PROSECUTORIAL MISCONDUCT AND NEGLIGENCE: Tactics for the Trenches ©

NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ADIRONDACK CRIMINAL DEFENSE CLE SEMINAR

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ETHICS CREDIT - 1 HOUR

"Lost causes are the only ones worth fighting for."
~ Clarence Darrow

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After graduating from law school in the Middle Ages, B.C. ["before computers,"], he practiced in Columbus, Ohio. In an effort to expedite the end of the War in Vietnam, he was ordered to active duty in the Air Force, where he spent two tours as a JAG Defense Counsel, including being the Senior AF Defense Counsel in the Republic of Korea. After leaving active duty, he practiced in Frankfurt am Main, Germany, in an American law firm representing GI's all over Europe in courts-martial. He then spent 11 years in the violent felony bureau of the Monroe County Public Defenders office before returning to private practice.

His practice at ***Brenna Boyce PLLC,*** consists of criminal and military trial, appellate and post-conviction matters, court-martial defense and civil litigation involving civil rights and personal injury issues. He has tried 225+ cases and has been co-counsel on two capital cases. Concentrating in forensic matters, he has achieved acquittals in murder cases by proving suicide by hanging versus strangulation; electrocution versus "shaken baby" syndrome; and exposing a fabricated inculpatory page of a written confession. In the "bizarre but true" category, he obtained an acquittal in a rape prosecution following forensic engineering testimony about the tensile strength of a tampon string. He has defended police, a CIA representative, a classified espionage trial, fellow lawyers (unfortunately) and a client with 5 personalities.

A frequent CLE lecturer and author on criminal defense issues and techniques, he also frequently lectures on *Professional Responsibility* issues. He has co-authored a chapter in *Forensic Neuropsychology* (Plenum Pub. Co.), entitled, "Forensic Neuropsychology in Criminal Cases," a graduate level text for neuropsychology students. Additionally, he frequently serves "of counsel" to the Profession on military and constitutional law subjects. He is presently battling the government in contentious litigation over the proper *application* of *Brady's* principles in the context of failing to disclose a government's expert opinion that corroborated self-defense in a homicide.

Dedicated to *Mari-Rae Sopper, Esq.*, a damn fine Defense Attorney and colleague who died in the plane that crashed into the Pentagon, September 11, 2001.

TABLE OF CONTENTS

PROSECUTORIAL MISCONDUCT AND NEGLIGENCE: Tactics for the Trenches

I. INTRODUCTION.

> If we continue to do nothing practical to prevent such [prosecutorial] conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court-recalling the bitter tear shed by the Walrus as he ate the oysters-breeds a deplorably cynical attitude towards the judiciary.[1]

As criminal defense lawyers we groan and moan about "prosecutorial misconduct" and sometimes even throw a "hissy fit" to a bored Black Robe. Whether it be a *Brady* violation, a *Giglio* non-disclosure, or *Kyles* issues,[2] relief is rarely forthcoming. The goal of this presentation is to give you – the defense lawyer in the trenches – both the law as well as the tools to increase the odds of successfully prevailing when the issue raises its ugly head.[3]

From a historical perspective, the Bible offers a rather poignant example of the use of fabricated evidence, *i.e.,* what today would be a classic *Brady* violation. When Jesus was brought before the Roman Prefect, Pontius Pilate - who under Roman law had judicial powers – witnesses

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[1] *United States v. Antonelli Fireworks Co.,* 155 F.2d 631, 661 (2nd Cir. 1946) (Frank, J., dissenting).

[2] *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *Giglio v. United States,* 405 U.S. 150, 153 (1972); and *Kyles v. Whitley,* 514 U.S. 419, 435 (1995).

[3] To get a feel for the "Perfect Storm" of prosecutorial misconduct coupled with some serious ineffective assistance of counsel, I suggest that you start with reading a comprehensive legal "autopsy" of injustice by Professor Susan Rutberg, *Anatomy of a Miscarriage of Justice: The Wrongful Conviction of Peter J. Rose,* 37 Golden Gate U. L. Rev. 7 (2008); available at: http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1938&context=ggulrev [last accessed: 11 March 2017].

falsely claimed treason,[4] *viz.*, that he had said that he was the "King of the Jews." One does not have to be religious to perceive the wrongful conviction and resulting death sentence.[5]

A. *What* We Are Going to Cover Today.

Our intellectual journey will cover four areas:

1. A *linguistic* suggestion that is perhaps less psychologically antagonistic than the phrase "prosecutorial misconduct;"[6]

2. A synopsis of the various sources of *discovery* that must be asserted pretrial in an effort to prevent, but if not, preserve, these discreet issues;

3. A discussion of how to determine just what constitutes prosecutorial *error*; and

4. Suggestions on how to properly *preserve* issues of prosecutorial misconduct or error, pretrial and during trial.

As Mr. Sevilla observes:

> Prosecutors are far less likely to try and take advantage of a defense attorney who is ready to pounce on misconduct by objections and calls for sanctions.[7]

B. *Why* We Are Going to Talk About This.

1. My Legal "Anti-Bullying" Campaign

   - Don't tell *me* it's not *Brady* material – tell it to the judge!

   - Don't tell *me* it's not admissible and therefore not discoverable – I'll argue this before the judge.[8]

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[4] The scenario also involved a lying snitch - Judas Iscariot.

[5] *See* the Book of Matthew, Chapter 27 [KJV].

[6] I am indebted to fellow NACDL member, Charles Sevilla, Esq., for his cerebral analysis about this topic, from which I have borrowed liberally. His monograph on this is entitled, *Successfully Developing and Litigating Prosecution Errors at Trial & Beyond* (Dec. 2016), and is available at: http://charlessevilla.com/_pdf/DAmisconduct11.pdf [last accessed, 11 March 2017]. Hereinafter "Sevilla."

[7] *Id.* at 5.

[8] *See, e.g., DiSimone v. Philips*, 461 F.3d 181, 195 (2nd Cir. 2006):

(continued...)

! Don't tell *me* you don't have the authority to release it – tell the judge you need a *Protective Order* to release it.[9]

! Don't tell *me* it's *privileged* – assert the privilege before the judge and we'll litigate that.

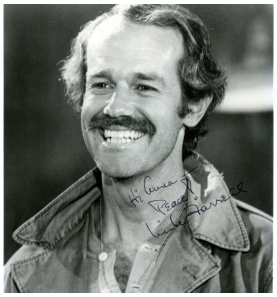
2. It is *US*, or It is Injustice.

! John Adams defending the British Soldiers in the *Boston Massacre* case in 1770.

3. The Need to be Proactive on All Fronts.

4. We Do Not Stand Alone!

a.



Mike Ferrell

- "Captain B.J. Hunnicut" on M*A*S*H.
- Avid anti-death penalty advocate.

b.

John Grisham

- Best-selling "legal" author.
- Non-fiction author of *The Innocent Man: Murder and Injustice in a Small Town* (2006).
- Significant financial contributor to the *Innocence Project*.

[8] (...continued)

> [I]f there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel-and not of the prosecution-to exercise judgment in determining whether the defendant should make use of it.

[9] *See*, CPL § 240.50, giving the judge authority to issue a protective order.

II. THE PSYCHOLOGY OF WORDS: A LINGUISTIC MODIFICATION – PROSECUTORIAL *ERROR.*

Think about it. Most Black Robes' lineage comes from their years as a prosecutor. Hardly a foundation for serious legal thinking or judicial temperament – yet, a pervasive occurrence. Hence the dull stare and rolling eyeballs when you as defense counsel, stand up and object that the prosecution's mid-trial disclosure of their star witness's prior inconsistent statement and three prior felony convictions, is "prosecutorial misconduct." The prosecution "fraternity" that most Black Robes claim alumni membership in, makes it highly unlikely that such an objection will – except in the most obvious and egregious circumstances – ever be sustained.

But, what if your objection is framed as follows: "Your Honor, we object on the basis of *prosecutorial* ***error*** which is denying my client his Due Process rights to a fair trial by this untimely and late disclosure. We move for a mistrial."[10] A number of things flow from this approach. First, avoiding the accusatory "misconduct" charge reduces the psychological "bonding" between the former and current prosecutors. Conversely, injecting a more neutral "prosecutorial error" concept within the framework of a due process / fair trial claim, is both less threatening to the Black Robe and may simultaneously, peak his judicial interests. After all, what Black Robe wants to face *possible* reversal for condoning a *prosecutor's* errors? Thinking ahead to the panel of Black Robes likely to hear any appeal, it is certainly more psychologically palatable to claim *prosecutorial error* where the standard of review is looking at whether or not the "error" denies due process and a fair trial.

The rationale here is simple:

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[10] Note the ***three*** things necessary for proper preservation of this issue: (1) stating the objection, *i.e.*, "prosecutorial error;" (2) the prejudice to the defendant, *e.g.*, the denial of Due Process and a fair trial; and (3) a proposed remedy, *i.e.*, a mistrial.

> Trial judges often do not have any sensitivity to the issue and the only way to sensitize them is to point out that it is judicial error and misconduct not to govern over an impartial trial.[11]

Mr. Sevilla aptly (and correctly in my opinion) justifies this linguistic change from "prosecutorial misconduct" to "prosecutorial error" on the basis that a due process error does *not* require "intent" – something that the charge of "misconduct" certainly implies. Rather, this change focuses on the constitutional right to a fair trial – the very focus of *Brady* and its progeny.

III. PROSECUTORIAL DUTIES: IDENTIFYING THE PROBLEM AND GETTING THE DISCOVERY YOUR CLIENT IS ENTITLED TO.

The legal academy is slowly realizing that the courts and disciplinary committees are simply unwilling to address the issues of misbehaving prosecutors. In a seminal article on "prosecutorial misconduct," entitled, *Why Prosecutors Misbehave,*[12] Professor Gershman asks:

> *Why does this occur? (It often pays off.) And, why does it continue? (There are no effective sanctions.)*[13]

Professor Gershman went on to observe, what most of us in the trenches already know:

> Faced with a difficult case in which there may be a problem of proof, a prosecutor might be tempted to sway the jury by adverting to a matter which might be highly prejudicial. . . . Consequently, an unethical courtroom "trick" can be a very attractive idea to the prosecutor who feels he must win.[14]

Using social science concepts, Professor Alafair S. Burke, identifies three fundamental sources that cause prosecutorial misconduct.[15]

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[11] Sevilla, *supra* at 3.

[12] Gershman, *Why Prosecutors Misbehave,* 22 Crim. L. Bull. 131 (1986); available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1537&context=lawfaculty [last accessed: 15 MAR 17].

[13] *Id.* [emphasis in original].

[14] *Id.* at 135 [footnote omitted].

[15] Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science,* 47 Wm. & Mary L. Rev. 1587 (2006); available at: http://scholarship.law.wm.edu/wmlr/vol47/iss5/3/ [last accessed: 15 March 2017]. **DISCLOSURE:** Until I read Professor Burke's article, I had no idea that she uses one of my cases, *United States v. Al*

(continued...)

- ***Confirmation Bias:*** *i.e.,* "people tend to favor information that confirms their theory over disconfirming information."[16] "Proper scientific method requires that researchers seek to *disprove* their working hypotheses."[17]

- ***Selective Information Processing:*** "A good deal of empirical research demonstrates that people are incapable of evaluating the strength of evidence independent of their prior beliefs."[18]

> In criminal cases, prosecutors [are] potentially basing their theories of guilt on retracted confessions, flawed eyewitness testimony, and false testimony from jailhouse informants.[19]

- ***Belief Perseverance:*** "[T]he phenomenon of belief perseverance describes the tendency to adhere to theories even when new information wholly discredits the theory's evidentiary basis."[20] A classic example of this is prosecution reluctance to dismiss criminal charges even in the face of exonerating DNA evidence.

> [Consider] the influence of "tunnel vision," whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories.[21]
>
> [T]he tunnel vision phenomenon is simply one application of the widespread cognitive phenomenon of *confirmation bias*. Law enforcement fails to investigate alternative theories of the crime because people generally fail to look for evidence that

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[15] (...continued)
Halabi – an alleged Guantanamo Bay "espionage" death penalty case by an Air Force linguist. *Id.* at 1607 *et seq.*, as an example of "belief perseverance" discussed *infra*.

[16] *Id.* at 1594 [footnote omitted].

[17] *Id.* at 1595 [emphasis in original; footnote omitted]. For a good overview of this, *see* Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand. L. Rev. 577 (1986); available at: http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1255&context=fac_artchop [last accessed: 15 MAR 17].

[18] *Id.* at 1596 [footnote omitted].

[19] *Id.* at 1599.

[20] *Id.*

[21] *Id.* at 1604 [footnote omitted]. *See also,* Raeder, *What Does Innocence Have to Do With It?: A Commentary on Wrongful Convictions and Rationality*, 4 Mich. St. L. Rev. 1315, 1327 (2003); available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089994 [last accessed: 15 March 2017], where she notes:

> [T]he tunnel vision problem has been widely noted in wrongful conviction cases. Officers and prosecutors either don't realize the significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect's guilt.

Hereinafter, "Raeder."

disconfirms working hypotheses.[22]

A. The Problems of "Tunnel Vision" by Police and Prosecutors.

As noted above, the question of "tunnel vision" infects a large percentage of wrongful convictions. But, precisely what are we talking about? In a comprehensive analysis of this psychological phenomenon, it has been aptly described as follows:

> By tunnel vision, we mean that "compendium of common heuristics and logical fallacies," to which we are all susceptible, that lead actors in the criminal justice system to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt." This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.[23]

The concept of tunnel vision in criminal investigations is not something new. Sir Arthur Conan Doyle, via his famed fictional detective "Sherlock Holmes" noted a century ago:

> *One should always look for a possible alternative, and provide against it. It is the first rule of criminal investigation.*[24]

And again advised,

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[22] *Id*. at 1605 [footnote omitted]. *See also,* Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System,* 7 Ohio St. J. Crim. L. 413, 420 (2009); available at: http://moritzlaw.osu.edu/osjcl/Articles/Volume7_1/Bandes-FinalPDF.pdf [last accessed, 13 March 2017], where Professor Bandes notes:

> [T]he investigations on which prosecutors are relying may themselves be infected by the unwillingness of the police to consider alternative scenarios (i.e. tunnel vision). . . . ***Tunnel vision is often identified as the leading cause of wrongful convictions***. [footnotes omitted; emphasis added].

She also cites to Raeder, *supra*.

[23] Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 Wisc. L. Rev. 291, 292; available at: https://media.law.wisc.edu/m/hyjb3/findley_scott_final.pdf [last accessed: 15 March 2017].

[24] *The Adventure of Black Peter*, The Complete Sherlock Holmes, 567; available at: http://ignisart.com/camdenhouse/canon/blac.htm [last accessed: 15 March 2017].

It is a capital mistake to theorize in advance of the facts.[25]

That advice would go a long way in reducing the problems caused by tunnel vision.

The above forms the foundation for most prosecutorial misconduct. Of course, the prosecutor who seeks a conviction at "any cost" could, no doubt, care less.[26]

B. The "Ethical" Duties Are Not the Same as the "Legal" Duties.[27]

Most prosecutors at best pay lip service to their *ethical* discovery obligations and most Black Robes are oblivious to even the existence of such. Thus, as a defense counsel your first job is to educate them and make *specific* discovery demands under New York's *Rules of Professional Conduct*, Rule 3.8, to wit:

SPECIAL RESPONSIBILITIES OF PROSECUTORS AND OTHER GOVERNMENT LAWYERS

> (a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.
>
> (b) A prosecutor or other government lawyer in criminal litigation ***shall make timely disclosure*** to counsel for the defendant . . . of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal. [Emphasis added]

- **NOTE:** Unlike the *Constitutional* rule of *Brady* and its progeny, the ethical rule here does *not* contain any "materiality" prong – thus it is broader in

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[25] *The Adventure of the Second Stain*, The Complete Sherlock Holmes, 657; available at: http://ignisart.com/camdenhouse/canon/seco.htm [last accessed: 15 March 2017].

[26] *See e.g.*, Keenan *et al.*, *The Myth of Prosecutorial Accountability After* Connick v. Thompson, *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. 203 (2011)[Online ed.]; available at: http://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf [last accessed: 15 MAR 2017].

[27] For an extensive discussion of this issue, *see* Green & Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51 (2016), available at: http://ndlawreview.org/wp-content/uploads/2016/12/NDL102.pdf [last accessed: 15 March 2017].

scope and should always be asserted separately in your discovery demands.

1. The American Bar Association, Standards for Criminal Justice (4th ed, 2015), *The Prosecution Function.*[28]

Standard 3-5.4 is entitled, "Identification and Disclosure of Information and Evidence." It reads in relevant part:

> (a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.
>
> (b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.
>
> (c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.
>
> (d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.
>
> (e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. ***When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely***

[28] Available at: http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html [last accessed: 12 March 2017].

> ***a general acknowledgement of discovery obligations***. Requests and responses should be tailored to the case and "boilerplate" requests and responses should be disfavored. [Emphasis added].
>
> (f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.
>
> (g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.
>
> * * * * *

There is no good reason not to include specific discovery demands under the above standard – the Supreme Court of the United States routinely cites them.

2. ABA Formal Opinion, 09-454 (July 8,2009), *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense.*[29]

If you have not read this opinion and put a copy of it in your "Trial Notebook," do so before you continue reading here. This Ethics Opinion interprets Rule 3.8(d), *Model Rules of Professional Conduct,* and contains additional citations of authority. The Opinion covers the following areas:

a. *Waiver:* A defendant *cannot* waive his/her rights under RPC 8.3(d);

   ! This includes waivers under "Open File" discovery plans.

b. *Sentencing:* The duty continues through the sentencing process;

   ! Do ***not*** overlook or ignore this. Sometimes it is our only chance at real advocacy for our clients.

c. Supervisors and Managers must ensure compliance with this Rule;

   ! ***Preserve this issue!*** If an ADA denies the existence of *Brady* material and you have a good faith belief that it exists, send a letter to the Supervisor or

[29] Available at: http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf [Last Accessed: 12 March 2017].

Bureau Chief, etc., asking for a "supervisory review" citing this Opinion.

3. Prosecution Conflicts-of-Interest.

The scope of this issue and its application to our cases far exceeds the goals of this monograph. I raise it because of its importance and impact on the day-to-day operations of our criminal justice system.[30]

C. Statutory Discovery: CPL § 240.20.

This is the bare-bones minimum "discovery" that the Legislature has deemed appropriate for us to defend our client with little if any teeth to enforce non-compliance or outright violations. But, do not forget about § 240.20(h), which also mandates discovery of:

> Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.

D. *Constitutional* Discovery.

1. *Brady* Material is "Favorable" Material, *Not* "Exculpatory" Material.

This is a concept that *most* State prosecutors simply do not understand, and thus, frequently violate. *Brady* material is ***favorable*** information, ***not*** "exculpatory" information, relevant to guilt or innocence, the degree of guilt, or for sentencing purposes. If you receive a *Brady* response which says something to this effect, "The People are aware of their *Brady* obligations and will disclose any *exculpatory* evidence that we become aware of," right off the bat, the prosecutor has proven that s/he does not even know, much less understand the *Brady* rule, so just how are they going to comply with it?[31] Bring this to the Black Robe's attention immediately and request that the

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[30] For an exceptional piece of scholarship on this topic, *see* Green & Roiphe, *Rethinking Prosecutors' Conflicts of Interest,* [forthcoming, 2017], available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849658 [last accessed: 15 March 2017].

[31] *See*, ABA *Standard* 3-5.4(e), *supra*, as to why this is an improper response.

Court Order them to comply with *Brady* as written, not as the People interpret it. Notably, in the majority opinion in *Brady*, the Court *never* uses the word "exculpatory," only "favorable" information.[32] So, tailor your ***Discovery Request*** to follow the holding in *Brady*.

2. *Kyles* Material is *Not* Co-Extensive With *Brady* Material.

If you have not read *Kyles*, do so before you do your next discovery demand. Contrary to many New York decisions, the Court in *Kyles* held that the prosecution, under *Brady* principles, violated it in numerous ways.

- Withholding information that "the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point . . . ."[33]
- "[T]hat the lead police detective who testified was either less than wholly candid or less than fully informed . . . ."[34]
- "[T]hat the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse . . . ."[35]
- "[T]hat one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant. . . ."[36]
- "[T]hat another eyewitness had been coached . . . ."[37]
- "[T]hat there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length."[38]
- Evidence as to "the reliability of the investigation in failing even to consider

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[32] New York case law is replete with this erroneous analysis – no doubt because the majority of appellate jurists who have criminal trial experience, were former prosecutors, who never knew or understood *Brady* themselves.

[33] 514 U.S. at 453.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*. at 454.

Beanie's [informant] possible guilt . . . ."[39]

Kyles offers numerous *federal* Due Process considerations for *Brady* material – most of which seem to be as alien to Black Robes as Einstein's theories in physics. And, unless New York decides to adopt a more liberal standard than federal law mandates, ensure that your pleadings are clear that you are relying on ***both*** the federal standards and New York law.

3. *Giglio* Material – the Negligence Standard.

Simply put, this mandates disclosure of all deals, promises or other types of inducements, oral or written, formal or informal by a District Attorneys office to any prosecution witness. Remember the clear language of the opinion:

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.[40]

Again, you must make a specific demand for *Giglio* material, so tailor your discovery demands accordingly.

E. Spoliation of Evidence.

1. The Sad Saga of Larry Youngblood and Why the Supreme Court Got It Wrong in *Arizona v. Youngblood,* 488 U.S. 51 (1988).[41]

2. Judicial Sanctions for Spoliation.[42]

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[39] *Id.* at 446.

[40] 405 U.S. at 154-55.

[41] *See*, Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241 (2008), for an extensive examination of this issue, available at: http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1118&context=law_lawreview [last accessed: 15 March 2017].

[42] Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for Destruction of DNA Evidence,* (continued...)

F. Other Prosecutorial Errors.

As one noted scholar in this area has observed, "there is an increasing concern . . . that the criminal justice system is seriously prone to error."[43] Prosecutorial Errors (if not misconduct) are a significant contributing factor to the trend towards injustice, or wrongful convictions. Here is a non-exhaustive list of "problem areas.

1. Witness (Snitch) Coaching.

As Professor Gershman has astutely observed:

> The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers.[44]

He continues with a profound statement. "Cooperators are manipulative, and some prosecutors can be easily manipulated.[45]

2. Errors During Summation.

First things first – if you do not object to an improper closing argument, in almost all cases expect to read that the issue was "not preserved for our review" by the Appellate Division. This cannot be emphasized enough. That being said, consider these examples of *improper* closing arguments, and thus prosecutorial "error."[46]

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[42] (...continued)
77 Fordham L. Rev. 2893 (2009), available at:
http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4453&context=flr [last accessed: 15 March 2017].

[43] Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 832 (2002)(footnote omitted). Available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1125&context=lawfaculty [last accessed: 15 March 2017].

[44] *Id.* at 847.

[45] *Id.* at 848.

[46] I am indebted to Professor Daniel Medwed's insightful article, *Closing the Door on Misconduct: Rethinking the Ethical Standards That Govern Summations in Criminal Trials*, 38 Hastings Const. L.Q. 915 (2011). The examples cited are his.

- A prosecutor cannot offer her personal opinion as to the guilt or innocence of the defendant. The reason being is that this "invades the province of the jury."[47]

- A prosecutor may not "vouch" for the credibility of a witness via his personal opinion. Witness credibility is a jury function.[48]

- Arguing "facts" not admitted as evidence. As noted above, that constitutes an ethical violation.[49]

- Misstating evidence or testimony. Again, such constitutes an ethical violation.[50]

- Commenting on a defendant's declining to testify at trial or having invoked his right against self-incrimination.[51]

- A prosecutor cannot "mock[ ] or impugn[ ] the integrity of defense counsel during closing argument." Such violates the defendant's Sixth Amendment right to counsel.[52]

- A prosecutor cannot argue what a *non-witness* [*e.g.*, deceased victim] "would have said." Such is *testimonial hearsay* and violates the Confrontation Clause, as well as "vouching" for that so-called "witness."

G. Cumulative Errors.

The relatively recent case of *Milke v. Ryan*,[53] is a horrendous example of the "conviction at any cost" approach. Debra Milke was convicted of murdering her four year old son. The concurring opinion of Chief Judge Kozinski says it best:

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[47] *Id.* at 918.

[48] *Id.* at 919.

[49] *Id.*

[50] *Id.*

[51] *Id. But see* (and understand) *Salinas v. Texas*, 113 S.Ct. 2174, 2182 (2013)(Plurality), where the plurality held: "A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."

[52] Medwed, *supra* at 920.

[53] 711 F.3d 998 (9th Cir. 2013).

> This is a disturbing case. There's no physical evidence linking Debra Milke to the crime, and she has maintained her innocence since the day she was arrested. Neither of the men who actually did the killing testified against Milke. Roger Scott refused to testify because his "testimony would not be what he felt was the truth." After spending many years on death row, James Styers continued to insist that "Debbie had nothing to do with it and thats [sic] the truth." The *only* evidence linking Milke to the murder of her son is the word of Detective Armando Saldate, Jr.—a police officer with a long history of misconduct that includes lying under oath as well as accepting sexual favors in exchange for leniency and lying about it.[54]

He went on to note:

> In Milke's case, Saldate testified that he doesn't have to stop talking to suspects just because they asked for an attorney. That would be ridiculous...." What I find ridiculous is that this man—with his track record of trampling basic constitutional rights—is sent to interrogate a suspect without a tape recorder, a video recorder, a witness or any other objective means of documenting the interrogation.[55]

Detective Saldate claimed – without any corroboration – that Milke "confessed" to him. But,

> . . . Saldate turned the interrogation room into a black box, leaving us no objectively verifiable proof as to what happened inside. All we have are the conflicting accounts of a defendant with an obvious reason to lie and a detective whose disdain for lawful process is documented by one instance after another of lying under oath and other misconduct.
>
> No civilized system of justice should have to depend on such flimsy evidence, quite possibly tainted by dishonesty or overzealousness, to decide whether to take someone's life or liberty. The Phoenix Police Department and Saldate's supervisors there should be ashamed of having given free rein to a lawless cop to misbehave again and again, undermining the integrity of the system of justice they were sworn to uphold. As should the Maricopa County Attorney's Office, which continued to prosecute Saldate's cases without bothering to disclose his pattern of misconduct.[56]

Judge Kozinski then explained:

> It's not just fairness to the defendant that calls for an objectively

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[54] *Id.* at 1022.

[55] *Id.* at 1023.

[56] *Id.* at 1024.

> verifiable process for securing confessions and other evidence in criminal cases. We all have a stake in ensuring that our criminal justice system reliably separates the guilty from the innocent. Letting police get away with manufacturing confessions or planting evidence not only risks convicting the innocent but helps the guilty avoid detection and strike again.
>
> Could the people of Arizona feel confident in taking Milke's life when the only thread on which her conviction hangs is the word of a policeman with a record of dishonesty and disrespect for the law? Bad cops, and those who tolerate them, put all of us in an untenable position.[57]

The Court granted a *writ of habeas corpus* based upon *inter alia* the prosecution's withholding *Brady* "favorable" evidence; withholding *Giglio* "impeachment" evidence; and *Kyles* "sloppy police investigation evidence."

H. Failing to Corroborate Jailhouse "Snitches."

Of the exonerations obtained by the *Innocence Project,* 15% have involved "informant" testimony.[58] But, in another study limited to capital cases, the *Center on Wrongful Convictions*, concluded that 46% of the exonerations in capital cases via DNA, snitches were involved.[59] Professor Raeder in a separate and equally authoritative article has commented that:

> The incentives for jailhouse informants to lie are so great, and the consequences so minimal, that prosecutorial reliance on this category of cooperating witnesses is always ethically challenging. The truthfulness of jailhouse informants is permanently suspect, unless the conversation with the defendant is recorded, and the confession is actually captured on the tape.[60]

Professor Raeder finally concludes: "it logically follows that prosecutors should have the

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[57] *Id*.

[58] https://www.innocenceproject.org/causes/incentivized-informants [last accessed: 15 March 2017].

[59] Center on Wrongful Convictions, *The Snitch System*, at 3, available at: http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf [Last accessed: 15 March 2017].

[60] Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 Fordham L. Rev. 1413, 1419-20 (2007), available at: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4329&context=flr [last accessed: 15 March 2017].

ethical obligation to refrain from using this type of witness unless they can affirmatively show that the particular jailhouse informant is truthful."[61]

I. Lying Witnesses.

Similar to snitches, lying witnesses in criminal trials are a perpetual problem. False testimony against a defendant may give rise to a Due Process, denial of a fair trial, violation.[62] A prosecutor's *knowing* use of false testimony is unethical *and* violates Due Process.[63] Finally, even the *unknowing* presentation of false testimony by the government "taints" any resulting conviction.[64]

IV. DEFENSE COUNSELS' DUTIES.

A. Being Prepared – it ***always*** helps!

1. **Ethical Duty**. *Query:* How can one raise *prosecutorial* shortfalls in good conscience if one is not in compliance with *defense* counsel's ethical requirements?

2. **Duty to Investigate**.

a. *Strickland v. Washington,* 466 U.S. 668, 690 (1984).

- ". . . the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

* * * * *

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. . . . In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

b. *Wiggins v. Smith,* 539 U.S. 510, 523 (2003).

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[61] *Id.* at 1437.

[62] *See, e.g., Hysler v. Florida,* 315 U.S. 411, 413 (1942).

[63] *White v. Ragen,* 324 U.S. 760, 764 (1945).

[64] *Mesarosh v. United States,* 351 U.S. 1, 9 (1956). For a comprehensive treatise-like article on this subject, *see* Poulin, *Convictions Based Upon Lies: Defining Due Process Protection,* 116 Penn St. L. Rev. 331 (2011), available at: http://www.pennstatelawreview.org/116/2/116%20Penn%20St.%20L.%20Rev.%20331.pdf [last accessed: 15 MAR 17].

- "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688."

c. *Rompilla v. Beard*, 545 U.S. 374, 388 (2005).

- ". . . looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce."

d. *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).

- [quoting] "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA *Standards for Criminal Justice* 4–4.1, p. 4–53 (2d ed.1980).

B. Provide *Zealous Representation.*

C. Protect the Accused's Constitutional and Statutory Rights.

V. PRESERVING THE ISSUES.

A. Motions.

1. Definitions – If there are no objections, both waiver and consent may apply. Stop worrying about what the Judge will "think" or "do." Do your job.

2. Specificity in your motions, *e.g.*, separate, *Brady, Kyles, Giglio,* etc. motions.

B. Objections.

1. ***Summation Issues***. Don't worry about being "rude," don't worry about jurors – they expect you to object, and ***do not*** let Black Robes "bully" you into waiting until the end of the prosecution's summation to make your objections.[65]

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[65] Margrum, *I Believe, The Golden Rule, Send a Message and Other Improper Closing Arguments*, 48 Creighton L. Rev. 521 (2015)[a virtual treatise on improper closing arguments by prosecutors], available at: http://dspace.creighton.edu:8080/xmlui/bitstream/handle/10504/72815/48CLR521.pdf?sequence=1&isAllowed=y [last accessed: 15 March 2017]; *see also*, Giannelli, *Closing Arguments: Prosecution Misconduct*, (Faculty Publication), available at: http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1325&context=faculty_publications [Last accessed: 15 March 2017]; and Saltzburg, *Proper and Improper Closing Arguments*, 26 ABA Criminal Justice 62 (2011), available at:

(continued...)

2. Know and have a check-list of improper arguments in your trial notebook.

C. Jury Instructions.

1. Just because it's in the NY CJI, does not mean that it is an accurate statement of the law – be prepared to attack them at the Charge Conference, ***in writing.***

2. Don't be afraid to draft your own for submission, just ensure that it is a correct statement of the law and include citations. Use the NYSACDL list-serve to seek out jury instructions for specific issues.

VI. ISSUES IN THE TRENCHES.

As defense attorneys, we *cannot* be complacent; we *cannot* be silent. Whether by motions, by arguments, or by appellate advocacy, we owe it professionally to our clients to expose both prosecutorial misconduct or negligence which deprives our clients of fair trials. Professor and colleague Ellen Yaroshefsky – a long-time NYSACDL member – has perhaps captured this idea best by describing it as our "duty of outrage."[66] ***So be it!***

[65] (...continued)
http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_trialtactics.authcheckdam.pdf [last accessed: 15 March 2017].

[66] Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation To Speak Truth to Power To the Prosecutor and the Court When the Criminal Justice System is Unjust*, 44 Hofstra L. Rev. 1207 (2016), available at: http://www.hofstralawreview.org/wp-content/uploads/2016/09/BB.9.Yaroshefsky.pdf [last accessed: 15 March 2017].

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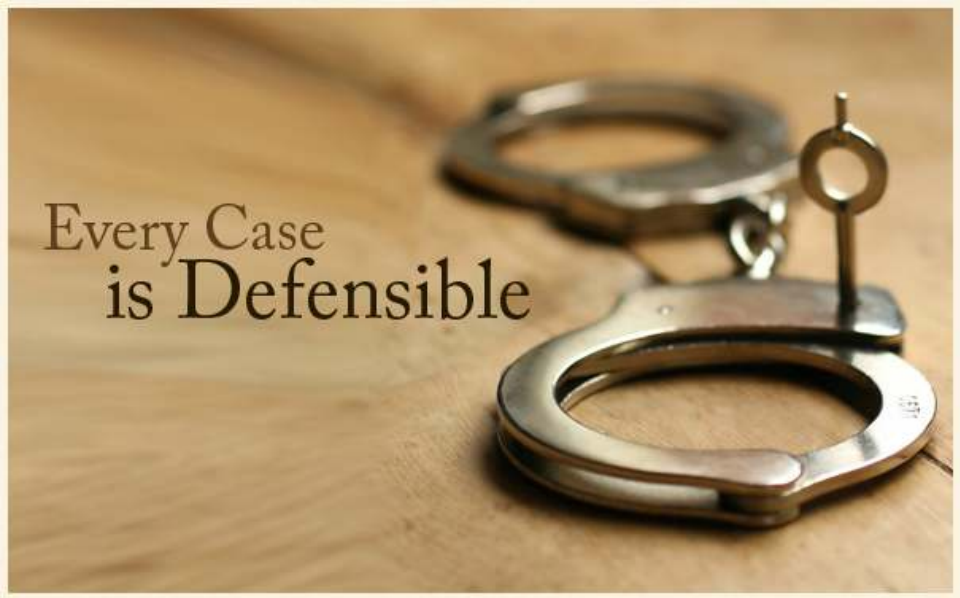

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