



**Protecting your
client's rights to
due process and
effective
representation**

April 2023

Today's Discussion

- I. Prosecutorial Misconduct
 - A. Rules and Standards
 - B. What is it and how to recognize it

- II. Ineffective Assistance of Counsel
 - A. What is ineffective assistance?
 - B. What are your obligations post-representation?

Prosecutorial Misconduct

ENTERTAINMENT • CRIME

Netflix's *When They See Us* Is Putting Central Park Five Prosecutors on the Defense

"Progressive Prosecutors" on Trial

June 9, 2022

By SAM OZER-STATION

News 04.23.20

Why Holding Prosecutors Accountable Is So Difficult

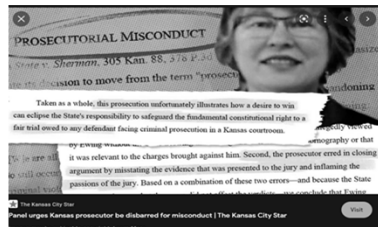
Innocence Project senior litigation counsel Nina Morrison discusses prosecutorial misconduct.

TRUE CRIME

Disbarred Duke lacrosse prosecutor Mike Nifong is back, along with more misconduct allegations

By Tom Jackman

August 30, 2016 at 5:25 a.m. EDT



Federal “rules” governing misconduct



The McDade Act, aka Citizens Protection Act:

Assistant United States Attorneys are subject to “State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B (Enacted 1998)

This legislation was the culmination of 10 years of conflict between DOJ and state bars about whether federal prosecutors are subject to the same ethical rules as other attorneys practicing in federal court in a state, mostly because of rules governing contact with represented parties.

Regulations governing federal prosecutors’ ethical duties: 28 C.F.R. §§ 77.1 through 77.5

- “The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards.”
- Purpose: to implement 28 U.S.C. § 530B and to provide guidance to attorneys about requirements imposed.
- Applies in “all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings”
- Includes guidance when rules of attorney’s state of licensure conflict with rules of the court where case is pending or is likely to be pending.
- McDade Act provides no substantive or procedural rights and isn’t a basis for dismissing charges.

N.C. Rules of Professional Conduct

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction.”

- NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 3.8, COMMENT 1.

N.C. RULE 3.8 - SPECIAL RESPONSIBILITIES OF A PROSECUTOR (Adopted 1997)

Among other things, requires prosecutors to:

- Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.
- Conduct “reasonably diligent inquiry” followed by disclosure of
 - Evidence negating guilt *or mitigating the offense*;
 - In connection with sentencing, all unprivileged mitigating information known to the prosecutor
- Only subpoena lawyer to testify about client under certain circumstances.
- Not make extrajudicial statements about accused unless they serve a legitimate law-enforcement purpose (supplements Rule 3.6)
- Post-trial, promptly disclose “new, **credible** evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted,” including to NCIDS or FPD, depending on circumstances.
 - **BUT: “A prosecutor who concludes in good faith that evidence of information is not subject to disclosure” doesn’t violate the rule “even if the prosecutor’s conclusion is subsequently determined to be erroneous.”**



“A Jedi uses
the Force for
knowledge
and defense,
never for
attack” -
Yoda

Charging discretion



Central Park [Six]



Central Park [Six]

Alleged that prosecutors:



- Ignored evidence that teens were not responsible for the rape
- Knew DNA & rape kit evidence excluded the Five but argued it could have come from a sixth accomplice
- Ignored inconsistencies in confessions
- Encouraged coerced confessions without parental consent

Discretion: Duke Lacrosse case

- Nifong “immediately recognized that the case would garner significant media attention and decided to handle the case himself.”
- Police advise Nifong of case’s weaknesses, including the alleged victim changing her story; another exotic dancer and eyewitness disputing the alleged victim’s story; the alleged victim could not identify anyone in a lineup; and lacrosse teammates cooperated and denied any attack.
 - Initial rape kit did not find blood, semen, or saliva. Later rape kit found DNA from 4 males, none of whom were lacrosse teammates.
- Photo lineup – alleged victim told before that all 46 men in lineup were at the party.
- Refused to consider evidence of alibis before indictment.



Brady & discovery violations





STANDARDS/
GOVERNMENT'S DISCOVERY OBLIGATIONS

Due Process



Brady: Government must provide all exculpatory evidence

The “suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Brady v. Maryland, 373 U.S. 83, 87 (1963)

“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”



Giglio/Napue: Government must disclose its promises and agreements with witnesses

“evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness’s] credibility and the jury was entitled to know of it.”

Giglio v. United States, 405 U.S. 150, 154-55 (1972).

“It is of no consequence that the falsehood bore upon the witness’ credibility rather than directly upon defendant’s guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.”

Napue v. Illinois, 360 U.S. 264, 269 (1959).



Informant/Snitch benefits



- Due process requires a new trial when the prosecution fails to turn over evidence of promises made to key witnesses. *Giglio v. United States*, 405 U.S. 150 (1972)
- “We conclude that the government did have knowledge, for purposes of the disclosure requirements, of the criminal record, whatever it may be, of the [witness], and that it withheld or suppressed the available information.” *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980)
- “Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.” *United States v. Bagley*, 473 U.S. 667, 676 (1985)

Jencks: Government must provide reports and statements of its testifying witnesses

“We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.” *Jencks v. United States*, 353 U.S. 657, 672 (1957).

18 U.S. Code § 3500(a) – (e) - Demands for production of statements and reports of witnesses



Fed. R. Crim. P. 16: Discovery and Inspection

- Defendant's oral statement;
- Defendant's Written or Recorded Statement;
- Defendant's Prior Record;
- Documents and Objects (material to preparing defense and government intends to use);
- Expert witnesses



Local Criminal Discovery Order/Fed. R. Crim. P. 5(f)

- (2)(E). E. Pursuant to the Due Process Protections Act, the Court confirms the obligation of the Government to disclose to the defendant all exculpatory evidence—that is, evidence that favors the defendant or casts doubt on the case brought by the Government under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and ORDERS the Government to comply with this obligation. The Government is advised that failure to disclose exculpatory evidence in a timely manner may result in the exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, or other sanctions, as may be appropriate.



Government's "open file" discovery Policies 9-5.001 and 9-5.002

"It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant."

"this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt."

"Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial."



How to Address and Protect Against Government Discovery Violations



I. Send a Standard Discovery Letter Requesting Discoverable Material at the Outset of the Case

Dear AUSA :

On behalf of Defendant Smith, Under the Fed. R. Crim. P. 12 and 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), the Jencks Act, this district's standard criminal discovery order, and the U.S. Attorney's Office Open-File Policy, I am writing to request the following discovery: . . .

II. Identify All Missing Discovery, Evidence and Information about Potential Witnesses and File Motion to Produce Discovery

NOW COMES the Defendant, under the Local Rules Governing Criminal Cases and Fed. R. Crim. P. 16 as well as the provisions of the Fifth and Sixth Amendments to the United States Constitution, respectfully moves this Honorable Court to compel the government to produce and disclose the following material described below:

III. Identify Discovery violations and file appropriate motions

- Motion to Dismiss;
- Motion to exclude witness/evidence;
- Motion for Adverse Inference Finding/Jury Instruction;
- Motion for New Trial

IV. ESTABLISHING DUE PROCESS VIOLATIONS for SPOILED AND LOST EVIDENCE

A criminal defendant may prove a due process violation based on the prosecution's failure to preserve evidence if the evidence "possess[es] an exculpatory value that was apparent before the evidence was destroyed" and if it is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." See *California v. Trombetta*, 467 U.S. 479, 489 (1963)

BUT

A showing of bad faith is required when the lost evidence can only be said to be "potentially useful" to the defendant because the contents of the evidence are unknown. See *Arizona v. Youngblood*, 488 U.S. 51, 57-58, (1988) (holding "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

V. Request a Full Evidentiary Hearing

“we cannot ratify the district court's approach of disallowing witnesses and then relying on the limited evidentiary record to reject the defendants’ [Brady/Trombetta] claim.”
United States v. Johnson, 996 F.3d 200 (4th Cir. 2021).

Remedies

DOJ Office of Professional Responsibility

OPR'S ROLE AND AUTHORITY

The Office of Professional Responsibility (OPR) is responsible for ensuring that Department attorneys perform their duties in accordance with the highest professional standards, as would be expected of the nation's principal law enforcement agency.

In addition, through investigations of FBI whistleblower retaliation complaints, OPR seeks to ensure that current, former, and prospective FBI employees are protected from reprisal when they report what they reasonably believe to be misconduct.

Updated June 5, 2019

DOJ Office of Professional Responsibility

2022

1. Investigation of Alleged Conflict of Interest, Failure to Advise the Client, and Failure to Comply with Discovery Obligations
2. Investigation of Alleged Misrepresentations to Court
3. Investigation of Alleged Misrepresentations to the Court and Failure to Obey Court Orders

SUBMIT PROFESSIONAL MISCONDUCT COMPLAINT TO OPR

2021

1. Investigation of Alleged Conflict of Interest and Failure to Advise the Client
2. Investigation of Alleged Failure to Timely Provide Discovery and Misrepresentation to the Court and Defense Counsel
3. Investigation of Alleged Misrepresentations to Court, Failure to Obey Court Orders, Failure to Competently Represent Client, Unauthorized Public Disclosure of Confidential Information, and Failure to Comply with Discovery Obligations
4. Investigation of Alleged Prosecutorial Vindictiveness and Failure to Obey Court Order

OPR receives allegations from a variety of sources, including U.S. Attorney's offices and other Department components, courts, Congress, media reports, other federal agencies, state and local government agencies, private citizens, private attorneys, criminal defendants, civil litigants, and self-referrals. OPR also regularly conducts its own searches to identify judicial findings of misconduct against Department attorneys.

<https://www.justice.gov/opr>

Motion to Compel Discovery

UNITED STATES OF AMERICA.

Plaintiff,

vs.

Defendant.

DOCKET NO

Motion to Compel

In July a jury indicted with: Count One – conspiracy to distribute and to possess with intent to distribute cocaine (21 U.S.C. §§ 841); Count Two – conspiracy to commit money laundering (18 U.S.C. 1956); and Count Three – possession with intent to distribute heroin (21 U.S.C. §§ 841). Indictment, Dkt. #3. (Mr. was not charged in the remaining five counts in the indictment.) This Court recently granted a co-defendant's motion to continue the trial date. Order. Mr. new trial date is

Because the government has failed to produce discovery requested by the defendant that is material to preparing his defense, he requests that the Court order the government to produce this discovery, so that this case can proceed expeditiously.

Due Process Act

Motion to Dismiss under Due Process Act and Fed. R. Crim. P. 5:

ORDER

Pursuant to Rule 5(f) of the Federal Rules of Criminal Procedure, the Court confirms the obligation of the Government to disclose to the defendant all exculpatory evidence that is, evidence that favors the defendant or casts doubt on the case brought by the Government under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and ORDERS the Government to comply with this obligation. The Government is advised that failure to disclose exculpatory evidence in a timely manner may result in the exclusion of evidence, dismissal of charges, contempt proceedings, disciplinary actions, or other sanctions, as may be appropriate.

U.S. v. Bundy – Motion to Dismiss

1 INTRODUCTION 2 This Court declared a mistrial on December 20, 2017, almost a month and half into trial. 3 As 4 vic This Court declared a mistrial on December 20, 2017, almost a month and half into trial. 5 6 re As the Court's findings made clear, the mistrial was the result of numerous, willful discovery 7 thi 8 Th violations by the government. 9 where the violations sincerely initiated by this Court are more than enough to justify dismissal. 10 there remain other issues that have yet to be explored—notably those arising from [REDACTED] 11 [REDACTED] provided to the defense on December 8, 2017. The information 12 threat 13 failure 14 into th 15 I. The Court should now dismiss the indictment against the defendants with prejudice. This 16 17 remedy is justified as both a remedy for outrageous government misconduct and an exercise of 18 this Court's supervisory powers. See <i>United States v. Chapman</i>, 524 F.3d 1073 (9th Cir. 2008). 19 due pr 20 State The Court should also rule that the double jeopardy clause bars retrial. 21 22 <i>Moreno</i>, 951 F.2d 1089, 1091 (9th Cir. 1991). Under either theory, however, because "[d]ismissing 23 an indictment with prejudice encroaches on the prosecutor's charging authority," such a sanction 24 is permitted only "in cases of flagrant prosecutorial misconduct." <i>United States v. Simpson</i>, 927 25 F.2d 1088, 1090 (9th Cir. 1991). 26 Under the first theory, a district court may dismiss an indictment for outrageous government conduct that amounts to a due process violation. <i>Barrera-Moreno</i>, 951 F.2d at 1091.	Case 2:16-cr-00046-GMN-NJK Document 3117 Filed 01/08/18 Page 1 of 1 UNITED STATES DISTRICT COURT DISTRICT OF NEVADA ATES OF AMERICA JUDGMENT OF DISMISSAL V CLIVEN D. BUNDY, RYAN C. BUNDY, AMMON E. BUNDY, and RYAN W. PAYNE, CASE NUMBER: 2:16-cr-00046-GMN-PAL-1-4) that the Superseding Criminal Indictment against Defendants Cliven D. & Ammon E. Bundy and Ryan W. Payne is DISMISSED WITH PREJUDICE.  Gloria M. Navarro, Chief Judge U.S. District Court Name of Judge Title of Judge January 8, 2018 Date
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Improper argument

Prosecutor may not comment on defendant's silence.

"[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609 (1965).



Does that rule apply when the silence referred to is pre-arrest? Not according to the panel majority in *United States v. Smith*, 962 F.3d 755, 771 n.5 (4th Cir. 2020) (Wilkinson, J., joined by Floyd, J.).

Consider filing a motion in limine to preclude this type of evidence if you know/suspect it may be an issue at trial.

Prosecutor may not comment on evidence not before the jury.

- *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998).
 - In drug trafficking trial, evidence showed that after a drug sale, defendant shot at a car as it drove away; car slowed down like it had been hit, then drove away; and car was found later about a half-mile away, off the road.
 - Prosecutor argued that one of the defendants had committed a murder when he fired a gun at the car.
 - Court concluded that an inference that the car or even the driver had been hit by gunfire, prosecutor couldn't fairly argue that the defendant murdered the driver.
 - Because prosecutor asserted something as a fact that hadn't been proved, the argument "was clearly improper."
 - Conviction of defendant whom prosecutor branded as murderer is vacated.
- Note: rule prohibiting comment on evidence not before the jury applies to defense counsel as well.

Prosecutor may not offer personal opinion about witness veracity or guilt of the accused.

A prosecutor's vouching for the credibility of witnesses or expressing a personal opinion concerning the guilt of the accused is dangerous because it can convey the impression that the prosecutor knows information not presented to the jury, and the prosecutor's opinion carries the imprimatur of the government. *United States v. Young*, 470 U.S. 1 (1985).

Examples:

- "The officer didn't commit perjury. He came in here and told you the truth about what happened." *United States v. Williams*, 112 F. App'x 581, 582 (9th Cir. 2004).
- "Was [the witness] credible? Was he honest? Of course, he was." *United States v. Rodriguez-Adorno*, 695 F.3d 32, 40-41 (1st Cir. 2012).
- Stating that the defendant "lied about it under oath." *United States v. Woods*, 710 F.3d 195, 202-03 (4th Cir. 2013).

Other misconduct

ORDER OF DISCIPLINE

1. Michael B. Nifong is hereby DISBARRED from the practice of law.

Misrepresentations: Duke Lacrosse case

- Violated Rule 3.6(a) & Rule 3.8(f)
 - made extrajudicial statements that had “substantial likelihood of” prejudicing defendant
- Violated Rule 3.8(c)
 - instructed expert to prepare misleading report
- Violated Rule 3.8(d), 3.4(d), & 3.4(d)(3)
 - did not reasonably and diligently make timely disclosure to defense;
 - did not comply with legal discovery request
- Violated Rule 3.3(a)(1), 4.1, & 8.4(c)
 - made false statements to tribunal and defense
- Violated Rule 8.1(a) & 8.4(c)
 - made false statements to Grievance Committee
- Violated Rule 8.4(d)
 - conduct prejudicial to the administration of justice

Conflict of interest

Based on the results of its investigation, OPR concluded that the lead AUSA committed intentional professional misconduct in violation of his obligations under Rules of Professional Conduct (RPC) 1.7 and 1.4 when he knowingly continued to represent the government in the case despite a conflict of interest that arose from his personal interest in the government witness and without obtaining his client's consent to his continued prosecution of the case, and by knowingly failing to inform his client of his personal interest in the witness and of his pretrial communications with the witness to further that interest. Further, OPR concluded that the lead AUSA committed intentional professional misconduct in violation of his discovery obligations when he knowingly failed to disclose to the defense his pretrial communications with the witness.

including a case that ultimately went to trial. As a result of the information it learned during its investigation, which included conducting multiple interviews and reviewing court filings, transcripts, and Department training records, OPR concluded that the AUSA committed professional misconduct, when in reckless disregard of her obligations under Rules of Professional Conduct 1.4 and 1.7, she failed to keep her client reasonably informed by not disclosing to USAO management that she was involved in an intimate romantic relationship with the agent, and in continuing to represent the government despite a conflict of interest that arose from her relationship with the agent, without having obtained her client's consent to her continued representation of the government. OPR referred the matter to the PMRU.



Interference with Witnesses



"government conduct which amounts to substantial interference with a witness' free and unhampered determination to testify will violate due process . . . However, even if a defendant is able to prove . . . substantial interference with a witness, that misconduct will not result in a new trial if it can be said to be harmless."

United States v. Foster, 128 F.3d 949 (6th Cir. 1997)

Vindictive Prosecution

Due process prohibits the government from punishing a person for exercising a constitutional right.

Without any evidence of bad faith by the prosecutor, due process prohibits the prosecutor from "respond[ing] to [a defendant's] invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial."

Blackledge v. Pery, 417 U.S. 21, 27-29 (1974)



Due process is not violated when a prosecutor carries out a threat made during plea negotiations to bring more serious charges.
Bordenkircher v. Hayes, 434 U.S. 357 (1978)

Actual vindictiveness is hard to prove because a defendant must show the prosecutor:
(1) “harbored vindictive animus;” and
(2) pursued the prosecution “solely to punish” the defendant.
United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001)



Breach of plea agreement

US v. Petties, 42 F.4th 388 (4th Cir. 2022)

- In conditional plea agreement, government promised to dismiss two counts, and Petties agreed to plead guilty to the remaining count: committing a crime of violence – kidnapping – while having failed to register as a sex offender. Petties reserved the right to appeal his conviction on the ground that kidnapping is not a crime of violence. Government agreed to “not further prosecute [Petties] for conduct constituting the basis for the indictment.”
- Petties won that argument on appeal (government conceded that kidnapping is not a COV), and Fourth Circuit vacated his conviction.
- On remand, when Petties moved for release, the district court allowed the government to proceed against Petties on one of the previously dismissed charges; the government argued that it was relieved of its obligations under the plea agreement once Petties’ conviction, and the district court’s judgment, were vacated.
- Court relies on familiar rule construing any ambiguities against the government.
- Result: where government does a bad job drafting its plea agreement, it doesn’t get a do-over when that agreement works to its disadvantage.

Misconduct in federal criminal cases

Table 20: Proportions of all Federal Exonerations, and of Federal Convictions in 2006, by Crime

	Exonerations (112)	Convictions (73,804) ⁹²
White-collar (46)	41%	16%
Violence (31)	28% *	4%
Drugs (25)	22%	36%
Immigration (4)	4%	23%
Weapons (5)	4%	12%
Military Justice (1)	1%	-
Other Property & Public Order Crimes	-	9%

Table 21: Official Misconduct by Prosecutors and by Police in Federal Exonerations, by Crime^a

	Misconduct by Prosecutors	Misconduct by Police	ALL OFFICIAL MISCONDUCT
White-collar (46)	65%	9%	65%
Violent (31)	45%	39%	61%
Drugs (25)	36%	20%	48%
ALL FEDERAL EXONERATIONS (112)	52%	20%	61%

* Some cases include misconduct by more than one type of official.

US v. [Senator] Ted Stevens

Investigation:

- Failed to turn over exculpatory, handwritten note that went to heart of defense.
- Presented estimates that were “wildly overblown.”
- Coaching star witness on eve of trial.
- Failure to disclose “explosive” impeachment evidence – that the state’s star witness had a sexual relationship with a 15-year old girl and then lied about it under oath.

Ineffective Assistance of Counsel

Feb. 8, 2023, 4:24 PM; Updated: Feb. 8, 2023, 6:54 PM

Lawyer's Racism Sparks Court Debate Over Fair Representation (1)



Allie Reed
Reporter

KS Supreme Court disbars Topeka lawyer for being drunk at hearing

ARE

POLITICS

Trump Lawyer Jenna Ellis Disciplined After Admitting to Election Falsehoods

Campaign attorney admitted to making 10 misrepresentations, including

NEWS · CRIME & PUBLIC SAFETY

Dorchester man convicted of 2010 murder gets new trial because his lawyer was really bad



Supreme Court Restricts Review of Ineffective Counsel Claims in Death Penalty Cases

05.25.22

Home / Editor's Picks / Judge: counsel ineffective in handling reneged plea promise

Judge: counsel ineffective in handling reneged plea promise

By Terry Bridges · February 10, 2023

In post-conviction proceedings during which it was revealed that a prosecutor reneged on his oral promise that a triple-murder defendant would get “the best deal” among his co-conspirators in exchange for cooperating testimony, a Superior Court judge ruled that defense counsel was ineffective in not alerting the sentencing judge to the broken promise.

What is IAC?



**THE
GREATEST
TEACHER,
FAILURE IS.**

Yoda, Episode VIII: The Last Jedi (2017)

WWW.THEPARKPDIE.COM

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

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. **First**, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. **Second**, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

Strickland deficient performance

“Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”

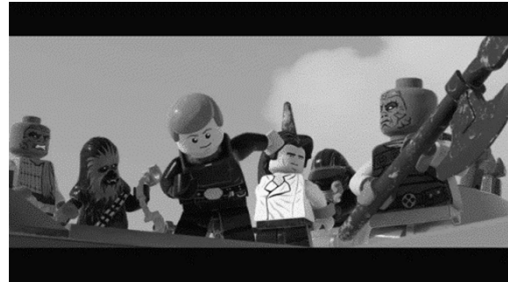
Strickland prejudice

“The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Weaver v. Massachusetts, 137 S.Ct. 1899 (2017)

“[T]he concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means ‘a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’ 466 U.S., at 694. But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a ‘mechanical’ fashion. *Id.*, at 696. For when a court is evaluating an ineffective-assistance claim, the **ultimate inquiry must concentrate on ‘the fundamental fairness of the proceeding.’**”

“A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.



- NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 1.1
(COMPETENCE)



United States v. Freeman, 24 F.4th 320 (4th Cir. 2022) (en banc)

A. Attorney's performance was deficient.

1. Attorney waived written PSR objections at the sentencing hearing.
2. Attorney erroneously concluded the PSR objection to number of pills wouldn't change the GL range.
3. Attorney waived meritorious objection to obstruction enhancement.
4. Obstruction waiver caused her to lose acceptance.

B. Freeman suffered prejudice.



Witherspoon v. Stonebreaker, 30 F.4th 381 (4th Cir. 2022) (**King**, Gibney (E.D. Va.)) (Rushing, dissenting)

1) Counsel ineffective when she “merely attempted to object” to the court’s order that defendant stand side-by-side with surveillance video.

2) “There is a reasonable probability that, but for Witherspoon’s trial counsel’s failure to object to the stand-up order, the result of Witherspoon’s trial would have been different.”



United States v. Cannady, 20-6906 (4th Cir. March 24, 2023)

Trial counsel held ineffective for failing to object to career offender designation based on recent change in the law that a conspiracy offense does not qualify as a “controlled substance offense.”

Client suffered prejudice, namely that his sentence would have been halved without the enhancement.



Other 4th Cir. examples

United States v. Mayhew, 995 F.3d 171 (4th Cir. 2021) (remanded for evidentiary hearing on claim that counsel provided ineffective sentencing advice during plea negotiations)

United States v. Glover, 8 F.4th 239 (4th Cir. 2021) (attorney ineffective based on an actual conflict of interest – counsel represented Glover at motion to withdraw plea hearing but also argued against the motion. “Prejudice presumed” based on the actual conflict.)

United States v. Pressley, 990 F.3d 383 (4th Cir. 2021) (remand for hearing to determine whether counsel was ineffective for failing to file a motion to suppress Pressley’s incriminating statements)

United States v. Stirling, 914 F.3d 302 (4th Cir. 2019) (attorney ineffective for failing to investigate whether Stirling suffered from Fetal Alcohol Syndrome)

Other 4th Cir. examples

United States v. Carthorne, Sr., 878 F.3d 458 (4th Cir. 2017) (attorney ineffective for failing to object to defendant's classification as a "career offender")

United States v. Russell, 221 F.3d 615 (4th Cir. 2000) (attorney ineffective for failing to confirm the status of Russell's two prior convictions)

United States v. Tucker, 603 F.3d 260 (4th Cir. 2010) (attorney ineffective when he failed to object to use of a misdemeanor as a predicate felony conviction under the ACCA and established prejudice because other burglaries committed on separate occasions)

United States v. Luck, 611 F.3d 183 (4th Cir. 2010) (attorney ineffective for failing to request "informant instruction")

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

- NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 1.7
(CONFLICT OF INTEREST: CURRENT CLIENTS)

Racist counsel?

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13356

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS

Appellee,

v.

ANTHONY DEW,

Defendant-Appellant.

Rac

timef

bigot

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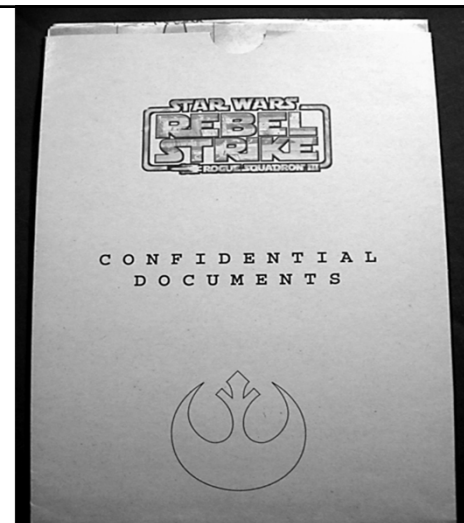
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CPCS investigated and determined that Mr. Doyle was responsible for these public Facebook posts. *See* PSRA 29. And based on these posts, CPCS found that under Rule of Professional Conduct 1.7, Doyle had an “actual conflict” of interest representing “people of the Muslim faith” and “[p]eople who do not appear to be Caucasian.” *See* PSRA 29–31.⁵ CPCS therefore concluded that Mr. Doyle had a “duty to refrain from representing clients in these classes due to his personal beliefs about them.” PSRA 32. And in February 2018, he was suspended from taking any criminal case assignments “for no less than 1 year,” and required to complete an “ethics course and a cultural competency course” before requesting reinstatement. PSRA 50.



(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). ...

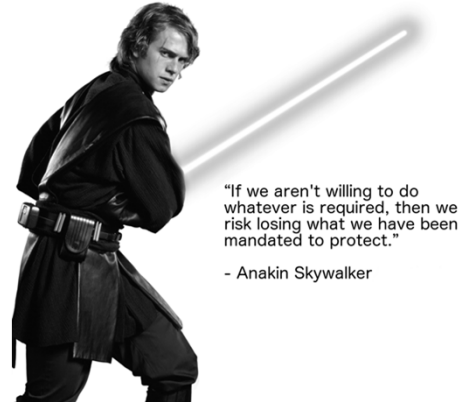
(b) (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;



- NORTH CAROLINA RULE OF PROFESSIONAL CONDUCT 1.1
(COMPETENCE)

ABA Formal Op. 10-456

Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.



NC 2011 Formal Ethics Op. 16

Outside of the court-supervised setting contemplated by the ABA opinion, may a North Carolina lawyer accused of ineffective assistance of counsel disclose information about the former representation to the extent that lawyer believes it is reasonably necessary to establish a defense to the accusation? For example, in response to prosecutors' inquiries, but before a court has ordered the lawyer to do so, may the lawyer disclose information about the representation of a former client that the lawyer believes is reasonably necessary to respond to a claim of ineffective assistance of counsel in the former client's post-conviction motion for appropriate relief?

Opinion #1:

Yes. We decline to adopt ABA Formal Op. 10-456 (2010).

NC 2011 Formal Ethics Op. 16

In reaching this conclusion, however, we are also relying on the fact that both N.C. Gen. Stat. § 15A-1415(e) and Rule 1.6(b)(6) clearly admonish lawyers who choose to respond to claims of ineffective assistance of counsel, regardless of the setting, to respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim. Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer *carte blanche* to disclose all information contained in a former client's file.

North Carolina Ethics Hotline

After consulting the Rules of Professional Conduct and the relevant ethics opinions, if you continue to have questions about your professional responsibility, any lawyer may request informal advice from the ethics department of the State Bar by calling (919) 828-4620 or by emailing ethicsadvice@ncbar.gov. If you call the Bar, tell the receptionist that you have an ethics question. Your call will be directed to one of the assistant ethics lawyers. Ethics inquiries will be answered in the order in which they are received.

Information received by an ethics staff lawyer from a lawyer seeking informal ethics advice is confidential information pursuant to Rule 1.6 of the Rules of Professional Conduct. Such information may only be disclosed by the ethics lawyer as necessary to respond to a false or misleading statement made about the informal ethics advice or as allowed by Rule 1.6(b).

Questions?

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