



Are you OK? 2025 CJA Panel Ethics Presentation

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Agenda

- Taking Care of Your Clients
 - Being an Officer of the Court
 - What does that mean for our Clients?
 - Pre-Trial Dilemmas
 - Trial Dilemmas
 - Sentencing Dilemmas
 - Taking care of you!
- 



Applicable Rules of Professional Conduct

- Rule 1.2(a)(1)
- . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
- Rule 1.2(a)(3)
- Comment [4]: In a case where the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

- Rule 1.2(a)(3)

- In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

- Example: Comment [1]: Attorney may consent to opponent's request for an extension of time.

- Th Dever



Trial Dilemmas

- The Diminished Capacity Client

- Rule 1.14: Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

- 98 Formal Ethics Opinion (FEO) 16

- Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous
 - Other issues included conflict of interest, standing to appeal to superior court and DSS role vis-à-vis attorney for incompetent client



Trial Dilemmas

- Discovery
 - The “last minute” discovery dump
 - The “Seems like something is missing...”
 - I asked for [it] and didn’t get it until after the entry of the plea



United States v. Bartko, 728 F.3d 327 (4th Cir. 2013)

- Although “courts of necessity examine undisclosed evidence item-by-item, their materiality determinations must evaluate the cumulative effect of all suppressed evidence to determine whether a Brady violation has occurred.” *United States v. Ellis*, 121 F.3d 908, 916 (4th Cir.1997). When “the net effect of the evidence withheld by the [government] in [a] case raises a reasonable probability that its disclosure would have produced a different result, [the defendant] is entitled to a new trial.” *Kyles v. Whitley*, 514 U.S. 419, 421–22, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). “A reasonable probability does not mean that the defendant ‘would more likely than not have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine [] confidence in the outcome of the trial.’ ” *Smith v. Cain*, — U.S. —, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012) (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555).

The real lesson of Bartko

- Having analyzed the Brady and Giglio issues that Bartko raises, **we pause here to address the discovery practices of the United States Attorney's office in the Eastern District of North Carolina.**¹ A cursory review of this Court's opinions reveals recent consideration of at least three cases involving discovery abuse by government counsel in this district. See, e.g., *United States v. Flores-Duran*, 531 Fed.Appx. 348, 351–53, No. 11–5167, 2013 WL 3286248, *2–4 (4th Cir. July 1, 2013)² (noting that (1) “[d]uring the week prior to trial, ... the [g]overnment sent over one thousand pages of additional discovery, the bulk of which was due no later than fourteen days prior to trial” and that the government argued its “discovery violation” was excusable because it “misread[] ... the discovery order; a power outage [occurred] at the courthouse in Raleigh; and [it made a] last minute decision to present certain evidence” and (2) that on the Saturday immediately prior to the Monday on which trial was to begin, the government faxed key information obtained approximately twenty-four hours earlier to defense counsel's office, but it did nothing to ensure that counsel received the fax, even though it sent the information outside of normal business hours); *United States v. Burkhardt*, 484 Fed.Appx. 801, 802 (4th Cir.2012) (considering a defendant's appeal of his civil commitment as a sexually dangerous person and citing as a “matter of concern” the government's failure to disclose prior to the commitment hearing that one of the defendant's victims would testify); *United States v. King*, 628 F.3d 693, 701–04 (4th Cir.2011) (vacating and remanding the defendant's conviction for felony possession of a firearm because the government “specifically rebuffed both ... written and oral demands [by the defendant] that it disclose” potentially exculpating grand jury testimony and “refused to disclose” the testimony, even after the district court “suggest[ed] that it do so”). And this case, which confronts us with three alleged constitutional violations—two instances of withholding discoverable evidence and one choice to leave uncorrected a witness's false testimony—only adds to the list.
- *United States v. Bartko*, 728 F.3d 327, 341 (4th Cir. 2013)



Sentencing

- Rule 51: Preserving Claimed Error

- (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought-- of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

- **Rule 52: Harmless and Plain Error**

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) *Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.*

Plain Error

- What is it?
 - United States v. Olano, 507 U.S. 725 (1993).
 - A right of any sort, including a constitutional one, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before the court having jurisdiction of it.
 - But, even so, courts of appeals have limited power to correct plain errors, i.e. errors that:
 - (1) are plain AND
 - Plain = “clear or obvious”
 - (2) affect substantial rights
 - i.e., prejudicial → affected the outcome of the district court proceeding
 - The power to correct is not automatic though; court has discretion even when the above requirements are met.
 - Court can only correct obvious errors affecting substantial rights “if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”

Plain Error

- Evolved into 4-prong test:
 - Puckett v. United States, 556 U.S. 129, 135 (2009).
 - **First**, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant.
 - **Second**, the legal error must be clear or obvious, rather than subject to reasonable dispute.
 - **Third**, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings.
 - **Fourth** and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.



Plain Error

- The bottom line → We want to AVOID it.
- Defendants clearly have a lesser chance of prevailing at the courts of appeals when the court applies a plain error standard to the alleged error.
- “Meeting all four prongs [of the plain error doctrine’s requirements] is **difficult**, ‘as it should be.’”
 - Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).



Plain Error

- So, how do we avoid it?
 - Object → Rule 51(b)
 - Inform the court, when the unfavorable decision is made, of
 - the action you wished the court had taken OR
 - your objection to the action taken and grounds for that objection.
- What does this look like with respect to federal sentencing?
 - Consider:
 - The Presentence Report
 - The Sentencing Hearing



Presentence Report

- Rule 32, Federal Rules of Criminal Procedure
 - (f) Objecting to the Report
 - (1): “the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements *contained in or omitted from the report*”
 - (g) Submitting the Report
 - PO must submit the presentence report “and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.”



Taking Care of You

- This job is tough, what are you doing to take care of yourself
 - The PTS"D" issue
 - Clients
 - Funding and Tyranny of Distance

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