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APPENDIX A
Order, Supreme Court of California, July 18, 2018, denying Petition for Review in case number S248793

SUPREME COURT
Filed
July 18, 2018
/s Jorge Navarrete Clerk
Deputy

Court of Appeal, Fifth Appellate District - No. F076064

S248793

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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DAVID SOUZA, Petitioner
v.
SUPERIOR COURT OF TULARE COUNTY,
Respondent;

THE PEOPLE, Real Party in Interest.

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The petition for review is denied.

CANTIL-SAKAUYE
s/Cantil-Sakauye
Chief Justice

APPENDIX B
Petition for Review filed in case number S249793

IN THE SUPREME COURT OF CALIFORNIA

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| DAVID SOUZA,<br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF TULARE COUNTY,<br><br>Respondent,<br><br>THE PEOPLE,<br><br>Real Party in Interest. | S _____<br><br><br><br>F076064<br><br>(Tulare Super. Ct. Nos. VCF285006 & VCF325933) |

PETITION FOR REVIEW

Fifth District Court of Appeal, Case No.: F076064,
Petition for Writ of Mandate

ROGER T. NUTTALL (SBN 42500)
NUTTALL & COLEMAN
2333 Merced Street
Fresno, California 93721
Tel: (559)233-2900

EDGAR E. PAGE (SBN 231147)
Page Law Firm
Post Office Box 994314
Redding, California 96099-4314
Tel: (916) 449-3970
Attorneys for Petitioner

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NOTE: ATTACHMENT A HAS BEEN INCLUDED AS APPENDIX C IN THE PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF CALIFORNIA

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| DAVID SOUZA,<br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF TULARE COUNTY,<br><br>Respondent,<br><br>THE PEOPLE,<br><br>Real Party in Interest. | S<br>_____<br><br><br>F076064<br><br>(Tulare Super. Ct. Nos. VCF285006 & VCF325933) |

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Petitioner, DAVID SOUZA, by and through his counsel, ROGER T. NUTTALL, of NUTTALL & COLEMAN, and EDGAR E. PAGE, of the Page Law Firm, respectfully requests that this Court grant review of the May 3, 2018, Order of the Court of Appeal, Fifth Appellate District. (Rule 8.500(a)(1) ["A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal"].)

## I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioner submits the following "concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail." (Rule 8.504(b)(1).)

Petitioner sought relief in the Court of Appeal based upon the Prosecution not complying with well-established law (Penal Code sections 1009, 1382, 1385, and 1387) in the trial court by filing of a second separate and distinct criminal case involving the same nucleus of operative facts as in the first case. (Pet. 20.) Furthermore, Petitioner asserted that the conduct of the Prosecutor violated the federal and state constitutional rights to due process of law, to a speedy trial, and to be free of harassment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

The Court of Appeal issued an order directing the Attorney General to file an informal reply; after several filings, the Court ultimately denied any relief on May 3, 2018. (Rule 8.490(b)(1)(A).)

The documents filed by Petitioner, the Prosecution in Respondent Court and the Attorney General in the Court of Appeal are not attached or filed with the instant petition; however, those documents are referenced within the instant petition. (Rule 8.504(a)(1); 8.204(a)(1)(C )[2].) A list of the

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[2] Petitioner attempted to cite to all the relevant parts of the record. Should any citation have been missed, this was only an oversight due to the need to make sure the document is filed timely within the 10 day deadline. A more complete

exhibits that contain the record from Respondent Court is provided after the Table of Authorities and referred to herein as "Pet.Ex."

The documents filed in the Court of Appeal are referred herein when citing to that record as follows:

- Petition for Writ of Mandate referred to herein as "Pet."
- First Informal Response filed on September 28, 2017, by Attorney General is referred to herein as "Response."
- Supplemental Informal Response filed on December 6, 2017, by Attorney General referred to herein as "2nd Response."
- Amended Informal Response filed by Attorney General is referred to herein as "3rd Response."
- Petitioner's Reply was filed on March 20, 2018, and is referred to herein as "Reply."
- May 3, 2018, Court of Appeal Order denying Petition for Writ of Mandate referred to herein as "Att. A."

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citation to the record will be done should the instant petition be granted.

In the instant filing, Petitioner now urges this Court to grant his Petition for Review based upon the following issues:

ISSUE 1: DID THE PROSECUTION VIOLATE APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS AFTER (1) CONSOLIDATING TWO SEPARATE AND DISTINCT CASES (EVENTS) INTO ONE CASE, AN THEREAFTER OBTAINING A HOLDING ORDER; AND THEN (2) SEVERAL YEARS LATER, WHILE MAINTAINING THE FIRST CASE, THE PROSECUTION FILED A NEW COMPLAINT – WITHOUT SEEKING PERMISSION OF THE TRIAL COURT PURSUANT TO PENAL CODE SECTION 1387 – AND WHEREBY THE NEW COMPLAINT CONTAINED THE SAME NUCLEUS OF OPERATIVE FACTS FROM ONE OF THE CASES (EVENTS) PREVIOUSLY CONSOLIDATED WITH THE ORIGINAL CASE?

The Legislature has duly enacted Penal Code sections 654[3], 954, 1009, 1382, 1385, and 1387 so as to protect a defendant's fundamental federal and state constitutional rights to due process of law, to a speedy trial, and to be free of harassment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; Dunn v. Superior Court (1984) 159 Cal.App.3d

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[3] The Attorney General raised the issue of the application of Penal Code section 654 along with Kellett v. Superior Court (1966) 63 Cal.2d 822. (Response, p. 11.)

1110, 1119. See citations to record at Pet. 35-36; Pet.Ex. 104, 121-122; Reply 14, 17.)

The Legislature has determined that a felony must go to trial within "60 days of the defendant's arraignment on an [] information" unless there has been a waiver of the speedy trial right by the defendant. (Pen. Code, §1382, subd. (b).)

Once a case has been filed, the Legislature has imposed requirements upon the Prosecution to file an application and demonstrate that "substantial new evidence" has been discovered to support any new allegations and that the Prosecution had acted with "due diligence" in pursuing the new allegations after the first case has been filed before the first case will be dismissed to allow a second action to be filed. (See Penal Code section 1387, subd. (a)(1). See Pet. 20, 35, 36, 41; Pet.Ex. 107-108, 113-114.)

"The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions [citation] and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382 [citation]." (Dunn v. Superior Court (1984) 159 Cal.App.3d 1110, 1119. See Pet.Ex. 114-115, 121-122.)

## A. TWO SEPARATE EVENTS HAD ALREADY BEEN JOINED INTO ONE CASE BEFORE FIRST PRELIMINARY HEARING

### 1. Information Filed In September 2014

In case number VCF285006 (hereafter "first case"), the case involved two separate and distinct events with different facts.

The first set of operative facts involved allegations of conduct with two children who were in Tulare County (hereinafter "Tulare incidents") but where the allegations did not involve

pornographic images. The second set of operative facts were from communications using a cellphone with children in other locations outside California including Canada that involved texting and sending pornographic images (hereafter "cellphone incidents"). The cellphone was discovered and seized by the police during the search of Petitioner's home regarding allegations associated with the first set of operative facts.

A holding order was issued at the end of the preliminary hearing held on September 15, 2014. (Pet.Ex. 176-225.) The prosecuting attorney filed an Information regarding these allegations on September 25, 2014. (Pet.Ex. 154-162.)

2. Prosecuting Attorney Opposed Severance On January 15, 2015, Arguing Judicial Economy As One Reason To Keep The Tulare Incidents Consolidated With The Cellphone Incidents

Petitioner's first defense counsel on January 15, 2015, sought to sever all the counts involving the cellphone incidents from the other counts which involving the Tulare incidents; the prosecuting attorney opposed the motion. (Pet.Ex. 229.) One reason for opposing the severance was "a single proceeding would be efficient use of the Court's time." (Ibid.) The trial court denied the defense's severance motion. (Pet.Ex. 232.)

B. IN OCTOBER, 2015,THE SAME PROSECUTING ATTORNEY FILED A SECOND AND DISTINCT CASE INVOLVING NEW ALLEGATIONS ASSOCIATED WITH PREVIOUS CELLPHONE INCIDENTS

1. Second Case Allegations Based Upon Same Or Similar Cellphone Incidents As First Case

On October 21, 2015, the Prosecution filed a new felony complaint making additional allegations regarding the same common nucleus of operative facts found in Counts 5, 6 and 7 of the first case involving the cellphone incidents. (Pet. 14-15, 17-19.)

The Prosecution filed no application with the trial court pursuant to Penal Code section 1387, subdivision (a)(1).

2. Second Information Filed March 22, 2017

In the case number VCF325933 (hereafter "second case"), a preliminary hearing was held on February 23, 2017. (Pet.Ex. 235-284.) An Information was filed on March 22, 2017. (Pet.Ex. 162-175.)

3. Consolidation Motion Of First Case With Second Case And Opposition Thereto

After the Information in the second case was filed, the prosecuting attorney filed a consolidation motion (Pet.Ex. 43) with no mention of the first case having already been consolidated prior to the first preliminary hearing. Further, the Prosecution never informed the trial court about the previous defense severance motion after the first preliminary hearing.

Petitioner's second trial counsel learned of the connections between the first and second case after the motion to consolidate had been filed, and wherein he filed a continuance motion to review the entire record. (Pet.Ex. 91.)

Afterwards, Petitioner's counsel filed several motions opposing the consolidation and sought to dismiss the cases. (Pet.Ex. 103-153.)

The Prosecution did not demonstrate (1) that the evidence introduced in the second case (VCF325933) was "substantially new evidence" and (2) that by due diligence it could not have discovered the evidence before the preliminary hearing in the first case (VCF285006) regarding the cellphone incidents. (Pen. Code, § 1387, subd. (a)(1).)

The Prosecution took none of these steps. Instead, the prosecuting attorney simply proceeded to file a new complaint in the second case (VCF325933) while the Information in the first case (VCF285006) was pending.

The Prosecution knew or should have known, when it filed the second case (VCF325933), that the events associated with Emma L. had already been joined in the first case (VCF285006) since it was just ten months earlier that the same prosecuting attorney had opposed the Petitioner's first defense counsel's severance motion. (Pet.Ex. 229, 232.)

Respondent Court refused to dismiss either case, and the Court of Appeal ultimately denied Petitioner any relief. (Pet. 22-23; Pet.Ex. 308; Att. A.)

Neither the Legislative intent behind the requirements of Penal Code section 1387, subdivision (a)(1) and/or the protections of the Due Process Clause (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) have been followed by the Prosecution in this case. This is notable in that the Prosecution

made no showing, as required by statute, of substantially new evidence having been obtained with due diligence before proceeding.

In actuality, the filing of the second and separate case simply served to waste and abuse the court's judicial resources.

Therefore, Petitioner seeks review of this issue and suggests, at the very least, that the second case should be dismissed, and that the matter of the first case be set for trial within 60 days.

ISSUE 2: THE PROSECUTION HAS BEEN ADAMANT THAT PENAL CODE SECTION 1387 DOES NOT APPLY TO A SITUATION AS DISCUSSED IN ISSUE 1; IS THE PROSECUTION CORRECT?

The Prosecution's position throughout the litigation in Respondent Court and in the Court of Appeals continues to be that second case (VCF325933) and the first case (VCF285006) are two separate and distinct cases, and that the requirements of Penal Code 1387 do not apply. (Pet.Ex. 301, 306.)

> The prosecuting attorney argued there is "no requirement under 1387 for the People to have, you know, dismissed the previous case. They're two separate and distinct cases." (Pet.Ex. 306.)

The Prosecution further argued that if the Court had disagreed with the motion to consolidate, it would have then proceeded with two separate cases. (Pet.Ex. 306.)

The Attorney General adopted the prosecuting

attorney's position in the Court of Appeal. (Response, p. 8-9 ["the prosecution did not fail to comply with section 1387 .... section 1387 was inapplicable"]; Response p. 14 "Since the first action had not been dismissed, section 1387, subdivision (a)(1)'s requirement that the due diligence be shown was inapplicable"]; 2nd Response, p. 5 ["The speedy trial provisions in Penal Code section 1382 and the dismissal as bar to prosecution in Penal Code section 1387 are simply irrelevant to this case"] [emphasis added].)

Petitioner contested these issues in both the Respondent Court and in the Court of Appeal. (Pet. 20, 35, 36, 41; Pet. Ex. 104-105, 107-108, 113-114, 119-122, 149-150; Reply pp. 14-19, 38.)

Petitioner now seeks review of these issues in this Court and submits this is an issue of statewide concern for other similarly situated defendants as this particular situation may well reoccur – particularly since the Attorney General has taken the same position as the prosecuting attorney in Respondent Court.

ISSUE 3: WHEN A SITUATION SUCH AS DISCUSSED IN ISSUE 1 OCCURS, DOES IT AMOUNT TO AN ABUSE OF PROCESS AND/OR VINDICTIVE PROSECUTION?

One of the purposes of Penal Code section 1387, is to prevent the Prosecution from harassing a defendant with successive prosecutions and, in part, to pressure the Prosecution to bring a case to trial within the time limits of Penal Code section 1382. (U.S. Const., Amends. 6th & 14th; Cal. Const., art. I, §§ 7 & 15; Dunn v. Superior Court (1984) 159 Cal.App.3d 1110. See Pet. 20, 35-37, 40-41; Reply 14-19, 38; Response 11.)

The filing of the second case involving facts from the same cellphone incidents as in the first case abused the process particularly after the same prosecuting attorney who filed the second case had, ten months earlier, opposed the defense motion in the first case to sever the cellphone incidents from the other counts.

The filing of this second case did not comport with the Legislative intent behind requiring an application to be filed and proof of that the new allegations are supported by substantially new evidence along with a showing of due diligence. (Pen. Code, §1387, subd. (a)(1).) In this sense, and under the circumstances of this case, the fact of the filing of the second separate and distinct case violates the spirit of the law which protects a defendant's due process rights to a speedy trial.

At no point in the litigation in either Respondent Court or the Court of Appeals has any prosecuting attorney acknowledged that an "application" (Pen. Code, §1387, subd. (a)(1)) should have been filed. (Pet. 36.)

The Prosecution, in Respondent Court and in the Court of Appeal, disagreed, asserting that Penal Code 1387 simply does not apply. (Pet.Ex. 306; Response 8-9 ["the prosecution did not fail to comply with section 1387 .... section 1387 was inapplicable"]; Response p. 14 "Since the first action had not been dismissed, section 1387, subdivision (a)(1)'s requirement that the due diligence be shown was inapplicable"]; 2nd Response, p. 5 ["The speedy trial provisions in Penal Code section 1382 and the dismissal as bar to prosecution in Penal Code section 1387 are simply irrelevant to this case"].)

As well, the prosecution has insisted that the Government has the right to proceed in this manner, and that if Respondent Court had not consolidated

the first and second case, they would have proceeded with two separate trials. (Pet. 35; Pet.Ex. 306.)

Petitioner asserts that these positions clearly represent an abuse of process and that they are not supported by the law as enacted by the Legislature, nor does it conform to the intent of Penal Code section 1387. (Pet. 10, 20-22, 32, 36-37, ; Pet.Ex. 107-108, 116-118, 120-122 ; Reply 16, 24-34, 38.)

Petitioner asserts that the Prosecution's conduct, especially after opposing a severance of in the first case involving the same or similar facts, represents a violation of the spirt of the law that protects a defendant's due process rights.

Therefore, the least that should have occurred to protect Petitioner's rights and the rights of similarly situated defendants is that the second Information should have been dismissed with Respondent Court instructed to proceed to trial within 60 days on the first case.

ISSUE 4: WHEN A DEFENDANT SEEKS APPELLATE RELIEF, DOES THE ATTORNEY GENERAL, EITHER IN THIS COURT AND/OR IN THE COURT OF APPEAL, HAVE TO ACKNOWLEDGE WHEN THE PROSECUTION HAS ABUSED THE PROCESS BY FILING AND MAINTAINING OF TWO SEPARATE AND DISTINCT CASES BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS?

In the Court of Appeal, the Attorney General had three separate opportunities to provide a candid response respecting the correct procedures to follow. (Reply 32-33.)

Instead of being forthright, the Attorney General's position was that no procedural error occurred. None of the responses before the Court of

Appeal ever acknowledged that the Prosecution in Respondent Court improperly filed and maintained a separate and distinct case, and then conducted a second preliminary hearing before seeking consolidation of case number VCF285006 with the second case.

In fact, in the Court of Appeal, the Attorney General maintained the same position as the Prosecution in Respondent Court. The position taken in the Court of Appeal was that the Penal Code provisions referenced by Petitioner in his filing do not apply, and had the case [case Nos. VCF285006 & VCF325933] not been consolidated, the prosecution would have proceeded on both. (Response, p. 9 citing Pet.Ex. 306 [emphasis added].)

Petitioner asserts that this represents an on-going abuse of process, as well as vindictive prosecution.

ISSUE 5: WHAT STEPS DOES ANY PROSECUTOR HAVE TO TAKE IN ORDER TO FULFILL THE MANDATORY REQUIREMENTS OF NAPUE AND ITS PROGENY AS TO FALSE AND/OR MISLEADING TESTIMONY OF A PROSECUTION WITNESS?

Petitioner filed a motion requesting that the Attorney General address the on-going abuse of process, especially as related to the use of false testimony. (Reply 12-13.) The Attorney General was then directed to address the issues which were raised in the motion.

The Attorney General filed a third response (3rd Response).

The Attorney General persisted in refusing to accept the fact that Detective Ford's testimony was not truthful and/or that Ford did not act with due

diligence. (Reply 21-24, 26-29.)

Detective Ford had been a member of the prosecution team throughout the proceedings in Respondent Court. "The prosecution team includes both investigative and prosecutorial agencies and personnel." (People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 1315. Accord, Kyles v. Whitley (1995) 514 U.S. 419, 437-438; Giglio v. United States (1972) 405 U.S. 150, 154.)

Detective Ford's false testimony (Pet. 38-39; Pet.Ex. 120-121, Reply 20-24; (2nd Response p 6 citing Pet.Ex. p. 242 [italic emphasis added in 2nd Response not by Petitioner]) was used to support a showing of due diligence in the Court of Appeal, thereby representing an on-going violation of Petitioner's due process rights, and whereby the utilization of emphasis so as to draw the Court's attention to that false testimony compounds the on-going abuse of process and violation of Petitioner's due process rights. (See Mooney v. Holohan, supra, 294 U.S. 103, 112; Pyle v. Kansas (1942) 317 U.S. 213; Napue v. Illinois (1959) 360 U.S. 264, 269 [the prosecution has a duty to not allow false testimony to be "uncorrected when it appears"]; Colorado v. Connelly (1986) 479 U.S. 157, 522 ["'[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' [citation omitted]".]

The Attorney General's position violated well-established law that the Prosecution has ethical duties so as to protect Petitioner's procedural due process rights. (Berger v. United States, supra, 295 U.S. 78, 88.) The individual prosecutor also has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (Giglio v. United States, supra,

405 U.S. 150.)

Further, all prosecutors have a duty to not allow false testimony to go "uncorrected when it appears." (Napue v. Illinois, supra, 360 U.S. 264, 269.) The prosecution must correct the false and/or misleading testimony the instant it happens without any objection by defense counsel and without any finding by the court.

With due respect, it is submitted that the positions of the prosecuting attorney before Respondent Court and of the Attorney General before the appellate court, raise significant issues of statewide concern.

## ISSUE 6: WHAT IS THE APPROPRIATE RELIEF ONCE A PETITIONER HAS DEMONSTRATED HARM WHICH OCCURRED PRETRIAL

### 1. Dismiss The Second Information With Instructions For The Trial In The First Case To Begin In 60 Days Or Be Dismissed

The bottom line here is that the second case should have been dismissed by Respondent Court. The second case involved the same nucleus of operative facts from the cell phone incidents, whereby no "application" as required by Penal Code, section 1387 subdivision (a)(1) was filed, and whereby there was no proof that the new allegations were supported by "substantial evidence", and whereby there was no showing of "due diligence."

### 2. Dismiss Both Cases Pending In Respondent Court Because Of On-Going Abuse Of Process

Petitioner had respectfully asserted in the

Court of Appeal, and it is asserted in this Court as well, that both cases in the Respondent Court should be dismissed with prejudice based upon the cumulative deprivation of Petitioner's substantial rights and the on-going abuse of the process.

Petitioner asserts that the combination of the following actions, would justify an order dismissing both cases with prejudice.

- the Prosecution did not immediately acknowledge in Respondent Court or this Court the improper filing of the second separate and distinct case (VCF325933),

- the Prosecution did not immediately acknowledge and stop any member of the prosecution team from continuing to argue that Penal Code sections 654, 1382, 1385, and 1387 were not applicable, and

- the Prosecution has not promptly acknowledged and corrected sua sponte the use of false and/or misleading testimony,

- rather, the Prosecution is adamantly insisting that the testimony was not false.

In the Court of Appeal, the Attorney General has

- repeatedly used arguments that are not supported by the facts and the law even after being placed on notice,

- failed to promptly correct sua sponte the use of false and/or misleading testimony which does not require any objection by defense counsel or any finding by the court, and

- persistently used with emphasis false and/or misleading testimony even after having been placed on notice of its nature.

The deprivation of Petitioner's rights are of statewide concern particularly based upon the Attorney General's Office being responsible for supervising all of the district attorney's offices in the state. (Gov. Code, §12550.)

The lawful procedures enacted by the Legislature have not been complied with in this case, and the self-executing duties, along with the mandatory ethical responsibilities, have not been fulfilled. Rather, there has been an on-going abuse of process which continues to deprive Petitioner of procedural justice.

## II. GROUNDS FOR REVIEW

Appellant provides the following explanation for "how the case presents a ground for review under rule 8.500(b)" (Rule 8.504(b)(2)) based upon review being "necessary to secure uniformity of decision or to settle an important question of law." (Rule 8.500(b)(1).)

### GROUND 1. WHAT CIRCUMSTANCES REQUIRE THE PROSECUTION TO COMPLY WITH THE LEGISLATIVE INTENT OF PENAL CODE SECTION 1387 AND/OR THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTION

### SUB-GROUND 1.1. WHEN DOES THE PROSECUTION HAVE TO COMPLY WITH THE REQUIREMENTS OF PENAL CODE 1387 AND THE DUE PROCESS CLAUSE BEFORE NEW ALLEGATIONS ARE FILED AND WHILE A CASE IS ALREADY PENDING?

After criminal allegations have been filed and are pending against a defendant, under what circumstances, and when, does the Prosecution have to file an application (Pen. Code, §1387, subd.(a)(1)) with the Respondent Court and establish that the new allegations are based upon (1) "substantially new evidence" and (2) that the prosecution acted with "due diligence" before filing a new complaint alleging the new allegations (ibid.)?

SUB-GROUND 1.2. DOES THE PROSECUTION VIOLATE A DEFENDANT'S STATUTORY AND CONSTITUTIONAL RIGHTS BY MAINTAINING ONE CASE AND FILING A SECOND SEPARATE AND DISTINCT CASE BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS?

Also, review should be granted to determine whether the Prosecution must comply with the requirements of Penal Code section 1387 and the Due Process Clause (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) of the federal and state Constitution when the Prosecution maintains an original case which had already been consolidated with a separate case (event) and which contains the same nucleus of operative facts which are alleged in a new complaint (based upon the same nucleus of operative facts of the first case) and which is filed several years later.

GROUND 2. DOES THE PROSECUTION ABUSE THE PROCESS AND VIOLATE THE LEGISLATIVE INTENT OF PENAL CODE SECTIONS 654, PENAL CODE SECTION 1387, AND/OR THE DUE PROCESS CLAUSE BY CONTINUING TO ASSERT THAT THE PROSECUTION CAN STILL MAINTAIN AND GO TO TRIAL ON TWO SEPARATE CASES BASED UPON A SITUATION DESCRIBED IN ISSUE 1?

When the Attorney General maintains that the Prosecution can continue to pursue two separate and distinct cases based upon the same nucleus of operative facts, statewide concerns are raised since this position violates the fundamental protections an individual accused of a crime as provided by duly enacted legislation and articulated in Penal Code sections 654, and 1387, along with the fundamental protections provided by the Due Process Clause (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) of the federal and state constitution.

Since the Attorney General, in the filings submitted in the Court of Appeal, continued to advance the same position as the prosecuting attorney in Respondent Court, this represents, as well, an issue of statewide importance that supports granting the Petition for Review.

GROUND 3: DOES IT AMOUNT TO EITHER AN ABUSE OF PROCESS AND/OR VINDICTIVE PROSECUTION WHEN THE PROSECUTION USES FALSE AND/OR MISLEADING TESTIMONY?

As related to proceedings before Respondent Court, Petitioner's counsel identified testimony from the Prosecution's investigator and expert, Daniel Ford, regarding the process required in order to obtain information from a Canadian company, as well as the misrepresentations in the testimony of this witness. (Napue

In the Court of Appeal, the Attorney General relied upon this same testimony and actually emphasized it.

Petitioner suggests that this is an issue of statewide importance, particularly since the Attorney General took no action.

GROUND 4. WHEN DOES A PROSECUTOR'S ETHICAL DUTIES REQUIRE CANDOR TO THE COURT REGARDING A PROCEDURAL VIOLATION?

Multiple opportunities have been provided for the Prosecution to acknowledge that the proper procedures were simply not followed in Respondent Court, to correct the false testimony of a member of the prosecution's team, and to concede that an abuse of process occurred by filing two separate and distinct cases regarding the same or similar facts associated with the cellphone incidents.

No prosecuting attorney, including supervising prosecuting attorneys, have acknowledged or have expressed candor as to the issues raised by Petitioner.

The amended Rules of Professional Conduct Rule 5-110 reiterated that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice ...." (Discussion [1], Rules Prof. Cond. 5-110 [emphasis added]. See Rules Prof. Cond. 1-100; see also Berger v. United States (1935) 295 U.S. 78, 88.)

The Attorney General's failure to exercise its self-executing duty represents an on-going violation of Petitioner's due process rights (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) along with the recent change in the law respecting a prosecutor's special ethical duties, as discussed in the November 2, 2017, expedited order that modified the Rules of Professional Conduct. (Discussion [1], Rules Prof. Cond. 5-110 [emphasis added]. See Rules Prof. Cond. 1-100; see also Berger v. United States, supra, 29 U.S., at p. 88.)

Rule 3-110 requires a prosecutor to supervise other attorneys and members of the prosecution team. (Discussion, Rule 3-110.)

It is respectfully submitted that this case reveals a systemic disregard for the procedural justice which is guaranteed by State and Federal law. (U.S. Const., 6th & 14th Amends.; Berger v. United States, supra, 295 U.S. 78, 88; Cal. Const., art. I, §§ 7 & 15; Discussion, Rule 3-110; Discussion [1], Rules Prof. Cond. 5-110. See also Rules Prof. Cond. 1-100.)

Petitioner has not been "accorded procedural justice" by the Prosecution's conduct – in Respondent Court and/or in the Court of Appeal. (Id.) Indeed, all of the State's filings regarding Detective Ford's investigation are misplaced, and are frankly not candid. (Ibid.)

The Attorney General's failure to correct either the improper filing of the second case and/or to correct the use of false and/or misleading testimony also represents issues of statewide concern. (Rules of Prof. Cond., Rule 5-110, Discussions [1] and [6]; Rule 3-110, Discussion; Napue v. Illinois, supra, 360 U.S. 264, 269; People v. Avila (2009) 46 Cal.4th 680, 711; People v. Morrison (2004) 34 Cal.4th 698, 716-717.)

### SUB-GROUND 4.1. VIOLATION OF PENAL CODE SECTION 1387 NOT ACKNOWLEDGE; INSTEAD, ARGUED NOT APPLICABLE

The second and separate case was filed without alerting the Respondent Court and/or the defendant that this case was based upon same or similar facts as the first case.

Penal Code section 1387 subdivision (a) protects judicial resources and a defendant's procedural due process rights (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) by requiring the Prosecution to follow a particular procedure before additional criminal allegations may be filed.

The statute provides a procedure whereby the Prosecution my submit an application before new allegations are filed to allow the trial court an immediate opportunity to determine whether new allegations are supported by substantially new evidence that could not of been discovered through due diligence.

Did the prosecuting attorney have to follow the procedure outlined in Penal Code section 1387 before the second case was filed? The Prosecution says no; while Petitioner advances that the Penal Code requirements apply. The Attorney General

continued to advance the Prosecution's position in Respondent Court.

The Attorney General position, if Petitioner is correct, raises serious statewide issues because the Attorney General is responsible for supervising all of the district attorney offices throughout the state.

### SUB-GROUND 4.2. FALSE TESTIMONY IDENTIFIED IN RESPONDENT COURT NOT CORRECTED IN COURT OF APPEAL

The Attorney General's position that Ford's testimony as to when the Canadian company was beginning to accept search warrants compounded the abuse of process when the Attorney General in its Second Response argued that Ford was diligent when in fact Ford was not diligent, and that his testimony about Kik was false as to the testimony that the Canadian company in 2015 was "finally accepting U.S. search warrants for investigations" Appendix B, E, G, H.

The Attorney General's reliance and emphasis upon this false testimony represents an on-going misrepresentation as to Ford's due diligence in his investigation as to what evidence was available, as well as when that evidence was available, with respect to the Emma series of photographs, thereby violating Petitioner's substantial procedural due process rights. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; Berger v. United States, supra, 295 U.S. 78, 88; Giglio v. United States, supra, 405 U.S. 150.)

The 3rd Response contains harsh language which is not supported by the record. In this regard, it was a member of the prosecution team who has perpetrated a "falsehood" in Respondent Court and before the Appellate Court.

At no point in the litigation in Respondent Court did the Prosecution file any opposition to contest Petitioner's position that Ford did not act with due diligence, particularly when considering the MLAT, the Kik Guide, and the federal agencies he had access to during his investigation to assist him. (Rule 4.111(a); accord Tulare County L. R. 805.)

Petitioner's counsel argued during the motions hearing that Ford should have known the proper procedures because he "was a member of the Central California Internet Crimes Against Children task force for some time" and his conduct represents an abuse of process for him not to exercise due diligence. (Transcript from June 29, 2017, motion hearing, p. 15, which is attached as an exhibit to the petition, p. 308.)

Both the Prosecution, in Respondent Court, and the Attorney General, before the Appellate Court, had multiple opportunities to fairly address these issues, but they have not.

GROUND 5. WHAT IS THE APPROPRIATE RELIEF PRETRIAL SHOULD A PETITIONER RECEIVE AFTER DEMONSTRATING HARM AND/OR CUMULATIVE HARM BASED UPON THE ACTIONS OF EACH PROSECUTOR'S INVOLVED IN THE PROCESS BASED UPON AN ABUSE OF PROCESS

The second case involving the cellphone incidents was filed years after the Prosecutor had argued in the first case (a consolidated case involving the Tulare incidents and the cellphone incidents) that it should not be severed.

Petitioner's second counsel discovered this procedural violation and violation of Petitioner's

substantial rights after the Prosecution sought to consolidate the first case with the second case.

While Petitioner's counsel was investigating this issue, it was discovered that the Prosecution's witness, Daniel Ford, had not testified truthfully about when the information that was supposed to support the second case was available. He testified that the Canadian company had only started excepting subpoenas after 2015 – this was not true as demonstrated by the treaty, and the Kik user manual.

If the Prosecution has violated the duly enacted law (Pen. Code, §1387, subd. (a)(1)) and Petitioner's due process rights (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; Napue), he does not have to demonstrate prejudice pretrial to obtain relief of a violation of his substantial rights when seeking pretrial relief as prejudice is presumed. (Stanton v. Superior Court (1987) 193 Cal.App.3d 265, 272 quoting People v. Pompa-Ortiz (1980) 27 Cal.3d 519, 529.)

As such, what relief should a defendant receive in this situation?

Petitioner suggests that, at the very least, the second Information should be dismissed with prejudice.

This case also presents a particularly unique situation in which the Attorney General adopted the Prosecution's position taken in Respondent Court and refused to alter that position after Petitioner had provided substantial legal authority and was granted judicial notice of documents that refuted certain of their positions. What type of relief should be granted in that situation? Petitioner suggests here that both cases should be dismissed based upon an on-going abuse of process.

Further, based upon the circumstances in this

case, Petitioner urges the Court to grant the instant Petition for Review.

## III. NO PETITION FOR REHEARING WAS FILED

The filing in the Court of Appeal was final upon issuance of the May 3, 2018, Order; therefore, Petitioner could not file a petition for rehearing in the Court of Appeal. (Rules 8.504(b)(3); 8.500(c)(2); 8.490(b)(1)(A).)

## IV. NO OPINION WAS FILED BY COURT OF APPEALS

The Court of Appeal did not file an opinion after it considered the informal response and informal reply of the parties. (Rule 8.504(b)(4).)

## V. THE COURT OF APPEAL ORDER IS ATTACHED

The May 3, 2018, Court of Appeal order summarily denying the petition for writ of mandate is attached hereto as Attachment A and referred to herein as "Att. A." (Rule 8.504(b)(5).)

## STATEMENT OF CASE IN COURT OF APPEAL

On August 2, 2017, Petitioner filed a petition for writ of mandate referred to herein as "Pet." A list of all the exhibits filed with the original petition for writ of mandate is provided after the Table of Authorities and referred to herein as "Pet.Ex."

The Court of Appeal filed an order on

September 1, 2017, directing the Attorney General to file, on or before 30 days from the date of the order, an informal response to the petition. Petitioner was granted leave to file an informal reply on or before 30 days after the filing of the informal response.

On September 28, 2017, the Attorney General filed an informal response which is referred to herein as "Response."

On October 30, 2017, based upon the Attorney General's arguments in the Response, Petitioner filed both a request for judicial notice and a request to for the Court of Appeal to order the Attorney General to file a Supplemental Informal Response after the Court takes judicial notice of Kik's Guide for Law Enforcement.

On November 9, 2017, the Court filed an order granting Petitioner's "Motion for Judicial Notice, " filed on October 30, 2017, and directed the Attorney to file a supplemental informal response on or before 30 days from the date of this order regarding the materials this court judicially noticed. This Court of Appeal noted that the Attorney General may include arguments regarding other issues to supplement its prior informal response. Petitioner was granted leave to file its informal reply on or before 30 days after the Attorney General's supplemental informal response is filed.

On December 6, 2017, the Attorney General filed its Supplemental Informal Response referred to herein as "2nd Response."

On January 3, 2018, based upon the Attorney General's arguments in the 2nd Response, Petitioner filed a second request for judicial notice of Kik's Guide for Law Enforcement-Revised January 2014 (submitted separately) as Exhibit 1. On January 23, 2018, the Court deferred the ruling on the motion.

On January 10, 2018, Petitioner filed an

application requesting the Court of Appeal to direct the Attorney General to file a supplemental informal response regarding the Kik's Guide for Law Enforcement-Revised January 2014.

On January 12, 2018, the Court of Appeal denied Petitioner's January 10, 2018, application requesting to order a second supplemental response.

On January 18, 2018, Petitioner filed a motion for reconsideration and to clarify order the January 12, 2018, order.

On January 18, 2018, the Attorney General filed an opposition to Petitioner's second motion for judicial notice.

On January 22, 2018, Petitioner filed a reply filed to the Attorney General's opposition.

On January 23, 2018, the Court of Appeal directed the Attorney General to file an amended response (referred to herein as "3rd Response") pursuant to Petitioner's motion filed on January 18, 2018. Said response could address any issues raised by Petitioner, including the issues Petitioner asserted have not been raised previously. The amended informal response was allowed to incorporate by judicial notice any portions of the previous pleadings filed by the Attorney General. In light of the Attorney General's opposition, a ruling upon the motion for judicial notice filed on January 3, 2018, is deferred. (People v. Preslie (1977) 70 Cal.App.3d 486, 492-493.)

On February 6, 2018, the Attorney General filed its amended informal response as required by the January 23, 2018, order. The amended informal response is referred to herein as "3rd Response."

On February 28, 2018, the Attorney General filed a separate declaration signed by Sergeant Daniel Ford in support of AG's amended Informal Response filed on February 6, 2018.

On March 2, 2018, Petitioner filed a motion to strike the Ford declaration.

On March 6, 2018, the Court of Appeal filed an order in which Petitioner's request to strike will be deferred until the other issues presented by this petition are considered. (Cf., 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 742.)

On March 7, 2018, Petitioner filed a motion for reconsideration of the March 6, 2018 order. On March 9, 2018, the Court of Appeal denied the motion for reconsideration stating that all of the issues Petitioner raises will be considered at one time to avoid separate, duplicative, and piecemeal adjudications. (Cf. 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 942.)

On March 20, 2018, Petitioner timely submitted his Reply was filed.

On April 2, 2018, a letter was filed by the Attorney General indicating that a new attorney is now counsel for Respondent as the attorney who submitted all the filings in the Court of Appeal had retired.

On May 3, 2018, the Court of Appeal denied the petition for writ of mandate. The Order stated, "'Petition for Writ of Mandate, Prohibition, and/or Any Other Appropriate Relief, ' filed on August 2, 2017, is denied. Petitioner's motions for judicial notice are granted. This court did not consider Officer Ford's declaration for any purpose. Petitioner's requests for further relief are denied."

Petitioner timely files the instant Petition for Review.

## PETITION TIMELY FILED

Petitioner must file the instant petition within 10 days after the appellate court's order was filed on May 3, 2018. (Rule 8.500(e)(1) ["A petition for

review must be served and filed within 10 days after the Court of Appeal decision is final in that court"].)

"The time in which any act provided by these rules is to be performed is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or other legal holiday, and then it is also excluded." (Rule 1.10(a)(1).)

The tenth and "last day" to file the petition in this case is "Sunday," therefore, it is "excluded" making "the last day" to file the petition Monday, May 14, 2018. (Rule 1.10(a)(1).)

Therefore, the instant petition is timely filed within time period required after the denial of his petition for writ of mandate if filed on or before May 14, 2018. (Rules 8.500(e)(1); 8.25(b)(3).)

## CONCLUSION

Petitioner respectfully urges the Court to grant review in the present case, and upon review, to grant Appellant appropriate relief.

Dated: May 11, 2018

Respectfully submitted,

NUTTALL & COLEMAN

/s/ Roger T. Nuttall
ROGER T. NUTTALL
Attorney for
Petitioner/Defendant

VERIFICATION OF ROGER T. NUTTALL

I, ROGER T. NUTTALL, hereby verify that:

1. I am a duly licensed attorney, licensed to practice law in the State of California, and that I am a member in good standing of the State Bar of California;

2. I represent David Souza, a defendant in the above-entitled action;

3. I have read the foregoing petition, and the attachment hereto, and know that the matters alleged therein are true as based upon my reading of true copies of court documents on file in this matter.

4 The factual statements and assertions which are contained in the instant Petition are true and correct to the best of counsel's knowledge and belief, and as to those matters stated on information and belief, I believe them to be true.

I declare, under penalty of perjury under the laws of the State of California, that the forgoing is true and correct and that this Verification was executed on this 11th day of May, 2018, in Fresno, California.

/s/ Roger T. Nuttall

ROGER T. NUTTALL

CERTIFICATE OF COMPLIANCE

I, Roger T. Nuttall, certify that the word count is 6,680 based upon "the word count of the computer program used to prepare the document" and comports with the requirement "not exceed 8,400 words, including footnotes." (Rule 8.504(d)(1).)

Dated: May 11, 2018

/s/ Roger T. Nuttall
ROGER T. NUTTALL

PROOF OF SERVICE

STATE OF CALIFORNIA )
)
COUNTY OF FRESNO )

I am employed in the County of Fresno, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On May 11, 2018, I served the foregoing document described as: PETITION FOR REVIEW, on the interested parties in this action by placing a copy thereof enclosed in a sealed

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, California, 93721

Darren K Indermill, Esq.
Office of the Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

Clerk of the Court, Criminal Division
Tulare County Superior Court
221 S. Mooney Blvd., Rm. 124
Visalia, CA 93291

Honorable Gary A. Paden, Judge,
Tulare County Superior Court
Department 6
221 S. Mooney Blvd.
Visalia, CA 93291

Chelsea Wayte, Deputy District Atty.
Tulare County DA Office
221 S. Mooney Blvd., Rm. 224
Visalia, CA 93291

[X ] BY MAIL

I deposited such envelopes in the mail at Fresno, California. The envelope was mailed with postage fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing.

I declare under penalty of perjury under the law of the State of California that the above is true and correct.

EXECUTED on May 11, 2018, Fresno, California.

/s/ Bryan Murray
BRYAN MURRAY

APPENDIX C
Order, Petition for Mandate, Prohibition and/or Any Other Appropriate Relief in the Court of Appeal of the State of California for the Fifth Appellate District, denied on May 3, 2018

Court of Appeal, Fifth Appellate District
Charlene Ynson, Clerk/Administrator
Electronically FILED on 5/3/2018 by DMONOPOLI,
Deputy Clerk

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

| | |
|---|---|
| DAVID SOUZA,<br>Petitioner,<br>v.<br>THE SUPERIOR COURT OF TULARE COUNTY,<br>Respondent;<br>THE PEOPLE,<br>Real Party in Interest. | F076064<br><br>(Tulare Super. Ct. Nos. VCF285006<br>&<br>VCF325933)<br><br>ORDER |

BY THE COURT:*

The "Petition for Writ of Mandate, Prohibition, and/or Any Other Appropriate Relief," filed on August 2, 2017, is denied. Petitioner's motions for judicial notice are granted. This court did not consider Officer Ford's declaration for any purpose. Petitioner's requests for further relief are denied.

s/ Levy
Levy, A.P.J.

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* Before Levy, A.P.J., Detjen, J., and Meehan, J.

APPENDIX D
Excerpt of Petitioner's Motion to Dismiss Which Was Referred To In The Filing In The California Supreme Court As Pet.Ex. 121-122

If Officer Ford had exercised due diligence, he would have known that

- "Agencies outside of Canada may need to submit a Mutual Legal Assistance Treaty (MLAT) request through the proper legal authorities in order to obtain any user data from [Kik]." (Kik's Guide for Law Enforcement, p. 6);

- The United States ratified a Mutual Legal Assistance Treaty with Canada on October 24, 1989 (https://www.congress.gov/treaty-document/100th-congress/14);

- The Office of International Affairs (OIA), Department of Justice, is the United States Central Authority for Mutual Legal Assistance Treaties (https://www.justice.gov/criminal-oia).

Thus, with the exercise of due diligence, Office Ford could have easily obtained information about the Kik users in 2013.

Consequently, the Prosecution failed to comport with the requirements pursuant to Penal Code section 1387, subdivision (a)(1). Accordingly, the Prosecution abused the process in obtaining the Information in this matter -- VCF325933.

Hence, Mr. Souza's substantial rights have been violated; therefore, the Information in case number VCF325933 should be dismissed.

GROUND III: IN ADDITION, THE PROSECUTION HAS VIOLATED MR. SOUZA'S DUE PROCESS RIGHTS BY ENGAGING IN VINDICTIVE PROSECUTION SUCH THAT CASE NUMBER VCF325933 SHOULD BE DISMISSED

A separate ground to dismiss this case is based upon a claim of vindictive prosecution.

On October 21, 2015, when the Prosecution filed the complaint in this case, the Prosecution failed to follow well-established procedure and did not file an application to dismiss the case number VCF285006 as required by Penal Code section 1385. And, the Prosecution did not obtain a ruling by this Court as to whether it could proceed with a new complaint by making a showing that substantially new evidence existed and it had exercised due diligence in obtaining the new evidence as required by Penal Code section 1387, subdivision (a)(1).

"The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions (Lee v. Superior Court [(1983)] 142 Cal.App.3d 637, 640) and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382 (Alex T. v. Superior Court (1977) 72 Cal.App.3d 24, 30)" (Dunn v. Superior Court (1984) 159 Cal.App.3d 1110, 1119.)

In this case, the Prosecution proceeded as if it had a new and separate case to prosecute in addition to the pending Information in case number VCF285006.

> "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'

> [Citation.] In a series of cases beginning with North Carolina v. Pearce … , the [Supreme] Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." (United States v. Goodwin (1982) 457 U.S. 368, 372 [] (Goodwin).) Thus, the "due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15) forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (People v. Jurado (2006) 38 Cal.4th 72, 98 [].)

(Johnson v. Superior Court, supra, 4 Cal.App. 5th 937, 945-946.)

"California and federal cases place great emphasis on when during the criminal proceedings the prosecutor's allegedly vindictive action occurs." (Johnson v. Superior Court, supra, 4 Cal.App.5th 937, 947 citing In re Bower (1985) 38 Cal.3d 865, 874–877, 879; Goodwin, supra, 457 U.S. at p. 381.)

"[W]hether the circumstances appear vindictive is assessed by reviewing all the facts—even if the new charges stem from different events, conduct, or victims than those in the original case." (Johnson v. Superior Court, supra, 4 Cal.App.5th 937, 959 quoting United States v. Krezdorn (5th Cir. 1983) 718 F.2d 1360, 1364–1365.)

In United States v. Groves (9th Cir. 1978) 571 F.2d 450, the Court "emphasized the totality of the circumstances—namely what the government knew, when they knew it, and when they decided to bring

the new charges. (Groves, supra, at pp. 453–454.) Twiggs also relied on U.S. v. Ruesga-Martinez, in which the Ninth Circuit emphasized the appearance of vindictiveness and held 'that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive.'" (Johnson v. Superior Court, supra, 4 Cal.App.5th 937, 960 quoting United States v. Ruesga-Martinez (9th Cir. 1976) 534 F.2d 1367, 1369 [italics added in original]; Twiggs v. Superior Court (1983) 34 Cal.3d 360, 371.)

APPENDIX E
Excerpt of Detective Ford's Testimony During The Preliminary Hearing On February 23, 2017, Page 7

A I WAS.
Q AND WHAT WAS THE NATURE OF THAT
INVESTIGATION?
A CHILD MOLEST INVESTIGATION.
Q NOW, I'D LIKE TO CALL YOUR ATTENTION
TO FEBRUARY OF 2015. DID SOMETHING SIGNIFICANT
HAPPEN DURING -- REGARDING THIS INVESTIGATION IN
THAT MONTH, IN THAT YEAR?
A IT DID.
Q AND WHAT WAS THAT?
A I HAD ATTENDED A TRAINING JUST PRIOR
TO FEBRUARY 2015 WHERE I HAD DISCOVERED THAT THE
KIK USER APP, WHICH IS A SOCIAL MEDIA APPLICATION
USED FOR CHATTING WITH INDIVIDUALS IN AN ANONYMOUS
NATURE AND IS CANADIAN BASED WAS FINALLY ACCEPTING
U.S. SEARCH WARRANTS FOR INVESTIGATIONS.
Q OKAY. AND DID YOU SUBSEQUENTLY DRAFT
A SEARCH WARRANT FOR KIK BASED ON THE NEW
INFORMATION THAT YOU RECEIVED AT TRAINING?
A I DID. I ACTUALLY WROTE A SEARCH
WARRANT TO RE-EXAMINE MR. SOUZA'S PHONE JUST PRIOR

TO BUT EVENTUALLY, YES, I WROTE THE SEARCH WARRANT FOR KIK.

Q ALL RIGHT. AND JUST A LITTLE BIT OF BACKGROUND. DURING YOUR INITIAL INVESTIGATION THAT BEGAN IN MAY OF 2013 DID YOU RECOVER A CELL PHONE

APPENDIX F
Reference To MLAT Excerpt from Petitioner's Supplemental Opposition to Consolidate Which Was Referred To In The Filing In The California Supreme Court As Pet.Ex. pp. 137-140. See also https: // www. congress. gov / treaty-document / 100th-congress/ 14/ all-info

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All Information (Except Treaty Text) for TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS Senate Consideration of Treaty Document 100-14

Back to this treaty document

Treaty Document

Formal Title
The Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985.

Date Received from President
02/22/1988

Countries / Parties
Canada

Latest Senate Action
10/24/1989
Resolution of advice and consent to ratification agreed to in Senate with amendments by Yea-Nay Vote. 99 - 0. Record Vote Number: 267.

Jump to: Actions | Titles | Resolution Text | Index Terms

Actions (12)

| Date | Senate Actions |
|---|---|
| 10/24/1989 | Resolution of advice and consent to ratification agreed to in Senate with amendments by Yea-Nay Vote. 99 - 0. Record Vote Number: 267. |
| 10/24/1989 | Amendment No. 1044 agreed to by Voice Vote. |

https: // www. congress. gov / treaty-document / 100th-congress/ 14/ all-info
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Exhibit 1, Page 1

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| Date | Senate Actions |
|---|---|
| 10/24/1989 | Amendment No. 1044 proposed by Senator Helms. |
| 10/24/1989 | S.Amdt.1047 Amendment agreed to in Senate by Voice Vote. |
| 10/24/1989 | S.Amdt.1047 Proposed by Senator Kerry for Senator Helms. To prevent the granting of assistance to foreign officials who engage in, encourage, or facilitate the production or distribution of illegal drugs. |
| 07/31/1989 | Reported by Mr. Pell, Committee on Foreign Relations, with printed report with additional views - Ex.Rept. 101-10. Without reservation. |
| 10/21/1988 | No further action at sine die, 100th Congress; automatically rereferred to Foreign Relations Committee under paragraph 2 of Rule XXX of the Standing Rules of the Senate. |
| 09/30/1988 | Reported favorably, with a resolution of |

| | |
|---|---|
| | advice and consent to ratification without reservation, by Mr. Pell, Committee on Foreign Relations (Printed Report together with additional views--Ex. Rept. 100-28). Calendar No. 19. |
| 09/27/1988 | Committee on Foreign Relations. Ordered to be reported without amendment favorably. |
| 06/14/1988 | Committee on Foreign Relations. Hearings held. |
| 04/20/1988 | Committee on Foreign Relations. Hearings held. |
| 02/22/1988 | Received in the Senate and referred to the Committee on Foreign Relations by unanimous consent. |

Titles

Formal Title: The Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985.

Short Title: TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Resolution Text

TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION AS AGREED TO BY THE SENATE:

Resolved, (two-thirds of the Senators present

concurring therein), That the Senate advise and consent to the ratification of the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985, subject, however, to the inclusion in the instruments of ratification of the following understandings:
(1) Understanding. Nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States.
(2) Understanding. Pursuant to the rights of the United States under this Treaty to deny requests which prejudice its public interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that

https: // www. congress. gov / treaty-document / 100th-congress/ 14/ all-info
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Exhibit 1, Page 2

Treaty Document 100-14 - TREATY WITH CANADA ON MUTUAL LEGAL ASSIST... Page 3 of 3

a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.

Index Terms
100-14
CANADA
CRIMINAL

CRIMINAL MAnERS
LEGAL
LEGAL ASSISTANCE
MUTUAL LEGAL ASSISTANCE
https:
https: // www. congress. gov / treaty-document / 100th-congress/ 14/ all-info
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APPENDIX G
2014 Kik Guide For Law Enforcement Which Petitioner Requested And Was Granted Judicial Notice Of By Court Of Appeal And Was Part Of Record Considered By State Court Of Last Resort

KIK's GUIDE FOR LAW ENFORCEMENT

Thanks for checking out our law enforcement guide. Kik takes the safety of our users very seriously, and we hope this guide will be a useful tool for you. Itincludes information about our app; the features and functions we offer to helpkeep our users safe; and how we can work with you if you're investigating a casethat involves a Kik user.
If you have questions that aren't answered in our guide, you can reach us atsupport@kik.com.



KIK's GUIDE FOR LAW ENFORCEMENT

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KIK's GUIDE FOR LAW ENFORCEMENT

What is Kik?

o Kik Messenger is a smartphone application available for download from the AppleiTunes Store, Google Play Store, Windows Phone app store, and the Ovi Store (forSymbian users). BlackBerry users (on OS versions 4.6 to 7) can download Kik from the Kik web site.

o Kik Messenger provides cross-platform smartphone instant messaging, which allows our users to have text-based conversations with one another. Kik users can also use Kik Messenger to share rich media like photos, YouTube videos, and other forms of content.

o Kik Messenger is free to download and free to use with a Wi-Fi connection. It requires a smartphone (like an iPhone, Android-based phone or iPod) with either a data plan or access to a Wi-Fi

network.

o Kik Messenger is rated 17+ in the iTunes Store and Medium Maturity in the GooglePlay store.

Kik features that help protect user safety

o Unlike many other smartphone instant messengers, which are based on a users' phone number, Kik uses usernames to identify our users. By using usernames instead of phone numbers as the unique identifier on Kik, users' personal information like cell phone numbers and email addresses are never shared by Kik. Only those people that users choose to share their username with are able to contact them on Kik.

o Kik's “Block” feature allows our users to block all contact with another user, without revealing to the other user that they've been blocked. This terminates any undesired contact from that person on Kik through the blocked account.

o The “Ignore New Users” feature allows our users to hide messages they receive from people they've never talked to before, and turn off notifications for those messages. If a Kik user doesn't want to see an inbound message from someone they don't know -they don’t have to.

o Here’s a link to the information on how to use our safety features:http://help.kik.com/entries/24745228.

Kik’s philosophy/approach

o We believe that Kik users need to feel safe and respected when they use our services, and we need to

be good corporate citizens in providing our service. To be sure of this, we will follow three principles:

• We will comply with applicable law;

• We will protect our users' privacy; and

• We will promote user safety on Kik.

o Kik Interactive is located in Ontario, Canada, and as such is governed by Canadian law.

Contacting Kik

o Our team is small, and we do everything we can to ensure that we respond quickly to urgent inquiries from law enforcement. To help us do so, we direct all in bound inquiries to support@kik.com. To ensure that inquiries are directed and responded



to promptly, we ask that law enforcement agencies include the words "Law Enforcement Inquiry" in the subject line of their emails.

o Our mailing address is 420 Weber St North, Suite I, Waterloo ON N2L 4E7 CANADA.

o We aren't able to accept inquiries by fax.

TIP: Be sure to ask your IT team to "allow" emails from our support@kik.com email address, so our replies aren't filtered as spam.

Finding a Kik username

o A Kik username is the only unique identifier in our systems, and the only way we can identify a unique Kik account.

o Unfortunately, information like phone numbers, first name, last name, or an email address will not allow Kik to identify a user in our systems. We need to be provided with an exact Kik username to be able to find, preserve on, or release data for a specific user.

o To find a Kik username, please see the instructions in Appendix A.

TIP: Kik usernames never include spaces. They may include lower and upper case letters, numbers, and/or punctuation.

What information might be available?

TIP: The text of Kik conversations is ONLY stored on the phones of the Kik users involved in the conversation. Kik doesn't see or store chat message text in oursystems, and we don't ever have access to this information.

o User Profile:

• Users of Kik's online services create their own user profile (username, first and last name, and email address). This information isn't verified by Kik, meaning that we don't have any way to know if it's accurate.

o IP address:

• We collect IP address information (because we

need it to process messages sent within Kik Messenger), but this information is provided by third parties and isn't verified by Kik.

o History:

• In some cases, we might have information about how a user has used, or is using, Kik Messenger. This "transaction history" is similar to call detail records available from wireless carriers. Transaction history does not include chat message text or phone numbers.

Obtaining 'tombstone' data from Kik

Kik has established processes for obtaining tombstone data in the case of an emergency, and for cases of child sexual exploitation or child abuse.

Available information might include first and last name, email address, IP addresses, account creation date, and device type and manufacturer. Phone number (if provided by the user) is not stored or accessible by Kik.



TIP: Through this process, IP history is only accessible for the last 21-30 days. IP addresses are provided by third parties.
Emergency Disclosure Requests

o If law enforcement officials believe there is an emergency involving death, loss of security or serious

physical injury to any person, and Kik Interactive Inc. may have relevant information (see above for details of what information might be available), Kik has established an Emergency Disclosure Request process to allow for the release of 'tombstone data'.

o Our Emergency Disclosure Request form (along with instructions for completing andsubmitting the form correctly) can be downloaded from our website at http://kik.com/lawenforcement.

o In the event that Kik responds to an Emergency Disclosure Request, we will notifythe relevant Kik users of this emergency request via the email address theyregistered with their Kik account. Law enforcement officials who believe that notification would jeopardize an investigation should inform Kik upon submitting therequest; Kik will carefully consider that request as part of our emergency disclosure.

o We always recommend that Kik users who are aware of an emergency situationshould immediately contact their local law enforcement agency for help.

TIP: To ensure quick processing of an Emergency Disclosure Request, pleasesubmit the request with the subject line "EMERGENCY DISCLOSURE REQUEST".

Matters involving child sexual exploitation or child abuse

o For cases of child sexual exploitation or child abuse only, Kik has established a LawEnforcement Request process to allow the release of tombstone data (as outlined above).

o Our Law Enforcement Request form, (along with instructions for completing and submitting the form correctly) can be downloaded from our website at http://kik.com/lawenforcement.

o PLEASE NOTE: If Kik Interactive Inc. has reasonable grounds to believe that Kik Messenger has been used to commit a child pornography offence, it will file a reportwith its local law enforcement agency.

TIP: To ensure quick processing of a Law Enforcement Request, please submit the request with the subject line "URGENT LAW ENFORCEMENT REQUEST FOR DISCLOSURE".

Obtaining content data from Kik

Kik Interactive is located in Ontario, Canada, so we're governed by Canadian law. That means we'll need a valid Canadian court order (production order) before we're able to consider releasing content data.



Available data might include photographs, videos, and chat logs. Photos and videos are not accessible to the support team, and are automatically deleted within a short period. Kik doesn't see or store the text of conversations, and we don't ever have access to this information.

TIP: To ensure data isn't lost, we recommend submitting a Preservation Request to Kik as soon as possible.
Preservation Requests

o We understand that obtaining a production order occasionally takes time. If a production order isn't yet available, Kik can voluntarily preserve information once we receive a formal preservation request from a law enforcement agency. We accept preservation requests from any law enforcement agency globally.

o Our Preservation Request form (along with instructions for completing and submitting the form correctly) can be downloaded from our website at http://kik.com/lawenforcement.

o Completed Preservation Request Forms can be emailed to Kik at support@kik.com. Please include the words "Preservation Request" in the subject line.

o Once we receive your completed form, Kik will review and acknowledge receipt of the preservation request.

o If Kik receives a preservation request with an invalid username, or a request that doesn't include a Kik username, unfortunately we won't be able to preserve any information. Kik will notify the law enforcement agency, and request an updated preservation request form with the correct information.

Obtaining data from Kik

o Kik Interactive is located in Ontario, Canada, and as such is governed by Canadian law. That

means we'll need a valid Canadian court order (production order)before we're able to consider releasing content data about a user in connection with an investigation.

o Valid Canadian court orders need to include the following:

• The display name and username of the individual(s). Please see Appendix A for details on finding the username. (Without a username -the only unique identifier on Kik Messenger-we won't be able to find accounts to preserve data).

• A list of the information requested.

• The way in which the evidence should be delivered to law enforcement.

• Valid Canadian court orders can be emailed to Kik at support@kik.com. Please include the words "Production Order" in the subject line.

• Requests for information should be specific in nature. Overly broad requests will cause significant delays in responding, and in some cases will mean Kik is not able to respond at all.

o We disclose account records in accordance with our terms of service and applicable law. That means that agencies outside of Canada will need to submit an Mutual Legal Assistance Treaty (MLAT) request through the proper legal authorities to allow us to disclose details about a Kik user's account.

o If an investigation involves child pornography or child abuse, please see the section above related to matters involving child sexual exploitation or child

abuse.



Impersonation reports

o Kik users are encouraged to contact our support team if they feel they are being impersonated on Kik. Our team will investigate the report, and take action as appropriate. We may remove the profile picture from an account, and/or disable the impersonating account.

o In the event that our team isn't able to investigate or make a determination about an impersonation report, we'll recommend that the user contact law enforcement for additional help.

o If law enforcement officials receive a report of impersonation or identity theft on Kik Messenger, they can submit a report via email to support@kik.com, with the subject line "Law Enforcement Inquiry".

o Impersonation reports need to include the following:

- The name of the law enforcement agency;
- The officer's name and badge number;
- The officer's contact information, including an email address;
- The Kik username of the impersonating account;

and

• The Kik case number (assigned to the user who originally reported the impersonation).

o Kik can permanently disable the impersonating account once we receive an official police report.



Appendix A – Finding a Kik Username

NOTE: Appendix A of the Kik Guide for Law Enforcement not included with the instant filing.

APPENDIX H
Excerpt of California Attorney General's December 5, 2017, Response Filed In Court Of Appeal In Which Attorney General Continues To Rely Upon False Testimony

[] Ford also was able to learn that petitioner's Kik account had been active in March 2015 which corresponds with statements from Emma that petitioner continued to communicate with her – and this was after petitioner had been released from jail following his arrest in 2013. (Ibid.) Manifestly, count 5 in the first case and counts 1-9 in the second case do not relate to the same events. Consequently, petitioner's entire argument is predicated on a falsehood. The speedy trial provisions in Penal Code section 1382 and the dismissal as bar to prosecution in Penal Code section 1387 are simply irrelevant to this case.

Petitioner's Kellett argument turns on the prosecutor's exercise of due diligence and the import of the Kik's Guide. (Supp. at p. 6.) Respondent now addresses this document. Although this Court has judicially noticed the Kik's Guide, its legal significance is nil. As petitioner notes, this document was not before the trial court because petitioner neglected to include it in his filing. (Motion for Judicial Notice, p. 4; hereafter "Mot.") Additionally, the document petitioner has submitted is the March 2017 revision of the Kik's Guide. Since Detective Ford would not have had access to this document in 2013 or 2014, it is irrelevant. And while this 2017 revision explains the search warrant information Kik now requires to be able to access and produce information, this had not always been the case. As Ford testified:

> I had attended a training just prior to February 2015 where I had discovered that the Kik user app, which is a social media application used for chatting with individuals in an anonymous nature and is Canadian based was finally accepting U.S. search warrants for investigations.

(Ex. 16, p. 242, emphasis added.)

Petitioner cannot avoid the facts. The only evidence before the trial court was that, as of early 2015, Kik had only recently begun accepting U.S. search warrants. Until Ford was able to access the Kik application on petitioner's phone, Emma was simply an unknown person who identified herself as a 12-year-old female from Canada by that name. (Ex. 18, pp. 301-302.) Only after Kik began accepting U.S. search warrants, and Detective Ford received training regarding the Kik app, was Emma's real identity discovered and new photographs of sexual activity unearthed. This led to an interview of Emma who stated that petitioner had directed her to perform the acts that underlie counts 1-9 in the second complaint. After petitioner was held to answer on those new charges, the prosecutor properly moved to consolidate the two cases under Penal Code section 954.

APPENDIX I
Excerpt of California Attorney General's February 6, 2018, Response Filed In Court Of Appeal In Which Attorney General Continues To Rely Upon False Testimony

In sum, nothing in the record calls into question the reliability of Ford's testimony that, just prior to February 2015, he discovered that Kik "was finally accepting search warrants for U.S. investigations." (Ex. ¶ 16, ¶ 212.) Consequently, Petitioner's request for writ relief must fail.

Dated: February 6, 2018 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL P. FARRELL
Senior Assistant Attorney General
CARLOS A.MARTINEZ
Supervising Deputy Attorney General

/S/ Stephen G. Herndon

STEPHEN G. HERNDON
Supervising Deputy Attorney General
Attorneys for Real Party in Interest

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APPENDIX J
Except Of Trial Court Record In Which Prosecutor Asserted Due Diligence And The Right To File The Cases As Two Separate And Independent Cases

[]

It was after diligent attempts by Visalia Police Department that we were able to obtain that information and then file an additional case. We've complied with the procedure set forth in the Penal Code and the rules of criminal procedure in

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Superior Court of the State of California County of Tulare 07-05-201111 :37AM

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filing a separate case, showing up, having him arraigned, conducting the preliminary hearing, getting a bindover and then now filing this motion to consolidate, which has been granted by Court.

Any other way is -it just doesn't exist. There's no requirement under 1387 for the People to have, you know, dismissed the previous case. They're two separate and distinct cases.

And if the Court had disagreed with our motion to consolidate, that's how we would have proceeded, under two separate, distinct cases.

I think I've addressed what I need to address. If the Court needs any further

information
from the People --
THE COURT: No. This is such an interesting
legal issue. I'm amazed at how you figure out how to
even file these motions. It's innovative, I'll say
that.
MR. NUTTALL: Well, innovative in the sense
that there's some legal authority to support the
assertion that and it's really this assertion with
respect to the first nine counts of the second
complaint ending in -or information ending 5933.
And the point is that when the earlier
case was filed, we know that the detective in charge of
the investigation knew of the alleged victim on

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