Don’t Bring a Knife to a Gunfight

[1]Features
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Every case a criminal defense attorney takes on has the potential to become a gunfight, with the dramatic showdown coming to a head in front of a judge and jury. The defendant faces significant consequences if his attorney has not properly prepared, and unfortunately, this is the reality in many criminal defense cases.

I’m referring to the gross under-utilization of private investigators to objectively review and investigate the facts of the case for the defense.

According to an online article in the *Journal Sentinel*, dozens of Wisconsin defense attorneys routinely worked hundreds of felony cases without ever engaging a private investigator. Seneca Malone was the defendant in the case example, but the article makes it clear that not using private investigators was a common practice. You can read the full article here: shorturl.at/bkT45.
There is no study that measures how many Texas attorneys regularly use private investigators, but a consensus amongst my colleagues put the number at about 35%. This is despite guidance published in the State Bar of Texas? ?Performance Guidelines for Non-Capital Criminal Defense Representation,? which states:

Counsel has a duty to conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. Counsel should, regardless of the client?s wish to admit guilt, determine whether the charges and disposition are factually and legally correct and inform the client of potential defenses to the charges. Counsel should explore all avenues leading to facts relevant both to the merits and to the penalty in the event of a con-vice-tion. In no case should counsel delay a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed.

Considering that 100% of all DAs use investigators, this guidance is particularly meaningful.

Of course, there is Gideon v. Wainwright, 372 U.S. 335 (1963), the landmark case in which the SCOTUS determined it was unfair for an unrepresented defendant to face the combined forces of the prosecutor?s office and police investigators without assistance?which includes independent investigators.

At issue in every case is the quality of investigations conducted by law enforcement and/or the DA?s office. In a nutshell, a LE investigation should accomplish the following:

- Determine if a crime has been committed;
- Identify the person(s) who committed the crime;
- Gather evidence & factually record the details regarding the crime;
- Develop PC to arrest the perpetrator of the crime & make an arrest; and
- Prepare the reports & file the case.

These are different from what the DA?s investigator will focus on:

- Review the results of the LE investigation and the five things listed above;
- Investigate the strength of the case and the ability to prove the facts of the case as seen by LE;
- Investigate the credibility of the officers, witnesses & victims;
- Determine whether LE conducted their investigation as per the law & Constitution;
- Investigate & determine how to charge the case;
- Investigate the state?s role in protecting society & seeking justice for the victim; and
- Investigate the defendant?s background for the punishment phase to maximize the penalty.

As a certified law enforcement instructor, I know that the education and training for police investigators is not standardized. Sure, there are plenty of TCOLE approved courses that cover investigative topics, but the frequency and sophistication of the training investigators receive is dependent on their agency?s budget, training opportunities, manpower requirements, and, to a large degree, their own initiative.

Even if investigators are well-trained, there is still the question of how much actual experience they have with a given offense. How long has the officer been an investigator? What resources did he/she have at the time? How many other cases was the officer working? Was the investigator solo, or did they have a senior/junior partner? There are many good criminal investigators out there, but if a sub-par investigator?s work has never been properly challenged, the defense will never know the difference.

As a former criminal investigator, I admire and respect law enforcement; they have a tough job to do. If I were to suggest, however, that police always conduct objective, professional, and thorough investigations, I would be laughed out of the room. They are human, and therefore make their fair share of mistakes, made possible by a lack of training, experience, or supervision, tunnel-vision, or some other variable. Worse, they
are agents of a system that *hates* to admit mistakes, which makes it difficult for many investigators to concede their own errors. Knowing this, why on earth would any attorney try a case without having an independent investigator?

In my own experience, I have discovered actionable evidence that the state did not properly investigate in almost every case, police manipulation of witness statements, witnesses who committed perjury, relationships between actors that police failed to explore, close analysis of crime scenes to disprove the state’s theory of the crime—just to name a few. These are issues that most attorneys do not have the training, experience, or time to discover on their own.

According to the National Registry of Exonerations, in 86 death-row cases, the causes of wrongful conviction varied:

- 52% Eyewitness Error
- 20% Government Misconduct
- 12% Snitch
- 10% Junk Science
- 9% False Confession
- 38% Other

The statistics are overlapping, as more than one cause may have contributed to the conviction. Notice, however, that other than junk science, there is no scientific test to guard against the rest of these causes. Ergo, the vast majority of wrongful convictions are not due to bad science, but flawed investigations. It also proves that law enforcement can’t be relied upon to go the extra mile, and that’s where independent investigators come in to tell the rest of the story.

An attorney who has never used private investigators may not realize how invaluable they can be, whether at trial, or even better, by ensuring the client never goes to trial. Even in cases where a defendant’s guilt is clear, independent investigation can provide strong support for mitigation in the punishment phase.

As part of the defense team, investigators assist in the evaluation, preparation, and presentation of a defense. That includes any or all of the following:

- Conduct an investigation to uncover reasonable doubt;
- Determine the correctness of the charges by validating/in-validating elements of the offense;
- Conduct a complete initial defendant interview (this should not be done by the attorney);
- Identify and classify prosecution and defense witnesses;
- Identify deficiencies/strengths in witness credibility;
- Locate and interview witnesses;
- Confirm or dismiss an alibi;
- Develop alternative suspects;
- Identify preliminary theory of defense;
- Prepare a timeline of major events;
- Crime-scene examination and analysis;
- Call upon experts; and
- Focus on specific issues.

Let’s be honest, though?it often comes down to money, doesn’t it? Cost is the number-one reason cited by attorneys for why they didn’t hire an investigator. It’s true: Good investigators aren’t cheap, but neither are good lawyers, and the reality is that in the case of a defendant who can’t afford an investigator, the state is responsible for ensuring they have access to independent investigation. In court-appointed cases, no one gets paid what they are worth, but with good record-keeping, attorneys and investigators can still make a living.
In the end, the decision to hire an investigator comes down to a defense attorney’s duty to provide the best possible defense for their client. With that in mind, and given the verbiage in the performance guidelines, failure to conduct an independent investigation is a strong argument in an IAC claim. Every bad case generally has the same two things in common: a flawed law enforcement investigation and a defense attorney who failed to vigorously challenge it.

Do your clients a favor and find a really good private investigator you can count on. Check their background, ask for referrals, talk to other attorneys who have used them, and take the time to understand their capabilities. Not all private investigators are created equal, however, so here are a few things to look for and expect:

- **LE Experience?** Ideally you want someone familiar with the way law enforcement personnel operate. Rules, regulations, policies, limitations, practices, mores, mindset, etc.;
- **Investigative Experience?** You want an investigator who knows how an investigative task should be conducted and how LE conducts this task (interview & interrogation, crime-scene response & processing, report writing, chain of command, chain of custody, use of LE tools, search warrants, arrest warrants, tactical operations & tactics, etc., etc.);
- **Ability to use their experience and tactics like LE does, but in the defense investigation role;**
- **Ability to communicate this knowledge to the defense attorney;**
- **Ability to subpoena witnesses & records as needed; and**
- **Ability to help provide ideas for defense strategy.**

You should ideally have more than one investigator, because you may need different specialties, like cyber-forensics or accounting. Do a few cases with the ones you like, then make it a habit. Without a doubt, you’ll get better results for your clients, and you will have satisfied both the spirit and intent of your duty.

*Daryl Parker received help on this with Billy Meeks, J. D. Spielman, and Trent Forbes, partners in Blackfish Investigations ([4](http://www.blackfishpi.com)), a full-service private investigation firm headquartered in Collin County.*

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