

CONTINUING LEGAL EDUCATION
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Cross - Examination in the Narcotics “Buy and Bust” Case

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CROSS-EXAMINATION IN THE NARCOTICS "BUY AND BUST" CASE

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"The battle is won before it is fought." Sun Tsu

I. Concepts of cross-examination in the narcotics cases- Cross examination is a situation of "crisis". There is both danger and opportunity.

1. Conduct cross-examination around your theory of the case. You must have direction in your cross-examination.
2. You testify, they verify.
3. It's not a battle between you and the police officer, it's a battle for information.
4. Cross-examination isn't one big thing, it's a lot of little things. You don't win a war, you win territory.
5. It's not the facts that count, but how the jury feels about them. If you destroy the police officer's credibility, facts are meaningless.
6. Look for the hole, not the donut.
7. Tell your story. Be visual. Be concrete. Cross-exam to the probabilities.
8. Sincerity is key. Stay in character--from voir dire to summation.

II. Establish Theory of the Case- "A true victory can only be won with a strategy." Sun Tsu

1. Frame-up.
2. Mis-identification.
3. Frame/Mis-identification.
4. Agency-Not an affirmative defense.
5. Entrapment-an affirmative defense.

III. Examine Police Reports. "One container of the opponent's food is the same as twenty of your own." Sun Tsu

1. Buy report, complaint-61, on-line worksheet, TAC plan, expense report, vouchers, PRBM, DA write-up, arrest report, vouchers, lab report, memo books, felony complaint, buy corrob report (ghost), over-time sheet (Sgt.), DAR's, grand jury testimony.
2. Errors in reports may point the way to your theory of the case.

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IV. Suppression Hearing- "...as you plan your strategy gather your information." Sun Tsu.

1. Did you make written notes of U/C's transmission?
2. Where was the back up team located?
3. How much time from U/C's transmission to the arrest of the defendant?
4. Did you arrest defendant?
5. Did the defendant run, throw, hide resist?
6. Does the defendant live in the area? Work in the area?
7. What did the defendant have on his person? Beeper, money, weapon, drug slips, drugs.
8. Did you search for stash? Search for PRBM.
9. Were there other people on the street? Describe.
10. How many times were you in the area for other buys? Ever see the defendant before?

V. Voir Dire 'Those who have direction can arouse like changing water.' Sun Tsu

1. State theory of your case.
2. Explain the necessity of your cross-examination. Cops who are lying won't readily admit it. If lengthy... prepare them for it.

VI. Opening "Those who cannot triumph should defend, those who cannot triumph may attack." Sun Tsu

- State theory of the case.
- "I will prove to you by my cross-exam that the officers aren't truthful, and/ or are mistaken."

VII. Cross-examination topics for the undercover officer

"An artful strategy must be supported by a thousand swift vehicles." Sun Tsu

"Attack where they are unprepared. Appear where least expected." Sun Tsu

1. U/C Background- How long a cop? Volunteered for U/C. Arrests before narcotics assignment. Arrests after. How many buys total? How long with team? How many buys with team?
2. Promotions - Promotion to detective isn't civil service. Many factors. Arrests are one factor.
3. Training for fieldwork. Equipment- Kel, Nagra, dusting powder, fingerprints, telephoto camera's, photo surveillance, vans, video camera's.

Role playing- Body language (drug buyer), no staring, deception, street talk, looking down.

4. The concept of "ghost"- Purpose of ghost is for your safety. Ghost can transmit a running narrative. Ghost is for corroboration.
-Ghost duties as per manual.
5. Trial prep of the U/C- Memorize notes. Look at jury. How many times have you discussed the facts of this case? (G.J., Several different ADA's.) How many times at trial ADA's office? When? Who was present? ADA take notes? (Memory Differential) ADA prepare you for cross-examination? How? What team members were present? Team effort. Did you go over your court identification? My cross-examination.
7. Pre-buy meeting- TAC plan, equipment. How many team members? -duties, supervisors, ghost, weather. (Jacket-Pockets). Did you have your ID in your pocket? Your Badge? Why no recorder?
8. The Buy- Only "yes" or "no." (Details of buy enhance U/C's credibility.) Transaction can usually be measured in seconds, ^{seconds} Few words spoken. U/C watching his 'back.' U/C looking at hands while giving PRBM. U/C ^{looking at} sellers hands, not looking at sellers face.
 - A. Id Cases - U/C looking at ground. Playing a role. U/C doesn't want to look suspicious. U/C doesn't hang around.
 - B. Frame-Up- You've been searched by police on the street. Was this an end of tour buy? (Check DAR.) Arrested wrong man. Too late to change (civil suit.)
9. The 'Set' - Put many people on the 'set.' Describe them. Residential-commercial neighborhood. Bus stop. Subway. Hang outs.
10. PRBM on defendant-same brand drugs on defendant - Drug buyers get PRBM change. Drug buyers purchase same brand drugs as U/C. Working people buy drugs also.
11. In the U/C car post buy- Did you write description down? How many buys that day? Lost subjects. How many descriptions were you walking with? Did you write any of them down? Was paperwork for all subjects ^{done} in Pct? How many hours after 1st and last arrest?
12. Arrest of Defendant- U/C not present. Mistaken Identification. Generally, lengthen time from buy to arrest. Trace U/C's steps from 'set' to car.
13. Drive-by - Defendant surrounded by team (suggestive). U/C couldn't get too close..safety... Night, rain, snow, lightning... etc. Car moving, U/C driving. (Mistaken ID)

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14. Post buy meeting -
 - Paperwork- after defendant's arrest (Defendant's name on buy-report).
 - Description filled out with defendant in precinct.
 - DAR's match. Cooperative effort, time keeper assigned.
 15. Sign & Seal -
 - Many witnesses for sign and seal none for buy.
 16. Fingerprints-
 - Latent unit down the hole from chemists.
 17. Overtime-
 - Holiday's coming? Overtime only with arrests.
 18. Many buys-few trials Police do what they want-don't expect to be reviewed. Don't expect to testify. All cases similar. How can they remember any particular case?

VIII Topics for cross- Arresting Officer - "Those who know how to challenge and how not to challenge will triumph." "When strong appear weak, when weak prepare strong."

1. Procedures- Same every case. This case is one of many hundreds. How can you remember this case.
2. Team- Brotherhood. How long was team together? Arrest differential (before vs. narcotics assignment). How many team members present?
3. Pre-Buy Meeting- They know where they are going? TAC plan (designated locations), equipment. Complaints from community- dirty areas and anyone in them. Designated A/O. PRBM (no time/stamp). Equipment given out. (Check the TAC plan. Useful equipment?)
4. On the set - Location, number of cars, black/hispanic/women officers who could be on the street, ghost, equipment used. Roof surveillance, panel truck, binoc's. (ob sale)
Many police officers working. No one doing anything.
5. Transmission of U/C's description - No contemporaneous writing (fear of memorializing errors), no tape recording. Many men, many pens, no paper. Didn't know if any would be arrested immediately. Lost subjects (walking around looking for people with no written description.!) Your purpose is to make the case as strong as possible.

6. Arrest - Defendant didn't run, didn't throw, didn't hide, didn't resist. Defendant in targeted area. Everyone on 'set' is suspect. Search for stash, PRBM. Many officers available. No one did anything. Generally, extend time 'interval' from U/C transmission to arrest. (Contra, defendant had nothing on him.)
7. Search of Defendant - No witnesses. How many team members present. The most important moment.
8. Trip to Pct - Tossed in van with others. Driving around collecting people.
9. Pct - All paperwork done after buy. A/O spoke to u/c (gave name to u/c). DAR's are the same. Wrote description of defendant with him in front of you.
10. Photos - Taken for trial vs. none taken at time of buy. After the fact.
11. Diagram - Use it for your purpose.
 - Have A/O mark location of other team members, Sgt., ghost. (He won't be able to.)
 - Show lost surveillance opportunities in diagram.
 - Show exits from "set" on diagram.
12. Time/Stamp
 - If none - why? Office time stamp available.
13. Habits of sellers vs. defendant's action - sellers use look-outs. Police cars stick out.
 - Sellers leave area. Get rid of PRBM. Don't hold drugs.
 - Who left block after U/C exited set? Officers don't know.
 - Defendant would have opportunity to get rid of PRBM. If U/C says other buyers present.
14. PRBM back to Fund - Why aren't they holding onto all evidence? Unlimited resources NYPD. (Number of officers times 8 hours of salary.)
15. Overtime - Only with arrests. Holiday's coming?

IX. When to End Cross-Examination "Once a challenge is executed, if triumph is prolonged, the strategy becomes dull and the vigor dampened." Sun Tsu

Cases and Quotes

“Fear them not therefore; for there is nothing covered, that shall not be revealed, and hid, that shall not be known.” **Mathew 10:26**

1. “The age old tool for ferreting out truth in the trial process is the right to cross-examine. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.” Perry v. Leake, 109 S.Ct. 594, 488 U.S. 272 (1989).
2. “Cross-examination is the greatest legal engine ever invented for the discovery of truth.” 5 J. Wigmore, Evidence sec 1367 (J. Chadbourne rev 1974).
3. “Cross examination is the principal means by which the believability of a witness and the truth of his or her testimony are tested.” Davis v. Alaska, 415 U.S. 308 (1974).
4. “Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness’ testimony at just the right time, in just the right way.” Perry v. Lake, 109 S.Ct 594, 601, 488 U.S. 272 (1989).
5. “No permission or foundation is needed for a lawyer to write on a blackboard as the examination proceeds, so long as what is written is drawn from either a proper question or a proper answer.” Siemer, Tangible Evidence: How to Use Exhibits at Trial (2nd ed. 1989).
6. “In weighing testimony, the fact-finder is not required to credit a particular fact testified to by...witnesses. The inherent probability or improbability of such a fact is to be tested by the totality of circumstances surrounding the occurrence as well as by the ordinary laws that govern human conduct. Believable testimony must have the ring and flavor of credibility, and the latter ‘involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.’ “ Carbo v. U.S. 314 F 2nd 718.

“In some cases police testimony, like other testimony, will simply be too weak and too incredible, under the circumstances, to accept... Sometimes it is possible to disprove testimony as a matter of logic by the uncontradicted facts or by scientific evidence... But **the doctrine of inherent incredibility** does not require such positive proof. It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge. Our task is a technical one. It

has nothing to do with truth in the abstract. The officers testimony may be true but we cannot give it effect... without disregarding the ordinary laws that govern human conduct." Jackson v. U.S., 353 F. 2nd 862.

7. "The principal purpose of cross-examination [is] to challenge whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." Ohio v. Roberts, 448 U.S. 56, 71 (1980).

8. "If [a lawyer] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course....Undoubtedly there are some limits which defense counsel must observe but more often that not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying." United States v. Wade, 338 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

9. "The less people know, the more stubbornly they know it." Osho; "A false conclusion once arrived at and widely accepted is not easily dislodged, and the less it is understood, the more tenaciously it is held." The Law of Conservation of Ignorance, Georg Cantor.

10. "The court should refuse to credit testimony that has all the appearance of having been patently tailored to nullify constitutional objections." People v. Garafolo, 44 AD 2nd 86 (1974).

11 "In criminal proceedings, it is well-settled, but oftentimes misunderstood, that a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct testimony." People v. Blackwell, 490 NYS 2d 457, People v. Kennedy, 420 NYS 2d 23.

Dear Assistant District Attorney

In the case of People v. _____, Indictment
No. _____ please provide me with the following
police reports concerning the Undercover Purchase of
Narcotics:

Arrest Report
Buy Corroboration Report
Complaint Report
Complaint Report Worksheet
DA's Write-up
Daily Activity Reports
DD5's
Defendant's Statement
Expense Report
Expense Voucher
Field Test Report
Lab Report
Line of Duty Injury Report
Memo Book Entries
Miranda Warning/Card/Sheet
Observation Sale DD5
On Line Booking System Arrest Worksheet
Overtime sheets
Photocopy of PRBM
Prisoner Property Envelope
Property Clerk Vouchers
Report of Photographic Equipment Used
Report of Recording Devices Used
Request For Departmental Recognition
Scratch Copy of Complaint Report
TAC Plan
U/C Buy Report
U/C's handwritten notes

The People's Rosario obligation extends to
material in the custody of the NYPD but not in the actual
possession of the District Attorney's Office. People v.
Rangelle, 69 NY2nd 56(1986)

Date:

Thank You,

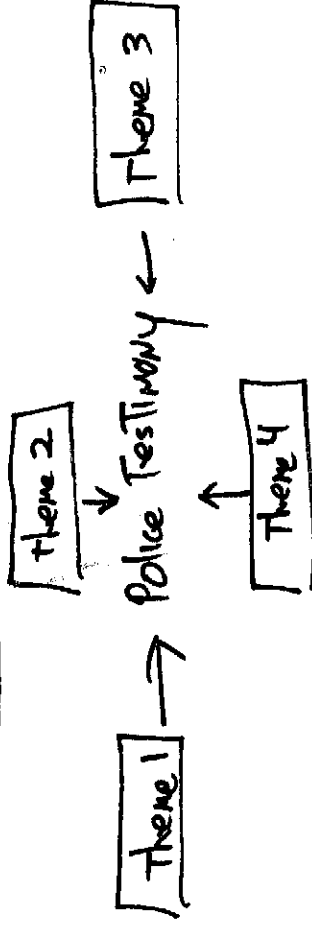
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Theory of Defense - Frame-up / MIS ID - INNOCENCE

STRATEGY - Police NOT CREDIBLE

TACTICS - Attack from the 4 directions

MANEUVER - Goal oriented Chapter Cross-Examination



Theme 1 - Police DON'T USE EQUIPMENT TO GATHER EVIDENCE

- A. Recording - K&L
- B. Photographic - Telephoto
- C. Surveillance - video, audio
- D. Fingerprint
- E. DUSTY POWDER
- F. CONSUMER ELECTRONICS - cell phone, IPOD
- G. VANS.

Theme 2 - The Police DON'T WANT WITNESSES

Police DON'T WANT WITNESSES

- A. The Sale
- NO SHOT
- NO B/L'S
- B. The Arrest
- C. The Search
- DRUGS
- PRBM

Theme 3 - The Police Are LAZY, INCOMPETENT AND SUSPICIOUS, ROUTINE

- A. No writing of description
- B. Don't get good look at seller-fast
- C. Drive-By id is suggestive - cops
- D. 'set' wasn't searched - supports, etc slash
- E. Comparison to chaotic photos
- F. Window dressing - sign + seal - diagrams at trial
- G. 4c Training Deceiver
- H. Arrest incentives - \$, defective
- i. Conflicting Reports - some descriptions
- J. Preparation in Dis office
- K. PRBM fact to FUMP - They bring EVID
- L. NO TIME STAMP ON PRBM
- M. 100% of descriptions - ALL SIMILAR

Theme 4 - The Defendant WAS NOT INACIA of Seller

- A. No Running, throw money
- B. No seller call
\$ drugs, weapons, cell phone
- C. Defendant NORT
His home in only
Neighborhood.

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