



Orange County District Attorney's Office

Report on Sheriff's Department Evidence Booking Issues

January 13, 2021

Introduction

Due process is the cornerstone of our criminal justice system and is embedded within our federal and state constitutions. (U.S. Const., amend. V & XIV; Cal. Const., Art. 32, § 7(a).) The collection and preservation of evidence is a key element of procedural due process. "A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed." (*Cal. v. Trombetta* (1984) 467 U.S. 479, 485.)

As members of the same prosecution team in cases investigated by the Sheriff's Department and prosecuted by the District Attorney's Office, the District Attorney (DA) and Sheriff must work together to protect the integrity of all such criminal prosecutions in Orange County. The proper collection, preservation and presentation of evidence are critical to ensuring the integrity of criminal cases. And the duty to ensure the integrity of criminal cases does not end with a conviction. A prosecutor is not only required to protect the due process rights of the accused before conviction, but "[e]ven after a conviction the prosecutor...is bound by the ethics of his office to inform the appropriate authority of...information that casts doubt upon the correctness of the conviction." (*Curl v. Superior Court* (2006) 140 Cal.App.4th 310, 318, quoting U.S. Supreme Court.)

In mid-November 2019, the District Attorney became aware of the extent of evidence booking issues within the Orange County Sheriff's Department (OCSD) and the existence of department-wide internal audits. DA Spitzer had not been made aware of the extent of these audits previously and only became aware of the matter on November 15, 2019 when he was informed about it from a local newspaper reporter.

Upon learning of the full extent of the audits, the DA immediately requested additional information from the Sheriff's Department about potentially impacted criminal cases to ensure that the DA is able to "identify any and all cases handled by the OCDA where a defendant's due process rights may have been negatively impacted by having evidence collected but not booked." (Exhibit 1, DA letter to Sheriff, 11/21/19). DA Spitzer also directed two senior prosecutors to oversee the office's response: Assistant District Attorneys Chris Duff and Robert Mestman, heads of the Special Prosecutions Unit (SPU) and Conviction Integrity Unit (CIU), respectively.

Criminal Referrals & Brady Review

In August of 2017, OCSD submitted an internal criminal case or “Green File” to the Special Prosecutions Unit for review of a deputy based on numerous incidents where there was a complete failure to book evidence or there was late booking of evidence. The existence of the evidence booking audit was never mentioned in the Green File. Over a two-year period, OCSD continued to sporadically submit a series of seemingly unrelated criminal investigations into deputies for their apparent failures to either book evidence in a timely manner or to book evidence at all. The Special Prosecutions Unit received 16 additional Green Files from OCSD for criminal review for evidence booking related crimes. However, OCSD did not properly disclose that the Sheriff’s Department was engaged in a systematic department-wide review of evidence-related booking issues.

The DA’s office would later learn that deputies were flagged by OCSD and referred to the District Attorney’s Office based on the following limited screening criteria from an internal audit:

- 1) evidence was booked 31 or more days late;
- 2) evidence was booked after a conviction in the case; and
- 3) there was no justifiable reason for the delay in booking the evidence.

At no time was the DA’s office asked for input or direction in the handling of this initial audit. Despite constant communication with OCSD at the time the cases were submitted for review, OCSD failed to notify the District Attorney’s Office that they had conducted a department-wide audit and had uncovered a systemic issue with their evidence handling. In June of 2018, the Green Files submitted began mentioning the existence of an “internal audit conducted of the department’s Property Evidence System.” No further explanation of the audit was given. Subsequently, some of the Green Files submitted for criminal review no longer mentioned the internal audit.¹

In March 2018, an OCSD deputy on a pending misdemeanor case asked the prosecutor to dismiss the case because the evidence (narcotics and a pipe) was missing. Finding this request unusual, the prosecutor reported the incident up her chain of command at the DA’s office. The head of the Special Prosecutions Unit contacted the Internal Affairs lieutenant at OCSD to report the suspicious request and asked for an investigation. In October 2018, a Green File on that deputy was submitted to the DA’s office, one of the multiple files submitted by OCSD.

¹ OCSD has argued that it submitted a number of reports to the OCDA to review and that it “should have known” that the OCSD was conducting an evidence booking audit. The DA, himself, acknowledges that although it is not an unreasonable point of view, it begs the question why did OCSD need to have an encryption device to understand the complexity of the issues. Instead, it was incumbent on the OCSD to fully explain clearly and comprehensively the systemic issue it discovered regarding the failure to book evidence. This disclosure occurred only after being disclosed by the Orange County Register in November 2019.

As mentioned, over an approximate two-year span the Special Prosecutions Unit received 17 Green Files for criminal review. The DA's Office reviewed every case involving evidence related issues associated with the 17 deputies going back several years, a total of 544 cases (DRs). These included cases with late booked evidence as well as evidence that was not booked. From this review, 252 cases were deemed potentially impacted and notice was provided to the defense in all such cases, a total of 289 notifications.² Thirty-six (36) of these cases have been dismissed at the request of the District Attorney's Office in the interests of justice. However, in the majority of cases the evidence booking deficiencies did not rise to the level where the case could not be proven beyond a reasonable doubt or the District Attorney had lost faith in the conviction.

Additionally, 16 of the 17 OCSD deputies have been added to the *Brady* Notification System as a result of their evidence booking-related conduct.³ And, as a result of a follow-up review requested by DA Spitzer (see below), Green Files on 14 additional deputies have been submitted to the DA's office for criminal and *Brady* review, and CIU referred an additional nine (9) deputies to SPU for *Brady* review.

OCSD Evidence Audits

On December 10, 2019, the District Attorney received the complete evidence booking audit from OCSD. The audit's objective, according to OCSD, was to "conduct an audit of all items booked into property/evidence by deputies" during a two year period and was used to identify:

- duration of time between the date an item was collected and the date an item was booked;
- individual deputies with a systemic delay in booking evidence;
- department trends in booking evidence; and
- issues with the property booking process.

This audit (commonly referred to as the "first audit") was completed in March 2018 and reviewed all cases during a two-year period from February 2016 to February 2018. A total of 98,676 cases (DRs) and 1,535 deputies were reviewed as part of the process. It was determined that 26,622 cases had evidence booked according to the REMEDY system, which is OCSD's evidence booking management system.⁴ This audit reviewed all reports/cases during this time period, regardless of whether or not the cases were submitted to the DA for criminal

² The number of notices is more than the number of cases/DRs because of multiple defendant cases.

³ The *Brady* Notification System is an internal DA system that tracks peace officers with verified/sustained dishonesty, moral turpitude or gross negligence in their background so discovery can be provided to the defense pursuant to *Brady v. Maryland* (1963) 373 U.S. 83.

⁴ The OCSD audit lists 27,091 cases/DRs, but 469 DRs were determined to be duplicative based on: (1) multiple deputies booking evidence under same DR; (2) two deputies in the audit being the same person; or (3) DRs for one deputy being mistakenly added to another deputy as well.

prosecution and/or resulted in a conviction. The audit determined that 30% of evidence collected was booked outside of OCSD policy.

OCSD policy stated that, “Property and evidence WILL be secured [booked] in an authorized Property/Evidence locker by the end of shift,” unless extenuating circumstances exist and alternative procedures are authorized by a supervisor.⁵ It should be noted that OCSD’s first audit only reviewed cases where evidence was actually booked according to the REMEDY system. Thus, cases where evidence was collected but not booked or was otherwise missing were not included in the first audit.

OCSD also conducted a secondary evidence audit, with a follow-up report issued in December 2019. The Sheriff’s Department realized that the first audit “was not sufficiently broad [enough] to identify all potential issues regarding evidence retention” and missed cases where evidence was collected but not booked. This second audit took a random sample of 450 cases from the more than 71,000 cases in which the first audit determined that no evidence had been booked.⁶ Of the 450 cases, OCSD determined that only one filed case involved evidence that was collected but not booked (a case involving two grams of suspected methamphetamine). An additional 10 cases had missing evidence (nine involving digital evidence and one involving a debit card), but none of those cases resulted in the filing of criminal charges. Thus, out of 450 cases sampled, 11 cases (2.4%) had evidence that was collected but not booked or was otherwise missing.

District Attorney Actions

When the full extent of the OCSD evidence booking audits became known, the DA’s Conviction Integrity Unit (CIU) was tasked with conducting a review of the evidence booking audit, including reviewing all potentially impacted cases. The District Attorney’s primary goal was to conduct a comprehensive review and provide notice to the defense on all potentially impacted cases. In addition, DA Spitzer publicly stated that the office would take proactive action to ensure the integrity of cases prosecuted by the office, up to and including dismissing some, or all, of the charges in impacted cases.

The DA divided potentially impacted cases into three (3) categories:

- 1) All open/active cases;
- 2) Closed cases with potential late booked evidence; and
- 3) Closed cases with missing or non-booked evidence.

⁵ OCSD Field Operations Manual, Section 19, Page 19.4 (Subsection V.C.4.), Revised September 2017. The current version of this policy is located in Section 802.2 of the OCSD Policy Manual.

⁶ As will be explained, *infra*, the DA ordered a review of all cases resulting in a conviction over a three (3) year period. Many of these approximately 71,000 cases were reviewed as part of this process. However, the majority of these ~71,000 cases did not result in a conviction nor were submitted to the DA’s Office for prosecution, and as such were not part of the DA’s review. It is likely that in some of these cases evidence was collected but not booked.

Open/Active Cases

With regard to open and active cases, the DA identified 1,226 OCSD cases with a date of violation prior to March 22, 2018.⁷ REMEDY printouts were requested from OCSD on all the cases and in January 2020 the REMEDY reports were distributed to the prosecutors assigned to those cases for their review and discovery to the defense. The DA also instructed prosecutors to request and discover REMEDY printouts on all OCSD cases going forward.⁸ The REMEDY printouts included a list of all evidence booked on a case, with a description of the item and the date it was booked. Thus, the REMEDY printouts – in conjunction with the underlying report – would indicate if there were any items of evidence that were booked late or not booked at all. In addition, OCSD, with the assistance of DA personnel, conducted a case-by-case review of all the active cases and determined that 18 of the cases had potential evidence booking deficiencies. Two (2) such cases were dismissed at the request of the DA, notifications were made for 21 defendants and in two (2) cases it was determined that photos were embedded in the underlying report (as opposed to being booked into evidence) and no further action was necessary.⁹

Closed Cases With Potential Late Booked Evidence

With regard to closed cases with potential late-booked evidence, the DA identified all cases from the audit that resulted in convictions where evidence was booked late (i.e., two or more (2+) days after the incident occurred or the DR number was generated). In referring cases to the DA, OCSD had only flagged a limited number of cases where evidence was booked 31 or more days late. Using the expanded criteria, the DA identified 2,342 additional cases from the audit where evidence was potentially booked late. Letters were sent to defense counsel -- or *pro per* defendants -- on all such cases to notify them that a particular piece of evidence may have been booked late.¹⁰

The notices included contact information for the CIU should the defense wish to make any inquiry or request further action on a case. When an inquiry from a defense attorney or a *pro per* defendant was received, a senior prosecutor would review the case and take any necessary action. To date, 63 inquiries have been received – either via phone or email – and only one (1) case merited the dismissal of charges after further review.¹¹

⁷ The Sheriff's Department took remedial action to correct deficiencies in their evidence booking system and procedures effective March 22, 2018.

⁸ OCSD has since included the REMEDY printouts as part of the standard package of reports submitted to the DA for review and discovery to the defense.

⁹ Again, the numbers do not add up because of multiple defendant cases (i.e., multiple defendants associated with a single DR).

¹⁰ 2,866 notifications were sent to defense counsel or *pro per* defendants on 2,473 cases identified in the first audit, though when considering duplicates from the DA's review of Green Files, those numbers are 2,714 notifications and 2,342 cases. Some cases had multiple defendants and required more than one notification per case.

¹¹ The one case was a misdemeanor narcotics case with both late booked evidence and evidence that was not booked.

It is important to note that simply because a case was identified from the audit as having evidence booked late does not necessarily mean that an item of evidence was indeed booked late or any delay was material or negatively impacted a case. The audit only identified the duration between when evidence was booked and the date the DR number was generated. But, there may have been lawful and appropriate justification or other reasons for the apparent delay.

For example, in Case No. 16-051522, a stolen vehicle report was generated on 3/2/16 when the victim reported his car stolen to a deputy. On 3/15/16, the same deputy located the stolen vehicle with a suspect who was in possession of narcotics. The deputy then booked the narcotics at the end of his shift under the original DR number. While the narcotics were booked properly and pursuant to policy, the audit showed that evidence was booked 13 days “late” because of the difference in date between when the car was reported stolen (3/2/16) and when the suspect was arrested in possession of narcotics (3/15/16). And in Case No. 17-004855, a counterfeit bill and surveillance video were booked properly in the same package. However, the evidence package was later checked out and the items were separated upon re-booking. Re-booking the items separately gave the unwarranted appearance that one of the items was booked, for the first time, at a later date in violation of department policy.

Closed Cases With Missing Or Non-Booked Evidence

The DA quickly realized that the first audit -- while helpful to determine the scope of any evidence booking issues -- only focused on cases with evidence booked late. And the second audit was only a random sample of cases and not a thorough review of all cases and the impact of evidence booking problems on specific cases. Additionally, the cases flagged during the criminal/*Brady* referral process used limited criteria and only focused on 17 specific deputies. Because of the deficiencies in the Sheriff’s audits, DA Spitzer ordered a review of all cases resulting in convictions over a three (3) year period -- from March 2015 to March 2018 -- to determine if there were any cases where evidence was collected but not booked.¹² Many of these cases would have been missed by OCSD’s first audit (which focused only on late bookings) and very likely the second audit too (which only reviewed a limited random sample of 450 cases).

A total of 22,289 cases (DRs) were reviewed by a joint team of OCSD and DA investigators. This months-long review (sometimes referred to as the “third audit”) consisted of a case-by-case review of all reports and a physical inspection of the evidence, when appropriate. Cases that had previously been identified during the criminal/*Brady* referral process were excluded from further review. Weekly updates were provided to the Conviction Integrity Unit, where senior attorneys reviewed all referred cases to determine what action, if any, needed to be taken, such as providing notice to the defense or proactive dismissal of charges.

¹² Per footnote 7, *supra*, OCSD had taken remedial action to address problems in the handling and booking of evidence effective March 22, 2018. Thus, the DA-ordered review went back three (3) years from that date.

As a result of this review, 562 cases were referred to CIU for further examination as potentially having an item of evidence that was missing or not booked. Potentially relevant or material evidence booking issues were identified in 523 cases; the vast majority of these cases (488) involved digital evidence, specifically photographs.¹³ The DA provided notice to the defense on all impacted cases, a total of 636 notifications. In 30 cases the District Attorney proactively dismissed charges on its own motion in the interests of justice.

Local DNA Expungement

The District Attorney's Office also took the proactive step of expunging, or removing, all DNA samples submitted to the local OCDA DNA database from any defendant whose case was identified in the OCSD evidence booking audit. This action applies to every case identified in the audit, regardless of whether there was any actual deficiency in evidence booking in that matter or not.

Pitchess Notification List

In addition to providing notification to the defense and taking proactive steps to address evidence booking issues in specific cases, the District Attorney is also notifying the defense of potentially relevant information on cases where particular deputies are witnesses. Because County Counsel has determined that the evidence booking audit is a peace officer personnel record as defined by Penal Code § 823.8, it is thus privileged and by operation of law cannot be released by the DA's Office without an appropriate court order or stipulation. (Exhibit 2, County Counsel letter to District Attorney, 3/13/20.)

Consequently, the DA created a *Pitchess* Notification List to alert the defense when deputies who are listed in the audit as having booked evidence outside of OCSD policy are potential witnesses in upcoming cases.¹⁴ After a review of the OCSD audit, it was determined that multiple deputies may have booked evidence late without justification and in violation of OCSD policy. Notice will be provided to the defense in all cases where any of these deputies are a potential witness, as well as past cases that resulted in a conviction where any impacted deputy testified. This notice and the procedure employed by the DA's Office have been endorsed by the California Supreme Court. (See *People v. Superior Court (Johnson)* (2015) 61 Cal. 4th 696; see also *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.)¹⁵

¹³ When submitting photographs, deputies would download the photos to a CD and then mail the CD to the OCSD photo lab via internal county "pony" mail in an envelope with a handwritten form that contained relevant case information. Photographs were not booked into evidence in the traditional sense. Due to deficiencies in the way OCSD handled photographic evidence at the time, it is not possible to determine if the missing photographs were simply not submitted by the deputy, were lost in transit to the photo lab, or were lost or misidentified after being received by the photo lab.

¹⁴ With the limited information it has, the District Attorney cannot make a determination that the evidence audit itself is exculpatory and discoverable pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 or Penal Code § 1054.1(e).

¹⁵ The California Supreme Court noted that defendants are in the best position to represent their own interests. "[C]riminal defendants and the prosecution have equal ability to seek information in confidential personnel records,

If the defense agrees to a global stipulation and protective order, the District Attorneys' Office will provide the relevant evidence audit records along with the underlying reports and Remedy printouts, without need for any further action, motion or court order. For attorneys or defendants who choose not to agree to the stipulation, access to the evidence booking audit records can be sought via compliance with the statutorily-authorized *Pitchess* process. Note that the *Pitchess* Notification List is separate and apart from any *Brady* notifications the DA provides proactively regarding deputies that may have dishonesty, moral turpitude or gross negligence in their backgrounds.¹⁶

Conclusion

When District Attorney Spitzer became aware of widespread evidence booking problems at the Sheriff's Department, the District Attorney's Office immediately took action to address the issue. DA Spitzer assigned two high ranking management-level attorneys to the project and gave it the highest priority. To ensure the integrity of the cases it prosecutes, the DA's Office reviewed more than 41,000 OCSD cases going back several years for evidence booking irregularities. Such irregularities were documented in approximately 3,100 cases (~7.6%). More than 3,600 notifications were provided to the defense in both open/active cases and closed cases that had resulted in convictions.

To date, the CIU has had attorneys or defendants contact them asking for additional information about the evidence issues on less than 100 cases. Most of the attorneys and defendants, once notified of the specific evidentiary issues, have agreed with CIU's initial evaluation that the case was not negatively impacted or compromised by the missing or late evidence. In the end, 67 cases (0.16%) had some or all charges dismissed by the DA in the interests of justice. (See Exhibit 3.) In the other cases, the DA's Office determined that the evidence booking issue did not rise to the level of having negatively impacted the case to the point where the defendant's due process rights were violated, the charges could not be proven beyond a reasonable doubt and/or the District Attorney lost faith in the integrity of the conviction.

While even one case with material evidence booking deficiencies is one too many, the DA's comprehensive review of the matter has determined that a relatively small number of cases – less than one-quarter of one percent of all cases reviewed -- were actually negatively impacted

and because such defendants, who can represent their own interests at least as well as the prosecution and probably better, have the right to make a *Pitchess* motion whether or not the prosecution does so," the prosecution fulfills its duty if it provides the defense this information. "That way, defendants may decide for themselves whether to bring a *Pitchess* motion." (*People v. Superior Court (Johnson)*, *supra*, at 705.)

¹⁶ The DA's office has conducted criminal and *Brady* reviews of several deputies concerning the handling and booking of evidence. To date, several deputies have been placed on the DA's *Brady* Notification System. These deputies are not implicated by the *Pitchess* procedure referenced here as *Brady* discovery is proactively provided to the defense on all appropriate cases. However, such discovery does not include the evidence audit.

by OCSD evidence booking issues. However, the DA provided notice to the defense on **all** potentially impacted cases.

The DA's Office will continue to review cases and provide notice to the defense when appropriate to ensure that defendants' due process rights are protected, but because of remedial action OCSD has taken to address evidence booking deficiencies, there should be few, if any, negatively impacted cases in the future. The DA's Office systematic review of cases is now concluded, though if new or additional information is presented that warrants further follow-up, the DA's Office will take appropriate action.

In every step of this process, the DA's office reacted to this issue consistent with the principle that, "The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor." (*Hollywood v. Superior Court* (2008) 43 Cal. 4th 721, 734.) The District Attorney's Office will continue to do so.

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TABLES

Overall		
Total Cases (DRs) Reviewed by DA ¹⁷	41,142	
Potentially Impacted Cases (DRs)	3,117	7.6%
Defense Notifications	3,639	
Negatively Impacted Cases (i.e., Dismissal, Reduction)	67	0.16%

OCSD “First Audit” (Late Booked Cases)		
Total Cases (DRs) With Evidence Booked Per REMEDY ¹⁸	26,622	
Closed Cases With Potential Late Booked Evidence ¹⁹	2,342	8.8%
Notifications To Defense	2,714	
Negatively Impacted Cases (i.e., Dismissal, Reduction)	1	0.004%

DA Review of Cases “Third Audit” (Non-Booked Cases)		
Total Sheriff Cases (DRs) Over 3 Years Resulting In Conviction ²⁰	22,289	
Cases Flagged For Attorney Review	562	2.5%
Potentially Impacted Cases	523	2.3%
Potentially Impacted Cases Excluding Photo Cases	35	0.2%
Defense Notifications	636	
Negatively Impacted Cases (i.e., Dismissal, Reduction)	30	0.1%

¹⁷ Includes cases identified in the 1st audit that had evidence booked (26,622), all filed criminal cases resulting in conviction over a three year period (22,289), all active cases with date of violation prior to 3/22/18 (1,226), and all other cases associated with Green File submissions (544), disregarding duplicate DRs that appeared in multiple audits/reviews (9,539).

¹⁸ From all DRs generated between February 2016 – February 2018, minus any duplicates.

¹⁹ Cases resulting in a conviction where audit shows evidence was booked two or more (2+) days after DR was generated.

²⁰ All criminal cases resulting in conviction over a three-year period, with date of violation between 3/22/15 – 3/22/18. When disregarding duplicate DRs from the 1st audit, the figure is 13,150.