



## THE AUTHORITY OF FOREGOING BY THE PUBLIC PROSECTOR IN PROVIDING CASE EXAMINATION STAGE OF THE TRIAL

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<p><b>Received:</b> January 6<sup>th</sup> 2023 <b>Accepted:</b> February 6<sup>th</sup> 2023 <b>Published:</b> March 14<sup>th</sup> 2023</p>	<p>The results obtained from the research, that Criminal Procedure Code as the rule in event For disclose truth material limit gift authority foreclosure only to investigators at the investigative stage, matter This close possibility happening invention goods proof moment until trial , because reality on the ground sometimes happen new There is meet goods the proof moment until trial , so make prosecutor prosecutor general as party representatives of victims, society and the state in proof case at court experience difficulty in the proof . On the other hand based on Regulation of the Prosecutor General of the Republic of Indonesia Number: PER-036/A/JA/09/2011 and Guidelines Number 24 of 2021 concerning Standard Operational Procedures for Handling Cases of General Crimes and Cases Decision of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Enforcement of Book II of the Guidelines for the Implementation of Duties and Administration of Courts, which principally rule the give authority to prosecutor Prosecutor General For do foreclosure stage inspection trial . this is acceptable norm made base for prosecutor prosecutor general For disclose truth material in the judge specifically related confiscation</p>

**Keywords:** foreclosure ; Authority ; Proof

### INTRODUCTION

Criminal procedural law basically discusses proving the occurrence of a violation of material criminal law. From the evidence it is known that a defendant will be found guilty or acquitted. Law of the Republic of Indonesia Number 8 of 1981 concerning criminal procedural law which was born on December 31, 1981 in Jakarta is a masterpiece of the Indonesian nation, has regulated the use of how to convey evidence to judges in court both from the stage of investigation, investigation, prosecution , trial examinations, as well as legal remedies, by prioritizing the protection of human rights as part of the due process of law . In line with the postulate nullum delictum nulla poena sine praevia lege poenalli which positively means there is no crime, there is no punishment without being based on the regulations that precede it which is usually called the principle of legality, in line with the postulate nullum crimen sine poena legal which positively means all criminal acts must be punished according to law, then the Criminal Procedure Code as the rule in proceedings, adheres strictly to 3 three) principles of legality, namely lex certa which means written, lex scripta which means clear and lex stricta which means that it should not be interpreted other than what is written clearly. The logical consequence of the principle of legality is that in seeking material truth, law enforcers, be they investigators, public prosecutors, judges, legal advisors, must use the methods stipulated in the provisions of the Criminal Procedure Code. Deviating from the Criminal Procedure Code as a due process of law , this is an exclusionary rule , unlawful legal evidence, or illegally acquired evidence, which results in the release of the accused.

For the purposes of proof, the presence of physical evidence or real evidence or known as evidence is very necessary to explain the facts of a crime. To obtain evidence, it can be done through forced efforts, namely confiscation. Confiscation is absolutely essential in the investigation process. The purpose of confiscation is to designate evidence as the main thing in the interest of proof before a trial, because evidence is absolute for whether or not a case can be brought to court. Strictly speaking, confiscation is a legal action carried out at the investigator level or part of investigative activities. Article 38 paragraph (1) of the Criminal Procedure Code states that confiscation can only be carried out by investigators. With the affirmation of this article, it has been determined with certainty that only investigators have the authority to carry out confiscation or in other words, the authority for confiscation lies only with investigators and not with the public prosecutor.

On the other hand, in special criminal cases, namely money laundering crimes, there is authority granted by law to the public prosecutor to confiscate where the law in article 81 states that, "in the event that sufficient evidence is obtained that there are still assets assets that have not been confiscated, the judge orders the public prosecutor to confiscate said assets". At least there have been several confiscations that have been carried out by the public prosecutor during the trial examination stage, including:

1. Case Number: 392/Pid.Sus/2017/PN.Bks an. Defendant Hendra Widjaja, SE;
2. Case number: 334/Pid.B/2019/PN.Ckr an. Defendant I Fenny Lusianti Alias Fenny Binti Rossy Erna Widiawati;
3. Case number 6/Pid.Sus-TPK/2020/PN.Jkt.PSt an. Honggo Wendratno  
each of whom was charged with committing the crime of money laundering, as well as;
4. Case number 62/Pen.Pid.Sus/TPK/XII/2022/PN.Jkt.Pst an. The defendant Surya Dharmadi was also charged with committing the crime of money laundering in the amount of more than 78 trillion with the confiscation stipulation number: 62/Pid.Sus-TPK/2022/PN.JKT.PST on December 19, 2022 at the Corruption Court at the Central Jakarta District Court

The entire confiscation was carried out by the public prosecutor at the trial examination stage based on law number 8 of 2010 concerning money laundering, especially article 81. paragraph (2) letter b Regulation of the Attorney General of the Republic of Indonesia Number: PER-036/A/JA/09/2011 concerning Standard Operational Procedures for Handling General Crime Cases (hereinafter referred to as PERJA 36/2011) and Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number : KMA/032/SK/IV/2006 concerning Enforcement of Book II Guidelines for the Implementation of Court Duties and Administration (hereinafter referred to as KMA 32/2006).

According to KMA 32/2006, the sub-section of confiscation of criminal cases, states that "if during a trial the judge deems it necessary to confiscate an item, the judge's order to carry out the confiscation is addressed to the investigator through the public prosecutor". The provisions in KMA 32/2006 open up opportunities for public prosecutors to carry out confiscations at the trial examination stage through investigators. It can be seen that the formulation of KMA 32/2006 in no way eliminates the application of Article 38 paragraph (1) of the Criminal Procedure Code which states that only investigators have the authority to carry out confiscations.

In connection with the formulation of KMA 32/2006, in Article 23 paragraph (1) and paragraph (2) letter b Regulation of the Attorney General of the Republic of Indonesia Number: PER-036/A/JA/09/2011 concerning Standard Operational Handling Procedures General Crime Case (hereinafter referred to as PERJA 36/2011) which states that :

1. Additional examination as formulated in article 23 paragraph (1) which states "in the case of additional examinations or examinations at trial in the interest of settling cases, the public prosecutor may confiscate."
2. Article 23 paragraph (2) states that the confiscation as referred to in paragraph (1) is carried out in the following manner:
  - a. For cases that have not yet been transferred to court, the head of the district attorney after receiving the report of confiscation through the head of the general non-crime section or the head of the branch of the district attorney's office makes a letter requesting a permit for confiscation/approval of the confiscation to the head of the district court; or
  - b. For cases that have been delegated and during the trial it is found that there are goods/objects that should have been confiscated, the head of the district attorney after receiving the confiscation report through the head of the general crimes section or the branch of the district attorney's office issues a letter requesting a permit for confiscation/approval for confiscation to the head of the district court cq. The panel of judges examining the case.
3. Article 23 paragraph (3) states "in the event that the trial has been declared closed, the public prosecutor requests the chairman of the panel of judges examining the case to reopen the trial on the grounds that he will submit a letter of confiscation permit as referred to in number (2) letter b

In Article 23 paragraph (2) letter a constitutes confiscation at the prosecution level namely additional examinations carried out by the public prosecutor after obtaining approval for confiscation from the chairman of the district court, meanwhile, in Article 23 paragraph (2) letter b constitutes a confiscation at the trial examination stage which can be carried out by the public prosecutor after obtaining approval for confiscation from the chairman of the district court. In addition, in Article 23 paragraph (3) it is still possible that in the event that the trial has been declared closed, the public prosecutor can ask the chairman of the panel of judges examining the case to reopen the trial on the grounds that he will submit a letter of confiscation permit as referred to in paragraph (1) PERJA 36/2011 . In Article 23 paragraphs (4) and (5) it states that after receiving a confiscation order from the head of the district court at the additional examination level or the decision from the chairman of the panel of judges at the examination level at the trial court, the public prosecutor shall carry out the confiscation based on an order from the head of the prosecutor's office. country which in practice must be accompanied by minutes of confiscation

So it is clear, in this case the confiscation authority can also be carried out by the public prosecutor and not There is restrictions or specializing in implementation follow criminal money laundering only .

That example ever case \_ some are writers convey in study This including :

1. Case Number: 392/Pid.Sus/2017/PN.Bks an. Defendant Hendra Widjaja, SE;
2. Case number: 334/Pid.B/2019/PN.Ckr an. Defendant I Fenny Lusianti Alias Fenny Binti Rossy Erna Widiawati;
3. Case number 6/Pid.Sus-TPK/2020/PN.Jkt.PSt an. Honggo Wendratno
4. Case number 62/Pen.Pid.Sus/TPK/XII/2022/PN.Jkt.Pst an. Defendant Surya Dharmadi with confiscation order

number: 62/Pid.Sus-TPK/2022/PN.JKT.PST dated 19 December 2022 at the Corruption Court at the Central Jakarta District Court

Which each matter the indicted with existing indictments \_ follow criminal washing the money .

On the side On the other hand , the reality in general criminal cases is not There is follow criminal washing the money , the Public Prosecutor as the party subject to the obligation to prove a crime when the trial examination found the fact that there was evidence that had relevance to prove the guilt of the defendant. However, this evidence has not been confiscated by investigators so that it does not become evidence that can strengthen evidence in proof, for example is a case handled by the author himself where in the case of embezzlement of a car, during the investigation stage the whereabouts of the car were not found so there were no items the only physical evidence of the car that existed was a photo of the car and a photocopy of the document which was confirmed by the witnesses and the defendant himself, but after the case was declared complete and handed over to the court for examination and decision, during the trial examination, the witness-victim stated that he saw and knew the position of the car and requested the public prosecutor and the panel of judges to confiscate the evidence of the car however, and examples other is exists follow criminal fraud with goods cheated evidence \_ is A motorcycle , where? in stage study file on stage investigation goods motor proof no there and no done foreclosure , only based on document related form photocopy of the original STNK and BPKB as well as Photo boosted motor \_ with testimony of witnesses and confessions accused , in short after file stated complete and delivered to court For examined and tried , at the time inspection victim witnesses at trial new is known existence goods the evidence of the motorbike and the witness the victim pleaded to prosecutor prosecutor public and assembly the trial judge the case For do steam forced to goods proof the form action confiscation so that the victim's witness motorbike can return However prosecutor prosecutor the public and the panel of judges do not can grant application defendant the Because case No authority investigator in stage investigation and because Article 38 paragraph (1) of the Criminal Procedure Code as the rule in proceedings expressly states that the authority for confiscation lies only with investigators and not with the Public Prosecutor. then how is the authority of the actions carried out by the public prosecutor in dealing with this reality. Are the rigid legal procedures coupled with the legal positivistic mindset stopping the public prosecutor's steps to prove the material truth of the defendant's guilt. What are the steps for the public prosecutor to free himself from the rule . Based on this, the writer is interested in narrating how the concept of confiscation at the general crime prosecution level is the answer to this reality.

This research was conducted by the author based on the ideas, ideas and experiences of the assignment which were tested with legal theories and statutory regulations.

That within the framework of this writing, the author also makes a comparison with previous writings, namely:

1. Confiscation of property proceeds of crime according to law number 81 concerning criminal procedure law
2. Procedures for confiscating evidence of a crime according to the Criminal Procedure Code;
3. Confiscation and confiscation of assets resulting from corruption as an effort to impoverish corruptors and

Where this research discusses confiscation by the public prosecutor in the court trial stage. Therefore, the authenticity of this research can be accounted for, but if the same research has been carried out, this research is expected to be able to complement it and can be used as comparison material.

## **METHOD**

Type research used that is juridical dripping normative focus on doctrines or principles in knowledge law with approach research used is approach legislation, Conceptual Approach and Approach Cases by taking primary legal material sources obtained from legislation, records official or treatise in making legislation and judges ' decisions , then secondary legal material in the form of publication about law No in class documents official , like publication about law , journals and commentaries on decision courts as well as tertiary legal materials derived from dictionaries, encyclopedias and public opinion. Analysis of legal materials is carried out by means of legal interpretation (interpretation) and legal construction methods.

## **RESULTS**

the confiscation was carried out by the public prosecutor at the trial examination stage based on law number 8 of 2010 concerning money laundering, especially article 81. In addition, the confiscations carried out by the public prosecutor during the trial examination stage were also based on the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning Enforcement of Book II Guidelines for the Implementation of Court Duties and Administration (hereinafter referred to as KMA 32/2006) and Article 23 paragraph (1) and paragraph (2) letter b Regulation of the Attorney General of the Republic of Indonesia Number: PER -036/A/JA/09/2011 concerning Standard Operational Procedures for Handling General Crime Cases (hereinafter referred to as PERJA 36/2011) which was strengthened by the Attorney General's Office Guidelines number 24 of 2021 concerning Handling of General Crime Cases (hereinafter referred to as PKA 24/2021) ) in which each of these regulations authorizes the public prosecutor to carry out confiscations at press examinations dish,. These regulations have binding power as statutory regulations as referred to in Article 8 paragraph (1) and (2) of law number 12 of 2011 concerning the formation of regulations for the formation of legislation, especially in Article 8 paragraph (1) which states, "Types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the people's representative council, the regional representative council, the supreme court, the constitutional court, the financial audit agency, the judicial commission, Bank

Indonesia, the Minister, bodies, institutions, or commissions of the same level established by law or the government by order of law, regency/city regional people's representative councils, regents/mayors, village heads or equivalent. And in paragraph (2) it states that "Legal regulations as referred to in paragraph (1) are acknowledged to exist and have binding legal force as long as they are ordered by higher laws and regulations or formed based on authority. So it is clear, in this case the confiscation authority also can be carried out by the public prosecutor and has binding legal force from the author's experience as a legal practitioner, in handling a car embezzlement case, during the investigation stage the physical identity of the embezzled car is not known so that the physical car cannot be confiscated, only a photocopy is available stnk and bpkb as well as a photo of the car which the witness the victim and the defendant acknowledged, but after the case was declared complete by the public prosecutor, and the case file was transferred to the court for examination and trial, especially during the examination of the victim witness at trial, it was found that the whereabouts of the embezzled car is physically known and the victim-witness requests the judge and public prosecutor to confiscate the victim-witness' car, but considering the criminal procedural law as a rule that enforces formal regulations has not provided certainty regarding the confiscation of the trial examination stage, so the public prosecutor experiencing difficulties in carrying out the confiscation, even though in Article 23 paragraph (1) and paragraph (2) letter b of the Attorney General of the Republic of Indonesia Regulation Number: PER-036/A/JA/09/2011 concerning standard operating procedures for handling general criminal cases ( hereinafter referred to as PERJA 36/2011) and Decision of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the enactment of book II on the implementation of duties and court administration guidelines dated April 4, 2006 (hereinafter referred to as KMA 32/2006). Grant authority to the public prosecutor to confiscate the trial examination stage.

### DISCUSSION

#### A. Confiscation Authorities By Investigators

Philipus M. Hadjon stated that all government steps must be based on valid authority. Where this authority is obtained from 3 (three) sources, namely attribution authority, delegation authority and mandate authority. The powers of attribution are usually limited through the division of state powers by law. In delegation, the handover process originates from government organizations to other government organizations on the basis of laws and regulations, and the responsibility shifts to the delegates (recipients of the delegation). Those who give the delegation cannot use the authority again, except after a withdrawal based on the principle of *contrarius actus*. Means, every transition, withdrawal of a regulation implementing legislation, can only be carried out by an official who decides on the intended regulation, and carried out with comparable or higher rules. In the Mandate, the submission process related to superiors and subordinates is routine. And the responsibility remains with the giver of the mandate. At any time the person giving the mandate can take advantage of the delegated authority.

The state gives authority by attribution, delegation or mandate to run a government wheel so that the government runs according to the goals mandated by the constitution. Attribution is government authority granted by legislators to government agencies/institutions to carry out decisions that come directly from laws as their formal legality.

The authority that is obtained from absolute attribution comes from the mandate of the law which is explicitly contained directly from the editorial of certain laws or articles. And the attribution recipient can expand the field of attribution and expand the new authority that has been obtained as long as it does not exceed his authority. The authority of attribution will remain attached as long as there are no changes to laws and regulations, absolute responsibility and accountability to the recipient of the attribution, the legal relationship of authority between legislators and government organs/agencies. The formulation is based on the applicable laws and regulations, besides containing the meaning for the legitimacy (legality) of each government authority carried out by government organs/agencies, it also shows that government authority originates from the applicable laws and regulations only.

As in the provisions of Article 38 of the Criminal Procedure Code which states that confiscation can only be carried out by investigators, in another provision, namely the law on the prevention and eradication of criminal acts of extortion, Article 81 states that, "in the event that sufficient evidence is obtained that there are still assets that have not been confiscated, the judge orders the public prosecutor to confiscate said assets." Here it clearly states that confiscation can not only be carried out in the investigative stage by investigators, but also in the trial examination stage in court by the public prosecutor. There have been many examples of cases where confiscation authority was given to the public prosecutor .

#### B. The authority for confiscation by the Public Prosecutor in follow criminal money laundering

As in the provisions of Article 38 of the Criminal Procedure Code which states that confiscation can only be carried out by investigators, in another provision, namely the law on the prevention and eradication of criminal acts of extortion, Article 81 states that, "in the event that sufficient evidence is obtained that there are still assets that have not been confiscated, the judge orders the public prosecutor to confiscate said assets." Here it clearly states that confiscation can not only be carried out in the investigative stage by investigators, but also in the trial examination stage in court by the public prosecutor.

According to KMA 32/2006, the sub-section of confiscation of criminal cases, states that "if during a trial the judge deems it necessary to confiscate an item, the judge's order to carry out the confiscation is addressed to the investigator through the public prosecutor". The provisions in KMA 32/2006 open up opportunities for public prosecutors to carry out confiscations at the trial examination stage through investigators. It can be seen that the formulation of KMA 32/2006 in no way eliminates the application of Article 38 paragraph (1) of the Criminal Procedure Code which states that only investigators have the authority



to carry out confiscations. Unlike the KMA Rules 32/2006, in Article 23 paragraph (1) and paragraph (2) letter b PERJA 36/2011 regulates the formulation regarding the concept of confiscation namely:

1. Additional examination as formulated in article 23 paragraph (1) which states "in the case of additional examinations or examinations at trial in the interest of settling cases, the public prosecutor may confiscate."
2. Article 23 paragraph (2) states that the confiscation as referred to in paragraph (1) is carried out in the following manner:
  - c. For cases that have not yet been transferred to court, the head of the district attorney after receiving the report of confiscation through the head of the general non-crime section or the head of the branch of the district attorney's office makes a letter requesting a permit for confiscation/approval of the confiscation to the head of the district court; or
  - d. For cases that have been delegated and during the trial it is found that there are goods/objects that should have been confiscated, the head of the district attorney after receiving the confiscation report through the head of the general crimes section or the branch of the district attorney's office issues a letter requesting a permit for confiscation/approval for confiscation to the head of the district court cq. The panel of judges examining the case.
3. Article 23 paragraph (3) states "in the event that the trial has been declared closed, the public prosecutor asks the chairman of the panel of judges examining the case to reopen the trial with the reason that he will submit a letter of confiscation permit as referred to in number (2) letter b

In Article 23 paragraph (2) letter a, it is a confiscation at the prosecution level, namely an additional examination carried out by the public prosecutor after obtaining approval for confiscation from the chairman of the district court. Meanwhile, in Article 23 paragraph (2) letter b, it is a confiscation at the trial examination stage which can be carried out public prosecutor after obtaining approval for confiscation from the head of the district court. In addition, in Article 23 paragraph (3) it is still possible that in the event that the trial has been declared closed, the public prosecutor may ask the chairman of the panel of judges examining the case to reopen the trial on the grounds that he will submit a letter of confiscation permit as referred to in paragraph (1) PERJA 36/2011. In Article 23 paragraphs (4) and (5) it states that after receiving a confiscation order from the head of the district court at the additional examination level or the decision from the chairman of the panel of judges at the level of examination at the trial court, the public prosecutor shall carry out the confiscation based on an order from the head of the district attorney who in practice must be accompanied by minutes of confiscation. The interesting thing in KMA 32/2006 and article 23 paragraph (1) and paragraph (2) letter b PERJA 36/2011. In the opinion of the author, because it is based on Article 1 point 16 of the Criminal Procedure Code which states that confiscation is carried out for the purposes of prosecution and trial or examination at trial, then all conditions regulated in the confiscation procedure at the level of investigation *mutatis mutandis* also apply to the public prosecutor when carrying out the confiscation. at the prosecution stage, namely the additional examination as well as the judicial stage or examination at trial. It is simply to discover material truth. The confiscation by the public prosecutor without going through the investigator can also be carried out considering that the public prosecutor is a prosecutor based on Article 30 of law number 16 of 2004 as amended by law number 11 of 2021 concerning amendments to law number 16 of 2004 Regarding the Attorney General's Office of the Republic of Indonesia, it can act as an investigator who has the authority to investigate certain criminal acts. The authority to investigate certain criminal acts, in this case corruption and gross human rights violations, is an extraordinary measure because the object of its pro-justiciary action is extraordinary crime . Thus, technically as well as experience the public prosecutor also has the skills and understanding in confiscating evidence. This skill and understanding legitimizes the public prosecutor to carry out confiscations in a professional manner based on statutory provisions.

Even though PERJA36/2011 has been revoked with the Republic of Indonesia's attorney general regulation number 13 of 2019 concerning the revocation of the attorney general's regulation number: PER-036/A/JA/09/2011 concerning standard operating procedures for handling general criminal cases on November 28, 2019, implementation confiscation by public prosecutors is still regulated in Guideline number 24 of 2021 concerning the Handling of General Crime Cases, which in its provisions adopt exactly the same as PERJA 36/2011 so that these norms have binding power as statutory regulations as referred to in Article 8 paragraph (1) and (2) Law of the Republic of Indonesia number 12 of 2011 concerning the formation of statutory regulations at least opens up opportunities for public prosecutors to carry out confiscations both at the prosecution level, namely additional examinations and at the judicial level or examination at trial. The difference is that in KMA 32/2006, confiscation is addressed to investigators through the public prosecutor, while in Article 23 paragraph (1) and paragraph (2) letter b SEMA 36/2011 and KMA 32/2006 which were later updated with CHAPTER II General number 6 letter c confiscation at the prosecution stage paragraph (2) letter b of Guidelines number 24 of 2021 concerning the handling of general criminal cases, the confiscation is carried out directly by the public prosecutor. PERJA 36/, Guidelines 24/2021 and KMA 32/2006 are regulations that were born in the midst of the need for law enforcement which must be responsive to the laws and regulations above. The similarities and differences between the two laws and regulations need to be harmonized so that they do not conflict with the Criminal Procedure Code, which could potentially turn evidence into unlawful legal evidence or illegally acquired evidence .

In line with the *actori incumbit onus probandi* postulate , which means whoever indicts a person is obliged to prove, the public prosecutor bears the burden of proof to prove his indictment. It is from the confiscation action that evidence as corroborating evidence has the strength of evidence to be authenticated with other evidence so that it strengthens the judge's belief in the truth of the public prosecutor's indictment. The public prosecutor's authority to confiscate evidence that has relevance to evidence can basically strengthen the position of other evidence which *mutatis mutandis* strengthens the judge's conviction in making a decision. Without that, the public prosecutor cannot prove his charges so that the charges must be

acquitted as stated in the *actore non probante reus absolutor* postulate.

### **CONCLUSION**

1. Trial examination as part of the criminal justice system to find material truth has a very important role because it is at this stage that the evidence is realized to convince the judge that the defendant is indeed guilty of committing the crime he was charged with. To strengthen the evidence, a confiscation was carried out. The Criminal Procedure Code as the rule in proceedings grants confiscation authority only to investigators at the investigative stage.
2. the stage of examination of the trial of the public prosecutor who is burdened with proof according to the postulate *actori incumbit onus probandi*, in reality on the ground requires an expansion of authority by attribution in criminal procedural law in carrying out confiscation of the trial examination stage as stipulated in KMA 32/2006 and PERJA 36/2011 and PKA 24 /2021 where these regulations have binding power as statutory regulations as referred to in Article 8 paragraph (1) and (2) law number 12 of 2011 regarding the formation of statutory regulations. So all the conditions regulated in the confiscation procedure at the level of investigation *mutatis mutandis* also apply to the public prosecutor when confiscating at the prosecution stage, namely additional examinations or the trial stage or examination at trial.

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