

ATTICUS

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Why aren't we using Private Investigators?



Matt Kluger is a criminal practitioner in private practice in the Bronx. He previously worked at the New Hampshire Public Defender and the Bronx Defender and is certified to the 18(b) Supreme Court and Homicide panel as well as the CJA panel for the Southern District of New York. He is a former vice-president of the NYSACDL and the current President of the NYSACDL Foundation. NYSACDL members can find Mr. Kluger's sample state and federal investigator affirmations and requests on the NYSACDL website, www.NYSACDL.org.

All eyes turned as the detective strode confidently to the stand, brimming with self-assurance and credibility. With hundreds of homicide investigations and over twenty years of experience under his belt, he raised his right hand, looked the jurors in the eyes, and promised to tell them the truth, the whole truth and nothing but the truth. They had no doubt that he would. The jury leaned forward in their seats, hanging on his every word. I rose from my seat to begin my examination, but rather than get that sinking feeling that we have all experienced in the face of such a devastating witness, I smiled at the jury, cleared my throat, and began my *direct*. That's right, this was no dream, the witness was *my* investigator, and he was about to irreparably undermine the prosecution's main witness.

As criminal defense attorneys, we often fall into the trap that our cases are as "open and shut" as the prosecutor and law enforcement want us to believe that they are; most of the time, they are not. Most of us recognize that our role as defense counsel requires us to investigate our cases. In fact, we are constitutionally obligated to do so. A criminal defense attorney's duty to conduct competent, reasonable pretrial investigation is founded in the Sixth Amendment right to the effective assistance of counsel as a means to protect a defendant's right to a fair trial.¹ In *Strickland v. Washington*, the seminal ineffective assistance of counsel case, the U.S. Supreme Court held that defense counsel has an obligation to investigate those aspects of the defense which are deemed meritorious. Similarly, New York Courts have routinely held that a defendant's right to representation entitles him to an attorney who conducts "appropriate investigations, both factual and legal, to determine if matters of defense can be developed."² A complete abdication of the duty to investigate, for no strategic reason, renders counsel ineffective.³

1 *Strickland v. Washington*, 466 U.S.668, 684-86 (1984). See also NY Const, art I, § 6).

2 *People v. Reid*, NY Slip Op 21088 (Sup., NY, Decided March 14, 2011) ("Defense counsel's . . . failure to investigate was not part of a legitimate strategy, it was the result of neglect. Because defendant was denied meaningful representation, he is entitled to a new trial").

3 *People v. Bussey*, 6 A.D.3d 621, 623 (2nd Dept 2004); *People v. Fogle*, 10 A.D.3d 618 (2nd Dept 2004).

So, although the courts tell us that we *have* to, they don't really tell us *how* to. What does constitute an effective and thorough investigation? Is a telephone call by counsel to a potential witness sufficient? An internet search? A discovery motion?! This article argues that in most cases, it is *absolutely essential* for an attorney – no matter how skilled or experienced - to have the assistance of an experienced, licensed, private investigator; preferably someone with prior law enforcement experience. A private investigator not only brings a unique and invaluable perspective to a case, but can serve as a powerful investigatory tool in a criminal defense attorney's somewhat limited informational toolbox. Trained eyes and boots "on the ground" can locate and speak with witnesses, uncover facts and clues which law enforcement may have overlooked, and pursue avenues of defense which we, mostly non law-enforcement types, may have failed to even consider. Yet, despite the seemingly endless list of reasons to use a private investigators, it appears that few of us regularly do.

The following charts represent information provided by the New York City Criminal Justice Coordinator's Office pursuant to the author's FOIL request. Chart A represents the total number of criminal defendants referred to members of the Assigned Counsel Plans for the First and Second Departments for calendar years 2008, 2009 and 2010. Chart B represents the number of experts designated as investigators for which County Law 18-b vouchers were submitted by the Assigned Counsel Plan for payment during the same period.

With less than 4,000 private investigators used in approximately 125,000 assigned counsel cases citywide over a three year period – or roughly 3.2% - the numbers seem to indicate that assigned counsel

attorneys are not using investigators to the extent that they should or could be.⁴ This is true despite the fact that the Assigned Counsel Plans in both Departments recognize the importance of private investigators and have implemented relatively simple procedures to obtain the funding to retain one.⁵ Moreover, given the state of the law, even the stingiest judge would think twice before denying

counsel's application for funds to hire a private investigator once a genuine need has been demonstrated. The same generally holds true for CJA matters in federal court.

So, at least in assigned cases where funding is readily available, what explains this apparent aversion to using private investigators? Belief in a predetermined outcome, neglect, unfamiliarity with the procedure for obtaining funds in an assigned case, unwillingness to relinquish control over your cases, a combination of all of the above? Perhaps you simply don't know a private investigator or don't understand how an investigator can benefit your case. Regardless, *none* of these reasons are sufficient to overcome the constitutional mandate to properly and thoroughly investigate a client's case. We fail to do so at our own peril and often, to the client's detriment.

So just how does the defense benefit from the assistance of a private investigator and why does it make good sense to use one? A private investigator is an asset to any criminal defense team. They can free up your time to work on legal matters, locate and speak to witnesses

CHART A

Year	1st Department	2nd Department
2008	23,788	18,897
2009	22,926	19,826
2010	149,908*	18,078

*The number of cases listed here includes the number of misdemeanors and violations that were disposed of at arraignment. In previous reporting years, those cases were not included.

CHART B

Year	1st Department	2nd Department
2008	860	412
2009	885	424
2010	840	497

4 Because statistics are not as readily available with respect to investigator usage by institutional public defenders or attorneys handling private matters, this article generally confines itself to assigned counsel cases. Accordingly, the author can reach no conclusions regarding the extent to which institutional defenders and "private" attorneys are using qualified investigators or whether or not they are being used to a greater or lesser extent than by assigned counsel. However, from experience, I believe it is fair to say that both public defenders and private attorneys – whether due to financial concerns, investigator inexperience, or otherwise – have their own obstacles to overcome to satisfy their constitutional obligation.

5 This is not to suggest that the author believes that the presumed "statutory" hourly rate of \$32 authorized for licensed investigators by the 18(b) Assigned Counsel Plan's "Compensation Rate Guidelines" is reasonable, particularly for investigators with prior law enforcement or other specialized experience. Although routinely denied, when it is appropriate, I regularly request enhanced rates for investigators.

and follow-up on the information they receive, get information from contacts who would never speak to you without being ordered to do so, and evaluate the case from a different perspective, often times pointing out investigative strategies that may not have occurred to you. According to Investigator Claude O'Shea, a Principal at Cadre Investigative Consultants with offices in White Plains and Manhattan, a defense attorney must recognize that the odds are skewed from the start.⁶The Prosecution has most of its case developed from the outset. Witnesses have been interviewed, statements have been taken, identification procedures have been performed, and evidence has been gathered, evaluated and tested. The defense attorney, on the other hand, generally has only the story of the accused, which, as we know, is fraught with uncertainty, to say the least. Metaphorically speaking, the defense attorney is engaged in a poker game with a pair of deuces against a prosecutor with a full house. A practical person would fold; the defense attorney cannot.

Retired from the New York City Police Department with over 20 years of service, O'Shea was assigned to the Bronx Homicide Squad where he was involved in the investigation of over 250 homicides. "It has been said," O'Shea says smiling, "that a person who represents himself has a fool for a client. Similarly, a defense

⁶ The author wishes to express his thanks to Investigator Claude O'Shea for his valuable assistance in preparing this article. I have employed Cadre Investigative Consultants on both assigned and private matters and consider Claude and the other investigators there to be an integral part of my defense team, most recently helping to earn a dismissal of all charges against our client in a Bronx homicide case. See *People v. Ayyash*, 2777-2007, N.Y.L.J., January 27, 2012. Contact Claude at coshea@cadreinvestigativeconsultants.com or see his ad on the adjoining page.

attorney who decides to prepare a case for trial by themselves should assume the same philosophy." It is at this point, O'Shea notes, that a criminal investigator becomes the corner-stone of the defense team. The purpose of the investigator is not to replace the attorney, but rather to become another member of the defense team who brings specialized skills and experience to the table, skills and experience that an attorney often lacks. For example: were proper police procedures employed during the course of the investigation, were identification procedures conducted properly, were witness statements taken and memorialized properly, was the crime scene properly secured and inventoried, or was the scene contaminated, potentially tainting the evidence? These are all areas where an investigator, with particularized knowledge, training, and skill, can assist the attorney in evaluating and defending the case.

In a battle of investigatory resources, the defense is always at a decided disadvantage. The prosecutor has the police, investigators assigned to the district attorney's office, and other municipal resources at their disposal to ensure that they are presenting the strongest, most extensively investigated case. How could a defense attorney, standing alone, expect to stand up to this inequity? Legal skills alone are rarely enough to even the playing field. A qualified and licensed criminal investigator is a necessity for the defense team. "In the end," says O'Shea, "a dedicated attorney and a good investigator are a force to be reckoned with. Your prosecutorial counterpart is using his or her investigators and pushing them hard - I know this because I was one."

Most attorneys are aware of the various pitfalls, including possible removal from the case, inherent in

interviewing and taking statements from our own witnesses. Yet, whether for financial reasons or otherwise, the statistics above seem to indicate that defense attorneys are routinely doing their own witness interviews and investigations. In most cases, this does you and your client a disservice. Perhaps the most well known role of the private investigator is to interview known witnesses or locate and interview witnesses who may have been previously unidentified. "Witness statements can make or break a case," says O'Shea. A skilled interviewer should be able to illicit information from a witness, which, for many reasons, the witness may have been previously unwilling, or unable, to share. In addition to the facts of the case, additional areas should be explored, such as the witness' relationship to the accused, use of drugs or alcohol, level of education, and employment history. If possible, a thorough background check, including criminal history and asset searches, should be conducted as well."

Case-law and newspapers are replete with examples of defendants, many of whom were wrongly convicted, who were denied an effective defense due to an attorney's failure to properly investigate a potential alibi defense, visit the crime scene, or locate an important witness who may have altered the outcome of the case. To truly give meaning to the constitutional mandate to thoroughly investigate our cases, then we must avail ourselves of the services of a qualified private investigator. If we as defense attorneys fail to recognize the importance of an investigator, then we shouldn't be surprised when the court does so as well.

In the end, you should not do a thorough investigation or use the services of an investigator simply because the court says you should;

you should do it because it will benefit you, your client and the case. Your time is better spent working on the legal aspects of the case - leave the investigation to a trained professional. Your client will rest assured knowing that his case is being handled by a competent, professional legal team that is leaving no stone - whether legal or investigatory - unturned. Ultimately, the case results will be better because whether for better or for worse, a thorough investigation provides information, and information allows you and your client to make better, more informed decisions about how best to handle the case. **A**

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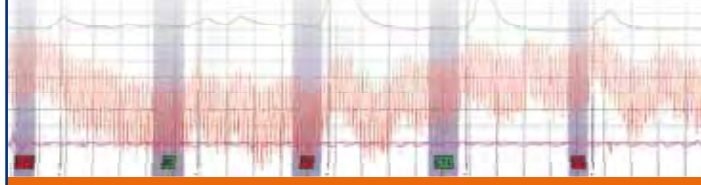
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