DEFENDING AN UNWINNABLE CRIMINAL CASE

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Wednesday, June 12, 2019
10:40 – 11:40 a.m.
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Galt House Hotel
Louisville, Kentucky

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Kentucky Bar Association

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DAVID F. FESSLER is the Senior Partner and Founder of Fessler, Schneider & Grimme where he focuses his practice in the areas of personal injury, business and corporate law, wills and estates, civil litigation and U.S. federal criminal law. Mr. Fessler earned his J.D. from the Salmon P. Chase College of Law in 1996. He has been a member of the Criminal Justice Act defense attorney panel in the Eastern District of KY since 1987 and served as Federal Court (EDKY) Divisional Representative of the Criminal Justice Act Committee from 2008-2014. Mr. Fessler is the City Attorney for the City of Bellevue and serves as President of the Bellevue Education Foundation. He is a member of the Northern Kentucky and Kentucky Bar Associations as well as the Kentucky Justice Association. Mr. Fessler was voted "10 Best Attorneys in KY" in 2017, 2018 and 2019 in the area of Personal Injury for exceptional client service by AIPIA.

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DAVID HOSKINS was born and raised in southeastern Kentucky. After obtaining his B.A. from Davidson College in 1981 and his J.D. from Wake Forest University in 1984, he returned to Corbin where he has practiced law ever since. From 1984 to 1986, Mr. Hoskins served as assistant county attorney for Whitley County, Kentucky. In 1987, he found the area of the law that most interested him – criminal defense. Since then, he has successfully defended hundreds of persons in the state and federal courts of Kentucky. Mr. Hoskins is a life member of the National Association of Criminal Defense Lawyers and the Kentucky Association of Criminal Defense Lawyers. In 2012, he served as president of the Kentucky Association of Criminal Defense Lawyers. Mr. Hoskins has also served as an instructor and leader of several continuing education programs sponsored by the Kentucky Association of Criminal Defense Lawyers and the federal court for the Eastern District of Kentucky. He is active in civic affairs, having served as president of the Greater Corbin Chamber of Commerce, president of the Corbin Rotary Club, member of the 34th Judicial Circuit Judicial Nominating Committee, and as an elder of the Corbin Presbyterian Church.

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LEE METZGER is a partner with Cetrulo, Mowery & Hicks in Edgewood. He is a member of the Criminal Justice Act Panels for the Eastern District of Kentucky at Covington and the United States Court of Appeals for the Sixth Circuit, and regularly defends people accused of federal crimes. He also defends clients against felony charges in state courts in Kentucky, Ohio, and Indiana. Mr. Metzger presently serves on the KBA YLD Executive Committee as the Sixth District Representative. He is a graduate of the University of Kentucky, and of the Notre Dame Law School.

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PATRICK NASH represented defendants in criminal matters for two decades before teaming with Brandon W. Marshall and forming Nash Marshall, PLLC in 2012. His practice focuses on complex criminal defense, with particular emphasis on federal matters. Mr. Nash is the current coordinator of all attorneys in the Eastern District of Kentucky who contract with the Court to provide defense services for indigent defendants. He is a member of the United States Courts' Defender Services Advisory Group, the United States Court of Appeals for the Sixth Circuit's Advisory Committee on Local Rules, and the Sixth Circuit's Committee on Pattern Criminal Jury Instructions. He has represented an array of high-profile defendants, public officials, attorneys, physicians, and professionals of all types accused of various forms of malfeasance. Mr. Nash frequently organizes and presents continuing legal education seminars for federal criminal practitioners. He is also a recurrent speaker at the University of Kentucky College of Law, lecturing on criminal law topics. He is a graduate of Cornell University and the University of Kentucky College of Law. Before going into private practice, Mr. Nash was a law clerk for the Honorable Henry R. Wilhoit, Jr., United States District Court Judge

A criminal case seems unwinnable when your client has clearly committed a crime and the government has constitutionally obtained the evidence to prove it. Frankly, we shouldn't be winning those cases, absent some legal defect in obtaining the evidence, in the pretrial procedure, during the trial, or at sentencing. Our legal system is designed to discover the truth. An outcome based on the truth is a just outcome.

By practicing long enough – or, perhaps more realistically, by practicing for even a very short time – every criminal defense lawyer will represent a client in an unwinnable criminal case. Sometimes, the facts are against you. Sometimes, it's the law. And in many instances, perhaps more often than not, it's a combination of both. So how can you effectively provide the assistance of counsel to an accused person in a case that is (or seems to be) impossible to win?

I. REMEMBER THAT YOUR JOB IS NOT NECESSARILY TO WIN AN ACQUITTAL

Were it otherwise, you would be deemed to have "failed" every time a client is convicted or pleads guilty, which certainly isn't the case. Rather, your job is to properly advise your client, and to defend him or her to the best of your ability.

II. RE-DEFINE "WINNING"

Many lawyers are Type A, competitive sorts. We are used to having a winner and a loser, like in baseball or basketball. Do not approach your defense work with the same mindset. Criminal law is not a sport. While there are certainly cases where an acquittal or dismissal is a potential outcome, in many others, none of the realistically possible outcomes are particularly attractive. Picture, for example, the drug trafficking case where the government has constitutionally obtained evidence against your client of 10 controlled buys, supported by audio and video surveillance, with no chain of custody issues and the drugs have been appropriately tested by the crime lab, and there are multiple recorded confessions from your client after he was Mirandized. In such a case, your job may be more about doing damage control, rather than winning an acquittal. Can you avoid mandatory minimums? Can you make a persuasive sentencing argument to get a sentence lower than the maximum? Avoiding a mandatory minimum or obtaining a sentence well below a maximum when your facts are particularly bad should fall into the category of a "win."

III. ADOPT THE MINDSET THAT NO CASE IS UNWINNABLE

This strongly relates to the second point. There may be cases where a dismissal or acquittal is impossible – or may appear to be impossible – but that doesn't mean you can't obtain a good result for your client.

IV. BE FRANK AND HONEST WITH YOUR CLIENT ABOUT HER CHANCES OF WINNING AN ACQUITTAL

Your business card says ***lawyer***, not ***magician***.

V. ASK YOUR CLIENT WHAT HE THINKS THE DEFENSE SHOULD BE

He often has a better understanding of the facts than you do – after all, it's his life – and can point you in the direction of factual defenses of which you may not have otherwise been aware. In addition, asking him what he thinks his defense should be may make him more realistic about some of the bad facts.

VI. RESEARCH THE LAW

We can file this under "Duh." But in many instances, we can become complacent. We think, "I've handled this type of case before…" and then fail to research the statute and pertinent case law. But what if there is a recent opinion describing the viability of a defense that was not available the last time you researched the crime your client is charged with? What if the statute has been amended? You do a disservice to your client by assuming that you know what the law is, rather than researching it anew in each case.

VII. BOUNCE IDEAS OFF OF OTHER LAWYERS IN YOUR OFFICE

Sometimes, a case might seem unwinnable just because we've gone too far into the weeds and have overlooked a critical defense. Asking for advice and learning from other lawyers makes us all better practitioners.

VIII. TAKE ANOTHER LOOK AT THE FACTS

Sometimes defenses are not apparent to us at first blush because we don't have all the facts as we speak with our client for the first time or review the discovery materials. Once you have a more complete picture of what the evidence is, you are in a better position to assess weaknesses to attack.

IX. NEGOTIATE!

If your case is unwinnable, your best alternative may be to negotiate the best possible alternative to a conviction at trial. To effectively negotiate, you need to know – and have a good relationship with – your prosecutor. The best way to do this is by (a) being courteous and kind, (b) making serious proposals, and (c) actually trying cases against them from time to time.[1] You tend to get better offers if you're known as a person who will actually try the case, rather than fold at the first plea offer that comes your way.

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[1] Note that it is the client, not the attorney, who ultimately gets to decide whether to go to trial. *McCoy v. Louisiana*, 584 U.S. ____, 138 S.Ct. 1500 (2018) ("Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal").

X. DON'T GIVE UP. EVER.

Sometimes the very best thing you can do for your client in an unwinnable case is to try the case. In some cases, the facts are just bad and the client knows the likelihood of acquittal is slim to none (consider, for example, the case carrying a mandatory minimum of life imprisonment even with a guilty plea). Remember, even in cases where you do not have a strong theory of the case, you can always fall back on the defense of, "We don't have to prove anything – the burden is entirely on the government." Make your jabs at the government's proof where possible, as they never have a perfect case.

XI. IF YOU DO TRY THE CASE, FOR GOODNESS SAKES, INSIST ON A JURY

If your client expresses a desire for a bench trial, do your best to talk her out of it. You only need to have one juror side against the prosecution to avoid a conviction. Perhaps a juror is persuaded by your client's defense. Perhaps the juror has something in common with your client and feels sympathy for her. Maybe the juror has had a negative experience with the justice system before. Maybe the juror just hates the government. Whatever the cause, even in an unwinnable case there is the chance, however slim, that a juror will vote against a conviction for a reason wholly unrelated to the pertinent facts of the case. Jurors are wild cards. Judges aren't (for the most part).

XII. CONSIDER THE APPEAL

Bad facts and bad law do not guarantee a flawless trial. Just ONE error in the trial, or in the court's rulings in the pretrial motions, can result in a reversal on appeal. Unwinnable cases may require more, not fewer, defense motions and objections. Give your client as many opportunities for appealable issues as you can. The facts will be largely determinative of the outcome of the trial; but the court's procedure and rulings will largely determine the outcome of the appeal.

There are several techniques used to win "unwinnable" cases with honesty and integrity. Of course, they all take hard work, skill, sophistication, a deep knowledge of the law and an intimate understanding of human behavior. Just because these techniques sound simple doesn't make them easy to apply:

1. **Elbow grease** – good ole' fashioned hard work. So often the other side presents frivolous and outlandish claims. While the natural tendency is to become overwhelmed and frustrated and to just start sputtering apoplectically, the better reaction is to take a deep calming breath, and start cataloguing the evidence that refutes the other side's claims. This often requires time and perseverance, a willingness to leave no stone unturned and to even, on occasion, go "dumpster diving" to gather and accumulate the evidence that will demonstrate to the Court the other side's dissembling.

2. **Develop a compelling "theory of the case"** – this is likely the hardest technique to master, summarize, or explain. Entire books and chapters have been written on it, and great lawyers have devoted years of their lives to master it. Each side of the controversy always has a "story" or a "narrative." The side whose narrative the Court [or jury] "buys" into, will win. It takes skill and a deep understanding of human behavior (social and psychological) to develop a narrative that is consistent with the facts and that leaves the Court with the compelling feeling that there's an injustice here that needs to be remedied. Have you ever heard someone say, "I can feel it in the gut, but I can't explain it?" A great trial lawyer will find the words to make those feelings come alive, and convey the injustice the client feels . . . . It's that ability to take a feeling of injustice and put it into words, a logical, emotional, and legal construct, that allows it to be transmitted to others and move them to rectify your injustice.

3. **Rehabilitate your client** – many people have weaknesses and shortcomings that are harmful to their legal claims [or defenses]. Often a client can change and improve and thereby improve their ability to succeed in Court.

4. **Legal *jiu jitsu*** – *jiu jitsu* differs from many other martial arts in that the practitioner uses the attacker's own force against the attacker. Instead of resisting or counterattacking, the defender usurps and redirects the attacker's momentum and power, and uses it to defeat the attacker. Judge Ralph Adam Fine, in chapter 9 of his excellent book *The How to Win Trial Manual* ("Use the Bad Facts to Your

[2] https://thenewyorkdivorcelawyers.com/resources/how-to-win-the-unwinnable-case/

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Advantage"), describes how the government used this technique in the John Gotti criminal trial, when it proffered the testimony of Sammy "the Bull" Gravano. Sammy the Bull was one of Gotti's murderous henchmen, and the government knew that the defense would attempt to destroy his credibility by pointing out all of his own dastardly deeds. To counter the defense, the government readily admitted that Sammy the Bull was a cold-stone killer but argued that he was still a patriot. Though he was in cahoots with Gotti, when he heard Gotti betray and criticize the United States during Operation Desert Storm, he turned State's evidence against him. By framing it this way, the more mud the Gotti team would sling on Sammy the Bull, the worse Gotti himself would seem, to have Sammy the Bull turn on him.

5. **Adjust your sights** – sometimes the way to win is not to ask for the whole pie, but just a piece. Determining realistic achievable goals – goals that can be obtained after hard work, developing a wise legal theory, and presenting favorable facts in a powerful way – goals that may be a stretch but are not impossible, is the way to snatch victory from the jaws of defeat.

6. **Negotiate** – of course, a good way to win the unwinnable case is to negotiate it away. By negotiating you retain control over the resolution. And if you have "bad facts" that will sink your case in Court, the best course of action may be to make the other side an offer they can't refuse.

Of course, **there are no guarantees!** Litigation is inherently unpredictable. There are so many moving parts, so many personalities, so many facts that clients "forget" to tell their lawyers about, and so many judges with different views, that no lawyer can give any client an iron-clad assurance about any result in a particular case. And that's just another reason why negotiating a resolution is a safer bet, because it allows parties to determine their own fates.

WHY TRY THE UNWINNABLE CASE[4]
Scott H. Greenfield, Simple Justice Criminal Defense Blog © 2007
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When I try a case, it's not because I enjoy doing so (though I do) or that I just want to tweak the government's nose. I try because I must. I try because I have no choice.

I go to trial because my client tells me he is innocent and wants his day in court. I will give it to him, after fully informing him of what that means.

I go to trial because the government has left my client with no choice but to try the case. This is typically because the plea offer is horrible, leaving the defendant without options. My job is to fulfill my clients' needs as best I can, given the circumstances. Sometimes, it looks like the case cannot be won, but the defendant, after being fully informed of the options and recognizing that there is no option that he can live with, says, "do it." And I will.

But I've never tried a case just to screw with the government. Even when the case is unwinnable, it is never my purpose to exact a cost from the government if they want to put my client in a box. [Other commentators] mudd[y] the waters by using the phrase "costly and difficult," but it's not clear what [that means]. If it means that I'm not going to roll over and die because it would make the government's job easier, then I agree. If it means that I'm just going to make their life more difficult for its own sake, then no.

When trying the unwinnable case, the potential for prosecutorial screw-up is my primary focus and greatest hope. And with surprising frequency, prosecutors don't disappoint. Between the various tentacles of the law enforcement-prosecutorial complex, there are so many opportunities for errors that I never dismiss that potential. I remain keenly aware of any opening to exploit. Because of this heavy emphasis, I find things when others do not. And it doesn't hurt to see potential openings and then do what I can to "lend a hand" to a prosecutor or cop who may elect to take a shortcut or two.

Is this a cynical criminal defense lawyer playing the system for all it's worth? Well, I guess. If you want to make it sound pejorative. If you're the defendant, or spouse, or child, or parent . . . you would think differently. A more useful perspective would be to expect everyone, including those fine public servants who know that their paycheck will come every other Friday as long as the government continues to have the power to tax . . ., to do their jobs. If they do, then my eagle-eyed expectation of error is for naught.

So the unwinnable case never really exists in my world, or at least not in my head. While cases may appear unwinnable from a neutral perspective, assuming *arguendo* that everything happens the way it should and the trial proceeds flawlessly, I would be incapable of trying a case if I did not believe that at some point, at any moment, whenever I least expect it, something will happen that will let me blow the prosecution out of the water.

And that's why I try the unwinnable case. Like I said, I try it because I must.

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[4] https://blog.simplejustice.us/2007/12/22/why-try-the-unwinnable-case/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

ELECTRONICALLY FILED

CRIMINAL ACTION NO. 15-CR-02-ART-CJS

UNITED STATES OF AMERICA **PLAINTIFF**

vs.

EDWARD DARKO AGYEMANO

DEFENDANT

****

NOTICE OF DEFENSE

****

Comes now Defendant, Edward Darko Agyemano, by and through counsel, and hereby gives notice that he intends to raise the Defense of Justification as set forth and/or defined in the Sixth Circuit Pattern Jury Instructions 6.07. Said defense and evidence supporting said defense will be mostly consistent with evidence presented in the previous Trial (Case No. 14-cr-20) wherein the Court allowed said defense and a jury instruction therefore.

Respectfully submitted:
/s/ David F. Fessler, Esq.
FESSLER, SCHNEIDER & GRIMME
14 North Grand Avenue
Fort Thomas, Kentucky 41075
(859) 291-9075

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

ELECTRONICALLY FILED

CRIMINAL ACTION NO. 15-CR-02-ART-CJS

UNITED STATES OF AMERICA **PLAINTIFF**

vs.

EDWARD DARKO AGYEMANO

DEFENDANT

****

MOTION FOR COURT TO TAKE
JUDICIAL NOTICE OF DOCUMENT

****

Comes now Defendant, Edward Darko Agyemano, by and through counsel, and moves this Court to take judicial notice of the attached document. The attached document is from our own government, a warning from our State Department. Moreover, the Court took judicial notice of this same document and allowed its admission as evidence in the prior case against Edward Agyemano (14-cr-20, Defendant's Exhibit "T").

Mr. Agyemano is again raising the defense of Justification at Trial; therefore, this document is relevant and necessary for his defense.

Respectfully submitted:
/s/ David F. Fessler, Esq.
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Ghana http://travel.state.gov/content/passports/english/country/ghana/html

 Ghana
Official Name: Republic of Ghana
LAST UPDATED: JULY 18, 2014

Quick Facts

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  Must be valid at time of entry
- BLANK PASSPORT PAGES:
  One page required for entry stamp
- TOURIST VISA REQUIRED:
  Yes
- VACCINATIONS:
  Required for entry. See below.
- CURRENT RESTRICTIONS FOR ENTRY:
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Destination Description

Entry, Exit & Visa Requirements

Safety and Security

Due to the potential for violence, U.S. citizens should avoid political rallies and street demonstrations and stay aware of their safety at all times.

There are a number of ongoing chieftaincy disputes in Ghana that generally involve competition over limited resources. Several of these disputes have erupted into violence and unrest during recent years, most notably in Yendi in the Northern Region and Bawku in the Upper East Region. Visitors should exercise caution when traveling in those areas and remain alert to outbreaks of unrest.

Travelers should also be aware that the standards of construction are often lower than those found in the United States. These lower standards have contributed to building-collapses, fires, and reports of electrical shock, including the death of a Westerner from electrocution at the Stellar Lodge in Takoradi (Ghana's Western Region).

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- Enroll in the Smart Traveler Enrollment Program so we can keep you up to date with important safety and security announcements.

DEFENDANT'S EXHIBIT
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

ELECTRONICALLY FILED

CRIMINAL ACTION NO. 15-CR-02-ART-CJS

UNITED STATES OF AMERICA **PLAINTIFF**

vs.

EDWARD DARKO AGYEMANO

DEFENDANT

****

DEFENDANT'S PROPOSED JURY INSTRUCTION

****

Comes now Defendant, Edward Darko Agyemano, by and through counsel, and submits the following Proposed Jury Instruction. Defendant reserves the right to supplement this Instruction as necessary or as the Court permits.

Respectfully submitted:

/s/ David F. Fessler, Esq.
FESSLER, SCHNEIDER & GRIMME
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(859) 291-9075

CERTIFICATION

I hereby certify that on this 2nd day of March, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Robert McBride, Esq., Assistant U.S. Attorney.

/s/ David F. Fessler, Esq.

Instruction No.
Justification

6.07 JUSTIFICATION

(1) One of the questions in this case is whether the defendant was justified in committing the crime. Here, unlike the other matters I have discussed with you, the Defendant has the burden of proof.

(2) For you to return a verdict of not guilty because of a justification defense, the defendant must prove the following five factors by a preponderance of the evidence:

(A) First, that the defendant reasonably believed there was a present, imminent, and impending threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

6th Cir. Pattern Jury Instructions 6.07