

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ANTHONY W. ISHII

JEFF SILVESTER, et al.,)	1:11-cv-2137-AWI
)	
Plaintiff,)	
)	COURT TRIAL
vs.)	
)	Day 3
KAMALA D. HARRIS, Attorney)	
General of California, and)	
DOES 1 to 20,)	
)	
Defendants.)	

Fresno, California

Thursday, March 27, 2014

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 3, Pages 367 to 534, inclusive

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1 Thursday, March 27, 2014

Fresno, California

2 9:03 a.m.

3
4 THE COURT: All right, on the record, before we
5 continue with the testimony, are there any matters we need to
6 take up, plaintiff's side?

7 MR. KILMER: The parties have reached some
8 stipulation as to some additional exhibits, and I have
9 prepared a stipulation on that that I'll be filing later this
10 morning.

11 THE COURT: Okay.

12 MR. KILMER: And we'd like to recite it into the
13 record for now, though.

14 THE COURT: Okay. Great.

15 MR. KILMER: And that is the parties are going to
16 stipulate that plaintiff's exhibit that has already been
17 marked for identification has 06 and was part of the black
18 binder that we submitted. And the description of the document
19 is AV 497, Processing Alternatives Feasibility Study, Report
20 of Findings, and it's dated May 1991. The author of the
21 report is the State of California Department of Justice,
22 Division of Law Enforcement. The Bates number on the document
23 is AG-000766 through AG-000826. The parties agree that that
24 can be admitted.

25 THE COURT: All right.

1 THE CLERK: Clerk that was Plaintiffs' Exhibit 6?

2 MR. KILMER: Yes, 06. It's in this black binder, and
3 it's designated as 06 in this binder.

4 THE CLERK: Okay.

5 MR. KILMER: And in addition to that, the defendants'
6 exhibit, previously marked for identification as Exhibit CS,
7 the description of the document is Silver Star Custom Leather.
8 I don't have a Bates number on that.

9 MR. CHANG: There is no Bates number.

10 MR. KILMER: The parties agree that that may be
11 admitted.

12 Furthermore, defendants' exhibit marked for
13 identification CT, and the description on the document is the
14 "First Amended Complaint," the parties stipulate that that can
15 be admitted. Did you want to recite the withdrawals?

16 MR. CHANG: Sure. And without objection from the
17 plaintiffs, the defendants withdraw -- defendant withdraws
18 exhibit -- Defendants' exhibits CK, CL, CM, CN, CO, CP, CQ,
19 CR, HA, and HB.

20 THE COURT: Okay. All right, there being no
21 objection, then, the Court will grant defense motion to
22 withdraw each of those exhibits, CK through CR and HA and HB.
23 The Court will admit into evidence, Plaintiffs' Exhibit No. 06
24 and admit into evidence Defense Exhibits CS and CT. All
25 right.

1 (Plaintiffs' Exhibit 06, received in evidence.)

2 (Defendants' Exhibits CS, CT, received in evidence.)

3 MR. KILMER: And we'll file a stipulation to that
4 effect later this morning, Your Honor.

5 THE COURT: Thank you very much.

6 MR. CHANG: And just -- Your Honor, just for a point
7 of clarification, the previous stipulation wherein the parties
8 stipulated to the admissibility of Exhibits A -- all the
9 exhibits that start with A, all the exhibits that start with B
10 and CA, CB, and CC, the Court has admitted those exhibits?

11 THE COURT: Yes.

12 MR. KILMER: That's my recollection.

13 MR. CHANG: Thank you, Your Honor.

14 MR. KILMER: One other preliminary matter,
15 Your Honor. Are we going to be adhering to the plan in the
16 Pretrial Order that the parties will not be presenting closing
17 arguments? We will simply conclude evidence, and the Court
18 will issue a briefing schedule?

19 THE COURT: Yes. We'll set a briefing schedule. And
20 closing argument will be actually be set after the proposed
21 findings of facts and conclusions of law have been submitted,
22 and then you can argue off of those documents.

23 MR. KILMER: Thank you, Your Honor.

24 THE COURT: All right, if there are no other
25 preliminary matters, then, we'll have Mr. Graham retake the

1 witness stand, continue with his testimony.

2 **BLAKE GRAHAM,**

3 resumed the stand as a witness on behalf of the Defendants,
4 having been previously duly sworn, testified further as
5 follows:

6 THE COURT: All right, Mr. Graham, I just remind you
7 you're still under oath.

8 All right, we'll continue with the testimony.

9 MR. KILMER: Your Honor, I'm going to at this point
10 in time renew my objection to some components of this witness'
11 testimony from yesterday and move to strike portions of it.
12 And I'd like to be heard on that matter.

13 THE COURT: Okay, I'm sorry, yes.

14 MR. KILMER: Yes, Your Honor, the waiting period has
15 been justified in all of the briefing in this case so far as
16 for the purpose of conducting background checks on prospective
17 purchasers and as cooling-off periods to prevent impulsive
18 violent acts. Part of this witness' testimony yesterday dealt
19 with a third justification that has not been part of this case
20 until -- until yesterday's testimony, that somehow the 10-day
21 waiting period facilitates the investigation to straw man
22 purchases. We'd ask that that testimony be stricken as not
23 relevant to these proceedings.

24 MR. EISENBERG: Your Honor, may I be heard on this
25 point?

1 THE COURT: Sure.

2 MR. EISENBERG: Mr. Graham -- I'm sorry, Special
3 Agent Supervisor Graham's testimony is all about background
4 investigations. That's part of the background check process.

5 Secondly, the plaintiffs took no depositions.
6 Special Agent Supervisor Graham has been disclosed as a
7 potential witness since sometime in the spring of 2012. This
8 is not new information. It's simply information that the
9 plaintiffs chose not to discover earlier.

10 THE COURT: Anything further on behalf of plaintiffs
11 side, then?

12 MR. KILMER: Nothing, Your Honor.

13 THE COURT: I'm going to go ahead and overrule the
14 objection. In terms of background check, it is important for
15 the record that whatever is involved in a background check be
16 disclosed because the background check obviously is part of
17 the question of whether or not the 10 days or any waiting
18 period regardless of the time frame is reasonable or not.

19 Okay, all right, any other preliminary matters, then?

20 MR. KILMER: None, Your Honor.

21 THE COURT: Okay, we'll go ahead and proceed and
22 continue on with the testimony of Mr. Graham.

23 CROSS-EXAMINATION

24 BY MR. KILMER:

25 Q. Agent Graham.

1 A. Sir.

2 Q. Is there some statutory authority that you can point to
3 that a straw man investigation is part of every Dealer Record
4 of Sale process?

5 MR. EISENBERG: Objection. Calls for speculation.
6 The witness is not an expert on the relevant law.

7 THE COURT: Okay, I'll sustain the objection.
8 Foundation?

9 BY MR. KILMER:

10 Q. You testified yesterday that you conduct straw man
11 purchases or investigations into straw man purchases; is that
12 correct?

13 A. Yes.

14 Q. And under what authority do you conduct those
15 investigations?

16 A. The Penal Code provides that when neither party holds a
17 dealer license, they must go through a gun store, 27545, used
18 to be 12072(d). That type of an investigation is tied into
19 the straw purchase investigation, because if a straw
20 purchaser, you know, makes the purchase and then hands it off
21 at some point later, there would be a 27545 violation
22 possibly.

23 Also the new Penal Codes are -- since the
24 renumbering, I'm not as good with them anymore, but it used to
25 be 12072(a)(1). That was basically providing a firearm to a

1 known prohibited party. In most cases, a straw purchaser is
2 kind of involved in that situation. So those are the two
3 things that we would look for and potentially charge involved
4 in a straw purchase.

5 Q. What is your involvement in the Dealer Records of Sale
6 program?

7 A. In the course of a straw purchase investigation, you may
8 want to get ahold of the actual DROS document, Dealer Record
9 of Sale document. If I say "DROS," that's what I mean.
10 There's a wealth of information on there from address, phone
11 number, some information about the weapon, things like that.

12 Q. You submitted a curriculum vitae in connection with this
13 lawsuit; is that correct?

14 A. Yes.

15 Q. All right. And you stated in here that you are currently
16 a special agent, supervisor, California Department of Justice
17 Bureau of Firearms Division. That's correct?

18 MR. EISENBERG: Objection, Your Honor. The document
19 has not been presented to the defense. It's not before the
20 witness.

21 MR. KILMER: I'm assuming he's familiar with his CV,
22 Your Honor.

23 THE COURT: Overruled.

24 THE WITNESS: I'm actually -- it's obviously now been
25 updated to the Bureau of Firearms, but I think my wording in

1 there was the firearms division, and then it became the Bureau
2 of Firearms.

3 BY MR. KILMER:

4 Q. Well, I think your curriculum vitae is correct. It does
5 say Bureau of Firearms.

6 A. Okay.

7 Q. Do your duties with the Bureau of Firearms, are they
8 primarily on sort of the front-end paperwork keeping, or are
9 you primarily enforcement?

10 A. I'd say maybe 50-50 actually. I'm kind of unique in the
11 sense that there's -- there's less than 15 supervisors in the
12 Bureau of Firearms. I'm sort of the -- I don't know, one-man
13 band within the headquarters in a sense, so I get a lot of
14 special projects. If something is broken, I get assigned to
15 fix it. My office is very close to the chief's and assistant
16 chief's, so I get a lot of special projects.

17 Q. You've been employed with the Department of Justice in
18 some capacity since 1994.

19 A. Actually, the Alcoholic Beverage Control from '94 to '99,
20 and then from '99 to present with the DOJ.

21 Q. Okay. Fair enough.

22 So you're somewhat of a utility player for the
23 Department of Justice?

24 A. Correct. Yes.

25 Q. All right. You've had extensive training in many classes

1 here. In fact, let's go ahead and get your CV in front of you
2 here.

3 May I approach the witness, Your Honor?

4 THE COURT: Yes.

5 BY MR. KILMER:

6 Q. Agent Graham, I've just handed you a three-page document
7 that's been previously marked and admitted as Exhibit BU. And
8 it is Bates stamp No. AG-001919 through 1921. Do you see that
9 in front of you?

10 A. Yes, I do.

11 Q. And is that your curriculum vitae?

12 A. At some point in the past, this was current and accurate,
13 but there's been a few additions to it since this document was
14 probably given to you.

15 Q. And as we go through there, you'll correct me on my
16 updates?

17 A. Sure.

18 Q. Thank you.

19 Under the "Training Section," the second entry there,
20 there is an entry for a 32-hour class in entry weapons. What
21 kind of class was that?

22 A. So basically that's a class that at the time DOJ was
23 producing -- or not producing, but it's offering for agents,
24 so they would become familiar with the use of long guns during
25 the course of a search warrant service so that we would

1 properly use the weapons to their fullest extent and be safe
2 with them and so forth.

3 Q. All right. There is the next entry, has to do with
4 advanced tactical operations, less lethal munitions, and
5 chemical agent certifications. What kind of classes with
6 those?

7 A. It was part of the same block of training. That
8 particular class was taught by the -- pretty much the same
9 group of instructors. It's not up to the level like a SWAT
10 school, but something less than that, if you will. More of
11 just tactical refinement of skills that he may already
12 possess, using those weapons systems.

13 Q. On the next page, lower right-hand corner, Bates number
14 1920. It continues the training that you've had. The fourth
15 entry is on September 13th, 2004, you had a ballistics testing
16 exercise. What did that involve?

17 A. So back then, there was a request from the then director
18 of the firearms division, Randy Rossi, that we evaluate some
19 rounds that were produced by some outside source. They had
20 some -- sort of like a bullet serialization-type stuff
21 imprinted upon them. And we basically fired the rounds into
22 those substances that are mentioned on the CV.

23 Q. With the ballistics gelatin and two car doors?

24 A. Correct.

25 Q. Was the purpose of that testing to test the, I guess,

1 destructive power of that particular round?

2 A. No, actually it was just to see if -- once the rounds
3 struck those substances with a readable.

4 Q. Okay, so there was some sort of identifier on the bullet,
5 and you wanted to make sure once it passed through some
6 medium, it would still be legible?

7 A. That's correct.

8 Q. All right. Moving two entries down in March of 2006, you
9 completed a 16-hour Colt 1911 pistol armor school in
10 Sunnyvale. Do you recall that?

11 A. Yes.

12 Q. What is the designation 1911?

13 A. It's basically the model for a specific class of
14 semiautomatic pistols. They're generally .45-caliber, but
15 there's some offshoots in that realm of weapons, but if
16 somebody says a 1911, 98 percent of the people that know about
17 firearms are going to say that's a .45.

18 Q. Okay. Thank you.

19 Now, does the designation 1911 also refer to the year
20 that that particular pistol was designed and introduced into
21 military service?

22 A. That's my understanding, sir.

23 Q. Do some of those firearms qualify as curios and relics?

24 A. Yes.

25 Q. And -- but the 1911 is also sold today as a modern

1 firearm, isn't it?

2 A. Sure.

3 Q. And what are some of the differences, if you know,
4 between, for instance, maybe a curio and relic 1911 and a
5 modern 1911?

6 A. So there's several different manufacturers out there that
7 make modern 1911's. Kimber, Springfield, Para Ordnance, you
8 know, several other companies that are smaller than those,
9 they may have a difference in the way that the guide rod and
10 spring interacts, the way the barrel nut attaches to the
11 slide. There could be changes with the extractor, an internal
12 versus an external extractor, things like that.

13 Q. Don't some of the more modern firearms also have
14 additional safety features?

15 A. Yeah, there are different versions of the weapon that will
16 be called -- sometimes by like series 80, series 90, and that
17 might be incorporated or somehow changed the model number.
18 It's still going to kind of fall in the 1911 family, if you
19 will. But the exact model might be somehow tweaked a little
20 bit.

21 Q. Okay. And some of the modern 1911's are actually on the
22 California-approved roster of handguns, aren't they?

23 A. Yes.

24 Q. If you know, is there any difference between the lethality
25 of the round fired from, say, a curio and relic 1911 versus a

1 modern 1911?

2 A. The lethality might only change between those two groups
3 of weapons if the barrel length was somehow different or the
4 round itself was somehow different. Assuming, let's say, a
5 five-inch barrel and a round of the same box of ammo was fired
6 from both guns, should be the same.

7 Q. All right. Your CV goes on to identify during the course
8 of your career, you've assisted in the arrest of at least 30
9 persons for violations of illegal weapons possession. Does
10 that number need to be updated now?

11 A. Yeah, over time, it's changed, yeah. I don't keep track.
12 I would say that's a low-end number.

13 Q. So when you say at least 30, you're being modest. It's
14 more than that.

15 A. Yes.

16 Q. All right. And then it goes on to state also you've
17 participated in excess of 30 search warrants involving illegal
18 possession of firearms.

19 A. Yes. I did write that.

20 Q. Are you being modest again; it's more than that?

21 A. Yes.

22 Q. Of those -- of the search warrants that you've assisted
23 in, how many of those have you written?

24 A. That's a good question, over the years, about what that
25 specific type of crime, I don't know, less than 10 maybe.

1 Q. All right. I'd like you to focus on the 10 that you were
2 personally involved in. I don't want you to testify about
3 anything you don't have any personal knowledge of.

4 When you're putting together a search warrant for
5 illegal possession of firearms, what would be an example of an
6 illegal possession of a firearm?

7 MR. EISENBERG: Objection. Assumes facts not in
8 evidence. He's saying that the only ones that he was involved
9 with were the ones that he wrote.

10 THE COURT: Overruled. You can answer.

11 THE WITNESS: Okay. Could you repeat your question,
12 sir?

13 BY MR. KILMER:

14 Q. Okay. You testified that maybe you've personally written
15 10 search warrants.

16 A. On that specific type of crime.

17 Q. Okay, and the specific type of crime is illegal possession
18 of firearms.

19 A. Correct.

20 Q. So all 10 that you are going to talk about now were for
21 illegal possession of firearms.

22 A. And they may have other crimes incorporated as well.

23 Q. Okay. Thank you.

24 And if that becomes relevant, you'll let me know.

25 A. Sure.

1 Q. Generally what is the crime of illegal possession of
2 firearms?

3 A. It depends on the actual prohibition. That's a broad
4 term, the illegal possession, because you could have someone
5 that's a felon in possession, you may have someone that's a
6 misdemeanor, one of the -- 30-plus misdemeanors in California
7 that are firearms prohibiting. That's going to be a different
8 section. Used to be 12021. Then it became -- I think it's
9 now 29800. The misdemeanor section used to be 12021(c)(1),
10 now it's 29, I think, 805.

11 There's also people that are prohibited from
12 possession of firearms due to conditions of probation. You
13 have mental health reasons why they shouldn't have them.
14 That's under usually a 5150 commitment or some other Welfare
15 and Institutions Code. The prohibitor is 8103 of the Welfare
16 and Institutions Code. 8103(i), I think. Anyway, so there's
17 a few others out there that were more commonly involved. A
18 lot of these are touching into the APPS database, and even
19 before APPS was around, the same sections generally applied
20 before the renumbering.

21 Q. All right. And in your work preparing these search
22 warrants, do you access any databases to confirm whether the
23 person -- do you access any databases on your research?

24 A. Yes.

25 Q. And what are the examples of some of those databases you

1 might access?

2 A. We might look into the Armed Prohibited Persons System,
3 the APPS system, we might look into the restraining order
4 system, criminal history system, mental health. We might look
5 at warrants to see if somebody has a warrant in addition to
6 what we're looking under them for. There may be other
7 agencies that have had unresolved criminal matters, if there
8 is a warrant floating around for them. Let's see, DMV. We
9 look for vehicle information, driver history to see where they
10 might reside, things like that.

11 Q. Okay, and those are all to identify somebody who might be
12 prohibited from having a firearm; correct?

13 A. Yes.

14 Q. And then make a positive ID of the person and try and
15 locate them.

16 A. Correct.

17 Q. Okay, but in order for you to get the warrant or persuade
18 the neutral and attached magistrate that a crime has been
19 committed, you also have to present evidence that the
20 person -- there is evidence that the person has a gun too;
21 correct?

22 A. Yes.

23 Q. And how do you go about doing that research?

24 A. Depending if we know about the person on the front side
25 such as a -- like an APPS case, we'll have information -- the

1 Armed Prohibited Persons System might be there, and some of
2 that information, I think as I testified yesterday, comes from
3 the Automated Firearms System. In the event that we're doing
4 a more fluid situation as opposed to a kind of a planned event
5 with an APPS case, if it's a gun show case, and we identify
6 somehow a felon at a gun show, and they're buying ammunition,
7 we don't necessarily know what gun they're asking -- that they
8 may have, but we know that they've bought a particular type of
9 ammunition, so we may have to ask a little bit broader, if
10 we're looking for a .45-caliber weapon that this felon has
11 just bought ammunition for an hour ago.

12 Q. Isn't it true that under California law, that a
13 prohibited -- somebody is prohibited from having a gun is also
14 prohibited from having ammunition?

15 A. Yes.

16 MR. EISENBERG: Calls for a legal conclusion.

17 THE COURT: Overruled.

18 BY MR. KILMER:

19 Q. I want to make sure that the record is clear on that. It
20 is a true statement that people who are prohibited from having
21 guns are also prohibited from having ammunition?

22 A. Yes.

23 Q. So they're also prohibited from purchasing ammunition?

24 A. Yes. When we catch them, we would arrest them for that if
25 we caught them in the middle of it.

1 Q. So if a peace officer observes a known felon to purchase
2 ammunition, they can make an arrest on the spot.

3 A. Yes.

4 Q. Okay. Is it fair to say that you access the AFS system
5 for evidence that somebody already has a firearm?

6 A. That's one of the reasons, yes, sir.

7 Q. All right. And so if you can put those two together, the
8 fact that this person is in a prohibited class of people, and
9 the AFS system indicates that they already have firearms, is
10 that generally enough to at least approach a magistrate for a
11 warrant for a prohibited person of a possession of a gun?

12 A. Not necessarily. There may be a large staleness issue.

13 Q. I'm sorry, a large --

14 A. Staleness issue, where the specific gun was purchased in
15 1986.

16 Q. All right.

17 A. And clearly there is a long gap in between. So we would
18 have to do a ton of research to figure out, hey, does this
19 person have any gun arrests that don't show an evidence entry,
20 or a warrant kind of linked to an evidentiary entry, an
21 Automated Firearm System, that sort of thing.

22 Q. Now, when you access the AFS to try to determine if this
23 prohibited person has a gun, and it shows a firearm purchased
24 in the last, say, six months, does that make it easier to make
25 a decision to approach a magistrate about getting a warrant?

1 A. It would make things a lot easier, but that still may not
2 be enough. Certain DA's offices wouldn't -- they wouldn't
3 want to have that much of a window.

4 Q. All right.

5 A. So that -- it would really depend maybe prosecutor by
6 prosecutor. We will typically run our search warrants through
7 a prosecutor before taking them to a judge.

8 Q. Okay. So the date on which the last purchase is
9 information that's available to you on the AFS system.

10 A. If assuming it's a handgun or a registered assault weapon,
11 there's a date tied to it. If there are long guns prior to
12 the 1-1-14, we don't have any information on those unless the
13 person put a -- like, say, a voluntary registration form or a
14 firearm ownership record in with us because they wanted to
15 self-register in a sense or self -- to identify themselves to
16 certain weapons.

17 Q. Now, we've heard testimony that the AFS system does not
18 keep records of long gun sales prior to January 1st of this
19 year?

20 A. That's correct.

21 Q. But does the AFS system keep a record of the fact that a
22 transaction took place prior to that regardless of the weapon?

23 A. No, AFS does not do that.

24 Q. Okay. When you make the entry while you're doing your
25 investigation and you access the database, and you make the --

1 I assume you sit at a terminal and enter your password and log
2 onto the system; correct?

3 A. Yes.

4 Q. And then you'll make an inquiry as to -- into the AFS
5 system, what kind of inquiries do you make -- do you type in?

6 A. We might just do a name tied with a date of birth search,
7 John Smith, 1-1, you know, 2010 was the birth date I'll make
8 up --

9 Q. All right.

10 A. And try to see what weapons might be associated with that
11 person. We'll have to somewhat filter it, maybe with the
12 driver's license or, you know, something like that.

13 Q. All right. And does that sometimes result in multiple
14 hits?

15 A. Often.

16 Q. Just because of commonality of names and that sort of
17 thing?

18 A. Yes.

19 Q. Are you also able to input into the system any unique
20 identifiers about people other than their name or date of
21 birth?

22 A. Could you explain what you mean by unique identifiers?

23 Q. Like a California driver's license number, for instance.

24 A. I don't enter driver's license numbers and link them to, I
25 guess, an evidence entry, per se, or something like that. I'm

1 not sure where you're going with that. If you're talking
2 about querying the system, there may already be driver's
3 license info in there since 1996 on handguns. Does that --

4 Q. Yes, my question is could you use a California driver's
5 license as one of the -- one of your queries if you had it?

6 A. In the way our format, I guess, offers the search
7 parameters to us, you can't just plug a driver's license in
8 and -- like, I can't run my driver's license to see what guns
9 I have. I have to search "Blake Graham" and my birthday, and
10 then it would list out potential weapons that I have owned
11 over a period of time.

12 Q. All right. Are those the only two descriptors you can put
13 into the database to try and identify guns in the system?

14 A. If I know the serial number, I can run the serial number
15 into the weapon, or if I've got a list of weapons, let's say,
16 are recovered in a crime, often we'll get queries from other
17 agencies about, "Hey, we've got this gun. We don't see a
18 record, you know, on cable. Send me a picture of what you
19 think the serial number is." And I might do some searches
20 on -- if it's a foreign gun, often the numbers are kind of
21 jumbled, or whatever. I might try to help the agency properly
22 identify a weapon.

23 Q. Have you ever in your investigation, in preparation for a
24 search warrant, actually gone to a gun store where you think
25 the sale took place and asked to look at a physical copy of

1 the DROS?

2 A. Yes.

3 Q. And do the DROS's have unique numbers on them for each
4 transaction?

5 A. There are DROS identifying numbers, yes.

6 Q. Can you use that number to do a search as well?

7 A. I think within -- not within AFS, but there might be
8 another system. I would actually -- if you get down to that
9 level of the computer side of things, I'm going to lean on our
10 program staff, Mitch Matsumoto. I might ask him to, "Hey, can
11 you help me out? I want to make sure I'm looking at the right
12 thing here," that sort of thing.

13 Q. And he's usually pretty helpful on that?

14 A. Yes.

15 Q. And returns the results pretty quickly?

16 A. Yeah, they're very busy on background checks and whatnot.
17 So I'll ask, "Hey, can you help me out with this when you get
18 a chance."

19 Q. But if you're involved in investigating a crime, that
20 might get some priority?

21 A. Yes.

22 Q. Have you ever helped prepare a search warrant to prosecute
23 or gather evidence for a straw man purchase?

24 A. Yes.

25 Q. How many?

1 A. Off the top of my head right now, I'm thinking of three,
2 one in this county, one in Sacramento, and one in -- I think
3 it was Shasta County or Tehama.

4 Q. All right. In a straw man purchase scenario, that's where
5 one person is buying a gun, but another person is receiving
6 the gun; is that correct?

7 A. Yes.

8 Q. Is that always illegal?

9 A. No. There is a chance that it might be a legal-type
10 transaction if it's maybe intended as a gift, something like
11 that. But that's something that we may not go down the path
12 of a search warrant. If we have an indicator, we might turn
13 that into a knock-and-talk situation if we've got some pretty
14 good feelings about what it might be.

15 Q. In fact, are you familiar with the -- a document called a
16 4473?

17 A. Yes.

18 MR. KILMER: May I show the witness a copy of this
19 document, Your Honor?

20 THE COURT: Yes.

21 MR. KILMER: I have a copy for the Court as well
22 that's not in the exhibit binder.

23 BY MR. KILMER:

24 Q. I'd ask you to review this document and let me know once
25 you've finished taking a look at it.

1 A. Okay, sir.

2 Q. All right, this is a -- a six-page document. It is -- the
3 title of the document is "The Firearms Transaction Record,
4 Part 1, Over the counter." It's got an ONB number 1140-0020.
5 In the lower right hand corner, it's called an ATF Form 4473.
6 That's the document you have in front of you?

7 A. Yes, sir.

8 Q. And this is the federal form that dealers are required to
9 collect at the point of sale during a firearms transaction.
10 Is that generally accurate?

11 A. Yes.

12 Q. And these records are kept by the dealers, I guess, as
13 long as they're in business, and then when they go out of
14 business, they ship them off to ATF; is that correct?

15 A. Yes, they would go to the out-of-business records group,
16 East Coast.

17 Q. And at this point in time, these records of sales that the
18 federal government requires are not electronic?

19 A. Yeah, not to my knowledge. They're all basically paper,
20 kept in dusty boxes in gun stores across California.

21 Q. Okay. In fact, you've had to review these documents
22 sometimes in your investigations.

23 A. Yes.

24 Q. All right. And on page 1 of this document, there is a
25 series of questions under paragraph 11, and I want to draw

1 your attention specifically to paragraph 11-A.

2 A. Yes.

3 Q. Do you see that?

4 A. Yes.

5 Q. That's the part of the questionnaire on the 4473 that is
6 designed to elicit information whether the person who's
7 filling out this form is going to be the person receiving the
8 gun; correct?

9 A. Yes.

10 Q. All right. And this document is signed under penalty of
11 perjury?

12 A. Correct.

13 Q. And, in fact, prosecutions under federal law for straw
14 purchases are usually prosecuted as -- in many ways, correct,
15 under various -- various crime statutes?

16 MR. EISENBERG: Objection. Vague and ambiguous.

17 THE COURT: Sustained.

18 MR. KILMER: I'll rephrase the question.

19 BY MR. KILMER:

20 Q. A prosecution for a straw man purchase can be prosecuted,
21 for example, as perjury with relation to making a false
22 statement on this form; correct?

23 A. Yes.

24 Q. It could also be prosecuted as a conspiracy to violate
25 United States gun law; correct?

1 A. That would be one of my suggestions to the Assistant
2 United States Attorney if I was going to try to take a case
3 federally for this type of a violation.

4 Q. And while we're on that, sometimes you jointly participate
5 in federal crime investigations, gun crime investigations;
6 correct?

7 A. Yes, sir. I'm a task force officer with ATF as well.

8 Q. So you work with the federal government and help them
9 prosecute federal crimes. Do they also help you prosecute
10 state crimes?

11 A. In the sense they may have given us manpower or something
12 like that to help us out with something here and there, yeah.
13 I don't remember a time necessarily when they would come and
14 go to state court, you know what I mean? I haven't seen a lot
15 of ATF agents in state court. It's sort of a one-way street.

16 Q. But you have appeared and testified in federal court.

17 A. I'm trying to think here. I've got stuff pending, but I
18 don't know if I've gone into federal court and testified.

19 Q. All right. Somebody who makes a false statement on this
20 4472 could also be prosecuted for just making a false
21 statement too; correct?

22 A. I'm not sure about that, sir. I haven't gone down that
23 road in a federal prosecution for that type of a violation.

24 Q. Okay. Are those crimes of making either conspiracy or
25 perjury, the two we've identified, those are felonies;

1 correct?

2 A. On the state system, yes. And federally, I would assume
3 the same, at least a wobbler, yes.

4 Q. All right. Serious charges?

5 A. Yes.

6 Q. I'd like to direct your attention to page 4 of 6 of this
7 document. Well, actually let's go back one page to page 3 of
8 6. And on that page in the lower half starts a series of
9 notices and instructions and definitions. Do you see that?

10 A. Yes, sir.

11 Q. Are you familiar with this portion of this document?

12 A. I've read it in the past, yeah.

13 Q. So what follows in the next several pages are basically
14 the ATS's understanding of how to correctly fill out this
15 form.

16 A. Yeah. That would be their instructions to the purchaser,
17 yes.

18 Q. All right. And then going back to page 4 of 6, there is
19 an explanation of question 11-A.

20 A. Correct.

21 Q. Have you had an opportunity to read that?

22 A. I did. That was one of the things I've looked at while
23 you ask me to review the form earlier.

24 Q. And this would be an example, it's stated in that section,
25 of where somebody who is filling out this form might not

1 actually be the person who is going to receive the gun.

2 Correct?

3 A. Yes. It identifies what -- under the federal law, the ATF
4 believes a purchaser is versus the intended recipient and kind
5 of walks them down some examples.

6 Q. And one of the examples is, for instance, for a gift.

7 A. Yes.

8 Q. So, for example, extrapolating on an example that you gave
9 us yesterday, if you observed at a gun show a man having a
10 particular interest in a firearm, and then later the wife
11 purchased the firearm, you identified that as a potential
12 straw purchase.

13 A. Yeah, that's one of the scenarios where we've had females
14 buy guns for prohibited males.

15 Q. But if you just observe a man at a gun show express an
16 interest in a gun, and then his wife later buys it, is that
17 automatically a potential straw purchase?

18 A. No. I mean, if we've eventually identified that man as
19 being prohibited, I'm going to lean towards a straw purchase.
20 But just the fact that a woman buys a gun with a man in the
21 building, that's not, you know, necessarily the scenario.

22 Q. So in order for that situation that you've described to be
23 suspicious, one or both of them have to be prohibited.

24 A. Yeah, I mean, for the straw purchase, in my eyes, there's
25 going to be a prohibited party in the mix somewhere. It

1 doesn't make much sense for -- in the example we're using,
2 we're talking about the woman being the straw buyer, doesn't
3 make much sense for a prohibited person to try and buy if the
4 hidden buyer is not prohibited because it's backwards.

5 Q. Right. So the only way to be certain that you might have
6 observed a straw purchase is whether or not the interested
7 party who is not filling out the paperwork is prohibited;
8 correct?

9 A. Generally that's what we will spend our time on. If we
10 can figure out if the -- you know, what -- maybe the hidden
11 buyer is prohibited, then we're going to probably go down the
12 path of this is a straw purchase on some level and put a lot
13 more energy into it. If we've got -- if we've identified two
14 people that are, you know, let's say it's a husband and wife
15 scenario, and neither appears to be prohibited, we're probably
16 not going to have to go down the path of getting a search
17 warrant for something like that. We'll probably just ask
18 them, hey, we'll contact them, maybe on the 10th day when they
19 pick up. Just say, hey, we saw some stuff. Can you explain
20 what's going on with this transaction, and we might explain
21 what we saw at a gun show, for example. Can you explain
22 what's happening here? We don't want to waste their time. We
23 don't want to waste our time. If we've got a prohibited
24 person that's doing the same kind of actions, we're going to
25 treat it a little differently, probably try to get a search

1 warrant, which may drag out our time commitment and whatnot as
2 well.

3 Q. So we have two possible scenarios where you're at a gun
4 show and you observe multiple parties that appear to be acting
5 in concert to purchase a weapon, one person looking at the
6 gun, and another person willing to pay the money and do the
7 paperwork.

8 A. Yes.

9 Q. And some of those instances might be perfectly innocent?

10 A. Yes.

11 Q. And some of those might be a crime?

12 A. Yes.

13 Q. How would you know -- is there any way to determine
14 whether it is a crime while you're at the gun show itself?

15 A. If we can identify what we think is a straw buyer and the
16 hidden buyer, basically just both parties that are kind of
17 maybe conspiring to purchase this weapon, we would have a very
18 good idea about is there a conspiracy going on potentially.
19 Is what -- you know, what violations may be happening. Are
20 they a felon, is there a mental health hold on one of these
21 people, or something like that? And we would have much more
22 certainty of what path we might take.

23 Q. Would you have the resources while you're at the show to
24 make an inquiry as to whether one of the two parties is
25 prohibited?

1 A. We may, depending on the vehicle that they came in, or if
2 we can somehow identify the people involved at the, you know,
3 table. Maybe they're filling out the forms there. If we can
4 get a look at the -- you know, if they're scratching out
5 information on there, we can make a call to try and identify
6 that person that's filling out the documents, we might be able
7 to get some kind of a workup while they're still at the show.

8 Q. And in that circumstance, would you take any action to
9 alert the DROS system that this may be an illegal activity and
10 this sale perhaps should be put on hold?

11 A. I don't know that we would have -- if there is a definite
12 crime involved there, we generally will try and go to kind of
13 like an intercept path, and we're going to probably let things
14 play out, and we don't want to necessarily tip off our hand to
15 the gun store unless it's a store that we feel we can trust,
16 or whatever. Some stores will or might, you know, tip off the
17 people that, "Hey, the cops are looking at you. You don't
18 need to come back here," or something like that. So it
19 depends on what we feel about the store, if we've had problems
20 with the store before or something like that.

21 Q. Okay, you've kind of shifted to guns stores, and we were
22 dealing mostly with gun shows.

23 A. Gun shows are -- the vendors at the shows are often the
24 same people that have a storefront.

25 Q. All right. And while we're on that, is there any

1 difference at all except for a place in the background check
2 or the paperwork necessary to fill out to purchase a gun at a
3 gun show versus a gun store?

4 A. I think for the most part, most of the same documents are
5 required. I can't really think of anything that would be less
6 involved.

7 Q. So in both instances, the buyer has to go through a
8 background check.

9 A. Yes. If there's a dealer sale to someone that sees
10 something at either store or a gun show, there is going to be
11 state and federal paperwork to be filled out, a right
12 thumbprint on the back of the DROS, a background check in the
13 next 10 days or so, those kinds of things, yeah.

14 Q. And, in fact, even though in other states under the
15 federal background checks system, sales can take place between
16 private parties on the same day with just an exchange of money
17 for a gun. That's not -- that's illegal in California, isn't
18 it?

19 A. What type of -- you said individuals, is that what you
20 said?

21 Q. Well, there's a term that's been bandied about called
22 private party sales.

23 A. Okay.

24 Q. That would be a firearm sale between two private parties
25 rather than a dealer and a party.

1 A. Yeah, my answer will be that if the people have no
2 licensing attached to themselves, and they're just average
3 citizens, they generally have to go through a gun store of
4 some kind to do it -- to transact a firearm from one to
5 another.

6 Q. Okay. And that also involves the background check and the
7 waiting period.

8 A. Yes.

9 Q. And that -- the same thing, the same would apply to a
10 private-party sale taking place at a gun show as well.

11 A. Yes, given those same set of circumstances.

12 Q. And, in fact, most gun show promoters actually hire a
13 licensed dealer to be on site to facilitate those
14 transactions; correct?

15 A. Yes, usually there's one or more transfer dealers is what
16 they're generally termed at every show, and often there are
17 individuals that are selling off maybe their personal
18 collection. The right thing that should happen is a purchaser
19 would pick up a weapon. "I want to buy that. Okay, great.
20 Let's go over to the transfer dealer," and that's where the
21 paperwork can start.

22 Q. And, in fact, as part of your duties for the Bureau of
23 Firearms in investigating gun shows, you will sometimes attend
24 a gun show as a -- well, undercover, I guess, that would be
25 the word you'd use?

1 A. Yes.

2 Q. To observe that the laws are being followed; correct?

3 A. Yes.

4 Q. And some of the checks that you'll do is make sure there's
5 a licensed dealer on the premises.

6 A. Yeah. The promoters actually have to provide us with that
7 information before the show actually starts, so we get a
8 listing of the vendors, and then we sort out before the show
9 actually starts who the licensed dealers are. We tell the
10 promoter, hey, these are the licensed people and these that --
11 these names that you've given us are not licensed. So the
12 promoter knows who can transact business as a transfer dealer,
13 so there is no, I guess, vagary about who can do the
14 transfers.

15 Q. And it's also illegal for people, for instance, to go out
16 into the parking lot to try and escape notice and try to
17 transact business. That's illegal?

18 A. Yes.

19 Q. And some of your duties might be to primarily make sure
20 people aren't doing that as well.

21 A. Yes.

22 Q. Does the -- do you know whether or not the California
23 Department of Justice has any programs to help educate dealers
24 on how to spot a straw man purchase?

25 A. I don't believe California DOJ has that. ATF has taken

1 the lead on that nationwide. There's posters and some
2 information on their website and such.

3 Q. Is that the "Don't Lie For the Other Guy" program?

4 A. Yeah, something like that.

5 Q. Have you familiarized yourself with that program?

6 A. I think when it first -- you know, came out years ago, I
7 looked at the stuff, but I haven't -- maybe been to that web
8 page in a while.

9 Q. All right. Is it your recollection that it basically
10 alerts dealers to keep an eye on suspicious activity like one
11 person showing an interest in a firearm, and the other person
12 who actually tries to, you know, buy the gun?

13 A. I think that's consistent.

14 Q. All right. Does it give the dealers any other pointers in
15 trying to find that?

16 A. Yeah, like I said, it's been a while since I've looked at
17 their materials on that.

18 Q. Do you know whether or not the training material includes
19 a way for the dealer to contact a law enforcement agency and
20 say, "I'm seeing suspicious activity, what should I do?"

21 A. I think that was part of the group of suggestions and
22 advisories to the dealers that they could contact -- I think
23 at the time it was, hey, contact ATF if you see any suspicious
24 transactions that you think might be a straw purchase,
25 something along those lines.

1 Q. Do you know whether or not dealers have the right to
2 refuse to conduct a sale of a firearm in California?

3 A. Yes, they do.

4 Q. So if a dealer sees suspicious activity, and they have the
5 right to say, you know, you're not buying a gun at my store?

6 A. I don't know about those exact words, but I know that ATF
7 can -- ATF will back up a dealer that is concerned about a
8 straw purchase because the dealer doesn't want to become
9 involved in criminal activity, something along those lines.
10 Otherwise, you're going to get discrimination complaints maybe
11 if you say, you know, you can't because of X, Y, Z, whatever.

12 Q. And, in fact, sometimes dealers themselves can be indicted
13 on charges of conspiracy to facilitate straw sales if they're
14 kind of, you know, turning a blind eye or engaged in a
15 wink-wink, nod-nod on a straw purchase; correct?

16 A. I've heard of those types of prosecutions, but I've never
17 been involved in one of those that I can remember.

18 Q. But it is something that can land the -- a firearms dealer
19 in prison?

20 A. It could.

21 Q. If they conspire to assist in a straw purchase.

22 A. Yes.

23 Q. So there's an incentive for dealers to themselves alert
24 law enforcement to suspicious activity of a straw purchase?

25 A. Yes, I would say that.

1 Q. Agent Graham, there's been previous testimony in this case
2 that the total number of Dealer Record of Sale inquiries and
3 approvals in the State of California for the year 2012
4 exceeded 800,000. Do you have any reason to dispute that
5 number?

6 A. That sounds right. I think it was maybe 812,000.

7 Q. There's also been testimony that in the year 2013, that
8 that number exceeded 900,000.

9 A. That sounds accurate. I was going to say around a million
10 or so. Yes.

11 Q. Okay. In any one year of your observations of gun shows,
12 how many instances of suspicious activity for a straw man
13 purchase have you observed?

14 A. In any one year, I'd say --

15 Q. Let's take 2012, for example.

16 A. Me personally, I can think of one right off the top of my
17 head, and I think it was Sacramento County.

18 Q. For the year 2012, there was one that you personally
19 observed?

20 A. That I personally was involved in the investigation on at
21 a gun show.

22 Q. What about the year 2013?

23 A. '13? I don't -- I can't think of one right off the top of
24 my head for 2013. I didn't go to a lot of shows in 2013.

25 Q. Okay.

1 A. I would say the more paperwork that I get involved in, the
2 less shows I go to on the weekends because my overtime ends up
3 being on the weekends trying to catch up with things that
4 happened during the week. So --

5 Q. That's the price you pay for advancing in your career,
6 huh?

7 A. In a sense I guess, yes.

8 Q. How many shows did you attend in 2012?

9 A. 2012? Probably -- I don't know, three or four.

10 Q. All right. Did you observe -- were you able to observe in
11 2012 any straw man -- suspicious activity that might be a
12 straw man purchase at any gun stores in 2012?

13 A. Not me personally. I do receive reports from the field
14 representatives that when they inspect the stores, they've
15 come across documents that they believe are straw purchases,
16 and they will funnel that information to me.

17 Q. Okay. And what is the nature of those investigations that
18 funnel paperwork to you?

19 A. Well, the field reps might see a denial in the denial
20 portion of the gun dealer's paperwork.

21 Q. All right.

22 A. And while looking at other documents, they may see that
23 that weapon was eventually transferred to someone with a
24 common address or maybe a common last name. And usually it's
25 within 30 or 60 days, that gun will leave the store to someone

1 that had that same address or same last name. They will then
2 make a photocopy of the DROS information, and then I'll --
3 probably within -- once they get back into the office because
4 they'll be at different stores statewide. I'll get a copy of
5 that information and try to evaluate to see if there's
6 something to follow up on.

7 Q. Okay. And so in that example you just gave me, the
8 background check and the 10-day waiting period didn't stop
9 that straw purchase, did it?

10 A. Sometimes they'll find them that they're actually in a
11 10-day wait, that second -- second swipe at that same gun by
12 maybe the involved parties are still pending. But most of the
13 time, it's going to be a situation where the gun's gotten out
14 of the store already. But there are times when they'll find
15 one in the 10-day wait that was tied to a previous denial.

16 Q. As you sit here today, do you have any specific statistics
17 on the number of times that that straw purchase was caught
18 during the 10-day waiting period?

19 A. I don't have a -- we don't do studies on that sort of
20 thing. I can just say from experience on the last probably
21 five years, probably of the straws that get sent to me,
22 probably 15 percent of those, there might be like an active
23 one that we have to really jump on as opposed to kind that has
24 already gotten out, and we have to retrieve one.

25 Q. And that's the basis of your statement that most straw

1 purchases are not caught during the 10-day period, they're
2 caught after?

3 A. Yeah, in the sense that the field reps, when they find
4 them at a gun show, it's more of an active thing. We might
5 actually be able to do it because I'm not the only person
6 going to gun shows. There are different teams out there.
7 There's 90 to 100 shows a year. And there are agents that go
8 to most of those. But, you know, like I said, I'm not able to
9 be in 20 different places at once. So other agents out there
10 may see something that I may not necessarily hear about.

11 Q. But when a law enforcement agent observes suspicious
12 activity that might be a straw purchase, it's either because
13 they're there looking for that activity, or it's by random
14 chance that they see it?

15 A. Yes.

16 Q. In your work as enforcing California's gun laws, if you
17 receive information that a pending transaction might be
18 illegal, do you have the authority to stop the transaction?

19 A. Could you give me more information on what you think is
20 going on in your hypothetical?

21 Q. If you observe two people not at a gun show or not at a
22 gun store, and one is a known felon, and they appear to be
23 trying to exchange a firearm, could you intercede in that?

24 A. Yes, if I somehow had prior knowledge that a person was a
25 felon, and one person was handing a gun to that felon, we'd

1 have probable cause to get ahold of that person and sort it
2 out and probably potentially arrest both if I could show that
3 the person giving the gun to the felon knew he was a felon.

4 Q. Okay. But in those cases where you don't have that kind
5 of certainty, you need to conduct an investigation?

6 A. Yes, which takes time.

7 Q. There's been some recent amendments to the California
8 Penal Code with regard to background checks. I believe
9 AB 500. Are you familiar with that law?

10 A. Yes.

11 Q. Can you tell the Court what AB 500 has done that's
12 different from prior to its passage.

13 A. So as far as the bill number, I'm a little foggy on that,
14 so I'm assuming you're correct. The change to the background
15 check process is what I'll discuss. It's -- basically allows
16 DOJ after we have given our best efforts to get, let's say, a
17 disposition from a Court, when we've tried and tried to get a,
18 let's say, a conviction confirmation or dismissal information.
19 The courts have not given us that. Specifically, within the
20 10 days, and then the new rule is that we can, after, I think,
21 30 days now. And this is more of a Mitch Matsumoto issue.
22 It's something we don't get pulled into, but I kind of know in
23 a general sense, so I'll couch my answer that way.

24 Q. Okay.

25 A. We have the ability now to tell the dealers that, hey, we

1 weren't able to verify everything, so it's up to you at this
2 point, if you want to release the weapon, that's on you.

3 We're not denying or delaying the past 30 days.

4 Q. All right. So, in other words, it used to be that the
5 department only had 10 days to approve or deny a gun purchase.
6 And now, after AB 500, the department now has the ability to
7 approve, deny, delay, or have it undetermined.

8 A. Yeah, the undetermined is, I think, the proper language
9 now, that those types of background checks might result in an
10 undetermined title or label.

11 Q. All right. Now, I want to talk, though, about one of the
12 other results, and that's the delay. That can be delayed for
13 up to 30 days; is that correct?

14 A. Yes, I think that's the term -- the term now.

15 Q. And that's to conduct additional investigation to make
16 sure that this transaction is legal.

17 A. Yes, that the person is or isn't prohibited and so forth.

18 Q. All right, and also to identify the person.

19 A. How do you mean identify the person? I'm not sure why
20 that would take 30 days to identify them. In the sense we
21 have a driver's license probably, that would be the
22 identifier. Maybe in the event of maybe an identity theft
23 issue, but that's really small numbers there.

24 Q. All right. Would an investigation into whether a
25 particular transaction is a straw purchase be also a reason to

1 delay for up to 30 days?

2 A. I don't know that we have gone -- have gone and done that.

3 Q. Are you saying that you haven't done it, or you don't
4 believe that you're authorized under the law to do it?

5 A. I'm saying that I don't remember if we have or haven't.

6 Q. As you sit here today, do you know whether or not the law
7 authorizes you to delay the sale for up to 30 days if there is
8 suspicious activity relating to straw purchase?

9 A. I think I would probably go to our background check unit
10 and/or our lawyers and say, "Hey, here is the situation.
11 What's your advice?"

12 Q. Okay. Have I given you an idea?

13 A. Excuse me?

14 Q. Have I given you an idea?

15 A. About what?

16 Q. To assist. Well, you stated earlier that sometimes less
17 than -- you said maybe only 15 percent of the time do you
18 catch straw purchases within 10 days. If you had an
19 additional 20 days, would that give you more time to try and
20 stop the sale based on the potential straw purchase?

21 A. Yes, sometimes the timing isn't everything because
22 sometimes the straw buyer that's -- I'm sorry, the hidden
23 buyer, we may not be able to identify that person or persons
24 until we actually contact him face to face because they've
25 insulated themselves well enough. It's going to take us

1 looking into their wallet to figure out who they really are.
2 So it wouldn't help in every eventuality. But time is a
3 benefit to us to investigate straw purchases.

4 Q. That was my question, though. Wouldn't additional time
5 also be a benefit?

6 A. I'm sorry, I thought I just said that towards the end of
7 my answer there.

8 Q. Okay. And the additional time between while you're doing
9 investigations for the straw purchase and the time the gun is
10 delivered, that also helps ensure public safety; correct?

11 A. I believe so.

12 Q. All right. Have you ever stopped a straw purchase on the
13 day you observed a suspicious activity?

14 A. I can't say that we have, because typically, if the straw
15 purchase occurs at a show, we know there's going to be a
16 10-day wait in a sense. And if -- because of manpower
17 issues -- we have multiple things that are going on at the
18 shows often. A straw purchase is often -- isn't the only
19 potential criminal violation we've seen.

20 Q. All right.

21 A. So we have to figure out what we can spend time on that
22 day. And it will get handled because we don't want guns to
23 get out there that shouldn't to a straw buyer and hidden
24 purchaser scenario.

25 Q. Yesterday you testified about a shooting by someone who

1 used a newly acquired purchase to commit a violent crime. Do
2 you remember testifying about that?

3 A. Yes.

4 Q. I believe you said you think the shooting occurred in
5 Cupertino.

6 A. Yes.

7 Q. Do you -- as you sit here today, do you recall any other
8 instances of that scenario?

9 A. Where a person that already owned a gun acquired a second
10 weapon and then used one of those in the shooting. Is that
11 what you're getting at, sir?

12 Q. Yes, I am.

13 A. I would say that off the top of my head right now would be
14 one that comes to mind. I don't -- I don't think I have
15 others.

16 Q. So the one that you -- you were referring to, or the one
17 that you have knowledge of is the one that happened in
18 Cupertino recently?

19 A. Yeah. It was Shareef Allman, I think, was the shooter in
20 that case.

21 Q. You didn't have the name yesterday, but you have it today?

22 A. Yes.

23 Q. Okay. What can you tell us about the facts of that case?

24 A. So when the shooting did happen, the -- when there's kind
25 have a mass shooting like that, myself and the two analysts

1 that work for me will sort of get an assignment to research
2 the -- the facts surrounding the case to see A, is the person
3 in APPS, are they prohibited? Are there guns in the system
4 that we do know about that match the fact patterns that's
5 coming out in the news, something like that.

6 This happened probably a year or two ago. I don't
7 remember who asked me to look into it, but I did myself, or my
8 analyst looked into it, and I ended up contacting -- I think
9 it was the sheriff's department and spoke to the detective
10 that was in charge of that just to figure out some of the news
11 they were putting out, that an AK-47 was involved. And I was
12 trying to figure out if this was a true AK-47, or was it a
13 clone. Was it an assault weapon, or did it have some type of
14 device that caused the magazine to be a fixed magazine versus
15 an attachable magazine, that sort of thing. Just trying to
16 get to the bottom to get through what's put in the news.

17 Q. Did Mr. Shareef use an AK-47?

18 A. He had one. Again, it was a clone-type weapon, and I
19 don't believe it was used in the shooting, but it was found, I
20 think, later the same day that he ended up -- he killed
21 himself.

22 Q. And did -- did you conduct an investigation as to how many
23 firearms Mr. Shareef had?

24 A. At the time within a day or so of that shooting, I was
25 involved in an investigation to see what weapons were known to

1 us.

2 Q. And what weapons were known to you?

3 A. There was at least one or two handguns and, I believe, an
4 AK-47. I don't remember if it was a pistol version or a long
5 gun version of the AK. And the long gun version obviously
6 wouldn't be in our systems, so I think that might have been
7 what prompted me to call the Sheriff's Department to get a
8 little more information about it.

9 Q. Any other firearms?

10 A. That's what I remember. He may have had other ones, but I
11 don't remember. It's been a while.

12 Q. Are you aware that the District Attorney of Santa Clara
13 County issued a full report on that incident?

14 A. No, sir.

15 Q. Have you ever read that report?

16 A. No.

17 Q. Did you personally observe the AK-47 that Mr. --

18 A. No.

19 Q. So you're relying on the -- on other officers' reports?

20 A. It was actually just a verbal. I hadn't read any reports
21 by any of the agencies involved. I basically just called to
22 figure out who was involved in the case and identified myself
23 and my position at DOJ and said, "Hey, is there something you
24 can tell me about this without, you know, giving away any, you
25 know, secrets, so to speak?" Just trying to figure out if

1 it's an assault weapon or a clone, that kind of thing.

2 Q. Would it surprise you to learn that the two weapons
3 recovered from Mr. Shareef were a Glock and a Caltech .223
4 rifle?

5 A. The Glock, actually I remember there being a Glock
6 involved. The Caltech, I don't really have a recollection of
7 that coming up in my conversation or even reading about it
8 like other people in the news or anything.

9 Q. Did you conduct any further investigation to find out
10 whether or not Mr. Shareef had obtained these firearms
11 legally?

12 A. I recall, you know, looking at the AFS record, and I think
13 there was a Glock. There may have been at least one other
14 pistol, but I don't remember hearing much about the second
15 pistol or anything like that. But I think -- yeah, because it
16 was in the system under his name. So it was the handgun, I
17 want to say, was a lawfully purchased weapon.

18 Q. All right. And the Caltech being a rifle, you wouldn't
19 have a record on it past the approval; correct?

20 A. Yeah, even less -- well, you know, after the approval had
21 been granted, then it would be purged on the computer side of
22 our systems.

23 Q. That's because Caltech is a long arm.

24 A. Caltech rifles are long arms. There are a few Caltech
25 handguns out there, but we're talking about a rifle.

1 Q. The DA report refers to a Caltech .223.

2 A. Probably it was a SU-16 variant of some type.

3 Q. Was there any evidence that that rifle was obtained
4 illegally by Mr. Shareef?

5 A. I didn't get into anything like that. That was the
6 Sheriff's Department. And I figured if they needed help on
7 that level, they could get back to us. I had already
8 contacted them, and the ATF often gets involved in these
9 because the tracing aspect of that and their -- the San Jose
10 office would have handled that for ATF.

11 Q. And, in fact, when there is a crime involving a firearm,
12 the ATF does something called a time-to-crime trace. Is that
13 accurate?

14 A. Yeah. Basically every crime gun entry that gets pushed
15 into AFS by local agencies here, when that information gets
16 sent back to them, either by eTrace or maybe by mail, there's
17 going to be a time-to-crime number thrown out there, and
18 that's going to be based upon the original date of sale and
19 then the recovery date.

20 Q. So the ATF keeps statistics on the passage of time from a
21 lawful sale, because by definition, if ATF has a record of it,
22 it was a lawful sale, to the time to crime.

23 A. Yes.

24 Q. Do you know if those statistics are published publicly or
25 not?

1 A. It may be. I don't know. I know that there are
2 ATF-tracing statistics, but I don't know if it gets down to
3 that level of detail.

4 Q. Okay. We can go to an ATF website and pull up a report on
5 that or something?

6 A. Yeah, there are ATF published tracing data for California
7 and other states on their websites, I can assure you of that.

8 Q. And it gives us statistics on average and probably
9 individual breakdown of the time it -- or the time from a
10 purchase to a crime?

11 A. I don't know about the time-to-crime stats. I can say
12 that it will give you raw numbers for sure about the number of
13 guns that were traced in a particular state, but I'm not sure
14 if they provide that time-to-crime information.

15 Q. And this tragic incident involving Mr. Shareef Allman, I
16 think, is the man's name -- Allman, I think, is his last name.
17 S-H-A-R-E-E-F, A-L-L-M-A-N. That event terminated with his
18 suicide, didn't it?

19 A. As I understand it, yes.

20 Q. Would it be fair to say that this was an instance in which
21 the background check and 10-day waiting period did not prevent
22 violent acts?

23 A. Yes.

24 Q. I want to ask you a little bit more about the APPS system.
25 This is a relatively new system, isn't it?

1 A. In terms of DOJ systems, it's a baby.

2 Q. Prior to that and because based on your resume and your
3 prior testimony, you'd have to kind of go to a bunch of
4 different databases to get your information to do your
5 enforcement work; correct?

6 A. Correct.

7 Q. And the APPS system is designed to kind of consolidate all
8 of that for you?

9 A. Yeah, it will pull together a lot of data, where in the
10 past, you'd have to hunt around, yeah.

11 Q. And would it be fair to say that the specific purpose of
12 the APPS system is to specifically identify people who are
13 known to the State of California to have a firearm and that
14 have had a subsequent prohibiting event and, therefore, should
15 not have a gun.

16 A. In general, sense, yes, that's pretty good.

17 Q. And, in fact, recently, there was by statute a transfer --
18 strike that.

19 Gun buyers in the State of California, when they
20 apply to purchase a gun, they pay what's called a DROS fee; is
21 that correct?

22 A. Yes.

23 Q. And I think it's varied over the years, but it's currently
24 \$25, I think?

25 A. Yeah, there is -- I think it's 19, and there's a dollar

1 fee for a couple things. A dollar, and I think another \$5
2 fee. So the chief could probably give you a better breakdown
3 than I could.

4 Q. As you sit here today, do you know how much it actually
5 costs the department to run a dealer record of sale to check
6 on somebody?

7 MR. EISENBERG: Objection. Irrelevant.

8 THE COURT: Sustained.

9 BY MR. KILMER:

10 Q. Did the Dealer Record of Sales fees, did they generate a
11 surplus of funds for the Department of Justice?

12 MR. EISENBERG: Objection. Irrelevant.

13 THE COURT: Sustained.

14 BY MR. KILMER:

15 Q. Is the APPS system partially funded with -- from surplus
16 funds that were made available for the Dealer Record of Sale
17 fee system?

18 MR. EISENBERG: Same objection.

19 THE COURT: Relevance?

20 MR. KILMER: Your Honor, the Penal Code Section
21 30005, I believe, is cited in our brief. It was a specific
22 allocation of excess funds from the Dealer Record of Sale fee
23 program specifically allocated to the APPS system, and this
24 witness has testified he's familiar with the APPS system. I'm
25 asking him if he knows the source of funding for doing his

1 work.

2 THE COURT: And the relevance to the issues at hand
3 here?

4 MR. KILMER: There was earlier testimony, Your Honor,
5 that there was a lack of resources for conducting law
6 enforcement activity with respect to background checks and
7 public safety.

8 THE COURT: Is lack of resources going to be an issue
9 in this case?

10 MR. KILMER: We don't think that there should be a
11 lack of resources defense for enforcing and protecting
12 constitutional rights, Your Honor, but I anticipate that the
13 Government will and has made the argument that they're
14 overworked and understaffed and just can't get to all those --
15 all this work.

16 Also there is the issue, Your Honor, of we have more
17 than 99 percent of lawful gun purchasers because we've already
18 established that less than 1 percent are denials. We have
19 99 percent lawful gun purchasers basically funding law
20 enforcement activities.

21 THE COURT: Government response to the proffer in
22 terms of relevance?

23 MR. EISENBERG: The specific question goes to fees
24 for APPS, which is not the sum total of law enforcement. I
25 don't see how the funding that's been allocated for that

1 specific system can be relevant to whether there are agents in
2 the field, et cetera. It's not BOF's decision if there's
3 money that's allocated to enhance the APPS system. So I think
4 it's both irrelevant, and it's so narrow as to be especially
5 irrelevant.

6 THE COURT: There may be some relevance, but is the
7 Government -- is the defense going to argue one factor to
8 consider is lack of resources, either human or budgetary or
9 actually they're sort of related, but --

10 MR. EISENBERG: The Government's position is that
11 even if you doubled the number of CIS's, they can't make a
12 deputy sheriff in Shasta County put a record into the system
13 any faster. There is a time lag that's inherent in a system
14 with multiple human beings and multiple locations, some of
15 them even out of the state getting records into the system on
16 time. That's why an instant background check is somewhat of a
17 charade, frankly. That's going to be the heart of our
18 position.

19 THE COURT: Okay, and that would not have to do
20 with -- with the state per se, hospitals have to report,
21 courts have to report, and the various systems we've heard,
22 other local law enforcement agencies need to report. So that
23 would be separate and apart from personnel and funding issues
24 within the State itself.

25 So if you're not going to make -- if the defense is

1 not going to make an argument of lack of funding within the
2 State itself or State employees, we've heard Mr. Matsumoto
3 testify there are only 24 people reviewing, and they're all
4 working 80 hours a week, but I don't know if that really goes
5 to lack -- if there is going to be an argument of lack of
6 resources, I suppose that funding availability might be an
7 issue. It's not a major issue, but it is -- it has some
8 relevance.

9 MR. KILMER: There's one additional relevant point
10 too, Your Honor, and that is that part of the central theme of
11 this case is that people with concealed carry permits and
12 people with COE's, and people who already have firearms that
13 are known to the State of California should be auto-approved.
14 And that the Government's counter argument is that, no, we
15 need a 10-day waiting period in case there's a superseding
16 intervening prohibiting event. Our position is that the APPS
17 system is a more narrowly-tailored remedy for addressing
18 people who become prohibited rather than simply impose a
19 10-day waiting period on already-trustworthy gun owners. And
20 because the Government has this APPS system, and it is already
21 well funded through the fees of law-abiding citizens, that
22 that APPS system is the better fit for addressing those three
23 categories of gun owners who are already trustworthy if they
24 become subsequently prohibited. That's our point, Your Honor.

25 THE COURT: Well, the fact that the system is in

1 place, unless there's some argument that it is deficient
2 because of a lack of funding, I think, may be relevant, but
3 right now it isn't relevant because the system apparently is
4 in place, and so far, there's been no argument that it is
5 deficient because of lack of funding.

6 So I'll sustain the objection for now. You can
7 always raise it a little later on in case it should become
8 relevant.

9 MR. KILMER: Thank you, Your Honor.

10 THE COURT: Now, it is 10:30. Take our morning
11 recess now?

12 MR. KILMER: I have -- we'll take the recess,
13 Your Honor.

14 THE COURT: All right, 15 minutes.

15 (Recess.)

16 MR. KILMER: Are we ready to proceed again?

17 THE COURT: All right, we'll continue on with the
18 testimony.

19 MR. EISENBERG: Your Honor, if I may be heard for a
20 moment.

21 THE COURT: Sure.

22 MR. EISENBERG: We're going to withdraw the
23 objection. You can ask the question of Special Agent Graham.

24 THE COURT: Okay, all right.

25 MR. KILMER: About funding?

1 MR. EISENBERG: Yes.

2 MR. KILMER: All right.

3 THE COURT: Okay. Go ahead and proceed with the
4 testimony.

5 BY MR. KILMER:

6 Q. If you know the answer to the question, did the Dealer
7 Record of Sale program generate excess funds?

8 A. I've heard in a general sense that we have a surplus.

9 Q. All right. And where was that surplus kept?

10 A. I imagine a bank account. I don't know. I'm not into the
11 weeds on the budget stuff, sir.

12 Q. And recently, there was legislation to transfer some of
13 that surplus to a fund specifically for APPS; is that correct?

14 A. Yes.

15 Q. Do you know the amount of that funding?

16 A. The amount that was, I think, in the legislation was about
17 24,000,000.

18 Q. All right. And that's to be used exclusively for the APPS
19 system?

20 A. Yeah. I haven't read the nitty-gritty of that stuff.
21 That would be more something the chief and the people higher
22 up than me would get into, how it was exactly broken down in
23 the spending.

24 Q. And in the organizational chart, or maybe chain of command
25 would be a better word, where do you fit in the APPS system?

1 A. I'm just one of several supervisors in the state.

2 Q. All right. Is that broken down regionally or --

3 A. Yeah, we have six regional offices.

4 Q. All right. So how are APPS cases worked up?

5 A. In the sense like how does an analyst create one?

6 Q. What generates your lead that there has been a crime?

7 A. Okay, so if the computer systems have deemed someone to be
8 a candidate, they will get pushed into a queue. A group of
9 analysts in our program side in the APPS unit will figure out
10 if they think the computers are accurate. If the gun is still
11 in the system or still associated to the person, they will
12 then actually push the person into the live APPS system.

13 Q. Okay, so the computer system itself is programmed to
14 basically flag people who would be defined as armed and
15 prohibited?

16 MR. EISENBERG: Objection. Assumes facts not in
17 evidence.

18 THE COURT: Sustained.

19 BY MR. KILMER:

20 Q. How are the leads that end up in the queue generated?

21 A. It's my understanding that the different databases that
22 I've already testified about will find a commonality between a
23 person, a weapon, one or more weapons, and then one or more
24 prohibitions, and it will be pushed into a queue to be
25 verified by one or more human analysts.

1 Q. Okay, and you're familiar with the terms "reasonable
2 suspicion?"

3 A. Yes.

4 Q. And probable cause?

5 A. Yes.

6 Q. And is there a difference between them?

7 A. Yeah. Probable cause is a higher threshold.

8 Q. All right. The databases that generate the information
9 that goes into the queue, would that be classified as what may
10 be reasonable suspicion?

11 A. I don't know that anyone has ever asked me that question
12 before, so I haven't given it that much thought, frankly.

13 Q. But it's at least an indicator that further investigation
14 is necessary.

15 A. Yes.

16 Q. And as the investigation proceeds, it might reach
17 reasonable suspicion?

18 A. Possibly.

19 Q. And that it might actually reach the threshold of probable
20 cause?

21 A. Given a certain set of circumstances, it could.

22 Q. And at that point in time, the APPS system is designed to
23 then call on resources to try and get a search warrant and
24 then go out and engage in some enforcement action to collect a
25 gun and make an arrest?

1 A. It's sort of a -- I guess it's a repository for data about
2 possible illegal weapons possession by various people. We can
3 go into the system and query a particular county, if you will.

4 Q. Okay.

5 A. Let's say we're going to work Placer County.

6 Q. All right.

7 A. We can figure out what -- you know, we need to have 10
8 people to look at this week or this day, or whatever, and the
9 enforcements CIS's, which are different than the program CIS's
10 that push them in, they will then look at the new -- you know,
11 those names, do a package and figure out if they're worthy for
12 going in the field.

13 Q. All right, so I may be trying to oversimplify this, but
14 sounds like the APPS system basically generates a to-do list
15 for you guys?

16 A. Yes, in the sense.

17 Q. All right, and then you prioritize, based on certain
18 criteria, whether you're going to either work a certain
19 county, or you're going to look at the more serious cases. Is
20 that how it generally goes?

21 A. Yeah, it can be a number of factors. Hey, how long has it
22 been since we've been to a particular county? We might work
23 that county next because it's been, you know, a month or two
24 since we've visited the people in that -- and trying to find
25 people that allegedly live there, something like that.

1 Q. Are there any special -- other than the computer system
2 itself, are there any special resources allocated to the APPS
3 system? For example, did you purchase more vehicles or more
4 guns or hire more special agents with some of the funding?

5 A. I'm aware that we're rehiring people that were laid off in
6 the past.

7 Q. All right. And are they -- are they specially designated
8 to work on the APPS system, or are they just hired for general
9 purposes?

10 A. APPS-related enforcement.

11 Q. Okay.

12 MR. KILMER: Your Honor, at this time, I'd ask that
13 the exhibit I used earlier today, the 4473 Form, be marked for
14 identification as Plaintiff's Exhibit 07, I think is the next
15 in order, and that it be admitted, and I don't believe that
16 the defendants are going to object?

17 MR. EISENBERG: Correct. No objections, Your Honor.

18 THE COURT: It will be marked as Plaintiffs' No. 07
19 and admitted into evidence.

20 (Plaintiffs' Exhibit 07, received in evidence.)

21 MR. KILMER: May I submit that to your clerk,
22 Your Honor?

23 THE COURT: Yes.

24 MR. KILMER: My copy. Thank you.

25 BY MR. KILMER:

1 Q. Final housekeeping, the 4473 is a paper form, I think we
2 established that earlier. The DROS form used to be paper
3 form; is that correct?

4 A. There's a DROS work sheet that sometimes will get filled
5 out, you know, by the dealers, and it will get pushed in by
6 the dealer at their computer often.

7 Q. Currently the system is electronic, though. The entries
8 are made on a computer?

9 A. Right.

10 Q. All right. Is there more information contained in the --
11 that can be inputted into the computer and then shows up on
12 the work sheet that gets printed out?

13 A. Not that I know of.

14 Q. Okay, so the printed version of it that a dealer might
15 print out is literally just identical to those that goes into
16 the computer screens?

17 MR. EISENBERG: Objection. Assumes facts not in
18 evidence about printing out the form.

19 THE COURT: Sustained. Foundation.

20 BY MR. KILMER:

21 Q. Dealers currently use a computer to input the data for the
22 DROS system; correct?

23 A. Yes.

24 Q. They're also able to actually print out the DROS
25 application after it's complete; is that correct?

1 A. Yes. Yes.

2 Q. And the paperwork that gets printed out is populated with
3 the same information that's in the electronic form; is that
4 correct?

5 A. Yes.

6 Q. To your knowledge, that's the same information that is
7 printed out on the paper form that is contained in the
8 electronic form?

9 A. That's my understanding, yes.

10 MR. KILMER: Nothing further from this witness,
11 Your Honor.

12 THE COURT: And redirect.

13 MR. EISENBERG: May we proceed with the redirect,
14 Your Honor?

15 THE COURT: Yes.

16 REDIRECT EXAMINATION

17 BY MR. EISENBERG:

18 Q. Special Agent Supervisor Graham, you testified earlier, I
19 believe, that you had three times written search warrants for
20 straw purchase?

21 A. I testified earlier that I was involved in the preparation
22 of. I think that's what his question was.

23 Q. Three warrants?

24 A. Yes, Mr. Kilmer's question, I think, said something to the
25 effect of was I involved in the preparation, or I assisted in

1 the preparation of three straw purchase-type investigations,
2 and I could remember three at that time that fall under his
3 question.

4 Q. Are there other special agents at BOF that also write
5 those kind of warrants?

6 A. Yes.

7 Q. Do you know how many other warrants of that sort have been
8 written to the best of your memory and recollection?

9 A. Most of those are going to be from the Sacramento regional
10 office, which I'm generally attached to. There would be --
11 right now, I can think of at least three other agents that
12 have written straw purchase-type investigations in the last
13 couple years and -- but I know that they occur in other
14 offices, but I don't really have any numbers for those because
15 it's not something that would get funneled to me in the sense
16 of the follow-up. We might tell them, hey, there's some straw
17 purchase possibilities with this case. Take a look. I don't
18 really get anything back unless there's some really odd
19 circumstance going on.

20 Q. On the straw purchase warrants that you've written, have
21 any of them turned out to just be gift purchases?

22 A. Not that I can remember.

23 Q. Have you gone to more gun shows in past years than you
24 have in the last couple of years?

25 A. Yes.

1 Q. And I believe you testified earlier, you're not the only
2 agent that works gun shows.

3 A. Correct.

4 Q. Have there been more than one -- have there been more than
5 one occasion where a straw purchase was discovered at a gun
6 show?

7 A. Yes.

8 MR. KILMER: The question is vague and ambiguous.

9 THE COURT: Overruled.

10 THE WITNESS: I think I already said yes.

11 BY MR. EISENBERG:

12 Q. Do you know the number of times, say, over the last 10
13 years that BOF agents have discovered straw purchases during
14 their gun show investigations?

15 A. Again, this is just speaking from memory. There has been
16 probably a handful of times that were straw purchase cases
17 that we thought were straw purchases that turned out to be.
18 So I would say, you know, maybe five over the last several --
19 several years that I can think of.

20 Q. And straw purchases don't occur only at gun shows;
21 correct?

22 A. Right.

23 Q. So your answers so far have not tried to quantify the
24 number of straw purchases that are identified by dealers'
25 self-reporting?

1 A. No, those would be something separate from a from a gun
2 show-related event. Typically those happen at a store. Yeah.
3 It would be more of like a Monday through Friday kind of
4 thing, and we'll get a phone call possibly.

5 Q. And do you have the numbers say in the last five years of
6 dealers' self-reports about straw purchases, or is that
7 something that you can't quantify?

8 A. It would come in probably -- I'm thinking of that one
9 particular chain. We'll probably get potentially like three
10 or four a year from one particular chain in Northern
11 California. And there may be others that are also coming in,
12 but that's the one that comes to mind.

13 Q. And do you have any quantification of the number of straw
14 purchases that are identified through the field audits that
15 you spoke about yesterday?

16 A. When our field representatives go out, they will often get
17 sort of spurts or batches of these because they'll hit a
18 particular store, and if it's been a while, we may get, you
19 know, up to maybe three from one particular store as a result
20 of one inspection. And they'll often hit multiple stores in a
21 particular town or county. So in the course of a week, I
22 might get up to -- I don't know -- I remember one particular
23 busy week a few weeks ago, I think one field rep found up to
24 six in just a couple of stores. The guns had already gone
25 out, and we had to evaluate to see what was left to do, if

1 anything.

2 Q. Do you believe that the Bureau of Firearms has enough
3 agents working gun shows and gun dealers, given the number of
4 gun shows and gun dealers?

5 MR. KILMER: Objection. Calls for speculation.

6 THE COURT: Overruled, if you can answer from your
7 own personal knowledge.

8 THE WITNESS: When you say "enough," sir, what do you
9 mean, enough to do what?

10 BY MR. EISENBERG:

11 Q. Would you be able to do your job more effectively, catch
12 more straw purchases if you had more agents?

13 A. Yes. In a general sense, yes.

14 Q. You did testify that the dealer inspections are sometimes
15 only once every three years?

16 A. Correct.

17 Q. And there are about -- something like 1900 gun stores?

18 A. There's about 1800 licensees, I think, in the state.

19 Q. And the numbers of agents you have working doing this kind
20 of work for the whole state is how many?

21 A. I'm not sure of the exact number, probably over 50 at this
22 point.

23 Q. Can an APPS check be a replacement for a background check
24 on a gun purchaser?

25 A. It would be an inadequate check for the existing

1 background check that we do.

2 Q. Why?

3 A. There's staleness issues, some of the information in APPS
4 is dated, and the -- the number of prohibited people in
5 California is -- far exceed the number of people in APPS.
6 There -- I think I testified yesterday, there's about
7 1.5 million mental health records in the system alone. And
8 just last year, we had 225,000 mental health events that gets
9 pushed in as part of that 1.5 million number. There are only
10 about 21,000 people in APPS. They have about -- around 4,000
11 mental health events spread amongst those 21,000 people. So
12 you can see there's a tiny fraction of just the mental health
13 records are tied to those APPS people.

14 The restraining order system isn't fingerprint-based,
15 so if someone -- well, APPS alone by itself wouldn't really --
16 it's not going to give you the full picture. It would just be
17 like the pinhead in a sense on a larger group of people that
18 would need to be considered for a background check.

19 Q. Is APPS a replacement for a background check for a DROS
20 applicant who has bought a gun before?

21 A. It's not a -- it's not a replacement system that we use,
22 no.

23 Q. Do the issues that you mentioned about the inadequacies of
24 APPS apply equally to a first-time firearm purchaser as to a
25 subsequent firearm purchaser?

1 A. Yes.

2 Q. When you're surveilling for possible straw purchases at
3 gun shows, do you suspect every male/female couple to be a
4 straw purchaser situation?

5 A. No. No.

6 Q. What distinguishes a straw purchaser from just an ordinary
7 couple in your experience? Or rather, what distinguishes a
8 potential straw purchaser from just an ordinary couple in your
9 experience?

10 A. In the times in the past that I recall, the woman that's
11 interested in buying a gun for herself, she's probably going
12 to be a little more comfortable handling a weapon, and she may
13 not be standoffish. There's -- the times that I can recall on
14 straw purchases when there was a male/female situation, the
15 male was very excited to handle the weapon and talking with
16 the person selling the gun or offering the gun for sale. And
17 the female was kind of an afterthought. In the times where
18 I've noticed what appeared to be more of a legitimate
19 transaction, it was an equal partnership, a husband and wife
20 or boyfriend/girlfriend, there was an equal amount of banter
21 amongst all three, and it was very -- very apparent that there
22 was an equal amount of interest on the gun with both the male
23 and the female.

24 Q. When you suspect that you're observing the straw purchase
25 situation, and you do your investigation, can you get a search

1 warrant within a day in each case?

2 A. Not in every case.

3 Q. How long might it take you to work up the evidence so that
4 you can write a sufficient search warrant application?

5 A. It can take several days. I mean, if -- we generally
6 would only have 10 days at the most to put everything
7 together, and in some cases, we don't have enough time because
8 of the hidden buyer being somewhat good at obscuring their
9 whereabouts or their residence, that sort of thing.

10 Generally, it's a several-day process to get a warrant unless
11 there is a very finite set of facts, and that rarely happens
12 in our line of work.

13 MR. EISENBERG: I have no further questions for this
14 witness right now, Your Honor.

15 THE COURT: All right. And recross.

16 RECROSS-EXAMINATION

17 BY MR. KILMER:

18 Q. One reason that the APPS system -- again, that's the Armed
19 Prohibited Persons System.

20 A. Yes.

21 Q. It can't be a substitute for a background check is because
22 it draws on the information from the background check, doesn't
23 it?

24 MR. EISENBERG: Objection. Vague and ambiguous.

25 THE COURT: Sustained.

1 BY MR. KILMER:

2 Q. You testified earlier that the APPS system couldn't be a
3 substitute for a background check; correct?

4 A. Yes.

5 Q. And isn't one of the reasons for that is because the APPS
6 system draws its information from all of the databases that
7 the background system itself uses; is that correct?

8 MR. EISENBERG: Objection. Assumes facts not in
9 evidence and/or misstates the evidence.

10 THE COURT: Overruled, if you know.

11 THE WITNESS: Could you rephrase it. There's a lot
12 to that question.

13 BY MR. KILMER:

14 Q. Okay. Let's -- one moment.

15 MR. KILMER: May I approach the witness, Your Honor?

16 THE COURT: Yes.

17 BY MR. KILMER:

18 Q. I've handed you a document that's been previously marked
19 and admitted into evidence, that's Exhibit CB. And have you
20 ever seen this document before?

21 A. No. Well, actually it was here maybe yesterday, when I
22 came up here. But other than that, no.

23 Q. All right, I'd ask you to review it, then.

24 A. Okay. Okay, sir.

25 Q. Okay. This document purports to be a schematic of some of

1 the databases that the California Department of Justice,
2 Bureau of Firearms Division, how the databases interact. Do
3 you understand that?

4 A. Yeah, it looks accurate, in the sense that a lot of the
5 databases that tie into -- you know, APPS are mentioned here
6 on the right side of the page.

7 Q. Okay. Could you please go through some of those for me.
8 The top one says DMV?

9 A. DMV. There's Automated Firearms System. ACHS, which is
10 the criminal history system.

11 Q. All right.

12 A. WPS, the warrant system. CARPOS, that's the restraining
13 order system. Mental health is the next one down, and then
14 the NICS system on the bottom.

15 Q. Okay, you're familiar with all of those databases?

16 A. More or less, yes. I have some more expertise in some
17 than I do in the other ones.

18 Q. Okay, and because you access those databases in
19 researching search warrants and engage in enforcement actions;
20 is that correct?

21 A. Most of them. NICS, I don't really ever get into.

22 Q. All right, fair enough.

23 Is the APPS system a separate database, or does it
24 access those databases?

25 A. The databases on the right side of this particular page

1 are what help populate APPS or provide candidates for
2 population of APPS.

3 Q. Okay. And in order for you to -- the AFS system, I
4 believe you earlier testified, is the system that is -- the
5 catalog of the Dealer Record of Sales that the Department of
6 Justice has, and that includes handguns since '91 and long
7 guns since January 1st of this year; correct?

8 A. That's actually incorrect.

9 Q. Okay.

10 A. The handguns are from '96 to current.

11 Q. Okay.

12 A. And then long guns are from January of this year to
13 current.

14 Q. That's the AFS system?

15 A. AFS, and there's also registered assault weapons that
16 would also be in the pool of weapons that might trigger
17 someone being in APPS if they were lawful -- the lawful owner
18 of one of those weapons too.

19 Q. Okay, and how would you assess the reliability of that --
20 of the AFS database in connection with the investigations
21 you've done?

22 A. In the sense that there are -- the DROS entries are in
23 there are by and large good data. Occasionally you'll have a
24 serial number error. Maybe a dealer -- you know, hit the
25 wrong zero, instead of an 0 or something. By and large,

1 that's pretty good. You may have a make issue or maybe a typo
2 in the model. But it's pretty good information on the DROS's.

3 Q. Pretty reliable?

4 A. Yes.

5 Q. In fact, the AFS system has also accessed real time by
6 these officers in the street investigating act of crimes
7 sometimes too, aren't they?

8 A. AFS, yes.

9 Q. For instance, an officer might be investigating, rolling
10 up to a scene of alleged domestic violence, and they want to
11 know whether there might be a gun in the house; is that
12 correct?

13 A. That might be something that an officer would do, roll
14 into a hot caller. The dispatcher would funnel that
15 information perhaps if there is a shots fired call or domestic
16 or something.

17 Q. And that's an automated system and pretty fast?

18 A. Yes, if you know the person that you're dealing with. If
19 you've got prior calls for service, then maybe they might have
20 a name and date of birth already.

21 Q. Have you ever relied upon the AFS database for an
22 investigation on the proposition that somebody had a gun in
23 the house, and then you later found out that they didn't have
24 a gun?

25 A. Yeah. Yes. We'll knock on a door, and they'll say, "Oh,

1 I sold it," or something like that.

2 Q. How many times has that happened?

3 A. Personally?

4 Q. Sure. I don't want you to testify unless you personally
5 know.

6 A. Right. Probably dozens of times.

7 Q. Over the course of how many years?

8 A. Ten years, let's say.

9 Q. All right. Do you -- in the course of your duties in
10 enforcing California firearms laws, you interact quite a bit
11 with licensed dealers; is that correct?

12 A. Yes.

13 Q. In fact, this whole system for ensuring that firearms
14 remain -- only go to law-abiding citizens remain out of the
15 hands of prohibited people wouldn't work if the licensed
16 dealers weren't trustworthy; is that correct?

17 A. Yeah, the premise is that they're going to put the
18 accurate information in the computer, and they're going to
19 verify, let's say, the driver's license number and make sure
20 that the person -- the driver's license info matches the
21 person standing in front of them. They'll take the
22 thumbprint, and then they'll push it on to the background
23 check unit through the DROS system.

24 Q. So this whole system depends for the bulk of its
25 enforcement on the law-abiding people trusting each other and

1 following the law.

2 A. I think I understand your question, but the dealers
3 provide us with information. We background check it, and then
4 we tell the dealer yes or no as far as releasing the gun. I'm
5 hoping I'm responsive to your question.

6 Q. Okay, I have a follow-up question. And if the dealers
7 were just saying, "No, the DOJ doesn't know what they're
8 doing, I'm going to give this guy a gun anyway," not only is
9 that a violation of the law, but it's a violation of the trust
10 and working relationship between the dealers and the
11 Department of Justice; correct?

12 A. I would agree with that, yes.

13 Q. And for those dealers who are inclined to not follow the
14 law, whether it's through either lack of training or because
15 they form the specific intent that they're not going to comply
16 with the law, they have you to deal with, don't they?

17 A. ATF and DOJ and potentially local agencies if they are
18 involved in the discovery of crimes like that.

19 Q. And you make it your business to make sure that -- that
20 you'll stop those violations and make sure that the system
21 runs correctly.

22 A. Yes.

23 Q. That's your job.

24 A. Yeah, that's one of the jobs, one of the hats that we
25 wear.

1 MR. KILMER: Thank you. I have nothing further from
2 this witness, Your Honor.

3 THE COURT: All right, redirect.

4 FURTHER REDIRECT EXAMINATION

5 BY MR. EISENBERG:

6 Q. Special Agent Supervisor Graham, do you know if APPS pulls
7 information from NICS?

8 A. I don't think that it -- well, I think the database people
9 would be the best person to answer that. I don't know that it
10 does on a regular basis. If it does, I'm not a hundred
11 percent on that.

12 Q. Do you know if APPS does any kind of check for a name
13 verification?

14 A. I think you're getting down to parameters of the program
15 inside. We basically just go after what's in the system and
16 try to make sure that the person we're going to talk to is
17 prohibited, but I'm not sure like names, searches, or Soundex
18 or anything of that stuff.

19 Q. So if you wanted to find the answer to that question, you
20 would consult somebody besides yourself?

21 A. Yes.

22 Q. Who would you consult?

23 A. Probably Assistant Chief Buford, perhaps our programming
24 staff, maybe the people in the APPS unit that do the actual
25 pulling of the data and pushing them from the queue into the

1 active pool of people out there.

2 Q. So you're not really that well versed in what databases
3 APPS pulls from, are you?

4 A. I'm well versed in the ones that I use. But I may not
5 know every single aspect of the system and all the business
6 rules on the computer side of things.

7 MR. EISENBERG: Okay. No further questions.

8 THE COURT: And recross?

9 MR. KILMER: Nothing further, Your Honor.

10 THE COURT: Okay, either side may still call you back
11 to testify. You're still under oath. I'll leave it to
12 counsel to let you know the date and time if necessary to
13 return.

14 THE WITNESS: Sure. Thank you.

15 THE COURT: All right.

16 MR. EISENBERG: Your Honor, the defense would like to
17 call Bureau of Firearms Chief Steve Lindley. May we have a
18 moment to locate him? We understand that he's in the
19 building.

20 THE COURT: Sure.

21 (Pause in the proceedings.)

22 THE CLERK: Would you come right up here, sir. Raise
23 your right hand.

24 ///

25 ///

1 **STEVE LINDLEY,**
2 called as a witness on behalf of the Defendants, having been
3 first duly sworn, testified as follows:

4 THE CLERK: Take the witness stand right over there
5 and give us your full name, please.

6 THE WITNESS: Stephen J. Lindley, L-I-N-D-L-E-Y. I
7 spell Steven with a P-H.

8 **DIRECT EXAMINATION**

9 **BY MR. EISENBERG:**

10 Q. Good morning, Chief Lindley.

11 A. Good morning.

12 Q. I'd like to start by asking you some questions about your
13 education and professional background. Now, Chief, did you
14 attend college?

15 A. Yes.

16 Q. Did you graduate from college?

17 A. Yes.

18 Q. What year did you graduate?

19 A. 1998 with my bachelor's.

20 Q. And did you have a major course of study?

21 A. Criminal justice.

22 Q. Did you pursue formal education beyond your bachelor's
23 degree?

24 A. Yes.

25 Q. What other degrees, if any, did you obtain?

1 A. I have a master's in business management.

2 Q. What year did you receive that degree?

3 A. Late 1999.

4 Q. Have you had any professional employment in law
5 enforcement?

6 A. Yes.

7 Q. Will you tell me what was the name of the first law
8 enforcement agency for which you worked?

9 A. The National City Police Department in San Diego County.

10 Q. What years did you work for the National City PD?

11 A. Roughly between 1990 and 2001.

12 Q. What was your job title at the police department?

13 A. I started off as a police cadet and left there as a police
14 sergeant.

15 Q. Did you have any other jobs in between those two ranks?

16 A. Yes, I was a reserve officer, a police officer, a
17 detective, and then a sergeant.

18 Q. At some point, did your employment with the National City
19 Police Department conclude?

20 A. Yes.

21 Q. Did you move on to another law enforcement employer?

22 A. Yes.

23 Q. Which employer is that?

24 A. The Department of Justice.

25 Q. And what year did you begin work at Cal DOJ?

1 A. 2001.

2 Q. And you're presently employed at the California Department
3 of Justice?

4 A. Yes.

5 Q. What is your current job?

6 A. I'm the Bureau Chief for the Bureau of Firearms.

7 Q. How long have you been the Bureau Chief?

8 A. Roughly four years.

9 Q. So that takes us back to about 2009?

10 A. Yes.

11 Q. In the intervening years about 2001 and 2009, you're
12 employed by the Bureau of Firearms at all times?

13 A. No.

14 Q. What years were you employed between 2001 and 2009 with
15 the Bureau of Firearms?

16 A. Well, actually I started off at the Department of Justice
17 in the California Bureau of Investigations as a special agent
18 assigned to the San Diego regional office. In the summer of
19 2003, I was promoted and moved to the Los Angeles regional
20 office, and I handled a team working out of the Riverside
21 regional office where I was the supervisor. In the summer of
22 2006, I was promoted up to the division's headquarters in
23 Sacramento. I spent about a year there. And then I moved
24 over to the Bureau of Firearms in July of 2007.

25 Q. Okay, so I was mistaken. Those years between 2001 and

1 2007, you were in the employment of the California Department
2 of Justice, but not the Bureau of Firearms within Cal DOJ; is
3 that right?

4 A. Correct.

5 Q. In your current position, do you supervise other
6 employees?

7 A. Yes.

8 Q. How many other employees do you supervise?

9 A. Roughly about 224.

10 Q. Are any of those employees peace officers?

11 A. Yes.

12 Q. Are you yourself a peace officer?

13 A. Yes.

14 Q. And are the remainder of the employees nonpeace officers?

15 A. Yes.

16 Q. Are you the supervisor for Assistant Chief Buford?

17 A. Yes.

18 Q. Are you the supervisor -- well, are you ultimately the
19 supervisor for Mitch Matsumoto?

20 A. Yes.

21 Q. Are you ultimately the supervisor for Special Agent
22 Supervisor Graham?

23 A. Yes.

24 Q. Have you ever worked as an instructor in any law
25 enforcement techniques?

1 A. Yes.

2 Q. Would you describe briefly that experience?

3 A. I taught at the San Diego Sheriff's Academy for about four
4 years. I believe around 1998 to 2002 or so, and I taught
5 criminal -- excuse me, I taught interview and interrogation
6 and preliminary investigation and occasionally ethics.

7 Q. At the Bureau of Firearms, have you articulated a concept
8 known as "Time Equals Safety"?

9 A. Yes.

10 Q. Will you please explain what that concept is.

11 A. The more time that we have to do a quality background
12 check, the better the public safety so that we can ensure that
13 we're not allowing any prohibited person to possess a firearm.

14 Q. Is there a staff at the Bureau of Firearms that performs
15 the background checks on a prospective firearms purchasers?

16 A. Yes, we have a unit that does that.

17 Q. Do you know roughly how many people work in that unit?

18 A. All told, somewhere probably between 28 and 30, that's
19 including management, admin staff, and then our analysts and
20 supervisors.

21 Q. You've heard of the term, a "DROS application"?

22 A. Yes.

23 Q. What is a DROS application?

24 A. It's an application from an individual to purchase a
25 firearm and allows us the opportunity to do a background check

1 on them.

2 Q. So the Bureau of Firearms processes the DROS applications?

3 A. Yes.

4 Q. Do you know how many DROS applications the Bureau of
5 Firearms processed last year?

6 A. I believe it was 960,179. I might be off by a number or
7 two.

8 Q. And do you have the figure for the prior year 2012?

9 A. It was 817,248, I believe, give or take a few.

10 Q. Is the staffing that you have to process the background
11 checks enough that the work can get done in a 40-hour week by
12 your staff?

13 A. No.

14 Q. Does your -- well, is there a name for the people that do
15 the background checks? Do they have a job title?

16 A. Are you talking about their specific job title or just the
17 unit?

18 Q. The job title of the individuals.

19 A. Usually they are Criminal Identification Specialists, and
20 their classification is a II based on their level of
21 expertise.

22 Q. Have you ever heard that position referred to by just the
23 abbreviation CIS?

24 A. Yes.

25 Q. Do the CIS's work overtime?

1 A. Yes.

2 Q. Do you know how much overtime?

3 A. Depends on the employee. I have a set minimum that they
4 need to work on a monthly basis in order for us to keep our
5 heads above water. But there are a number of analysts that
6 work well in excess of 100 hours of overtime a month.

7 Q. You're the manager of those folks ultimately; correct?

8 A. Yes. I'm responsible for them.

9 Q. Why are you having people work so much overtime?

10 A. We have high volumes for the DROS applications.

11 Q. Can you just bring in temporary CIS's when they are --
12 when there's a backlog of work?

13 A. No, you cannot.

14 Q. Why not?

15 A. Through the process of just the state hiring, our
16 background checks that we do on the -- on our individual
17 employees before we employ them at the Bureau of Firearms as a
18 full -- not a criminal background check, but investigative
19 employment background check is an investigation on top of just
20 the time that it takes to train an individual, that can be
21 anywhere from four to nine months, depending on the
22 individual, for really they're qualified to do those checks,
23 and we feel comfortable allowing them to do them.

24 Q. If you had an extra large sum of money, say, an extra
25 billion dollars just to hire and train CIS's, would you be

1 able to perform -- get all the background checks to perform
2 instantaneously or nearly instantaneously?

3 A. No.

4 Q. Why do you say that?

5 A. There's still a wide variety of information that we have
6 to pull, and we talk about a background check, it sometimes
7 can be a background investigation. If an individual has an
8 open disposition on an arrest, whether it's a recent arrest or
9 one a couple years old, and that disposition would be
10 prohibited if they were either convicted or pled guilty to
11 that charge, we have to chase down the disposition. That's
12 just one of the issues. We have to contact the courts and get
13 them to provide us that information. That has proved very
14 challenging over the past several years. We have to decipher
15 people's names because they're not always using the same name,
16 so we have aliases issues in order to find out about.

17 Mental health hospitals, when they send us the
18 information, they send us the information that they are
19 provided by the patient at that time. But oftentimes when the
20 patient is coming in, they're not in their right mind. That's
21 why they're in that facility. And oftentimes when they're
22 leaving, they might be prescribed a number of drugs. That
23 also might make them a little less lucid, so it's a problem
24 getting their names. We have to decipher that. They have to
25 contact that facility and make sure that we're not giving a

1 prohibited person a firearm and ensuring that the person is
2 not prohibited. We make sure they're approved as well. So
3 it's just not as easy as checking a box in order to do a
4 quality background check that we feel is in the public's best
5 safety sense. It takes time to do that.

6 On top of it, we can't control the volume that comes
7 in. Some days we get 1500. There's been days we've gotten
8 10,000.

9 Q. If the Bureau of Firearms was ordered to do an
10 instantaneous background check or near instantaneous
11 background check, how would that sync up with your philosophy
12 of time equals safety?

13 A. We could do it. It would be a very poor quality
14 background check. We wouldn't have the time to check our work
15 and make sure that we're ensuring that people who are
16 prohibited don't possess a firearm. It just wouldn't be very
17 quality, and it wouldn't be the -- it would be -- in my terms
18 kind of a crappy background check for California, and we'd be
19 allowing prohibited people to get a gun.

20 Q. Are you familiar with the term "CCW?" Actually let me
21 back up a second.

22 You spoke about people admitted to mental health
23 facilities maybe not giving correct identifying information
24 upon intake. What's the basis for that knowledge that you're
25 claiming?

1 A. I was a police officer for roughly 11 years on the
2 streets. I've dealt with people with mental illness a
3 majority of that time. Besides the social issues with that
4 and how we need to take care of them, they can pose a threat
5 to themselves or others at times. You know, sometimes they
6 think they're the devil. Sometimes they think aliens are
7 invading their body. There's ones that think they have robots
8 inside their body. They're giving names that aren't their
9 true person because they have some serious mental health
10 issues. When we take them to the facility to be evaluated,
11 again, that evaluation takes some time by the doctors and the
12 staff there. And then depending on when they're released and
13 what drugs they might be under in order to control the
14 psychosis, again, can interfere with their memory, you know,
15 just being lucid or not at that time.

16 Q. Do you have an understanding of what the law is for
17 whether a person who has been on a mental health hold may
18 possess or acquire a firearm?

19 A. There's roughly a five-year prohibition for a California
20 5150. Also for a 5250, it's also a five-year prohibition in
21 California. However, under federal law, that 5250 is a
22 lifetime prohibition.

23 Q. What is a 5150?

24 A. When someone who has been in a mental institution for
25 about 72 hours for evaluation, and under 5150 of the Welfare

1 and Institutions Code, that outlines. If they're in there for
2 that time frame, and the facility believes they're a danger to
3 themselves or others, they would have what's called a 5150
4 placed on them.

5 Q. If a person is a 5150, they're prohibited from having a
6 firearm under California law?

7 A. Correct.

8 Q. Are they prohibited from having a firearm under federal
9 law?

10 A. Not under 5150, no.

11 Q. Now, I'd like to move on to the questions about CCW's.
12 Have you heard the term "CCW" in the course of your work?

13 A. Yes.

14 Q. What's your understanding of what a CCW is?

15 A. In laymen's terms, it's a permit to carry a concealed
16 weapon. Normally a firearm.

17 Q. Does the Bureau of Firearms issue CCW's to citizens?

18 A. No, we do not.

19 Q. Do you know what agency or agencies issues CCW's?

20 A. Local Sheriff's Departments and police departments.

21 Q. Is the Bureau of Firearms involved in any way in the
22 application for a CCW?

23 A. Yes.

24 Q. How?

25 A. Depending on the county, depending on the City. Normally

1 when they start the process to obtain a CCW, at some point
2 during that process, they need to have fingerprints taken and
3 sent to the Department of Justice to do a background check on
4 them. We determine whether the person is prohibited or not
5 prohibited and forward that to the licensing agency along with
6 the copy of their California criminal history.

7 Q. Does the Bureau of Firearms communicate to law enforcement
8 agencies that there's any kind of expiration date or time
9 period within which the check that you've done is valid?

10 A. Like with our other processes, when we clear someone to
11 purchase a firearm, stating they're not prohibited, you
12 normally have 30 days. That background check is good for 30
13 days.

14 Q. And is it the case, to your knowledge, that the other law
15 enforcement agencies always issue the CCW's within that 30-day
16 window?

17 A. I would say it's rare that they issue that license within
18 the 30-day window.

19 Q. Do you know about the length of time it takes for the CCW
20 to issue?

21 A. It really depends on the agency, but some agencies are as
22 far as nine months after we've done the background check, that
23 they're issuing the CCW permit to the citizen.

24 Q. If a person has a CCW, does that entitle the person to
25 purchase a firearm without going through the 10-day waiting

1 period?

2 A. No, it does not.

3 Q. If a person has a CCW, does that entitle the person to
4 purchase a firearm without going through a background check?

5 A. No, it does not.

6 Q. Doesn't the fingerprinting and the background check that
7 the Bureau of Firearms did when the person applied count for
8 the length of the CCW?

9 A. No, it does not.

10 Q. Are you familiar with the California Penal Code?

11 A. It's very large, but, yes.

12 Q. In the course of doing the background check, is there a
13 check for whether the applicant is a trustworthy person?

14 A. I don't believe that's in the Penal Code.

15 Q. Is trustworthy person, is that a criteria that is measured
16 in the background check?

17 A. Not the background check, no.

18 Q. Do you understand that there is a firm definition in
19 criminal law of what a trustworthy person is?

20 A. I'm not aware of that.

21 Q. Are you aware that there are statutory exemptions to the
22 Waiting-Period Law?

23 A. Yes.

24 Q. I'd like to -- well, are you knowledgeable about the
25 different exemptions?

1 A. For the most part, yes.

2 Q. I'd like to ask you questions about the various
3 exemptions.

4 Are you aware that there is an exemption to the
5 waiting period for peace officers?

6 A. Yes.

7 Q. Do you know why there is an exemption for peace officers?

8 A. It's designed so they can get their duty weapon that they
9 need to perform their duties.

10 Q. Is a peace officer subject to a background check on, you
11 know, joining a police academy?

12 A. A somewhat extensive background check, yes. I mean, they
13 have psychological examinations, a polygraph examination. The
14 background check that they do is more of a background
15 investigation into who they are, what they are, going back to
16 high school, college, checking their neighbors, past
17 employers, friends, family, girlfriends, boyfriends, and we
18 need to know what type of a character we're going to give that
19 authority to.

20 Top of that, if they are hired by the agency, they
21 have anywhere between 600 and 900 hours of training in an
22 academy. Once they graduate there, they can have anywhere
23 from six months and a year of field training before they're
24 actually let out by themselves as a peace officer and then
25 constantly supervised by the agency.

1 Q. Is the background -- the background investigation that you
2 mentioned, is it just the same as what a person going through
3 a DROS application background check goes through?

4 A. No, apples and oranges.

5 Q. Are you aware that there are exemptions for firearms
6 dealers from the Waiting-Period Law?

7 A. Yes.

8 Q. Why are firearms dealers exempt from the Waiting-Period
9 Law?

10 A. Well, just the level of regulation that they're under, not
11 only from California, from DOJ, but also from ATF, the federal
12 firearms license. They have to apply for federal firearms
13 license from the ATF. Once that process has been completed
14 and they've been given that license, then they can apply for a
15 Certificate of Eligibility or COE from DOJ. Again, that isn't
16 fingerprint-based alone. More intensive of a background check
17 than would be done on DROS.

18 Top of that, they're heavily regulated at their place
19 of business. For instance, any time during their normal
20 business hours, either ATF or DOJ can inspect that premise,
21 and they can't stop us from doing that. That's part of
22 running that business and part of having those licenses.

23 Q. Are you aware of an exemption to the Waiting-Period Law
24 for dangerous weapons permits holders?

25 A. Yes.

1 Q. Why is there such an exemption?

2 A. Normally most dangerous weapons holders, permit holders,
3 oftentimes they're also FFL holders and COE holders, normal
4 firearms dealers in California, or they have some type of
5 contracting or business with the federal government. So
6 they've gone through an intensive security check through them
7 as well. We do the check, and we just don't do a background
8 check on them. We actually do a background investigation very
9 similar to what we do for a peace officer. We talk to them,
10 we talk to their neighbors, their business neighbors, we talk
11 to their family. We talk to ex-wives, current wives,
12 boyfriends, relatives, to get somewhat of a knowledge about,
13 one, why they need that permit, and who they are because we're
14 giving them some great responsibility with that permit.

15 Again, they're heavily regulated by both DOJ and ATF
16 if they have an FFL, and they have constant supervision. On
17 top of that, we inspect their premises and their firearms
18 regularly to make sure they're in compliance.

19 Q. Is the background investigation that a person goes through
20 to get a dangerous weapons permit the same as for a person
21 submitting a DROS application to purchase a firearm?

22 A. No, far more intensive. I could actually add all
23 Dangerous Weapons Permits that are approved by the department
24 are approved by me, so I see all those and approve those.
25 That's a little bit different than most DROS applications.

1 Q. There are peace officers in the Bureau of Firearms;
2 correct?

3 A. Correct.

4 Q. If a peace officer seeks to exercise the exemption, the
5 Waiting-Period Law exemption, is there anything that a peace
6 officer has to do, or can they just go to a gun store, flash
7 their badge and walk out with a gun?

8 A. They have to request that letter through their chain of
9 command all the way up to my boss, which is the director of
10 the divisional law enforcement, and I have to make a
11 recommendation to him or her at the time. If I approve of
12 that agent or that peace officer, I give him that exemption.

13 Q. Do you routinely approve those applications?

14 A. I have never approved one.

15 Q. I'd like to move on to discuss another exemption. Have
16 you heard that there is an exemption for people who hold a
17 curio and relic firearm permit?

18 A. Yes.

19 Q. What is a curio and relic firearm?

20 A. One that is on the ATF's list of curio and relic firearms,
21 and that is normally 50 years older or old.

22 Q. If a person has a curio and relic permit, has that been
23 obtained from the State of California?

24 A. Partially from the State and partially from ATF, I
25 believe.

1 Q. What are the agencies involved in granting this permit?

2 A. Both DOJ and ATF, and, again, they have a Certificate of
3 Eligibility listing them as a curio and relic dealer.

4 Q. Are you aware of the general availability of curio and
5 relic firearms in California?

6 A. Roughly, yes.

7 Q. Are curio and relic firearms as readily -- well, sorry.

8 Are you aware of the general availability of firearms
9 that are not curio and relic firearms in California?

10 A. Yes. There's roughly over 1900 dealers in California that
11 sell firearms.

12 Q. Are curio and relic firearms as readily available as other
13 kinds of firearms?

14 A. Generally, no. Again, it's a small segment of firearm
15 purchases. And it's based upon their age, their historical
16 value, maybe who possessed them before. You know, whether it
17 was used in combat, let's say, like a Colt 1911. And just
18 even though there are guns that are still out there, not a
19 large percentage of them come into the market for resale.

20 Q. Are you aware of whether there are variations in the
21 quality of curio and relic firearms?

22 A. Yes. You could equate it to like vehicles compared to --
23 there's different qualities of T-Birds going all the way back
24 to 1957. The better quality that it is, the more it can
25 command on the market as a price.

1 Q. Is it common to find a 50-year-old firearm in mint
2 condition?

3 A. Common, no, but they're out there.

4 Q. I'd like to move on to discuss another exemption. Are you
5 aware of whether there is an exemption for the Waiting-Period
6 Law for gunsmiths?

7 A. Yes.

8 Q. What is a gunsmith?

9 A. I guess in laymen's terms would be an individual with
10 training to work on firearms. I would equate it to a very
11 good mechanic for a vehicle.

12 Q. And gunsmiths are licensed by some entity?

13 A. They're licensed by ATF.

14 Q. Does the State of California license gunsmiths?

15 A. I don't believe that we do.

16 Q. Why is there an exemption for gunsmiths from the
17 Waiting-Period Law?

18 A. They take in firearms from individuals, and under
19 California law, a firearm can be loaned to an individual up to
20 30 days, but oftentimes a gunsmithing process, depending on
21 what the individual wants done with that firearm and how
22 quickly the gunsmith can do it might take, 30, 60, 90 days.
23 So during that process, they would kind of be in violation of
24 California law. Therefore, if we have an exemption for them,
25 again, the -- they've gone through the background passes with

1 ATF, and they're regulated by ATF, and that's part of their
2 business in order to bring in firearms to do work on them.

3 Q. Like to move on to discuss another exemption. Have you
4 heard of an exemption for firearm wholesalers?

5 A. Yes.

6 Q. Why are firearm wholesalers exempt from the Waiting-Period
7 Law?

8 A. Again, very similar to regular firearm dealers is they're
9 transacting firearms back and forth, and they're regulated and
10 licensed not only by ATF, but by California DOJ as well.
11 They're open to inspection on other premises, they have to go
12 through certain processes in order to transfer those firearms,
13 so it's a regulated process for both what would be a normal
14 DROS application.

15 Q. If a wholesaler wants to stop the Bureau of Firearms from
16 doing an inspection, can a wholesaler do that?

17 A. Not during their normal business hours.

18 Q. Does the Bureau of Firearms have to preannounce that
19 they're doing an inspection of a wholesaler?

20 A. No, we do not.

21 Q. I'd like to discuss another exemption. Have you heard of
22 an exemption from the Waiting-Period Law for target shooting
23 facilities?

24 A. Yes.

25 Q. Why -- why does that exemption exist, to your

1 understanding?

2 A. Well, a lot of the firearm facilities that have --
3 shooting facilities that have firearms on the premises
4 oftentimes have a FFL and a COE in order to sell firearms. I
5 would harken it towards people coming there, they want to try
6 different firearms and see how they feel in their hands, how
7 they shoot them. Very similar to how someone wants to
8 purchase a vehicle, they want to take the car for a test
9 drive. Kind of the same thing. They might think they might
10 want a certain caliber, a certain type of a gun. They can
11 test fire there. If they don't, they find another one that
12 they do, and the facility can make that sale.

13 On top of that, the guns that they have there for
14 firing can't be taken off the premises. A lot of facilities
15 oftentimes when a person is doing the shooting, oftentimes
16 that's one-on-one supervision from one of the range masters.

17 Q. And, Chief, I'd like to ask you about another exemption.
18 Are you aware of whether there is an exemption that applies in
19 the entertainment industry?

20 A. Yes.

21 Q. Why is there an exemption for the entertainment industry
22 from the Waiting-Period Law?

23 A. In order for them to be able to get firearms in use in
24 television movie productions. But there's a couple of
25 distinctions with them that's far above what normal people or

1 even normal businesses deal with. One, they've gone through
2 the Dangerous Weapons Permit process normally, a slight
3 variation of the entertainment permit, so we've done a full
4 background on them. Most of the firearms that they have on
5 the premise that they're using will oftentimes don't fire real
6 bullets anymore. They've been gunsmithed to fire blank
7 ammunition. A lot of that deals with the insurance companies
8 that insure these events, the movie industry. And they have
9 very strict guidelines of what they want on those sets because
10 accidents have happened in the past.

11 So just the regulations that the insurance companies
12 and the movie industry has put on themselves are oftentimes
13 far greater than what we would have placed on them or have
14 placed on them. But, again, they're subject to inspection by
15 us at any time.

16 Q. What kind of safeguards are you aware that the movie
17 industry uses that's not necessarily required by state law?

18 A. Well, I can talk about Universal Studios. And they have
19 their prop masters that have dangerous weapons permits. All
20 the stunt actors that would use that firearm also has a
21 Dangerous Weapon Permit. That's just by their policy. So
22 when their -- I guess one of the events they have is a
23 *Terminator* ride or a *Terminator* show, the prop master will
24 bring that firearm in a locked safe to the event, hand it to
25 the actor or the stunt person. They check it, they use it,

1 they come back, it's put right back in the safe, locked and
2 taken back to their master safe. And those firearms cannot
3 fire a regular 9-millimeter bullet. It's some form of a blank
4 that is firing. They're very protected because of insurance
5 purposes to ensure they don't have any accidents on the
6 facility.

7 Q. You're aware that the background checks that the Bureau of
8 Firearms does sometimes lead to the denial of firearm
9 purchases; correct?

10 A. Correct.

11 Q. Does the Bureau of Firearms -- do they do any work
12 retrieving firearms that are in the hands of prohibited
13 people?

14 A. We have our Armed Prohibited Person System.

15 Q. In terms of public safety, is it preferable to have one
16 versus the other? Is it preferable to stop the release of a
17 firearm to a prohibited person, or is it preferable to
18 retrieve a firearm from a prohibited person?

19 A. It's always far easier, cheaper, and in the public's best
20 interest to prevent a prohibited person from possessing a
21 firearm in the first place. Retrieving a firearm from
22 someone, especially, let's say, they have some mental health
23 issues, can be a very dangerous event for the public, for the
24 agents, or the officers that are allowed to do that, and for
25 the individual that's prohibited.

1 Q. Are there any examples of where California's background
2 check system has prevented firearms from being released to
3 prohibited persons that you're aware of, any specific
4 instances?

5 A. There are thousands of them, there's a couple that come to
6 mind as far as notable instances that happened within the last
7 couple years.

8 Q. Please describe those instances.

9 A. I believe his name is John Bedell, B-E-D-E-L-L. He was
10 the Pentagon shooter back in March. I believe he did the
11 shooting at the Pentagon early March of 2010. That individual
12 was a California resident. He tried to purchase a firearm, I
13 believe, in January of that year here in California. That
14 purchase was denied because -- and he had some prohibitions.
15 Unfortunately, after that denial, he drove to Las Vegas and
16 purchased actually two handguns from a private dealer in
17 Las Vegas at a gun show, then drove out to Arlington, Virginia
18 and conducted the shooting at the Pentagon.

19 One of far more recent is the individual who shot
20 several people at the Santa Monica College. Again, I believe
21 his name was John Zawahri, Z-A-W-A-R-I, I believe. He tried
22 to purchase a handgun in California as well and was denied
23 because he had several firearm prohibitions. Unfortunately,
24 he was able to obtain a gun illegally and conduct the shooting
25 at the college. So those are the two instances where

1 California law prevented it. They chose to get guns in other
2 illegal means, sometimes from another state. But our process
3 worked in stopping a prohibited person from possessing a
4 firearm.

5 Q. You're aware -- you testified that there are approximately
6 960,000 DROS applications processed by your bureau in 2013;
7 correct?

8 A. Yes.

9 Q. Do you know how many denials were issued?

10 A. 74' or 7500, roughly.

11 Q. Do you know if any people who have been denied were second
12 time or subsequent purchasers; in other words, it was not the
13 first attempt to purchase a firearm?

14 A. I know that it has happened, but it has been brought to my
15 attention. I just can't remember the particular instances,
16 but that does happen.

17 When somebody is denied a firearm purchase because
18 they're prohibited, one of the things that DOJ does is we
19 notify the local jurisdiction that the gun purchase or the
20 attempted gun purchase was made in -- on top of contacting the
21 DA's office of that county, notifying them of that purchase,
22 or that attempted purchase took place, and that that is a
23 crime.

24 THE COURT: All right, it's 12:00. We'll take our
25 noon recess. 1:30 this afternoon.

1 MR. EISENBERG: I actually only have one more
2 question.

3 THE COURT: We'll finish up at least direct exam.
4 BY MR. EISENBERG:

5 Q. If the waiting period were reduced from 10 days to a
6 smaller number, say, three days, zero days, would there be the
7 same number of denials in 2013?

8 A. I believe denials would go up, denials could go down,
9 depending on what information we're able to obtain in three
10 days. For instance, if someone -- if as I say goes down to
11 three days, someone purchased a firearm on Friday afternoon at
12 6:00, and they had an open disposition on an arrest, or they
13 had some type of 5150 that we needed to check information on,
14 we can't get to that information on Saturday or Sunday because
15 those businesses are closed, the courts are closed. If the
16 Court is dark on Monday, we wouldn't be able to check at all
17 before the three 24-hour periods. So we would not be able to
18 do an accurate or thorough background check because we just
19 don't have the time to do it because we rely on information
20 from other entities in order to make a good determination.

21 Q. So would more guns go to prohibited persons on a
22 background check, or would you catch more people with a
23 shorter background check, a shorter waiting period?

24 A. I look at it like this: Time equals safety. The longer
25 we can do a background check, and I think 10 days is a very

1 adequate time for to us get through a majority of those
2 background checks. Anything lower than that, it's very
3 difficult for us to be able to contact the entities that we
4 need to do to determine whether somebody is prohibited or not
5 prohibited.

6 MR. EISENBERG: I have no further questions for this
7 witness at this time, Your Honor.

8 THE COURT: All right. Okay, we'll take our noon
9 recess, 1:30 this afternoon.

10 THE WITNESS: Thank you, Your Honor.

11 (Noon recess.)

12 **AFTERNOON SESSION**

13 MR. EISENBERG: Your Honor.

14 THE COURT: All right, back on the record.

15 MR. EISENBERG: Your Honor, during the break, I
16 realized that I might have a few more questions for the
17 witness. I spoke with plaintiffs' counsel. He said I could
18 just finish up and then -- is that all right with you?

19 THE COURT: Oh, sure. Fine. Continue on with direct
20 examination.

21 BY MR. EISENBERG:

22 Q. Good afternoon, Chief Lindley.

23 Have you heard of a term "refresher" in connection
24 with the background check?

25 A. Yes.

1 Q. What's your understanding of that term?

2 A. Basically as the -- our DROS entry system gets the
3 information from the dealer, it's forwarded to our DROS
4 system. A background check, electronic background check is
5 done at that time, so an analyst can analyze information to
6 see what actual work needs to be done. That's usually done
7 day one, let's say.

8 Sometimes the analyst might not get to that
9 information for several more days. Before they start their
10 background process, they will refresh that information to make
11 sure that any information that maybe came in in the past three
12 or four, five days is refreshed, and we have the best
13 information possible in order to start the background process
14 with.

15 Q. Are you familiar with the system known as APPS, A-P-P-S?

16 A. Yes.

17 Q. Are you aware that APPS is a database system?

18 A. It is a system that relies on information from other
19 databases, yes.

20 Q. Okay, relies on information from other databases?

21 A. Yes.

22 Q. Do you know what databases APPS pulls its information
23 from?

24 A. It uses our CFIS, AFS information to identify individuals
25 that have legally purchased firearms at one time or registered

1 assault weapons since 1989. Then it compares that information
2 to the department's mental health system, our commission on
3 the Restraining Order System, the wanted persons system, and
4 our criminal history system.

5 Q. Have you heard of a term called BFEC in your work at the
6 Bureau?

7 A. Yes. Our Basic Firearms Eligibility Check.

8 Q. Are there databases consulted in a BFEC?

9 A. Yes, basically the same ones, however, we also check the
10 National NICS system as part of BFEC.

11 Q. Does the APPS database pull from NICS?

12 A. No. It is not allowed to.

13 Q. Why is it not allowed to?

14 A. I believe under federal law, that's not one of the uses
15 for a NICS check.

16 Q. In your work either as a police officer or at the Bureau
17 of Firearms, have you ever come across a situation where one
18 family member wants to take firearm -- firearms away from
19 another family member who may be acting erratically or
20 depressed?

21 A. Yes. That happens a little more often as of late,
22 especially dealing with our soldiers that are returning from
23 Iraq and Afghanistan, and if that they have certain PTSD, or
24 Posttraumatic Distress Disorder.

25 MR. KILMER: I object to this point, Your Honor, this

1 entire line of questioning. Is the witness testifying as to
2 his own personal experience, or is he testifying to newspaper
3 articles he's read?

4 THE COURT: All right. Foundation?

5 MR. EISENBERG: Okay.

6 THE COURT: Sustained. Foundation.

7 BY MR. EISENBERG:

8 Q. Have you had any personal experience with the scenarios
9 described?

10 A. Yes.

11 Q. What's the basis of those experiences?

12 A. They were forwarded to my telephone number, and I talked
13 to these family members personally.

14 Q. In what capacity were you speaking to them?

15 A. As the Chief of the Bureau of Firearms and as a police
16 officer, a human, someone they can turn to for some
17 assistance.

18 Q. Is there anything that law enforcement is authorized to do
19 in a situation like that?

20 A. Well, if an individual wants to surrender firearms for
21 safekeeping to law enforcement, they're allowed to do that.
22 And oftentimes, these citizens are doing that. Oftentimes,
23 it's a wife or close family member that wants to get the
24 firearms out of the house until that individual, their loved
25 one can seek treatment through the VA system for their PTSD

1 that they sustained as a cause of the war.

2 They oftentimes tell me that, you know, they're not
3 going to commit suicide by taking pills, you know, jumping to
4 death, suffocating themselves or hanging themselves, but
5 because they're very familiar with firearms, they will shoot
6 themselves. And they oftentimes quote the data, I think that
7 was a 2012 data, that the military especially the U.S. Army
8 was sustaining more losses through suicide, returning soldiers
9 than they were going through on --

10 MR. KILMER: Objection.

11 MR. EISENBERG: Let him finish his testimony.

12 THE COURT: Well, hold on.

13 MR. KILMER: The witness is testifying as an expert
14 now regarding mental health issues, Your Honor.

15 THE COURT: Sustained. Rephrase the question.

16 BY MR. EISENBERG:

17 Q. Was the entire testimony stricken or just part of it,
18 Your Honor?

19 THE COURT: Well, just for clarity, I'll strike the
20 entire last answer. Go ahead and rephrase and restate the
21 question.

22 BY MR. EISENBERG:

23 Q. What, if anything, can law enforcement do in a situation
24 like that where one family member wants to take guns away from
25 another family member?

1 A. Well, in a case of a husband or wife, identify it as
2 community property so they can surrender those firearms to law
3 enforcement for safekeeping.

4 MR. EISENBERG: I have no further questions at this
5 time.

6 THE COURT: And cross-examination.

7 MR. KILMER: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. KILMER:

10 Q. Good afternoon, Mr. Lindley. Is it Director Lindley?

11 A. It's Chief Lindley.

12 Q. Chief Lindley, I'm sorry.

13 You testified earlier that when it comes to
14 regulating the sale of firearms, timing was safety. Am I
15 accurately remembering your testimony?

16 A. Yes.

17 Q. Does that mean also more time equals more safety?

18 A. I think there's a limit in order of what time frame we can
19 do the background check. Oftentimes, we have to delay a
20 purchase for longer than the 10 days because we're trying to
21 trace down the disposition. At one point, we can do that for
22 a much longer period. Recently under current California law,
23 we can only now do that for 30 days.

24 Q. All right. So sometimes on one side of the equation, you
25 need more time in order to get to more safety.

1 A. In order for us to make an accurate determination about
2 the person's status, yes. It does take longer at times.

3 Q. But the equation you gave us was time equals safety.

4 A. In my opinion, it does.

5 Q. Okay. Is there such a thing as too much safety?

6 A. I would say no.

7 Q. So then how would you do a balancing test between time and
8 safety if there's not too much safety?

9 A. Don't understand your question.

10 Q. I mean, for example, you cited recent legislation that
11 allows you to delay a sale for up to 30 days.

12 A. Correct.

13 Q. To conduct further investigations.

14 A. Correct.

15 Q. Is 30 days always enough?

16 A. No.

17 Q. Is 60 days always enough?

18 A. No.

19 Q. Ninety days?

20 A. That percentage, it's getting very small at that point,
21 but there are times where it takes longer than 90 days, yes.

22 Q. What's the longest it's ever taken to complete a
23 background check?

24 A. I believe we had ones that took as long as 12 to 16
25 months.

1 Q. At what point does that become not just a delay, but
2 actually a denial of the right?

3 MR. EISENBERG: Objection. Vague and ambiguous,
4 calls for a legal conclusion.

5 THE COURT: Sustained.

6 BY MR. KILMER:

7 Q. Would it be fair to say that a goal of your background
8 check system and the 10-day waiting period system is to
9 hopefully get to almost a perfect record of denying people who
10 are not entitled to have guns?

11 A. Okay, that was a little bit of a spin. Maybe you can
12 clarify that. I'm not exactly sure what you're asking.

13 Q. I mean, for example, do you have any statistics on your
14 accuracy rate? Are you denying 90 percent of unlawful
15 purchases?

16 A. We have a percentage of people that we deny on an annual
17 basis. We have that statistic. I think he said earlier 7400
18 to 7500 last calendar year.

19 Q. All right. And that was against more than 900,000
20 approved sales?

21 A. No, that was against 960,179 total sales.

22 Q. All right.

23 A. So you subtract that down, you're looking at somewhere
24 around 953,000, 152,000.

25 Q. So would it be fair to say that less than 1 percent to

1 have DROS applications resulted in a denial?

2 A. If you look historically, it's right around 1 percent.

3 Some years it goes up slightly maybe to 1.1, 1.2 percent.

4 Other times it goes as low as .7 percent. Looking at now last
5 year, somewhere between .7 and .8 percent.

6 Q. All right. Do you keep any statistics on mistakes made by
7 the system, for example, where a firearm was approved, and the
8 10-day waiting period lapsed, and there was a mistake?

9 A. We keep those.

10 Q. How many times has that happened?

11 A. More than I would like it to. Probably looking at about
12 10, 12 times a year.

13 Q. So very small?

14 A. It is very small.

15 Q. So you'd characterize your system as pretty reliable?

16 A. I would hope to be. We want it to be absolutely reliable,
17 but we do have a human factor and a lot of information.

18 Q. All right. And that was the point of my earlier question
19 is that your goal as administrator of this system is to get to
20 where you're not falsely denying, and you're not falsely
21 approving sales?

22 A. Absolutely. I mean, I want to be in a zero failure
23 business.

24 Q. All right. But right now, you're pretty close to that if
25 you're only making a mistake of approving a sale -- I mean, if

1 you deny or delay a sale, the worse thing that happens is
2 somebody doesn't get a gun?

3 A. Yes, and there's an appeal process for that because there
4 are times where we didn't get all the pertinent information,
5 and they have an appeals process for that.

6 Q. But from a public safety perspective, the bottom line is
7 one gun has been kept off the street. One person's rights may
8 need to still be further adjudicated, but one gun has been
9 kept off the street in a potentially dangerous situation.

10 A. Yes, as far as the information we had, we denied that
11 purchase.

12 Q. And a very minuscule, maybe 10 or less per year against
13 the background of sometimes a million sales a year, do you
14 accidentally approve a sale that shouldn't have been?

15 A. That should have been denied?

16 Q. Yes.

17 A. Yes, that happens.

18 Q. There are some exceptions to the waiting period, and you
19 testified about those earlier. Are you aware of any exception
20 for a victim of domestic violence to obtain the means of
21 self-defense immediately after being a victim of domestic
22 violence?

23 A. Either purchasing a gun or being able to obtain a gun
24 through other means?

25 Q. To purchase a gun through your system.

1 A. No.

2 Q. So they would still have to wait the 10 days?

3 A. They would have to wait the 10 days.

4 Q. Or perhaps get somebody to loan them a gun?

5 A. Correct.

6 Q. And that would be legal under California law as long as
7 the loan didn't exceed 30 days?

8 A. Correct, and the person believed that the person they were
9 loaning the gun to was not prohibited.

10 Q. Okay. So in that circumstance where somebody might have
11 an actual threat of violence against them based on, you know,
12 the arrest of the person who perpetrated the violence would
13 have somebody loan them a gun for a short period of time, and
14 that's kind of done on the honor system?

15 MR. EISENBERG: Your Honor, I want to object to this
16 line of questioning as all hypothetical.

17 THE COURT: All right, sustained. But obviously
18 within his personal knowledge would be acceptable.

19 MR. KILMER: I'll withdraw the question.

20 BY MR. KILMER:

21 Q. You were remarkable with your numbers. The year 2013, you
22 said there were 900-and-some thousand. You actually had an
23 actual number.

24 A. 960,179, give or take a few.

25 Q. Okay. And those were approvals that went through the full

1 process?

2 A. Those weren't approvals, those were DROS's that went
3 through the process.

4 Q. DROS's that went through the process. And what would be
5 the number of ones that were actually approved?

6 A. Well, you would subtract out the 74, 7500 from the
7 960,179, and that should roughly give you the number. I don't
8 have the exact amount of the denials, but it's right around
9 that amount for, again, calendar year 2013.

10 Q. Okay. So maybe 940,000 if we just round off?

11 A. It would be more like 950,000, but --

12 Q. Okay. So 950,000 approvals, lawful sales that went
13 through the 10-day waiting period and the background check.

14 A. Again, we still had some delays as well during that.

15 Q. Sure.

16 A. But, yes.

17 Q. These were people who got their guns.

18 A. Yes.

19 Q. All right.

20 A. Those are approved DROS's.

21 Q. All right. And the bulk of them only waited 10 days, and
22 some of them may have waited a little bit longer based on the
23 new system.

24 A. Not necessarily in the new system. Oftentimes, it was
25 trying to track down information, usually on an open

1 disposition or some issue about the name within the health
2 system.

3 Q. Okay. So that was approximately 950,000 times that
4 California citizens waited 10 days to get their lawfully
5 purchased firearms.

6 A. Yes.

7 Q. So that was approximately 9,500,000 days that Californians
8 collectively couldn't use their firearms that were eventually
9 lawfully turned over to them.

10 MR. EISENBERG: Objection. Argumentative.

11 THE COURT: Sustained.

12 BY MR. KILMER:

13 Q. You testified earlier about the Department of Justice's
14 involvement with the CCW process.

15 A. Yes.

16 Q. In fact, the form for CCW's -- let me back up a minute.
17 CCW's are issued by chiefs of police and sheriffs in the State
18 of California?

19 A. Correct.

20 Q. All right. And, however, the permit or at least the
21 application is required to be created by the Department of
22 Justice.

23 A. It's required to be created by the Department of Justice,
24 but it's also in cooperation with the California Sheriff's
25 Association and the California Police Chiefs Association, the

1 standardized one form and one permit statewide.

2 Q. Okay. In other words, the CCW application is a document
3 that the DOJ publishes as an agency, but with input from local
4 Sheriff's.

5 A. Yes.

6 Q. And it's a standardized form that's used throughout the
7 State.

8 A. Yes.

9 Q. And in order to get a CCW or a license to carry, the
10 person must get a background check?

11 A. Yes.

12 Q. They must get a full, all 10-digit fingerprint?

13 A. Yes.

14 Q. And that breaks down into -- sometimes it's ink and card
15 depending upon the jurisdiction, but for the most part, we
16 kind of transitioned to live scan?

17 A. Yes, it's very rare for us to use the old print, rolled
18 cards.

19 Q. Okay.

20 A. But it does happen from time to time.

21 Q. What's the advantage of using live scan?

22 A. One of the things, just the time and order that it gets
23 from the live scan vendor to the Department of Justice,
24 doesn't have to go through a mail system, and I believe also
25 the accuracy. The vendor can see right then and there how it

1 looks, and I believe the computer gives it a score on how
2 clear those prints are. So we don't have the back and forth
3 of the person having to be reprinted time and time again.

4 Q. Is there any analysis done on these fingerprints?

5 A. That analysis is done within the Department of Justice and
6 of the Bureau as far as making sure that it's clear and
7 identifiable.

8 Q. Okay. Now, when you say clear -- well, clear just means
9 that it's readable.

10 A. Yes. Again, I'm not a fingerprint analyst, but just --
11 you can look at it and make sure that you can look at the
12 ridges and make sure that you can have an identification off
13 that particular print.

14 Q. All right. And then that particular fingerprint is -- are
15 you familiar with a term called "CII?"

16 A. Yes.

17 Q. And what is that?

18 A. It's basically a number that is given based off of your
19 fingerprint score, and it's going to be a tracking number.

20 Q. So it would be a unique number assigned to each person?

21 A. Yes. I have a CII number based on my fingerprints when I
22 became a police officer.

23 Q. All right. And so as long as you're in the system, your
24 fingerprints are forever tied to the CII number; correct?

25 A. I wouldn't say forever, but by design, we should be in

1 there for a very long time.

2 Q. Okay. And what other information is contained in a -- and
3 CII, what does that stand for?

4 A. I don't know.

5 Q. Criminal Identification Index?

6 A. Well, people ask what the rap sheet is, and, you know --
7 but it's -- it's based on a criminal because lots of people
8 who have no criminal history have a CII number because they've
9 given the prints up to be a teacher, boy scout leader, peace
10 officer, an attorney.

11 Q. All right. Well, you taught me something I didn't know.

12 And there's other information that's linked to the
13 CII as well as the name and fingerprint; is that right?

14 A. Yes, oftentimes a person's date of birth, maybe some
15 biographical information, a driver's license, height, weight,
16 that type of information is oftentimes obtained.

17 Q. All right. And that information is -- and that
18 information that's collected on the CCW application, in
19 addition to the fingerprints and the designation of a CII
20 number, is that all stored, collected by the Department of
21 Justice?

22 A. Yes.

23 Q. Is it stored electronically?

24 A. Yes.

25 Q. Does the information on a CCW permit also include things

1 like the firearm that the person is entitled to carry?

2 A. Are you talking about when they first get their
3 fingerprints rolled or later on when they actually get the CCW
4 print issued to them?

5 Q. I mean the actual permit when the -- the sheriffs usually
6 issue a permit. Don't they usually also endorse what firearms
7 the person can carry?

8 A. Yes, I'm following you? Yes, it will -- normally it will
9 contain one to several firearms. Usually the make, model,
10 caliber, and serial number of that firearm.

11 Q. Now, the information on the firearm, the make, model, and
12 serial number, is that also transmitted to the Department of
13 Justice?

14 A. It's not transmitted. The Sheriff's Department, police
15 department send that permit to us, and then we input that into
16 our AFS system. So you --

17 Q. Sorry. I apologize. I interrupted you.

18 A. No, that's used when a law enforcement officer pulls
19 somebody over, and they identify that they have that CCW
20 permit, and they want to verify that. They verify that
21 through our AFS system, and they also verify what firearms
22 that that sheriff is authorized or that police chief has
23 authorized that person to carry as part of that permit.

24 Q. Okay. And, in fact, is there some penalty if somebody who
25 even has a concealed license permit is carrying a gun that's

1 not designated on the license?

2 A. That deals more with the issue and agency, not with what
3 DOJ looks at.

4 Q. All right. Do you have any familiarity with the NICS
5 system?

6 A. Not as much as some of the other people you may have
7 talked to, but I'm very familiar with the system.

8 Q. All right. Do you know whether or not the NICS system
9 exempts people with licenses to carry from background checks
10 and waiting periods?

11 A. I didn't follow you on that. I apologize.

12 Q. Does the federal government in its NICS background check
13 exempt somebody who has a license to carry?

14 A. I don't believe so.

15 Q. All right. Does the Department of Justice have any duties
16 with respect to a concealed carry license if it learns that
17 the licensee has become prohibited?

18 A. Yes.

19 Q. And what is that duty?

20 A. We will notify the issuing agency to see how they want to
21 handle it, and if it's a prohibition that we can enforce, we
22 might enforce that as well.

23 Q. All right. In fact, I believe the Penal Code requires to
24 you immediately notify the issuing agency.

25 A. Yes.

1 Q. Why is that done?

2 A. We want to take a firearm away from somebody who is
3 prohibited from possessing it.

4 Q. All right.

5 A. It poses a threat to public safety.

6 Q. And how do you learn about that prohibition?

7 A. We have a system which, in laymen's term, is called a
8 rap-back system.

9 Q. Can you explain what that is?

10 A. Based on the person's submitted fingerprints, if their
11 name comes up through the criminal history system as being
12 arrested, that goes into the system and would flag. So I'll
13 use myself as an example.

14 Q. All right.

15 A. Let's say that last night, I was arrested for domestic
16 violence. Taken down to county jail, my fingerprints were
17 rolled. This morning, DOJ would have been notified by our own
18 system that I was arrested for domestic violence, which
19 potentially could be a prohibiting offense if I'm convicted or
20 plead guilty to it. So that allows that agency to take some
21 action, especially since I'm a police officer, maybe to remove
22 me from the field, put me on admin leave, but they're notified
23 of that arrest.

24 Q. All right. What's the difference between rap-back and
25 APPS?

1 A. APPS is -- excuse me, it's just -- can I get some water,
2 please?

3 Q. Absolutely. Do you have a cup up there?

4 A. Yes, there's a cup up here.

5 So the question was what's the difference between
6 rap-back and an Armed Prohibited Person System?

7 Q. Yes, sir.

8 A. Rap-back is designed for people that we have fingerprints
9 on. People that go into APPS, we might not necessarily always
10 have fingerprints on them because they're contained in
11 different databases. Like our mental health database,
12 restraining order database, or the wanted persons database.
13 Rap-back mainly deals with the people who are in the criminal
14 history system, and the CII number and that information goes
15 in and is part of the criminal history. So if you ran a
16 criminal history on me, you'll only find that I have the CII
17 number and the two agencies that I used to be employed with.
18 DOJ, which I'm currently, and National City previously.

19 Q. Okay, so the rap-back system sounds like a smaller
20 database.

21 A. I don't know about numbers, but it only really checks
22 criminal history.

23 Q. All right.

24 A. And our automated criminal history system.

25 Q. Does the APPS system also access rap-back?

1 A. I don't believe so because it's designed a different way.

2 Q. All right. You testified earlier that a CCW or a --
3 strike that.

4 You're familiar with the term "COE?"

5 A. Yes.

6 Q. That's a Certificate of Eligibility?

7 A. Yes, sir.

8 Q. And does the person -- does the department have any
9 discretion in issuing COE's?

10 MR. EISENBERG: Objection. Lacks foundation as to
11 who issues COE's.

12 THE COURT: Sustained.

13 BY MR. KILMER:

14 Q. Does the Department of Justice issue the COE?

15 A. Yes, the Department of Justice issues the COE based off
16 the result of the fingerprint. We do have some discretion
17 because it really kind of depends on what they're applying
18 for, and if they completed the other requisite application
19 processes.

20 Q. And what are the other processes?

21 A. It depends on what they're getting the COE for, but let's
22 say in this case, they're getting the COE in order to be a
23 firearm dealer. They would need to have a federal firearms
24 license before they apply for a COE.

25 Q. All right. And what are some of the other reasons that

1 somebody might seek a COE?

2 A. If they -- say, someone in the entertainment business,
3 someone has a dangerous weapons permit because they're dealing
4 as a vendor or a contractor or trainer for military or law
5 enforcement, maybe someone in the high tech industry because
6 they're working on some type of contract for the military.
7 There's others. Those are the ones that come up to my mind
8 right now.

9 Q. Does a COE also get a full live scan set of fingerprints?

10 A. Yes.

11 Q. Are they also issued a CII number?

12 A. As part of that fingerprint process. If they already
13 didn't have one, they would be issued one.

14 Q. You testified earlier that a CCW is not an ongoing
15 background check process because I believe you said -- because
16 there is no way to know that a person has committed a
17 subsequent act that might be prohibiting.

18 A. That's correct.

19 Q. Does the APPS system keep track of people who have
20 concealed carry permits?

21 A. It is not designed to track CCW permits, no.

22 Q. May not be designed to, but does it?

23 A. I don't believe it does. Other than the firearms that a
24 person might have in their name, and if they do have a CCW
25 permit, that's listed in AFS. But it's not independently

1 tracking those.

2 Q. All right. How -- the APPS system is designed to flag for
3 further investigation people who are suspected to have guns
4 and who become prohibited. Is that a fair description of the
5 system?

6 A. I would clarify it a little bit differently, but that's
7 relatively close, yes. APPS is a pointer system that
8 identifies, compares people who are in our CFIS or AFS system
9 to four databases. Then the human analysts are based off
10 those triggering events to determine if that's the same
11 person. And we have that information once a person is
12 identified as potentially possessing these firearms that they
13 purchased at one time legally and have subsequently become
14 prohibited due to several different issues. Triggering events
15 hits if we identify that as accurate, then the person goes
16 into the APPS system, but APPS is a pointer system, it's an
17 investigative tool for law enforcement. They still need to do
18 their due diligence off that. And being in the APPS system
19 isn't probable cause for us to take action on somebody. We
20 still have to develop the case.

21 Q. Okay. But suppose somebody committed a triggering act and
22 went into the APPS system and then applied to purchase a
23 firearm. Would their Dealer Record of Sale application get
24 flagged or hit?

25 A. It would get flagged or hit, but not by APPS. It would

1 get flagged or hit based on their new prohibition and the new
2 background check.

3 Q. Okay. So then the APPS system is somewhat redundant.

4 A. No. APPS is designed to do exactly what it was supposed
5 to by the legislation. SB 950 was very specific about what it
6 was supposed to do, and that system was based to do that.
7 It's an investigative tool for law enforcement.

8 Q. Okay.

9 A. To disarm prohibited people.

10 Q. Okay. Would it be fair to say that the Dealer Record of
11 Sale and background check, background check and waiting period
12 is designed to stop somebody from getting a firearm, whereas
13 the APPS system is designed to go get a firearm from somebody
14 who has become prohibited?

15 A. That would be very accurate.

16 Q. Okay. So that way you've actually covered almost the
17 universe of -- of trying to stop gun crimes, keeping guns out
18 of the hand of bad people and taking them out of the hands of
19 bad people.

20 A. Prevent people -- prohibit people from possessing them and
21 then taking the guns out of the hands of people who are
22 prohibited.

23 Q. I use the term "bad people," and you use "prohibited."
24 You're very nice.

25 How often is the APPS system updated?

1 A. Nightly.

2 Q. Is that every day of the week or just on business days?

3 A. I believe it's every day of the week.

4 Q. So it's a 24/7 or at least every 24 hours way of updating
5 people who are potentially in violation of the law because
6 they may have a firearm and be a prohibited person?

7 A. Yes.

8 Q. And then I think there was prior testimony that when that
9 hit or flag happens, that dumps the information for that case
10 into a queue, and then somebody in your -- in your bureau then
11 starts an investigation.

12 A. Yes.

13 Q. You testified earlier about some of the statutory
14 exceptions to the 10-day waiting period. And most of your
15 testimony, if I recall, was based on some of the reasons for
16 the exceptions was that these were highly-regulated
17 individuals or highly-regulated activities, and, therefore,
18 additional waiting periods and background checks weren't
19 necessary.

20 MR. EISENBERG: Objection. Misstates the testimony.
21 He did not say the background checks were not done.

22 THE COURT: Sustained. Go ahead and rephrase.

23 BY MR. KILMER:

24 Q. All right, then I'll rephrase the question.

25 That because these persons and activities were highly

1 regulated and inspected on a regular basis, that they did not
2 need to be subject to the 10-day waiting period to receive a
3 firearm?

4 A. That's how the code reads, yes.

5 Q. All right. Are you aware that the 10-day waiting period
6 has been justified on the basis of two reasons: One is to
7 make sure that only law-abiding people are handling firearms
8 through the background check and the time necessary to do
9 that. And the other reason for the justification for the
10 10-day waiting period is to stop impulsive violent acts. Are
11 you aware of that?

12 A. I would characterize that differently, but I think we're
13 looking at we're trying to prevent prohibited people from
14 possessing firearms, and there's a public safety component to
15 it as well.

16 Q. Are you familiar with the term "cooling-off period?"

17 A. Yes, sir.

18 Q. What does that mean to you?

19 A. Cooling-off period is a period of time in order for you to
20 be able to gather your emotions so you don't make any
21 impulsive decision.

22 Q. And the public safety aspect of that is that if we can
23 delay the sale to somebody who we'd have no information about,
24 we might prevent a suicide or other violent act.

25 A. Yes. Oftentimes people act impulsively. This gives them

1 the opportunity to maybe rethink their decisions and also
2 allows us the time to do the background check.

3 Q. Okay. But the exception for the waiting period for peace
4 officers to obtain a firearm wouldn't stop a peace officer
5 from committing a violent act with a firearm or an impulsive
6 act, would it?

7 MR. EISENBERG: Objection. Assumes facts not in
8 evidence, and it's a hypothetical and an incomplete
9 hypothetical.

10 THE COURT: Overruled, if you can answer.

11 THE WITNESS: Would you ask the question again, sir.
12 Sorry.

13 BY MR. KILMER:

14 Q. Sure. I understand the rationale behind exempting a peace
15 officer from the waiting period because he doesn't need to
16 perform a background check. He's considered trustworthy. But
17 the other reason for the background check for the general
18 population is to impose a waiting period or chilling-off
19 period or chilling out --

20 MR. EISENBERG: Chilling out?

21 BY MR. KILMER:

22 Q. Chilling-off period. Cooling-off period, excuse me.

23 To impose a cooling-off period. So the exemption for
24 peace officers doesn't permit the imposition of a cooling-off
25 period for a peace officer, does it?

1 MR. EISENBERG: Objection. Misstates testimony.
2 There has been no testimony that peace officers do not go
3 through background checks because of the waiting exemption.

4 THE COURT: Sustained. Form of the question.

5 BY MR. KILMER:

6 Q. All right. For a peace officer who is exempt from the
7 10-day waiting period, and who has obtained all of the letters
8 and all of the procedures and requirements and permissions,
9 the reason why he's exempt from the waiting period is because
10 we don't need to do a background check on him; is that
11 correct?

12 MR. EISENBERG: Objection. Misstates the testimony.

13 THE COURT: Yes, sustained. I think the distinction,
14 there is a background check, but not done through the system.

15 MR. KILMER: All right, I'll rephrase the question.

16 BY MR. KILMER:

17 Q. So the peace officer is subjected to the background check
18 anyway.

19 A. Yes, they are.

20 Q. But he's not subjected to the 10-day waiting period.

21 A. Based on approval from his command, yes.

22 Q. All right. So the rationale, the other rationale for the
23 waiting period being the cooling-off period is not applied to
24 the peace officer, is it?

25 A. No.

1 Q. Thank you.

2 A. The question was a little bit -- but, yes, he doesn't, or
3 she doesn't, have to wait the 10 days.

4 Q. Correct. So the idea that we're going to prevent a
5 violent or impulsive act by making somebody rethink their
6 actions doesn't get applied to this peace officer who has had
7 the background check, but also has met the other exceptions
8 for the 10-day waiting period.

9 MR. EISENBERG: Objection. Assumes that the
10 background check happens instantaneously in this case.

11 THE COURT: Overruled.

12 THE WITNESS: If you're talking about police
13 officers, like I described before, they go through a lot more
14 intense scrutiny than the average individual, which includes
15 psychological examinations.

16 BY MR. KILMER:

17 Q. Do peace officers ever commit suicide?

18 A. Yes, they do.

19 Q. Do people with dangerous weapons permits ever commit
20 suicide?

21 A. Yes, they do.

22 Q. Do people commit suicides at target-shooting places?

23 A. Yes, they have.

24 Q. You testified earlier that oftentimes target facilities
25 require a one-on-one supervision for -- for the loan or

1 renting of a gun; is that correct?

2 A. That's based on their company policy. I wouldn't say
3 standard, but an awful lot of them do that. It's not
4 required.

5 Q. But there is no law. That was my question.

6 A. Correct, no law.

7 Q. That's a good idea?

8 A. I think it's a good business practice. Probably good
9 sales practice as well.

10 Q. You testified earlier about guns used in entertainment,
11 and I believe you mentioned a specific example. Is it
12 Paramount or Universal or --

13 A. Universal Studios.

14 Q. Is that based on personal experience?

15 A. That's based on reading a lot of the background
16 investigations and their policies in handling firearms, yes.

17 Q. Have you ever personally visited a movie set where
18 entertainment guns were being used?

19 A. No, sir.

20 Q. So your testimony that -- that they're transported in
21 locked containers and only given to the actor for the scene
22 and then returned to the locked container, is that based on
23 reports you read?

24 A. Reports from witnesses that they're interviewing and just
25 reviewing some of their policies that they have in place.

1 Q. All right. And you also testified that somebody from the
2 Department of Justice sometimes inspects these movie sets
3 where the firearms are being used pursuant to a permit; is
4 that correct?

5 A. Yes, sir.

6 Q. All right. You also testified that these entertainment
7 guns don't fire real bullets. Am I misstating your testimony
8 there?

9 A. No. Oftentimes a majority of them do not fire real
10 bullets. They're firing some sort of blanks.

11 Q. But that doesn't mean I don't have a real gun, though,
12 does it?

13 A. They are oftentimes real guns that have been gunsmithed to
14 only shoot blanks, but they were a real gun at one time.

15 Q. All right. And sometimes these entertainment guns are
16 modified machine guns even, aren't they?

17 A. Yes, sir.

18 Q. And sometimes they're modified to be able to fire blanks.
19 They're modified so they can fire blanks, which makes them
20 different from a machine gun that will fire real bullets; is
21 that correct?

22 A. Not a gunsmith, but I think I followed you with that, yes.

23 Q. Okay. Are there background checks done on the actors who
24 use these guns?

25 A. Certain studios do that, yes.

1 Q. And how do they do that?

2 A. They do that through our process for a Dangerous Weapons
3 Permit.

4 Q. So the actor would have a Dangerous Weapons Permit?

5 A. Yes.

6 Q. And what percentage of actors who are using entertainment
7 guns have dangerous weapons?

8 A. I couldn't tell you.

9 Q. So it's not a -- it's not a formal policy.

10 A. No.

11 Q. All right. There are normally -- there's been previous
12 testimony that the DROS system results in four possible
13 outcomes: deny, a delay, an approval, and an undetermined.
14 Is that accurate?

15 A. There's a couple other ones. It would be a delay or a
16 deny -- I'm sorry, an approval or a denial after delay. But,
17 yes.

18 Q. All right, I just want to make sure we get clear on this,
19 because my understanding was that the DROS -- the Dealer
20 Record Sales would be submitted, and it will go through the
21 process and it will result in an approval, in which case the
22 dealer is instructed to release the firearm to the owner.

23 A. Correct.

24 Q. That's one possible outcome. It can come through, and the
25 person can have a flag that says they were convicted of a

1 robbery five years ago, they were a felon, they can never have
2 a gun. That's a denial.

3 A. The dealer would not know the reason for the denial, but,
4 yes. We would inform them of the denial.

5 Q. Okay, so that the dealer just gets a notification, deny
6 sale?

7 A. Correct.

8 Q. But you know it's because the guy is an armed robber or
9 something.

10 A. Yes.

11 Q. All right. And a third one might be, we have a hit. We
12 don't know if this person is prohibited. They might be, but
13 further investigation is necessary. That results in a denial;
14 is that correct?

15 A. No.

16 Q. I'm sorry, a delay.

17 A. That will result in delay. We can't determine that within
18 the 10 days.

19 Q. Okay. And the new legislation says you can take up to 30
20 days to complete the investigation on that.

21 A. It gives us 30 days in order to delay an individual.

22 Q. All right.

23 A. If necessary.

24 Q. And then if you exhaust the 30 days, and you still don't
25 have enough information to say either approve or deny, it will

1 be undetermined, and then it's up to the dealer whether they
2 want to release the firearm or not.

3 A. Correct.

4 Q. Okay. Are you familiar with the term "auto approval?"

5 A. Yes.

6 Q. What is that?

7 A. It's when all the stars are lined perfectly, and based on
8 all the information that we received from the dealer purchase,
9 it hits in none of our systems, including NICS.

10 Q. Okay. And so, then, the only reason -- if somebody is
11 auto-approved, then that means that they're not in a
12 prohibiting category. There's no -- no flags, no hits. So
13 then the only public policy reason for withholding the
14 delivery of the firearm is to complete the cooling-off period;
15 correct?

16 A. Sometimes those are the -- the auto approvals are
17 rechecked later on, but for the most part, yes, he's just
18 waiting for the 10-day cooling-off period.

19 Q. Why would they be rechecked?

20 A. Just to refresh it because oftentimes the information
21 comes in on day one, and there are things that can change.

22 Q. Wouldn't the APPS system that's also running 24/7 flag the
23 individual?

24 A. Not until they pick up the firearm, and that information
25 is detained into AFS, and they have a subsequent prohibition.

1 Q. All right, but if they already had a gun, the APPS system
2 would flag them; correct?

3 A. If an individual already had a gun, and then they had a
4 subsequent prohibition, that person would be contained in
5 APPS, yes.

6 Q. Well, except for running the recheck, which is not
7 statutorily required, is it?

8 A. No, sir.

9 Q. Why not simply release firearms upon approval?

10 A. Because we have the 10-day waiting period as a cooling-off
11 period as well.

12 Q. All right, so the only thing that's stopping you from
13 releasing a firearm upon approval of the background check is
14 the statute, and the statute is based upon we still want a
15 cooling-off period.

16 A. Once the background is approved?

17 Q. Yes.

18 A. Yes.

19 Q. You testified earlier that APPS can't draw on the NICS
20 system. Why is that?

21 A. I believe it's federal law.

22 Q. Okay. But does APPS draw on any other federal database?

23 A. I don't believe so. There are occasions where we become
24 aware of a federal prohibition, and since that would still be
25 a prohibition for firearm possession, we would then put that

1 person in once we do the investigation. For instance, you
2 have somebody that, say, that was dishonorably discharged from
3 the military. Maybe their resident alien status has changed,
4 or we also find out that maybe they had a felony conviction in
5 another state.

6 Q. All right, so then the only time that the NICS system and
7 the DROS system intersect is when an actual DROS is done.

8 A. Correct.

9 Q. All right. And the way that system works is I think we've
10 had testimony yesterday that the DROS is run through the
11 various California databases, and that as a last check, it
12 also goes through NICS?

13 A. I'm not sure what stage that happens, but, yes, it's
14 electronically sent off to the FBI.

15 Q. That's probably a futile act to try to figure out when
16 because it's all in seconds anyway?

17 MR. EISENBERG: Objection. Misstates the prior
18 testimony.

19 THE COURT: Sustained. Go ahead.

20 MR. KILMER: I need to look something up, Your Honor.
21 May I take just a short one-minute break?

22 THE COURT: Sure.

23 BY MR. KILMER:

24 Q. Chief Lindley, I asked you earlier if the department has
25 any discretion in issuing a Certificate of Eligibility, and I

1 have a Penal Code here on Certificates of Eligibility, Penal
2 Code Section 26710. May I show it to you?

3 A. Yes.

4 MR. EISENBERG: Your Honor, we request a copy of
5 the --

6 MR. KILMER: Sure.

7 THE WITNESS: Which one do you want me to look at?

8 MR. KILMER: 26710.

9 MR. EISENBERG: Do you have a copy for us?

10 MR. KILMER: Not right now I don't.

11 MR. EISENBERG: We're entitled to see it. May I
12 approach the witness?

13 THE COURT: Yes.

14 (Pause in the proceedings.)

15 BY MR. KILMER:

16 Q. Have you had an opportunity to read that statute?

17 A. The three paragraphs, A, B, C, and D?

18 Q. Yes, sir.

19 A. Yes.

20 Q. Do you want to change your answer about whether the
21 Department of Justice has the discretion to issue a COE, or
22 whether it was mandatory?

23 A. It still looks like that we have the ability to adopt
24 regulations for the administration of the process.

25 Q. Regulations, yes.

1 A. Yes.

2 Q. But doesn't the statute say that the department shall
3 issue a CC -- or shall issue a COE to people who pass the
4 background check, submit the -- their fingerprints and pay the
5 filing fee and fill out the application?

6 A. It does say the department shall examine its records and
7 available -- the records and the records available to the
8 department and the National Criminal Instant Justice System.

9 Q. So if a person does pass the background check, pay the
10 filing fees, submit the fingerprints, then you're required to
11 issue a COE; is that correct?

12 A. It would appear so, yes.

13 Q. Thank you.

14 MR. EISENBERG: I request that we mark this book as
15 an exhibit and put it in the record, please.

16 THE COURT: Why don't we do this: If you can get a
17 copy that everyone agrees on is the actual language of that
18 code section.

19 MR. KILMER: What I will do, Your Honor, is I will --
20 at the afternoon break, I'll simply convert from LexisNexis a
21 pdf of that statute. I will show it to opposing counsel and
22 ask them if they'll accept that.

23 THE COURT: All right.

24 BY MR. KILMER:

25 Q. Now, you testified earlier that the CCW background check

1 is performed by the Department of Justice; is that correct?

2 A. Well, I think there's two stages of that background check.

3 Q. Sure.

4 A. There's a background check to determine if the person is
5 prohibited or not prohibited from possessing a firearm.

6 Depending on the agency, they also do a further background
7 check into the, I guess, the suitability of that individual to
8 possess a firearm.

9 Q. Okay. And you do that work for the local issuing agency?

10 A. We just do the determination whether that person is
11 prohibited or not prohibited from possessing a firearm and
12 then submit that information and a copy of the criminal
13 history to the issuing agency.

14 Q. Okay.

15 A. Or the requesting agency, actually.

16 Q. All right, I understand. As part of that check, do you
17 also consult NICS?

18 A. I'm not sure. I believe that we do.

19 Q. Okay. Is the process for renewal of a CCW the same as for
20 initial issuance, at least from your end?

21 A. I would have to check with one of my people, but I believe
22 it's relatively the same.

23 Q. All right. And same questions for COE. Is the NICS
24 system accessed or checked when you're issuing a COE?

25 A. I believe so.

1 Q. All right. And you would go through the same check for a
2 renewal of a COE?

3 A. Well, stand back.

4 Q. Sure.

5 A. On the initial COE, NICS is checked.

6 Q. All right.

7 A. On a renewal, I believe that it's checked.

8 Q. All right.

9 A. Clarifies?

10 Q. All right. That's a good enough answer for me.

11 We have nothing further, Your Honor.

12 THE COURT: And redirect.

13 MR. EISENBERG: Nothing further from the defense,
14 Your Honor.

15 THE COURT: Any party can still call you back to
16 testify. You're still under oath. You can go ahead and leave
17 the courtroom. I'll leave it to counsel to let you know the
18 date and time if necessary to return.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Thank you. All right, further witnesses?

21 MR. EISENBERG: No further witnesses, Your Honor.

22 THE COURT: All right. Further witnesses on behalf
23 of plaintiff?

24 MR. KILMER: Your Honor, may I propose that we take
25 an afternoon recess at this particular point so I can confer

1 with my clients. I'm anticipating the answer will be no. We
2 don't have further witnesses. I just want to check with them.

3 THE COURT: Okay, we'll take a 15-minute recess.
4 Will that give you enough time?

5 MR. KILMER: That will be plenty of time, Your Honor.

6 THE COURT: All right. Fifteen minute recess.

7 (Recess.)

8 THE COURT: All right, back on the record.
9 Plaintiff?

10 MR. KILMER: Plaintiffs have no further witnesses to
11 call, Your Honor.

12 THE COURT: And let me just ask for both sides, are
13 there any other live witnesses? I assume we have the
14 deposition transcript, but any other live witnesses?

15 MR. EISENBERG: No, Your Honor.

16 MR. KILMER: No, Your Honor.

17 THE COURT: All right. Okay. Obviously we need to
18 go through the exhibits. They're obviously fairly voluminous.
19 I did indicate earlier that once we finish the live testimony,
20 I'd take a break and allow counsel to meet and confer.

21 A couple of things. First of all, if you can agree
22 on some of the -- some more of the exhibits, that would be
23 helpful. And obviously from both sides, based upon the live
24 testimony and the exhibits that have already been received in
25 evidence, if you believe that some of your exhibits now that

1 are marked would not be necessary, that would be great, and
2 then we can sort of focus in and narrow down the exhibits for
3 which there are disputes.

4 The one thing I don't want to have to do, of course,
5 is to go through each exhibit page by page. So perhaps, for
6 example, if one of the parties has excerpts from a book or
7 something like that, and it's 50 pages that you're really
8 going to focus in on two or three pages, that would certainly
9 be helpful.

10 If there's a recognition that some of the -- some of
11 the exhibits are not necessary, obviously that would be
12 helpful too. But I would intend to recess and allow you folks
13 time to meet and confer.

14 But before I do that, is there anything further by
15 plaintiff before we take a break?

16 MR. KILMER: The only thing is, Your Honor, is that
17 the defendants wanted a copy of the statute that I used my --
18 my LexisNexis code from, and I have emailed the statute to
19 your clerk, and I think he's going to print it out for us, and
20 I believe that there is no objection that it be admitted as
21 Plaintiff's, I believe, 08 as next in order.

22 MR. EISENBERG: Actually, Your Honor, I'd like a
23 chance to examine it against the book version just to make
24 sure that they're the same.

25 THE COURT: Sure, okay.

1 MR. KILMER: I don't have any objection to that.

2 THE COURT: Okay, so once it's printed out, we'll
3 have it marked as plaintiff's next in order. And then when we
4 come back on the record, you can tell me what the status is in
5 terms of the admissibility.

6 Anything else for plaintiff's side before I take a
7 quick recess?

8 MR. KILMER: None, Your Honor.

9 THE COURT: Defense, anything?

10 MR. CHANG: None, Your Honor.

11 THE COURT: Okay, I'll go ahead and take a recess.
12 And basically I and my staff will be standing by. Whatever
13 time frame you need is fine with me. Obviously the more you
14 get resolved, the less we have to do on the record. So take
15 whatever time you need.

16 Now, if it turns out, we still have obviously plenty
17 of time in the afternoon, but if you feel that you would like
18 to work on it for the rest of the afternoon and come back in
19 the morning with your decision, that's perfectly fine too.
20 But I'm going to be available all afternoon. Obviously I've
21 still blocked out all of tomorrow too. So obviously I would
22 like to -- and I'm sure you would like to get the exhibit
23 issues resolved.

24 So if there is nothing further on the record now,
25 I'll go ahead and stand in recess, and, again, I and my staff

1 will be standing by.

2 MR. KILMER: All right, thank you, Your Honor.

3 THE COURT: All right, we'll be in recess.

4 (Recess.)

5 THE COURT: All right, back on the record. If I can
6 just get an update on the status of exhibits.

7 MR. KILMER: Yes, Your Honor. I believe that the
8 defendants have had an opportunity to review plaintiffs'
9 proposed Exhibit 8, which is a printout from the LexisNexis
10 system of the statute that I questioned the last witness on,
11 and they've confirmed, I believe, that it matched the exhibit
12 that I showed the witness. I believe there's a stipulation
13 that it will be admitted.

14 MR. EISENBERG: That is correct, Your Honor.

15 THE COURT: All right. It is. Plaintiff's 8 is
16 admitted.

17 (Plaintiffs' Exhibit 8, received in evidence.)

18 MR. KILMER: Thank you, Your Honor.

19 THE COURT: Okay. And then with respect to -- is
20 there anything else with respect to all of plaintiffs'
21 exhibits?

22 MR. KILMER: Plaintiffs' Exhibit 1, Your Honor, and
23 Plaintiffs's Exhibit 2 would be tendered at this point as
24 rebuttal, depending upon how the Court rules on the
25 defendants' proposed exhibits. I believe Plaintiffs'

1 Exhibit 5 is already in evidence under another -- under the
2 defense tender. I believe that Plaintiffs' Exhibit 6 has
3 already been admitted as well.

4 And so Plaintiffs' 1 through -- excuse me, 1 through
5 3, 1, 2, and 3 are reserved at this point, and 4 -- I don't
6 know if we introduced 4 or not. Do you have any objection to
7 4 coming in?

8 MR. EISENBERG: That's Brandon Combs' Certificate of
9 Eligibility. No objection.

10 MR. KILMER: So we'd ask that Plaintiffs's Exhibit 4,
11 which I can describe for the record, Your Honor, is a
12 January 14th letter, 2014, addressed to Brandon Combs
13 regarding a Certificate of Eligibility. And page 2 of that
14 exhibit is the actual certificate of Eligibility.

15 And Plaintiffs' Exhibit 5 is the Concealed Weapons
16 Permit of Jeffery Sherman Silver -- I believe it's already in
17 evidence when Mr. Silvester was testifying. Is that your
18 recollection as well?

19 MR. EISENBERG: Pardon me? I didn't hear what you
20 just said.

21 MR. KILMER: That Plaintiffs' 5 is already in
22 evidence, I believe?

23 MR. EISENBERG: If it's not, we're not objecting.

24 MR. KILMER: So we'd ask that Plaintiffs' 5 be
25 admitted.

1 THE COURT: If not already, Plaintiffs' 4 and 5 are
2 admitted into evidence if they have not already been.

3 (Plaintiffs' Exhibits 4, 5, received in evidence.)

4 THE COURT: So we're basically dealing with
5 Plaintiffs' 1, 2, and 3?

6 Okay, let me turn, then, to defense exhibits. If I
7 can just get an update on the status of the defense exhibits
8 which have not already been addressed.

9 MR. EISENBERG: There are none. The remaining
10 documents are all the ones that are subject to the request for
11 judicial notice. And the parties have not been able to reach
12 an agreement on whether those documents are admissible. And
13 those documents would include Exhibit 1, 2, and 3 on the
14 plaintiffs' side, I believe. They're the same kind of
15 documents as the historical materials that the defense
16 submitted. We've talked about ways to reach an agreement,
17 including proposals for stipulations, but we have not been
18 able to reach an agreement. The only thing we have been able
19 to reach an agreement on is that we will -- we will provide
20 you excerpts of documents that you deem admitted.

21 MR. KILMER: That is the agreement, Your Honor.

22 THE COURT: All right. Let me just -- in terms of
23 the defense exhibits, I have seven binders here of the defense
24 exhibits. Obviously probably about three of the binders have
25 already been resolved, but I don't necessarily want to have to

1 go through as to each binder, each exhibit one by one to get
2 argument. What I want to try to do is do this as efficiently
3 as possible. I recognize, and counsel has noted that in the
4 various fairly recent cases of the Circuit, including the
5 *Peruta* case and the *Chovan* case, there was a discussion
6 regarding information that the courts really need to look at.

7 And, for example, in the *Peruta* case, the Court made
8 it very clear in criticizing contrary decisions on other
9 circuits, that they didn't do the full research that the Court
10 in *Peruta* did, and the Court reviewed -- and, of course, this
11 is on the issue of whether or not the Second Amendment applies
12 to the issue at hand, which is the right to bear arms
13 essentially outside the home. And the Court does go through
14 the history of case authority. The Court goes through
15 historical legislation, and the Court goes through
16 commentaries. And the case authority dates back to what the
17 Court called 19th century case law. The historical
18 legislation dated back to post civil war legislative scene.
19 And the commentaries, be considered post civil war
20 commentators, understanding of the right. So it is fairly
21 clear that I have to consider each of those aspects in terms
22 of historical context.

23 So let me just say in general parameters -- and,
24 again, with respect to weight of the evidence as opposed to
25 admissibility, I am proposing to admit Law Review articles.

1 Courts generally cite to Law Review articles fairly
2 frequently. Legislative histories, the courts can take
3 judicial notice of legislative histories.

4 To the extent that certain proposed exhibits are
5 dealing with public agency reports, notices, statistics, to
6 the extent that they are public records, I would consider
7 admitting those.

8 The big concern I have is with respect to articles,
9 because, frankly, with respect to articles, if it's one person
10 or a small body, a group of people's opinions, personal
11 opinions in the form of an article, I'm not sure that those
12 are the things that courts can take judicial notice of.
13 Certainly if they are in dispute, then that is one of the
14 factors on judicial notice because basically the Court can
15 only take judicial notice of those items or exhibits for which
16 they are relatively uncontroverted. So that's problematic in
17 terms of taking judicial notice.

18 I also recognize, however, that I do need some
19 background information. The only question is with these
20 various proposed exhibits, which ones are really helpful and
21 authoritative items of background information that are not
22 primarily editorial comment by one or more individuals
23 regarding their personal opinions regarding primarily, in this
24 case, any waiting periods or the impact of various state laws.

25 I'm certainly open to any suggestions with those sort

1 of parameters as to how we're going to deal with this. If it
2 comes down to, okay, we're just going to set aside a couple
3 days, I'll start with exhibit whatever -- and I'll just use
4 this hypothetical -- Exhibit 1, and we will go through
5 Exhibit 1 through 100, and take up every page to see what's
6 relevant or not. We can do that. I don't propose to do that.

7 What I propose to do is allow defense counsel to
8 submit as to each exhibit for which there is a dispute the
9 basis for taking judicial notice; the -- a very brief summary
10 of what the exhibit states that would be relevant to the
11 particular issues at hand here; give plaintiff's counsel an
12 opportunity to respond, and then I would conduct another
13 hearing after I've had a chance to review that. But I --
14 again, I'm not otherwise inclined to go through each exhibit
15 and hear arguments on each exhibits. That would take arguably
16 days. And I just don't see doing that.

17 So with that little bit of my thoughts, defense?

18 MR. EISENBERG: Yes, Your Honor. We certainly agree,
19 and the things like legislative history, Law Review articles,
20 early case law, legislation should come in. We have submitted
21 some of those materials, and I would think, then, that you
22 would just deem them admitted without need of document by
23 document review.

24 THE COURT: Right.

25 MR. EISENBERG: So we certainly do not have a

1 negative response to that commentary.

2 As far as some of the other categories, we believe
3 that history books were cited, the Malcolm were cited --
4 Joyce Lee Malcolm, the professor of history, her books have
5 been cited in either Heller or -- and McDonald or both.
6 Scholarly works of history seem to be something that is
7 definitely relied on in these kinds of cases.

8 I also want to draw your attention to an advisory
9 committee comment about Federal Rule of Evidence 201, because
10 we're talking about legislative facts as opposed to
11 adjudicative facts, and the standard of not controverted does
12 not apply.

13 Quote, "In determining the content or applicability
14 of the rule in domestic law, the judge is unrestricted in his
15 investigation and conclusion. He may reject the propositions
16 of either party or of both parties. He may consult the
17 sources of pertinent data to which they refer, or he may
18 refuse to do so. He may make an independent search for
19 persuasive data or rest content with what he has or what the
20 parties present.

21 "The parties do no more than to assist. They control
22 no part of the process."

23 That, and the case that we cited to *Daggett*, and just
24 simply the practice of the Ninth Circuit is that in a case
25 where you're considering the constitutionality of a law, a

1 wide range of materials come in even if there are, say, two
2 sides of a scholarly dispute. The Heller opinion, you know,
3 showcased a scholarly dispute, and all of those materials were
4 considered. They were not rejected on the grounds that they
5 were uncontroverted.

6 I don't think you're going to find very many books
7 about the history of the Second Amendment or the meanings that
8 are not controverted by one side or the other. So, therefore
9 we have proposed excerpts from history books to be considered,
10 and the plaintiffs in their submission have done the same
11 thing. You know, the Founders Amendment book by Stephen
12 Halbrook, a well-known NRA lawyer who definitely has a strong
13 position on the issue. We're not going to say that you should
14 not even look at that material just because the author has a
15 perspective that a lot of people disagree with. We believe
16 that our materials are ultimately going to be more persuasive
17 to you, but we think that they all should be admitted and
18 given the weight that you deem just.

19 And to back up my point, I actually want to quote
20 from the response of the plaintiffs to our motion on this
21 topic. Now, we're dealing with the historical materials, not
22 the medical science studies that go to the second part of the
23 *Chovan* test.

24 But they wrote here, "Given that the United States
25 Supreme Court in both *District of Columbia v. Heller*" -- and

1 they give the cite, "and the *McDonald v. City of Chicago*" --
2 and then they give the site, "engaged in a survey of
3 historical evidence of the scope and meaning of the Second" --
4 well, they skipped the word "of" -- "scope and meaning of the
5 Second Amendment, the plaintiffs herein cannot and do not
6 object to that kind of evidence being derived from academic
7 studies and law journal articles."

8 MR. KILMER: May I respond to that, Your Honor?

9 THE COURT: Sure. Are you done on that, then?

10 MR. EISENBERG: Yeah, I would just submit that they
11 have already essentially conceded the point.

12 MR. KILMER: Your Honor, I think the point we were
13 trying to make there, and I don't -- I'm not contradicting our
14 statement, but the kind of analysis that the Supreme Court
15 engaged in in the *District of Columbia v. Heller* and *McDonald*
16 *v. City of Chicago*, is that they did survey the historical
17 data, and they did derive some of the historical data from Law
18 Review articles. That's without question.

19 However, the problem is that the defendants are
20 trying to admit as evidence the opinions and analysis of law
21 professors, and that's just not appropriate. Now, if those
22 articles contain excerpts of law journals or statutes or
23 writings on the meaning of the Second Amendment at the time of
24 its ratification and at the time of its incorporation, those
25 obviously are relevant for the Court to look at, but there's a

1 difference between a court reading a case or reading a law
2 review article that is cited in a brief in order to have an
3 informed opinion and then calling the Law Review article
4 evidence. It's not evidence.

5 THE COURT: All right.

6 MR. KILMER: Further comment on the suicide studies,
7 Your Honor --

8 MR. EISENBERG: We haven't even addressed that issue.

9 THE COURT: All right. Okay, and I'm not sure how
10 the lower courts or Supreme Court did their survey, whether --
11 whether the trial court level documents were submitted as
12 exhibits as evidence, or whether or not there were simply a
13 list given -- I don't know. I guess part of the problem is
14 certainly, it's sort of like, okay, I'm not sure how each of
15 these articles fit in. I can obviously tell once there are
16 proposed findings of facts as articles are referred to and the
17 specific citations to specific articles would obviously be
18 helpful. Of course, then it's what I allow first. Do I admit
19 provisionally or otherwise these as exhibits and then take a
20 look and see when there are proposed findings of facts? Just
21 whether or not I'm going to give -- then it's just a matter of
22 how much weight I would give to those references.

23 MR. KILMER: Your Honor, if I may be somewhat
24 presumptuous in inquiring about how the Court is going to --
25 we're going to proceed with the findings of facts is my

1 suggested solution. My understanding of how we're going to
2 proceed once the evidence is closed is that the parties
3 will -- the Court will set a briefing schedule. We'll get
4 copies from the transcripts from this matter. We'll each
5 prepare a proposed findings of facts and conclusions of law.
6 I'm assuming we're going to be able to also support that with
7 the memorandum of points and authorities, and then we'll also
8 be able to each submit what we -- excerpts of records, almost
9 like a Court of Appeal, we'll submit excerpts of record of
10 those exhibits and those portions of testimony that we want
11 the Court to focus on instead of just giving you a whole bunch
12 of documents.

13 I have no objection to the Court simply taking under
14 submission the admissibility of the contested exhibits and
15 then ruling on their admissibility in a separate memorandum
16 after you've taken a look at our proposed findings of facts
17 and conclusions of law and read our memorandum in support and
18 taken a look at the specific exhibits we think are important.
19 And then the Court can simply make its evidentiary ruling at
20 that time. That may be the most efficient way to proceed.

21 THE COURT: Defense?

22 MR. EISENBERG: Mr. Kilmer, are you proposing to do
23 that for both the historical materials and the medical
24 studies?

25 MR. KILMER: I'm proposing that -- that the parties

1 simply tender their arguments in their proposed findings of
2 fact and conclusions of law from exhibits that have been
3 marked. I mean, I'm not in the business of censoring district
4 court judges. If the judge wants to look at it and then say,
5 "No, this isn't admissible, I'm not going to allow it," and
6 it's always subject to a motion to strike, I suppose.

7 MR. EISENBERG: Okay, with the understanding that all
8 of the submitted exhibits could be considered, and there's not
9 a category that you're saying that we're not permitted to even
10 cite to the judge, then we will agree to this proposal, which,
11 by the way, I have just heard for the first time.

12 THE COURT: All right. Okay.

13 MR. KILMER: That's because I just thought of it for
14 the first time.

15 THE COURT: That may be the most pragmatic thing to
16 do, understanding, then, that really your proposed findings of
17 facts will be essentially drafts because I may make certain
18 rulings that might cause you to modify them. But that
19 certainly would be probably cleaner than saying, okay,
20 defense, instead of that, you're going to prepare little brief
21 excerpts of each of the documents here so that we can take a
22 look at that and I can rule on it. Because it could well be
23 as we're going through your proposed findings of fact that you
24 may be able to really pinpoint more as to a particular exhibit
25 which portions of that exhibit that you want the Court to

1 refer to in terms of a proposed findings of fact. And there
2 might be some that you might decide, well, we really don't
3 need that, it's duplicative. Or this person's article is
4 really covered by this particular Law Review article, or
5 something like that, so it's really cumulative or redundant.
6 So that's a possibility, and I certainly don't have a problem
7 with that.

8 I will tell you, Miss Thomas, my court reporter, has
9 indicated that she can probably get to you a certified copy of
10 the transcript, if you ordered them in three weeks. So that's
11 something --

12 MR. KILMER: That's good. So, Your Honor, the status
13 of the contested exhibits at this point is that they are
14 basically being that each of the exhibits are at this point in
15 time an offer of proof, subject to -- perhaps a motion to
16 strike, that the Court will rule on at the same time it
17 renders its decision in this case.

18 THE COURT: I can take it -- each of the exhibits
19 under submission, and then once I've had a chance to take a
20 look at your proposed findings of fact, which would include
21 references to specific exhibits including the Plaintiffs'
22 Exhibits 1 through 3, and the various defense exhibits for
23 which have not yet been submitted or withdrawn. That might be
24 a workable solution. Defense?

25 MR. EISENBERG: Your Honor, we are in agreement with

1 what we're hearing. Thank you very much, Your Honor.

2 THE COURT: Now -- and let me do this: So right now,
3 what I would propose to do is just set a schedule. Now, as it
4 turns out, as you think about this and start drafting your
5 proposed findings of facts, you're thinking, you know, there's
6 a problem here, then I don't have a problem in coming back and
7 we can talk about it further. And in all candor, if at some
8 point in time, it's, "Judge, I'm sorry, we're going to have to
9 go through 1 through 100 before we continue on with our
10 proposed findings of facts," we can certainly do that. I
11 don't have a problem with that because obviously this is
12 something that has been suggested, and it seems to be
13 workable. It might turn out not to be. But if it is
14 workable, obviously it's probably the cleanest way to do it.

15 So with that understanding, then, as far as preparing
16 proposed findings of facts and conclusions of law, and
17 assuming -- and I'm not sure if you're going to be requesting
18 or ordering transcripts. If you are, that will be about three
19 weeks. With that understanding, let me get a time frame for
20 submitting proposed findings of facts and conclusions of law.
21 If you want to chat first briefly about scheduling it, it
22 might be more productive to do that.

23 So let me just take a quick break. You can meet and
24 confer, and if you can agree on a schedule and then a date
25 that I can set aside for essentially what would be closing

1 arguments, it would be after the parties have submitted your
2 proposed findings of facts and conclusions of law and that
3 will give us all frameworks to deal with closing arguments.

4 So let me take a quick break, and you can check.
5 Mr. Nazaroff will have my schedule, and obviously whatever
6 time frame, we'll just work it in.

7 MR. KILMER: One quick question, Your Honor, just so
8 we understand the format. So that we're going to agree on a
9 date where each party submits a proposed findings of facts and
10 conclusions of law, the excerpts that we want the Court to
11 look at, and then a legal memorandum addressing the points we
12 want to argue. Will the parties then have an option to also
13 file simultaneous responses, and then we'll come back for oral
14 argument if necessary?

15 THE COURT: Yeah, if you wish. You can file a
16 response to the other side's proposed findings of facts and
17 conclusions of law and the memorandum. That's fine. Go ahead
18 and build that in.

19 MR. KILMER: And I'm going to be the rude one and ask
20 what page limits does the Court want to impose on us?

21 THE COURT: I'm not going to impose any page limits.
22 As I said, it's important, I said this at the outset, and I
23 still believe that we need to make sure that both sides within
24 the framework of the rules, et cetera, that you make as clear
25 and as complete record as possible.

1 MR. KILMER: Thank you, Your Honor.

2 THE COURT: I'm perfectly fine with that.

3 Let me take a quick break. As soon as you're ready,
4 meet and confer. Figure out on your schedules, check with
5 Mr. Nazaroff, make sure that we can carve out some time if you
6 think that we need a day, we need two days, or whatever, to do
7 the closing arguments, that's fine. We'll just work out a
8 time frame. And then figure out your own calendars as to what
9 will work out best. As I've indicated, Miss Thomas, your
10 three weeks is --

11 (The court reporter nods.)

12 THE COURT: As soon as you're ready to come back on
13 the record with a briefing schedule, I'll come back on the
14 record. You can cite it on the record, and I'll be okay with
15 that.

16 MR. KILMER: Thank you, Your Honor.

17 MR. EISENBERG: Thank you, Your Honor.

18 THE COURT: We'll take a brief recess.

19 (Recess.)

20 THE COURT: All right, back on the record, update on
21 the status of the case, briefing schedule, et cetera.

22 MR. KILMER: Yes, Your Honor. I think we have agreed
23 on a schedule. And that is that -- that madam reporter will
24 have until the 21st of April, which is a Monday, to have the
25 transcripts to us by then or sooner. That the parties will

1 then file their initial findings of fact and proposed findings
2 of facts and conclusions of law, any memorandum of law that
3 they wish to accompany that, and then the excerpt of record
4 that they want the Court to consider, basically pinpointing
5 what they want the Court to look at. And that filing date
6 will be June 16th. And then each party will be entitled to
7 file a response on June 30th. And then the parties would
8 return on July 21st for oral argument or closing argument.

9 THE COURT: All right. Defense?

10 MR. EISENBERG: We agree with that schedule,
11 Your Honor.

12 THE COURT: That will be the order of the Court,
13 then. And if it turns out, when I get the initial briefing,
14 that it might take some further time, what I might do is just
15 move it to a separate date. Monday is my law and motion day,
16 and if I think it needs more time, then I would try to move it
17 over to a different day rather than a Monday. But I'll give
18 you plenty of notice so you can plan accordingly. I'm not
19 just going to tell you a week before to show up on a Tuesday
20 instead of Monday.

21 MR. EISENBERG: Your Honor, I'll be on a family
22 vacation July 26th to August 2nd. If I don't tell you that,
23 my wife will be very angry with me.

24 THE COURT: If I move it to a day other than the
25 21st, I'll obviously make sure it's a day that everyone is

1 available.

2 MR. KILMER: Thank you, Your Honor.

3 THE COURT: I won't just automatically move it. I'll
4 consult both counsel first.

5 MR. EISENBERG: Thank you, Your Honor.

6 THE COURT: So that will be the order of the Court,
7 then, and so basically at this point in time, if there is
8 nothing further, this will conclude today's proceedings.

9 Now, if for whatever reason, it doesn't have to be
10 scheduling wise, but if you feel that you need to contact or
11 communicate with the Court, just contact my chambers,
12 Mr. Nazaroff. We can set up telephonic conferences. I can
13 have it reported by the court reporter if it's an update or
14 something comes up that you feel that you need to discuss with
15 me. If you believe that it's best to have it in open court,
16 then we can also schedule that.

17 MR. KILMER: Thank you. Your Honor, will the Court
18 be preparing a minute order as to what happened today, or
19 should the parties prepare that or --

20 THE COURT: Yeah, I think we'll do just a minute
21 order on that. We'll do a minute order on that.

22 MR. KILMER: Thank you, Your Honor.

23 MR. EISENBERG: Thank you very much.

24 THE COURT: Okay, so that will conclude today's
25 proceedings.

(Court was adjourned at 4:03 PM.)

I, Gail Lacy Thomas, Official Court Reporter, certify
that the foregoing transcript is true and correct.

Dated: 04/10/2014

/s/ Gail Lacy Thomas
GAIL LACY THOMAS, RMR-CRR