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IAC, Public and Private Practice

Author:

[Robert M. Sanger](#)

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Criminal Justice

By Robert Sanger

*Robert Sanger is a Certified Criminal Law Specialist and has been a criminal defense lawyer in Santa Barbara for over 36 years. He is a partner in the firm of **Sanger & Swysen**. Mr. Sanger is an Officer of California Attorneys for Criminal Justice (CACJ) and is the Co-Chair of the CACJ Death Penalty Committee as well as a Director of Death Penalty Focus and a Member of the ABA Criminal Justice Sentencing Committee.*

IAC, PUBLIC AND PRIVATE PRACTICE

Introduction

Most readers of this publication are aware of the acronym, IAC. It stands for “ineffective assistance of counsel” in the context of representation of people accused of crimes. It is based on the requirements of the Sixth Amendment to the United States Constitution which provides that the accused has a right to counsel. That right is not satisfied unless the counsel is not only present but also effective.

The right to effective assistance of counsel includes the right to have ancillary services sufficient to provide such assistance. Under *Ake v. Oklahoma*[\[1\]](#), the United States Supreme Court stated that the right includes the right to have experts and investigators. Since *Ake*, there has been much litigation, particularly in capital cases, regarding the duty to use such experts to do an effective job. But now it is clear that there is a duty to use an investigator in just about every case, including “garden variety” drug cases and misdemeanors.

In this month’s *Criminal Justice* column, we will consider what this duty to have an investigator means. We will consider the burden it squarely places on each individual lawyer in each individual case. We will also consider the obligations that are imposed

on the governmental agencies, including the County Board of Supervisors and the public, to provide effective assistance of counsel through appointed counsel and the Public Defenders Office.

Standards of Practice Relating to Investigation

In a previous *Criminal Justice* column,[\[2\]](#) we discussed the fact that appointed counsel, including the Public Defender, has the duty to defend a case vigorously and to investigate all defenses. It is not an exception to that duty to say that the office will not provide money for experts or other resources. In particular, we reviewed the case of *In re Edward S.*[\[3\]](#) in which the Court held that that the lawyer assigned to a juvenile was incompetent as counsel where he did not follow up on defenses and employ experts. In this column, we will look at the specific question of whether it is ineffective assistance of counsel - IAC - to fail to hire an investigator.

We remember Paul Drake, often sitting on the credenza behind Perry Mason's desk while the two of them and Mason's legal assistant, Della Street, discussed their case strategy.[\[4\]](#) Drake was in on every case and, whatever the theatrics of the *Perry Mason*[\[5\]](#) television episodes, in each one of them, Paul Drake went out into the field and investigated. Of course, *Perry Mason* was the fictional creation of Erle Stanley Gardner. But Gardner was a real lawyer who practiced in Ventura. Gardner created a group called the "Court of Last Resort" where he got together investigators, forensic experts, lawyers and even a prison warden to review cases where a miscarriage of justice might have occurred. Their work resulted in stunning reversals of convictions. They were cases in which the trial lawyer did not investigate properly. Gardner did not allow that to happen in his fictional accounts.

Since the days of the Court of Last Resort, there have been other advocates for the wrongly convicted. The most famous and most prevalent currently is the Innocence Project started by Barry Scheck and Peter Neufeld and now a feature around the country often associated with major law schools. The common theme is the reinvestigation of cases which were not investigated properly by the defense. The Death Penalty Information Center reports that from 1978 to present, there have been 138 persons exonerated and released from death row.[\[6\]](#) The number of other people on death row who were wrongly convicted will never be known and the number of people wrongly convicted of non-capital cases is probably staggering. The causes of the wrongful convictions include faulty eye-witness identification, jail house snitches, prosecutorial or police misconduct, false confessions and other things. But most wrongful convictions are the result of a combination of factors, including IAC. And, at the core of IAC is the failure of the defense lawyer to investigate some part or all of the case.

The United States Supreme Court in *Wiggins v. Smith*[\[7\]](#) reiterated the constitutional requirement that the defense lawyer not only use an investigator in capital cases but that the investigation be thorough. This requirement applies to appointed and to

retained counsel. The obvious corollary to the enunciated principle of thorough investigation is that defense counsel has to obtain the services of an investigator, and usually more than one, in capital cases. Whether retained, appointed or designated as counsel of record in a capital case, the lawyer must have investigation services. The Court has made it clear that it wants counsel to investigate the first time around and not to leave the matter for reinvestigation later. So, the standards of practice are well established and the real equivalent of the fictional Paul Drake is mandatory these days in capital cases.[\[8\]](#)

Standards of Practice Relating to Investigation in Non-Capital Cases

Few private lawyers or law firms have full time in-house investigators. To the extent that a private lawyer uses an investigator, the investigator is usually hired on an hourly or per-case basis. Appointed counsel often do the same. In some counties, lawyers get together and contract to provide indigent defense services or to provide such services for cases in which the Public Defender has a conflict of interest. Sometimes such contracting lawyers have a designated investigator and sometimes they contract on an as needed basis. Public Defenders generally hire a staff of investigators to assist the lawyers but investigative services are a limited resource which may be allocated on some sort of priority basis.

Judges and practitioners in the criminal courts throughout the state are well aware that there are lawyers who appear regularly and who seldom employ an investigator - some never do. There are other lawyers who employ investigators in a greater percentage of their cases but not in most of them. There are appointed lawyers who individually or as members of a group do not budget for investigators for many cases. There are Public Defenders whose Board of Supervisors has not provided adequate funding for investigators as needed and they, too, have to ration investigative services, sometimes making arbitrary decisions.

The fact is that the individual lawyers handling cases in these situations may fall below the standards of practice. Contrary to what is often happening, it is necessary to employ an investigator in the vast majority, perhaps almost all, criminal cases. It is not sufficient, for instance, for the lawyer to take her or his own photographs of the scene or to rely on a friend of the accused to do so. It is not sufficient to say that the issue at hand can be raised in a garden variety suppression motion, for instance, and then proceed to a hearing to cross-examine the police officers without interviewing all other witnesses present at a stop and search. It is not sufficient for appointed counsel to say that their contract group has limited resources for investigation and that they cannot afford to hire an investigator in certain kinds of cases. And, it is not sufficient for Public Defender offices to say that they can only delegate investigative services to violent felonies or that their lawyers will have to do without an investigator in some cases due to lack of budget.

It is also not sufficient for private practitioners to be retained on criminal cases and to not use the services of an investigator. Our law firm has a full time investigator on staff and, in addition, we contract with a number of other outside private investigators. We take the position that every case, even a garden variety misdemeanor, is a candidate for investigation. There are few cases where there is truly no factual issue on anything and we can rule out investigation. Our firm is not alone in this practice. To have an investigator or investigators available at all times and to be involved in almost every case is now the standard in California for all criminal cases. As we will see, having Paul Drake in on each case is not just a theatrical touch, it is constitutionally required and anything less is IAC.

People v. Charles Thomas Jones

The court of Appeal for the First Appellate District decided a case arising out of Lake County on June 30, 2010, entitled, *People v. Charles Thomas Jones*.^[9] The case had a long procedural history but, otherwise, has all the earmarks of a garden variety drug case. Mr. Jones was stopped in 2006 for running a stop sign at night. This infraction led to the officers deciding he was under the influence and then they located methamphetamine. He was eventually charged in two cases. His lawyer, who was mentioned by name throughout the reported opinion of the Court,^[10] was a member of a group of twelve lawyers that contracted with the Lake County to provide indigent defense services. That group had an investigator. However, the administrators of the group prioritized the use of that investigator primarily for violent felonies. Ultimately the Court found that the failure of this particular lawyer to use an investigator in this case was IAC.

This is not a case where the lawyer simply failed to identify a potential Fourth Amendment violation. In fact, the lawyer brought a motion to suppress pursuant to Penal Code Section 1538.5. This was not a case where the lawyer did nothing to prepare for the hearing. In fact, he went to the scene of the alleged failure to stop and took pictures and he also obtained pictures from a friend of the client. This was not a case where the lawyer failed to present evidence. In fact, at the hearing the lawyer showed the photographs to the officers and the photographs were admitted into evidence. This was also not a case where the lawyer failed to cross-examine the officers. In fact, the lawyer did so and the suppression hearing took a full day.

Nevertheless, the Court of Appeal found that the lawyer's representation failed to meet the standards of practice and that the lawyer failed to satisfy the requirements of competent defense counsel under the Sixth Amendment to the United States Constitution and Article I, Section 15 of the California Constitution. The Court held that it was ineffective assistance of counsel - IAC -- to fail to have an investigator go to the scene and take the photographs and that it was IAC to fail to have the investigator interview the people who were with the defendant, either in his car or behind him, at the time he said he stopped at the intersection.

The court based this on the objective standards of reasonableness as to the practice of criminal law as set forth in *Strickland v. Washington*[11] and then found that the failure to meet that standard caused prejudice. It was not enough for the lawyer to investigate the motion to suppress himself. It was not enough for him to bring in photographs and admit them into evidence. It was not enough to cross examine the officers in a day long hearing. The lawyer was ineffective because he did not employ an investigator to take photographs of the scene and to testify to the significance of the photographs. The lawyer was also ineffective because he did not employ an investigator to interview the witnesses to the defendant's driving.

In so holding, the Court looked to the American Bar Association Standards[12] and, in particular, a Commentary entitled, "*The Importance of Prompt Investigation.*" The court also looked to other texts and case law as well as *Strickland* itself regarding the duty to investigate. The Court lamented the fact that the failure to investigate "places poor people at constant risk of wrongful conviction." [citations omitted] The Court went so far as to note approvingly that class actions are being filed to address systematic deficiencies in the defense of the indigent. The court said that the provision real legal representation for the poor was 30 years overdue.

Here the lawyer had claimed that the group of twelve lawyers he was a part of, which had contracted to provide indigent defense services in Lake County, was only allocated one investigator. He said that they had to prioritize the use of that investigator and it was beyond his control. The Court rejected that excuse and held that the individual lawyer had the duty to either be prepared on each individual case or to not take the case. The full burden of providing effective assistance is on the shoulders of each attorney whether retained, appointed, a member of a group or a member of a Public Defender office. The individual lawyer has a duty to move to withdraw if his or her caseload is too heavy or if he or she does not have the investigative resources. Furthermore, the lawyer has a duty to seek appellate relief if the trial court denies the motion to withdraw. The failure of the county to provide adequate funds for investigation does not excuse the lawyer.

Conclusion

The courts in both *In re Edward S.* and *People v. Jones* make it clear that they are not going to tolerate IAC based on a failure to investigate. That means, unequivocally, that criminal defense lawyers have to use an investigator. There is no excuse that there is a lack of funds. There is no excuse that someone running the program will not provide the resources. It is up to the Board of Supervisors to adequately fund indigent defense and, in particular, to have an investigator available for any and all cases. And it is incumbent on private law firms and retained counsel to spend the money to hire investigators and use them.

But the final responsibility is on the individual lawyer in each individual case. If the lawyer cannot meet the obligation to have an investigator, she or he must move to withdraw and seek appellate relief. This is the standard in California.

[1] 470 U.S. 68 (1986)

[2]

[3] 173 Cal.App.4th 387 (2009).

[4] The original series ran from 1957 through 1966 and starred Raymond Burr, William Hopper, Barbara Hale as Mason, Drake and Street. William Tallman played the ill fated D.A., Hamilton Burger

[5] Theatrical though they may have been, they provided inspiration for no less than Justice Sotomayor to pursue a career in law. Recall her colloquy with Senator Al Franken where she cited Perry Mason for her desire to be a prosecutor, leading to the remark that the prosecutor in the show lost all but one of his cases. See, e.g., the AP story at <http://www.aolnews.com/story/al-franken-makes-perry-mason-joke/573756>

[6] <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>

[7] 539 U.S. 510 (2003)

[8] In capital cases in California, the legislature has provided for funding of investigative and expert services under Penal Code Section 987.9.

[9] Slip opinion, First Appellate District, Division Two, Case Number A126005, file June 30, 2010.

[10] The lawyer's name is mentioned repeatedly in the decision but it is not important for our purposes.

[11] 46 U.S. 668 (1984).

[12] ABA Standards for Criminal Justice prosecution Function and Defense Function
(3d ed. 1993)