



PROSECUTOR'S BRIEF

Vol. 38, No. 4

Summer 2016

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Admissibility of Kites**

**The Neurobiology of
Traumatic Assault
and the Implications
for Prosecutors**

**Closing Brothels
Operating as Asian
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**Human Trafficking
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TRaCE Task Force

**Conviction Review
Units**



CALIFORNIA
DISTRICT
ATTORNEYS
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Cover photo: Mono County historic courthouse.

Prosecutor’s Brief is presented quarterly as a cumulative annual volume, therefore page numbering is continual through each issue in the volume. An index of all articles appearing in the volume is on the inside front cover. The pages with the gray-shaded edges in the back of each volume indicate articles with a focus on the mission of the CDA Foundation.

CDAA's mission is to promote justice by enhancing prosecutorial excellence.

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“Nothing Remains Still”

by the Honorable Patrick J. McGrath



Patrick J. McGrath is the 2015-16 President of the California District Attorneys Association. He has served as the Yuba County District Attorney since 1998.

The full quote is “Everything changes and nothing remains still ... you cannot step twice into the same stream.”

Whoa, I know what you’re thinking—the old guy has gone all philosophical on us. Well, maybe yes, and maybe no. As this is my last “President’s Message,” bear with me a bit, okay?

The quote is from Heraclitus, a Greek philosopher who is remembered (often anonymously) for the more common version, “you can’t step twice into the same river.” My familiarity with Heraclitus is a bit of flotsam and jetsam from a Jesuit education that left me with a passing familiarity with long-dead languages (“semper ubi sub ubi”) and an appreciation for ancient metaphysical babble.

That “*nothing remains still*” certainly applies to our professional world as prosecutors, and to CDAA. When I first began my career 32 years ago, I struggled with the rather bizarre determinate sentencing rules “crafted” by the Legislature—things like the “double the base term” rule and the “five-year lid.” Those concepts are now long dead, and totally unfamiliar to our newest generation of prosecutors.

Instead, this generation lives in a world of “state prison” versus “local prison,” split and straight sentences, Proposition 47 value limitations, and a criminal justice system held in little regard by many of the folks that we serve. It’s scary for us “old timers” (a.k.a., dinosaurs) to realize that the “new generation” have never known a different world; i.e., our world.

Your association—the CDAA of 2016—is also much different than the association I first joined in 1984.

Metaphorically, it’s the same stream, but the water rushing past is so much different.

For instance, just this year we introduced Sidebars, our new online communities, which act as an information commons for us to discuss ethical questions, inquire about a defense expert witness, or take part in advanced discussion on an esoteric aspect of Grand Jury use. A perfect example of the value of this new tool is the Prop. 47 master update made available to us by San Bernardino County prosecutor Grace B. Parsons. If you haven’t seen it, check it out on the Prop. 47 community page. Thank you, Grace!

More significantly, CDAA acknowledged a harsh lesson in the aftermath of the Prop. 47 campaign. We realized that our traditional identity in the legislative process as subject matter and policy experts meant little—we needed to be engaged in the political process on a broader scale. Statewide campaigns that affect our roles and standing in the criminal justice system aren’t going away. They are definitely a contact sport, requiring us to be proactive and not reactive.

We’re engaged in that contact sport as I write this. For the first time in its history, you and I—the association—are suing the Governor of the State of California. We are fully engaged in a

CDAA acknowledged a harsh lesson in the aftermath of the Prop. 47 campaign. We realized that our traditional identity in the legislative process as subject matter and policy experts meant little—we needed to be engaged in the political process on a broader scale. Statewide campaigns that affect our roles and standing in the criminal justice system aren’t going away. They are definitely a contact sport, requiring us to be proactive and not reactive.

structured media outreach campaign to voice our deep concerns over what appears to be Governor Brown’s deeply flawed criminal justice reform initiative. Financial contributions are being made to the CDAA Foundation, and we are organizing the fight on a grassroots level with the help of your deputy district attorney associations.

Yes, “*nothing remains still.*” Some things will not change, however. Prosecutors will always have a unique and indispensable role in the criminal justice system, and CDAA will always strive to promote prosecutorial excellence.

Finally, I didn’t want to end my last President’s Message without thanking you—my colleagues and fellow prosecutors—for all you have done to establish, nurture, and maintain that excellence in your day-to-day work. ■

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Breaking the Silence: *Our Voices Going Mainstream*

by Mark Zahner



Mark Zahner has been the Chief Executive Officer of the California District Attorneys Association since 2013. Prior to that he was a deputy attorney general and Sacramento County deputy district attorney.

Every three months I get the bully pulpit with my offering through this august publication. *Prosecutor's Brief* provides me with a platform to write something and potentially have thousands of you read it. I am in a unique situation in that, through this column and other CDAA media platforms, I can be heard by a lot of people.

But CDAA affords our members a significant voice, too. At the most fundamental level, CDAA now hosts Sidebars—online communities for members that have been a huge success. Using the various forums has been so profound, that the company whose software we use to facilitate these discussions uses CDAA as a model when presenting their product to new and potential clients. It's something on the magnitude of 10 times the normal usage for an association just starting out with this technology.

In addition, some of you write articles for us, while others teach classes. We're fortunate as an organization that so many of you take the time to participate and communicate with and for CDAA in countless ways.

Yet what remains your most powerful voice is CDAA itself. Your voice is heard as a body of professionals every time CDAA leads the battle against ill-conceived and dangerous legislation. Your voice was heard perhaps at its loudest the past few months as CDAA spearheaded a lawsuit aimed at challenging Governor Brown’s “Public Safety and Rehabilitation Act of 2016.”

On February 11, CDAA and Sacramento County District Attorney Anne Marie Schubert filed, with board approval, a writ of mandate with the courts seeking to direct Attorney General Kamala Harris from issuing the title and summary of Governor Brown’s proposed measure due to a denial of proper public due process, as required by statute.

“We filed this writ because there is nothing more important than elected officials following the same rules and laws that apply to the citizens they represent,” said Patrick J. McGrath, president of CDAA and district attorney of Yuba County.

Anne Marie Schubert added that she “signed as a petitioner plain and simple to protect the rights of victims. This initiative effectively repeals Proposition 8, California’s Victims’ Bill of Rights law that the voters passed in 1982. It also effectively repeals Marsy’s Law passed by the voters in 2008.”

On February 24, Sacramento County Superior Court Judge Shelleyanne Chang granted CDAA’s writ to block the Governor’s initiative.

The Governor’s legal team appealed to the California Supreme Court on February 25, seeking a writ that would, for all practical purposes, void Judge Chang’s ruling. On March 9, the court directed



Look for this!

The CDAA website offers a vast array of resources for California prosecutors—and even more for CDAA members. Look for this symbol that will direct you to <https://www.cdaa.org>

where you can find more information on the topics covered in *Prosecutor’s Brief*. Or just scan the QR Code with your mobile device!



CDAAs and Schubert to show cause as to why the Governor's emergency relief should not be granted.

On March 23, we filed our final brief with the court. Additionally, the Los Angeles Police Protective League and Memory of Victims Everywhere (MOVE), have each submitted amicus letters in support of CDAAs' position. On May 5, the California Supreme court will hear oral arguments.

I'm writing this message at the very end of April, so by the time this issue of *Prosecutor's Brief* reaches your office, the Governor's initiative may be settled. No matter what the outcome is, I can tell you with confidence that your collective voice has been heard on this matter.

The CDAAs lawsuit has been mentioned in more than 500 news articles, on TV, and we are still fielding frequent talk radio interviews throughout the state. CDAAs made it a priority to express your voice on this issue through our countless forays at the Capitol and constant exchanges with the press. And that will continue in the future.

There are other matters waiting in the wings that will call for our collective attention. Rest assured that CDAAs, armed with your voice, will be there; ready to enter the fray and strive to see that prosecutors are well equipped to go about the business of protecting California. ■



CDAAs Issues

For CDAAs to impact public policy in a positive way, we must actively and accurately promote public safety issues, as well as bring to light the dangers some propositions and legislation will have on the safety of Californians. Issues of interest to California district attorneys include sentencing reform, the death penalty, victims' rights, body-worn cameras, and public safety funding.

Stay up to date with what is happening in these areas by visiting our Issues page at <https://www.cdaa.org/issues-committee>.



Examining the Evidentiary Value and Admissibility of Kites

by Greg Anderson

Kites—written messages from prisoners to other inmates or individuals not in custody—can play a vital role when prosecuting a case. Kites can be an effective evidentiary tool and are admissible in various ways, as long as prosecutors comply with the rules of evidence. Used in conjunction with a conspiracy charge and/or expert testimony, kites can provide a jury with a gateway into the lives of inmates and their criminal activities.

Proper preparation and legal briefing is essential to guarantee the admissibility of kites, however. This article provides a brief history of kites, and how to use them as evidence in a trial.

Greg Anderson is a senior deputy district attorney in Fresno County. He has been a prosecutor for more than 26 years and has tried numerous jury trials, including special circumstances homicides, multiple defendant gang homicides and shootings, and prison crimes. He is an active instructor for CDAA, NDAA, and POST.

Origin and Use of Kites

The Oxford English Dictionary defines a kite as a surreptitious communication between prisoners, first used in 1864. In those days, prisoners in penitentiaries were supposed to be penitent, and not allowed to speak, so they passed messages written on small pieces of paper to each other. The paper available to them was Kite (brand) cigarette rolling papers. Kite tobacco and papers continue to be available today.

Kites are usually sent within the same prison gang, and conversations often use code words. A kite is also sometimes called a “filter” or “willa.” Kites are typically composed in



micro writing on a small piece of paper. The paper is rolled up and covered in plastic or saran wrap, then concealed in a prisoner’s nasal cavity, mouth, or rectum.

Kites can be passed between numerous prisoners and can take months to reach a final destination. Often kites are passed when prisoners go to court or are involved in jail or prison visits. Sometimes, kites take the form of questionnaires by a prison gang (Security Threat Group [STG] as they are now called in CDCR) for new admittees to the jail or prison, requesting the history and pending charges or convictions of the new admittee.

Prison gangs use kites to ensure there are no snitches or traitors within the gang. Kites can also be used to issue orders from higher-ranking prison gang members to lower-ranking members within the prison, or to street gang members. Many times the orders transmitted through a kite are “removal orders” or “green lighting,” which instruct gang members to target a specific person for assault or murder.

Some kites are called “roster kites” and provide updates to upper-level gang members, such as the current number of members of a specific gang in the prison, jail pod, cell block, or yard; and the gang members’ names and vitals. This data can also reveal the charges for which the gang members are incarcerated, monikers, CDCR numbers, dates of birth, booking numbers, location in the prison or jail, and pending court dates.

Kites as a Crime

Under California law, two Penal Code sections deal with kites as a crime. First, Penal Code section 4570 makes it a misdemeanor for any person, without the warden's permission, to communicate with a kite or take a kite from a prisoner in jail or prison. Second, Penal Code section 4570.1 makes it a misdemeanor for any person to deliver or take a kite from a prisoner while being transported. These charges are seldom used, but be aware that they may create Fifth or Sixth Amendment implications for those witnesses who sent or received kites, even if you do not charge them.

Kites as Evidence

Kites as a Statement by a Party Opponent

A prosecutor may want to use a kite that is written by a defendant that admits the defendant's involvement in a charged crime. Under Evidence Code section 1220, a defendant's (party) statement is admissible when offered against him or her, even though it is hearsay, as an exception to the hearsay rule. Therefore, if a kite is written by a defendant and is being admitted as an admission or confession against that defendant, it will be admissible under section 1220. However, the prosecutor still must authenticate the kite as being written by the defendant.

But what about kites that are written by one defendant that are being used to inculcate a co-defendant? Is the kite admissible?

Kites as a Statement by a Co-Defendant: Bruton and Crawford Concerns

Bruton v. United States holds that even a limiting jury instruction does not protect the confrontation clause rights of a defendant who is incriminated by a co-defendant's statements (in our instance, a kite) admitted against the co-defendant in a joint jury trial.¹ If the co-defendant testifies, then *Bruton's* restriction is inapplicable, as there is no violation of the confrontation clause.² *Bruton* also does not apply when the co-defendant is not a defendant in the trial where the kite is being offered.³ In addition, the rule does not apply in a court trial or juvenile proceedings where a jury is not present.⁴

Crawford v. Washington held that the confrontation clause prohibits an out-of-court statement from being admitted if it is “testimonial” in nature, if the declarant is available to testify, or if the declarant is unavailable to testify coupled with the defense having no opportunity to cross-examine the declarant.⁵ *Crawford* modified the *Bruton* rule by stating that it applies only to testimonial statements. So is a kite a testimonial statement? The California Supreme Court stated that “testimonial” statements hinge on “... statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial.”⁶

Under this analysis, a kite communicating facts not written with the intent it be used in a criminal trial for another inmate and/or an outside person, would not usually be testimonial in nature. Case law has held that such types of statements, written or unwritten, are not “testimonial” in nature.⁷

Therefore, a kite written by a co-defendant, which is not intended to be used in a trial proceeding, would likely not be testimonial under the *Crawford* analysis.

Kites as an Admission of a Co-Conspirator

Kites can be very useful in conspiracy prosecutions under Penal Code section 182. Under Evidence Code section 1223, kites can arguably be admitted as an admission by a co-conspirator, and as such, its offering does not violate the *Bruton* rule.⁸

Per Evidence Code section 1223(a), the kite must have been made and/or transmitted while the declarant was participating in the conspiracy, and be made or transmitted in furtherance of the conspiracy. Under section 1223(b) and (c), the kite must be made prior to or during the time the party was participating in the conspiracy, **and** offered after other evidence sufficient to find facts supporting that the kite was made while participating in the conspiracy, in furtherance of the conspiracy, or during the time that the party was participating in the conspiracy.

In addition, admissibility of a kite does not depend on whether an actual conspiracy count is alleged under Penal Code section 182. Failure to file a conspiracy count does not prohibit the prosecutor from presenting and arguing a conspiracy theory and liability in

the case.⁹ A prosecutor must still instruct the jury as to conspiracy, even if it is uncharged and only used as a theory of liability.¹⁰

Kites can be useful in other ways to the prosecution using a conspiracy theory, or an actual charge of conspiracy, depending on what is actually contained in the kite. To prove conspiracy, two requirements must be met:

1. An agreement must be formed, either formally or informally.¹¹
2. The commission of an overt act to accomplish the object of the agreement, i.e., in furtherance of the conspiracy.¹²

Admitting a kite that specifically states an agreement between the parties, in writing, satisfies the first requirement.¹³ If the language of the kite gives orders or directives in furtherance of a criminal conspiracy, then the statement may arguably be used to show an overt act, thus meeting the second requirement.

Finally, a kite can arguably be used to show either the specific intent required to commit the agreed upon crime, or the specific intent to conspire.¹⁴

Kites as Prior Inconsistent Evidence

If the author of a kite takes the stand, and his or her testimony is inconsistent with what he or she wrote, the kite can be used to impeach the witness for an inconsistent statement under Evidence Code section 1235. However, the kite is only going to be allowed as substantive evidence of the crime if Evidence Code section 770 is followed, which requires the witness be allowed to explain the kite and its inconsistency.

Keep in mind that a kite cannot be used as substantive evidence in a case if you try to impeach the witness with the content of the kite *after* he or she has left the stand and been excused.

Kites Used as Gang Evidence

Kites can be used to provide relevant foundational evidence for a gang expert's testimony. In addition, kites can be highly probative both as to whether a defendant was an active member of a gang (e.g., roll call kites), and as to whether the crimes were "gang related."

In *People v. Gutierrez*, the prosecution used gang kites retrieved from the defendant's cell to help prove a Street Terrorism Enforcement and Prevention (STEP) Act violation and that the defendant was an active member of the Puente 13 criminal street gang.¹⁵ The court stated:

Here, the trial court admitted Deputy Lusk's testimony about defendant's affiliation with the Puente 13 gang, and regarding the notes found in defendant's cell. This evidence related directly to the elements of the gang enhancement pursuant to section 186.22, subdivision (b)(4). The evidence demonstrated that defendant was a member of the Perth clique of the Puente 13 gang, the primary purpose of which was to commit crimes.¹⁶

When looking at using kites as gang evidence, remember that the evidence will only be as good as the expert discussing it. Make sure your expert is up to date on gang kites and their use, and has extensive knowledge and understanding of the STEP Act and what is required to prove its elements.

How to Admit a Kite into Evidence

Authentication

In order to be admissible, a kite needs to be authenticated.¹⁷ Evidence Code section 1400 states:

Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

Note that authentication is not just required of written words, but also of written symbols, insignias, or other markings, which convey a particular meaning.¹⁸ Such items are commonly used in kites.

Handwriting Experts

Authenticating a kite may seem easy, but it can be difficult. Handwriting experts used to show that the defendant wrote the

kite may not be useful since most kites are done in micro writing with symbols, often in code, making it hard for the expert to authenticate. Many times a gang expert or custodial kite expert can be qualified and testify as to the origins and author of the kite. When coupled with circumstantial evidence of the kite's origin, that can be enough to authenticate the kite.

Custodial kite and gang experts are often found in the Special Services Unit (SSU) and Institutional Gang Investigator (IGI) units of the prison where the defendant is incarcerated. Local law enforcement agencies may also have gang experts or custodial experts that can be used for inmates. When using one of these experts, it is important they have a solid foundation to support their testimony. Cases may hinge on whether the expert had sufficient knowledge to opine as to the origination and meaning of a kite.

Chain of Custody

As a piece of physical evidence, a kite may require a chain of custody to be admitted:

“The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. ¶ The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.”¹⁹ [Citations.]

Based on the above, and as a rule of thumb when presenting kites as evidence, prosecutors should make sure all people who maintained control of the kite after it was seized are documented and presented.

Hazardous Substance Issues/Best Evidence Rule

Admitting the actual kite into evidence can be detrimental to your health. Many kites have been carried in the body cavities of inmates or other people. Those individuals may have diseases in their secretions or bodily fluids, for example, that remain on the kite. Correctional officers are always very careful to use gloves when handling kites because of these concerns. It should be no different for prosecutors. Remember the “Best Evidence Rule” was repealed in California in 1998, therefore, a Xerox copy, photo, or scanned image should be sufficient under the “Secondary Evidence Rule.”²⁰

Developing Trends with Kites and Custodial Communication

In 2015, sections 3000, 3044, 3269, 3269.1, and 3335–3344 of the California Code of Regulations were amended. The change resulted in many inmates assigned to Security Housing Units (SHUs) being released into general population yards at various prisons. Coupled with the way CDCR identifies and houses gang members there has been a dramatic increase in high-level prison gang members being housed on general population yards.

As a result, communication on yards by and between gang members has increased. New gang members on the yards need to supply their credentials to the yard shot-caller for the gang, and new leadership on the yards need to establish (or re-establish) ground rules for the gang’s operation in the prisons. This communication often takes the form of kites. Not surprisingly, inter-prison communication by kites has increased in the past year.

In addition, due to Realignment, individuals that would have been incarcerated in state prisons are now either incarcerated in county jails, or out of custody. This also provides additional avenues of communication for inmates to the outside. Therefore, it is likely that the amount of prison-to-jail and prison-to-out-of-custody kiting has increased.

Kites can be a very useful tool to prosecutors, and while various legal issues on kites have been addressed in this article, this is only a cursory review and it would behoove prosecutors to conduct a more in-depth analysis of the specific kites and surrounding facts in their case, as well as the current law, before proceeding to court. ■

ENDNOTES

1. *Bruton v. United States* (1968) 88 S.Ct. 1620, 1625.
2. *People v. Ainsworth* (1988) 45 Cal.3d 984, 1010.
3. *People v. Brown* (2003) 31 Cal.4th 518, 537.
4. See *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1478 [cert. for part. pub.], as well as at a preliminary hearing; and *People v. Miranda* (2000) 23 Cal.4th 340, 349.
5. *Crawford v. Washington* (2004) 541 U.S. 36, 59.
6. *People v. Cage* (2007) 40 Cal.4th 965, 984 fn. 14 [emphasis in original].
7. See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1401 [oral communication between inmates taped by police is not testimonial]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 199 [letters between co-defendant and third-party inmate not testimonial as to the other co-defendant]; *Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1037 [written diary entries not testimonial].
8. See *People v. Brawley* (1969) 1 Cal.3d 277, 288; *People v. Luparello* (1986) 187 Cal.App.3d 410, 449.
9. See *People v. Lopez* (1963) 60 Cal.2d 223, 250, citing *People v. Pike* (1962) 58 Cal.2d 70, 88; *People v. Ditson* (1962) 57 Cal.2d 415, 447.
10. *People v. Earnest* (1975) 53 Cal.App.3d 734, 744–745.
11. *People v. Lipinski* (1976) 65 Cal.App.3d 566.
12. Pen. Code § 184; CALCRIM 415–416; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.
13. See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135; *People v. Cooks* (1983) 141 Cal.App.3d. 224, 311.
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Understanding the Neurobiology of Traumatic Assault and the Implications for Prosecutors and Investigators

by John Preston, Psy.D.

Police officers, detectives, and prosecutors all want effective investigations that lead to guilty verdicts. Success, however, is often dependent on how well those individuals can obtain accurate details of a crime. That task can be difficult, particularly when questioning victims of assaults.

People exposed to extremely traumatic assaults often provide information that may be odd and perplexing, and exhibit an inability to recall details in a clear, sequential fashion. This is often the case with victims who develop post-traumatic stress disorder (PTSD). PTSD is defined by the Mayo Clinic as a mental health condition triggered by experiencing or witnessing a terrifying event. Symptoms of PTSD can include flashbacks, nightmares, severe anxiety, and uncontrollable thoughts about the event.¹

Problems occur, in large part, due to significant changes in memory and other cognitive processes associated with specific changes in brain functioning seen in *some* victims. Understanding the nature of these abnormalities in

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brain functioning can help police and other investigators modify interrogation techniques that yield more reliable information.

Looking at Post-Traumatic Stress Disorder

Most people confronted by potentially life-threatening assaults (including sexual assaults) do *not* develop PTSD. Every victim is certainly emotionally shaken by assaults. All victims experience anxiety and may show some intense emotional reactions immediately following an assault and in the days that follow.

In fact, it has been recommended that detailed interrogation occur after a victim has had two full nights of sleep. This gives the victim time to process past events, and often allows the brain to function more normally, enabling the person to have a clearer and more coherent recollection. This should also result in a more articulate description of the crime.

Rates of PTSD in people assaulted generally range between 7 and 25 percent, although higher rates are seen in victims of sexual assaults. Study results vary, but the lifetime prevalence of PTSD for women who have been sexually assaulted is 50 percent.²

Abnormalities in memory and cognitive functioning in those with PTSD result in victim recollections of the crime that are vague, confused, and inconsistent; not just immediately after the crime, but well into the future. Such reports often lead to inferences that the person is lying. These recollection difficulties often occur during subsequent interrogations and also when testifying (even months after the crime).

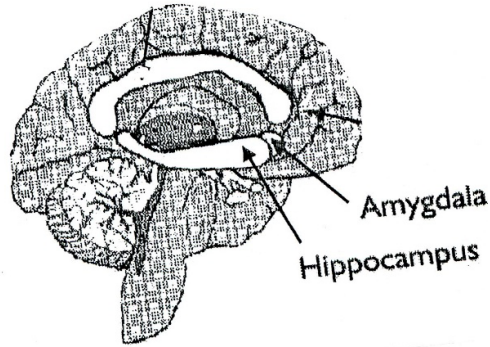
Russell Strand and Rebecca Campbell, Ph.D., first articulated the underlying patterns of memory and cognitive dysfunction in PTSD assault victims, tied to striking changes seen in brain function.³ Strand and Campbell's elucidation of such abnormalities in trauma-related neurobiological changes are in keeping with recent discoveries regarding the psychobiology of traumatic emotional states.

Neurobiology of Traumatic Stress: *Impact on Memory and Cognitive Functioning*

Under normal circumstances, experiences are perceived, processed, and put to memory by two separate parts of the brain:

the *hippocampus* and the *amygdala*.

The hippocampus is located in the medial temporal lobe and has rich connections with the cerebral cortex—the most highly evolved part of the human brain.



Working together, the hippocampus and cerebral cortex are able to encode *explicit memories*. Explicit memories register and recall very specific, detailed aspects of an event. Additionally, explicit memories can lead to a coherent and sequential recall of specific experiences.

The amygdala—also located in the medial temporal lobe—plays a primary role in processing memories, threat appraisal, and emotional reactions. It is important to note that perception and memory occurring at the primitive level of the amygdala are totally separate from that seen in the hippocampus/cortex. The amygdala engages in 24/7 threat appraisal. Input to the amygdala comes directly from our base senses: vision, hearing, smell, and touch. The amygdala encodes memories quite differently than the hippocampus/cortex encodes explicit memories.

For example, the amygdala takes in patterns of raw sensory data and “brands” images of experiences into its memory circuits. The amygdala *does not think*, and therefore, makes no interpretations or conclusions about the event. Instead, it encodes sensory events, especially those associated with intense emotional states. It does this by registering crude sensory patterns (similar to taking a photograph where details are imprinted, but unaccompanied by any explanation or reference to what occurred either before or after). These memories are referred to as *implicit memories*.⁴

Where explicit memories are conscious and may change or be forgotten over time, implicit memories *never* change. Implicit memories, along with the intense emotions that accompany them, can be reactivated by perceptions, images, or thoughts that were

originally registered at the time of the trauma. Therefore, it is important for prosecutors and investigators to understand that for those victims with PTSD, these implicit memories can continue to occur many months or even years after the traumatic experience, if triggered.

Consider these two examples. Ms. Smith is sexually assaulted, but does **not** develop PTSD. During her assault, both the hippocampus and amygdala are recording the events. When emotionally intense events are encoded in people who do not develop PTSD, both systems operate to memorize aspects of the event. Later, when Ms. Smith is asked to recall details of the assault, she is able to provide a detailed narrative because her explicit memory is intact.

In contrast, Mrs. Jones is sexually assaulted and **does** develop PTSD. Her recollection of the assault is incoherent and vague. In individuals with PTSD, such as Mrs. Jones, the hippocampus is temporarily disabled and is thought to be due to exposure to very high levels of the stress hormone, cortisol.

The hippocampus is packed with cortisol receptors and when toxic levels of cortisol are released in the brain, millions of synapses (where nerve cells make connections) are disconnected. The rest of the brain is relatively unaffected. In a sense, the hippocampus is overwhelmed by the high cortisol levels and is shut off for a period of time—generally minutes, but sometimes longer—and explicit memories are only recorded partially in non-integrated fragments.

Occasionally, when the trauma is so extreme, the victim may have no explicit memories for the event and suffer from amnesia. This type of amnesia is not what is commonly referred to as repression. Rather, it is a failure of the hippocampus to execute initial information encoding due to the surge of cortisol during the trauma. In these cases, explicit memory is either missing or spotty, and detailed recall is generally impaired. Over a short period of time, the hippocampus synapses are eventually restored.

The amygdala, however, is not affected when high levels of cortisol are released and continues to take in and record the intense sensory experiences during the assault. Implicit memories are not “remembered” consciously. Instead, specific patterns of sensory experiences are permanently encoded. At a later time, if

this victim were to see, hear, smell, or talk about specific sensory elements associated with the traumatic event, the brain would subconsciously evoke an implicit memory causing the victim to display the associated emotion tied to the event, e.g., fear, trembling, nausea, or disorganized thinking.

As noted earlier, the amygdala engages in *pattern recognitions*. If the victim encounters a stimulus that even somewhat matches the amygdala-level implicit memory pattern, or when the victim is questioned about the event, this does **not** evoke a “memory” in the ordinary sense—it generates one or more of the reactions previously mentioned.⁵ Implicit memories are permanent and can be reactivated. If reactivated, the emotional state (minus explicit memories) leads to vague or fragmented images, emotions, or bodily responses.⁶

A metaphor often used to describe this is a jigsaw puzzle. A person not affected by PTSD is generally able to recall details in a coherent, sequential manner (before, during, and after) as if bits of the memory are written out, start to finish, on a jigsaw puzzle that is fully constructed. Therefore, recall is like reading details on each puzzle piece in sequence from left to right. Individuals affected by PTSD, however, simply see a jumble of puzzle pieces that have fragments of memories or emotional sensations. Therefore, the recall in this situation is non-sequential.

It is important to note that for those with PTSD, the reactivation of implicit memory and fragmented recall can occur immediately after the assault, but also much later on when being interrogated or providing testimony. Some survivors experience a good deal of emotional healing, which helps them recall the events in a more organized fashion months later. This may be the case when speaking to someone they have grown to trust, such as their attorney. However, the stress of testimony or seeing the perpetrator may result in significant upheaval and a return of impaired thinking and recall.

Other Common Post-Traumatic Assault Symptoms

Tonic Immobility

Approximately 52 percent of sexual assault victims experience an involuntary freeze response at the time of the assault.⁷ All mammals can exhibit various freeze responses. Such responses are involuntary, common, and hardwired into the primitive brain. Tonic immobility is a particular type of freeze response where the individual is literally unable to move, i.e., not able to resist, fight back, or escape.

Tonic immobility is often misinterpreted by police officers, first responders, and sometimes by prosecutors as “they must have not minded it so much or they would have struggled to escape or fight back” (or other inaccurate conclusions). When survivors freeze, they, too, are often perplexed by this response and may either blame themselves or feel ashamed, often wondering why they did not fight back. Experts recommend telling the survivor that this is a very common response to life-threatening experiences and not his or her fault. This is especially reassuring to victims, both in the immediate aftermath and also when revisited during more in-depth interrogations later. The shame felt is unwarranted and can intensify emotional distress that can further result in greater problems providing accurate information about the assault. Putting this into perspective, it is interesting to note that 7 percent of police officers also experience tonic immobility in situations where they must fire on a perpetrator.⁸

Apparent Bland Indifference and Detachment

Apparent bland indifference and detachment is a neurochemically mediated numbing response that is also seen in victims of traumatic assault. This involuntary response, also mediated by primitive brain mechanisms, results in what is clinically known as *dissociation* (commonly referred to as “emotional shock”). Likewise, this must not be misinterpreted as actual indifference. Dissociation can last for minutes to weeks and also be re-evoked during later interrogation or testimony.

The most common conclusion prosecutors or law enforcement mistakenly have about a victim suffering from this response is that

the victim's lack of intense emotion means he or she is not as upset as one might expect. Be aware this could also have a significant impact on jurors.

Time Distortion

While in a state of overwhelming fear, the brain is often unable to accurately judge time (e.g., the duration of the assault). Again, this disruption of cognitive functioning is not to be misunderstood. The survivor simply cannot have accurate recall of the passage of time.

Intense Physical and Emotional Responses

Trembling, shortness of breath, and increased heart rate (sometimes accompanied by tightness in the chest and chest pains that may resemble a heart attack), dilated pupils, dizziness, and lightheadedness are further post-traumatic symptoms of assault. The symptoms, in themselves, often frighten the victim and intensify extreme emotions of terror he or she is already experiencing.

When first responders, law enforcement, or prosecutors encounter a survivor displaying any of the symptoms discussed—including confusion and an inability to accurately describe what happened—it is crucial to reassure the survivor that these are common, human responses associated with a violent assault. To state or even imply that somehow these are signs of lying or lack of effort to escape (i.e., tonic immobility) not only adds to the already heightened state of fear and sometimes self-blame, but is a critical factor reducing the likelihood of obtaining accurate information about the crime.

Finally, it should be noted that similar reactions, as outlined above, can also be seen in some witnesses.

The Forensic Experiential Trauma Interview (FETI)

Russell Strand, chief of the Behavioral Sciences Education and Training Division for the U.S. Military Police School, developed an interview protocol—the Forensic Experiential Trauma Interview (FETI)—that is notably different than standard interrogation strategies followed by most police and prosecutors. The FETI approach has been shown to be more effective than typical interview tactics for victims suffering from PTSD and enables the

interrogator to gather more accurate data, thereby reducing rates of recantation.⁹

FETI is based on the study of sexual assault survivors and their way of responding to more typical interviews. FETI strategies are informed by an understanding of the neurobiology and cognitive functioning of assault victims as outlined above. Interviewers that use the FETI approach gather more accurate information, increase the effectiveness of prosecution, and allow survivors to provide answers in a less stressful environment.

Key Aspects of FETI in Interrogation

Police officers must first acknowledge that the survivor's experience was very traumatic. Being patient and showing concern and empathy reduces some degree of distress and begins to create a sense of trust and safety between the survivor and law enforcement.

Since most victims cannot present a sequential narrative, the FETI approach suggests first asking, "What are you *able* to remember?" If a victim is asked to "start at the beginning," the implication is that he or she *should* be able to spell out a coherent narrative. Asking "What are you *able* to remember?" takes the pressure off and helps improve recall of important elements of the crime.

In addition, "why" questions almost inevitably put victims on the defensive (e.g., Why were you in this part of town?). When, where, and why generally imply guilt for the victim, and should be avoided. These types of questions increase the victim's emotional distress and significantly interfere with the investigator's ability to obtain accurate data.

Finally, questions such as "What was the most difficult part of the experience for you?" and "Is there anything about the experience that you just can't forget?" are, according to Strand, high-yield inquiries. A good resource is Strand's "Shifting the Paradigm for Investigating Trauma Victimization," which provides in-depth discussion on FETI, and offers additional suggestions and examples that are beyond the scope of this article. Additionally, a very useful and detailed presentation of FETI can also be found in Strand's online presentation.¹⁰

An understanding of the nature of post-trauma brain changes and cognitive problems have led to an approach to interrogation

that is fundamentally different than standard interview techniques. FETI provides strategies that are effective and less traumatic for the victim from the immediate aftermath of the assault to testimony that may occur months later. ■

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A Toolkit for Closing Brothels Operating as Asian Massage Parlors

by Casey Bates, Steven Jesse Corral, and Tim Wagstaffe

Asian Massage Parlors (AMPs) often operate as illegal brothels, and are usually a form of organized crime. Successfully prosecuting AMPs requires an approach that investigates these organizations with tactics that go beyond looking for violations of vice-related crimes. Therefore, a coordinated effort between law enforcement and prosecutors is needed to ensure successful results such as felony convictions, asset forfeiture, and/or the businesses being closed.

The Alameda County District Attorney's Office has developed a prosecutorial approach to AMPs focusing on areas of law not traditionally used to attack brothels, such as laws related to human trafficking, tax evasion, and money laundering. By pulling these elements together, a case is developed that has more jury appeal, and is more likely to result in a positive outcome.

This article discusses the history of AMPs operating as brothels and describes the steps Alameda County prosecutors are using to shut them down and earn convictions.

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Background on Asian Massage Parlors

Over the past decade, California has seen a tremendous upsurge in the number of brothels operating as AMPs. These businesses provide a relatively anonymous setting for the sale and purchase of illicit sex. There are as many as 7,000 in the United States, with 3,000 in California, alone.¹ The proliferation of these businesses is not just limited to urban areas of the Golden State, however. AMPs are located in many suburban and rural communities. Experience in Alameda County has shown that AMPs generate tremendous amounts of cash, but require a business structure that necessitates the involvement of organized crime.

To adequately address the problem that AMPs have become, a multi-faceted approach is essential. There is a tremendous need for an adequate statutory scheme to regulate and control existing AMP businesses and those applying for new business permits. This means requiring that the service providers are actual massage therapists certified by a legitimate massage therapy school, and licensed by a regulatory agency with adequate resources to enforce the law.

Agencies responsible for issuing use permits to AMPs need to strictly adhere to this statutory scheme as a condition precedent to issuing or renewing any business license for a massage parlor. Failure to adhere to the requirements related to proper licensing should be treated harshly, and any proof of improper sexual activity at a massage establishment should result in steep fines and/or revocation of the business license.

Experience has shown that owners of these businesses tend to operate and control more than one brothel. As a result, permitting organizations should make best efforts to identify individuals who are, or have been owners of illicit massage establishments. The need for proper regulation cannot be emphasized enough. The sheer number of AMPs that currently exist is more than the criminal law can handle by itself. By providing an adequate regulatory environment, communities can limit the number of future illegitimate businesses, and then focus on the existing AMPs that are currently flying under the radar.

How Asian Massage Parlors Operate

Investigating AMPs is not a simple task. To successfully attack these brothels, it is important to understand their business structure. AMPs are typically open year-round from 10:00 a.m. to 10:00 p.m., seven days a week. On average, there are two to three service providers: the individuals who are providing sexual services and a manager who is onsite at all times. The service providers are typically foreign nationals who are in the country on legitimate or illegitimate work visas. They typically have limited proficiency in the English language.

Many service providers sleep onsite at the massage parlor and pay rent to the owner out of the “tips” they earn by providing sex. Service providers are moved from city to city and from AMP to AMP. When interviewed, they will deny both that they are providing sex and that they are victims of sex or labor trafficking. Purchasers of commercial sex typically desire “new” and “young” masseuses. This requires successful AMPs to have a steady supply of new labor. It is here that we see the involvement of international organized crime. Experience on the West Coast has shown that the majority of sex workers are being trafficked from China, Thailand, Taiwan, and Korea.

AMPs rely on Internet advertising to attract customers on websites such as *Craigslist.org* and *Backpage.com*, the former in particular. These advertisements falsely portray the individuals that work at the facility. For the most part, the advertisements contain no pictures that depict the massage parlor or the service providers who work there. Instead, they rely on images of young Asian women in sexually provocative positions offering promises of relaxation. For example, a recent ad on *Craigslist.org* reads: “All new CMT with VIP service—Avg. Age 24.” Another ad states: “Excellent Massage and Beautiful Masseuses.”

Purchasers also rely on review websites (similar to *Yelp*) such as *Rubmaps.com*, which provides reviews of AMPs and their service providers. Users rate the AMP by number of stars ranging from 1–5. A one-star rating denotes that there is no sexual activity at the location. A five-star rating indicates that the location is a brothel that offers various sexual services. Sites such as *Rubmaps.com* inform the purchasers as to the price that is expected to be paid,

the physical description of the service provider, and the acts that the women are willing to perform.

In terms of how the commercial sexual exchange occurs, the purchaser is greeted by the manager at the front counter. There is a standard fee for a given length of massage, known as the door or gate fee. Prices vary from \$30–\$45 for a half-hour to \$45–\$60 for an hour massage. In most cases, no conversation related to sexual services is discussed between the manager and the customer. These conversations take place in the massage room itself between the purchaser and the appointed service provider.

Transactions are usually done in cash so there is no paper trail. Credit cards are usually accepted, but they are discouraged and generally require the payment of an additional fee to cover the cost of the transaction—much like the way gas stations offer different prices for payments in cash and credit. Most, if not all, of the door or gate fee is kept by the owner of the business. The service provider’s salary is largely dependent on the “tip” that is given in exchange for the sexual act.

Once placed in the massage room by the manager, the purchaser is requested to get naked and wait on the table for the masseuse to arrive. Thereafter, the massage begins with focus on the purchaser’s backside. No discussion of sexual services occurs up to this point. Approximately halfway into the massage, the customer is asked to turn over onto his or her back. This is known as the “flip” and when negotiations for sex occur.

Most AMPs only provide manual masturbation, but others provide what purchasers describe as “full-service” sex. Fees range depending on the service provided. Manual masturbation typically costs \$40–\$60, while oral copulation and sexual intercourse may cost as much as \$200. The service provider keeps some of the “tip” for the sexual act, and the rest of the money is kept by the house. The cash proceeds are picked up at the end of the day, usually by the owners.

Developing a Successful Approach to Investigating and Prosecuting Asian Massage Parlors

When developing a strategy for addressing AMPs, it is important to emphasize and remember that this business structure

is a form of organized crime. A criminal organization that is breaking the law one place, is most likely breaking it in other places and in multiple ways. Defining “success” for an office’s AMP strategy is the next critical step in the process. Setting the parameters of success will inevitably shape how the investigation of the criminal organization should proceed and ultimately what charges will be sought.

Depending on resources, the investigation may only require closing the AMP. Such an approach has a short-term benefit of closing the establishment, but runs the risk that the owners will simply open up another business in short order. Law enforcement could very well find itself playing a frustrating game of “whack-a-mole,” where another AMP pops up right after you knock one down.

Alameda County decided to define success in three ways:

1. Closing the businesses.
2. Identifying and ensuring the forfeit of all assets attributable to the criminal enterprise.
3. Convicting all owners and managers of felonies, plus requiring that the convicted individuals not own, manage, or operate a brothel in the future.

To achieve these goals, Alameda County prosecutors found that the best tactic was to attack the criminal organization from several different angles. This approach was similar to the “Al Capone Method,” where law enforcement prosecuted Al Capone for the taxes he did not pay, rather than the murders attributed to him.

Explaining the Capone Method

Alameda County AMP cases are broken into three parts:

1. the criminal sexual activity at the brothel;
2. the failure to withhold payroll tax; and
3. money laundering.

The idea behind the Al Capone Method is to look for charges that can be continually prosecuted against owners and managers of AMPs—even if other parts of the case end up unprovable.



CDAA Webinars On Demand Library

Casey Bates and Steven Jesse Corral presented a webinar entitled *Investigation and Prosecution of Illicit Behavior in Massage Parlors: The Capone Method* for CDAA in 2015.

It is available, along with other human trafficking webinars, for members to view in the CDAA Webinars On Demand Library. Visit <https://www.cdaa.org/training/webinars/webinars-library> to watch it or any of the other titles offered.



Experience has shown that defendants tend to plead guilty to tax-related felony charges rather than sex or money-laundering charges.

In addition, it is best to build a case that does not depend on the testimony of potential victims, i.e., the service providers at the AMPs. When thinking about how to prove your case, service provider victims are usually not available to testify at the time of the preliminary examination or trial. They are typically foreign nationals who will leave the country as soon as possible. To the extent they remain in the U.S., they are not likely to tell the truth about what went on in the massage rooms and what sexual acts their bosses instructed them to perform. Therefore, it is not recommended that prosecutors rely on their testimony.

Initial Investigation

Tips from the community, or simple research on *Rubmaps.com* and *Craigslist.org* should lead to the initial identification of potential brothels, but this is just the beginning of the work. The goal is to build a case that will include the potential for the following felony charges:

- sex trafficking;
- labor trafficking;
- pimping;
- pandering;
- failure to file taxes;
- failure to pay taxes;

- failure to provide adequate unemployment insurance; and
- money laundering.

Other miscellaneous misdemeanor charges include: maintaining a house of prostitution, unfair labor practices, failure to carry workers' compensation insurance, and prostitution.

Investigating an AMP should begin with business inspections before any undercover operations are conducted. This can include business inspections by the local regulatory agency, which helps identify the following:

- the number of employees present;
- the owners and managers;
- the massage licenses posted;
- whether the individuals present correspond to the names on the massage licenses;
- work conditions;
- what documents are used to establish identification;
- who holds or controls the service providers identification;
- whether employees also live at the facility;
- unsafe work/living conditions; and
- other miscellaneous code violations.

The workplace should be well documented in writing, with photographs and video, if possible. Particular note should be paid to the degree of control the manager or owner exercises over the employees at the time of the inspection. For example, are the providers purposefully taken away from the inspector? Who is allowed to speak to the inspector? Effort should also be made to speak to the providers to the extent this is possible to ferret out the nature of the employer/employee relationship.

It is important to note the existence of all video cameras within the business and whether the cameras are being used for security purposes or to monitor the employees. Make sure to look for evidence of a written set of rules that service providers are expected to follow. Keep in mind that employee rules are often posted in a different language.

To prove the tax-related charges, investigators should contact the Employment Development Department (EDD) to determine whether the businesses are filing tax returns and paying the

appropriate taxes. Additionally, investigators should contact the Workers' Compensation Insurance Rating Bureau of California (WCIRB) to establish whether the businesses have workers' compensation policies for their employees.

Finally, resources permitting, surveillance should be conducted of the business to note the number of customers. Because a case is being built that is larger than just purchasing sex, undercover officers should document the following:

- When workers arrive to work;
- How workers arrive to work: Do they drive or are they dropped off?;
- The license plates of all cars associated with the business;
- Who opens and closes the business;
- The number of customers who come to the establishment;
- The gender of the customers; and
- The license plate numbers of customers for follow up.

If law enforcement cannot undertake the surveillance previously described, thought should be given to using pole cameras as an alternative means of procuring this information.

Undercover Operations

The purpose of undercover operations is to identify the existence of potential felony crimes that are being committed on the premises. Crimes that may become apparent onsite include sex trafficking, labor trafficking, pimping, and pandering. To prove these counts and develop probable cause, it is necessary to send undercover officers into the suspected brothels to see what activity is occurring. Internet forums provide valuable intelligence in terms of which AMPs to target and which providers to see.

Armed with this information, undercover officers will know what services to ask for, and just as important, what services will *not* be provided and should therefore be avoided as a topic of conversation. The goal should be to gain as much information as possible without putting the undercover officer in a compromising position.

Of equal importance during an undercover operation is determining the nature and extent of an employer/employee

relationship, and identifying the bank accounts associated with the criminal organization. Undercover officers should use credit cards as much as possible during the investigation to later identify bank accounts. Credit card receipts also provide physical evidence.

Further, undercover officers should observe all factors indicating that the service provider victims are employees and not independent contractors. For example, take note of direction from managers, the lack of individual business cards, the lack of individual advertisements for service providers, price lists for massage services in the lobby rather than the massage room, and receipts listing the business rather than the individual service provider. These are just some of the evidentiary items that help prove an individual is an employee rather than an independent contractor.

The extent to which the undercover officer is permitted by his or her respective agency to be touched in an intimate area by the masseuse is one of the greatest challenges for law enforcement in the context of an undercover operation at an AMP. Because many agencies do not allow their officers to be touched, AMP employees are trained to touch before a solicitation occurs. It is clearly a Catch-22 scenario.

The good news is that there is a ruse that has been used successfully on multiple occasions that bypasses this problem: Two undercover officers present themselves to the AMP; one of the officers is present to pay for the massage and the “extras” for his buddy (e.g., the birthday boy, employee of the month, a Christmas bonus). Both the “gate fee” and the “tip” for the extra service are paid for and negotiated by the treating officer. The manager negotiates solely with this officer.

After the negotiations are complete, the manager inevitably procures another person to perform the massage on the other agent. The undercover officers should ask how many masseuses are available and ask to see them if possible. This will help confirm the number of people working that day. This can also be done before the officers arrive by calling the AMP and asking how many people are working that day. The officers should have a cover story that they have previously been to the establishment before and seen a particular provider who is known to them on *Rubmaps.com*

as someone who provides sexual services. If that person is not working, the officer can ask the manager to make sure the AMP can provide a masseuse that can provide the same services as the non-present masseuse.

Once inside the room, the officer who is to receive the sexual service should confirm that all services have been paid for by his “friend.” Thereafter is it only a matter of coming up with a convenient excuse to end the encounter in the massage room, such as an intervening telephone call or text requiring the officer to leave immediately, or a change of heart expressed by the officer indicating that he or she does not want to go through with the sexual act but just wants the massage. The latter approach is preferred because it will cause a reaction by the masseuse who will be confused by the change of heart and may talk about what service was to be provided. Once this scenario has been used successfully, it should be possible to replicate it with a different “friend” or “employee” to establish a pattern of criminal conduct at the target establishment.

The crimes proven in this scenario include:

- Pimping (felony)—the receipt by the manager of the money from the “treating” officer.
- Pandering (felony)—procuring another person to do the act.

Other Investigations Are Also Vital

Working in conjunction with the undercover operation is the financial investigation. All property seized needs to be identified and traced to the criminal activity that is the subject of the eventual complaint or indictment. Such property may include items contained in safe deposit boxes, bank accounts, cash on-hand, computers, phones, cars, and real property.

Once an AMP is suspected of criminal activity, subpoenas can be issued to the websites that the AMPs used to place ads. The returns on these subpoenas will inevitably lead to more subpoenas for Internet providers, credit card companies, and phone companies to identify who placed and paid for the ads.

In addition to gathering information from AMP advertisements, subpoenas will need to be issued for all banking institutions identified with accounts associated with the proceeds from illegal

activity and those used to facilitate criminal organizations. These may or may not be the same accounts at the same banks. Note that it may take several weeks to get compliance from the financial institutions. These records, in turn, must be analyzed to trace the assets for forfeiture and possible money laundering charges.

Executing Arrest and Search Warrants

Warrants need to be executed simultaneously. Failure to do so can result in inadvertently tipping-off one of the parties, causing the entire operation to be compromised. Imagine if your main target—the owner and operator of the massage parlor—learns that some, but not all, of his or her assets have been frozen. Nervous about being caught, the owner may liquidate any remaining assets and flee the country before he or she is caught and all assets are frozen. Therefore, notice of asset forfeiture with the associated banks and the county recorder's office must occur at the same time as the warrants are executed.

Trauma-Informed, Victim-Centered Approach

In addition to gathering evidence and prosecuting the criminals, victim services and interpreters must be provided onsite to assist the service providers (AMP employees) and determine what needs these potential victims might have. Interviewers must take a victim-centered, trauma-informed approach (see Dr. Preston's article on page 258 for more information) to their task of interviewing those who have been working at the brothel. It may turn out that you are not able to prove human trafficking due to a lack of disclosure by the service providers who were working at these establishments, but there is a moral imperative to see that they are recognized as victims and treated appropriately.

Financial Crimes and Forfeiture

Due to the nature of the business, brothels produce large sums of money. The vast majority of transactions are paid for with cash. Cash enables a purchaser of commercial sex to remain relatively anonymous and allows the business to initially avoid detection by the Internal Revenue Service (IRS) and the Franchise Tax Board (FTB). The receipt of large quantities of cash also poses a major

problem for criminal profiteers. In practice, it is difficult to squirrel all of this money away without drawing unwanted attention. Some enterprises simply stuff the money under the mattress; more sophisticated criminal enterprises launder the money through a pattern of “structuring” and “layering” the cash into the banking system.

The two main weapons that prosecutors have in their arsenal to attack this part of the criminal enterprise are Penal Code section 186.10 [money laundering] and Penal Code sections 186–186.8 [“the Little RICO Act”].

Penal Code section 186.10 prohibits the intent to deposit revenues derived from illegal activity, such as pimping and pandering, or the intent to facilitate the illegal business by using requisite sums. The statute requires the deposit be at least \$5,000 or more as a single deposit or an accumulated sum within seven days, or \$25,000 within 30 days.

“The Little Rico Act” prohibits profiting from enumerated crimes when the proceeds are derived from a “pattern of criminal profiteering activity.” An effective way to punish and deter criminal activity of organized crime is through forfeiture of profits acquired and accumulated as a result of criminal activities.

Financial Investigation

With large sums of cash at issue, the first step in the financial investigation of an AMP is to discover bank information and obtain records from the Financial Crimes Enforcement Network (FinCEN) to observe the individuals’ bank activity. These records may reveal large amounts of cash being moved in and out of the suspects’ bank accounts. A further analysis of the bank records will likely be necessary and financial “sealed” search warrants should be obtained.

Many district attorney offices also have forensic auditors or inspectors with backgrounds in financial investigation. When available, use these resources to analyze the bank records. The obtained records should be scanned and date-stamped. Make sure an account analysis is conducted that produces spreadsheets showing the flow of cash.

When the criminal investigation is coupled with the financial investigation, there should be evidence that the illegal enterprise is gaining large sums of wealth through the proceeds of the illegal activity. It should also be apparent that money laundering activity is occurring that may require additional financial record and expert analysis. This aspect of the investigation will require more time and you may decide to obtain more records and have an expert examine them. If so, the investigation could lead you to file an amended complaint.

Forfeiture Investigation

The financial investigation may provide sufficient evidence to move forward on “Little Rico Act” forfeiture. To proceed down this avenue, keep the following questions in mind:

- Have you alleged the requisite crime(s)? Penal Code section 186.2(a) requires predicate crimes such as pimping and pandering, as defined by Penal Code section 266;² money laundering, as defined in section 186.10; as well as conspiracy to commit any crime listed earlier in this article, as defined by Penal Code section 182.
- Will you be able to show a pattern of activity? Penal Code section 186.2(b)(1) requires that the proceeds be from a “pattern of criminal profiteering activity,” i.e., the defendant(s) engaged in at least two incidents of criminal profiteering. In your case, you will have to show that the section 266 activity occurred at least twice and that the activity generated proceeds. Witnesses from the undercover operation will be able to provide the necessary proof that these enterprises generated proceeds from a “pattern of criminal profiteering activity” since the suspects under investigation had committed at least two incidents of criminal profiteering.

You will also need to identify the illegal proceeds. Penal Code section 186.3 clearly defines what assets can be forfeited from a “pattern of criminal profiteering activity”:

- (a) ... upon a conviction of the underlying offense, the assets listed in subdivisions (b) and (c) shall be subject to forfeiture upon proof of the provisions of subdivision (d) of Section 186.5.

(b) Any property interest whether tangible or intangible, acquired through a pattern of criminal profiteering activity.

(c) All proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.

You may find that the accumulation of wealth is narrowly isolated to the proceeds of the illegal activity.

During undercover operations, your officers may observe that the suspects had only one source of income: the illegal massage parlor. The course of conduct must also be examined to determine when the proceeds were acquired to ensure only assets acquired from the time that sufficient evidence exists showing the illegal activity to the present day. Some of the items you may identify include:

- **Bank Accounts:** These may contain sums of money derived from the illegal activity, as evidenced by the bank records and undercover operations (the account records could also show money laundering activity).
- **Cars Owned by the Suspects:** DMV registration records can show if the car was purchased (outright) and if the purchase occurred during the course of the illegal activity.
- **Cash-on-Hand (if found):** Cash can be both evidence of illegal activity and proceeds from the illegal activity. Large amounts of cash are typically stashed in homes, massage parlors, and/or safe deposit boxes.
- **Real Property:** Public records provided by the county recorder's office and transactional history provided by the bank records can show if real property was acquired during the period of the illegal activity and with the use of illegal proceeds. If possible, have property purchases reviewed by forensic auditors.

Filing of Forfeiture Action

A forfeiture petition is required to obtain jurisdiction over seized/frozen assets pending a conviction or determination by a

jury.³ It is also required that a criminal complaint be filed either before or with the forfeiture petition (there is no pre-complaint seizure or freezing of assets, unlike the ability to seize assets pursuant to Health and Safety Code sections 11470 et seq.). The prosecutor assigned to the case should file a forfeiture petition on the same date as filing the criminal complaint. This could be one day prior to executing the arrest and search warrants. Because specified assets may not yet be determined, many of the descriptions on the petition will be general references, such as “cash-on-hand.” You can include a provision in the original petition allowing for amendment of the petition once specified assets are identified. Additional charges can also be added on later.

“Pendente lite” requests are allowed under Penal Code section 186.6 or Code of Civil Procedure section 527. These sections allow prosecutors to file applications for temporary restraining orders (TROs) to seize and freeze identified assets. The TRO application can be prepared and submitted to the judge on the same day that the criminal complaint and forfeiture petition are filed. The application should include declarations in support of the TRO, with the burden of proof being “probable cause.”⁴

The prosecutor can submit declarations from forensic auditors (to freeze accounts and file *lis pendens* on real property), and the lead detective of the undercover operation, who qualifies as an expert on the topic of massage parlor and brothels. Prosecutors should also submit a general TRO and a bank TRO for freezing bank accounts and *lis pendens* over real property. The general TRO should also include a notice to appear for a preliminary injunction hearing to be scheduled within 15 days of the order.⁵

Once the TRO is signed by the judge, the proponent has five days to serve the defendants and any identifiable third parties.⁶ The bank TROs should be served on the banks the same morning of the arrests. Penal Code section 186.4 requires service of the forfeiture petition upon the defendants either personally or through certified mail or publication.⁷ The authors recommend personally serving the defendants the same night of their arrest.

A preliminary injunction hearing should be set on the court calendar and all parties should be served with a notice to appear.⁸ Most likely, all of the defendants will request continuances beyond

the 15 days, probably to better understand what a Code of Civil Procedure section 527 injunction hearing is about. Prosecutors should note that some defendants could eventually stipulate to the preliminary injunction orders pending the outcome of the criminal prosecution. In addition, prosecutors can request that a “receiver” be appointed over real properties to assist the court with maintaining the frozen properties. Draft a “receiver order” that would require a report to the court on a monthly basis and allow for expenditures to come from the defendants’ assets.

Using the TRO process will require much work “up front.” Because this type of forfeiture requires filing a complaint, a forfeiture petition, and TROs, there must be complete coordination between the investigating agency and the district attorney’s office. A coordination meeting is essential to ensure all agencies are operating with the same knowledge and plan. ■

ENDNOTES

1. According to a conversation author Casey Bates had with Bradley Myles, chief executive officer of Polaris, an organization that helps disrupt human trafficking networks.
2. Defense attorneys may challenge the use of this section since the criminal complaint may allege Penal Code section 266i and 266h—lower courts have ruled that section 266 was inclusive and not exclusive—it being a predicate crime within the act. See also the newly amended Penal Code section 186.2(d), which expands the meaning of “organized crime” to include pimping and pandering, as well as money laundering.
3. Pen. Code § 186.4.
4. Pen. Code § 186.6(b).
5. Code Civ. Proc. § 527(d)(1).
6. Code Civ. Proc. § 527(d)(2).
7. Pen. Code § 186.4.
8. Code Civ. Proc. § 527(d)(2).

Combating Human Trafficking Through Big Data

by Wendy L. Patrick

Human trafficking continues to plague society as an insidious and pervasive form of modern day slavery. An internationally recognized epidemic, the sale of adults and children for both sex and labor is one of the most profitable enterprises in the world.¹

A powerful tool to help eradicate human trafficking is big data. “Big data” refers to various sources of unsorted electronic information that is collected and synthesized by complex analytical programs to reveal trends and other valuable statistics for decision makers. For example, big data has been used by police to help predict where and what times crimes are likely to occur.² Or, in the case of firefighting, getting the jump on potential hot spots before a blaze ignites.³

Big data’s usefulness doesn’t end there, however. Modern data-tracking efforts help investigators and law enforcement agencies dig deep into the darkest corners of the Internet to provide information critical to human trafficking indictments.⁴

Using big data to track human trafficking activity also takes the pressure off of law enforcement agencies and

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prosecutors to rely on the testimony of victims, who may not always be cooperative.

Big Data and the Hunt for Illicit Transactions Online

In “Can Big Data Help Fight Human Trafficking?” attorney Casey C. Sullivan discusses how in contemporary times, financial data is being used to detect criminal activity.⁵ Sullivan points out that mining financial data is a good way to spot signs of human trafficking that may be important in criminal prosecutions.

In an effort to capitalize on technology’s ability to “follow the money,” the New York County District Attorney’s Office, in conjunction with the Thomson Reuters Foundation, issued a white paper in 2013 that explains the process of tracing financial data to suspected trafficking activity.⁶ Examples of questionable financial transactions outlined in the paper include:

recurrent business transactions taking place outside the time of known business operations, cross-border transfers of funds that are inconsistent with the stated business purpose of the financial institution’s customer, and a high number of individual accounts opened and closed simultaneously.⁷

Digital breadcrumbs leading investigators to potentially illicit online transactions by traffickers is a promising avenue of opportunity in the global fight against human trafficking. In addition, this type of virtual money trail provides a practical method of both investigating and prosecuting crimes of human trafficking.

Pimps often leave digital trails leading back to their activities, according to Assistant United States Attorney Alessandra P. Serano. When contacted for this article, Serano noted that financial information and other data is often recoverable and can be critical to proving a case. For example, *Backpage.com* is a classified advertising website that allows users to place classified ads in a number of different categories, including an adult section. The site stores important user information such as email address, IP address, home address, phone number, and credit card data.

Once granted access to the information—either with the site’s permission or through a search warrant—investigators can then gather additional information from these leads.

Serano had success with this approach in the past. In one instance, the name on a *Backpage.com* account was the house of a trafficker’s mother. This information showed a connection between the ad and the trafficker, which can sometimes provide a nexus for law enforcement to get a search warrant. Gaining access to an individual’s email account via a search warrant can lead to a gold mine of information, as the account may contain dominion and control information for the trafficker. It may also lead to the location of where a person logs in to the account through the IP address. Many times, it is a hotel with free Wi-Fi, or a coffee shop near a hotel.

Credit card data used to post the ad can also be helpful. Most traffickers will hold on to the money (cash or credit cards) so when he or she is arrested, the credit card(s) found may have been the ones used to post multiple ads. Once investigators obtain a subpoena for the user’s credit card account records, they may be led to other trafficking ads, hotels where both the pimps and traffickers stayed, or places they visited, such as restaurants or nails salons.

Cell site data is another source of data that can help prove a trafficking case. How often were the trafficker and the victim in and around the same location (usually hotels) at the same time? Cell site data can show the location of where a particular phone is located—generally within 50 feet—by triangulating cell towers. Investigators can also identify a trafficker’s smartphone through police field interviews, police contacts, or social media platforms such as Facebook.

Finally, if a hotel is located during the investigation, Serano encouraged prosecutors to keep tabs on hotel data. For example, many hotels will keep vehicle information (e.g., license plate numbers) associated with their guests. If the trafficker did not rent the room, he or she may have rented the car associated with that room. Most hotels also keep video surveillance, which can show the trafficker checking into the hotel with his or her victim(s).

Keep Following the Money

A trafficker's financial records can also help verify victim(s) and lead to additional charges such as money laundering. Mary Ellen Barrett, who prosecutes human trafficking cases for the San Diego County District Attorney's Office, said that financial records often help identify the trafficker, victims, or witnesses. She explained that several companies offer family-plan-type accounts that permit the transfer of money between individuals. The victim puts the money into the account and then the trafficker takes it out, as often and as frequently as he or she wants. These accounts also allow the trafficker to send messages to the victims such as "good job" or "you are allowed to proceed." This contact and control can occur while the trafficker is miles or states away. Without looking into the financial records, police would not know the identity of the trafficker.

A credit card or PayPal account can also facilitate hotel or travel payment, according to Barrett. She said that this is another way the trafficker can distance himself/herself from the crime and hide the financial benefits of the crime. Using large amounts of cash to pay for hotel rooms or transportation fares attracts attention; using a credit card does not. Savvy traffickers also use Bitcoin (see "Understanding the 'Nonce-Sense' of Bitcoin: *A Guide for Prosecutors*" in Vol. 38, No. 1 *Prosecutor's Brief* for more on digital currency), which adds a layer of anonymity when used at places such as *Backpage.com*. This also enables the trafficker to distance themselves from the prostitution scene.



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Hold the Phone: Digital Gold Mining for Data

Another source of helpful data is stored on the smartphone of the trafficker or victim. Information such as emails, contacts, text messages, and call logs are rich in evidentiary value, Serano said.

She pointed out that traffickers will often text or message (using text applications such as WhatsApp, Viber, or Snapchat) their victims on a routine basis throughout the day. Messages can include instructions on how much to charge a sex customer or the location of where the trafficker is waiting or checking in on the victims to ensure they are working. Contact data can provide prosecutors with the names of potential “Johns” or other victims that the trafficker may also be contacting.

Regarding movement of the trafficker and victims, Serano noted that smartphones can also contain GPS data revealing where the possessor of the phone traveled. Photos can contain Exchangeable Image File (EXIF) data indicating where and when the photo was taken. This may prove helpful in formulating timelines or places traveled. Serano further explained that phones with Internet access can provide search history, which may reveal hotel searches, emergency room locations, or other relevant information that can help prove your case.

As seen from the legal showdown earlier this year between Apple Inc., and the FBI, however, modern smartphones have passcodes and only allow 10 attempts before the data is permanently locked or wiped from existence. Newer Apple phones are encrypted, meaning that without the passcode, the data is

What is EXIF?

EXIF is a format that is a standard for storing interchange information in digital photography image files using JPEG compression. Almost all new digital cameras use the EXIF annotation, storing information on the image such as shutter speed, exposure compensation, F number, what metering system was used, if a flash was used, ISO number, date and time the image was taken, whitebalance, auxiliary lenses that were used, and resolution. Some images may even store GPS information.

Source: Webopedia.com—<http://www.webopedia.com/TERM/E/EXIF.html>

permanently inaccessible. Serano added that while manufacturers had “backdoor” access to a device—with the appropriate legal process such as a court order or search warrant—in the past, recent litigation seems to indicate a new trend of technology manufacturers not willing to assist law enforcement with accessing data.⁸

Corroborating the importance of technology in proving human trafficking cases, Barrett noted that computers or cellphones are typically used by traffickers in every step of their relationship with a victim. She said that the trafficker starts by making contact with his victim online, gaining his or her trust, posting pictures of lots of cash and luxury items, taking pictures of the victim, posting ads on relevant websites (*Backpage.com* or *Craigslist.org*, which is unfortunately making a comeback), keeping track or threatening the victim by text messages, or booking travel online.

Be Wary of Victim Testimony

Victims are typically not waiting to be rescued by police, Serano said. She frequently encounters situations where victims are reported missing by their families, but are found in hotel rooms by police. But human trafficking victims often do not perceive themselves as, or act like, “victims”—many can be uncooperative, combative, and violent.

Many trafficking victims have been seduced into relationships with traffickers who initially posed as adoring suitors, and have stayed in their situation out of love for their abuser. Accordingly, some relationships between human traffickers and their victims often masquerade as consensual relationships of love and affection. Some of these young men or women fail to self-identify as victims and remain willfully blind to the deception, manipulation, and coercion that pervades the relationship. This often traumatic bond of love and loyalty creates significant issues of cooperation with law enforcement and credibility on the witness stand—if the victim even agrees to testify. As a result, calling the victim to testify at trial against his or her trafficker is usually not an option for prosecutors.

We live in a world where law enforcement is able to track criminals both physically and digitally. When it comes to detecting human trafficking activity, tracking digital footprints is often

easier than following real ones. Prosecutors and law enforcement personnel are encouraged to take advantage of the benefits big data can provide investigations, as we continue the fight against modern day slavery and strive to make our communities safer. ■

ENDNOTES

1. Although statistics exist, further research is needed to assign a clear monetary value to human trafficking profitability.
2. Brian Heaton, "Behavioral Data and the Future of Predictive Policing," (Nov. 2, 2012) *Government Technology* <<http://www.govtech.com/Behavioral-Data-and-the-Future-of-Predictive-Policing.html>> (accessed Mar. 9, 2016).
3. Brian Heaton, "New York City Fights Fire with Data," (May 15, 2015) *Government Technology* <<http://www.govtech.com/public-safety/New-York-City-Fights-Fire-with-Data.html>> (accessed Mar. 9, 2016).
4. The New York County District Attorney's Office, "Manhattan District Attorney's Office Applies Innovative Technology to Scan the "Dark Web" in the Fight Against Human Trafficking" [press release] (Feb. 9, 2015) <<http://manhattanda.org/press-release/manhattan-district-attorney%E2%80%99s-office-applies-innovative-technology-scan-%E2%80%9Cdark-web%E2%80%9D-fig>> (accessed Mar. 9, 2016).
5. Casey C. Sullivan, Esq., "Can Big Data Help Fight Human Trafficking?" (Jan. 26, 2016) <<http://blogs.findlaw.com/technologist/2016/01/can-big-data-help-fight-human-trafficking.html>> (accessed Mar. 9, 2016).
6. Thomas Reuters Foundation, "New paper issued on using financial data to fight human trafficking," (Jan. 10, 2014) <<http://news.trust.org//item/20140110083052-ujoy8/>> (accessed Mar. 9, 2016).
7. *Id.*
8. Serano is referring to Apple Inc., refusing to follow a court order to unlock a terrorist's cellphone, taking the position that they should not be required to assist the Government at the expense of their customers' privacy interests. Apple believes that by unlocking a phone, the company will make their customers susceptible to unwanted cyberattacks on their products.

Tax Recovery Task Force Capitalizing on Collaborative Enforcement

by Vikram Mandla and Randy Silva

The Tax Recovery and Criminal Enforcement (TRaCE) Task Force was authorized by Assembly Bill 576 in 2014.¹ Consisting of investigators and special agents from state and federal agencies, the group's goal is straightforward: work together to investigate, prosecute, and recover unreported tax revenue lost to the underground economy.

Current members of the Task Force include the California Board of Equalization (BOE), the California Department of Justice (DOJ), the Department of Alcoholic Beverage Control (ABC), the Employment Development Department (EDD), the Franchise Tax Board (FTB), the Federal Bureau of Investigation (FBI), Homeland Security Investigations, and the Internal Revenue Service (IRS). These agencies have established memorandums of understanding (MOUs), enabling them to share investigative intelligence, data, documents, leads, complaints, and other information to collectively combat organized elements of the underground economy.

To date, over 60 organizations have agreed to partner with TRaCE, including

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the International Anti-Counterfeit Coalition, the California Labor Federation, the California Sheriff's Association, the California Organized Retail Crimes Association, and the California District Attorneys Association. (For a complete listing of TRaCE members, visit <https://www.boe.ca.gov/trace/>.)² With investigative oversight by the California Department of Justice (DOJ) and day-to-day operational oversight by DOJ task force commanders, TRaCE pursues entities engaged in manufacturing, importing, distributing, and selling pirated intellectual property and other economic crimes that result in evading business, payroll, and income taxes.

Governed by an executive board comprised of members from the partner agencies, TRaCE is headquartered in Sacramento. Given the high volume of illegal economic activities occurring in Southern California, a regional task force was established in Los Angeles, in March 2015. With this collaborative enforcement gaining momentum, TRaCE anticipates establishing a presence in San Diego and the greater Bay Area, pending available resources.

TRaCE pursues entities engaged in manufacturing, importing, distributing, and selling pirated intellectual property and other economic crimes that result in evading business, payroll, and income taxes.

Defining the Problem

California loses an estimated \$8.5 billion annually in corporate, sales, use, and personal income taxes due to smugglers, counterfeiters, and illegal operators known to support organized gang and terrorist activities. Operators in the underground economy deliberately fail to obtain proper permits or licenses, pay employees less than minimum wage, use victims of human trafficking as cheap or slave labor, sell counterfeit products, and either underreport or do not report their business activities in order to evade income and business taxes. Counterfeit and stolen products, once the domain of “fences” (sellers of stolen goods) and street gangs, have entered legitimate distribution networks and are being sold openly via the Internet or in retail outlets, often without invoices and at discounted prices for cash.

The underground economy affects business owners and consumers alike. It is important, therefore, that TRaCE engages

both the public at large and California's industries in closing down these illegal operations. TRaCE makes a concerted effort to meet with and provide the public, industry, and local law enforcement agencies with information about the pervasive presence of the underground economy in California and the enforcement role of the newly established Task Force. In addition, the Task Force discusses how stakeholders can help deter these illegal activities and recoup revenues that help provide them with vital state and local services.

The TRaCE Task Force enhances the state's ability and overall effectiveness in combating the underground economy. Through the collaborative efforts of TRaCE members, the state expects to see:

- increased compliance from the business community;
- revenue streams return to legitimate business enterprise;
- revitalized interest in California's small business entrepreneurship;
- increased job opportunities and assured earnest wages and benefits for workers; and
- additional revenue for the state's public programs and services.

Early Successes

Since the launch of TRaCE's online complaint system in December 2014, 239 complaints have been received. All complaints are addressed; those not meeting the multi-agency felony criteria are referred to other agencies with the appropriate enforcement jurisdiction.

TRaCE has successfully prosecuted a number of cross-program cases, capitalizing on the talents, information, skills, and abilities that each agency and team member brings to the Task Force. These cases crossed a wide range of criminal charges including:

- **Tax evasion**—sales, excise (tobacco taxes), employment, and income tax fraud.
- **Human trafficking**—pandering, pimping, conspiracy, bribery, and tax fraud.
- **Counterfeiting**—piracy, counterfeiting, trafficking in counterfeit labels, criminal copyright infringement, tax evasion, conspiracy, and aggravated white collar crime enhancement.

One of the factors that makes TRaCE unique is that investigations crossing enforcement agencies are brought together early in the investigative process, rather than after a single agency case has been filed or brought to the attention of a prosecutor. Search warrants are often collaboratively served using agents from each of the TRaCE agencies involved in the investigation. This improves evidence identification and collection, as each agency brings years of specialized investigative and enforcement expertise. As the agencies work together on investigations, they are building a cross-trained cadre of networked investigators and providing each team member with insights to new methods and tools to improve investigative processes, and identify and combat emerging fraud trends.

The TRaCE Task Force's unique ability to share specific investigative

TRaCE's Objectives and Tasks

In carrying out its mission, TRaCE is:

- Creating a responsible investigative and prosecutorial body within state government in partnership with private industry, the business community, and labor organizations to combat organized underground economic activity.
- Encouraging and facilitating collaboration among state agencies, labor organizations, local governments, and business groups to promote a unified front in reducing the underground economy.
- Coordinating and collaborating with federal partners to leverage federal enforcement efforts addressing the underground economy.
- Working with district attorney offices and the DOJ to reduce the time, workload, and prosecutorial costs associated with investigating and prosecuting underground economy activities that impact multiple agencies—prosecution of cross-program violations as one case not only improves efficiencies, but captures the severity of crimes and imposes the maximum penalties permitted by law.
- Referring cases to DOJ prosecutors, who are also cross-designated as Special Assistant United States Attorneys, thereby allowing for simultaneous or successive prosecutions in state and federal court.

information related to criminal activities and thoroughly vet an investigation across multiple state and/or federal programs has yielded considerable results during the past two years. Consider the following two examples:

- A BOE investigation revealed that a retail clothier with multiple locations evaded nearly \$1.5 million in sales tax. Sharing information specific to this case with other TRaCE members revealed that the retail clothier was also engaged in income and payroll tax evasion, along with insurance fraud. The initial estimated \$1.5 million sales tax evasion turned out to be nearly \$7 million in tax evasion and insurance fraud. Through collaboration, a single agency's investigation turned into a multi-agency case involving the BOE, the EDD, the FTB, and the Department of Insurance. Had the investigation been limited to the BOE's investigative findings, the perpetrator(s) would have easily evaded \$5.5 million in other taxes and fees.
- An Oregon man's five-year tax fraud scheme defrauded California out of approximately \$250,000. A joint investigation by TRaCE members, in this case, the BOE, and the Department of Motor Vehicles (DMV) led to the arrest and conviction of the defendant on one felony count of tax evasion and another of perjury. From 2009 to 2014, the defendant operated a business headquartered in Oregon that sold large rigs used for towing disabled "big rig" trucks to California buyers. Each rig sold for more than \$200,000. The five-year scheme involved charging California customers the applicable sales tax (usually about 8 percent) on each new vehicle, then registering the vehicle for the customer after altering paperwork on each transaction by an average of \$20,000.

The defendant eagerly pocketed the extra money while paying reduced registration fees to the DMV. Investigators proved that on more than 140 vehicle transactions the defendant falsely declared to the DMV "under penalty of perjury" that the altered sales price was accurate. The defendant was sentenced to two years in jail and ordered to pay \$42,000 to the DMV as restitution for unpaid registration fees and \$189,000 to the BOE for unpaid sales taxes.

It should be noted that not all TRaCE cases originate or are prosecuted by participating TRaCE agencies. TRaCE also receives

cases from local law enforcement jurisdictions and deputy district and/or city attorneys, which help enhance existing investigations through the identification and evidentiary support of additional applicable charges, including taxes and fees.

Working with Prosecutors Is Vital

TRaCE gives district attorney's offices an opportunity to prosecute egregious or complex cases with a financial nexus that has been developed by a multi-faceted investigative collaborative body. TRaCE brings a cross-section of investigative talent and tools together to build cases that present the totality of the crimes being committed. Further, TRaCE cases avail from the opportunity to be prosecuted in the most appropriate venue—by a district attorney's office, the DOJ, or the United States Attorney's Office.

Given the depth of the underground economy and the scope of investigative resources, DOJ prosecutors assigned to the TRaCE Task Force cannot handle all of these cases. This has and will result in local district attorney's offices being presented with cases that are ready to prosecute and/or to prosecute jointly with DOJ prosecutors. Having had the opportunity to work with TRaCE, the authors can personally attest to the undeniable benefits of presenting evidence of multiple felonies spanning tax, financial, and/or Penal Code violations. Collaborative investigations and prosecution—it is a win-win for the judicial system and California. ■

ENDNOTES

1. <http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0551-0600/ab_576_bill_20131007_chaptered.html> (accessed Mar. 14, 2016).
2. <<http://www.boe.ca.gov/trace>> (accessed Mar. 14, 2016). The TRaCE Task Force website was developed for easy access and transparency. It contains information concerning the underground economy, provides links to related resources, lists community partners, and highlights some of TRaCE's recent enforcement activities and successes.

Conviction Review Units: *A Modern Model for Seeking Justice After Trial*

by *Lucy Salcido Carter and Bryn Kirvin*

Despite the best efforts of legal professionals, mistakes happen in the investigation and prosecution of criminal cases, at times leading to tragic results. While no upstanding prosecutor wants the wrong person convicted, exonerations prove that to err is human. As a result, conviction review units (CRUs) are emerging in prosecutor offices across the country as a way to address wrongful convictions.

CRUs provide opportunities to step outside the adversarial prosecutor-defense attorney dynamic to look at potentially problematic convictions with fresh eyes. CRUs can help remedy mistakes, confirm proper convictions, and assist with implementing system improvements that can prevent error—all actions that support the prosecutor's and the public's shared goal of seeking justice.

The majority of CRUs were established in just the last few years, all with varying structures, staffing, and policies. Consensus on best practices have not yet emerged in this developing area. Nonetheless, CRUs offer prosecutors an opportunity to proactively fulfill their

Bryn Kirvin, a San Diego County deputy district attorney, and Lucy Salcido Carter, policy director for the Northern California Innocence Project, co-wrote this article to share current information about conviction review units—programs they both believe have great potential. They also wanted to test a collaborative approach to reviewing and presenting information; an approach that reflects both perspectives, finds common ground, and models how collaboration can happen even with differing views. This article is a product of that process.

duties to protect the innocent before, during, and well after trial; and to partner with other criminal justice stakeholders to correct injustices that may have occurred during a case.

CRUs also provide prosecutors with a more formalized and consistent mechanism for reviewing convictions in question, similar to how other industries study the root cause of errors in their complex, high-risk systems in order to rectify and prevent errors. CRUs have the potential to bridge the gap between prosecutors and innocence projects so that these stakeholders can move forward productively.

Introduction to Conviction Review Units

Prosecutors' efforts to obtain post-conviction justice have taken various forms over the years. Although many prosecutor offices engage in informal post-conviction reviews, the first formalized conviction review program was established in 2004, in Santa Clara County, California. Since that time, more than 25 other jurisdictions nationwide have joined the ranks, including four additional counties in California: Los Angeles, San Diego, Ventura, and Yolo. Twelve new CRUs have been announced around the country since the start of 2014, roughly doubling the number nationwide.¹ California has the highest number of CRUs of any state in the country.

CRUs typically operate through a county prosecutor's office and conduct extra-judicial reviews of the facts of a criminal case that resulted in a conviction that is being questioned because of a "claim of innocence."² Structures, policies, procedures, and parameters vary greatly between each CRU. These programs are also called "conviction integrity units" or CIUs. (The term "CRU" is used here

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

—Martin Luther King, Jr.
Letter from a Birmingham, Ala. jail,
April 16, 1963

for consistency.) In addition, although most CRUs are county-based and operate within a prosecutor's office, North Carolina has an independent statewide program called the North Carolina Innocence Inquiry Commission, which is mandated and funded by the North Carolina Legislature.

The purpose or motivation for establishing one of these programs differs from jurisdiction to jurisdiction. For example, Dallas County (Texas) and Kings County (New York) began their programs to proactively review cases involving specific government officials whose conduct in cases may have resulted in wrongful convictions. Other jurisdictions have had informal procedures in place, but decided to formalize and clarify post-conviction procedures and policies through a designated program. These programs may only respond to external requests for post-conviction review, unlike the proactive approach taken by Dallas County and Kings County.

As far as the authors know, CRUs have not been formally evaluated. Several reports have been published describing existing programs, however, which analyze the opportunities and challenges CRUs offer and make recommendations for good practices. For example, in 2012, the Center for the Administration of Criminal Law published "Establishing Conviction Integrity Programs in Prosecutors' Offices," which highlighted the important role prosecutors can play in ensuring that convictions are "of the guilty and not of the innocent."³ The Quattrone Center for the Fair Administration of Justice published "Conviction Review Units: A National Perspective" (the Quattrone Report), in December 2015. This comprehensive report chronicled the findings from a survey of CRUs and from interviews with CRU leaders.⁴ The New York-based Innocence Project suggests recommendations for promising practices in implementing CRUs on its website.⁵

In addition to these qualitative reports, several recent and unprecedented national events put the spotlight on post-conviction review, providing a beacon for all stakeholders in the criminal justice system.⁶ At these events, prosecutors, judges, defense attorneys, innocence project attorneys, academics, and exonerees met to share information about existing programs and to explore opportunities to improve post-conviction review. These meetings

opened the door for greater collaboration among prosecutors' offices doing CRU work and innocence organizations, paving the way for more opportunities in the future.

The Opportunity of Conviction Review Units

Sentencing reform measures, police shootings, prosecutorial misconduct, and wrongful convictions have put the criminal justice system under a microscope in California and nationwide. CRUs are an opportunity to demonstrate that prosecutors are committed to doing the right thing, even when mistakes are uncovered and public scrutiny is heightened. CRUs should not be dismissed as “window dressing” to placate public distrust, but rather as a rich opportunity to rectify and prevent wrongful convictions. Whether as a way to reinvent, formalize, or expand what some counties already do, a CRU is a powerful tool for prosecutors to use to fulfill their duty to protect the innocent before, during, and *after* trial.

Berger v. United States aptly describes the role of the prosecutor, highlighting the “twofold aim of which that guilt shall not escape or innocence suffer.”⁷ In protecting the innocent, a prosecutor’s lens is widely focused on targets, suspects, defendants, and of course, victims—sometimes to the exclusion of the convicted. By and large, the convicted are tried fairly, having the presumption of innocence and the right to remain silent, to counsel, to present a defense, and to call and cross-examine witnesses. The convicted also have appeals and writs at their disposal.

There are the rare occasions when information about a closed case crosses a prosecutor’s desk, leading to exoneration in its purest form. Indeed, prosecutors are charged with disclosing



Conviction Review Seminar

On Monday, June 27, at The Westgate Hotel in San Diego, CDAА is offering a one-day interactive training that will provide comprehensive information to any county interested in starting

a conviction review program as well as those counties already doing work in this area.

For more information and to register, visit <https://registrations.cdaa.org>.



information that casts doubt on a conviction to ensure the innocent do not suffer, although courts have not uniformly described the source of that duty. Whether bound by purely ethical precepts⁸ or an extension of the *Brady* rule,⁹ prosecutors have an affirmative duty under California and federal law to disclose exculpatory material after trial¹⁰ and are expected to disclose it promptly and fully.¹¹

One recent shining example of a prosecutor protecting the innocent post-conviction was the swift and decisive action of Lake County District Attorney Don Anderson and his staff in the case of Luther Ed Jones Jr.¹² Working closely with the court and defense counsel, Anderson obtained Jones' release from prison on February 16, 2016, within two weeks of a call to the district attorney's victim-witness office by the victim, who had come to regret the lie she had told at trial. Regrettably, Jones had served 18 years for child sexual abuse he did not commit.

But all too often, cases such as Jones' are left to chance. Why wait for these cases to present themselves? What if instead, the

We cannot change the human condition, but we can change the conditions under which humans work.

—James Reason

public could contact someone specific at a district attorney's office, who would give them direct access to independent conviction review outside of the appellate process?

CRUs give prosecutors a new avenue to do the work of protecting the innocent, even well after conviction, turning the table on popular cynicism fed by stories of prosecutorial misconduct. Fact-based, extra-judicial, post-conviction review demonstrates in a tangible way the integrity and diligence with which prosecutors seek justice at all stages of a case, including long after conviction.

Understandably, prosecutors spend the majority of their time on the front-end working with law enforcement on investigation, reviewing cases for issuance, and preparing cases for trial—because they carry the burden of proof. Trial-related system improvements are predominantly made at the front-end, with continuing legal education and better investigative and

presentation tools. But just as in other industries involving complex processes, human error is built into the process of criminal justice. Although it is often said that our system is not perfect but it is the best in the world, there should be no acceptable margin of error, however small. Nevertheless, prosecutors tend to focus their post-conviction analysis on trial reports and on the appellate review process. If a case is lost, the analysis is focused primarily on whether it should be re-tried.

Other industries involving similar multi-layered processes engage in root cause analysis (RCA), a method of problem solving used to identify causes of error rather than to simply examine the symptoms and lay blame.¹³ RCA supports the idea that one failure is too many, even if identifying the problem is like finding a needle in a haystack. RCA requires an objective, fact-based dissection of events. Whether in aviation, manufacturing, engineering, or medicine, the error is studied and used as an opportunity to learn. RCA can ensure future success, mitigate error, and boost accountability and public confidence in any industry.

The National Institute of Justice (NIJ) established the Sentinel Events Initiative in 2014 to promote sentinel event reviews (SERs) of errors in the criminal justice system. Borrowed from the healthcare industry, the term “sentinel event” is defined as an unanticipated event that, in a healthcare setting, results in a death or serious injury not related to the natural course of the patient’s illness. Sentinel events are identified and reviewed to help develop preventive measures. The theory is that when a bad outcome occurs in a complex social system, it is rarely the result of just one person’s mistake. Instead, a group of smaller errors coalesce to create an underlying weakness in the system.¹⁴ The NIJ has tested the SER model in Milwaukee, Philadelphia, and Baltimore criminal justice communities.¹⁵ The NIJ white paper, *Mending Justice: Sentinel Event Reviews*, explores the potential to learn from criminal justice system errors, including wrongful convictions, by applying an SER model.¹⁶

The only thing we have
to fear is fear itself.

—Franklin D. Roosevelt
First Inaugural Address
March 4, 1933

Although RCA and SER differ from CRUs, the three models do involve back-end analysis and acknowledge that the criminal justice system is a high-stakes, human endeavor requiring constant improvement. All three models promote forward-thinking accountability for errors that occur.¹⁷ With CRUs, discovery of wrongful convictions is no longer left to chance. Instead, CRUs can rectify system errors, while continuing to protect the innocent after trial and into the future.

Currently, prosecutors leave some important post-conviction work to innocence projects, perhaps because of a belief that the appellate process will take care of most perceived injustices. Prosecutors also strongly believe in the integrity of their work and take pride in their service to justice. So why would a prosecutor's office need a program to review conviction integrity when the conviction is the very result of the integrity with which the prosecutor argued the case? It may be that the very pride prosecutors take in their work obscures the enormous opportunity that post-conviction review presents.

The narrative that prosecutorial misconduct is an “epidemic” has also potentially alienated prosecutors from the idea of collaboration with innocence projects.¹⁸ In addition, it also has perpetuated misunderstanding about the challenging work prosecutors undertake in prosecuting a case. In the face of that landscape, prosecutors are still well served by getting more engaged in discovering, acknowledging, and rectifying errors that do happen. Prosecutors are professionals—they can agree to disagree with other stakeholders, yet still move forward demonstrating their ability to adapt, advance, and find new ways to serve the public.

In the middle
of difficulty lies
opportunity.

—Albert Einstein

Conviction Review Unit Implementation

Jurisdictions that want to set up a CRU have a number of decisions to make regarding program structure, policies, procedures, and parameters. A CRU's effectiveness, and how it is perceived internally and externally, will depend on the program's independence and resources, and the overall position within your

office's structure. For example, because prosecutors reviewing the work of other prosecutors can be inherently challenging, the presence of an external review mechanism may increase public faith in a CRU's decisions.

Transparent policies and procedures can also increase public faith in program decisions. Some programs publicly communicate their case selection, investigation, and review policies and procedures; other programs do not. The range of cases CRUs accept for investigation and review also varies from program to program. On some of these implementation issues, national reports offer recommendations; on others, they do not. Decisions about implementation should be based on the goals of the program and the context in which the program will operate.

Below are some factors to consider when considering setting up a CRU.

Leadership Support

Leadership support is vital to the success of a CRU. Visible leadership support sends a clear message to prosecutors in the office, and to external partners, that the work of the CRU is valued and important. The work of the CRU may be met with suspicion at first, but clear communication from leadership about the purpose of the CRU and its alignment with prosecutors' goals can help dispel those suspicions.

The location of the CRU in the structure of the prosecutor's office can also indicate the value that leadership places on the work. Some CRUs are their own division, with the director of the division reporting directly to the elected district attorney. This arrangement shows that the elected district attorney is willing to devote time directly to CRU efforts and is prioritizing those efforts. The direct reporting arrangement shows possible naysayers that the elected district attorney is truly committed to the work. This arrangement also gives the CRU flexibility to conduct reviews outside the other existing structures and procedures in the office.

The Quattrone Report recommends that CRUs not be located in the appellate division of the prosecutor's office.¹⁹ Locating the CRU in the appellate division might seem practical and efficient since similar work is already happening in that division. However, the

appellate division can raise certain procedural bars, and operates under standards of review that do not apply to the CRU. Appellate attorneys work in an adversarial context, whereas CRUs work outside that context and must have the flexibility and independence to conduct a neutral review.

There are also potential disadvantages to placing the CRU outside the appellate division. Post-conviction cases come through that division, so a case flow process already exists. Placing the CRU outside the appellate division also places the unit outside the existing case screening and review process. New procedures must be put in place to ensure that CRU staff can assess incoming cases to determine upfront which cases are appropriate for their review.

Staffing and Resources

Proper post-conviction review is a time-consuming process that can include extensive investigation into the original facts of the case, often many years after the crime and conviction have occurred. Designated CRU investigators facilitate an expedient review process. Designated attorneys who do CRU work on a full-time basis highlight the leadership's commitment to this work. By devoting their attention solely to CRU matters, these attorneys can develop the unique skills and collaborative partnerships that support success.

The Kings County (New York) District Attorney's Office, for example, employs nine full-time attorneys, three investigators, and two paralegals in its CRU.²⁰ Los Angeles County's CRU has an annual budget of nearly \$1 million.²¹ On the other hand, smaller jurisdictions may have very limited budgets for post-conviction review and may assign only one or two prosecutors—who may also have other responsibilities—to conduct post-conviction review.

Not all jurisdictions with CRUs dedicate extensive funds to these programs. Lake County, Illinois, for example, uses in-house prosecutors and investigators, and a volunteer panel of external reviewers. The volunteer reviewers, who are active or retired attorneys, assess the internal review by the prosecutors and make an independent recommendation regarding each case. Smaller prosecutors' offices can develop creative approaches that share

resources across jurisdictions and use community-based resources when available.

As with any allocation of resources, dedicated funds for a CRU will be part of a prioritization of competing goals. CRUs can draw attention to criminal justice system mistakes, but they also show a strong commitment to justice and can provide a mechanism for preventing costly mistakes in the future.

Case-Screening Criteria

Jurisdictions with CRUs define case-screening parameters differently depending on the CRU's goals and other factors, such as capacity. Some jurisdictions limit the cases they will consider to claims of actual innocence; other jurisdictions welcome due process claims of innocence, such as ineffective assistance of counsel or *Brady* violations, and actual innocence claims.

In California, because the standard for showing new evidence of actual innocence is so high (“points unerringly to innocence”),²² limiting CRU review to only those claims will result in very few cases leading to exoneration and will omit the claims most often used to address wrongful conviction in the state. Broader case-screening parameters increase the likelihood of finding and remedying mistakes that may have resulted in the wrong person being convicted and imprisoned.

Review Standards and Procedures

The CRU review process has four stages: intake and screening, investigation, recommendation, and decision. Cases fall away at each point in the process if they do not meet the standards of proof established by the CRU. To decide whether to continue with the investigation of a case, all CRUs consider whether there are sufficient facts to support innocence. However, CRUs differ in the standards of proof required at each point in the process.

Few CRUs are transparent about their standards for reviewing cases. On the one hand, CRUs need the flexibility to consider each case independently and to reach a conclusion that supports justice, regardless of protocol. In addition, CRUs may hesitate to make their policies known for fear that they will be held legally liable if they do not follow those policies to a tee. On the other hand, transparency

regarding review standards can increase the public's faith in the CRU's work and give petitioners more information to choose the best way to have their claim reviewed. Because CRU review of cases is extra-judicial and typically operates within the prosecutor's office, increased transparency can help address concerns about CRUs serving merely as a mechanism for confirming convictions.

One area of controversy centers on the original trial prosecutor's role in post-conviction review of the case. The Innocence Project recommends that prosecutors who originally tried the case should not re-investigate themselves.²³ The Quattrone Report states that all surveyed CRUs agree that the original prosecutor on the case should not lead the CRU investigation and review.²⁴ The CRU process is not meant to point fingers at individual prosecutors or to assign blame, unless there is the rare occurrence of intentionally unlawful behavior. But CRUs may decide not to involve the original prosecutor in the post-conviction review because his or her feelings about the case may affect neutrality, or purely because it is very difficult for anyone to view one's own completed work objectively.

However, there may still be a role in the post-conviction review process for the original prosecutor. That prosecutor knows the facts of the case and understands the context in which the facts unfolded and the case was tried. Clearly stated CRU policies that indicate the neutrality of the review process may ease the discomfort associated with reviewing convictions and may enable the original prosecutor to provide some input as the conviction is being reviewed.

Regardless of the review process, the elected district attorney typically makes the final decision regarding the case, based on the recommendation of CRU staff.

Roles of External Players

The roles of external partners vary from CRU to CRU. Some CRUs include dual review procedures, with external reviewers typically assessing the CRU's recommendation on a case. External players typically are attorneys who serve as reviewers on a volunteer basis. Part of the appeal of the external review model is that external reviewers are not employees of the prosecutor's office, and therefore can act more independently than internal

reviewers. An external review mechanism can address the concern of having prosecutors review the work of their colleagues and can help ensure neutrality.

The Lake County (Illinois) CRU has a six-member, volunteer, external review panel that includes a trial lawyer, two retired judges (one a former prosecutor), a private attorney (and former prosecutor), a civil and federal litigator, and a former Cook County (Illinois) prosecutor. The panelists are sworn in as special assistants to the state's attorney, but are not on the payroll.²⁵

Kings County (New York) has an external review panel of three attorneys who do an independent assessment of the CRU's recommendation of how to proceed with a conviction. The North Carolina Innocence Inquiry Commission has a court-appointed, eight-member review board—including a prosecutor, sheriff, judge, defense attorney, and victim advocate—that makes case recommendations to a three-judge panel with ultimate decision-making power.²⁶

Not all CRUs use external reviewers in the review process, however. CRUs that follow an investigative process similar to that of any other case investigation typically do not use external reviewers. The Innocence Project recommends that CRUs be directed or advised by a defense attorney.²⁷ Most CRUs do not follow this recommendation, although several are led by prosecutors who have had defense experience in the past.

Evaluation and Results

Program evaluation is important in any field. It can highlight successful approaches, explain failures, and fine-tune already effective programs. With the number of CRUs rising nationwide, evaluation can provide vital information on how existing review programs are doing, but also on how best to implement new CRUs.

Outcome data for CRUs, including information about types and numbers of cases reviewed, and outcomes of case investigations and reviews, can increase public faith in the CRU, and in the prosecutor's office. Currently, most CRUs report on exonerations that come out of their offices. That information shows the commitment to undoing wrongful convictions when they do occur. But little is known about CRU case reviews that result

in confirmation of the conviction. Prosecutors should consider communicating their decisions better, as sharing information about why the office stands behind a conviction can aid in the court of public opinion.

Exonerations are the desired outcome when a rigorous review process shows that the conviction was erroneous and that an innocent person was imprisoned. But confirmation of a conviction is also important, showing that the system was operating as it should have in that case.

If you don't have a seat at the table, then you're probably on the menu.

—Elizabeth Warren
U.S. Senator

CRUs can also provide a mechanism for assessing causes of wrongful convictions when they do occur and for facilitating conversations about how to address those causes. Although there is this potential role for CRUs, few existing programs have a formal approach for taking findings from case reviews and using them to inform changes to system practices overall.

Conviction Review Units and Collaboration

Innocence projects recognize the significant role prosecutors play in post-conviction review and in obtaining exonerations. And, although there will be differing views, innocence projects welcome the opportunity to collaborate with prosecutor offices to rectify system errors and to address the fundamental causes of these errors. Organizations do not need to agree on all matters in order to be able to collaborate where there is common ground. Justice is a common goal shared by innocence project attorneys, prosecutors, defense attorneys, and other criminal justice stakeholders. The growing attention to errors, as highlighted by the increasing number of exonerations, provides an ideal opportunity for greater collaboration.

Prosecutors may not know, for example, that innocence projects conduct rigorous case screening and investigation to determine which cases to pursue. Innocence projects receive thousands of requests each year, but only move forward with a small number of cases that truly show new evidence pointing

to innocence and a possible wrongful conviction. Years of investigation can happen before the project attorneys decide that a system error has occurred that warrants revisiting a conviction. Collaboration (among prosecutors and innocence project attorneys) on individual cases typically results in faster decisions about how to move forward with the innocence claim.

CRUs provide a mechanism for increased collaboration to access the full facts of a case, locate remaining evidence, resolve claims more quickly, and address causes of system error. Innocence projects hold a piece of the puzzle needed to improve the criminal justice system. Prosecutor offices also hold a piece of that puzzle, as do many other criminal justice system stakeholders. By working together to improve policies and practices, stakeholders can help prevent system mistakes and increase the likelihood of justice for victims and for the wrongfully convicted.

Collaboration can help expedite the post-conviction review process and ensure access to all case information. Innocence projects may have access to information that the prosecutor's office does not have, and vice versa. Because many of these convictions are old, it can often be difficult to access information. Prosecutors can work cooperatively with defense attorneys and innocence project attorneys to share case information to get to as many case facts as possible. Collaboration yields more information to use in reviewing the case and in making a determination about the viability of the conviction.

Models already exist for such collaboration. The Quattrone Report describes a range from very little collaboration with outside counsel to engagement of outside counsel in many stages of the investigative process.²⁸ The Innocence Project document recommends open-file discovery and information exchange among defense attorneys, innocence project attorneys, and CRU attorneys.²⁹

Formal confidentiality agreements among the attorneys involved in the case can help ensure that case information is not disclosed to other parties, including to the press. Having parameters around the extent of information sharing can increase cross-organization trust.

Attorneys are trained to be adversarial, so engaging in a collaborative approach can take time. As partnerships strengthen, trust can increase to the point where more open discussions and exchange of information can happen. Cross-agency training about the goals of the CRU can help ease resistance to collaboration.

Reviewing possible conviction errors is challenging work, but the costs of imprisoning innocent people and letting perpetrators of crime go free are too great to ignore the challenge. ■

ENDNOTES

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4. "Conviction Review Units," *supra*.
5. "Conviction Integrity Unit Best Practices," <<http://www.innocenceproject.org/free-innocent/improve-the-law/ConvictionIntegrityUnitBestPractices0716151.pdf>> (accessed Mar. 17, 2016).
6. Other events include the "Summit on Wrongful Convictions. Justice Continued: Prosecutors and Conviction Review," hosted by the Kings County District Attorney's Office and Brooklyn Law School on October 15-16, 2015, in Brooklyn, New York.
7. *Berger v. United States* (1935) 295 U.S. 78, 88.
8. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261 [After conviction, the prosecutor is bound by the ethics of his office to disclose information materially favorable to the defense.].
9. *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179-1182 [The prosecution's failure to disclose exculpatory evidence during post-conviction appeal is a constitutional due process violation under *Brady*.].
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11. *Gonzalez, supra*, at 1261.
12. Elizabeth Larson, "Judge orders man falsely accused of molestation released from prison," (Feb. 17, 2016) *Lake County News* <http://www.lakeconews.com/index.php?option=com_content&id=45221:judge-orders-man-falsely-accused-of-molestation-released-from-prison-&Itemid=197> (accessed Mar. 17, 2016).

13. James Reason's "theory of error" has been used to improve safety in medicine, nuclear power, financial services, and aviation. RCA is applied by various industries to methodically identify and correct the root causes of failure events, rather than simply addressing the symptomatic result. Reason hypothesizes that most accidents can be traced to one or more of four levels of failure: organizational influences, unsafe supervision, pre-conditions for unsafe acts, and the unsafe acts themselves.
14. Nancy Ritter, "Testing a Concept and Beyond: Can the Criminal Justice System Adopt a Nonblaming Practice?" (Dec. 2015) *National Institute of Justice Journal*, No. 276 <<http://www.nij.gov/journals/276/pages/sentinel-events.aspx>> (accessed Mar. 29, 2016).
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17. James M. Doyle, "Learning About Learning From Error," (May 2012) *Ideas in American Policing* <<http://www.policefoundation.org/wp-content/uploads/2015/06/Doyle-2012-Learning-About-Learning-From-Error.pdf>> (accessed Mar. 17, 2016).
18. United States Court of Appeals for the Ninth Circuit Justice Alex Kozinski asserts in published opinions, video-recorded oral argument, and in law review articles that there is an "epidemic" of prosecutorial misconduct nationwide. Of the 29 cases Kozinski cited in *United States v. Olsen* (9th Cir. 2013) 737 F.3d 625, 631–632, four were from California.
19. "Conviction Review Units," *supra*, at pp. 23–25.
20. From the transcript of the video recording of "In the Interest of Justice: Conviction Review Programs," a symposium hosted by the Northern California Innocence Project of Santa Clara University School of Law on September 25, 2015, in Santa Clara. Contact author Lucy Salcido Carter for more information.
21. See Los Angeles County District Attorney's Office announcement <<http://da.co.la.ca.us/media/news/da-jackie-lacey-announces-creation-conviction-review-unit>> (accessed Mar. 17, 2016).
22. *Lawley, supra*.
23. "Conviction Review Units," *supra*, at p. 3.
24. *Id.* at p. 30.
25. Ruth Fuller, "Lake County State's Attorney impanels board to examine wrongful convictions." (Feb. 25, 2013) *Chicago Tribune* <http://articles.chicagotribune.com/2013-02-25/news/ct-tl-lake-county-states-attorney-board-20130225_1_wrongful-convictions-state-s-attorney-mike-nerheim-robert-baizer> (accessed Mar. 17, 2016).
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2013 New Laws for Advocates • 2016 New Laws for Prosecutors • Addiction and the Legal Profession • Addressing the Needs of Homeless Victims of Domestic Violence • Addressing the Needs of Transgender Victims • Advanced Immigration-Related Topics • Advanced Skill Building for Victim Advocates Working on Homicide Cases • Beyond the Crime & Prison Time: Committing the Sexually Violent Predator • Brady and Discovery for New Prosecutors • Brady for Victim Witness Advocates • Brady Law For Prosecutors Part 1 • Brady Law For Prosecutors Part 2 • Bridging the Battlefield: Veteran's Courts in California and PC 1170.9 • Characteristics of Human Trafficking Offenders • Child Abuse: Conducting Effective Examination of Witnesses Who Shield Abusers • Child Abuse: Exigent Circumstances, Warrants, and Hearings • Child Abuse: Indeterminate Offenses & Forcible Sex Crimes Sentencing Child Sex Tourism & Legal Implications • Child Sexual Abuse Testimony • Civil Commitments • Cloud Computing • Competency • Criminal Forfeiture • Cross-Examination • Dementia and Elder Abuse: Recognition & First Response Training • Discovery of Confidential Documents in Prison Cases • DNA & Cold Cases • DUI Marijuana • Elimination of Bias in the Legal Profession • Ethics 101 • Ethics and the Media in Public Corruption Cases • Ethics, Liability & Leadership • Ethics of Closing Argument • Family Law Basics • (The) Fundamentals of Impeachment: Using Prior Inconsistent Statements to Prove the Truth • Gangs Confidential: The Use of Cooperating Witnesses & Confidential Informants in Gang Cases • Hate Crime Offenders • Hate Crime Victims • Hate Crimes 101 • Hot Topics in Discovery 2014 • Hot Topics in Discovery 2015 • How To Stay Out Of Trouble With The State Bar • Human Trafficking for Victim Advocates • Human Trafficking Laws and New Developments • Human Trafficking: An Overview • Impact of Workplace Violence/Mass Casualties • Insanity—A Guide to the Law and Procedures • Interpreting the Child Sexual Abuse Evidentiary Exam: What to Do When the Findings are Inconclusive for Abuse • Introduction to Social Networking • Investigating & Charging Intellectual Property Crimes • Investigating & Prosecuting Illicit Behavior in Massage Parlors: The Capone Method • Investigation and Charging Misdemeanor Domestic Violence Cases • Issues with Search Warrants for Digital Evidence • Juvenile Adjudicative Competence • Law and Neuroscience • Legal Issues in Strangulation Cases I • Legal Issues in Strangulation Cases II • Liability Issues: Inside & Outside • Malingering • Media, Public Relations & Crisis Communications • Mental Defenses—Practical Applications • (The) Mentally Ill Offender • Navigating Your Way Through Prop. 36 • Neurobiology of Sexual Assault • (The) New World of Lifer Hearings Part 1 • (The) New World of Lifer Hearings Part 2 • (The) New World of Lifer Hearings Part 3 • Non-Warrant Search & Seizure • Opening Statements • Overview of Delinquency Law • Overview of Forensic Biology & DNA Testing-Part I • Overview of Forensic Biology & DNA Testing-Part II • Paraphilias: An Overview • PC 1368/1370 Competency Issues • People's Appeals & Writs • Physical and Psychological Effects on Children Living in Violent Homes • Pivotal Role of the Sexual Assault Forensic Examiner in Maximizing Recovery of Assault DNA: Connecting the Dots • Preparing the Sexual Assault Victim for Direct Examination • Prosecuting Crimes Involving Victims with Disabilities • Providing Services to Financial Crime Victims • Proving the Gang Case • Recognizing and Developing Stalking and Criminal Threats Cases • Rapid DNA Analysis for Sexual Assault Kits: New Developments • Rediscovering the Criminal Investigative Grand Jury • Respectful and Effective Communication with the Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Community • Responding to a Wheeler-Batson Motion • Restitution • Restraining Orders • Serving Victims of Youthful Offenders • Sexual Assault Suspect Forensic Examination • Sexual Exploitation and the Criminal Street Gang • Short Notice Trial Prep • Special Topics in DNA Analysis • State Habeas Corpus Practice • (The) S.T.E.P. Act • Strangulation in Sexual Assault Cases Part 1 • Strangulation in Sexual Assault Cases Part 2 • Strangulation in Sexual Assault Cases Part 3 • Strangulation Medical Issues & Forensic Challenges • Strangulation Prosecution 101 • Treatment & Monitoring of Sex Offenders and Juvenile Sex Offenders • Truancy Overview for Prosecutors • U.S. Immigration & Customs Enforcement (ICE) or U.S. Citizenship & Immigration Services (USCIS) • Update on Latest Relevant Case Law in California: Child Abuse and Neglect • Vehicle Forfeitures • Victims of Human Trafficking • Violence and Sex Offender Risk Assessment • Voir Dire in Child Abuse Cases: Addressing Issues of Intent, Motive, Questionnaires, and the CSI Effect • Voir Dire in Domestic Violence Cases • Voir Dire in Domestic Violence Homicide Cases • Voir Dire in Sexual Assault Cases • When Bad Looks Good: How Judges and Jurors Fall For Good-Looking Criminals • Wiki for Prosecutors • Wiretaps: An Effective Tool for Gang & Murder Investigations • Youth Hate Crimes