

ATTICUS



NYSACDL
NEW YORK STATE ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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Criminal Defense Lawyers**

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Message from the President

By Aaron J. Mysliwiec

The People of the State of New York were taking to the streets as 2014 came to an end. They joined their fellow Americans in Ferguson, and in other cities across the country to protest and to demand a review of the criminal justice system. This time it was in response to the non-indictments of police officers in the deaths of Michael Brown and Eric Garner. These events again highlighted the fundamental place our criminal justice system occupies in our nation's sense of its identity and values.

A fair and transparent criminal justice system is part of the foundation for the rule of law and a civil society. When that system is associated with injustice as much as justice, our communities experience greater turmoil, conflict, and dissension. As criminal defense lawyers, we witness injustices daily and we have been shouting about them for years – draconian mandatory minimums, ghastly prison conditions, recurring *Brady* violations, outdated discovery statutes, encroachments on the attorney-client privilege, ever expanding forfeiture laws, and the erosion of specific intent *mens rea* requirements, among other things. These times of protest present an opportunity for us to persuade the public that meaningful reform in these areas should be made.

As this issue of *Atticus* goes to press, Governor Andrew Cuomo has announced his intention to do a “comprehensive review” of New York’s justice system. Now is a time when we must rededicate ourselves to public policy advocacy. It takes time and effort, but many of our members are at the forefront of reform initiatives. Renewing your membership and asking colleagues to join us is more important than ever.

Thank you for your membership and commitment to NYSACDL. You know our system’s flaws, you refuse to accept them, and you have dedicated your careers to fighting them. You have the courage to demand fairness for the human being next to you, no matter what that person has been accused of doing. I look forward to seeing many of you at our dinner on January 29, celebrating the battles of the past year, and drawing new inspiration from you for the battles ahead. **A**

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From the Editors' Desk

On December 5, 2015,
The New York Law Journal
published the following letter
written by Michael Shapiro,
NYSACDL Vice President
(and co-chair of Carter Led-
yard & Milburn's white collar
practice):



"In 1971, after a year of hearings concerning rampant corruption permeating the NYPD (think Serpico), the blue-ribbon Knapp Commission recommended and Governor Nelson Rockefeller established, the creation of an independent Special Prosecutor's Office that superseded the jurisdiction of the five local district attorneys in New York City.

The Knapp Commission recognized the inherent conflict of interest in a local district attorney investigating and prosecuting police-committed crimes. The district attorneys and the police department work hand in glove on a daily basis; that same district attorney cannot reasonably be expected to bring unvarnished objectivity to a case in which the police themselves are the suspects. The special prosecutor's office, established in 1972, and disbanded in 1987 (allegedly for budgetary reasons) had its own investigators and lawyers.

Many of the district attorneys, especially legendary New York County District Attorney Frank Hogan, were unhappy to say the least. While the first special prosecutor, Maurice Nadjari, found himself quickly enmeshed in controversy because of his excessive zeal, his successors, among them now-Southern District Judge John Keenan, established a remarkable track record in fairly, objectively and successfully investigating and prosecuting police officers and others in the criminal justice system suspected of criminality.

Had there been special prosecutors investigating the death of Michael Brown in Ferguson, Missouri and Eric Garner in Staten Island, as there was in Florida for the George Zimmerman case, the result of the grand jury presentations would almost certainly have been different.

Perhaps it is time for the reestablishment of the special prosecutor's office."

A few days later in a lead editorial, the New York Times joined an expanding chorus calling for the establishment of a Special Prosecutor's Office to investigate and prosecute instances of alleged serious police criminality. Shortly thereafter, Attorney General Schneiderman offered to take on that role. A dissenting view has been expressed by Kings County District Attorney Kenneth Thompson, who asserts that he and his office are ready, willing and able to go after criminal cops.

With due regard for the views of Mr. Thompson, who has been in office for less than a year, and some of his district attorney

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Dispatches from 90 State

Jennifer Van Ort
Executive Director



Submit an Article to *Atticus*

Members wishing to submit articles for inclusion in *Atticus* should submit them via email to **atticus@nysacdl.org**.

Questions regarding submission may be directed to:

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The editors reserve the right to modify any submission for style, grammar, space and accuracy. Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.
2. When a Case is mentioned in the text, its citation should be in the text as well.
3. Articles longer than 4 pages may be edited or serialized.

As we wind down another productive year at NYSACDL and look forward to 2015, I want to take a special moment to thank all of our loyal members for your support during 2014. Without you, NYSACDL truly could not fulfill its mission of protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Throughout 2014, President Aaron Mysliwiec committed his time to increasing our membership ranks in both numbers and diversity, including professional specialties and geography, and we are pleased to say that, as of this writing, we are well on our way to over 800 members in 2014, and to over 500 of those already committed for 2015. ***(This is a great time to remind you to send your membership renewal in!)*** President-Elect Wayne Bodden is committed to continuing this membership push, and we will again ambitiously strive to increase these numbers in 2015.

One exciting development that we hope will encourage increasing membership is the recent launching of our new member Web site and database, built upon the great work done a few years ago updating and expanding the NYSACDL Web site. By now, you should have all received your temporary password and login information – I encourage you to login and update your expanded member profile and explore the new options available. Some of the advantages of this new system include: Enhanced Membership Profile – We will continue the tradition of a public, searchable member directory that you have all enjoyed for several years. Your online membership account offers the opportunity to include a headshot and extended information in your public profile. Additionally, every time you update your profile, it is automatically updated in backend database as well, so all of your contact information with NYSACDL will remain accurate and up-to-date.

Easier Purchasing of CLE Videos & Materials – The new store set-up on the Web site will increase the ease and efficiency of purchasing NYSACDL CLE seminar materials and videos, including automatic receipt of purchase access information. Also, your transaction history will be stored in your member account, so you can easily revisit your purchases. Over the next few months, we will be looking in to adding your CLE Certificates of Attendance to member accounts so that you can access the files whenever you need!

Quicker Access to Member-Only Areas – Items such as Ray Kelly's Trial Notebook, *Preparation, Persuasion and Self: Defending Fellow Human Beings*, no longer need an additional password for access. Simply log-in to your member account to see your exclusive member-only areas.

Access to Membership History, Automatic Renewal Reminders & Auto-Renew Options – When your 2015 membership

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From the Defense Table

Member **James M. Hartmann** of Delaware County obtained an acquittal in a felony drug trial in early November in *People v. Jason Wilsey*. Mr. Hartmann's client was charged with Criminal Sale of a Controlled Substance 1°, an A-1 felony, for which he was facing a sentence of 8-20 years. The charge involved a sale of a quantity of pure oxycodone powder which the People alleged had been stolen from the pharmaceutical company the defendant worked for. Mr. Hartman successfully confronted 'snitch' testimony from his client's own half-brother, and the jury deliberated for just about one hour before returning with their verdict of 'Not Guilty'.

Member **Anjelica Cappellino** of New York County was recently published in the *Albany Law Review's* "Miscarriages of Justice" issue, co-authoring an article entitled, "The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences". John Meringolo of Meringolo & Associates co-authored the piece, which examines the history of sentencing in the federal system, the

creation and evolution of the United States Sentencing Guidelines, and the effects of the Supreme Court's seminal decision in *United States v. Booker* and its progeny. The article also discusses mandatory minimum penalties for drug offenses, and how these statutes effectively conflict with the Guidelines' advi-

The jury returned with an acquittal in less than thirty minutes.

sory nature. It also examines the future of federal sentencing in light of recent policy shifts, such as Attorney General Eric Holder's expressed support for changing mandatory minimums, and is an important and informative read for any defense attorney dealing with the complexities of federal sentencing.

Member **Harlan Greenberg** of New York County was successful in showing that the police had neither the drugs nor the money on his client charged with Criminal Sale of a Controlled Substance 3° and Tampering with Physical Evidence in *People v. Yusif Robinson*. Mr. Green-

berg's client had three prior felony convictions, two for drug sale charges, and was on parole for a Federal drug conspiracy for which he still owed approximately 40 months if violated. The People's case relied on a team of 12 plain clothes officers engaged in an observation buy and bust, with one officer claiming to have been less than ten feet behind Mr. Greenberg's client when the alleged sale took place. However, as it came out at trial, no drugs were ever recovered from the defendant or the alleged

buyer at the scene on the street. They were both arrested and drugs were later recovered from the alleged buyer at the station. The money which the officer testified he observed Mr. Greenberg's client throw to the ground after the exchange proved to be a problem for the People at trial, where Mr. Greenberg pointed out a discrepancy with the denominations and that the officer had mixed up the recovered money with other currency. The money itself was never entered into evidence, the judge dismissed the tampering charge prior to the case going to the jury, and they returned with an acquittal in less than thirty minutes. **A**

From the Editors Desk

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colleagues, the New York State Association of Criminal Defense Lawyers joins the many other thoughtful, experienced and trenchant voices calling for a statewide special prosecutor with both investigative and prosecutorial power, who will be able to step in and supersede the local DAs in cases of suspected serious police criminality. Both history and current events lead us to this position.

As they should, our county DA offices throughout the state work closely with the police, day in and day out. Much of the effectiveness of a DA's office depends on that close, collegial relationship. As the Knapp Commission concluded 40 years

ago, and as recent events in Ferguson and Staten Island have shown, the inherent conflict of a District Attorney fairly and objectively investigating his or her closest allies in law enforcement may, in reality, be a near-impossible task. But what is certain, is that when that situation arises, the perception that justice will prevail is effectively undermined. NYSACDL is committed to both justice and the perception of justice. Accordingly, we ask the Governor and Legislature to act quickly to establish an Office of the Special Prosecutor that will investigate, and where appropriate, prosecute, instances of serious crimes by the police. **A**

Decision Making As Property: *Can You Steal What You Can't Extort?*



By Michael Shapiro

Giridhar Sekhar was a managing partner at FA Technology Ventures, an investment fund management company. The Office of the New York State Comptroller, the agency responsible for investing all of New York State's employee pension funds, was considering investing in the FA Technology company, but decided not to do so. Somehow, Sekhar heard rumors that the general counsel in the Comptroller's Office was having an extramarital affair.

The general counsel then received a series of emails demanding that he persuade the Comptroller to move ahead with the FA investment or the general counsel's alleged affair would be disclosed to his wife, the media and others. The general counsel called the cops. The police traced the emails to Sekhar.

Sekhar was charged and ultimately convicted after trial of, among other things, extorting the general counsel, a violation of the Hobbs Act.



.....
Michael Shapiro is a partner at Carter, Ledyard & Milburn, LLP, where he is co-chair of the White Collar and Government Investigations Practice, and Chair of the firm's Diversity Committee. He is a Vice-President of NYSACDL and has been practicing criminal law for 41 years.

The Hobbs Act, 18 U.S.C. § 1951(a), criminalizes acts that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a) (2014). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (2014). The Hobbs Act and its definition of extortion have their roots in § 850 of the 1909 New York Penal Law and its antecedent, the 19th century Field Code. In drafting the Hobbs Act, Congress copied the New York law, including its definition of extortion, but did not include in the Hobbs Act the related crime from the New York statutes, coercion. *Id.* The New York Penal Law defined coercion as "the use of threats to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." N.Y. Penal Law § 530 (1909), earlier codified in N.Y. Penal Code § 653 (1881), the Field Code. The elements of each crime differ. Specifically, as it pertains to an alleged victim's property, extortion requires the extortionist to actually acquire property; coercion, on the other hand, merely requires interference with an individual's right to act or abstain from acting, and is not limited to property crimes. In reversing Sekhar's conviction, the United States Supreme

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Decision Making as Property

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Court made clear that threatening someone to affect their exercise of an intangible right, such as recommending an investment, does not violate the Hobbs Act because Congress chose not to include coercion within its ambit. *Sekhar v. United States*, 133 S.Ct. 2720, 2727 (2013).

The federal mail fraud statute, first enacted in 1872, prohibits the use of the postal system in “furtherance of ‘any scheme or artifice to defraud’” unsuspecting victims of their money or property. *McNally v. United States*, 483 U.S. 350, 356 (1987) (quoting 18 U.S.C. 1341). Congress added the specific language referring to money or property in the statute, “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,” after the initial clause in response to the Supreme Court’s decision in *Durland v. United States*, 161 U.S. 306 (1896), in which the Court ruled that the statute not only applied to misrepresentations of existing fact but also to false promises concerning future events. *McNally v. United States*, 483 U.S. at 356-57. In *McNally*, the Court interpreted this new clause as Congress’ method of codifying the *Durland* decision and explicitly stating that fraudulent future promises were illegal under the statute. *McNally v. United States*, 483 U.S. at 358-59. Although this interpretation seems contrary to the plain meaning of the statute, which implies the second clause is independent and explicitly prohibits using the mail fraudulently to obtain property, the Court clarified this seeming discrepancy by defining “to defraud” as “to wrong one in his property rights by dishonest methods or schemes,” and therefore the term “property” was already applicable to the statute through the initial clause. *McNally v. United States*, 483 U.S. at 358 (citing *Hammer-*

schmidt v. United States, 265 U.S. 182, 188 (1924)). The wire fraud statute, which Congress enacted in 1952, contains language virtually identical to the mail fraud statute; it prohibits the use of wire, radio, or television communication for fraudulent schemes to deprive individuals of their property. 18 U.S.C. 1343 (2014). What, therefore, is property?

SUPREME COURT’S DEFINITION OF “PROPERTY”

The Court’s interpretation of the term “property” has been shaped by several key decisions and it has expanded its definition of property in important criminal statutes beyond traditional, physical property. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that intangible property rights, such as the right to confidential business information, received protection under criminal statutes similar to actual property. *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (holding that the Wall Street Journal’s right to confidential information in yet to be released news articles in its publication was property under the mail and wire fraud statutes). However, in *Cleveland v. United States*, 531 U.S. 12 (2000), the Justices reversed a mail fraud conviction, holding that obtained property must be considered property in the hands of the victim and it is not sufficient that the item may become property in the hands of the recipient. *Cleveland v. United States*, 531 U.S. 12, 15 (2000) (holding that the video poker license that would be obtained from the State through misrepresentations in the application was not property and could not therefore be obtained). In *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003), the Court looked to whether the defendants pursued or received “something of value which the [defendant] can exercise, transfer,

or sell” in determining whether or not the property rights at issue were property. *Scheidler v. NOW, Inc.*, 537 U.S. 393, 405 (2003) (citing *United States v. Nardello*, 393 U.S. 286, 290 (1969)) (holding that abortion opponents’ acts did not constitute extortion where the intangible right to exercise control over use of a business’ assets was not obtained or attempted to be obtained by the abortion opponents who sought to shut down abortion clinics).

In 2013, the Supreme Court decided *Sekhar*, another seminal opinion defining “property” as it pertains to criminal statutes, particularly the extortion statute. The Court held that under the Hobbs Act, the property extorted must be obtainable property; the property must be “transferable – [...] capable of passing from one person to another.” *Sekhar v. United States*, 133 S.Ct. at 2725. In the opinion, Justice Scalia emphasized that “the obtaining of property from another” is an essential requirement for extortion under the Hobbs Act and to be guilty of extortion the victim must be deprived of his or her property and the extortionist must take possession of the property. *Id.* at 2725. For this to occur, Justice Scalia writes, the property itself must be capable of being transferred from the victim to the extortionist, which was not possible under the circumstances before the Court. *Id.* The Court ruled that “a yet-to-be-issued recommendation that would merely approve (but not effect) a particular investment” was not transferable property, and therefore was not obtainable property. *Id.* at 2727. Resultantly, the Court found that *Sekhar* was more likely guilty of coercion than extortion, but given that the charges were for attempted extortion, the Court reversed the Second Circuit’s affirmance of the conviction. *Id.*

In *United States v. Finazzo*, 2014 U.S. Dist. LEXIS 4690, 2014 WL 184134 (E.D.N.Y. Jan. 14, 2014), Judge Roslynn Mauskopf in the Eastern District of New York refused to extend the definition of property in *Sekhar* to property under the wire and mail fraud statutes. *United States v. Finazzo*, 2014 U.S. Dist. LEXIS 4690, *55, 2014 WL 184134 (E.D.N.Y. Jan. 14, 2014). In the case before the court, Finazzo was convicted of conspiracy to commit mail and wire fraud, violate the Travel act, and mail and wire fraud based on his undisclosed financial relationships with a vendor under contract with his employer, a major clothing retailer, that deprived his employer of its intangible right to make informed business decisions. *Id.* at *1. In failing to extend *Sekhar* to *Finazzo*, the district court reasoned that the text and history of the Hobbs Act and the mail and wire fraud statutes do not support the proposition that the statutes share the same definition of property. The Court came to the conclusion that the types of property in each statute are inherently different, because only the Hobbs Act requires the defendant to be successful in obtaining the property from the victim. *Id.* at *52-55.

PROPERTY IS PROPERTY IS PROPERTY (OR NOT)

Contrary to the reasoning in *Finazzo*, there is support from the Supreme Court for a unified definition of property among the mail and wire fraud statutes and the Hobbs Act. First, the Supreme Court has used the same precedents in defining property under both the Hobbs Act and the mail and wire fraud statutes. For example, in *Sekhar*, Justice Scalia compares the meaning of property under the mail and wire fraud statute and the Hobbs Act by citing the Court's previous opinion in *Cleve-*

land. Justice Scalia reasoned that if a license, prior to being issued by a State, is not considered property under the mail fraud statute, the general counsel's recommendation for the commitment is even less so obtainable property, in the Hobbs Act context. *Sekhar v. United States*, 133 S. Ct. at 2727. Similarly, in *Scheidler*, the Court references its opinion in *Carpenter* as a resource for its discussion of potential extortion liability for obtaining or attempting to obtain intangible property, instead of reiterating the argument in *Scheidler*. *Scheidler v. NOW, Inc.*, 537 U.S. at 402. The Supreme Court's repeated use of case law describing the property that can be obtained under the mail and wire fraud statutes and the Hobbs Act shows that they view the term uniformly in similar statutes, and accordingly, lower courts should adopt the same analytical framework.

Second, the purposes of both statutes also lends support to the notion that property should mean the same thing under both statutes. The Hobbs Act seeks to protect individuals from being forced to part with their property through threats of force, violence, fear, or under color of official right. Similarly, the mail and wire fraud statutes protect against the loss of property by false promises or fraudulent schemes. At their core, both statutes seek to protect individuals and entities from losing the economic value of something that had theretofore been duly obtained and to which the person or entity had a continuing right to possess. It should be of no moment that the obtaining of the property occurs via force or threat of force as in the Hobbs Act or by trick, lie or fraudulent omission as in mail or wire fraud. It is that which is obtainable and transferable that is key and should therefore be the same in both statutes.

The reasoning in *Finazzo* that the requisite completion of obtaining property under extortion leads to a different definition of property is flawed. The Court focused on the language in the mail and wire fraud statutes which allows a defendant to be found guilty for simply devising a scheme to defraud another, even if the scheme was ultimately unsuccessful. The Third Circuit provides a clear and reasonable explanation of how this provision should be read and understood, stating "the mail fraud statute was thus intended to cover 'any scheme or artifice to defraud [one of his money or property],' including any '[scheme] for obtaining money or property by means of false or fraudulent . . . promises.'" *United States v. Al Hedaithy*, 392 F.3d 580, 602 (3d Cir. 2004). Although property appears once in the first two joined clauses in the fraud statutes, the Court stated in *McNally* that property is impliedly included in the first clause through the definition of defraud. *McNally v. United States*, 483 U.S. at 358. Based on this reading, although obtaining property is not required for a violation of the mail fraud statute, it is one of the possible violations that could be charged under the statute. For an individual to even attempt to obtain property under a fraud scheme, aligning with the ruling in *Sekhar*, the property must be obtainable or transferable. It is simply inconsistent with fundamental statutory interpretation to use different definitions for the same terms within the same statute, to wit, Title 18 of the U.S. Code. The definition of property as explicated in *Sekhar* should be equally applicable to the property definition in all locations, implicit or explicit, in which it appears in the mail and wire fraud statute. Whether or not the property is actually obtained is inconsequential. In the same manner that the

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Decision Making

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general counsel's investment recommendation in *Sekhar* was not amendable to being transferred or obtained, so to in *Finazzo*, the company's right to make informed business decisions concerning its assets was neither transferable nor obtainable, either by *Finazzo* or by anyone else. The Second Circuit will have its opportunity in the *Finazzo* appeal to conform the Hobbs Act and mail/wire fraud definitions of property by focusing on what harm was caused by *Finazzo*'s disclosure omissions to his employer and whether the right of the employer to make business decisions based upon proper disclosure can fairly and logically be described as property under the federal fraud statutes. ■

Dispatches From 90 State

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approaches expiration, you will automatically receive reminders to renew with links to purchase securely online. You can also sign up for auto-renewal that will process your credit card at the end of your membership cycle so you don't miss any days of membership access. Should you happen to need extra time to renew, logging in to your membership account past your expiration date will immediately remind you to renew and continue to receive your benefits!

I am looking forward to working with you on additional ways this new system can provide more benefits, such as groups and forums related to specialty area, or even per CLE seminar so discussion can continue after the fact. Other benefits may include job boards and direct messaging with other members. An additional internal bonus, following the learning curve of the new system, will be the freeing up of both your time and my time spent managing specific administrative aspects of your membership. This will allow all of us to devote more time to enhance the important work of NYSACDL.

If you have any questions regarding the new system, your member benefits, or need help processing your membership renewal, please don't hesitate to contact me.

As always, thank you for your continued support of NYSACDL and for the work that you do to protect your clients' rights. I personally want to thank all of you for your support and good wishes during my 2nd year as Executive Director, and during my maternity leave. ■

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IMMIGRATION CONSULTANTS TO THE CRIMINAL BAR

Public Hearing on Civil Forfeiture and Deferred Prosecution

Excerpts from the Testimony of Steven L. Kessler,
December 9, 2014

Good morning. My name is Steven Kessler. It is indeed an honor and a privilege to appear before you this morning to discuss issues related to civil forfeiture.

As many of you know, I have a unique perspective on CPLR Article 13-A. I was a member of the Forfeiture Law Advisory Group of the New York State District Attorney's Association around the time the statute was drafted and codified and, now, in my new life, I work on and litigate forfeiture issues nationwide.

I will give a brief introduction and then open the floor to questions.

The invitation I received from the Assembly had an interesting introduction of today's topic:

"Civil forfeiture is a tool commonly used by law enforcement to prevent those who have committed crimes from financially benefitting from their illegal actions. Depriving persons who commit crimes of ill-gotten gains can help deter crime and provide revenue to support government operations."

I use the word "interesting" because of the last phrase in the second sentence. Forfeiture was one of the first issues addressed after we became a country. And the way the Continental Congress addressed forfeiture was to abolish it. Forfeiture was indeed used to provide revenue to support government operations. But that was by the British, who did the equivalent of balance their budget on the backs of the colonists by way of forfeiture. So, to show the true nature of our new country, the new Americans abolished all of the forfeiture laws. Except for one. The one remaining law had to do with British vessels that were docked in American ports. If the British did not pay their fees or charges, the colonists wanted to make sure that they could seize the British ships. Thus, it should come as no surprise that the lone forfeiture statute remaining after Congress eliminated the remnants of British forfeiture laws was codified in the Admiralty laws, where one of the primary rules relating to federal forfeiture law remains today.

But, no, to correct the blurb on the announcement, forfeiture has no business being targeted to "provide revenue to support government operations." And that is the problem. Forfeiture should take

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When bringing actions where the defendant or his family or friends have assets, prosecutors often suggest global settlements which present the defendant with scenarios that sound an awful lot like the proposition made by the mugger to Jack Benny.

Civil Forfeiture

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the profit out of crime and remove the ill-gotten gains from the criminal. What happens to those funds should not be the driving force behind forfeiture. Yet, fast forward 200 years and that is precisely what drives the forfeiture laws today. Indeed, civil forfeiture doesn't even require a conviction or proof of a crime beyond a reasonable doubt. And, more often than not, it is someone other than the defendant who is being punished or losing property. So, instead of being used as a form of punishment for the defendant, forfeiture has become the fund-raising tool of choice for many

statutes on the federal books and at least two in each of our 50 states. New York is proud to incorporate some 17 statutes in our codes. Many are local, such as New York City's Administrative Code and Nassau County's Administrative Code. Many have been struck down as unconstitutional, most specifically NYC's Administrative Code, which has received that honor at least twice.

This body, however, should be quite proud of its creation. Article 13-A of the CPLR is unique among civil forfeiture statutes. And that was the point when

unmatched by any other civil forfeiture statute.

Another unique characteristic of Article 13-A is its creation of the "non-criminal defendant." A non-criminal defendant is, as the title reflects, someone who is not alleged to have committed any crime, but who has an interest in property alleged to be involved in criminal activity. The statute contains numerous provisions providing additional protection for non-criminal defendants, including dedicated sections regarding limitation of damages, burdens of proof, defenses, procedural remedies and presumptions. Notably, forfeiture from a non-criminal defendant is limited to the property itself. The prosecutor may not secure a money judgment – the method of choice these days in most civil forfeiture cases – from a non-criminal defendant.

So, instead of being used as a form of punishment for the defendant, forfeiture has become the fund-raising tool of choice.

states and municipalities. One county in Texas prides itself on paying its Sheriff from the forfeiture fund. Think about that for a moment. If there is no forfeiture in that county, there is no food for the Sheriff. Talk about incentive for abuse.

And while state and local forfeiture abuse is common, it pales next to the 900 pound gorilla of federal forfeiture. According to a New York Times article published last month, "the value of assets seized [federally] has ballooned to \$4.3 billion in the 2012 fiscal year from \$407 million in 2001." [S. Dewan, Police Use Department Wish List When Deciding Which Assets to Seize, N. Y. Times, Nov. 9, 2014].

From sea to shining sea, we are a nation gorging ourselves on the spoils of property seized – legally or not – from its own citizens. At last count, there are more than 200 separate forfeiture

it was drafted. If you study the statute's legislative history, you will note the pains this body took to ensure that NY's primary civil forfeiture statute was not like those of other states or, worse, like the federal statutes. There are protections in Article 13-A that are present in no other civil forfeiture statute. For example, while almost all other civil forfeiture statutes are based on in rem jurisdiction, which is one of our legal fictions meaning that the defendant is the purportedly guilty property, not the person who owns the property, the drafters of Article 13-A insisted from the beginning – despite vigorous protests from the law enforcement community – that the statute be in personam in nature. As a result, unlike in other jurisdictions, your property cannot be forfeited unless you are sued individually in the civil forfeiture proceeding. As a named defendant, the New York statute provides you with a level of due process and other constitutional protections

When the House of Representatives in Washington passed the bill which became the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), it did so by the lopsided margin of 375 to 48. Henry Hyde, a conservative Republican from Illinois, and John Conyers, a Carter Democrat from Michigan, co-sponsored the bill. And these two men, who probably didn't agree on many things politically, did so on this issue because the rampant documented abuses by law enforcement with regard to civil forfeiture did not divide well along party lines. When law enforcement seize property without respect for the law, they take from the rich as well as the poor. In fact, it is usually from the rich, because their property is more valuable and more desirable. Indeed, it has been Supreme Court Justices like William Rehnquist and Clarence Thomas – Republican appointees who

are wealthy in their own right and have never been confused with ‘criminal loving liberals’ – who have declared civil forfeiture punitive, despite its label, and subjected these procedures to provisions such as the excessive fines clause of the Eighth Amendment. These are people of means, who have peeled back the vague, generic, ‘feel good’ statements of prosecutors and agents to reveal the true reasons behind the dramatic increase in civil forfeiture – to fund raise and balance the budget. Why else would it be the Porsche in the right lane that is stopped for the DWI rather than the Camry in the left lane? Both are going at the same rate of speed and weaving from one lane to the other next to one another. My guess is that the Porsche will look better than the Camry in the State Police’s car pool. Or maybe the trooper thinks the Porsche will just be more fun to drive.

As I am sure many of you have seen from recent series in the New York Times, the Washington Post, the New Yorker, the Wall Street Journal and on television programs on HBO and other media, civil forfeiture is ripe for abuse. No criminal charges are required, let alone a conviction. The defendant is a thing, not a person. And because of the scores of administrative statutes, rules and provisions strewn throughout the federal codes, very few attorneys, let alone ‘regular folk’, are able to navigate the time constraints and deadlines and other numerous requirements for fighting civil forfeiture actions. The result is rampant abuse of the laws by the federal authorities. Why? Because they can. In a notable case, a yacht was seized and forfeited because one lone marijuana cigarette was found in one hamper in one bathroom. In another case, a family lost its home because Daddy made one

phone call to his drug dealer from his office in the basement.

Which brings us to today. I am always concerned when I hear there may be a proposal before this august body to make our statute “better”. There certainly are a few things that can be done to massage Article 13-A which would make me happy. But those would be in the form of clarification, not change. A couple of years ago, the District Attorneys of this state wished to change Article 13-A. To what? To look a lot more like its federal counterparts. Fight the urge. The protections in our New York statute are second to none. And, certainly, prosecutors cannot cry poverty when it comes to their forfeiture booty in New York. But to make our laws like the federal laws would be criminal, in addition to violating the express purpose underlying the statute when it was drafted some 30 years ago.

One final note. The notice regarding this hearing also referenced Deferred Prosecution Agreements. It is interesting to me that we are discussing Deferred Prosecution Agreements in the same breath as civil forfeiture, because this hits the problem of forfeiture and its place in the criminal justice system squarely on its head. When bringing actions where the defendant or his family or friends have assets, prosecutors often suggest global settlements which present the defendant with scenarios that sound an awful lot like the proposition made by the mugger to Jack Benny. As I am sure most of you know, Benny was perhaps most famous for a comic scene in a March 28, 1948 broadcast that depicts Benny being accosted by a mugger. The mugger demands, “Don’t make a move, this is a stickup. Now, come on. Your money or your life.” Benny does

not immediately respond and the audience, knowing Benny’s skinflint comic persona, is already laughing during the pause. His frustration building, the mugger repeats, “Look bud! I said your money or your life!”. This time Benny snaps back, “I’m thinking!”

Not to kill the humor, but what makes this scene funny is that most people exercising common sense will gladly part with their property to save themselves. So, one must be really cheap to do anything but quickly agree to such an exchange. And this human survival urge is of course the motivation that underlies the ability of prosecutors to extract huge consent forfeitures in exchange for a reduction in a criminal charge or sentence. In our crippled criminal justice system, most defendants do not delay, as Benny did, before choosing money as the option to forego. So forfeiture becomes, not just a fund-raising tool for the prosecutors, but a mechanism to encourage pleas to charges of which the defendant may not be guilty just to get a more favorable criminal disposition. The result of that case may work for the defendant at that time. But if he is arrested again, say, for a second DWI offense or a second marijuana related matter, the consequences may be significant, especially relating to incarceration. So please keep Article 13-A strong, constitutional and unique, to prevent the abuses of the civil forfeiture statutes that have been prevalent for decades, but which are only now making their way into the mainstream media for public consumption.

I appreciate the opportunity to appear before you. I am available to answer any questions you may have.

Thank you. **A**

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privacy

Protecting Sexual Privacy: New York Needs a ‘Revenge Porn’ Law

Mary Anne Franks

In what was referred to as New York’s first “revenge porn case,” Ian Barber posted naked pictures of his girlfriend to his Twitter account without her consent and sent them to her employer and to her sister. After his actions were reported to police, Barber was charged with dissemination of an unlawful surveillance image, harassment, and public display of offensive sexual material. In February 2014, Judge Steven M. Statsinger ruled that while Barber’s conduct was “reprehensible,” it did not violate any of these laws.¹ The case offered a compelling illustration of how New York law fails to protect sexual privacy.

Judge Statsinger ran down the list of charges against Barber: given that unlawful surveillance laws only apply to images that are obtained through surreptitious means, and no information was provided about how Barber obtained the images, the unlawful surveillance charge was not supported. With regard to harassment,



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¹ <http://law.justia.com/cases/new-york/other-courts/2014/2014-ny-slip-op-50193-u.html>

PHOTO ILLUSTRATION: ROSE TANNENBAUM

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Judge Statsinger noted that New York's definition requires actual communication with a person. Given that Barber did not send the images to his girlfriend, this charge also could not stand. Finally, with regard to the public display of offensive sexual material, Judge Statsinger expressed skepticism with regard to whether either tweeting or emailing a photo could be considered a "public" display, and observed that the complaint did not indicate whether the images, in addition to featuring nudity, appealed to a "prurient interest in sex," as required by the statute. The Barber case suggested that "revenge porn" was perfectly legal in New York.²

In August 2014, several news outlets reported that New York had corrected this problem, claiming that a law signed by Governor Cuomo made revenge porn illegal.³ However, the law Gov. Cuomo signed did not in fact accomplish this. Instead, the law closed a loophole in unlawful surveillance provisions. Before the revision, unlawful surveillance only applied to images in which the victim's "sexual parts" were exposed. This presented a problem especially for female victims, whose sexual parts are not necessarily on display in various sexual acts.⁴ The law now applies when a victim is recorded during sexual conduct "in the same image with the sexual or intimate part of any other person."⁵

While this was an important correction, New York's unlawful surveillance law remains extremely limited. First, it only applies to images that were created without the knowledge and consent of the other person. It does not apply to situations in which individuals have voluntarily entrusted their intimate partners with sexually explicit pictures or videos of themselves, only to have those confidantes expose this intimate material to others – classic cases of so-called "revenge porn."

Secondly, New York's unlawful surveillance law only applies to recordings that are made "surreptitiously." This offers no help to victims who may be aware that they are being recorded but have not consented to being recorded – and in fact may be powerless to prevent it. Recording sexual assaults and distributing these recordings has become a disturbing new trend.⁶ Rapists sometimes record assaults as a means of further humiliating or intimidating their victims, and it is not uncommon for onlookers to record assaults for purposes of entertainment. In July 2014, pictures of a 16-year-old U.S. rape victim's unconscious body, accompanied by mocking captions, went viral on social media sites.⁷ Pictures of Audrie Pott, a 15-year-girl who was sexually assaulted by several boys at a party while unconscious, were circulated around her school. The teenager killed herself

shortly thereafter.⁸ New York's unlawful surveillance law would not apply to these situations if, as often is the case, the individuals taking pictures or video of sexual assaults did so openly instead of surreptitiously.

Finally, New York's unlawful surveillance law does not apply to the distribution of intimate images that were consensually created but accessed by third parties through unauthorized means, such as hacking. While New York's computer crime laws prohibit the unauthorized access of computers,⁹ the law is silent with regard to the subsequent distribution of such images. In September 2014, private nude photos of over one hundred celebrities – nearly all of them female – were hacked and exposed to the general public on the popular web forum reddit.com.¹⁰ Within hours, links to the images had appeared on hundreds of other websites and widely distributed through Twitter and Facebook. As this mass hacking of private photos of celebrities demonstrated, the harmful effects of the initial unauthor-

² <http://www.thedailybeast.com/articles/2014/02/25/i-heart-revenge-porn-new-york-fails-its-first-revenge-porn-case.html>

³ http://www.syracuse.com/news/index.ssf/2014/08/revenge_porn_now_illegal_in_new_york.html; <http://newyork.cbslocal.com/2014/08/01/cuomo-signs-amendment-strengthening-statewide-revenge-porn-ban/>

⁴ <http://www.cagoldberglaw.com/blog/90340ut34tu>

⁵ <http://open.nysenate.gov/legislation/bill/s1982c-2013>

⁶ <http://rochester.twcnews.com/content/news/769719/man-accused-of-recording-rape-of-teen-girl-in-police-custody/>; <http://www.khou.com/story/news/local/texas/2014/07/23/12094998/>; <http://www.mirror.co.uk/news/uk-news/rapist-boasted-ill-spend-15-4511065>

⁷ Claire Cohen, Mocking of teen rape victim prompts major internet backlash, *The Telegraph*, <http://www.telegraph.co.uk/women/womens-life/10968068/Teen-rape-victim-viral-photos-Ja-dapose-prompts-major-internet-backlash.html> (July 15, 2014).

⁸ <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>

⁹ New York Penal Law, Article 156. Article 156.35 does criminalize the knowing possession of illegally accessed computer data, but only if the perpetrator acts "with intent to benefit himself or a person other than an owner thereof." This only criminalizes possession, not distribution, and would not clearly criminalize possession motivated by vengeance or prurient interest. Article 156.30 prohibits the "duplication" of computer data, but only if the duplication "intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars" or if the duplication is done with the "intent to commit or attempt to commit or further the commission of any felony." It would be difficult even for celebrities to show that the duplication of their private naked photos deprives them of economic value; private individuals even less so.

¹⁰ Scott Mendelson, Jennifer Lawrence Nude Photo Leak Isn't A 'Scandal.' It's A Sex Crime, *Forbes*, <http://www.forbes.com/sites/scottmendelson/2014/09/01/jennifer-lawrence-nude-photo-leak-isnt-a-scandal-its-a-sex-crime/>, Sept. 1, 2014.

ized access often pale in comparison to the viewing and sharing of the images by millions of people.

All of these kinds of sexual privacy violations have devastating consequences and should be prohibited, even if they do not all fit the common understanding of “revenge porn.” The term “revenge porn,” which seems to have been created by those who make a profit from trafficking in this material, is misleading in two respects. First, perpetrators are not always motivated by vengeance; many act out of a desire for profit or notoriety.¹¹ The disclosers in the celebrity hacking event were hoping for Bitcoin (online currency) donations, and likely have no personal relationship to their victims at all.¹² Even more recently, a California Highway Patrol officer accused of accessing and forwarding a female DUI suspect’s intimate cellphone pictures claimed that the “game” of obtaining and exchanging such photos was common among officers.¹³ Such behavior is clearly not intended to harass or distress the victim; indeed, the perpetrators have good reason to avoid victim’s discovery of such conduct.

The term “revenge porn” is also misleading in the way that it suggests that taking a picture of oneself naked or engaged in a sexual act (or allowing someone else to take such a picture) is the same thing as creating pornography. Creating explicit images in the expecta-

tion within the context of a private, intimate relationship – an increasingly common practice¹⁴ – is not at all equivalent to creating pornography for commercial purposes.

The act of disclosing a private, sexually explicit image to someone other than the intended audience, however, can fairly be described as transforming a non-pornographic image into a pornographic one. Many victim advocates accordingly use the term “non-consensual pornography,” which conveys how the practice transforms a private, intimate image into sexual entertainment for the general public, while underscoring the significance of consent in sexual activity.¹⁵ Consent is, after all, what distinguishes many lawful acts from crimes: its existence means the difference between sex and rape, sporting events and assaults, charity and theft.

Non-consensual pornography should be defined, accordingly, as private, sexually explicit images that are disclosed without consent, regardless of how they were originally obtained. The term encompasses material obtained by hidden cameras, consensually exchanged within a confidential relationship, hacked photos, and recordings of sexual assaults. New York’s unlawful surveillance law currently only applies to material in the first category.

The harm caused by the non-consensual disclosure of intimate images is immediate, devastating, and in most cases irreversible. A vengeful ex-partner,

opportunistic hacker, or rapist can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs,¹⁶ and forced to change schools.¹⁷ Some victims have committed suicide.¹⁸

While non-consensual pornography can affect both male and female individuals, available evidence to date indicates that the majority of victims are women and girls and that women and girls face more serious consequences as a result of their victimization.¹⁹ Non-consensual pornography often plays a role in intimate partner violence, with abusers using the threat of disclosure as a way to keep their partners from leaving or reporting their abuse to law enforcement.²⁰ Traffickers and pimps also use

¹¹ End Revenge Porn Campaign, Frequently Asked Questions, <http://www.endrevengeporn.org/faqs/> (2014).

¹² See Rob Price, Bitcoin Beggars Try to Profit Off Leaked Celebrity Nudes, *Daily Dot*, Sept. 1, 2014.

¹³ See Matthias Gafni & Malaika Fraley, Warrant: CHP officer says stealing nude photos from female arrestees ‘game’ for cops, *Contra Costa Times*, Oct. 24, 2014.

¹⁴ In a recent survey of 1100 New Yorkers, nearly half (45%) reported that they had recorded themselves having sex. New Yorkers Reveal What Their Sex Lives Are Really Like, *New York Post*, Sept. 3, 2014.

¹⁵ <http://www.endrevengeporn.org/faqs/>

¹⁶ See Ariel Ronneburger, Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0, 21 *Syracuse Sci. & Tech. L. Rep.* 1 (2009), 10.

¹⁷ See Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 *Wake Forest L. Rev.* 345 (2014).

¹⁸ http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parents_how_should_the_legal_system_treat_nonconsensual.html

¹⁹ See Jill Filipovic, Revenge Porn is About Degrading Women, Jan. 30, 2013; Danielle Citron, Cyber Stalking and Cyber Harassment: A Devastating and Endemic Problem, *Concurring Opinions*, March 16, 2012.

²⁰ See Jack Simpson, Revenge Porn: What is it and how widespread is the problem?, *The Independent*, <http://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html> (July 2, 2014); Annmarie Chiarini, “I was a victim of revenge porn.” *The Guardian*, Nov. 19, 2013.

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non-consensual pornography to trap unwilling individuals in the sex trade.²¹ The disclosure of intimate images – or the threat of such disclosure – is often used to punish and discourage outspoken or successful women.²² The practice normalizes non-consensual sexual activity, promotes the use of sex as punishment, control, and extortion, and encourages the consumption of sexual humiliation as a form of entertainment.

Non-consensual pornography is not a new phenomenon, but its prevalence, reach, and impact has increased in recent years. The Internet has greatly facilitated the rise of non-consensual pornography, as dedicated “revenge porn” sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows.²³ As many as 3000 websites feature “revenge porn,”²⁴ and intimate material is also widely distributed without consent through social media, blogs, emails, and texts.

Like domestic violence, sexual assault, and sexual harassment, non-consensual pornography is disproportionately targeted at women and girls. These are also the types of conduct that have historically been taken less seriously by both law and society, and for which

victims rather than perpetrators are routinely blamed. Victims are told that they should never have taken or shared the images to begin with, and that by consenting to be seen naked by one person, they are effectively agreeing to being seen by the entire world.

Before 2013, there were few laws explicitly addressing this invasion of sexual privacy, even as concerns over almost every other form of privacy (financial, medical, data) have captured legal and social imagination. While some existing voyeurism, surveillance, and computer hacking laws prohibit the non-consensual observation and recording of individuals in states of undress or engaged in sexual activity, including New York’s unlawful surveillance law, the non-consensual disclosure of intimate images has been largely unregulated by the law. This is beginning to change.

The Philippines criminalized non-consensual pornography in 2009, making it punishable by up to 7 years’ imprisonment.²⁵ The Australian state of Victoria outlawed non-consensual pornography in 2013.²⁶ In 2014, Israel became the first country to classify non-consensual pornography as sexual assault, punishable by up to 5 years imprisonment.²⁷ Canada, the United Kingdom, Brazil, and Japan are all currently considering

legislation on the issue.²⁸ In 2014, a German court ruled that an ex-partner must delete intimate images of his former partner upon request.²⁹

As Vice-President of the Cyber Civil Rights Initiative,³⁰ a nonprofit organization advocating for legal, social, and technological reform to address online abuse, I drafted model federal and state criminal laws prohibiting the disclosure of private, sexually explicit images without consent and with no legitimate public purpose.³¹ Before 2013, only three U.S. states had criminal laws that could address non-consensual pornography as such; now 15 states do, many of them basing their laws on CCRI’s model state statute.³² Punishment ranges from fines to up to five years in prison. Legislation has been introduced or is pending in 17 other states, as well as the District of Columbia and Puerto Rico.³³ In addition to working with several states, CCRI is working with Representative Jackie Speier (D-CA) on U.S. federal criminal legislation to protect sexual privacy.³⁴

²¹ See Ann Bartow, *Pornography, Coercion, and Copyright Law* 2.0, 10 Vand. J. Ent. & Tech. L. 799, 818; Marion Brooks, *The World of Human Trafficking: One Woman’s Story*, NBC Chicago, Feb. 22, 2013.

²² Emma Gray, *The Emma Watson Threats Were A Hoax, But Women Face Similar Intimidation Online Every Day*, Huffington Post, Sept. 26, 2014.

²³ Dylan Love, *It Will Be Hard to Stop the Rise of Revenge Porn*, Business Insider, <http://www.businessinsider.com/revenge-porn-2013-2>, Feb. 8, 2013.

²⁴ <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be>

²⁵ World Intellectual Property Organization, *Anti-Photo and Video Voyeurism Act of 2009* (Republic Act No. 9995), <http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph137en.pdf>

²⁶ Daily Mail, *‘Revenge porn’ outlawed: Israel and Australia ban spurned lovers from posting compromising photos of their exes*, <http://www.dailymail.co.uk/femail/article-2535968/Revenge-porn-outlawed-Israel-state-Australia-ban-spurned-lovers-posting-compromising-photos-exes.html>, Jan. 8, 2014.

²⁷ Yifa Yaakov, *Israeli law makes revenge porn a sex crime*, Times of Israel, <http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/>, Jan. 6, 2014.

²⁸ Alex Cochrane, *Legislating on Revenge Porn: An International Perspective*, Society for Computers and Law, <http://www.scl.org/site.aspx?i=ed38027>, July 24, 2014.

²⁹ Philip Oltermann, *‘Revenge porn’ victims receive boost from German court ruling*, The Guardian, <http://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>, May 22, 2014.

³⁰ Cyber Civil Rights Initiative, <http://www.cybercivilrights.org/about>

³¹ Mary Anne Franks, *Combating Non-consensual Pornography: A Working Paper*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537, Sept. 7, 2014.

³² Mary Anne Franks, *Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823, July 18, 2014.

³³ Id.

³⁴ Mary Anne Franks, *The Need for Sexual Privacy Laws*, Brookings Institution, <http://www.brookings.edu/blogs/techtank/posts/2014/09/09-sexual-privacy-laws>, Sept. 8, 2014.

It is past time for the law to recognize that sexual privacy is at least deserving of respect as other forms of privacy. People rely on the confidentiality of transactions in other contexts all the time: we trust doctors with sensitive health information; we trust salespeople with credit card numbers; we trust search engines with our most private questions and interests. We are able to rely on the confidentiality of these transactions because our society takes it as a given—most of the time—that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Laws protecting victims from unauthorized disclosures of their financial, legal, or medical information have a long and mostly uncontroversial history; it is remarkable that disclosures of sexual information have for so long been treated differently. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information. The circulation of credit card numbers, health records, or trade secrets without proper authorization all carry serious criminal penalties.

Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one's body. Criminal laws prohibiting surveillance and voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punish-

ment.³⁵ The legal and social condemnation of child pornography is another example of our society's collective understanding that the distribution of certain kinds of sexual images is a harm in itself. In *New York v. Ferber* (1982), the Supreme Court recognized that the distribution of child pornography is distinct from the underlying crime of the sexual abuse of children,³⁶ observing that "the distribution of photographs and films... are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."³⁷ As one victim describes it, knowing "that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it [is] like I am being abused over and over and over again."³⁸ The trafficking in this material moreover increases the demand for images and videos that exploit the individuals portrayed. The Court in *Ferber* held that it is necessary to shut down the "distribution network" of child pornography in order to reduce the sexual exploitation of children: "The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."³⁹ Victims of non-consensual pornography of any age are similarly harmed each time a person views or shares their intimate images, and to allow the traffic in such images to flourish increases the demand and

the pervasiveness of such images.⁴⁰

Some critics claim that non-consensual pornography can be effectively addressed through existing laws, such as tort and copyright, and insist that no criminal law prohibiting non-consensual pornography can be reconciled with the First Amendment. These critics are wrong on both counts.

First, the insistence that existing laws are sufficient to address this conduct is an ivory-tower response that ignores the reality victims face. Copyright law, while useful in some cases, cannot be invoked by a victim who did not take the image herself. Even when the victim does hold the copyright and submits a proper DMCA notice and takedown request, many site owners will ignore it.⁴¹ Even when a site owner does honor a takedown request, the image will often pop up on another site or even the same site after a short time. Bringing civil actions require money, time, and resources that many victims simply don't have, and the chances of success are very low. Even successful civil actions cannot truly address the harm created by revenge porn: even if a victim wins damages or an injunction forcing the poster to take down the image, there is literally nothing to stop the hundreds of other people that have already downloaded or re-posted her image.⁴² While

³⁵ National District Attorneys Association, *Voyeurism Statutes 2009*, http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf

³⁶ 458 U.S. 747

³⁷ *Id.* at 759.

³⁸ Adam Liptak, "Allocating Liability for Child Pornography, in Full or Fractional Shares," *New York Times*, Dec. 2, 2013.

³⁹ *Id.* at 760.

⁴⁰ As revenge porn victim Bekah Wells writes, "I am victimized every time someone types my name into the computer. The crime scene is right before everyone's eyes, played out again and again." *Women Against Revenge Porn*.

⁴¹ <https://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/>; <http://talkingpointsmemo.com/caffe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn>

⁴² CCRI recently launched a project with the law firm of K&L Gates to provide pro bono legal services to victims. <http://www.cyberrightsproject.com/>

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criminal penalties also cannot guarantee that images will be removed, they offer far greater potential for deterrence than the vague and unlikely threat of civil action.

The Barber case demonstrates some of the limitations of existing criminal laws against harassment, and harassment and stalking laws often can only be brought to bear in cases where the perpetrator is engaged in a “course of conduct” that is intended to harm or harass – a single act of uploading a private image would generally not constitute harassment, no matter how devastating the result.⁴³

Secondly, the claim that existing law can effectively regulate non-consensual pornography and the claim that any criminal law prohibiting non-consensual pornography would violate the First Amendment cannot both be true. If non-consensual pornography is categorically protected by the First Amendment, then any law that regulates it – civil or criminal – is constitutionally impermissible. That would mean victims could not sue for invasion of privacy or intentional infliction of emotional distress, or take advantage of criminal laws prohibiting stalking and harassment, solely on the basis of non-consensual pornography. Such a conclusion is clearly absurd. Non-consensual pornography, like other invasions of privacy, can be regulated through carefully drafted criminal, as well as civil, laws.

The Cyber Civil Rights Initiative consulted with legal scholars, practitioners, judges, law enforcement, victims, and anti-domestic violence and trafficking organizations in drafting its model

criminal legislation. As CCRI urges in its Guide for Legislators, laws prohibiting non-consensual pornography should be narrowly and carefully drafted to protect both the important privacy and sexual autonomy interests at stake and the values of the First Amendment.⁴⁴ In particular, legislators should ensure that the law only applies to depictions of living, identifiable individuals, avoid using overbroad definitions of nudity, and include an exception for disclosures made of public or commercial images or for legitimate public purposes. The last of these is extremely important: without such an exception, individuals could potentially face prosecution for disclosing images of unlawful activity, such as flashing or the transmission of unsolicited and unwanted sexual imagery.

The law should not, however, be limited by a requirement that perpetrators intend to cause emotional distress or to harass, as the ACLU has suggested.⁴⁵ While the requisite mens rea for each element of a criminal law should be clearly stated, criminal laws are not required to include – and indeed the

majority do not include – motive requirements. “Intent to cause emotional distress” or “intent to harass” requirements arbitrarily distinguish between perpetrators motivated by personal desire to harm and those motivated by other desires, such as entertainment or profit. Prohibiting only disclosures of sexually explicit images when they are motivated by a desire to cause distress or to harass while allowing disclosures motivated by a desire to generate profit or entertain, is not only illogical but also raises First Amendment issues of under-inclusiveness and viewpoint discrimination.⁴⁶

In 2013, New York legislators made several proposals regarding “revenge porn.”⁴⁷ Unfortunately, many of these proposals were both under-protective and likely unconstitutional. Bill S5946A, which passed the Senate in June 2014, requires “an intent to harass, annoy or alarm,” while providing no exceptions for commercial pornography, voluntary exposures in public, or disclosures made with a lawful public purpose.⁴⁸

⁴⁴ <http://www.endrevengeporn.org/guide-to-legislation/>

⁴⁵ The ACLU Foundation of Arizona makes this claim in its recent lawsuit against Arizona’s non-consensual pornography law, *Antigone Books et al v. Horne* (2014). The ACLU of Maryland made this claim in its Testimony for the Maryland House Judiciary Committee on HB 43 (Jan. 28, 2014). The ACLU seems to believe that such intent requirements are necessary to avoid constitutional overbreadth. While constitutional overbreadth is a legitimate concern to raise with regard to any statute that regulates expression, such a concern “must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). That is, the mere possibility that a statute could be applied too broadly is not sufficient grounds to invalidate it. The ACLU’s recommendation is all the more strange considering that the ACLU itself, in objecting to federal stalking provisions of the Violence Against Women Act, characterized “intent to cause substantial emotional distress” elements, as well as intent to “harass” or “intimidate” elements, as “unconstitutionally overbroad.” (ACLU, New Expansion of Stalking Law Poses First Amendment Concerns, March 12, 2013). If the ACLU maintains that such language is unconstitutional in the context of stalking laws, one wonders how it can maintain that such language is necessary to ensure the constitutionality of nonconsensual pornography laws

⁴⁶ For example, a Texas court recently held that ruled that the state’s improper photography statute could not be rescued from constitutional overbreadth because it only criminalized photographs taken with the intent to arouse or gratify a person’s sexual desires. In fact, the court found that such an intent requirement was an “attempt to regulate thought.” *Ex parte Thompson* (2014), 11-12.

⁴⁷ <http://www.nydailynews.com/blogs/dailypolitics/state-lawmakers-introduce-bills-targeting-revenge-porn-updated-blog-entry-1.1696649>

⁴⁸ http://assembly.state.ny.us/leg/?default_fld=&bn=A08214&term=&Summary=Y&Actions=Y&Text=Y

⁴³ <http://ypdcrime.com/penal.law/article120.htm#p120.40>; <http://ypdcrime.com/penal.law/article240.htm#p240.25>

New York Assemblyman Ed Braunstein's proposed bill, A08214A, criminalizing the "non-consensual disclosure of sexually explicit images" is a greatly superior effort.⁴⁹ This law, which CCRI helped draft, clearly and narrowly focuses on violations of sexual privacy, ensuring that disclosures of public or commercial images or disclosures made with a legitimate public purpose or not swept into its reach.

Some critics of criminalizing non-consensual pornography feel that jail time is simply too harsh a punishment for non-consensual pornography. Such critics fail to appreciate the devastating and often irreversible impact of this conduct, as well as failing to acknowledge that criminal law is routinely used to punish far less serious conduct. While it is, as a general matter, regrettable that a person should be deprived of liberty, it is far more regrettable that a person engages in destructive, unjustifiable conduct with impunity. At the heart of New York's unlawful surveillance law is the recognition that people have the right to control who can view them in their most intimate moments. Taking that right seriously requires criminalizing all forms of non-consensual pornography. ■

⁴⁹ http://assembly.state.ny.us/leg/?default_fld=&bn=A08214&term=&Summary=Y&Actions=Y&Text=Y

“Laws are like cobwebs,
which may catch small flies, but
let wasps and hornets break
through.” — Jonathan Swift

LEGAL AID DNA WIN

Nearly two years after Legal Aid lawyers **Jessica Goldthwaite**, **Clint Hughes**, and **Susan Friedman** began *Frye* hearings into the contested issues of the OCME's Forensic Statistical Tool (FST) and Low Copy Number (LCN) DNA testing, they emerged victorious on November 7, 2014 with a landmark ruling from Justice Mark Dwyer of New York Supreme Court in Kings County. Justice Dwyer's decision, that FST and LCN testing do not meet the *Frye* standard of general acceptance in the relevant scientific community, is a year ending highlight, not only for our hard working colleagues at the Legal Aid Society, but for every practicing criminal defense attorney. Those who attended our exemplary Cross of a DNA Panel in July will remember hearing members of the Legal Aid Society's DNA unit speak about these practices, as well as getting a preview of their arguments challenging the testing. A December 15, 2012 New York Times article discussed the creation of the then innovative but controversial procedure to analyze smaller samples of DNA containing a mixture of contributors. Dr. Theresa A. Caragine of the OCME forensic biology department, who helped produce the FST, was quoted in that article proclaiming her confidence in the methodology, which has now failed to pass *Frye* standard muster. She said at the time "if I was nervous that it wasn't going to prevail, then we wouldn't be using it today." Kudos to the attorneys who litigated the issues for over two years and who were prepared to continue the fight after prosecutors moved to reopen the hearing. Despite the People's efforts to challenge the ruling Judge Dwyer denied their motion on January 5, 2015.

The Exoneration of David McCallum

Presents a Startling Reminder of the Need for Competent Counsel in Defense of Criminal Matters

By Oscar Michelen



On October 15, 2014, David McCallum became a free man after spending nearly 29 years in prison for a murder he didn't commit. Arrested as a 16 year old teenager, along with Willie Stuckey, his co-defendant of the same age, he walked into his family's arms as a 45 year old man. Willie was not as fortunate – he died in prison in 2001. The blame for the wrongful convictions of these two men can be placed on a number of things – rampant crime in the 1980s led to an over-burdened system where individual's rights were given short shrift; an over-zealous prosecutor who successfully used smoke-and-mirrors to detract the judge and jury from key evidence; and a Brooklyn homicide detective who used physical force, duress and deception to get the young men to make false confessions. But blame must also fall on the pair's criminal defense attorneys, who simply did not do enough with the available evidence that would have established the boys' innocence (or at the very least established reasonable doubt) and pointed the jury to another pair of much more likely suspects. The case should serve as a strong reminder of a defense counsel's obligations to zealously represent his client even in the face of a confession to the crime.¹

The underlying criminal case

On October 20, 1985, at approximately 3:00p.m., Nathan Blenner was abducted in front of his home at 111th St. in the Ozone Park neighborhood in Queens, New York City. Two witnesses, Gregory Prasad, age 10, and John Egan, age 11, reported

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¹The author realizes that writing this article for this magazine and its readership is likely "preaching to the choir" but what's wrong with preaching to the choir now and then?

that they looked out the window of a porch-like room at the front of Prasad's house and saw Nathan Blenner trying to start his 1979 black Buick Regal. Across the four lane street, two black males were walking toward the car from the rear, one on the street and one on the sidewalk. As the men were about to pass the car, they turned around and ran over to the car windows. The two men entered the car, pushed Mr. Blenner into the back seat, and drove off down 111th St toward 117th St. According to the boys, one of the black males was taller than the other. Neither of the two boys was able to identify McCallum or Stuckey as the abductors.

The next day, October 21, 1985, Mr. Blenner's body was discovered in the rear of Aberdeen Park, a wooded area in the Bushwick section of Brooklyn bordered by Evergreen Cemetery and a railroad yard. Nathan Blenner's body was lying face down, with his arms at his side and with a single gunshot wound to the rear of his head.

Blame must also fall on the pair's criminal defense attorneys, who simply did not do enough with the available evidence that would have established the boys' innocence.

The police investigation establishes some leads

Police from the 106th precinct canvassed the area and spoke with several people in the neighborhood. One man reported seeing a black male driving Blenner's car at around 3 p.m.; a woman named Kathleen Hank said that at approximately 2:00 p.m. on the date of the crime she was washing her 1975 Buick Regal in front of her residence on 117th St, when she observed two black males walking north on 117th. She described both males as in their twenties. One was 5'6, thin build. The other was 5'10, with a thin build. One had hair in braids. One of the males said, "That's a nice car." Ms. Hank replied, "If it's not here tomorrow, I'll know where to look." The men continued walking north toward 111th St. Neither Stuckey nor McCallum had braids and both were 5'5" tall and therefore did not match Hank's or the two boys description of the men they saw. Ms. Hank clearly indicated that she could identify the two men and would be willing to go to the station to view mug shots.

The ME determined the cause of death to be the gunshot to the head, and he found no evidence of stippling² or gunpowder residue. The time of death was estimated to be 3:30 p.m. on October 21, 1985.

On October, 22 1985, Brooklyn homicide detectives learned that in the 105th precinct (where Blenner lived) there were eight carjackings between October 18 and October 20, 1985. In all instances, the perpetrators were two black males ages 18-20, one 5'6, the second 5'11, armed with a gun. This physical description exactly matched the description given by Ms. Hank. That same day the Blenner vehicle was found burning in Flatbush. A kerosene can was found in the back seat. Several young boys who were found around the car were questioned. Numerous fingerprints were lifted from various surfaces, though only on the front and left side of the car and on the kerosene can. Some of the prints belonged to members of the Blenner family and others to Damon McIntyre, a man who resided in the area

² Tell-tale marks left by unburned powder and debris seen in shots fired at close range.

Continued on next page

and was identified as one of the people hanging around when the car was burning. The prints that were not identified did not match the other youths or McCallum and Stuckey.

An Amoco credit card receipt found in the Blenner vehicle established that in the early morning hours of October 21, 1985, the day following the daytime abduction of Nathan Blenner, an Amoco credit card belonging to Mr. Blenner's employer was used to buy gas from a gas station at 720 New York Avenue, Brooklyn New York.

On October 24, 1985, Ms. Hank reported her car stolen from in front of her residence, exactly where she had been washing it when she saw the two black males in the neighborhood about an hour before Nathan Blenner was abducted. The following day, two black males, one of whom had braided hair matching the perpetrator described by Ms. Hank, were arrested for robbery in the 104th precinct. The first, we'll call him "HM," was 19 years old. The second, we'll call him "TH," was 18 years old. TH lived not far from where Nathan Blenner's body was discovered. His alibi was that he was at work at "Pops Hardware." The reporting officer knew this to be the same store where the Nankee kerosene can found inside Nathan Blenner's car was sold. TH told police that someone named "Supreme" was trying to sell a gun "with a body on it" and that the gun belonged to a James Johnson.

James Johnson told detectives that during an incident in a grocery store, he fired some shots in the store. He fled and took the gun to his Aunt Lottie's house. Someone from his aunt's house, in turn, gave the gun to someone named

"Jamie." Mr. Johnson said that several days after, he ran into Willie Stuckey and that Mr. Stuckey, whom Mr. Johnson identified as having the nickname "Supreme," told him he had gotten Mr. Johnson's gun from "Jamie" and he could get it back for Mr. Johnson. Mr. Johnson said he did not want it. Detective Butta (in charge of the Blenner investigation) promised to forget about the shooting in the grocery store if he testified to this story.

There was never any further follow-up of the TH and HM angle. Instead, relying on James Johnson's statement, the police brought Willie Stuckey in for questioning. He told them that David McCallum was the person known as "Supreme", so the police questioned McCallum as well.

The boys confess

Both young men gave very short, undetailed statements about the incident; each stated he was merely present during the shooting and that the other pulled the trigger. Their statements, each totaling only about three-four minutes in length, were videotaped by ADA David Rappaport. Both McCallum and Stuckey immediately recanted their confessions and told their lawyers they were beaten and threatened by Detective Butta into giving the confessions. The confessions of the two boys vary greatly in describing the circumstances of the crime. Neither version comports with the two eyewitnesses' version of the abduction. The confessions are very brief and provided no new evidence to the police. In fact, although Willie confessed to the gun still being under his mattress, when the police sent someone to the house to retrieve it, there was no gun there. Willie offered no further

information about its whereabouts. In his written statement taken before the videotape, Willie also was forced to confess to the Hank incident.

The Hank Incident was Purposely Confused at Trial

When the police first started investigating the case, it is clear that they believed that whoever accosted Ms. Hank also abducted Nathan Blenner. We know

Both McCallum and Stuckey immediately recanted their confessions and told their lawyers they were beaten and threatened by Detective Butta into giving the confessions.

this because Detective Butta's initial DD-5 (detective report) contains the Hank description of the perpetrators as the suspects. But at trial, ADA Eric Bjorneby and Detective Butta took great pains to try to confuse the judge and jury about the significance of the Hank incident. Through a series of maneuvers they led the court and jury to believe that the Hank incident occurred at 12:00 noon rather than 2 p.m., and that Ms. Hank stated she could not identify the perpetrators, even though she previously had testified that she could and would come down to the precinct to view photos. The main problem with the government trying to establish that the incidents were unrelated is that Willie Stuckey *was made to confess to the*

Hank incident in his written confession.

The men were both convicted and sentenced to 25 years to life.

Rubin “Hurricane” Carter Takes David’s Case

In 2005, after exhausting all of his State appeals and Federal Habeas petitions, many of them done *pro se*, David began a letter writing campaign, seeking assistance to get his conviction overturned. His pleas caught the attention of Innocence International, a Canadian organization led by legendary wrongful conviction advocate Rubin “Hurricane” Carter and author Ken Klonsky. They decided to take a hard look at the facts of David’s case, and came to the conclusion that he was in fact innocent.

Rubin then contacted me after reading a news story about my first exoneree, Angelo Martinez, who served 18 years for a murder he didn’t commit. He sent me David’s file and I also believed that David was innocent. Rubin and I traveled to Eastern Correctional Facility in Ulster County, New York to meet David. He impressed both of us with his direct and pleasant manner; his knowledge of the case and the law; and his overall positive and uplifting demeanor. So we agreed to commit time and energy to overturning his conviction. Neither of us thought it would take ten years!

New evidence is discovered

DNA and Fingerprint Evidence

Our investigation revealed several pieces of evidence that were never tested for DNA material, as that science did not exist at the time of the conviction. In particular, after the car was recovered, numerous cigarette butts and a marijuana roach were found inside the ashtray

of the car. We made a motion for DNA testing along with requesting that the Kings County District Attorney’s Office (KCDA) run the fingerprints through the system again to see if the unidentified prints could now be identified.

The recent print comparisons conducted by KCDA revealed new additional matches. One, also obtained from the outside of the car, matched another of the three boys around the car. The second, obtained from a “stub” card found inside the car, matched someone whose name does not appear anywhere in the DD5s and who died in 1992. Most significantly, DNA analysis of the nine cigarette butts found in the car proved fruitful. Two of these butts matched someone we’ll call RM, a person who is in the New York DNA registry on the basis of past criminal conduct. This person has alternatively told Det. Patrick Lannigan of the KCDA Conviction Review Unit that he does not know how two cigarettes carrying his DNA found their way into Mr. Blenner’s car or that he must have flicked the butts into the car as he walked past it on his way to school – an obvious fabrication. We located his current whereabouts and he recently told me and our investigator, Van Padgett, that RM has no idea how the cigarette butts ended up in the car and that it must be a mistake. None of the new DNA and fingerprint evidence tied David or Willie to the crime.

HM

Van Padgett tracked down HM’s sister. The sister told Van that HM was detained and questioned by Brooklyn police three separate times before anyone was arrested for the Blenner homicide. No DD-5 reflects these incidents.

Van spent months and months trying to track down HM. He was finally located when he entered Riker’s Island where he was detained on a recent re-arrest. Van and I interviewed him on January 30, 2014. He confirmed being questioned and detained by the police about the Blenner homicide – except that there were not just three (as his sister told the investigator) but four contacts with the NYPD about the Blenner homicide. The first was when HM was riding his bike past the crime scene when police first found the Blenner body in Aberdeen Park. He was then brought down to the stationhouse three more times over the next few days. He provided an affidavit to us attesting to all of the above.

His sister also told Van that HM had “dirty dealings” with the police providing an explanation why they NYPD may not want to charge him with a homicide.

Kathy Hank

We were able to track down and interview Ms. Hank. She informed us that after she called the police to report the stolen car, she was visited by a Brooklyn detective who brought mug books of robbery arrestees from the Brooklyn precinct handling the Blenner murder. She spent time going through all of the mugbooks but could not identify anyone. But, more importantly, no DD-5 exists of this visit to Hank and Butta testified at trial that Hank told him she could not identify anyone. She also provided an affidavit attesting to all the above.

Having been arrested for robbery in the 83rd precinct prior to their arrest for the Blenner homicide, McCallum and

Continued on next page

Stuckey's mugshots would have likely been in the mugbooks presented to Ms. Hank. Ms. Hank's husband (who was then her boyfriend) and her mother also confirmed that this visit and viewing of mugbooks occurred after Ms. Hank had reported her car stolen.

Not only did the KCDA fail to disclose that Detective Butta had shown mugbooks to Ms. Hank, ADA Bjorneby actively misled the jury by suggesting to the jury that the conversation Ms. Hank had with the two men occurred at noon rather than 2:00p.m. On his second redirect of Det. Butta, ADA Bjorneby again tried to reiterate for the jury that Ms. Hank told Detective Butta that she saw the two black males at 12:00 p.m. When Willie's lawyer objected, arguing that the question had been "asked and answered," ADA Bjorneby then made a remark that had the effect of giving his own testimony to the jury:

"All right. Fine. Judge. 12:00 is what he said we will leave it at that."

Having locked Detective Butta into testifying that Kathy Hank said she saw two black males at 12:00 p.m., Bjorneby then argued that the jury should disregard her statements because she had described an incident that had occurred several hours before Blenner was abducted – even though he knew that her initial interview with the police stated the incident occurred at around 2 p.m.. Hank also told us that she never told Butta the incident happened at 12 p.m., but rather that she was accurate when she gave the time during the initial canvass. In his closing argument, ADA Bjorneby argued that the "woman who mentions braids is not even a witness to this incident...She describes to the police who are canvassing about a

missing person and a kidnapping, she describes how several hours before she saw two black men."

This disingenuous remark, in my opinion, constituted prosecutorial misconduct. Ms. Hank never said she saw the man in braids and his companion at 12:00 p.m; she told officers that it was at 2:00 p.m., within an hour before witnesses told the police they saw Blenner abducted. The new evidence that Ms. Hank was willing to, and did in fact, view mugbooks also placed Det. Butta's credibility and truthfulness into serious doubt. Keeping this fact from the defense by not creating a DD-5 about the contact and by not telling the defense of potentially exculpatory evidence was yet another cause of the wrongful conviction of David McCallum.

Analyzing the Confessions

In 1985, videotaped confessions were rare. Even though these confessions were brief and without details, it would have been hard for the jury to ignore them, especially when defense counsel did not point out the inconsistencies among the confessions and between the confessions and the physical evidence. At the time of Mr. Stuckey's and Mr. McCallum's trial in 1985, the study of false confessions was in its infancy. In the past two decades, however, social science research into the phenomenon of false confessions has grown exponentially, increasing the understanding of the causes and consequences of false confessions. According to the Innocence Project, the advent of DNA testing has resulted in 318 exonerations to date, approximately 30% of which involve false confessions. In cases of homicides without sexual assaults, false confessions are the leading cause of the convictions

which are later overturned because of DNA, doubling (62%) the percentage of DNA exonerations (31%) due to mistaken eyewitness identifications. Many of the false-confession exonerations involve teenagers like Mr. McCallum and Mr. Stuckey, who are more vulnerable to police pressure and more likely to confess to crimes they did not commit when pressured. In fact, two of the most highly-publicized New York-area exonerations of recent times – the Central Park Jogger Case and Marty Tankleff's case – both involved young men confessing to crimes they did not commit.

Rubin Carter reached out to Professor Steven Drizin, a leading authority on false confessions, and the former Legal Director of Northwestern University School of Law's Center on Wrongful Convictions. Professor Drizin examined the tapes in this case and found them troubling; they contain many of the key indicators of false confessions. As in the Central Park Jogger case, there are numerous inconsistencies between Stuckey's and McCallum's confessions (e.g. the numbers of shots fired, the route followed after the shooting, what happened to the car). Neither Stuckey nor McCallum were able to lead the police to any evidence that corroborated the confessions, including the murder weapon, Mr. Blenner's wallet, and a credit card that was stolen and used by the perpetrators to purchase gas. There is also evidence that the police "contaminated" the confessions by feeding facts to the boys that only the police and the true perpetrators should have known. McCallum and Stuckey provided very few details about the crime and offered no new evidence to the police or the KCDA. The confessions spoke of

a close range shooting, which did not match the ME's report noting that there was no stippling or gunpowder residue. Professor Drizin not only provided a report attesting to all of the above, he agreed to join the legal team and consulted with us on the matter continuously until David was exonerated.

The overturning of the conviction

The majority of the above material was presented to the KCDA under Charles Hynes but the office refused to act. In fact, the McCallum team was essentially told that despite all of this new evidence, Mr. McCallum would not be released until we found sufficient evidence to charge someone else with the crime.

But then the people of Brooklyn saw fit to usher in a new era in the DA's Office through the election of Kenneth Thompson. By the time of the election, Hynes' grip on the borough was unraveling, as evidence of a wave of wrongful convictions and questionable practices by the KCDA's office was revealed.³

I had met Ken Thompson many years earlier, when I was representing David Johnson, Governor Paterson's embattled aide, while Thompson represented Sherruna Booker, Mr. Johnson's ex-girlfriend who was at the center of a firestorm of charges against Johnson and then-Governor Paterson. We had

developed a professional and mutual respect that allowed me to call him and ask him to personally take a second look at the McCallum case.

He then appointed Ronald Sullivan, the faculty director of Harvard University's Criminal Justice Institute, to head his newly formed Conviction Review Unit (CRU). In addition to exemplary academic credentials, Professor Sullivan's professional experience includes heading Washington, D.C. and New Orleans'

David's lawyer Peter Mirto has since died, but not before being disbarred for stealing his clients' money from his escrow account.

And if you think I am speaking ill of the dead, you're right.

Public Defender's Offices. To my knowledge, it was the first time such a unit was headed by someone with a deep history of defending the indigent in criminal matters, as opposed to an experienced former or current prosecutor.

Ultimately, a thorough and new re-investigation of the case was done by the CRU. In addition to checking out the information we provided, they found additional evidence including a witness who established the high probability that James Johnson had perjured himself at trial. The CRU agreed that

the conviction was wrongful and unjust and that it should be vacated and the indictment dismissed.

They consented to our 440 motion and stated on the record that the re-investigation of the case revealed that:

- a) a material witness (James Johnson) who supplied the probable cause to the police that resulted in the arrest of McCallum gave false and misleading statements to the police and false and misleading testimony in court at the trial. Furthermore, they stated that the police at that time should have been able to determine that Mr. Johnson's statements were false and misleading.
- b) There is no evidence whatsoever that connects Mr. McCallum to the crime;
- c) There is quite a bit of evidence that would tend to connect people other than McCallum to the crime; and
- d) The confession of McCallum was very brief and undetailed; internally contradictory to Stuckey's confession; and
- e) There was unmistakable and unrebuttable evidence that the statements were not voluntary recollections or admissions of the two defendants, but rather were the product of improper suggestion, improper inducement and perhaps coercion.

These statements were a "joyful noise" to David, his family and the team mem-

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³ See NY Daily News, June 3, 2014, "Ex-Brooklyn DA Charles Hynes hides after report shows he may have misused public funds for re-election bid" <http://www.nydailynews.com/new-york/ex-da-charles-hynes-hides-allegations-emerge-article-1.1816098>

Continued from previous page

bers present in the courtroom. David had been pleading his innocence for just under 29 years; I had been working on the case for nearly ten years; and his family had been supporting David all along. It was a bittersweet moment because Willie Stuckey had died in prison in 2001, and while his conviction was also overturned, it came too late. Also, Rubin Carter had passed away in April of this year, and his guiding influence and inexhaustible spirit were the driving force behind the McCallum team. He wrote a death-bed plea to

Thompson, published in the NY Daily News, that, along with an independent film called "David & Me" produced by Ken Klonsky's son Ray, shed important light on David's case. It's a shame we could not get it done in time for Willie and Rubin.

What's the Message?

It's also bittersweet because there is a possibility that with competent counsel the conviction may have been averted in the first place, and that needs to be the message of David McCallum's plight.

Attention needs to be paid to the defense of the indigent. David's lawyer Peter Mirto has since died, but not before being disbarred for stealing his clients' money from his escrow account.

And if you think I am speaking ill of the dead, you're right. Here are some of the highlights of his purported defense:

- a) He failed to visit the crime scene or to visit David while he was in Rikers' Island awaiting trial, choos-

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Jenny Rivera

New York State Court of Appeals



Jenny Rivera, Associate Judge of the Court of Appeals, was born in New York City in December 1960. On January 15, 2013, Governor Andrew M. Cuomo nominated her to the Court of Appeals, and the New York State Senate confirmed her appointment on February 11, 2013.

Judge Rivera has spent her entire professional career in public service. She clerked for the Honorable Sonia Sotomayor, on the Southern District of New York, and also clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. She worked for the Legal Aid Society's Homeless Family Rights Project, the Puerto Rican Legal Defense and Education Fund (renamed Latino Justice PRLDEF), and was appointed by the New York State Attorney General as Special Deputy Attorney General for Civil Rights. Judge Rivera has been an Administrative Law Judge for the New York State Division for Human Rights,

and served on the New York City Commission on Human Rights. Prior to her appointment, she was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality.

She graduated from Princeton University, and received her J.D. from New York University School of Law and her LL.M. from Columbia University School of Law.

Recipient of the Thurgood S. Marshall Award for Outstanding Criminal Practitioner

Herbert L. Greenman, Esq.

Herbert L. Greenman is a Senior Partner with Lipsitz Green Scime Cambria LLP. He concentrates his practice in the area of Criminal Defense; with extensive experience in matters including criminal trials, criminal appeals, constitutional law, narcotic cases, and search & seizure. After earning both his B.A., and J.D. at the State University of New York at Buffalo, Mr. Greenman began his career as an Assistant District Attorney for Erie County; prosecuting drug felonies from 1973 to 1974. He has been in private practice since 1974 and has earned several awards and distinctions throughout his career. Mr. Greenman's Buffalo colleagues praise him for being a tireless advocate with clients that include the full range of those in need: impoverished CJA defendants charged with "street" crimes to wealthy white collar defendants charged with complex federal offenses. All his clients receive the benefit of unyielding energy,

zealous representation, and encyclopedic knowledge. He also is a mentor to the younger, up and coming criminal defense practitioners in Western New York, and even the most experienced courtroom warriors call him for advice and wise counsel. Mr. Greenman has numerous published articles for seminars, including Criminal Law Updates (Federal & State), Motion Practice, Trial Procedures and Search & Seizure, as well as Federal Sentencing guidelines and has been a lecturer at several seminars for the New York State Bar Association, the Bar Association of Erie County and the Federal Bar. He also spent 20 years teaching in the Trial Techniques Program for second and third year students at the State University of New York at Buffalo School of Law. In addition to NYSACDL, Mr. Greenman is a member of the Bar Association of Erie County and the New York State Bar Association.



Justice Award

Vincent Warren, Esq. & Center for Constitutional Rights



Vincent Warren is the Executive Director of the Center for Constitutional Rights (CCR). He oversees CCR's groundbreaking litigation and advocacy work which includes using international and domestic law to hold corporations and government officials accountable for human rights abuses; challenging racial, gender and LGBT injustice; and combating the illegal expansion of U.S. presidential power and policies such as illegal detention at Guantanamo, rendition and torture. Prior to his tenure at CCR, Vince was a national senior staff attorney with the American Civil Liberties Union (ACLU), where he litigated civil rights cases, focusing on affirmative action, racial profiling and criminal justice reform. Before joining the ACLU, Vince monitored South Africa's historic Truth and Reconciliation Commission hearings and worked as a criminal defense attorney for the Legal Aid Society in Brooklyn. Vince is a graduate of Haverford College and Rutgers School of Law.

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

ing instead to talk to him only during court appearances⁴.

- b) He waived his opening statement – an old criminal lawyer’s tactic that had long lost favor with the criminal defense bar.
- c) He never told the jury about Kathy Hank or HM or TH; in fact, it is clear from the record that he utterly failed to understand the significance of the Hank incident or that Willie had been made to confess to it;
- d) He did not cross examine the two boys who witnessed the abduction to elicit their description, which did not match David or Willie.
- e) He did not cross-examine the medical examiner, whose autopsy contradicted the confessions on several key points.
- f) He did not cross-examine James Johnson to elicit the sweet deal the KCDA and NYPD had given him in exchange for his testimony – Stuckey’s lawyer asked only one question about the deal, so the jury was not given much to work with to attack Johnson’s testimony which placed the gun in Willie’s hand;
- g) Johnson did so by testifying to double hearsay without objection. To sum up his testimony it went something like this: “My aunt told me that Jaime told her that Willie told him the gun had a body on it;”

⁴ We know this not just because David told us so but because we obtained his 18-b billing records on the case.



Oscar Michelen and David McCallum in court

PHOTO: AP/BEBETO MATTHEWS

- h) In his summation, in which his only job was to refute the confession, he praised the trial judge, the trial ADA and the NYPD at various points.

There are more deficiencies, but these are the main points. Faced with a video confession and this level of representation, David McCallum had little or no chance against a seasoned prosecutor and homicide detective willing to do anything to win.

Of course, the right to competent counsel is at the very heart of our criminal justice system, engrained there by the 6th Amendment to the Constitution. But often, State governments do no more than pay lip service to the idea. They underfund Legal Aid offices and fight their requests for more money and upgraded facilities at every turn. One would think that the recent rash of exonerations and convictions being overturned would make those in charge of the purse strings see the obvious – that the best way to avoid a wrongful conviction in the first instance is by

making sure the accused is properly and ably represented.

Recently, Governor Andrew Cuomo took a step in the right direction, settling a seven-year-old lawsuit brought by the New York Civil Liberties Union demanding more money for indigent defense in five New York Counties. The state will help pay for more defense lawyers and other support staffers in the five counties as part of the settlement. Caseload limits for public defense lawyers will be set, and indigent defendants will get counsel at arraignment in those counties where they did not get that representation.⁵

The case also sends a message to all lawyers who endeavor to represent the accused: don’t take anything for granted; leave no stone unturned; examine every available angle; make sure that you are doing all you can for your client even if the evidence seems stacked against them. We are the last and best line of defense in a system controlled and managed by the various prosecutors we go up against. We must always gather up our energy and put our best effort into every matter, every time, as hard as that may seem. If you have lost that steam and drive needed for this type of work and you find you are just going along doing the bare minimum, move on to some other area of practice and pass the baton to someone who will give the client the representation they deserve and which is guaranteed to them by the Constitution. **A**

⁵ See The Watertown Daily Times, October 22, 2014, “New York settles in seven year lawsuit taking on cost of indigent defense in five counties,” <http://www.watertowndailytimes.com/article/20141022/DCO/141029521>

Keeping the **Preliminary Breath Test** *Out of Evidence*

by Steven Epstein, Esq.

PBT IS THE ABBREVIATION FOR PRELIMINARY BREATH TEST (often referred to incorrectly as portable breath tests). It is typically utilized in a DWI investigation at the scene of an arrest. New York Vehicle and Traffic law (“VTL”) §1194 refers to preliminary breath tests as “field tests” and the statutory scheme in New York clearly distinguishes a “field test” from a “chemical test.”

A “chemical test” typically is administered in a controlled environment such as a precinct. These include the Intoxilyzer 5000 and the Datamaster among others. The term chemical test is derived from the early breath test devices such as the Breathalyzer 900a which used chemical solutions in the testing process.

VTL §1194 (1) provides:

(b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit to a chemical test in the manner set forth in subdivision two of this section.

This expresses a legislative intent to differentiate between chemical tests and field tests.

It had long has been recognized that the purpose of a field test is to provide probable cause for a defendant’s arrest and not to serve as evidence at trial. In *People v. Thomas*, 70 NY2d 823 (1987), the Court of Appeals held that it was error to admit evidence of a field test at trial, specifically an Alco-Sensor. Many courts have similarly ruled that field tests are inadmissible at trial. See *People v Reed*, 5 Misc 3d 1032(A) (Sup Ct, Bronx County 2004, Tallmer, J.); *People v Santana*, 31 Misc 3d 1232(A) (Crim Ct, NY County 2011, Simpson, J.); *People v Schook*, 16 Misc 3d 1113(A)(Suffolk Dist Ct 2007, Alamia, J.); *People v Harper*, 18 Misc 3d 1107(A)



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Steven Epstein, Esq. is admitted as an attorney in New York and Connecticut, as well as before the United States District Courts for the Eastern, Southern and Northern Districts of New York and the United States Supreme Court. General Member, National College for DUI Defense (NCDD)

(Justice Ct., Dutchess County 2007, Steinberg, J.).

Preliminary breath tests are not generally accepted by the scientific community. Cases across the nation routinely hold that preliminary breath tests are unreliable as evidence of blood alcohol content. For example, the Missouri Court of Appeals outlined in *State v. Robertson*, 328 S.W.3d 745 (2010), the many times its state courts have found preliminary breath tests unreliable and therefore inadmissible. Reasons included no evidence that it was properly calibrated, maintained or working properly at the time of the test, and that the testifying officer did not know how the machine worked internally, nor the scientific process by which the machine took a sample. See e.g. *State v. Kaufman*, 770 N.W.2d 850 (Iowa App. 2009)(upholding that the results of a preliminary breath test are inadmissible at trial); *Com v. Brigidi*, 607 Pa. 329, 6 A.3d 995 (2010)(Preliminary breath tests have not reached to “a stage where they manifest sufficient reliability to satisfy prevailing judicial standards governing the admissibility of scientific evidence.”); *Sharber v. State of Indiana*, 750 N.E.2d 796 (2001)(Court of Appeals held preliminary breath tests generally inadmissible if the Department has not approved some aspect of the test); *Boyd v. City of Montgomery*, 472 So 2d 694, 697(Ct. of Crim. App., Alabama, 1985); *State v. Thompson*, 357 NW2d 591, 593-594 (Sup. Ct. Iowa. 1984)(Appendix K); *State v. Smith*, 218 Neb 201, 352 NW2d 620, 624 (Sup. Ct. Nebraska, 1984); *State v. Orvis*, 143 Vt 388, 465 A2d 1361 (Sup. Ct. Vermont, 1983); *State v. Albright*, 98 Wis 2d 663, 298 NW2d 196, 203 (Ct App Wisconsin, 1980)(Preliminary breath tests do not reliably render accurate quantitative results and should not be admitted into evidence at trial.).

There have been a recent series of decisions in the local Criminal Courts of the City of New York that have allowed the prosecution to introduce the results of preliminary breath tests to establish intoxication at trial. See *People v. Jones*, 33 Misc.3d 181 (N.Y.City. Crim. Court, 2011, Mandelbaum, J.); *People v. Aliaj*, 36 Misc.3d 682 (N.Y. City Crim.Ct., 2012, Conviser, J.), *People v. Hargobind*, 34 Misc.3d 1237(A)(Kings Co. Crim. Ct., 2012, Gerstein, J.). The rationale of these decisions is premised on the fact that some preliminary breath test devices are included on the Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by the United States Department of Transportation/National Highway Traffic Safety Administration.

On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol. A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974. On December 14, 1984 NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices and published a Conforming Products List of instruments that were found to conform to the Model Specifications.

The Conforming Products List has been adopted in New York through both VTL 1195 and VTL 1194 (“[t]he department of health shall issue and file rules and regulations approving satisfactory techniques or methods of conducting chemical analyses of a person’s blood, urine, breath or saliva and to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person’s

blood, urine, breath or saliva”). The department of health has adopted the Conforming Products List of Evidential Breath Measurement Devices through the enactment of 10 NYCRR 59.4.

The courts that have admitted the preliminary breath tests into evidence despite the holding in *Thomas* and the cases referenced above have reasoned that the Conforming Products List itself establishes the general acceptance of the reliability and accuracy of the preliminary breath test results. There are however many arguments that should be made that rebut this reasoning and it is important for defense counsel to make a complete record so as to preserve all possible issues on appeal. These arguments include: existing appellate court decisions; the lack of sophistication and reliability of the device; requesting a Frye hearing; existing statutory framework; and in New York City, the failure to comply with the New York City Police Laboratory Breath Test Rules.

EXISTING APPELLATE COURT DECISIONS

The Appellate Division in *Thomas*, in a landmark decision that was affirmed by the Court of Appeals, held, in relevant part:

It is well settled that “[t]here must be a sufficient showing of reliability of the test results before scientific evidence may be introduced.” “[S]cientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community.” Thus, the Alco-Sensor evidence should have been excluded because as it was presented to the jury it served as proof of intoxication and the People failed to lay a proper foundation showing its reliability for

Continued on next page

this purpose....Moreover, cases from other jurisdictions hold that the Alco-Sensor test is not reliable evidence of intoxication.***In our view, evidence regarding the Alco-Sensor test had no place in the trial and the objection to its admission should have been sustained. *Thomas*, 121 A.D.2d 73 (App. Div. 4th Dept. 1986); *aff'd* 70 N.Y.2d 823 (1987).

In his decision in *Jones*, 33 Misc.3d at 181, Judge Mandelbaum distinguished *Thomas* because the Court of Appeals *narrowly* ruled that the evidence that was offered at trial was irrelevant, however the language of the Appellate Division decision cited above was far more broad and supports the conclusion that there is no place in a trial for the admission of the results of a preliminary breath test.

In the recent decision of *People v. Kulk*, 103 A.D.3d 1038 (3rd Dept. 2013) the court again concluded that there is no place in a trial for the admission of the results of a preliminary breath test and affirmed the trial court decision which denied the defendant's request to introduce the results of a preliminary breath test. In *Kulk*, the defendant sought admission of a PBT test which indicated a BAC of .06 into evidence at trial. The court held that "although the alco-sensor test may be used to establish probable cause for an arrest, it is not admissible to establish intoxication, as its reliability for this purpose is not generally accepted in the scientific community.

When citing to the *Kulk* decision be sure to point out that the Appellate Division is a single statewide court divided into departments for administrative convenience, and therefore, the doctrine of *stare decisis* requires trial courts in

any Department to follow precedents set by the Appellate Division of another department until the Court of Appeals or that particular Appellate Division pronounces a contrary rule. *Mountainview Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dept. 1984).

In *People v. Rosas*, Ind. 4773/2012, Justice Goldberg of the New York County Supreme Court ruled that the *Kulk* decision compels a finding that the result of the portable breath device in that case, an SD-S is inadmissible at trial. Justice Goldberg ruled in this manner despite the fact that the SD-2 is on the Conforming Products List.

There is another 3rd Department decision that counsel should be aware of and that is *People v. Hampe*, 181 A.D.2d 238 (3rd Dept. 1992). In *Jones*, 33 Misc.3d at 18, the Court cited to *Hampe* for the court's holding that the inclusion of a testing device on the Conforming Products List itself establishes the general acceptance of the reliability and accuracy of a device. But the device in *Hampe* was not a preliminary breath test, it was the BAC Verifier, a station house device akin to the traditional chemical test devices which are routinely admitted into evidence throughout the State and the nation.

THE LACK OF SOPHISTICATION AND RELIABILITY OF THE DEVICE

The reason the preliminary breath test has not been accepted in the scientific community is their lack of sophistication and safeguards which are prevalent in chemical tests traditionally administered with equipment such as the Intoxilizer 5000. Intoxilizers, for example, must go through a 13 point checklist before being operated, require the use of 3 "air blanks" checks at different intervals to make sure that there is

nothing in the room that interferes with the reading, contains a radio frequency detector, a slope detector to eliminate the contamination caused by mouth alcohol and most importantly requires the use of a reference standard before every subject test to ensure the equipment is operating properly at the time the evidentiary sample is measured. Preliminary breath testing devices on the other hand, not only lack the heightened technology and protocol, but are more prone to error because they are always administered in the field. This type of uncontrolled setting makes it nearly impossible for the officer to observe the suspect and control radio interference with the onset of nearby and unpredictable traffic and pedestrians. See *Aliaj*, at 692. ("Even under the most optimal conditions, tests given in the field are prone to multiple possibilities for interference which may not exist at police stations."); *Reed*, at 7. (Stating that the "conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment.")

REQUESTING A FRYE HEARING

In relying on the inclusion of devices on the Conforming Products List as the *sine qua non* of admissibility of evidence the trial courts that have allowed the preliminary breath test into evidence have abandoned their role as gate keeper of evidence. In order to preserve this issue counsel must make factual allegations such as those referenced herein as to why the device is unreliable and request a *Frye* hearing. However if counsel is successful in obtaining such a hearing you must be prepared to successfully conduct the hearing or risk the establishment of very bad precedent. Therefore counsel should proceed with extreme caution before giving the court the opportunity to make very bad law.

EXISTING STATUTORY FRAMEWORK

VTL §§ 1194(1)(b) and 1194(2) differentiates between a preliminary field test and a chemical breath test, the latter being admissible at trial when the proper foundation is laid. According to VTL §§ 1194(1)(b) and 1194(2), initial breath tests and subsequent breath tests serve two different purposes—one is employed to establish that alcohol is present for the purposes of probable cause, while the other determines the level of alcohol consumed. *See McKinney's Commentary to the VTL*, which states that a field test is reliable for the determination of some presence of alcohol in a person's blood but not the actual percentage or concentration. Carrieri, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 62A, VTL § 1194 (2012) at 336-337. The court in *Reed*, 5 Misc.3d at 1032(a) summed this up when it concluded:

The position urged by the People does violence to this statutory scheme and is contrary to the weight of judicial authority construing VTL 1194. Clearly, the Legislature intended to differentiate between preliminary tests done at the scene of the crime and those conducted back at the station house. The obvious rationale for this distinction is that the conditions surrounding a field test do not give the same assurance of reliability and accuracy as those in a controlled environment.

NEW YORK CITY POLICE LABORATORY BREATH TEST RULES

Though not yet raised or discussed in any of the lower court decisions, there exists an issue that is specific to the practice in New York City. Within the discovery packet at each of the trials in New York City the prosecutor will turn over the "New York City Police Laboratory Breath Test Rules." These rules require



two things that the government cannot establish in order to get the results of a preliminary breath test into evidence at trial. They are: breath tests must be given only by those members who possess a valid breath analysis permit; and when a breath test is administered the operator must complete the operational check list and operate the instrument in accordance with that checklist. The Department of Heath does not issue permits for preliminary breath tests and the operational checklist does not exist for the preliminary breath test.

HAS A SUFFICIENT FOUNDATION BEEN LAID?

In *Jones* 33 Misc.3d 181, Judge Mandelbaum rendered a decision post trial so when the decision was written the Court had the benefit of having already ruled on the question of foundation for admission into evidence. The phrasing of the issue before the court is vital because despite a court's ruling on the general acceptance of the reliability and accuracy of the results of any breath test, the prosecution still must lay a proper foundation for the results of any breath test to be admitted at trial. Exactly what is required for that foundation is not clear nor is it consistently applied by the courts.

In *Hargobind*, 34 Misc.3d at 1237(a) the court held the preliminary breath test was admissible but recognized the difficulty the prosecution would have in establishing foundation and set forth a list of minimum requirements which include that the device had been tested, producing a reference standard, within a reasonable period prior to defendant's test; that the device had been properly calibrated; that the device was properly functioning on the day the test was administered; that the test was administered properly, including that the device was purged prior to the test, by a properly qualified administrator; and that defendant was observed for at least 15 minutes prior to the test to ensure that Defendant had not "ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have anything in his/her mouth." In *Aliaj*, 36 Misc.3d at 682 the court held that as a general matter preliminary breath tests are presumptively inadmissible but adopted what the court described as a five factor test that can be applied and gave the prosecution the burden of establishing by clear and convincing evidence that such results bear the hallmarks of a reliable chemical test.

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Regardless of whether the test is a stationary chemical test or a preliminary breath test, neither test can come into evidence unless a proper foundation can be established that the machine is (a) accurate, (b) that it was working properly when the test was performed, and (c) that the test was properly administered. *People v. Mertz*, 68 N.Y.2d 136, 148 (1986).

The Court of Appeals recently reiterated the requirement of establishing that the test was in proper working order at

ing laid in most cases. The preliminary breath testing device has no systematic method of measuring and recording a reference unless the police change the manner in which the device is used.

In an article published in the peer-reviewed international publication, *The Journal of Analytical Toxicology*, “Quality Assurance in Breath-Alcohol Analysis,” Dr. Kurt M. Dubowski, Ph.D., states that virtually every automated breath-alcohol testing device is factory calibrated as opposed to calibrated at the

time the subject is tested. He states, “[c]ontrol tests accompanying every human subject test are an essential form of scientific

safeguard. In essence, a control test constitutes a total system check because it tests the contribution of the alcohol analyzer, its calibration, the analysis process, the analyst’s function, the environment, and the reporting process.” And the National Safety Council Committee on Alcohol and Other Drugs, in its Recommendations of the Subcommittee on Alcohol Technology, Pharmacology, and Toxicology: Acceptable Practices for Evidential Breath Alcohol Testing recommends that “at least one control analysis should be performed as a part of each subject test sequence as an assessment of within-run accuracy and/or verification of calibration” if the reading in question is going to be assigned evidentiary weight at trial.

Proper maintenance is another issue that must be explored in the context of not only weight of evidence but foundation. The very same provision of the Department of Health Rules and Regulations that adopts the Conforming Products List also provides that “[m]aintenance

shall be conducted as specified by the training agency, and shall include, but shall not be limited to, calibration at a frequency as recommended by the device manufacturer or, minimally, annually.”

Although the Court of Appeals in *Boscic*, 15 N.Y.3d at 494 eliminated the requirement that breath testing devices be calibrated at a minimum every six (6) months, it specifically did not address the requirements set forth in the 10 NYCRR Part 59.

Counsel should be sure to obtain at a minimum the most recent record of calibration of all breath testing devices as well as the manual for the device. The SD-2 for example requires monthly calibration, something the New York Police Department does not currently do.

The administration of a preliminary breath test is typically performed at the time of initial contact between a law enforcement officer and the defendant. Most states, including New York, have a requirement that the subject be observed continuously for 15 to 20 minutes prior to supplying a breath sample; that protocol is rarely part of the preliminary breath testing procedure. The observation period is required to insure that the measurement of breath is not contaminated from something in the mouth or from a burp, belch, or regurgitation which might interfere with accurate results. In most states, results are intended to be for “screening purposes” only, and are sufficient to establish probable cause for an arrest or search warrant basis, but not a conviction. This has long been the law in New York and it should stay that way. **A**

Counsel should be sure to obtain the most recent record of calibration of all breath testing devices

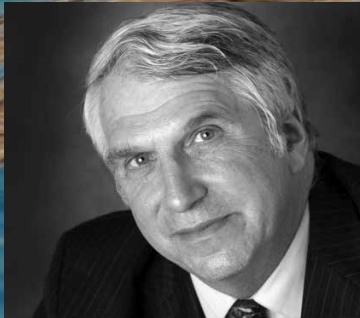
the time it was administered. In *People v. Boscic*, 15 N.Y.3d at 494, the Court held that the People were required to demonstrate the “instrument was in ‘proper working order’ at the time the test was administered. If the People fail[ed] to demonstrate that, then the chemical test results [would be] inadmissible at trial.” *Boscic*, 15 N.Y.3d at 498 (2010).

The use of a reference standard as mandated by 10 NYCRR 59.5 ensures a machine is in proper working order at the time a defendant gives a breath sample for evidentiary purposes. To comply with the requirements set forth by the Department of Health the People must produce evidence of “the result of an analysis of a reference standard with an alcoholic content greater than 0.08 percent” as set forth in 10 NYCRR § 59.5(d), and the analysis “shall immediately precede or follow the analysis of the breath of the subject and shall be recorded.” This requirement should prevent a proper foundation from be-

Reflections On Judge Jack Weinstein

By Mitchell Dinnerstein, Esq.

The walk to justice is not straight and the thwarting of Judge Weinstein's inclusions among those District Court judges who are occasionally designated to the Second Circuit is a deviation from justice. Deprived of his good work at the appellate level, legal practitioners and the public at large have been shortchanged.



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Mitchell J. Dinnerstein is a practitioner in Manhattan and a member of the Board of Directors of NYSACDL.

Lawyers who practice in the Eastern District of New York sometimes have the good fortune of having one of their cases assigned to the Honorable Judge Jack Weinstein. Judge Weinstein will turn 94 this year. Appointed by President Johnson in 1967, he has been a judge in the Eastern District of New York for 47 years. Judge Weinstein is more than just brilliant and a scholar of the law. He is also a good and great man who tries every day to dispense justice in his Courtroom. I once heard Judge Weinstein say that judges should turn to the Preamble of the United States Constitution to appreciate the Founding Fathers original attention to justice. They wrote, in the very first words in the Preamble, "We the People in order to form a more perfect Union establish justice". The rest of the Constitution is, he reflected, "just commentary" about how to go about doing that. How simple.

It is true that Judge Weinstein has received numerous accolades from the legal community too numerous to mention. His contributions are acknowledged by the highest level of the judiciary. In April of this year, for instance, Justice Steven Breyer of the Supreme Court of the United States, will make a keynote address at DePaul University Law School about Judge Weinstein's impact on topics of justice. At the subsequent symposium, speakers will discuss topics such as what it means to be a judge to seek justice in American courts. Justice Breyer's selection of Judge Weinstein as the subject of his address speaks of Judge Weinstein's life work of trying to bring about justice for people.

For criminal defendants, Judge Weinstein's writings, for example, regarding mandatory minimum sentences may finally bring a groundswell of Congressional action against the barbaric and cruel sentences judges are currently required to impose. It may fairly be said that Judge Weinstein is the conscience of the judiciary and at least, in this area, will eventually help make change of the law.

It is sadly too long in coming. I reflect today about what might have been. Judge Weinstein has remained a District

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Cutting Edge CLE

NYSACDL is noted for our innovative, interesting and informative CLE programs, which we present at various locations around the state each year. Seminar Registration Available at www.nysacdl.org Questions? Call the NYSACDL office at 518-443-2000 or email jlvanort@nysacdl.org.

CLE Seminar Roundup 2014

NYSACDL had a fantastic fall season filled with interesting and informative CLE seminars. NYSACDL prides itself on continuing to provide high quality, convenient, and affordable programs to members of the criminal defense bar. Seminars could not be produced without the committed work of our Officers, Directors, Past-Presidents and Members.

We are, as always, grateful for the outstanding faculty who took time out of their busy schedules to present practical and useful information to our seminar participants. Please find specific faculty information listed below in the individual seminar summaries. Last, but certainly not least, our CLE seminar sponsors make it possible to keep our registration fees affordable for both the private and public bar, as well as to offer scholarships for those needing financial assistance. We say thank you to Fall 2014 seminar sponsors: Counsel Press; Dopkins & Company, LLP; Find Law, Thomson Reuters; and LexisNexis.

Did you miss one of our fall CLEs? Or perhaps your interest will be sparked after reading the summaries below? Several of the seminars listed below are available for sale as video reproductions, or PDFs of seminar materials, at www.nysacdl.org. Visit and order today!

CONVICTIONS OF THE INNOCENT

September 19, 2014

New York Law School

NYSACDL's fall CLE seminar schedule started out with an important day focusing on wrongful convictions from several angles. Almost 100 people joined an exceptional line-up of faculty for several discussions on this topic, including general and focused views as well as practical tips for both avoiding wrongful conviction and handling the appeal of such a case.

The day started out with Ronald L. Kuby giving attendees an overview of wrongful convictions, including an in-depth look at some of the cultural causes associated with them. Following Ron, attendees were able to hear a unique view from "The Prosecution's Perspective" with William Darrow of the New York County District Attorney's Office and Ronald Sullivan, Jr., the recently appointed head of the Conviction Review Unit in the Brooklyn District Attorney's Office. This was followed by an important discussion on handling prosecutorial misconduct, presented by Joel Rudin.

Later in the day, Claudia Trupp of the Center for Appellate Litigation, reviewed the nuances and procedures of 440 Motions. Finally, Dr. Saul Kassin, Professor of Psychology at John Jay College of Criminal Justice, provided a stirring lecture on understanding false confessions and the motivations of those who provide them.

NYSACDL is proud to have presented this seminar focused on this important, current topic in our justice system, and we thank Find Law, Thomson Reuters for its generous sponsorship of this program.

CLE

CROSS-EXAMINATION – A DAY OF STUDY AND PRACTICE: EFFECTIVELY UTILIZING OUR MOST DANGEROUS TOOL

October 18, 2014

Onondaga Community College

Cross-examination is one of the most powerful and important tools of the criminal trial lawyer, but powerful tools can be treacherous to use. In Syracuse, NYSACDL presented a seminar on the Terry MacCarthy Method of “Look Good Cross-Examination. A two-hour plenary session on how to employ this method of controlled cross-examination was followed by breakout groups in which participants were paired to work together to prepare cross using the method, and ten of our finest trial lawyers mentored the small groups. George Goltzer, John Wallenstein, Ken Moynihan, Craig Schlanger, Ray Kelly, Lisa Peebles, Randy Bianco, George Hildebrandt, and Chuck Keller joined group leader Rob Wells for these exercises as instructors and proctors. You will recognize many of these names as Past-Presidents, Officers and Directors of NYSACDL; our internal resources are deep. Terry MacCarthy himself presented for an entire hour in plenary session; after all, who better than Terry himself?

At the end of the afternoon, one cross-examination fashioned by each of the small groups was presented to the whole group. This participatory, hands-on workshop method gave the participants nearly the full day to improve their cross-examination skills using a set of six, short hypotheticals. It is fair to say that by the end of the seminar the participants were better cross-examiners than they were even that very morning. More than that, this whole experience was a great deal of fun for instructors and participants.

IMPORTANT TOPICS FOR FEDERAL PRACTICE

October 24, 2014

New York Law School

In late October, NYSACDL took its CLE presentations back to New York City, once again at New York Law School, for our annual Federal Practice seminar. Attendees were treated to a packed day with top-notch local and national Federal practitioners. NYSACDL continues to balance our Federal Practice seminars with topics of interest to experienced practitioners and those new to Federal law.

Nicolas Bourtin, of Sullivan & Cromwell, started the day off with a practical review of cooperation, proffers & reverse proffers and their usage in both the Eastern and Southern Districts. Following him, John Cline joined us from California to present a look at current trends in Federal criminal cases and how those trends may affect future cases. Peggy Cross-Goldenberg from the Federal Defenders of New York brought the discussion back to daily practice tips with a review of deferred prosecution agreements.

Following lunch, Anthony Barkow and Katya Jestin of Jenner & Block led a discussion of Federal Sentencing practices and related topics. Marjorie Pearce of Ballard Spahr Stillman & Friedman, LLP joined Joshua Dratel for a discussion on Federal Grand Jury Practice for the end of the skills portion of our day. This discussion was both informative and a segue to our ethics portion of the day with Michael Ross, who also spent a good portion of his discussion on social media impacts.

NYSACDL will continue to produce the Federal Practice seminar annually, with new topics and interesting faculty. We thank Find Law, Thomson Reuters

for its generous sponsorship of this program.

SUPERSTAR TRIAL SEMINAR 2014 – BUFFALO

November 7, 2014

US Courthouse

On Friday, November 7, 2014, a cast of superstar trial attorneys spoke to more than 100 criminal defense lawyers at the United States Courthouse in Buffalo, New York. The program gave the capacity crowd helpful insights about the various phases of a trial, techniques for successfully defending clients, and first-hand information about important defense work being performed in a case of international and historical significance.

Brian Kelly of Nixon Peabody LLP, Boston, lead counsel for the prosecution of the Whitey Bulger case and now in a thriving defense practice, gave helpful and practical tips about theme development and opening statements in complex cases. Robert Wells of Syracuse mesmerized the audience with his ideas for successful courtroom storytelling. Former federal prosecutor and current white collar defender Lisa Zornberg of Lankler Siffert & Wohl LLP, helped audience members understand what leads to successful negotiations with prosecutors, including presentation strategy, attorney proffers, reverse proffers, immunity issues, and *Brady* issues. Buffalo defender and NYSACDL Past-president James Harrington shared his experiences, insights, and concerns from his representation of Guantanamo detainee Ramzi bin Al-Shibh in an eye-opening discussion of the military tribunals. Reid Weingarten of Steptoe & Johnson LLP, widely acclaimed by his peers as the top white collar criminal defense lawyer in

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CLE 2014 Highlights

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the United States, showed the audience how to organize, prepare for, try, and win high profile complex cases. And a lively panel discussion featuring Buffalo attorneys Andrew LoTempio and Angelo Musitano and Rochester lawyers John Parinello and Matthew Lembke took the audience through their successful representation of four co-defendants who were acquitted of homicide in a federal murder-for-hire case.

NYSACDL President Aaron Mysliwiec addressed the crowd and spoke of the importance of the solidarity and strength derived from NYSACDL's statewide presence and influence. The program was sponsored by Dopkins & Company, LLP, LexisNexis, and Counsel Press. The program, the third annual in Buffalo, continues to evince the strength of the criminal bar in Western New York.

HUDSON VALLEY SEMINAR 2014

November 14, 2014

Poughkeepsie Grand Hotel

On Friday, November 14, 2014, First Vice President Andy Kossover and Director David Goldstein hosted NYSACDL's annual Hudson Valley CLE Seminar at the Poughkeepsie Grand Hotel. The Program featured Paul Shechtman (Zuckerman Spaeder, LLP) providing an overview of twelve important criminal cases decided by the Court of Appeals during the past year. Next up was Steven Epstein (Barket, Marion, Epstein & Kearon, LLP) who provided an entertaining perspective on "The Courtroom as Theater." Mr. Epstein illustrated how attorneys can present their case to the jury like a well told story in order to capture their attention and support, much the way a good playwright captures the attention and minds of the audience. Concluding the afternoon was guest lecturer Catherine

Opela (LexisNexis), who shared with us a slew of wonderful tips to enhance attorney efficiency through technology.

WEAPONS FOR THE FIREFIGHT 2014

December 5, 2014

St. Francis College, Brooklyn

NYSACDL ended its 2014 CLE seminar season with the annual favorite, Weapons for the Firefight, in Brooklyn. This seminar focuses on the skills and tools needed to take on the important cases and issues our clients face. We were pleased to present a lecture from one of our most highly reviewed past presenters, Benjamin Brafman, who discussed the importance of a stunning

summation and why constant work is needed on summation skills. Following that, NYSACDL Vice-President Andre Vitale joined us from Rochester to give a well-received lecture on *Brady* topics.

After lunch, two top New York Legal Aid attorneys, Peter Mitchell and John Schoeffel, joined us. Peter presented an always-important lecture on leading an investigation as a defense attorney, while John reviewed discovery issues and stressed the importance of continued advocacy for discovery reform. At the end of the day, NYSACDL Secretary Arnold Levine lectured on effective Voir Dire techniques, with a specific focus on *Batson* issues.

Upcoming CLE Presentations in 2015

NYSACDL encourages you to save the dates for our 2015 CLE seminars:

JANUARY 5 – BRADY AND DISCOVERY SEMINAR

5pm-9pm, Suffolk County Bar Association, Hauppauge, NY

Sponsored By: Suffolk County Bar Association, Suffolk County Assigned Counsel Plan & NYSACDL

Speakers Include: Judge Mark Cohen; Judge John Collins; David Besso, Esq.; Harry Tilis, Esq.; and John S. Wallenstein, Esq. Moderated by Steve Kunken, Esq.

APRIL 11 – SYRACUSE SPRING SEMINAR (*Tentative*)

APRIL 17 – CROSS TO KILL 2015 (*Tentative*) *New York City*

MAY 15 – CRIMINAL CONSPIRACY *195 Broadway, New York, NY*

Sponsored By: National Association of Criminal Defense Lawyers & NYSACDL

NACDL and NYSACDL are proud to join together to produce this 1st Annual 1-day Conference on Criminal Conspiracy. The program will introduce the major evidentiary, elemental, and constitutional challenges that criminal defense attorneys face when their clients are charged with conspiracy and provide you with arguments and sources to use in tackling these difficult cases.

JUNE 5 – SPECIAL STATE PRACTICE SEMINAR (*Topic TBD; Tentative*)

New York City

Judge Jack Weinstein

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Court judge for his entire judicial career. He has not risen to the Second Circuit or for that matter to the Supreme Court, despite his obvious and well recognized talents. If promotions were based on merit only, Judge Weinstein would have been promoted. His talents could have even been better utilized if he was given at least a regular opportunity to make law in an appellate setting.

Judge Weinstein's stature should be that of the great Supreme Court judges, no less than a Holmes or Cardozo or Brennan. Just think how different and how much more responsive to the rights of individuals the law would have been if Judge Weinstein had sat on the Supreme Court for the last 47 years instead of in a District Court. Judge Weinstein's role in formulating the law, although of great value, has been sadly diminished by the fact that he has not advanced beyond the District Court level.

I write today to discuss my view of why Judge Weinstein has not advanced to an appellate court where his judicial imprint would have been greater. It is the common practice in the federal system, for District Court judges to be invited periodically to judge in the nearby Appellate Courts. One would think that a judge as undoubtedly brilliant and creative as Judge Weinstein would have been invited often to preside in the Appellate Court, here in the Second Circuit, to assist that Court in its decision making. He would unquestionably be respected as a positive, intellectual force who could add to the legal literature from the Circuit. Instead, he has been shunned by the Second Circuit. The Second Circuit has demurred from inviting him since 1990.

To review Judge Weinstein's last trip to the Second Circuit, one has to go back to January 8, 1990. In two of the cases argued on that day, *USA v. Riley*, 906 F. 2d. 841 (2nd Cir., 1990); and *USA v. Patrick*, 899 F. 2d. 169(2nd Cir. 1990), Judge Weinstein filed dissenting opinions. A review of those cases and Judge Weinstein's dissents follows.

The issue in *USA v. Riley* was whether to suppress items seized after law enforcement officials were issued a search warrant to seize bank records, business records and a safe deposit box at defendant's residence. The issue for the Circuit was whether the search warrant was sufficiently particularized. The District Court suppressed stating that the warrant was partially unsupported by probable cause and insufficiently particularized. The majority from the Circuit reversed. *supra* at 842.

Judge Weinstein dissented. Judge Weinstein, critiquing the majority opinion, expressed the following view that the majority apparently took umbrage with:

"The majority opinion constitutes one small step forward in the current war on drugs and one giant leap backward in the centuries-old struggle against general search warrants." *supra* at 846

Judge Weinstein agreed with the majority that there was sufficient evidence to find that the defendant was involved in drug transactions, only that the majority had improperly accepted a search warrant, that in his view and that of the District Court judge, was written so broadly

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that it constituted a general search warrant and therefore violated the Fourth Amendment.

Judge Weinstein explained that one of the items seized from the defendant's home was an expired rental agreement for a commercial storage locker in a town 10 miles away. The issue for Judge Weinstein was whether there was a basis under the warrant to seize the rental agreement. Law enforcement, based upon the seizure of this rental agreement, obtained a second search warrant for the locker and then obtained additional evidence against Riley. The majority found that the warrant language "other items that constitute evidence of the offenses of conspiracy to distribute controlled substances" was sufficiently particularized to justify the seizure of the rental agreement. Judge Weinstein disagreed. He warned that "vague boilerplate language so construed creates grave dangers to personal liberty". *supra* at 847. On this basis, apparently shared by the District Court judge, Judge Weinstein found that the language of the warrant did not justify the seizure of the rental agreement, and therefore was a general warrant which violated the Fourth Amendment.

Judge Weinstein also dissented in *United States v. Patrick*, 899 F.2d.169 (2nd Cir. 1990). The issue in *Patrick* was whether United States custom officials at the Canadian border in Niagara Falls had probable cause to detain and arrest Patrick who then made an inculpatory statement.

The somewhat unusual facts were not generally in dispute. Taylor, a female, and Patrick, a male, were both walking across a bridge between Canada

and the United States. Taylor possessed an American passport. Patrick had a Jamaican one. There was no evidence that they were walking together or were seen in communication with one another, only that they were crossing from Canada to the United States on a well-used footpath between the countries. Each separately told a similar story. Each of them had wanted to get off the bus in the United States, but mistakenly traveled across the border to Canada. Realizing their mistakes independently,

The rest of us – lawyers, scholars and all the people referenced in the Preamble to the Constitution – all would have benefitted from his wisdom.

they decided to take the short walk back to the United States. There was no evidence that they knew each other or had even spoken to one another.

Taylor was searched, presumably as a border search. Cocaine was found in her pocketbook. Taylor was placed under arrest. Patrick, who was carrying a black backpack, apparently was also searched to negative results. Still, the majority determined that based on Patrick's story to the customs officials (of failing to get off the bus in the United States), a similar story to Taylor's, custom officials had probable cause to detain, arrest and question Patrick. Then, an inculpatory statement was made by Patrick. The majority found that the statement was admissible, overruling the District Court judge who had found that Patrick's "proximity" to Taylor did not warrant Patrick's arrest. *supra* at 171.

Judge Weinstein agreed with the District Court judge and dissented. He voted to suppress the statement, finding

that there was no probable cause to arrest Patrick. He presented his reasoning with eloquent emphasis on the higher causes of the issue.

"Were we not involved in a war on drugs (with the usual threat to civil liberties posed by any such serious national conflict) and had defendant been a citizen of the middle class (instead of a member of three minority classes by virtue of socioeconomic status, color and alienage), the good people who guard our borders would not have so encroached on his freedom, and this case would never have arisen. The lesson must be relearned in every generation—allow the rights of the least powerful to wither and the corrosion of injustice leaches out justice in the rest of society". *supra* at 172.

The majority of the Court has the right, of course, to disagree with Judge Weinstein's analysis. That is, of course, not the point. It would be wrong though, if their disagreement with Judge Weinstein's views, was the reason to blackball him from sitting by designation on the Second Circuit. There appears to be no other recognizable reason, other than that members of the Second Circuit disagreed with his views and then they chose not to designate him for routine Second Circuit assignments. It is not debatable that Judge Weinstein has the intellect and the talent to judge wisely in any Courthouse. It is not just Judge Weinstein though who has been shortchanged by him not being given regular opportunities to judge cases in the Second Circuit. The rest of us – lawyers, scholars and all the people referenced in the Preamble to the Constitution – all would have benefitted from his wisdom. We have all been shortchanged. ■

Second Circuit Highlights

by Lisa Peebles

Summarizing significant decisions from the Second Circuit Court of Appeals

A complete list and summary of cases decided during the last Term is available at www.ca2.uscourts.gov

Can't Believe Everything You Find on Facebook: Use of Russian Facebook Page Without Proper Authentication is Harmful Error.

United States v. Vayner, 765 F.3d 125 (2d Cir. 2014) (*Livingston, Wesley, Lohier CJJ.*)

A conviction, for violating 18 U.S.C. § 1028(a)(2) and (b)(1)(A)(ii), was vacated and remanded after the defendant appealed claiming the admission of a page from the Russian equivalent of Facebook known as “VK” and related testimony was without proper authentication.

The Circuit held that Rule 901 requires “evidence sufficient to support a finding that the item is what the proponent claims it is.” Although it was uncontested that information about the defendant, Zhytsou appeared on the VK page, there was no evidence that Zhytsou himself had created the page or was responsible for its contents leaving the document without proper authentication. This error was not harmless because the government’s proof on the issue of whether Zhytsou transferred a fake birth certificate to a cooperating witness was not unassailable. As a result, the printout of the VK profile was by no means cumulative as claimed by the government, but played an important role in the government’s case, which the AUSA augmented by highlighting the evidence in her summation.

Can't Believe Everything You See: Use of Charts Based Upon Hearsay and Containing Inaccurate Information was Plain Error

United States v. Groysman, 766 F.3d 147 (2d Cir. 2014) (*Kearse, Winter, Wesley CJJ.*)

The defendant appealed from a jury verdict convicting her of conspiring to commit health care fraud, in violation of 18 U.S.C. § 1349, and conspiring to commit money laundering, in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1)(A)(i), and 1956(a)(1)(B)(i). She was sentenced to 97 months imprisonment. The scheme involved “durable medical equipment” in which a retailer obtained equipment from a wholesaler and an invoice with inflated prices for the equipment. The retailer would give the wholesaler a check for the total, then bill an insurance company for the inflated total. The wholesaler and retailer would then split the difference.

On appeal the defendant contended the main government witness, the lead agent, gave inadmissible hearsay and opinion without personal knowledge. The testimony also failed to establish a foundation for the admission of seven government chart exhibits containing inaccurate and misleading information. The defense objected that the charts were being used as evidence, were inaccurate and were not based on the agent’s first-hand knowledge.

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Lisa Peebles joined the Federal Public Defender’s Office for the Northern District of New York in August 1999. She was appointed First Assistant Public Defender in 2005 and Federal Public Defender in 2010. She is a native of Cleveland, Ohio and has practiced law in the Syracuse area for the past 20 years.

Second Circuit Highlights

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The panel decided that the serious impropriety of the use of the government's witness in light of the record as a whole which included the evidentiary errors and other errors admitted by the government met the standard for plain error review and granted a new trial.

Conviction Vacated after a Jury is Trapped in a State of Confusion by an Erroneous Instruction on Entrapment
United States v. Kopstein, 759 F.3d 168 (2d Cir. 2014) (*Jacobs, Lynch, CJJ; Livingston, CJ., dissenting*)

A jury convicted Kopstein of transporting and shipping child pornography to a federal agent posing as a twelve-year-old girl in a "chat room" conversation. Kopstein did not deny that he possessed the images, but argued that he was entrapped into transporting and shipping pictures when he had no predisposition or inclination to do so, after the agent threatened to terminate the conversation if Kopstein did not transmit child pornography repeatedly requested by the agent.

In summation, Kopstein's counsel conceded that he initiated the chat and that the government had proven the transporting and shipping, but argued that he was guilty of the lesser-included offense of possession because the federal agent induced the transport and shipment conduct; and the government did not prove beyond a reasonable doubt that Kopstein was predisposed to send the images.

On appeal, the Court, recognizing the jury instruction was critical because of the defense of entrapment, found error in the instruction because of the substantial jury confusion. The supple-

mental instructions increased the confusion by apparently taking possession away as a lesser included offense of the transporting and shipping. The defense objected to the instruction as shifting the burden of proof to the defendant.

The panel vacated the conviction and ordered a new trial after finding that the jury instructions were confusing as to the burdens on the defense and prosecution and failed to consistently and adequately guide jury on the defense of entrapment. Judge Livingston, in dissent, did not believe the errors were

Although the evidence was sufficient, the ambiguity of Mergen's role of informant and actor made the exclusion of the recording harmful since the jury had not heard that his acts could have been justified

sufficiently preserved, the instructions erroneous or prejudicial.

Using the Government's Words Against Them Vacates Convictions
United States v. Mergen, 764 F.3d 199 (2d Cir. 2014) (*Katzmann, Jacobs, CJJ.; Duffy, DJ.*)

A trial after a previously vacated conviction and remand again resulted in a conviction under the Travel Act for arson and other crimes. Mergen, an FBI informant, had participated with mob members in the arson without giving the FBI a pre-arranged signal that would have allowed agency intervention. After he initially agreed to cooperate, the government claimed he breached the agreement. A superseding indictment was brought and Mergen was convicted after trial.

He appealed, arguing the evidence was insufficient and the district court com-

mitted evidentiary error by excluding testimony as hearsay and for lack of authentication.

At trial, Mergen's recorded statements, testimony from agents and cooperating witnesses were used against him. Mergen as the sole defense witness testified that he was authorized to commit only certain crimes, and needed prior approval for others. He also testified that he had warned agents about the arson's timing and the FBI told him that everything was "under control."

On appeal Mergen claimed the district court erred by excluding a surreptitious recording he made soon after the arson in which an agent told him he had not done "anything wrong" the night of the arson. The recording contradicted testimony of the agent that he believed at the time of the arson that Mergen should be prosecuted.

The Court vacated the Travel Act conviction finding that although the evidence was sufficient, the ambiguity of Mergen's role of informant and actor made the exclusion of the recording harmful since the jury had not heard that his acts could have been justified and not a rogue actor.

The other convictions involving the robbery, drugs, firearm and conspiracy convictions were vacated as barred by the statute of limitations because the tolling provisions in the plea agreement did not encompass those charges because the tolling provision only applied to charges derived from information provided by him.

Indefinite Possession of Seized Mirrored Hard Drives with Information

Outside the Scope of the Warrant Violates the Fourth Amendment
United States v. Ganas, 755 F.3d 125 (2d Cir. 2014) (*Chin*, CJ., *Restani*, DJ.) (*Hall*, CJ. *dissenting in part*)

In August 2003, the Criminal Investigative Command of the Army received a tip from a confidential source that evidence of thefts from an Army facility could be found at the offices of American Boiler and IPM, as well as at the offices of Ganas who did accounting work for IPM and American Boiler.

In November 2003, a search warrant issued which authorized the seizure from Ganas' offices of: "All books, records, documents, materials, computer hardware and software and computer associated data relating to the business, financial and accounting operations of [IPM] and American Boiler...." The warrant was executed two days later. Army computer specialists did not seize Ganas's computers but made identical copies, or forensic mirror images, of the hard drives of all three of Ganas's computers, copying every file on all three computers which included files beyond the scope of the warrant, such as files containing Ganas's personal financial records.

On appeal from the denial of suppression of evidence Ganas specifically challenged the indefinite detention and wholesale retention of his computer information as unreasonable. The Court recognized that off-site review of computer files was constitutionally permissible in most instances but advised the review process was subject to Fourth Amendment reasonableness review.

Citing the advisory committee notes to Rule 41(e)(2)(B), the Court addressed

variables which impact the reasonableness of the seizure and search: the storage capacity of media, the difficulties of encryption or electronic booby traps, and computer-lab workload. The factors might justify an off-site review for a significant period of time but did not provide an "independent basis" for retaining any electronic data other than those specified in the warrant.

The Court held that the government violates the Fourth Amendment when it indefinitely retains computer files (Ganas's personal files) that were seized

The Circuit found that district court abused its discretion by finding the proffered evidence was temporally irrelevant.

pursuant to a search warrant but are not responsive to the warrant even with the issuance of a second warrant.

A majority found the "good faith" exception was inapplicable because the government affected a widespread seizure without objectively reasonable reliance on appellate precedent for which the deterrent effect was great and the cost to government was minimal. Judge Hall dissented from this part of the decision.

A Reminder for the Prosecution Of the Rules Against Bolstering, the Bounds Of Permissible Summation, and the Importance Of the Defendants' Evidence Of Good Faith.
United States v. Certified Environmental Services, Inc., 753 F.3d 72 (2d Cir. 2014) (*Raggi*, *Carney*, *CJJ.*, *Rakoff*, DJ.)

An asbestos air monitoring company,

five employees, and an employee of an asbestos abatement contractor, were convicted of conspiracy, mail fraud, and false statements. On appeal, the defendants argued that the district court improperly excluded evidence that they acted in the good-faith belief that they were complying with applicable state regulations; and (2) the prosecutors engaged in misconduct.

The federal convictions stemmed from a scheme to violate state and federal environmental clean air regulations and false certifications of air quality

monitoring. The Court held that the district court erred by excluding the proffered evidence of good faith that the company and its employees believed they were complying with state regulations governing their asbestos abatement acts. The Circuit found that district court abused its discretion by finding the proffered evidence was temporally irrelevant.

The government also conceded and the court found that the prosecutor committed misconduct when he: (1) improperly bolstered government witnesses based on their cooperation agreements prior to their impeachment; (2) improperly vouched for witnesses in summation; (3) improperly included outside the record references in rebuttal summation; and (4) improperly used his rebuttal summation to advise the jury of the consequences of their verdict.

The Court found that the prejudice from the district court's erroneous evidentiary ruling and the prosecutors' misconduct violated the defendants' right to fair trial because they "infected every stage of the trial," and even in the

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Second Circuit Highlights

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face of “strong evidence the improprieties were “not insubstantial” because the evidence was not “overwhelming.” The curative measures taken by the district court failed to eliminate the prejudice. Accordingly, the Court vacated the convictions and ordered a new trial.

Review of Prior Deportation Proceedings for Possible 212(c) Relief Available for Aggravated Felony Conviction Secured After Trial

***United States v. Gill*, 748 F.3d 491 (2d Cir. 2014) (Katzmann, Winter, Calabresi, CJJ.)**

Gill was charged with illegal reentry in 2007 under Section 1326 after he returned. He moved under 1326(d) to dismiss the charge on the ground that his prior deportation was fundamentally unfair because, contrary to the BIA’s ruling, he was in fact eligible for § 212(c) relief. The district court denied the motion, holding that, under the Second Circuit’s decision in *Rankine v. Reno*, 319 F.3d 93, 96 (2d Cir. 2003), Gill was ineligible for

§ 212(c) relief because he was convicted of his underlying aggravated felony after trial, and that Congress’s repeal of 212(c) did not have an impermissible retroactive effect on defendants who went to trial.

Gill had been deported to Barbados in 2004, following his conviction after trial of attempted robbery, an aggravated felony. He had requested relief from deportation under section 212(c) of the Immigration and Nationality Act, appealed the denial to the Bureau of Immigration Appeals (BIA) but the BIA dismissed the appeal because the enactment of AEDPA in 1996 made

aliens with aggravated felony convictions ineligible for § 212(c) relief.

The panel held that *Rankine* was abrogated by *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), which found that deeming noncitizens who had been convicted of an aggravated felony after trial ineligible for § 212(c) relief would have an impermissible retroactive effect attaching new legal consequences to convictions that pre-dated the repeal of § 212(c).

The Circuit remanded for reconsideration of relief under 8 U.S.C. § 1326(d).

Grouping Sentences for Aggravated Identity Theft Does Not Require Consecutive Sentences.

If the court found that Gill had been deprived of the opportunity for judicial review and his deportation order was fundamentally unfair his conviction would be vacated and the indictment dismissed.

Statements in Declaration in Support of a Suppression Motion Did Not Provide Basis for Obstruction of Justice Enhancement

***United States v. Pena*, 751 F.3d 101 (2d Cir. 2014) (Jacobs, Pooler, CJJ., Roman, DJ.) (per curiam)**

Pena was convicted of conspiracy to distribute and possess with intent to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. § 846. At sentencing, the district court applied a two level enhancement for obstruction of justice based on written statements made in support of his motion to suppress. On appeal, Pena challenged the application of the obstruction of justice

enhancement on the ground that the statements did not do not demonstrate a willful intent to commit perjury.

Pena had submitted a written declaration in support of his motion to suppress which contained four statements relevant to the appeal: 1) prior to consenting to the x-ray, he requested a lawyer at least seven times; 2) the officers extracted the consent by threatening physical force; 3) he confessed after the x-ray in response to questioning by customs officers not later, after questioning by DEA agents); and 4) he did not fully comprehend the importance of a *Miranda* waiver form.

The district court’s judgment was vacated and the case remanded for resentencing After examining the content of the declaration for indications of deliberate falsehoods, the appeal found that the district court improperly determined defendant willfully made false statements to court because the statements were general enough to support an inference that they were not fabrications.

Grouping Sentences for Aggravated Identity Theft Does Not Require Consecutive Sentences.

***United States v. Chibuko*, 744 F.3d 259 (2d Cir. 2014) (Katzmann, CJ., Kearse Wesley CJJ.) (per curiam)**

The defendant was convicted on a variety of fraud counts which included three allegations of aggravated identity theft under 18 U.S.C. § 1028A. A challenge to the sentence was brought on appeal because the district court imposed a consecutive sentence on all three aggravated identity theft counts. Two of the three violations had been part of the same scheme with the same victim.

The Guidelines advise that the sentences on those two related counts should generally run concurrently with each other when the underlying offenses are “groupable” under USSG 3D1.2.

The Circuit held that the district court committed plain error by failing to explain its departure from the general rule that the 1028A sentences should run concurrently with each other when the underlying crimes are grouped. The district court has not addressed grouping the counts. The Court remanded for supplemental findings and an explanation, or in the alternative for re-sentencing.

The Government Learns to Be Careful What it Wishes For When Rehearing is Sought and Conviction Remains Vacated with Additional Rational for Doing So.

United States v. Taylor, 745 F.3d 15 (2d Cir. 2014) (Jacobs, Kearse and Carney, CJJ.)

The three defendants were convicted of robbing a pharmacy. The Circuit originally vacated their convictions, holding that the district court erred in its admission of the primary defendant’s involuntary confession. That admission was deemed prejudicial to all the defendants because the confession had been a cornerstone in the government’s case, and had been used to support the credibility of a cooperating witness.

The Court went on to find that it need not decide whether the admission of the court-redacted confession violated the co-defendants’ Confrontation Clause rights under *Bruton v. United States*, 391 U.S. 123 (1968).

The government petitioned for rehearing and argued that the jury was instructed that the confession was admitted only against the defendant who made it, and could not be grounds for a new trial for the other co-defendants unless the confession violated *Bruton*. The Circuit withdrew its original opinion and granted the government’s petition.

In its new decision, the panel again found the main defendant’s confession involuntary and prejudicial as to him. The Court also addressed the

MVRA requires a court to order restitution for the four categories of harm limited to those in the statute, and makes no other type of reimbursement mandatory.

Bruton issue resolving it in favor of the co-defendants, holding that the admission of the redacted confession violated the Confrontation Clause rights of the co-defendants because the awkward redactions of the confession obviously implicated the co-defendants.

The Court found “the awkward circumlocution used to reference other participants, coupled with the overt naming of another participant” (the cooperating witness) that it not only offended *Bruton* but *Gray v. Maryland*, 523 U.S. 185 (1998), and *United States v. Jass*, 569 F.3d 47 (2d Cir. 2009) because of the extent of its “unnatural, suggestive, and conspicuous” content.

A Victim Bank is Overdrawn on its Request for Restitution

United States v. Maynard, 743 F.3d 374 (2d Cir. 2014) (Jacobs, Kearse,

Parker, CJJ.)

The defendants were convicted of robbing five banks. At sentencing, the district court ordered the defendants to pay restitution to the banks under the MVRA. Much of the restitution calculation was properly based on the money stolen during the robberies. Some of the loss amount came from expenses paid by one of the banks which included: paid time-off for the bank’s staff, the pay of substitute staff; mileage expenses for the substitute staff; the cost of wanted posters; and the cost of a temporary security guard at the bank after the robbery.

Addressing a challenge to the restitution amount on appeal, the Court noted that the MVRA requires a court to order restitution for the four categories of harm limited to those in

the statute, and makes no other type of reimbursement mandatory. The Court held that only those necessary expenses listed in Section 3663A(b) are proper for the calculation of restitution.

Thus, the restitution award was proper only for the amounts stolen from the five banks. The expenses sought by the individual bank for wages for the regular staff for the afternoon the bank was closed as a crime scene was also proper because the bank conducted no business while the bank was closed to offset the expense. The other loss amount from the bank allowing its regular staff to stay home with pay to recover for a few days after it reopened was not a proper basis for restitution because the bank would have paid for days off even if the bank had not been robbed. None of the other claimed expenses were included under the categories listed in §3663A(b).

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Book Review

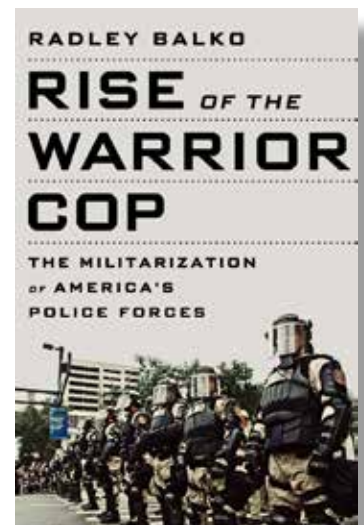
Reviewed by Frank Quigley

Rise of the Warrior Cop: The Militarization of America's Police Forces

by Radley Balko (Public Affairs Press, paperback edition, 2014)



Ferguson, Missouri, Saturday, August 9: Police Officer Darren Wilson shoots and kills Michael Brown, an 18-year-old resident of the predominantly black community. Wilson is white; Brown was black. Police release little information; Brown was unarmed, and some civilians say that he had his hands up in the air when the officer fired. On the following day police officers meet a reportedly peaceful demonstration with tear gas, and for the next several days the media streams video of burnt out buildings, billowing tear gas clouds, marchers, looters, heavily armed officers and their armored vehicles, all playing out in the absence of a coherent explanation for the death of Michael Brown.



Did the aggressive police turnout keep the peace... or did it provoke rioting, looting and arson in the Ferguson community? One thing that the police response did accomplish was to focus attention on the transformation of our law enforcement agencies into the image of combat forces on urban occupation duty. The media caught on and some in Congress started to ask questions.

As an Assistant District Attorney in Nassau County for more than thirty years, **Frank Quigley** tried homicide, rape and robbery cases in the Major Offense Bureau. While Chief of Special Investigations, he prosecuted public integrity cases, including bribery, official misconduct and excessive force. A graduate of Fordham College and Fordham Law School, Quigley practices criminal defense law in Garden City.

How did we get here? Where did all that military hardware come from? Don't say we were not warned. Journalist Radley Balko has been asking these questions and more, and he's documented the transformation in *Rise of the Warrior Cop: The Militarization of America's Police Forces*, published by Public Affairs Press, in hardcover and trade paperback.

Balko finds that across the country police SWAT teams have been used for many assignments that have nothing to do with genuine emergencies, let alone poten-

tially violent confrontations. The author traces the history of the SWAT movement from the post-Watts riots of the 60's, when the undersized LAPD leveraged its roster with a unit of cops outfitted with black, military-style combat uniforms, a new vision quickly picked up and headed mainstream courtesy of a popular TV series. Far from being perceived as incompatible with the work that most officers actually do, the concept and the look caught on, seemingly meeting a psychic need somewhere for power, control and security.

Fast forward 45 years, and the Darrell Gates innovation has spawned a plethora of SWAT units, some of them, Balko finds, in the most unlikely agencies. Proponents of the concept will argue that mass shootings in Colorado and Connecticut justify the SWAT approach, and yet mass shootings break out in spite of the increase of those SWAT forces.

Could it be that politicians find the SWAT picture an easier, cheaper way to respond to public fears, without having to actually do something substantive, innovative or controversial? Call out SWAT, but don't infringe on the free speech rights of corporations that allow teenagers to submerge their fragile brain cells in hyper-violent video games. Send for SWAT, but don't challenge aggressive police unions or wasteful labor practices that degrade police effectiveness. After all, the SWAT idea is so much more visceral than supporting mental health courts and drug treatment courts that represent truly efficient investments of criminal justice resources. Schedule a photo-op with the SWAT guys, but don't ask questions about training,

supervision, discipline, down time or accountability.

Balko provides a sobering tour of four decades of SWAT mishaps around the country. Fair and balanced? Not really. If there are any positive stories, you won't read about them here. The book makes little mention of the current generation of destructive drugs and we see no more than a passing reference to organized gangs, which are well armed and more than a match for the average Officer on the street. At times, the author compares apples and oranges, particularly when drawing parallels between tiny municipalities and the biggest cities, but that's his point: small, out of the way communities have loaded up on expensive and unnecessary hardware, much of it courtesy of federal taxpayers, and all of it at the expense of resources that could have been deployed to old-fashioned community policing, just being on the street, talking with residents, building public trust and making life safer for residents and officers alike.

Even before Ferguson, Balko was reporting the story and, thanks to Ferguson, we know how right Balko was: under the 1033 program, for example, the Department of Defense awarded hundreds of high tech, heavily armored (and monumentally expensive) combat vehicles, originally designed for the Middle East, to police departments far and wide, including rural agencies with as few as 11 officers. Because of Ferguson, some Members of Congress sponsored a hearing and called for legislation to rein in the 1033 program.

There will be some overdue cosmetic changes, at least in that particular pro-

gram. But the main problem will still exist: what does it mean when officers nationwide feel the need to dress in battle uniforms, festooned with military gear and high-powered automatic rifles? Does that style help those officers to perform their jobs, or, as in Ferguson, does the militarization of law enforcement promote a self-fulfilling mindset that is counterproductive to serving the public and keeping the peace?

Rise of the Warrior Cop presents some mindboggling case histories of SWAT raids gone wrong; a veritable catalogue of bad practices and what not to do, this book can help policy makers and police supervisors take a deep breath and reflect on the real price that we pay for militarizing law enforcement.

How did we get here? Balko's book, ahead of its time, has it all. Too bad we weren't paying attention.

Editor's Note: As reported by the Associated Press, on 12.2.14, "President Barack Obama said Monday he wants to ensure the U.S. isn't building a 'militarized culture' within police departments, while maintaining federal programs that provide the type of military-style equipment that were used to dispel racially charged protests in Ferguson, Missouri. Instead, the president is asking Congress for funding to buy 50,000 body cameras to record events like the shooting death of an unarmed 18-year-old Michael Brown and look for ways to build trust and confidence between police and minority communities nationwide. He announced the creation of a task force to study success stories and recommend ways the government can support accountability, transparency and trust in police..."



Reviewed by Dick Barbuto

Kitty Genovese: A True Account of a Public Murder and Its Private Consequences

by Catherine Pelonero (Skyhorse Publishing, 2014)

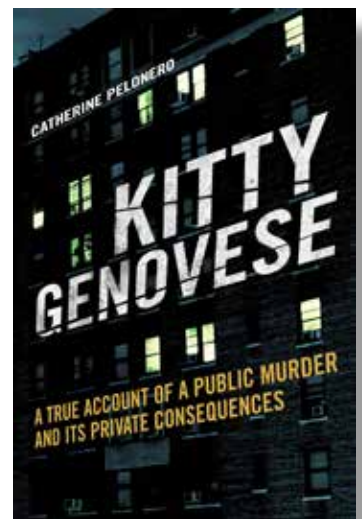


2014 marked the 50th anniversary of the brutal murder of Catherine “Kitty” Genovese. The murder was brutal not only because of its savagery, but also because the killer, Winston Mosely, having failed in his first attempt to kill Kitty, came back a few minutes later to finish the job. If this wasn’t bad enough, perhaps as many as 38 witnesses either saw or heard parts of the two knife attacks by Mosely and did nothing.

Catherine Pelonero pulls no punches in her book. The gravamen of the book, of course, has to do with the failure of some residents in Kew Gardens, Queens, to do anything to save Kitty, despite incontrovertible evidence that there was something horrible going on right outside their windows.

The book is broken up into three parts, dealing with: (1) Kitty’s life, and that of Winston Mosely, as well as the murder and investigation of the crime; (2) the trial of Mosely, his conviction and escape and the subsequent court proceedings; and (3) the attempt at revisionist history concerning the apathy of so many people who refused to come to the aid of a fellow human being.

Pelonero’s book is marked by first rate research, and is full of facts and quotes by many of the people involved in the case, including journalists, residents of Kew Gardens, those who investigated and tried the case, and of Mosely himself. The author put a great deal of work into her book and it shows.



The reviewer of this book, **Dick Barbuto**, is a past president of NYSACDL. He has practiced criminal law in multiple jurisdictions, both state and federal.

On a personal note, I became aware of the Genovese case at the age of 15 while growing up in Massachusetts. I read about it in *Reader's Digest* and was greatly disturbed that so many people did nothing. I wondered about this place called Kew Gardens in New York City. A few years later I came around a corner on to Lexington Avenue in midtown Manhattan, to see a man in his early 20's hitting an elderly man repeatedly for some perceived slight, while maybe 25 people stood around watching. Memories of the Genovese case came flooding back. A decade later I would become an Assistant District Attorney in Queens County, with an office about 2 blocks from the scene of the murder. Of course I had to visit and walk around the area. In 1988, it fell to me to make a parole recommendation with regard to Mosely on behalf of the Queens DA. And now here I am reviewing a book about her life and death.

I never met Kitty Genovese, but she has made an impact on my life. Kitty would have been 78 this year. Mosely, at 79, is the oldest living prisoner in the New York State Department of Correctional Services.

Read this book. It will have an impact on you whether you are a lawyer or not. Thank you, Catherine Pelonero.

“ It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. ”

— Justice Felix Frankfurter, dissenting,
United States v. Rabinowitz (1950)

Sentence Increase For Distribution Requires More Than Using P2P Software

***United States v. Baldwin*, 743 F.3d 357 (2d Cir. 2014) (Cabranes, Sack, Lynch CJJ.) (per curiam)**

The sentence was vacated and remanded after the defendant appealed a sentence determination which included a two level enhancement for distribution of child pornography under USSG. § 2G2.2(b)(3)(F). The PSR had recommended the increase based upon a conclusion that “just as the defendant knew he could access and download shared files via [the P2P programs], there is a preponderance of the evidence to establish that he also knew his files were available for others to do the same.” Baldwin objected to the enhancement because he did not have the requisite *mens rea*, the knowledge that he was sharing child pornography.

The Court of Appeals held that although the defendant's *intent* is irrelevant for an enhancement under § 2G2.2(b)(3)(F), a district court must find that a defendant *knew* that his use of P2P software would make child-pornography files accessible to other users in order to impose two-level sentence enhancement for distribution of child pornography. A determination that a defendant should have known his child pornography would be shared by his peer-to-peer (P2P) file-sharing software did not constitute a finding that the defendant knowingly distributed child pornography. ■

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“If I speak, I am condemned. If I stay silent, I am damned!”

— Victor Hugo, *Les Misérables*

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- To promote the proper administration of criminal justice.
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- To protect individual rights and improve the criminal law, its practices and procedures.

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