

5 Defense Lessons From Prosecutors' Recent Evidence Flubs

By **Anden Chow** and **Jonathan Porter** (August 14, 2024)

With two recent high-profile cases in the headlines involving prosecutors withholding or misrepresenting evidence, it is worth highlighting the takeaways from those cases and what steps white collar defense attorneys can take if they are concerned evidence has been withheld or misrepresented.

This article seeks to highlight those lessons, first by taking a closer look at the two recent cases, and then offering some best practices for white collar defense attorneys to keep in mind.

Case One: Alec Baldwin's Dismissed Charges

Alec Baldwin's much-publicized indictment in New Mexico state court over the unfortunate shooting death of a cinematographer on the set of the film "Rust" was upended on July 12, when the trial judge dismissed all charges with prejudice due to the failure of prosecutors to turn over potentially exculpatory evidence.

The prosecutor in New Mexico v. Baldwin was alleged to have withheld from the defense live ammunition evidence that was in the custody of law enforcement.

According to reports, the prosecutor believed that the live ammunition did not match other live rounds found on the movie set, and therefore had no relevance or value in the case. Based on that determination, the prosecutor did not disclose that the live ammunition had been received.

Moreover, law enforcement is alleged to have inventoried the live ammunition evidence in a separate case file, which was done, according to the defense, to avoid the ammunition showing up on an inventory log that would have been discoverable by the defense.

When the defense learned of the ammunition evidence on the second day of trial, defense counsel moved to dismiss the charges,^[1] arguing that the prosecution's failure to notify them of the ammunition and logging of the ammunition under a different case file was conduct that was "egregious and require[d] dismissal."

First Judicial District Judge Mary Marlowe Sommer agreed with the defense, stating, "The late discovery of this evidence during trial has impeded the effective use of evidence in such a way that it has impacted the fundamental fairness of the proceedings."

With that, the judge ended the trial against Baldwin and dismissed the charges with prejudice. In recent filings, the prosecutor has argued that the judge "misunderstood the testimony," about the ammunition and should not have thrown the case out.

Case Two: Inauguration-Protesting Defendants' Cases

During the 2017 inauguration of former President Donald Trump, police in Washington, D.C., arrested more than 200 people accused of destroying property, blocking traffic and



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fighting with police.

The local U.S. attorney's office decided to charge all those arrested — even individuals who had not engaged in any violent activity — on a theory that they had all participated a conspiracy to, among other aims, incite a riot.

Prosecuting those 200-plus individuals proved difficult. Only 20 pled guilty. Six were acquitted on all charges in the first trial in December 2017. At the second trial, four defendants were acquitted on some charges and the jury hung on the rest of the charges. The prosecutors ultimately dropped charges against the remaining defendants in mid-2018.

Central to these cases was a video surreptitiously recorded by Project Veritas, a group that infiltrated the protestors' planning meeting. Project Veritas edited their infiltrators' covert footage and provided the edited version of the video to law enforcement.

The prosecutor, Jennifer Kerkhoff Muyskens, allegedly then further edited the video to remove certain portions of the footage that revealed the identity of the infiltrating operative who obtained the covert footage, and produced only the further edited version to the defense (1) without identifying that a Project Veritas operative was the source of the video, and (2) without alerting the defense that it was not producing other portions of the video that revealed the identity of the operative.

Counsel for one of the defendants realized the video had been altered and sought discovery about the video, including the identity of the person filming and whether the government made any edits to the video.

The prosecutor allegedly responded, "I decline to provide you any information about who recorded the meetings or the circumstances under which they were recorded." With that, the prosecutor refused to produce the original files, though she acknowledged that redactions were made to protect the recording operative's identity.

Before trial in *U.S. v. Macchio*, the defense filed a motion to exclude the video footage on the grounds that the video had been edited in a misleading way.

The Superior Court of the District of Columbia did not rule on the pretrial motions, and during the 2017 trial the prosecutor represented to the court that defense counsel had been provided "the full entirety of those videos" in discovery, though the prosecutor did finally acknowledge that the source of the videos was Project Veritas.

The defendants in that trial were all acquitted.[2]

After investigating the prosecutor's actions, the D.C. Office of Disciplinary Counsel brought charges before the Board on Professional Responsibility on July 15, alleging violations of the rules of professional conduct.

Best Practices for White Collar Defense Attorneys

What follows are some — though certainly not all — best practices for white collar defense attorneys to consider if they are concerned evidence is being withheld or misrepresented.

1. Know your discovery, and think critically about what could be missing.

The road to the disciplinary review of the prosecutor in the inauguration-protesting defendants' case began with a defense attorney who paid enough attention to video files in the discovery to surmise that portions could be missing.

The road to Baldwin's dismissal began with a defense attorney's careful scrutiny of what physical evidence had been made available for inspection in discovery.

Future defendants' rights to a prosecution that complies with the government's discovery obligations rely on defense attorneys' close attention to detail when it comes to discovery.

To help with that, request that the prosecutor provide a table of contents or index that meaningfully identifies and describes the discovery produced. Some courts' local rules specifically require this, and even when the rules do not, prosecutors have proved willing to do so in some cases.

Though defense lawyers cannot trust that such table of contents or index will be complete or accurate, even an incomplete index can help counsel identify missing evidence.

2. Take all reassurances with a grain of salt.

While the people, the state or the U.S. are all referred to as monolithic entities in case captions, the prosecution of cases remains a human endeavor.

Prosecutors, while mostly well-meaning, are not omniscient. They frequently rely on information and representations provided by other parties, including case agents, paralegals and third parties responding to subpoenas. Along the way, details can be missed.

If something does not feel right, do not let mere reassurance from the prosecution deter you from demanding and conducting further diligence, even if it means a delay in proceedings.

In the Baldwin case, law enforcement investigators had decided years earlier that the live ammunition did not match the ammunition that resulted in the shooting death, and filed it away under a different case number.

Based on that decision, prosecutors incorrectly represented that they had turned over all available evidence. That was at odds with information defense counsel had learned through other sources, and so Baldwin's counsel focused its cross-examination of witnesses to establish the truth.

3. Make a record.

Ask explicitly if evidence has been destroyed or altered. If the prosecution provides verbal reassurance that the evidence you suspect is missing does not exist, seek to have the representation memorialized in a written communication from the prosecution or in a court transcript.

Defense counsel for the inauguration defendants repeatedly asked the prosecutor to make statements on the record regarding the authenticity of the video evidence turned over.

While it appears that this did not change that prosecutor's approach, the pressure of memorializing the representation will often persuade a prosecutor to double-check their sources and perhaps uncover the information you seek. And, without a record, defendants

are left with a difficult path to remedy improper situations down the road.

4. Request and review source data.

In many white collar cases, the data involved in the case is voluminous. There exists a powerful urge to rely solely on seemingly reliable summaries of that data — agent affidavits and charts, expert reports, grand jury presentations — but the answers sought often lie in the source data underlying those summaries.

The defense is entitled to that data, and it should make sure it is included in the discovery. The defense should also ensure that the prosecutor has produced the data in a way that identifies the data's authors and custodians.

Once in possession of source data, defense attorneys should ensure that the metadata supports the prosecution's theory of the evidence. This depends on the nature of the data, but often metadata can be used to check whether the author or custodian is truly who the prosecution claims, and whether the document or data in question was created at a time that fits with the prosecution's theory.

For example, access to the metadata underlying the videos turned over in the case of the inauguration defendants might have showed that the final edit date was after the recording allegedly took place.

5. Look at the bigger picture.

If it turns out that certain evidence has been withheld or misrepresented, consider whether it is strategically more effective to move to suppress the evidence in advance of trial, or to save the issue for trial, when it can be used on cross-examination to demonstrate the unreliability of the evidence and investigation.

And this consideration should include what larger implications such deficiencies may have besides just the admissibility of that specific piece of evidence. Further relief may be justified.

For example, were any representations regarding the withheld or misrepresented evidence made to a magistrate judge in seeking approval for legal process to obtain other evidence? Were any representations regarding the withheld or misrepresented evidence made to the grand jury in seeking an indictment?

In communicating concerns to the court, defense counsel should learn from the approach of Baldwin's attorney to frame the issue as one that is not harmless, but rather is tied inextricably to an articulable theory of the case that prejudices the defendant.

Focusing the court's attention on specific representations by the prosecution, and the harm caused, will put the defense in a position to receive the remedy requested.

Conclusion

In sum, defense attorneys can help protect their clients from evidentiary mishaps — whether intentional or not — by proactively considering the possibility that evidence is missing or misrepresented.

The Baldwin and inauguration-protesting prosecutions show that defense counsel must

remain diligent at all stages of factual development to ensure that defendants are protected against injustice when it comes to evidence provided in discovery.

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[1] assets.law360news.com/1857000/1857611/baldwin%20motion%20to%20dismiss.pdf.

[2] See *United States v. Macchio et al.*, 2017 CF2 001183, et seq.