due to said [unintelligible][,] it is allowed."

On June 27, 2013, a federal grand jury returned a thirty-count indictment against Dzhokhar, including seventeen capital charges. The government subsequently filed a notice of intent to seek the death penalty, alleging six statutory and seven non-statutory aggravating factors.<sup>52</sup> Several of the aggravators focused on the status of, or harms to, the victims of the Tsarnaevs' crimes. In particular, the government alleged grave risk of death to others;<sup>53</sup> heinous, cruel, and depraved manner of killing;<sup>54</sup> vulnerable victim;<sup>55</sup> law enforcement victim (non-statutory); and victim impact (non-statutory). Two other aggravators—the multiple killings

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<sup>52</sup> J. in a Criminal Case, *United States v. Tsarnaev*, No. 1: 13 CR 10200 - 001 – GAO, 2015 WL 3945832, at \*1–2 (D. Mass. June 24, 2015) (including chart listing specific allegations).

<sup>53</sup> See 18 U.S.C. § 3592(c)(5) (2012).

<sup>54</sup> See § 3592(c)(6).

<sup>55</sup> See § 3592(c)(11).

or attempted killings factor<sup>56</sup> and the uncharged offenses factor (non-statutory)—also contemplated the plights of hundreds of bombing survivors, injured or otherwise.

Because the brothers had killed and injured scores of people in a highly public forum, the ensuing investigation required a heroic effort at victim and witness outreach. In the immediate aftermath of the bombing, the Red Cross, government agencies, and other nongovernmental organizations partnered with area hospitals and health care providers to establish a Family Assistance Center, which provided a critical but short-lived resource for victims. Within twenty-four hours of the bombing, One Fund Boston, as it was later called, filed incorporation papers and opened bank accounts. It became a conduit for massive charitable donations, though it existed as little more than a website and a PayPal account. Relying on its institutional agility, One Fund Boston quickly disbursed charitable donations, relieving some of the immediate financial impact of the attack, especially for the most seriously injured.

As responsibility for the investigation shifted to the federal government, the FBI drew together a team of victim-witness advocates, including many professionals experienced in mass-casualty events. Soon thereafter, the U.S. Attorney's own victim-witness advocates began coordinating with the FBI and other organizations, including the Massachusetts Office of Victim Assistance (MOVA), the Massachusetts Attorney General's office, and the Resiliency Center. The U.S. Attorney's Office enjoyed the support of a team of victim-witness coordinators from within the Justice Department, who provided training and other support during the pendency of the case.

Before the Attorney General decided to seek the death penalty against Tsarnaev, the FBI and U.S. Attorney met with all those victims who were willing to discuss the case and their views on the pursuit of capital punishment. In leading up to trial, the U.S. Attorney's Office created and maintained a list of hundreds of victims, who received regular updates on the progress of the prosecution. The prosecution owes an enormous debt of gratitude to all its investigative partners—the FBI, local police, and other allied agencies—which identified and interviewed hundreds of victims and witnesses while simultaneously cataloging a warehouse of physical evidence.

The prosecution faced significant challenges in forging meaningful relationships with Tsarnaev's victims. Trial preparation interviews involved much more than perfunctory reviews of facts and admonitions to provide truthful and succinct answers. In the months before trial, prosecutors and agents interviewed, re-interviewed, and consoled eyewitnesses, amputees, and grief-stricken relatives. Most interviewers had the critical assistance of victim-witness coordinators, who arranged for transportation, housing, and special accommodations. The accounts of the survivors were, at once, compelling and disturbing, often detailing harrowing injuries, painful recoveries, and fresh emotional wounds. Interviews frequently had to accommodate witnesses who could barely contain their stress and grief. The patience of the interviewers engendered trust and elicited important information, but the interviews proved mentally and emotionally taxing.

After reviewing investigation reports for hundreds of potential trial witnesses, prosecutors generated a tentative witness list that included about fifty family members and injured survivors. Recognizing that the court would not permit cumulative evidence, the prosecution limited its witness list to about ten eyewitnesses from each bombsite for each phase of the trial. Ultimately, the prosecution presented only a fraction of the listed victims because much of its proof of culpability stemmed from forensic evidence. Apart from the number of potential witnesses, the prosecution's attorneys also had to contend with the demands of preparing for a two-phase trial. As in every capital case, the aggravating factors alleged against Dzhokhar Tsarnaev required detailed proof of facts unrelated to questions of culpability.

Among the alleged aggravating factors, victim impact often proves paramount in importance to

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<sup>56</sup> See § 3592(c)(16).

the outcome of any capital case. Victim impact evidence permits juries to consider facts about a decedent's personal characteristics and about the emotional impact the homicide had on friends and family.<sup>57</sup> The doctrine only extends to homicide victims, necessarily excluding the potentially compelling testimony of those injured in events like the marathon bombing, a fact equally frustrating to prosecutors and survivors alike.

From the outset, the prosecutors assumed that victim impact evidence would carry great weight in this case, given the youth, character, and, vitality of those killed by the Tsarnaevs. But the presentation had its challenges. The family of Martin Richard maintained strenuous objections to capital punishment and would not testify at the penalty phase of trial. The Richards were not alone, and the government similarly accommodated all the witnesses who objected to the death penalty. But beyond the issue of unwilling witnesses, the government had to avoid the appearance of exploitation or overplaying the injuries and death of any single victim, especially a child like Martin Richard, whose family members had all suffered physical and emotional injuries.

Other victim-focused factors permitted the government to cast a wider net—one that captured survivors as well as decedents. In particular, the multiple attempted killings, grave risk of death to others, and uncharged crimes factors allowed the presentation of survivors who could detail their injuries and struggles in recovery. Such evidence went to the weight of the aggravators as much as to the proof of the allegations and appeared to have a tremendous impact on the jury. The evidence played to a natural strength of the government's case—the social and economic diversity of those affected by the crime. Under the auspices of the victim-centered aggravators, the government adduced the testimony of, among others, an Ivy League undergraduate student from tony Beacon Hill, a hairdresser from working-class Lowell, and a personal trainer from far-flung Charlotte, North Carolina. Broadly sourced evidence cannot fail to have a degree of jury appeal, all but ensuring that every juror will identify with at least one witness. Here, the diffuse impact of the crimes required prosecutors to curate their presentations to avoid cumulativeness.

The number and diversity of victim witnesses created challenges, some more foreseeable than others. Beyond the logistics of maintaining contact with hundreds of geographically scattered people, some of whom had suffered debilitating injuries, public interest in the bombings sometimes impeded the development and maintenance of relationships with potential witnesses. By their nature, the bombings undermined the victims' sense of security, and many survivors felt ill-at-ease in offering any assistance to the government because of fear of reprisal. (Indeed, those concerns extended to the government itself, which spent millions of dollars in overtime pay to secure the courthouse during the trial, an effort that involved dozens of uniformed personnel and an armed patrol boat in Boston Harbor.) With the cooperation of the court, the U.S. Attorney's Office provided accommodations for survivors, including special entry and exit procedures from the building and an overflow courtroom in which to view the trial on a closed-circuit video feed. Survivors in the courthouse also had access to counselors from the Resiliency Center, which had opened a few months beforehand as part of the Boston Medical Center's Multicultural Mental Health program.

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<sup>57</sup> See [Payne v. Tennessee](#), 501 U.S. 808, 827 (1991); [United States v. Fields](#), 516 F.3d 923, 946–47 (10th Cir. 2008) (citing [United States v. Barrett](#), 496 F.3d 1079, 1098–99 (10th Cir. 2007)).

Apart from the understandable reluctance of witnesses who had fallen prey to crimes of politically motivated violence, the notoriety of the offenses attracted public interest that further deterred many potential witnesses. Some internet sites theorized that the bombing was a staged “false flag” event and that its victims were actors in an elaborate stage set. One particularly odious site continues to deny the identity of Jeff Bauman, who lost both legs when the first bomb exploded. On the other side of the media coin, those victims inclined toward public attention had little difficulty finding a ready internet audience. Necessarily, such exposure raised concerns that witnesses would create fodder for their own cross-examinations, unwittingly making inconsistent statements or appearing to exploit their victimization for personal gain. Less obviously, such attention engendered some resentment among more reticent victims, who questioned the motives of the less media-shy. Those perceptions led some victims to resist testifying, citing the ready availability and apparent enthusiasm of media darlings.

Moreover, the media provided willing fora to victims who wanted to advocate for or against the death penalty, culminating in the *Boston Globe*'s publication of an essay authored by Martin Richard's parents, who implored the prosecution to abandon its pursuit of capital punishment. The *Globe* published the piece on its front page the Friday before the commencement of the penalty phase. While the court had instructed jurors to avoid media accounts of the case, the high profile positioning of the publication might have easily attracted unwitting notice.

The long-term group effort to identify, interview, and present victim testimony illustrated for the jury the human costs of the Tsarnaevs' monstrous crimes. During the penalty phase, the jury heard from survivors like Marc Fucarile, who had lost a leg and endured nearly seventy surgical procedures in the two years before he testified. At the time of trial, Fucarile's body still contained BB shot, nails, and other shrapnel, including a piece of metal that doctors could not remove from his heart. Another amputee, Heather Abbott, described her decision to permit the removal of her leg rather than face dozens of salvage surgeries that would leave her with a fused ankle, legs of unequal length, and a lifetime of excruciating pain. Before surgery to amputate her left leg, Adrienne Haslet-Davis recalled crawling over broken glass after the explosion and speaking by phone to her parents for what she believed might be the last time.

As to those victims who did not survive the attacks, the relatives of Lingzi Lu, Krystle Campbell, and Sean Collier also testified. Ms. Lu's aunt, Jinyan Zhao, described her niece as a “beautiful nerd” and a sweet daughter who appreciated all her parents had done for her. Ms. Zhao ended her testimony by explaining the family's decision to bury Ms. Lu in Boston because the young graduate student had expected to make her life there. Krystle Campbell's brother described his sister as the centerpiece of their family, and Sean Collier's stepfather testified about a dedicated police officer and community volunteer, who once violated M.I.T. policy to shelter a homeless man on a winter night.

Despite the controversy, the prosecution succeeded in introducing evidence of Martin Richard's suffering. The prosecution presented the testimony of Dr. David King, an Army Reservist and specialist in trauma medicine, with an expertise in the treatment of IED injuries. Through Dr. King, the government presented evidence of Martin Richard's particular physical vulnerability to the effects of an explosive device and gave a description of the visceral pain he would have endured in the last moments of his life. The prosecution's final penalty phase witness, Steve Woolfenden, recounted his experience outside the Forum restaurant shortly after observing Dzhokhar Tsarnaev walking down Boylston Street. When Dzhokhar detonated the nearby bomb, it severed Woolfenden's leg, forcing him to surrender his injured toddler, Leo, to a passing police officer. As Woolfenden lay on the ground awaiting assistance, he looked to his immediate right, where Denise Richard was pleading over the dying body of her son. Woolfenden placed his hand on Ms. Richard's back, prompting her to ask if he was okay, to which he replied, “Yes, I'm fine.”

### III. *United States v. Dylann Storm Roof*<sup>58</sup>



Clockwise, from upper left: Suzie Jackson, Ethel Lance, Rev. Dan Simmons Sr., Cynthia Hurd, Rev. Clementa Pinckney, Rev. Sharonda Coleman Singleton, Rev. Myra Thompson, Rev. Depayne Middleton, Tywanza Sanders.

In the early evening of June 17, 2015, Dylann Roof walked into a Bible study at “Mother” Emanuel African Methodist Episcopal (A.M.E.) Church in Charleston. Roof had planned for months to murder African-American parishioners, yet Roof’s victims welcomed him, and he joined the Bible study for more than half an hour. As the group, with Bibles still open, stood to close in prayer, Roof began methodically executing one after the other. Having fired more than seventy rounds from his Glock .45 pistol, Roof’s attack left nine victims dead, five survivors traumatized, and an array of family members, loved ones, and community members devastated.

#### A. Roof’s Attack

Roof entered through a side door that leads to the fellowship hall of Mother Emanuel. The fellowship hall is on the ground floor below an elevated sanctuary. The church sits just blocks from the busy tourist section of Charleston, South Carolina, though the current location is not the church’s first.<sup>59</sup> After Mother Emanuel’s founding in the early 1800s, it was shut down and outlawed from 1834 until the end of the Civil War in 1865, and an earthquake destroyed a prior building in 1886.<sup>60</sup> The church played a vital role during Reconstruction, served as a focal point during the Civil Rights movement for the Charleston and South Carolina African-American communities, and hosted many important figures during its history, including Booker T. Washington and Dr. Martin Luther King Jr.<sup>61</sup> The church is called “Mother” Emanuel due to its important historical role as well as its status as the oldest A.M.E. congregation in the southern United States and one of the oldest predominantly black congregations in the South.<sup>62</sup>

<sup>58</sup> *United States v. Roof*, Criminal No.: 2:15–472–RMG, 2016 WL 8116892 (D.S.C. July 19, 2016).

<sup>59</sup> *Overview of Emanuel AME Church*, SCIWAY (last visited June 9, 2017).

<sup>60</sup> *See id.*

<sup>61</sup> *See Bill Chappell, ‘Mother Emanuel’ Church Suffers a New Loss in Charleston*, NPR: THE TWO-WAY (June 18, 2015).

<sup>62</sup> *See id.*

The church's video surveillance system captured Roof walking into Mother Emanuel's fellowship hall around 8:16 PM. The video shows Roof casually get out of his car and walk to a set of heavy wooden double doors. He checks the door handles once to see if they are locked, then swinging the doors open, he calmly goes inside. At twenty-one years old, Roof could easily pass as a college student from the nearby College of Charleston—except for the unusual bag buckled around Roof's waist. Too big to be a "fanny pack," one can hardly tell what it is from a quick glance. Agents would later find it lying just inside the doorway of the fellowship hall and learn it was a tactical pouch Roof had purchased to carry his Glock .45 pistol and eight magazines. Each magazine was loaded with eleven rounds, totaling eighty-eight hollow-point rounds. For Roof, these eighty-eight bullets symbolized the letters "H.H." ("H" being the eighth letter of the alphabet) for "Heil Hitler," just one expression of the virulent, violent, racist beliefs Roof brought with him to Mother Emanuel.



Dylann Roof enters Mother Emanuel AME church on June 17, 2015.

Roof had been developing his racist hatred for years, accessing racist websites and chat rooms. In the months preceding his crime, he had researched several potential targets and had physically scouted Mother Emanuel for six months in advance of the attack. For Roof, Mother Emanuel was an ideal target because it was a place where he knew he would likely find African Americans, yet he did not have much concern that white people would be present. He knew the folks at the church would be good, innocent people, and Roof believed that killing that type of men and women would bring greater notoriety to his crimes and his message of white supremacy. He also believed that the people at Mother Emanuel were less likely to be armed; therefore, he would be able to kill them without subjecting himself to much harm.

That evening as Roof drove from Columbia to Charleston, parishioners entered the fellowship hall through the same doors Roof would later walk through. During a business meeting that evening, several members received their certificates to preach, a step on the path to becoming ordained A.M.E. ministers. One of these members was Myra Thompson, who had received her certificate that night and was scheduled to lead the Bible study, set to begin immediately after the business meeting. Other pastors attended the Bible study as well. Rev. Daniel Simmons Sr. was a long-time A.M.E. minister and served as the Bible study's weekly leader. Rev. Depayne Middleton was a dedicated ordained Baptist minister and vocalist, but she was an even more dedicated mother of four daughters and a loving sister and daughter. Rev. Sharonda Coleman Singleton was a powerful preacher whose pride and joy were her three children. Other Bible study regulars also attended. Ethel Lance was a loving mother and grandmother and served as the church's sexton. Susie Jackson was an Emanuel matriarch and beloved member of the choir. Felecia Sanders, who was Suzy Jackson's friend and niece, served the church and others as an involved member of the congregation and community. Felecia brought her eleven-year-old granddaughter and her son, twenty-six-year-old Tywanza, with her to church that night. Cynthia Hurd, a hard working librarian, and Polly Sheppard, a retired nurse, mother of four boys, and devoted member of the group that made Mother Emanuel operate, also attended, both hoping to support Myra as she led her first Bible study. Finally, Mother Emanuel's pastor and state senator, Rev. Clemente Pinckney, also attended the Bible study that evening. Rev. Pinckney's wife Jennifer and six-year-old daughter joined him that night, waiting for him in an office separated by a thin wall from the fellowship hall in which the Bible study took place.

The group of twelve studied the Gospel of Mark that night, specifically the Parable of the Sower.<sup>63</sup> The parable tells of seeds being scattered upon the earth and only the seeds that fell on good soil

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<sup>63</sup> [Mark 4:1-20](#).

grew.<sup>64</sup> When Roof walked in, the parishioners welcomed him. Rev. Pinckney pulled out a chair for Roof and gave him a Bible and the handout that Myra had prepared. For the next forty minutes, Roof studied with the group. Rev. Middleton told a story, and Roof laughed along with the rest of the parishioners at the story. As the study closed, the group stood and gathered hands for a final prayer. Their tradition was to recite the “Mizpah” benediction at the end of the study.<sup>65</sup> Taken from Genesis 31:49, the prayer reads, “May the Lord watch between me and thee when we are absent one from the other.”<sup>66</sup> As they stood with their eyes closed, reciting this prayer, Roof opened fire on them with his Glock .45.

Roof fired his first shots while still seated in the chair Rev. Pickney had pulled out for him. Roof first shot and killed Rev. Pinckney, who was just feet away. Rev. Simmons ran toward Roof and the fallen pastor before being shot. The other Bible study members dove under tables, taking cover. Roof then walked down the row of tables, shooting Myra, Cynthia, Depayne, Sharonda, and Ethel as they lay face down under the tables. Reaching the end of the tables, he stood a few feet away from seventy-six-year-old matriarch Suzie Jackson, who had also taken cover under a table. He shot her eleven times, going through an entire clip of hollow-point bullets.

As Roof rounded the end of the tables and headed to the other side, he stood over Polly Sheppard, who was praying aloud. This caught Roof’s attention, and he told Polly to “shut up.” He then asked if he had shot her yet. She said no. Roof told her he would let her live to tell his story. Next to Polly was Felecia, her son Tywanza, and Felecia’s eleven-year-old granddaughter; Tywanza, injured by the earlier gunfire, was bleeding. Felecia wiped some of her son’s blood on her, held her granddaughter tight to her body, and lay still, hoping Roof would think they were already dead. Felecia would later testify that as Roof walked through the room, she and Tywanza were communicating under the table, so Tywanza knew she was still alive. As Roof spoke with Polly Sheppard, Tywanza Sanders, injured and bleeding, rose up onto his elbow. He asked Roof why he had to do this. Roof said, “You all are raping our women” and “You all are taking over the world.” Tywanza Sanders told Roof that Roof did not have to do this, assuring him, “[W]e mean you no harm.” Roof then shot Tywanza several more times, killing him.

Roof did not go any farther toward Felecia or her granddaughter. The two of them, along with Polly Sheppard, survived. Bullets struck and pierced the room behind Rev. Pinckney where his wife and daughter were hiding, unharmed, under a desk. The other nine members of the Bible study lay dead or dying below the tables.

Roof fired seventy-four rounds from his .45 caliber handgun. The heavy walls and doors muffled the sound of the gunshots, so they went unnoticed. At 9:07 PM, just about fifty minutes after he had entered the church, Roof stepped over the body of Rev. Simmons, who lay dying in the fellowship hall’s vestibule, then slowly peeked out the same heavy wooden doors he had entered. Seeing the parking lot empty, Roof calmly walked back to his car, .45 in hand, and drove off.



Dylann Roof exits Mother Emanuel AME church.

## B. Manhunt and Arrest

Panicked 911 calls came in to dispatch from Polly Sheppard and Jennifer Pinckney. Polly Sheppard was able to give a description of Roof to 911 operators and later to the first responders

<sup>64</sup> See *id.*

<sup>65</sup> See *Genesis* 31:49.

<sup>66</sup> See *id.* (King James).

who began to flood the church and the surrounding area. Charleston City Police Department (CPD) detectives soon accessed the surveillance footage showing Roof enter and leave the church, giving them their first look at their suspect.

Charleston has a tight-knit law enforcement community. Agencies routinely work with each other, even on the most mundane cases. Within hours of the shooting, the CPD reached out to the local FBI office for assistance. The agencies paired up, with each CPD Detective working hand-in-hand with an FBI Special Agent. They accepted assistance offered from other state and federal agencies and collectively began the manhunt for Roof. In the early morning hours of Thursday, June 18, 2015, investigators released still shots from the video showing Roof enter the church. Within an hour of the release, phone calls began coming in to the FBI tip line, several of which identified Dylann Roof. Around 10:00 AM, a woman in Shelby, North Carolina, just west of Charlotte, reported seeing Roof driving through the area. Shelby Police Department officers followed up on the call and arrested Roof around 10:30 AM. The gun Roof used was on the backseat of the car. When asked if he was involved with what happened in Charleston, Roof confirmed that he was.

### **C. Roof Explains His Racist Hatred**

Soon after his arrest, two FBI agents interviewed Roof. Roof not only admitted to what he did, but was eager to explain why. Roof told the interviewing agents that he “had to do it” and explained:

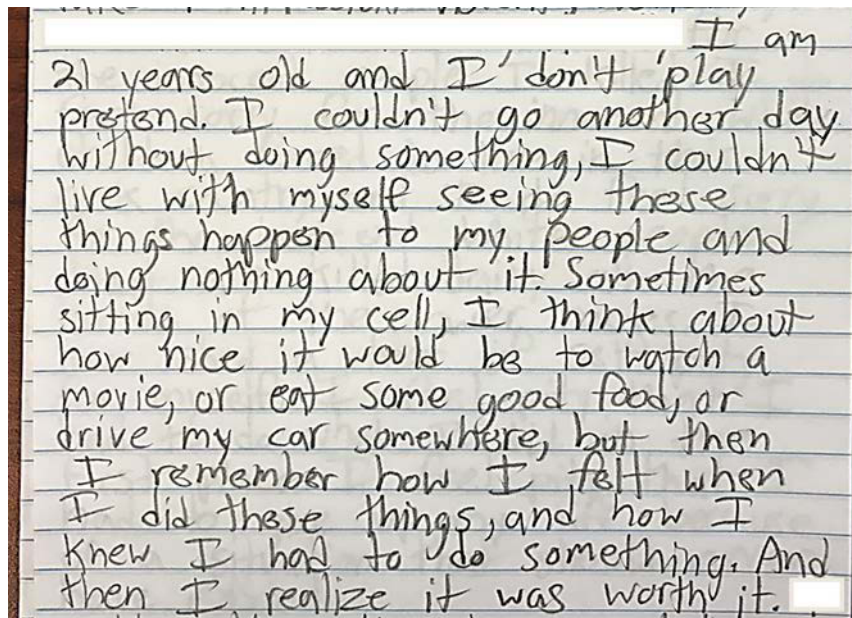
Um, well, I had to do it because somebody had to do something. Because, you know, black people are killing white people every day on the streets[,] and they rape[,] they rape white women, a hundred white women a day. . . . I had to do it because nobody else is going to do it. Nobody else is brave enough to do anything about it, you know. Back in the late [80s] and early [90s], you know we had skinheads and stuff like that. There's [sic] no skinheads left, there's no KKK. The KKK never did anything anyway.

When asked why he chose a church attended predominantly by African Americans, Roof explained: “Right, well, you know, obviously I realize that these people, you know, they're, they're at church[,] you know, they're not criminals or anything[,] but that's not the point. What is, is that criminal black people kill innocent white people every day.”

In Roof's car, investigators later discovered a journal containing a racist manifesto, which was repeated on a website that showed race-related photographs. This manifesto and these photographs were consistent with Roof's statements to the FBI. Through his statements and writings, Roof detailed his racial hatred and desire to agitate race relations.

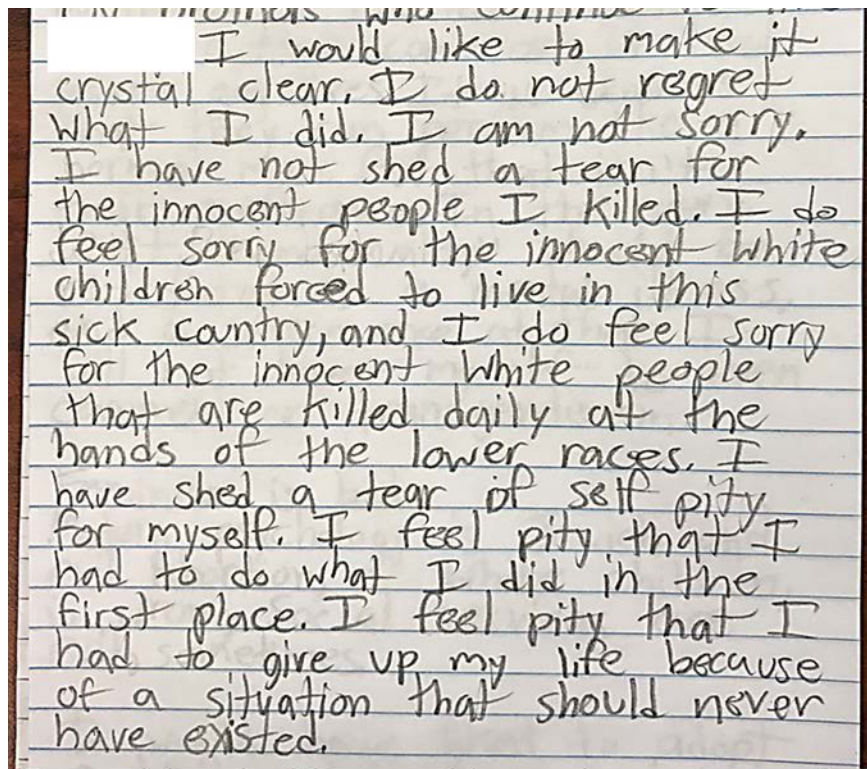


Roof did not stop espousing his racial beliefs and motivations after his arrest. Located in his jail cell six weeks after his arrest was a new manifesto in which Roof had written:



I am 21 years old and I don't 'play pretend. I couldn't go another day without doing something, I couldn't live with myself seeing these things happen to my people and doing nothing about it. Sometimes sitting in my cell, I think about how nice it would be to watch a movie, or eat some good food, or drive my car somewhere, but then I remember how I felt when I did these things, and how I knew I had to do something. And then I realize it was worth it.

Regarding the innocent people he killed, Roof wrote:



I would like to make it crystal clear, I do not regret what I did. I am not sorry. I have not shed a tear for the innocent people I killed. I do feel sorry for the innocent white children forced to live in this sick country, and I do feel sorry for the innocent white people that are killed daily at the hands of the lower races. I have shed a tear of self pity for myself. I feel pity that I had to do what I did in the first place. I feel pity that I had to give up my life because of a situation that should never have existed.

Roof maintained these same views throughout trial, at times wearing jail-issued canvas shoes upon which he had drawn white supremacy symbols. In a brief penalty phase closing argument, Roof told jurors, "I felt like I had to do it[,] and I still feel like I had to do it."

## D. USAO Role

The USAO in Charleston is a branch office with eight criminal AUSAs and three civil AUSAs. The office's approach to cases is fairly traditional and likely typical of most small offices. Charleston AUSAs develop relationships with agents by working directly with them, and most agents contact AUSAs directly with case referrals. Working relationships with local police agencies are similar, with AUSAs consistently handling adopted cases. Many AUSAs also have prior experience working in the local prosecutor's office, where they developed working relationships with local police and state prosecutors. As a result, the Charleston branch of the USAO has a longstanding working relationship with Charleston-area state and federal agencies and has earned the trust of these agencies. However, nothing like the *Roof* case had ever occurred in Charleston. When traditional approaches met with a nontraditional case, adjustments had to be made, and the office developed a case-specific prosecution approach. That approach, and the lessons learned through that process, could readily apply to other prosecutors and offices faced with a mass shooting or similar crisis.

### 1. Reliance on Victim Witness Coordinator

In a mass shooting, or other similar crisis, a Victim Witness Coordinator's (VWC's) responsibilities increase exponentially. Clarissa Whaley, a VWC who works out of the Charleston office, is normally responsible for half of the district's cases, covering the eastern part of the state.

In the immediate aftermath of the Mother Emanuel shooting, one could see that the District's victim assistance resources would be overwhelmed. In the hours following the shooting, VWC Whaley joined with other local advocates, forming a collaborative team that could serve the immediate needs of victims and be involved in later prosecutions, whether in state or federal court. Early on, the FBI's Rapid Deployment Victim Services Team led this group. Immediately after the group was established, they set up a Family Assistance Center (FAC), located in a hotel near Mother Emanuel. The FAC served as a consistent gathering place for survivors and victims' families where they could obtain information about the case and services.

VWC Whaley's extraordinary efforts highlight the need to have a plan in place before a mass shooting or crisis occurs. This plan should include coordinating with local resources and personnel. Worth noting is that AUSAs, often traditional points of contact in victim cases, will likely be unavailable because of the increased demands of such a case. Having other points of contact to turn to, such as a Criminal Chief, First Assistant, or U.S. Attorney, works as an alternative when AUSAs are wrapped up in case work. Coordinating victim resources is vital. In the *Roof* case, Whaley relied on guidance from the Criminal Chief, First Assistant, and U.S. Attorney as well as the experienced victim service personnel she teamed up with. Likewise, Whaley turned to that team to pool much-needed early resources. A particularly helpful immediate resource was the FBI's victim response team. Almost without delay, the FBI surged resources to Charleston and sent a team to work with victims and local advocates for days. This support gave Whaley and others time to organize and put victim resources in place.

Once the FBI's Rapid Deployment Team put immediate services in place, Whaley turned to a tremendous resource in EOUSA's Office of Legal and Victim Programs (OLVP). Through a series of weekly conference calls and emails, EOUSA was able to connect her with colleagues who had worked the Boston bombing and the Oklahoma City bombing. Whaley also reached out to national NGOs whose work focused on helping survivors of mass casualties. Based upon the experiences and best practices shared, Whaley put together a collaborative team that consisted of a fifty-five member Victim Services Team (VST), reflecting the specific needs of the church shooting victims. Thirty of the members were victim advocates, who revolved in and out of the case as needed. The advocates came from a well-established statewide network of victim services, as well as from EOUSA's victim services response team. In addition to the advocates, the team included fourteen clinical support personnel who provided counseling. Finally, and perhaps most unique to the *Roof* case, the team included a Spiritual Support

Team (SST) of eleven, led by the South Carolina State Law Enforcement Division's Emergency Assistance Program (SCLEAP) and its State Chaplaincy Program. Together with local ecumenical leaders, the SST provided survivors and victims with assistance, consolation, reassurance, and inspiration throughout the trial. Like those killed in the church shooting, their families and the survivors were deeply religious. The SST not only understood the trial process and what the victims and survivors were going through each day, but it also had spent years dealing with situations where crime and religion intersect. Therefore, the SST was always able to provide an appropriate religious context for the difficulties faced by the victims' families and the survivors, resulting in providing a comfort unique to the group.

As the *Roof* case moved toward trial, the pool of victims (survivors, families, and their support) grew from an expected 98 to 151. In addition to numerous meetings with prosecutors, agents, and the VWC, communications with victims throughout the case went through a website that contained case updates and links to helpful resources. The website also gave access to an email group for immediate case updates and offered a dedicated conference line, when needed, for victim input and questions. VWC Whaley obtained access to the courthouse's jury assembly room and turned it into a Family Gathering Room. In the weeks before trial, court personnel vetted and cleared all members of the VST for access to the victim gathering and viewing areas established by the Court. The Family Gathering Room became a "home base" for victims at trial. It served as a "family support center" and was reserved for victims and support only. Because of the number of victims who attended court daily, not all could (or wanted to) observe the trial in the courtroom. The Family Gathering Room had a live feed of the trial, which allowed victims to see as much or as little of the trial as they wanted. Just outside the Family Gathering Room were smaller respite rooms where individuals could find privacy and where they could meet one-on-one with prosecutors, spiritual support, or clinical support. VWC Whaley also made sure that prosecutors gave daily briefings, both at the start and end of each trial day. These briefings ensured that victims could ask questions about the proceedings and prepare for whatever evidence was scheduled to be heard. Finally, Whaley managed all of the logistics associated with getting the victims to and from the courthouse. This effort included securing off-site parking, transporting victims to and from the parking area to the courthouse, and giving them unique identification cards allowing secured access around the courthouse, away from the media.

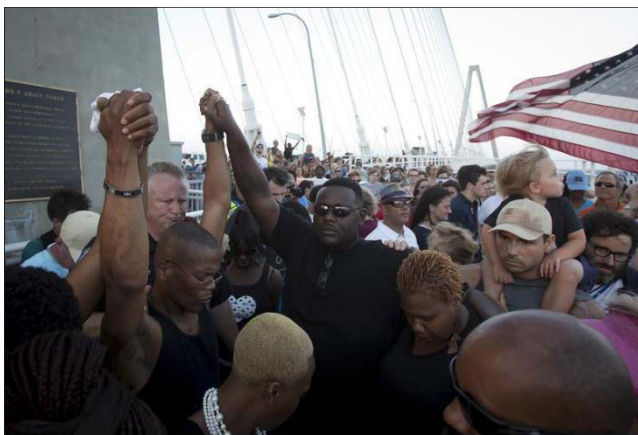
One major resource that made all of these accommodations possible was a grant provided through the Office for Victims of Crime's (OVC) Anti-Terrorism and Emergency Assistance Program. This money funded assistance from mental health professionals throughout the case and continues today to fund the Mother Emanuel Empowerment Center (MEEC). The MEEC provides daily assistance to the victim community and is conveniently located on the grounds of Mother Emanuel. Other funding came from OVC's Federal Crime Victim Assistance Fund, administered through EOUSA's Office of Victims and Legal Programs (OVLP) on behalf of OVC. Those funds helped provide for travel, lodging, transportation, and parking for all victims who attended the trial.

Whaley found that a team-oriented approach became the most critical factor in her success. She identified and then fully relied upon a team of professionals who understood how important the judicial process was to the victims. Her approach and efforts made it clear that, although the trial often focused on the acts of the defendant, the case was ultimately about the victims and those they lost.

## 2. Attorneys Working with Victims in a Death Penalty Case

In the days following the church shooting a community response began to take shape. Most expected a reaction of sadness and outrage, but an extraordinary response of unity, grace, and forgiveness emerged that rightfully garnered national attention and commendation. Three days after the shootings, an estimated 10,000 to 15,000 Charleston residents formed a “unity chain” over the Ravenel Bridge, a local landmark that spans around 2.5 miles. There, residents joined hands, waved flags, and held a five-minute moment of silence in honor of those killed. Charlestonians continually gathered at the front gates of Mother Emanuel, leaving flowers and forming improvised prayer circles outside the church. In defiance of Roof’s hatred and plan to divide, Charleston showed unity and love. A message set forth by some victims’ families and survivors certainly influenced this response. At the initial bond hearing, two days after the shooting, several members of the victims’ families addressed the defendant. Some told Roof they forgave him. Some said that they had no room for hate, so they had to forgive. Some said that love would conquer hate, telling Roof that “hate won’t win.”

As one might imagine with such a large group of victims and surviving family members, the victims’ views on the death penalty were diverse. Many of the victims believed strongly that Roof should receive the death penalty; others strongly opposed the death penalty on religious grounds. And many, if not most, simply and understandably, were not ready to think about forgiveness, the death penalty, or anything apart from how to get through each day after such a profound loss.



Unity March, June 20, 2015

Eleven months after the shooting, Attorney General Lynch directed the prosecution team to seek the death penalty. AUSA Jay Richardson worked closely with Clarissa Whaley and Civil Rights Division (CRT) Trial Attorney Mary Hahn to prepare the victims’ testimony during the penalty phase of Roof’s trial. While their preferences on the appropriate punishment varied significantly, the personal views of the survivors and victims regarding the death penalty ultimately did not become a substantial factor in the *Roof* trial. Instead, having the opportunity to express the loss they suffered was far more important to the survivors and victims than any views they might hold about punishment. While much of the trial focused on the defendant’s hateful thoughts, words, and actions, the victim testimony provided a window into these extraordinary victims and their legacy of love, faith, and engagement.

Of course, as a prosecutor, fully understanding the story and important aspects of a victim’s life is not easy. Richardson found that nothing could replace spending significant time with each survivor and member of a victim’s family. Getting to know the individuals affected, separate from their relationship with their loved one, was both an important trial foundation and the most rewarding and enjoyable work of his career. This investment of time with each survivor and victim’s family member allowed Richardson to really understand who each victim was as a person.

In learning about the victims, Richardson and the trial team sought out information—pictures, videos, recordings, stories, birthday cards, letters, etc.—from everyone they could locate and every source they could find. Doing so not only helped them appreciate who the victims were, but also allowed witnesses to use the aids in testifying about the victims. For instance, when Myra Thompson’s daughter testified about how her mother called her every day, she was able to play one of the last voicemail messages her mother had left. When DePayne Middleton’s family spoke of her deep faith and tremendous singing voice, Richardson played a moving recording of DePayne’s singing “Great is Thy Faithfulness.”

And when Ethel Lance’s granddaughter described a memorable day spent with her grandmother, she was able to show photographs of their time together. While this information-gathering took a lot of time, and only a fraction of the information ended up in court, the effort allowed the testifying witnesses to more fully tell their stories.

Getting close to survivors and victims is sure to take an emotional toll on a prosecutor. Standard advice to prosecutors is to avoid getting close to victims because that closeness can affect a prosecutor’s ability to focus on the case. How a prosecutor handles the emotional aspects of a case depends largely upon that individual prosecutor. Richardson believed prosecutors should “be themselves” with victims. Authenticity builds trust and gives a prosecutor credibility, which they often need to rely upon later. Richardson’s emotional attachment to the victims was apparent; however, he did rely on the rest of the trial team to make sure that his emotions did not improperly impact any decisions. Moreover, he was open about his own limitations, recognizing the role emotion played as he worked through the case. In looking back on the *Roof* case, he realized that having some emotional involvement in the case served to build a better, more invested prosecution team.

### **3. Utilizing Department Resources**

Another unique aspect of the *Roof* case was the short time frame between the offense and the trial. Guilt phase opening statements were presented about eighteen months after the day of the shootings, and jury selection took place about five months after authorization to seek the death penalty. The six months between filing the death penalty notice and trial was twelve to eighteen months shorter than normal.

This quick turnaround time required extensive cooperation. In the immediate aftermath of the church shootings, trial attorneys with the Criminal Section of the Civil Rights Division began working with South Carolina AUSAs. Anticipating potential hate crime charges, CRT attorneys gave early advice about specific focuses to take and issues that might arise in the civil rights context. Similarly, attorneys from the Criminal Division’s Capital Case Section (CCS) became involved early, anticipating a potential death penalty. Accordingly, working relationships between South Carolina AUSAs, CRT trial attorneys, and CCS trial attorneys started early.

Most AUSAs and Department attorneys are familiar with this type of intra-Departmental cooperation. The quick timeline in the *Roof* case highlighted what makes these relationships succeed. For CCS Deputy Chief Rich Burns and CRT attorneys Steve Curran and Mary Hahn, getting their offices involved early in the case was essential. As was true in the *Roof* case, few AUSAs have had significant experience in complex civil rights cases or capital cases—the very experience which specialized Department attorneys can provide. Obtaining help from these attorneys is especially beneficial early in the case, when AUSAs may not have time to fully research the many specific, highly detailed issues that specialized attorneys deal with regularly. For instance, a CCS attorney can help with issues such as grand jury special findings or developing specific evidence that will later be needed to support aggravating factors or rebut mitigating factors in the penalty phase of trial. In the *Roof* case, CRT attorneys were involved early and provided needed assistance during the investigation of specific civil rights statutes. For instance, knowing the types of evidence needed to support civil rights charges was important as early as the day after the shootings occurred, when the interviewing agents sought specific lines of questions prior to interviewing Roof. Also, specialized attorney assistance can be helpful later in a case to avoid “reinventing the wheel” in handling certain issues or even contradicting the Department’s existing positions on those issues.

Some AUSAs may resist outside help, avoiding working with attorneys with whom their office has little firsthand knowledge, or fearing that Department attorneys might attempt to push

them off a case. In *Roof*, the opposite occurred. CRT and CCS played a vital and needed role in the case and complemented the USAO. This is certainly a credit to the individual attorneys and their approach to cases. But as Burns explained, CCS attorneys are always willing to play whatever role is needed in a case. In cases with only one assigned AUSA, a CCS attorney could be more involved. In others, a CCS attorney may focus on death penalty-specific areas, allowing other prosecutors to handle areas where they have some specialization. The same is true of a CRT attorney. As Curran and Hahn explained, CRT attorneys routinely work side-by-side with AUSAs across the country and understand the value of forging strong teamworking relationships.

Especially in high profile cases, USAOs often need the help Department attorneys provide. The *Roof* case strained the resources of the South Carolina USAO, even with significant help from EOUSA, FBI's Rapid Deployment Team, CRT, and CCS. In facing an accelerated timeline and the coordinated efforts of *Roof*'s federal and state defense teams, the five-attorney prosecution team worked around-the-clock to be ready for trial. Because the Charleston office had only eight criminal AUSAs, the assistance from CRT and CCS was not just appreciated, it was necessary. Also, these offices provided more than just attorney support. CRT dedicated a paralegal to both coordinate discovery and provide litigation support at trial. CCS provided resources to locate and obtain expert witnesses and jury consultants. Likewise, when projects were facing a deadline, the number of available attorneys functionally tripled. Although an AUSA may have some initial resistance to outside help, the *Roof* case shows that Department help can be necessary in a mass shooting or other complex case.

Apart from the critical help Department attorneys can provide, their involvement can also demonstrate the prosecution team's commitment to the case. Early in the *Roof* case, the support from CRT and CCS visibly demonstrated the Department's commitment. Likewise, the relocation of CRT and CCS attorneys to Charleston months before the scheduled start of trial demonstrated these attorneys' commitment and proved to be a sacrifice greatly appreciated by the victims. The varying attorney backgrounds in the *Roof* case also made generating assignments easier—a benefit usually lacking when AUSAs from the same office work on a case. Finally, Department attorneys assigned to high profile cases generally have extensive experience working “in the field” and working with other attorneys, thereby helping to ensure good working relationships. As seen in the *Roof* case, CCS and CRT attorneys were accustomed to working side by side with AUSAs, and, in turn, the AUSA office enjoyed working with them.

## IV. Conclusion

Ultimately, the evidence in the *Tsarnaev* and *Roof* cases persuaded the juries to recommend multiple death sentences. Those victims whom the prosecution elected not to call at trial still had the opportunity to provide statements during the defendants' formal judicial sentencing. Regardless of the jury's decisions, the survivors and families of victims took part in telling two stories that needed to be told fully. Both prosecutions owe much of their success to those who overcame and bravely bore witness to horrific tragedy.

### ABOUT THE AUTHORS

□ **Jeff Kahan** is a graduate of Oberlin College, Oberlin Conservatory, and the University of Southern California Gould School of Law. He joined the Department of Justice's Capital Case Section in 2005 after ten years of service as a California deputy attorney general in the Criminal Appeals, Writs, and Trials Section.

□ **Nathan S. Williams** is a Supervisory Assistant U.S. Attorney in the District of South Carolina, serving as the Branch Manager of the office in Charleston, South Carolina. He has been an Assistant U.S. Attorney since 2009 and was a state prosecutor for ten years in Charleston, South Carolina, and Lansing, Michigan, prior to joining the U.S. Attorney's office. He is a graduate of the University of Detroit Mercy School of Law.

□ **Aloke Chakravarty** is a veteran Assistant U.S. Attorney in the District of Massachusetts. He previously served as a state prosecutor, as an attorney at the FBI and Main Justice, and as a trial attorney at the UN-ICTY. He is a graduate of Emory University School of Law.

□ **Steven Mellin** is currently an Assistant U.S. Attorney prosecuting capital cases and terrorism matters in the Southern District of Texas. Previously, he worked as a Trial Attorney in the Capital Case section, prosecuting federal capital cases throughout the United States. He also worked in the U.S. Attorney's Offices in the Eastern District of Virginia and the District of Columbia.

# ATF Resources to Combat Violent Crime

*Ellen V. Endrizzi*  
*Division Counsel*  
*National Investigative Division*  
*Bureau of Alcohol, Tobacco, Firearms, and Explosives*

## I. Introduction

The primary criminal enforcement mission of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is to protect the public from violent crime. In partnership with AUSAs and state prosecutors, ATF agents disrupt and dismantle the criminal organizations plaguing communities. Whether the target is a gang member committing murders and armed robberies, a firearms trafficker, or an arsonist or bomb maker trying to strike fear through fire and destruction, ATF has dedicated assets and expertise to identify those criminals and facilitate a successful prosecution. This article provides a brief overview of those resources, focusing on three key areas: investigation and evidence collection, expert information and testimony, and public information and assistance.

## II. Investigation and Evidence Collection

Before an ATF special agent presents a “blue cover” for prosecution, ATF has likely employed a wide variety of resources to further the investigation and collect evidence. This section aims to provide a basic familiarization with some of the tools that provide the biggest return on investment and yield the best evidence.

### A. NIBIN and Mobile NIBIN

In 1999, ATF established the National Integrated Ballistic Information Network (NIBIN) to provide federal, state, and local partner agencies with an automated ballistic imaging network. NIBIN is the only national network that allows for the capture and comparison of ballistic evidence to aid in solving and preventing violent crimes involving firearms. NIBIN is vital to any violent crime reduction strategy because it provides investigators the ability to compare their ballistic evidence against evidence from other violent crimes on a national, regional, and local level, thus generating investigative links that would rarely be revealed absent the technology.

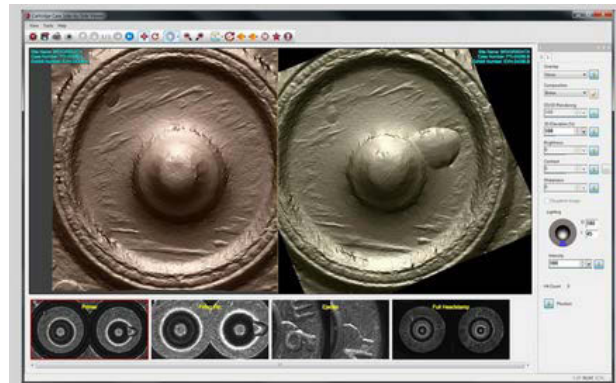
NIBIN is most effective when agents can engage in comprehensive collection, timely analytical turnaround, and investigative follow up. For purposes of comprehensive data collection, the priority level for all firearms ballistic evidence must be equal. Agents must collect and submit into NIBIN all firearms ballistic evidence meeting NIBIN entry requirements, regardless of the crime. Evidence includes recovered cartridge cases and test fires from seized crime guns.

Turnaround involves entry into the NIBIN system, correlation review, and “lead” notification to investigators. The goal for NIBIN sites is to provide “leads” to investigators within forty-eight hours of shooting incidents.



A NIBIN *lead* is an unconfirmed, potential link between at least two pieces of firearms ballistic evidence based on a correlation review of the digital images. This is a determination by either a firearms examiner or a trained NIBIN technician that two cartridge casings *may* have been fired from the same firearm. Prosecutors must use this information for intelligence purposes only. A prosecutor cannot use a NIBIN lead in support of a search warrant or as evidence in court.

Instead, a NIBIN *hit* is appropriate for search warrants and is admissible evidence. A NIBIN hit is based on a correlation review of the digital images of the casings and a microscopic confirmation by a firearms examiner.



Example of NIBIN review of cartridge casings

Each week a new NIBIN success story seems to arise. A YouTube search for “ATF” and “NIBIN” produces numerous news videos recounting cases where officials solved murders and other shootings because of connections made through NIBIN. Does a prosecutor have a “community gun” in a RICO or VCAR case? NIBIN can connect shootings that may have occurred in areas outside that prosecutor’s jurisdiction.

NIBIN programs can be expensive, however, and not every district has a NIBIN site. An interactive map of locations is available at <https://www.atf.gov/firearms/nibin-interactive-map>.<sup>67</sup> To make



Mobile NIBIN

NIBIN more accessible, in March 2017, ATF rolled out the first NIBIN van, known as Mobile NIBIN. Mobile NIBIN is a state-of-the-art forensic lab where agents can perform NIBIN correlations and microscopic comparisons. It also travels with a trailer where investigators can test fire confiscated weapons to compare the markings on casings with others entered in the ATF database. Mobile NIBIN first visited Harrisburg and York, Pennsylvania, then Baltimore, Maryland, and Chicago, Illinois.

NIBIN acquisitions are expressly limited to ballistic information from recovered firearms and fired ammunition components pursuant to a criminal investigation. Therefore, NIBIN cannot capture or store ballistic information acquired at the point of manufacture, importation, or sale, nor can it

ascertain the purchaser, the date of manufacture, or other sale information. More information about NIBIN is available at <https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin>.<sup>68</sup>

## B. Crime Gun Intelligence Centers

ATF runs twenty-six Crime Gun Intelligence Centers (CGICs). A CGIC is an interagency collaborative body that focuses on the collection, management, and analysis of crime gun data. The goal of a CGIC is to identify the most violent offenders, groups, violent gun crime areas, and sources of crime guns. The CGIC then provides this consolidated and coordinated intelligence to enforcement groups.

<sup>67</sup> NIBIN INTERACTIVE MAP, ATF (last updated Dec. 5, 2016).

<sup>68</sup> NATIONAL INTEGRATED BALLISTIC INFORMATION NETWORK (NIBIN), ATF (last updated Sept. 22, 2016).

These focused efforts allow federal, state, and local law enforcement to direct limited resources to the prosecution of the most violent offenders in a particular jurisdiction.

CGICs also analyze trends pertaining to firearms trafficking and detect potential high-risk federal firearms licensees (FFLs) who may be violating the Gun Control Act (GCA),<sup>69</sup> the National Firearms Act (NFA),<sup>70</sup> and other federal laws.

CGIC staff can help AUSAs by doing the following: identifying electronic evidence on social media and email accounts; creating packages of information for detention hearings; developing maps and demonstrative exhibits based on cell-site and geolocation data information; and monitoring online firearms classifieds and forums for particular stolen weapons, sellers, or purchasers.

CGICs were the subject of a November 2015 USA Bulletin article.<sup>71</sup>

### **C. Division Counsel and Field Attorneys**

What is a “POC state”? Can a California “wobbler” be the basis for a firearms prohibition? If evidence is inadequate to prosecute individual straw purchasers buying firearms from a particular FFL, does a regulatory remedy exist? Does a particular Alabama statute qualify as a misdemeanor crime of domestic violence?

ATF attorneys are an underutilized resource for AUSAs. Each ATF field division has a division counsel, and larger offices have an additional staff attorney. These lawyers, some of whom are former AUSAs and SAUSAs, are well-versed in the intersection of state laws with federal firearms laws. The legal questions regarding GCA and NFA prohibitions and elements of proof can seem simple at first, but application of the facts can uncover complicated questions of law that vary from state to state. Gangs are now trafficking cigarettes. Is the prosecutor comfortable charging violations of the Contraband Cigarette Trafficking Act, or would the prosecutor rather have the assistance of an ATF attorney who has worked in this area for twenty-five years? ATF field and Headquarters attorneys are always available to answer questions and discuss issues.

### **D. Financial Investigative Services Division**

The Financial Investigative Services Division (FISD) provides comprehensive financial investigative services to ATF in the target areas of arson, explosives, alcohol, tobacco, and firearms. These investigations can be large and complex, involving money laundering, asset identification, and forfeiture. FISD supports all ATF programs, including Organized Crime Drug Enforcement Task Force, High Intensity Drug Trafficking Area, Violent Crime Impact Team, Project Safe Neighborhood, and other multi-agency task forces.

FISD personnel are experts in the field of forensic accounting. Almost every investigation involves a reconstruction of the entity’s or suspect’s financial condition, typically with no physical financial support documents. As such, FISD employees have forensic audit experience unique in the area of forensic accounting. FISD employees routinely testify about the results of their investigations in court. The results of FISD’s financial investigations provide the financial condition that a jury may rely on to establish motive in an investigation. Additionally, FISD identifies and establishes other ancillary crimes, such as bank fraud, wire fraud, mail fraud, money laundering, theft, and embezzlement. FISD plays an integral role in identifying assets while conducting its financial investigation.

AUSAs can rely on FISD for financial investigations linked to violent crime. FISD’s experts reduce pressure on limited USAO financial analyst resources.

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<sup>69</sup> See 18 U.S.C. §§ 921-931 (2012).

<sup>70</sup> See 26 U.S.C. §§ 5801-5872 (2012).

<sup>71</sup> John F. Walsh & Luke Franey, *ATF Crime Gun Intelligence Centers*, 63 U.S. ATTORNEYS’ BULL. 49 (2015)

## E. National Canine Division

ATF canine officers may be the cutest members of a prosecution team, and they certainly will work tirelessly to help locate the gun, shell casing, explosive device, accelerant, or fleeing suspect pertinent to a case.



Abby is an explosive detection/SEEK K-9 working in the ATF Los Angeles Field Division.

The National Canine Division (NCD) trains explosives and accelerant detection canines for federal, state, local, and international law enforcement and fire investigation agencies. Since 1990, ATF has trained approximately 919 explosives detection canines and 253 accelerant detection canine teams. From March 2009 through March 2017, the NCD has successfully imprinted 3,791 Department of Defense military working dogs on homemade explosives.

NCD initiated the ATF Search Enhanced Evidence K-9 (SEEK) Program in 2013, and currently, thirteen teams work throughout the United States. The SEEK Program trains explosives detection canine handlers to work their canines off-leash. This type of handling allows the canines to work independently, more quickly, and at a greater distance, abilities that can be invaluable in a variety of circumstances, including the recovery of firearms, explosive, and post-blast evidence.

The SEEK Program is a thirteen-week training course during which the canines learn to search in open areas, fields, schools, vehicles, bus lots, warehouses, retail stores, and other facilities, often off-leash. Prior to the program, the canines underwent a separate twelve-week training session where they learned to recognize more than 19,000 explosives compounds and to detect firearms and spent ammunition. They also learned to detect trace amounts of all types of low explosives, such as smokeless and black powders, and high explosives, such as TNT. In addition, they learned to detect traces of residue from firearms and spent shell casings.

The Special Response Team (SRT) K-9 Program utilizes handpicked canines and handlers trained in areas that support the SRT mission to reduce violent crime and protect the public. The eleven SRT canine teams are trained and certified in six areas:

- Obedience
- Building Search
- Area Search
- Tracking
- Evidence Search, and
- Aggression Control

One tactical canine (Ike, pictured right) is also trained and certified in explosives detection.



Ike, a tactical canine, can detect explosives.

## F. Violent Crime Analysis Branch

The mission of the Violent Crime Analysis Branch (VCAB) is to provide ATF and other federal, state, local, and international law enforcement agencies with useful and accurate crime gun, explosives, arson, and tobacco trafficking intelligence information in statistical and visual formats. VCAB serves to

collect, analyze, and disseminate criminal intelligence information derived from various sources for the purpose of reducing violent crime and protecting the public.

VCAB regularly produces reports, maps, and studies on the following:

- Crime Gun Trace Studies—used to determine any trends and patterns relative to firearms trafficking schemes.
- Explosive and Arson Studies—used to analyze trends and patterns of explosive and arson incidents.
- Tobacco Studies—used to analyze trends and patterns of tobacco trafficking.
- Mapping Studies—Geographic Information System or other visual representation of geographic information extracted from various ATF databases, including licensee populations, firearms tracing, violent crime data, explosives and arson incidents, theft of firearms from federal firearms licensees, etc.
- Data Extracts—extracts of firearms, explosives, arson, and tobacco data in spreadsheet form instead of the graphic formats described above.

This data and the graphics are useful in sentencing memoranda because they can give the court a larger picture of the trends in, and effects of, firearms or tobacco trafficking, FFL thefts, and violent crime. Specialized data extracts and graphics may be available, upon request, for use in a particular prosecution. For more information and to view VCAB statistical and mapping products that are posted annually to ATF’s website, visit: <https://www.atf.gov/resource-center/data-statistics>.<sup>72</sup>

## G. National Tracing Center

Located in Martinsburg, West Virginia, ATF’s National Tracing Center (NTC) is the country’s only crime gun tracing facility. The NTC’s mission is to conduct firearms tracing to provide investigative leads for federal, state, local, and foreign law enforcement agencies.

The GCA authorizes the U.S. Attorney General to administer firearms tracing, a task that the Attorney General has delegated solely to ATF. The NTC may only trace a firearm for a law enforcement agency involved in a bona fide criminal investigation, and the firearm must have been used or suspected to have been used in a crime. Several programs within the NTC receive, manage, and disseminate firearms information, in conjunction with firearms tracing, to support the law enforcement community in the effort to combat violent crime and firearms trafficking.

Firearms tracing begins when a law enforcement agency discovers a firearm at a crime scene and seeks to learn the origin or background of that firearm to develop investigative leads. Tracing is a systematic process of tracking the movement of a firearm, beginning at its manufacture or its introduction into U.S. commerce by the importer, and continuing through the distribution chain (i.e., wholesaler or retailer), to identify an unlicensed purchaser. That information can help to link a suspect to a firearm in a criminal investigation and identify potential traffickers. Firearms tracing can detect intrastate, interstate and international patterns in the sources and types of crime guns. ATF processes crime gun trace requests for thousands of domestic and international law enforcement agencies each year. It also traces U.S.-sourced firearms recovered in foreign countries for law enforcement agencies in those countries.

The NTC processed 386,999 trace requests in fiscal year 2016. The goal of the NTC is to complete traces classified as “urgent” in less than twenty-four hours. The NTC completes traces classified as “routine” within five days, on average. The law enforcement agency submitting the trace request

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<sup>72</sup> See [DATA & STATISTICS, ATF](#) (last updated May 23, 2017).

determines the trace classification.

The NTC manages a number of other programs, including eTrace, FFL Theft/Loss, Multiple Sales, Out of Business Records, Interstate Theft, Obliterated Serial Number, and Demand Letters for FFLs. In August 2016, *GQ* magazine published an interesting article about the NTC, its dedicated employees, and the challenges it faces under congressional constraints.<sup>73</sup>

## H. Fire and Arson Investigation Branch

The Fire and Arson Investigation Branch manages ATF's National Response Team (NRT) and the Arson and Explosives Criminal Investigative Analysis (Profiler) Program. ATF developed the NRT and Profiler Programs to meet the challenges, in partnership with federal, state, and local investigators, faced at the scenes and investigations of significant or complex fire and explosion incidents. The primary mission of the NRT and Profiler Programs is to reduce the risk to public safety caused by arson or bombings, and provide the highest level of investigative response and expertise.

Formed in February 1978, the NRT investigates significant fire and explosion incidents. Federal, state, and local investigators can request the activation of the NRT, and the International Response Team, part of the NRT program, can be deployed worldwide to investigate fires and explosions at the request of the U.S. Department of State.



ATF's National Response Team (NRT)

The NRT's primary mission is to concentrate ATF explosives and fire investigative resources and expertise on large-scale incidents or on more complex investigations. The NRT provides an immediate and sustained nationwide response capability that typically deploys within twenty-four hours of notification and utilizes state-of-the-art equipment and the most qualified ATF personnel.

## III. Expert Information and Testimony

ATF experts, particularly in the areas of firearms, explosives, and fire science, are vital to effective prosecutions. The extensive knowledge and technical skill these men and women possess are valuable at all stages of a case—from identifying evidence at search warrant locations or crime scenes, to testifying before a grand jury, petit jury, or the sentencing court. The resources described below demonstrate the unique expertise ATF brings to the fight against violent crime.

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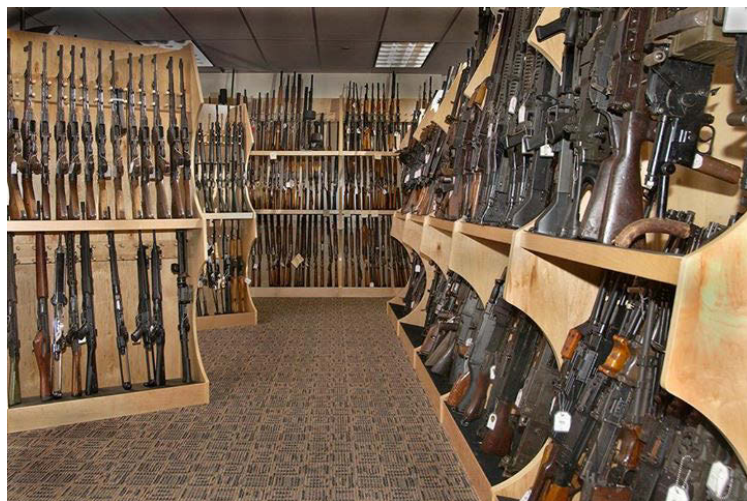
<sup>73</sup> Jeanne Marie Laskas, *Inside the Federal Bureau of Way Too Many Guns*, *GQ* (Aug. 30, 2016).

## A. Firearms and Ammunition Technology Division

In many ATF cases, one must first ask this basic question: “Is it a firearm?” ATF’s Firearms and Ammunition Technology Division (FATD) personnel are the experts who supply the answer.

FATD provides expert technical support on firearms and ammunition to the Bureau, the industry, the general public, and other federal, state, local, and foreign law enforcement agencies. The Division is the federal technical authority regarding firearms and ammunition and their classification under federal laws and regulations. FATD possesses subject matter experts who focus on new and emerging firearm and ammunition technologies and resources. The Division contributes to the operation of the Bureau by providing technical guidance concerning the GCA, NFA, Arms Export Control Act, and other related federal statutes and regulations.

FATD also maintains ATF’s extensive reference collection of more than seventeen thousand firearms. The Division, located in the ATF Martinsburg facility, also houses a technical reference library



Part of ATF’s reference collection

containing over two thousand publications, technical reference files on firearms, specialized testing equipment, specialized gunsmithing tools, and a test-firing facility.



Part of ATF’s reference library

Within FATD, the Firearms Technology Criminal Branch (FTCB) responds to law enforcement requests to test, evaluate, classify, and provide training regarding firearms and ammunition. FTCB personnel also assist in enforcement operations, particularly during the execution of search warrants. FTCB provides technical reports for use in criminal prosecutions and expert witness testimony in federal, state, and military courts. Testimony includes the identification and origin of firearms, interpretation of federal firearm regulations, and technical opinions concerning criminal diversion of firearms.

One area in which AUSAs will need FTCB experts is the identification of machineguns. As defined in 26 U.S.C. § 5845(b), a machinegun is “any weapon [that] . . . is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”<sup>74</sup> A “machinegun” is also “the frame or receiver of any such weapon, any part . . . or combination of parts designed and intended [to convert] a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled . . . .”<sup>75</sup> Except under certain very limited circumstances, a person must not “transfer or possess a machinegun.”<sup>76</sup>

<sup>74</sup> 26 U.S.C. § 5845(b) (2012).

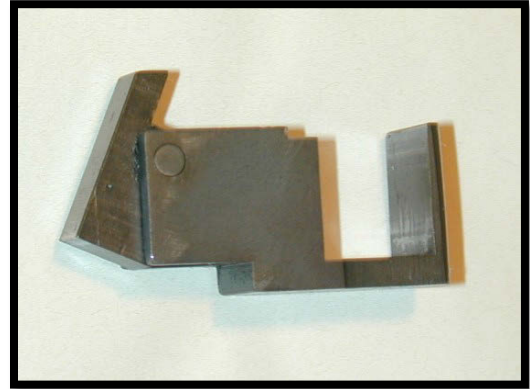
<sup>75</sup> *Id.*

<sup>76</sup> 18 U.S.C. § 922(o) (2012).

There are items for sale, especially online, that, at first glance, look like small pieces of metal. However, these parts readily convert semiautomatic firearms into machineguns. Drop-in auto sears, lightning links, and trigger control group travel reducers can all be machineguns.

## **B. Advanced Firearms and Interstate Nexus Branch**

Certain violations of the GCA, including 18 U.S.C. § 922(g), require a nexus to interstate commerce.<sup>77</sup> Approximately three hundred ATF special agents are nexus examiners with the responsibility of providing an interstate nexus determination and report for firearms and ammunition. Examiners have completed basic and advanced training courses and have made factory visits to many firearms and ammunition manufacturers. ATF examiners often testify in court as expert witnesses.



Example of a part that converts a semiautomatic firearm into a machinegun.

Although other federal law enforcement agencies have made interstate nexus determinations, such determinations are risky. No other agency has the same nexus resources as ATF. ATF examiners have access to licensing and manufacturing records and, more importantly, marking variances. Whether a manufacturer received a variance to produce firearms or ammunition from a different location for a certain period of time is a crucial fact directly affecting an element of the alleged crime. Defense attorneys know that other law enforcement agencies do not have this information, a fact that can make for an uncomfortable cross-examination. It is always safer to use ATF nexus experts.

## **C. Forensic Science Laboratories and the Fire Research Laboratory**

AUSAs are familiar with the unfortunate “CSI effect,” where jurors have unrealistic expectations of forensic science and incorrectly assume that the cutting-edge scientific analysis dramatized in television crime shows, which is wholly fictional at times, should be run on every piece of evidence. ATF Laboratory Services Division may not have the holographic screens that provide instantaneous, multidimensional imagery of the DNA recovered on nanotechnology (ridiculous), but their experts provide outstanding analysis and testimony, even if the testimony simply communicates the lack of fingerprints on a firearm (reality).

The ATF Laboratory Services Division provides analytical and advisory services on scientific matters. This Division has three Forensic Science Laboratories (FSLs), with facilities in Atlanta, Georgia, Walnut Creek, California, and Ammendale, Maryland, and one Fire Research Laboratory (FRL), also located in Ammendale.

ATF laboratories employ chemists, scientists, forensic biologists, engineers, fingerprint specialists, firearm and tool mark examiners, document examiners, and administrative personnel. ATF laboratory personnel hold leadership positions in numerous professional scientific organizations and are among the most highly qualified specialists in their fields. ATF actively supports and encourages professional certification of its scientists and engineers. Laboratory staff consists of highly trained individuals specializing in the examination of evidence typically seen in fire-, explosive-, and firearm-related crimes. These individuals perform forensic exams and provide technical support, expert witness testimony, and advanced training to a wide range of national and international law enforcement personnel.

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<sup>77</sup> See *id.* § 922(g).

In fiscal year 2015, ATF's laboratories accomplished the following:

- Received 2,457 requests for analysis and testing;
- Completed analysis on 1,975 forensic cases (FSL);
- Performed 190 laboratory case testing experiments (FRL);
- Performed 152 laboratory research testing experiments (FRL);
- Provided 87 days of expert testimony in the courts;
- Worked 177 days at crime scenes; and
- Provided 834 days of instruction for federal, state, and local investigators and examiners.

Information about ATF Laboratory Services Division's significant accreditation is available at <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-atf-laboratory-services>.<sup>78</sup>

ATF's Fire Research Laboratory opened in 2003. It is the world's only large-scale research laboratory dedicated to fire-scene investigations. FRL scientists use its unique structure and sophisticated instrumentation to investigate fire-scene phenomena, conduct forensic fire science and engineering tests, and analyze fire growth and dynamics questions.



ATF's Research Laboratory

The FRL is a one-of-a kind facility that includes state-of-the-art hood and exhaust systems, data acquisition systems, and instrumentation that allows researchers to measure data, such as the heat release rate, burning rate, heat flux, and temperature of burning materials. The facility offers a range of capabilities for fire scientists, from bench-scale fire measurement instruments to a 16,900-square-foot burn room that can accommodate a three-story structure. Its reconfigurable small-scale test areas and bench-scale test equipment allow investigators to predict large-scale fire behavior and perform computer fire modeling for use during fire-scene reconstruction and test validation. The FRL facility provides a controlled environment in which to test fire investigation theories, reconstruct and test key

aspects of fire scenarios, and evaluate the potential cause of fires that fire investigators encounter in the field.

<sup>78</sup> FACT SHEET—ATF LABORATORY SERVICES, ATF (Mar. 2016).



As the premier fire science research facility, the FRL serves as a national and international model for forensic fire research and for the development of research protocols. The laboratory is an internationally recognized research and education center for fire cause investigations and fire scene reconstructions. The American Society of Crime Lab Directors—Laboratory Accreditation Board has accredited the FRL to conduct investigations related to fire scene reconstructions.



A demonstration cell burns to test a newer, thinner drywall at the ATF Fire Research Laboratory.

FRL scientists specialize in fire protection; mechanical, structural, chemical, electrical and materials engineering; physics; and metallurgy. FRL scientists are able to test industrial electrical components, determine their potential role in the cause of fires, analyze timelines, assess witness statements, and correlate fire scene damage to fuel loads and ventilation that are present at the time of a fire. They work with ATF certified fire investigators, prosecutors, and the fire investigation community conducting research and providing case support. FRL engineers conduct scientific research that validates fire scene indicators and improves fire scene reconstruction and fire evidence analysis. This information can improve investigative and prosecutorial procedures, advance fire investigation expertise, and serve as a central repository for fire investigative research data. The FRL staff also provides specialized training in fire investigation and analysis to the fire science community and authors many highly regarded publications.

In 2012, *Washingtonian* magazine published an article about the FRL and some of its cases.<sup>79</sup> If the prosecution involves a complex fire scene, these are fitting experts.

#### **D. National Center for Explosives Training and Research**

ATF is responsible for investigating non-terrorist criminal acts involving explosives, bombings, and explosive threats; these non-terrorist acts comprise more than 90 percent of all such nationwide incidents. Additionally, ATF investigates the cause and origin of accidental explosions.

The National Center for Explosives Training and Research (NCETR), located in Huntsville,

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<sup>79</sup> Michael J. Gaynor, *Playing With Fire: Inside the World's Largest Fire-Science Laboratory*, WASHINGTONIAN (Nov. 6, 2012).

Alabama, consolidates and coordinates ATF's explosives, fire, canine, and response operations. At the NCETR, ATF provides outstanding training facilities and the unmatched expertise of its staff in delivering life-saving advanced explosives and arson training for our nation's explosives handlers, bomb technicians, criminal investigators, and our military's explosives ordnance disposal operators.

## 1. Certified Explosives Specialist Program

ATF's Certified Explosives Specialist (CES) program is comprised of experienced special agents, who investigate violations of the federal explosives laws, and explosives enforcement officers (EEOs), who provide support for investigations involving explosives and destructive devices. The CES serves as ATF's primary resource to provide technical expertise and analysis in support of ATF's explosives enforcement mission in the areas of explosives identification, handling, use and disposal, post-blast investigation, and support to state and local authorities.

The special agent CES, certified after a two-year training program, specializes in investigating violations of federal explosives and firearms laws. These violations include bombings, explosives thefts, and other explosives-related matters relevant to the unlawful use, storage, manufacture, and distribution of explosives. The special agent CES also enforces the federal explosives laws and protects the public from criminal acts involving the illegal manufacture and use of explosives, as well as the unsafe storage of explosives. EEO CES personnel are experienced bomb technicians who render destructive devices safe, conduct advanced disassembly procedures to preserve and exploit evidence, and provide destructive device determinations for expert evidence testimony in criminal prosecutions. The efforts of both the special agent CES and the EEO CES support ATF's and the Department of Justice's strategic goals of preventing terrorism and violent crime and safeguarding the nation's security.

A CES must maintain a working knowledge of commercial, military, and homemade explosives (HMEs) as well as improvised explosive devices (IEDs). As ATF's primary investigative resource for explosives matters, a CES responds to all explosions, conducts explosives recoveries and large-scale seizures, conducts disposal operations, provides technical assistance to other public safety entities, and delivers expert courtroom testimony. The CES also supports ATF industry operations investigators in matters relating to explosives regulations and provides training to ATF personnel, private sector and public safety entities, other law enforcement, military personnel, and international partners.

An ATF EEO has unique technical capabilities in explosives and bomb disposal. EEOs render bombs and other destructive devices safe, conduct advanced disassembly procedures in order to preserve and exploit evidence, provide explosive device determinations for criminal prosecutions, and routinely conduct explosives threat assessments of vulnerable buildings, airports, and national monuments. EEOs assist ATF special agents, CESs, and local, state, and other federal law enforcement agencies in explosives-related investigations and provide expert courtroom testimony in support of these investigations. EEOs are ATF's primary point of technical assistance and support in matters involving IEDs and destructive devices. Their duties range from conducting explosive product testing and evaluation to assisting the Department of State's Antiterrorism Assistance Program in conducting antiterrorism capability assessments outside the United States. Many EEOs previously



Demonstration of technical explosive capabilities

served as explosive ordnance disposal technicians in the U.S. military. On average, EEOs have sixteen years of experience in the explosives field prior to their employment with ATF.

One area, of many, in which the explosives experts at NCETR can assist AUSAs is “destructive device determination.” Under the GCA and the NFA, a “destructive device” is a firearm.<sup>80</sup> In 28 C.F.R. § 0.130, the U.S. Attorney General delegated specifically to ATF the authority to administer and enforce the NFA and the GCA.<sup>81</sup> Thus, while both the FBI and ATF have authority to investigate violations of the NFA and GCA, ATF is the only federal agency delegated the responsibility for implementation of both the regulatory and the criminal enforcement of the NFA and the GCA. This distinction is important because destructive device classifications in criminal cases will have significant impact on regulatory matters, and vice versa.

By regulation, ATF has the sole authority to determine whether a particular item is excluded from the definition of “destructive device” under both the GCA and the NFA.<sup>82</sup> An “excluded” determination will eliminate the need to register the item and will make unregistered possession lawful. As a result, these types of determinations will significantly impact charging decisions and evidence proffered in criminal cases. ATF EEOs conduct approximately 130-150 criminal case-specific destructive device determinations per year, far more than any other agency.

Finally, if an item is a destructive device, one must register it in the National Firearms Registration and Transfer Record (NFRTR), per 26 U.S.C. § 5841.<sup>83</sup> Only ATF may conduct a search of the NFRTR. The registration of a destructive device, or lack thereof, is a key element for any case brought under 26 U.S.C. § 5861(d).<sup>84</sup>

## **2. The Fire Investigation and Arson Enforcement Division**

The Fire Investigation and Arson Enforcement Division (FIAED) is also located at the NCETR. FIAED manages the Certified Fire Investigator (CFI) Program, the Fire and Arson Investigation Branch, the National Fire Academy partnership, and all other advanced fire and arson training programs, such as the Arson for Prosecutors, Advanced Arson Investigation, and Advanced Origin and Cause/Courtroom Testimony Training programs. FIAED structures these training programs so that federal, state, and local investigators and prosecutors receive instruction about how to determine the origin and cause of fires and, when a fire is determined to be arson, how to identify and successfully prosecute those responsible. The ATF CFI is a highly trained special agent who provides technical support, analysis, and assistance to ATF and its state and local partners in fire origin and cause determination and in arson investigation. The ATF CFI is a field division’s primary resource in fire- and arson-related investigations, and CFIs are the only federal agents trained both to make origin and cause determinations and to provide expert opinion testimony. All ATF CFIs complete a two-year training program that includes the following: fire origin and cause determination; fire dynamics; fire modeling; building construction; electricity and fire causation, health, and safety; scene reconstruction; and evidence collection. CFI candidates take fifteen credit hours of graduate level courses in a partnership with Oklahoma State University. The CFI program relies on rigorous training, education, and experience to provide agents with the knowledge, skills, and abilities necessary to obtain credentials to testify as expert witnesses in the field of fire origin and cause.

## **3. U.S. Bomb Data Center and National Explosives Tracing Center**

ATF has been collecting, storing, and analyzing records on explosives and arson incidents since 1976. Under federal explosives laws, the U.S. Attorney General designated the U.S. Bomb Data Center (USBDC) to serve as the national repository for data related to explosives and arson. The mission of the USBDC is to collect, analyze, and disseminate data to increase regional and situational awareness and to

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<sup>80</sup> See 26 U.S.C. § 5845(f) (2012).

<sup>81</sup> See 28 C.F.R. § 0.130(a)(2) (2016).

<sup>82</sup> See *id.*

<sup>83</sup> See 26 U.S.C. § 5841 (2012).

<sup>84</sup> See *id.* § 5861(d).

assist in the investigation of bombings, arson, and the criminal misuse of explosives. These intelligence products include statistical and technical information as well as analysis trends related to the criminal use of explosives and arson.

The USBDC also collects, monitors, and disseminates information related to the theft or loss of explosive materials, in coordination with other U.S. law enforcement agencies. Federal law establishes this responsibility by requiring that, if explosive licensees or permittees have knowledge of the theft or loss of any explosive materials from their stock, they report the theft or loss within twenty-four hours of discovery to ATF and local authorities.

Additionally, the USBDC maintains the National Explosives Tracing Center, which is responsible for the identification and tracing of domestic and foreign commercial and military explosives and ordnance as well as other munitions. Through its strong partnerships with the explosives industry and the Department of Defense, the USBDC can trace recovered explosives through their movement in interstate and international commerce to their point of origin for the purpose of aiding law enforcement officials in identifying criminal suspects, establishing stolen status, and proving ownership.

## IV. Public Information and Assistance

The public is a valued partner in combatting violent crime. ATF uses citizen-supplied information to locate criminals, and Bureau personnel participate in community outreach events and programs designed to provide positive role models for young people and encourage them to turn away from gangs and violence.

### A. ATF Tips and ReportIt<sup>®</sup>

ATF takes to heart the adage, “See something, say something,” and provides numerous means for the public to contact ATF with information to report criminal or regulatory violations. The following are ATF Hotlines:

Criminal Activity 1-888-ATF-TIPS (1-888-283-8477) <a href="mailto:ATFTips@atf.gov">ATFTips@atf.gov</a>	National Tracing Center 1-800-788-7133 (law enforcement only)
Illegal Firearms Activity 1-800-ATF-GUNS (1-800-283-4867)	Firearms Theft 1-888-930-9275
Bombs and Explosives 1-888-ATF-BOMB (1-888-283-2662)	Explosives Theft 1-800-461-8841
Arson 1-888-ATF-FIRE (1-888-283-3473)	Stolen, Hijacked or Seized Cigarettes 1-800-659-6242

Additionally, ATF and ReportIt<sup>®</sup> have developed a free mobile application to make submitting tips even easier. Users can submit tips anonymously and confidentially in seventeen languages. ATF does not collect any electronic device information through the service. The tip is only identifiable through a unique ID that has no connection to the device. An infographic is available about ATF Tips and can be provided at anti-violence community events.<sup>85</sup>

ATF field offices may also offer a reward in certain circumstances to encourage the public to come forward with information that otherwise may not have been obtained without the reward. If a prosecutor believes an offer of a reward would benefit an investigation, the case agent can submit a request for approval by the special agent in charge of the particular field division.

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<sup>85</sup> See [HAVE A TIP?, ATF](#) (last updated May 8, 2017).

## B. ATF, Facebook, and Fugitives

Social media is a terrific tool for law enforcement. In addition to typical investigative uses, ATF takes advantage of Facebook's broad reach to notify the public of its hunt for fugitives. ATF posts fugitive notices to its page and can target dissemination of the notice to users based on location and age. If a prosecutor would like violent fugitive information posted, the prosecutor can ask an ATF agent directly or contact the ATF public information officer in the closest field division. The ATF website also lists fugitives and allows searches by location.<sup>86</sup>

The image shows a screenshot of a Facebook post from the ATF (Bureau of Alcohol, Tobacco, Firearms and Explosives) page. The post is dated May 31 at 12:10pm. The text of the post reads: "WANTED: Erik Flores Elortegui, aka Eric Flores, is a wanted fugitive who was indicted on September 16, 2015 in the U.S. District Court for the District of Oregon for conspiracy regarding false statements in connection with the acquisition of firearms and smuggling goods from the United States. Elortegui, 34, is a 5'6" Hispanic male, approximately 210 lbs. and has brown hair and brown eyes. If you have any information as to the location of Elortegui, please contact ATF at 1-888-ATF-TIPS (1-888-283-8477). Find out more at <http://ow.ly/sRfz3092ssu>." Below the text is a large graphic titled "WANTED" in yellow letters. The graphic features the ATF logo on the left and a portrait of Erik Flores Elortegui on the right. To the right of the portrait, it lists "Wanted For" (Conspiracy: False statements in connection with the acquisition of firearms, and smuggling goods from the U.S.), "Physical Description" (Hispanic male, 34 years old | 210 lbs. | 5'6", Brown hair and brown eyes), and "Additional Information" (Alias: Erik Flores). At the bottom of the graphic, it says "REPORT CRIME: Call 1-888-ATF-TIPS or Download the ReportIt® app" and includes logos for the App Store, Google Play, ATF TIPS, and ReportIt, along with a QR code. The post has 60 reactions and 29 shares.

Example of an ATF Facebook posting for a wanted fugitive

## C. GREAT Anti-Gang Education Program

ATF participates in the Gang Resistance Education and Training (GREAT) Program. The GREAT Program's primary objective is awareness and prevention of delinquency, youth violence, and gang membership. The GREAT lessons, aimed at elementary and middle school students, focus on providing life skills to help students solve problems and avoid delinquent behavior and violence. GREAT seeks to help students avoid gang membership and teaches them how to resist gang pressure and develop

<sup>86</sup> See [LOCAL FUGITIVES, ATF](#) (last visited May 26, 2017).

positive attitudes concerning law enforcement.

There are four GREAT Program components: the six-week elementary school program; the thirteen-week middle school program; a summer program, which builds on the school-based curriculum and adds structure to the summer months; and a six-session family training program that engages parents and young people in cooperative lessons that facilitate communication and decision-making skills. Since its inception in 1991, GREAT has graduated more than seven million students.

## V. Conclusion

ATF is committed to combatting violent crime and making our communities safer. In addition to the special agents at the frontline of criminal investigations, ATF has a wide variety of resources to support prosecutions, and they are always available to AUSAs through requests made to ATF field offices or headquarters. ATF values its relationships with U.S. Attorneys' Offices around the country. Together, we can do justice.

### ABOUT THE AUTHOR

□ **Ellen V. Endrizzi** is Division Counsel for ATF's National Investigative Division and Acting Senior Counsel for Field Operations. Prior to joining ATF in 2015, she was an Assistant U.S. Attorney for ten years, working in the Eastern District of California and the Northern District of Georgia. She also twice served as the Department of Justice Attaché to the United States Embassy, Baghdad, Iraq. In 2016, she received an Attorney General's Award for her work with ATF's Internet Investigations Center.

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# Gang Experts: Best Practices and Avoiding Pitfalls

*Catherine Kuo Dick*  
*Trial Attorney*  
*Organized Crime and Gang Section*  
*Criminal Division*  
*U.S. Department of Justice*

## I. Gang Experts: When Should You Use One?

Since the 1980s, gang experts have become an increasingly commonplace sight in federal courtrooms. A gang expert's testimony has advantages and disadvantages: on the one hand, the expert can provide a comprehensive overview of the gang and introduce jurors to a criminal world they would not otherwise understand.<sup>87</sup> A poised, effective expert at the beginning of your case can set the stage for the rest of your evidence, some of which may come from less-than-articulate cooperators. And in the RICO context, an expert alone may be able to establish the existence of the enterprise.<sup>88</sup> On the other hand, an expert is almost sure to draw legal challenges at the trial level, as well as scrutiny and potentially reversal on appeal.<sup>89</sup> The question that frequently arises in cooperator-driven cases is: why use a gang expert if you have cooperators who can testify about much of the same information?

The answer will, of course, depend on the facts of your case and charges to be proven. You may not need or want a gang expert, but where a gang is national or transnational in nature, a gang expert may be uniquely able to explain the inner workings where a cooperator, or even a series of cooperators, cannot. For instance, the average 19-year old member of MS-13 will not know the lengthy history of MS-13: its origins in 1980s Los Angeles, how it spread to the Northern Triangle region of Central America, and to other areas of the United States, and the consequences of that history. A gang expert, by contrast, who has sifted through a variety of evidence and reached an independent judgment about the origins and spread of MS-13, can explain to a jury how and why MS-13 members on the East Coast coordinate with one another through leadership in El Salvador, where MS-13 on the West Coast typically does not take direction from El Salvador. That background may be important to understanding the structure of the gang and communications facilitating the criminal activity in your case.

The same 19-year old MS-13 cooperator may also lack a nuanced understanding in other critical areas. For instance, he might testify in absolute terms that MS-13 has rigid rules, *e.g.*, murder is a requirement of membership. A different cooperator might then testify that he was required to participate in extortion, robberies and beatings, but not murder, to become a member. A gang expert with a longer view and deeper knowledge of the history of the gang can explain that MS-13 rules sometimes vary by region or circumstance: where a region is less active or where a clique has lost members and needs to build up its ranks, it may ease the usual requirements for membership or put on hold the requirement until

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<sup>87</sup> See, *e.g.*, [United States v. Tocco](#), 200 F.3d 401, 419 (6th Cir. 2000) (“[E]vidence regarding the inner-workings of organized crime has been held to be a proper subject of expert opinion because such matters are ‘generally beyond the understanding of the average layman.’”) (quoting [United States v. Espinosa](#), 827 F.2d 604, 611 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988)).

<sup>88</sup> See [United States v. Palacios](#), 677 F.3d 234, 249 (4th Cir. 2012) (testimony expert was sufficient for reasonable jury to determine MS-13 was a RICO enterprise).

<sup>89</sup> See [United States v. Mejia](#), 545 F.3d 179, 199 (2d Cir. 2008) (expert's reliance on and repetition of out-of-court testimonial statements violated Sixth Amendment's Confrontation Clause).



after formal membership is granted (effectively allowing the member to owe a debt of violence to be fulfilled later). An MS-13 expert can therefore ensure that jurors will understand that these differences are not, as a defense attorney might argue in a RICO case, contradictory or inconsistent with MS-13 operating as a single enterprise. Rather, the variations remain consistent with MS-13’s overarching goal of controlling communities through fear and violence.

The decision of whether to use a gang expert will ultimately be a judgment call based on a number of factors, including the need to provide the jury with an understanding of the gang beyond that of your cooperators, recordings, or other evidence, and the availability of a witness with the requisite qualifications. Should you decide to call a gang expert, certain questions will help you to define the scope of your expert’s testimony, employ best practices in introducing that testimony, and avoid the potential for traps or overreach.

## II. Best Practices and Avoiding Pitfalls: Defining the Scope of and Foundation for Your Gang Expert’s Testimony

### A. Relevance and Reliability: What Purpose Does Your Expert Serve and What Does Your Expert Know About the Gang?

The first question to ask is why are you calling an expert and what purpose your expert’s testimony will serve. Will he or she testify about the history of the gang, its hierarchy and structure, the symbols and coded language of its members? All of the above?<sup>90</sup> By first identifying the type of testimony to be introduced, you can then identify a clear rationale and basis for how that testimony will help you navigate the initial objections that defense counsel will undoubtedly make. As a threshold matter, the defendant is likely to argue under [Federal Rule of Evidence 401](#) and [Federal Rule of Evidence 403](#) that the prejudice of the gang affiliation evidence against him outweighs its probative value.<sup>91</sup>

Courts have held that gang affiliation evidence is relevant for a variety of reasons:

- Evidence of relationships in a conspiracy.<sup>92</sup>
- Intent and motive.<sup>93</sup>

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<sup>90</sup> See, e.g., [United States v. Mejia](#), 545 F.3d 179, 190 (2d Cir. 2008) (“[L]aw enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon and internal structure of criminal organizations”); [United States v. Feliciano](#), 223 F.3d 102, 109 (2d Cir. 2000) (upholding gang expert testimony about “the structure, leadership, practices, terminology, and operations of [the gang] Los Solidos”).

<sup>91</sup> See [United States v. Abel](#), 469 U.S. 45, 54 (1984) (“Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court’s sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.”)

<sup>92</sup> Courts will likely be skeptical of the relevance of gang affiliation evidence where no conspiracy is charged or other direct connection exists between membership and the crime charged. See [United States v. Newsom](#), 452 F.3d 593, 602–03 (6th Cir. 2006) (gang tattoo not relevant to felon in possession of firearm charge). See, e.g., [United States v. Ford](#), 761 F.3d 641, 649 (6th Cir. 2014) (“Evidence of gang affiliation is relevant where it demonstrates the relationship between people and that relationship is an issue in the case, such as in a conspiracy case”); [United States v. Archuleta](#), 737 F.3d 1287, 1293–94 (10th Cir. 2013) (collecting “prior cases where conspiracy is charged that gang-affiliation testimony may be relevant”); [United States v. Alviar](#), 573 F.3d 526, 538 (7th Cir. 2009) (“[E]vidence of Latin King handshakes, symbols, colors, and tattoos tended to establish gang membership or affiliation, and it was proper for the government to prove gang membership as part of the conspiracy”), *cert. denied*, 559 U.S. 916 (2010).

<sup>93</sup> See [United States v. LaFond](#), 783 F.3d 1216, 1222 (11th Cir. 2015) (defendants’ membership in white supremacist gang relevant to intent and motive in attacking white inmate with black cellmate); [United States v. Ozuna](#), 674 F.3d 677, 681 (7th Cir. 2012) (“[E]vidence of gang affiliation was admissible, from the beginning to show bias, interest, or motive”).

- Identity.<sup>94</sup>
- Impeachment.<sup>95</sup>
- Bias.<sup>96</sup>

Your expert’s reliability will depend on his familiarity with your gang, not just general gang practices as, “[g]iven the variation in practices among different gangs, a gang expert’s testimony on these relevant subjects is *reliable* only insofar as it is based on significant experience with the gang about which the expert is testifying.”<sup>97</sup> Furthermore, if your expert is not familiar with the gang in your area, it will be crucial to tie together the relevance of his expertise to the facts of your case. In *United States v. Rios*, the defendants challenged a Latin Kings gang expert’s relevance and reliability, as he had no specific knowledge of the Latin Kings in Holland, Michigan.<sup>98</sup> The Sixth Circuit held the expert’s testimony was relevant because he properly opined on the national organization of the Latin Kings, and the government was able to link the local group to the national organization through other testimony.<sup>99</sup>

## **B. Avoiding *Crawford* Problems: Has Your Expert Exercised Independent Judgment?**

Your expert will undoubtedly have formed opinions, in part based on the testimonial statements of cooperating witnesses, confidential informants, and others. Admission of those statements on their own would present a problem under *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Supreme Court held that the Confrontation Clause permits the introduction of “[t]estimonial statements of witnesses absent from trial...only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>100</sup> However, an expert witness may base an opinion on inadmissible evidence “[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”<sup>101</sup>

**Rule 703** and the Confrontation Clause “can be reconciled if the expert exercises ‘independent judgment’ in assessing and using the hearsay (and other sources) to reach an expert opinion.”<sup>102</sup> “[C]ourts have agreed that it is the process of amalgamating the potentially testimonial statements to inform an expert opinion that separates an admissible opinion from an inadmissible transmission of testimonial statements.”<sup>103</sup> “An expert witness’s reliance on evidence that *Crawford* would bar if offered

<sup>94</sup> See *United States v. Ellison*, 616 F.3d 829, 833 (8th Cir. 2010) (evidence of defendant’s membership in “West Side Hustler” gang relevant to showing defendant was likely to wear gang color green as bank robber did); *United States v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995) (“[E]vidence tending to show identity, such as the gang-related connections between the defendants, the mastermind of the crime, and the getaway car, was very probative.”)

<sup>95</sup> See *United States v. Ellison*, 616 F.3d 829, 833 (8th Cir. 2010) (evidence of gang affiliation impeached defendant’s testimony that he was not a member of “West Side Hustler” gang, wore green clothing as bank robber did or bandana or knew gang color was green); *United States v. Hankey*, 203 F.3d 1160, 1171–73 (9th Cir. 2000) (evidence regarding gang code of silence relevant for purposes of impeaching witness’s credibility by showing of bias or coercion).

<sup>96</sup> See *United States v. Takahashi*, 205 F.3d 1161, 1165 (9th Cir. 2000) (evidence that defendant and exculpatory witness were members of gang that required oath of total loyalty was relevant to issue of bias). See also *Ozuna*, 674 F.3d 677; *Hankey*, 203 F.3d 1160.

<sup>97</sup> *United States v. Rios*, 830 F.3d 403, 414 (6th Cir. 2016), cert. denied sub nom. *Casillas v. United States*, 137 S. Ct. 1120 (2017).

<sup>98</sup> *Id.* at 415.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 59.

<sup>101</sup> FED. R. EVID. 703.

<sup>102</sup> *United States v. Garcia*, 793 F.3d 1194, 1212 (10th Cir. 2015), (quoting *United States v. Kamahale*, 748 F.3d 984, 1000 (10th Cir. 2014), cert. denied, 136 S. Ct. 860 (2016)).

<sup>103</sup> *Rios*, 830 F.3d at 403.

directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.”<sup>104</sup>

It is crucial to protect your expert’s testimony by first, laying a foundation establishing that the basis of your expert’s testimony encompasses far more than just testimonial hearsay statements.<sup>105</sup> Your expert should be able to articulate the variety of non-testimonial hearsay evidence on which he or she based his or her opinions, including non-testimonial statements that do not implicate *Crawford*. Examples of non-testimonial statements include:

- Co-conspirator wiretap calls.<sup>106</sup>
- Statements to a government informant.<sup>107</sup>
- 911 calls and other statements taken under emergency circumstances.<sup>108</sup>

Other types of evidence on which your expert has likely relied to form his or her opinions include: (1) personal observation on patrol, on surveillance, or through the execution of search or arrest warrants; (2) formal and informal training; (3) interaction with other law enforcement, and (4) any other experiences that informed his or her conclusions.<sup>109</sup> Laying foundation that the expert relied on all of this information will help protect your expert’s testimony from challenges both in the trial court and on appeal.<sup>110</sup>

Second, the testimony itself must convey the expert’s independent judgment and should not specifically reference any particular testimonial facts learned from interviews.<sup>111</sup> Here, generality is the expert’s friend: “[a]n important consideration in distinguishing proper testimony from parroting is the generality or specificity of the expert testimony.”<sup>112</sup>

What does the exercise of independent judgment mean practically speaking? If your expert testifies, “Homeboy Flaco told me that MS-13 has at least 10 cliques in this area,” you will almost

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<sup>104</sup> [United States v. Johnson](#), 587 F.3d 625, 635 (4th Cir. 2009).

<sup>105</sup> [United States v. Palacios](#), 677 F.3d 234, 243–44 (4th Cir. 2012) (no *Crawford* violation, even if expert’s opinion was “based, in part, on testimonial hearsay” because expert had relied on “other sources of his extensive knowledge about MS-13[] to form an independent opinion” and “did not specifically reference any [testimonial hearsay] during his expert testimony”).

<sup>106</sup> See [Crawford v. Washington](#), 541 U.S. 36, 56 (2004) (statements in furtherance of a conspiracy are “by their nature” not testimonial); [United States v. Ciresi](#), 697 F.3d 19, 31 (1st Cir. 2012).

<sup>107</sup> See [Davis v. Washington](#), 547 U.S. 813, 825 (2006).

<sup>108</sup> See *Id.* at 821 (“[S]tatements are non-testimonial where they are made to police under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”).

<sup>109</sup> See, e.g., [United States v. Vera](#), 770 F.3d 1232, 1239 (9th Cir. 2014) (bases of agent’s expert opinion included experiences on patrol, contact with gang members as deputy sheriff in jail, formal classroom training, and training as member of task force, homicide investigator, and gang suppression detective).

<sup>110</sup> See, e.g., [United States v. Palacios](#), 677 F.3d 234, 244 (4th Cir. 2012) (approving gang expert where bases of gang investigator’s expertise included “extensive gang culture training, interaction with other law enforcement officers who specialize in gangs, personal observation through surveillance and executing search warrants, and ‘[h]undreds and hundreds . . . , if not thousands’ of interviews with MS-13 member and victims of MS-13 gang violence”).

<sup>111</sup> See [United States v. Kamahale](#), 748 F.3d 984, 998 (10th Cir. 2014) (inquiry is whether “the expert” simply parroted a testimonial fact learned from a particular interview”).

<sup>112</sup> [United States v. Garcia](#), 793 F.3d 1194, 1213 (10th Cir. 2015), cert. denied, 136 S. Ct. 860 (2016). See also [United States v. Ayala](#), 601 F.3d 256, 275 (4th Cir. 2010) (approving of experts who “offered their independent judgments, most of which related to the gang’s general nature as a violent organization and were not about the defendants in particular”).

certainly have a *Crawford* problem. Your expert should be able to testify that she came to the independent judgment, consistent with her experience and observation, that there were at least 10 cliques in your area from a variety of evidence that she’s gathered, both testimonial and non-testimonial, e.g., gang graffiti with clique names, victim statements, wire evidence, field stops, search warrant evidence reflecting particular clique, etc. Certainly no matter what her opinion, she should not simply repeat back any particular testimonial statement of any particular person upon whom that opinion was based.<sup>113</sup>

### C. Dual Witness Problem: Was Your Expert Part of the Investigation?

The next question to ask is whether your proposed expert is or could be a fact witness in your case. An expert who has been either exposed to the facts of your case or is expected to testify concerning them as a lay witness presents a dual witness issue. The Second Circuit in *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003), identified multiple areas of concern where a case agent also testifies as an expert, including an “aura of special reliability” and “unmerited credibility” conferred on the witness’s lay/fact testimony by his expert status and juror confusion and difficulty in discerning “whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case.”<sup>114</sup>

The Fourth Circuit’s decision in *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014) provides a cautionary tale in using an expert who has factual knowledge of the investigation. The agent was proffered as a decoding expert who could opine on “the meaning of coded references in several [wiretap] calls used by the conspirators, when discussing drug trafficking over the phone.”<sup>115</sup> The agent had also been part of the investigation, both having monitored the wire calls in the case involving the discussion of drug trafficking and having debriefed several cooperators.<sup>116</sup> The trial court noted two potential problems with her testimony: “the need to distinguish between her lay fact testimony based on her personal knowledge, on the one hand, and her expert opinion testimony based on her training and investigatory experience, on the other; and (2) ensuring that she was testifying on the basis of her experience and expertise in coded language, and not simply repeating what cooperators or witnesses told her.”<sup>117</sup> Despite noting these issues, the conviction was reversed by the Fourth Circuit because there were “inadequate safeguards to protect the jury from conflating [the expert’s] testimony as [an] expert and fact witness.”<sup>118</sup> In particular, the Circuit noted that while some of the agent’s decoding testimony was based on her expertise and some based on her factual knowledge as an investigator, the distinction was not made for the jury: “there were repeated instances of [the agent] moving back and forth between expert and fact testimony, with no distinction in the Government’s questioning or in [the agent’s] answers.”<sup>119</sup> Furthermore, because the agent testified to having debriefed three co-conspirators in the case whom she “specifically identified as contributing to her ‘understanding of the coded language used in this case,’”<sup>120</sup> the Circuit stated that “it was incumbent upon the Government to demonstrate that [the agent] was not merely channeling information and statements by non-testifying participants in the conspiracy into the trial record.”<sup>121</sup> As a result of the dual witness issues and a failure to demonstrate requisite reliability in

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<sup>113</sup> See *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012) (“If an expert simply parrots another individual’s out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert’s opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth.”).

<sup>114</sup> *Dukagjini*, 326 F.3d at 53–54.

<sup>115</sup> *Garcia*, 752 F.3d at 386.

<sup>116</sup> *Id.* at 387.

<sup>117</sup> *Id.* at 387.

<sup>118</sup> *Id.* at 392.

<sup>119</sup> *Garcia*, 752 F.3d at 392.

<sup>120</sup> *Id.* at 394.

<sup>121</sup> *Id.* at 395.

the expert’s decoding method itself, the Circuit reversed and remanded.<sup>122</sup>

Similarly, in *United States v. Rios*, 830 F.3d 403 (6th Cir. 2016), the Sixth Circuit held that a dual witness gang expert “strayed into testimony that [was] potentially problematic when he testified about specific criminal actions” as opposed to testifying “within the appropriate scope of gang-expert testimony, as it focused on the traditional areas in which a gang expert can testify—history, organization, and unique terminology or symbols.”<sup>123</sup> The failure of the court and witness to delineate between his fact and expert testimony was also problematic as “[s]eamlessly switching back-and-forth between expert and fact testimony does little to stem the risks associated with dual-role witnesses.”<sup>124</sup> And finally, the Circuit faulted the trial court’s failure to explain that the jury could consider the expert’s status as a key fact witness for the government in evaluating the credibility of his expert testimony.<sup>125</sup> While the *Rios* Court ultimately found the error to be harmless,<sup>126</sup> the various pitfalls are evident in using a dual witness.

Given the inherent legal issues in a dual witness, the best practice is to use an expert who has not been part of your investigation. You may not have that option, however, where your gang is a smaller, local crew, and almost all of the potential experts have had direct contact with your case. To the extent your expert has direct knowledge of the investigation—whether or not she testifies as a lay witness as well—you should lay careful foundation that she derives expertise from information that is unrelated to the case, so there is no question as to whether she is simply “channeling information” about it.<sup>127</sup>

If your expert is also testifying as a lay witness, you and the Court should employ additional safeguards to ensure that the expert and fact testimony do not become intermingled either in fact or in the jury’s mind.<sup>128</sup> Such steps should include the following:

- Bifurcation of lay/fact and expert testimony;
- Instruction to jury as to what type of testimony will be given prior to the testimony;
- Instruction that jury not give undue weight to witness’s fact testimony because of his status as an expert; and
- Instruction that jury can consider expert’s status as a fact witness in evaluating the credibility of his expert testimony.

### III. Conclusion

Gang experts can offer a wealth of knowledge to your jury and even establish an element of proof—the existence of the enterprise—in a RICO trial. And much like a jury address, the gang expert can give structure to and context to evidence coming in through multiple witnesses, further reinforcing

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<sup>122</sup> *Id.* at 395–96.

<sup>123</sup> *Id.* at 415.

<sup>124</sup> *Id.* at 416 (quoting *United States v. York*, 572 F.3d 415, 426 (7th Cir. 2009)).

<sup>125</sup> See *Rios*, 830 F.3d at 414–415 (citing *United States v. Tocco*, 200 F.3d 401, 418 (6th Cir. 2000) (approving that “dual roles were emphasized to the jury by the fact that [agent] testified at two different times” and “the district court instructed the jury, both before he gave his opinion and again in the jury charge, that it should consider [the agent’s] dual roles in determining what weight, if any, to give [the] expert testimony”).

<sup>126</sup> *Id.* at 416–17.

<sup>127</sup> See *Garcia*, 752 F.3d at 395.

<sup>128</sup> See, e.g. *United States v. Martinez*, 657 F.3d 811, 817 (9th Cir. 2011) (approving of dual testimony where court instructed “three times on the difference between percipient and expert testimony”); *United States v. Anchrum*, 590 F.3d 795, 803–04 (9th Cir. 2009) (trial court “avoided blurring the distinction between [the agent’s] distinct role as a lay witness and his role as an expert witness” when it “clearly separated [the agent’s] testimony into a first ‘phase’ consisting of his percipient observations and a second ‘phase’ consisting of his credentials in the field of drug trafficking and expert testimony regarding the modus operandi of drug traffickers”).

your theory of the case. By carefully delineating the scope of your expert's testimony and laying a solid foundation, you can avoid potential legal pitfalls while taking advantage of law enforcement expertise to help your jury understand the inner workings of organized crime.

#### **ABOUT THE AUTHOR**

□ **Catherine Kuo Dick** is a Trial Attorney in the Criminal Division's Organized Crime and Gang Section (OCGS). Prior to OCGS, she was an Assistant Chief with the Criminal Division's Fraud Section. Her current practice is in violent gang prosecutions and RICO, with a particular focus on MS-13 and on the national and international coordination of MS-13 investigations and prosecutions in the United States and in the Northern Triangle.

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# Operation Sudden Impact: The Effective Use of Federal and State Resources to Combat Gang Violence

*Reema M. El-Amamy*

*Assistant U.S. Attorney*

*Organized Crime Drug Enforcement Task Force Section*

*U.S. Attorney's Office*

*Central District of California*

## I. Introduction

On January 11, 2017, Jimmy “Shyboy” Valenzuela, the leader of the Southside Montebello (SSM) gang’s “Killer Squad,” was sentenced in California state court to two life sentences without the possibility of parole in connection with two separate execution-style murders of rival gang members. The jury had previously found the special allegation that these were murders committed in furtherance of the activities of a criminal street gang, and at sentencing the judge described the murders as “unprovoked” and “senseless.”

Valenzuela is a member of the SSM gang, which is aligned with the Mexican Mafia. For generations now, members and associates of the SSM gang conducted criminal activity in Montebello, a city less than ten minutes away from downtown Los Angeles. Valenzuela was arrested in 2012 as a result of cooperative efforts by federal and local law enforcement working under the oversight of the U.S. Attorney’s Office in Los Angeles. Their goal was to combat gang crime in the city of Montebello, and solve a number of “cold-case” gang-related homicides. Also arrested was Joe John Dorantes, who was charged with the 2008 killings of Albert Garcia and his 12-year-old son, neither of whom had any gang affiliation. As a result of the agents’ joint efforts, thirty-eight gang members and associates, including Valenzuela, were arrested on a combination of federal racketeering, drug, and weapons charges, as well as state charges, including murder.



Pictured on the left is Joe John Dorantes, and on the right is Jimmy “Shyboy” Valenzuela—the leader of the SSM Killer Squad.



Law enforcement seized twenty handguns, three fully automatic handguns, one sawed off bolt-action rifle, and more than half a kilogram of methamphetamine in total, from various street-level drug dealers.



Firearms that were seized during Operation Sudden Impact.

Law enforcement dubbed the investigation “Operation Sudden Impact.” The investigation targeted “gang members who [had] been terrorizing [the city of Montebello] and the surrounding communities for years,” according to Montebello Police Chief Kevin McClure.<sup>129</sup> The Operation was designed to bring some measure of relief for the residents of the city of Montebello and adjacent communities, who had been terrorized by escalating gang violence. The operation culminated with arrests in May of 2013.

A year after Operation Sudden Impact ended, violent crime data for the city of Montebello revealed a record low number of homicides, with not a single homicide during the first half of 2014.<sup>130</sup> This was a decrease from the two homicides in 2013, four in 2012, and seven in 2010 (prior to the initiation of the investigation).<sup>131</sup> The Montebello Police Department attributed the significant decrease in homicides to Operation Sudden Impact, which resulted in many of the city’s most violent gang members, including Valenzuela, being incarcerated.<sup>132</sup>

The success of Operation Sudden Impact is credited to the creative use of a wide range of investigative techniques, and the efforts of federal and local law enforcement to work together to achieve their common goal of making the city of Montebello a safer place to live. As a result of this operation, the SSM gang has been effectively dismantled. The lead agents believe the gang is unlikely to rebuild any time in the near future.

## II. History of the SSM Gang

The SSM gang is believed to have been formed in the 1960s, and is one of scores of gangs in Southern California that has been aligned with and has answered to the Mexican Mafia for decades. The Mexican Mafia, often referred to as “La Eme” (derived from the Spanish pronunciation of the letter “M”), is a criminal organization that operates from within the California state prison system, the streets and

<sup>129</sup> Brian Day, *Feds nail South Side Montebello street gang and ‘killer squad’ clique* (May 15, 2013, 12:01 AM), <http://www.whittierdailynews.com/article/zz/20130515/NEWS/130519382>.

<sup>130</sup> Nancy Martinez, *Montebello Credits Focus on Gangs for Drop in Homicides* (Jul. 10, 2014, 8:46 AM), <http://egpnews.com/2014/07/montebello-credits-focus-on-gangs-for-drop-in-homicides/>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

suburbs of large cities throughout Southern California, and elsewhere. Hispanic street gangs aligned with the Mexican Mafia typically signal their allegiance to the Mexican Mafia by displaying the number 13 after the gang's name, in tribute to the letter "M" the thirteenth letter in the alphabet.

Federal gang prosecutions within the Central District of California have repeatedly proven that the Mexican Mafia exerted tight control over Hispanic criminal street gangs for years, including by establishing a code of conduct with which each of these gangs, including the SSM gang, must comply. The Florencia 13 (F13) gang is one of the larger Hispanic criminal street gangs in Los Angeles that answers to the Mexican Mafia. In 2007, prosecutors in Los Angeles, in *United States v. Vasquez, et al.*, CR No. 07-202-DOC, alleged that, more than a decade ago, a Mexican Mafia member issued from his prison cell a set of "reglas" (rules) for all F13 gang members to follow. These rules established a formal process for electing F13 gang leaders to oversee the gang's criminal operations on the streets, and directed members of the F13 gang to extort or "tax" all drug dealers who sell drugs in F13 gang territory, such that members of the gang would enjoy a profit of all drug sales in the areas controlled by F13.

The Azusa 13 gang controlled the city of Azusa, approximately twenty minutes from downtown Los Angeles, until it was the target of another prosecution in the Central District of California, in *United States v. Rios, et al.*, CR No. 11-492-MWF. In the *Rios* case, prosecutors alleged that as early as 1997, a senior member of the gang authored an explicit "business plan" that the members of the gang were to follow consistent with Mexican Mafia directives regarding how all Hispanic criminal street gangs in Southern California were to conduct gang business moving forward.<sup>133</sup> The senior Azusa 13 gang member stated that per Mexican Mafia orders, the gang "reserve[d] the exclusive rights to control [sic] the underground drug market in the city of Azusa."<sup>134</sup> The "business plan" instructed members of the gang to "imagine the 'varrio' [gang territory] as a company, [and] imagine the homeboys as employees of this company . . . [and that the] company provides security services, protection and exclusive sales rights [for drug suppliers] within the Azusa City Limits."<sup>135</sup> Azusa 13 gang members were instructed to select a "representative" to speak to all individuals selling drugs in the City of Azusa in order to explain to those drug distributors that the Azusa 13 gang would act as enforcers that would protect the dealers' drug business in exchange for a share of the profits from their drug sales.<sup>136</sup> According to the business plan, the gang would "offer and guarantee full protection, that the [gang members] will collect from their customers that are refusing to pay, and [that the Azusa 13 gang] w[ould] deal harshly with anybody who is interfering with their business."<sup>137</sup> Members of the gang were also instructed to warn all drug distributors in the gang's territory that "anybody refusing to cooperate with the company policy w[ould] not be allowed to conduct business within the Azusa City limits, and [would be] subject to severe punishment." *Id.* Pursuant to the "business plan," the gang was to send its "wrecking crew" to steal non-compliant individuals' drugs, money, and valuables, or to kidnap a family member of the drug distributor in order to display the unyielding authority of the gang.<sup>138</sup> Finally, the "business plan" required the gang to invest in "company supplies and equipment" and to maintain "top of the line artillery, A-K's, SKS's, Tec-9's, mini 14's, bullet proof vests, [police] scanners, walkie talkies, [and] binoculars."<sup>139</sup> The senior leaders of the gang instructed Azusa 13 gang members that the gang's "main objective" was to "monopolize the entire drug market in the City of Azusa," and reminded the gang's members to make "contributions" of extorted drug proceeds to the Mexican Mafia.<sup>140</sup>

Twenty years since they first began to issue their rules, Mexican Mafia-aligned gangs continue to

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<sup>133</sup> *United States v. Rios, et al.*, CR No. 11-492-MWF (CR 1 at 24-25).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

operate under the same or very similar “business plans” as that described in the Florencia 13 and Azusa 13 prosecutions. Because these gangs have operated the same way for generations, the organizational rules of the road are now second nature to members and associates of southern California Hispanic criminal street gangs. This was how members of the SSM gang operated prior to the conclusion of Operation Sudden Impact.

The SSM gang claimed a portion of the city of Montebello, including a housing project located in the south side of the city. Members of the gang marked their “territory” with their gang name or abbreviations, such as “SSM” or “VSSMTB” (an abbreviation for Varrio Southside Montebello) so that both rival gang members and innocent citizens alike were aware of the gang’s control over the area. The gang graffiti also regularly contained explicit threats to law enforcement as well as rival gang members in the city.



Examples of graffiti that the SSM gang used to mark its territory in Montebello

Per Mexican Mafia directives, members of the gang “patrolled” the territory, “taxed” drug dealers who sold drugs in the portion of the city that the SSM gang claimed, and answered to the Mexican Mafia. Members of the gang, themselves, also sold drugs, usually methamphetamine and crack cocaine. Most troubling, though, was the escalating violence. Over the years, members of the gang stockpiled weapons, and engaged in murders, attempted murders, and gang-related shootings.

### III. Local Law Enforcement Strikes Back

Gang violence in SSM gang territory began to escalate around 2000. On November 10, 2004, in *People v. Southside Montebello*, (Los Angeles Case No. BC324344), the attorney for the city of Montebello filed an injunction against the SSM gang. While gang injunctions have commonly been used to combat gangs in Southern California, the city of Montebello was one of the first cities outside of Los Angeles to obtain an injunction against a criminal street gang.<sup>141</sup> Several law enforcement officers with the Montebello Police Department submitted declarations in support of the injunction that documented the gang’s increasingly violent activities in the city.

<sup>141</sup> *Injunctions curbing gangs said ‘quick fix,’ San Gabriel Valley Tribune*, (Nov. 12, 2005).

Specifically, officers with the Montebello Police Department noticed that members of the gang committed the majority of their crimes, including street robberies, shootings, and carjacking's, in an area of Montebello that would later be designated the city's "safety zone" under the terms of the injunction. The injunction prohibited SSM gang members from associating with one another, carrying guns or other weapons, dealing or using drugs, recruiting children, and tagging or carrying spray cans or tools to create graffiti. SSM gang members were also prohibited from showing gang signs and harassing people within the "safety zone." Additionally, SSM gang members were prohibited from being in the "safety zone" from 10:00 p.m. through sunrise.

After the city obtained the injunction, officers with the Montebello Police Department could serve SSM gang members who were engaging in conduct prohibited by the terms of the injunction. Officers were required to document the fact that they served SSM gang members with the injunction, as well as any statements made by the SSM gang member upon being served. These documented admissions normally included either explicit or tacit admission of SSM gang membership. These admissions later became useful evidence against individuals charged federally as a result of Operation Sudden Impact. Once served, if the SSM gang member then again violated the terms of the injunction, law enforcement had the authority to arrest that gang member for a misdemeanor charge.

In the first year after the city of Montebello obtained the injunction, local law enforcement arrested approximately twenty-five SSM gang members.<sup>142</sup> The city of Montebello experienced some measure of relief, and citywide, "all crimes but rape decreased slightly in the first six months of 2005, compared with the first six months of 2004."<sup>143</sup>

Unfortunately, while the injunction did help with the crime rate, it did not prevent all gang violence in Montebello. Soon after the injunction was in place, SSM gang members created an even more violent subgroup of the gang: the "K-Squad" or "Killer Squad" clique of the gang. Members of the SSM gang who committed several shootings or at least one murder were elevated to this elite level of the gang.

After the injunction was in place, members of the gang committed a number of murders. For example, Jimmy Valenzuela, who was a founding member of the "Killer Squad" clique, committed the execution-style slayings of two rival gang members in 2007 and 2010. On July 4, 2008, SSM gang member Edward "Evil" Dewey killed Jose Cassillas, who was shot while attending an Independence Day celebration with his family. Members of the SSM gang helped Dewey to flee the scene and dispose of the murder weapon. On June 21, 2008, Juan Garcia and his 12-year-old son, Albert Garcia, were shot to death as they attended a graduation party in Montebello, where a fight broke out between SSM gang members and their rivals. Neither the father nor the son were believed to have any gang ties.

In April 2011, the Montebello Police Department formally tasked a team to investigate these and other gang-related homicides, and to obtain sufficient evidence to bring them to prosecution. This was the beginning of Operation Sudden Impact. What began as a discrete mission to resolve a handful of cold-case homicides morphed into an investigation that ultimately dismantled the gang.

## IV. Operation Sudden Impact

The success of Operation Sudden Impact is credited in large part to the extensive experience that law enforcement officers assigned to the operation had gained in earlier investigations, where they conducted undercover operations, handled confidential informants, and gathered evidence regarding the activities of criminal enterprises. During the operation, the agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), gang detectives with the Montebello Police Department, and a Major Crimes Detective with the Los Angeles County Sheriff's Department used the techniques that they had

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

honed over the years in previous investigations of violent criminal organizations, including criminal street gangs.

To meet its initial goal of solving a discreet number of gang-related homicides, law enforcement needed confidential informants as well as intelligence related to these murders.

### **A. Confidential Informants and Undercover Operations**

In the first quarter of 2011, gang detectives with the Montebello Police Department identified an SSM gang member who ultimately provided invaluable assistance during the first phase of the operation. The cooperator was a relatively high-level SSM gang member who had risen through the ranks of the gang quickly, but had recently been shot and permanently wounded by his fellow SSM gang members, who were jealous of his rising success in the criminal world. Local law enforcement officers developed an opportunity to approach this individual, and were able to ascertain not only his willingness to cooperate against the gang's shot-callers, but, more importantly, his willingness to be closely controlled throughout his cooperation. His role in the investigation, unlike other confidential informants used during the investigation, was focused on obtaining video and audio-recorded confessions of homicides and attempted murders from enforcers for the gang. After he obtained this recorded evidence, his proactive cooperation was terminated, and he was relocated away from SSM gang territory in anticipation of any trial testimony that would be necessary.

Early on, law enforcement directed the confidential informant to obtain a confession from Valenzuela regarding the murders that he was suspected of committing. At law enforcement's direction, the confidential informant was able to persuade Valenzuela to come to an undercover warehouse supplied by the ATF. The warehouse was covertly equipped with audio and video recording capabilities. The operation involved a ruse meeting initiated by an experienced ATF undercover agent. While at the undercover warehouse, sitting together in a break room eating lunch, the confidential informant asked Valenzuela to describe details of the two murders that he had committed. Unaware that he was being recorded and that law enforcement was monitoring his conversation from another room, Valenzuela casually bragged about the two execution-style murders he had committed—evidence that ultimately led to Valenzuela's convictions and life sentences.

Similarly, the confidential informant was able to persuade another of the SSM gang's most hardened members, Corina Castellanos, to speak with him regarding the 2008 shooting committed by Edward Dewey. Castellanos described in graphic detail the shooting, and bragged about jumping over the dead body while laughing, and helping Dewey evade capture by law enforcement. Based on her recorded admissions, Castellanos was convicted on both a state accessory to murder charge, and a federal racketeering charge related to her involvement in this murder, and has remained in custody since 2012. As individuals such as Valenzuela and Castellanos admitted their role in homicides to the confidential informant, law enforcement worked to take them into custody as quickly as possible in a manner that would not jeopardize the ongoing operation.

### **B. Recorded Jail Calls**

In addition to the use of this confidential informant, during the early stages of Operation Sudden Impact, law enforcement began reviewing hundreds of jail calls made by incarcerated SSM gang members and associates, particularly those suspected of having information related to the gang's violent crimes. Though tedious, the review of jail calls provided not only invaluable intelligence regarding gang-related homicides and other violent crime, but also explained the various roles that members and associates of the SSM gang held in the criminal organization, including the identities of the gang's hierarchy.

Operation Sudden Impact was atypical of other large gang investigations because it never relied on a Title III wiretap, which is generally a primary and useful investigative tool used in large-scale gang

investigations. The recorded communications of SSM gang members and associates consisted entirely of body recordings generated by undercover law enforcement officers or confidential informants when they interacted covertly with the targets of the investigation, undercover recordings from, for example, the ATF undercover warehouse, or recorded jail calls. Obtaining the recorded communications in this manner was relatively more efficient and cost-effective than overseeing a lengthy wiretap investigation, and had the added benefit of being valuable evidence of the gang’s violent crimes that could not be challenged by a motion to suppress post-indictment as would be the case with Title III recordings.

Additionally, even after the proactive phase of the investigation was over, law enforcement continued to review and make strategic use of information that SSM gang members provided casually over recorded jail calls. For example, in November 2012, prior to the conclusion of the operation, law enforcement arrested two SSM gang members on federal drug charges, and purposefully provided them with discovery related to the larger gang investigation. The discovery revealed that law enforcement was investigating the SSM gang as a whole. Immediately after the production of the discovery, one of them placed a recorded jail call to his father, who was also a SSM gang member, describing the strength of the evidence that had been obtained during Operation Sudden Impact:

DEFENDANT 1	[00:01:00 START] ... I got my discovery today, dad.
DEFENDANT 2	Huh?
DEFENDANT 1	I got my discovery. I got all... everything that they have. Everything... [VOICES OVERLAP]
DEFENDANT 2	What does that mean?
DEFENDANT 1	It’s all the—all the... everything they have against us. Everything they could use against us. All the f**kin’ material. All the f**kin’... You need to get a copy of it. They sent me a video of all kinds of paperwork. You need a copy of it. You need to see this. You really need to see this. It’s very serious. It’s... It... [VOICES OVERLAP]
DEFENDANT 2	Why?
DEFENDANT 1	...it could get real serious very fast. More serious than what it already is. It’s a lot worse.
DEFENDANT 2	Is it?
DEFENDANT 1	Yeah, dad. Yeah.

DEFENDANT 1	Well—well—well, listen to this, dad; They’ve also threatened Marcus that in a... later on down the line in a about a year or so, they’re gonna hit him with a RICO Act and there’s about 35 people, 40 people involved. A lot of these names are in our indictment and—and... in our discovery. If you go to the discovery they have a lot of people’s cases a lot of things that they’re not even getting hit with. They’re just sitting on ‘em. For whatever reason they’re building cases. Whatever they’re doing there’s a lot of s**t you need to see. The people... you need to see the f**kin’... You need to look at everything and f**kin’ know what’s going on around you. Believe me when I’m telling you this, dad. I can’t say it...I can’t say much in letters or on—on phone. You need to see it for yourself. You need to see it, dad. You need to see. Stay away! Just do your own thing and don’t worry about us... [VOICES OVERLAP]
DEFENDANT 2	I am and I’ve been doing my own things. Marcus [U/I] at ‘em?

DEFENDANT 1	Tell Melissa and tell Karina just f**kin', just you know? Just keep away, take care of the kids, and just don't even f**kin' get involved in anything. We're f**kin'... I'm gonna have to fu... We're gonna have to sit this out and just see what happens. And a...and about a year or so there's about... in... When you get RICOed [PH] it's not a joke. It's not really a joke in here. There's about... there's about 4 different areas where there's a gang of people in the RICO Act and they're bringing in 20 of them at a time.
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### C. Controlled Buys

While the high-ranking SSM gang cooperator was working to obtain evidence of the gang's violent crimes, in 2011, law enforcement began using other confidential informants to purchase drugs and guns from SSM gang members. These buys were recorded, and, occasionally, an undercover law enforcement officer was able to make these controlled purchases directly from the dealer. Towards the end of the operation, these controlled buys included the purchase of multiple fully automatic rifles by an ATF undercover officer from an associate of the SSM gang.

The strength of the evidence yielded from these controlled purchases caused multiple SSM gang members to cooperate post-indictment, and to provide law enforcement with information regarding the gang's violent crimes after the conclusion of Operation Sudden Impact.

### D. Evidence of the Conspiracy

By 2012, Operation Sudden Impact had grown substantially, and law enforcement had identified individuals involved in the gang's crimes that could be prosecuted federally on racketeering conspiracy, drug conspiracy, or weapons charges. Of importance to the federal prosecution of these individuals on conspiracy charges was evidence that SSM gang members were acting together as a criminal organization, as well as evidence of those individuals' association with the SSM gang.

In order to obtain that evidence of association, law enforcement officers used various tactics. First, they exploited the social media posts of SSM gang members, particularly on Facebook. Law enforcement obtained current photographs of SSM gang members displaying gang signs, pledging allegiance to the gang, and holding weapons. They also obtained social media posts from one co-conspirator to another discussing the gang's activities or their common membership in the gang.

Next, near the end of the operation, law enforcement officers conducted parole searches of the residences of SSM gang members and seized gang letters, photographs, and gang-related art and music lyrics. During one parole search, law enforcement recovered a letter written by one SSM gang member to another describing his suspicion that federal law enforcement was presently working with the Montebello Police Department to conduct a federal wiretap investigation of the gang.

Finally, local law enforcement officers retrieved historical law enforcement reports documenting the crimes that SSM gang members had committed dating back at least fifteen years. These historical reports contained admissions by SSM gang members of their membership in the gang, including admissions when they were served with the SSM gang injunction, admissions concerning the possession of firearms, distribution quantities of drugs in the SSM gang's territory, and admissions concerning violent conduct committed by SSM gang members over the years. This historical evidence, combined with evidence seized from social media and parole searches, all became part of the federal conspiracy cases against SSM gang members that was the culmination of Operation Sudden Impact.

### V. Conclusion

Between 2011 and 2013, federal and local law enforcement worked together to use their collective experience and resources to engage in a variety of investigative techniques to target, and

ultimately dismantle, a violent criminal organization. Operation Sudden Impact ultimately resulted in solving six “cold case” gang-related murders, and obtaining convictions against dozens of individuals affiliated with a violent criminal street gang. The collaborative and strategic efforts made by federal and local law enforcement working together to bring cases against SSM gang members and associates, left the city of Montebello, even years later, a safer place to live.

#### **ABOUT THE AUTHOR**

□ **Reema El-Amamy** is an Assistant U.S. Attorney in the Central District of California in Los Angeles, having joined the office in 2008. Over the past decade, Ms. El-Amamy has prosecuted hundreds of gang members in connection with racketeering, drug and weapons-related offenses, as well as civil rights violations, and has overseen multiple large-scale investigations targeting violent criminal street gangs. In addition to Operation Sudden Impact, Ms. El-Amamy successfully prosecuted dozens of members of the Azusa 13 gang, a notoriously criminal and racist organization that terrorized African-American residents in the city of Azusa for decades. In addition to the gang’s racketeering and weapons-related offenses, Ms. El-Amamy prosecuted the leadership of the gang in connection with their conspiracy to “racially cleanse” the city of all African-Americans. The Azusa 13 prosecution effectively dismantled the gang, and, even years later, Azusa remains a safer place to live. Ms. El-Amamy has also tried several complex multi-defendant cases against members of criminal street gangs. These trials included the RICO convictions of two Mexican Mafia members who also led a violent gang with hundreds of members linked to murders, attempts to kill law enforcement, and a mass stabbing at a Southern California restaurant. Ms. El-Amamy has served as an anti-gang coordinator for her office, and has regularly served as a lecturer at the National Advocacy Center on trial advocacy issues, as well as on issues related to racketeering and complex drug investigations and prosecutions.



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# A Uniform Approach to Mental Condition Evidence in Capital Trials: The Interplay Between Federal Rules of Criminal Procedure 12.2 and 16

*Jeffrey A. Zick*  
*Trial Attorney*  
*Capital Case Section*  
*U.S. Department of Justice*

## I. Introduction

[Federal Rule of Criminal Procedure 12.2](#) severely restricts the government’s access to a defendant’s mental condition evidence in the penalty phase of a capital trial.<sup>144</sup> The plain language of [Rule 12.2](#) provides that a defendant must give notice to the government of his intent to introduce expert mental condition evidence. Any expert reports must be sealed and not disclosed to any government attorney until after a guilty verdict and the defendant confirms his intent to offer the expert evidence of his mental condition.

This framework ensures that a defendant is insulated from the government’s acquisition and use of any court-compelled statements in the sentencing proceeding. The construct of [Rule 12.2](#) provides little definition as to the content of the notice a defendant must provide the government, nor does it resolve how the government experts are to conduct their examinations while adhering to the prohibition against early disclosure of their opinions and results of their examinations to the trial prosecutors. Moreover, the rule provides the district courts with little guidance on what procedures to employ in ordering disclosure of mental condition evidence.

Adding to the confusion is the application of [Federal Rule of Criminal Procedure 16](#), which compels a defendant, upon the government’s request, to disclose summaries describing expert witness opinions, the bases and reasons for those opinions, and the expert’s qualifications.<sup>145</sup> The plain language of [Rule 12.2](#), however, appears to restrict this disclosure.

The developed case law interpreting [Rule 12.2](#) has resulted in numerous district court orders that provide a panoply of procedures that are inconsistent with one another. Some courts have strictly followed the language of [Rule 12.2](#), leaving the government hampered in its ability to properly rebut a defendant’s mental health mitigation evidence. Other courts have structured various ways in which mental condition evidence is disclosed in a manner that allows the acquisition of rebuttal evidence prior to trial while protecting the defendant’s constitutional rights.

This article will discuss the tension between [Rule 12.2](#) and [Rule 16](#), in the context of disclosure of expert mental condition evidence, and offer a uniform approach for government prosecutors to seek fair disclosure of mental condition evidence. This approach advocates the use of “firewall” counsel to receive defense disclosures that may contain information subject to constitutional or other protections.

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<sup>144</sup> [FED. R. CRIM. P. 12.2](#).

<sup>145</sup> [FED. R. CRIM. P. 16](#).

The appointment of firewall counsel will ensure the protection of the defendant’s Fifth and Sixth Amendment rights while permitting disclosures that allow the government to properly acquire rebuttal evidence. This procedure complies with [Rule 12.2](#) stated purpose of avoiding unnecessary delay in capital sentencing proceedings, provides the necessary protection of the defendant’s statements, and comports with the truth-seeking process of the capital sentencing proceeding.

## II. Notice and Disclosure of Mental Condition Evidence

### A. Federal Rules of Criminal Procedure 12.2

Two provisions in [Rule 12.2](#) play an important role in the capital sentencing context—the notice provision under [Rule 12.2\(B\)\(2\)](#) and the disclosure provision in [Rule 12.2\(c\)\(2\)](#). The notice provision of [Rule 12.2\(b\)](#) provides:

**(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.<sup>146</sup>

If a defendant provides notice under [Rule 12.2\(b\)](#), the court may, upon the government’s motion, order the defendant to submit to an examination.<sup>147</sup> The rule provides that the procedures for such examination are within the court’s discretion.

[Rule 12.2\(c\)\(2\)](#)—the disclosure provision—provides for the disclosure of expert examination reports and results as follows:

**(2) Disclosing Results and Reports of Capital Sentencing Examination.** The results and reports of any examination conducted solely under [Rule 12.2\(c\)\(1\)](#) after notice under [Rule 12.2\(b\)\(2\)](#) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.<sup>148</sup>

Likewise, the plain language in [Rule 12.2\(c\)\(3\)](#) compels the defense to disclose its expert’s results, and reports to the government, but only after the government has disclosed its results and reports under [Rule 12.2\(c\)\(2\)](#).

### B. Federal Rule of Criminal Procedure 16

Related to [Rule 12.2](#) disclosure requirements, [Rule 16\(b\)\(1\)](#), also speaks to a defendant’s duty to disclose mental condition expert evidence he intends to use in a capital sentencing proceeding. This rule, in pertinent part, states:

**(C) Expert witnesses.** —The defendant must, at the government’s request, give to the government a written summary of any testimony that the defendant intends to use under Rule 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

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<sup>146</sup> FED. R. CRIM. P. 12.2 (b).

<sup>147</sup> FED. R. CRIM. P. 12.2 (c)(1)(B).

<sup>148</sup> FED. R. CRIM. P. 12.2 (c)(2).

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant’s mental condition. This summary must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.<sup>149</sup>

### III. The Tension between Federal Rule of Criminal Procedure 12.2 and 16

The directive in Rule 16(b)(1)(C) states that a defendant must provide information including summaries of testimony, opinions, and bases and reasons for those opinions, upon the government’s request. Rule 16(b)(1)(C) conflicts with the commands of Rule 12.2, which provides that a defendant’s mental condition experts’ reports must be sealed, and the results he intends to use may not be released until after a guilty verdict, and the defendant confirms his intent to introduce mental condition evidence.

The procedure provided by Rule 12.2 protects a defendant’s Fifth and Sixth Amendment rights by sealing from the government any court-compelled statements. This protection creates an unnecessary disadvantage for the government. Strictly interpreted, Rule 12.2 provides little, if any, notice of a defendant’s mental condition evidence. While the government can seek an evaluation of the defendant’s mental condition, it is likely to do so in the dark, with little idea of the parameters of defendant’s claim or any knowledge of the results and opinions of defendant’s experts. This affects the government expert’s ability to conduct a proper examination of the defendant, and directly affects the government’s ability to acquire rebuttal evidence. In the end, the truth-gathering process providing the jury with all necessary evidence to make an informed decision in this important process, is harmed.

Federal prosecutors need to navigate this tension, keeping two competing goals in mind: (1) the protection of the defendant’s Fifth Amendment rights, and (2) seeking meaningful discovery so as to not undermine the truth-seeking process of the capital sentencing proceeding. These goals can be accomplished within the confines of Rule 12.2 by requesting the designation of firewall counsel to receive defense disclosures and overseeing and assisting the government’s expert evaluations prior to the capital sentencing proceeding.

Constitutional protections against the government’s use of a defendant’s compelled statements are built into the structure of Rule 12.2. The Supreme Court has recognized that use of a defendant’s statements during a court-ordered examination may compromise the defendant’s right against self-incrimination.<sup>150</sup> Subsequent cases, however, have indicated that a defendant waives the privilege if he introduces expert testimony of his mental condition.<sup>151</sup>

These protections are reflected in Rule 12.2(c), which indicates that statements of the defendant are sealed and may be used against him only after he has introduced testimony on his mental condition. These limitations present difficulties in complying with the stated purposes of Rule 12.2—to prevent unnecessary delay in capital sentencing proceedings and providing the government with an opportunity to conduct an appropriate examination to acquire rebuttal testimony.<sup>152</sup> For example, the defendant’s Rule

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<sup>149</sup> FED. R. CRIM. P. 16(b)(1)(C)(ii).

<sup>150</sup> See *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (finding defendant’s self-incrimination right violated when he was not advised of right to remain silent during court-ordered competency evaluation and government introduced statements from evaluation in capital sentencing proceeding).

<sup>151</sup> See *Powell v. Texas*, 492 U.S. 680, 683–84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 423–24 (1987) (government allowed to introduce the results of court-ordered mental examination for the limited purpose of rebutting mental-status defense); *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013) (affirming the rule stated in *Buchanan* and holding “Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.”).

<sup>152</sup> See FED. R. CRIM. P. 12.2(b)(c) advisory committee’s note to 2002 amendment (the notice provision “adopts the view” that “the better practice is to require pretrial notice of th[e] intent [to offer expert evidence on the defendant’s

12.2(b) notice of intent to introduce mental condition evidence typically contains no information pertaining to the type of experts or testing he intends to introduce. This type of notice is meaningless to the prosecutor tasked with rebutting the defendant’s penalty phase mitigation.

Likewise, disclosure of expert opinions, reports, and data under [Rule 12.2](#) are made after the guilt phase of the trial, which leaves the government prosecutor at a decided disadvantage in preparing to rebut the defendant’s mitigation. Under a strict reading of [Rule 12.2](#), the prosecutor will not have access to any expert report, including her own, until after the defendant is found guilty and confirms his intent to introduce mental condition evidence. And if the government prosecutor requests disclosure under [Rule 16](#)—disclosure the government is entitled to receive—[Rule 12.2](#) forbids this information from being disclosed to the government.

A strict reading of [Rule 12.2](#) results in limiting the government’s ability to acquire rebuttal evidence and may have a negative impact on the truth-seeking process. For example, during an examination of the defendant, the government’s experts may realize that additional testing is necessary or that a different type of expert needs to evaluate the defendant to either rule out a diagnosis or confirm findings made during the evaluation. Under the strict language of [Rule 12.2](#), the government’s experts will be unable to communicate with any government trial attorney regarding those issues. Instead, the government will learn of these issues days prior to the sentencing phase of the trial, and likely too late to develop evidence concerning these issues. Not only will this hamper the government’s ability to develop appropriate rebuttal testimony, but it may also be detrimental to the defendant, if this information could lead to beneficial testimony. In that case, the government will be compelled to seek a delay in the sentencing proceeding to develop evidence that could have been developed, had firewall counsel been employed.

While [Rule 12.2](#) provides district courts with authority to order a defendant to be examined by the government experts, it does not resolve how the government experts are to conduct their examinations while adhering to the prohibition against early disclosure of the results and reports of their examinations to the trial prosecutors. As stated above, it is foreseeable that issues could arise during the course of the government’s examination of the defendant—such as the non-cooperation of the defendant, or the need for additional testing that would need to be communicated to a government trial attorney. If the government’s expert raises those potential problems with the prosecution trial team, the results of government testing could be prematurely disclosed, thus risking a dispute over whether the government impermissibly used the information for purposes other than rebuttal evidence.

## IV. Federal Courts’ Treatment of Federal Rule of Criminal Procedure 12.2 and in the Capital Sentencing Context

Several district courts have grappled with the tension between the Federal Rules of Criminal Procedure 12.2 and 16. A majority of district courts have reportedly appointed firewall counsel to allow for the disclosure of mental condition evidence while protecting a defendant’s Fifth Amendment rights.<sup>153</sup> Other courts have denied requests for firewall counsel and, for various reasons, strictly followed the

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mental condition] so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings”).

<sup>153</sup> See *United States v. Watts*, No. 14-cr-40063, 2016 WL 7337986 (S.D. Ill. Dec. 16, 2016); *United States v. Montgomery*, 10 F.Supp.3d 801 (W.D. Tenn., 2014); *United States v. McCluskey*, 893 F. Supp. 2d 1117 (D.N.M. 2012); *United States v. Williams*, 731 F. Supp. 2d 1012, 1024–26 (D. Haw. 2010); *United States v. Lujan*, 530 F. Supp. 2d 1224, 1238–40 (D.N.M. 2008); *United States v. Wilson*, 493 F. Supp. 2d 348, 350–51 (E.D.N.Y. 2006); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1077–81 (N.D. Iowa 2005); *United States v. Fell*, 372 F. Supp. 2d 753 (D. Vt. 2005); *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004).

language in [Rule 12.2](#).<sup>154</sup>

These cases have provided the groundwork for a uniform position the government can take in confronting the notice and disclosure of mental condition evidence in capital sentencing proceedings. The government must request that the defendant’s notice be meaningful and that [Rule 16](#) disclosure of mental condition evidence be provided to firewall counsel prior to trial and not shared with the trial team so as to not violate [Rule 12.2](#).

## A. Content of the Federal Rule of Criminal Procedure 12.2(b) Notice

[Rule 12.2\(b\)](#) provides that a defendant “must” give notice before trial if he intends to introduce expert mental condition evidence at the sentencing phase of a capital trial. That notice triggers the government’s right to request an examination of the defendant. If the notice fails to provide the necessary information the government’s experts need, the government expert will not be able to conduct meaningful testing to assess the defendant’s mental condition. The overwhelming majority of federal courts have found that notice under [Rule 12.2\(b\)](#) must be meaningful.

In *Sampson*, the government challenged the sufficiency of Sampson’s notice. The notice stated only that he “may introduce, at the penalty phase of this capital case, expert evidence relating to a mental disease or defect or any other mental condition bearing on the issue of punishment.”<sup>155</sup> Sampson’s notice failed to provide the government with the necessary information needed for its experts to evaluate him. The government requested that Sampson supplement his [Rule 12.2\(b\)](#) notice with: (1) the nature of the proffered mental condition(s); (2) the identity and qualifications of the expert who would testify or whose opinions would be relied upon; (3) a brief, general summary of the topics to be addressed that was sufficient to permit the government to determine the area(s) in which its expert(s) must be versed; and (4) all medical records and test results relating to mental health that would be the subject of the anticipated expert testimony.<sup>156</sup> Sampson objected to the government’s request, arguing that the request provided more information than [Rule 12.2](#) explicitly required.<sup>157</sup>

The district court in *Sampson* discussed the tension between the government’s right to develop rebuttal evidence and the prohibition of derivative use of a defendant’s statements in violation of the Fifth Amendment.<sup>158</sup> The court observed that the pretrial notice requirement of [Rule 12.2\(b\)](#) comports with the government’s right to develop rebuttal evidence fairly and efficiently and was consistent with Congress’ reason for enacting the prior version of [Rule 12.2\(b\)](#)—namely, without notice of the defendant’s mental condition claim, “the government would not have an opportunity to conduct the kind of investigation needed to acquire rebuttal testimony.”<sup>159</sup> The court held that the notice required by [Rule 12.2\(b\)](#) must be meaningful and serve the overall purpose of providing the government with information to fairly acquire rebuttal evidence.<sup>160</sup>

[Rule 12.2](#) curbs the government’s right to acquire rebuttal evidence by sealing any results and reports of mental condition evidence from the government attorneys in order to protect a defendant’s Fifth and Sixth Amendment rights. The court found that [Rule 12.2\(c\)\(2\)](#) sealing requirement was designed to avoid litigation over whether the government improperly made derivative use of the defendant’s mental

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<sup>154</sup> See [United States v. Roof](#), 2016 U.S. Dist. LEXIS 183564 (D.S.C. July 19, 2016); [United States v. O’Reilly](#), No. 05–80025, 2010 WL 653188 (E.D. Mich. Feb. 19, 2010); [United States v. Taveras](#), 233 F.R.D. 318, 322 (E.D.N.Y. 2006).

<sup>155</sup> *Sampson*, 335 F. Supp. 2d at 241.

<sup>156</sup> *Id.* at 242.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 242–43.

<sup>159</sup> *Id.* at 243 (quoting [FED. R. CRIM. P. 12.2](#), advisory committee’s note to 2002).

<sup>160</sup> *Id.*

condition evidence.<sup>161</sup>

Given these parameters, the parties in *Sampson* agreed to a supplemental notice that included “the kinds of mental health professionals who have evaluated Mr. Sampson (e.g., forensic psychiatrist, neuropsychologist, clinical psychologist), as well as the specific nature of any testing that these experts have performed (e.g., MMPI-2, WAIS-2, etc.) in the course of their evaluations of Mr. Sampson.”<sup>162</sup> The additional information the government sought, the court found, was impermissible under [Rule 12.2](#). For example, the government sought the disclosure of the nature of the proffered mental condition. The court held that requiring a defendant to provide this information is essentially the same as providing the “results and reports” which are barred by [Rule 12.2\(c\)\(2\)](#).<sup>163</sup> Likewise, the request for a general summary of the topics to be addressed and all medical records and test results were impermissible for the same reason.

The majority of federal courts follow the *Sampson* court’s model regarding the notice a defendant is required to provide under [Rule 12.2\(b\)](#).<sup>164</sup>

## B. Conduct of the Government Expert’s Examination

Once a defendant files his notice of intent to introduce mental condition evidence under [Rule 12.2\(b\)](#), the government has the right to request an examination of the defendant by a government retained expert, and the court may order an examination “under procedures ordered by the court.”<sup>165</sup> The text of [Rule 12.2\(c\)\(2\)](#) prohibits the disclosure of the “results and reports” to any attorney for the government unless the defendant is found guilty and confirms an intent to offer expert mental condition evidence. This framework assures that a defendant is insulated against the government’s acquisition and improper use of court-compelled statements in the sentencing proceeding.<sup>166</sup> The construct [Rule 12.2](#) “does not resolve how, as a practical matter, the government experts are to conduct their mental condition examinations while adhering to the prohibition against early disclosure to the prosecutors of the ‘results and reports’ of those examinations.”<sup>167</sup> Foreseeable issues can arise during the course of the government expert’s examination of the defendant—such as defendant’s non-cooperation or an unexpected need to administer additional testing—that will need to be communicated to the prosecution team. This communication, however, could run the risk that the expert’s results could be prematurely revealed in violation of [Rule 12.2\(c\)\(1\)\(B\)](#).<sup>168</sup> “Rule 12.2’s goal of avoiding delays in capital sentencing proceedings would not be served if any problems with the government testing were not revealed until after the guilt phase.”<sup>169</sup> In addition, under the literal language of [Rule 12.2\(c\)\(2\)](#), the reports and results of expert evaluations cannot be revealed to “any attorney for the government” until the defendant is found guilty and confirms his intent to introduce mental condition evidence.

The majority of courts that have wrestled with this issue have allowed for the designation of government “firewalled” counsel to have access to expert mental condition evidence and handle the related litigation prior to the capital sentencing proceeding. The court in the *Sampson* case found that the reasonable interpretation of “any attorney for the government” in [Rule 12.2\(c\)\(2\)](#) includes those

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 242.

<sup>163</sup> *Sampson*, 335 F. Supp. 2d at 243.

<sup>164</sup> See *Fell*, 372 F. Supp. 2d at 759 (“[T]he right to offer rebuttal testimony . . . would be a hollow one indeed without discovery into the mental condition of the accused.”); *Johnson*, 362 F. Supp. 2d at 1079–80; *Wilson*, 493 F. Supp. 2d at 356; *McClusky*, No. 1:10-cr-02734, ECF at 219; *United States v. Montgomery*, 2014 U.S. Dist. LEXIS 191370, at \*12–13 (W.D. Tenn. Mar. 27, 2014); *Lujan*, 530 F. Supp. 2d at 1238–39; *Watts*, 2016 WL 7337986, at \*3; *O’Reilly*, 2010 WL 653188, at \*3.

<sup>165</sup> FED. R. CRIM. P. 12.2 (c)(1)(B).

<sup>166</sup> *United States v. Williams*, 731 F. Supp. 2d 1012, 1026 (D. Haw. 2010).

<sup>167</sup> *Sampson*, 335 F. Supp. 2d at 244.

<sup>168</sup> See *id.*

<sup>169</sup> *Id.* at 245.

government attorneys in a particular prosecution except those representing the government’s interests “solely in connection with its experts’ testing.”<sup>170</sup> To avoid premature disclosure of the “results and reports” to the prosecution team, the court directed that a “firewalled” Assistant U.S. Attorney would handle the government’s interests in the examination of the defendant.<sup>171</sup> The court held that the “firewalled” attorney could not be a member of the prosecution team and was not allowed to join the prosecution team until after the penalty phase began.<sup>172</sup>

The purpose of appointing a firewalled prosecutor is to avoid derivative use issues regarding the mental condition examination intended for sentencing. In addition, it provides a procedure by which the government’s experts can conduct their examinations while adhering to the prohibition on early disclosure of their results and reports to the prosecution trial team. Moreover, disputes that may arise prior to and during the examinations that require communication with the government experts can be handled by a firewall counsel to protect defendant’s Fifth Amendment rights. Other courts have used the appointment of firewalled counsel to ensure adherence to the early disclosure prohibition of [Rule 12.2\(c\)\(2\)](#) and to facilitate the pre-trial examination of defendants to avoid delaying the capital sentencing proceeding.<sup>173</sup>

Other courts, however, have forgone designating firewall counsel and have strictly followed the language of [Rule 12.2](#).<sup>174</sup> The defense typically argues against designating firewall counsel stating that courts have done so only with the consent of the defendant. In *Roof*, the district court did not authorize the appointment of firewall counsel based on the defendant’s lack of consent to the sealing requirements of [Rule 12.2\(c\)\(2\)](#).<sup>175</sup> Likewise, in *O’Reilly*, the court vacated its order appointing firewall counsel when the defendant withdrew his consent to the appointment of firewall counsel.<sup>176</sup>

The decisions in *Roof* and *O’Reilly* cases are certainly in the minority. [Rule 12.2](#) is silent on any requirement of a defendant’s consent or waiver, and does not condition the court’s authority to order discovery procedures on a defendant’s assent. Courts have appointed firewall counsel over the objection of the defendant.<sup>177</sup> Moreover, [Rule 12.2\(c\)\(1\)\(B\)](#) grants discretion to the district courts to order a defendant’s examination “under procedures ordered by the court.”

The designation of firewall counsel also cures any infirmity with disclosure of expert reports and results pursuant to [Rule 16\(b\)\(1\)\(C\)\(ii\)](#), which provides that a defendant must provide certain information—testimony, summaries, opinions, bases and reasons for the opinions and expert qualifications—about his expert witness “at the government’s request.”

In *Wilson*, the court considered the defendant’s disclosure obligations under [Rule 12.2\(c\)\(1\)\(C\)](#) in light of the procedures defined in [Rule 12.2](#).<sup>178</sup> The government requested disclosure to firewall counsel consisting of summaries of the opinions of the defendant’s experts and the bases and reasons for those opinions, the test results and reports, and all of the raw data obtained by the defense experts.<sup>179</sup> *Wilson*

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *Sampson*, 335 F. Supp. 2d at 243; *Johnson*, 362 F. Supp. 2d at 1077–81; *United States v. Williams*, 731 F. Supp. 2d 1012, 1026 (D. Haw. 2010); *United States v. Umana*, 2009 WL 2489309 (W.D.N.C. Aug. 12, 2009); *Lujan*, 530 F. Supp. 2d at 1240; *Wilson*, 493 F. Supp. 2d at 353–57; *United States v. Millner*, No. 7:13-cr-00015, ECF at 48 (E.D. Ky. May 19, 2014); *Montgomery*, No. 2:11-cr-2044, ECF at 369 (W.D. Tenn. Mar. 27, 2014); *Watts*, 2016 WL 7337986, at \*4.

<sup>174</sup> *Roof*, 2016 U.S. Dist. LEXIS 183564; *O’Reilly*, 2010 WL 653188.

<sup>175</sup> *Roof*, 2016 U.S. Dist. LEXIS 183564.

<sup>176</sup> *O’Reilly*, 2010 WL 653188, at \*3.

<sup>177</sup> See *Watts*, 2016 WL 7337986; *United States v. Millner*, No. 7:13-cr-00015, ECF at 48 (E.D. KY May 19, 2014); *United States v. Montgomery*, No. 2:11-cr-2044, ECF at 369 (W.D. Tenn. Mar. 27, 2014).

<sup>178</sup> *Wilson*, 493 F. Supp. 2d at 353.

<sup>179</sup>



argued that [Rule 16](#) did not apply to the penalty phase. The court, agreeing with the decision in *United States v. Catalan-Roman*, 376 F. Supp. 2d 108, 114 (D.P.R. 2005), held that [Rule 16\(b\)\(1\)\(C\)](#) applied to mental condition experts in the penalty phase of a capital trial and that disclosure of this information served to facilitate the truth-seeking process by eliminating unnecessary delay, avoiding surprise, and ensuring an informed sentencing determination.<sup>180</sup>

In *Lorenzo-Catalan*, the court found that the goals served by [Rule 16](#) disclosure—fair and efficient administration of justice and avoiding surprise—applied equally to ensuring an informed sentencing determination.<sup>181</sup> The court further stated:

Although the essential policy of facilitating the truth-seeking process is diminished during the sentencing phase because the jury has already rendered it guilty verdict, there nevertheless remain myriad factual issues during the sentencing phase. It is no less imperative that the facts affecting a sentencing determination be as trustworthy as those informing a guilty verdict, and it is beyond dispute that the adequate preparation eased by early disclosure will contribute to the truth-seeking process, resulting in a more reliable sentencing determination.<sup>182</sup>

The application of [Rule 16](#) to the capital sentencing proceeding also dovetails with the Federal Death Penalty Act, which permits the government “to rebut any information received [at the sentencing hearing], and shall be given a fair opportunity to present argument as to the adequacy of the information to establish the existence of any . . . mitigating factor.”<sup>183</sup>

## V. A Uniform Approach to the Disclosure of Mental Condition Evidence

In order to facilitate the goal of full and fair discovery of mental condition evidence in the penalty phase of a capital trial while protecting a defendant’s constitutional rights, federal prosecutors should request the designation of firewall counsel to assist in the pre-trial issues related to the government experts’ examination of the defendant. The government’s proposed procedure should include the following:

- that the defendant provides meaningful notice of his intent to introduce mental condition expert evidence to the prosecution trial team, which shall include, at a minimum, the types of experts the defendant proffers and the specific tests administered in the defense experts’ examinations of the defendant;
- if the defendant provides notice of his intent to introduce mental condition expert evidence, the defendant shall be examined by mental health experts selected by the government;
- the designation of a government firewall prosecutor to be named by the prosecution team with notice to the defendant;

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<sup>180</sup> *Id.* at 355–56; see also *Watts*, 2016 WL 7337986, at \*4; *United States v. Lorenzo-Catalan*, 376 F. Supp. 2d 108, 113–14 (D.P.R. 2005); see also *United States v. Beckford*, 962 F. Supp. 748, 754–57 (E.D. Va. 1997) (pre-2002 FED. R. CRIM. P. 12.2 amendment ordering penalty phase mental health evidence disclosure because “the authority to impose notice and reciprocal discovery is an inherent judicial power which need not be grounded in a specific statute or rule”).

<sup>181</sup> *Lorenzo-Catalan*, 376 F. Supp. 2d at 114.

<sup>182</sup> *Id.*

<sup>183</sup> 18 U.S.C. § 3593(c) (2012).

- that the defendant provides Rule 16 disclosure to firewall counsel upon request, including disclosure of defendant’s experts’ results and reports, raw data, notes, and any documents and records relied upon by defendant’s experts, in a timeframe agreed upon by the parties; and
- the government trial team and firewall counsel not communicate from the time firewall counsel receives the defendant’s Rule 16 disclosures, expert mental condition reports, and evidence, until the defendant is found guilty of a capital eligible offense and has confirmed his intent to introduce expert mental condition evidence in the sentencing proceeding.

The government prosecutor should move to require the defendant to file his [Rule 12.2\(b\)](#) notice early in the case to ensure there will be adequate time in which to designate qualified firewall counsel and retain the necessary experts to examine the defendant. Government firewall counsel should be someone familiar with mental condition evidence, and, in particular, litigation in the capital sentencing context. The trial prosecutors need to rely on firewall counsel to properly litigate issues that will arise during the examination process that trial counsel will not be able to handle.

The trial team should receive the [Rule 12.2\(b\)](#) notice and be able to retain the appropriate experts based on the notice’s content—the types of experts and specific tests administered. Once the appropriate experts are retained, but before the defendant’s [Rule 16\(b\)\(1\)\(C\)](#) disclosures are submitted, the government should designate a government prosecutor as firewall counsel. The defendant’s [Rule 16](#) disclosures will be provided to firewall counsel and not shared with the trial team unless and until there is a finding of the defendant’s guilt and the defendant confirms his intent to offer the mental condition evidence, as [Rule 12.2](#) provides. This arrangement is a constitutionally sufficient means of ensuring that any issues involving mental condition evidence are raised in a fair manner to all parties without compromising the defendant’s constitutional rights, and comports with [Rule 12.2](#)’s policy of encouraging early disclosure of mental condition evidence to avoid delay between the guilt and penalty phases of a capital trial.<sup>184</sup>

The selection of firewall counsel also contains potential issues that could lead to further litigation. For example, the defense will likely object to the selection of a federal prosecutor located in the same office as the trial team.<sup>185</sup> Although there is no rule or constitutional provision prohibiting appointment of firewall counsel from the same office, federal prosecutors should be aware that some courts have ordered that firewall counsel must be a federal prosecutor from another district.<sup>186</sup>

There is also the question of who selects firewall counsel. In *Johnson*, the government moved for the designation of firewall counsel from the trial team’s office, but the defendant objected and proposed firewalled federal prosecutors from a different district.<sup>187</sup> In the overwhelming majority of cases, the government has chosen the designated firewall counsel.

But federal prosecutors should be prepared to litigate potential challenges to their choice. In one instance, the government requested an out-of-district federal prosecutor to act as firewall counsel, but after the defendant objected, the court appointed a defense attorney to act as expert firewall counsel.<sup>188</sup> While this case appears to be an aberration, it serves as a reminder that federal prosecutors may need to protect the government’s ability to staff its own case.

Once the court designates a firewall counsel, the timing of disclosures of defense expert results

<sup>184</sup> See *Wilson*, 493 F. Supp. 2d at 356.

<sup>185</sup> See e.g., *Johnson*, 362 F. Supp. 2d at 1084 (recognizing outside taint attorney not always necessary, court erred on side of caution in appointing outside counsel to protect government’s interest relating to mental examinations); *United States v. Sampson*, No. 1:01-cr-10384, ECF at 1664 (D. Mass.) (indicating preference that the government select firewall counsel from another district).

<sup>186</sup> See also *Watts*, 2016 WL 7337986, at \*4.

<sup>187</sup> *Johnson*, 362 F. Supp. 2d at 1084.

<sup>188</sup> *United States v. Sanders*, No. 10-00351, ECF at 192.

and reports should be settled. The timing is largely left to the parties and the discretion of the court. In *Wilson*, 493 F. Supp. 2d at 357, the court ordered disclosure approximately 21 days before the commencement of jury selection. In *Montgomery*, the court ordered Rule 16(b)(1)(C) disclosure to firewall counsel approximately 60 days prior to trial.<sup>189</sup> But in *Watts*, the court directed the parties to confer and agree on a reasonable date for disclosure, using *Montgomery* and *Wilson* as guides.<sup>190</sup> The government prosecutor will want to consider how much time the government's experts will need to schedule their evaluations and digest the reports and data from the defense experts prior to the evaluations.

The virtues of designating firewall counsel were well-stated by the court in *Sampson*:

Rule 12.2's goal of avoiding delays in capital sentencing proceedings would not be served if any problems with the government testing were not revealed until after the guilt phase. The defendant could suffer no prejudice from the fire-wall procedure. Indeed, the procedure might provide the defendant with an even greater sense of security that his defense strategy . . . would remain hidden from the prosecution team.<sup>191</sup>

Early disclosure of the defense experts' results and reports to firewall counsel will facilitate the government's right to acquire appropriate rebuttal evidence. In order to protect defendant's Fifth Amendment rights, firewall counsel, not the prosecution team, will be able to provide the government experts with the necessary information to appropriately examine defendant. This early disclosure also comports with Rule 12.2's stated goal of unnecessarily delaying capital sentencing proceedings. Any communication between the government trial team and firewall counsel shall cease when firewall counsel receives defendant's Rule 16 disclosure of his expert mental condition reports and evidence. The government trial team and firewall counsel can resume communication only if defendant is found guilty of a capital eligible offense and he confirms his intent to introduce expert mental condition evidence in the sentencing proceeding.

## VI. Conclusion

Designating firewall counsel to receive disclosure of a defendant's Rule 12.2 mental condition evidence in a capital case serves a dual purpose: (1) it protects the defendant's Fifth and Sixth Amendment rights and prohibits the risk of derivative use of a defendant's statements by the government, and (2) it allows the government, prior to trial, the ability to acquire rebuttal evidence, thus avoiding unnecessary delay between the guilt and penalty phases of the capital trial. Federal prosecutors should be aware of the strict language of Rule 12.2 and its effects on Rule 16 disclosures. Without designated firewall counsel, prosecutors will not have the ability to litigate issues that are likely to arise during and after their expert's evaluation of the defendant. Moreover, the capital sentencing may well be delayed due to issues that arose during the examination process. The appointment of firewall counsel to assist in this litigation and assist the government experts in their evaluation facilitates the truth-seeking process of the capital sentencing proceeding and comports with Rule 12.2's policy goals.

### ABOUT THE AUTHOR

**Jeff Zick** is a Trial Attorney in the Capital Case Section of the U.S. Department of Justice. Zick's practice includes both trial and post-conviction litigation of federal capital cases. Prior to joining the Department of Justice, Mr. Zick was Chief Counsel and Assistant Solicitor General of the Capital Litigation Section in the Arizona Attorney General's Office.

<sup>189</sup> *Montgomery*, 2014 U.S. Dist. LEXIS 191370 at \*\*28–32.

<sup>190</sup> *Watts*, 2016 WL 7337986 at \*5.

<sup>191</sup> *Sampson*, 335 F. Supp. 2d at 245.

# The Detroit One Violent Crime Reduction Initiative: How It Works and How Similar Programs May Benefit Your District

*Christopher Graveline*  
*Chief*  
*Violent and Organized Crime Unit*  
*U.S. Attorney's Office*  
*Eastern District of Michigan*

*Joseph Wheatley*  
*Trial Attorney*  
*Organized Crime and Gang Section*  
*U.S. Department of Justice*

2012 was not a kind year for the city of Detroit. Bankruptcy proceedings for the city were looming, its former mayor was on trial in federal court on racketeering charges, an interim police chief was in charge, and there was a real possibility that to satisfy debts the masterpieces in the Detroit Institute of Art would be sold. To make matters worse, 2012 saw the highest homicide rate the city had endured in twenty years. According to FBI and Detroit Police Department statistics, there were 386 homicides—a rate of 55 homicides per 100,000 residents. In addition, there were 1,263 non-fatal shootings in the city.

Days after the finalization of those numbers, the U.S. Attorney for the Eastern District of Michigan, Barbara McQuade, convened numerous law enforcement leaders from around the district and Michigan to discuss what to do about the untenable violence. These leaders included the SACs of FBI, ATF, DEA, HSI, IRS, U.S. Marshals, the Michigan High Intensity Drug Trafficking Area Team (HIDTA), and Customs and Border Patrol, along with state and local leaders of the Michigan State Police, Detroit Police Department, the Wayne County Prosecutor's Office, Wayne County Sheriff's Department, Michigan Department of Corrections, Detroit Public School Police, the Mayor of the City of Detroit, and the Governor's Office. Her message was clear: Everyone was working hard, but in order to reduce this violence everyone would need to work both smarter and in better coordination. The leaders all concurred some re-thinking was required to address the gun violence.

Within her own office, U.S. Attorney McQuade challenged her team of prosecutors to study various violent crime reduction ideas in other cities in order to see which approaches might work in Detroit. She also asked them to re-evaluate their own internal processes in order to determine what changes they could make to change the dynamics of the situation. The team found a comparable model in Washington D.C.'s priority offender program, which focused on individuals who were driving violence within the city. After identifying those individuals, investigations would occur and then their cases tracked as they made their way through the criminal justice system. The District of Columbia had seen remarkable success with this model—dropping from 262 to 88 homicides over the decade between 2002 and 2012. Still, this process had to be modified for Detroit in order to accommodate the separation of state

and federal prosecutorial authority that the District of Columbia does not encounter and to weave in the federal law enforcement agencies' mission of longer-term gang investigations and disruption.

The ensuing re-evaluation and strategy going forward became known as the Detroit One Initiative (Initiative). The Initiative had three components: (1) identify and prosecute priority offenders; (2) dismantle violent gangs and criminal organizations; and (3) engage the community to act. As for the first component, priority offenders, known colloquially as "trigger pullers," were individuals who had committed, were committing, or were most likely to commit a crime while using or shooting a firearm. By working together and utilizing their combined intelligence to identify the most significant "trigger pullers," law enforcement agencies could efficiently allocate their time and resources to investigate some of the most dangerous individuals in the city.

In identifying the priority offenders, the Detroit law enforcement partners decided that it was important not to rely solely on prior criminal convictions since many violent offenders either fly under the radar or are younger without significant criminal history. While there were no firm criteria for identifying priority offenders, the Detroit One partners agreed to weigh the following factors: (1) prior arrests, including juvenile arrests; (2) documented firearms involvement; (3) numerous and recent violent crime arrests, convictions, and reports; and (4) reliable intelligence of criminal activity, such as information obtained from credible confidential sources. Utilizing this information, each federal agency and police precinct examined their areas of responsibility and identified individuals who were driving the violence. Then, analysts from each partner agency shared any intelligence they had on these individuals in a two-day meeting focused on discussing and narrowing their respective lists down to the top fifty priority offenders in the city.

To facilitate any investigation or prosecution of a priority offender, McQuade also assigned at least one and often times two AUSAs to each Detroit police precinct. These AUSAs' role was to act as a point of contact for the local police, to discuss arrests or investigations, to evaluate whether federal charges may be brought, and to convene meetings at the precinct with police and the federal law enforcement partners. The goal of the precinct team was to be able to answer three questions: (1) who are the three or four individuals driving the violence in our area right now; (2) what is the most violent gang in our area; and (3) what is the main drug block in our area. Once these questions were answered, the precinct team then developed strategies to address the identified drivers of violence in that particular area. As the Initiative developed, the partners learned that the best precinct teams met on a regular basis, usually monthly, to discuss the issues and individual priority offenders in their area. These regular meetings directly led to numerous successful prosecutions in both state and federal court, including felon in possession of a firearm, carjacking, narcotics, and robbery charges. Regular meetings also allowed for frequent updating of the priority offender list, as most individuals were arrested or removed from the list within six months.

Once a precinct team identified a problem group or area, they were able to maximize all of the resources of the various law enforcement agencies to combat that problem. For example, the Fourth Precinct identified a particular motel, the Victory Inn, as being a location that promoted narcotic sales, heroin overdoses, human trafficking, and was the locale for a number of shootings. The assigned AUSA was able to bring together HSI and the Detroit Police to work a joint investigation to dismantle the human trafficking and drug distribution conspiracy at the Victory Inn. Coordinating with the neighboring city's police, all three agencies conducted extensive surveillance in order to obtain a federal search warrant.

At the same time, the AUSAs directing the investigation brought in federal forfeiture attorneys and the City of Detroit legal department to shut down the business after the raid. On January 12, 2017, HSI and local police executed the search warrant for twenty-five rooms at the Victory Inn. During the execution, agents rescued fourteen lethargic female human trafficking victims who were suffering from drug withdrawal in disheveled rooms. They arrested two co-conspirators and recovered crack cocaine, one loaded firearm, narcotics paraphernalia, and dozens of cell phones. Later in January, a state court

judge ordered the Victory Inn to be shut down. Less than two months later, a federal grand jury charged six defendants in a nine-count human trafficking and drug distribution indictment. The investigation is still ongoing, and the IRS has joined the effort to follow the money trail.

The second component of the Initiative was identifying the gangs most responsible for the violence in the city. It was conventional wisdom within law enforcement circles that Detroit was not a “gang city,” meaning that the gangs were more neighborhood-based crews as compared to the traditional Blood or Crip sets found in Los Angeles or Chicago. This belief was so deeply rooted that law enforcement often failed to appreciate when gang activity caused or contributed to a particular shooting or homicide. However, the Initiative leaders, particularly the federal agencies, were interested in building larger gang cases that could be brought in federal court. Consequently, some re-thinking of the USAO’s approach was necessary.

First, U.S. Attorney McQuade asked her Violent and Organized Crime Unit (VOCU) and Drug Task Force attorneys to work with the federal agencies to identify the most violent gangs. This group identified eight gangs and one or two AUSAs were assigned to work these investigations. Then, the USAO asked the federal and local agencies to join forces and to work together on these investigations in order bring their respective resources and talents to bear and break down some of the barriers in communication that had existed between the federal and local agencies. These joint investigations had the added benefit of being able to seek OCDEF applications, thus adding Drug Task Force AUSAs into the mix in working these gang cases. Nor was U.S. Attorney McQuade hesitant to pair AUSAs from the General Crimes, National Security, White Collar, or Health Care Fraud Units with VOCU attorneys depending on the facts of the case. Finally, the USAO actively coordinated with the Organized Crime and Gang Section (OCGS) of the Criminal Division to strategize their gang prosecutions and to team with OCGS prosecutors as co-counsel on cases.

A prime example of the benefits of this aspect of the Initiative partnership was the multi-indictment prosecution of the violent Vice Lords street gang. The Vice Lords are a national gang engaged in a variety of crimes, including murder, robbery, narcotics trafficking, and witness intimidation. The Vice Lords’ leaders are located in both Chicago and Detroit, and the gang is broken down into various “branches,” including the Traveling Vice Lords, Insane Vice Lords, Conservative Vice Lords, and Mafia Insane Vice Lords. The Phantom Outlaw Motorcycle Club emerged out of the Vice Lords and has shared members and leaders in common with the gang.

Prior to the Initiative, ATF had begun investigating Vice Lord activity within Detroit but the investigation had not resulted in any significant charges. The ATF learned that there were high-ranking Vice Lord leaders, including the National President of the Phantom Outlaw Motorcycle Club, living in Michigan. However, the investigation had stalled due to a lack of cooperating witnesses and leads, and it was hampered by the mindset that Detroit was not a “gang city.” However, ATF, USAO, and OCGS agreed to a renewed focus and increased resources with the kickoff of the Initiative. The FBI was also invited to join the investigation; and within nine months after the Initiative began, the Vice Lords/Phantom Outlaw Motorcycle Club were charged in the city’s first street gang racketeering indictment in close to a decade.

Under the Initiative, federal, state, and local law enforcement agencies have worked together in the prosecution of the gang, which has led to the arrests and convictions of dozens of Vice Lords leaders and members over the last few years. The government’s indictments of the Vice Lords have taken whatever form the facts call for, including charging a single defendant with Hobbs Act robbery and firearms offenses or charging more than a dozen defendants with RICO conspiracy and VICAR offenses. The unifying thread was that each of these indictments have been part of the Initiative’s efforts to reduce violent crime in the city, whether that involves prosecuting a single individual or a dozen in order to dismantle this violent organization.

For instance, in a trial in August 2014, a jury convicted Christopher Tibbs, also known as “Chief Fatah,” the leader of the Mafia Insane Vice Lords branch for Michigan, of Hobbs Act robbery and an [18 U.S.C. § 924\(c\)](#) firearms offense relating to an armed robbery that Tibbs helped plan and “blessed” for the gang. The evidence showed that Tibbs recruited and used young adults and teenagers to commit crimes for the gang, and he ordered the murder of a witness in connection with this case. This case marked the first time that the federal criminal street gang enhancement ([18 U.S.C. § 521](#)) was charged in the Eastern District of Michigan. Because the jury found that Tibbs committed the crime to advance the criminal activities of his gang, the maximum penalty for aiding and abetting the robbery was increased from twenty to thirty years. In January 2015, Tibbs was sentenced to almost twenty-eight years in prison.

In two trials in March and May 2015, juries convicted eight leaders and members of the Phantoms, many of whom were also leaders and members of the Vice Lords, for various crimes, including a 2013 multi-state mass-murder plot against a rival organization and the shooting of a member of another rival organization. At trial, evidence showed that the Phantoms and Vice Lords were preparing for the first phase of the murder plot at the time search warrants were executed, including stockpiling firearms, hiring a thief to steal a van to be used in the murders, conducting research and surveillance of their intended victims, and assigning Phantom and Vice Lords members to stalk and murder the intended victims. The Phantoms’ and Vice Lords’ mass-murder plot was averted in large part by the quick action of Initiative partners, particularly through the efforts of ATF, FBI, and the Detroit Police Department.

Among those convicted was Antonio Johnson, also known as “MT” and “Mister Tony,” the National President of the Phantoms and the Three-Star General over all of the Vice Lords in Michigan. The evidence showed that Johnson used the Vice Lords to assist the Phantoms in various criminal endeavors, including to search for and violently attack rivals of the Phantoms. On September 8, 2015, Johnson was sentenced to thirty-five years in prison for RICO conspiracy, VICAR murder conspiracy, VICAR assault with a dangerous weapon, and firearms offenses. Of that indictment, thirteen members and associates of the Phantoms and Vice Lords were convicted of racketeering offenses and firearms offenses, including one person who fired upon the ATF during the execution of a search warrant, and they received sentences ranging from eight years to as high as forty years in prison.

In another example of the Initiative’s collaborative efforts against the Vice Lords, Initiative partners arrested and prosecuted nine members of the Traveling Vice Lords branch in 2015 and 2016 for the May 7, 2015, non-fatal shooting of a family of four with an AK-47, which was committed in part because two of the family members attempted to leave the gang. Those nine defendants pleaded guilty to RICO conspiracy, VICAR offenses, and firearms offenses, and they received sentences as high as twenty years in prison. In 2016, Initiative partners also arrested and prosecuted an associate of the gang, who was sentenced to four years in prison for witness tampering and HIPAA violations. He misused his position as an employee of a Detroit medical facility to access the facility’s private medical database to search for victims of the gang’s May 7, 2015, shooting and their family members. Knowing that his brother in the gang wanted this information to locate these relatives and prevent them from cooperating in the investigation and prosecution of the shooting, he provided information about those individuals, including their addresses, to his brother. In total, thirty-one Vice Lord members have been convicted as part of the Initiative.

The Initiative has not been solely focused on the Vice Lords. In re-thinking its approach to gang violence, the USAO decided that a few guiding principles were necessary: (1) begin again to utilize RICO conspiracy and VICAR charges to address gang violence; (2) act quickly to put an end to violence by identifying and charging gang leaders or “trigger pullers” to get them off the streets as quickly as possible, usually through a variety of charges, such as narcotics or felon in possession as the larger enterprise case is built; and (3) size of the gang does not matter—indicting five neighborhood clique members who are shooters for RICO can be just as effective as a forty person takedown. Since 2013, the following gang members have been investigated and charged:

- Eighteen members of the Seven Mile Blood street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Nine members of the Bounty Hunter Bloods street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Fourteen members of the Rollin' 60s Crips street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Thirteen members of the Latin Counts street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Three members of the Band Crew street gang charged under the state of Michigan gang felony statute for violent acts in furtherance of their gang activities, and eight members of the Band Crew for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Ten members of the RTM street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Four members of the Band Gang street gang charged under the state of Michigan gang felony statute for conspiracy to commit murder and assaults with intent to commit murder, and eleven members/associates of Bang Gang in federal court for access device fraud, aggravated identity theft, firearms, and obstruction of justice;
- Five members of the YNS street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Three members of the A1Killers street gang for federal narcotics offenses;
- Eleven members of the 6Mile Chedda Grove street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering;
- Twenty-four individuals on drug conspiracy charges for their use of sixteen different houses an eastside neighborhood of Detroit, many of them abandoned homes, for distributing heroin, cocaine, and crack cocaine between 2013 and 2015; and
- Fourteen individuals on criminal enterprise, drug distribution, or weapons offense for drug distribution in a west side neighborhood of Detroit.

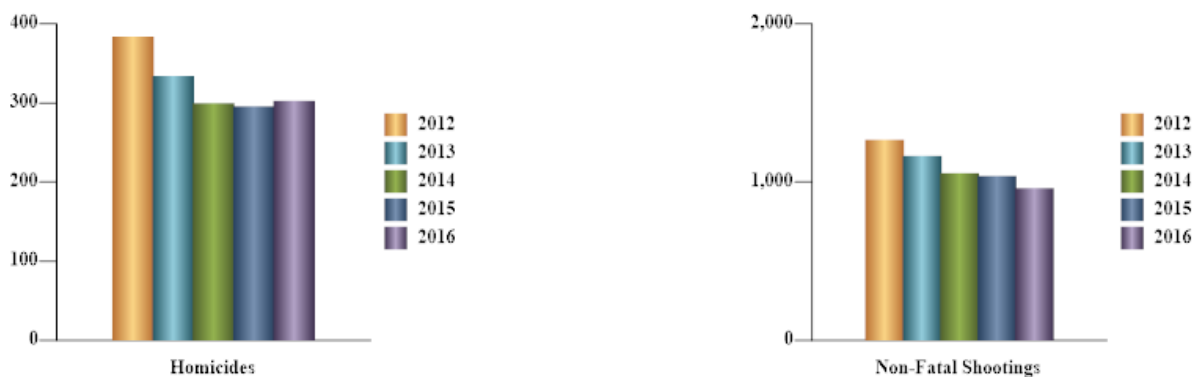
OCGS has been a vital partner in this fight against gang activity within the city. In addition to all of the RICO reviews, OCGS has sent its prosecutors to join the prosecution teams on cases as large as a national gang like the Vice Lords or as small as a neighborhood clique like the Band Crew.

The final component of the Initiative strategy was community outreach and involvement. The law enforcement leaders recognized that any policing strategy must be coupled with buy-in from the community, especially when pushing back against the prevalent “no-snitch” culture that existed in Detroit. Consequently, the leaders invited community partners from the faith, business, education, and non-profit communities to assemble and discuss from their perspectives how violence could be reduced in the city and how to encourage citizens to report crime. This police-community partnership led to a variety of anti-violence events, including a rap contest for high school kids and a perennial cottage garden planting in memory of crime victims. Additionally, by having AUSAs assigned to each police precinct, they became spokespersons within the community by attending block club meetings or other community events to speak on safety and security within the neighborhoods. Finally, the Initiative’s focus on gangs dovetailed with the city’s use of the Ceasefire model—a program that recruits community involvement to deliver a positive, yet stern, message to gang members to leave behind the gang life and to stop the shootings or face significant consequences from themselves personally and their gang.



The Initiative results have been significant. In 2014 and 2015, homicides were under 300 for the first time since 1967. Comparing the four years of the Initiative to the preceding four years, there was an overall decrease of 166 homicides in the city. Moreover, the combined totals of homicides and non-fatal shootings have dropped from 1,649 in 2012 to 1,259 in 2016, a twenty-four percent drop over the four years.

## Shootings Per Year in Detroit



Moreover, the side benefit of the increased cooperation, coordination, and trust between the law enforcement agencies is readily apparent. Representatives from the USAO, DEA, FBI, ATF, DPD, Marshals, Customs and Border Patrol, Detroit Police, Michigan State Police, and Wayne County Sheriff meet every week to discuss the Detroit One priority offenders and the progress of various gang prosecutions. These meetings ensure a unity of purpose and common action not previously seen in Detroit.

However, the success of the Initiative is not limited to the particular circumstances of Detroit. The takeaways that can be applied elsewhere seem basic, but can sometimes be forgotten while handling our busy law enforcement dockets.

- **Coordination**—Establish regular meetings with the various law enforcement entities within your district. Oftentimes each agency or law enforcement entity gets “tunnel vision” on its own mission. The USAO can play a powerful role as convener and coordination hub within a district. Moreover, the USAO can tap into resources from Main Justice, such as OCGS, to bring subject matter expertise and additional prosecutors in to help in a particular locale.
- **Planning**—Establish an over-arching strategy that all of the partner agencies agree to work towards. Dwight Eisenhower once said, “Plans are useless, but planning is indispensable.” Everyone knows that even the best-laid plan needs to be changed almost immediately after it is put into actual use. But the process of planning—including everyone in the discussion, formulating a common goal and path forward, and agreeing to act accordingly—is invaluable. Going through a process where a district-wide strategy is agreed upon is valuable in both keeping everyone focused and resolving any disputes that arise between agencies.
- **Cooperation**—Focus on cooperation and resolve to spend less time on inter- and intra-agency disputes. By maximizing the strengths of the various agencies and coupling them with experienced AUSAs from across the various sections within the USAO, as well as OCGS trial

attorneys, Detroit has been able to identify, charge, and prosecute numerous gangs and cliques that what would not have been possible without this cooperation.

- Community involvement—Any successful law enforcement initiative begins and ends with community trust. Assigning AUSAs specific neighborhoods or precincts builds relationships and trust.

## ABOUT THE AUTHORS

❑ **Christopher Graveline** joined the Department of Justice, Criminal Division in 2007 with the Domestic Security Section (now the Human Rights and Special Prosecution Section) and has been at the U.S. Attorney’s Office—Eastern District of Michigan since 2009. Within his time at the USAO—EDMI, Chris has prosecuted numerous gangs and large-scale drug trafficking conspiracies. He has held the position of Deputy Chief of the Drug Task Force and is currently the Chief of the Violent and Organized Crime Unit.

❑ **Joseph Wheatley** joined the Criminal Division of the U.S. Department of Justice in 2005 through the Attorney General's Honors Program. He started as a Trial Attorney in the Organized Crime and Racketeering Section, now the Organized Crime and Gang Section, where he has prosecuted a variety of criminal groups, including MS-13, the Vice Lords, the Phantom Outlaw Motorcycle Club, La Cosa Nostra, and Eurasian organized crime. His work on the prosecutions of the Vice Lords and Phantom Outlaw Motorcycle Club in Detroit, from 2013 through the present, has been in support of the Detroit One Violent Crime Reduction Initiative.

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# Investigating and Prosecuting Prison Gangs: BOP Resources to Assist Federal Prosecutors

*Kevin Schwinn*  
*Chief of Intelligence*  
*Correctional Programs Division*  
*Federal Bureau of Prisons*

## I. Introduction

Gangs continue to be a significant problem for law enforcement and communities throughout the country. Bureau of Prisons (BOP) intelligence personnel track and monitor prison gang activity and maintain intelligence information that may be valuable to prosecutors. This article will identify resources and points of contact for Assistant U.S. Attorneys (AUSAs) seeking information on incarcerated gang members, including inmate data, transactional data, inmate communications, inmate visitor lists, and link analysis.

Previous investigations have identified significant links between prison gangs and gangs in the community. The BOP identifies inmates who are affiliated with gangs and criminal organizations and who maintain contact with members in the community, including day-to-day gang management, directing drug transportation, and authorizing assaults and murders of individuals within and outside of prison.

BOP staff collect intelligence to manage inmates and to protect institution security. The BOP collaborates extensively with law enforcement partners and assists in developing law enforcement strategies and intelligence operations. By providing initial and operational intelligence and direct investigative support to federal, state, and local law enforcement partners, the BOP plays a key role in many criminal investigations.

## II. Intelligence Resources:

The BOP has several entities that assist in tracking and disrupting gang communications between incarcerated gang members and gang members in the community, including the following:

- The Central Office Intelligence Section in Washington, DC;
- The Sacramento Intelligence Unit in California;
- The Counter-Terrorism Unit in Martinsburg, WV; and
- The Joint Intelligence Sharing Initiative (various cities).

These specialized BOP units work closely with federal, state, local, military, tribal, and international law enforcement. The BOP places particular emphasis on connections between inmates and groups involved in criminal activity, Transnational Organized Crime, human trafficking, and human smuggling.

The Central Office Intelligence Section within the Intelligence and Counter Terrorism Branch (CTB) is responsible for all aspects of intelligence and investigative policies and procedures within the

BOP. In addition, the Intelligence Section acts as the liaison between the BOP and other federal, state, and local law enforcement. It also designs, builds, and implements intelligence and investigative databases used to track gang members and their contacts in the community.

Hosted by the BOP, the Sacramento Intelligence Unit (SIU) is staffed by personnel from the United States Marshals Service (USMS) and the Probation and Pretrial Services Division of the Administrative Office of the U.S. Courts. The SIU provides operational intelligence and direct investigative support to field operations of the BOP, the U.S. Probation Office (USPO), USMS, and other federal, state, and local judicial and law enforcement agencies. While SIU places emphasis on street and prison gangs, it also provides intelligence for a wide variety of other offenders. SIU provides intelligence summaries on gang members and activities, gang-related incident analysis, intelligence trends, support in analyzing threats to the judiciary, notice to USPOs of pending releases, and a wide variety of published briefings, guides, and investigative support materials.

For international and domestic terrorism-related matters, the BOP's Counter Terrorism Unit (CTU) within the CTB provides a formal structure to manage potential inmate extremism in the BOP. Charged with identifying terrorist offenders in custody, the CTU monitors intelligence related to inmates with a nexus to terrorism, and provides information-sharing capabilities to federal, state and local partners. The CTB also develops, coordinates, and delivers relevant counter-terrorism training to BOP staff as well as external partners. The CTB has oversight for BOP staff members who are assigned to the National Joint Terrorism Task Force and to the Joint Terrorism Task Force in New York. These staff members are crucial to the BOP's intelligence sharing mission.

The Joint Intelligence Sharing Initiative (JISI) is a collaborative effort between the BOP Intelligence Section and the FBI Safe Streets Task Force, which embeds 20 BOP Intelligence Officers in local FBI Safe Streets Task Forces. The task forces are located in 14 major metropolitan areas. The purpose of the JISI is to provide information and intelligence between the agencies to initiate or bolster major gang and criminal cartel investigations, and to also provide the BOP with information on incoming inmates' criminal or gang affiliations to ensure proper monitoring. Although the staffs are located in a specific locale, they assist all federal, state, and local law enforcement and correctional partners throughout the country.

### **III. BOP Gang Monitoring**

The BOP validates and tracks inmates who are suspected of being affiliated with any of over 93 different gangs, groups, or cartels. Collectively, these groups are known as Security Threat Groups (STGs). Once an inmate is validated as a member or associate of an STG, the BOP enhances monitoring of the inmate's social communications and activities within the prison. The monitoring allows the BOP to ensure the inmates are not continuing their criminal or gang activities while incarcerated. Inmates attempt a significant amount of gang communication, including daily gang activities, assault orders, drug or human smuggling activities, and directing violent acts within the community. Gang members in the community maintain contact with incarcerated gang members and leaders to ensure they remain in "good standing" if they are incarcerated.

There are a significant number of BOP inmates who maintain contacts with the same outside person or entity. The connections range from attorneys, inmate advocacy groups, outside businesses, and criminal contacts. As the BOP identifies the contacts who assist inmates in criminal activities, investigators begin to monitor these contacts and build administrative case investigations. Officials then use this information to hold inmates accountable for participating in misconduct while incarcerated. Investigators are also able to build intelligence that may assist federal, state, or local investigators with ongoing gang or cartel investigations.

BOP staff monitor inmates' telephone calls, electronic messages, visiting history, and financial

transactions to identify the outside parties who may be assisting inmates to continue gang or criminal conduct while incarcerated. This information can be used for link analysis and is available to investigators and prosecutors upon request. The request can be in the form of a “transactional data request” or a written request on official letterhead. The BOP can release telephone call recordings in the ordinary course of monitoring without a subpoena. To receive a copy of the actual telephone call recordings, a written request must be provided to the institution where the target inmate is housed. These institutions can be found on the BOP’s public website: <https://www.bop.gov>. In cases where the inmate’s institution is unknown or where requests involve inmates at multiple institutions, contact BOP headquarters via email: [BOP-CPD/SIS@bop.gov](mailto:BOP-CPD/SIS@bop.gov), or by phone: 202-514-5855.

## IV. Conclusion

The BOP appreciates the important work carried out by the numerous AUSAs throughout the country to support BOP intelligence operations and protect BOP staff, inmates, and members of the public. We look forward to continuing our partnership with the U.S. Attorneys’ Offices and law enforcement partners to address this key initiative.

### ABOUT THE AUTHOR

□ **Kevin Schwinn** is the Chief, Intelligence Section, at the Central Office. In this capacity, he is responsible for developing national policy and audit guidelines for SIS operations, investigations, and other institution-based intelligence activities. Schwinn also develops and coordinates national training programs for investigative and intelligence staff. Schwinn began his career with the Bureau of Prisons in October 1995 as a Correctional Officer at ADX Florence. He subsequently held the position of Lieutenant at USP Pollock and FCC Oakdale. In 2004, Kevin was assigned as the Special Investigative Supervisor at FCC Oakdale. In 2006, he was assigned as the BOP Representative to the National Gang Intelligence Center. In this capacity, he acted as a liaison between the BOP and other federal, state, and local law enforcement agencies, collecting and sharing information about inmates incarcerated by the BOP and outside persons involved in gang activity.

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# National Gang Intelligence Center

*Joshua Rock*

*Director*

*Criminal Investigative Division*

*Federal Bureau of Investigation*

The National Gang Intelligence Center (NGIC) is a multi-agency fusion center responsible for the gathering and sharing of timely information to federal, state, local, and tribal law enforcement and correctional agencies regarding the growth, migration, criminal networks, patterns, trends, and associations of gangs whose violent criminal activities pose a significant threat to communities throughout the nation. The NGIC is comprised of intelligence professionals from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); the Federal Bureau of Prisons (BOP); the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); the U.S. Marshals Service (USMS); and the Department of Defense (DoD). These agencies integrate their resources in order to provide the most accurate, all-inclusive view of the gang situation in the United States.

The NGIC provides many resources to educate the law enforcement community on all matters gang-related:

- NGIC Online is a web-based system for researching and sharing gang-related intelligence with federal, state, and local partners. It includes a Gang Encyclopedia; Signs, Symbols, and Tattoo Database; General Intelligence Library; Officer Safety Alerts; and a mechanism to submit Requests for Information. NGIC Online is free and accessible through the Law Enforcement Enterprise Portal (LEEP). To apply for a LEEP account, see [www.cjis.gov](http://www.cjis.gov).
- The National Gang Report is a comprehensive assessment of the violent criminal activities and trends of national gangs around the country. The NGIC bases the report on survey responses from federal, state, and local law enforcement and correctional agencies nationwide regarding gang activities in their cities and states. Published every two years, the report is available in hardcopy and can be accessed digitally through some law enforcement databases and at [www.fbi.gov](http://www.fbi.gov).
- NGIC products include the following: strategic and tactical intelligence products intended to promote gang awareness and assist in law enforcement investigations by documenting current gang activity and trends; timely targeted threat assessments to inform law enforcement working in endangered communities on a regional or national basis; and officer safety bulletins to warn against possible gang threats directed at law enforcement.
- The NGIC provides gang training presentations and case support and also assists in case coordination meetings.

The NGIC works in conjunction with other law enforcement groups and organizations, including the following:

- The National Alliance of Gang Investigators' Associations (NAGIA) is an organization representing twenty-two state, regional, and provincial gang investigators' associations around the country. Its 20,000 members work together to provide a coordinated response to the violence, drugs, and gang-related crime that threaten the safety of the nation's communities. NAGIA assists in developing strategies to prevent and control gang criminal activity; administers professional training; establishes uniform gang definitions; advises policymakers; and assists law enforcement, criminal justice professionals, and the public in identifying and tracking gangs and gang members. For more information, see [www.nagia.org](http://www.nagia.org).



- The Correctional Intelligence Task Force (CITF), headquartered in California, consists of gang specialists and analysts from the BOP, California Department of Corrections and Rehabilitation (CDCR), and the FBI. The CITF acts as a central repository for correctional intelligence, which it disseminates to federal, state, and local law enforcement, as well as correctional personnel to enhance their investigations and prosecutions. Through the analysis of prison criminal activity, CITF assists in the identification of gang networks and relationships, street connections, and potential sources and targets. For more information, email [citfcentralintake@cdcr.ca.gov](mailto:citfcentralintake@cdcr.ca.gov).
- Joint Intelligence Sharing Initiative is a partnership between the NGIC and the BOP in which personnel develop and share BOP correctional intelligence with the law enforcement community to assist it in identifying and targeting criminal elements for investigations and prosecutions. Information given in monthly reports pertains to inmates entering or projected to enter BOP custody if those inmates are affiliated with a BOP Security Threat Group.
- The FBI's Safe Streets and Gang Unit provides program management oversight and support for the FBI's 170 Violent Gang Safe Streets Task Forces located throughout the country. The mission of these Task Forces is to identify and target the most violent gangs in their regions, disrupt the gangs' criminal activities, and reduce gang-related violence.
- The FBI's Cryptanalysis & Records Racketeering Unit examines encrypted documents and records of illegal activities that law enforcement intercept from street and prison gang members. It also provides forensic assistance in support of federal, state, and local law enforcement investigations, and imparts expert testimony for prosecutions. For further information, email [codebreakers@ic.fbi.gov](mailto:codebreakers@ic.fbi.gov).
- Regional Information Sharing Systems is a program used by law enforcement officers and criminal justice professionals in the United States, Canada, England, and New Zealand. It offers secure information sharing, critical analysis and investigative support services, and event deconfliction to ensure officer safety. It also supports efforts against all types of violent criminal and gang activities. For additional information, see [www.riss.net](http://www.riss.net).

## ABOUT THE AUTHOR

□ **Joshua Rock** is the Director at the National Gang Intelligence Center in the Criminal Investigative Division of the Federal Bureau of Investigation.

## Note from the Editor . . .

We are pleased to offer the United States Attorneys' community and the Department of Justice family the first of two issues on a very relevant and timely topic—Violent Crime. Please watch for the second issue on Violent Crime in August.

We would like to thank Gretchen C. F. Shappert, Assistant Director, Indian, Violent and Cyber- Crime Staff, Executive Office for United States Attorneys, for her continuing support of the Bulletin, including her leadership on this issue.

We would also like to thank Steve Cook (ODAG) and Robyn Thiemann (OLP) for their invaluable guidance and assistance on this issue.

We offer our sincere appreciation and thanks to Gretchen, Steve, and Robyn.

Attorneys prosecuting violent crime have some of the most difficult roles in the Department. Not only is it essential that their prosecutions be successful in order to remove violent offenders from the community, but the prosecutors also frequently need to deal effectively with the victims of the offenders. High stakes and hurting victims increase the pressure on the prosecutors to be successful.

Days in the courtrooms and nights in the office war room become standard for violent crime prosecutors. Making the community safer is an important but heavy burden. Hopefully, the articles in these two issues will aid them in that effort.

Thank you,

K. Tate Chambers